

ABOUT THE JOURNAL

The *Kansas Journal of Law & Public Policy* was conceived in 1990 as a tool for exploring how the law shapes public policy choices and how public policy choices shape the law. The *Journal* advances contemporary discourse on judicial decisions, legislation, and other legal and social issues. With its three published issues per year, the *Journal* promotes analytical and provocative articles written by students, professors, lawyers, scholars, and public officials.

The *Journal* fosters a broad notion of diversity in public policy debates and provides a forum for the discussion of public policy issues. The *Journal* endeavors to enable the policy-making process through the presentation of diverse treatment and critical analysis on significant policy matters. Our publication also aspires to serve a broad audience of decision-makers and the intellectually curious. We specifically target groups like legislators, judges, educators, and voters; each of which plays a valuable role in the legal process.

Non-partisan, student-governed, the *Journal* is an organization devoted to the study, commentary, and analysis of domestic and international legal and social issues. All student members of the *Journal* must complete a writing requirement and assist in the preparation of *Journal* issue publication through research and article edits. The Editorial Board, which is composed of law students, is responsible for selecting *Journal* content, editing article submissions, and preparing each volume for publication.

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Fall 2025

Dear Journal Readers,

Welcome to the Fall 2025 issue and first issue of Volume XXXV of the *Kansas Journal of Law & Public Policy*. This issue presents six pieces that engage pressing questions of public policy from multiple angles, including legal education, economic policy, the administration of justice in Kansas, sustainable agriculture, and public safety.

Our first article is from Professor Anna P. Hemingway, Professor of Law and Associate Dean for Academic Affairs at Widener University Commonwealth Law School. Professor Hemingway's article examines the role of kindness in legal education and argues that, properly understood, kindness can be a rigorous and meaningful part of effective pedagogy rather than a substitute for academic standards.

Our second article is from Justin Giles, who earned his J.D. from the University of North Carolina School of Law and his M.P.P. from Duke University's Sanford School of Public Policy in 2025. Mr. Giles surveys high-quality empirical research on unconditional cash transfers and assesses what the evidence does and does not show about common arguments made in support of such programs.

Our third article is from Sam Crawford, a Judicial Law Clerk for the United States District Court for the District of Kansas. Sam's article evaluates mandatory attorney appointment practices in Kansas and the constitutional and practical tensions that arise when appointed representation intersects with insufficient compensation.

Our fourth article is from John W. Head, the Robert W. Wagstaff Distinguished Professor of Law at the University of Kansas. Professor Head's article explores the legal regimes that shape science-based biodynamic-regenerative viticulture and considers how law can better support sustainability-oriented agricultural practices.

Our fifth article is our first of two student pieces. This article was written by Hayley Engelland, a third-year law student at the University of Kansas School of Law and the current Symposium Editor for the *Kansas Journal of Law & Public Policy*. Hayley's article was chosen anonymously and selected for publication by the prior Editorial Board of the Journal. The article analyzes the Kansas Right-

to-Farm Act and proposes legislative improvements aimed at restoring the statute's protective function while addressing modern nuisance-related conflicts.

Our final article is the second student piece. This article was written by Allison Koch Haggerty, a third-year law student at the University of Kansas School of Law and a current Articles Editor for the Kansas Journal of Law & Public Policy. Allison's article was also chosen anonymously by the prior Editorial Board of the Journal. The article examines the Supreme Court's decision in *Rahimi* and considers how Kansas can strengthen protections for victims of intimate partner violence in light of that ruling.

I hope that our readers find this issue as captivating as I do. I owe many thanks to the Editorial Board and Staff Editors for their tireless work and countless hours spent bringing this issue to publication. In addition, and on behalf of all Journal members, I thank Professors Richard Levy and Corey Rayburn Yung for their advice and support throughout the publication process. Now, please enjoy the scholarship we have prepared in the Fall 2025 issue of the Kansas Journal of Law & Public Policy.

Hunter Bach
Editor-in-Chief, Volume XXXV
Kansas Journal of Law & Public Policy

The Case for Kindness: Gender, Pedagogy, and Power in Legal Education

*Anna P. Hemingway**

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Introduction

In the past, I have inwardly cringed when students and faculty have referred to me as a “kind” professor. Although they have intended it as a compliment, I felt embarrassed being identified with a trait the legal academy does not particularly respect. Kindness, after all, is “singularly silent in accounts of teaching excellence, student satisfaction, or professional values.”¹ I judged it to be a term that is used to refer to someone who perhaps does not have other attributes that are seemingly of greater value in legal education, such as toughness, resilience, intelligence, and drive. Because I considered kindness to be a natural predisposition, and not something of particular difficulty to obtain,² its significance as an attribute of a law professor was lost on me.

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¹ Stephen Rowland, *Kindness*, 7 LONDON REV. OF EDUC. 207, 207 (2009).

² Adam Omary, *Is Kindness Genetically Predetermined?*, PSYCHOLOGY TODAY (2022), <https://www.psychologytoday.com/us/blog/natured-nurture/202208/is-kindness-genetically-predetermined> [<https://perma.cc/4UPA-B239>] (debating genetic essentialism versus genetic determinism).

Recently, however, I have had time to study the word, to consider its place in legal education, and to ultimately reconsider my position on its value. “Kind” with its etymological roots in “kin”³ has close ties to family. In Old English, it comes from the word-forming element “cund,” which refers to being born of a particular nature, especially loving, and full of tenderness.⁴ During the Industrial Revolution, as gender roles became increasingly segregated, it was unsurprisingly assigned to the more feminine domestic role, and “as an emotion was simultaneously feminized and devalued.”⁵ As feminized qualities like empathy and kindness were excluded from emerging definitions of professional authority, they came to be regarded as incompatible with intellectual seriousness or leadership.⁶ This gendered version of kindness makes it a trait that is valued in the creation of a safe and loving home, but is perhaps of little consequence in a competitive and more predominantly male workplace.

Indeed, the role of kindness is questionable in legal education. The ever-increasingly competitive nature of law schools for both faculty and students does little to encourage it. For professors, the collective demands of faculty positions push publication deadlines to the forefront and leave little room for serious consideration of best practices in teaching, let alone the role of kindness in the classroom. At most law schools, publications are rigorously encouraged and reviewed, while competent teaching is hardly acknowledged beyond tenure reviews and once-a-year faculty awards.⁷ Similarly, for students, the stress of the classroom and the quest for the highest grades negates any thoughts of engaging in kind acts. Law school is simply too intense, fast paced, and competitive to worry about being kind.

In fact, for some in the legal academy, kindness could be considered a sign of weakness that suggests a girlish gentleness to be exploited. The law, on the other hand, is thought of as having mostly clichéd male traits; it is “rational, logical, dispassionate, objective, professional, intimidating, and demanding.”⁸ As a profession, the law promotes tough-minded attorneys who can spot issues and who fight to protect their clients’ interests. In law school, therefore, law students are trained to solve problems in manners that seldom involve altruism or kindness. Instead, kindness is at best ignored and at worst, manipulated.

Faculty teaching traits that appear to be of more value in law school are similarly

³*Origin and History of Kindness*, ONLINE ETYMOLOGY DICTIONARY, <https://www.etymonline.com/word/kindness#:~:text=late%2014c.%2C%20%22kindness%2C,%2C%20philanthropy%2C%20kindness> [https://perma.cc/G6LX-MHFX].

⁴ *Id.*

⁵ Shoshana Magnet, Corinne Lysandra Mason & Kathryn Trevenen, *Feminism, Pedagogy, and the Politics of Kindness*, 25 FEMINIST TEACHER 1, 2 (2014).

⁶ Manuela Tremmel & Ingrid Wahl, *Gender Stereotypes in Leadership: Analyzing the Content and Evaluation of Stereotypes About Typical, Male, and Female Leaders*, FRONTIERS PSYCHOLOGY 1, 14 (2023).

⁷ See Ted Occhialino, Mitchell M. Simon & Robert L. Fried, *Herding Cats: Improving Law School Teaching*, 49 J. OF LEGAL EDUC. 256, 256 (1999) (“[D]espite the institutional lip service paid to teaching, scholarship and other outside activities are understood to be more highly valued than good teaching.”).

⁸ Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J. OF L. AND FEMINISM 333, 335 (1996).

stereotypically masculinized. Student comments in law school evaluations suggest that they work the hardest for professors who are “‘learned,’ ‘rigorous,’ ‘brilliant,’ ‘demanding,’ . . . and ‘tough’.”⁹ While professors of all genders do possess these qualities, these traits are unsurprisingly more often associated with men.¹⁰ Women faculty, in particular, often navigate a double bind: they are expected to be warm and approachable, yet they are judged harshly if they do not also project a version of authority that is more traditionally masculine.¹¹ This dynamic contributes to persistent disparities in student evaluations, where women faculty are penalized not for a lack of competence, but for failing to align with gendered expectations of both warmth and authority.

Although being knowledgeable and demanding appears to motivate law students, the attribute of kindness is rarely mentioned in this context. Instead, for some students, kind and demanding qualities appear to be discordant, which can lead to unexpected results. For instance, despite clearly communicating my expectations in advance, some students have indicated that their scores on the first assignments were lower than expected, given my kind classroom demeanor. These comments have come after I provided my students with scoring rubrics in advance of submission, explicit directions, and the warning that I have high, but attainable standards. Despite this, some students have unfortunately mistaken my kindness as a sign that I have less expectations of them.

This disconnect between student perceptions and classroom expectations reflects a broader tension within legal education: the persistent undervaluing of relational teaching practices, even as national reform efforts call for them. Legal education reform has continued to advance since the influential *Carnegie Report*, which urged law schools to incorporate more practical and ethical development into the curriculum.¹² For example, more recently, the Institute for the Advancement of the American Legal System reports have emphasized the importance of relational competencies such as empathy, respect, and professionalism as essential to effective legal training.¹³ Together, they critique the legal academy’s persistent focus on analytical reasoning at the expense of interpersonal connection, professional

⁹ *Id.* at 350.

¹⁰ See generally, Daniel Storage, Tessa E.S. Charlesworth, Mahzarin R. Banaji & Andrei Cimpian, *Adults and Children Implicitly Associate Brilliance with Men More than Women*, 90 J. OF EXPERIMENTAL SOC. PSYCH. 1, 1 (2020) (hypothesizing that a gender brilliance stereotype holds women back from advancing in occupations that require high levels of intellectual ability).

¹¹ See Olga Khokhlova, Nishtha Lamba & Sameer Kishore, *Evaluating Student Evaluations: Evidence of Gender Bias Against Women in Higher Education Based on Perceived Learning and Instructor Personality*, 8 FRONTIERS EDUC. 1158132 (2023).

¹² WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 6 (2007).

¹³ See Deborah Jones Merritt & Logan Cornett, *Building a Better Bar: The Twelve Building Blocks of Minimum Competence* 31–32 (Oct. 28, 2020), <https://iaals.du.edu/publications/building-better-bar> [<https://perma.cc/YVT2-9RGE>]; Scott Bales, Rebecca Love Kourlis, Alli Gerkman, Logan Cornett, James Swearingen & Zachariah DeMeola, *Think Like a Client* 7 (Oct. 2019), https://iaals.du.edu/sites/default/files/documents/publications/think_like_a_client.pdf [<https://perma.cc/2SBC-APGE>].

identity, and inclusive values. This article responds to that gap by introducing the concept of affirmational engagement, a pedagogical approach I propose pairs high expectations with relational affirmation. In doing so, it offers a new framework for understanding how kindness can function as a rigorous and equity-promoting force in legal education.

This article begins by considering why kindness is mostly disregarded in legal education. Part I operationally defines the term “kindness,” examines the role of faculty gender demographics, and argues that it impacts law school customs and legal writing pedagogy. It explains how legal writing faculty predominantly continue to identify as female, and gendered stereotypes regarding kindness and positive attributes in different courses remain the same. It also places these dynamics in the broader context of institutional gender norms and the historical undervaluing of care-based pedagogies in the legal academy. Part II establishes the crucial role of kindness in legal education, particularly in legal writing pedagogy. This part contends that kindness, as manifested through constructive feedback, non-punitive accountability, and affirmational engagement, can renovate legal writing instruction into a site of intellectual and professional flourishing. In so doing, it challenges the traditional view that kindness is incompatible with academic rigor, instead arguing that kindness is an essential pedagogical approach that strengthens learning, accountability, and professional development. Drawing on insights from feminist theory, educational psychology, and scholarship on professional identity, this part urges legal educators to reimagine kindness as a serious teaching strategy. It provides a detailed analysis of the emotional dynamics in legal education by rejecting shame-based pedagogies and suggests reshaping legal education’s culture by promoting psychological safety and nurturing confidence. Finally, the article concludes with an explanation of why I now smile every time a student or faculty member refers to me as a “kind” professor.

Why Kindness is Marginalized in Legal Education

An obvious first query in exploring why kindness is marginalized in legal education is considering how kindness is best defined beyond its etymological origin. When kindness is thought of as a behavior that benefits others at one’s own expense,¹⁴ it is no surprise that its role in the law would be marginalized by lawyers who are zealously advocating for their clients and by law students who are learning to do the same. Law is a hard-hitting profession because of its adversarial and competitive nature. Individuals rarely seek legal counsel when things are going swimmingly in their lives; rather, they see lawyers when their problems require the expertise of someone who has been trained in the law. In such an environment, expressions of kindness are often viewed as distractions from the aggressive posturing often expected of lawyers.

When considered as a personality trait, however, psychologists would likely begin with a different operational definition of kindness; one that is not easy to state. Does kindness always have to come at one’s expense, or can kindness encompass a

¹⁴ Michael Vlerick, *Explaining Human Altruism*, 199 SYNTHÈSE 2395 (2021) (noting that from an evolutionary perspective, kindness at a cost is puzzling).

more reciprocal functionality? Psychologists themselves disagree about what makes up kindness as an attribute and what role it has in people's lives.¹⁵ Some psychologists have viewed kindness as a form of self-kindness,¹⁶ while others have seen it as a behavior that serves others at a cost to the self.¹⁷

The American Psychological Association defines kindness as a "benevolent and helpful action intentionally directed toward another person. Kindness is often considered to be motivated by the desire to help another, not to gain explicit reward or to avoid explicit punishment."¹⁸ Psychologists have taken this foundational definition and conceptualized kindness as occurring in different variations. As a multifaceted, interpersonal trait, it has been described as having three aspects: benign tolerance, empathetic responsiveness, and principled proaction.¹⁹ Benign tolerance refers to a kindness expressed in a live and let live manner; it is a permissive humanity.²⁰ Empathetic responsiveness is described as a higher form of kindness that involves more emotion and is more personal.²¹ Finally, principled proaction focuses more on cognition than emotion. It involves honorable behavior towards others and is often considered altruistic.²² Each of these forms of kindness could be relevant in legal education: benign tolerance might support student autonomy, empathetic responsiveness could enhance inclusive classroom climates, and principled proaction could align with the profession's ethical commitments.

Additional psychological studies have suggested that kindness has great individual benefits. For example, kindness can be considered an act of self-kindness because it has been linked to reduced stress and lower blood pressure.²³ Some psychologists also proclaim that kindness "promotes healthy social interactions"²⁴ and greater life satisfaction.²⁵ There is considerable support that kindness is a psychological value that promotes wellbeing.

It seems, therefore, that kindness can both serve others at one's expense and be a form of self-kindness. As an act of permissive humanity, it comes at no cost to self, but as a genuine empathetic response, kindness could involve a reaction that is detrimental to self. Additionally, as a principled proaction, kindness may be

¹⁵ David V. Canter, Donna Youngs & Mira Yaneva, *Towards a Measure of Kindness: An Exploration of a Neglected Interpersonal Trait*, 106 PERSONALITY AND INDIVIDUAL DIFFERENCES 15 (2017).

¹⁶ See Kristin D. Neff, *The Development and Validation of a Scale to Measure Self-Compassion*, 2 SELF AND IDENTITY 223, 225-29 (2003).

¹⁷ Sonja Lyubomirsky, Kennon M. Sheldon & David Schkade, *Pursuing Happiness: The Architecture of Sustainable Change*, 9 REV. GEN. PSYCH. 111, 125 (2005).

¹⁸ *APA Dictionary of Psychology*, AM. PSYCH. ASS'N, <https://dictionary.apa.org/kindness> [<https://perma.cc/UY45-UZHF>].

¹⁹ Canter, *supra* note 15, at 17.

²⁰ *Id.*

²¹ Canter, *supra* note 15, at 17.

²² *Id.*

²³ Lee Rowland, *Kindness-Society's Golden Chain?*, PSYCHOLOGIST. 30, 31 (2018).

²⁴ Donna E. Youngs, Miroslava A. Yaneva & David V. Canter, *Development of a Measure of Kindness*, 42 CURRENT PSYCH. 5428, 5428 (2021).

²⁵ Kathryn E. Buchanan & Anat Bardi, *Acts of Kindness and Acts of Novelty Affect Life Satisfaction*, 150 J. SOC. PSYCH. 235, 235 (2010).

elevated to be a prosocial behavior that can encompass a form of self-kindness, even when it comes at a personal cost. For example, the kind act of a professor offering to provide additional review for a student outside of class will cost that professor time and effort but will also serve as a self-kindness because it will better develop the professor's teaching skills, and it will likely improve the classroom environment. Of course, it is also an act of kindness to the student because it helps the student better understand the material, while exhibiting that the professor cares about them and is deeply invested in their learning. The professor's commitment to education and student success becomes a virtuous cycle where the kind act helps the student, develops the professor's skills, and enriches the learning environment for everyone involved. This type of kindness resists narrow definitions of effective legal instruction that prioritize rigor over relationships, reminding us that learning flourishes in environments where students feel seen and supported.

Of course, these descriptions of kindness focus primarily on the individual acting, but it is important to recognize that the recipient also plays a crucial role in defining kindness. Receiving the act of kindness is essential, as intent alone, as is so often the case in legal application, is not enough: "it is the result, not the intention of kindness that counts."²⁶ Instead, recipients must receive some benefit, even if they are unaware of the kind act. Most often, when recipients are aware, they will be left with a good feeling that is often underestimated by the giver.²⁷ This underscores the idea that kindness, while initiated by the giver, carries a transformative effect on the recipient, even when it is not immediately obvious to the giver. In legal education, small acts such as offering thoughtful feedback, remembering a student's name, or showing grace during office hours can reshape a student's sense of belonging in a system where imposter syndrome²⁸ and marginalization are common. This ripple effect of kindness, where the recipient benefits even in subtle ways, highlights its enduring value, especially in professions where emotional support and well-being are central.²⁹ This recognition of kindness as relational, which is dependent not only on intent but also on reception, has particular significance in legal education, where power dynamics between professors and students can shape how acts of kindness are interpreted, welcomed, and much too frequently, even dismissed.

This positive feeling makes kindness especially valued in most helping professions. Helping vocations, certainly, are extremely varied; they include the "work of counselors, teachers, . . . , doctors, lawyers, grocery clerks, and customer

²⁶ Austin B. Hake & Stephen G. Post, *Kindness: Definitions and a Pilot Study for the Development of a Kindness Scale in Healthcare*, PLOS ONE 1, 5 (2023).

²⁷ Amit Kumar & Nicholas Epley, *A Little Good Goes an Unexpectedly Long Way: Underestimating the Positive Impact of Kindness on Recipients*, 152 J. EXPERIMENTAL PSYCH. 236 (2022).

²⁸ See Sara L. Ochs, *Imposter Syndrome & The Law School Caste System*, 42 PACE L. REV. 373 (2022). Interestingly, this article focusses on the professor's feelings of being an imposter. In reality, both professors and students experience imposter syndrome; Kevin Cokley, Shannon McClain, Alicia Enciso & Mercedes Martinez, *An Examination of the Impact of Minority Status Stress and Imposter Feelings on the Mental Health of Diverse Ethnic Minority College Students*, 41(2) J. MULTICULTURAL COUNSELING & DEV. 101, 106 (2013).

²⁹ See generally Sheldon Cohen & Thomas A. Wills, *Stress, Social Support, and the Buffering Hypothesis*, 98 PSYCH. BULL. 310 (1985). While this article focuses on social support, it suggests that emotional support, which can be a form of kindness, can improve well-being.

service representatives.³⁰ Kindness is traditionally valued in these occupations because most of these workers intend to make things better, rather than worse, for the people they serve.³¹ This intention rings true for most teachers and lawyers. Yet, in legal education kindness often goes unrecognized or unrewarded. This is especially true when kindness is expressed through mentoring, availability, or emotional support, which are the very labors that are feminized and frequently invisible in formal evaluations of professional success. This is a striking contradiction: teachers are generally attracted to the profession for altruistic reasons,³² while lawyers are attracted to the profession to be helpful and to pursue justice and fairness.³³ Still, the structures of legal academia can discourage those very instincts.

Because law professors are commonly both teachers and lawyers, the idea that kindness is not especially valued in legal education is puzzling until the history and demographics of the profession are considered. Unlike many other teaching positions, more law professors, priorly and presently, identify as male; professors identifying as female constituted roughly forty percent of law school faculties in 2024.³⁴ This is less than a one percent increase from the previous year.³⁵ The same slow drift is occurring in law school administrations. Most law schools are led by male deans, with 42 percent of all law school deans identifying as female in 2024.³⁶ In 2020, one in five law schools had never had a female dean.³⁷

Although these numbers suggest that the gender gap is shrinking in legal education, individuals who identify as female consistently hold less prestigious jobs within the legal academy. For example, ever since the 1990s, “women faculty have been 2-3 times more likely than men faculty to occupy non-tenure track and non-

³⁰ ANNE M. GEROSKI, *SKILLS FOR HELPING PROFESSIONALS* 11 (2016).

³¹ See generally Martin Smith, *Wounding Healers. Killing with Kindness on the Road to Hell*, 33 J. SOC. WORK PRAC. 109 (2019) (considering the dark side of altruism and unintended consequences).

³² Ab Rahim Baker, Shamsiah Mohamed, Asmawati Suhid & Ramlah Hamzah, *So You Want to Be a Teacher: What Are Your Reasons?*, 7 INT’L EDUC. STUD. 155, 155 (2014) (finding that altruistic motivation seemed more prevalent than intrinsic motivation and extrinsic motivation).

³³ *Profile of the Legal Profession 2024: Legal Education*, AMERICAN BAR ASSOCIATION <https://www.americanbar.org/news/profile-legal-profession/legal-education/> [<https://perma.cc/BK2U-AN7T>] (also listing a path to political careers, government and public service work, a passion for that type of work, and wanting to promote social change as reasons for wanting to enter the legal profession).

³⁴ *Law School Faculty Demographics* (2024), ENJURIS, <https://www.enjuris.com/students/law-school-faculty-demographics-2024/> [<https://perma.cc/M7YN-2F8M>] (“[I]n 2024, 55.71 percent of law school professors identified as male, while 43.53 percent identified as female. Additionally, 0.08 percent identified as ‘another gender,’ and 0.59 percent chose not to disclose.”).

³⁵ *Id.* In 2023, there were 11,820 faculty members who identified as female, and in 2024 the number had increased to 12,171.

³⁶ *Women in the Legal Profession* (2024), AMERICAN BAR ASSOCIATION, <https://www.americanbar.org/news/profile-legal-profession/women/> [<https://perma.cc/P892-5WC7>]

³⁷ Elizabeth D. Katz, Kyle Rozema & Sarath Sanga, *Women in U.S. Law Schools, 1948-2021*, 15 J. LEGAL ANALYSIS 48, 49 (2023).

research positions. A similar pattern follows for deans but is delayed by roughly a decade. Since the 2000s, female deans have been more than 2 times as likely as male deans to occupy that position on an interim basis.³⁸ Additionally, the top fourteen law schools as ranked by U.S. News and World Reports, account that only two out of five professors identify as female.³⁹ Although statistically the gender divide significantly shrunk in law school faculty, the increase in faculty spots held by females can mostly be attributed to lower paying and lower status positions. This means that despite sluggishly and shiftily changing demographics, legal education is still predominately led by men.

The idea that law school and law school topics may be gendered could also help to explain why kindness is not prized in legal education. A law school topic is considered gendered when (1) it is historically taught by a particular gender, (2) its employment terms exhibit societal attitudes regarding prestige and power, and (3) it requires skills that are customarily thought to predominately belong to one gender.⁴⁰ First, some doctrinal subjects are gendered male because they have traditionally been taught by men and are associated with analytical reasoning and technical expertise. For example, Federal Taxation is a course that could be labeled as being gendered male because it has traditionally been taught by men. A review of the top tax scholars at the beginning of 2024 reveals that the top 50 are predominately male law professors, with a female tax scholar not appearing on the list until the number nine spot.⁴¹ In contrast, a review of the most recent Association of Legal Writing Directors/Legal Writing Institute Survey suggests that legal writing is gendered female because it is disproportionately taught by women in lower-status, non-tenure track jobs: in 2023-2024, 78.6 percent of the 295 legal writing professors who responded to the survey identified as female⁴² and only 18.2 percent of the 172 law schools that responded provided legal writing faculty with tenured or traditional tenure-track status.⁴³

Second, societal attitudes regarding prestige and power are reflected in employment terms associated with various teaching roles in legal education. This dynamic reinforces gender hierarchies that prioritize traditionally masculine-coded subjects, while simultaneously marginalizing those predominantly taught by women. One way to understand how these attitudes result in disparate employment

³⁸ *Id.* at 70.

³⁹ Laura Spitalniak, *Top law schools have been slow to add women faculty members, research finds*, HIGHER ED DIVE (Oct. 11, 2022), <https://www.highereddive.com/news/top-law-schools-have-been-slow-to-add-women-faculty-members-research-finds/632086/> [<https://perma.cc/S64Y-2YR6>].

⁴⁰ See Steven K. Homer, *Hierarchies of Elitism and Gender: The Bluebook and the ALWD Guide*, 41 PACE L. REV. 1, 34 (2020).

⁴¹ Paul Caron, *2024 Tax Prof Rankings: Google Scholar H-Index All*, TAXPROF BLOG (Jan. 23, 2024), https://taxprof.typepad.com/taxprof_blog/2024/01/2024-tax-prof-rankings-google-scholar-h-index-all.html [<https://perma.cc/R5X9-MYCL>] (noting that of the top 50 tax scholars on this list, only 12 are women).

⁴² *ALWD/LWI 2023-2024 Report of the Individual Survey*, ASS'N LEGAL WRITING DIRS. & LEGAL WRITING INST. 112 (2024), <https://www.alwd.org/images/resources/2023-2024-ALWD-and-LWI-Individual-Survey-report-FINAL.pdf> [<https://perma.cc/73H5-GCX6>].

⁴³ *Id.* at iv. Additionally, 21.9% schools reported that their legal writing professors were in fulltime, short positions and 12.3% reported that their legal writing professors were in fulltime long-term positions without 405(c) status that provides a presumptively renewable contract with of least a five-year duration.

terms is through the concept of gender ideology. This concept can be used in legal education to explain how cultural beliefs about masculine and feminine traits influence the structure, values, and hierarchies within the legal academy. Gender ideology, in this context, refers to what it means in a particular culture to be male or female. It “shape[s] the public and private social space shared between men and women.”⁴⁴ It is a complex idea that goes beyond the patriarchal notion of gender differences being rooted in biological differences and placing women in an inferior position.⁴⁵ Instead, it considers how gender roles have been defined by changing economic structures in society and how society has treated genders unequally.⁴⁶ In the legal academy, this manifested itself in employment terms that perpetuate prestige and power disparities.

Drawing on Judith Lorber’s work on gender and social institutions, we can understand how law schools and law school topics are gendered, with gender roles impacting compensation structures and faculty assignments.⁴⁷ Lorber’s framework suggests that institutions reflect gendered division of labor, gendered social control,⁴⁸ and gendered expectations.⁴⁹ For example, law schools that pay their faculty who identify as male more than their faculty who identify as female, have at least one indicator that they are gendered male. Professors identifying as male are also far more likely than professors identifying as female to earn at least \$150,000.⁵⁰ This is partially accounted for by the rank of the law school where the professors teach, with 86% earning over \$150,000 if they teach at a top 20 U.S. News and World Report ranked school.⁵¹ The number of professors identifying as female approaches fifty percent at schools ranked higher than 51.⁵²

A lack of comparable professional titles and office space for legal writing faculty further contributes to a gender ideology that reinforces the hierarchical and gendered nature of the legal academy. Although most law schools now provide legal writing faculty with the title of “professor” the designation is often accompanied

⁴⁴ Larry Catá Backer, *Emasculated Men, Effeminate Law in the United States, Zimbabwe and Malaysia*, 17 YALE J. OF L. & FEMINISM 1, 50 (2005) (explaining that gender ideology can be a form of patriarchy).

⁴⁵ S.U. Philips, *Gender Ideology: Cross-Cultural Aspects*, INT’L ENCYCLOPEDIA SOC. AND BEHAV. SCI’S. 6016, 6016-20 (2001).

⁴⁶ Danice Lynn Langdon & Roger Klomegah, *Gender Wage Gap and Its Associated Factors: An Examination of Traditional Gender Ideology, Education, and Occupation*, 39 INT’L REV. MOD. SOCIO. 173, 177 (2013).

⁴⁷ See Andrea Giampetro-Meyer, *Toward Gender Equality: The Promise of Paradoxes of Gender to Promote Structural Change*, 1 WM. & MARY J. WOMEN AND L. 131, 132-33 (1994) (conducting an interdisciplinary review of Lorber’s PARADOXES OF GENDER (1994)).

⁴⁸ Linda Sheryl Greene, *Mirror, Mirror on the Wall— Gender, Olympic Competition and Persistence of the Feminine Ideal*, 31 WIS. J. OF L., GENDER & SOC’Y. 57, 63 (citing JUDITH LORBER, PARADOXES OF GENDER (1994)).

⁴⁹ See JUDITH LORBER, PARADOXES OF GENDER 292 (1994) (questioning basic assumptions about gender and arguing that gendering is done to produce an inequality of genders).

⁵⁰ Christopher J. Ryan & Meghan Dawe, *Mind the Gap: Gender Pay Disparities in the Legal Academy*, 34 GEO. J. LEGAL ETHICS 567, 609 (2021).

⁵¹ *Id.* at 601.

⁵² Katz et al., *supra* note 37, at 62.

with a distinction that sets them apart from “professors of law.” Instead, they are given the title of “professor of legal writing” or “professor of practice,” which subtly, yet meaningfully sets them apart from professors of doctrinal classes who are simply referred to as “professors of law” and further diminishes their position by providing a less prestigious title.⁵³ These nuanced title variations buttress hierarchical divisions within the faculty, and disproportionately affect women who make up the considerable majority of the legal writing faculty. This gender disparity is additionally compounded by the physical environment: legal writing faculty are sometimes placed in offices that are less desirable than others,⁵⁴ with the justification that the amount of student conferencing done necessitates the need for different and separated space. In reality, such arrangements both reflect and perpetuate the devaluation of feminized labor efforts in the legal academy.

Perhaps the valuation of scholarship in the legal academy is the greatest indicator that legal education is deeply rooted in gender ideology that takes on a traditionally masculine approach. Scholarship has been traditionally valued over teaching in law schools because it is supposedly more intellectually demanding than teaching. Not surprisingly, scholarship is also more frequently associated with male professors, an image that “has been passed down from the original monastic figures who preceded the modern university.”⁵⁵ This alignment of scholarship with masculinity enhances its prestige, reinforcing the perception that intellectual rigor resides primarily in abstract, solitary work rather than in the interactive, communicative labor of teaching. Teaching “is often gendered, and then devalued, within the legal academy, which has a particularly negative effect on those who teach legal writing because of its intensely student-oriented and labor-intensive teaching.”⁵⁶ Because the art of teaching has often been characterized as women’s work in society, legal writing faculty in particular are relegated to the non-tenure-track ‘pink ghetto,’ a status that stems from the intensive one-on-one student contact their work requires and that is less common in other courses.⁵⁷ Again, this disparity in employment terms reflects broader societal attitudes about prestige and power, in which feminized labor is consistently undervalued.

Third, the intellectual labor associated with different law school courses is similarly stratified along gender lines, further developing the gendering of law school courses. For example, male-gendered courses are regularly taught by professors who identify as male because they require the often gendered skill of analysis, which in turn carries higher esteem because the courses are thought to

⁵³ See ALWD/LWI 2023-2024 Report of the Individual Survey, *supra* note 42, at vi-ix (listing qualifications attached to titles).

⁵⁴ L. Danielle Tully, *What Law Schools Should Leave Behind*, 2022 Utah L. Rev. 837, 850 (2022). Additionally, the 2021-2022 ALWD/LWI Institutional Survey, which was the last survey to collect information on offices, revealed that faculty with lesser status and titles were not given comparable offices to their peers with more prestigious titles and status; *ALWD/LWI 2021-2022 Report of the Institutional Survey*, ASS’N LEGAL WRITING DIRS. & LEGAL WRITING INST. (2022), <https://www.lwionline.org/sites/default/files/2025-03/2021-22%20Institutional%20Survey%20Report.FINAL%20June%202023.pdf> [<https://perma.cc/GY24-P64C>].

⁵⁵ Paula A. Monopoli, *Gender and the Crisis in Legal Education: Remaking the Academy in Our Image*, 2012 MICH. ST. L. REV. 1745, 1759 (2012).

⁵⁶ Homer, *supra* note 40, at 38–39.

⁵⁷ *Id.* at 39.

necessitate more challenging intellectual work.⁵⁸ Legal writing courses are on the other end of the spectrum; they are thought of as softer skill courses that are less coveted to teach.⁵⁹ They are less attractive and less valued in the legal academy because of the student contact hours they require, their supposed lack of legal doctrine,⁶⁰ and the fact that they are prevalently taught by women.⁶¹ The high level of student interaction they demand routinely call for traits that are traditionally coded as feminine—such as being nurturing, empathetic, and of course, kind⁶²—which further contributes to their marginalization in the legal academy. This suggests that kindness, as a core but often invisible pedagogical value in legal writing courses, is routinely overlooked or trivialized, reinforcing the perception that it holds little intellectual or institutional merit.

Interestingly, a doctrinal Constitutional Law course will still be deemed more intellectually demanding than a Legal Writing course, even when the Legal Writing course uses Constitutional Law as a substantive vehicle to teach skills. For example, I traditionally use difficult First Amendment school speech concepts to teach appellate advocacy, however my doing so does not elevate the perception of the rigor of my Legal Writing course within the academy. This is likely due to the misunderstanding that “legal writing, in particular, is viewed as involving the mere teaching of commas and proper spelling,”⁶³ when in reality, it involves the explicit

⁵⁸ See generally Anaïs Llorens, Athina Tzovara, Ludovic Bellier, Ilina Bhaya-Grossman, Aurélie Bidet-Caulet, William K. Chang, Zachariah R. Cross, Rosa Dominguez-Faus, Adeen Flinker, Yvonne Fonken, Mark A. Gorenstein, Chris Holdgraf, Colin W. Hoy, Maria V. Ivanova, Richard T. Jimenez, Soyeon Jun, Julia W.Y. Kam, Celeste Kidd, Enitan Marcelle, Deborah Marciano, Stephanie Martin, Nicholas E. Myers, Karita Ojala, Anat Perry, Pedro Pinheiro-Chagas, Stephanie K. Riès, Ignacio Saez, Ivan Skelin, Katarina Slama, Brooke Staveland, Danielle S. Bassett, Elizabeth A. Buffalo, Adrienne L. Fairhall, Nancy J. Kopell, Laura J. Kray, Jack J. Lin, Anna C. Nobre, Dylan Riley, Anne-Kristin Solbakk, Joni D. Wallis, Xiao-Jing Wang, Shlomit Yuval-Greenberg, Sabine Kastner, Robert T. Knight & Nina F. Dronkers, *Gender Bias in Academia: A Lifetime Problem That Needs Solutions*, 109 NEURON 2047, 2060 (2021) (both male and female students attribute certain traits to male and female professors despite the same subject matter being taught from either a male or female professor).

⁵⁹ Homer, *supra* note 40, at 33 (noting that Immigration Law and Poverty Law are gendered female as being softer courses, and that Legal Writing courses are less prestigious).

⁶⁰ The argument that Legal Writing courses do not teach doctrine is flawed. Legal Writing courses explicitly teach foundational doctrinal concepts such as *stare decisis*, precedent, legal rhetoric, statutory interpretation, and procedure.

⁶¹ Amanda L. Stephens & Sean M. Viña, *On Women Professors Who Teach Legal Writing: Addressing Stigma and Women’s Health*, 48 VT. L. REV. 237, 238 (2024) (noting that nearly eighty percent of professors teaching legal writing are women).

⁶² See Xiaohui Zhai, Shazia Rehman, Abdullah Addas, Qingke Liu, Erum Rehman & Muhammad Nasir Khan, *Emotional Labor and Empathic Concern as Predictors of Exhaustion and Disengagement in College Teachers*, 15 SCI. REP. 1, 12 (2025) (suggesting that “female teachers may be more socially conditioned to navigate emotional demands aligning with societal expectations of nurturance and relational labor.”).

⁶³ Larry Cunningham, *Dividing Law School Faculties into Academic Departments: A Potential Solution to the Gendered Doctrinal/Skills Hierarchy in Legal Education*, 67 VILL. L. REV. 679, 696–97 (2022). The author goes on to explain that this is a misconception and that teaching legal writing is rigorous and demanding work.

teaching of legal analysis and persuasion. In addition to teaching rule-based and policy-based analysis that is so often stressed in substantive law classes, legal writing classes also teach analogical reasoning skills. This misunderstanding not only undercuts the intellectual labor involved in legal writing but also diminishes the professional worth of the kindness, patience, and individualized attention it demands.

Kindness appears to be marginalized in legal education not only because it lacks value, but because it is undervalued within a system that prizes traits aligned with traditional masculinity—competitiveness, detachment, and intellectual abstraction—over those associated with traditional femininity, such as empathy, collaboration, and care. Legal education, shaped by long-standing gender ideologies, has institutionalized a hierarchy that rewards solitary scholarship over student-centered teaching, and that privileges analytical rigor over relational intelligence. Traits that underlie kindness, such as emotional awareness, responsiveness, and concern for others, are thus relegated to the margins, especially when embodied in feminized roles such as legal writing faculty. By viewing kindness as soft, self-sacrificing, or lacking in intellectual seriousness, the legal academy overlooks the transformative power it holds for fostering inclusive learning environments and supporting student development. Until the values of care and relational labor are given equal standing to more traditionally masculine-coded academic pursuits, kindness will remain a sidelined virtue in legal education, appreciated in theory but rarely institutionalized in practice.

The Crucial Role of Kindness in Legal Education

Today's law students are notably in need of expressions of kindness from their professors. When law students first begin their legal education, their initial enthusiasm is quickly morphed into a sense of self-doubt as they are shepherded into a highly competitive environment.⁶⁴ Throughout the remainder of their education, this self-doubt evolves into feelings of being overwhelmed; first as they tackle extracurricular activities, and then again as they look for employment and prepare to study for the bar exam.⁶⁵ As evidenced by several six-word stories penned by law students, including "Lost: sanity. Last seen: before orientation" and "Scared 1Ls, stressed 2Ls, Impatient 3Ls," legal education clearly takes a toll on students' mental health.⁶⁶ For many, it erodes confidence and replaces it with deep insecurities and nagging doubts about their career choices.

One of the primary sources of the impact on law students' mental health is the intense pressure surrounding academic performance. As students strive to maintain their footing in an already demanding environment, the weight of grades becomes an ever-present source of anxiety. Law school cultures undoubtedly vary from

⁶⁴ Raashi Shama, *Law Student Mental Health: An Open Dialogue*, 67 BOS. B. J. 13, 13 (2023).

⁶⁵ *Id.*

⁶⁶ Mary Lynn Dunnewold, *Handling Law School Stress Well*, A.B.A. LAW STUDENT DIVISION (Dec. 1, 2011), https://www.americanbar.org/groups/law_students/resources/student-lawyer/personal-financial/handling-law-school-stress-well/ [<https://perma.cc/UMA8-YY4Q>]. Other six-word stories touching on the stress of law school include "Happy people don't study hard enough" and "My wife should sue for damages."

school to school, yet one constant remains: grades matter because they determine access to key opportunities, such as law review and competitive job placements.⁶⁷ This message is reiterated to law students in numerous ways, including faculty normalization scales, class rank, and scholarship opportunities. This emphasis on grades heightens students' anxiety and narrows their perception of success, often reducing their self-worth to a number or a rank.

Unfortunately, faculty actions can subtly reinforce this message, even when done unintentionally. For example, having singular summative assessments creates a tremendous high-stakes situation, where one exam determines an entire course grade. This amplifies the importance of grades and contributes to an already stressful environment which can undermine students' well-being. Similarly, "faculty delighting in sharing stories of typos and grammatical errors that cost clients millions of dollars and former lawyers their licenses"⁶⁸ and making casual, in-class, unfavorable judgments about other lawyers' writings or actions, can cause students to doubt themselves and worry about their abilities as professionals.⁶⁹ Although these stories are meant to capture students' interests and to provide them with cautionary tales, they can cause students to fret about their own shortcomings as writers and as law students. Considered together, these actions can further erode students' confidence and exacerbate the anxiety they already feel about their place in the law school and the vocation of law.

The stress and anxiety law students experience is reflected in the alarming statistics of law student mental health. Research studies in the last two decades have regularly shown that law students experience higher rates of mental distress than similarly situated students of other disciplines, including medicine.⁷⁰ Over fifty percent of all law students experience very high levels of stress, as defined by the Law School Student Stress Module⁷¹ as a score of six or seven on a seven-point Likert scale.⁷² The 2022 Bloomberg Law Survey suggests that these LSSSE's number may be a bit low, finding that "over 75% of student respondents reported increased anxiety because of law school related issues, and over 50% reported experiencing depression."⁷³ These studies suggest that stress and anxiety are not just

⁶⁷ Chelsea M. Baldwin, *Bad Therapy: Conceptualizing the Teaching of "Thinking Like a Lawyer" as Cognitive Behavioral Therapy*, 55 ST. MARY'S L.J. 917, 959 (2024).

⁶⁸ *Id.* at 963.

⁶⁹ *Id.*

⁷⁰ Baldwin, *supra* note 67, at 921.

⁷¹ Law School Survey of Student Engagement, *How a Decade of Debt Changed the Law School Experience*, LSSSE 17 (2015), [LSSSE-annual-report-2015-update-final-revised-web.pdf](https://perma.cc/28EH-JGLA) [https://perma.cc/28EH-JGLA]. LSSSE has been administering surveys to law students since 2004 and tracking law student stress since 2015.

⁷² Jakki Petzold, *Law Student Stress and Anxiety*, LSSSE Blog (May 16, 2022, 10:00 AM), <https://web.archive.org/web/20220808104357/https://lssse.indiana.edu/blog/law-student-stress-and-anxiety/> [https://perma.cc/V4BR-G3AG]. The LSSSE Module is particularly telling because it pinpoints and separates law school stress from other stressors, such as finances.

⁷³ Jessica R. Blaemire, *Analysis: Well-Being in Law School—Law Students Aren't OK*, BLOOMBERG LAW (Feb. 3, 2023), <https://news.bloomberglaw.com/banking-law/analysis-well-being-in-law-school-law-students-arent-ok> [https://perma.cc/4TLE-3LY9].

peripheral reactions to the current state of legal instruction, but that depression has also become a much too common feature of the law school experience.

Moreover, the 2021 Survey of Law Student Well-being saw the number of students considering suicide more than double since 2014.⁷⁴ While alcohol consumption has declined, the use of marijuana and psychedelic drugs has increased,⁷⁵ signaling shifts in how law students attempt to cope with the stress of legal education. Research studies and academic scholars attribute these issues to the competitive grade-focused law school environment and law school cultures that unintentionally discourage help-seeking behaviors.⁷⁶ This data suggests that the emotional toll of legal education is not an incidental byproduct; rather, it is a systemic issue, shaped by academic structures and institutional norms that at least partially define the law school experience. In light of these challenges, reevaluating structural aspects and pedagogical approaches within the classroom becomes essential for improving the law school experience.

As part of this broader structural revamping, reconsidering the role of kindness in law school pedagogy is especially important. Although traditional law school teaching techniques, such as the Socratic Method, may emphasize and reward traits associated with masculinity and sideline more feminine qualities like empathy and patience, kindness is not a weakness, nor is it incompatible with academic rigor. On the contrary, it is an essential pedagogical stance that can strengthen student learning. When done deliberately, kindness is a teaching tool that enhances learning because it fosters academic success, and creates a welcoming climate where students feel comfortable making contributions and taking risks.

While kindness could be valuable in every law school course, it is especially important in legal writing instruction. For students, becoming strong legal writers entails boldness, humility, and vulnerability⁷⁷ because it requires them to make mistakes and accept critiques.⁷⁸ First-year law students, in particular, must be receptive to learning legal writing, a topic that may simultaneously feel both familiar and foreign to them. Many law students come in as strong writers who were previously praised for their work, only to be told by their law professors that their writing practices will not earn them high marks in law school. Accustomed to writing in order to reach a certain page limit, and saving the conclusion to the end, they are now told that they need to write more concisely and lead with their conclusion. Their first attempt at doing so requires them to humbly consider embracing a more technical writing style,⁷⁹ while at the same time showcasing the analytical thought process they are just learning. To do so requires courage and openness that can be difficult for students to marshal in the competitive law school

⁷⁴ David Jaffe, Katherine M. Bender & Jerome M. Organ, "It Is Okay to Not Be Okay": *The 2021 Survey of Law Student Well-Being*, 60 UNIV. LOUISVILLE L. REV. 441, 458 (2022).

⁷⁵ *Id.* at 460. As noted by the authors, the decrease in drinking and simultaneous increase in marijuana use may be attributable to the legalization of recreational use in many states.

⁷⁶ *Id.* at 470. See generally Eric Short, *Infusing Leadership Competencies into 1L Professional Identity Formation*, 62 SANTA CLARA L. REV. 113 (2022).

⁷⁷ Olivia Ruschill, *Creative, Vulnerable and Bold: Learning the Art of Good Legal Writing*, 91 KAN. B.J. 14, 14 (2022).

⁷⁸ *Id.* at 15.

⁷⁹ Michael J. Higdon, *The Legal Reader: An Exposé*, 43 N.M. L. REV. 77, 80-82 (2013). Professor Higdon defines technical writing as "any communication concerning a specialized area that is directed at a particular audience for a discrete purpose." *Id.* at 80.

environment.

For professors, teaching students to become strong legal writers requires kindness demonstrated through honesty, empathy, and sincerity. Professors must be honest enough to identify flaws, empathetic enough to understand the emotional weight of critiques and grades, and sincere enough in their belief that all students can improve and grow as legal writers.⁸⁰ In this context, kindness is not ancillary to learning; rather, it is crucial in developing the confidence and precision that legal writing demands.

The expression of kindness when teaching legal writing in an honest, empathetic, and sincere manner takes on specific and deliberate forms. It is expressed by providing honest feedback, insisting on accountability without resorting to shaming, and voicing an authentic confidence in law students' abilities. These pedagogically rigorous practices are often undervalued in comparison to the traditional and more masculine norms of legal education that emphasize detachment and dominance through aggressive questioning.⁸¹ Yet each of these practices demands mastery and precision. Reframing them as essential teaching strategies rather than signs of softness allows professors to broaden their understanding of what effective legal pedagogy can look like.

Cultivating a learning environment where honest feedback can thrive requires a shared ethic of kindness that is not rooted in politeness or avoidance but instead is a practice of mutual respect and intellectual generosity. For professors, this means offering direct and thoughtful critique that genuinely respects students' efforts while gently nudging them toward greater clarity and academic rigor. For students, kindness may take on the form of openness: the willingness to receive feedback not as a personal affront, but as a serious investment in their growth. When feedback is delivered and received as an act of care rather than as a confrontation or condemnation, the professor/student relationship is strengthened, and legal writing instruction is greatly enhanced.

⁸⁰ Although a full exploration of the issue is beyond the scope of this paper, some law professors are still debating whether writing can be taught. Several social science studies confirm that it can. See Emily S. Darowski, Elizabeth Helder & Nikole D. Patson, *Explicit Writing Instruction in Synthesis: Combining In-Class Discussion and an Online Tutorial*, 49 *TEACHING OF PSYCH.* 57 (2022); Susan De La Paz & Mark K. Felton, *Reading and Writing from Multiple Source Documents in History: Effects of Strategy Instruction with Low to Average High School Writers*, 35 *CONTEMP. EDUC. PSYCH.* 174 (2010); STEVE GRAHAM & DOLORES PERIN, *WRITING NEXT: EFFECTIVE STRATEGIES TO IMPROVE WRITING OF ADOLESCENTS IN MIDDLE AND HIGH SCHOOLS 4–5* (2007). Additional articles focus on making improvements specifically in legal writing. See also Florian Weber, Thiemo Wambsganss & Matthias Söllner, *Enhancing Legal Writing Skills: The Impact of Formative Feedback in a Hybrid Intelligence Learning Environment*, 56 *BRIT. J. EDUC. TECH.* 650, 650–51 (2024); Jeremy Francis, Daphne O'Regan, Ryan Black, *Designing Success: Motivating and Measuring Successful 1L Student Engagement in an Optional Proficiency-Based Program Teaching Grammar and Punctuation*, 21 *J. OF LEGAL WRITING INST.* 129, 183 (2023).

⁸¹ The Socratic Method is often criticized as being unnecessarily harsh and having a disproportionately stifling effect on female students' voices. See Michael P. Harvey-Broughton II, *Ending the Chill of Cold Calling: A Multimodal Solution to the Pitfalls of the Socratic Method*, 16 *DREXEL L. REV.* 359, 379 (2024).

Providing Constructive Feedback

First, providing honest feedback, both inside and outside of the classroom, is an intimidating but necessary act of kindness when teaching legal writing. Interestingly, this process can be intimidating for both the student receiving feedback and the professor providing it. Legal writing can be especially nerve-racking for students because it demands precision, clarity, and a command of legal reasoning that many students are still developing when they receive their feedback. When professors provide honest feedback, they highlight weaknesses and areas for improvement, which can be discouraging to students who have invested significant time and effort into their work. This direct critique often feels deeply personal, exposes students' vulnerabilities, and causes them to wonder if their work is inadequate or even failing.⁸² In turn, this provokes anxiety, self-doubt, and even resistance to further instruction.

Additionally, students who are accustomed to receiving positive feedback on their writing can feel affronted by the suggestions that are offered.⁸³ They may misinterpret the feedback that is given as a judgment on their potential as lawyers. This pressure can make receiving feedback feel overwhelming rather than constructive, increasing the risk that students will become defensive or disengaged.

For professors, it requires direct engagement with students' weaknesses, which can feel uncomfortable, especially when students already feel vulnerable. Some professors worry that straight-talking critiques will prompt defensive reactions, which can result in poor student evaluations, an uncomfortable classroom dynamic, or, worst of all, damaged students' confidence.

Although some may dismiss faculty members' concerns for receiving poor student evaluations, emerging social science research suggests that negative feedback can have a profound impact on professors' mental health and career trajectories. Anonymous student evaluations, in particular, can contain hurtful and defamatory comments that can cause psychological harm.⁸⁴ They can lead faculty members not just to stress, but to extreme distress, with some professors choosing to resign rather than be subjected to further negative comments.⁸⁵ Professors have even reported severe acute and chronic illnesses that they attribute to the trauma of receiving negative student evaluations.⁸⁶ These effects can be magnified in courses where students are more likely to experience emotional responses to feedback that can distort their evaluations.

Consequentially, for professors who teach legal writing, negative evaluations and student comments may be even more severe. Law students have traditionally

⁸² See generally Felice J. Batlan, Kelly Hradsky, Kristen Jaschke, LaVonne Meyer & Jill Roberts, *Not Our Mother's Law School?: A Third-Wave Feminist Study of Women's Experiences in Law School*, 39 U. BAL. L.F. 124, 137 (2009) (providing anecdotal support that feedback was internalized and viewed as an indicator of not being smart enough to be in law school).

⁸³ Lauren E. Sancken, *Grade Expectations: Helping Students Process Feedback Better*, 37 SECOND DRAFT 1 (2024) (noting that as a law student, the author only saw "the message 'you aren't good at this' in red glaring print" and could not focus on the feedback).

⁸⁴ Richard Laekeman, Rosanne Coutts, Marie Hutchinson, Debbie Massey, Dima Nasrawi, Jann Fielden & Megan Lee, *Stress, Distress, Disorder and Coping: The Impact of Anonymous Student Evaluation of Teaching on the Health of Higher Education Teachers*, 47 ASSESSMENT AND EVALUATION HIGHER EDUC. 1489 (2022).

⁸⁵ *Id.* at 1494.

⁸⁶ *Id.* at 1495.

rated legal writing courses lower than other doctrinal courses,⁸⁷ likely because of the amount of feedback they receive in relation to other courses. Additionally, comments left in evaluations seem to be especially hurtful, leaving legal writing professors to wonder if students are taking out their frustrations on what they deem to be safe targets.⁸⁸ This dynamic reflects a deeper tension in legal education, where the emotional strain of teaching is often unnoticed, even as it shapes how professors openly take on students' development.

As a result, some professors may hesitate before providing critical feedback, not because they are indifferent, but because they are protecting themselves from unkind comments. When a faculty member believes that their well-being and career are at risk, they may soften their critique to such a degree that they risk academic honesty.⁸⁹ Ultimately, this increases the invisible and emotional toll on faculty which undermines the quality of education for students.

In legal writing, honest feedback must strike a delicate balance between pedagogical judgement and emotional labor because the stakes of clarity, logic, and precision are paramount, as is the student/professor relationship. It must be rigorous enough to foster growth, but delivered in a way that students can hear and ultimately use. Going beyond feedback on writing assignments, this challenge is intensified by the relational dynamics inside of the classroom; professors may fear being perceived as too harsh, too critical, or even biased, a fear that can result in adapting to a less than rigorous approach. Educational research confirms that verbal feedback delivered during classroom interactions can significantly influence student learning and motivation, but when perceived as overly critical, it can cause defensiveness or disengagement.⁹⁰ Giving precise, honest feedback in the classroom setting with clarity, kindness, and care requires emotional labor, educational skill, and a willingness to risk temporary discomfort in the service of long-term student development.

Insisting on Accountability Without Shaming

Next, to grow as legal thinkers, students must be held accountable for the exactitude the legal profession demands. Yet accountability, particularly in the context of legal education, ought not to be motivated through shaming. Shame-based pedagogies imply more than just a lack of understanding or correctable shortcoming in skill; rather, they suggest that a student's failure indicates a personal deficit in their character or identity.⁹¹ This distinction is significant. When professors conflate critique with condemnation, they risk damaging the learning

⁸⁷ Melissa Marlow-Shafer, *Student Evaluation of Teacher Performance and the "Legal Writing Pathology": Diagnosis Confirmed*, 5 CUNY L. REV. 115, 115-16 (2002).

⁸⁸ *Id.* at 130-33.

⁸⁹ See Judith D. Fischer, *The Use and Effects of Student Ratings in Legal Writing Courses: A Plea for Holistic Evaluation of Teaching*, 10 J. LEGAL WRITING INST. 111, 149 (2004).

⁹⁰ John Hattie & Helen Timperley, *The Power of Feedback*, 77 REV. EDUC. RSCH. 81, 86-90 (2007).

⁹¹ Alessandra Fussi, *Aristotle on Shame*, 35 ANCIENT PHIL. 113, 114 (2015) (asserting that shame results from an incongruence between self-expectations of who we want to be and being viewed as less than that, or perhaps even as defective).

process they aim to cultivate. In contrast, accountability rooted in kindness communicates high expectations while reinforcing the students' value and potential.

It is not surprising that some legal educators, despite the long-standing call for the humanization of legal education,⁹² will at times still rely on shaming as a didactic tool. Most, if not all, law professors went to law school in an age where shaming was likely more acceptable. They were probably educated during a time when aggressive cold calling was, and unfortunately perhaps still is, normalized: "The dominant doctrinal courses in the law school curriculum focus on reading curated excerpts of cases followed by a Socratic discourse focused on the facts, reasoning, and holding of each case."⁹³ These experiences likely influence their teaching styles, and in some cases, can perpetuate a cycle that can result in discomfort, fear, and even shame, for students in the classroom.

Additionally, most law professors are licensed lawyers too, who have been trained to at least partially view the world in terms of legal definitions and theories. Although shaming is a term that at first may be thought of as predominately belonging in the realm of the social sciences, it also can be found in the law. Judicial opinions have solidified the role of shaming in the law by affirming the use of shaming as sanctions in criminal law cases. In particular, courts have at times upheld shaming sanctions, such as public apologies or signs identifying one's offense, as legitimate forms of punishment aimed at deterrence and moral condemnation.⁹⁴ Thus, shaming is not foreign to the legal profession or legal academics and has long been used as a tool to signal disapproval and enforce norms within the legal system.

When carefully considered, the law professor's understanding of shaming, as framed by legal concepts, focuses perhaps on its broader social goal of deterrence, or when considered in a more favorable light, in rehabilitating the offender. Understood in this manner, shaming is dualistic and communal in nature, as "both views maintain the common elements of public denunciation and shunning"⁹⁵ and require a community to be effective.⁹⁶ This conceptualization situates shaming as a structured and purposeful social mechanism with historical legitimacy in legal contexts that helps explain why shaming quietly persists in legal education,⁹⁷ despite

⁹² Nancy J. Knauer, *Learning Communities: A New Model for Legal Education*, 7 ELON L. REV. 193, 201 (2015) (noting that the Kingsfield method of education, which includes shaming, has decreased because of efforts to make legal education less harsh).

⁹³ Jason G. Dykstra, *Teaching the Arc of Electric Spark: Igniting Curiosity, Creativity, and Innovation Throughout the Law School Curriculum*, 45 N. ILL. UNIV. L. REV. 194, 236 (2025).

⁹⁴ See *United States v. Gementera*, 379 F.3d 596, 609 (9th Cir. 2004) (affirming defendant's punishment of wearing a sandwich board stating guilt); *HTH Corp. v. NLRB*, 823 F.3d 668, 678 (D.C. Cir. 2016) (upholding employer's punishment of reading a letter from the NLRB in front of employees by opting to have an NLRB employee read the letter in the employer's place). *But see Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 383 F.2d 230, 233-34 (D.C. Cir. 1967) (rejecting employer's punishment of reading a letter to a group of employees during work hours as it would be degrading and humiliating and will affect the employer's and Union's relationship).

⁹⁵ Deni Smith Garcia, *Three Worlds Collide: A Novel Approach to the Law, Literature and Psychology of Shame*, 6 TEX. WESLEYAN L. REV. 105, 112 (1999) (explaining that the foundation of modern shaming stems from earlier liberal and utilitarian theories).

⁹⁶ *Id.*

⁹⁷ Although shaming has certainly been diminished in legal education, it has yet to disappear entirely. Katie Rose Guest Pryal, *Front-Line Faculty and Systemic Burnout: Why More Faculty*

calls to make legal education more empathetic.⁹⁸ The unfortunate appeal of shaming lies in its perceived past utility as both a signal of standards and discipline.

Shaming in the classroom also finds some legitimacy in philosophy and social science research. For example, some modern philosophers have argued that shame can support character development because it encourages self-reflection and fosters pro-social sensitivity.⁹⁹ The main idea, with roots in Aristotelian philosophy,¹⁰⁰ is that shame “shapes one’s internal norms, and these norms become socially independent.”¹⁰¹ Philosopher Jean-Jacques Rousseau similarly emphasized that shame can be a force that binds individuals to social norms and can foster a sense of ethical responsibility.¹⁰² When used constructively, it can be considered a developmental tool because its negative emotional charge acts as a successful motivator.¹⁰³ Rooted in philosophical traditions, this envisions shame as a mechanism for cultivating virtue and moral character.

Similarly, some social science and education research suggested that shame can motivate learning. Instead of shying away from shame, it is thought of as a learning prompt that can be deliberately used.¹⁰⁴ For example, consider the use of it in the medical profession: students are often shamed when they don’t know the answer to a question or if they make a medical mistake.¹⁰⁵ This form of constructive embarrassment is intended to reinforce the importance of knowledge and precision, which in turn, should drive students to study harder and avoid future errors. In this light, shame can be productive for adult learners, and even transformative, when it is used as “something to learn from and learn through.”¹⁰⁶ When embedded within a supportive educational framework, some researchers posit that shame has the potential to function as an edifying instrument that can foster academic and professional competence.

Should Attend to Law Students’ Mental Health and the Inequities Caused by Faculty Who Opt Out, 27 J. LEGAL WRITING INST. 199, 201 (2023) (“From my own observations, some law professors have continued to blame their students for these manifestations of mental health struggles in the classroom, blaming laziness and poor work ethic. Many professors refuse to alter their pedagogy despite the overwhelming social upheaval we are living in, citing the necessity to maintain ‘rigor.’”).

⁹⁸ Ian Gallacher, *Thinking like Nonlawyers: Why Empathy Is a Core Lawyering Skill and Why Legal Education Should Change to Reflect its Importance*, 8 LEGAL COMM’N. & RHETORIC 109, 139–140 (2011).

⁹⁹ Sabrina B. Little, *A Case for Shame in Character Education*, 42 STUD. IN PHIL. & EDUC. 283, 284 (2023).

¹⁰⁰ *Id.* at 285 (noting that “for Aristotle, the path to virtue depends on shame.”).

¹⁰¹ *Id.* at 286.

¹⁰² JEAN-JACQUES ROUSSEAU, *EMILE, OR ON EDUCATION* 94 (Allan Bloom trans., Basic Books 1979) (1762).

¹⁰³ Little, *supra* note 99, at 295.

¹⁰⁴ Jude Walker, *Shame and Transformation in the Theory and Practice of Adult Learning and Education*, 15 J. TRANSFORMATIVE EDUC. 1, 4 (2017).

¹⁰⁵ See Sandy Miles, *Addressing Shame: What Role Does Shame Play in the Formation of a Modern Medical Professional Identity?*, 44 BJ PSYCH. BULL. 1 (2020).

¹⁰⁶ Walker, *supra* note 104, at 11.

The philosophical traditions and strands of social science that have framed shame as a potentially constructive force in education have been challenged by additional comparable research in psychology and teaching methodology, particularly in the context of higher education. Shame is being increasingly recognized as an emotion that constructs a barrier to learning.¹⁰⁷ Studies suggest that both explicitly and subtly shaming students can erode motivation, increase anxiety, and undermine studying.¹⁰⁸ Shame often correlates with increased fear of failure, particularly among students from marginalized backgrounds and first-generation law students who may already experience heightened vulnerability in law school.¹⁰⁹ In this view, shame is not a constructive pedagogical tool, but rather, it is an emotional burden that can impede learning and deepen educational inequities. Given the intensity of legal education, as well as the professional pressures law students face, these effects are especially troubling in the law school context.

Yet shame can likely be found at least on two levels in law schools. First, at a macro-level,¹¹⁰ shaming is prevalent throughout the legal education process. It exists through the concept of bad grades, which signals to students a level of inadequacy that can be internalized and cause students to withdraw from their learning.¹¹¹ Publicizing class ranks can further deepen this shame when students are not highly placed, as does failing to qualify for prestigious honors such as law review and moot court. Second, at a micro-level, shaming can be found in the classroom and in professors' critiques. Both implicit and explicit reactions, through tone, language, and manner of feedback, can shame students for mistakes and gaps in knowledge.¹¹² This localized experience of shame can compound the broader institutional pressures, making it a pervasive force that can hinder learning and professional development.

Simultaneously, it is important to recognize that professors themselves can feel ashamed in the classroom. Legal educators, especially those early in their teaching careers or navigating institutional pressures, may experience feelings of inadequacy or self-doubt that can manifest when teaching. Consider, for example, the new professor who hesitates before asking students if they have any questions in an effort to avoid feeling inadequate if they do not know the answer. Professors can feel shame for not giving students the chance to ask questions and again, feel shame if they fail to answer or explain a concept adequately.¹¹³ In such moments, shame can surface as frustration, defensiveness, or an assertion of authority. One unfortunate manifestation of this reaction is through shaming students. Understanding this

¹⁰⁷ See Lisa Modenos, *Shame and Adult Learners* 30 J. ADULT & CONTINUING. EDUC. 5, 8 (2024).

¹⁰⁸ See Alexandria Serra, *AI Lawyering Skills Trainers: Transforming Legal Education with Generative AI*, 16 CASE W. RESV. J. L. & TECH. INTERNET 74, 87 (2025) (noting that the Socratic Method can cause students to worry that they will not look intelligent in front of their peers). This would likely lead to a feeling of shame.

¹⁰⁹ Modenos, *supra* note 107, at 8.

¹¹⁰ I first came across the idea of macro and micro levels of shame in elementary education in Ruth Leitch, *The Shaming Game: The Role of Shame and Shaming Rituals in Education and Development*, ERIC ED 433483 (Apr. 1999), <https://eric.ed.gov/?id=ED433483> [<https://perma.cc/E4JW-MEUB>]. I believe it is equally applicable to legal education.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Brian Manternach, *Shaming and Blaming*, 78 J. SINGING 103, 105 (2021).

emotional dynamic does not justify the use of shame, but it does suggest that professors must also be supported in developing reflective, emotionally intelligent teaching practices that interrupt the cycle. Naming and addressing the emotional experiences of faculty is therefore another necessary part of fostering kinder and more constructive classroom cultures.

When considering the importance of kindness in legal education, shaming has no place in the law school classroom, and it is particularly problematic in a legal writing course. As one of the few ABA instructional requirements placed on law schools,¹¹⁴ legal writing courses offer a unique position in the law school curriculum because they commonly present the first opportunity for students to engage deeply with legal analysis and to receive sustained individual feedback.¹¹⁵ In this simultaneously formative and summative environment, the professor's approach must recognize the vulnerability inherent in learning a new discourse, especially when it involves submitting early legal work for critique.¹¹⁶ Even done unintentionally, overt comments, a less than kind tone, or a disproportionate emphasis on error can cause shame to have a lasting negative consequence. If this occurs, the risk of undermining students' confidence and reinforcing feelings of inadequacy that often disproportionately affect female students and students from underrepresented backgrounds may rise.¹¹⁷

Moreover, shaming can cause serious damage to law students' professional identity formation. When feedback is delivered in even a carelessly shaming manner,¹¹⁸ it can undermine the values of professionalism, collegiality and respect that legal writing professors work diligently to instill. For example, consider the comment "Your analysis fails to apply the law correctly" penned on a student's legal writing assignment. Although the professor may think this is a helpful comment that is simply pointing out a problem to a student that must be addressed, it is shame-inducing because of its harsh and absolute tone. The word fail is especially shaming because it suggests a fundamental failure rather than a place for improvement.

Kindness in this context would not require softening expectations or avoiding critique; rather, it demands intentional framing of feedback that is rigorous yet

¹¹⁴ *Standards and Rules of Procedure for Approval of Law Schools 2024–2025*, AM. BAR ASS'N (2024),

https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2024-2025/2024-2025-standards-and-rules-for-approval-of-law-schools.pdf [https://perma.cc/ZK57-WY28].

¹¹⁵ Katrina Robinson, *Let Them Lead: Professional Identity Formation in Student Conferences*, 30 PERSP. 8, 8 (2023).

¹¹⁶ Angela B. Debush, *Using Intention-Setting Practices to Increase Student Engagement in the First-year Legal Writing Classroom*, 27 J. LEGAL WRITING INST. 237, 245 (2023).

¹¹⁷ See David Grenardo, *What About Us? How Law Schools Can Help Historically Underrepresented Law Students Develop Their Professional Identities*, 75 MERCER L. REV. 1483, 1502 (2024).

¹¹⁸ Consider Brian Manternach's introduction to *Shaming and Blaming* where he has a visceral reaction to being wrong when he was part of a group who was asked to point to the lowest part of the body the diaphragm reaches on an inhale. He wondered about the public call out and if the pedagogue intended to shame. See Manternach, *supra* note 113, at 104.

respectful, balancing directness with humanity. In other words, it encourages non-punitive accountability that holds students to high standards. As educational research increasingly affirms the connection between psychological safety and academic performance, legal writing pedagogy should continue to adopt feedback practices that intentionally use kindness in a manner that promotes learning through trust and encouragement, while still retaining academic rigor.

