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# INSTITUTIONAL ELASTICITY AND ORDERED INNOVATION: CHINA'S AI GOVERNANCE AS COUNTER-MODEL TO NEOLIBERAL DEVELOPMENT THEORY

Ge Zheng*

**Abstract**: This article dismantles neoliberal typologies of technological governance, reframing China's AI regulatory paradigm as a dialectical counter-model to Daron Acemoglu's institutional determinism. Through Albert O. Hirschman's unbalanced growth and Dani Rodrik's institutional diagnostics, this analysis reveals how state-orchestrated elasticity transcends the dominant "inclusive-extractive" binary by engineering dynamic disequilibria: deliberate institutional asymmetries—where innovation precedes safeguards, infrastructure scales ahead of compliance, and algorithmic governance anchors privacy—transform uncertainty into developmental agency. China's phased legislation exemplifies adaptive sequencing, deploying regulatory "red lines" not as constraints but as Hirschmanian linkages: forward linkages catalyze sectoral breakthroughs while backward linkages contain systemic risks, thus harmonizing technological dynamism with sovereign control. This institutional stretch capacity operationalizes Rodrik's context-driven diagnostics, rejecting universal blueprints through heterodox policy experimentation—local sandboxes incubate national frameworks, ministerial rules calibrate oversight to algorithmic ontologies, and strategic deregulation fuels targeted advancement. By prioritizing evolutionary co-adaptation over static property rights, China achieves "developmental triage," proving that institutional plasticity—not ideological conformity—enables latecomer economies to harness disruptive technologies. The resultant ordered innovation model offers Global South nations an emancipatory alternative to the Washington Consensus: a contingent institutionalism where the state, as adaptive choreographer, leverages elasticity to convert technological precarity into structured opportunity—thus redefining developmental possibility beyond neoliberal orthodoxy.

**Keywords**: Institutional Elasticity; State-Led AI Governance; Hirschman-Rodrik Framework; Legal Adaptation; Development Paradox; Neoliberal Approach

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## INTRODUCTION: PROBLEMATIZING THE DOMINANT PARADIGM

Digital technologies, particularly artificial intelligence, are radically restructuring economic systems and social practices while simultaneously destabilizing traditional legal orders. Within this transformative landscape, Anu Bradford's tripartite framework in *Digital Empires*—categorizing AI governance into state-centric (China), market-driven (US), and rights-based (EU) models—has emerged as the dominant analytical paradigm in Western scholarship.[1] Yet this typology suffers from conceptual reductionism that obscures real legislative purpose. In similar manner, Zhang Huyue's characterization of China's digital regulatory measures as a "crackdown" versus the EU's "rights protection" narrative reflects *value-laden presuppositions* divorced from institutional realities.[2]

Applying Albert O. Hirschman's linkage theory [3] and Dani Rodrik's institutional diagnostics[4], we deconstruct three critical fallacies: (1) The EU's "rights-based" façade: Despite rhetorical commitments, the AI Act (Article 114 TFEU) prioritizes market harmonization over fundamental rights, revealing *Rodrikan institutional arbitrage*—using regulatory integration to circumvent member-state fragmentation while treating rights as collateral outcomes. (2) America's "market-led" illusion: Federal inaction on domestic AI legislation alongside the CHIPS Act's extraterritorial controls demonstrates *Hirschmanian unbalanced development*—strategic deregulation internally compensates for external techno-nationalism, exposing security imperatives beneath market ideology. (3) China's misrepresented "statism":

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[1] Anu Bradford, *Digital Empire: The Global Battle to Regulate Technology*, Oxford University Press, 2023.

[2] Angela Huyue Zhang, *High Wire: How China Regulates Big Tech and Governs Its Economy*, New York: Oxford University Press, 2024.

[3] Hirschman's linkage theory posits that economic imbalances—manifest through forward linkages (demand-pulling from downstream industries), backward linkages (supply-pushing to upstream inputs), consumption linkages (income-driven market expansion), and fiscal linkages (state revenue reinvestment)—trigger sequential investment decisions that propel development via induced disequilibrium. Using one sentence to precisely summarize how this theory functions in my article "Institutional Elasticity and Ordered Innovation"。See Albert O. Hirschman, *The Strategy of Economic Development*, New Haven, CT: Yale University Press, 1958, pp.98-119; Albert O. Hirschman, "A Dissenter's Confession: The Strategy of Economic Development Revisited," in Gerald M. Meier and Dudley Seers (eds.), *Pioneers in Development*, Oxford University Press, 1984, pp.87–111. In this article, Hirschman's linkage theory manifests as China's deliberate institutional disequilibrium—where forward linkages (AI-driven judicial efficiency catalyzing innovation) and backward linkages (enhanced state oversight containing risks) interact within state-orchestrated elasticity to propel development through sequenced adaptation, thus offering a counter-model to neoliberal determinism by transforming uncertainty into developmental agency.

[4] Dani Rodrik's institutional diagnostics framework rejects universal blueprints, instead advocating for context-specific identification of binding constraints—via sequential analysis of low social returns, private appropriability failures, or finance gaps—to design targeted, heterodox interventions that leverage institutional plasticity, thus transforming localized dysfunction into development momentum through prioritized, politically feasible adaptation. See Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth*, Princeton, NJ: Princeton University Press, 2007, Chapters 2 & 6. In this article, Rodrik's institutional diagnostics manifests as China's state-orchestrated elasticity—where context-specific binding constraints (e.g., innovation-security tradeoffs) are resolved through heterodox sequencing: phased legislation, regulatory sandboxes, and sectoral "red lines" enable adaptive control while leveraging institutional plasticity to transform AI governance into a development catalyst, thus operationalizing Rodrik's rejection of universal blueprints through context-driven institutional innovation.

Local experimentalism (e.g., regulatory sandboxes) and phased legislation embody *adaptive sequencing* (Rodrik), where institutional innovation emerges through context-specific trial-error cycles rather than top-down coercion.

Bradford's taxonomy thus undergoes epistemic collapse when confronted with ground-level legislative dynamics: the EU deploys risk discourse for trade protectionism, the US weaponizes market discourse for hegemony, while China's *hybrid governance* synthesizes control and innovation through *Hirschmanian policy linkages*. This necessitates replacing rigid tripartism with a contingent institutionalism attuned to developmental embeddedness.