Affirmational Engagement

Finally, legal education is strengthened by kindness when rigorous expectations are paired with a genuine confidence in students' potential. Going beyond a supportive tone or even encouraging words, I propose the term "affirmational engagement" to describe an expression of pedagogical kindness that is rooted in the professor's authentic confidence in their students' capacity to grow into the demands of the legal profession. It is not simply a belief that students are capable in a general sense as that has already been established by their acceptance into law school. Rather, it is about trusting students to navigate ambiguity when answers are not immediately apparent. It consigns students to actively engage with complex materials and to take ownership of their learning.

Affirmational engagement is not a term that is currently widely used in legal education or the social sciences. A definition for it, therefore, is not commonly available, but can be adapted from established concepts in psychology and communication. In psychology, self-affirmation refers to validating and reinforcing a person's perception of self-worth and identity through positive interactions.¹¹⁹ Engagement is a multidimensional construct involving behavioral, emotional, and cognitive dimensions.¹²⁰ Combined, affirmational engagement can be understood as the process by which individuals become meaningfully involved when they feel that their identity is recognized and affirmed within an interaction or environment.

This concept gains clarity and support when viewed through a cross-disciplinary lens that brings together feminist psychology's relational-cultural theory within the framework of humanistic psychology's self-determination theory, especially as they apply to legal education. According to relational-cultural theory, interpersonal dynamics encourage personal growth.¹²¹ It posits that individuals thrive in places where they feel seen. Their motivation to do well and to be connected with their community increases when they perceive that they are valued, understood, and capable of making meaningful contributions.¹²² Self-determination theory advances the idea that people are motivated to succeed when they feel competent, autonomous, and connected to others.¹²³ When individuals experience this trifecta, their intrinsic motivation and engagement are heightened. Together, these two theories help

¹¹⁹ *APA Dictionary of Psychology: self-affirmation*, AM. PSYCH. ASS'N, <https://dictionary.apa.org/self-affirmation> [<https://perma.cc/WM8H-7UKH>] I believe the APA Dictionary of Psychology definition also applies to affirmation of others.

¹²⁰ Jennifer A. Fredricks, Phyllis C. Blumenfeld & Alison H. Paris, *School Engagement: Potential of the Concept, State of the Evidence*, 74 REV. EDUC. RSCH. 59, 60 (2004).

¹²¹ Judith V. Jordan, *Relational-Cultural Theory: The Power of Connection to Transform Our Lives*, 56 J. HUMANISTIC COUNSELING 228, 230-231 (2017).

¹²² Amy Rector-Aranda, *Critically Compassionate Intellectualism in Teacher Education: The Contributions of Relational-Cultural Theory*, 70 J. TCHR. EDUC. 388, 393 (2019).

¹²³ LISA LEGAULT, SELF-DETERMINATION THEORY I (Virgil Zeigler-Hill & Todd K. Shackelford, eds., 2017).

illuminate the rationale behind affirmational engagement as I define it: a highly motivated form of participation that emerges when learners are both personally affirmed and meaningfully connected within their environment.

Affirmational engagement, in the context of legal education, refers to a pedagogical approach where professors actively communicate a steadfast belief in their students' potential to thrive under the demands of law school, particularly in the face of uncertainty and complex material. It can be found in how professors express their expectations, not as traps or as tests, but as invitations to engage in critical thinking. Instead of focusing on the errors all law students are bound to make, affirmational engagement highlights promising instincts and affirms law students' developing skills. It is a form of pedagogical kindness that trusts students with real challenges and assumes that they are capable of successfully working through them.

Although this article focuses primarily on gender, the perception and reception of kindness in legal education are also shaped by intersecting identities. Faculty of color, LGBTQ+ professors, and those from less institutionally privileged backgrounds may face distinct pressures related to emotional expression and classroom demeanor. When these professors engage students through kindness or affirmation, their efforts may be interpreted differently or even discounted because of racialized and gendered expectations.¹²⁴ Similarly, students from historically marginalized groups may depend differently on affirming feedback and relational trust to feel fully seen in classroom spaces. Attending to these intersectional dynamics highlights the potential of kindness not only as a teaching strategy, but also as a quiet force for equity in legal education.

This approach centers on the professor-student relationship – a dynamic that plays a crucial role in student motivation and learning outcomes. Social science research confirms “a significant relationship between the perception of how much students feel cared for by their professors and how much effort students put forth, as well as how much a student thinks he or she learned in class.”¹²⁵ This level of care tends to spill over into how readily students will apply concepts they learned in the classroom into their lives.¹²⁶ Revealingly, both positive and negative attitudes towards students that professors convey has been identified as motivators and as demotivators for students.¹²⁷ This dynamic underscores the powerful role that faculty attitudes can serve. The findings suggest that expressions of care and confidence are central to fostering student engagement and academic self-concept.

This dynamic becomes especially important in challenging courses, such as

¹²⁴ See MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* 78–82 (2019) (finding that implicit bias in course evaluations and classroom interactions disproportionately affects faculty of color and women of color).

¹²⁵ Amber R. Dickinson & Ursula W. Kreitmair, *The Importance of Feeling Cared for: Does a Student's Perception of How Much a Professor Cares About Student Success Relate to Class Performance?*, 17 J. OF POL. SCI. EDUC. 356, 357 (2021).

¹²⁶ *Id.*

¹²⁷ Joan Gorham & Diane M. Christophel, *Students Perceptions of Teachers' Behaviors as Motivating and Demotivating Factors in College Classes*, 40 COMMUN. Q. 239, 247 (1992).

most law school offerings. Research suggests that the level of respect professors demonstrate for students' academic abilities meaningfully affects outcomes.¹²⁸ Perceived faculty respect has been linked to a slight bump in course grades, and a more substantial increase in student confidence.¹²⁹ When professors express belief in their students' potential through tone and expectations, students are more likely to persist through difficulty and engage more deeply with material.

Despite these findings, legal education faces persistent challenges in cultivating classroom environments where students feel respected and seen. Elizabeth Mertz's ethnographic work demonstrates that the legal classroom often trains students to value detachment and linguistic precision over relational understanding.¹³⁰ Legal scholars like Susan Sturm have argued for a more inclusive pedagogical approach that actively shapes institutional culture indicating that change can occur when faculty and students work together to improve education.¹³¹ More recent scholarship on faculty-student dynamics, however, cautions against overcorrecting the neglect suggested, particularly if it results in helicopter teaching.¹³² Affirmational engagement offers a middle path by fostering trust and respect without diminishing rigorous expectations, thus empowering students to develop both independence and professional maturity.

In the legal writing classroom, affirmational engagement demonstrating respect and belief in students might take on the form of providing feedback as live critiques during individual writing conferences. These conferences are most effective when professors display an authentic confidence in their students' ability to engage with complex feedback and revise accordingly. Instead of marking papers up with corrective comments, professors provide suggestions to their students that highlight their strengths and identify areas for growth in real time.¹³³

For example, a professor would ideally start the student conference by identifying an aspect of the assignment where the student performed well, such as identifying key legal issues, or if needed, something more basic such as following guidelines or having a strong organizational foundation. This initial positive focus is not just a pedagogical nicety; rather, it is a strategic expression of confidence. It helps to establish a respectful tone that signals to the student that they are in a safe space where their work is valued. Further, it lets the student know that the professor is taking their work seriously and wants to provide meaningful feedback by engaging

¹²⁸ Marina Micari & Pilar Pazos, *Connecting to the Professor: Impact of the Student-Faculty Relationship in a Highly Challenging Course*, 60 COLL. TEACHING, 41, 45 (2012) (surveying undergraduate students in six organic chemistry courses).

¹²⁹ *Id.*

¹³⁰ See ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* 45 (2007).

¹³¹ Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J. L. & GENDER 247, 290 (2006).

¹³² See Emily Grant, *Helicopter Professors*, 53 GONZ. L. REV. 1, 5-6 (2017). (Like helicopter parenting, helicopter professors produce similar detrimental results for students such as reduced critical thinking, denial of educational autonomy, and an overreliance on a professor or professors).

¹³³ See generally Elizabeth M. Bloom, *A Law School Game Changer: (Trans)formative Feedback*, 41 OHIO N. UNIV. L. REV. 227, 257-58 (2015).

in a conversation instead of just pointing out deficiencies.¹³⁴ From this starting point, the student should be in a position to think more critically about their work without the fear of being judged. It also acknowledges the student's existing skill and subtly signals that becoming a strong legal writer involves a process that they are being taught.

These live critique conferences provide affirmational engagement not just in the spoken words, but also in what they silently signal. They demonstrate to students that their professors trust their capacity to reflect and to improve their work. They also quietly demonstrate that their students are worth investing time and attention in, because they know that they can improve their work. These live critique conferences are grounded in high expectations that are paired with a genuine belief in their students' potential.¹³⁵

Affirmational engagement offers a meaningful middle ground for professors and students to meet; it is not a site for solely passive reception or performative rigor. Rather, it is a space where intellectual challenge, relational respect, and encouragement coexist. In this context, kindness is grounded in high expectations and professional trust. It affirms students' capacity and identity while reinforcing students' efforts as being productive and appreciated. Research in cognitive psychology supports this approach: students are more likely to persist and ultimately be successful when professors convey a sincere belief in their potential.¹³⁶ In this way, affirmational engagement fosters students' critical thinking and intellectual growth while still providing space for what each student and professor brings to the learning environment.

Conclusion

Kindness underscores the human element of legal education. It should be recognized as a foundational principle in legal education that enables rigorous intellectual development while fostering an environment of respect, equity, and emotional safety. Amid the gendered dynamics that continue to subtly shape the legal academy, kindness offers a gentle corrective to traditional practices that often privilege harshness and impersonal critique. When expressed through honest feedback, accountability without shaming, and affirmational engagement, kindness becomes a tool for developing the intellectual precision, professional identity, and resilience that legal education demands. While these principles are especially visible in legal writing instruction, where vulnerability and critique are central to the learning process, they are equally applicable across the broader law school

¹³⁴ See Ellie Margolis, *Doing Less—Reflections on Cognitive Load and Hard Choices in Teaching First-Year Legal Writing*, 68 ST. LOUIS UNIV. L.J. 399, 416 (2024) (stating that professors focus more on fundamental issues during live conferences rather than minutia).

¹³⁵ Amanda L. Sholtis, *Say What?: A How-To Guide on Providing Formative Assessment to Law Students Through Live Critique*, 49 STETSON L. REV. 1, 7-9, 10 (2019).

¹³⁶ See SARAH ROSE CAVANAGH, *THE SPARK OF LEARNING: ENERGIZING THE COLLEGE CLASSROOM WITH THE SCIENCE OF EMOTION* 102 (2016).

curriculum.

As legal educators reexamine the conditions that support effective teaching and meaningful learning, kindness should be recognized as a pedagogical strength and a professional imperative. I did not always see it this way. But now, when students refer to me as a kind professor, I no longer worry that it signals softness or lowered expectations. I understand it as a reflection of an intentional, rigorous, and humanizing approach to legal education, and it makes me smile.

**SHOULD THE UNITED STATES GIVE PEOPLE MONEY?
EVIDENCE FROM HIGH-QUALITY EMPIRICAL RESEARCH ON
UNCONDITIONAL CASH TRANSFERS**

JUSTIN GILES*

Unconditional cash is a popular tool for people of all political stripes, forming the basis of policy proposals like Universal Basic Income and an expanded Child Tax Credit. Many rationales for unconditional cash exist. Some defend the policy on efficiency grounds, with arguments that cash is preferable to in-kind support, that it would generate greater economic benefits than costs, or even that it would pay for itself. Others argue for unconditional cash on moral grounds, saying that it would improve recipients' lives, reduce poverty, and lead to a more egalitarian society.

Over the past decade, researchers have conducted multiple high-quality studies to assess the effects of transfers of up to \$12,000 in yearly unconditional cash lasting several years. This essay surveys this latest round of research to determine which policy rationales for unconditional cash transfers it supports—if any. It finds that the research supports the moral arguments for unconditional cash transfers more strongly than the efficiency arguments, but that uncertainties remain regarding unconditional cash's long-term effects.

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Introduction

Unconditional cash transfers (UCTs) are among the simplest policy interventions: They involve giving people money with no behavioral requirements attached.¹ Cash transfers that are conditional on the recipient working, like the Earned Income Tax Credit, or limited to certain categories of spending, like food stamps, are generally not considered to be UCTs, whereas cash transfers that require only that the recipient have children, be below a certain income threshold, or have disabilities generally are considered UCTs.² UCTs appeal to a wide range of ideologies. A libertarian might see a UCT as removing paternalism from government benefits,³ while a progressive might see a UCT as wealth redistribution in its purest form.⁴

The last decade has taken the reputation of UCTs on a roller coaster ride. Experiments in low-income countries like Kenya found that giving people cash yields numerous benefits, including improvements in health, education, savings, and investments.⁵ Excitement over universal basic income (UBI)—a UCT received by every member of a society—spiked around 2015, leading to endorsements from conservatives like Charles Murray and labor leaders like Andy Stern.⁶ Grant money poured out for experiments giving people in the United States and other high-income countries up to \$12,000 in cash for multiple years.⁷

The excitement was not confined to the world of policy research. Democratic primary presidential candidate Andrew Yang rose to fame in 2020 by suggesting UBI could help Americans weather job losses caused by artificial

¹ *The State of Social Safety Nets 2015*, WORLD BANK GROUP (2015), <https://documents1.worldbank.org/curated/en/415491467994645020/pdf/97882-PUB-REVISED-Box393232B-PUBLIC-DOCDATE-6-29-2015-DOI-10-1596978-1-4648-0543-1-EPI-1464805431.pdf> [<https://perma.cc/ZSH5-JAR2>].

² See, e.g., *id.*; Nicole Kovski, Natasha V. Pilkauskas, Katherine Micheltore & H. Luke Shaefer, *Unconditional Cash Transfers and Mental Health Symptoms Among Parents with Low Incomes: Evidence from the 2021 Child Tax Credit*, 22 SSM - POPULATION HEALTH, 2023, at 1.

³ Miranda Perry Fleischer & Daniel J. Hemel, *Atlas Nods: The Libertarian Case for a Basic Income*, 2017 WIS. L. REV. 1189, 1234 (2017).

⁴ MATT ZWOLINSKI & MIRANDA PERRY FLEISCHER, UNIVERSAL BASIC INCOME: WHAT EVERYONE NEEDS TO KNOW 192 (2023); e.g., Matt Bruenig, *UBI Already Exists, We Just Need to Redistribute It*, JACOBIN (2019), <https://jacobin.com/2019/09/universal-basic-income-passive-capital> [<https://perma.cc/A9VE-978Y>].

⁵ E.g., Abhijit Banerjee, Michael Faye, Alan Krueger, Paul Niehaus & Tavneet Suri, *Effects of a Universal Basic Income During the Pandemic* 25–28 (Innovations for Poverty Action Working Paper, 2020). See generally, Francesca Bastagli, Jessica Hagen-Zanker, Luke Harman, Valentina Barca, Georgina Sturge & Tanja Schmidt, *The Impact of Cash Transfers: A Review of the Evidence from Low- and Middle-Income Countries*, 48 J. SOC. POL'Y 569 (2019).

⁶ Hilary Hoynes & Jesse Rothstein, *Universal Basic Income in the United States and Advanced Countries*, 11 ANN. REV. ECON. 929, 930–31 (2019).

⁷ *Id.* at 953–54.

intelligence.⁸ In response to the COVID-19 pandemic, the Child Tax Credit became fully refundable for the 2021 tax year, effectively providing a UCT between \$3,000 and \$4,000 per child to many families.⁹

Then the results of the UCT experiments in high-income countries began to trickle in. Their findings on metrics like physical and mental health underperformed the expectations of many economists.¹⁰ Critics felt the experiments demonstrated UCTs decreased work and made their recipients worse off.¹¹ Even those in favor of UCTs began to doubt that cash was a strong tool for policy goals other than poverty reduction.¹²

This essay surveys the recent explosion of research on UCTs to determine whether such pessimism is warranted. While my essay is not the first to review this literature,¹³ it is, to my knowledge, the most up-to-date and comprehensive. I also believe it to be the only essay that (1) synthesizes the recent studies to predict broad policy-relevant outcomes, and (2) reexamines popular policy rationales for UCTs based on the new evidence.

The essay concludes that while the empirical evidence does not strongly support efficiency-based arguments for UCTs, it is not fatal to them either. Moreover, the essay concludes that the evidence *does* tend to support popular moral arguments for UCTs. These conclusions are limited to the types of UCTs studied empirically—that is, UCTs of \$12,000 per year or (usually significantly) less, given to low-income individuals for under four years.¹⁴

The essay proceeds in four parts. Part I describes popular efficiency-based and morality-based rationales for UCTs. Part II describes what sort of high-quality research on UCTs exists. Part III synthesizes this research to predict the general effect of a UCT on productivity, physical health, household finances and consumption, mental health and subjective well-being, and harmful behaviors like crime and alcohol consumption. Part IV looks at whether the effects of UCTs predicted by Part III support the policy rationales for UCTs described by Part I.

⁸ Lakshmi Varanasi, *Will AI Replace Human Jobs and Make Universal Basic Income Necessary? Here's What AI Leaders Have Said about UBI*, BUS. INSIDER (2025), <https://www.businessinsider.com/universal-basic-income-ai> [<https://perma.cc/UUH5-Z4U3>].

⁹ American Rescue Plan Act of 2021, Pub. L. No. 117–2, § 9611, 135 Stat. 4, 144–45 (2021); Kovski et al., *supra* note 2, at 1.

¹⁰ Ania Jaroszewicz, Jon Jachimowicz, Oliver Hauser & Julian Jamison, *How Effective Is (More) Money? Randomizing Unconditional Cash Transfer Amounts in the US* (2024), <https://papers.ssrn.com/abstract=4154000> [<https://perma.cc/3GND-V93C>].

¹¹ Chris Giles, *Universal Basic Income: The Bad Idea That Never Quite Dies*, FIN. TIMES (July 26, 2024), <https://www.ft.com/content/27057ff2-e9b6-4630-a6ea-201e0f6d72d9>

[<https://perma.cc/783F-CFEN>]; Allysia Finley, *The High Cost of Free Money*, WALL ST. J. (2022), <https://www.wsj.com/articles/the-high-cost-of-free-money-harvard-exeter-study-stimulus-handout-low-income-well-being-health-personal-agency-poverty-covid-11658166372> [<https://perma.cc/R73M-G9PW>].

¹² Dylan Matthews, *What a Big Experiment Giving Money to Parents Reveals*, VOX (July 15, 2024), <https://www.vox.com/future-perfect/359737/researchers-parenting-mom-stress> [<https://perma.cc/JVC8-7HTC>].

¹³ See, e.g., Hema Shah & Lisa A. Gennetian, *Unconditional Cash Transfers for Families with Children in the U.S.: A Scoping Review*, 22 REV. ECON. HOUSEHOLD 415 (2023).

¹⁴ *Infra* Part II(A).

I. Rationales for Unconditional Cash Transfers

This Part covers popular policy rationales for UCTs and describes the empirical evidence that might support each. It separates these rationales into two buckets: efficiency-based rationales and morality-based rationales. This is only a rough distinction. For example, we might believe that efficiency helps us realize a more moral society by, e.g., setting a higher cap on the amount of wealth that can be redistributed to those in need.

A. Efficiency-Based Rationales

The policy rationales discussed in this subpart are pareto efficiency, Kaldor-Hicks efficiency, and tax revenue generation. The first two are core concepts of economic and policy research; the last is more popular with politicians and laypeople.

1. Pareto Efficiency

A policy creates a pareto improvement if it makes at least one person economically better off without making anybody economically worse off.¹⁵ In a strict sense, a pareto improving UCT is probably unattainable. Even if most UCT recipients were made better off, at least some would probably come to harm (famously, even lottery winners sometimes wind up worse off as a result of their winnings).¹⁶ But a UCT could at least satisfy the spirit of a pareto improvement if it were to make its average recipient better off without hurting the average person whose taxes paid for the UCT.

Is this possible? Not if the baseline is no taxation. Most people would agree that taxing Peter to pay Paul makes Peter worse off.¹⁷ But if the baseline is instead the current level of taxation, then a UCT could be a pareto improvement so long as it does not raise taxes. Imagine: Instead of spending tax revenue on in-kind benefits like Medicaid and Supplemental Nutrition Assistance Program (SNAP, or food stamps), the United States could disburse that tax revenue to the former beneficiaries of these programs in the form of cash. Libertarian proponents of UCTs often argue that this would be better for recipients, who could spend the cash to meet their unique needs rather than accept non-cash benefits like healthcare that they

¹⁵ Daniel M. Hausman, *Philosophy of Economics*, STANFORD ENCYCLOPEDIA PHIL. (Sept. 4, 2018), <https://plato.stanford.edu/archives/fall2024/entries/economics/#Effi> [https://perma.cc/MBL9-3Y3M].

¹⁶ Joe Nocera, *The Bad Luck of Winning*, N.Y. TIMES (Nov. 30, 2012) <https://www.nytimes.com/2012/12/01/opinion/nocera-the-bad-luck-of-winning.html> [https://perma.cc/956M-K9HJ].

¹⁷ Of course, if Peter and Paul both receive some benefit from taxation worth more to them than their tax dollars—say, a publicly-run wastewater treatment plant—then they would both be better off. But this essay does not deal with such possibilities because it is mathematically impossible to provide a UCT larger than its cost in tax dollars. That being said, a UCT could yield benefits beyond its dollar amount if, for example, it caused recipients to become more productive. In such a scenario, all members of society could wind up better off, especially if returns to the newly created productivity were partially redistributed back to taxpayers. Part I(A)(2) considers these sorts of scenarios.

might not need.¹⁸ Moreover, even if the recipients were indifferent between cash and in-kind benefits, cash benefits could still be a pareto improvement if they reduce administrative costs.¹⁹ As evidence for this point, the Social Security Administration provides cash benefits at a fraction of the cost of government agencies that provide in-kind benefits.²⁰

What sort of evidence should we look for to see whether replacing existing government benefits with UCTs could be a pareto improvement? It is difficult to say, because the main logic of this policy rationale is that recipients would benefit in different ways given their differing needs and preferences. General improvements in well-being would be one important indicator. We might also want to see improvements in the types of metrics that in-kind benefits support, such as health and food security. Such measures could reassure non-libertarians that people will spend UCTs in ways that actually benefit them, rather than on goods that may be self-destructive, like drugs and alcohol.²¹

2. Kaldor-Hicks Efficiency

A UCT that fails to be pareto improving—for example, one that raises the taxes paid by high earners—might still be Kaldor-Hicks improving.²² A policy is Kaldor-Hicks improving when it creates greater economic benefits than economic costs.²³ Raising taxes to fund a UCT would likely have at least a small economic cost; for example, it might involve administrative costs,²⁴ and it might also reduce

¹⁸ See ROBERT FRANK, *MICROECONOMICS AND BEHAVIOR* 75 (9th ed. 2014); Fleischer & Hemel, *supra* note 3, at 1234; See generally CHARLES MURRAY, *IN OUR HANDS: A PLAN TO REPLACE THE WELFARE STATE* (2006).

¹⁹ Fleischer & Hemel, *supra* note 3, at 1235.

²⁰ *Id.*

²¹ Cf. Zwolinski & Fleischer, *supra* note 4, at 162–66.

²² Note that the baseline for assessing pareto efficiency in this sentence is different from the baseline used in the previous subpart. Generally, when this essay discusses whether a UCT can be a pareto improvement, its baseline is in-kind benefits funded by the same level of taxation as the UCT would require. However, when this essay discusses whether a UCT can be a Kaldor-Hick improvement, the baseline is no taxation. I believe this correctly tracks the popular policy arguments for UCTs, wherein some proponents (often libertarians) believe UCTs to be a superior alternative to the existing welfare state, and other proponents (often progressives) believe UCTs would generate net positive economic benefits. Compare Fleischer & Hemel, *supra* note 3 with Irwin Garfinkel, Laurel Sariscsany, Elizabeth Ananat, Sophie Collyer, Robert P. Hartley, Buyi Wang & Christopher Wimer, *The Benefits and Costs of a Child Allowance*, 13 J. BENEFIT-COST ANALYSIS 335 (2022). But this may be confusing to readers literate in economic theory who expect that a policy that is not a Kaldor-Hicks improvement also cannot be a pareto improvement. That would be true if the Kaldor-Hicks and pareto improvements in question were assessed using the same baseline. But given that this essay uses different baselines when assessing pareto versus Kaldor-Hicks criteria, its assessment of one has no bearing on the other.

²³ The economic benefits of a Kaldor-Hicks improving policy can sometimes be redistributed to create a pareto improvement. ANTHONY E. BOARDMAN, DAVID H. GREENBERG, AIDEN VINING & DAVID L. WEIMER, *COST-BENEFIT ANALYSIS: CONCEPTS AND PRACTICE* 32–33 (4th ed. 2017). See generally Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 *ECON. J.* 549 (1939); J. R. Hicks, *The Foundations of Welfare Economics*, 49 *ECON. J.* 696 (1939).

²⁴ Garfinkel et al., *supra* note 22, at 352 (estimating administrative cost for an expanded Child Tax Credit).

the productivity of taxpayers.²⁵ Yet a UCT might have even greater economic benefits: for example, it might increase recipients' productivity and health, or it might decrease crime.²⁶

At first, the idea that a UCT could raise its recipients' productivity may seem implausible. Economists generally model income receipt as causing people to work fewer hours.²⁷ But other forces push in the opposite direction. People with more money may invest more in their own or their children's human capital (education, job training, etc.), which may lead to greater productivity in the long run.²⁸ They may also consume more, which boosts demand for goods and services, raises wages, and lures additional labor into the market (this essay will refer to this effect as the "labor demand" effect).²⁹

That a UCT could yield economic benefits in the form of improved health and reduced crime is more intuitive. In the United States, men aged 40 in the top 1% of the income distribution can expect to live 15 years longer than their counterparts in the bottom 1%. Researchers frequently assume this relationship to be at least partially causal and speak of income as a "social determinant of health."³⁰ If they are correct, UCTs could provide enormous economic value both in the form of improved health for recipients and reduced burden for society.³¹ Crime tends to be similarly correlated with income,³² and is often modeled as enticing criminals whose legal earnings prospects are low.³³ Given the large costs crime imposes on both victims and taxpayers (who must fund the criminal justice system),³⁴ a UCT that reduced crime could generate large economic benefits.

²⁵ The amount of money taxpayers paid in taxes due to the UCT would not be considered a net economic cost in the Kaldor-Hicks analysis because UCT recipients would receive this exact amount as a benefit, perfectly canceling out taxpayers' loss. For a policy rationale that counts taxation as a cost, see *infra* Part I(A)(3).

²⁶ Garfinkel et al., *supra* note 22, at 352 (suggesting that an expanded Child Tax Credit would be Kaldor-Hicks improving due largely to its effects on improve productivity, health, and crime).

²⁷ Frank, *supra* note 18, at 464–65.

²⁸ Hoynes & Rothstein, *supra* note 6, at 948.

²⁹ Hoynes & Rothstein, *supra* note 6, at 949.

³⁰ See generally Gopal K. Singh, Gem P. Daus, Michelle Allender, Christine T. Ramey, Elijah K. Martin, Chris Perry, Andrew A. De Los Reyes & Ivy P. Vedamuthu, *Social Determinants of Health in the United States: Addressing Major Health Inequality Trends for the Nation, 1935-2016*, 6 INT'L J. MCH AIDS 139 (2017).

³¹ See Haru Iino, Masayuki Hashiguchi & Satoko Hori, *Estimating the Range of Incremental Cost-Effectiveness Thresholds for Healthcare Based on Willingness to Pay and GDP per Capita: A Systematic Review*, 17 PLOS ONE, 1, 5–9 (2022) (finding that willingness to pay for a quality adjusted life year is generally between 0.5 and 1.5 times GDP per capita).

³² E.g., Anders Nilsson, Felipe Estrada & Olof Bäckman, *The Unequal Crime Drop: Changes over Time in the Distribution of Crime among Individuals from Different Socioeconomic Backgrounds*, 14 EUR. J. CRIMINOLOGY 586, 595–97 (2017).

³³ See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176–79 (1968).

³⁴ Kathryn E. McCollister, Michael T. French & Hai Fang, *The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation*, 108 DRUG & ALCOHOL DEPENDENCE 98, 104–05 (2010) (finding, for example, that the average robbery costs the victim and society a total of \$42,310 in 2008 dollars).

For the above reasons, evidence of improvements in productivity, human capital formation, consumption, health, and crime would all weigh in favor of a UCT being Kaldor-Hicks improving. Admittedly, this only represents the economic benefit side of the Kaldor-Hicks calculation. To determine whether benefits exceeded costs, we would also need to consider the deadweight loss caused by the taxes that funded the UCT (e.g., whether taxpayers became less productive). But the economic cost side of the Kaldor-Hicks analysis is beyond the scope of this essay, given that it was not (and could not have been) tested by the randomized controlled trials on which this essay draws.³⁵

3. Tax Revenue Generation

If a UCT increases productivity on net, it may also generate more tax revenue than it costs. Research on the Earned Income Tax Credit suggests it might “pay for itself” in this way.³⁶ This sort of rationale could be influential for politicians hoping to sell the public on increased government spending. For reasons described in the last subpart, evidence that a UCT improves productivity, human capital formation, and consumption would all weigh in favor of that UCT generating tax revenue on net.

B. Morality-Based Rationales

The policy rationales discussed in this subpart are beneficence, poverty alleviation, and egalitarianism. While it is clarifying to separate these concepts from one another, many people support some form of all three. Moreover, even a person who does not *intrinsically* value poverty alleviation or equality may still believe that reducing poverty or promoting equality are *instrumentally* valuable insofar as they make people better off. What it means for a person to be better off is a question for the first morality-based rationale: Beneficence.

1. Beneficence

Perhaps you believe that you usually ought to act in ways that improve other people’s well-being. If so, you believe in *beneficence*.³⁷ If you believe not only in improving well-being but in maximizing the amount of well-being that exists in the world, you are a *utilitarian*.³⁸ Utilitarianism is the more famous and more controversial moral theory, but beneficence probably plays a role in most moral reasoning.³⁹

Beneficent moral theories like utilitarianism tend to support UCTs so long as one believes in the diminishing marginal utility of income—that is, the idea that the amount of well-being provided by a unit of income decreases as a person’s income increases.⁴⁰ If the marginal utility of income diminishes, then we should

³⁵ Cf. *infra* Part II(A).

³⁶ Andrew C. Barr, Jonathan Eggleston & Alexander A. Smith, *Investing in Infants: The Lasting Effects of Cash Transfers to New Families* 28 (Nat’l Bureau of Econ. Rsch., Working Paper No. 30373, 2022); Jacob E. Bastian & Maggie R. Jones, *Do EITC Expansions Pay for Themselves? Effects on Tax Revenue and Government Transfers*, 196 J. PUB. ECON. 1, 1 (2021).

³⁷ Cf. SHELLY KAGAN, *NORMATIVE ETHICS* 133 (1st ed. 1997).

³⁸ *Id.* at 61.

³⁹ Cf. Tom Beauchamp, *The Principle of Beneficence in Applied Ethics*, STANFORD ENCYCLOPEDIA PHIL. (Feb. 11, 2019), <https://plato.stanford.edu/archives/spr2019/entries/principle-beneficence/> [<https://perma.cc/2KDR-CPQN>].

⁴⁰ Frank, *supra* note 18, at 181.

expect redistributing income from a high-income taxpayer to a low-income recipient to increase the recipient's well-being by more than it decreases the taxpayer's well-being.⁴¹

What type of evidence supports beneficent rationales for UCTs? It depends on what definition of well-being one adopts. Popular definitions include that well-being is (1) positive mental states like happiness⁴², (2) desire-satisfaction⁴³, or (3) some objective list of good things like loving relationships, aesthetic appreciation, and knowledge.⁴⁴ If we adopt the positive mental state definition, we might look for improvements in mental health or happiness, as well as decreases in stress. Increased consumption or the ability to meet one's goals would support desire-satisfaction theory. The type of evidence that would support objective list theory is dependent on what sort of things one considers objective goods, but improvements in relationships or education would likely suffice.

2. Poverty Alleviation

Many moral theories embrace a special concern for the least well-off members of society. For example, Rawlsians believe that the state ought to maximize the primary goods available to those at the bottom of the resource distribution.⁴⁵ Even those who do not believe in state-sponsored beneficence—like some libertarians—may believe people living in particularly destitute conditions create negative externalities (harms experienced by people not in poverty) like crime and aesthetic displeasure, which justify government intervention.⁴⁶

Such views tend to support raising everybody's income above a certain threshold. The federal poverty line is an obvious candidate for such a threshold, given that it is, in theory, a measurement of the financial resources necessary for a family to meet its basic needs.⁴⁷

Poverty alleviation is among the easiest rationales to evaluate empirically. The degree to which a UCT reduces poverty is a function of (1) how large the UCT is, (2) how family size changes due to the UCT (given the poverty line is higher for larger families), and (3) how non-UCT earnings change due to a UCT.

⁴¹ Such a statement is usually impossible within an economic efficiency analysis, given such analyses tend to look only at economic value, not well-being. Ethicists tend to be far more comfortable making interpersonal comparisons of well-being than economists. Compare Kagan, *supra* note 37, at 44–45 with LIONEL ROBBINS, AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE 124 (1932).

⁴² Kagan, *supra* note 37, at 30–31.

⁴³ R.Y. Chappell & D. Meissner, *Theories of Well-Being*, UTILITARIANISM.NET (2023), <https://utilitarianism.net/theories-of-well-being/> [<https://perma.cc/QG67-BFKF>].

⁴⁴ *Id.*

⁴⁵ See Leif Wenar, *John Rawls*, STANFORD ENCYCLOPEDIA PHIL. (2021), <https://plato.stanford.edu/archives/sum2021/entries/rawls/> [<https://perma.cc/LE8B-WKQU>].

⁴⁶ Fleischer & Hemel, *supra* note 3, at 1224–25.

⁴⁷ Joseph Dalaker, CONG. RSCH. SERV., R44780, AN INTRODUCTION TO POVERTY MEASUREMENT (2024).

3. Egalitarianism

If a person values equality, what exactly is it they want to be equal? Some ethicists might say “well-being.”⁴⁸ Others might say “resources”⁴⁹ or even “luck,”⁵⁰ given that equalizing well-being might seem wrong under certain conditions (e.g., should a person who has expensive tastes or who has squandered their resources receive additional resources?).⁵¹ But we cannot redistribute well-being or luck directly.⁵² So, redistributing resources in an effort to effectuate a more equal distribution of luck or well-being is likely what the egalitarian is stuck with.⁵³

Evaluating a UCT’s effect on the distribution of resources is similar to evaluating its effect on poverty. If a UCT causes recipients’ incomes to go up—for example, because recipients do not reduce their earnings enough to cancel out the UCT—then we can likely implement the UCT in a way that reduces inequality.

II. Overview of Existing Research

The recent uptick in empirical work on unconditional cash involved randomized controlled trials (RCTs). RCTs are the “gold standard” of policy research because they allow researchers to test whether a policy *causes* outcomes of interest—as opposed to merely being *correlated with* such outcomes—more reliably than any other method.⁵⁴

I supplement the RCT findings with findings from quasi-experimental research to compensate for the RCTs’ limitations. For example, the RCTs were conducted too recently to provide data on long-term effects. Additionally, RCTs cannot—both for practical and research design reasons—test the effects of

⁴⁸ Kagan, *supra* note 37, at 48–50.

⁴⁹ See generally Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981).

⁵⁰ See generally Kasper Lippert-Rasmussen, *Justice and Bad Luck*, STANFORD ENCYCLOPEDIA PHIL. (2023), <https://plato.stanford.edu/archives/spr2023/entries/justice-bad-luck/> [https://perma.cc/6C79-EX6R].

⁵¹ See Ronald Dworkin, *What Is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185, 189 (1981).

⁵² Kagan, *supra* note 37, at 50.

⁵³ The tax policy literature distinguishes vertical and horizontal equity. See, e.g., Paul R. McDaniel & James R. Repetti, *Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange Commentary*, 1 FLA. TAX REV. 607 (1992). Vertical equity roughly maps onto the resource distributional concerns described in the above paragraph. Compare *id.* with Kagan, *supra* note 37. Horizontal equity refers to equal treatment of similarly situated individuals. McDaniel & Repetti, *supra*, at 607. This essay does not address horizontal equity because it depends in large part on how a UCT would be implemented (for example, whether it would be given only to parents of young kids), which is largely beyond the scope of this essay. An argument may also exist that UCTs could be a horizontally equitable replacement for the current social safety net because they would equally benefit people who, e.g., need healthcare versus do not need healthcare. The evidence supporting that argument will resemble the evidence supporting the argument that UCTs are a pareto improvement over in-kind benefits. See Part I(A)(1).

⁵⁴ Sophie Webber & Carolyn Prouse, *The New Gold Standard: The Rise of Randomized Control Trials and Experimental Development*, 94 ECON. GEOGRAPHY 166, 166–68 (2018).

universality for any policy, which makes their findings less indicative of the effects of a UBI.⁵⁵

A. Randomized Controlled Trials

In an RCT, a researcher randomly separates a group of people into a control group and a treatment group.⁵⁶ The researcher then exposes the treatment group to the policy being tested⁵⁷ (for our purposes, the treatment group members get the UCT). The random selection process allows the researcher to assume that any differences between the two groups are due to the policy tested on the treatment group.⁵⁸

Table 1 provides basic information on each RCT I cite throughout the remainder of the essay. All RCTs in Table 1 took place in the United States, except for the Finnish experiment.⁵⁹

The remainder of the essay will treat the results of these RCTs as generalizable to unconditional cash given out for longer periods of time and to greater numbers of people. But there are multiple reasons to remain cautious about such a generalization. One is that most of these studies coincided with the COVID-19 pandemic. During this time, the U.S. government disbursed multiple thousands of dollars to most U.S. households.⁶⁰ If we believe in the declining marginal utility of income, then we should believe that the cash given out by the RCTs during this time was worth less to its recipients than it would have otherwise been.

Another complication with generalization is that UCT recipients may behave differently in different contexts, like when there are greater versus fewer opportunities for investment. For example, a person might invest more in their education when jobs requiring education are plentiful than when they are not.⁶¹

⁵⁵ Hoynes & Rothstein, *supra* note 6, at 954.

⁵⁶ RICHARD J. MURNANE & JOHN B. WILLETT, *METHODS MATTER: IMPROVING CAUSAL INFERENCE IN EDUCATIONAL AND SOCIAL SCIENCE RESEARCH* 43 (1st ed. 2010).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *See infra*, note 62 (all RCTs cited).

⁶⁰ *E.g.*, 26 U.S.C. § 6428(a) (providing \$1,200 per individual plus \$500 per child); American Rescue Plan Act of 2021, Pub. L. No. 117–2, § 9611, 135 Stat. 4, 144–45 (2021) (providing \$3,000 or more per child).

⁶¹ *Cf.* ABHIJIT V. BANERJEE & ESTHER DUFLO, *POOR ECONOMICS: A RADICAL RETHINKING OF THE WAY TO FIGHT GLOBAL POVERTY* 35–38, 76–78 (2012) (describing how the global poor may prioritize buying entertainment over nutrition in small villages with few entertainment options, and may not invest in education when the returns are not perceived as high enough).

Table 1. Randomized controlled trials of unconditional cash transfers in high-income countries⁶²

<i>Study</i> Years conducted	Yearly amount disbursed	Disbursal schedule	Length of disbursal schedule	Number of participants	Participant characteristics
<i>ORUS</i> ¹ 2020–23	\$12,000	Monthly	3 years	3,000	Ages 21–40 HH income ⁸ < 300% FPL ⁹
<i>BFY</i> ² 2018–25	\$4,000	Monthly	4 years ¹⁰	1,000	Mothers of newborn babies HH income ⁸ < FPL ⁹
<i>SEED</i> ³ 2019–21	\$6,000	Monthly	2 years	331	Residents of census tracts with average income below \$46,033
<i>Finnish Experiment</i> 2017–18	€560 ⁴	Monthly	2 years	175,000 ⁷	Ages 25–58 Unemployment benefits recipients
<i>Chelsea Eats</i> 2020–21	\$200–\$400 ⁵	Monthly	8 months	2,880	HH income ⁸ < 30% area median income
<i>COVID-19 Study</i> 2020–21	\$500–\$2000 ⁶	One time	–	5,244	Applicants for COVID-19 relief funds
<i>GiveDirectly Study</i> 2020	\$1,000	One time	–	14,000	SNAP recipients

¹ Open Research Unconditional Income Study.

² Baby's First Years.

³ Stockton Economic Empowerment Demonstration.

⁴ About \$600 in 2017 dollars.

⁵ Households of one, two, or three or more people received \$200, \$300, or \$400, respectively.

⁶ This study involved two treatment groups; the larger (1,375) received \$500 and the smaller (699) received \$2,000.

⁷ The control group contained 2,000 participants.

⁸ Household income.

⁹ Federal Poverty Line.

¹⁰ BFY is now disbursing cash for its sixth year, but only four years of data are currently available.

⁶² The information in this table came from the following sources: For ORUS, Eva Vivalt, Elizabeth Rhodes, Alexander W. Bartik, David E. Broockman, Patrick Krause & Sarah Miller, *The Employment Effects of a Guaranteed Income: Experimental Evidence from Two U.S. States* 1, 2, 7, 10–11 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32719, 2024); for BFY, Kimberly G. Noble, Katherine Magnuson, Lisa A. Gennetian, Greg J. Duncan, Hirokazu Yoshikawa, Nathan A. Fox & Sarah Halpern-Meekin, *Baby's First Years: Design of a Randomized Controlled Trial of Poverty Reduction in the United States*, 148 PEDIATRICS, 2021, at 1–6; for SEED, Stacia West & Amy Castro, *Impact of Guaranteed Income on Health, Finances, and Agency: Findings from the Stockton Randomized Controlled Trial*, 100 J. URB. HEALTH 227, 227–28 (2023); for the Finnish Experiment, OLLI KANGAS, SIGNE JAUHAINEN, MISHKA SIMANAINEN & MINNA YLIKÄNNÖ, THE

B. Quasi-Experimental Research

Quasi-experimental research looks at the effects of existing policies rather than those tested in an experiment.⁶³ This sort of research is much less reliable than RCTs, because policies implemented outside of experiments involve confounding variables. For example, imagine a study comparing the health of people who live in a city that gives out a UCT to the health of people who live in a city that does not. Any health differences between the cities might have been caused by other differences between the cities—such as demographics or culture—rather than the UCT. Quasi-experimental researchers use various statistical methods to attempt to avoid these issues. For example, they might look at the effect of random policy changes that are plausibly unrelated to confounding variables.⁶⁴ Such methods allow the researchers to argue that they are measuring the effect of an “exogenous” shock that was related *only* to the policy of interest, which is why this body of research is referred to as *quasi*-experimental.⁶⁵

This essay draws on quasi-experimental research on three cash transfers: the Alaska Permanent Fund Dividend (PFD), the casino payments to members of the Eastern Cherokee Tribe in Western North Carolina, and the Earned Income Tax Credit (EITC). The Alaska PFD has disbursed \$300 to \$2,100 to Alaska residents on a yearly basis since 1982.⁶⁶ The Eastern Cherokee payments come from casino profits and average around \$3,500; they have been disbursed every six months since 1996.⁶⁷ The EITC involves yearly payments ranging from \$2 to nearly \$8,000, depending on the taxpayer’s number of children.⁶⁸ While the EITC is conditional on the recipient working, the quasi-experimental literature generally measures the effects of EITC increases unrelated to work—for example, those that come from

BASIC INCOME EXPERIMENT 2017–2018 IN FINLAND: PRELIMINARY RESULTS 8–9 (2019); for Chelsea Eats, Sumit D. Agarwal, Benjamin Lê Cook & Jeffrey B. Liebman, *Effect of Cash Benefits on Health Care Utilization and Health: A Randomized Study*, 332 JAMA 1455, 1456 (2024); for the COVID-19 study, Jaroszewicz et al., *supra* note 10, at 7–8; for the GiveDirectly Study, Brian Jacob, Natasha Pilkauskas, Elizabeth Rhodes, Katherine Richard & H. Luke Shaefer, *The COVID-19 Cash Transfer Study II: The Hardship and Mental Health Impacts of an Unconditional Cash Transfer to Low-Income Individuals*, 75 NAT’L TAX J. 597, 600–01 (2022). Euros to dollars conversion information came from: *CPI Inflation Calculator*, BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm [<https://perma.cc/LSN3-ELZY>]; *1 EUR to USD - Euros to US Dollars Exchange Rate*, XE.COM, <https://www.xe.com/currencyconverter/convert/?Amount=1&From=EUR&To=USD> [<https://perma.cc/MYD9-GJXN>].

⁶³ Murnane & Willett, *supra* note 56, at 135–37.

⁶⁴ *See id.*

⁶⁵ *Id.* at 29–36.

⁶⁶ Mouhcine Guettabi, *What Do We Know about the Effects of the Alaska Permanent Fund Dividend?*, INST. SOC. ECON. RSCH., UNIV. ALASKA, ANCHORAGE, May 20, 2019, at 1, 5.

⁶⁷ Randall Akee, William Copeland, E. Jane Costello & Emilia Simeonova, *How Does Household Income Affect Child Personality Traits and Behaviors?*, 108 AM. ECON. REV. 775, 781–82, 814 (2018).

⁶⁸ *EITC fast facts*, IRS (2025), <https://www.eitc.irs.gov/partner-toolkit/basic-marketing-communication-materials/eitc-fast-facts/eitc-fast-facts> [<https://perma.cc/9R6R-U9SW>].

variation in state EITCs.⁶⁹ For this reason, it is plausible that these effects are similar to those we would see from unconditional cash.

III. Findings from Existing Research

Below, I synthesize findings from the research described above to predict the effect of UCTs on productivity and human capital development, physical health, household finances and consumption, mental health and subjective well-being, and harmful behaviors. All effects discussed below are statistically significant—that is, if there were actually no effect, the probability of the given finding would be at most 10%, and usually much less. Additionally, all effects described below are the average effect experienced by cash recipients; they do not represent the exact effect experienced by any one individual.

A. Productivity & Human Capital Development

This Subpart divides UCTs' effects on productivity into two categories: labor supply (i.e., whether people decide to work less because they received a UCT) and labor demand (i.e., whether UCTs increase consumption and thereby induce greater productivity). It concludes that large cash transfers probably result in small productivity losses, while small to moderate cash transfers probably have little effect. UCTs may still boost productivity via their long-term effect on the human capital of recipients' children, but this effect is probably too small to outweigh any negative short-term effects. A UCT's labor demand effect could also boost productivity overall, but the research on this point remains thin.

1. Effects on Labor Supply

The randomized controlled trials suggest that large UCTs mildly decrease productivity, while small UCTs have no effect. Cash recipients in ORUS—the randomized controlled trial that disbursed the largest UCTs—had individual earnings about \$2,000 lower than those in the control group, and household earnings roughly \$3,000 lower.⁷⁰ Similarly, the ORUS recipients worked about 1.3 fewer hours per week, while their households worked about 2.3 fewer hours per week.⁷¹ Surveys of the cash recipients showed they had greater interest in entrepreneurial ideas and willingness to take risks, but this did not translate into more concrete entrepreneurial activity.⁷² BFY, Finland, and Chelsea Eats—all of which disbursed less cash than ORUS—found no effect on earnings or employment.⁷³

⁶⁹ See, e.g., Breno Braga, Fredric Blavin & Anuj Gangopadhyaya, *The Long-Term Effects of Childhood Exposure to the Earned Income Tax Credit on Health Outcomes*, 190 J. PUB. ECON. 1, 1 (2020).

⁷⁰ See Vivalt et al., *supra* note 62, at 19.

⁷¹ *Id.* at 46.

⁷² *Id.* at 26.

⁷³ Maria Sauval, Greg J. Duncan, Lisa A. Gennetian, Katherine A. Magnuson, Nathan A. Fox, Kimberly G. Noble & Hirokazu Yoshikawa, *Unconditional Cash Transfers and Maternal Employment: Evidence from the Baby's First Years Study*, 236 J. PUB. ECON. 1, 8 (2024); Kangas et al., *supra* note 62, at 11–14; Jeffrey Liebman, Kathryn Carlson, Eliza Novick & Pamela Portocarrero, *The Chelsea Eats Program: Experimental Impacts* 52 (Rappaport Inst. for Greater Boston Working Paper, 2022).

Do UCT recipients invest in their human capital, such that their long-term productivity might increase? Probably not. For example, ORUS found no significant effect on cash recipients' educational achievement.⁷⁴

But UCT recipients may invest more in the human capital of their children. BFY cash recipients spent an average of 11 more minutes per week with their kids doing things like playing or reading to them.⁷⁵ These children showed signs of neural activity associated with greater educational achievement later in life.⁷⁶ ORUS found that cash recipients' child-related spending (on books, toys, childcare, etc.) increased by \$22 per month, a disproportionately large amount compared to other spending categories.⁷⁷ BFY found an even larger increase⁷⁸ in child-related spending, at an additional \$67 per month.⁷⁹

Still, BFY failed to find any effect on children's language development, socioemotional skills, or probability of facing developmental issues.⁸⁰ Children of

⁷⁴ Vivalt et al., *supra* note 62, at 42.

⁷⁵ Lisa A. Gennetian, Greg J. Duncan, Nathan A. Fox, Sarah Halpern-Meekin, Katherine Magnuson, Kimberly G. Noble & Hirokazu Yoshikawa, *Effects of a Monthly Unconditional Cash Transfer Starting at Birth on Family Investments among US Families with Low Income*, 8 NATURE HUM. BEHAV. 1514, 1517, 1519 (2024).

⁷⁶ Sonya V. Troller-Renfree, Molly A. Costanzo, Greg J. Duncan, Katherine Magnuson, Lisa A. Gennetian, Hirokazu Yoshikawa, Sarah R. Black, Debra S. Karhson, Michael K. Georgieff, Jennifer Mize Nelson, Timothy D. Nelson, Nathan A. Fox & Kimberly G. Noble, *The Impact of a Monthly Unconditional Cash Transfer on Child Brain Activity: A 4-Year Follow-Up*, PSYARXIV (2024), https://osf.io/dw2em_v1 [<https://perma.cc/6J55-JF5Z>]; Sonya V. Troller-Renfree, Molly A. Costanzo, Greg J. Duncan, Katherine Magnuson, Lisa A. Gennetian, Hirokazu Yoshikawa, Sarah Halpern-Meekin, Nathan A. Fox & Kimberly Noble, *The Impact of a Poverty Reduction Intervention on Infant Brain Activity*, 119 PROC. NAT'L ACAD. SCI. 1, 1 (2022).

⁷⁷ Alexander W. Bartik, Elizabeth Rhodes, David E. Brookman, Patrick K. Krause, Sarah Miller & Eva Vivalt, *The Impact of Unconditional Cash Transfers on Consumption and Household Balance Sheets: Experimental Evidence from Two US States* 51 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32784, 2024).

⁷⁸ BFY's larger increase in child-related spending than ORUS despite its smaller UCT, was likely due to two differences in study design. First, all BFY participants were mothers of newborns, *supra*, Part II(A)(2), whereas ORUS participants included both parents and nonparents, *supra*, Part II(A)(1). Second, BFY used behavioral cues to indicate that its UCT was related to the child. For example, BFY labeled the debit card on which mothers received their UCT "4 My Baby." Lisa A. Gennetian, Sarah Halpern-Meekin, Lauren Meyer, Nathan Fox, Katherine Magnuson, Kimberly G. Noble & Hirokazu Yoshikawa, *Implementing Cash Transfers to U.S. Families: Insights from the Baby's First Years Study* 28 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30379, 2022).

⁷⁹ Gennetian et al., *supra* note 75, at 1517, 1519.

⁸⁰ Emma R. Hart, Lisa A. Gennetian, Jessica F. Sperber, Renata Penalva, Katherine Magnuson, Greg J. Duncan, Sarah Halpern-Meekin, Hirokazu Yoshikawa, Nathan A. Fox & Kimberly G. Noble, *The Effect of Unconditional Cash Transfers on Maternal Assessments of Children's Early Language and Socioemotional Development: Experimental Evidence from U.S. Families Residing in Poverty*, 60 DEV. PSYCH. 2290, 2300–03 (2024); Kimberly Noble, Katherine Magnuson, Greg Duncan, Lisa A. Gennetian, Hirokazu Yoshikawa, Nathan A. Fox, Sarah Halpern-Meekin, Sonya Troller-Renfree, Sangdo Han, Shannon Egan-Dailey, Timothy D. Nelson, Jennifer Mize Nelson, Sarah Black, Michael Georgieff & Debra Karhson, *The Effect of a Monthly Unconditional Cash Transfer on Children's Development at Four Years of Age: A Randomized Controlled Trial in the U.S.* 41–42, 46 (Nat'l Bureau of Econ. Rsch., Working Paper No. 33844, 2024).

UCT recipients in the Chelsea Eats experiment were no more likely to attend school.⁸¹

Could the subtle forms of parental investment suggested by BFY and ORUS generate long-term productivity gains? The quasi-experimental literature suggests so. Eastern Cherokee children whose parents received casino payments averaged an additional year of education by age 21.⁸² A parent's EITC receipt when their child is an infant may lead that child to earn between \$300 and \$500 more in their twenties (a roughly 1.5% earnings increase).⁸³ Similarly, a parent's EITC receipt when their child is a teen could lead to a 1% increase in the probability of that child being employed in their twenties and a \$560 (or 2.2%) increase in that child's yearly earnings as an adult.⁸⁴

Hopefully, the quasi-experimental results will replicate when the children of RCT cash recipients become older. But even if they do, they may remain insufficient to give UCTs a net positive effect on productivity. Imagine a household that decreases its yearly productivity by \$3,000 after receiving a cash transfer, as found by ORUS.⁸⁵ If this household has two children, the quasi-experimental research says they may both grow up to make an additional \$500 per year as a result of the UCT. But this adds up to only an additional \$1,000 per year—not enough to offset the earlier \$3,000 yearly loss.⁸⁶

2. Effects on Labor Demand

The RCTs clearly demonstrate that cash recipients consume more,⁸⁷ which could lead to higher demand for labor, raising wages and incentivizing people to work more. Evidence for this comes from research on the Alaska Permanent Dividend Fund, which appears to have increased employment overall, an effect the authors attribute to an increase in labor demand.⁸⁸ But this result should be interpreted with caution. It is the only study I found that contains such an effect. And unfortunately, RCTs are ill-equipped to study cash transfers' effect on labor demand. Even if an RCT could disburse cash to enough people to affect labor demand, the control group would experience this effect as well.

B. Physical Health

The randomized controlled trials—including ORUS, BFY, SEED, and Chelsea Eats—consistently found that UCTs have no short-term effect on the

⁸¹ Liebman et al., *supra* note 73, at 46.

⁸² This effect seems driven by mothers who received payments, not fathers, perhaps due to greater mother investment in children. Randall K. Q. Akee, William E. Copeland, Gordon Keeler, Adrian Angold & E. Jane Costello, *Parents' Incomes and Children's Outcomes: A Quasi-Experiment Using Transfer Payments from Casino Profits*, 2 AM. ECON. J.: APPLIED ECON. 86, 103–05 (2010).

⁸³ Barr, Eggleston, and Smith, *supra* note 36, at 18.

⁸⁴ Jacob Bastian & Katherine Micheltore, *The Long-Term Impact of the Earned Income Tax Credit on Children's Education and Employment Outcomes*, 36 J. LAB. ECON. 1127, 1158 (2018).

⁸⁵ See Vivalt et al., *supra* note 62, at 17, 19.

⁸⁶ This example ignores the time value of money and the possibility of the children receiving the UCT as adults, both of which would make the productivity loss even more difficult to offset.

⁸⁷ See *infra* Part III(D).

⁸⁸ Damon Jones & Ioana Marinescu, *The Labor Market Impacts of Universal and Permanent Cash Transfers: Evidence from the Alaska Permanent Fund*, 14 AM. ECON. J.: ECON. POL'Y 315, 315 (2022).

physical health of recipients.⁸⁹ However, long-term effects remain possible. ORUS found that UCT recipients consumed more healthcare, including more visits to a primary care doctor (by 8%), dentist (by 10%), ER (by 19%), and hospital (by 23%);⁹⁰ Chelsea Eats also found a consumption increase, though only for specialist care (by 25%).⁹¹ ORUS found a very slight increase in healthy eating (1%),⁹² Chelsea Eats found an increase in consumption of vegetables,⁹³ and BFY found an increase in consumption of fruit.⁹⁴ That being said, ORUS also found a decrease in sleep, averaging 5 minutes per week, and a slight decrease in physical activity.⁹⁵

Could the increase in healthcare consumption (and possible increase in healthy eating) lead to long-term health benefits? The quasi-experimental literature suggests it is possible, but the evidence is mixed. Analysis of the EITC suggests that children whose parents receive an extra \$100 annually are 2.6% more likely to report excellent or very good health in their twenties.⁹⁶ Additionally, both the research on the Alaska PFD and the EITC suggest that cash can lead to a roughly 4% drop in obesity.⁹⁷ However, the Alaska PFD research finds that this effect was largely driven by middle-income households.⁹⁸ And that result is corroborated by research on obesity in Eastern Cherokee UCT recipients, where cash *increased* obesity, especially for households with the lowest incomes.⁹⁹

⁸⁹ Sarah Miller, Elizabeth Rhodes, Alexander W. Bartik, David E. Broockman, Patrick K. Krause & Eva Vivalt, *Does Income Affect Health? Evidence from a Randomized Controlled Trial of a Guaranteed Income* 26–27 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32711, 2024); Jessica F. Sperber, Lisa A. Gennetian, Emma R. Hart, Alicia Kunin-Batson, Katherine Magnuson, Greg J. Duncan, Hirokazu Yoshikawa, Nathan A. Fox, Sarah Halpern-Meekin & Kimberly G. Noble, *Unconditional Cash Transfers and Maternal Assessments of Children's Health, Nutrition, and Sleep: A Randomized Clinical Trial*, 6 JAMA NETWORK OPEN 1, 6 (2023); West & Castro, *supra* note 62, at 233; Agarwal et al., *supra* note 62, at 1455.

⁹⁰ Miller et al., *supra* note 89, at 28, 45.

⁹¹ Agarwal et al., *supra* note 62, at 1459

⁹² Miller et al., *supra* note 89, at 29, 47.

⁹³ Liebman et al., *supra* note 73, at 48.

⁹⁴ Sperber et al., *supra* note 89, at 7.

⁹⁵ Miller et al., *supra* note 89, at 29–30, 48.

⁹⁶ Braga et al., *supra* note 69, at 1.

⁹⁷ Brett Watson, Mouhcine Guettabi & Matthew Reimer, *Universal Cash Transfers Reduce Childhood Obesity Rates*, SSRN (2019), <https://papers.ssrn.com/abstract=3380033> [<https://perma.cc/MR5Z-YWN8>]; Braga et al., *supra* note 69, at 1.

⁹⁸ Watson et al., *supra* note 97, at 8–9.

⁹⁹ Randall Akee, Emilia Simeonova, William Copeland, Adrian Angold & E. Jane Costello, *Young Adult Obesity and Household Income: Effects of Unconditional Cash Transfers*, 5 AM. ECON. J.: APPLIED ECON. 1, 2 (2013).

C. Household Finances and Consumption

This Subpart finds that UCTs have a positive effect on household income and consumption, but no effect on savings and investments.

1. Effect on Income and Financial Security

Given that UCTs did not cause recipients to reduce work by much, they consistently increased recipients' total household income.¹⁰⁰ As a result, BFY found that recipients' probability of living above the poverty line rose.¹⁰¹ Chelsea Eats saw food insecurity levels fall.¹⁰²

2. Effect on Savings and Investments

UCTs in the range studied do not appear to have large effects on financial savings and investments. ORUS did find that UCT recipients saved more, but only slightly.¹⁰³ ORUS's UCT had no effect on homeownership or financial anxiety,¹⁰⁴ and it caused a slight increase in debt related to car ownership.¹⁰⁵

3. Effect on Consumption

That UCTs cause recipients to consume more is among the clearest findings in the recent literature. As previously described, UCTs increase health-related consumption and, disproportionately, child-related consumption.¹⁰⁶ ORUS additionally found that UCT recipients spend more across the board, including on food (7% increase), rent (9%), cars (8%), and—disproportionately—gifts or loans to family members or charities (26%).¹⁰⁷ BFY, with its lesser cash disbursement, found no increase in food consumption, though it did find a 10% increase in food purchased at restaurants.¹⁰⁸ Chelsea Eats found a 13% increase in food consumption.¹⁰⁹

¹⁰⁰ Vivalt et al., *supra* note 62, at 17–20; Gennetian et al., *supra* note 75, at 1518; Katherine A. Magnuson, Greg J. Duncan, Hirokazu Yoshikawa, Paul Y. Yoo, Sangdo Han, Lisa A. Gennetian, Sarah Halpern-Meekin, Nathan A. Fox & Kimberly G. Noble, *Can Cash Transfers Improve Maternal Well-Being and Family Processes among Families with Young Children? An Experimental Analysis*, SSRN (2024), <https://papers.ssrn.com/abstract=4955765> [<https://perma.cc/URG2-N2Q9>].

¹⁰¹ Magnuson et al., *supra* note 100, at 13; Gennetian et al., *supra* note 75, at 1517.

¹⁰² Liebman et al., *supra* note 73, at 49.

¹⁰³ Bartik et al., *supra* note 77, at 25.

¹⁰⁴ *Id.* at 25, 56.

¹⁰⁵ *Id.* at 58.

¹⁰⁶ *Supra* Part III(A)(1), (B).

¹⁰⁷ Bartik et al., *supra* note 77, at 22, 51.

¹⁰⁸ Lisa A. Gennetian, Matthew Maury, Laura Stilwell, Hemah Shah, Katherine A. Magnuson, Kimberly G. Noble, Greg J. Duncan, Nathan A. Fox, Sarah Halpern-Meekin & Hirokazu Yoshikawa, *The Impact of Monthly Unconditional Cash on Food Security, Spending, and Consumption: Three Year Follow-Up Findings from the Baby's First Years Study*, SSRN (2024), <https://papers.ssrn.com/abstract=4781670> [<https://perma.cc/YEF5-YFKS>].

¹⁰⁹ Liebman et al., *supra* note 73, at 48. The larger effect on food consumption found by Chelsea Eats than BFY—despite Chelsea Eats smaller UCT amount—may be related to the fact that Chelsea Eats's name suggested its UCT was intended to combat food insecurity. This would align with BFY's finding that its framing of its UCT as intended to help children appeared to affect how the cash was spent, *see* note 78.

D. Mental Health & Subjective Well-being

ORUS,¹¹⁰ BFY,¹¹¹ and the GiveDirectly study¹¹² all found that their UCTs had no significant effect on general mental health, feelings of distress, depression, anxiety, cortisol level (a stress hormone), or mental bandwidth (ability to handle complex psychological tasks due to lack of stress). Similarly, BFY found no difference in parents' perception of their relationship quality with co-parents or their child.¹¹³ The COVID-19 study—which involved a one-time cash transfer—found a slight decrease in mental health, which the authors suggested might have resulted from the UCT prompting the recipient to think more about their financial situation without doing much to help it.¹¹⁴ But given that no other study found a decrease in mental health—including the GiveDirectly study, which involved a similar disbursement amount and schedule to the COVID-19 study, and a larger sample size—this result appears unlikely to represent most cash transfers.

The null results are not the end of the story. Cash transfers had positive effects on mental health and life satisfaction in at least three RCTs. Chelsea Eats found a decrease in mental health-related hospitalizations.¹¹⁵ SEED found a small improvement in mental health, a 6% decrease in bodily pain, an increase in energy levels, and an increase in emotional well-being.¹¹⁶ The Finnish experiment found elevated levels of subjective well-being, including an increase in self-reported satisfaction with life by 0.5 on a 10-point scale, and an increased sense of financial confidence and confidence in the future.¹¹⁷

It is unclear why these results differ from those of the other RCTs. They are unrelated to larger cash transfers or longer disbursement schedules.¹¹⁸ However, their measurements of well-being did differ from the others: SEED was the only RCT to use Kessler 10 scores¹¹⁹ (a measure of psychological distress), and the Finnish Experiment was the only RCT to use the 1–10 subjective well-being scale.¹²⁰ The measurements used by the other RCTs may simply not have captured the same things.

Finally, although the evidence is tentative, UCTs may aid recipients in feeling able to meet their goals or make life changes. BFY found that mothers

¹¹⁰ Miller et al., *supra* note 89, at 40.

¹¹¹ Shannon Egan-Dailey, Lisa A. Gennetian, Greg Duncan, Nathan A. Fox, Katherine Magnuson, Kimberly G. Noble & Hirokazu Yoshikawa, *Effects on Maternal Bandwidth of Monthly Unconditional Cash Starting at Birth Among U.S. Families with Low Income*, SSRN (2024), <https://papers.ssrn.com/abstract=4940902> [<https://perma.cc/V5H3-8MYH>]; Magnuson et al., *supra* note 100, at 16, 30.

¹¹² Jacob et al., *supra* note 62, at 608–09.

¹¹³ Magnuson et al., *supra* note 100, at 31.

¹¹⁴ Jaroszewicz et al., *supra* note 10, at 24.

¹¹⁵ Agarwal et al., *supra* note 62, at 1457–58.

¹¹⁶ West & Castro, *supra* note 62, at 232.

¹¹⁷ Kangas et al., *supra* note 62, at 18, 20.

¹¹⁸ *Supra* Table 1.

¹¹⁹ West & Castro, *supra* note 62, at 232.

¹²⁰ Kangas et al., *supra* note 62, at 18.

receiving a UCT were more likely to meet their breastfeeding goals.¹²¹ The UCT recipients in Chelsea Eats were more likely to be pregnant.¹²² ORUS found that UCT recipients were more likely to have moved to a new location.¹²³

E. Harmful Behaviors

One of the most common worries about UCTs is that they will allow recipients to indulge in self-destructive or antisocial habits.¹²⁴ The RCTs do not bear that conclusion out. Chelsea Eats found a decrease in hospitalizations related to substance use.¹²⁵ BFY found no increase in the use of alcohol, opioids, or cigarettes.¹²⁶ While ORUS did find an increase in spending on alcohol, drugs, and gambling, that increase was proportionate to spending increases in all other consumption categories.¹²⁷ ORUS also found that the degree to which drinking caused problems—such as interference with relationships or work—decreased.¹²⁸ Finally, ORUS's UCT recipients were less likely to use unprescribed painkillers than members of the control group.¹²⁹

The quasi-experimental research also suggests that UCTs reduce antisocial behavior. The number of arrests an Eastern Cherokee child faced by age 16 or 17 decreased by 22 percentage points as a result of their parent's UCT receipt.¹³⁰

IV. Which Rationales Does the Research Support?

This Part considers whether the evidence on the effects of UCTs described by Part III supports the policy rationales described by Part I. It concludes that the recent evidence should reduce our confidence in efficiency-based arguments for UCTs, but not by enough to rule out the possibility of an efficient UCT. On the other hand, the evidence tends to affirmatively support morality-based arguments for UCTs, though not always as strongly as advocates previously hoped it would. This Part's conclusions are limited to UCTs in the range tested—that is, somewhere

¹²¹ Laura Stilwell, Maritza Morales-Gracia, Katherine Magnuson, Lisa A. Gennetian, Maria Sauval, Nathan A. Fox, Sarah Halpern-Meekin, Hirokazu Yoshikawa & Kimberly G. Noble, *Unconditional Cash and Breastfeeding, Child Care, and Maternal Employment Among Families with Young Children Residing in Poverty*, 98 SOC. SERV. REV. 260, 279 (2024).

¹²² Liebman et al., *supra* note 73, at 53. *But see* Molly A. Costanzo, Katherine A. Magnuson, Lisa A. Gennetian, Sarah Halpern-Meekin, Kimberly G. Noble & Hirokazu Yoshikawa, *Contraception Use and Satisfaction Among Mothers with Low Income: Evidence from the Baby's First Years Study*, 129 CONTRACEPTION 1, 3 (2024) (finding cash recipients were no more likely to be pregnant).

¹²³ Vivalt et al., *supra* note 62, at 30. *But see* Liebman et al., *supra* note 73, at 53 (fewer cash recipients moved than control group members).

¹²⁴ *Cf.* Zwolinski & Fleischer, *supra* note 4, at 162–66.

¹²⁵ Agarwal et al., *supra* note 62, at 1457–58.

¹²⁶ Paul Y. Yoo, Greg. J. Duncan, Katherine Magnuson, Nathan A. Fox, Hirokazu Yoshikawa, Sarah Halpern-Meekin & Kimberly G. Noble, *Unconditional Cash Transfers and Maternal Substance Use: Findings from a Randomized Control Trial of Low-Income Mothers with Infants in the U.S.*, 22 BMC PUB. HEALTH, 1, 8 (2022).

¹²⁷ Bartik et al., *supra* note 77, at 51.

¹²⁸ Miller et al., *supra* note 89, at 49.

¹²⁹ *Id.*

¹³⁰ Akee et al., *supra* note 82, at 107.

between a one-time disbursement of \$1,000 and an ongoing monthly disbursement of \$1,000 for several years.¹³¹

A. Efficiency-Based Rationales

The argument for UCTs from pareto efficiency, while not strongly supported by the recent research, emerges mostly unscathed. However, the arguments from Kaldor-Hicks efficiency and tax revenue generation now face greater headwinds, given evidence that UCTs may negatively affect labor supply and may not improve short-term health.¹³²

1. Pareto Efficiency

As discussed in Part I(A)(1), the argument for UCTs from pareto efficiency is that the beneficiaries of government programs would be better off if they received the funds allotted to these programs directly rather than in-kind. Unfortunately, the empirical evidence does not speak to this argument well. The RCTs tested the effect of cash given in addition to existing government benefits,¹³³ making it difficult to know what the effect of cash that replaced such benefits would be. It is possible that the positive effects found by the RCTs would not have appeared had the cash replaced existing government benefits.

Moreover, the positive effects of cash in the RCTs often differed from the goals of government benefits. For example, while the RCTs found that cash recipients consumed more healthcare, their health did not improve.¹³⁴ Thus, unconditional cash does not appear to satisfy the goals of a program like Medicaid, one of the largest in-kind benefits that the federal government provides.¹³⁵

But—as argued later in Part IV(B)(1)—UCT recipients’ general well-being does seem to have improved, particularly as measured by consumption. For example, the RCTs reliably found evidence of increased food consumption and reduced food insecurity,¹³⁶ and some weak evidence of mildly healthier food consumption.¹³⁷ This is consistent with the idea that UCTs could replace programs like SNAP with positive effects.

2. Kaldor-Hicks Efficiency

Would the net economic benefits of UCTs outweigh their economic costs? As described in Part I(A)(2), this could happen if UCTs improve productivity and health and decrease crime.

¹³¹ *Supra* Table 1.

¹³² It is possible for UCTs to be pareto improving but not Kaldor-Hicks improving here because the analyses use different baselines. *See* note 22 for further discussion.

¹³³ *E.g.*, Noble et al., *supra* note 62, at 3.

¹³⁴ *See supra* Part III(B).

¹³⁵ *Policy Basics: Where Do Our Federal Tax Dollars Go?*, CTR. ON BUDGET & POL’Y PRIORITIES (Jan. 28, 2025), <https://www.cbpp.org/research/federal-budget/where-do-our-federal-tax-dollars-go> [<https://perma.cc/S8LC-9SKU>].

¹³⁶ *Supra* Part III(C)(1),(3).

¹³⁷ *See supra* Part III(B).

Unfortunately, the recent round of RCTs provides evidence against such effects. The picture is the bleakest for productivity. Cash recipients did not work more—if anything, they worked less.¹³⁸ They did not invest in their own human capital to any degree that would suggest increased future earnings, and they invested only slightly more in their children's human capital.¹³⁹ Though future data might still reveal these investments to have positive effects, the quasi-experimental literature suggests such effects would be small—probably too small to outweigh the negative short-term productivity effects from larger UCTs.¹⁴⁰

Positive effects on health are similarly lacking. Though UCT recipients consumed more healthcare, their health outcomes did not improve.¹⁴¹ However, it is worth noting that long-term health effects for children are by far the largest economic benefit predicted by those who argue that UCTs can be Kaldor-Hicks improving.¹⁴² And unlike productivity, UCT recipients' health did not *decrease*.¹⁴³ Therefore, if future data reveals positive long-term health effects—particularly for cash recipients' children—UCTs could still generate net economic benefits.

The recent RCTs did not measure cash transfers' effects on crime,¹⁴⁴ but the quasi-experimental literature suggests a meaningful decrease.¹⁴⁵ Notably, crime reduction is the second largest economic benefit predicted by those who argue for Kaldor-Hicks improving UCTs.¹⁴⁶

In sum: The randomized control trials cast significant doubt on claims that UCTs will enhance productivity, moderate doubt on claims that UCTs will improve health, and no doubt (though no support either) on claims that UCTs will reduce crime. As a result, the ways a UCT could generate net economic benefits appear more limited than they did before the randomized controlled trials were conducted. Nevertheless, a Kaldor-Hicks improving UCT remains possible, especially given that the largest economic benefits from UCTs might come from long-term improvements to children's health and reductions in crime.

3. Tax Revenue Generation

Given ORUS found evidence that UCTs decrease productivity, the case for a tax revenue-generating UCT has become much more difficult to make. Policymakers hoping to see a productivity-enhancing UCT probably face limited options. They could consider providing less cash than the ORUS's yearly \$12,000; something like BFY's yearly \$4,000 should have fewer negative effects on labor

¹³⁸ *Supra* Part III(A)(1).

¹³⁹ *Supra* Part III(A)(1).

¹⁴⁰ *Supra* Part III(A)(1).

¹⁴¹ *Supra* Part III(B).

¹⁴² Garfinkel et al., *supra* note 22, at 352.

¹⁴³ Compare *supra* Part III(A)(1) with *supra* Part III(B).

¹⁴⁴ An analysis of the Finnish Experiment's effects on crime has been planned, but the results have not yet been released. Martti Kaila, *Basic Income and Crime*, OSF (Apr. 14, 2025), <https://osf.io/37ps6/> [<https://perma.cc/N8FX-AHJC>].

¹⁴⁵ See *supra* Part III(E).

¹⁴⁶ Garfinkel et al., *supra* note 22, at 352.

supply.¹⁴⁷ They might also favor means-tested¹⁴⁸ UCTs over universal ones. Under means-testing, if the children of UCT recipients become more productive, they also become less likely to receive the UCT and experience its work-disincentivizing effect.

It also remains possible that the positive labor demand effects of a UCT could outweigh any direct negative effects on productivity. As a point in favor of this argument, all of the RCTs found a substantial increase in consumption.¹⁴⁹ But the evidence that such an increase would be large enough to increase productivity overall comes from a single quasi-experimental study, which looked at a *universal* UCT.¹⁵⁰ UCTs that go to fewer people—such as stringently means-tested UCTs—may not be large enough to generate such an effect.¹⁵¹

B. Morality-Based Rationales

The empirical evidence supports all three morality-based rationales for UCTs. The evidence is strongest for poverty alleviation and egalitarianism, but evidence also exists for beneficent rationales.

1. Beneficence

Do UCTs increase recipients' well-being? Probably, but the strength of the RCT evidence depends on the definition of well-being one adopts.

If one defines well-being as positive mental states, the RCT evidence is mixed. Three of the RCTs found indicators of improved mental health or subjective well-being; the rest did not.¹⁵² But all of the RCTs found that the cash changed recipients' lives in ways that we might reasonably expect to generate positive feelings, even if such feelings were not transformative enough to show up on mental health assessments. For example, recipients spent more on food and housing,¹⁵³ they took more time away from work;¹⁵⁴ they provided more aid to family members

¹⁴⁷ See *supra* Part III(A)(1).

¹⁴⁸ Means-tested benefits are those only given to people below a certain income threshold. In practice, means-tested benefits are often “phased out” gradually to avoid “cliffs” that discourage a benefit recipient from increasing their income lest they lose the benefit. See generally THERESA ANDERSON, AMELIA COFFEY, HANNAH DALY, HEATHER HAHN, ELAINE MAAG & KEVIN WERNER, *BALANCING AT THE EDGE OF THE CLIFF: EXPERIENCES AND CALCULATIONS OF BENEFIT CLIFFS, PLATEAUS, AND TRADE-OFFS* (2022).

¹⁴⁹ *Supra* Part III(C)(3).

¹⁵⁰ *Supra* Part III(A)(2).

¹⁵¹ That being said, a modestly means-tested UCT might actually boost consumption more than a universal UCT if the means testing allows it to become more redistributionary (e.g., by allowing the UCT to disburse more money). This is because those are the lower end of the wealth distribution spend income more quickly than those at the higher end of the wealth distribution. Jonathan D. Fisher, David Johnson, Timothy Smeeding & Jeffrey P. Thomson, *Estimating the Marginal Propensity to Consume Using the Distributions of Income, Consumption, and Wealth*, 65 J. MACROECONOMICS 1, 1 (2020).

¹⁵² *Supra* Part III(D).

¹⁵³ *Supra* Part III(C)(3).

¹⁵⁴ *Supra* Part III(A)(1).

and charities;¹⁵⁵ mothers spent more time with their children,¹⁵⁶ and problematic behavior related to drug and alcohol use dropped.¹⁵⁷

If one instead defines well-being as desire-satisfaction, the evidence becomes stronger. The broad increase in consumption across all categories indicates that recipients were better able to satisfy desires, as do the increases the RCTs found in moving residences, buying vehicles, risk taking, entrepreneurial spirit, breastfeeding goals met, and pregnancies.¹⁵⁸

Objective list definitions of well-being are the least well-supported by the RCT evidence. Some positive indicators do exist, like reductions in drug and alcohol problems, increased time spent with children, and increased financial supports to family and charity.¹⁵⁹ But the RCTs found no direct evidence of improvements in relationships or education,¹⁶⁰ though the quasi-experimental literature suggests long-term data on recipients' children might eventually provide evidence of the latter.¹⁶¹

2. Poverty Alleviation

Of all the rationales for UCTs considered by this essay, poverty alleviation is most uncontroversially supported by the empirical evidence. No study found that UCT recipients reduced their non-UCT earnings by anywhere near enough to offset the UCT.¹⁶² While UCTs may increase pregnancy, this effect does not appear large enough to cancel out the UCT on average (and could be further accounted for by any policy that gave more money to people with more children).¹⁶³ It is therefore unsurprising that UCTs reduced the number of people living below the poverty line¹⁶⁴ and increased recipients' ability to meet basic needs.¹⁶⁵

3. Egalitarianism

The evidence that UCTs can increase income equality is the same evidence that supports UCTs' poverty reduction effects: UCT recipients' income went up.¹⁶⁶ However, for this effect to translate into a more equal distribution of income, the UCT must also be non-universal or supported by progressive taxation (i.e., higher tax rates on the wealthy than on the poor).

A point in favor of non-universality comes from the effect of UCTs on savings and investment. The randomized controlled trials studied low-income populations and found that UCTs had only a small positive effect, if any, on their savings.¹⁶⁷ Most UCT income was instead consumed.¹⁶⁸ But it is possible that middle to high-income individuals would invest their UCTs and grow their wealth,

¹⁵⁵ *Supra* Part III(A)(1), (C)(3).

¹⁵⁶ Gennetian et al., *supra* note 75, at 1517, 1519.

¹⁵⁷ *Supra* Part III(E).

¹⁵⁸ *Supra* Part III(A), (D).

¹⁵⁹ *Supra* Part III(A)(1), (C)(3), (E).

¹⁶⁰ *Supra* Part III(A)(1), (D).

¹⁶¹ *Supra* Part III(A)(1).

¹⁶² *See supra* Part III(A)(1).

¹⁶³ Liebman et al., *supra* note 73, at 53.

¹⁶⁴ Gennetian et al., *supra* note 75, at 1517.

¹⁶⁵ Magnuson et al., *supra* note 100, at 13, 26.

¹⁶⁶ *See supra* Part III(A)(1).

¹⁶⁷ *Supra* Part III(C)(2).

¹⁶⁸ *Supra* Part III(C)(3).

which could later be converted into a greater amount of income than the UCT originally provided.¹⁶⁹ And in fact, this is exactly what one observational¹⁷⁰ study found when looking at the Alaska PFD.¹⁷¹ Thus, a means-tested UCT may be sound egalitarian policy, but the case is less clear for UBI.

For such a redistributive scheme to meaningfully improve income equality, broadly progressive tax rates would also be necessary—including higher taxes on the “upper middle class.”¹⁷² Simulations of tax increases for only the top marginal rate reveal that even a rate as high as 50% would have little effect on income inequality.¹⁷³

Conclusion

We should not downplay the fact that the recent round of RCTs has injected some sobriety into the case for unconditional cash transfers in high-income countries. Contrary to the prior beliefs of advocates—including many economists inspired by the successes of UCTs in low-income countries¹⁷⁴—UCTs of \$12,000 a year or less do not appear to have large positive effects on recipients’ short-term productivity, physical health, or mental health.¹⁷⁵

But perhaps this is not surprising. If we believe that income increases well-being at a diminishing rate, surely the well-being gains seen by the average rural Kenyan will be greater than those seen by the average low-income American. It therefore makes sense that the effects of providing cash to the latter would be more subtle than the former.

Moreover, we should remember that some of the most influential arguments for UCTs in high-income countries—that they are pareto improvements on in-kind transfers, or that they increase the well-being of recipients by more than they decrease the well-being of taxpayers—are not easily captured by a single

¹⁶⁹ Cf. Fisher et al., *supra* note 151, at 1 (finding that marginal propensity to consume to decreases as one moves up the wealth distribution).

¹⁷⁰ While the authors of this essay argue that “income and population tend to behave exogenously,” they use no research design to achieve exogeneity. See Kate Kozminski & Jungho Baek, *Can an Oil-Rich Economy Reduce Its Income Inequality? Empirical Evidence from Alaska’s Permanent Fund Dividend*, 65 ENERGY ECON. 98, 99 n.3 (2017).

¹⁷¹ *Id.* at 101.

¹⁷² Class labels are fraught. Less than 2% of Americans consider themselves “upper class.” Megan Brenan, *Steady 54% of Americans Identify as Middle Class*, GALLUP (May 23, 2024) <https://news.gallup.com/poll/645281/steady-americans-identify-middle-class.aspx> [<https://perma.cc/DFE7-JBMW>]. But meaningful redistribution may require higher taxes on those in the 20% of income, who hold over 50% of the wealth in the United States. See RICHARD REEVES, *DREAM HOARDERS: HOW THE AMERICAN UPPER MIDDLE CLASS IS LEAVING EVERYONE ELSE IN THE DUST, WHY THAT IS A PROBLEM, AND WHAT TO DO ABOUT IT* 22–27 (2017).

¹⁷³ William G. Gale, Melissa S. Kearney & Peter R. Orszag, *Would a Significant Increase in the Top Income Tax Rate Substantially Alter Income Inequality?*, BROOKINGS (Sep. 2015), <https://www.brookings.edu/wp-content/uploads/2016/06/would-top-income-tax-alter-income-inequality.pdf> [<https://perma.cc/Z9G5-CMDT>].

¹⁷⁴ Compare Jaroszewicz et al., *supra* note 10, at 21 with Banerjee et al., *supra* note 5.

¹⁷⁵ *Supra*, Part III.

metric. These rationales rest on the idea that UCTs make recipients better off than they otherwise would be *despite heterogeneity in what makes each recipient better off*. The ORUS research team wrestled with this idea after finding their UCT had no health effects, saying:

The appeal of cash transfers lies in the freedom that they give beneficiaries to make their own choices about what type of consumption to prioritize. However, the nature of that freedom means that cash transfers are a blunt instrument for improving health and reducing health disparities specifically. Program participants have a variety of needs that they may prioritize over health inputs when making consumption decisions [O]ur study participants consumed more leisure, food, housing, transportation, and goods and services as a result of being randomly assigned to the high cash transfer arm. While these choices did not appear to directly affect their health, they did allow participants to increase consumption in ways that the participants valued most, as revealed by their own choices.¹⁷⁶

Accordingly, this essay made the case for qualified optimism. On many metrics, UCTs have no effect. But on others, UCTs continue to show promise. UCTs demonstrably reduce poverty and enable households to better meet their needs.¹⁷⁷ Recipients spend more time and money on their children and, in some studies, show signs of improved mental health and life satisfaction.¹⁷⁸ Large UCTs may negatively affect productivity, but small UCTs may not, and it remains possible that UCTs' labor demand effects will drive up productivity overall.¹⁷⁹ Moreover, the recent RCTs have not yet been able to collect data on UCT recipients' children's long-term health and criminality, where the quasi-experimental literature predicts large benefits.

For these reasons, the moral arguments for UCTs remain strong, and the efficiency arguments for UCTs remain viable, if more complicated than before. The death of unconditional cash as sound policy in the United States has been greatly exaggerated.

¹⁷⁶ Miller et al., *supra* note 89, at 36.

¹⁷⁷ *Supra* Part III(C).

¹⁷⁸ *Supra* Part III(A), (D).

¹⁷⁹ *Supra* Part III(A).

An Evaluation of A Kansas Attorney’s Rights Appointed in a Mandatory Appointments Practice District

By: Sam Crawford*

I. Introduction

“You have the right to have an attorney. If you cannot afford an attorney, one will be provided for you.”¹ Many recognize these words as part of the Miranda Warning law enforcement must give when taking an individual into custody, as mandated by the Supreme Court of the United States.² The right to an attorney in criminal proceedings is fundamental under the United States Constitution,³ and is well-studied and litigated across the country as a result.⁴ Kansas is no exception.⁵ The Kansas Supreme Court recently established a committee to study access to attorneys across the state, and its most recent report was in December 2024.⁶ This report reveals that Kansas is currently “on the verge of a constitutional crisis” regarding an individual’s access to an attorney due to an attorney shortage in rural counties.⁷

This constitutional crisis, however, concerns not only the individuals who need legal representation, but also the attorneys themselves. Many rural counties in Kansas must rely on members of the private defense bar to voluntarily take appointed work, especially in counties without a public defender’s office.⁸ At least one county resorted to mandatory appointments practices for a time and required all members of the county defense bar to take appointments whether they wanted to or not.⁹ These mandatory appointments practices could become more prevalent in counties with a shortage of competent defense attorneys willing to take appointed work voluntarily. While this result may be necessary to afford an individual’s right to an attorney, it also impacts the lesser-studied rights of the appointed attorneys themselves.¹⁰

Requiring an attorney to accept appointed work, particularly at rates that do not compensate for an attorney’s overhead costs, raises several legal issues. These

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¹ *What Are Your Miranda Rights?*, MIRANDAWARNING.ORG, <http://www.mirandawarning.org/whatareyourmirandarights.html> [https://perma.cc/U385-TK83].

² *See id.*; *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966).

³ U.S. CONST. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

⁴ *See, e.g.*, THOMSON REUTERS, RIGHT TO APPOINTED COUNSEL (2024), Westlaw 0030 SURVEYS 22 (surveying state law on the right to an attorney); *Cases – Right to Counsel*, OYEZ, <https://www.oyez.org/issues/226> [https://perma.cc/BF62-K72A] (collecting cases).

⁵ *See, e.g.*, THOMSON REUTERS, *supra* note 4; *State v. Kerrigan*, 538 P.3d 852, 855–56 (Kan. 2023) (evaluating a defendant’s right to an attorney under the Kansas evidentiary breath test law).

⁶ *See* KAN. RURAL JUST. INITIATIVE COMM., KANSAS RURAL JUSTICE INITIATIVE: COMMITTEE FINAL REPORT TO THE KANSAS SUPREME COURT 4 (2024) [hereinafter “KAN. RURAL JUST. COMM.”].

⁷ *Id.* at 17, 19.

⁸ *See* KAN. ADMIN. REGS. § 105-3-1(a) (requiring administrative judges in each county to compile a list of volunteer defense attorneys to take appointed work).

⁹ *See* Administrative Order 2023-1 (2023) (on file with author).

¹⁰ *See infra* Section III.

issues necessarily include a defendant's right to an attorney and the ethical obligations on both attorneys and courts to provide representation, as well as the appointed attorneys' own constitutional rights to equal protection and just compensation.¹¹ Accordingly, this Article evaluates an appointed attorney's rights in a mandatory appointments district against the backdrop of other interests involved. Section II describes factual background on the right to an attorney generally and Kansas's methods of affording this right. Section III chronicles the evolution of Kansas case law that addresses the rights and the ethical obligations of the appointed attorneys themselves. With this background in mind, Section IV evaluates whether a mandatory appointments practice violates an appointed attorney's constitutional rights and, if so, proposes three possible vehicles an attorney-challenger could use to enforce their constitutional rights.

II. Factual Background

A general discussion on the mechanics of appointed work is required before discussing its legal intricacies. This Section describes the right of the indigent to an attorney and how Kansas fulfills that right within its various district courts. This Section also specifically describes the previous mechanics of the Twenty-First Judicial District's mandatory appointments practice in Riley County, Kansas, for misdemeanor and traffic offense appointments.

A. The Right to an Attorney Generally

The Supreme Court significantly changed the world of criminal defense when it decided *Gideon v. Wainwright* in 1963.¹² In *Gideon*, the Court established the right to an attorney for indigent criminal defendants facing felony charges through the Sixth Amendment of the United States Constitution¹³ and incorporated this right to the states through the Fourteenth Amendment.¹⁴ The Court recognized the important role criminal defense attorneys serve when it highlighted that “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”¹⁵

In *Argersinger v. Hamlin*, the Court also used this language when it later recognized the right to an attorney for those charged with misdemeanors who face jail time.¹⁶ While “*Gideon* involved felonies,” the Court explained, “[its] rationale has relevance to any criminal trial, where an accused is deprived of his liberty.”¹⁷ The Court also noted that misdemeanor cases present unique challenges warranting the right to an attorney, including that the high volume of misdemeanor cases may lead to hasty decisions at the expense of fairness to the defendant.¹⁸ The right to

¹¹ See *infra* Sections II–III.

¹² See *Gideon v. Wainwright*, 372 U.S. 335, 339, 344–45 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942)).

¹³ *Id.* at 339, 343, 344–45. The Sixth Amendment states in pertinent part: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI.

¹⁴ *Gideon*, 372 U.S. at 343–45.

¹⁵ *Id.* at 344–45 (quotation marks omitted) (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

¹⁶ *Argersinger v. Hamlin*, 407 U.S. 25, 32–34 (1972) (quoting *Powell*, 287 U.S. at 68–69).

¹⁷ *Id.* at 32.

¹⁸ See *id.* at 34–36.

appointed counsel, therefore, is just as fundamental in misdemeanor cases involving potential jail time as in felony cases.¹⁹

Not only do indigent defendants have the right to an attorney, they also have the right to the effective assistance of counsel.²⁰ An appointed attorney must act to ensure the “proper functioning of the adversarial process” to ensure that any given trial “produced a just result.”²¹ Whether an appointed attorney is effective or ineffective is determined by judging “the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.”²² The failure to afford the effective assistance of counsel such that the defendant is prejudiced is the failure to afford the fundamental right to an attorney.²³

B. Kansas Methods of Affording the Right to an Attorney

Kansas has long recognized that the right to an attorney is fundamental in criminal proceedings.²⁴ After *Gideon*, the Kansas Legislature enacted K.S.A. 22-4514²⁵ to statutorily fulfill this right.²⁶ The statute initially created the Board of Supervisors of Panels to Aid Indigent Defendants to coordinate public defense services across the state.²⁷ Under the Board of Supervisors, the first public defender offices in Kansas opened in 1972, located in Topeka and Junction City.²⁸ In 1982, the legislature dissolved the Board of Supervisors due to cost concerns and reformed it into the current primary version of public defense in Kansas: the Kansas State Board of Indigents’ Defense Services (BIDS).²⁹

¹⁹ *See id.* at 32, 40.

²⁰ *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

²¹ *Id.*

²² *Id.* at 689–90 (articulating the standards for Sixth Amendment ineffective assistance of counsel claims).

²³ *See id.* at 687.

²⁴ *See* 1868 Kan. Gen. Stat. ch. 81, § 160 (current version at KAN. STAT. ANN. § 22-4503).

²⁵ Bluebook Rule requires citing to Kansas statutes using “KAN. STAT. ANN.” THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 264 tbl.T1.3 (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2020). Kansas practice, however, refers to Kansas statutes using “K.S.A.” *See, e.g., State v. Ernesti*, 239 P.3d 40, 45 (Kan. 2010). To conform to both conventions, this Article refers to Kansas statute by “K.S.A.” in above-line text and uses “KAN. STAT. ANN.” in footnotes.

²⁶ Act of Apr. 18, 1969, ch. 291, § 3, 1969 Kan. Sess. Laws 786, 787 (codified as amended at KAN. STAT. ANN. § 22-4514 (repealed 1982)).

²⁷ *Id.* § 14.

²⁸ *The History of Public Defense in Kansas*, KAN. STATE BD. OF INDIGENTS’ DEF. SERVS., <https://www.ksbids.gov/the-history-of-public-defense-in-kansas> [<https://perma.cc/TRK4-DELX>].

²⁹ *See Clark v. Ivy*, 727 P.2d 493, 494–95 (Kan. 1986); Indigents’ Defense Services Act, ch. 142, § 9, 1982 Kan. Sess. Laws 599, 602–03.

BIDS and public defense in Kansas are primarily governed by K.S.A. 22-4501 *et seq.*³⁰ and K.A.R. 105-1-1³¹ *et seq.*³² K.S.A. 22-4503 requires Kansas courts to appoint counsel to indigent defendants:

If it is determined that the defendant is not able to employ counsel, as provided in K.S.A. 22-4504, and amendments thereto, the court shall appoint an attorney from the panel for indigents' defense services or otherwise in accordance with the applicable system for providing legal defense services for indigent persons prescribed by the state board of indigents' defense services for the county or judicial district.³³

The applicable system for each county varies across Kansas. BIDS currently has fourteen offices with trial defense attorneys, and those offices take felony case appointments in their respective counties.³⁴ In counties where there is not a BIDS office, or for misdemeanor, traffic, and felony appointments where BIDS is conflicted-out, district courts employ appointments panels consisting of a list local attorneys on a rotation schedule.³⁵ Some district courts work with the county board of commissioners to establish contract panels where a select number of attorneys are on the panel and are paid a yearly salary.³⁶ Others, such as Riley County, may rotate certain appointed cases to all competent criminal defense attorneys barred in the county.³⁷

C. Riley County's Prior Method of Providing Indigent Defense

The history of Riley County's appointments practice for its misdemeanor and traffic cases presents a legal dilemma. Prior to 2022, the Riley County court appointed attorneys on a panel contract to misdemeanor and traffic cases; the contract attorneys were paid a yearly salary funded by the Riley County Board of Commissioners.³⁸ One of the six contracted attorneys left the panel in 2022.³⁹ The

³⁰ See KAN. STAT. ANN. § 22-4501–4529.

³¹ Bluebook Rule requires citing to Kansas regulations using “KAN. ADMIN. REGS.” THE BLUEBOOK, *supra* note 25. Kansas practice, however, refers to Kansas regulations using “K.A.R.” See, e.g., State v. Ernesti, 239 P.3d 40, 45 (Kan. 2010). To conform to both conventions, this Article refers to Kansas regulations by “K.A.R.” in above-line text and uses “KAN. ADMIN. REGS.” in footnotes.

³² See KAN. ADMIN. REGS. § 105-1-1 to § 105-31-6.

³³ KAN. STAT. ANN. § 22-4503(c).

³⁴ *Contact Information*, KAN. STATE BD. OF INDIGENTS' DEF. SERVS., <https://www.ksbids.gov/contact-info> [<https://perma.cc/X56Z-78CU>].

³⁵ KAN. ADMIN. REGS. § 105-3-1(a); e.g., Administrative Order No. 25-03, <https://www.dgcoks.gov/sites/default/files/2025-02/2025%20Administrative%20Orders.pdf> [<https://perma.cc/5FCX-H2RN>] (describing Douglas County's current private defense attorney appointments panel).

³⁶ See, e.g., Letter from Riley County Defense Bar to Grant Bannister, C.J., Kansas 21st Jud. Dist. (Jan. 5, 2023) (on file with author).

³⁷ Administrative Order 2023-1 (2023) (on file with author).

³⁸ Letter from Riley County Defense Bar to Grant Bannister, *supra* note 36.

³⁹ *Id.*

remaining five attorneys sought higher compensation to better match the rates in surrounding counties and to compensate for the extra cases they would be appointed in the sixth's absence.⁴⁰ The Board of Commissioners and Riley County District Court failed to agree on an updated contract price, causing the panel to disband entirely.⁴¹

Caught between an unmoving Board of Commissioners and an increasing number of indigent defendants without appointed counsel, the Riley County District Court was forced to abandon panel negotiations and issue Administrative Order 2023-1.⁴² The Order states:

As a last resort, it is the ORDER of the Judges of the Riley County District Court that actively licensed attorneys admitted to practice law in this state, who maintain a law office in Riley County, Kansas, and who hold themselves out as being competent in the area of criminal defense will be placed on the appointment list to represent indigent Defendants accused of misdemeanor and traffic offenses.⁴³

The Order provides exceptions for attorneys with conflicts of interest, with health issues, and who lack competency in criminal law.⁴⁴ It also allows an attorney to delegate their responsibility to a different attorney upon written request and consent.⁴⁵ Attorneys appointed on these cases were compensated at a rate of \$120 an hour, as opposed to a yearly salary.⁴⁶

The mandatory nature of this Order was certainly consequential to criminal defense attorneys in private practice. At the time of the Order, criminal defense attorneys in Riley County charged anywhere from \$250 to \$325 an hour for their services.⁴⁷ That number, alongside overhead costs of maintaining an office, has undoubtedly risen in the years since.⁴⁸ Arguably, the attorneys appointed in Riley County under this system lost money for every hour spent on appointed work. While Riley County has since reinstated its contract panel practice for appointed work, at least one attorney office that billed at a compensatory rate above \$120 remains unpaid.⁴⁹ This prompts a question: does the private defense bar bear the burden to provide indigent defense to those charged with misdemeanors and traffic offenses in

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Administrative Order 2023-1 (2023) (on file with author).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Telephone Interview with Thomas Addair, CEO of Addair Law, Chtd., (Dec. 3, 2025).

⁴⁷ Letter from Riley County Defense Bar to Grant Bannister, *supra* note 36.

⁴⁸ See *id.*

⁴⁹ Telephone Interview with Thomas Addair, *supra* note 46.

Kansas? As the next Section addresses, the Kansas Supreme Court has already answered this question.⁵⁰

III. Legal Background on Appointments in Kansas:

This Section addresses Kansas law on appointments to attorneys first by chronicling the evolution of Kansas case law on the matter from 1868 to the present day. It then addresses the ethical obligations placed on Kansas attorneys related to accepting appointments.

A. The Evolution of Kansas Case Law on Appointments Practices

Relevant case law on compensation for appointments in Kansas dates back to 1868, primarily because of its recognition of the right to an attorney since the era of its statehood.⁵¹ Kansas case law on the matter remained unchanged until two significant events occurred: the Supreme Court decided *Gideon* in 1963⁵² and the Kansas Legislature enacted BIDS in 1982.⁵³ These events triggered several lawsuits that changed the legal landscape surrounding appointments in Kansas.⁵⁴ This Section chronicles the evolution of these cases, beginning with the legal landscape as it stood in 1868.

1. 1868: The Burden of Appointments on Kansas Attorneys in a Pre-Gideon Landscape

Pre-*Gideon*, Kansas statutorily recognized the right of the indigent defendant to an attorney.⁵⁵ As early as 1868, Kansas law required courts to appoint counsel to “any person, about to be arraigned upon an indictment or information for a felony, be without counsel to conduct his defense, and be unable to employ any”⁵⁶ Accordingly, district courts had “full power . . . to assign . . . attorneys to prisoners who may be unable to employ counsel.”⁵⁷ But the attorneys appointed to represent the indigent in this era were not entitled to compensation for services rendered under the 1868 legislation.⁵⁸

In *Case v. Board of County Commissioners of Shawnee County*, an attorney sought \$15 payment⁵⁹ for his work on an appointed case.⁶⁰ The District Court, which appointed the attorney, approved the request; however, the Shawnee County Board

⁵⁰ See *infra* Section III.A.3.

⁵¹ Kansas was granted statehood in 1861. NAT'L ARCHIVES, *Kansas Statehood, January 29, 1861* (Aug. 15, 2016), <https://www.archives.gov/legislative/features/kansas> [<https://perma.cc/GV4J-G8X7>].

⁵² See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁵³ Indigents' Defense Services Act, ch. 142, 1982 Kan. Sess. Laws 599 (codified as amended at KAN. STAT. ANN. § 22-4501).

⁵⁴ See *infra* Section III.

⁵⁵ 1868 Kan. Gen. Stat. ch. 81, § 160 (current version at KAN. STAT. ANN. § 22-4503).

⁵⁶ *Id.*

⁵⁷ See *Case v. Bd. of Cnty. Comm'rs*, 4 Kan. 511, 512 (1868) (quoting “Sec. 2 of an act relating to the organization of courts”).

⁵⁸ *Id.* at 513–14 (1868), *overruled by State ex rel. Stephan v. Smith*, 747 P.2d 816 (Kan. 1987).

⁵⁹ \$15 in 1868, adjusted for inflation, is approximately equal to \$342 today. CPI INFLATION CALCULATOR, <https://www.officialdata.org/us/inflation/1868?amount=15> [<https://perma.cc/9Y2F-X3N2>].

⁶⁰ *Case*, 4 Kan. at 512–13.

of Commissioners refused to pay.⁶¹ A unanimous, although torn,⁶² Kansas Supreme Court bench reluctantly agreed with the County, holding that “[t]he law makes provisions for such appointments, but not for any compensation . . . the fact is fatal to the [attorney’s] claim.”⁶³ Consequently, the court concluded that the burden of providing indigent defense “must rest in the tender conscience and manly honor of the members of the bar.”⁶⁴ This burden would not be squarely revisited by the Kansas Supreme Court for over a century.⁶⁵

2. 1982–1986: *BIDS and the Beginning of Compensation Disputes in Appointed Cases*

The legal landscape surrounding compensating attorneys for appointed work remained largely unchanged until the Supreme Court issued its landmark ruling in *Gideon v. Wainwright* in 1963.⁶⁶ Shortly after *Gideon* and its progeny recognized a Sixth Amendment right to counsel, the Kansas legislature enacted state-sponsored indigent defense, which resulted in compensation efforts for appointed work.⁶⁷ While private defense attorneys were still not entitled to compensation for appointed work under *Case*, a Kansas statute provided payment beginning in 1941 at a rate of \$10 per day, not to exceed \$300 total.⁶⁸ Accordingly, Kansas counties began to set aside funds to pay appointed counsel—particularly those with a high volume of criminal cases, such as Sedgwick County.⁶⁹ When forming the current version of state-sponsored indigent defense, BIDS, in 1982, the legislature was concerned with the costs of appointed work in criminal felony cases in areas where there was not a public defender office.⁷⁰ At the time, the Eighteenth Judicial District, consisting of Sedgwick County, did not have a public defender

⁶¹ *Id.*

⁶² *See id.* at 514 (“It is true that it would be a disgrace to the jurisprudence of the age if a man should be tried without counsel, merely because he is poor. It would be a worse disgrace if a man were allowed to starve, in a country like this. Yet if the legislature makes no provision for the poor, those who give in private charity would look in vain to the county for reimbursement. The considerations urged in this case are strong, the reasoning satisfactory, but the court is powerless.”).

⁶³ *Id.* at 513.

⁶⁴ *See id.* at 514.

⁶⁵ *See State ex rel. Stephan v. Smith*, 747 P.2d 816, 836–37 (Kan. 1987) (revisiting *Case* and its burden on defense attorneys, which “was decided almost 120 years ago”). The Kansas Supreme Court relied on *Case* twice to determine if a county board must compensate individuals but did so in separate contexts. *See Linton v. Comm’rs of Linn Cnty.*, 7 Kan. 79, 81–82 (1871) (probate judge compensation); *Comm’rs of Neosho Cnty. v. Stoddart*, 13 Kan. 207, 207, 210–11 (1874) (courtroom furnishing compensation).

⁶⁶ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁶⁷ *See supra* Section II.B.

⁶⁸ *See Bd. of Cnty. Comm’rs v. Burns*, 747 P.2d 1338, 1341 (Kan. 1988) (collecting Kansas statutes).

⁶⁹ *See, e.g., Clark v. Ivy*, 727 P.2d 493, 495 (Kan. 1986); *see also Smith*, 747 P.2d at 822 (explaining Anderson County’s appointment compensation process before overruling *Case*.)

⁷⁰ *Clark*, 727 P.2d at 495.

office.⁷¹ Instead, it relied solely on appointing cases to local defense attorneys, resulting in a “substantial portion” of state funds expended in the county.⁷²

This issue culminated a few years later into the dispute underlying *Clark v. Ivy*.⁷³ A newly created public defender’s office opened in Sedgwick County, Kansas, on June 18, 1984, with the aim of containing state costs expended on appointed cases.⁷⁴ Shortly afterwards, the Board adopted the following policy:

that in public defender districts the administrative judges appoint the public defender offices to A, B and C felonies (most serious offenses) in lieu of assigned counsel unless a conflict of interest arises and that the Board will review such claims from assigned counsel to decide whether or not such claims will be paid.⁷⁵

Despite the availability of the new office and notice of this policy, Honorable Paul W. Clark, presiding judge of the Eighteenth District’s criminal division, continued appointing private defense counsel in criminal felony cases even though no BIDS conflicts were present.⁷⁶ Seven of these private defense attorneys submitted claims to BIDS for compensation.⁷⁷ BIDS denied these claims “due to the board’s policy not to pay assigned counsel in cases where the public defender office could have been appointed.”⁷⁸ In return, Judge Clark initiated contempt proceedings against BIDS and pursued a mandamus action against BIDS to compel payment.⁷⁹

At the Kansas Supreme Court, the parties primarily disputed whether BIDS’s review and rejection of claims violated the separation of powers doctrine between the judicial and executive branches.⁸⁰ The court held the practice did not violate the separation of powers because BIDS does not infringe on the judiciary’s right to appoint attorneys.⁸¹ Rather, BIDS only steps in after the appointment is made in the compensation phase “of such appointed attorney.”⁸² In reaching this conclusion, the court reaffirmed that the burden to provide indigent representation relies primarily on the attorney, noting that “mere appointment . . . does not create an absolute duty on the part of the State to compensate that attorney.”⁸³

But the court did not leave it there; it continued by taking a moment to express its disappointment in the parties.⁸⁴ It reminded the parties that they “are

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 501.

⁷⁷ *Id.* at 495–96.

⁷⁸ *Id.* at 497.

⁷⁹ *Id.* at 497–98.

⁸⁰ *Id.* at 498 (citing *State ex rel. Stephan v. Kan. House of Representatives*, 687 P.2d 622, 634–35 (1984)).

⁸¹ *Id.* at 501.

⁸² *Id.*

⁸³ *Id.* at 499.

⁸⁴ *See id.* at 503.

bound together in the common goal of providing adequate legal services to indigent defendants on a cost-effective basis and should work together to accomplish that goal.”⁸⁵ It also noted that the seven private defense attorneys “through no apparent fault of their own, become casualties in a territorial dispute between two members of the judiciary and a state agency.”⁸⁶ Perhaps this sympathy for the private defense attorneys influenced the court’s subsequent decision to revisit the burden it originally placed on them.⁸⁷

3. 1987–1988: *The Burden Shifts to the State in Smith*

Just as it closed the door on one appointment compensation dispute in *Clark*, the Kansas Supreme Court opened another door to a more complicated appointment compensation dispute in *State ex rel. Stephan v. Smith*.⁸⁸ Because *Smith* is a significant case for the issue this Article seeks to address, this section divides *Smith* into its factual background, legal analysis, and conclusion.

a. Factual Background

The facts underlying *Smith* involve two private defense attorneys practicing in the Fourth Judicial District of Kansas in 1987.⁸⁹ One attorney in Osage County was actively appealing a contempt citation for refusing to accept an appointment in a felony case.⁹⁰ Another attorney in Anderson County filed motions in his three appointed felony cases to be discharged because the amount of compensation allowed by BIDS was “inadequate to pay even his office overhead costs”⁹¹ These two disputes were consolidated into one hearing before the Honorable James J. Smith in Anderson County.⁹²

Judge Smith first set aside the contempt citation, finding that the Osage County defense attorney was “incompetent in criminal law matters.”⁹³ Then Judge Smith ordered two of the three cases involving the Anderson County attorney be “dismissed without prejudice, and the defendants discharged from custody within 30 days, unless during that time effective . . . the State provided ‘reasonable compensation.’”⁹⁴ Judge Smith denied the attorney’s motion in the third case but determined that the amount to be reasonably compensated should be \$68 an hour—over double the \$30 an hour provided by Kansas Administrative Regulations at the time.⁹⁵ Judge Smith’s order also set the “reasonable compensation rate” for all panel attorneys in Anderson County at \$68 an hour and ordered that charges be dismissed without prejudice against defendants with appointed counsel that the State would

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *State ex rel. Stephan v. Smith*, 747 P.2d 816, 836–37 (Kan. 1987) (revisiting *Case* and explicitly overruling it).

⁸⁸ *See generally id.* at 821–50.

⁸⁹ *See id.* at 821–22.

⁹⁰ *Id.*

⁹¹ *Id.* at 821.

⁹² *Id.* at 822.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 822, 826 (quoting KAN. ADMIN. REGS. § 105-5-2 (1984)).

not pay at this rate.⁹⁶ The Honorable Phillip M. Fromme subsequently entered a similar order for appointments in Coffey County.⁹⁷

Both orders from the Fourth Judicial District prompted the then-Kansas Attorney General Robert Stephan to file a petition for writ of mandamus on the State's behalf in the Kansas Supreme Court.⁹⁸ The State's petition asked the court to compel the judges to "rescind their respective general orders . . . insofar as they apply to conditions of appointment based on compensation and the rates of compensation which exceed those established by the State Board of Indigents' Defense Services."⁹⁹ After reviewing the judges' responses and various amicus briefs, including ones from the defense attorneys, the court analyzed several legal issues the case posed.¹⁰⁰

b. Legal Analysis

The district court judges countered the mandamus action under several legal theories, including that "appointed attorneys are entitled to reasonable compensation"¹⁰¹ and that the duty to provide indigent defendants with the effective assistance of counsel under *Gideon* is imposed on the State, not "on the private bar."¹⁰² Relying on *Clark*, the judges also argued that they had the right to appoint "any attorney he or she pleases who is capable of adequately representing a defendant providing, of course, the attorney accepts the appointment."¹⁰³ But the court determined *Clark* was inapplicable because, unlike the order in *Clark*,¹⁰⁴ the judges' orders contravened the statutes and regulations on appointing counsel.¹⁰⁵ The court put it simply: "[t]he indigent defendant, however, has no right to adequately paid counsel; the defendant has no right to demand that the State provide 'reasonable compensation' for his or her attorney; the level of compensation is to be determined by the judge."¹⁰⁶

Clark did not provide for reasonable compensation, but the United States and Kansas constitutions would.¹⁰⁷ For the first time since 1868, the court looked at the constitutional rights of the defense attorneys themselves regarding compensation for appointed work.¹⁰⁸ The court first squarely addressed *Case* and the burden it placed on defense attorneys to provide indigent defense.¹⁰⁹ The court noted that the burden placed on defense attorneys "may well have been reasonable under the existing circumstances" in *Case*.¹¹⁰ But it recognized that the circumstances in *Case* had since drastically changed: *Gideon* imposed a duty on the State to provide counsel under the Constitution, K.S.A. 22-4501 *et seq.* authorized attorney compensation,

⁹⁶ *Id.* at 822.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 822–23.

¹⁰⁰ *Id.* at 823, 828.

¹⁰¹ *See id.* at 823 (noting that Judge Smith wrote a response that Judge Fromme adopted).

¹⁰² *Id.* at 830 (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

¹⁰³ *Id.* at 832–33 (quoting *Clark v. Ivy*, 727 P.2d 493, 501 (Kan. 1986)).

¹⁰⁴ *See Clark*, 727 P.2d at 500–01.

¹⁰⁵ *Smith*, 747 P.2d at 833.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 833, 850.

¹⁰⁸ *Id.* at 850.

¹⁰⁹ *Id.* at 836.

¹¹⁰ *Id.*

and the costs of maintaining office overhead had drastically increased.¹¹¹ Accordingly, the court stated: “[w]e do not find *Case* persuasive today, and we specifically overrule it. We hold that *the State has an obligation to compensate attorneys appointed to represent indigent defendants accused of crime.*”¹¹²

Now that the burden of providing indigent representation was squarely shifted to the State, the Court next turned to whether the then-present system of appointing and compensating attorneys violated the defense attorneys’ constitutional rights.¹¹³ It addressed individual rights under the following provisions: (1) Fifth Amendment Takings Clause;¹¹⁴ (2) Fifth Amendment Equal Protection;¹¹⁵ (3) Thirteenth Amendment Involuntary Servitude;¹¹⁶ and (4) Article 2, Section 17 of the Kansas Constitution.¹¹⁷ The court quickly disposed of the Thirteenth Amendment concern,¹¹⁸ but spent a significant amount of time discussing the others.

The first right the court struggled with was the proposition that a defense attorney has a Fifth Amendment right to be free from being required to provide legal services without just compensation.¹¹⁹ After a lengthy review of other state courts’ analyses,¹²⁰ the court concluded that Kansas attorneys have a property interest in the services they provide and that those services are property that receive Fifth Amendment Takings Clause protection.¹²¹ Accordingly, the court concluded:

When the attorney is required to advance expense funds out-of-pocket for an indigent, *without full reimbursement*, the system violates the Fifth Amendment. Similarly, when an attorney is required to spend an unreasonable amount of time on indigent appointments so that there is *genuine and substantial interference with his or her private practice*, the system violates the Fifth Amendment.¹²²

The court next addressed Fifth Amendment Equal Protection, including whether the appointments practice discriminated against attorneys based on their

¹¹¹ *Id.*

¹¹² *Id.* (emphasis added).

¹¹³ *See id.* at 837–49.

¹¹⁴ *Id.* at 837–42.

¹¹⁵ *Id.* at 843–46.

¹¹⁶ *Id.* at 846–47.

¹¹⁷ *Id.* at 847–49.

¹¹⁸ *See id.* at 847 (citing U.S. CONST. amend. XIII) (“We know of no Kansas attorney who has been imprisoned for failure to accept an appointment under the Act. Without further discussion, we hold that the system does not offend the Thirteenth Amendment.”).

¹¹⁹ *See id.* at 837.

¹²⁰ *See id.* at 838–41 (collecting cases from West Virginia, Illinois, Oklahoma, Kentucky, Iowa, Arkansas, Nevada, Oregon, Alaska, Nebraska, Missouri, Florida, and New Jersey).

¹²¹ *Id.* at 842.

¹²² *Id.* (emphasis added).

profession and geographic location.¹²³ Applying rational basis review,¹²⁴ the court determined that the State's interest in providing counsel to the indigent is a legitimate public goal.¹²⁵ But doing so at the "expense of a particular group of people," here, attorneys, is impermissible.¹²⁶ An attorney's "ethical obligation may justify paying attorneys a reduced fee for legal services to the poor . . . but not less than the lawyers' average expenses statewide."¹²⁷

The court further noted that the State system impermissibly treated attorneys differently based on geographic location.¹²⁸ Attorneys in larger counties where public defender's offices are located employ voluntary panels for appointments, whereas attorneys in smaller counties with no public defender's office remained subject to mandatory appointment.¹²⁹ At the time, this meant that approximately 45% of attorneys in smaller counties bore a higher burden to provide indigent defense than the remaining 65% of attorneys in larger counties.¹³⁰ "It is difficult," the court concluded, "to articulate a rational basis for requiring some attorneys to donate a considerable amount of their time and money to indigent criminal defense, and other attorneys none, simply because of their geographic location."¹³¹

Similarly, the court concluded that the State's system violated Kansas's Equal Protection Clause, articulated in Article 2, Section 17 of the Kansas Constitution, which requires Kansas law to apply uniformly across the state.¹³² The court noted that to "apply uniformly" requires a law to be "geographically uniform."¹³³ "The present system," the court concluded, "quite obviously does not operate uniformly across the state" and accordingly violates Kansas Equal Protection.¹³⁴

c. Conclusion

¹²³ *Id.* at 843. The Fifth Amendment states, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Fifth Amendment Equal Protection is intertwined with the Fourteenth Amendment's Equal Protection clause: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1; see *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954).

¹²⁴ See *Smith*, 747 P.2d at 844 ("The traditional yardstick for measuring equal protection arguments is the 'reasonable basis' test. Under this test, the constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.").

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 845.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See *id.* at 845–46 (listing Osage, Anderson, and Coffey County as examples of mandatory appointment districts). The disparity between the number of attorneys living in urban versus rural counties in Kansas continues to grow today; 79.2 percent of attorneys living in Kansas live in the five most populous counties while only 20.8 percent live in rural counties. KAN. RURAL JUST. COMM., *supra* note 6, at 9.

¹³¹ *Smith*, 747 P.2d at 845.

¹³² *Id.* at 849. Article 2, § 17 states, in pertinent part: "All laws of a general nature shall have a uniform operation throughout the state." KAN. CONST. art. 2, § 17.

¹³³ *Smith*, 747 P.2d at 848 (emphasis omitted) (citing *Stephens v. Snyder Clinic Ass'n*, 631 P.2d 222, 232 (Kan. 1981)).

¹³⁴ *Id.* at 849.

The *Smith* court concluded that BIDS' appointment system, which failed to fully compensate appointed attorneys, violated several provisions of the United States and Kansas constitutions.¹³⁵ In doing so, it made two key findings:

- (1) The State . . . has an obligation to pay appointed counsel such sums as will fairly compensate the attorney . . . at a rate that is not confiscatory, considering overhead and expenses.¹³⁶
- (2) Kansas attorneys have an ethical obligation to provide pro bono services for indigents, but the legal obligation rests on the state, not upon the bar as a whole or upon a select few members of the profession.¹³⁷

The court then made several suggestions to the State to amend its practice to bring it up to constitutional scrutiny, including a mix of legislative and administrative actions.¹³⁸

While the court ultimately denied the State mandamus, it also set aside the judges' orders to compensate the attorneys \$68 an hour to give the State time to amend its appointments practice and to ensure defendants received their constitutional right to representation.¹³⁹ "That is a burden," the court stated, "which the bar must continue to shoulder, at least temporarily, under the present system."¹⁴⁰

4. *Post-1987: Smith's Extension and Other Legal Challenges*

Cases surrounding appointment compensation disputes did not end with *Smith*.¹⁴¹ Indeed, the facts surrounding *Smith* and the decision itself prompted two cases from opposite sides of the issue that presented new legal theories.¹⁴² First, the Osage County Board of Commissioners brought a declaratory judgment action against its misdemeanor appointments panel attorneys who demanded the \$68 hourly compensation that *Smith* addressed.¹⁴³ Second, several attorneys in Liberal, Kansas, filed a class action lawsuit against the State seeking compensation for the

¹³⁵ *Id.* at 850.

¹³⁶ *Id.* at 849.

¹³⁷ *Id.* at 850.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See generally *Bd. of Cnty. Comm'rs v. Burns*, 747 P.2d 1338 (Kan. 1988); *Sharp v. State*, 783 P.2d 343 (Kan. 1989).

¹⁴² See *Burns*, 747 P.2d at 1340; *Sharp*, 783 P.2d at 345.

¹⁴³ *Burns*, 747 P.2d at 1340 (citing *Smith*, 747 P.2d at 816).

appointed services rendered prior to *Smith's* ruling.¹⁴⁴ This Section addresses each case in turn.

a. 1988: *Smith's* Ruling is Extended to County Boards for Misdemeanor Appointments via a Declaratory Judgment Action

Board of County Commissioners of Osage County v. Burns was another Fourth Judicial District appointment compensation dispute that arose alongside *Smith*.¹⁴⁵ After Judge Smith and Judge Fromme entered their orders in Anderson and Coffey County, attorneys in Osage County submitted claims to its Board of Commissioners seeking the same \$68 an hour for services provided in misdemeanor appointments.¹⁴⁶ The Osage County Board, however, only budgeted \$30 an hour for such services.¹⁴⁷ Seeking to avoid paying the full value of the claims, the Osage County Board sought declaratory judgment to determine if it had a legal duty to pay these claims at all and, if so, whether it must do so at the \$68 rate requested.¹⁴⁸

One argument the Kansas Supreme Court considered on appeal was that the statute only required the State to pay for appointed work on felony cases, not misdemeanor cases.¹⁴⁹ Indeed, a Kansas Administrative Regulation explicitly states that “[l]egal representation at state expense shall not be provided in . . . services on behalf of a defendant charged with a misdemeanor”¹⁵⁰

Confronting this regulation, the court again confirmed that “the State has the obligation to furnish counsel and to pay appointed counsel such sums as will fairly compensate the attorney . . . at a rate which is not confiscatory, considering overhead and expenses.”¹⁵¹ The court further noted that the Board of Commissioners for each county in Kansas is statutorily responsible for all expenses of its district courts.¹⁵² Any judicial expenses not borne by the State, therefore, fall to the counties.¹⁵³ Accordingly, the court concluded that “the county has a legal obligation to provide counsel for indigent defendants who are charged with misdemeanor offenses when imprisonment is a real possibility and to pay fees to such appointed counsel.”¹⁵⁴

With the legal obligation placed on the Board of Commissioners, the court next addressed the question of compensation.¹⁵⁵ In doing so, the court held that “the county is not required to pay more than the hourly rate fixed for attorneys representing indigents in felony cases for attorneys representing indigents in

¹⁴⁴ *Sharp*, 783 P.2d at 344–45 (citing *Smith*, 747 P.2d at 816).

¹⁴⁵ See generally *Burns*, 747 P.2d at 1338–43.

¹⁴⁶ *Id.* at 1340.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1341 (citing KAN. STAT. ANN. § 22-4519 (1986)).

¹⁵⁰ *Id.* (citing KAN. ADMIN. REGS. § 105-1-1(b)(3) (1986)).

¹⁵¹ *Id.* at 1342 (quotations omitted) (citing *State ex rel. Stephan v. Smith*, 747 P.2d 816, 849 (Kan. 1987)).

¹⁵² *Id.* (citing KAN. STAT. ANN. § 20-348 (1986)).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1342–43.

misdeemeanor cases.”¹⁵⁶ It also suggested that the administrative judge in each county work with the Board of Commissioners during the budget process to establish a reasonable compensation rate.¹⁵⁷ Even so, the court again emphasized that “[t]he rate should fairly compensate the attorney . . . at a rate which is not confiscatory, considering the attorney’s overhead and expenses.”¹⁵⁸

b. 1989: Class Action Raising New Legal Claims is Denied

Seeking compensation under the *Smith* standard, several attorneys practicing in Liberal, Kansas, commenced a class action lawsuit against the State for work performed *before* the court ruled in *Smith*.¹⁵⁹ This suit posed several new claims that the Kansas Supreme Court did not consider in *Smith*, including claims under 42 U.S.C. §§ 1983, 1985, and 1994, and *Bivens v. Six Unknown Federal Narcotics Agents*.¹⁶⁰ None of these claims withstood scrutiny.¹⁶¹ Although the section 1994 claim appeared to be new, the provision is simply the vehicle to enforce the Thirteenth Amendment’s prohibition against involuntary servitude.¹⁶² The court rejected this claim just as it did previously in *Smith*.¹⁶³

The remaining claims required the court to review as a matter of first impression in the context of appointment compensation disputes. Section 1983 provides a civil action against a “*person* who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . .”¹⁶⁴ The section 1983 claim was brought against the State itself for monetary damages, implicating Eleventh Amendment immunity.¹⁶⁵ Kansas has not waived its immunity in this area, so it is immune from suit under section 1983.¹⁶⁶ The section 1983 claim also failed because Kansas, as a state, is not a “*person*” that can be sued within the statute’s meaning.¹⁶⁷ This fact was also fatal to the attorneys’ section 1985 claim, which provides a civil action “[i]f two or more *persons* . . . conspire . . . for the purpose of depriving . . . any person . . . of the equal

¹⁵⁶ *Id.* at 1342.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 1342–43.

¹⁵⁹ *Sharp v. State*, 783 P.2d 343, 344–45 (Kan. 1989).

¹⁶⁰ *Id.* at 345 (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)). The class action also pursued inverse condemnation and unjust enrichment claims that this Article does not address. *See id.*

¹⁶¹ *See id.* at 346–48.

¹⁶² *Id.* 783 P.2d at 346 (first quoting 42 U.S.C. § 1994; and then quoting U.S. CONST. amend. XIII).

¹⁶³ *Id.* at 346–47 (citing *State ex rel. Stephan v. Smith*, 747 P.2d 816, 846–47 (Kan. 1987)).

¹⁶⁴ 42 U.S.C. § 1983 (emphasis added).

¹⁶⁵ *Sharp*, 783 P.2d at 346. The Eleventh Amendment states: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

¹⁶⁶ *Sharp*, 783 P.2d at 346 (citing *Beck v. Adult Auth.*, 735 P.2d 222 (1987)).

¹⁶⁷ *Id.* (citing *Will v. Mich. Dep’t of State Police*, 491 U.S. 58 (1989)).

protection of the laws.¹⁶⁸ Finally, the *Bivens* claim, a claim similar to section 1983 against federal officers,¹⁶⁹ failed because those claims are reserved solely against the federal government and do not provide for monetary damages.¹⁷⁰

Sharp revealed several flaws in the claims brought against the State when disputing compensation for appointed work.¹⁷¹ Adjustments, however, may allow for viable claims in the future.¹⁷² Potential attorney-challengers, however, must also consider a Kansas attorney's ethical obligation to accept appointments.¹⁷³

B. Ethical Obligations on Kansas Attorneys to Accept Appointments

Kansas case law generally has not further addressed the constitutionality of appointments practices in Kansas.¹⁷⁴ But the Kansas Rules of Professional Conduct (KRPC) continue to impose ever-present ethical obligations on Kansas attorneys to accept appointments.¹⁷⁵ KRPC 6.1, titled "Pro Bono Public Service," states that "[a] lawyer should render public interest legal service."¹⁷⁶ Interestingly, comment 3 to KRPC 6.1 continues to uphold the principle that the "responsibility for providing legal services for those unable to pay ultimately rests upon the *individual lawyer*."¹⁷⁷ This is contrary to the clear decree that *Smith* and its progeny emphasized: the State ultimately bears the burden of providing legal services for indigent defendants.¹⁷⁸

Regardless, KRPC 6.2, titled "Accepting Appointments," states that Kansas attorneys "shall not seek to avoid appointment by a tribunal to represent a person except for good cause . . ."¹⁷⁹ One good cause exception to this general rule is if "representing the client is likely to result in an unreasonable financial burden on the lawyer."¹⁸⁰ Comment 2 to KRPC 6.2 elaborates on what an unreasonable financial burden may be by describing it as "a financial sacrifice so great as to be unjust."¹⁸¹ Whether being required to accept an appointment that does not adequately compensate overhead expenses qualifies as an unreasonable financial burden remains an open question.

¹⁶⁸ *Id.* (citing *Will*, 491 U.S. 58); 42 U.S.C. § 1985(3) (emphasis added).

¹⁶⁹ See *Ziglar v. Abbasi*, 582 U.S. 120, 130–31 (2017).

¹⁷⁰ *Sharp*, 783 P.2d at 347–48.

¹⁷¹ Indeed, the attorney-challengers in this case tried three times without success. See *Sharp v. State*, 827 P.2d 12, 14, 17–18 (Kan. 1992) ("This is the third action filed by these plaintiffs against the State of Kansas since our decision in *Smith*." (concluding that *Smith*'s holding that the appointments practice was unconstitutional did not retroactively apply to the class action's claims).

¹⁷² See *infra* Section IV.B.3.

¹⁷³ *Infra* Section III.B.

¹⁷⁴ One exception this Article does not address is compensation for appointed work on municipal cases. See *Ricke v. City of El Dorado*, 939 P.2d 916, 917–18 (Kan. 1997). In *Ricke v. City of El Dorado*, the Kansas Supreme Court held "that a municipal court may contract for legal services for indigent defendants in a criminal case, and if it chooses that method, the market will set the price." *Id.* at 918. The court noted, however, that "[i]f the market system does not produce effective counsel, then the municipality must adopt a mandatory appointment system and compensate the attorney so appointed as set forth in *State ex rel. Stephan v. Smith*." *Id.*

¹⁷⁵ See KANSAS RULES OF PRO. CONDUCT r. 6.1–6.2 (KAN. SUP. CT. 2025).

¹⁷⁶ *Id.* r. 6.1.

¹⁷⁷ *Id.* r. 6.1 cmt. 3 (emphasis added).

¹⁷⁸ Compare *id.*, with *State ex rel. Stephan v. Smith*, 747 P.2d 816, 849 (Kan. 1987), and *Bd. of Cnty. Comm'rs v. Burns*, 747 P.2d 1338, 1342 (Kan. 1988).

¹⁷⁹ KANSAS RULES OF PRO. CONDUCT r. 6.2.

¹⁸⁰ *Id.* r. 6.2(b).

¹⁸¹ *Id.* r. 6.2 cmt. 2.

An exhaustive review of legal research databases does not reveal any disciplinary actions against a Kansas attorney for refusing to accept an appointment, but that does not mean a disciplinary action for such conduct is unavailable. The use of the word “shall” in KRPC 6.2 as opposed to the word “should” in KRPC 6.1 suggests that KRPC 6.2 is mandatory and not merely aspirational.¹⁸² If an attorney rejects a judge’s appointment, the judge may be obligated to report the attorney for misconduct.¹⁸³ The attorney’s colleague witnessing the refusal would need to do the same.¹⁸⁴ Once in disciplinary proceedings, the attorney faces several ramifications ranging anywhere from informal admonition to permanent disbarment.¹⁸⁵ These are serious consequences that attorneys who may seek to avoid an appointment or challenge an appointments practice should consider.

IV. Legal Analysis: Does a Mandatory Appointments Practice Withstand Legal Scrutiny?

Ethical obligations aside, a private defense attorney may seek to challenge a mandatory appointments practice. The Kansas Supreme Court clearly placed the burden of providing indigent defense on the State for felony appointments¹⁸⁶ and on the County Board of Commissioners for misdemeanor and traffic appointments.¹⁸⁷ This Section contemplates whether a mandatory appointments practice, such as the one previously present in Riley County for misdemeanor and traffic cases, would withstand legal scrutiny if challenged. It also explores the mechanisms available to a private defense attorney seeking to challenge such a practice.

A. Possible Legal Violations

Previous cases challenging appointments disposed of several claims brought by private defense attorneys.¹⁸⁸ Accordingly, this Section does not address rejected claims under the Thirteenth Amendment, related federal claims, or separation of powers doctrine.¹⁸⁹ Reviewing Kansas case law does reveal two

¹⁸² Cf. David L. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735, 737, 739 (1980) (explaining how the American Bar Association replaced the word “shall” with “should” in its version of the pro bono obligation to ensure pro bono service remained an aspirational goal as opposed to mandatory rule subject to discipline).

¹⁸³ KANSAS CODE OF JUD. CONDUCT Canon 2 r. 2.15(B) (KAN. SUP. CT. 2025).

¹⁸⁴ KANSAS RULES OF PRO. CONDUCT r. 8.3(a).

¹⁸⁵ See KAN. SUP. CT., *Rule 225: Types of Discipline*, in REPORTS OF RULES ADOPTED BY THE SUPREME COURT OF THE STATE OF KANSAS, 274, 274 (2025), <https://kscourts.gov/KSCourts/media/KsCourts/Rules/2025-RuleBook.pdf> [<https://perma.cc/UJD2-PWH2>].

¹⁸⁶ State *ex rel.* Stephan v. Smith, 747 P.2d 816, 850 (Kan. 1987).

¹⁸⁷ Bd. of Cnty. Comm’rs v. Burns, 747 P.2d 1338, 1342 (Kan. 1988).

¹⁸⁸ See *Smith*, 747 P.2d at 842–43, 846–47 (disposing separation of powers and thirteenth amendment claims); *Sharp v. State*, 783 P.2d 343, 346–48 (Kan. 1989) (definitively disposing 42 U.S.C. § 1994, Thirteenth Amendment, inverse condemnation, unjust enrichment, and *Bivens* claims).

¹⁸⁹ See *Smith*, 747 P.2d at 842–43, 846–47; *Sharp*, 783 P.2d at 346–48. Even if an attorney faced disciplinary sanctions for refusing to accept an appointment, a Thirteenth Amendment claim is unlikely viable unless the attorney is imprisoned. See Shapiro, *supra* note 182, at 770 (“In the case

general umbrellas of potentially viable claims an attorney-challenger could be successful under: (1) federal and state equal protection clauses; and (2) the Fifth Amendment takings clause.¹⁹⁰

1. *Equal Protection Clauses*

A mandatory appointments practice arguably violates the equal protection clause of the United States Constitution. Whether it violates equal protection under the Kansas Constitution, however, is a more nuanced answer.

a. **Equal Protection Under the United States Constitution**

The Fifth Amendment states, in pertinent part: “No person shall . . . be deprived of life, liberty, or property, without due process of law.”¹⁹¹ This protection is incorporated to the states through the Fourteenth Amendment.¹⁹² Courts analyze equal protection claims using a three-step analysis:

The first step of an equal protection analysis is to determine the nature of the . . . classifications and whether the classifications result in arguable indistinguishable classes of individuals being treated differently.

....

After determining the nature of the . . . classifications, a court examines the rights which are affected by the classifications. The nature of the rights dictates the level of scrutiny to be applied.

....

The final step of the analysis requires determining whether the relationship between the classifications and the object desired to be obtained withstands the applicable level of scrutiny.¹⁹³

Courts also presume that the challenged practice is constitutionally valid.¹⁹⁴

Under the first step, there are two potentially viable classifications that an attorney-challenger may argue that are being treated differently.¹⁹⁵ First, a mandatory appointments practice treats attorneys differently compared to other

of the lawyer, then, the imposition of professional discipline, even to the point of disbarment, for refusal to accept an assignment appears to pass muster under the thirteenth amendment [sic]. But those who have reached this point with me may share my doubts about imprisonment for contempt for such a refusal.”).

¹⁹⁰ See *Smith*, 747 P.2d at 837–43, 843–50.

¹⁹¹ U.S. CONST. amend. V.

¹⁹² *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954).

¹⁹³ *Miami Cnty. Bd. of Comm’rs v. Kanza Rail-Trails Conservancy, Inc.*, 255 P.3d 1186, 1207–08 (Kan. 2011).

¹⁹⁴ *Id.* at 1207.

¹⁹⁵ *Smith*, 747 P.2d at 843.

professionals by only requiring attorneys to provide indigent defense services.¹⁹⁶ Second, within attorneys, a mandatory appointments practice in one county, but not all others, treats attorneys differently based on geographic location.¹⁹⁷

Applying the second step, the *Smith* court held that an appointments practice affects the fundamental right of those attorneys, particularly if it violated the Fifth Amendment.¹⁹⁸ Attorneys, however, are not a suspect class under the second step of an equal protection analysis.¹⁹⁹ Accordingly, the appropriate level of scrutiny to apply under step two is rational basis.²⁰⁰ Rational basis is satisfied “if the classification bears a rational relationship to a legitimate governmental purpose.”²⁰¹

There is no argument that providing indigent defense is not a legitimate governmental purpose.²⁰² This responsibility is both rooted in the United States Constitution, Kansas statute, and attorney ethics.²⁰³ To say otherwise should cut against the core values of every defense attorney, private or public.

But, under each identified classification, the rational relationship between the appointments practice and the classification may be subject to further debate.²⁰⁴ Comparing attorneys to other professionals, the *Smith* court concluded that assisting the indigent is a legitimate goal, “but cannot be accomplished at the expense of a particular group.”²⁰⁵ Other professions, such as grocers, builders, and even veterinarians, are not forced to provide their services to the indigent without adequate compensation.²⁰⁶ Even payment of \$120 an hour would violate equal protection when “the effect is similar if their overhead and out-of-pocket expenses are not covered by the compensation they receive.”²⁰⁷ Private defense attorneys who maintain offices and multiple staff likely have high overhead and out-of-pocket costs that are not covered by the compensation received when representing indigent defendants in a mandatory appointments county.²⁰⁸

Perhaps the stronger classification private defense attorneys can argue under is different treatment between attorneys based on geographic location.²⁰⁹ As of 2024, 78.82 percent of Kansas attorneys live in the five most urban counties, leaving the remaining 21.18 percent thinly spread across Kansas’s remaining 100

¹⁹⁶ *See id.* at 843–44.

¹⁹⁷ *See id.* at 845.

¹⁹⁸ *Id.* at 844.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *See id.* at 831, 844–45.

²⁰³ *See id.* at 832, 834, 844.

²⁰⁴ *Id.* at 843–44.

²⁰⁵ *Id.* at 844.

²⁰⁶ *Id.* (citing *Cunningham v. Superior Ct.*, 177 Cal. App. 3d 336, 348 (1986)). Even Kansas veterinarians are entitled to reasonable compensation under Kansas law for their expenses for services provided to the State. KAN. STAT. ANN. § 47-610.

²⁰⁷ *Smith*, 747 P.2d at 844.

²⁰⁸ *See* Letter from Riley County Defense Bar to Grant Bannister, *supra* note 36.

²⁰⁹ *See Smith*, 747 P.2d at 845.

rural counties.²¹⁰ Sixteen counties have three or fewer attorneys; of those sixteen, two counties have none.²¹¹ These numbers only report attorneys' location generally, they do not differentiate between those competent to practice criminal law and those not.²¹² It is safe to say that the majority of Kansas criminal defense attorneys practice in urban areas.

As the *Smith* court articulated, “[i]t is difficult to articulate a rational basis for requiring some attorneys to donate a considerable amount of their time and money to indigent criminal defense, and other attorneys none, simply because of their geographic location.”²¹³ When a rural county, like Riley County, is forced to implement a mandatory appointments practice to ensure indigent defendants are constitutionally afforded their right to an attorney, it disproportionately affects the attorneys living in Riley County.²¹⁴ Such a practice would disproportionately affect attorneys living in other rural districts, too.²¹⁵ With an ever-increasing shortage of attorneys practicing in rural counties, mandatory appointments practices already are or may become necessary, and the geographic disparity between urban and rural defense attorneys heightens.²¹⁶ Attorneys challenging a mandatory appointments practice today based on geographic location differential treatment have strong equal protection claims under the United States Constitution.

b. Equal Protection Under the Kansas Constitution

Equal protection under the Kansas Constitution largely works like equal protection under the United States Constitution.²¹⁷ Under the Kansas Constitution, “[a]ll laws of a general nature shall have uniform operation throughout the state.”²¹⁸ As the *Smith* court noted, Kansas courts interpret this provision to require that laws “apply uniformly throughout the state and thus be *geographically* uniform.”²¹⁹

Mandatory appointments practices do not operate uniformly across the state since they are products of a few rural counties compared to the entirety of Kansas’s 105 counties.²²⁰ But does a mandatory appointments practice issued by a single

²¹⁰ KAN. RURAL JUST. COMM., *supra* note 6, at 8–9. The five urban counties in Kansas include Douglas, Johnson, Sedgwick, Shawnee, and Wyandotte. *Id.* at 8.

²¹¹ *Id.* at 11.

²¹² *See id.* at 9–12 (reporting attorney numbers generally, instead of by practice area).

²¹³ *Smith*, 747 P.2d at 845.

²¹⁴ *See id.* (“The net effect is that an attorney in private practice in a small district without a public defender bears a much greater proportion of the burden than do his or her peers in voluntary or public defender districts.”).

²¹⁵ *Id.*

²¹⁶ *See id.* at 846. (“Those in mandatory districts . . . are required to shoulder the burden of indigent criminal defense, paying part of the expense out of their own pockets, while being paid fees that average less than their fixed office overhead. Meanwhile, most Kansas attorneys are not required to participate or contribute.”).

²¹⁷ *Miami Cnty. Bd. of Comm’rs v. Kanza Rail-Trails Conservancy, Inc.*, 255 P.3d 1186, 1207–08 (Kan. 2011) (considering federal and Kansas equal protection together under the same standard of review).

²¹⁸ KAN. CONST. art. 2, § 17. The section further allows special laws to be enacted in areas designated as “urban areas.” *Id.* Currently, these areas only include Johnson and Sedgwick counties. KAN. STAT. ANN. § 19-2654.

²¹⁹ *Smith*, 747 P.2d at 848 (emphasis in original) (quoting *Stephens v. Snyder Clinic Ass’n*, 631 P.2d 222, 232 (Kan. 1981)).

²²⁰ *See County List*, KANSAS.GOV., <https://portal.kansas.gov/government/county-list/> [<https://perma.cc/WJC2-YRHS>]; *see supra* Section IV.A.1.

district court in one county qualify as a law of general nature? For example, it is true that Riley County's mandatory appointments practice was a law of general nature towards private defense attorneys in Riley County, but the Order did not extend generally to all counties in the state.²²¹ Conversely, the Order derives authority from the Indigents' Defense Services Act.²²² This Act is a law of general nature across the state.²²³ Whether a challenge to one county's appointments practice necessarily challenges the Indigents' Defense Services Act itself is currently an open question.

This question has not been squarely addressed by case law, but *Burns* is informative.²²⁴ *Burns*, which extended *Smith* to county boards, did not involve a direct challenge under Kansas Equal Protection.²²⁵ But the challenged counties' appointments practices derived their authority from several Kansas statutes authorizing payment for appointed attorneys.²²⁶ The *Burns* court noted that "the responsibility for providing counsel for indigents charged with misdemeanors has been left by the legislature to the county."²²⁷ The *Burns* court also noted that counties have statutory and regulatory authority to fix the amount of payment.²²⁸ A county's appointments practice is significantly intertwined with the Indigents' Defense Services Act—a law of general nature subject to equal protection under the Kansas Constitution.²²⁹

2. *Fifth Amendment Takings Clause*

A mandatory appointments practice arguably violates another federal right: the Takings Clause under the Fifth Amendment of the United States Constitution. The Fifth Amendment Takings Clause states: "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."²³⁰ This clause is incorporated against the states through the Fourteenth Amendment.²³¹ A government "taking" must satisfy due process principles to be valid:

More specifically,
reasonableness, e.g., arbitrariness, is an issue
under the Due Process Clause of the United

²²¹ Compare Administrative Order 2023-1 (2023) (on file with author), with *Smith*, 747 P.2d at 848 (concluding that the Indigent Defense Services Act of 1986 was a law of general nature because it "is of consequence, in all counties of the state").

²²² KAN. STAT. ANN. § 22-4503(c) ("If it is determined that the defendant is not able to employ counsel . . . the court shall appoint an attorney from the panel for indigents' defense services or otherwise in accordance with the applicable system for providing legal defense services . . ."); cf. Administrative Order 2023-1 (2023) (on file with author) (establishing a mandatory appointments practice).

²²³ *Smith*, 747 P.2d at 848.

²²⁴ See generally Bd. of Cnty. Comm'rs v. *Burns*, 747 P.2d 1338, 1340–42 (Kan. 1988).

²²⁵ *Id.*

²²⁶ See *id.* at 1341–42.

²²⁷ *Id.* at 1342.

²²⁸ *Id.*

²²⁹ State *ex rel.* Stephan v. *Smith*, 747 P.2d 816, 848 (Kan. 1987).

²³⁰ U.S. CONST. amend. V.

²³¹ *Zimmerman v. Bd. of Cnty. Comm'rs*, 264 P.3d 989, 999 (Kan. 2011) (citing *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005)).

States Constitution, while takings is a Takings Clause issue. Accordingly, if the governing body action is unreasonable, there cannot be a taking. The action is simply void. Only if the action is reasonable does a court proceed to address the takings issue.²³²

If the governmental action satisfies due process, then the challenging party must establish that the property at issue is a “constitutionally cognizable property interest.”²³³ Only then is a party entitled to just compensation, typically measured at a “fair market value” rate.²³⁴

Here, attorney-challengers will likely fail to establish that a mandatory appointments practice fails basic due process requirements, especially when the practice emerges from the necessity to afford the indigent the right to an attorney.²³⁵ Attorney-challengers, however, can establish that attorney services are a constitutionally cognizable property interest by citing to *Smith* which explicitly held that “attorneys’ services are property, and are thus subject to Fifth Amendment protection.”²³⁶ Accordingly, defense attorneys are entitled to just or reasonable compensation for appointed services.²³⁷

Calculating reasonable compensation, however, presents a challenge. *Smith* described reasonable compensation as “not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses.”²³⁸ The *Smith* court identified several factors to consider in calculating overhead costs, such as “the cost of the office, library, equipment, supplies, professional liability insurance, and secretarial help.”²³⁹ Overhead costs are certain to vary from attorney to attorney and firm to firm, making this determination time-consuming and tedious.²⁴⁰

A county board of commissioners possesses the tools for making these determinations since budgeting is crucial to county work.²⁴¹ Each county already budgets for its respective county attorney offices; similar procedures could be

²³² *Id.* at 1000.

²³³ *Id.* at 1001.

²³⁴ *See* Creegan v. State, 391 P.3d 36, 48 (Kan. 2017) (evaluating a Fifth Amendment Takings Clause claim for taken land).

²³⁵ *See* State *ex rel.* Stephan v. Smith, 747 P.2d 816, 837–38 (Kan. 1987). This is not to say that establishing that a mandatory appointments practice always satisfies due process. *See id.* at 838 (“Under such an analysis, the statute on its face does not violate due process. There are some problems with the application or administration of the present statutory system, however, which could render it unreasonable and arbitrary.”).

²³⁶ *Id.* at 842.

²³⁷ *See id.* at 849–50 (“The State . . . has an obligation to pay appointed counsel such sums as will fairly compensate the attorney.”).

²³⁸ *Id.* at 849.

²³⁹ *Id.* at 837.

²⁴⁰ *Cf.* Moreno v. City of Sacramento, 534 F.3d 1106, 1116 (9th Cir. 2008) (“We are well aware that awarding attorneys’ fees to prevailing parties . . . is a tedious business.”).

²⁴¹ *See, e.g.,* SEDGWICK CNTY., BUDGET PROCESS 35 (2012), https://www.sedgwickcounty.org/media/27160/budget_process.pdf [<https://perma.cc/7L4K-VWLZ>] (“Sedgwick County recognizes the foundation for strong fiscal management rests in the adherence to sound financial policies and goals.”).

applied to private defense attorney offices.²⁴² County boards also already work with the administrative judge in each district for budgeting purposes; this meeting can facilitate a budgeting process for local defense attorney offices.²⁴³ County boards can also avoid this process by implementing, or returning to, contractual appointments panels that compensate at a rate attractive to volunteer private defense attorneys.²⁴⁴ Accordingly, determining a reasonable compensation rate is achievable to compensate for taking attorneys' services.

B. Possible Attorney Lawsuits²⁴⁵

Case law on appointments practices was formed by various types of lawsuits brought by interested parties.²⁴⁶ Multiple lawsuit vehicles may be available today for private defense attorneys subject to mandatory appointments practices to enforce their constitutional rights. This Section evaluates select advantages and disadvantages of three possible vehicles: (1) a petition for a writ of mandamus; (2) a petition for declaratory judgment; and (3) a 42 U.S.C. § 1983 claim.

I. Petition for a Writ of Mandamus

A petition for a writ of mandamus was the challengers' choice to enforce their rights in two of the four cases discussed in Section III, including in *Smith*.²⁴⁷ In Kansas, "mandamus is a proceeding to compel some inferior court . . . [or] board . . . to perform a specified duty, which duty results from the office, trust, or official station of the party to whom the order is directed, or from operation of law."²⁴⁸ Mandamus provides an opportunity to obtain an authoritative interpretation of regulatory and statutory rules guiding appointments practices—even if mandamus is ultimately denied.²⁴⁹ Attorney-challengers can also file a petition for writ of mandamus directly to the Kansas Supreme Court under its original jurisdiction for expedited final results.²⁵⁰

There is no guarantee, however, that the Kansas Supreme Court would hear the petition without it going through the standard appeals process first. Attorney-challengers must demonstrate why they chose to bring the action to the Kansas

²⁴² See, e.g., BRITTANY PHILLIPS, RILEY CNTY., KAN., RILEY COUNTY, KANSAS 2024 BUDGET 17–18 (2024), [https://www.rileycountyks.gov/ArchiveCenter/ViewFile/Item/3218/\[https://perma.cc/9WZH-BP4G\]](https://www.rileycountyks.gov/ArchiveCenter/ViewFile/Item/3218/[https://perma.cc/9WZH-BP4G]) (budgeting for the Riley County Attorney Office's personnel, contractual, commodity, and capital outlay expenses).

²⁴³ KAN. STAT. ANN. § 20-349.

²⁴⁴ See Letter from Riley County Defense Bar to Grant Bannister, *supra* note 36.

²⁴⁵ DISCLAIMER: this Section discusses possible lawsuits on a basic and general level. It should not be taken as legal advice, and possible attorney-challengers should obtain legal representation to properly evaluate their options.

²⁴⁶ See *State ex rel. Stephan v. Smith*, 747 P.2d 816, 822 (Kan. 1987) (writ of mandamus); *Bd. of Cnty. Comm'rs v. Burns*, 747 P.2d 1338, 1339 (Kan. 1988) (declaratory judgment action); *Sharp v. State*, 783 P.2d 343, 344 (Kan. 1989) (class action).

²⁴⁷ *Smith*, 747 P.2d at 821; *Clark v. Ivy*, 727 P.2d 493, 494 (Kan. 1985); see *supra* Section III.A.2–3.

²⁴⁸ KAN. STAT. ANN. § 60-801.

²⁴⁹ See *Smith*, 747 P.2d at 829, 849–50 (denying mandamus but directing parties to adjust their appointments practice to comply with the United States and Kansas Constitutions).

²⁵⁰ KAN. CONST. art. 3, § 3; see also KAN. SUP. CT., *Rule 9.01: Original Action*, in REPORTS OF RULES ADOPTED BY THE SUPREME COURT OF THE STATE OF KANSAS, *supra* note 185, at 63–64.

Supreme Court instead of the district court.²⁵¹ To do so, attorney-challengers can rely on concerns about judicial economy.²⁵² Challenging a county's appointments practice in district court could necessarily require all judges within that county to recuse themselves, delaying proceedings to find a replacement judge.²⁵³ Attorney-challengers can also rely on a need for speedy adjudication of the issue because of its well-established importance to the public statewide.²⁵⁴ Even in light of these needs, the Kansas Supreme Court's review under original jurisdiction remains discretionary.²⁵⁵

Mandamus is also difficult to obtain. Courts consider granting a writ of mandamus an "extraordinary remedy."²⁵⁶ One court described mandamus as having a "drastic character."²⁵⁷ Writs of mandamus are only issued upon a showing that the respondent's legal duty is clear, which may be difficult to establish.²⁵⁸ Even if the legal duty is clear, courts ultimately retain discretion on whether to grant relief under mandamus.²⁵⁹ Overall, while mandamus offers an opportunity for expedited results, challengers should carefully consider the chances of success under this extraordinary remedy.²⁶⁰

2. *Petition for Declaratory Judgment*

One of the cases discussed in Section III involved a petition for declaratory judgment.²⁶¹ While the county board in this case sought a declaratory judgment against defense attorneys, the reverse can be sought, too.²⁶² Under the Kansas Declaratory Judgment Act, "[c]ourts of record within their respective jurisdictions shall have power to declare the rights, status, and other legal relations whether or not further relief is, or could be sought."²⁶³ Unlike mandamus's extraordinary nature, the Declaratory Judgment Act "should be liberally construed and administered" to settle uncertainty between disputed rights.²⁶⁴ Additionally, "further relief based on a declaratory judgment may be granted whenever necessary or proper."²⁶⁵ In an appointments practice challenge, a declaratory judgment order can clarify the rights

²⁵¹ *Id.* at 64; *Ambrosier v. Brownback*, 375 P.3d 1007, 1009 (Kan. 2016).

²⁵² *Ambrosier*, 375 P.3d at 1009.

²⁵³ *See State v. Sawyer*, 305 P.3d 608, 613 (Kan. 2013) (citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876–87 (2009)) ("[A]s an objective matter, recusal would be required in order to satisfy due process: when a judge has a direct, personal, substantial pecuniary interest in the case"). For example, all "Judges within the Riley County District Court" issued Order 2023-1. *See* Administrative Order 2023-1 (2023) (on file with author).

²⁵⁴ *Smith*, 747 P.2d at 828–29.

²⁵⁵ *Ambrosier*, 375 P.3d at 1009.

²⁵⁶ *See Smith*, 747 P.2d at 828 (collecting cases).

²⁵⁷ *State ex rel. Stephan v. O'Keefe*, 686 P.2d 171, 176 (Kan. 1984).

²⁵⁸ *Comprehensive Health of Planned Parenthood of Kan. & Mid-Mo., Inc. v. Kline*, 197 P.3d 370, 396 (Kan. 2008).

²⁵⁹ *Id.*

²⁶⁰ To pursue more aggressive litigation, attorney-challengers may need to first follow the procedures listed in K.S.A 12-105b. *See generally* KAN. STAT. ANN. § 12-105b.

²⁶¹ *See supra* Section III.A.4.a; *Bd. of Cnty. Comm'rs v. Burns*, 747 P.2d 1338, 1339 (Kan. 1988).

²⁶² *Burns*, 747 P.2d at 1339; *see* KAN. STAT. ANN. § 60-1704 ("Any person . . . whose rights . . . are affected by a statute, municipal ordinance, contract or franchise . . . may obtain a declaration of rights, status or other legal relations thereunder.").

²⁶³ KAN. STAT. ANN. § 60-1701.

²⁶⁴ *Id.* § 60-1713.

²⁶⁵ *Id.* § 60-1703.

of the attorney-challengers, the obligations of a county board, and more specifically define what reasonable compensation should be.²⁶⁶

One disadvantage of filing a petition for declaratory judgment action is that doing so in the district court of the county whose practice is being challenged will cause delay due to judges recusing themselves.²⁶⁷ But filing a petition for declaratory judgment presents a less combative option for those seeking to challenge an appointments practice since favorable declaratory relief alone does not award damages or otherwise order any specific action.²⁶⁸ This may prompt a county to change its mandatory appointments practice to avoid future litigation on the matter and ultimately save all parties time and resources. Inaction, however, may require further and more aggressive litigation.

3. 42 U.S.C. § 1983 Claim

A more aggressive lawsuit may be filed under 42 U.S.C. § 1983.²⁶⁹ Section 1983 provides a civil cause of action to enforce certain violations of federal rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.²⁷⁰

Accordingly, section 1983 could be the vehicle used to bring Fourteenth Amendment Equal Protection and Takings Clause challenges.²⁷¹ The *Sharp* challengers unsuccessfully attempted to use section 1983 to bring their constitutional claims,²⁷² but a few adjustments to their strategy may prove viable today.

The primary adjustment challengers should make is to the parties named as defendants. The *Sharp* challengers erroneously named the State of Kansas in their claim for damages.²⁷³ The *Sharp* court did not reach the merits of their claim; instead, it dismissed the case because the State of Kansas is immune from suit under

²⁶⁶ See *Burns*, 747 P.2d at 1342–43.

²⁶⁷ See *supra* notes 252–53 and accompanying text.

²⁶⁸ See *Relief*, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining declaratory relief as merely “relief that pronounces upon the legal status or ownership of a thing”).

²⁶⁹ See 42 U.S.C. § 1983; *id.* § 1988.

²⁷⁰ See *id.* § 1983.

²⁷¹ See, e.g., *Smith v. Robinson*, 468 U.S. 994, 994–95, 1013, 1021 (1984) (affirming the award of attorney’s fees in a section 1983 claim alleging violations of equal protection under the Fourteenth Amendment); *Knick v. Twp. of Scott*, 588 U.S. 180, 185 (2019) (“[T]he property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under § 1983 at that time.”).

²⁷² *Sharp v. State*, 783 P.2d 344, 346 (Kan. 1989).

²⁷³ *Id.* at 346.

the Eleventh Amendment and because a state is not a “person” within the meaning of section 1983.²⁷⁴ Naming a board of county commissioners, however, as defendants avoids both problems. First, a board of county commissioners is not entitled to immunity under the Eleventh Amendment.²⁷⁵ Second, a board of county commissioners is considered a “person” within the meaning of section 1983.²⁷⁶ The claim can also name each commissioner on the board as an individual defendant in their official and personal capacities.²⁷⁷

Overcoming Eleventh Amendment immunity and the person requirement will get challengers today further than those in *Sharp*,²⁷⁸ but the work is not done there. Challengers will also need to establish that the named defendants acted “under color of” state law.²⁷⁹ This can be done by arguing that the county board and its officials exercise their rights under state statutes and regulations when compensating appointed work.²⁸⁰ Challengers will then need to successfully argue their claims under municipal liability principles²⁸¹ and overcome claims of qualified immunity made by defendants sued in their individual capacities.²⁸²

While section 1983 claims involve a significant amount of work, they possess several advantages. For example, a section 1983 claim may be filed in either state or federal court.²⁸³ Filing in federal court can be beneficial; it allows challengers to bring their claims before a court with more experience with and solicitude towards federal claims.²⁸⁴ A federal district court, however, may need to involve the Kansas Supreme Court if evaluating the federal law claims requires certification of a state law question that is determinative of the cause of action.²⁸⁵

²⁷⁴ *Id.*

²⁷⁵ See *Lincoln Cnty. v. Luning*, 133 U.S. 529, 530–31 (1890).

²⁷⁶ See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978).

²⁷⁷ See *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989); *Hafer v. Melo*, 502 U.S. 21, 27, 31 (1991).

²⁷⁸ See *Sharp*, 783 P.2d at 345–46 (dismissing the section 1983 claim on Eleventh Amendment immunity and person requirement grounds).

²⁷⁹ 42 U.S.C. § 1983; *Monroe v. Pape*, 365 U.S. 167, 184, 187 (1981).

²⁸⁰ Whether a party engages in state action involves a two-prong analysis: (1) the deprivation must be caused by the exercise of some right or privilege created by the state; (2) and the party charged with the deprivation must be a person who may fairly be said to be a state actor. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982).

²⁸¹ See *Monell*, 436 U.S. at 694; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479–84 (1986) (articulating municipal liability standards under the official policy or custom theory of liability).

²⁸² An individual is immune from damages under qualified immunity when they objectively acted reasonably in light of the law that was clearly established at the time. See *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

²⁸³ See *Maine v. Thiboutot*, 448 U.S. 1, 3 n.1 (1980).

²⁸⁴ *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005).

²⁸⁵ See KAN. STAT. ANN. § 60-3201. One question that could be certified stems from *Burns*, which concluded that “the county is not required to pay more than the hourly rate fixed for attorneys representing indigents in felony cases for attorneys representing indigents in misdemeanor cases.” *Bd. of Cnty. Comm'rs v. Burns*, 747 P.2d 1338, 1342 (Kan. 1988). K.S.A. 22-4507 currently fixes the minimum hourly rate for felony representation at \$120. KAN. STAT. ANN. § 22-4507(c)(1). Because this is the amount that Riley County attorneys received under its mandatory appointments practice, an affirmative answer to whether K.S.A. 22-4507 controls “may be determinative of the cause.” See *supra* Section II.C; KAN. STAT. ANN. § 60-3201.

Section 1983 also allows courts to award damages to successful plaintiffs.²⁸⁶ Private defense attorneys who can demonstrate that they have lost money on appointed work may be interested in the possibility of compensatory damages.²⁸⁷ Punitive damages, however, are not available against a board of county commissioners.²⁸⁸ Regardless, perhaps the greatest advantage to a section 1983 claim is the availability of attorney's fees for successful plaintiffs.²⁸⁹ Under 42 U.S.C. § 1988(b), the court must award "a reasonable attorney's fee" to parties who prevail in a section 1983 claim.²⁹⁰ Overall, section 1983 provides a powerful opportunity for private defense attorneys to enforce their constitutional rights.

V. Conclusion

Requiring an attorney to accept appointed work presents a complicated legal issue with several legal rights and interests to consider. An individual's right to an attorney must be afforded, but Kansas case law clearly places the burden to do so on the State and its counties.²⁹¹ Further, while ethically obligated to accept appointments, private defense attorneys have their own constitutional rights under the United States Constitution and the Kansas Constitution. A mandatory appointments practice arguably violates these rights, particularly as it pertains to reasonably compensating these attorneys for their work. Attorneys seeking to challenge such a practice have several possible vehicles to enforce these constitutional rights.

While this Article proposes possible lawsuits attorney-challengers might bring to enforce their constitutional rights, it does not intend to place blame on courts in counties where forced to implement mandatory appointments practices. Affording the right to an attorney should be the prevailing concern of all parties involved. But, without change, the constitutional crisis that Kansas currently faces will only worsen if attorneys' rights continue to be violated and resentment grows. Boards of county commissioners must be educated on the legal importance of providing reasonable compensation to appointed attorneys, and the potential consequences of refusing to do so. Hopefully, scholarship such as this Article suffices, future mandatory appointments practices can be avoided, and no litigation will be necessary.

²⁸⁶ *Carey v. Phipus*, 435 U.S. 247, 253–54 (1978).

²⁸⁷ *Cf. Farrar v. Hobby*, 506 U.S. 103, 112 (1992) ("[N]o compensatory damages may be awarded in a § 1983 suit absent proof of actual injury").

²⁸⁸ *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

²⁸⁹ *See* 42 U.S.C. § 1988(b).

²⁹⁰ *Id.* Generally, "in its discretion" is interpreted to require courts to award attorney's fees, unless the plaintiff is a pro se litigant. *See Kay v. Ehrler*, 499 U.S. 432, 437 (1991).

²⁹¹ *State ex rel. Stephan v. Smith*, 747 P.2d 816, 849 (Kan. 1987); *Bd. of Cnty. Comm'rs v. Burns*, 747 P.2d 1338, 1342 (Kan. 1988).

***Strengthening Legal Regimes to Support Science-
Based Biodynamic-Regenerative Viticulture:
How can we restore soil health and
help foster a global shift to agroecology?***

*John W. Head **

Abstract

While most of the world's foodcrops come from grasses such as wheat, maize, and rice, many important foodcrops come instead from woody plants that provide seeds and fruits used in human diets. As part of a wider research agenda that focuses on woody perennial agricultural in general, I concentrate in this article on viticulture (production of grapes). Although viticulture is an ancient form of agriculture, we now see it experiencing a transformation (and restoration) toward certain science-based biodynamic and regenerative practices that promise great rewards for soil health — that is, a reversal of the soil degradation that has become a plague on planet Earth. Legal and policy reforms in some jurisdictions have encouraged this shift toward biodynamic and regenerative viticulture. I survey such reforms here — involving subsidies, certifications, research support, tax incentives, and the like — to help chart a course for robust government support of a growing shift to natural-systems viticulture, not just regionally but also globally ... and with hopes of hastening the adoption of natural-systems agroecology more generally.

Key words: law / viticulture / biodynamic / regenerative agriculture / soil health

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I. Introduction: questions, perspective, synopsis

When I mentioned to my friend Tim Crews, a plant scientist and director of research at The Land Institute, that my wife and I do lots of volunteer work at a biodynamic vineyard, Tim’s eyes narrowed. He asked if I knew about the “pseudoscience” or outright quackery that has made many scientists skeptical or even dismissive of biodynamic agriculture generally. I told Tim that my upbringing on a northeast Missouri grain-and-cattle farm in the 1960s — in the excitement of the Green Revolution — had helped instill in me a strong respect for science-based analysis. Even though I chose law (not science) for my career path, my high regard for science and my love of soil (“the skin of the earth,” as some observers have called it¹) have prompted me to write this article.

IA. Specific questions

My aims in this article are modest: I wish to address three questions. First, what is “biodynamic-regenerative viticulture,” and how does it differ — particularly in terms of its scientific basis and its certification standards — from “organic viticulture” and related terms and practices? Second, why should we care? Might an energetic shift to biodynamic-regenerative viticulture (and therefore away from using conventional “industrial” agricultural methods in vineyards) help address the global soil-degradation crisis? Third, if biodynamic-regenerative viticulture *does* promise to help address the soils crisis, how can official public support — especially legal, financial, commercial, and research support — be directed toward fulfilling that promise?

Readers of the *Kansas Journal of Law & Public Policy* might have a further question of their own: why would the *Journal* publish an article on wine, inasmuch as Kansas is much better known for wheat fields than for vineyards? I can offer two reasons. First, Kansas does in fact have a strong history of wine and a climate generally amenable to viticulture. A 2023 “farm winery report” prepared by the Kansas Department of Agriculture gives this account:

Kansas has a rich history of growing grapes and producing wine. In the 1800s, European immigrants traveling west began establishing vineyards along the Missouri River. Modern-day western Missouri and eastern Kansas became a wine mecca as native and French varieties flourished under the experienced watch of these viticulturalists. Around 80% of U.S. wine originated from this region

¹ For a recent use of this metaphor, see *Soil, the Earth’s Living, Breathing Fragile Skin*, BRIT. SOC. SOIL SCI. (Jun. 1, 2022), <https://soils.org.uk/news/soil-the-earths-living-breathing-fragile-skin/> [https://perma.cc/8BR8-MNY4]. The metaphor also appears as the title of Chapter Two (“Skin of the Earth”) in DAVID R. MONTGOMERY, *DIRT: THE EROSION OF CIVILIZATION* (2007). See also WILLIAM BRYANT LOGAN, *DIRT: THE ECSTATIC SKIN OF THE EARTH* (2007).

by the end of the 19th century. In 1900, there were over 5,000 acres of vineyards in Kansas. Most of this acreage was concentrated in the northeast and near urban centers, with the counties of Wyandotte (583 acres), Sedgwick (404 acres), and Doniphan (351 acres) leading at the turn of the century. Successful wineries and support businesses such as rootstock breeding thrived alongside. However, the temperance movement changed the industry's trajectory. In 1880, Kansas was the first state in the union to pass a state constitutional amendment prohibiting the manufacturing and sale of alcohol, as well as subsequent laws creating misdemeanors for its manufacture. Producers endured this environment by selling their grapes out of state or producing wine clandestinely. Once the Volstead Act and Prohibition took effect nationally, vineyards drastically decreased as the production of wine also declined in Kansas. After federal Prohibition ended in 1933, Kansas retained constitutional prohibition for 15 more years. Strict alcohol production and sale laws remained even after prohibition was repealed in the state, preventing the industry from rebounding in the decades to follow. In 1983, Kansas passed the Kansas Farm Winery Act, which established guidelines for farm wineries and allowed for wine to once again be produced in Kansas. The state began to slowly return to the wine industry, with 13 licensed farm wineries producing grapes on 170 acres by 2005. Production has continued to grow since.²

Building from that rich history of viticulture in Kansas, a nonprofit organization applied in 2022 for distinction as the first American Viticultural Area ("AVA") in Kansas:

The KAW Valley AVA includes 33 currently established Kansas Farm Wineries and Kansas Vineyards on the list to receive recognition. An AVA is a delimited grape-growing region with specific geographic or climatic features that distinguish it from the surrounding regions and affect how grapes are grown. Using an AVA designation on a wine label allows vintners to describe more accurately the origin of their wines to consumers and helps consumers identify wines they may purchase.³

² *Kansas Farm Winery Report*, KAN. DEP'T OF AGRIC. 6 (Jan. 8, 2024), <https://www.agriculture.ks.gov/home/showpublisheddocument/8050/638518832993930000> [<https://perma.cc/2LLK-2BNR>].

³ *Home*, KAN. VITICULTURE & FARM WINERY ASS'N, www.kansasfarmwineries.com [<https://perma.cc/TTD5-8U6C>]. The same website gives a history of viticulture in Kansas. *Kansas Wine History*, KAN. VITICULTURE & FARM WINERY ASS'N, www.kansasfarmwineries.com/kansas-wine-history/ [<https://perma.cc/F3DD-8Z98>].

This AVA designation process has not yet been completed,⁴ but its sponsoring organization provides a map of the proposed AVA and promotes the “Kaw Valley Wine Trail,” including 16 wineries.⁵ Although the Kansas Department of Agriculture “farm winery report” cited above explained that “the Kansas grape and wine industry has a positive outlook,”⁶ the industry is faced with a variety of barriers — including the problem of chemical drift from neighboring agricultural operations — and is therefore grouped with “Emerging” U.S. states for expanding its grape and wine production.⁷

However, the questions I address in this article relate to Kansas also in a second, much broader, fashion: they might bear on the long-term prospects for agriculture more generally, which sits at the very center of the state’s economy and culture. Allow me to expand on that topic.

IB. Viticulture as a harbinger for agroecological reform

In other writings, I have emphasized the profound degradation that modern agriculture has caused to the soils all around the Earth, but especially in those vast ecoregions that were covered until relatively recently with temperate grasslands.⁸ Most of the world’s grasslands have been converted to agricultural production. This production takes the form predominantly of annual monoculture crops — that is, crops such as maize, wheat, and rice that are used for human food

⁴ For a chronological listing of the officially-designated AVAs in the United States, see ALCOHOL & TOBACCO TAX & TRADE BUREAU, *List of AVAs by Establishment Date*, U.S. DEP’T OF THE TREASURY (Oct. 2, 2025), <https://www.ttb.gov/regulated-commodities/beverage-alcohol/wine/ava-establishment-dates> [<https://perma.cc/5C6Q-5LCX>]. The proposed Kaw Valley AVA is in a “pending” category, per the U.S. Department of the Treasury Alcohol and Tobacco Tax and Trade Bureau (TTB). The TTB defines the “pending” category as “accepted as perfected,” meaning the proposed AVA meets the federal requirements necessary for AVA designation, but the TTB does not guarantee their creation. See ALCOHOL & TOBACCO TAX & TRADE BUREAU, *List of Pending American Viticultural Areas Petitions*, U.S. DEP’T OF THE TREASURY (Aug 8, 2025), <https://www.ttb.gov/regulated-commodities/beverage-alcohol/wine/list-of-pending-american-viticultural-areas-petitions> [<https://perma.cc/TC4B-U6MH>].

⁵ See *Kaw Valley AVA*, KAN. VITICULTURE & FARM WINERY ASS’N, www.kansasfarmwineries.com/kaw-valley-wine-trail/ [<https://perma.cc/7Z9V-YJRA>].

⁶ *Kansas Farm Winery Report*, *supra* note 2, at 5. That report notes that “there is an estimated 566 acres of grapes [grown] in Kansas Seventy different varieties of bearing grapevines can be found in 40 Kansas counties. In 2022, approximately 1,036 tons of grapes were harvested from these vines [with] [t]he vast majority going into the wine supply chain.” *Id.* at 7.

⁷ *Id.* at 5.

⁸ See generally JOHN W. HEAD, *GLOBAL REGIMES TO PROTECT THE WORLD’S GRASSLANDS* (2012) [hereinafter *GRASSLANDS*]; JOHN W. HEAD, *INTERNATIONAL LAW AND AGROECOLOGICAL HUSBANDRY* (2017) [hereinafter *AGROECOLOGICAL HUSBANDRY*], and JOHN W. HEAD, *A GLOBAL CORPORATE TRUST FOR AGROECOLOGICAL INTEGRITY* (2019) [hereinafter *GLOBAL TRUST*].

(or feed for livestock) and grown in single-crop fields, so that they must be planted and harvested anew every year.⁹

The soil degradation coming from these practices has reached crisis proportions. At the same time that our global human population — and therefore global agricultural-production demand — continues to grow rapidly, the Earth's capacity to grow annual crops in monoculture is declining through a combination of soil erosion, soil poisoning, soil exhaustion, and the like.¹⁰

As I have pointed out in earlier publications, the picture might be quite different if human food production were to rely *not* on annual monocultures but on perennial polycultures. In this connection, I have drawn special attention to the work of The Land Institute, which is headquartered in Salina, Kansas, but coordinates with research stations all around the world. A central aim of The Land Institute is to develop foodcrops that rely on *perennial* grains suitable for growing and harvesting, with commercial viability, in *polycultures* ... that is, mixtures of crops in the same field so as to maximize the use of natural nitrogen-fixing capacity of legumes.¹¹

In this article, I take a different perspective by looking at a *different* kind of perennial polyculture. Instead of focusing on *herbaceous* plants, I consider *woody* plants that produce food for humans. Granted, many of the world's key foodcrops come from grasses. Wheat, maize, and rice are prime examples. These are herbaceous in character and produce seeds that humans use for food. However, some of the world's foodcrops come instead from *woody* plants — that is, trees and woody vines. In those cases, humans use the seeds and fruits for food. Important treecrops, for instance, include: (i) stone fruits (also called drupes),¹² such as

⁹ For detailed explanations of this conversion of grasslands to agriculture, see AGROECOLOGICAL HUSBANDRY, *supra* note 8, at 78–83; GRASSLANDS, *supra* note 8, at 43–45.

¹⁰ For highlights of the soil-degradation consequences of modern agriculture, see AGROECOLOGICAL HUSBANDRY, *supra* note 8, at 89–91. I also offer below (in subsection IIIA) more details about how the global soils crisis relates to viticulture.

¹¹ For specific details on the perennial-polycultures approach, and the work of The Land Institute to develop that approach, see AGROECOLOGICAL HUSBANDRY, *supra* note 8, at 148–152; GRASSLANDS, *supra* note 8, at 217–223. For The Land Institute's own account of its crop-research work, including a summary of its “international initiative” and a world map showing affiliated research efforts in many countries for over a dozen types of crops, see THE LAND INST., www.landinstitute.org [<https://perma.cc/FUN9-JCU3>].

¹² For more details on stone fruits, see *Stone Fruit*, UNIV. OF FLA. (May 7, 2025, 3:44 PM), <https://hos.ifas.ufl.edu/stonefruit/> [<https://perma.cc/GH82-AC3H>] [hereinafter *Stone Fruit*]; *Western Washington Tree Fruit and Alternative Fruits: Stone Fruit*, WASH. STATE UNIV., <https://extension.wsu.edu/maritimefruit/tree-fruit/stone-fruit/> [<https://perma.cc/7U87-M32K>] (stone fruits in western Washington); Emily Hoover, Emily Tepe & Doug Foulk, *Growing stone fruits in the home garden*, UNIV. OF MINN. EXTENSION (2024), <https://extension.umn.edu/fruit/growing-stone-fruits-home-garden> [<https://perma.cc/HQV4-KGQ3>] (stone fruits in Minnesota); *Stone Fruit Propagation*, UNIV. OF CAL. AGRIC. & NAT. RES., https://ucanr.edu/sites/btfnp/fruitnutproduction/Stone_Fruit_Propagation/ [<https://perma.cc/T96Q-FAGP>]. As noted in the first source cited above, stone fruits “feature a layer of fleshy, edible pulp surrounding a relatively large, hard pit (the ‘stone’) that shields and protects a seed.” See *Stone Fruit*, *supra*.

peaches, apricots, plums, cherries, nectarines, and dates; (ii) pome fruits,¹³ such as apples, pears, loquats, and quince; and (iii) nuts, such as chestnuts, hazelnuts, and pecans.¹⁴ (Other foods that we typically think of as “nuts,” such as almonds, cashews, and peanuts, are not nuts in the botanical sense: almonds and cashews are stone fruits, and peanuts are legumes.¹⁵)

As part of a wider research agenda that focuses on woody perennial agricultural foodcrops in general, I examine in this article just one form in particular: viticulture, which is the production of grapes.¹⁶ Like the treecrops mentioned above, grapes come from woody perennials, but these woody perennials take the form of *vines* rather than trees. Also like the treecrops mentioned above, the product of the vine that is of human interest for food is the fruit, which in the case of viticulture takes the form of berries.¹⁷ My hope is that an examination of

¹³ For more details on pome fruits, see *Fertilizing for High Yield and Quality Pome and Stone Fruits of the Temperate Zone*, INT’L POTASH INST. (2009), <https://www.ipipotash.org/uploads/udocs/296-IPi-Bulletin-19.pdf> [<https://perma.cc/GDV6-2XF2>] (international overview of pome (and some stone) fruits); *Apples, pears and other pome fruit*, NEW S. WALES GOV’T, <https://www.dpi.nsw.gov.au/agriculture/horticulture/pomes> [<https://perma.cc/K8UZ-B88A>] (pome fruits in New South Wales, Australia) [hereinafter *Apples, etc.*]; *Growing and Care of Pome Fruits*, UNIV. OF CAL. AGRIC. & NAT. RES., https://ucanr.edu/sites/hdnmastergardeners/Resources_for_Home_Gardeners/Fruit_Trees_Berries_and_Grapes/Pomes/ [<https://perma.cc/3DXW-PZ6K>] (growing pome fruits in home gardens). As noted in the second of the three sources cited above, “[p]ome fruits are ... fruits that have a ‘core’ of several small seeds, surrounded by a tough membrane [which is] encased in an edible layer of flesh.” See *Apples, etc., supra*.

¹⁴ For details on nuts, see U.S. Forest Service, *Nuts*, USDA, <https://www.fs.usda.gov/wildflowers/ethnobotany/food/nuts.shtml#:~:text=Chestnuts%2C%20hazelnuts%2C%20pecans%20and%20walnuts,like%20a%20plum%20surrounds%20almonds> [<https://perma.cc/PGC3-Y4NW>].

¹⁵ See Caitlin Bard, *Cashews and almonds aren’t technically nuts. So what are they?*, MCGILL OFF. SCI. & SOC’Y. (July 10, 2020), <https://www.mcgill.ca/oss/article/nutrition-did-you-know/cashews-and-almonds-arent-technically-nuts-so-what-are-they#:~:text=Some%20examples%20of%20true%20nuts,a%20seed%20on%20the%20inside> [<https://perma.cc/VUN6-BVF6>].

¹⁶ Grape production is called viticulture, reflecting the Latin word for vine: *vitis*. The species of grapevines most commonly used for making wine is *vitis vinifera*. HUGH JOHNSON, *THE STORY OF WINE* 17 (2nd ed. 2005). Grape production for “table grapes” and for jams and juices sometimes also relies on *vinis vinifera* but can involve other species such as *vitis labrusca*, which is native to the American Northeast, and *vitis rotundifolia*, which is native to the American South. See KAREN MACNEIL, *THE WINE BIBLE* 58 (2nd ed. 2015) (*vitis labrusca*); Doris Stanley, *America’s First Grape: The Muscadine*, USDA AGRESEARCH MAG. (Nov. 1997), <https://agresearchmag.ars.usda.gov/1997/nov/musc> [<https://perma.cc/PA24-6ZSZ>] (*vitis rotundifolia*, also known as “muscadine”). Karen MacNeil’s work is a valuable general source about viticulture and wine. She sets the tone of her book with this assertion: “*Vit*, the Latin root of the word *viticulture*, is also the source of *vita* — life itself.” MacNeil, *supra* at 16.

¹⁷ From a botanical perspective, a berry is a fruit whose seeds and pulp derive from the ovary of a flower. These include grapes, currants, tomatoes, bananas, pumpkins, avocados, and cucumbers,

viticulture, and how it can be used to fight the soils crisis rather than contribute to it, might serve as a harbinger for broader reforms in other types of agriculture. I use “harbinger” here in the sense of “something that foreshadows a future event” or “something that gives an anticipatory sign of what is to come,” or something “that initiates a major change.”¹⁸

IC. Structure of this article

As I explain below in section II, the cultivation of grapevines is an ancient form of agriculture that is today undergoing a dramatic transformation — or perhaps it is better seen as a restoration. After several decades of expanding use of innumerable biocides (insecticides, herbicides, fungicides), many vineyards and wineries are changing course, or at least trying to do so. Some take the steps necessary to qualify as “organic” operations, but a few aspire to follow practices that meet an even higher standard described (inconsistently) as “biodynamic viticulture” or “regenerative viticulture.” Subsections IIC through IIF describe these practices, and subsection IIG offers a wrap-up on what I call “science-based biodynamic-regenerative viticulture” (“SBBRV”).

A key aim of this article is to explore, from a legal and policy perspective, the standards and the challenges of SBBRV and to consider how we can and should provide a broad range of support — and especially public-sector support — to quicken the pace of the transformation currently underway. It is, after all, a transformation that (according to its proponents) promises great rewards for soil health — a reversal of the soil degradation that has become a plague on the planet.

But what is “soil health”? Section III of the article gives close attention to this question, showing how the concept of “soil health” (or, as it is sometimes termed, “soil quality”) stands as an overarching value that SBBRV aims to serve. Giving attention to some scientific aspects of soil health, and especially mycorrhizal network health, that section of the article explores the inter-related topics of *terroir* (localized biogeographical characteristics of vineyard ecosystems), soil health, and SBBRV. In doing so, section III both (i) summarizes some recent scientific research regarding SBBRV’s impact on soil health and also (ii) identifies the *destination(s)* that are to be reached through various forms of legal and policy support for SBBRV.

Section IV then focuses on such support currently in place in various jurisdictions. Specifically, given the potential significance of these reforms and concepts — that is, the shift toward biodynamic practices and the “soil health” that those practices can improve — the article moves in section IV to an illustrative

but do not include strawberries, blackberries, mulberries, or raspberries. See Ada McVean & Cassandra Lee, *Bananas are Berries. Raspberries are Not.*, MCGILL OFF. SCI. & SOC'Y (Dec. 6, 2017), <https://www.mcgill.ca/oss/article/did-you-know/bananas-are-berries-raspberries-are-not> [<https://perma.cc/L5LS-MF9M>].

¹⁸ For these Merriam-Webster definitions of “harbinger,” see *Harbinger*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/harbinger> [<https://perma.cc/N78C-534U>].

survey of six political jurisdictions. Two are the nation-states of Chile and Italy. Three are U.S. states, specifically California, Washington, and Oregon (three of the largest wine-producing states in the United States¹⁹), and the last one is the province of British Columbia (one of the two largest wine-producing provinces in Canada²⁰). For each of these, I offer a vignette of the official public support for a “de-industrialization” of viticulture. Such support typically takes the form of subsidies, research funding, certifications, and tax incentives.

Although my examination of these issues can be no more than preliminary in the context of this article, I offer in section V a few concluding observations about encouraging government support of a growing shift to the “natural-systems” approach that SBBRV represents. Given the global character of the soil-degradation crisis, I also call for international initiatives that could facilitate reforms in this regard.

II. Biodynamic-regenerative viticulture in a grapeseed

The small vineyard where my wife and I work in the Columbia Gorge AVA is certified as Biodynamic, Regenerative Organic, and Organic (NOP).²¹ Our daughter-in-law carried most of the load in earning these certifications, and it was a big load indeed. In the following paragraphs I try to untangle the meanings of the designations and the related certifications. For each term, I give special consideration to (i) how old and well-established the designation is, (ii) how detailed its certification standards are, (iii) how much of a science-based

¹⁹ For details on top wine-producing U.S. states, see Nat'l Ass'n Am. Wineries, *United States Wine and Grape Industry FAQs*, WINEAMERICA (2018), <https://wineamerica.org/policy/by-the-numbers/> [<https://perma.cc/S4UX-YT3R>]. See also Wash. State Wine Comm'n, *Fast Facts*, WASH. WINE, <https://www.washingtonwine.org/fast-facts/#:~:text=Washington%20is%20the%20second%2Dlargest,annual%20in%2Dstate%20economic%20impact> [<https://perma.cc/MWY3-DU8F>].

²⁰ For details on wine production in Canadian provinces, see *Explore the Best Wineries in Canada*, WINETOURLISM, <https://www.winetourism.com/wine-country/canada/#:~:text=Ontario%20is%20Canada's%20largest%20wine,Noir%2C%20and%20the%20distinctive%20Icewine> [<https://perma.cc/NF5F-KUPM>] (noting that Ontario and British Columbia are the top two wine-producing provinces).

²¹ For details of the Columbia Gorge American Viticultural Area, which straddles the Columbia River about an hour's drive east of Portland, Oregon, see *Columbia Gorge AVA*, WASH. WINE, <https://www.washingtonwine.org/resource/columbia-gorge/> [<https://perma.cc/VB62-74W6>]. For information about the vineyard itself, see ESTELBROOK FARM & VINEYARDS, <https://www.estelbrook.com> [<https://perma.cc/LZY9-C2JG>] (showing certifications for CCOF Organic, Demeter Certified Biodynamic, and Regenerative Organic Certified (Silver)). Expressed in their trademark forms, these certifications carry initial capital letters (as shown in the preceding sentence). Throughout this article, however, I have for simplicity used all-lowercase for the terms organic, biodynamic, and regenerative — all of which will be further explained below — because most references I make here are general, not trademark-specific.

perspective (as opposed to “pseudoscience” or spiritual or “woo-woo” perspective) it involves, (iv) how widespread its acceptance has become (global versus only local), and (v) whether the relevant certification process is primarily facilitated through private organizations or under the legal control of state authorities. I start, though, by explaining how these designations and certifications fit into a larger trend favoring natural-systems approaches both to agriculture in general and viticulture in particular.

IIA. The overall context: organic agriculture and “natural-systems” restoration

The last few decades have seen a surge in demand for “natural” and “organic” foods. (I use quotation marks to emphasize the fact that these terms carry widely variable meanings, as explored more fully below.) For example, in 2000, foods characterized as “organic” accounted for US\$18 billion in sales on the global food market. In 2022, global sales of organic food reached nearly US\$135 billion.²² In 2023, the organic food market reached US\$177 billion, and that value is projected to grow annually by about 12% through 2032.²³ In Europe, organic foods claimed over 44% of the food market in 2023,²⁴ while in the United States, sales of certified organic products exceeded US\$71 billion in 2024.²⁵ Consumers have cited various reasons for preferring “organic” products, including their personal health, the lack of pesticides in organic foods, and the perception that organic foods are better for the environment.²⁶

Like the demand for “organics,” consumer choices have also shifted to show a preference for products with other certifications and characterizations: regenerative, “natural-systems,” non-GMO, and some others likewise intended to distinguish such food products from those produced with more conventional “industrial” agricultural practices. The market size of regenerative agriculture worldwide is expected to have an annual growth rate of about 18% from 2025 to 2030.²⁷ The global market for non-GMO food is expected to have an annual

²² *Worldwide sales of organic food from 1999 to 2023*, STATISTA (Feb. 2025), <https://www.statista.com/statistics/273090/worldwide-sales-of-organic-foods-since-1999/> [<https://perma.cc/2JXJ-FGKN>].

²³ *Organic Foods Market Size, Share & Industry Analysis*, FORTUNE BUS. INSIGHTS (Oct. 20, 2025), <https://www.fortunebusinessinsights.com/industry-reports/organic-foods-market-101470> [<https://perma.cc/GJJ9-LSCU>].

²⁴ *Id.*

²⁵ Sandy Pfaff, *Organic Trade Association reports sales of organic products at \$71.6 billion with growth rate more than doubling overall marketplace*, ORGANIC TRADE ASS'N (Apr. 23, 2025), <https://ota.com/about-ota/press-releases/growth-us-organic-marketplace-accelerated-2024> [<https://perma.cc/KR8V-UW8N>].

²⁶ Raghava R. Gundala & Anupam Singh, *What motivates consumers to buy organic foods? Results of an empirical study in the United States*, NAT'L LIBR. MED. (Sep. 10, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8432837/> [<https://perma.cc/NN5E-5Q26>].

²⁷ *Global Regenerative Agriculture Market Size & Outlook*, GRANDVIEW RSCH., <https://www.grandviewresearch.com/horizon/outlook/regenerative-agriculture-market-size/global> [<https://perma.cc/3UYU-EAAF>].

growth rate of nearly 12% from 2024 to 2032.²⁸ All in all, there is a general move toward higher demand for products seen as better for, or at least less damaging to, the environment.

Therefore, before focusing on viticulture specifically, let us orient ourselves on the landscape of agricultural techniques (and mindsets) more generally. For starters, I can offer these simplified definitions of some of the terms noted above, as drawn from various sources — bearing in mind that several of the terms, particularly in the specific context of viticulture, will be examined more closely from a regulatory standpoint in subsections IIC through IIF, below. Indeed, the definitions in the following list for “biodynamic agriculture” and “regenerative agriculture” will be significantly fine-tuned in those later subsections to explain why I have settled on the hybrid term that I propose in subsection IIG: “science-based biodynamic-regenerative viticulture.”

- *Natural-systems agriculture*, according to The Land Institute, is a practice that “uses perennial polycultures and mutually beneficial relationships to increase the health and productivity of crops. This strategy takes advantage of benefits found in natural systems, such as pest control, fertility and nutrient cycling, erosion control, drought resistance and water management, and carbon sequestration.”²⁹
- *Agroecology* “refers to a way of practicing agriculture that attempts to balance environmental and economic risks of farming while maintaining productivity over the long term.”³⁰ It is mindful of the ecological, health, social, and economic factors that are implicated in the design and activity of agriculture systems.³¹
- *Regenerative agriculture*, according to the Natural Resources Defense Council, “asks us to think about how all aspects of agriculture are connected through a web — a network of entities who grow, enhance, exchange, distribute, and consume goods and services — instead of a linear supply chain.” Thus, regenerative agriculture is

²⁸ *Non-GMO Food Market Size, Share & Industry Analysis*, FORTUNE BUS. INSIGHTS (Oct. 20, 2025), <https://www.fortunebusinessinsights.com/non-gmo-food-market-106359> [https://perma.cc/JAR5-Q2CZ].

²⁹ Biomimicry Inst., *Sustainable Industrial Agriculture Inspired by Prairie Ecosystems—The Land Institute*, ASKNATURE, <https://asknature.org/innovation/sustainable-industrial-agriculture-inspired-by-prairie-ecosystems/> [https://perma.cc/6A85-SF37].

³⁰ JOHN W. HEAD, DEEP AGROECOLOGY AND THE HOMERIC EPICS 68 n.15 (2021) (quoting FREDERICK L. KIRSCHENMANN, CULTIVATING AN ECOLOGICAL CONSCIENCE: ESSAYS FROM A FARMER PHILOSOPHER 51 (2010)) [hereinafter DEEP AGROECOLOGY].

³¹ See Rachel Kerr, Sidney Madsen, Moritz Stuber, Jeffrey Liebert, Stephanie Enloe, Noelle Borghino, Phoebe Parros, Daniel Mutyambai, Marie Prudhon & Alexander Wezel, *Can agroecology improve food security and nutrition? A Review*, 29 GLOB. FOOD SEC. 1, 1 (2021).

“about farming and ranching in a style that nourishes people and the earth, with specific practices varying from grower to grower and from region to region.” The principles underlying regenerative agriculture are therefore “meant to restore soil and ecosystem health, address inequity, and leave our land, waters, and climate in better shape for future generations.”³² According to another entity focusing on regenerative agriculture — the Regenerative Organic Alliance³³ — regenerative agricultural practices build on generations of organic-agriculture farmers and visionaries to promote holistic agricultural practices that increase soil organic matter, sequester carbon, improve animal welfare, and provide economic stability and fairness for farmers.³⁴

- *Organic agriculture* produces food without the use of synthetic fertilizers or pesticides.³⁵ The organization IFOAM–Organics International defines organic agriculture as “a production system that sustains the health of soils, ecosystems, and people. It relies on ecological processes, biodiversity and cycles adapted to local conditions, rather than the use of inputs with adverse effects.” In these ways, organic agriculture “combines tradition, innovation, and science to benefit the shared environment and promote fair relationships and good quality of life for all involved.”³⁶ The U.S. Department of Agriculture (USDA) organic-agriculture standards “require operations to use practices that cycle resources, conserve biodiversity, and preserve ecological balance.”³⁷
- *Biodynamic agriculture* “follows a sustainable, holistic approach which uses only organic, usually locally-sourced materials for fertilizing and soil conditioning, views the farm as a closed, diversified ecosystem, and [at least for those who hew most closely to the views expressed a hundred years ago by Rudolf Steiner] often

³² *Regenerative Agriculture 101*, NAT’L RES. DEF. COUNCIL (Nov. 29, 2021), <https://www.nrdc.org/stories/regenerative-agriculture-101> [<https://perma.cc/J2PP-XSMP>].

³³ See *Framework for Regenerative Organic Certified*, REGENERATIVE ORGANIC ALL. (June 27, 2023), <https://regenorganic.org/wp-content/uploads/2023/03/Regenerative-Organic-Certified-Framework.pdf> [<https://perma.cc/7YU6-6PVZ>] [hereinafter *ROC Framework*].

³⁴ *Id.* at 3. For another definition of regenerative agriculture, see Cheyanne Lepird, *Grapes with Wrath — How Sustainable Viticulture Can Save Winemaking for Generations to Come*, 28 DRAKE J. AGRIC. L. 117, 126 (2023) (Lepird quotes from a New York Times article in defining regenerative agriculture as “a way of farming that emphasizes rebuilding, restoring, and supporting the organic matter that composes healthy soils”).

³⁵ See *Organic Farming*, U.S. EPA (Mar. 14, 2025), <https://www.epa.gov/agriculture/organic-farming> [<https://perma.cc/Q3JL-3MW8>].

³⁶ *Definition of Organic Agriculture*, IFOAM–ORGANICS INT’L (2024), <https://www.ifoam.bio/why-organic/organic-landmarks/definition-organic> [<https://perma.cc/2Q5Z-LS6N>].

³⁷ See Agric. Mktg. Serv., *USDA Certified Organic: Understanding the Basics*, USDA, <https://www.ams.usda.gov/services/organic-certification/organic-basics#:~:text=What%20is%20organic%3F,biodiversity%2C%20and%20preserve%20ecological%20balance> [<https://perma.cc/XD3A-WX8Y>].

bases farming activities on lunar cycles.”³⁸ As expressed by the Demeter organization (discussed at length below), “[b]iodynamics is a holistic, ecological, and ethical approach to farming, gardening, food, and nutrition.”³⁹

- *Sustainable agriculture* has been given a wide range of definitions, but in general it seeks to produce food and fiber for textiles in a way that meets current needs without hindering future generations from meeting those same needs.⁴⁰ Specifically, it seeks to build healthy soils and prevent erosion, to protect water supplies, to limit air pollution, and to promote biodiversity.⁴¹ Beyond these environmental elements, sustainable agriculture is also said to promote practices that allow small farms to be profitable and productive in their local economies, that encourage inter-generational as well as racial justice and equity, and that give access to nourishing food to everyone.⁴²
- *Industrial agriculture* focuses on high volumes of production, typically resorting to fossil-carbon fertilizers to increase yields, biocides to limit pests, and genetic modification of crops so that they can resist these biocides. Industrial agriculture is characterized by the attempt to overwhelm perceived limitations of natural systems to force production, regardless of what a particular landscape can bear.⁴³

As should be clear from the above definitions, “industrial agriculture” (sometimes called “conventional agriculture”) flies in the face of most of the other terms listed there. For reasons I have explored in depth elsewhere, “industrial agriculture” — which I have also characterized more precisely as “traditional extractive fossil-carbon-based industrial agriculture” of the sort that has emerged following the so-called Green Revolution of the twentieth century⁴⁴ — stands in

³⁸ Jeanine Davis, *Biodynamic Agriculture*, NC STATE EXTENSION (June 2025), <https://horticulture.ces.ncsu.edu/horticulture-organic-production/biodynamics/> [https://perma.cc/VC9T-8CFD] (quoting definition in the Merriam-Webster Dictionary).

³⁹ See *Biodynamics*, BIODYNAMIC FED’N DEMETER, <https://demeter.net/biodynamics/> [https://perma.cc/8ESA-SHZC].

⁴⁰ Univ. Cal. Sustainable Agric. Rsch. & Educ. Prog., *What is Sustainable Agriculture?*, UNIV. CAL. AGRIC. & NAT. RES. (Aug. 3, 2021), <https://sarep.ucdavis.edu/sustainable-ag> [https://perma.cc/KX3E-VFMM].

⁴¹ *What is Sustainable Agriculture?*, UNION CONCERNED SCIENTISTS (Mar. 15, 2022), <https://www.ucsusa.org/resources/what-sustainable-agriculture> [https://perma.cc/2M4X-LYSB].

⁴² *Id.* But see *infra* note 48 and accompanying text for a critique of the concept of “sustainable agriculture.”

⁴³ See AGROECOLOGICAL HUSBANDRY, *supra* note 8, at 14–16.

⁴⁴ See *id.* at 15–17.

sharp contrast to most of the means listed above by which humans interact with the Earth's natural landscapes in order to secure food to keep our species alive.⁴⁵

The role of fossil carbon in modern agriculture warrants special attention. In two principal respects, the “industrial agriculture” that dominates production of food, feed, and fiber in today's world is heavily dependent on fossil carbon. First, fossil *fuel* is essential to the production and use of heavy agricultural equipment and to the processing of the grains and legumes that provide roughly two-thirds of global human caloric intake.⁴⁶ Second, fossil carbon in the form of petroleum and natural gas serves as the feedstock (starting ingredient or raw material) in the formulation of chemical fertilizers and pesticides of various kinds.⁴⁷

Curiously, and unfortunately, the next-to-last term on the list I offered above — “sustainable agriculture” — has come to have a distorted (some would say badly tarnished) definition. Whereas the first several terms on the list emphasize the importance of evaluating agricultural techniques on the basis of how well they integrate human need for food into natural ecosystems without negatively impacting those ecosystems except temporarily, the term “sustainable agriculture” has in many contexts (as reflected in the definition offered above) assumed a connotation that implies a competition between human interests and non-human interests, in which the human interests must prevail.⁴⁸ (As noted below in subsection IIF, British Columbia presents a counter-example to this, in which the term “sustainable” has, at least in the context of viticulture, evolved differently.)

In a recent article, I explained how the same thing has happened to the concept of “sustainable development” (as distinct from “sustainable agriculture”). That concept has evolved to assume that human interests in economic and structural development must prevail over natural systems and processes — which, in their subsidiary status, need be given only that minimal amount of protection that is necessary to keep them supplying the needs of our own species. In that connection, I have urged the rejection of any such balancing test in which human interests prevail; I propose that the concept of “sustainable development” as it has

⁴⁵ See *10 things you should know about industrial farming*, UN ENV'T PROGRAMME (July 20, 2020), <https://www.unep.org/news-and-stories/story/10-things-you-should-know-about-industrial-farming> [<https://perma.cc/2QPU-WNGL>] (describing the negative effects of industrial agriculture on ecosystem and human health).

⁴⁶ For a description of how modern agriculture depends on the *burning* of fossil fuels, particularly oil and gas, see AGROECOLOGICAL HUSBANDRY, *supra* note 8, at 13–17.

⁴⁷ For details, see *id.*

⁴⁸ For a pointed criticism of the term “sustainable agriculture” from this perspective, see GRASSLANDS, *supra* note 8, at 214 n.79. For a recent explanation of how the term “sustainable agriculture” has been subjected to “greenwashing” (or “farm washing”), see *Farm Washing: Exposing the Greenwashing of Agriculture*, THE PEOPLES HUB (June 1, 2025), <https://thepeopleshub.org/news/farm-washing-exposing-the-greenwashing-of-agriculture/#:~:text=Exposing%20the%20Greenwashing%20of%20Agriculture%20in%20a%20supermarket%20Dominated%20World,practices%20through%20their%20purchasing%20demands> [<https://perma.cc/7WE3-6YL2>].

evolved in recent years be discarded and replaced with a concept of “process-relational restoration.”⁴⁹

In sum: Recent years have seen an explosion in the demand for “organic” food, and therefore both an urge and an opportunity for drastic reforms in agriculture. Numerous definitions and ultimate aims have emerged for these reforms, as evidenced by the rise of such terms as “sustainable,” “organic,” “biodynamic,” “regenerative,” and others. All of these reflect a rejection of certain “industrial” agricultural practices that became popular (and possible) only in the last several decades but that rely on extractive and damaging processes, and especially on fossil-carbon inputs. It is within the context of these developments that change also has come to one specific sector of agriculture: viticulture.

IIB. The viticulture sector: industrialization and its discontents

For thousands of years, humans have been growing grapes for wine-making. Archeologists have uncovered evidence of a 6,000-year-old winery in Armenia⁵⁰ and a 7,000-year-old jar in Iran containing wine residue.⁵¹ *Vitis vinifera*, the grape species used most often in wine production, has been cultivated in the Middle East since at least 4,000 BCE, and possibly earlier.⁵²

Throughout most of history, the growing of grapes for wine was necessarily “natural,” with various practices used to beat back pests of all sorts and to make the vines as strong and resilient as possible. Cato the Elder, writing his work *De agri cultura* in Roman times, instructed his readers to “sow clover if the soil [in a vineyard] is lean ... and around the roots apply manure, straw, grape dregs, or anything of the sort, to make it stronger” and “if a vine is unhealthy, cut its shoots into small bits and plough or spade them in around it.”⁵³ While Cato’s work does not suggest any means of pest control, Marcus Terentius Varro’s *De Re Rustica* warns readers that, where grapevines are grown in beds on the ground,

⁴⁹ See generally John W. Head, *Planetary Health in Times of Converging Crises: Reflections on Stockholm, decolonization, restoration, and global ecological governance*, 19 L., ENV’T & DEV. J. 284, 285 (2023) [hereinafter *Planetary Health*]. For the discussion of “process-relational restoration,” see *id.* at 290-295.

⁵⁰ James Owen, *Earliest Known Winery Found in Armenian Cave*, NAT’L GEOGRAPHIC (Jan. 12, 2011), <https://www.nationalgeographic.com/culture/article/110111-oldest-wine-press-making-winery-armenia-science-ucla> [<https://perma.cc/SG5F-VCEC>].

⁵¹ Mark Berkowitz, *World’s Earliest Wine*, ARCHAEOLOGY (Sep./Oct.1996), <https://archive.archaeology.org/9609/newsbriefs/wine.html> [<https://perma.cc/M3D7-SQNU>].

⁵² Maynard A. Amerine, *Wine*, ENCYCLOPEDIA BRITANNICA (Aug 25, 2025), <https://www.britannica.com/topic/wine> [<https://perma.cc/SN56-CAX8>]. For another historical account of viticulture, see Lepird, *supra* note 34, at 115–120.

⁵³ MARCUS CATO, ON AGRICULTURE 49, 53 (William Davis Hooper trans., Harvard University Press 1935).

“[t]he foxes often share the harvest with man ... and if the land breeds mice the yield is cut short unless you fill the whole vineyard with traps.”⁵⁴

The 17th, 18th, and 19th centuries saw the expansion of winemaking — and thus viticulture — into new territories. Spanish missionaries began planting grapes in California; the British brought vines to Australia and New Zealand; and the Dutch brought grapes to South Africa as early as 1654.⁵⁵ However, the 19th century also saw the emergence of two blights accidentally imported from the United States that nearly destroyed the wine industry.⁵⁶

First, in the 1850s, European vineyards were suffering from a fungal blight known as oidium or “powdery mildew.” Farmers involved in the field-operations aspects of growing grapes for wine successfully treated the plants with sulfur (sulphur) compounds, which had already been found effective in earlier centuries as a form of pest management.⁵⁷ Then in the 1860s, the Phylloxera bug — a small insect that, upon piercing the roots of grapevines to feed on the plant fluids, can allow bacteria to infect those roots — emerged and decimated the European wine industry.⁵⁸ Eventually, the European vines were grafted onto the heartier American roots, leaving them less vulnerable to the insects.⁵⁹

Beginning roughly a century ago, the landscape of viticulture changed. Vineyard operations and wine-making techniques adopted many of the hallmarks of “industrial agriculture” as defined above — specifically the development of equipment operated by fossil fuel. After all, tractors and cultivators of various forms can be useful in vineyards, and the first tractors specifically designed for vineyard use were introduced in Europe in the 1920s.⁶⁰ More specific equipment also emerged: the 1960s saw the introduction of the mechanical grape harvester.⁶¹ This allowed grapes to be harvested more quickly and lowered the cost of human labor, but those mechanical harvesters — along with the use of gas- or diesel-powered equipment more generally — increased the greenhouse gas emissions coming from vineyards.

Modern grape-growing has seen other technological innovations that also reflect the industrialization of agriculture more generally. These include the use of satellite imagery and drip irrigation. More offensive in the minds of some people,

⁵⁴ MARCUS TERENCE VARRO, ON AGRICULTURE 159, 201 (William Davis Hooper trans., Harvard University Press 1935).

⁵⁵ Amerine, *supra* note 52.

⁵⁶ For a more detailed account of the two blights summarized below, see MacNeil, *supra* note 16, at 30-31.

⁵⁷ See MARY LOUISE FLINT, INTRODUCTION TO INTEGRATED PEST MANAGEMENT 51-52, 58-59 (1981).

⁵⁸ *Id.* at 58-59. For details on the process by which Phylloxera led to grape plant root damage, see Ric Bessin, *Grape Phylloxera*, UNIV. OF KEN. DEP'T ENTOMOLOGY, (Sep. 2017), <https://entomology.ca.uky.edu/ef222> [<https://perma.cc/9XWR-WN9B>].

⁵⁹ Flint, *supra* note 57, at 58-59.

⁶⁰ *Horses vs. Tractors for Vineyard Farming*, THIS DAY IN WINE HIST. (Feb. 29, 2024), <https://thisdayinwinehistory.com/horses-vs-tractors-for-vineyard-farming/> [<https://perma.cc/L7V7-7547>].

⁶¹ See Amerine, *supra* note 52.

though, has been the growing use of other chemical products, especially pesticides, that have emerged only in the past few decades. These include boscalid, penconazole, pyrimethanil, and fludioxonil; these are all pesticides — specifically fungicides — used primarily for addressing such problems as black rot, powdery mildew, and gray mold. According to a study by the U.S. National Institutes of Health, these are the most common pesticide residues identified in conventionally-grown grapes.⁶² Moreover, multiple sources document the presence of pesticide residue in grapes and wine from various geographic areas.⁶³

Globally, the California Department of Pesticide Regulation (CDPR) has the “largest and most complete database on pesticide use.”⁶⁴ A study of the CDPR’s Pesticide Use Reports (PUR) reveals a steady increase in pesticide use between 1935 and 2016.⁶⁵ Recently, however, CDPR’s PURs indicate a decrease in chemical pesticide use, both in agriculture generally and for producing table, raisin, and wine grapes.⁶⁶ Experts in California-based vineyard management support a mix of chemical and organic pesticide practices, demonstrating the shift towards organic viticulture. For instance, Madeleine Rowan-Davis, a senior viticulturist with Atlas Vineyard Management, notes that operators in that company “use chemicals and management practices that are permitted in organic farming, even in [their] conventionally farmed properties.”⁶⁷ Similarly, Mark Greenspan of Advanced Viticulture, Inc., explains that company’s finding that “a mix of ‘chemical’ and organic materials is often the best approach.”⁶⁸ This increasingly mixed-use approach demonstrates that organic methods are no longer

⁶² Dana Schusterova, Jana Hajslova, Vladimir Kocourek & Jana Pulkrabova, *Pesticide Residues and Their Metabolites in Grapes and Wines from Conventional and Organic Farming System*, 10 FOODS 307, 311 (2021).

⁶³ See, e.g., *id.* at 307–08 (United States); Ozgur Golge & Bulent Kabak, *Pesticide Residues in Table Grapes and Exposure Assessment*, 66 J. AGRIC. & FOOD CHEM. 1701, 1701–13 (2018) (Turkey); A. Bouagga, H. Chaabane, K. Toumi, A. Hamdane, B. Nasraoui & L. Joy, *Pesticide Residues in Tunisian Table Grapes and the Associated Risk for Consumer’s Health*, 12 FOOD ADDITIVES & CONTAMINANTS: PART B 135, 135–44 (2019) (Tunisia); and *Agrochemicals Registered For Use in Australian Viticulture*, AUSTRALIAN WINE RSCH. INST. (Sep. 15, 2025), https://www.awri.com.au/wp-content/uploads/agrochemical_booklet.pdf [<https://perma.cc/H8SG-KZFF>].

⁶⁴ See Larry Wilhoit, *History of Pesticide Use Reporting in California*, AM. CHEM. SOC. 1, 1 (2018), <https://pubs.acs.org/doi/10.1021/bk-2018-1283.ch001> [<https://perma.cc/4MXN-FM9H>].

⁶⁵ *Id.* at 12.

⁶⁶ *Pesticide Use Annual Report — 2022 Data Summary*, CAL. DEP’T OF PESTICIDE REGUL. (July, 2024) https://www.cdpr.ca.gov/wp-content/uploads/2024/12/pur_2022_data_summary.pdf [<https://perma.cc/PS32-4FTT>].

⁶⁷ Cheryl Gray, *Pest and Disease Control: Industry Specialists Help Vineyard Protect Their Most Valuable Commodities*, GRAPEVINE MAG. (Jan. 5, 2021), <https://thegrapevinemagazine.net/2021/01/pest-disease-control/> [<https://perma.cc/K9DC-HQCP>].

⁶⁸ *Id.*

a niche alternative but rather a favored practice in reducing reliance on chemical pesticides.

For the title of this subsection, I used this formulation: “*The viticulture sector: industrialization and its discontents.*” Just as with modern agriculture more generally, viticulture has widely adopted a suite of innovations that were impossible until the past several decades. The development of fossil-carbon sources of energy and of chemical production has transformed some aspects of viticulture into an industrial-agriculture model.

At the same time, some producers have resisted these developments, and in recent years they have started reaping rewards as consumers have expressed their own discontent with the industrialization of wine-growing and wine-making. For purposes of this article — focusing as it does on soil health — the practices used in *growing* grapes for wine should occupy our attention more than the practices used in *making* wine from grapes. However, the two processes (growing and making) are perhaps largely indistinguishable in the minds of many consumers.

How, and to what extent, have consumers expressed discontent with “industrial” vineyard operations and a preference for natural-systems viticulture? Here are some statistics and illustrations:

- Globally, younger generations are more likely to pay a premium for organic wines, due in part to having “more exposure to organic foods as children” and being “more aware of environmental issues from their primary education.”⁶⁹
- Italian consumers are more likely to purchase organically certified wine as a gift than for themselves, demonstrating a perception of a higher-quality product.⁷⁰
- Increasing public interest in natural-systems viticulture practices recently prompted a survey of over 1,500 U.S. wine consumers to study the “motivations and purchasing habits” of such consumers. The survey results “show that many younger consumers give concerns about personal health as a reason to buy eco-friendly wines; whereas for older and more frequent wine consumers it’s dominated

⁶⁹ Daniel Moscovici, Jeff Gow, Adeline Ugaglia, Rana Rezwanul, Lionel Valenzuela & Radu Mahailescu, *Consumer preferences for organic wine - Global analysis of people and place*, 368 J. CLEANER PROD. 1, 8 (2022), <https://www.sciencedirect.com/science/article/pii/S0959652622028025#sec4> [<https://perma.cc/QMC6-XD8M>].

⁷⁰ Fabio Boncinelli, Andrea Dominici, Francesca Gerini & Enrico Marone, *Consumers wine preferences according to purchase occasion: Personal consumption and gift-giving*, 71 FOOD QUALITY & PREFERENCE 270, 272, 275 (2019).

by concern for the environment.”⁷¹ Other U.S. wine-industry experts echo the same points about “increasing market demand for sustainably produced wine,” explaining that “[a]s the value of sustainability in the marketplace flourishes, growers and vintners across the U.S. are increasingly embracing sustainable winegrowing practices.”⁷²

- Most Canadian wine consumers report being in a transition state towards sustainable wine practices, indicating a need for further education and easily interpreted, sustainable certifications for consumers.⁷³ Wine Intelligence surveys suggest American wine

⁷¹ See *Why Consumers Really Buy Eco-Friendly Wines: New WMC Study Uncovers Surprising Insights*, WINE INDUS. NETWORK (Jun. 2, 2025), <https://wineindustryadvisor.com/2025/06/02/why-consumers-really-buy-eco-friendly-wines/> [<https://perma.cc/CU85-3TJR>] [hereinafter *Surprising Insights*] (quoting the president of the Wine Market Council). The same observer noted that “the number one motivation for both groups to purchase eco-friendly wines is to support the farmers and producers of these types of wines.” *Id.* The same survey revealed gaps in consumer understanding of various types of designations and certifications that I explore in this article: “The study found that consumers are more familiar with the definition of wine made with organic grapes ‘Organic grapes’ (73%), ‘Organic wine’ (63%), and ‘Sustainably produced,’ (56%). Only 25% claimed they understood the term, ‘Regenerative’, while ‘Biodynamic’ scored at 36% and ‘Natural’ wine at 41%.” *Id.*

⁷² *Consumer & Trade Research Shows Increased Demand for Sustainably Produced Wine*, WINE INST. (Jun. 9, 2020), <https://wineinstitute.org/press-releases/consumer-trade-research-shows-increased-demand-for-sustainably-produced-wine/> [<https://perma.cc/K67Q-TRNG>] [hereinafter *Consumer & Trade Research*].

⁷³ Gary J. Pickering, *Consumer engagement with sustainable wine: An application of the Transtheoretical Model*, 174 FOOD RSCH. INT’L 1, 1 (2023). For other analytical reviews of growing consumer interest in natural-systems viticulture, see generally Mark A. Bonn, Joseph Cronin, Jr. & Meehee Cho, *Do Environmental Sustainable Practices of Organic Wine Suppliers Affect Consumers’ Behavioral Intentions? The Moderating Role of Trust*, 57 CORNELL HOSP. Q. 21 (2016); Sujaya Mendon, Meghana Salins, Kavyashree K., Ashwini V., Shilpa K. & Sharmila Shetty, *Customers Expectation towards Factors Driving Sustainable Choice: A Study on Organic Wine Consumption in Developed Economy*, 43 BULL. PURE & APPLIED SCI. - ZOOLOGY (ANIMAL SCIENCE) 1531 (2024); *Sustainably Produced Wine (US Market)*, WINE INTEL. (Jun. 2019), https://wineinstitute.org/wp-content/uploads/2019/12/Wine-Intelligence_US-Sustainability-Consumer-Research_June-2019.pdf [<https://perma.cc/6STM-Z42J>] [hereinafter *Sustainably Produced Wine*]; Giovanni Sogari, Cristina Mora & Davide Menozzi, *Sustainable Wine Labeling: A Framework for Definition and Consumers’ Perception*, 8 AGRIC. & AGRIC. SCI. PROCEDIA 58 (2016) (reporting on a study emerging from the fact that “the wine sector has seen the growth of ‘environmentally-friendly’ and ethical claims according to specific eco-certification schemes and labelling programs.”); See also *Global Wine Consumption Trends: The Shift Toward Sustainability, Quality, and Younger Consumers*, WINE INTEL. (Nov. 20, 2024), <https://wine-intelligence.com/blogs/wine-news-insights-wine-intelligence-trends-data-reports/global-wine-consumption-trends-the-shift-toward-sustainability-quality-and-younger-consumers> [<https://perma.cc/H9U2-DTJB>] (noting that a survey of wine-industry experts indicates that “[a] growing percentage of wine drinkers are making sustainability a priority [and that] ... [n]early 85% of those surveyed believe organic wine will lead consumption growth”).

consumers are in a similar change state, with 71% of participants reporting that they would consider purchasing sustainably produced wine.⁷⁴

As might be obvious from some of those illustrations, the distinctions between “biodynamic,” “organic,” and other labels or claims are fuzzy in the minds of consumers,⁷⁵ or at least in the minds of observers reporting on consumer sentiments. To examine what legal or policy reforms might be involved in responding to the pro-“natural” consumer sentiment, we need to define the relevant terms more precisely, especially as they apply in legal and regulatory settings.

In her popular book *The Wine Bible*, Karen MacNeil offers this account under the heading of “Sustainable and Organic: A Farm for the Future”: “In the first decade of the twenty-first century, the movement toward eco-friendly grape-growing accelerated worldwide.”⁷⁶ For MacNeil, “[g]reen viticulture ... generally falls under one of three concepts: sustainable, organic, or biodynamic.”⁷⁷ For reasons that I noted above in subsection IIA, I would exclude “sustainable” from the mix, and indeed MacNeil acknowledges that “sustainable viticulture has no single definition or legal requirements.”⁷⁸

The other two categories MacNeil identifies — “organic” and “biodynamic” — *do* have legal and certification requirements, and it is those two categories that, together with a third category of “regenerative viticulture,” that will hold our attention for the remainder of this survey. I start with “biodynamic viticulture” and the specific normative requirements that have been established for that designation. Most of those requirements date back roughly a century. Then I turn to the more recently established designations of “organic viticulture,” “regenerative viticulture,” and a few other similar labels. I end the survey in subsection IIG with an explanation of my term “science-based biodynamic regenerative viticulture.”

IIC. Biodynamic viticulture

Karen MacNeil offers this general description of biodynamic agriculture, focusing especially on its historical and theoretical underpinnings and the natural-systems approach that its earlier pioneers had in mind:

While biodynamic methods have been used by farmers for centuries, the term *biodynamics* came into use in the 1920s and was based on the teachings of the Austrian philosopher Rudolf Steiner and his student Maria Thun. Sometimes described as a “spiritual science,” biodynamic farming involves managing a farm holistically as a regenerative living organism. Vines are

⁷⁴ *Consumer & Trade Research*, *supra* note 72.

⁷⁵ *See, e.g., Surprising Insights*, *supra* note 71.

⁷⁶ MacNeil, *supra* note 16, at 35.

⁷⁷ *Id.*

⁷⁸ *Id.*

fertilized using compost created on the farm, and soils are regenerated naturally through the waste droppings of farm and ranch animals. Harmful pests are controlled by encouraging a population of beneficial pests that feed on them, creating a “living balance.” Biodynamic practitioners [*sic*] envision plants as existing in a “middle kingdom” influenced from below by the forces of the earth and governed from above by solar and astral forces. Thus, vineyard practices such as pruning are done according to the movement of the moon through the twelve houses of the zodiac. The goal of biodynamics is to align all of the forces of Nature, creating a natural harmony.⁷⁹

This synopsis by MacNeil needs unpacking in two respects. First, a distinction should be made between (i) the so-called “spiritual science” (or anthroposophy) attributable to Steiner and Thun (those are the aspects of biodynamic agriculture that so bothered my friend Tim Crews) and (ii) the specific practices that biodynamic agriculture actually encompasses, based on the purported benefits of those elements. Second, we should focus on the detailed certification requirements promulgated by the Demeter organization, technically titled The Biodynamic Federation Demeter International.⁸⁰ Doing so will reveal why only a few viticulture operations have earned Demeter’s official certification as “biodynamic” under that system, even though a much larger number of viticulture operations are certified as “organic” under U.S. and European standards.

The Steiner lectures, presented in 1924, make for fascinating but frustrating reading because they blend the so-called “spiritual” features of biodynamic farming with the specific practices that Steiner urges farmers to follow. To a modern reader, the spiritual features seem about 90 percent “woo-woo speculation” that is patently unscientific. Steiner offers almost no factual data or disciplined observation as authority for most of the propositions he offers.

Therefore, in composing this article, I faced a conundrum: Should I provide selected representative excerpts from Steiner’s lectures — reflecting the fact that Steiner is universally acknowledged as the founding voice for biodynamic

⁷⁹ *Id.* at 34.

⁸⁰ As explained by one source, there are two systems for biodynamic certification: The Demeter system, “[n]amed after the Earth Mother in Greek Mythology ... is overseen by The Biodynamic Federation Demeter International...” which was formed in 2020 from a merger of two other organizations and which dates back to the teachings of Rudolf Steiner, and Biodyvin, which is an “alternative certification [system] ... run by a group of over 200 member wineries,” mostly in France but with some members also in several other European countries. See Tom Jarvis, *Certified Biodynamic Wine*, WINE-SEARCHER (Dec. 9, 2024), <https://www.wine-searcher.com/certified-biodynamic-wine?srsId=AfmBOortVbsPbyzPM7PMk22PtMqMNdGW-Tti8aQzH0wXKlqGCe2TX> [<https://perma.cc/9PMH-R9DZ>].

agriculture — or should I offer only a tiny synopsis? I have split the difference. In the Appendix to this article I provide a few pages of representative excerpts, and I offer here a bare-bones bullet-point synopsis⁸¹ of the assertions Steiner made in his lectures,⁸² delivered just a year before he died in 1925:

- For Steiner, the *placement of the planets* and moon in relation to the earth is of utmost significance because of the roles of silicon and limestone in any cultivated field. He refers first to what he calls “the life of the siliceous substance in the world” and says that this substance contains forces that come not from the Earth itself but from Mars, Jupiter, and Saturn.
- Especially for plants used for food (rather than those which Steiner says “do nothing but reproduce themselves”), *silicon is especially important because it “opens up the being of the plant to the expanses of the Universe, ... so that it absorbs the formative forces bestowed by [those] planets”* (Mars, Jupiter, Saturn).
- Water is also essential in agriculture, and “[t]here is much more hidden in water than appears in the chemical properties of hydrogen and oxygen. *Water by its very nature ... distributes the lunar forces throughout the earthly realm.*”
- The Moon also has an effect on water in the plant kingdom. Indeed, “the *forces coming from the Moon* when it is full causes [*sic*] something tremendous to happen on Earth.” Those forces “*shoot right into the whole growing forces of the vegetable kingdom,*” at least if there has been a rainy spell before the full moon.
- The basis of all agriculture, though, “is the soil of the earth.” Soil is more than just mineral supplemented with other organic substances. Instead, soil “is a kind of organ within that organism which manifests itself wherever the growth of Nature appears.” For Steiner, “[*t*]he earth surface is really an organ ... which ... you may compare with the human diaphragm” with the head of the body underground and the bowels up above the ground, so that “[o]n a farm, we are walking about inside the belly, and the plants grow upwards within this belly.”

⁸¹ I thank Lucia Orth (who, like Tim Crews, is certainly no enthusiast for Steiner) for generating this synopsis.

⁸² For a full English version of the lectures’ transcripts (first prepared in 1929), see generally Guenther Wachsmuth, *The Agriculture Course*, RUDOLF STEINER ARCHIVE, https://rsarchive.org/Lectures/GA327/English/RSPC1938/Ag1938_index.html [<https://perma.cc/UJH4-KDPF>]. All specific citations to quoted material in the following bullet-points appear in Appendix A. In the following bullet-points, all added emphasis is my own.

- *Cosmic forces from planets and the Moon interact with plants through clay*, which “is the mediator through which the cosmic activity in the soil is enabled to work from below upwards.”
- Rich soil (humus) is best for this uptake process because “*when the seed is placed in the soil it is ... filled with the longing to deny the cosmic forces*, in order that it may spread and grow in all directions.” We need to “introduce[e] into the plant some form of living earthly matter which has not reached the state of chaos and seed formation, life which has been held up in a plant before the seeds have been formed.”
- The emphasis Steiner places on certain minerals and on introducing “living earthly matter” into plants seems consistent with the instructions he gives farmers for creating special mixtures (“preparations”) and then spraying them “over tilled land so [they] can get thoroughly into the soil.” Some of these preparations involve pressing manure into a cow-horn and burying for a period of time, then liquefying it for spraying. Other preparations involve quartz or flint buried in a cow-horn and later spraying the results (liquified and diluted) on the land.

Looking quickly at these key assertions from Steiner’s lectures or reviewing the longer excerpts that I provide in the Appendix to this article reveals just how odd or even inscrutable his assertions look to us as modern readers. In this regard, we can take some comfort in the reactions offered by Steiner’s audience from a hundred years ago:

When one reads the translated full text of the lectures, along with the interspersed question and answer discussions, one is reminded of the comments of others on reading Steiner’s work. ‘Tough going’ and ‘impenetrable’ ... ; “difficult” ... ; “daunting”, “confusing”, and “bewildering” ... ; and “irritatingly incomprehensible” ... are typical comments of those who have studied Steiner in depth.⁸³

I would offer three conclusions that I draw from my own survey of Steiner’s teachings. *First*, Steiner engaged in what seems patently unscientific. Indeed, I find the term some observers offer — “spiritual science” — to be overly generous in describing Steiner’s teachings, which seem to have precious little foundation in science of any sort.

⁸³ Andrew Chalk, *What Did Rudolf Steiner Actually Say?*, CHALK REP. (Dec. 2, 2022), <https://www.thechalkreport.com/post/what-did-rudolf-steiner-actually-say> [<https://perma.cc/W9ZU-J987>].

Second, Steiner seems to have been disengaged from the practice of farming itself — so disengaged, in fact, that one might ask just what Steiner's qualifications were for formulating and explaining a new discipline of "biodynamic agriculture." One observer, writing particularly from a viticulture perspective, offers this skeptical response:

[W]here Steiner had the most impact for wine industry participants was the creation of what came to be called biodynamic agriculture (often called biodynamics). Given this, it seems remarkable that Steiner's life [... had] so little involvement with agriculture, agronomy, other agricultural scientists, botanists, or biology. Certainly, he came across biology in his reading of Goethe, but this would have been mainly confined to morphology. Rather, the source of the comprehensive system of agriculture that Steiner presented is something of a mystery.⁸⁴

Third, despite how unscientific — even alien — some of Steiner's views might seem, he does posit numerous fundamentals that ring true, such as his assertion that "[t]he basis of all Agriculture is the soil of the earth"⁸⁵ and his statement that "the forces coming from the Moon when it is full causes something tremendous to happen on Earth."⁸⁶ The latter of these points (the significance of lunar phases) inspired Maria Thun (1922-2012), a German farmer, to study how lunar movements affected the growth of plants. One source offers this summary of her work:

Rudolf Steiner had pointed out the connection between cosmic forces and the growth of plants. Maria Thun began studying the astronomical calendar ... and discovered that every two or three days the moon passed into in a different constellation of the zodiac. This made her decide to study astronomy more intensively. She discovered that radishes acquired a different form and size depending in which constellation they were planted.

Maria Thun continued experimenting with sowing during the 1950s with almost all types of crops to see whether the movement of the

⁸⁴ *Id.* That same source explains the setting for Steiner's lectures, which evidently did attract some practicing farmers: "The actual delivery of [Steiner's views on] biodynamics was over 10 days in a series of 8 lectures in Koberitz, Silesia (now Kobjerzyce, Poland), from the 7th to the 16th June, 1924. The audience of just over 100 consisted of farmers and members of the Anthroposophical Society." *Id.*

⁸⁵ See *infra* text accompanying note 309.

⁸⁶ See *infra* text accompanying note 307. The moon's effect on tides is well known, but "Isabella Guerrini, at the University of Perugia, is one of the many researchers studying the effects of the moon on plants. Her studies show that plant sap moves and changes in intensity according to the phases of the moon." Anna Buzzoni, *The Moon in History and Biology*, STUDIO MEDULLA (Feb. 26, 2021), <https://studiomedulla.com/the-moon-in-history-and-biology/#:~:text=Isabella%20Guerrini%2C%20at%20the%20University,the%20phases%20of%20the%20moon> [https://perma.cc/CD6C-JC38].

moon had the same effect on all crops. From her observations she divided passage of the moon through the zodiac into four: root days, leaf days, fruit days and flower days, each indicating which type of plant is best sown on each specific day

The news of the results of [Maria Thun's] trials spread quickly through the biodynamic movement and *The Biodynamic Sowing and Planting Calendar* has been published annually for the last 50 years. As the extent of the trials expanded, so did the calendar and early on it was translated into French and Finnish, and today it is available in 27 languages.⁸⁷

With these observations as background to the historical and spiritual foundations of biodynamic agriculture in general, I turn to this more specific two-part question: How much of Steiner's teachings, and how much of Maria Thun's calendar, have found their way (i) into the actual practices of "biodynamic viticulture" and (ii) into the specific normative requirements that have been established for a formal "biodynamic" designation under the Demeter standards?

I would answer the first part of the question with "it depends." A few small vineyard operations do explicitly embrace Steiner's teachings and/or Maria Thun's calendar vigorously,⁸⁸ while others do little more than acknowledge their debt to some fundamental principles emphasized by Steiner and Thun.⁸⁹ The

⁸⁷ See *Maria Thun Biography*, FLORIS BOOKS, <https://www.florisbooks.co.uk/authors/maria-thun.php> [<https://perma.cc/S96Z-3AT6>].

⁸⁸ See, e.g., *Biodiversity*, AGRICOLA FORADORI, <https://www.agricolaforadori.com/biodiversita/> [<https://perma.cc/VFC2-7WVC>] (giving prominent attention to Steiner, including a three-page excursus on his philosophy, as being central to the viticulture operations of the Foradori vineyards near Trento, Italy — but with no mention of Maria Thun). See also *About Us*, TOJAK PENDITS, <https://pendits.com/en/about-us/> [<https://perma.cc/2B7U-8PDG>] (noting this Hungarian winery's adherence to the biodynamic planting calendar); see also <https://chateaumonty.com/pendits/> (citing Maria Thun specifically); *Biodynamics*, CULLEN WINES, <https://cullenwines.com.au/pages/biodynamics> [<https://perma.cc/3V3H-W264>] (offering a "Self-Guided Spiral Garden Biodynamic Tour" in which visitors to this Australian vineyard operation can learn about Steiner's practices); and *Frequently Asked Questions*, ROXANICH, <https://www.roxanich.com/faq> [<https://perma.cc/82EF-QTSZ>] (relying on Steiner and Thun's work for the basis of the practices of this Croatian vineyard). For other winery websites mentioning Steiner but not Thun in its praise of their biodynamic viticulture operations, see l'Univers M. Chapoutier, *Biodynamics*, <https://www.chapoutier.com/en/the-maison/biodynamics/> [<https://perma.cc/LCR8-BPVU>]; *Biodynamic: A Way of Life*, FREY VINEYARDS, <https://www.freywine.com/demeter-biodynamic> [<https://perma.cc/42BL-6ZJW>] (quoting Steiner but without referring to Thun).

⁸⁹ See, e.g., *A Soulful Approach*, ANALEMMA WINES, <https://analemmawines.com/a-soulful-approach/> [<https://perma.cc/C2Q2-2B7W>] (mentioning the word Demeter once but with no mention of Steiner or Thun as relevant to the operations of Analemma viticulture operations

answer to the second part of the question, however, seems clear: the Demeter standards require that in order to gain official certification as “biodynamic,” their operators must follow a fairly definite set of prescribed practices, including the use of “preparations” of the sort espoused by Steiner himself, but the Demeter standards give little attention to the Maria Thun calendar.

As noted above, Steiner’s instructions (delivered to the farmers listening to his 1924 lectures) regarding “preparations” involve the use of buried cow-horns — some stuffed with manure, some with other ingredients — and spraying a diluted liquid that results from that process.⁹⁰ These instructions have been adopted in part by the Demeter biodynamic-certification system. Under the English version of the international standards,⁹¹ Demeter certification of a vineyard requires application of certain compost preparations and certain cow-horn manure preparations.⁹² The general rationale for these requirements is as follows:

The biodynamic compost and spray preparations (= “preparations”) created out of natural and organic substances are used in minute doses to enhance soil life, plant growth and quality and animal health. They act as a kind of “bio regulator”, forcing the self-regulation of biological systems, e.g. the farm’s whole biological cycle.

headquartered in Mosier, Oregon, in the Columbia Gorge AVA); *see also What is Biodynamic Farming?*, HEDGES FAM. EST., <https://hedgesfamilyestate.com/the-land> [<https://perma.cc/QV4E-FQHC>] (displaying the Demeter certification design but with no mention of Steiner or Thun as relevant to the operations of Hedges Family Estate viticulture operations headquartered Benton City, Washington, in the Red Mountain AVA); *see also Farming*, QUIVIRA WINE, <https://quivirawine.com/farming/> [<https://perma.cc/EH39-DXK5>] (maintaining biodynamic practices while moving away from Demeter Biodynamic Certification, noting that many required practices had no beneficial effects); *Who We Are*, SUMMERHILL PYRAMID WINERY, <https://www.summerhill.bc.ca/us/who-we-are/#planet> [<https://perma.cc/4RYZ-2JK4>] (briefly describing biodynamics as “the most holistic” without mention of Steiner); *Certifications*, BENZIGER FAM. WINERY, <https://www.benziger.com/certifications/> [<https://perma.cc/2EBL-EFSE>] (discussing an overview of the practices of this California vineyard without mention of Steiner); and *see Domaine de l’Octavin*, MYSA NAT. WINE, https://mysa.wine/collections/domaine-de-loctavin?srsId=AfmBOoqaz-9cC5_ICxMmirGI3xhYY0QMqiCjI2_d5K3qH0kg1sIxyW18 [<https://perma.cc/QAD5-QR7S>] (in the Jura region of France, noting this vineyard’s Demeter certification but with no mention of Steiner or Thun).

⁹⁰ *See* the last bullet-point in the list following note 82, *supra*. For the excerpt from Steiner’s lectures relating to “preparations,” *see* the last entries in the Appendix to this article.

⁹¹ The four language versions of the Demeter standards are in English, Spanish, German, and French, although “in case of unclarity the English version is the deciding one.” *See The Demeter Standard: The Strictest Standard for Organic Agriculture Worldwide*, BIODYNAMIC FED’N DEMETER, <https://demeter.net/certification/standard/> [<https://perma.cc/9564-SXEV>]. The version used in the following discussions is the first of these; *see Production, Processing, and Labelling: International Standard for the use and certification of Demeter, Biodynamic and related trademarks (as of: September 2024)*, BIODYNAMIC FED’N DEMETER (Sep. 2023), https://demeter.net/wp-content/uploads/2024/10/2025_Int_Dem_bio_Standard_eng.pdf [<https://perma.cc/42GQ-UTRZ>] [hereinafter Demeter-English].

⁹² *See* Demeter-English, *supra* note 91, at 76.

They are essential to biodynamic agriculture and their use is a recognised requirement of the International Demeter Biodynamic Standard.

The production of preparations takes place on the farm. The method of production involves taking certain plant materials (e.g. camomile flowers, grated oak bark and dandelion flowers), cow manure or quartz meal, placing them in selected animal organ parts and fermenting them in the soil for certain period of time, usually half a year.⁹³

As a practical matter, the details on how to *make* the preparations are of little concern to many Demeter-certified vineyards, because the viticulturalists can *purchase* the preparations required in the Demeter standards.⁹⁴ More significant to most Demeter-certified vineyards would be the requirements on how to *apply* the preparations, including these details:

Cow-horn manure or prepared cow horn manure (500P) is to be spread at the start of the vegetative phase, or after harvest of the certified crop, but in any case at least once a year at a rate of at least 50 gr/ha. Horn silica is to be sprayed as the plant stage of development dictates,

⁹³ *Id.* at 131.

⁹⁴ See *Ask Jim*, DEMETER ASS'N, INC. (2013), <https://www.demeter-usa.org/for-farmers/for-farmers-archive/biodynamic-preparations.asp> (“Beyond making the [Preparation] 500 oneself, ... the 500 can be purchased from the Josephine Porter Institute (JPI) or from one of the numerous groups making the preparations across America”); See also *Biodynamic Preparations*, JOSEPHINE PORTER INST., <https://jpibiodynamics.org/collections/biodynamic-preparations> [<https://perma.cc/FAZ3-XLH5>]. The blogpost offers this counterpoint to the view that the use of preparations involves pseudoscience or poppycock:

While some like to poke fun at a Biodynamic practitioner’s use of preparations made in cow horns, the material that results is uber-biological, teeming with beneficial soil-based flora and fauna. If understanding the 500 only from a mechanical cause and effect point of view it can be understood as a soil inoculant. But anyone with a background or understanding of homeopathy can see a more holistic reality and view it as homeopathic medicine for the earth. The 500 and all the Biodynamic preparations medicinally treat the Earth as a living organism much like naturopathic medicines treat us. In fact it is a principle of homeopathy that very small amounts of material, when rhythmically potentized, are much more potent than large amounts of material. While a strange new world for some, it is an intrinsic element of Biodynamic agriculture.

Ask Jim, DEMETER ASS'N, INC. (2013), <https://www.demeter-usa.org/for-farmers/for-farmers-archive/biodynamic-preparations.asp> [<https://perma.cc/EX3Q-LN36>].

preferentially during the intensive growth stage and imperatively between growth stage and harvest, at a rate of at least 2.5 g/ha. ... The spray preparations must be applied with clean equipment. ... All organic manures (stable manure, compost etc.) are to be treated with the compost preparations.⁹⁵

In addition to the requirement for the use of certain compost preparations and certain manure preparations, the Demeter standards include provisions on:

- *Non-contamination.* “At all stages of production and processing there must be protocols in place to ensure that contamination of Demeter products is actively excluded (this includes cleaning products and protocols, separate production runs for Demeter products and other strategies to actively avoid mixing and substitution with uncertified materials).”⁹⁶
- *Origin of raw material.* Subject to some exceptions, “[p]rocessed Demeter products can only include agricultural products (including animal products) which originate from certified biodynamic farms (with a Demeter contract) which have been processed with Demeter approved aids and additives.”⁹⁷
- *Labeling.* “The Biodynamic trademarks ... can only be used to label ingredients, materials and products that meet [the Demeter] standard, by an organisation that has Demeter certification”⁹⁸ Regarding wine in particular, “[i]f wine is made from Demeter certified grapes and meets the [International Demeter Biodynamic Standard], it may be labelled with the Demeter trademark logo”⁹⁹
- *Genetically modified organisms.* “Seed, propagation and plant material of genetically modified varieties (GMO) including protoplasm and cytoplasm fusion techniques may not be multiplied or sown on Demeter enterprises.”¹⁰⁰
- *Fertilization.* Subject to certain exceptions, “[t]he total amount of nitrogen applied from all types of fertilisers used, may not exceed ...

⁹⁵ See Demeter-English, *supra* note 91, at 76.

⁹⁶ *Id.* at 18.

⁹⁷ *Id.* at 22.

⁹⁸ *Id.* at 36.

⁹⁹ *Id.* at 45. Other labeling rules apply to wines that use Demeter certified grapes but are processed using the EU organic wine standards instead of the Demeter standards; these wines can be labeled “Wine made from Demeter Grapes.” *Id.* For a summary of EU organic agriculture standards, see *infra* subsection IID.

¹⁰⁰ *Id.* at 55. Beyond prohibiting GMOs, the Demeter standards also prohibit the use of “material produced by new plant breeding techniques,” including through cisgenesis and CRISPR technology. *Id.* at 55–56.

50kg N/ha/y for viticulture (calculated as an average over three years)
...¹⁰¹

- *Irrigation water.* “The water must not be contaminated with pesticide residues, disease causing bacteria or parasites, or contaminate the end product in any way. If surface water is used for professional irrigation the water quality must be monitored through regular analyses.”¹⁰²
- *Livestock.* Although exemptions are available, “Demeter certification of agricultural enterprises without the incorporation of animals on the farm is [typically] not possible”¹⁰³ The number of “livestock units” per acre is smaller for agricultural operations under 40 hectares than it is for larger operations.¹⁰⁴
- *Sulfur.* As noted above, sulfur (sulphur) compounds have been used in viticulture for several centuries and for various purposes.¹⁰⁵ The Demeter standards impose limits on its use on any type of farm (not just a vineyard) wishing to qualify for biodynamic certification. For instance, lime sulfur qualifies as an “allowable aid” that can be used as a fungicide, insecticide, or acaricide.¹⁰⁶ Sulfur can also be used as a cleaning agent¹⁰⁷ and as a fertilizer or soil conditioner if “the results of soil testing, tissue/leaf analysis or other deficiency symptoms demonstrate the need [for such use].”¹⁰⁸

¹⁰¹ *Id.* at 59. “If [a biodynamic farm’s] own farmyard manure is not sufficient to cover the nitrogen demand, other fertilisers may be imported,” but only from organic sources. *Id.*

¹⁰² *Id.* at 71.

¹⁰³ *Id.* at 77. In order to meet the livestock requirements, a Demeter-certified farm can enter into cooperative arrangements with another biodynamic or organic farm. *Id.* at 79. Conditions for managing the livestock “must be organised such that the animals can express normal behavioural characteristics and movement; e.g. they must be able to stand and lie down unhindered, and have a dry resting place.” *Id.* at 80.

¹⁰⁴ In general, a farm involving less than 40 hectares must have at least 0.1 livestock units (defined differently for different types of livestock) per hectare, whereas a larger farm requires 0.2 livestock units per hectare. *Id.* at 77–78.

¹⁰⁵ See *supra* text accompanying note 57.

¹⁰⁶ Demeter-English, *supra* note 91, at 125. The Demeter standards explicitly permit use of wettable sulfur in case of a “fungal attack,” but only ... in “cases of proven need, and only if the biodynamic measures (e.g. rhythmical use of horn silica for insect control, peppering) cannot bring the problem under control.” *Id.* 123–124. See also *Biodynamic® Farm Standard*, DEMETER ASS’N, INC. (March 2023), <https://www.demeter-usa.org/downloads/Demeter-Farm-Standard.pdf> [<https://perma.cc/87SM-BBX4>]. In the winemaking process, as distinct from vineyard operations, sulfur dioxide can also be used as an additive or processing aid. Demeter-English, *supra* note 91, at 30.

¹⁰⁷ Demeter-English, *supra* note 91, at 53.

¹⁰⁸ *Id.* at 120–121.

It is important to understand that the Demeter standards include both mandatory *rules* and (more extensive) *guidelines* that are characterized as “a recommendation only.”¹⁰⁹ The standards I have highlighted above — for instance, requiring the use of certain types of preparations, prohibiting GMOs, and limiting the use of sulfur — all qualify as *rules*. Among the many other provisions of the 204-page International Demeter Biodynamic Standard” document are *guidelines*.¹¹⁰ Some of these relate to the preferred processes for formulating the preparations,¹¹⁰ but more generally they take the form of entreaties to farmers to act responsibly within the overall philosophy and aims of biodynamic agriculture:

The aim is always to practise agriculture in such a manner that structuring the farm as an integrated unit results in productivity and health, and that those inputs needed for production are generated out of the farm itself. If one however wants to use these standards in such a way as is often the case with laws, that the only concern is with adherence to formalities, or loopholes are sought for economic advantage, one should practise agriculture in some other fashion.¹¹¹

However, as I have emphasized above in subsection IIA,¹¹² the wave of consumer enthusiasm for “organic” and other natural-systems products is strong. Viticulture operations wishing to ride that wave need to consider the benefits of Demeter biodynamic certification. It is by far the oldest certification system for biodynamic operations, including vineyards, dating back to the 1920s.¹¹³ Even if the Steiner-Thun foundations of biodynamics trigger suspicion or rejection, the actual *rules* prescribed in Demeter certification standards reflect a serious commitment to responsible vineyard operations aimed at long-term stewardship of ecosystems (and especially soils) by environmentally-conscious farmers of the 2020s. Those rules carry almost no visible mark of the Steiner “woo-woo” of the 1920s.

I will offer another way of emphasizing this distinction between (i) the spiritual or “woo-woo” aspects of the Steiner-Thun version of biodynamic farming (especially as applied to viticulture) and (ii) all the *other* aspects of biodynamic viticulture as enumerated in the bullet-point list I offered above.¹¹⁴ Not a single item on the bullet-point list carries the Steiner-Thun spiritual or “woo-woo” elements of what we might call “orthodox” biodynamic agriculture. Instead, all of

¹⁰⁹ *Id.* at 131.

¹¹⁰ *See id.*

¹¹¹ *Id.* at 11–12.

¹¹² *See supra* text accompanying notes 22–28.

¹¹³ *See Certification*, DEMETER ASS'N, INC., <https://www.demeter-usa.org/certification/#:~:text=It%20is%20part%20of%20a%20world-wide%20organization%2C,the%20USA%20as%20a%20non-profit%20in%201985> [<https://perma.cc/98W6-ZRRN>] (“Demeter International ... was first formed in 1928 ... to advocate Biodynamic agriculture and to certify Biodynamic farms. Demeter remains the oldest ecological certification organization in the world, active in fifty countries around the globe”).

¹¹⁴ *See supra* text accompanying notes 96–108.

the items on the bullet-point list — even its rules on limiting the use of sulfur¹¹⁵ — would be unsurprising to any farmer familiar with agricultural realities before the introduction of fossil-carbon inputs, especially in the forms of petroleum-based fuels and synthetic fertilizers and pesticides. Expressed differently, what we might call “secular biodynamic agriculture” (including viticulture) strips out the spiritual or “woo-woo” elements to create an approach that resembles solar-based agriculture as practiced by humans for several thousand years. This “secular biodynamic agriculture” is (i) based mainly on energy from the sun, (ii) is conducted largely free of exogenous inputs and contaminants, and (iii) has emerged from generations of careful, broad-based experience-informed assessment of what techniques best serve the long-term interests of soil health (a term I define below in subsection IIIA). The only significant “residual” element from Steiner-Thun “orthodox biodynamic agriculture” showing up in the Demeter certification rules relates to the “preparations”; they remain as requirements even though their practical value has not yet been proven through broadly-accepted scientific inquiry and analysis — a matter I mention below in subsection IIIB.

In short, the Demeter approach to biodynamic approach is *not* Steiner’s sophomoric anthroposophy, infused with spiritual and “woo-woo” elements. To reject the tenets of biodynamic viticulture on grounds of “guilt by association” with Steiner or Thun is tantamount to throwing out the baby with the bathwater; doing so would also fly in the face of the reality that Karen MacNeil reminds us of: “biodynamic methods have been used by farmers for centuries.”¹¹⁶

One of the most important prerequisites to earning the Demeter biodynamic certification is that the farming operation first meets the relevant standards for “organic” production. Accordingly, let us turn to those standards.

IID. Organic viticulture

The pertinent passage in the Demeter standards emphasizes that “[a]ll labels that use the Biodynamic trademarks must also meet all ... current regulations for labelling of organic agricultural products (e.g. EU organic regulation, NOP, etc.).”¹¹⁷ In this context, “NOP” stands for the National Organic Program of the United States.¹¹⁸ Moreover, although products coming from a Demeter-certified operation typically need to use raw materials that *also* come from a Demeter-certified operation, an exception is available: the Demeter-certified operation can draw some of its raw materials from an external operation that meets the “organic” certification requirements.¹¹⁹

¹¹⁵ Demeter-English, *supra* note 91, at 120–121. *Also see* text accompanying note 108.

¹¹⁶ *See* MacNeil, *supra* note 16, at 34.

¹¹⁷ Demeter-English, *supra* note 91, at 35.

¹¹⁸ *Id.* at 21.

¹¹⁹ *Id.* at 22 (specifically citing the National Organic Program administered by the USDA).

In the context of a U.S. viticulture operation, then, the Demeter requirements constitute an “overlay” on the U.S. NOP requirements. That is, a vineyard in the United States wishing to gain certification as a biodynamic farm — and eligible therefore to display the official Demeter label — must first meet the organic-agriculture requirements of the NOP as administered by the USDA.

Meeting those NOP standards is challenging. They require, for instance, that crops not be genetically modified; they prohibit the use of most synthetic pesticides and fertilizers; growth hormones and sewage sludge are also prohibited.¹²⁰ Furthermore, seeds used to grow organic products must be organic themselves if possible, and must not be treated with fungicides.¹²¹ Organic farms must implement crop rotation and must follow so-called “PAMS” pest control strategies, with the term “PAMS” referring to prevention, avoidance, monitoring, and suppression.¹²² This approach favors prevention but allows the use of pesticides as a last resort, so long as they are approved by the organic certifier.¹²³ Farmers may not apply any prohibited substances to land that is to be used for organic farming for three years before the resulting product can be labeled “USDA Organic.”¹²⁴ Any application of a prohibited substance — even if done unintentionally — triggers the suspension process, and the three-year wait must begin again.¹²⁵

Europe has its own regime of organic-agriculture standards. Most of those standards appear in EU Regulation 2018/848, adopted in 2018, but amended several times since then.¹²⁶ Many of the EU standards resemble those of the USDA’s NOP. For example, the EU standards (like the U.S. standards) require a three-year transition period to gain organic certification.¹²⁷ Genetically modified

¹²⁰ *Allowed and Prohibited Substances*, USDA (July 1, 2013), <https://www.ams.usda.gov/sites/default/files/media/Allowed-Prohibited%20Substances.pdf> [<https://perma.cc/9PJK-GRSE>].

¹²¹ *Introduction to Organic Practices*, USDA (Sep. 11, 2015), <https://www.ams.usda.gov/sites/default/files/media/Organic%20Practices%20Factsheet.pdf> [<https://perma.cc/253Q-B2K2>].

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*; See also Lepird, *supra* note 34, at 128 (noting that even after meeting the three-year requirement, a vineyard is subject to yearly inspections and that “[t]his constant oversight coupled with an uncertain cost, on top of an already steep entry level investment to begin a vineyard, has caused some vinticulturists to be reluctant to become certified”).

¹²⁶ Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on Organic Production and Labelling of Organic Products and Repealing Council Regulation (EC) No. 834/2007, 2018 O.J. (L 150) 1 [hereinafter EU Regulation 2018/848]. According to the European Commission’s website, this 2018 regulation “is the applicable legislative act, also known as the basic act, laying down the rules on organic production.” *Legislation for the Organics Sector*, EUR. COMM’N, https://agriculture.ec.europa.eu/farming/organic-farming/legislation_en [<https://perma.cc/E6SB-LDDL>].

¹²⁷ EU Regulation 2018/848, *supra* note 126 art. 10; *id.* annex II, point 1.7.1.

organisms (“GMOs”) are prohibited.¹²⁸ Strict limits are imposed on any non-natural method of pest management.¹²⁹

The demanding standards imposed by the EU rest on a remarkably ambitious set of objectives, including these as announced in the 2018 regulation:

- contributing to protection of the environment and the climate;
- maintaining the long-term fertility of soils;
- contributing to a high level of biodiversity;
- substantially contributing to a non-toxic environment;
- contributing to high animal welfare standards and, in particular, to meeting the species-specific behavioural needs of animals¹³⁰

According to the EU organic-agriculture regulation, meeting these objectives will require applying certain general principles, such as “respect for nature’s systems and cycles,” “preservation of natural landscape elements,” “responsible use of energy and natural resources,” and “the use of precautionary measures and preventive measures.”¹³¹ Having announced these general principles, the relevant EU regulation focuses more specifically on standards for organic-agricultural *production* (as distinct from the *processing* of organic foods). The first item on the list of those standards elaborates on the need for strict attention to soil health — the topic I focus on in this article. According to the EU regulation, “organic production shall” give specific attention to:

... the maintenance and enhancement of soil life and natural soil fertility, soil stability, soil water retention and soil biodiversity, preventing and combating loss of soil organic matter, soil compaction and soil erosion, and the nourishing of plants primarily through the soil ecosystem.¹³²

What does the 2018 EU regulation say about viticulture in particular? Very little. Part VI of the regulation does address wine, but it runs only a page and a half in a 134-page document, and it applies mainly to (i) winemaking processes rather than to (ii) viticultural practices (that is, the production of the grapes as a matter of agricultural production).¹³³ The same emphasis on winemaking

¹²⁸ *Id.* art. 5(f)(iii).

¹²⁹ *Id.* annex II, point 1.10.1.

¹³⁰ *Id.* art. 4(e). Other objectives refer to preserving “rare and native breeds in danger of extinction” and maintaining a supply of “diverse plant genetic material.” *Id.* art. 4(g)–(i).

¹³¹ *Id.* art. 5(a)–(c).

¹³² *Id.* art. 6(a).

¹³³ *See id.* Part VI.

(oenology, or enology) instead of grape-production (viticulture) appears in three other EU instruments dating from 2009¹³⁴ and 2013.¹³⁵

One particular winemaking matter — the use of sulfites, mainly for reducing oxidation — receives different treatment in the EU organic-wine regulations from the treatment it receives in U.S. organic-wine regulations. A 2020 law-journal article describes the key difference: in general, EU organic-wine regulations permit winemakers to use sulfites in concentrations up to 100 parts per million (ppm) for red wines and up to 150 ppm for white wines, whereas U.S. organic-wine regulations *prohibit* the use of sulfites as additives.¹³⁶ That law-journal article proposes an international system for handling this U.S.-EU difference. However, because the sulfite issue does not directly relate to the vineyard-operations aspects of viticulture, it lies beyond the scope of my attention here.

Other key EU regulations regarding wine — both in terms of vineyard operations and in terms of winemaking processes — give special attention to labeling, including geographical indications. One online source (provided by a company advising participants in the wine industry) offers this specific explanation of how the 2018 EU organic-agriculture regulation bears on organic wine: “Organic wines must comply with Regulation (EU) 848/2018, which includes requirements for organic production and the EU Ecolabel. Biodynamic wines must comply with Demeter or Biodyvin standards, two of the main biodynamic certifications recognised in the EU.”¹³⁷

¹³⁴ See Commission Regulation (EC) 606/2009 of July 10, 2009, Laying Down Certain Detailed Rules for Implementing Council Regulation (EC) No 479/2008 as Regards the Categories of Grapevine Products, Oenological Practices and the Applicable Restrictions, 2009 O.J. (L 193) 1. See also Commission Regulation (EC) No 607/2009 of July 14, 2009, Laying Down Certain Detailed Rules for the Implementation of Council Regulation (EC) No 479/2008 as Regards Protected Designations of Origin and Geographical Indications, Traditional Terms, Labelling and Presentation of Certain Wine Sector Products, 2009 O.J. (L 193) 60.

¹³⁵ See Regulation (EU) No 1308/2013 of the European Parliament and of the Council of Dec. 17, 2013, Establishing a Common Organisation of the Markets in Agricultural Products and Repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, 2013 O.J. (L 347) 671.

¹³⁶ Ryan Puszka, *Reds, Whites, and Sulfites: Examining Different Organic Wine Regulation Practices in the United States and the European Union*, 40 NW. J. OF INT'L L. & BUS. 251, 266–269 (2020). In explaining these details, Puszka relies on a 2017 research paper reporting various permissible concentrations of sulfite under organic, biodynamic, and conventional methods. See Geoffrey Jones & Emily Grandjean, *Creating the Market for Organic Wine: Sulfites, Certification, and Green Values* 29 (HARV. BUS. SCH. WORKING PAPER 18-048, 2007). Puszka also describes the intense debate occurring within the U.S. wine industry that led to the prohibition on sulfite additives as well as how the “Equivalency Agreement” negotiated between U.S. and EU authorities on organic products excluded coverage of wines. Puszka, *supra*, at 264–269. He also points out that “all wine unavoidably contains some level of naturally occurring sulfites” and that “conventional wine standards dictate a sulfite limit of 350 parts per million.” *Id.* at 268, 269 (respectively).

¹³⁷ *New Wine Labelling Regulations: Everything You Need to Know*, WINEFO, <https://www.winefo.eu/post/new-wine-labelling-regulations-everything-you-need-to-know> [<https://perma.cc/G2CN-RTHA>]. See BIODYVIN, <https://www.biodyvin.com/en/biodyvin->

The reference in that online source to “biodynamic wines” raises this question: Does the 2018 EU organic-agriculture regulation say anything at all about biodynamic viticulture? Almost nothing. The long list of definitions at the beginning of that regulation does define the term “biodynamic preparations” (as simply “mixtures traditionally used in biodynamic farming”) and then uses that term just once in the main text, saying only that “[b]iodynamic preparations may be used” for purposes of soil management and fertilization. Using a digital search function of the regulation, I find it completely devoid of any references to Steiner or Thun. It seems, then, that the connection between “organic” and “biodynamic” in Europe resembles the situation in the United States. That is, Demeter certification requires satisfaction of the official “organic agriculture” standards, but those official “organic agriculture” standards do not impose additional biodynamic-viticulture requirements of the sort required for Demeter certification.

One reason I have given a brief survey of the EU regulatory approach to organic agriculture is that European policies favor it so strongly. Under the European “Green Deal,” “the European Commission has set a target of [having] ‘at least 25% of the EU’s agricultural land [placed] under organic farming ... by 2030.’”¹³⁸ Europe has already built momentum toward that goal in recent years: according to the European Commission, “[t]he area under organic farming has increased by almost 66% in the last 10 years — from 8.3 million hectares in 2010 to 13.8 million hectares in 2019. It currently accounts for 8.5% of the EU’s total ‘utilised agricultural area’.”¹³⁹

The preceding discussions, focusing on biodynamic viticulture and on “organic” viticulture, highlight the relationship between those two categories. Specifically, the Demeter standards provide that vineyards wishing to gain official Demeter “biodynamic” certification must meet the organic-agriculture requirements laid out by national or regional authorities — and then the Demeter standards impose additional requirements as well regarding the practices used in the vineyard to protect the natural systems. In addition, though, to operational requirements of the sort described above — application of special manure and compost preparations, for instance — Demeter certification also extends to issues

approval.html [https://perma.cc/XKN2-BF8M], for details on the standards imposed by Biodyvin (Syndicat International des Vignerons en Culture Bio-dynamique). See also *Biodyvin Approval*, BIODYVIN, https://www.biodyvin.com/en/the-union/presentation.html [https://perma.cc/VSX5-RW33] (The Biodyvin entity is “a union of winegrowers who apply biodynamic techniques throughout their property”).

¹³⁸ Eur. Comm’n, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan for the Development of Organic Production*, COM (2021) 141 final/2 (Mar. 25, 2021) (corrigendum Apr. 19, 2021).

¹³⁹ *Id.*

having a wider scope. These include, for instance, (i) biodiversity enhancement more generally (requiring that 10% of a farm qualify for a “biodiversity reserve”¹⁴⁰) and (ii) social responsibility (as prescribed in the Demeter “Social Responsibility Standard”).¹⁴¹

Given all the requirements involved in securing Demeter certification, it is hardly surprising that relatively few vineyards in the world have qualified or even applied for the official “biodynamic” designation. Even “organic” vineyards (under either the U.S. NOP system or the relevant EU regulations) constitute a small minority of viticulture operations worldwide. Although firm statistics are difficult to establish, the following figures give an impression of how rare these designations are:

- Demeter sources suggest that as of early 2024, 1,439 wineries had earned — or were in the process of *conversion* to — “biodynamic” certification, representing a total “vineyard space” of just under 27,000 hectares.¹⁴² Other sources give smaller figures of fully certified “biodynamic” operations.¹⁴³ Perhaps more vineyards could, if they applied, qualify for the official Demeter “biodynamic” certification. This would still, however, leave the number of biodynamic viticulture operations at a scale that pales in comparison to the total number of wineries and vineyards in the world, which is estimated at tens of thousands, perhaps even 100,000,¹⁴⁴ occupying a total vineyard surface area of about 7.2 million hectares.¹⁴⁵

¹⁴⁰ Demeter-English, *supra* note 91, at 72.

¹⁴¹ *Social Responsibility Standard*, BIODYNAMIC FED’N DEMETER, https://demeter.net/wp-content/uploads/2024/02/2024-02_BFDI_Standard_socialrespons_englVersion_changesaccepted_final_abb.pdf [<https://perma.cc/3RSD-39N3>]. In addition, rules for fighting corruption have been adopted. *BFDI Anti-Corruption Policy*, BIODYNAMIC FED’N DEMETER, https://demeter.net/wp-content/uploads/2023/02/BFDIAntiCorruptionPolicy_23-02-23.pdf [<https://perma.cc/Q237-R9G4>].

¹⁴² *Demeter Wineries Worldwide*, BIODYNAMIC FED’N DEMETER (2024), https://demeter.net/wp-content/uploads/2024/04/2024_Demeter-wineries-worldwide.pdf [<https://perma.cc/Z6YU-78J4>]. A total of 27,000 hectares would equal just under 67,000 acres.

¹⁴³ *See, e.g., Biodynamic Wine*, BIODYNAMIC-UK ASS’N, <https://www.biodynamic.org.uk/farm/biodynamic-wine/> [<https://perma.cc/923W-D3LP>]. (giving a figure, evidently dating from about 2021, of “over 600 Demeter certified biodynamic vineyards [including] over 250 in France and Italy, 75 in Germany, over 40 in Switzerland, [and] 49 in New Zealand”).

¹⁴⁴ Arielle Rose, *Global Wine Manufacturing – Market Research Report 2015-2030*, IBIS WORLD (2025), <https://www.ibisworld.com/global/industry/global-wine-manufacturing/410/>.

¹⁴⁵ *State of the World Vine and Wine Sector in 2023*, INT’L ORG. OF VINE & WINE (Apr. 2024), https://www.oiv.int/sites/default/files/2024-04/OIV_STATE_OF_THE_WORLD_VINE_AND_WINE_SECTOR_IN_2023.pdf [<https://perma.cc/H62K-CRAL>]. For an explanation of the character of the International Organisation of Vine and Wine, *see id.* A total of 7.2 million hectares would equal nearly 18 million acres. *Id.*

- Although firm numbers are difficult to find, USDA sources show that as of 2016, roughly 600 wineries had qualified for the “organic” designation under the NOP.¹⁴⁶
- According to EU sources, an estimated 19,000 vineyards have qualified for the “organic” designation under the applicable EU regulations.¹⁴⁷

III. Regenerative viticulture

Having examined the categories of biodynamic viticulture and organic viticulture, I turn to another category of natural-systems viticulture and the standards that apply to it. That category is “regenerative viticulture,” as part of a larger system of “regenerative agriculture.” For the latter term, a useful starting point is this description offered by the Regenerative Organic Alliance (ROA):

As agricultural practices continue to evolve, it is imperative that approaches to land management and associated processes are focused on contributing to the health of ecosystems, including human communities. Regenerative Organic Certified® builds upon and furthers the near 100-year legacy of organic movement visionaries like J. I. Rodale, Lady Eve Balfour, Dr. Rudolf Steiner, Sir Albert Howard, and the knowledge of generations of diverse, holistic producers — including native and Indigenous Peoples — that they channeled for inspiration and direction.

The goal of Regenerative Organic Certified® is to promote holistic agriculture practices in an all-encompassing certification that:

- Increases soil organic matter over time and sequesters carbon below and above ground, which could be a tool to mitigate climate change;
- Improves animal welfare; and
- Provides economic stability and fairness for farmers, ranchers, and workers.

¹⁴⁶ *Organic Integrity Database: NOP Taxonomy - Categories & Items*, USDA (Nov. 23, 2016), <https://www.ams.usda.gov/sites/default/files/media/INTEGRITY%20Categories%20and%20Items.pdf> [<https://perma.cc/UFU6-87M8>]. In July 2025, searching the database for “wine” resulted in nearly 1,000 hits. The USDA database varies nearly day to day and does not distinguish clearly between wineries and vineyards. For a current database, see *Organic Integrity Database*, USDA (2025), <https://organic.ams.usda.gov/integrity/> [<https://perma.cc/5AEU-MKQ5>].

¹⁴⁷ *Fully Organic Farms in the EU*, EUROSTAT (2020), https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Fully_organic_farms_in_the_EU#:~:text=Of%20the%20additional%20135%20000,cereal%2C%20oilseed%20and%20protein%20crops [<https://perma.cc/U794-LDFZ>]. This report shows 245,000 fully organic farming operations in 2020, of which 7.8% were vineyards, leading to the calculation of about 19,000 organic vineyards.

Regenerative Organic Certified® consists of three pillars: Soil Health & Land Management, Animal Welfare, and Farmer & Worker Fairness. Regenerative Organic Certified® has three levels: Bronze, Silver, and Gold. Each requires a different number and scope of regenerative organic practices used.¹⁴⁸

Although the ROA description offered above shifts quickly to the matter of *certification*, let us dwell further on the *concept* of regenerative agriculture. As noted above, the shorthand version of the concept of regenerative agriculture (as offered by the ROA) is that it “builds upon [the work of several] organic movement visionaries ... and the knowledge of generations of diverse, holistic producers” to “promote holistic agriculture practices that can increase soil organic matter, sequester carbon, improve animal welfare, and provide economic stability and fairness for farmers.¹⁴⁹ Further rationale for regenerative agriculture appears in the ROA’s insistence that “[g]rowing food and fiber through industrial methods has devastated our soil and climate. Forecasts have predicted that global topsoil will deplete in 60 years at our current rate, while studies have proven that conventional, industrial agriculture contributes up to 25% of the emissions driving the climate crisis.”¹⁵⁰ However, “there is hope ... [because with] regenerative organic agriculture, we can rehabilitate soil, respect animal welfare, and improve the lives of farmers. We can sequester carbon, build healthier communities, and reap more nutritious and abundant yields.”¹⁵¹

In sum, “[r]egenerative organic agriculture is a collection of practices that focus on regenerating soil health *and* the full farm ecosystem. In practice, regenerative organic agriculture can look like cover cropping, crop rotation, low-to no-till, compost, and zero use of persistent chemical pesticides and fertilizers.”¹⁵² The ROA website emphasizes the historical foundations of regenerative agriculture: “Both the term ‘regenerative agriculture’ and the practices that define it are not modern creations. ... [Indeed,] it is imperative to always note that regenerative agriculture practices draw from Indigenous wisdom and practices.”¹⁵³

¹⁴⁸ *ROC Framework*, *supra* note 33, at 3. The website of the Regenerative Organic Alliance itself, a nonprofit organization, provides further information. See *Home*, REGENERATIVE ORGANIC ALL., <https://regenorganic.org/> [<https://perma.cc/G9SY-GMLK>]. The ROA was “[f]ounded by the Rodale Institute, Dr. Bronner’s, and Patagonia, [and] other members of the alliance include Compassion in World Farming, Fair World Project, and the Textile Exchange.” *Why Regenerative Organic?*, REGENERATIVE ORGANIC ALL., <https://regenorganic.org/why-regenerative-organic/#regen-organic-certified> [<https://perma.cc/7UGR-4PVV>] [hereinafter “*Why RO?*”]. The same page of the ROA website explains that “[t]he term regenerative agriculture was first introduced by Dr. George Washington Carver, and was popularized by Robert Rodale of the Rodale Institute, who coined the term ‘regenerative organic’ to distinguish a kind of farming that goes beyond sustainable.” *Id.*

¹⁴⁹ *ROC Framework*, *supra* note 33, at 3.

¹⁵⁰ *Why RO?*, *supra* note 148.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

In order to encourage all these practices, the ROA manages a certification system — the Regenerative Organic Certification (ROC) system mentioned above — with three levels (Bronze, Silver, Gold) reflecting varying degrees of adherence by a farming operation to the ROC standards. The standards themselves resemble those of the Demeter certification system. Like the Demeter approach, the ROC approach to certification requires that an agricultural operation first secure certification as meeting the applicable “organic” requirements, such as those enumerated in the U.S. and EU regulations discussed above in subsection IID.

Beyond that threshold requirement (of meeting “organic” agriculture standards), the ROC system involves several steps for an applicant to achieve ROC certification.¹⁵⁴ In general, these involve (i) submitting information about the applicant’s existing operations and steps the applicant will take toward implementing a customized Regenerative Organic System Plan (“ROSP”); (ii) working with an ROA-approved certifying body (over a dozen such entities exist, with varying geographical coverages¹⁵⁵), which will undertake an onsite review and report to the ROA. If the review is favorable, the application for ROC certification will be approved, permitting the applicant to display the official ROC label on its farm and its products.

Several hundred operations have gained the ROC certification,¹⁵⁶ including Estelbrook Farms & Vineyard (owned by my son and daughter-in-law in southern Washington State). Of those, only about 30 operations (again, including Estelbrook) have ROC certification for “grapes” as a crop.¹⁵⁷

In addition to the ROA system of certifying agricultural operations (and products) as “regenerative” in character, several other systems also have emerged in recent years. The Regenerative Viticulture Foundation has compiled a list of the most prominent of these, summarized in this table:

¹⁵⁴ For details on these steps, see *Steps to Becoming Regenerative Organic Certified*®, REGENERATIVE ORGANIC ALL., <https://regenorganic.org/becoming-regenerative-organic-certified/> [<https://perma.cc/CE3F-NYD9>].

¹⁵⁵ Certifying bodies operating in North America, for instance, include Ecocert Environnement, CCOF, SCS Global, and others. See *Regenerative Organic Alliance - Approved Certifying Bodies*, REGENERATIVE ORGANIC ALL. (Sept. 16, 2025), https://regenorganic.org/wp-content/uploads/2024/11/ROA_Approved_Certifying_Bodies.pdf [<https://perma.cc/6E79-2HDX>]. For further information on CCOF, see *infra* text accompanying notes 260–261.

¹⁵⁶ For a list and accompanying world map, see *Certified Farm & Ranch Directory*, REGENERATIVE ORGANIC ALL. (2025), <https://regenorganic.org/certified-farm-ranch-directory/> [<https://perma.cc/GBZ4-RGBA>].

¹⁵⁷ *Id.* See also *Certification*, REGENERATIVE VITICULTURE FOUND. (Aug. 28, 2025), <https://www.regenerativeviticulture.org/toolkit/certification/> [<https://perma.cc/YAA7-8DB3>]. (“Around 25 vineyards worldwide have now been [ROC] certified, mostly in the USA, but rapidly expanding globally.”).

<u>Name</u>	<u>specific to viticulture?</u>
Certified Regenerative details at https://agreenerworld.org.uk/certifications/certified-regenerative/	No
Regenerative Viticulture Alliance details at https://www.viticulturaregenerativa.org/en/rva-certification	Yes ¹⁵⁸
ROC details at https://regenorganic.org/get-started/	No
Regenified details at https://regenified.com/regenerative-agriculture-certification/	No
Regenagri details at https://regenagri.org/	No
Land to market details at https://www.landtomarket.com/	No

Surely one reason for the relatively small number of vineyards that have thus far achieved any of these “regenerative” certifications or designations is that the standards of review are high. If some vineyard operators were to do a Google search for “typical provisions of a Regenerative Organic System Plan for viticulture,” they would probably see a long list of requirements reflecting the overarching principles described above. Those requirements might announce the following specific details on the issue of soil health and land management:

- **Minimizing Soil Disturbance (No-till/Low-till):** Practices that minimize or eliminate soil turning (tillage) are crucial to preserving soil structure, reducing erosion, and enhancing microbial communities.
- **Cover Cropping:** Planting various crops between vines or in rows to protect the soil, improve fertility, suppress weeds, enhance biodiversity, and sequester carbon. Examples include using legumes for nitrogen fixation or flowering plants to attract beneficial insects.
- **Composting:** Utilizing on-site compost, often from grape pomace and other organic materials, to enrich the soil with nutrients and improve its structure.
- **Organic Matter Incorporation:** Boosting soil organic matter and moisture retention by incorporating crop residues and other organic materials.
- **Biodiversity Enhancement:** Promoting diverse plant species, beneficial insects, and wildlife corridors within and around the vineyard to support natural pest control, pollination, and nutrient cycling.

¹⁵⁸ The Regenerative Viticulture Foundation highlights the fact that the Regenerative Viticulture Alliance has the “only scheme specific to viticulture” and explains that it was “founded by the Regenerative Viticulture Association with Familia Torres” and that it has “a strong Spanish language focus.” See *Certification*, *supra* note 157.

- Water Management: Implementing efficient irrigation systems, like drip irrigation, and considering rainwater capture to conserve water and improve soil moisture retention.
- Reducing/Eliminating Synthetic Inputs: Prioritizing the elimination of chemical pesticides, herbicides, and synthetic fertilizers in favor of natural alternatives and integrated pest management.¹⁵⁹

III. Other forms and designations of natural-systems viticulture

The foregoing discussions of biodynamic, organic, and regenerative viticulture — focusing especially on the standards and certification processes relating to vineyard operations — still do not plumb all the depths. To bring this survey to a close, let us look briefly at two other categories.

One such category is “natural wine,” a designation that has brought a crescendo of conflict in recent years. An April 2022 article titled “Certification of Natural Wine”¹⁶⁰ highlights the conflict in Europe, including inter-country and intra-agency fallings-out, some of which have involved pleas to EU authorities. The article explains that “[o]n March 25 2020, natural wine (NW) obtained legal recognition for the first time in France under the designation *vin méthode nature*, opening the way for similar initiatives worldwide.”¹⁶¹ The article surveys various possible responses to this development, but for now the future of a “natural wine” designation remains uncertain.

¹⁵⁹ This list emerged from my own Google search for “typical provisions of a Regenerative Organic System Plan for viticulture.” According to the ROC standards for certification, the operator seeking ROC certification initiates the preparation of basic documentation about the operation, after which “the ROA will send operation a customized Regenerative Organic System Plan (ROSP) based on an equivalency analysis of the applicant’s operation and current certifications.” See *Program Manual*, REGENERATIVE ORGANIC CERTIFIED (2023), <https://regenorganic.org/wp-content/uploads/2023/03/Program-Manual.pdf>. [<https://perma.cc/B9G7-LWLH>]. For a standard template used in seeking ROC designation, see *Regenerative Organic System Plan (ROSP)*, REGENERATIVE ORGANIC ALL., file:///C:/Users/johnhead/AppData/Local/Microsoft/Windows/INetCache/Content.Outlook/TT7VQ0XZ/ROC_QMS_FR_ROSPSHNOP_v1.1.pdf. Some of the requirements included in the above bullet-point list would likely fall outside the scope of the ROSP. As my daughter-in-law has explained, “[w]hile the ROSP is [our] foundational document [for ROC certification], there are many supporting documents that go along with it — material applications, seed searches, contracts with employees, payment logs, receipts for all material inputs, compost logs, etc.” E-mail exchange with Shahnnen Elizabeth Head, Jul. 1, 2025 (on file with author).

¹⁶⁰ See Pablo Gonzalez, Eva Dans & Rosan Fernández, *Certification of Natural Wine: Policy Controversies and Future Prospects*, FRONTIERS SUSTAINABLE FOOD SYS., 2022, at 1–3.

¹⁶¹ *Id.* at 1.

By contrast, the future seems much less uncertain for a viticulture designation recently introduced in British Columbia. As noted above, the term “sustainable agriculture” has been used (or mis-used) so much as to have lost much of its meaning in defining specific practices and standards. However, the term “sustainable viticulture” is still used with some specificity in the context of Canadian regulations. This is significant because Canada has a globally important wine industry, including a growing organic wine market,¹⁶² and Canada’s viticulture sector also has special requirements and designations relating to operations that follows natural-systems principles. Such requirements typically lie more at the provincial level than at the federal level, and in British Columbia a vineyard can earn certification under the “Sustainable Winegrowing British Columbia” (SWBC) Program,¹⁶³ which was established in 2011 by the British Columbia Wine Grape Council to offer independent “sustainable” certifications to wineries and vineyards.¹⁶⁴ In fact, the SWBC Program distinguishes between vineyard operations and wine-making operations. “The Program offers two different certification standards: the SWBC Sustainable Vineyards Standard, applicable for grape growing operations; and the SWBC Sustainable Wineries Standard, applicable for wine making operations.”¹⁶⁵

The more relevant of the two for purposes of this article is the Vineyard Standard. It runs 70 pages and prescribes specific requirements in four areas: (i) watershed management and conservation (including erosion control and biodiversity conservation), (ii) soil nutrition management (involving extensive soil analysis to design and implement a soil management plan), (iii) irrigation management (avoiding backflows, testing water quality, measuring usage, etc.), and (iv) social equity (involving worker training, compensation, and safety as well as community engagement).¹⁶⁶ Vineyard operators are expected to use prescribed templates for tracking their progress in meeting quantifiable targets on electricity consumption, on waste reduction and disposal, on ecologically-appropriate pest-management practices, and so forth.¹⁶⁷

¹⁶² The Canadian organic wine market totaled US\$922.9 million in 2023 and is expected to grow by 10% by 2030; measured in terms of revenue, “Canada accounted for 8.5% of the global organic wine market in 2023.” See Grand View Rsch., *Canada Organic Wine Market Size & Outlook, 2024-2030*, GRAND VIEW HORIZON,

<https://www.grandviewresearch.com/horizon/outlook/organic-wine-market/canada> [https://perma.cc/4DTK-YTS7].

¹⁶³ See *2023 Vineyard Standard*, SUSTAINABLE WINEGROWING B.C. (2023) <https://sustainablewinegrowingbc.ca/wp-content/uploads/2023/03/SWBC-Vineyard-Standard-2023-ver.-2-Interactive.pdf> [https://perma.cc/6954-YGYG]. [Hereinafter *BC Standards*]. I thank Allan Spahr, Wade Martin, and other friends at La Stella vineyards, near Osoyoos, British Columbia, for helping me learn about the SWBC Program and about the sustainable-viticulture practices that the La Stella operators follow. For information about La Stella, see LA STELLA, <https://lastella.ca> [https://perma.cc/B97B-JWQA]. I also thank Chris Bouzanis, a central player in SWBC operations, for explaining SWBC’s philosophy and success.

¹⁶⁴ See *About*, SUSTAINABLE WINEGROWING B.C., <https://sustainablewinegrowingbc.ca/about/> [https://perma.cc/LW2A-PGWB].

¹⁶⁵ See *BC Standards*, *supra* note 163, at 8.

¹⁶⁶ *Id.* at 16–52.

¹⁶⁷ See *Resources*, SUSTAINABLE WINEGROWING B.C., <https://sustainablewinegrowingbc.ca/resources/> [https://perma.cc/57L9-KXCY].

Given the stringency of the SWBC Program, it is no surprise less than two dozen vineyards have earned the right so far to use the “Sustainable Winegrowing BC” label.¹⁶⁸ By contrast, the Demeter Canada organization lists only a single Demeter-certified biodynamic winery in British Columbia: the Summerhill Pyramid Winery.¹⁶⁹

III. A summing-up on key categories of natural-systems viticulture and their standards

Four main points emerge from the discussion in the foregoing paragraphs. *First*: the term “biodynamic viticulture” is itself vague. It can refer to the Steiner-Thun pseudo-science and “anthroposophy” — what I have referred to above as the spiritual, “woo-woo,” or “orthodox” version of biodynamic viticulture — *or* it can have a primarily science-based perspective that largely disregards the astrological elements posited by Steiner and Thun but still prescribes strict environmental-protection practices. In that more “secular” *non*-Steiner-Thun version, biodynamic viticulture encompasses a highly developed set of standards requiring vineyards to undertake their operations in a holistic manner. The aim of this approach is to treat a vineyard as a natural and closed system from which practically all synthetic inputs are excluded. Those standards themselves reflect a science-based perspective in the sense that they have emerged not from external spiritual inspiration but from generations of careful, broad-based experience-informed assessment of what techniques best serve the long-term interests of soil health. Given the stringency of the standards, only a few vineyards worldwide have achieved official Demeter certification.

Second: the much younger notion (and label) of “regenerative viticulture” shares many features with biodynamic viticulture. It promotes holistic agricultural practices aimed at increasing soil organic matter, sequestering carbon, improving animal welfare, and providing economic stability and fairness for farmers. Although it does not involve the use of “preparations” of the sort prescribed by Rudolf Steiner, the demands of regenerative viticulture (like those of biodynamic viticulture) are so rigorous that very few vineyards have earned any level of ROC

¹⁶⁸ See *Membership*, SUSTAINABLE WINEGROWING B.C., <https://sustainablewinegrowingbc.ca/membership/> [<https://perma.cc/FM9P-3VYU>]. Only about a half-dozen wineries have earned such certification. *Id.*

¹⁶⁹ See *Our Certified Farms*, DEMETER CAN., <https://www.demetercanada.ca/certified-farms/> [<https://perma.cc/SU67-3VET>] (listing three other Demeter-certified farms in British Columbia, all of which produce organic vegetables but not wine grapes). For details about the Summerhill Pyramid Winery, where my wife and I were warmly greeted in June 2024 by Stephen Cipes, Michael Alexander, and others, see SUMMERHILL PYRAMID WINERY, <https://www.summerhill.bc.ca/us/> [<https://perma.cc/6VT8-J6AZ>].

designation — Bronze, Silver, or Gold as described above.¹⁷⁰ As members of my immediate family have seen in establishing and operating their vineyard, pest management in particular can prove much more difficult without the range of synthetic insecticides, rodenticides, fungicides, and other non-organic products that modern extractive agriculture has developed since the Green Revolution introduced those products. Both Demeter and ROC standards prohibit the use of nearly all such products in vineyards, which attract wasps, birds, voles (gophers), powdery mildew, and various other life forms eager to feast upon the leaves, roots, and fruit that grapevines offer them. Even sulfur compounds, which have been used in viticulture for several centuries,¹⁷¹ can be used only sparingly.¹⁷² Notwithstanding these challenges, the vineyard where my wife and I work part-time is one of the few vineyards worldwide — less than a dozen — that have earned both Demeter (biodynamic) and ROC (regenerative) designations.¹⁷³

Third: certification of a vineyard's operations (or outputs) as "organic" also requires careful exclusion of many synthetic fertilizers and similar inputs that "industrial agriculture" would otherwise offer. However, both U.S. and EU standards for organic viticulture are *less* demanding than the Demeter biodynamic standards or than the ROC standards in practically all respects¹⁷⁴ — and are in fact prerequisites for either biodynamic or regenerative certification. Significant differences exist between the EU and the U.S. organic-viticulture regulations — both of which are now several decades old — but they resemble each other in the important respect that they are official government-created and government-operated systems.

Fourth: some other classifications and terms — "natural" and "sustainable" and the like — have been proposed or attempted, and even used successfully in British Columbia, but they have thus far not gained much traction more generally. Many other classifications and certifications exist that lie beyond the scope of this survey.¹⁷⁵

¹⁷⁰ See *supra* text accompanying note 148.

¹⁷¹ See Flint, *supra* text accompanying note 57.

¹⁷² See, e.g., *supra* text accompanying note 108 (relating to sulfur use under the Demeter standards).

¹⁷³ This assertion emerges from a comparison of lists showing what operations have received "regenerative" and "biodynamic" certifications. The list found at <https://regenorganic.org/certified-farm-ranch-directory/> [<https://perma.cc/P48C-MC9H>] shows that many farms have obtained regenerative certification, but only about 30 of them are vineyards. Estelbrook Farms & Vineyard, referred to *supra* note 21, appears on that list. Estelbrook also appears on the list of U.S. operations with Demeter-certified biodynamic grapes, at <https://biodynamicfood.org/> [<https://perma.cc/JPJ5-DU2M>]. For a series of lists showing Demeter-certified operations in other countries, see <https://bfdi.demeter.net/operators>.

¹⁷⁴ As noted above, one aspect of the NOP system that makes it more stringent than the EU "organic" regulations, the Demeter requirements, or the ROC standards relates to the use of sulfites in wine-making. See Puszka, *supra* note 136, at 255, 272 and accompanying text. However, my focus in this article is on vineyard operations, not on wine-making.

¹⁷⁵ One example of another certification system is found in the so-called "LODI rules." One source explains that under these rules, originating from efforts made by grape growers in California, "a vineyard must meet six sustainability standards: business management, human

At the outset of this section II, I promised to try untangling the meanings of the various designations discussed above, giving special attention to (i) how old and well-established each such designation is, (ii) how detailed its certification standards are, (iii) how much of a science-based perspective (as opposed to a “pseudoscience” or spiritual or “woo-woo” perspective) it involves, (iv) how widespread its acceptance has become (global versus only local), and (v) whether the relevant certification process is primarily facilitated through private organizations or under the legal control of state authorities. Here’s what I can deliver on that promise, confining myself just to the three principal designations discussed above:

Demeter biodynamic viticulture:

- (i) about 100 years old and well recognized¹⁷⁶
- (ii) detailed in its certification standards
- (iii) in its current post-Steiner-Thun version, highly science-based in its perspective (on par with regenerative and organic), but with a lingering “stain” in the eyes of some observers, especially regarding “preparations” requirements
- (iv) global in reach, not nationally- or regionally-based
- (v) certification via private entities only

Organic viticulture:

- (i) a few decades old¹⁷⁷ and well recognized in the United States and Europe

resources management, ecosystem management, soil management, water management, and pest management.” Lepird, *supra* note 34, at 131. In terms of implementation, “a third-party, Protected Harvest, which is a board of environmentalists and pesticide risk scientists ... conducts all annual audits to ensure quality of the vineyards and to reduce the risk of a conflict of interest.” *Id.*

¹⁷⁶ For a timeline of developments regarding the Demeter standards and structure, see *History*, BIODYNAMIC FED’N DEMETER INT’L, <https://demeter.net/about/history/> [<https://perma.cc/APQ9-CBRC>]. As of 1999, Demeter had reportedly become “the biggest provider of organic goods world-wide.” *Id.*

¹⁷⁷ In the United States, the NOP was established under the Organic Food Production Act enacted in 1990. See Nat’l Inst. of Food & Agric., *Organic Agriculture Program*, USDA (July 7, 2025), <https://www.nifa.usda.gov/grants/programs/organic-agriculture-program> [<https://perma.cc/HZ8K-BY8W>]. Similarly, “[o]rganic farming and production has been regulated at the EU level since 1991,” *Organic Food in the EU*, EUR. CT. OF AUDITORS (Feb. 2018), https://www.eca.europa.eu/lists/ecadocuments/bp_organic_food/bp_organic_food_en.pdf [<https://perma.cc/SX7G-CCA2>], and “[i]n March 2002 the European Commission issued an EU-wide label for organic food” produced in accordance with the regulations — similar to the NOP program in the United States. Jacomijn Schraivesande-Gardei, *Organic Certification in the European Union*, ME. ORGANIC FARMERS & GARDENERS (2019), <https://www.mofga.org/resources/international/organic-certification-in-the-european-union/> [<https://perma.cc/Q2V7-XJG4>].

- (ii) detailed in its certification standards
- (iii) highly science-based in perspective
- (iv) not global in reach — national applicability for the U.S. NOP and European applicability for the EU regulation¹⁷⁸
- (v) certification by public agencies or by private agencies under public-agency supervision

Regenerative viticulture:

- (i) about five years old and becoming more recognized¹⁷⁹
- (ii) detailed in its certification standards
- (iii) highly science-based in perspective
- (iv) purportedly global in reach, not nationally- or regionally-based, but with limited applicability thus far
- (v) certification via private entities only

To conclude this survey: If we wish to provide a phrase or label to identify the most demanding of the standards used in the certification process for viticulture operations, while still leaving aside the astrological or pseudo-science that Steiner and Thun proposed in their version of “biodynamic agriculture,” we could usefully settle on the label I have introduced above, which is “science-based biodynamic regenerative viticulture,” or “SBBRV.” Emphasizing the highly-demanding standards of SBBRV — as shown in those of the Demeter organization and the ROA — could provide the “language” for hastening the shift away from industrial viticulture.

But why should we care about this? That is, why might we wish to encourage a hastening of momentum away from industrial viticulture and toward SBBRV? These questions return us to the overall theme of this article: soil health.

III. “Soil health” and biodynamic-regenerative viticulture

Karen MacNeil’s *Wine Bible* offers this enchanting narrative about the relationship of soil to viticulture:

The ground has always been seductive — the smell of it, the feel of it, the sight of it, and certainly the possession of it. The history of civilization is in large part a running commentary on

¹⁷⁸ For a discussion of the 2018 EU regulation, see European Commission, *supra* notes 126–139 and accompanying text.

¹⁷⁹ For details on the ROC certification system, see subsection IIE, *supra*. As one source explains, “[t]he ROA introduced the world’s first Regenerative Organic Certification scheme (ROC) in 2019.” Simon J. Wolf, *Digging into Regenerative Organic Agriculture*, THE MORNING CLARET (June 12, 2024), <https://themorningclaret.com/p/digging-into-regenerative-organic-agriculture> [<https://perma.cc/4BR2-LWPK>]. An especially famous wine expert, Jancis Robinson, has asserted that “[r]egenerative is the new buzzword in wine-growing circles.” Jancis Robinson, *Farm Like There’s No Tomorrow*, JANCISROBINSON.COM (Mar. 11, 2023), <https://www.jancisrobinson.com/articles/farm-theres-no-tomorrow> [<https://perma.cc/T9GH-V2RK>] [hereinafter Robinson 2023].

man's relationship to the land. Soil's allure is very evident in the world of wine. There is something strangely beautiful about the white chalk of Champagne, [which is] the legacy of ancient seabeds and sea fossils; or the jet-black, pitted stones of Santorini in Greece, [which are] the relics of a massive volcanic explosion; or the cool, blue-gray slate shards of the Mosel in Germany, [which are] remnants of the path of glaciers. Remarkably, vines grow contentedly in all of these.¹⁸⁰

MacNeil highlights an important feature shared by these diverse settings for viticulture: "Most viticulturalists today believe that the most important soil characteristic is its capacity to drain water. Nothing could seem less exciting," McNeil says, but "good drainage is critical in viticulture, ensuring that vines push their roots deep into the ground (sometimes 20 feet/6 meters or more) to find a stable source of water and nutrients."¹⁸¹ Perhaps reflecting this deep rooting of viticulture in the soils that support it, MacNeil portrays soil as "undoubtedly the soul of wine,"¹⁸² comprising particles of various sizes and composition which, taken in aggregate "help create the delicate balance of water drainage versus water retention" and that "aerate the soil and contribute minerals and nutrients."¹⁸³

A key criticism leveled at industrial agriculture, though, is that it *degrades* soil. Soil degradation will be the topic of subsection IIIA, along with a definition of "soil health" (or "soil quality") and why it matters. Subsection IIIB will then narrow the focus to viticulture and examine how biodynamic-regenerative operations enhance soil health.

IIIA. "Soil health" and the global soil-degradation crisis

As alluded to briefly in subsection IB above, modern agriculture has caused soil degradation all around the Earth, especially in those vast ecoregions that were covered until relatively recently with temperate grasslands.¹⁸⁴ In order to drive home the significance of this degradation, I offer the following bullet-point illustrations, some of which relate specifically to how viticulture can contribute to soil degradation:

- According to a late-2024 summary of information in a "soil atlas" document from an EU-affiliated source, "[s]oil degradation is a major but largely neglected global problem that threatens agricultural productivity, food security, and ecosystem health. Around one-third of soils worldwide

¹⁸⁰ MacNeil, *supra* note 16, at 26–27.

¹⁸¹ *Id.* at 27.

¹⁸² *Id.* at 28.

¹⁸³ *Id.* at 27.

¹⁸⁴ See AGROECOLOGICAL HUSBANDRY, *supra* note 8. See also text accompanying note 10.

are degraded,”¹⁸⁵ through such factors as “erosion, salinisation, acidification, compaction, nutrient depletion, and contamination by heavy metals.”¹⁸⁶ Just the first of these alone (soil erosion) “leads to the loss of an estimated 75 billion tonnes of soil a year, which in turn causes financial losses of around 400 billion US dollars annually.”¹⁸⁷ Improper agricultural methods contribute to the land degradation, and 38 percent “is subject to overgrazing that exceeds the land’s capacity to recover and maintain its productivity.”¹⁸⁸

- June 2024 saw the release of a “new map from the Save Soil movement — backed by the UNEP, UNCCD, UNFAO, WFP, and IUCN among others — illustrat[ing] the shocking percentage of global soil degradation predicted by 2050.”¹⁸⁹ An account of the map explains that “[d]egraded soil, resulting largely from intensive farming practices, is low in ‘organic matter,’ which means it does not retain water as effectively, making us vulnerable to climate shocks such as droughts, wildfires, and water shortages.”¹⁹⁰ The account quotes an official of Save Soil as urging that “[r]egenerative agriculture can help bring the organic matter, or the ‘life and health’ back into soil, reversing degradation, preventing droughts and saving lives on every continent.”¹⁹¹
- A five-decade survey of soil-erosion research specifically in vineyards found that “soil erosion rates in vineyards are higher than those in other land uses and represents a worldwide threat to sustainability in vineyards. This is due to intense tillage [and the] planting of vineyards on steep slopes and in poor soils.”¹⁹² The report of that survey noted that although “[s]tudies of soil erosion in vineyards have primarily focused on [the] three specific countries [of] France, Italy and Spain ... vineyards are widespread worldwide and the environmental problems they cause are also widespread.”¹⁹³ The authors of the report conclude that “[t]here is a need to find management practices that ... will achieve sustainability through reduction of soil losses via nature-based solutions.”¹⁹⁴

¹⁸⁵ Harun Warui, *Soil Degradation: The Silent Global Crisis*, HEINRICH-BÖLL-STIFTUNG (Nov. 12, 2024), <https://eu.boell.org/en/SoilAtlas-soil-degradation> [<https://perma.cc/9CQE-4D5S>] (quoting information on the website of the Heinrich-Böll-Stiftung, a German political foundation affiliated with the German Green Party).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Save Soil, *95% of the Earth’s Soil on Course to Be Degraded by 2050*, EARTH.ORG (June 17, 2024), <https://earth.org/95-of-the-earths-soil-on-course-to-be-degraded-by-2050/ife> [<https://perma.cc/UY9X-8MZE>].

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Jesús Rodrigo-Comino, *Five Decades of Soil Erosion Research in “Terroir”: The State-of-the-Art.*, 179 *EARTH-SCI. REV.* 436, 436 (2018).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

- A 2022 conference of the Regenerative Viticulture Foundation highlighted specific ways in which viticulture contributes to soil degradation, focusing especially on tillage (plowing), removal of plant cover more generally, and compaction.¹⁹⁵

By what standards do we make these assessments of soil degradation? Expressing this question differently: what do we mean by “soil health” or by “soil quality” — the quality, that is, that is purportedly being degraded?

Soil quality, a term that first emerged in the 1990s, has been defined by some early sources as the capacity of soil to function with respect to three components: “sustained biological productivity, environmental quality, and plant and animal health.”¹⁹⁶ The term emerged in part because of the lack of legislative standard to define or regulate soil quality (unlike air and water quality standards).¹⁹⁷ The term “soil health” is often used interchangeably with “soil quality,” but by some accounts the two terms are distinct, with soil quality focusing on the functions of soil that directly and indirectly impact humans and soil health “extend[ing] beyond human health to broader sustainability goals that include planetary health.”¹⁹⁸

In my view, we should remain skeptical about any anthropocentric implications of those definitions. If we take an “inter-species equity” approach, as I have urged in several publications,¹⁹⁹ we should emphasize the value of soil *per se* — that is, for its own sake regardless of what specific benefits it provides to humans as a single species among millions of species. Hence, focusing on productivity of soil for providing food for humans should not, in my view, dominate an evaluation of soil health or quality. Instead, from a natural-systems perspective, soil health should be assessed in a more neutral (less anthropocentric) manner that examines its resilience to stress, its fullness, the density and diversity

¹⁹⁵ See Tamlyn Currin, *Regenerative Viticulture is a Dirty Subject*, JANCIS ROBINSON (May 9, 2022), <https://www.jancisrobinson.com/articles/regenerative-viticulture-dirty-subject> [<https://perma.cc/B28Y-PXQ4>].

¹⁹⁶ D.L. Karlen, M.J. Mausbach, J.W. Doran, R.G. Cline, R.F. Harris & G.E. Schuman, *Soil Quality: A Concept, Definition, and Framework for Evaluation*, 61 SOIL SCI. SOC’Y AM. J. 4, 4 (1997).

¹⁹⁷ *Id.*

¹⁹⁸ Johannes Lehmann, Deborah Bossio, Ingrid Kogel-Knabner & Mathias Rillig, *The Concept and Future Prospects of Soil Health*, 10 NATURE REV. EARTH & ENV’T 544, 545 (2020), <https://pmc.ncbi.nlm.nih.gov/articles/PMC7116140/pdf/EMS94256.pdf> [<https://perma.cc/7HDP-MPXN>].

¹⁹⁹ See *Planetary Health*, *supra* note 49, at 287. See also John W. Head, *International Law and Species Diversity: An Immodest Proposal for Implementing a Progressive 30x30 Natural Restoration Initiative in the Great North American Prairies*, 33 KAN. J. L. & PUB. POL’Y 141, 187–188 (2024).

of individual organisms that are living within it, and the degree to which the soil itself might be regarded as a living thing.

In a 2020 science-journal article, Johannes Lehmann and three colleagues proposed a revised mechanism for defining and measuring soil health, starting with a survey of the history behind the term itself:

The burgeoning broad public interest in the soil health concept is largely grounded in historical development. Even though the term 'soil health' has been more regularly used in the scientific and popular literature only since the early 2000s, the analogy of the soil ecosystem to an organism reaches far into the past. Soil is frequently part of creation myths, and humans have always had deep spiritual connections with soil, as shown in songs, fine [arts] and performing arts.

Since the 1700s, scientists have introduced the notion of biological processes in the formation of soil, and [the fact] that soil ecosystems are endangered as much as any other ecosystem provided a foundation for [assessing] soil health. The 1979 Gaia concept popularized the view of nature as a planetary-scale self-regulation system, explicitly including soil ecosystem concepts and going beyond soil services solely for humans. Appreciation for soil biological processes was largely enabled by significant advances in analytical capabilities since the 1980s, including global mapping of soil biodiversity during the 2010s. The formulation of the UN's Sustainability Development Goals in 2015 provided a need to align soil functions with sustainability that makes soil health a suitable platform.

The soil health concept emerged from soil quality in the 1990s, and initially met with considerable criticism. More recently, policy makers have embraced the concept, exemplified by India distributing soil health cards to 100 million farmers and major companies starting programs on soil health to manage their supply chains more sustainably. Including carbon sequestration in soils as a main approach in the UNFCCC process to withdraw atmospheric carbon dioxide enhanced the political urgency to implement suitable soil health practices on a global scale. The rapid adoption of the soil health concept after 2010 may partly be rooted in its flexibility and thereby the ability by different stakeholder[s] to use it in their own way.²⁰⁰

With this historical background, Lehman and his collaborators survey a great variety of existing definitions and tests for soil health. They offer this summary:

²⁰⁰ Lehmann et al., *supra* note 198, at 546 (endnotes omitted).

In total, more than two thirds of soil health test frameworks currently include the traditional quantification of soil organic matter, pH, and plant-available phosphorus and potassium, and more than half [of the soil health test frameworks] include water storage and bulk density. A third of tests also recommend measurements of soil respiration, microbial biomass or nitrogen mineralization to characterize biological properties, as well as structural stability. Chemical indicators make up at least 40% of the indicators in 90% of the soil health assessment schemes ..., underscoring the continued importance of chemical properties in soil health quantification and the long-standing emphasis on plant production. Indeed, the most advanced analytical schemes currently, such as the Soil Management Assessment Framework, focus on indicators for sustainable crop production. However, the EU Commission recently recommended inclusion of soil biodiversity as one of six indicators of soil health.²⁰¹

In calling for “a new generation of indicators” for soil health, Lehman and his colleagues “suggest [that] additional measurements, especially biological assessments, be added” when evaluating soil health. Specifically, they urge that “aggregation, infiltration, earthworm abundance, organic C and N fractions should be more widely adopted in soil health testing ..., and N-mineralizing enzyme activity be added for soil health assessments for plant production.”²⁰² They also urge that for some purposes “several new indicators that are mainly geared towards non-agricultural soil services, such as human health and water quality, need to become part of routine soil health testing.”²⁰³

For reasons noted above, I am skeptical about including the anthropocentric indicators that Lehmann and his colleagues suggest at the end of that quoted passage. Still, the overriding theme of their article is valid and valuable: a much more detailed, science-based, and consistent set of standards should be established for quantifying soil health and thereby facilitating an urgent shift toward global environmental restoration, including an improvement in agricultural operations.

Lehman and his co-authors close their article with suggestions that carry legal and institutional implications both at the global level and at regional and local levels:

Because of soils’ broad environmental and societal functions, soil health should be legally recognized as a common good. The

²⁰¹ *Id.* at 548–49 (endnotes omitted).

²⁰² *Id.* at 49 (endnotes omitted).

²⁰³ *Id.* (endnotes omitted).

development of soil health quantification standards should be spearheaded by governmental or intergovernmental organizations such as the Global Soil Partnership. International standards have to be developed for suitable type of indicators, their methodological details[,] and their integration into indices. Such a comprehensive soil health index should then be referenced by local, regional or national jurisdictions and organizations to guide decisions that impact soil and its functions to benefit sustainability goals.²⁰⁴

IIIB. Observations on the restorative practices of biodynamic-regenerative viticulture

The preceding discussion has explained that although the standards for measuring “soil health” or “soil quality” are not nearly as clear and settled as we might wish, modern agriculture has caused soil degradation all around the Earth. Now let us look at the other side of the coin.

Evidence has grown recently for the proposition that science-based biodynamic-regenerative viticulture — which I have abbreviated above as SBBRV — does enhance soil health based on some of the key criteria explained above. The following research results, presented for brevity in bullet-point form, indicate that SBBRV shows enough promise to warrant further study on two subjects: (i) on how soil health should most appropriately be defined and measured in the specific context of viticulture operations and (ii) on how (and how much) SBBRV methods have yielded better results for soil health than do the methods used in conventional viticulture or even in organic viticulture.

- In a four-year study of conventional, biodynamic, and organic grape growing conditions, researchers found that soil quality was higher in organic and biodynamic operations and that “biodynamic management resulted in a morphology favouring production of high-quality grapes.”²⁰⁵ The researchers studied almost identical plots (in the same vineyard) over 4 years from 2006 through 2009, using GAP (good agricultural practice), organic, and Demeter biodynamic standards. The researchers found that “winegrowers have reported remarkable positive influences of biodynamic practices on soil quality, grapevine development, plant health and wine quality”; in particular, earthworm abundance was higher in biodynamic and organic plots than in the others.²⁰⁶

²⁰⁴ *Id.* at 544 (endnote omitted). Although Lehman and his colleagues say that soil should be legally recognized as a “common good,” their description suggests that it might be further recognized as part of the “common heritage of mankind” (CHM), a concept that dates back over half a century and already has legal heft and familiarity. For a historical survey of the CHM concept, see generally John E. Noyes, *The Common Heritage of Mankind: Past, Present, and Future*, 40 DENV. J. INT’L L. & POL’Y 447 (2011).

²⁰⁵ Georg Meissner, Miriam Athmann, Jurgen Fritz, Randolph Kauer, Manfred Stoll & Hans Schultz, *Conversion to Organic and Biodynamic Viticultural Practices: Impact on Soil, Grapevine Development and Grape Equity*, 53 OENO ONE 639, 639 (2019). The OENO One journal is managed by the International Viticulture & Enology Society.

²⁰⁶ *Id.* at 640, 646.

- A 2020 science-journal article reports similar results in studying organic and biodynamic viticulture operations. Noting that although longer-term tests are needed (since the first few years after switching from conventional to organic or biodynamic viticulture can have slow or maybe even opposite effects on soil quality), most of the researchers' studies "showed a clear increase in biodiversity under organic and biodynamic viticulture."²⁰⁷ The authors explain that "[t]he purpose of this study was to review evidence comparing effects of conventional, organic, and biodynamic viticulture on soil properties, biodiversity, vine growth and yield, disease incidence, grape composition, sensory characteristics, and wine quality."²⁰⁸ They assert that their "meta-analysis provides helpful guidance for defining further research in organic agriculture on perennial, but also on annual, crops."²⁰⁹
- A 2022 study coming from northern Italy distinguished specifically between organic viticulture and biodynamic viticulture, albeit on a small scale. Its authors explain: "As organic and biodynamic farming systems are increasingly becoming the subject of public debate, we considered it appropriate to investigate and compare the relative environmental performances of these two agricultural practices when it comes to wine production."²¹⁰ Therefore, a cradle-to-gate "life-cycle assessment" method was used to assess "the environmental profile of two organic and two biodynamic wines, produced by four small wineries in two areas of Northeast Italy, a region historically devoted to wine production."²¹¹ The study concludes in favor of the biodynamic approach: "On the whole, biodynamic products seem to have a lower impact than organic ones, regardless of the grape variety and geographical area analyzed. Results obtained from taking only the 'viticulture stages' into consideration once again suggest biodynamic production causes less environmental impact than organic."²¹²

²⁰⁷ Johanna Döring, Cassandra Collins, Matthias Frisch & Randolph Kauer, *Organic and Biodynamic Viticulture Affect Biodiversity and Properties of Vine and Wine: A Systematic Quantitative Review*, 70 AM. J. ENOLOGY AND VITICULTURE 221, 238 (2019), https://vinosa.it/wp-content/uploads/2020/12/221.full_.pdf [<https://perma.cc/X3TG-34PP>].

²⁰⁸ *Id.* at 221.

²⁰⁹ *Id.*

²¹⁰ Paola Masotti, Andrea Zattera, Mario Malagoli & Paolo Bogoni, *Environmental Impacts of Organic and Biodynamic Wine Produced in Northeast Italy*, 14 SUSTAINABILITY 6281, 6283 (2022).

²¹¹ *Id.*

²¹² *Id.* at 6293. For another comparative study of organic versus biodynamic viticulture practices, dating from 20 years ago, *see generally* Jennifer Reeve, L. Carpenter-Boggs, John Reganold, Alan York, Glenn McGourty & Leo McCloskey, *Soil and Winegrape Quality in Biodynamically*

In addition to the relatively recent studies I have mentioned here, the Demeter Association cites several other studies in the “Science” section of its website.²¹³ The account there seems to acknowledge a key feature that distinguishing biodynamic farming from organic farming — that is, the use of biodynamic “preparations” — has not been fully proven to be beneficial:

One of the chief differences between the USDA’s requirements for organic certification, and Demeter’s requirement for Biodynamic certification, is Demeter’s requirement for the use of eight preparations. These preparations (numbered 500 through 508) are made from animal manure, minerals, and herbs, and are applied in homeopathic quantities to soil, foliage, and compost piles. Anecdotal evidence and the strong growth of Biodynamic farms worldwide speak to the perceived benefit of the preparations, which were designed to promote nutrient and energy cycling in the soil and above ground. However, the mechanisms of action for the preparations, as well as the full extent of their abilities, are still not fully understood. While a reductionist scientific approach can explore some of the cause and effect that results from the preparations’ use, a holistic approach to scientific investigation of Biodynamic agriculture has also been utilized over the past 90 years to attempt to better understand them.²¹⁴

What about regenerative viticulture: do the claims that it contributes to soil health stand up under scientific scrutiny? A very recent meta-study suggests that they do, at least as compared to conventional (industrial-style) viticulture:

The purpose of this review was to evaluate the literature concerning individual, yet often interconnected components of, and approaches to RV [regenerative viticulture], including soil management, cover crops, weeds, pests and diseases, and livestock integration, to establish current knowledge and inform future research opportunities. ... The review found literature and science supporting viticulture’s potential

and *Organically Managed Vineyards*, 56 AM. J. ENOLOGY & VITICULTURE 367 (2005). That study, conducted in California, found no differences in soil quality in the first six years, and the researchers commented that these “results are consistent with the literature in that responses to the use of the biodynamic preparations have been seen in some situations but not others.” *Id.* at 367, 371.

²¹³ See *Science*, DEMETER ASS’N, INC., <https://www.demeter-usa.org/farmers/science.asp#:~:text=In%20comparing%20biodynamically%20and%20organically,conventionally%20managed%20yields%20are%20down> [<https://perma.cc/BMY3-Q6EK>].

²¹⁴ *Id.* For a 2021 report on carbon sequestration capacities of soil under regenerative viticulture operations, see Jessica Villat, *Down to Earth: Identifying and Promoting Regenerative Viticulture Practices for Soil and Human Health*, HARV. LIBR., (2021), <https://dash.harvard.edu/entities/publication/054174c8-dbf3-4bc9-9678-789acd1d61c4> [<https://perma.cc/CYB7-WVL7>]. The author concluded that after studying yearly soil carbon sequestration of regenerative vineyard practices versus other techniques, “soil regenerative practices can be beneficial when applied holistically and in concert with one another ... but [t]here was no significant difference between the N= 345 measures of soil C sequestration ... across seven practices in viticulture.” *Id.*

for: soil and biodiversity regeneration, carbon sequestration, land cooling, ecological enhancements, and soil water holding capacity improvements. There is less consensus regarding the impact of RV approaches on grape yield, wine quality and greenhouse gas (GHG) emissions, as well as a lack of vineyard-based evidence demonstrating the efficacy of biostimulants and Biological Control Agents (BCAs).²¹⁵

IIIC. Some open questions: soil health, wine quality, terroir, and mycorrhizal networks

One phrase in the preceding quoted paragraph prompts me to take a brief detour that emphasizes the character of what we do *not* know. The quoted paragraph noted that no full consensus has emerged “regarding the impact of R[egenerative] V[iticulture] approaches on ... wine quality.” This strikes me as an understatement, since no full consensus has emerged even on how (or if) *terroir* itself affects wine quality. One of today’s most famous judges of wine quality, Jancis Robinson, has addressed this issue by acknowledging that “those who really understand geology are increasingly insistent that, despite the suggestions given by much wine literature and many a tasting note, there can be no direct relationship between what is below the vineyard and what is in the glass.”²¹⁶ Indeed, Robinson continues, “one of the most wine-aware academic geologists [has written in the *Oxford Companion to Wine* that] ‘[a]necdotes

²¹⁵ Flora O’Brien, Belinda Kemp, Alistair Nesbitt & Rebecca Sykes, *Regenerative Viticulture and Climate Change Resilience*, 59 OENO ONE 1, 1 (2025). Results from another recent study — this one on regenerative agriculture generally, not just regenerative viticulture — have led to similar claims. A “pilot study encompass[ing] 78 regenerating farms across 14 EU countries, covering over 7,000 hectares . . . [and] conducted by 11 researchers with institutional support” found that “regenerating farmers delivered 33% higher RFP [Regenerating Full Productivity] on average” compared with neighboring fields using conventional farming practices. *Farmer-led Research on Europe’s Full Productivity: The Realities of Producing More and Better with Less — Place-based Innovation for the Good of All*, EUR. ALL. FOR REGENERATIVE AGRIC. (June 2025), https://eara.farm/wp-content/uploads/EARA_Farmer-led-Research-on-Europes-Full-Productivity_2025_06_03.pdf [<https://perma.cc/6LFH-AUDE>]. The Regenerating Full Productivity Index used in the study is referred to in the report as “a multidimensional performance metric developed by farmers, researchers and agronomists to capture the full spectrum of land stewardship outcomes: agronomic, ecological, and economic.” *Id.* at 4. As for agroecological factors, the study found that “[c]ompared to neighbouring fields, regenerating farms achieved over 25% higher photosynthesis, 24% higher soil cover and 16% higher plant diversity” over five years, yielding “better soil health.” *Id.* at 4. As for productivity, the study found that “[r]egenerating farms achieved, on average, only a 2% lower yield . . . while using 61% less synthetic nitrogen fertilizer and 75% less pesticides and making 20% higher gross margin per hectare[.]” *Id.*

²¹⁶ Jancis Robinson, *Holes in the Ground, and in our Knowledge*, JANCIS ROBINSON (Jun. 20, 2015), <https://www.jancisrobinson.com/articles/holes-ground-and-our-knowledge> [<https://perma.cc/D62K-Y65U>] [hereinafter Robinson 2015].

notwithstanding, vineyard geology cannot — in any direct, literal way — be tasted in wine.”²¹⁷

Robinson remains curious and pushes back against such a purely scientific analysis:

And yet, and yet. Those of us who taste thousands of wines a year find inescapable the fact that wines from different places taste different in what seem like predictable ways. And many of us with tasting experience can see relationships between wine character and vineyard soil types. A wine grown in sandy soil will invariably taste lighter and softer than one grown next door on clay. The Rieslings of the Mosel grown variously on blue/grey and red slate taste very obviously different. Wines grown in the Achleiten vineyard by those naughty Austrians, and the most characteristic reds of Priorat in north-east Spain, for instance, are grown on very particular rock formations and, in their very different ways, they taste perceptibly distinctive.²¹⁸

Central to Robinson’s observations, of course, is the notion of *terroir*. As I noted at the very beginning of this section III, viticulture takes place on a remarkably broad variety of soils, from chalky to stony to volcanic to glacial.²¹⁹ Indeed, winemakers often tout the peculiar features of their own soil and setting — usually summed up in the term *terroir* — in explaining the special characters of their wines. One source offers this explanation:

Terroir is a French word that means “earth” or “soil” in everyday speech, but the term has been adopted in the wine trade to refer to something else entirely: sensory traits in wine that are location-specific. ... The word was first used in this sense by medieval monks in the Burgundy region seeking to describe the noticeable differences found in wines grown in different sites. ... If wine were a piece of music, *terroir* wouldn’t be a melody or arrangement as much as the distinctive acoustics of a specific performance venue, like the famed resonance of Carnegie Hall.²²⁰

From this notion of *terroir*, and from Jancis Robinson’s reluctance to accept the assertion that *terroir* definitely *cannot* (as a scientific matter) have any direct effect on the taste of a wine, I wish to build an analogy between (i) soil’s effect on wine’s taste (and wine’s other sensory features) and (ii) SBBRV’s effect on soil health. As for the first of these, Robinson offers this conclusion: “something seems to be going on, even if for the moment it cannot fully be explained scientifically,” regarding the effect of *terroir* on the taste of

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ See MacNeil, *supra* note 16, at 26–27. See also text accompanying note 180.

²²⁰ Marnie Old, *Why Vineyard Soil is So Important for Terroir*, BEVERAGE DYNAMICS (Sep. 12, 2021), <https://bevinfo.org/2021/09/12/vineyard-soil-terroir-wine-meaning-definition/> [<https://perma.cc/YN5A-KJWZ>].

a wine. Perhaps, she surmises, “it may be that there is simply a missing link in our knowledge” about the “precise influences on the flavour and texture of wines.”²²¹

This brings me to the second half of my analogy. Even though the research efforts described above in subsection IIIB have not led (yet) to a broad scientific consensus as to how various natural-systems viticultural practices — biodynamic, organic, regenerative — affect soil health, there may simply be (in Robinson’s words) “a missing link in our knowledge” on this point thus far. After all, “[t]he ecosystems of healthy soils are alive, extremely active, vastly complex and poorly understood.”²²²

Indeed, it should come as no surprise that the complexity of the notion of *terroir* will complicate the scientific discernment of SBBRV’s effects on soil. Research into these effects will need to be conducted individually, in many settings and types of *terroir*. One source has explained this specificity and how it might be addressed:

Because *terroir* is a multifactor concept, no general quantitative relationships between one or more soil properties and the distinctive characteristics of wine from a particular site have been identified; rather a unique combination of soil factor values interacts with local climate, grape variety, vintage, canopy management, and winemaker technique to determine a site’s *terroir*. However, with modern methods of sensing spatially referenced values of environmental and other variables at high resolution, *terroirs* can be mapped. This provides a platform for monitoring *terroirs* over time and recording how they respond to changes in environmental factors or to manipulations in the vineyard and winery.²²³

Accordingly, the deeper research that I suggest for determining and maximizing the benefits of SBBRV will surely prove to be increasingly feasible

²²¹ Robinson 2015, *supra* note 216. In another article, Robinson makes the same general point regarding the effect that *biodynamic* viticulture can have on wine quality: although she acknowledges that biodynamics “means being guided by the phases of the moon, burying homeopathic doses of special ‘dynamised’ (stirred) preparations in cow horns at propitious times and generally seeming pretty deranged,” the fact remains that “all over the world producers of some of the most admired wines follow biodynamic principles more or less, with a *demonstrably beneficial effect on vine health and wine quality*.” Robinson 2023, *supra* note 179 (emphasis added).

²²² Currin, *supra* note 195.

²²³ Robert E. White, *The Value of Soil Knowledge in Understanding Wine Terroir*, 3 FRONTIERS ENV’T SCI. 1, 1 (2020). White advocates the use of “*terroir* maps at an appropriate scale [that] can be updated and hence used to monitor changes in the underlying variables in response, for example, to climate change. The information provided can then inform changes in viticultural management practices.” *Id.* at 2.

with new technology. Employing new technology might well teach us much more than we know now about a second point I wish to highlight in concluding this section: the importance of mycorrhizal networks. These are underground fungal networks or systems of interaction among roots of plants.²²⁴ As one source explains, “[s]everal studies have shown that these networks can influence plant establishment, nutrition, productivity and defense, nutrient distribution and storage, and multitrophic interactions.”²²⁵ The same source explains, however, that “many of these studies have focused on the importance of common mycorrhizal networks in [natural and largely undisturbed] ecological contexts and there has been less emphasis [on how mycorrhizal networks operate] in managed systems.”²²⁶

The significance of mycorrhizal networks in the context of viticulture lies in the fact that conventional viticulture practices create disturbances that injure soil health. One study demonstrates how “low-intervention practices (organic and biodynamic managements) promoted densely clustered [mycorrhizal] networks, describing an equilibrium state based on mixed collaborative communities” while conventional vineyards had “highly modular sparser communities.”²²⁷ Another study concludes that overlap of grapevine and cover-crop roots may lead to development of a common mycorrhizal network that, in turn, may facilitate direct nutrient transfer from cover crops to grapevines.²²⁸ In short, one key focal point of further research into the effects that SBBRV methods can have on soil health should be the specific impact those methods have on mycorrhizal networks.

IV. A faint constellation of official public support for biodynamic-regenerative viticulture

If, as I have suggested above, a biodynamic-regenerative approach to viticulture can help address the global soils crisis and provide a model for agricultural reform more generally, then a pair of questions arises. First, what should be the role, if any, for official public support in encouraging such a

²²⁴ For a lively podcast about CMNs, featuring references to the “Wood Wide Web” and a “fungal freeway system connecting one tree to the next to the next to the next,” see *From Tree to Shining Tree*, RADIO LAB (July 30, 2016), <https://radiolab.org/podcast/from-tree-to-shining-tree> [<https://perma.cc/6B8U-VGCS>].

²²⁵ Pierre-Louis Alaux, Yaqian Zhang, Lucy Gilbert & David Johnson, *Can Common Mycorrhizal Fungal Networks be Managed to Enhance Ecosystem Functionality?*, 3 *PLANTS, PEOPLE, PLANET* 433, 433 (2021).

²²⁶ *Id.* The authors of this article go on to explain that common mycorrhizal networks can help with plant nutrition and in “improving plant resistance and tolerance to abiotic [stresses such as drought] and biotic ... stresses. Thus, there is growing evidence of the multifunctional effects of CMNs across ecosystems involving different types of mycorrhizal fungi.” *Id.* at 435.

²²⁷ Rüdiger Ortiz-Álvarez, Hector Ortega-Arranz, Vicente Ontiveros, Miguel de Celis, Charles Ravarani, Alberto Acedo & Ignacio Belda, *Network Properties of Local Fungal Communities Reveal the Anthropogenic Disturbance Consequences of Farming Practices in Vineyard Soils*, *MSYSTEMS*, May 4, 2021, at 1.

²²⁸ Xiaomei Cheng & Kendra Baumgartner, *Arbuscular Mycorrhizal Fungi-Mediated Nitrogen Transfer from Vineyard Cover Crops to Grapevines*, 40 *BIOLOGY & FERTILITY OF SOILS* 406, 407 (2004).

biodynamic-regenerative approach — what I have abbreviated thus far as SBBRV (science-based biodynamic-regenerative viticulture)? Second, what types of support do some governmental systems already provide in various jurisdictions around the world? I examine those two questions in this section IV.

The heading I use for this section refers to “a faint constellation” of public support for SBBRV. As described below, even though some aspects of agriculture — especially those involving staple annual grains such as maize and wheat — do receive a broad range of subsidies, the same is not true of natural-systems viticulture. Like scattered points of lights in an evening sky, the public support for SBBRV is largely disorganized and hard to discern; only by straining can we imagine this public support constituting a faint constellation.

Subsection IVA will identify several *categories* of possible public support, using conventional extractive agriculture (annual foodgrains) as illustrative of subsidies, tax breaks, research funding, and the like. Subsections VB through VG will then focus on viticulture; it will offer details from several jurisdictions to illustrate how paltry the public support is thus far for SBBRV.

IVA. Subsidies for agriculture generally — broad programs but narrow focus

In order to generate a bird’s-eye summary of how conventional agriculture gets supported through various types of government programs, I decided to see what kind of Artificial-Intelligence (AI) response would emerge from a Google search asking this question: “What are the main types of subsidies provided to agriculture in the U.S. and the EU?” I was rewarded with this AI answer:

In the US and the EU, agricultural subsidies take various forms, including direct payments to farmers, price supports, and support for specific practices like conservation or disaster relief. Both regions also use border measures like tariffs and import quotas to protect their domestic markets.

This AI-generated synopsis is borne out by more official (and reliable) sources providing such details as these regarding both the U.S. federal system and the EU Common Agricultural Policy (“CAP”):

- The U.S. system of agricultural subsidies includes “monetary payments and other types of support ... to farmers or agribusinesses. While some subsidies are given to promote specific farming practices, others focus on

research and development, conservation practices, disaster aid, marketing, nutritious assistance, risk mitigation, and more.”²²⁹

- Although the specific forms and amounts of U.S. agricultural subsidies vary over time, a USDA webpage explains that the most recent legislation appears in “[t]he *American Relief Act, 2025*, signed into law on December 21, 2024, [which] extended the *Agriculture Improvement Act of 2018* (also known as the 2018 Farm Bill) for one year through Sept. 30, 2025.”²³⁰ That 2018 Farm Bill, in turn, provides “safety-net programs,” “price support programs,” and crop insurance, which “is one of the programs that is permanently authorized and does not expire.”²³¹
- Although the EU CAP subsidies are now in a state of transition, with the EU “drawing up plans to simplify rules governing its huge farming subsidy programme,”²³² EU farming subsidies are currently “worth around a third of [the EU’s] 2021-2027 budget, or around 387 billion euros ([US]\$399 billion) in payments to farmers and rural development.”²³³

One survey of agricultural subsidies provided by various national governments emphasizes three key points. First, such subsidies have been used for decades: “Since the early 1930s, governments of wealthier countries around the world have used a dizzying array of schemes to support and subsidize farmers.”²³⁴ Second, some countries provide very large agricultural subsidies: “Among OECD members (a group of high-income countries), ‘producer support estimate’ rates average about 31 percent of total revenue for the main grain, oilseed, sugar, and

²²⁹ See Nat’l Agric. Libr., *Agricultural Subsidies*, USDA, <https://www.nal.usda.gov/economics-business-and-trade/agricultural-subsidies#:~:text=The%20government%20provides%20agricultural%20subsidies,data%2C%20and%20other%20pertinent%20resources> [https://perma.cc/84DN-L4HN].

²³⁰ *Farm Bill*, USDA, <https://www.farmers.gov/working-with-us/farm-bill#available> [https://perma.cc/FAR8-ZAR6].

²³¹ *Id.*

²³² Kate Abnett, *EU Plans Simpler Rules for Billions Worth of Farm Subsidies, Draft Shows*, REUTERS (Feb. 10, 2025, 10:19 AM), <https://www.reuters.com/world/europe/eu-plans-simpler-rules-billions-worth-farm-subsidies-draft-shows-2025-02-10/#:~:text=The%20EU's%20Common%20Agricultural%20Policy,need%20to%20start%20your%20day> [https://perma.cc/FF4X-488Q].

²³³ *Id.* The same reporter explains that some of the CAP reforms involve weakening some of “the environmental conditions tied to the EU’s huge farming subsidy programme . . . as part of plans to cut back regulations and paperwork for farmers.” Kate Abnett, *EU Proposes Curbing More Green Rules on Farming Subsidies*, REUTERS (May 14, 2025, 9:44 AM), <https://www.reuters.com/sustainability/climate-energy/eu-proposes-curbing-more-green-rules-farming-subsidies-2025-05-14/> [https://perma.cc/2MKD-XQTG].

²³⁴ Daniel A. Sumner, *Agricultural Subsidy Programs*, ECONLIB, <https://www.econlib.org/library/Enc/AgriculturalSubsidyPrograms.html#:~:text=The%20main%20forms%20of%20subsidy,price%20supports%20or%20other%20programs> [https://perma.cc/P2ZE-7QM7]. The article, written by a former assistant secretary for economics at the USDA, appears on the website of the Library of Economics and Liberty, based in Indiana. See ECONLIB, <https://www.econlib.org/> [https://perma.cc/8KHV-LAJB].

livestock products,”²³⁵ and that “[t]he highest national average support equivalent rates, across all major commodities, are offered in Norway, Switzerland, and Iceland, with average subsidies of about 65–75 percent of the value of production. ... The average support rate in the European Union is about 35 percent of the value of production.”²³⁶ Third, the forms of subsidies and support are extremely diverse: they include “(1) direct payments to farmers and landlords; (2) price supports ... ; (3) regulations that set minimum prices by location, end use, or some other characteristic; (4) subsidies for such items as crop insurance, disaster response, credit, marketing, and irrigation water; (5) export subsidies; and (6) import barriers.”²³⁷ Moreover, “the governments of most wealthier nations provide aid for agricultural research and development, promotion, and some agricultural and rural infrastructure.”²³⁸

In focusing specifically on the U.S. farm-subsidies programs, the same source emphasizes the fact that these supports are highly selective by commodity: “The U.S. government heavily subsidizes grains, oilseeds, cotton, sugar, and dairy products. Most other agriculture — including beef, pork, poultry, hay, fruits, tree nuts, and vegetables (accounting for about half of the total value of production) — receives only minimal government support.”²³⁹

In a 2017 book, I explained that U.S. government subsidies have contributed to a severe concentration of types of grains and other agricultural products produced by U.S. farmers. The extent of this concentration is arresting:

As Jason Clay has observed, 90 percent of the world’s food today comes from 30 crop species, even though about 7,000 crop species exist. Moreover, ... corn (maize), wheat, and rice account for 89 percent of all cereal produced worldwide.” ... A key economic *cause* for this concentration of farm production in a small number of species — for the USA, the list includes corn, soybeans, wheat, rice, cotton, barley, sorghum, and oats, which together account for a very high proportion of US agricultural production — is that these are the crops most heavily subsidized. Indeed, in the USA, nearly all US government agricultural subsidies go to those eight crops, and 90 percent of the funding is concentrated in the first five [of these].²⁴⁰

²³⁵ *Id.* The author explains that the term “producer support estimate” is intended to “aggregate into a single index a large range of government programs, including price supports and trade barriers, that transfer benefits to farm producers and landlords.” *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ AGROECOLOGICAL HUSBANDRY, *supra* note 8, at 58.

In the same book, I pointed out that conventional (industrial) agricultural production in the United States benefits not only from the direct subsidies summarized above but also from an indirect subsidy represented by official support for the fossil-carbon industry:

From a farmer's perspective, it is an *indirect* subsidy because it is paid not to farmers themselves but rather to participants in the fossil-carbon extraction and processing industry. To the extent that the extraction and processing of such fossil carbons as coal, oil, and natural gas receive financial benefits from governments subsidies of various sorts ... the agriculture sector also benefits indirectly ... [because] fossil-carbon inputs figure prominently in farm production [under modern industrial agricultural practices].²⁴¹

In sum: many governments around the world provide an extensive array of subsidies to certain forms of agriculture. Such subsidies, though, are highly selective by sector (that is, by the types of products involved) and are most valuable to an industrial approach to agricultural operations. The question then arises: what are some illustrations of the sorts of official support offered to the viticulture sector, and specifically for encouraging environmentally conscious approaches to growing grapes for wine?

In the following subsections I offer a six-jurisdiction set of case studies to compare and contrast the level of governmental support for viticulture, coming mainly in the form of subsidies, research funding, certification processes, and tax incentives. In general, these case studies reveal that some jurisdictions do provide significant public support for viticulture. Such support seems less common, however, in the United States than in some key wine-producing states elsewhere in the world. In the United States, there is more likely to be funding from a private sector or a non-profit organization, as will be discussed when looking at funding pay structures for viticulture in California, Washington, and Oregon.

The United States is also unusual in another way: although the United States in general has certification processes and regulations to follow, some states create their own more rigorous rules and procedures that farmers must follow to obtain state-specific certification status — such as “Washington Certified” or “California Certified” — in an attempt to set themselves apart in the wine industry. Finally, it is important to note the difference between (i) organic status and (ii) either biodynamic status or regenerative status. As explained earlier, Demeter is the non-government entity in charge of biodynamic status (and has significant control over the term),²⁴² and the Regenerative Organic Alliance is the non-

²⁴¹ *Id.* at 60. As explained in that book, I use the term “fossil carbon” in this context, instead of the term “fossil fuel,” to reflect the fact that the extraction and processing of oil, natural gas, coal, and other hydrocarbons that exist in fossilized form are not always undertaken for the creation of *fuel*. For instance, when natural gas, such as methane, is used in the creation of synthetic ammonia (widely used as fertilizer in modern agriculture), it is not used as a fuel but instead as a component in the chemical process that results in ammonia. *Id.* at 60 n.50.

²⁴² *See supra* subsection IIC.

government entity that has assumed responsibility for ROC certification and standards (in these still-early days of formalizing regenerative-viticulture status).²⁴³ By contrast, organic-viticulture standards and certifications fall within the purview of a governmental agency's duty, as in the United States and the EU.²⁴⁴

The following illustrative survey is limited in scope. It focuses only on Italy, California, Chile, Washington, Oregon, and British Columbia.²⁴⁵ These jurisdictions are important for viticulture because all of them have important wine industries (along with the tourism that frequently accompanies viticulture).

IVB. Italy

Italy's wine industry is worth more than US\$10 billion, accounting for 17% of the world's wine production.²⁴⁶ Reflecting the importance of viticulture to the Italian economy, a review of the Italian wine industry — focusing both on the agricultural practices used and the wine business — reveals significant amounts of public-funded financial support coming from the Italian government and the EU. Although distinctions are not consistently drawn for these purposes between what is described above as “industrial” versus “organic” (or biodynamic) practices, recent steps by Italian authorities show that the distinction is increasingly important and that organic practices are indeed receiving some special attention and support. The following developments and data illustrate these points:

²⁴³ See *supra* subsection III E.

²⁴⁴ See *supra* subsection III D.

²⁴⁵ Naturally, other jurisdictions and regions would warrant similar examination. For a brief treatment of New Zealand's sustainable viticulture program, see Lepird, *supra* note 34, at 126–127. That program “began in 1995 and was one of the first to be recognized on an international level as a sustainable option for viticulture” with now “96% of the vineyards in New Zealand operat[ing] under these sustainability standards.” *Id.* at 124. A similar trend has been noticed in Uruguay: “Sustainability is a key focus for many Uruguayan wineries. Bodega Garzón, for example, is renowned for its commitment to sustainable practices, including water conservation and organic farming.” Chris Rigge, *Uruguay: South America's most underrated wine region*, SMOOTHRED (Aug. 1, 2024), <https://www.smoothred.com/inspiration/uruguay-south-americas-most-underrated-wine-region/> [<https://perma.cc/B7TW-L7KC>]. Similar trends toward natural-systems viticulture appear in France, which accounted (in terms of revenue) for 18.3% of the global organic wine market in 2023. See *France Organic Wine Market Size & Outlook, 2024-2030*, GRAND VIEW RSCH., <https://www.grandviewresearch.com/horizon/outlook/organic-wine-market/france> [<https://perma.cc/D9RB-KBA6>].

²⁴⁶ *The Wine Business in Italy, Consumption, Trends and Growth Prospects*, ROME BUS SCH. (Oct. 23, 2023), <https://romebusinessschool.com/blog/the-wine-business-in-italy-consumption-trends-and-growth-prospects> [<https://perma.cc/YJ23-ZTRS>].

- In 2023 and 2024, the EU invested around 323.8 million euros into the Italian wine industry.²⁴⁷ The EU's Common Market Organization (CMO) is providing the funding.²⁴⁸ However, the CMO has strict parameters for how the industry may use the subsidies.²⁴⁹ A decree from the Italian Ministry of Agriculture and Food sets out a rough breakdown of the subsidies noting that “the largest amount of 144 million euros will be given to farms for the restructuring and conversion of vineyards, while about 98 million euros have been granted for sales promotion on export markets.”²⁵⁰ Although not strictly about viticulture — but still in the realm of agriculture — clean harvesting or “green harvesting” is also being promoted.²⁵¹
- Due to a study conducted by researchers at the University of Bologna, “Italy plans to invest 3 billion euros (3.06 billion U.S. dollars) to transition 25% of the country’s agricultural land to organic by 2027.”²⁵²
- In 2011, the Italian Ministry of Environment and Energy Security created VIVA,²⁵³ a national program that focuses on promoting sustainability throughout the Italian wine industry. According to the Ministry, “VIVA is the only Italian public standard for measuring and improving the sustainability performance of the wine sector.”²⁵⁴ The program utilizes research conducted by the Centro di Ricerca OPERA,²⁵⁵ which is a sustainable agriculture research center and think tank.²⁵⁶
- A few years ago, Italy passed a law approving an “Organic Made in Italy” label and funding for organic farming research in hopes to support and encourage organic production throughout Italy.²⁵⁷

²⁴⁷ *EU Subsidises Italy’s Wine Industry with 323.8 Million Euros*, WEIN.PLUS (Jan. 31, 2023), <https://magazine.wein.plus/news/eu-subsidises-italy-s-wine-industry-with-323-8-million-euros-conversion-of-vineyards-promotion-green-harvesting> [<https://perma.cc/34E6-2NEA>].

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Italy to Invest 3 Billion Euros to Transition 25% of Farmland to Organic by 2027*, ORGANIC & NON-GMO REP. (Oct. 3, 2022), <https://non-gmoreport.com/italy-to-invest-3-billion-euros-to-transition-25-of-farmland-to-organic-by-2027/> [<https://perma.cc/P6SR-YM46>] (“The decision to transition the land to organic was spurred by a new study on sustainable strategies to limit the spread of pests and disease in Italy”).

²⁵³ *The Program VIVA Sustainable Wine*, MINISTRY OF ENV’T & ENERGY SEC. (Dec. 6, 2022), <https://www.mase.gov.it/pagina/program-viva-sustainable-wine> [<https://perma.cc/T393-8SPR>].

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *See generally* Eur. Observatory on Sustainable Agric., *About OPERA*, OPERA RSCH., https://operaresearch.eu/#_blank [<https://perma.cc/JP89-CU4F>].

²⁵⁷ Paolo DeAndreis, *Italy Introduces New Legislation to Promote Organic Production*, OLIVE OIL TIMES (Mar. 25, 2022), <https://www.oliveoiltimes.com/production/italy-introduces-new-legislation-to-promote-organic-farming/106185> [<https://perma.cc/262E-JGZZ>].

- Also a few years ago, a bill dealing with biodynamics, which had previously won the approval of the Italian senate, was blocked by only one vote.²⁵⁸

IVC. California

A review of California's approach to organic practices in viticulture shows an important shift in that state — a shift toward sustainable practices, organic certification, and the like. As in the case of Italy, California's support for the wine industry takes many forms, some of which are viticulture-specific and most of which are applicable to agriculture in general. Still, as the following developments illustrate, organic operations are getting priority attention:

- California has created a plan to eliminate pesticides by the year 2050 in an attempt to embrace a more environmentally sustainable culture. However, many of the state's wineries have been farming organically or biodynamically long before California "unveiled its 'sustainable pest management roadmap'."²⁵⁹
- In California, the California Certified Organic Farmers (CCOF), a non-profit entity, has created an organic certification program for agriculture (including viticulture). To receive an organic certification from CCOF, "a vineyard must be farmed without the use of any prohibited substances for a minimum of three years."²⁶⁰
- In addition to representing over 4,000 organic practices in California, CCOF is an advocate for California's agriculture industry, pushing for legislative changes and funding in organic agriculture. Recently, CCOF celebrated the California Governor signing a state budget into

²⁵⁸ Jessica Mason, *Biodynamic Farming Favoured by Sting Sees Bill Blocked in Italy*, THE DRINKS BUS. (Feb. 11, 2022), <https://www.thedrinksbusiness.com/2022/02/stings-biodynamic-farming-ends-as-bill-gets-blocked-by-italian-government/> [<https://perma.cc/XT8J-UHPA>]. Those opposed to the bill complained that biodynamics has no basis in science, whereas its supporters advocated that biodynamics requires a higher set of standards than organic wine production. *Id.*

²⁵⁹ Marisa Finetti, *California's Ban on Pesticides by 2050 Sees the State's Wineries Embracing 'Slow Wine'*, DECANTER (Mar. 28, 2023) <https://www.decanter.com/wine-news/californias-ban-on-pesticides-by-2050-sees-the-states-wineries-embracing-slow-wine-500270/> [<https://perma.cc/22W6-SGWB>].

²⁶⁰ Baldacci Fam. Vineyards, *Farming for the Future: Your Guide to Understanding Conventional, Sustainable, Organic, & Biodynamic Viticulture*, BALDUCCI, <https://www.baldaccivineyards.com/2023/03/farming-for-the-future/> [<https://perma.cc/7SFR-NTZF>].

law which allocated US\$5 million to transitioning farms and ranches into organic operations.²⁶¹

- A study conducted by John Dunham & Associates “shows that the California wine industry generated over [US]\$88 billion for the American economy in 2022” as well as created 513,738 jobs and paid billions in tax revenue to the local, state, and national government.²⁶²
- A bill, SB 1135, that would establish a tax credit for sustainable agricultural practices was submitted in 2024 to the California legislature. SB 1135 sought “to incentivize sustainable agricultural practices, undertaken by winegrape growers and other ag producers, by offering a tax credit for the utilization of compost to enhance carbon sequestration efforts.”²⁶³ The bill was held in committee for several months before becoming inactive and dying.²⁶⁴

IVD. Chile

A review of Chile’s governmental and private support to its wine industry shows a relatively recent escalation in funding and a push for sustainability. Typically, the Chilean government’s support for its agricultural industry is fairly weak. Some private actors in Chile, however, are taking steps similar to those of Italy and California by investing in research, creating organic certification, and pushing the government’s financial incentive structures for the industry. The following developments illustrate these points:

- More than 80% of Chilean wines comply with the Wines of Chile’s Chilean industry sustainability code and identify as a “Certified Sustainable Wine of Chile” in addition to other organic or biodynamic certifications.²⁶⁵ However, the Chilean industry

²⁶¹ CAL. CERTIFIED ORGANIC FARMERS, *New Organic Transition Program in California Following CCOF Advocacy Efforts*, (July 27, 2022), <https://www.ccof.org/news/new-organic-transition-program-in-california-following-ccof-advocacy-efforts/> [<https://perma.cc/LB4V-VMXN>].

²⁶² Nat’l Ass’n of Am. Wineries, *California Economic Impact Study 2022*, WINE AM. (2022), <https://wineamerica.org/economic-impact-study/california-wine-industry/> [<https://perma.cc/FAW3-3XG7>].

²⁶³ *California Association of Winegrape Growers Announces California Compost Tax Credit Legislation*, AM. VINEYARD (Mar. 6, 2024), <https://americanvineyardmagazine.com/california-association-of-winegrape-growers-announces-california-compost-tax-credit-legislation/> [<https://perma.cc/48TM-XQL8>].

²⁶⁴ For a report on the action taken on this proposal, see the California “legislative information” website at https://leginfo.ca.gov/faces/billStatusClient.xhtml?bill_id=202320240SB1135 [<https://perma.cc/JPV8-GNTR>].

²⁶⁵ David Falchek, *Chilean Wine Producers Embrace Sustainability*, REPUBLICAN HERALD (July 10, 2021, 4:00 PM), <https://www.republicanherald.com/2021/07/10/chilean-wine-producers-embrace-sustainability-2/> [<https://perma.cc/Y4ZQ-YBC9>].

sustainability code is a voluntary standard that simply guides wine companies on how to work sustainably.²⁶⁶

- In addition to creating a Chilean industry sustainability code, the Wines of Chile, together with the Chilean Economic Development Agency (CORFO), offer support by co-financing sustainable projects.²⁶⁷ Examples of sustainable projects that receive CORFO funding are: (i) a research project that looks “into native yeasts and wild fermentation surrounding the vineyards that will further understanding of the way biodiversity impacts on the wines and [(ii)] a circular economy research project that is looking to improve the quality of compost by incorporating organic agro-industrial wastes.”²⁶⁸
- The Chilean government spends only about 5% of its total government spending on agriculture — 0.5% of that funding being used for research and development in the wine industry — with no national agricultural investment policy.²⁶⁹ However, the Chilean government did invest in several programs instituted by different government agencies.²⁷⁰ One program by the National Agricultural Development Institute (INDAP) focuses on helping agricultural producers who are INDAP members gain access to “better commercial alternatives and new markets in order to contribute to the improvement of sustainable and transparent commercial relations.”²⁷¹
- In the wine industry specifically, Chile's government — in hopes of boosting its wine production — has implemented several policies supporting the industry. These policies “include investment

²⁶⁶ *Sustainability*, WINESOFCHILE, <https://www.winesofchile.org/sustainability/> [https://perma.cc/4JSC-5647].

²⁶⁷ Arabella Mileham, *Chile 'Needs to Push its Green Credentials' to Stand Out, Winemakers Agree*, THE DRINKS BUS. (Oct. 14, 2020), <https://www.thedrinksbusiness.com/2020/10/chile-needs-to-push-its-green-credentials-to-stand-out-its-winemakers-agree/> [https://perma.cc/W8MB-DK65].

²⁶⁸ *Id.*

²⁶⁹ Mayarí Castillo, Rodrigo Pérez-Silva, Catalina Chamorro & Macarena Sepúlveda, *Public Policies, Sustainability, and Smallholder Producers' Access to the Market. The Productive Alliance Programme in Chile: A Case Study*, 6 FRONTIERS IN SUSTAINABLE FOOD SYS. 1, 2 (Oct. 2022), <https://www.frontiersin.org/journals/sustainable-food-systems/articles/10.3389/fsufs.2022.1020049/full> [https://perma.cc/4632-G4JR].

²⁷⁰ *Id.*

²⁷¹ *Id.*

incentives, tax breaks, and the establishment of wine routes and tourism initiatives.”²⁷²

IVE. Washington

A review of the Washington wine industry shows that organic certification processes are conducted through governmental and private actors. Similarly, funding for research and sustainability follows this pattern with grants and reimbursements coming from both. With the wine industry being a big contributor to the Washington economy — and with sustainable and organic operations being an important part of that revenue — Washington appears to be prioritizing organic operations, as illustrated by these points:

- According to data provided by Washington Wine, wine production is a large part of Washington’s economy with Washington wineries and grape growers “contributing more than [US]\$10.56 billion in annual in-state economic impact.”²⁷³ This marks Washington as the second largest (falling behind California)²⁷⁴ wine producing state in the United States.²⁷⁵
- On the state level, Washington was the first state to implement a statewide certified sustainability program for its wine industry.²⁷⁶ The program, Sustainable WA, requires a third party to audit vineyards before certification to ensure the vineyard meets established standards, which Sustainable WA asserts are rigorous and science-based.²⁷⁷
- At the national level, the Washington State Department of Agriculture (WSDA) Organic Program serves as a certification agent for the USDA National Organic Program (discussed above in subsection IID).²⁷⁸ In order to get certified by the WSDA, vineyards must pay a number of fees.²⁷⁹ However, the WSDA can “reimburse

²⁷² *Wine – Chile*, STATISTA (June 2024), <https://www.statista.com/outlook/cmo/alcoholic-drinks/wine/chile#analyst-opinion> [<https://perma.cc/P8SP-WWR6>].

²⁷³ WASH. STATE WINE COMM’N, *Fast Facts*, WAWINE, <https://www.washingtonwine.org/fast-facts/> [<https://perma.cc/2WPL-YNR9>].

²⁷⁴ Eloise Feilden, *Top 10 Wine Producing States in the US*, THE DRINKS BUS. (Sep. 14, 2022), [https://www.thedrinksbusiness.com/2022/09/top-10-wine-producing-states-in-the-us/#:~:text=Top%2010%20wine%20producing%20states%20in%20the,\(0.3\)%%20*%20Vermon](https://www.thedrinksbusiness.com/2022/09/top-10-wine-producing-states-in-the-us/#:~:text=Top%2010%20wine%20producing%20states%20in%20the,(0.3)%%20*%20Vermon) [t%20\(0.3\)%%20*%20Virginia%20\(0.3\)%](https://perma.cc/RW4L-AVXM) [<https://perma.cc/RW4L-AVXM>].

²⁷⁵ See *Fast Facts*, *supra* note 273.

²⁷⁶ WASH. STATE WINE COMM’N, *Sustainable WA*, WAWINE (May 29, 2024), <https://www.washingtonwine.org/sustainable-wa/> [<https://perma.cc/55H9-A39D>] [hereinafter *Sustainable WA*].

²⁷⁷ *Id.*

²⁷⁸ Wash. State Dep’t of Agric., VOLUNTARY CERTIFICATIONS: ORGANIC CERTIFICATION 1, 1 (2019), https://cms.agr.wa.gov/WSDAKentico/Documents/DO/RM/RM/20_OrganicCertification.pdf [<https://perma.cc/6CLS-4BHN>].

²⁷⁹ *Id.* at 3.

certified operations for up to 75% of their annual certification fees.”²⁸⁰

- In addition to reimbursing certification fees, the Washington state government helps fund wine and grape research.²⁸¹ The state’s grant program gave over US\$1 million for research during the 2024-2025 fiscal year with funding from Washington State University, Washington Wine, and state liter taxes (1/4 cent per liter of all wine sold), among others.²⁸² Examples of the projects being funded include studies on irrigation approaches to prepare vines for winter, cultural and chemical approaches for sustainable vineyard pest management, and support for vineyard maintenance for wine grapes.²⁸³

IVF. Oregon

A review of Oregon’s approach to its wine industry shows a similar dichotomy to that of Washington, with both governmental and private actors playing a part in the organic certification processes and viticulture research funding. However, while Oregon seems to be on par with other states and countries in pushing “sustainable” practices and “organic” certification, there appears to be even more of a drive in Oregon to take these practices a step further and focus on biodynamic practices and certification. The following points help illustrate these developments:

- Wine-focused industries and grape growing in Oregon contributed about US\$8 billion in economic impact to the state in 2022 with a statewide increase from previous years according to a study released by the Oregon Wine Board (OWB).²⁸⁴

²⁸⁰ *Id.*

²⁸¹ Wash. State Wine Comm’n, *FY 25 Viticulture and Enology Research Grants Awarded*, WAWINE, <https://www.washingtonwine.org/research/fy-25-grants-awarded-from-the-washington-state-grape-and-wine-research-program-and-washington-state-wine-commission-research-grant-program/> [<https://perma.cc/SY2C-KQFU>].

²⁸² *Id.*

²⁸³ Wash. State Wine Comm’n, WASHINGTON STATE GRAPE AND WINE RESEARCH PROGRAM FY 25 PROJECTS I (2024), <https://www.washingtonwine.org/wp-content/uploads/2024/05/FY25ResearchProjectList.pdf> [<https://perma.cc/6CLS-4BHN>].

²⁸⁴ Or. Wine Bd., *The Oregon Vineyard and Wine Industry’s New Economic Impact Report Shows Continued Growth and Increased Contribution to the State’s Economy*, WINE INDUS. NETWORK ADVISOR (Mar. 27, 2024), <https://wineindustryadvisor.com/2024/03/27/oregon-wine-industrys-economic-impact-report-continued-growth/> [<https://perma.cc/7YD6-R3L2>].

- Similar to the WSDA Organic Program mentioned above, Oregon also has a state USDA-accredited certifying agent, which is the Oregon Department of Agriculture (ODA).²⁸⁵
- The OWB, “a semi-independent state agency[,] . . . manages marketing, research, and education initiatives that support and advance Oregon’s statewide wine and wine grape industry.”²⁸⁶ One initiative OWB funds is research in viticulture and enology.²⁸⁷ The OWB granted US\$279,060 worth of funding in the 2023-2024 fiscal year to support projects such as (i) grapevine trunk disease management for conventional and organic production and (ii) generating baseline data for smoke exposure and taint of nine grape varieties and corresponding wines.²⁸⁸
- A fully independent, non-for-profit organization, LIVE, offers a third-party certification for “environmentally and socially responsible winegrowing” in Oregon.²⁸⁹ LIVE is accredited by the International Organisation for Biological Integrated Control, which is an organization that promotes environmentally safe plant practices.²⁹⁰ LIVE has also expanded past Oregon and certifies vineyards in other states in the United States.²⁹¹
- In terms of biodynamic certification, Oregon is leading states in the United States by being home to “52% of all Demeter Certified Biodynamic acreage in the country.”²⁹²

IVG. British Columbia

The various forms of support that British Columbia vineyards can benefit from — including some support focusing specifically on natural-systems operations — include the following:

- In 2024, the Investment Agricultural Foundation partnered with British Columbia’s Ministry of Agriculture and Food to create the

²⁸⁵ *National Organic Program*, OR. DEP’T OF AGRIC., <https://www.oregon.gov/oda/agriculture-services/ma-certification/pages/national-organic-program.aspx> [<https://perma.cc/62RL-GHW6>].

²⁸⁶ Or. Wine Bd., *About the Oregon Wine Board*, OR. WINE, <https://industry.oregonwine.org/about-the-oregon-wine-board> [<https://perma.cc/N5XR-P668>].

²⁸⁷ Or. Wine Bd., *2023-24 OWB Funded Research | Viticulture & Enology Projects Summaries*, OR. WINE, <https://industry.oregonwine.org/resources/reports-studies/2023-2024-owb-funded-research-projects/> [<https://perma.cc/Y8A5-44MQ>].

²⁸⁸ *Id.*

²⁸⁹ *About*, LIVE, <https://livecertified.org/about> [<https://perma.cc/HC3A-BV6Z>].

²⁹⁰ *See also About IOBC-WPRS*, IOBC-WPRS, <https://iobc-wprs.org/about-us/> [<https://perma.cc/AA47-QAFF>].

²⁹¹ *See LIVE*, *supra* note 289.

²⁹² Maya Seaman, *Biodynamic Wine Explained*, OR. WINE, <https://www.oregonwine.org/discover/biodynamic-wine-explained/> [<https://perma.cc/ADG5-8LCJ>].

Enhanced Replant Program (ERP). The goal of the CA\$70 million, five-year project is to provide funds to the fruit and wine industries in British Columbia to replace struggling crops with climate resilient varieties.²⁹³ All eligible ERP applications are scored on criteria set by the Ministry of Agriculture and Food. Additional scoring criteria for wine grape replanting include participation in Sustainable Winegrowing British Columbia (discussed above in subsection IIF) or completion of the SWBC online self-assessment.²⁹⁴

- More generally, British Columbia’s agriculture sector finds environmental sustainability support through a variety of public (government) programs and initiatives. These include the Agri-Ecosystem Stewardship Initiative (AESI) (for helping farmers in adopting beneficial management practices that enhance Ecological Goods and Services)²⁹⁵ and the Environmental Farm Plan Program (to help farmers “enjoy increased efficiency, profitability and new customers as a result of increased environmental sustainability”).²⁹⁶
- Funding programs for Canadian wineries generally (not confined just to British Columbia) also take several forms, including investments in research and development to help improve grape cultivation techniques.²⁹⁷
- The Canadian government also provides sector-specific funding for viticulture through its Wine Sector Support Program, which “provides non-repayable grants to eligible Canadian wineries to help them adapt to ongoing and emerging challenges.”²⁹⁸ The program received another extension and further government funding in 2024

²⁹³ *Enhanced Replant Program*, GOV’T OF B.C. (Jan. 21, 2025), <https://www2.gov.bc.ca/gov/content/industry/agriculture-seafood/programs/enhanced-replant-program> [https://perma.cc/6QY6-8YV9].

²⁹⁴ *Enhanced Replant Program*, INV. AGRIC. FOUND. OF B.C., <https://iafbc.ca/enhanced-replant-program/> [https://perma.cc/DMD7-PTXE]. For further details about how the ERP benefits vineyards in British Columbia, see Dave Townsend, *B.C. vineyards, orchards receive help to replant for changing climate*, B.C. GOV’T NEWS (Mar. 13, 2024), <https://news.gov.bc.ca/releases/2024AF0006-000340> [https://perma.cc/8K28-P64Y].

²⁹⁵ See *Agriculture and seafood programs*, GOV’T OF B.C. (Nov. 3, 2025), <https://www2.gov.bc.ca/gov/content/industry/agriculture-seafood/programs> [https://perma.cc/2J7P-CBUT] (look under “Environmental sustainability”).

²⁹⁶ *Id.*

²⁹⁷ See *Top Funding Programs for Canadian Wineries*, RYAN ULC (Aug. 24, 2023), <https://funding.ryan.com/blog/government-funding/top-funding-programs-for-canadian-wineries/> [https://perma.cc/DAZ8-TFKX].

²⁹⁸ See *Funding Opportunities*, B.C. WINE GRAPE COUNCIL, <https://bcwgc.org/funding-opportunity/wine-sector-support-program/> [https://perma.cc/YA98-YYP2].

to “continue to help the Canadian wine sector improve its competitiveness and adapt to the challenges it faces.”²⁹⁹

IVH. A comparative wrap-up

The illustrative survey I have offered above reveals three key points. First, all jurisdictions included in the survey provide some types of public — that is, government-funded — support for viticulture, with particular emphasis on natural-systems operations. The forms of support vary widely. Some governments provide funds for restoration and conversion of vineyards. Some pay for promoting wine-export sales. Some have created public programs for measuring and improving sustainability efforts in the viticulture sector and for permitting special labeling (“organic,” “sustainable”). In some jurisdictions, governments have prohibited or further restricted pesticide use in vineyards. In others, tax credits are offered to viticulture operations using compost to boost carbon sequestration. Some states direct public funds to support research projects focusing on sustainable viticulture (irrigation, pest management, etc.). Others provide investment incentives for establishing wine routes and tourism initiatives. Several have implemented or facilitated jurisdiction-wide certification programs for viticulture sustainability standards.

Second, the degree of support offered by various jurisdictions falls far short of the support available to conventional “industrial” agricultural operations (of the sort summarized in subsection IVA, above). For instance, the scale of subsidies and other sorts of financial assistance for wheat, maize, and soybeans dwarfs the scale of financial support directed to the viticulture sector.

Third, private-sector entities play a large role in facilitating the shift toward SBBRV — presumably because the support of the viticulture sector pales in comparison to that provided to farmers producing the staple crops I refer to above. The CCOF in California, the Wines of Chile organization, the LIVE program in Oregon — these all illustrate the broad reliance that governments place on private and not-for-profit entities in supporting viticulture’s move toward environmental sustainability.

V. Concluding observations

This has turned into a long article on viticulture, not because of the enjoyment my wife and I get out of working in a biodynamic, organic, and regenerative vineyard (although we do enjoy that), but mainly because I have tackled a rather broad range of topics here. I have surveyed (i) the history and current status of the shift away from conventional “industrial” viticulture and toward what I have called SBBRV (science-based biodynamic-regenerative viticulture), (ii) the notion of “soil health” and how a transition to SBBRV can

²⁹⁹ See Minister MacAulay announces \$177-million extension to Wine Sector Support Program, GOV'T OF CAN. (Mar. 2024), <https://www.canada.ca/en/agriculture-agri-food/news/2024/03/minister-macaulay-announces-177-million-extension-to-wine-sector-support-program.html> [<https://perma.cc/BY8W-8CRT>].

reverse the global scourge of soil degradation and thereby help to restore soil health, and (iii) the forms of public support that currently are — or are not — provided to facilitate SBBRV and soil health. Now I offer some closing thoughts.

Worldwide, viticulture today (like agriculture more generally) faces big challenges. It finds itself in a transition prompted by both consumers and viticulturalists. The trend is toward techniques, and I would say toward mindsets and philosophies, that Rudolf Steiner and many others suggested long ago. Unfortunately, Steiner's blend of some science with lots of speculation, anthroposophy, and straight-out woo-woo fluff has left a dark stain on the term "biodynamic."³⁰⁰ Perhaps some or much of what Steiner said in his 1924 lectures will ultimately prove correct. After all, as Jancis Robinson has noted, there is "a missing link in our knowledge"³⁰¹ — indeed (I would say) whole chains of missing links. For now, though, most true scientists (including my friend Tim Crews) spurn many of Steiner's speculations.

This surely accounts in part for the separate rise of other terms and designations in lieu of "biodynamic." I have discussed the most prominent of these in my summaries of organic viticulture and regenerative viticulture. In actual operation, organic and regenerative viticulture closely resemble biodynamic viticulture as it is defined in the Demeter Standards. Indeed, the requirements for ROC regenerative viticulture certification, like the Demeter certification requirements, mainly expand (albeit significantly) on the requirements for organic-agriculture certifications offered in both the United States and the EU.

The presence of several similar but separate certification-and-labeling regimes causes trouble; it adds considerable complexity and confusion (certainly among wine-consumers³⁰²) to the already-demanding efforts that any of the certification systems require. Much of this trouble could be eliminated in a series of initiatives, beginning with a well-funded research program to expand our too-

³⁰⁰ Some other aspects of Steiner's career and personality also disturb many observers. For one thing, "Steiner's racial theories are a source of ongoing controversy." Peter Staudenmaier, *Race and Redemption: Racial and Ethnic Evolution in Rudolf Steiner's Anthroposophy*, 11 NOVA RELIGIO 4, 5 (2008). In addition, his academic credentials and scholarship were disparaged even during his lifetime, as "his theosophy and anthroposophy and the Waldorf humanism in particular were considered pseudoscience or at best pedagogy, not a philosophical system. Steiner's credentials were not university-level professional work. ... German mainstream scholarship called him an 'autodidact, with a poor teacher' and 'gypsy-intellectual.'" THORSTEN J. PATTEBERG, SHENGEN: ABOVE PHILOSOPHY AND BEYOND RELIGION 125 (2012); *Rudolf Steiner*, WIKIPEDIA https://en.wikipedia.org/wiki/Rudolf_Steiner#cite_note-t111-50 [<https://perma.cc/YSX9-4M4L>].

³⁰¹ See *supra* note 221 and accompanying text.

³⁰² For a reference to this consumer confusion, see *supra* note 71 and accompanying text. See also *Sustainably Produced Wine*, *supra* note 73, at 31 (noting that "[c]ertification 'over-load' leads to confusion ... Due to the number of certifications and claims made, consumers find difficulty in knowing which ones are 'reliable' and the specifics of what they stand for").

shallow understanding of which viticulture techniques best hit the target of “soil health.” Improving our understanding should lead to a science-based consensus on (i) just what are the crucial elements and techniques of biodynamic and regenerative viticulture and (ii) how we can best clarify and simplify the certification standards to dramatically boost our chances of addressing the global soils crisis effectively. This research program should also deepen our understanding of “soil health” itself, giving primacy not to the soil’s contribution to *human* well-being but rather to the soil’s overall role in the complicated natural systems that make our Earth a living planet.

Another set of initiatives, to be taken simultaneously with an intense research program, would involve public action by government agencies at multiple levels to support the “SBBRV transition” that is currently underway but is proceeding too slowly. I have provided in section IV of this article an illustrative summary of the types of support being provided in six jurisdictions. I urge the expansion of these programs. Government agencies should take a proactive approach and shoulder a much bigger role. This role would involve coordinating with effective private-sector and not-for-profit entities but not relying on them to assume the role that governments alone can play in issuing binding regulations and mobilizing public money.

I will close with a call for stronger *international* efforts. In addition to all of the suggestions I have made here — to do more research into SBBRV and soil health, to bring much-needed clarity to the relevant designations and certification requirements, to inject much more public (state) formality into the SBBRV transition through legal structures and binding rules, and to expand dramatically state-based financial and policy support for that transition — I would urge that these initiatives should all have a strong international component.

In my four books on global environmental governance, I have offered many details for international legal and institutional reforms relating to agriculture.³⁰³ These and other reforms need to be implemented with special attention to viticulture at the global level. Otherwise, awkward inconsistencies between political jurisdictions will continue to fragment the SBBRV transition.

³⁰³ For instance, I have enumerated 10 key principles that countries would commit to, in the form of a treaty called the Global Convention on Agroecology, for enhancing environmental protection in their own jurisdictions. See AGROECOLOGICAL HUSBANDRY, *supra* note 8, at 299–305. I have also formulated specific requirements that governments would hew to in enacting agriculture-related legislation, in removing fossil-carbon subsidies, and in funding ecology-focused research. See *id.* at 306–07, 318–19. I have also proposed the creation of “eco-states” with the powers and responsibilities adequate to coordinate with traditional nation-states (“anthro-states”) in governing human interaction with the rest of the natural world. See *id.* at 379; see also DEEP AGROECOLOGY, *supra* note 30, at 84–97. I have also identified the mechanisms by which a new global institution — the Global Corporate Trust for Agroecological Integrity (GCTAI) — would be created in order to give primacy to the soils crisis while ensuring adequate supplies of human food; in this connection, I have offered specific details about voting powers, participatory certifications, and sovereignty-like privileges and immunities to be accorded to such a GCTAI to avoid many of the structural criticisms that have been appropriately leveled at existing international organizations, such as the IMF and the World Bank. See GLOBAL TRUST, *supra* note 8, at Chapter 6.

Such a fragmentation will reduce the likelihood of meeting the overall goal I have in mind, in focusing here specifically on viticulture. That goal is to facilitate a transition of agriculture at large (not merely viticulture) from (i) the conventional “industrial” model that now dominates agriculture to (ii) a natural-systems agroecology based on biodynamic, organic, and regenerative principles and techniques.

Appendix — selected excerpts from Rudolf Steiner's 1924 lectures³⁰⁴

Some key elements of Steiner's so-called "spiritual science" views appear in these excerpts:

- In the immediate vicinity of the earth, we have the Moon and the other planets. The old instinctive science which reckoned the Sun, as one of the planets had one of the following sequence: Moon, Mercury, Venus, Sun, Mars, Jupiter, Saturn. Now, without going any further into the astronomical aspect of the subject, I wish to point to the relation which exists between planetary life and life on the earth. If we consider life on the earth in general the first thing we have to take into account is the very important part played by what I might call the life of the siliceous substance in the world Now everything siliceous contains forces that come, not from the earth, but from the so-called distant planets Mars, Jupiter and Saturn — the planets beyond the Sun. These planets work indirectly upon plant-life through silicon and allied substances. But the planets near the Earth namely, Moon, Mercury and Venus, send out forces into the plant-life and animal life on earth through the medium of the limestone and kindred substances. Thus, of any cultivated field it may be said that the forces of both silicon and limestone are at work in it. The silicon mediates the influences of Mars, Jupiter and Saturn, the limestone those of Moon, Venus and Mercury.³⁰⁵
- If we consider plants which are not used for food, which do nothing but reproduce themselves, we focus our interest in the cosmic forces of Venus, Mercury and Moon, related to reproduction. But in the case of plants which are eminently suitable for food because their substances have become perfected to the point of forming food-stuffs, for human and animal consumption, it is the planets Mars, Jupiter and Saturn that are working through the medium of silicon. Silicon opens up the being of the plant to the expanses of the Universe, it awakens the plant's senses, so that it absorbs the formative forces bestowed by the distant planets, Mars, Jupiter and Saturn. From the sphere of

³⁰⁴ As noted in the main text of this article, a full English version of the lectures' transcripts (first prepared in 1929) is available at *The Agriculture Course*, RUDOLF STEINER ARCHIVE, https://rsarchive.org/Lectures/GA327/English/RSPC1938/Ag1938_index.html [<https://perma.cc/RRA4-Y7N5>]. Excerpts appearing below are drawn from Steiner Lecture I, RUDOLF STEINER ARCHIVE, <https://rsarchive.org/Lectures/GA327/English/RSPC1938/19240607p02.html> [<https://perma.cc/U2WU-8KY3>], Steiner Lecture II, RUDOLF STEINER ARCHIVE, <https://rsarchive.org/Lectures/GA327/English/RSPC1938/19240610p02.html> [<https://perma.cc/XH94-2EB8>], and Steiner Lecture IV, RUDOLF STEINER ARCHIVE, <https://rsarchive.org/Lectures/GA327/English/RSPC1938/19240612p02.html> [<https://perma.cc/36LL-BWFE>].

³⁰⁵ Steiner Lecture I, *supra* note 304.

Moon, Venus and Mercury on the other hand, the plant absorbs only that which makes it capable of reproducing itself.³⁰⁶

- There is much more hidden in water than appears in the chemical properties of hydrogen and oxygen. Water by its very nature is eminently fitted to bear along with it the forces coming from the Moon on to the Earth. So, it comes about that it is water which distributes the lunar forces throughout the earthly realm. There is a certain kind of relation between the Moon and the water on the Earth. Let us suppose that after a rainy spell there is a full Moon. Now the forces coming from the Moon when it is full causes something tremendous to happen on Earth. They shoot right into the whole growing forces of the vegetable kingdom. They cannot do so if there has not been a rainy spell beforehand. We must always realise the importance of sowing seed after rainy days followed by the full Moon, and we should never work at random³⁰⁷
- If we burn wood taken from a tree which has been planted without an understanding of the cosmic rhythms we do not get such a healthy heat as from wood taken from a tree which has been planted with right understanding.³⁰⁸
- [T]he basis of all Agriculture is the soil of the earth. This soil ... is generally looked upon as being something purely mineral into which at the best organic substance has entered either because humus has been formed or manure has been introduced. ... If you start by considering the soil, then you must bear in mind the fact that it is a kind of organ within that organism which manifests itself wherever the growth of Nature appears. The earth surface is really an organ, an organ which, if you care to, you may compare with the human diaphragm. We may put the matter broadly in this way (it is not quite exact but will give the right idea): Above the diaphragm there are in man certain organs, the head in particular, and the processes of breathing and circulation which work up into the head. Under the diaphragm are other organs. Now if we compare the earth surface with the human diaphragm we must say: The individuality represented by our farm, having the earth surface for its diaphragm has its head under the earth, while we and all the animals live in its belly. Above the surface of the earth, is really what may be regarded as the bowels of what I will now call the “agricultural-individuality.”

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

On a farm, we are walking about inside the belly of the farm, and the plants grow upwards within this belly. Thus, we are dealing with an individuality which is standing on its head, and which is only rightly looked at if so understood, especially as regards its relation to Man. In relation to animals, the situation, as we shall see later on, is slightly different.³⁰⁹

- [T]here must be a constant interaction between the cosmic forces that have entered into the plant through silicon and those that are active ... in the “belly” and that supply the “head” below with what it requires. True the “head” must be provided for out of the Cosmos, but this process must interact with that which takes place above ground in the “belly.” The forces coming in from the Cosmos and being caught up underground must be able to flow upwards again, and the substance which brings this about is clay. Clay is the mediator through which the cosmic activity in the soil is enabled to work from below upwards.³¹⁰
- If ... we plant the seed of a given plant in the earth, the seed contains the impress of the whole Cosmos from a particular cosmic direction, which means that it came under the influence of a particular constellation and received its particular form. At the moment when the seed is placed in the soil it is strongly worked upon by the terrestrial ... forces, and it is filled with the longing to deny the cosmic forces, in order that it may spread and grow in all directions. For the forces above the surface of the Earth do not want the plant to retain this cosmic form. The seed had to be driven to the point of chaos; but now that the plant is sprouting it is necessary to oppose the terrestrial to the cosmic forces which live as the form of the plant inside the seed. For the cosmic forces must be opposed and balanced, as it were, by the terrestrial forces. We must help the plant to become more akin to the Earth in its growth. This can only be done by introducing into the plant some form of living earthly matter which has not yet reached the state of chaos and seed formation, life which has been held up in a plant before the seeds have been formed. For this purpose, a rich humus formation comes to man's assistance in those districts that are fortunate enough to possess it.³¹¹

The basis for Steiner's instructions to farmers on “preparations” appears in his Lecture IV:

Let us put manure just as it comes to hand into a cow-horn, pressing it full, and bury it at a certain depth — say 1½ to 2½ feet deep according to the soil, which should not be too sandy or clayey. We can choose any spot where the soil is in good heart. Now by thus burying it with its filling of manure, we

³⁰⁹ Steiner Lecture II, *supra* note 304.

³¹⁰ *Id.*

³¹¹ *Id.*

preserve in the horn that function which it would normally exercise in the cow's body, that is the reflecting of the life-giving and astral elements. Through the fact of its being surrounded with earth, all the currents of etheric and astral forces stream into its interior. These forces attract all the astral and etheric elements from the surrounding soil, and the manure contained in the horn becomes inwardly quickened with these forces in the course of the winter season when the earth itself is most alive. For the earth is most inwardly alive during the winter. All these living forces are preserved in the manure and thus there is a highly concentrated, life-giving manuring force in the contents of the horn. Then (in spring) the horn can be dug up and its contents removed. ... [W]hen the manure [is] removed it [will be] completely odourless ... , though naturally it [will have some odour] when it [gets] mixed with water. This shows that all its odour [will have] been concentrated and worked up within it. You have here a tremendous astral and etheric power which you can utilise by taking the content of the cow horn after its period of hibernation and diluting it with water which perhaps should be slightly warmed. As regards quantities and dilution, I have ascertained by repeated observation that an area of about 1500 square yards (near one-third of an acre) can be served with the contents of such a cow horn, diluted in about half a bucket full of water. The whole of the contents of the horn must be thoroughly united with the water. You must begin to stir it briskly round the edge of the bucket, until a crater is formed, in the middle reaching almost down to the bottom. At this point, suddenly reverse the movement thus causing the liquid to swirl round in the opposite direction. If you do this for an hour, the ingredients will become thoroughly mixed. You must remember what a really small amount of work is entailed in this.

The next thing to do is to spray the mixture over tilled land so that it can get thoroughly into the soil. Small areas can be treated with an ordinary syringe, larger areas will naturally call for the employment of specially constructed machines. But once we have learned to combine this kind of "spiritual dung" with ordinary manure it will be found that very great fertility will be produced. In particular, it will be found that these things are capable of still further development, for in addition to the measures I have [just] indicated, we can proceed as follows:

Again, we take a cow-horn and fill it in the same way, not with manure this time, but with quartz or flint or even orthoclase or feldspar that has been ground to powder and mixed with water so as to form a thin paste. Then instead of leaving the horn in the ground throughout the winter, we leave it there over the summer, take it out in late autumn and keep it till the following spring. Its contents, which have been exposed to the summer-life of the earth, are then emptied out and treated in the same way as has been described in connection with the dry manure, except that much smaller

quantities are required. Thus, a pinch of the contents of the horn about the size of a pea or even of a pin's head can be diluted in a bucket of water; the main thing is that it must be stirred for an hour, as before. And if you use this mixture for spraying the plants (not pouring it on to them but finely sprinkling it) you will see, particularly in the case of vegetables and the like, that this has the effect of supplementing and reinforcing that which works out of the soil through the cow horn manure. And if, as would not be amiss, the practice was extended to whole fields — it would be easy enough to devise machines which would sprinkle the liquid over whole fields — then you would see how the cow-horn manure was pressing up from below, the other drawing from above, neither too weakly nor too strongly. And this could have a wonderful effect, particularly on cereals.³¹²

³¹² Steiner Lecture IV, *supra* note STEINLECNOTE.

How Legislative Improvements Can Restore the Kansas Right-to-Farm Act to Its Intended Role in Protecting Kansans and Kansas Farmers

*Hayley E. Engelland**

I. INTRODUCTION

Like many Kansans, I come from a long line of farmers. I remember growing up and exploring the farm with my cousins, climbing hay bales, feeding cattle, and listening for the farm bell to let us know it was dinner time. This upbringing shaped me and Kansans like me over many generations. Sadly, fewer Kansans are experiencing this type of upbringing. A significant reason for this is the overexpansion of industrial agriculture corporations and the decline of Kansas family farms, like the one I grew up on. Kansas legislation has supported industrial agriculture through a seemingly protective measure that, in reality, is the root of the overexpansion.

Kansas legislation has facilitated this overexpansion through the Kansas Right-to-Farm Act,¹ which shields most agricultural activities from nuisance claims.² As a result, large agricultural corporations are allowed to take advantage of statutory protections that (as explored in detail below) the Kansas legislature enacted to protect Kansas farms from expanding urban development.³ The Act allows these agricultural corporations to expand their operations and negatively affect communities without any legal repercussions, so long as the practice is undertaken “in conformity with federal, state, and local laws and rules and regulations.”⁴ The language of the Act must be limited to lower protections for corporations while reasonably extending protection to small Kansas farmers.

Historically, family farms dotted Kansas’ landscape, many of which were passed down through generations.⁵ Farming in Kansas has been around long before

*J.D., 2026, University of Kansas School of Law. I am deeply grateful to my grandparents, John Engelland and the late Judith Engelland, whose farm and the environment they created there shaped many of my most favorite childhood memories. Their example continues to motivate my desire to protect and preserve those traditions for future generations. Any errors or omissions are my own.

¹ *Kansas’s Right-to-Farm Summary*, ONE RURAL, <https://onerural.uky.edu/right-to-farm/KS> [<https://perma.cc/RD7U-G76A>].

² *States’ Right-to-Farm Statutes: Kansas*, THE NAT’L AGRIC. LAW CTR., <https://nationalaglawcenter.org/wp-content/uploads/assets/righttofarm/Kansas.pdf> [<https://perma.cc/9QT6-F8QB>].

³ KAN. STAT. ANN. § 2-3201.

⁴ KAN. STAT. ANN. § 2-3202.

⁵ See generally Dave Kendall, *History of challenges adds to current stresses for Kansas farmers and their communities*, KAN. REFLECTOR (Apr. 3, 2022),

<https://kansasreflector.com/2022/04/03/history-of-challenges-adds-to-current-stresses-for-kansas-farmers-and-their-communities/> [<https://perma.cc/2Q4C-84HQ>].

white settlers entered the picture.⁶ The first Kansas farmers were Native Americans who produced small amounts of corn and beans.⁷ Later, white settlers moved to Kansas to strengthen the anti-slavery vote, becoming the newest Kansas farmers.⁸ Most had no training or knowledge of farming, yet it was their sole livelihood.⁹ To bring more people to Kansas, the Government offered homesteads to those who had “never borne arms against the U.S. government.”¹⁰ Those who claimed the land had to live on the land and improve it through cultivation.¹¹ Many took advantage of this opportunity for a fresh start, becoming the Kansas pioneer farmers we know today.¹²

The first sign of industrialization was in the early 1900s, when farmers began to widely adopt motorized farming equipment.¹³ Around the same time, “suitcase farmers” entered the market.¹⁴ Suitcase farmers were non-resident owners who purchased large tracts of land and hired farmers to cultivate and farm that land.¹⁵ Communities widely condemned this practice as not being true farming.¹⁶

Later, following the conclusion of World War II, another farming revolution began – a Green one.¹⁷ During the Green Revolution, farming continued to industrialize with the introduction of fertilizers, pesticides, and herbicides, aimed at increasing yields.¹⁸ Since this industrialization, large agricultural production facilities have swallowed up many of the pioneer Kansas farms.¹⁹ This industrialization has caused Kansas farms to grow in size, but dwindle in number.²⁰

A main driver in the reduction of smaller family farms is the entry of larger industrial agriculture corporations into the Kansas market.²¹ Over the years,

⁶ Federal Writer’s Project, *History of Kansas Agriculture*, KAN. STATE HIST., <https://www.kspatriot.org/index.php/articles/48-kansas-agriculture/226-history-of-kansas-agriculture.html> [<https://perma.cc/VGB9-LTC4>].

⁷ *Id.*

⁸ *Id.*

⁹ See e.g., *id.*

¹⁰ *Homestead Act (1862)*, NAT’L ARCHIVES, https://www.archives.gov/milestone-documents/homestead-act?_ga=2.28960380.1585839077.1759601832-1370338088.1756323436 [<https://perma.cc/D2TX-YMQ9>].

¹¹ *Id.*

¹² Federal Writer’s Project, *supra* note 6.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Kenneth M. Sylvester & Paul W. Rhode, *Making Green Revolutions: Kansas Farms, Recovery, and the New Agriculture, 1918–1981*, 91 AGRIC. HIST. 342, 342 (2017).

¹⁸ *Id.*

¹⁹ *Right to Farm History of Harm*, SIERRA CLUB (2022),

<https://www.sierraclub.org/sites/default/files/2022-10/Right%20to%20Farm%20History%20of%20Harm.pdf> [<https://perma.cc/Y63B-3KYD>].

²⁰ See *1982 Census of Agricultural-State Data*, USDA CENSUS OF AGRIC. HIST. ARCHIVE (1982), https://agcensus.library.cornell.edu/wp-content/uploads/1982-Kansas-CHAPTER_1_State_Data-121-Table-01.pdf [<https://perma.cc/PT8J-UNZ2>].

²¹ Dave Redmon, *Words of lament and hope for Kansas as big agriculture eradicated farmland traditions*, KAN. REFLECTOR (July 17, 2024, at 3:33 CT),

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agricultural production units have become larger and more complex, driving a shift from smaller independent farmers to larger operations.²² This shift began in the 1960s, and the market continued to narrow, favoring fewer, larger producers.²³ Examples of such producers affecting Kansans include Cargill, CHS, Inc., ADM, and others.²⁴

Right-to-Farm laws have been debated and analyzed in literature throughout the United States.²⁵ However, this literature does not focus on a variety of different industrial agriculture operations. Much of the literature focuses either on hog production facilities or concentrated animal feeding operations (CAFOs).²⁶ Moreover, the literature does not focus on the specific effects that Right-to-Farm laws have on Kansans.²⁷ Accordingly, this article seeks to bridge the gap by focusing on a variety of industrial agricultural operations that leverage the Kansas Right-to-Farm Act, and analyzing the Act's specific effects on Kansas communities and Kansas farmers.

Over the past 200 years, farming in Kansas has changed drastically. This article examines how these changes have negatively affected Kansans and how revisions to the Kansas Right-to-Farm Act could restore key values of Kansas farming. Part II outlines the problems that large agricultural production facilities bring to Kansas. Part III introduces the Kansas Right-to-Farm Act and its intended purpose. Part IV examines flawed provisions of the Kansas Right-to-Farm Act and their impact on Kansans. And part V proposes changes to the Act that both encourage agricultural production and protect Kansas communities and farmers.

II. THE PROBLEM WITH LARGE AGRICULTURE PRODUCTION FACILITIES

Large agricultural production facilities are using their protection under the Act to squeeze out smaller farmers, but is this really a problem? There is no denying

<https://kansasreflector.com/2024/07/17/words-of-lament-and-hope-for-kansas-as-big-agriculture-eradicates-farmland-traditions/> [<https://perma.cc/7X9V-LARD>].

²² *Id.*

²³ *Id.*

²⁴ *Top Agriculture Companies in Kansas*, GLASSDOOR, https://www.glassdoor.com/Explore/top-agriculture-companies-kansas_IS.4,15_ISEC10003_IL.26,32_IS3107.htm [<https://perma.cc/TN2M-YJC4>].

²⁵ See Rusty Rumley, *Article: A Comparison of the General Provisions Found in Right-to-Farm Statutes*, 12 VT. J. ENV'T. L. 327 (2011); Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103 (1998); Madeleine Skaller, *Comment: Protecting the Right to Harm: Why State Right to Farm Laws Should Not Shield Factory Farms From Nuisance Liability*, 27 SAN JOAQUIN AGRIC. L. REV. 209 (2017).

²⁶ See *e.g.*, Skaller, *supra* note 25.

²⁷ Rumley, *supra* note 25.

that these corporations provide the world with food and have positive impacts on the agricultural industry. The question is whether the negative effects these large facilities have on Kansas communities, local farmers, and Kansas as a whole outweigh the positive business effects.

A. Historic Kansas Farms Dwindling

Kansas family farms are ingrained in the state's history. Many children grew up on the farm, then came back later in life and took the family business over.²⁸ This cycle was at the center of Kansas agriculture production for generations.²⁹ However, in the 1980s, cracks began to appear as farm foreclosures increased,³⁰ resulting in the generational cycle being replaced by larger industrial operations.³¹

Over the past 70 years, Kansas farms have declined by more than 50%, from over 100,000 in the 1960s to around 50,000 in 2022.³² Yet, the total number of agricultural acres has remained steady, and the average size of Kansas farms has increased steadily.³² This is evidence of the expansion of farms and the increase in larger industrial agriculture operations over mid-sized family farms. The character of these facilities differs from that of the farms the Kansas Right-to-Farm Act was intended to protect. They are not run by families who have passed the farm down through the generations. Rather, these facilities resemble factories.³³ This type of character change in the agricultural space negatively affects Kansas communities that were once supported by and ingrained in local agriculture. In the country, each of these large operations displaces 10 family farmers from the market.³⁴ This problem is not only prevalent in Kansas but can be seen throughout the country, where small farmers are prevented from entering or staying in the market.³⁵ Policies across the country have allowed large corporations to get bigger while pushing small farmers out.³⁶

B. What is a Large Industrial Agriculture Facility?

Industrial agricultural production facilities are characterized by their high production yield and large-scale production methods.³⁷ These facilities prioritize

²⁸ See e.g., Kendall, *supra* note 5.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² 1982 *Census of Agricultural-State Data*, *supra* note 20.

³³ See *The Industrial Food System*, FOODPRINT (2024), <https://foodprint.org/the-total-footprint-of-our-food-system/issues/the-industrial-food-system/?cid=868> [<https://perma.cc/H889-HUDW>].

³⁴ *Are Factory Farms Still a Threat to America's Family Farmers?*, FARMAID (Aug., 2009), <https://www.farmaid.org/issues/industrial-agriculture/are-factory-farms-still-a-threat-to-americas-family-farmers> [<https://perma.cc/8YXR-ZWQE>].

³⁵ See WENDELL BERRY, *THE UNSETTLING OF AMERICA: CULTURE & AGRICULTURE* 223 (2nd ed. 1996).

³⁶ *Id.*

³⁷ *All You Need to Know About Industrial Agriculture*, [X]CUBE LABS (July 20, 2023), <https://www.xcubelabs.com/blog/all-you-need-to-know-about-industrial-agriculture/> [<https://perma.cc/W793-JA3L>].

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efficiency, productivity, and profitability.³⁸ The largest industrial agriculture facilities dominate the food supply chain and the market share through vertically integrated business models.³⁹ These facilities also employ high levels of modern technology to support a higher scale and output.⁴⁰ Another characteristic is market power and control. These corporations need to control the markets and maintain a concentration of power.⁴¹ Industrial agricultural facilities are also typically owned and run by corporations.⁴² These facilities are involved in a variety of agricultural supply chain steps, including grains, food processing, meat processing, ingredient processing, and food distribution.⁴³ An example of an industrial agricultural production facility is a concentrated animal feeding operation (CAFO).⁴⁴ A CAFO increases production efficiencies by housing around 1,000-2,500 animals in one facility.⁴⁵ To support the profit-first structure, animals are confined for multiple months out of the year.⁴⁶ These facilities are regularly associated with nuisances like odors and noise.⁴⁷

C. Large Industrial Agriculture Facilities in Kansas

There are many examples of large agricultural production facilities in Kansas, but this article will focus on three large contributors: Cargill, ADM, and Ingredion. These corporations have a heavy presence in Kansas and represent different parts of the agricultural supply chain, from production to processing to delivery. Additionally, these corporations are included to put a face to those who can and do take advantage of the Kansas Right-to-Farm Act.

³⁸ *Id.*

³⁹ Candice Wilson, *Too Big to Fail: How Consolidation in the Agricultural Industry Has Created Unintended Consequences that Threaten Farmers, Consumers, and our National Security*, 28.2 DRAKE J. AGRIC. L. 171, 174, 201 (2023).

⁴⁰ Redmon, *supra* note 21.

⁴¹ Emily M. Miller, THE TRUTH ABOUT INDUSTRIAL AGRICULTURE: A FRAGILE SYSTEM PROPPED UP BY MYTHS AND HIDDEN COSTS, FAM. FARM ACTION ALL. (July, 2021), <https://farmaction.us/wp-content/uploads/2021/07/Truth-Report.pdf> [<https://perma.cc/5MAJ-XXDH>].

⁴² *Corporate Control in Agriculture*, FARM AID, <https://www.farmaid.org/issues/corporate-power/corporate-power-in-ag/> [<https://perma.cc/WDV3-7TRS>].

⁴³ *Who is ADM and What Do We Do?*, ADM, <https://www.adm.com/en-us/about-adm/> [<https://perma.cc/8C3S-4TML>]; *Meet Ingredion: Who we are*, INGREDION, <https://www.ingredion.com/na/en-us/company/meet-ingredion.html#:~:text=Ingredion%20is%20a%20leading%20global,corrugating%2C%20brewing%20and%20other%20industries> [<https://perma.cc/3Y9F-D9HW>]; *Cargill at a glance*, CARGILL, <https://www.cargill.com/about/cargill-at-a-glance> [<https://perma.cc/UE2F-EG9N>].

⁴⁴ *See Concentrated Animal Feeding Operation (CAFO)*, MO. DEP'T OF NAT. RES., <https://dnr.mo.gov/water/business-industry-other-entities/agriculture-landowners/concentrated-animal-feeding-operation-cafo> [<https://perma.cc/6GJL-FFH2>].

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ BROTHER DAVID ANDREWS & TIMOTHY J. KAUTZA, IMPACT OF INDUSTRIAL FARM ANIMAL PRODUCTION ON RURAL COMMUNITIES 25 (2008).

1. Cargill

Cargill is one of the largest privately held companies in the world and controls much of the agricultural supply chain.⁴⁸ The company is involved in the agricultural supply chain with both processing and the manufacture of animal feed, among other things.⁴⁹ Cargill has a significant presence in Kansas with many operations across the state.⁵⁰ Some of their larger plants include a protein processing plant in Dodge City and an animal nutrition plant in Kansas City.⁵¹ In addition to these larger plants, Cargill has smaller operations throughout the state like grain elevators.⁵²

2. ADM

ADM has similar business lines to Cargill.⁵³ ADM produces food ingredients along with animal nutrition.⁵⁴ In addition to food solutions, ADM uses grains to produce industrial oils, ethanol, and biodiesel.⁵⁵ To support its product supply chain, ADM operates distribution services using boats, trains, and trucks.⁵⁶ ADM has a significant presence in Kansas; their presence across the country includes hundreds of grain elevators and processing facilities for agricultural products.⁵⁷ A large sector of ADM's business involves the agricultural supply chain, including the transport of grain and other agricultural products.⁵⁸

3. Ingredient

⁴⁸ Wilson, *supra* note 39, at 190.

⁴⁹ *Cargill at a glance*, *supra* note 42.

⁵⁰ *See generally Find a Location*, CARGILL (Nov. 24, 2024, at 19:07 CT), <https://www.cargillag.com/locations> [<https://perma.cc/6BMV-DP8T>].

⁵¹ *Dodge City Protein Processing Plant*, CARGILL, <https://careers.cargill.com/en/dodgecity-ks> [<https://perma.cc/VQ78-7EME>]; *Cargill in Kansas City*, CARGILL, <https://careers.cargill.com/en/kcjobs> [<https://perma.cc/ZDM7-W6PV>].

⁵² *See generally Find a Location*, *supra* note 51.

⁵³ *Compare Our Solutions Tailored to Your Needs*, ADM, <https://www.adm.com/> [<https://perma.cc/LS6S-DBY3>], with *Cargill at a glance*, *supra* note 42.

⁵⁴ *Our Solutions*, *supra* note 53.

⁵⁵ *Industrial Biosolutions*, ADM, <https://www.adm.com/en-us/products-services/industrial-biosolutions/products/> [<https://perma.cc/4F2C-ACNY>].

⁵⁶ *ADM's Transportation & Logistics*, ADM, <https://www.adm.com/en-us/products-services/services/transportation-logistics/> [<https://perma.cc/Y9BJ-HSHC>].

⁵⁷ *ADM Location Search*, ADM, https://www.e-adm.com/srch/srch_lsearch.aspx?search_city=&search_state=Kansas&search_zip=&search_country= [<https://perma.cc/L32R-D768>]; *Farmer Services & Farming Solutions*, ADM, <https://www.adm.com/en-us/products-services/services/farmer-services/> [<https://perma.cc/Z3GP-F2JG>].

⁵⁸ *Who is ADM and What Do We Do?*, ADM, <https://www.adm.com/en-us/about-adm/> [<https://perma.cc/8C3S-4TML>].

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Another industrial agricultural corporation is Ingredion, a global ingredient solutions provider.⁵⁹ Ingredion focuses on the production of agricultural products into ingredients such as starches, sweeteners, and proteins.⁶⁰ Ingredion has a presence in Kansas with its North Kansas City processing plant.⁶¹ This plant processes various agricultural products, including corn, into ingredient products such as starches and sweeteners.⁶²

D. Problems that Industrial Ag Bring to Kansas

Industrial agricultural corporations, under the protection of the Kansas Right-to-Farm Act, harm rural Kansas communities and Kansas farmers in a variety of ways.

1. *Impact on Communities*

Historically, local agriculture has been ingrained in Kansas communities.⁶³ Once industrial agriculture begins taking over a market, a culture like this changes.⁶⁴ Life is negatively affected in many ways in communities where industrial agriculture takes over.⁶⁵ One Kansas man, Tom Giessel, recounts the community he grew up in and the life he built in rural Kansas.⁶⁶ He credits the loss of small Kansas farmers to the lack of individuality and teamwork in farming.⁶⁷ Before the economic boom of industrial farming, Giessel remembers a time when the health of a farm was reliant on the community around it.⁶⁸ With the consolidation of farm operations, that community and support system diminished.⁶⁹ When industrial agriculture enters communities, there is significant social change and disruption.⁷⁰ Evidence of this social disruption includes increases in crime rates, heightened stress and social-psychological issues, deterioration of relationships between farmers and their neighbors, reduced neighborly relations, a decline in community services, and

⁵⁹ *Meet Ingredion: Who we are*, INGREDION, <https://www.ingredion.com/na/en-us/company/meet-ingredion.html#:~:text=Ingredion%20is%20a%20leading%20global,corrugating%2C%20brewing%20and%20other%20industries> [https://perma.cc/GU8K-U59K].

⁶⁰ *Id.*

⁶¹ *Ingredion*, NORTH KANSAS CITY BUSINESS COUNCIL, <https://members.nkcbusinesscouncil.com/list/member/ingredion-163> [https://perma.cc/BY37-GVMJ].

⁶² *Id.*

⁶³ Federal Writer's Project, *supra* note 6.

⁶⁴ Andrews & Kautza, *supra* note 47, at 25.

⁶⁵ *Id.* at 25–26.

⁶⁶ Calen Moore, *As Kansas farms grow bigger, more people leave and rural life gets lonelier*, KCUR (September 17, 2024, at 3:00 CDT), <https://www.kcur.org/2024-09-17/as-kansas-farms-grow-bigger-more-people-leave-and-rural-life-gets-lonelier> [https://perma.cc/L5GU-4ZXM].

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Andrews & Kautza, *supra* note 47, at 25.

diminished community trust and involvement.⁷¹ Overall feelings of freedom and independence in people's homes deteriorate as residents' property values decline and they lose the enjoyment of their property.⁷² Another issue that the Act (as well as other Right-to-farm legislation) presents for communities is the inability to vindicate the property interests of community members affected by large-scale industrial agriculture.⁷³

2. *Impact on Kansas Farmers*

In addition to the negative impact on Kansas communities, the Act harms Kansas farmers.⁷⁴ When industrial agriculture enters the market, smaller conventional farmers are driven out by a demand for higher production output and higher profits.⁷⁵ Because of this high demand for profit and production, small farmers are unable to keep up, especially with the consolidation and mechanization these industrial agricultural operations invest in.⁷⁶ Income for all Kansas operators except the largest has continued to fall, leading to debt-saddled farmers who are unable to keep up with their expenses.⁷⁷ This situation puts pressure on Kansas farmers and creates a challenging and stressful environment for farmers to maintain their farms,⁷⁸ as is evidenced by the outcomes of right-to-farm laws. These laws offer immunity to industrial agriculture corporations and favor them over local farmers.⁷⁹

III. BACKGROUND AND PURPOSE OF THE KANSAS RIGHT TO FARM ACT

Right-to-Farm laws are prevalent nationwide and generally serve similar purposes.⁸⁰ Each act is meant to protect small farmers; however, most give unintended benefits to industrial agricultural corporations.⁸¹ Like many states, Kansas's Right-to-Farm Act provides leniency for corporations and harms small Kansas farmers.⁸²

⁷¹ *Id.*

⁷² *Id.* at 26; *Right to Farm History of Harm*, *supra* note 19 at 4.

⁷³ Ginger Pinkerton, *Note: Sanctioning Nuisance: How the Modern Right to Farm Impermissibly Burdens Neighbors*, 72 CASE W. RESV. L. REV. 141, 144 (2021); Richard LeComte, *Family Farms or Big Agriculture? Rural Sociologist Examines Uses of Right-to-Farm Laws in Courts*, UNIVERSITY OF KENTUCKY COLLEGE OF ARTS AND SCIENCES, <https://www.as.uky.edu/family-farms-or-big-agriculture-rural-sociologist-examines-uses-right-farm-laws-courts> [<https://perma.cc/24BD-EK7L>].

⁷⁴ Redmon, *supra* note 21.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Kendall, *supra* note 5.

⁷⁹ Loka Ashwood & Danielle Diamond, *Right-to-Farm laws run counter to rural cultural and property rights*, ENV'T HEALTH NEWS (Apr. 11, 2019), <https://www.ehn.org/right-to-farm-laws-failing-rural-people-2634037860.html> [<https://perma.cc/TE9Y-QQGZ>].

⁸⁰ Ross H. Pifer, *Right to Farm Statutes and the Changing State of Modern Agriculture*, 46 CREIGHTON L. REV. 707, 710 (2013).

⁸¹ LeComte, *supra* note 73.

⁸² *Id.*

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A. Background of Right-to-Farm Acts Generally

Every state in the United States has enacted some form of a Right-to-Farm law.⁸³ Each law generally protects agricultural activities from nuisance lawsuits.⁸⁴ A nuisance would include a loud noise or odor that interferes with someone's use or enjoyment of their property.⁸⁵ The level of protection varies from state to state. Some states place limits, specifically narrowing protection through definitions, while others do not.⁸⁶ Generally, right-to-farm laws do not impose size limitations on operations that receive protection.⁸⁷ Nationwide, these right-to-farm acts have been found to protect industrial agriculture on a high level.⁸⁸ In a recent study of 306 cases in which right-to-farm laws were at issue, more than half involved industrial agricultural operations.⁸⁹ This level of protection for industrial operations not only hurts surrounding communities and homeowners but also hurts surrounding farmers.⁹⁰ The protection negatively affects surrounding communities and homeowners because it reduces their ability to sue for nuisance, leaving those affected with no legal recourse.⁹¹ Negative effects on farmers include being pushed out of markets, downward pressure on product sales prices, lower negotiating power, and less control over contracts they enter.⁹² In response, communities around the country are coming together to push for change.⁹³ Not only is this response happening nationwide, but Kansas communities are reacting in the same way.⁹⁴

B. The Purpose of the Kansas Right to Farm Act

Similar to the nationwide purpose, the Kansas Right-to-Farm Act's stated purpose is to "conserve and protect and encourage the development and improvement of farmland."⁹⁵ The Act specifically focuses on the "production of food and other agricultural products."⁹⁶ The Kansas Right-to-Farm Act was enacted to protect farmland and agricultural activities from the encroachment of nearby cities

⁸³ Pifer, *supra* note 80, at 710.

⁸⁴ *Id.*

⁸⁵ *Nuisance*, BLACK'S LAW DICTIONARY (12th ed. 2024).

⁸⁶ Rumley, *supra* note 25, at 329–331.

⁸⁷ Hamilton, *supra* note 25, at 112.

⁸⁸ LeComte, *supra* note 73.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Andrews & Kautza, *supra* note 47, at 13.

⁹³ Leah Douglas, *Big Ag Is Pushing Laws To Restrict Neighbors' Ability To Sue Farms*, NPR (April 12, 2019, at 7:00 AM EST), <https://www.npr.org/sections/thesalt/2019/04/12/712227537/big-ag-is-pushing-laws-to-restrict-neighbors-ability-to-sue-farms> [https://perma.cc/AHX8-R5NN].

⁹⁴ *Id.*

⁹⁵ KAN. STAT. ANN. § 2-3201.

⁹⁶ *Id.*

and suburbs.⁹⁷ The purpose is to prevent nuisance lawsuits against beneficial agricultural activity.⁹⁸ The legislature believed that agricultural activities needed protection from nuisance suits arising from the expansion of non-agricultural activities.⁹⁹ The legislature did not want to see nuisance suits from suburban developments put farms out of business.¹⁰⁰ It is important to read this purpose in light of when the Act was enacted in the early 1980s.¹⁰¹

During the early 1980s, agriculture was substantially different than the mechanized and industrialized agriculture we see today.¹⁰² This difference in agriculture has raised questions regarding the Act's original purpose, specifically regarding what constitutes agricultural activity and what type of activity deserves protection.¹⁰³ These questions likely arise from the actual effects of the Kansas Right-to-Farm Act: large farming operations continue to grow, while smaller farmers are pushed out of the market.¹⁰⁴ Originally, the Act was intended to protect smaller farmers who lack the resources to defend against nuisance suits; however, smaller farmers are not the only participants in agricultural activities.¹⁰⁵ The Act declares that agricultural activities conducted in a manner consistent with good agricultural practices are "presumed to be reasonable and shall not be found to constitute a nuisance," effectively preventing recovery for nuisance claims, including those based on odors or noise, arising from such activities.¹⁰⁶ The definition of an "agricultural activity" includes the growing or raising of crops, poultry, livestock, and dairy products for personal or commercial purposes.¹⁰⁷ This includes any activity that is related to the handling, storage, and transportation of agricultural commodities.¹⁰⁸ This means that from birth or planting to the consumer's hands, anyone who touches the protected products is protected by the Act.

The Kansas Right-to-Farm Act facilitates industrial agriculture through its enumerated exceptions to restrictions placed on protected agricultural activities.¹⁰⁹ Agricultural activities must not have a substantial adverse effect on public health and safety.¹¹⁰ While these restrictions were meant to help smaller farmers and restrict larger industrial corporations, the exceptions have had no such effect, and instead, the Act has deviated from its original intent.¹¹¹ The statute says that there is no substantial adverse effect on public health and safety if the activity conforms with the laws.¹¹² This definition leaves plenty of room for activities to have adverse

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See generally Pifer, *supra* note 80.

¹⁰² *Id.* at 708.

¹⁰³ *Id.* at 709.

¹⁰⁴ Redmon, *supra* note 21.

¹⁰⁵ LeComte, *supra* note 73.

¹⁰⁶ KAN. STAT. ANN. § 2-3202.

¹⁰⁷ *Id.* § 2-3203.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* § 2-3202.

¹¹⁰ *Id.*

¹¹¹ *Id.*; *Right to Farm History of Harm*, *supra* note 19, at 4.

¹¹² KAN. STAT. ANN. § 2-3202.

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effects, but still comply with local laws.¹¹³ Another restriction requires the agricultural activities to be established before the surrounding activities to receive protection.¹¹⁴ Surrounding activities may include encroaching subdivisions, small neighboring farms, or other neighboring communities. Protection is only given to established agricultural activities where surrounding activities had prior notice of their existence.¹¹⁵ This provision seems helpful, but is rendered useless through other relevant exceptions.

The two other relevant exceptions are the expansion provision and the assignment provision.¹¹⁶ These exceptions essentially nullify the requirement that the activity precede any surrounding activities.¹¹⁷ The assignment provision allows any successor or interest holder to assign or transfer their protections under the Act.¹¹⁸ This means that any smaller farmers being squeezed out of the market and forced to sell will transfer their protection to large industrial agriculture operations that purchase their land.¹¹⁹ There are no restrictions on assignment or transfer, so any industrial agriculture operation can operate as if it were in place before any surrounding activity.¹²⁰ The expansion provision permits any agricultural activity to expand its scope or change its overall character while maintaining protection.¹²¹ These provisions allow both a preexisting small family farm and a new industrial agricultural operation to maintain identical protections under the Act, regardless of legislative restrictions. This level of flexibility is likely to encourage Kansas agriculture by removing barriers, but the result goes beyond the intent.

1. The Actual Effect of Right-to-Farm Acts

The actual effect of the Kansas Right-to-Farm Act is becoming increasingly distant from the original intended purpose: to protect small farmers.¹²² Increasingly, rural communities in Kansas are dwindling, losing hotels, restaurants, churches, and stores.¹²³ Alongside a general community breakdown, small farmers are disappearing from the market, while farm sizes are increasing.¹²⁴ Agricultural markets are consolidating into fewer and larger producers.¹²⁵ These small farmers began being pushed out of the market in the 1980s, evidenced by an escalating

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ LeComte, *supra* note 73.

¹²⁰ KAN. STAT. ANN. § 2-3202.

¹²¹ *Id.*

¹²² Skaller, *supra* note 25, at 209.

¹²³ Redmon, *supra* note 21.

¹²⁴ *Id.*

¹²⁵ *Id.*

number of farm foreclosures.¹²⁶ These smaller farmers simply cannot keep up with the shift to an industrialized, larger operation.¹²⁷ Large agricultural operations require higher fixed costs and a demand for higher production, demands that industrial operations easily meet, while smaller farmers struggle.¹²⁸

At the core of these issues sits industrial agricultural operations.¹²⁹ Industrial agricultural operations take advantage of Kansas's right-to-farm laws intended to protect family farms.¹³⁰ The Act's definition of "agricultural activity" includes anything that is involved in the agricultural process from start to consumer.¹³¹ Because of how general the definition is, it includes industrial agricultural operations.¹³² These operations can easily overcome restrictions meant to limit protection to the fundamental purpose of right-to-farm laws: protection of the small farmer.¹³³ Because these operations avoid nuisance liability, they can change the size and scope of their operation as much as they want, and create as many nuisances as they would like, without consequence.¹³⁴ This flexibility is also likely intended to increase agricultural activity in Kansas, but the outcome goes beyond that. This has left Kansas farmers and communities without recourse or protection under an Act designed to protect them.

IV. Lenience of the Kansas Right to Farm Act

The Kansas Right-to-Farm Act provides exceptions for almost every restriction.¹³⁵ Owners may multiply or change the scope of their activity and assign or transfer their protections.¹³⁶ Provisions similar to these remove from community members almost all legal recourse to protect their communities.¹³⁷ The protective barrier protects against frivolous suits, as it was intended to do, but also restricts valid suits, which are the only means by which a community protects itself.

A. Specific Lenient Provisions

The Kansas Right-to-Farm Act has three areas of exceptional leniency: the expansion provision, the transfer provision, and the broad definition of what constitutes an "Agricultural Activity." These lenient provisions essentially nullify any of the "restrictive" measures included in the Act, like the requirement of prior existence, good agricultural practices, and not having a substantial adverse effect¹³⁸

¹²⁶ Kendall, *supra* note 5.

¹²⁷ Andrews & Kautza, *supra* note 47, at 11.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ LeComte, *supra* note 73.

¹³¹ KAN. STAT. ANN. § 2-3203.

¹³² *Id.*

¹³³ Danielle Diamond, Loka Ashwood, Allen Franco, Lindsay Kuehn, Aimee Imlay & Crystal Boutwell, *Agricultural Exceptionalism, Environmental Injustice, and U.S. Right-to-Farm Laws*, 52 ENV'T. L. REP. 10727, 10728 (2022).

¹³⁴ *Id.* at 10733.

¹³⁵ KAN. STAT. ANN. § 2-3202.

¹³⁶ *Id.* § 2-3203.

¹³⁷ Douglas, *supra* note 93.

¹³⁸ KAN. STAT. ANN. § 2-3203.

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1. *Expansion Provision*

The Kansas Right-to-Farm Act allows farms to maintain their protection regardless of any expansion in scope, acreage, animals, or activities.¹³⁹ The Act provides no limits on the amount of expansion that an agricultural facility may undertake.¹⁴⁰ Nor does the Act provide restrictions on how drastically a change in agricultural activities may be.¹⁴¹ This leniency allows agricultural operations with minimal activities to scale up and create significant nuisances while maintaining protections.¹⁴² Meanwhile, neighbors who had no notice of this potential nuisance problem are left without legal recourse.¹⁴³ The market has taken advantage of this level of expansion allowed by the Act and has increasingly forced smaller producers out.¹⁴⁴ The lack of expansion restrictions reinforces the pattern of farms getting smaller in number and larger in size.¹⁴⁵ Today, a farm size of 1000 acres is no longer enough to play with the big dogs.¹⁴⁶

This expansion allowance is contrary to the stated purpose of the Act. The Act intended to protect existing farmers from encroaching suburban activity.¹⁴⁷ The effect of allowing unlimited expansion does the opposite, as it no longer protects surrounding landowners and farmers from large agricultural operations.¹⁴⁸

An example of the above provision at work is the following: A family moves to an agricultural area adjacent to a farm. Under the Act, this family would be considered on notice and, accordingly, could not bring nuisance claims against the farm in the future. This is a logical result that aligns with the Act's purpose. But what happens if this farm starts expanding operations and decides to go into the hog production business? Suddenly, this family cannot enjoy their property because of nuisances from the newly expanded farm. Contrary to the Act's purpose and the logical conclusion, this family lacks legal recourse, even though they were not on notice of these nuisances. The Act's original purpose is valid and produces logical results. The lenient expansion provision, however, undermines the Act's purpose and yields illogical results.

2. *Transfer/Assignment Provision*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Diamond, *supra* note 133.

¹⁴³ Pinkerton, *supra* note 73.

¹⁴⁴ *Id.*

¹⁴⁵ Redmon, *supra* note 21.

¹⁴⁶ *Id.*

¹⁴⁷ KAN. STAT. ANN. § 2-3201.

¹⁴⁸ Diamond, *supra* note 133; Redmon, *supra* note 21.

The Act also allows protections to be assigned or transferred.¹⁴⁹ Accordingly, while the agricultural activity must have been previously established, protection under the Act may be transferred to any agricultural activity that was not previously established.¹⁵⁰ This lenience allows large agricultural production facilities to come in, buy out family farms, and maintain their previous protection.¹⁵¹ This transfer provision, like the expansion provision, ignores the Act's purpose and yields illogical results.

An example of the provision at work would be the following: Take the family from the above example, under this provision, if, after moving next to a small farm, the owner of the farm chooses to sell to a large hog production facility, both the property interest in the land and the right to protection under the Act are transferred. As a result, an illogical and negative result ensues as the family is left without a legal recourse when they had no notice that they would be moving next to an industrial agricultural facility.

3. Definition of "Agricultural Activity"

The Act defines "Agricultural activity" to include "growing or raising of...agricultural crops, hay, poultry, and livestock" and "livestock, poultry, and dairy products for commercial purposes."¹⁵² The definition does not stop there; rather, it includes any "activities related to the handling, storage, and transportation of agricultural commodities."¹⁵³ This last sentence broadens the definition greatly to include a multitude of industrial ag corporations in addition to large production companies that would already be included in the first part of the definition.

B. Compounding Effect of Lenient Provisions

This leniency shelters large agricultural production facilities and allows them to enter the market and expand, no matter how large, while community members have no legal remedy to protect their communities. Each of these provisions, on its own, may not seem drastic, but when combined, they have drastic effects on Kansas communities. The most powerful combination is the ability to transfer protection freely and then expand and change the scope of activities. This allows for a modest-sized farm to sell its land and transfer its interest to a large industrial agriculture operation, which is then entitled to receive the same nuisance protection.¹⁵⁴ This combination of exceptions causes this scenario, and it is something you can see happening in Kansas and throughout the country.¹⁵⁵ The broad category inclusion in the definition of Agricultural Activities contributes to the capacity for industrial agriculture facilities to prevail on Right-to-Farm claims.¹⁵⁶

¹⁴⁹ KAN. STAT. ANN. § 2-3202.

¹⁵⁰ *Id.*

¹⁵¹ Skaller, *supra* note 25.

¹⁵² KAN. STAT. ANN. § 2-3203.

¹⁵³ *Id.*

¹⁵⁴ See KAN. STAT. ANN. § 2-3202.

¹⁵⁵ Skaller, *supra* note 25, at 209–10.

¹⁵⁶ Diamond, *supra* note 133, at 10732.

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If the definition were narrower, large industrial plants might fall outside the protections, making them unshielded despite the expansion and transfer provisions. However, this is not the case in Kansas.

V. HOW TO PROTECT KANSAS AGRICULTURE AND KANSAS FARMERS

Finding the best solution is not an easy task, especially because the Act, at times, protects not only industrial agriculture, but also those farmers who actually need it. The Act provides necessary protection for hundreds of small Kansas farmers, so the solution must balance those needs. There have been some recent decisions regarding the Kansas Right-to-Farm Act, and it is important to evaluate these developments. It is also important to determine what the solution cannot be before recommending a possible solution.

A. Recent Developments

A recent Kansas Supreme Court case, *Ross v. Nelson*, addressed the Kansas Right-to-Farm Act and its limits.¹⁵⁷ In *Ross*, an industrial hog farmer decided to use hog waste to fertilize his nearby farmland.¹⁵⁸ To facilitate this, he piped the waste underground to spray on his nearby land.¹⁵⁹ The hog farmer was sued for trespass and nuisance due to this fertilization method.¹⁶⁰ He argued protection under the Kansas Right-to-Farm Act, but the Kansas Supreme Court found his use of pipes to constitute trespass; therefore, he was offered no protection under the Act.¹⁶¹ News articles reported this decision as limiting the Act and a win for Kansas communities in the fight against industrial agriculture.¹⁶² However, the case does not directly address or condemn the Act's leniency; rather, it was decided on trespass law.¹⁶³ The Kansas Right-to-Farm Act only protects activity “undertaken in conformity with federal, state, and local laws.”¹⁶⁴ The court found that the activity by the respondent

¹⁵⁷ *Ross v. Nelson*, 554 P.3d 636 (Kan. 2024).

¹⁵⁸ *Id.* at 641.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See generally Roger McEowen, *Firm to Farm: Kansas Supreme Court Upholds Property Rights*, RFD TV (Aug. 28, 2024 12:02 PM), <https://www.rfdtv.com/business/blogs/firm-to-farm/kansas-supreme-court-upholds-property-rights> [<https://perma.cc/MGW2-326V>]; Jason Alatidd, *Kansas right-to-farm law doesn't protect farmer's liquified hog waste pipeline*, TOPEKA CAPITAL-J. (Aug. 24, 2024 4:10 AM), <https://www.cjonline.com/story/business/agricultural/2024/08/24/kansas-right-to-farm-law-doesnt-protect-hog-farmers-wastewater-pipe/74917883007/> [<https://perma.cc/3K9X-F9X8>]; Tim Carpenter, *Kansas Supreme Court closes valve in protracted dispute on illegal hog-effluent pipeline*, LAWRENCE TIMES (Aug. 30, 2024) <https://lawrencekstimes.com/2024/08/30/kssupct-hog-pipeline/> [<https://perma.cc/6NTF-VLB2>].

¹⁶³ *Ross*, 554 P.3d at 641.

¹⁶⁴ KAN. STAT. ANN. § 2-3202.

was illegal and decided the case based on that.¹⁶⁵ The Court determined that the industrial farmer maintained no protection under the Act due to the illegality of his actions, not necessarily because the Act was too lenient or afforded protection to the wrong category of farmers.¹⁶⁶ While *Ross* does not limit or reconsider the Act's protection, the case indicates a change in the tide. It shows how ripe this issue is for Kansans. Even though the Court did not seem willing to limit or address the Right-to-Farm Act, it seems to signal the intent to protect those made victims of industrial agricultural nuisance. Kansas communities care about this issue, which is why a workable solution is needed.

B. What the solution cannot be

1. Repeal the Act

The problems with the Kansas Right-to-Farm Act cannot be solved by repealing it altogether. The original purpose of the Act, to protect farmers from expanding suburban activities, is still furthered through the Act.¹⁶⁷ Those farmers still need that protection from nuisance suits. It is not the local farmers' fault that the Kansas legislature has made the Act so broad and lenient that large agricultural corporations fall under its protection. If the legislature eliminated the Act, small farmers would be exposed to nuisance suits for reasonable farming activities. This liability would likely push more farmers out of the market as profit margins are already slim. The solution must encourage and protect small farmers from both nuisance suits and large industrial agriculture corporations.

2. Restricting the Right to Transfer/Assign

The solution also must not restrict the allowance of a transfer or assignment of protection under the Act. While the goal is to keep as many small Kansas farmers in the market as possible, farmers will still need to sell their farms. Restricting their right to transfer this protection reduces the profit they could realize from the sale and may deter the sale altogether. If a large corporation or even another small farm is coming in to buy the farm from a retiring farmer, it does everyone a disservice to disallow that retiring farmer from transferring their protection. If that protection may not be transferred to another small Kansas farmer, the purpose of the Act is equally thwarted. The solution must not restrict the Kansas farmer; rather, it must protect and bolster them.

C. Possible Solutions

This section will cover many possible solutions to the over-lenient Kansas Right-to-Farm Act. The first solution comes from examining other states' laws. Every state has right-to-farm laws that vary from ultra-lenient to Kansas-level lenient to narrow.¹⁶⁸ Many of these states have laws that would help solve the issues

¹⁶⁵ *Ross*, 554 P.3d at 641.

¹⁶⁶ *Id.* ("This trespass, in turn, precludes him from relying on the presumption of "good agricultural practice" under the right-to-farm statutes. To rely on that presumption, the statute requires conformity with all applicable laws, a condition Nelson's trespass violates.").

¹⁶⁷ KAN. STAT. ANN. § 2-3201.

¹⁶⁸ Rumley, *supra* note 25, at 328.

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in Kansas. Additional solutions come directly from issues found in the Kansas Act itself.

First, Kansans should consider specifically defining what nuisances are not permitted. This maintains protection from nuisance suits but outlines the standard that both farms and industrial agriculture facilities must hold themselves to. Another possible solution would be a restriction of the expansion provision. This solution would support the purpose of the Act and protect the surrounding communities from becoming neighbors to an ever-expanding production facility of which they had no notice. Finally, Kansas could statutorily outline alternative dispute resolution. This would give communities legal recourse while still protecting farms from costly nuisance suits.

1. Other States' RTF Laws

New Jersey provides farmers and communities alike with an agricultural mediation program.¹⁶⁹ This process has had much success in New Jersey, where most Right to Farm claims need a single mediation session.¹⁷⁰ Claims brought to mediation under this program include signs, farm buildings, equine activities, water runoff, manure, flies, odors, etc.¹⁷¹ Applying this process may help Kansas by providing another outlet for the community that is cheaper and faster.

Florida's Right-to-Farm laws provide for specific limitations on how much expansion a farming operation may have.¹⁷² The Act restricts an operation from expanding its operation regarding noise, odor, dust, or fumes.¹⁷³ This specifically applies where there is an established homestead or business adjacent.¹⁷⁴ This expansion limitation is not excessive but seems to solve many leniency problems. This type of limitation would maintain the purpose of the Kansas Right-to-Farm Act by protecting farmers while giving communities a recourse when an unexpected nuisance arrives near them.

Maine limits the applicability of the statute when there is a material change in the operation.¹⁷⁵ If a farm expands enough that the conditions or nature of the farm have materially changed, there is no protection under the Act.¹⁷⁶ Similarly, Vermont,

¹⁶⁹ *New Jersey Agricultural Mediation Program Handbook*, N.J. DEP'T OF AGRIC., STATE AGRIC. DEV. COMM., <https://www.nj.gov/agriculture/sadc/documents/agmediation/handbook.pdf/> [<https://perma.cc/KFU7-5UEQ>].

¹⁷⁰ *Id.* at 2.

¹⁷¹ *Id.* at 6.

¹⁷² FLA. STAT. § 823.14.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ ME. REV. STAT. tit. 7, § 153.

¹⁷⁶ *See id.*

prior to a 2025 legislative change, restricted protection when there was a significant change in a farm's operations.¹⁷⁷ This type of limitation may help Kansas in restricting industrial agriculture from expanding without limitation, but it may not be enough to resolve the leniency issues.

The Connecticut Right-to-Farm Act limits the protections for activities that are "used in normal, generally acceptable farming."¹⁷⁸ This definition limits what activities are protected, but may not be specific enough to exclude industrial agriculture operations. Minnesota includes a similar provision limiting protection to "generally accepted agricultural practices."¹⁷⁹ This limitation may help the Kansas Act, but might still be too lenient, as "normal" or "generally accepted" may include industrial agriculture operations. West Virginia includes a unique provision that limits protection when physical property damage is involved.¹⁸⁰ This provides more protection than the current Kansas Right-to-Farm Act, but likely would not solve the current problems with industrial agriculture corporations.

2. *Provide disallowed nuisances*

Like Florida's Right-to-Farm law, where certain types of expansions of odor, noise, dust, etc., are deemed actionable nuisances, Kansas could adopt a similar limitation. Kansas could implement an expansion limitation when an operation expands its operations regarding odor, noise, and other visual nuisances. Kansas could also include a limitation on these types of nuisances, regardless of expansion, and apply the limitation to general operations. This broad limitation would likely constrain industrial agricultural operations and the nuisances they generate, but it may harm farmers whom the Act seeks to protect. Small Kansas farmers would be harmed because they would likely produce some type of nuisance and be sued without the protection the Act was meant to provide.

3. *Restrict expansion provision*

The potentially most effective restriction would be limiting the expansion provision. A limit on this could be applied to both existing farms and farms that had protection transferred or assigned to them. Limiting the expansion provision allows the transfer and assignment provision to continue, but limits industrial operations from taking advantage. The best way to avoid adversely affecting farmers is to apply the limitation only to large expansions. Limiting any expansion at all would negatively affect farmers too much and limit their ability to make a profit. If the restriction applies to significant or material expansions or changes, farmers would

¹⁷⁷ VT. STAT. ANN. tit. 12, § 5753; *The Regulatory Environment for Farms is Changing Beneath Our Feet in Vermont: Agricultural Exemption from Municipal Zoning, Act 250, Current Use, Nuisance Protections, and Jurisdiction over Agricultural Regulation*, RURAL VT, <https://www.ruralvermont.org/from-the-statehouse-blog/2025/6/9/2025-end-of-session-recap> [<https://perma.cc/NYV3-J9JK>].

¹⁷⁸ CONN. GEN. STAT. § 19a-341.

¹⁷⁹ MINN. STAT. § 561.19.

¹⁸⁰ W. VA. CODE § 19-19-4.

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still be protected to expand their operations, but industrial operations would no longer be protected.

4. *Alternative Dispute Resolution*

Another potentially effective solution would be to provide for, or even require, an alternative dispute resolution process or a mediation process. Alternative dispute resolution would encourage parties to settle outside of court, saving time and resources. This would provide a remedy for neighbors who have been harmed, while also protecting small farmers from the costs of litigation. The best way to enforce this would be to statutorily require that type of resolution. This would give community members a legal recourse to nuisance issues, but would protect farmers from nuisance litigation. However, for this process to be effective, the legislature would need to be specific and provide solutions for community members. Even though it would likely minimize litigation costs for farmers, it could still open the door to excessive claims that may still harm farmers.

D. Best Solution for Kansas

The best solution for Kansas farmers, the Kansas community, and the agricultural industry is to limit protections for operations that materially and substantially expand their operations. This preserves the original purpose of the Act, to protect Kansas farmers from expanding suburban activities, and limits protection for industrial agricultural activities. Limiting the restriction to material and substantial expansions preserves farms' ability to moderately expand operations while remaining profitable. With this modified restriction, industrial agricultural corporations would be limited in their negative effects on communities, and Kansas farmers would be given a better chance to stay competitive in the market.

VI. CONCLUSION

Childhood memories of time on the farm, like those I experienced, are becoming increasingly rare in Kansas. The shift away from family farming is not just a nostalgic loss but a systemic problem tied to the rise of industrial agriculture production facilities. Large-scale agricultural operations have contributed to the steady decline of historic Kansas farms. While Kansas legislation, like the Kansas Right-to-Farm Act, purports to protect small Kansas farms, it has instead facilitated industrial agriculture operations at the expense of small, family-owned farms that once formed the backbone of rural communities. Lenient provisions in the Kansas Right-to-Farm Act allow industrial agricultural corporations to exploit protections intended for small Kansas farms.

To protect Kansas farms, changes to the Kansas Right-to-Farm Act are necessary. The solution to the issue cannot be to repeal the act or to restrict the right to transfer or assign protection rights. Both would negatively impact small Kansas farmers. Possible solutions include looking to other state right-to-farm laws. Other states disallow specific nuisances, some restrict expansion of operations, and others

require alternative dispute resolution. The solution that would best protect Kansas farmers and Kansans is to limit protections for operations that materially and substantially expand their operations. Limiting major expansion protects small farmers even when they do grow their operations. Conversely, limiting expansion removes from large operations the ability to buy protections from historic Kansas farms and drastically expand their operations, creating nuisances for the community. The goal must be to protect small Kansas farms and Kansas agriculture while protecting Kansans. Achieving this goal would bring back the culture of Kansas farming and allow others to form childhood memories like mine.

Green Means Go: How the Supreme Court's Holding in United States v. Rahimi Has Given Kansas the Greenlight to Better Protect Victims of Intimate Partner Violence

Allison Koch Haggerty*

I. INTRODUCTION

"I'll never forget him standing over me and watching his finger twitch on the trigger as he decided whether he was going to let me live or die."¹ This is the chilling testimony of Janet Federico, a survivor of firearm-related Intimate Partner Violence (IPV), and a resident of Wichita, Kansas, who submitted testimony to the Kansas State Senate in 2022.² Federico testified at length regarding the abuse she suffered at the hands of her former partner.³ "I am intimately familiar with the barrel end of my ex-partner's Heckler and Koch .45 semiautomatic pistol," she said, as she described the pattern of gun-related abuse in her previous relationship.⁴ Unfortunately, Federico's experience is not unique. That day, other victims, advocates, and legislators submitted testimony alongside her, hoping to convince Kansas State Senators to mandate the statewide removal of firearms from subjects of domestic violence restraining orders (DVROs).⁵ Despite the testimony, SB 192 was never voted on and ultimately died in committee.⁶ However, the June 2024 decision by the United States Supreme Court in *United States v. Rahimi*, which upheld the constitutionality of removing firearms from individuals subject to DVROs, has renewed hope for similar legislation nationwide.⁷

* J.D. Candidate, May 2026, University of Kansas School of Law. Thank you to the wonderful staff of the Kansas Journal of Law and Public Policy for their meticulous work editing this article. As a native Kansan, I am committed to making this state safer for victims of intimate partner violence. I hope this article inspires readers to advocate for gun laws that will protect the most vulnerable amongst us.

¹ Tim Carpenter, *Kansas House Member: Lawmakers Should Compel Domestic Abusers to Relinquish Firearms*, KAN. REFLECTOR (Mar. 7, 2022), <https://kansasreflector.com/2022/03/07/kansas-house-member-lawmakers-should-compel-domestic-abusers-to-relinquish-firearms> [https://perma.cc/GET8-VPDH].

² *Id.*

³ *Id.*; Janet Federico, *Testimony in Support of Kansas Senate Bill 192 House Committee on Federal and State Affairs*, KSLEGISLATURE.GOV (Feb. 28, 2022), https://www.kslegislature.gov/li_2022/b2021_22/committees/ctte_s_fed_st_1/documents/testimony/20220302_05.pdf [https://perma.cc/K8JR-NCTV].

⁴ Dinah H. Sykes, *Sykes SB 192 Written Testimony*, KSLEGISLATURE.GOV (Mar. 2, 2022), https://kslegislature.gov/li_2022/b2021_22/committees/ctte_s_fed_st_1/documents/testimony/202302_17.pdf [https://perma.cc/M5BH-YUKE]; 2021-2022 Legislative Sessions, *Minutes for SB192 – Committee on Federal and State Affairs*, KSLEGISLATURE.GOV (Mar. 2, 2022), https://kslegislature.gov/li_2022/b2021_22/measures/minutes/agenda_item_2022022208291464821 [https://perma.cc/M43J-7UJQ].

⁵ 2021-2022 Legislative Sessions, *SB 192*, KSLEGISLATURE.GOV (May 23, 2022) https://kslegislature.gov/li_2022/b2021_22/measures/SB192/ [https://perma.cc/LW8J-8EWR].

⁷ *Indiana Legal Services Applauds Supreme Court Ruling in USA vs. Rahimi*, IND. LEGAL SERVS. (Jun. 21, 2024), <https://www.indianalegalservices.org/indiana-legal-services-applauds-supreme-court-ruling-in-usa-vs-rahimi> [https://perma.cc/MA9L-LYWT].

Since the *Rahimi* ruling, multiple states have already begun the process of augmenting safety measures for firearm-related IPV victims.⁸ In the first quarter of 2025, both Indiana and Tennessee introduced new legislation targeting existing DVRO firearm relinquishment laws.⁹ The Indiana House of Representatives began reviewing a bill that would confiscate a DVRO subject's firearms within 72 hours of the issuance of an order and make the failure to comply a chargeable offense.¹⁰ Tennessee lawmakers introduced a new bill that would require the subjects of DVROs to name the third parties responsible for their relinquished firearms, a move advocates say will revolutionize the state's approach to reducing domestic violence.¹¹ In Illinois, Governor JB Pritzker signed into law a bipartisan bill, known as Karina's Law, that had been delayed in the state senate since the fall of 2023, pending the *Rahimi* outcome.¹² Karina's law closes a significant loophole in Illinois state law by establishing a clearly defined process for removing firearms from individuals subject to DVROs.¹³ Lawmakers are calling this a significant victory that should bring comfort to victims of firearm-related IPV across the state.¹⁴ This wave of new legislation supports the contention that the *Rahimi* ruling has given Kansas and other states across the country the green light to move forward with laws that could better protect victims like Federico in the future.

Intimate partner violence affects more than 12 million American citizens each year.¹⁵ Approximately 4.5 million women in the United States have been threatened with a gun by an intimate partner, and nearly 1 million American women have been shot during an IPV incident.¹⁶ Between 2018 and 2022, on average, 2 people were shot and killed each day at the hands of their current or former partner.¹⁷ During that same 4-year time period, the number of incidents where an IPV abuser murdered their current or former domestic partner with a firearm increased by 21.8%.¹⁸ This expanding crisis correlates to a decade-long uptick in the sale and

⁸ H.R. 1317, 124th Gen. Assemb., Reg. Sess. (Ind. 2025); Stephanie Wade & Leah Hope, *Gov. Pritzker Signs 'Karina's Bill' to Remove Guns from Domestic Violence Situations*, EYEWITNESS NEWS (Feb. 10, 2025), <https://abc7chicago.com/post/illinois-governor-jb-pritzker-sign-karinas-bill-remove-guns-domestic-violence-situations-little-village-mom/15888858> [<https://perma.cc/5VV5-36PP>].

⁹ H.R. 1317, 124th Gen. Assemb., Reg. Sess. (Ind. 2025); Paige Pflieger, *Tennessee Lawmakers Push to Change How the State Disarms Dangerous People to Better Protect Domestic Violence Victims*, PROPUBLICA (Feb. 12, 2025), <https://www.propublica.org/article/tennessee-guns-dispossession-domestic-violence> [<https://perma.cc/J3FR-B5C4>].

¹⁰ H.R. 1317, 124th Gen. Assemb., Reg. Sess. (Ind. 2025)

¹¹ Pflieger, *supra* note 8.

¹² Wade & Hope, *supra* note 8.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Domestic Violence Statistics*, NAT'L DOMESTIC VIOLENCE HOTLINE (last visited Feb. 19, 2025), <https://www.thehotline.org/stakeholders/domestic-violence-statistics> [<https://perma.cc/YB8H-TSUR>].

¹⁶ Alexandria Goodyear, Michael Rodriguez & Deborah Glik, *The Role of Firearms in Intimate Partner Violence: Policy and Research Considerations*, 41 J. PUB. HEALTH POL'Y. 185, 186 (2020).

¹⁷ *Firearm Intimate Partner Homicides*, BRADY UNITED, <https://www.bradyunited.org/resources/research/analysis-firearm-intimate-partner-homicides> (last visited Nov. 9, 2025).

¹⁸ *Id.*

possession of firearms nationwide.¹⁹ As gun ownership has increased across the country, communities in nearly every state have seen an escalation of firearm-related IPV incidents and homicides.²⁰

In recent years, the crisis has been compounded by a significant shift in the United States Supreme Court's treatment of the Second Amendment.²¹ In 2008, the Supreme Court recognized the individual right to possess firearms in the home in *District of Columbia v. Heller*.²² In 2022, the Court removed most remaining Second Amendment guardrails in *New York State Rifle & Pistol Association v. Bruen*, holding that any regulation affecting the right to bear arms must be rooted in the "historical tradition of firearm regulation."²³ This shift upended decades of precedent regarding the constitutional interpretation of the Second Amendment and signaled to state legislatures and federal courts alike that a range of gun restrictions might be in jeopardy.²⁴ As a result, ways to legally protect victims of firearm-related IPV became increasingly less clear amidst the worsening crisis.²⁵ In fact, the Fifth Circuit interpreted the Supreme Court's shift as a directive to reconsider the constitutionality of federal and state IPV-related firearm laws, leaving advocates in limbo and IPV victims in potentially increasing peril.²⁶

Then came the Court's decision on *Rahimi*.²⁷ The Court found that 18 U.S.C. § 922(g), a federal law prohibiting the subject of a DVRO from possessing a firearm for the duration of the order, is consistent with both the history and text of the Second Amendment.²⁸ The Court held that when an individual poses a credible threat to another's physical safety, that individual may be temporarily disarmed, consistent with the Second Amendment.²⁹ The Court's ruling conclusively rejected the Fifth Circuit's holding and upheld a critical protection for IPV victims.³⁰ As such, the *Rahimi* decision gave states, such as Kansas, the green light to enhance existing restrictions and expand the breadth and depth of gun-related IPV laws. Doing so will close current loopholes and create better systems to keep guns out of abusers' hands. *Rahimi* clearly delineated the starting line for courts, state legislatures, and advocates alike to help victims of gun-related IPV across the country, leaving the path to greater protections murky no more.

¹⁹ *Id.*

²⁰ Everytown Rsch. and Pol'y, *Guns and Violence Against Women*, EVERYTOWN FOR GUN SAFETY SUPPORT FUND (Nov. 20, 2024), <https://everytownresearch.org/report/guns-and-violence-against-women> [perma.cc/29HN-NBS5].

²¹ Chip Brownlee, *How the Supreme Court Broadened the Second Amendment*, THE TRACE (Sep. 12, 2024), <https://www.thetrace.org/2024/09/bruens-ruling-scotus-second-amendment-gun> [https://perma.cc/8SEF-YZXD].

²² *Id.*

²³ *Id.*

²⁴ Elizabeth Tobin-Tyler, *Intimate Partner Violence Firearm Injuries and Homicides: A Health Justice Approach to Two Intersecting Public Health Crises*, 51 J.L. MED. & ETHICS 64, 65 (2023).

²⁵ *Id.* at 70.

²⁶ *Id.*

²⁷ See *United States v. Rahimi*, 602 U.S. 680 (2024).

²⁸ *Id.* at 693.

²⁹ *Id.* at 702.

³⁰ *Id.* at 701.

Section II of this article begins by outlining the body of research around the connection between IPV and firearm possession. It presents evidence of the firearm-related public health crisis that currently exists in America. Then, in Section III, this article situates the *Rahimi* decision against the backdrop of both current Federal Law and the Supreme Court's contemporary approach to Second Amendment cases. In Section IV, this article analyzes the challenges posed by existing Federal and Kansas gun-related IPV laws and procedures and compares Kansas with other states that have successfully implemented effective enforcement. Section V offers a framework for both improving and expanding current Kansas law to better protect its citizens from firearm-related IPV. Finally, Section VI provides a brief conclusion to this article.

II. IPV AND FIREARMS: A PUBLIC HEALTH CRISIS ON THE RISE

A. Understanding IPV

The World Health Organization defines IPV as “behavior within an intimate relationship that causes physical, sexual or psychological harm, including acts of physical aggression, sexual coercion, psychological abuse, and controlling behaviors.”³¹ IPV is most often used to gain and then maintain an uneven power dynamic in a relationship and does not generally represent an isolated incident; it is a pattern of behavior that escalates over time.³² This escalation tends to reach its zenith when the relationship finally comes to an end, with IPV victims facing the most danger as they attempt to leave their abuser.³³ According to the Department of Justice, most IPV incidents take place after a couple formally separates.³⁴ In fact, the majority of domestic violence homicides and most serious injuries in abusive relationships occur when the survivor ends the relationship.³⁵ Unfortunately, this danger does not dissipate quickly.³⁶ While 77% of domestic violence-related homicides occur upon separation, there remains a 75% increased risk of violence for the two-year period following separations.³⁷

Women who are younger, lower income, members of racial/ethnic minority groups, and/or live with disabilities are disproportionately at risk for IPV.³⁸ The lifetime prevalence of IPV among lesbian, gay, bisexual, and transgender people is as high or higher than the US general population, pointing to inequities in access

³¹ *Intimate Partner Violence*, WORLD HEALTH ORG., <https://apps.who.int/violence-info/intimate-partner-violence> (last visited Nov. 2, 2024) [<https://perma.cc/9AA3-UUAV>].

³² *From Bad to Worse: The Escalation of Violence*, SOS VIOLENCE CONJUGALE (last visited Jan. 30, 2025), <https://sosviolenceconjugale.ca/en/articles/from-bad-to-worse-the-escalation-of-violence> [<https://perma.cc/RHB4-K9HL>].

³³ Jerry Mitchell, *Most Dangerous Time for Battered Women? When They Leave*, CLARION LEDGER (Jan. 28, 2017, 7:01 PM CT), <https://www.clarionledger.com/story/news/2017/01/28/most-dangerous-time-for-battered-women-is-when-they-leave-jerry-mitchell/96955552> [<https://perma.cc/UWE7-JEJL>].

³⁴ *Id.*

³⁵ *First 18 Months after Leaving an Abusive Partner Are the Most Dangerous*, JBWS (last visited Feb. 19, 2025), <https://jbws.org/news/the-first-18-months-after-leaving-an-abusive-partner-are-the-most-dangerous> [<https://perma.cc/P85V-U9QF>].

³⁶ *Eighteen Months After Leaving Domestic Violence is Still the Most Dangerous Time*, BATTERED WOMEN SUPPORT SERVS. (June 11, 2020), <https://www.bwss.org/eighteen-months-after-leaving-domestic-violence-is-still-the-most-dangerous-time> [<https://perma.cc/CLX2-EM56>].

³⁷ *Id.*

³⁸ *Intimate Partner Violence and Firearms*, BULLET POINTS, <https://www.bulletpointproject.org/intimate-partner-violence> [<https://perma.cc/T9U9-SZNA>].

to safety among different groups.³⁹ Although anyone can be the victim of IPV, overwhelmingly, the victims of IPV and IPV-related homicides are disproportionately female, and women are more likely to experience a higher frequency and severity of IPV.⁴⁰ Nearly 1 in 3 women have been subjected to IPV in their lifetime.⁴¹

According to the Educational Fund to Stop Gun Violence, over half of all women killed in the United States are murdered by a current or former intimate partner.⁴² Firearms are the most commonly used weapon by abusers to murder an intimate partner, and over half of intimate partner homicides are committed with a gun.⁴³ Perhaps the most critical and jarring statistic is that a woman is five times more likely to be murdered when her abuser has access to a gun.⁴⁴ Not only is an IPV victim more likely to be abused with a firearm when it is accessible to an abuser, but they are also significantly more likely to be murdered because that gun was accessible.

There is no question that the IPV crisis is “inextricably linked to the widespread and growing use of guns.”⁴⁵ The nationwide increase in IPV homicides has been directly correlated to an increase in gun sales across the country.⁴⁶ Gun sales have increased from 2015 to 2024, with a sharp incline in numbers in 2020, directly coinciding with the COVID-19 pandemic.⁴⁷ Firearms sales during the pandemic rose to “unprecedented levels with an estimated one in five U.S. households purchasing a firearm from March 2020 to March 2022.”⁴⁸ From March to July 2020 alone, 4.3 million firearms were purchased in America.⁴⁹ These numbers represent an 85% increase over the expected number of sales based on calculations from previous years.⁵⁰ Unsurprisingly, research indicates firearm-related IPV homicides increased nearly 28% during that same time period.⁵¹

³⁹ *Id.*

⁴⁰ *Violence Against Women*, WORLD HEALTH ORG. (Mar. 25, 2024), <https://www.who.int/news-room/fact-sheets/detail/violence-against-women> [<https://perma.cc/4Y92-MENB>].

⁴¹ *Id.*

⁴² *Domestic Violence and Firearms*, EDUC. FUND TO STOP GUN VIOLENCE (July, 2020), <https://efsgv.org/learn/type-of-gun-violence/domestic-violence-and-firearms/> [<https://perma.cc/VZU3-4U57>].

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Everytown Rsch. and Pol’y, *supra* note 20.

⁴⁶ *Id.*

⁴⁷ Everytown Rsch. and Pol’y, *Gun Sales Surged During the Covid-19 Pandemic*, EVERYTOWN FOR GUN SAFETY SUPPORT FUND, <https://everytownresearch.org/graph/gun-sales-surged-during-the-covid-19-pandemic> (last visited Nov. 10, 2025) [<https://perma.cc/RAM5-U9B7>].

⁴⁸ *Firearm Violence in the United States*, JOHNS HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH: CTR. FOR GUN VIOLENCE SOLS., <https://publichealth.jhu.edu/center-for-gun-violence-solutions/research-reports/firearm-violence-in-the-united-states> [<https://perma.cc/2FUQ-4SFM>].

⁴⁹ Jonathan Shipley, Megan Donnelly, Catherine Kuza, Areg Grigorian, Lourdes Swentek, Theresa Chin, Nolan Brown, Ninh Nguyen, & Jeffry Nahmias, *Domestic Firearm Violence Against Women (2018-2021)*, 17 SURGERY OPEN SCI. 75, 76 (2024).

⁵⁰ *Id.*

⁵¹ BRADY UNITED, *supra* note 17.

Elizabeth Tobin-Tyler, in her article, *Intimate Partner Violence, Firearm Injuries and Homicides, A Health Justice Approach to Two Intersecting Public Health Crises*, points out that not all IPV-related gun violence is fatal.⁵² Guns are often used to threaten, intimidate, or even wound.⁵³ As many as 4.5 million women have been threatened, and one million have been shot or shot at by a firearm during an IPV incident.⁵⁴ Firearms are a useful source of intimidation for abusers, leading victims to fear for their lives and, in doing so, coercing victims into remaining in the abusive relationship.⁵⁵ Studies have found that in gun-related IPV incidents, 69.1% of the time guns are used as a means to threaten the victim, whether actually brandished (42.4%) or threatened but not displayed (26.7%).⁵⁶

Women in domestic violence shelters are more than twice as likely to report that there was a gun in the home.⁵⁷ Unsurprisingly, IPV victims who seek out agency support (shelters, courts) report more severe non-fatal experiences of firearm-related IPV.⁵⁸ One study looking at IPV shelter residents found that 37% of the study's sample reported that an abuser used a firearm to hurt them, and 65% reported that their partner had used a gun to threaten or scare them.⁵⁹ A woman who is threatened or assaulted with a gun is 20 times more likely to be murdered than a woman who is not threatened or assaulted with a deadly weapon.⁶⁰ Taken together, these numbers make it clear that the use of a firearm in any IPV incident is a harbinger for escalating violence, as "abusers' previous threats with a weapon and threats to kill their partners are both predictors of intimate partner homicide."⁶¹

The IPV statistics in Kansas mirror those nationwide. The Kansas Bureau of Investigation Incidence Based Reporting Unit's 2022 report found that domestic violence-related homicides more than doubled between 2003 and 2022.⁶² Of those domestic violence-related homicides, 60% resulted from the use of a firearm. Also, in Kansas, Protections from Abuse Orders (also called DVROs) reached an all-time high in 2022 with nearly 8,600 filings.⁶³ Although data on a corresponding increase in gun ownership in Kansas are not included in that specific report, other studies

⁵² Tobin-Tyler, *supra* note 24, at 65.

⁵³ *Id.* at 66.

⁵⁴ *Id.* at 65.

⁵⁵ *Id.* at 66.

⁵⁶ Susan B. Sorenson, *Guns in Intimate Partner Violence: Comparing Incidents by Type of Weapon*, 26 J. WOMEN'S HEALTH 249, 251 (2017).

⁵⁷ Susan B. Sorenson & Rebecca A. Schut, *Nonfatal Gun Use in Intimate Partner Violence: A Systematic Review of the Literature*, 19 TRAUMA, VIOLENCE AND ABUSE 431, 435 (2018).

⁵⁸ Kellie R. Lynch, Denise Paquette Boots, Dylan B. Jackson & Claire M Renzetti, *Firearm-related Abuse and Protective Order Requests Among Intimate Partner Violence Victims*, 37 J. OF INTERPERSONAL VIOLENCE 12973, 12974 (2022).

⁵⁹ *Id.*

⁶⁰ EDUC. FUND TO STOP GUN VIOLENCE, *supra* note 42.

⁶¹ *Id.*

⁶² *Domestic Violence, Stalking, and Sexual Assault in Kansas as Reported by Law Enforcement Agencies*, KANSAS BUREAU INVESTIGATION INCIDENT BASED REPORTING UNIT, 9 (2022) (Showing an increase of DV-Homicides from 15 in 2003 to 35 in 2022).

⁶³ *Id.* at 45.

indicate that Kansas firearm ownership increased by 44% from 2014 to 2023, outpacing the nationwide increase of 33%.⁶⁴

B. Domestic Violence as a Public Health Crisis

Given what this research shows, America has a public health crisis on its hands. In her article, *Why Domestic Violence is a Public Health Crisis*, Amanda Kippert defined a public health crisis as any urgent situation in which the health of a population is negatively affected.⁶⁵ Other experts, like Georges Benjamin, the Chief Executive Director of the American Public Health Association, have concluded that “domestic violence is indeed of significant prevalence and impact that it is at public health crisis levels.”⁶⁶ Similarly, Alicia Nichols, the Deputy Director of the National Center on Gun Violence in Relationships, contends that IPV has “long-lasting, far-reaching and often devastating consequences for individuals, their families and entire communities.”⁶⁷

Victims and their children who do survive firearm-related IPV incidents suffer from a “multiplicity of negative health consequences.”⁶⁸ These include “higher rates of chronic stress which can lead to chronic mental health conditions, diseases, chemical dependency, substance abuse issues, [and] complications with pregnancies, ” all of which have both generational and systemic effects on communities at large.⁶⁹ Beyond the human cost, there is also a significant financial burden wrought by the pervasiveness of IPV.⁷⁰ Based upon research by the CDC, the “lifetime economic cost associated with medical services for IPV-related injuries, lost productivity from paid work, criminal justice, and other costs, is \$3.6 trillion.”⁷¹ Over an IPV victim’s lifetime, the personal financial burden is nearly \$103,767 for women and \$23,414 for men.⁷²

The data is clear. Firearm-related IPV represents a significant part of an ongoing public health crisis that is unlikely to resolve itself without intervention. Because firearms have never been more universally accessible and Second Amendment protections have never been stronger, it has never been more critical than it is at this moment that courts, legislators, and advocates in Kansas—and states

⁶⁴ *Kansas Gun Laws*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/states/kansas/> [<https://perma.cc/H5MZ-4Q7S>] (giving Kansas an F rating for its gun laws).

⁶⁵ Amanda Kippert, *Why Domestic Violence is a Public Health Crisis*, DOMESTICSHELTERS.ORG (Apr. 3, 2023), <https://www.domesticshelters.org/articles/ending-domestic-violence/why-domestic-violence-is-a-public-health-crisis> [<https://perma.cc/U2PV-23EX>].

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Kellie R. Lynch & Dylan B. Jackson, *Ready to Pull the Trigger? Adapting the Health Belief Model to Assess the Implementation of Domestic Violence Gun Policy at the Community Level*, 9 PSYCH. OF VIOLENCE 67, 67 (2019).

⁶⁹ Kippert, *supra* note 65.

⁷⁰ WORLD HEALTH ORG., *supra* note 40.

⁷¹ *About Intimate Partner Violence Prevention*, CTR. FOR DISEASE CONTROL (May 16, 2025), <https://www.cdc.gov/intimate-partner-violence/about/index.html> [<https://perma.cc/4BZ3-8WLQ>].

⁷² *Id.*

across the country—work to strengthen federal and state protections for these victims.⁷³

III. SITUATING THE RAHIMI DECISION

A. Background on Federal IPV Firearm-Related Prohibitions

In 1968, Congress enacted the first law to prohibit firearm possession by those convicted of felony offenses.⁷⁴ The Gun Control Act of 1968 was a comprehensive statute regulating the manufacture, sale, distribution, and possession of firearms in the United States.⁷⁵ It imposed both a regulatory licensing scheme and criminal prohibitions on specified firearms transactions, implementing for the first time a lifetime ban on firearm possession for felons with an IPV-related conviction.⁷⁶

However, it was not until the Violence Against Women Act (VAWA) was passed in 1994 “that federal lawmakers fully recognized and sought to address the added danger of firearm possession by IPV perpetrators.”⁷⁷ The VAWA expanded firearm prohibitions to include the subjects of domestic violence restraining orders.⁷⁸ Under this new law, 18 U.S.C. § 922(g), Congress made it unlawful for any person who is subject to an IPV-related court order and was deemed a credible threat by the court to possess or own a gun for the pendency of the order.⁷⁹ Additionally, 18 U.S.C. § 922(g) requires that the subject must have been given notice of a hearing and must have had the opportunity to participate in said hearing.⁸⁰ State adoption and implementation of this law varies and, as such, gives rise to gaps in legal protections nationwide.⁸¹

B. The Supreme Court and the Second Amendment

As noted above, in 2008, the Supreme Court began to move towards a broader interpretation of the Second Amendment.⁸² The Court's decision in *District of Columbia v. Heller* struck down a ban on handguns as a violation of the Second Amendment and, in doing so, elevated the right to keep and bear arms to a place commensurate with other constitutionally granted individual rights.⁸³ However, the holding of *Heller* was “expressly noncommittal about how its new articulation of the Second Amendment should be applied in other circumstances.”⁸⁴ And in the dictum of the holding, the Court clarified that “‘nothing in [the] opinion should be taken to cast doubt’ on laws restricting gun possession and ownership by certain people such as those with felonies or those with mental illness or laws prohibiting gun possession in certain sensitive places.”⁸⁵ Thus, despite a seismic shift in the

⁷³ EDUC. FUND TO STOP GUN VIOLENCE, *supra* note 42.

⁷⁴ 18 U.S.C. §§ 922(f)-922(g) (making unlawful the possession of a firearm for any person who has been convicted of a crime punishable by imprisonment for a term exceeding one year).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Tobin-Tyler, *supra* note 24, at 67.

⁷⁸ 18 U.S.C. § 922(g).

⁷⁹ *Id.* § 922(g)(8).

⁸⁰ *Id.* § 922(g)(8)(A).

⁸¹ EDUC. FUND TO STOP GUN VIOLENCE, *supra* note 42.

⁸² See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁸³ *Id.* at 635.

⁸⁴ Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and The Shackles of History*, 73 DUKE L.J. 67, 81 (2023).

⁸⁵ Tobin-Tyler, *supra* note 24, at 69.

Second Amendment protections it provided, *Heller* created a continued constitutional safe haven for state and federal IPV-related firearm restrictions.⁸⁶

Then, in 2022, the Supreme Court issued its ruling in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, which overhauled the Court's treatment of Second Amendment cases entirely and threatened to destroy the safe haven created in *Heller*.⁸⁷ In *Bruen*, Petitioners Brandon Koch and Robert Nash sued "state officials who oversee the processing of licensing applications—for declaratory and injunctive relief, alleging that respondents violated their Second and Fourteenth Amendment rights by denying their unrestricted-license applications for failure to demonstrate a unique need for self-defense."⁸⁸ In New York, an individual wanting to carry a firearm outside their home may obtain a "have and carry" unrestricted license if they can show "proper cause" to obtain the license.⁸⁹ The "proper cause" requirement is satisfied only when an applicant can "demonstrate a special need for self-protection distinguishable from that of the general community."⁹⁰

The Court ruled that New York's proper-cause requirement violates the Fourteenth Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms in public for self-defense.⁹¹ Further, the Court held that for governmental regulation of firearms to be constitutional, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."⁹² Essentially, this means that the government must show that any current regulation on firearms is consistent with prior regulations for it to be considered constitutionally valid.⁹³

The Court clarified that the government need not point to a "historical twin," but instead must present support that history and tradition combine to justify firearm regulation.⁹⁴ While much has been made of this seismic transformation to Second Amendment scrutiny and its far-reaching implications, for the purpose of this analysis, it is enough to merely note that this pivotal ruling provided the backdrop for the Court's review of the *Rahimi* case.⁹⁵

C. *Rahimi*, *Bruen*, and a Green Light

In December of 2019, Zackey Rahimi argued with his girlfriend, C.M., and threatened her during a heated argument in a parking lot.⁹⁶ A physical altercation

⁸⁶ *Id.*; See also Brownlee, *supra* note 21.

⁸⁷ Tobin-Tyler, *supra* note 24, at 69.

⁸⁸ *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 1 (2022).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 7.

⁹² *Id.* at 17.

⁹³ *Id.* ("Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'").

⁹⁴ *Id.* at 30 ("On the other hand, analogical reasoning requires only that the government identify a well-established and representative historical *analogue*, not a historical *twin*.").

⁹⁵ *Id.* at 22.

⁹⁶ *United States v. Rahimi*, 602 U.S. 680, 686 (2024).

ensued, and when Rahimi realized that a bystander had witnessed the altercation, he retrieved a gun from his car and, although the record is unclear, may have fired at the witness.⁹⁷ In the melee, C.M. managed to escape, but Rahimi later called her and threatened to shoot her if she told anyone about the incident.⁹⁸ C.M. was granted a protective order against Rahimi in February of 2020 because the court found that Rahimi had committed family violence and that the violence was likely to occur again in the future.⁹⁹ The order “suspended Rahimi’s handgun license, prohibited him from possessing a firearm, and warned him that his possession of a firearm while the order remained in effect would be a federal felony.”¹⁰⁰ Rahimi signed the order, which was good for two years, yet he proceeded to violate it on multiple occasions.¹⁰¹

Apart from the order, law enforcement suspected Rahimi of firing a gun on five different occasions and secured a warrant to search his residence.¹⁰² During the warrant’s execution, officers found multiple firearms, ammunition, and a copy of the protective order.¹⁰³ Rahimi was then indicted for violation of 18 U.S.C. § 922(g), which, as noted above, prohibited his knowing possession of a firearm during the pendency of the restraining order.¹⁰⁴ Rahimi moved to dismiss the indictment on the grounds that 18 U.S.C. § 922(g) violated his Second Amendment rights.¹⁰⁵ The district court denied the motion, and Rahimi was convicted.¹⁰⁶

The Fifth Circuit affirmed the district court’s decision, but then later withdrew and amended the opinion, reversing the decision after the Supreme Court’s review of *Bruen*.¹⁰⁷ The government then appealed, and the Supreme Court granted certiorari.¹⁰⁸ On appeal, the government argued, even within the framework created by *Bruen*, that both “history and tradition support the government’s ability to disarm persons who are not law-abiding, responsible citizens.”¹⁰⁹ With regard to history, the government “claim[ed] that English law allowed the government to disarm individuals who were ‘dangerous’ or not ‘peaceable,’” and that “‘Second Amendment precursors proposed during the Founding Era’ limited the right to keep and bear arms only to ‘honest and lawful’ citizens or those who posed no ‘danger of public injury.’”¹¹⁰ As to tradition, “the government assert[ed] that ‘American legislatures have long disarmed individuals whom they have found to be dangerous, irresponsible, or otherwise unfit to possess arms,’ including loyalists (during the Revolutionary War), ‘minors, intoxicated persons, and various vagrants’ (during the 19th century), and ‘felons and persons with mental illnesses’ (during the 20th

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 686–87.

¹⁰⁰ Steven D. Schwinn, *Can the Government Prohibit a Person Subject to a Domestic Violence Protective Order from Possessing a Firearm?*, 51 ABA PREVIEW OF UNITED STATES SUP. CT. CASES 21 (2023).

¹⁰¹ *Id.*; *Rahimi*, 602 U.S. at 687.

¹⁰² *Rahimi*, 602 U.S. at 687–88.

¹⁰³ *Id.* at 688.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 689.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 680.

¹⁰⁸ *Id.* at 690.

¹⁰⁹ Schwinn, *supra* note 100.

¹¹⁰ *Id.*

century).¹¹¹ Accordingly, the government argued that 922(g)(8) fell squarely within this history and tradition.

The Supreme Court was inclined to agree. In its opinion, the Court found that, “[s]ince the founding, our Nation’s firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms.”¹¹² As such, the Court held that “[a]s applied to the facts of this case, Section 922(g)(8) fits comfortably within this tradition.”¹¹³ Thus, despite the upheaval wrought by the *Bruen* decision, the Supreme Court left no question regarding the constitutionality of laws disarming individuals subject to DVROs who have been deemed a credible threat by the court. In doing so, the Supreme Court gave a green light to the lower courts and state legislatures alike to proceed with the enhancement and expansion of such protections for firearm-related IPV victims.

IV. IPV FIREARM LAWS: THE CURRENT STATE OF THINGS

A. IPV-Related Firearm Law: What Federal Law Does and Doesn't Do

To fully understand the argument for expanding current IPV laws post-*Rahimi*, it is necessary first to examine existing federal law and the range of IPV firearm-related state laws across the country. As noted above, 18 U.S.C. § 922(g) makes it a violation of federal law for the subject of a DVRO to possess a firearm, so long as that subject is deemed a credible threat by the court and has had notice of a hearing and the opportunity to participate in that hearing.¹¹⁴ However, while DVRO subjects are prohibited from owning or possessing guns for the pendency of the order, there is no federal system in place to guide or process that relinquishment.¹¹⁵ In fact, 18 U.S.C. § 922(g) does not require “the removal of guns that abusers already possess when they become prohibited.”¹¹⁶ Nor does the federal statute provide a scheme for the removal of firearms or a provision for the relinquishment of prohibited firearms to law enforcement or court officers.¹¹⁷

Additionally, 18 U.S.C. § 922(g) does not require that courts provide law enforcement or other regulatory databases with notice that a DVRO subject’s gun license has been revoked.¹¹⁸ It also does not require nor does it provide a scheme for the DVRO subject to be notified of that revocation.¹¹⁹ In summary, while it is illegal for subjects of DVROs to possess firearms, there is no requirement that law enforcement, gun registries, IPV victims, or even the DVRO subject themselves be notified of the firearm license revocation. Finally, 18 U.S.C. § 922(g) does not provide for a prohibition of firearm possession after the issuance of *ex parte* orders.¹²⁰ An *ex parte* IPV order is a temporary, emergency restraining order issued

¹¹¹ *Id.*

¹¹² *Rahimi*, 602 U.S. at 690.

¹¹³ *Id.*

¹¹⁴ 18 U.S.C. § 922(g).

¹¹⁵ EDUC. FUND TO STOP GUN VIOLENCE, *supra* note 42.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ 18 U.S.C. § 922(g).

¹¹⁹ *Id.*

¹²⁰ *Id.*

where the court deems a perpetrator to be a credible threat to prevent further IPV incidents by the abuser between the time of the incident and the official court hearing. Because 18 U.S.C. § 922(g) requires both notice of a hearing and the opportunity to participate in a hearing, ex parte IPV-related orders fall outside the scope of this federal law.¹²¹ In other words, the subjects of these temporary orders are not prohibited by federal law from owning or possessing firearms.

B. A Review of State Law Across the Country

Because of the gaps created by 18 U.S.C. § 922(g), separate state laws are “important to ensure the law is enforced properly.”¹²² Thirty-two states across the country have implemented state laws that prohibit the subjects of DRVOs from possessing firearms.¹²³ However, the enactment and enforcement of this legislation varies widely from state to state.¹²⁴ This, unfortunately, has created a significant disparity in victim protections across the nation.¹²⁵ The good news, however, is that when state IPV firearm-related laws are written and enforced effectively, lives are not just changed, they are saved.¹²⁶ The GIFFORDS Law Center, a national advocacy group focused on gun violence, rates gun safety laws and their enforcement in each state.¹²⁷ GIFFORDS has awarded an A rating to California and an A- rating to Colorado, in part, for their gun-related IPV laws. These states are considered the gold standard for enactment and enforcement in this area and for good reason, as the rates of IPV-related homicides in both states are measurably lower than the national average.¹²⁸

To achieve such a measurable impact, these states have not only enacted laws prohibiting DVRO subjects from possessing firearms but also expanded legal coverage in various ways. Both California and Colorado widened the scope of state law to prohibit firearm possession for the subjects of ex parte orders.¹²⁹ Additionally, both states require the relinquishment of firearms by DVRO subjects, even without

¹²¹ *Id.*

¹²² Everytown Rsch. and Pol’y, *Which States Prohibit Domestic Abusers Under Restraining Orders From Having Guns?*, EVERYTOWN FOR GUN SAFETY SUPPORT FUND, <https://everytownresearch.org/rankings/law/prohibition-for-domestic-abusers-under-restraining-orders/> [<https://perma.cc/D27U-QJZB>].

¹²³ *Id.*

¹²⁴ *Domestic Violence and Firearms*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/> [<https://perma.cc/M5WU-SP7K>].

¹²⁵ EDUC. FUND TO STOP GUN VIOLENCE, *supra* note 42.

¹²⁶ Carolina Díez, Rachel P. Kurland, Emily F. Rothman, Megan Bair-Merritt, Eric Fleegler, Ziming Xuan, Sandro Galea, Craig S. Ross, Bindu Kalesan, Kristin A. Goss & Michael Siegel, *State Intimate Partner Violence-Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015*, 167 ANNALS OF INTERNAL MED. 536 (2017).

¹²⁷ *About Giffords*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/about/> [<https://perma.cc/XAD7-6QCD>].

¹²⁸ *California Gun Laws*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/states/california/> [<https://perma.cc/6H7J-VZQB>];

Colorado Gun Laws, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://giffords.org/lawcenter/gun-laws/states/colorado/> [<https://perma.cc/YXU4-TCBV>].

¹²⁹ COLO. REV. STAT. § 13-14-104.5(4) (2021); *see also* CAL. FAM. CODE §§ 6218, 6389 (2023); *see also Id.* § 6304 (2024) (requiring notice of the firearm prohibition if both parties are in court).

a request by law enforcement officers, within 24 hours of a DVRO issuance.¹³⁰ California now also requires that a DVRO petitioner provide judges with the number, types, and locations of known firearms possessed by the DVRO subject on the DVRO application.¹³¹ Standing in stark contrast to Colorado and California, Kansas was awarded an F rating by GIFFORDS for its overall gun safety laws. According to GIFFORDS, “Kansas lawmakers have failed their communities, refusing to pass even the most basic gun safety laws or close deadly loopholes that enable gun violence.”¹³²

Kansas is among the 32 states that have adopted statutes similar to 18 U.S.C. § 922(g).¹³³ K.S.A. § 21-6301(a)(17), the Kansas statute governing DVRO firearm possession, is nearly identical to its federal counterpart.¹³⁴ It prohibits firearm possession by Kansas citizens who are the subject of domestic violence orders, so long as the subject has received actual notice of and an opportunity to participate in a hearing.¹³⁵ Like federal law, *ex parte* orders do not fall under this statute.¹³⁶ Kansas has passed no additional laws to require the removal of firearms from the scene of a domestic violence incident.¹³⁷ There are also no statewide laws governing how or when DVRO subjects are notified that their license has been revoked or a process in place for subjects of restraining orders to relinquish their weapons.¹³⁸ The development and enforcement of such processes are left to the discretion of local judges and law enforcement.¹³⁹

V. POLICY RECOMMENDATIONS AND CHALLENGES

A. Policy Recommendations for Kansas

As demonstrated by the statistics and public health assessments, there is an ever-growing need for effective enforcement and expansion of IPV firearm-related

¹³⁰ COLO. REV. STAT. §§ 13-14-105.5, 18-1-1001(9), 18-6-801(8)(b); *see also* CAL. FAM. CODE § 6389(c)(2) (2023) (“Alternatively, if a request is not made by a law enforcement officer, the relinquishment shall occur within 24 hours of being served with the order, by either surrendering the firearm or ammunition in a safe manner to the control of local law enforcement officials, or by selling, transferring, or relinquishing for storage pursuant to Section 29830 of the Penal Code, the firearm or ammunition to a licensed gun dealer.”).

¹³¹ CAL. FAM. CODE § 6389(c)(3) (2023).

¹³² *Kansas Gun Laws*, *supra* note 64.

¹³³ *Which States Prohibit Domestic Abusers Under Restraining Orders from Having Guns?*, *supra* note 121.

¹³⁴ KAN. STAT. ANN. § 21-6301(a)(17) (2012).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Domestic Violence & Firearms in Kansas*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE (Dec. 31, 2023), <https://giffords.org/lawcenter/state-laws/domestic-violence-and-firearms-in-kansas/> [https://perma.cc/WZ28-VDP7].

¹³⁸ *Id.*

¹³⁹ KAN. STAT. ANN. § 21-6301(a)(17) (2012).

laws here in Kansas.¹⁴⁰ As such, it is critical for Kansas to enact laws to protect the most vulnerable victims among us. Luckily, this movement has gained widespread support among gun owners and non-gun owners alike.¹⁴¹ With the Supreme Court's recent decision in *Rahimi* upholding the constitutionality of this movement, Kansas has been given a green light to meaningfully engage and to substantially improve outcomes for IPV victims across the state. Kansas laws governing domestic violence related to firearm possession will benefit greatly from an overhaul. As noted above, Kansas law, which largely mirrors 18 U.S.C. § 922(g), leaves significant gaps in coverage for victims and loopholes that allow the subjects of DVROs to continue possessing firearms despite prohibitions. The good news is that there are many ways in which these laws can effectively be improved, especially if Kansas follows the roadmap provided by the leaders in the clubhouse, namely, states like California and Colorado.

One significant and highly impactful change Kansas should make is to amend K.S.A. § 21-6301(a)(17) to remove the notice and hearing requirements. This would automatically expand coverage to include the subjects of ex parte orders, under K.S.A. § 60-31a05, the state law governing such orders, if a judge believes there is “good cause” to do so, they can grant an immediate ex parte temporary order.¹⁴² Temporary orders may be issued and good cause found “on presentation of a verified petition by the victim supporting a prima facie case of stalking, sexual assault or human trafficking.”¹⁴³ This order will stay in effect until a full hearing can be held, which is usually within 21 days of filing the petition.¹⁴⁴ As noted previously, the most dangerous time for an IPV victim is when they sever ties with their abuser.¹⁴⁵ An emergency order of protection is often the first step towards leaving an abusive relationship, and it creates a significant risk when an abuser realizes that they are losing control over their partner.¹⁴⁶ IPV victims who seek orders often suffer the most severe abuse and, as a result, are at a higher risk for firearm-related IPV if their abusers have continued access to firearms.¹⁴⁷ Because victims are at greater risk for homicide or serious injury during this time, it is imperative that judges and law enforcement be able to require and enforce the removal of firearms.¹⁴⁸ State laws

¹⁴⁰ See Kelly Roskam, Chiara Cooper, Phillip Stallworth & April M. Zeoli, *The Case for Domestic Violence Protective Order Firearm Prohibitions Under Bruen*, 51 *FORDHAM URB. L. J.* 222, 227 (2023).

¹⁴¹ Goodyear et al., *supra* note 15, at 190 (A national survey of U.S. adults in 2017 found that 81% of respondents, including both gun owners and non-gun owners, strongly support firearm prohibitions for individuals subject to a DVRO.”).

¹⁴² *Legal Information: Kansas, Restraining Orders*, WOMENSLAW.ORG, <https://www.womenslaw.org/laws/ks/restraining-orders/protection-stalking-or-sexual-assault-orders/steps-getting-protection-2> (last visited Oct. 30, 2025) [<https://perma.cc/HQB3-86F7>].

¹⁴³ KAN. STAT. ANN. § 60-31a05 (2012).

¹⁴⁴ *Id.*

¹⁴⁵ Wade & Hope, *supra* note 8.

¹⁴⁶ *Id.*

¹⁴⁷ Lynch et al., *supra* note 58, at 12975.

¹⁴⁸ Everytown Rsch. and Pol’y, *Ensuring effective Implementation of Law That Disarm Domestic Abusers*, EVERYTOWN FOR GUN SAFETY SUPPORT FUND, <https://everytownresearch.org/report/laws-that-disarm-domestic-abusers/> [<https://perma.cc/U9Y3-WCBK>]

that fail to do so for the pendency of ex parte orders leave victims at profound risk.¹⁴⁹ Conversely, state laws, like those in California, that expand their protections of victims during this critical period see a 16% reduction in IPV firearm-related homicides.¹⁵⁰

Gun rights activists will likely argue that a “good cause” finding for an ex parte order is not the due process equivalent of finding a credible threat where the subject of a DRVO has the opportunity to present evidence in their defense. However, because the *Rahimi* decision is predicated on a seemingly generalized finding that a “threat of physical harm” exists, this argument is likely to fall flat. Courts across the country have increasingly upheld extreme risk protection orders (ERPOs), also known as red-flag laws, which are similar to ex parte orders in that they permit the denial of firearms to individuals whom a judge has determined to present an imminent risk of harm to themselves or others, without notice or hearing.¹⁵¹ Although the threshold, or standard, for the deprivation of firearms is different and arguably far more lenient in ERPOs and ex parte orders than a standard DRVO, their basic structure, a finding by a neutral judge that the perpetrator is a credible threat to the victim or themselves, still “satisfies the requirements of due process.”¹⁵² This aligns directly with the new *Rahimi* precedent.¹⁵³ Ultimately, this alignment, combined with the brief duration of ex parte orders and the significant documentation of the extreme dangers faced by IPV victims who seek such orders, makes it unlikely that a due process claim against prohibiting firearms during the ex parte period would succeed.¹⁵⁴

Beyond the proposed amendment above, Kansas legislators should consider drafting new legislation to address the broader coverage gaps left by current statutes. One way to fill the gap would be to codify the delivery process when a gun license has been revoked, to notify subjects of domestic violence-related ex parte and post-hearing restraining orders, DVRO petitioners, and law enforcement. In California, state law requires that all forms that give notice to the abuser that a protective order has been granted must include language that orders the respondent to give up (relinquish) possession or control of any firearms and ammunition and not to purchase or receive or attempt to purchase or receive any firearms or ammunition while the restraining order is in effect.¹⁵⁵ Additionally, the state requires that all “Request for Order” forms provide the petitioner with the opportunity to disclose whether or not an abuser has a gun, and whether a petitioner has been threatened by the abuser with that weapon, so that a judge is on notice of a

¹⁴⁹ Tobin-Tyler, *supra* note 24, at 68.

¹⁵⁰ *Domestic Violence and Firearms*, *supra* note 124.

¹⁵¹ Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk and Legal Design: “Red Flag” Laws and Due Process*, 106 VA L. REV. 1285, 1286 (2020).

¹⁵² *Id.* at 1292.

¹⁵³ See *United States v. Rahimi*, 602 U.S. 680, 698 (2023) (holding “[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed.”).

¹⁵⁴ Tobin-Tyler, *supra* note 24, at 68.

¹⁵⁵ CAL. FAM. CODE § 6389(b) (2025).

subject's possible weapon possession.¹⁵⁶ This delivery system helps relieve some of the pressure placed on both law enforcement and the judiciary to independently fulfill service requirements.

Service of DVRO subjects by law enforcement officers or third parties is notoriously challenging.¹⁵⁷ In many cases, judges fail to even order these restrictions, and/or law enforcement personnel do not follow up to ensure the subjects' understanding of the restrictions on their firearms.¹⁵⁸ One study found that only 26% of abusers nationwide were ordered to surrender their firearms after IPV victims reported to the judge that their abusers owned a gun.¹⁵⁹ This gap in enforcement led to the murder of over 100 IPV victims by subjects with DVRO-related firearm restrictions between 2017 and 2020.¹⁶⁰ It is clear that judicial discretion can have a significant impact on the enforcement of existing laws when standard operating procedures or other statutory mechanisms for enforcement, such as standardized forms, are not present.¹⁶¹ Conversely, when firearm relinquishment protocols are introduced and followed, studies suggest enforcement is possible.¹⁶² If Kansas implemented a wide notification process like California's, it would greatly reduce the negative impact of unevenly enforced requirements.

Finally, and arguably most importantly, Kansas should adopt a clear scheme around firearm removal and relinquishment. This scheme should include a two-pronged approach to actively and safely engage both law enforcement and the courts when removing firearms from abusers.¹⁶³ States that do not require the subjects of DRVOs to relinquish their firearms have nearly twice as many IPV homicides involving a firearm.¹⁶⁴ Conversely, the removal of guns from the DVRO subject has been shown to reduce IPV firearm-related deaths by as much as 14%.¹⁶⁵ Restrictive firearm possession policies with relinquishment requirements at the state level "may provide upstream opportunities to reduce IPV injuries by potentially disrupting the mechanism of injury."¹⁶⁶

As such, the first prong of this new legislation should establish a clearly defined relinquishment scheme for subjects of ex parte and post-hearing orders to

¹⁵⁶ *Legal Information: California*, WOMENSLAW.ORG <https://www.womenslaw.org/laws/ca/state-gun-laws/guns-and-domestic-violence-restraining-orders-dvros#node-28880> (last visited Dec. 26, 2025) [<https://perma.cc/EK2W-YRVU>].

¹⁵⁷ Nipla D. Shah, Grace Nguyen, Jennifer A. Wagman, & Deborah C. Glik, *Factors Influencing the Use of Domestic Violence Restraining Orders in Los Angeles*, 29 VIOLENCE AGAINST WOMEN 1604, 1616 (2023).

¹⁵⁸ Goodyear et al., *supra* note 15, at 190.

¹⁵⁹ Tyler-Tobin, *supra* note 24, at 68.

¹⁶⁰ *Id.*

¹⁶¹ See Lynch et al., *supra* note 58, at 12991.

¹⁶² Goodyear et al., *supra* note 16, at 189–90.

¹⁶³ Shannon Frattaroli, *Removing Guns from Domestic Violence Offenders: An Analysis of State Level Policies to Prevent Future Abuse*, JOHNS HOPKINS CTR. FOR GUN POL'Y, 4 (2009).

¹⁶⁴ BRADY UNITED, *supra* note 17.

¹⁶⁵ Tobin-Tyler, *supra* note 24, at 68.

¹⁶⁶ Tiara C. Willie, Trace Kershaw, Rachel Perler, Amy Caplon, Marina Katague, & Tami P. Sullivan, *Associations Between State Intimate Partner Violence-Related Firearm Policies and Injuries Among Women and Men Who Experience Intimate Partner Violence*, 8 INJURY EPIDEMIOLOGY 1, 8 (2021).

facilitate effective and equal enforcement by Kansas courts. There are 20 states and the District of Columbia that currently have court-ordered gun removal laws.¹⁶⁷ However, the trigger and mechanisms for relinquishment vary significantly from state to state.¹⁶⁸ In states such as California, Hawaii, and Maryland, this law is automatically triggered upon issuance of an ex parte or DVRO order.¹⁶⁹ In California, subjects are held in violation of the orders if relinquishment is not satisfied within 24 hours.¹⁷⁰ In Illinois, when a petitioner files for a DVRO, they may request that the court issue a search warrant that will allow local law enforcement to seize firearms from an alleged abuser.¹⁷¹

¹⁷²¹⁷³ Implementation and enforcement of DVRO firearm prohibitions can be challenging.¹⁷⁴ Concerns regarding the safety of law enforcement throughout the relinquishment process, the storage of relinquished firearms, the logistics of managing the relinquishment system, and the process for returning firearms after the prohibition period ends are all issues gun rights advocates and law enforcement have raised in the wake of new and proposed legislation.¹⁷⁵ States have dealt with these issues and concerns in various ways. In Illinois, legislators worked with law enforcement to develop a scheme that met the goals of both groups.¹⁷⁶ They agreed that if a victim had not reported an IPV incident in the preceding three months, law enforcement was given the discretion to review the facts supporting the DVRO and to make changes to the search warrant accordingly.¹⁷⁷

In Pennsylvania, “[t]he respondent has the discretion to inform the court whether [they] will relinquish [their] guns to law enforcement, a licensed firearms dealer, or an eligible third party.”¹⁷⁸ If the respondent “chooses to transfer or sell [their guns] to a licensed firearm dealer, [they] must obtain an affidavit of transfer from the licensed dealer and provide that affidavit to law enforcement.”¹⁷⁹ If the respondent chooses to transfer to a third party, they must report the name of the individual to law enforcement, who will determine the third party’s eligibility to possess firearms.¹⁸⁰ If approved, the third party will be issued a “safekeeping permit” by the sheriff, following which the third party will then sign a receipt when they

¹⁶⁷ Frattaroli, *supra* note 163, at 8.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 20–22.

¹⁷⁰ CAL. FAM. CODE § 6389(c)(2) (2023)

¹⁷¹ Wade & Hope, *supra* note 8.

¹⁷² Goodyear et al., *supra* note 16, at 185.

¹⁷³ Wade & Hope, *supra* note 8.

¹⁷⁴ Goodyear et al., *supra* note 16, at 185.

¹⁷⁵ Wade & Hope, *supra* note 8.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ April M. Zeoli, Shannon Frattaroli, Kelly Roskam, & Anastasia K. Herrera, *Removing Firearms From Those Prohibited From Possession by Domestic Violence Restraining Orders*, 20 *Trauma, Violence & Abuse* 114, 119 (2019).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

receive the firearm, and the respondent will submit that signed receipt to law enforcement.¹⁸¹

Kansas legislators should partner with law enforcement agencies across the state to develop a relinquishment system that addresses existing safety and procedural concerns while also providing a necessary and effective layer of protection for IPV victims.

The second prong of this legislation should require the removal of both firearms and ammunition from the scene of a domestic violence incident by law enforcement officers when they have probable cause to suspect an IPV incident has taken place. There are 18 states that currently have laws on the books that provide law enforcement with the authority to remove firearms from the scene of an IPV incident, half of which mandate removal.¹⁸² Nine other states have enacted laws that contain various permissive guidelines.¹⁸³ Kansas law currently does not require nor explicitly authorize firearm removal by law enforcement in such cases.¹⁸⁴ Generally speaking, mandatory removal laws are preferable and more effective because, like the notification laws discussed above, these laws reduce discretion and allow for universal implementation.¹⁸⁵ To maximize the law's ability to lower the risk of severe or lethal abuse, conditions of removal should not be placed on prior abuse, the arrest of the batterer, or the use of a gun in the commission of the crime.¹⁸⁶ The duration of relinquishment after a mandatory removal by law enforcement varies by state, and Kansas legislators should examine what duration policy would most complement both proposed and existing IPV policies across the state to determine which duration would be appropriate for Kansas. Taken together, this two-prong approach would serve to profoundly enhance protections for citizens across the state.

VI. CONCLUSION

The empirical data is clear. Guns and IPV are inextricably linked, and IPV victims across the country are at an inherent and increasing danger of firearm-related abuse and homicide, given the rapidly accelerating growth of gun ownership in America. Equally clear is the Supreme Court's finding that keeping the guns out of the hands of those who would do harm is an integral part of the American government's history and tradition. As such, states like Kansas have received a green light to quell one of the largest public health crises ever faced here in the United States. Through the expansion and enforcement of laws protecting some of the nation's most vulnerable victims and prohibiting IPV offenders from perpetrating further violence, Kansas is now empowered to not just change the lives of its citizens, but to save them.

¹⁸¹ *Id.*

¹⁸² Frattaroli, *supra* note 163, at 6.

¹⁸³ *Id.*

¹⁸⁴ *See Kansas Gun Laws, supra* note 63.

¹⁸⁵ Frattaroli, *supra* note 163, at 29.

¹⁸⁶ *Id.*

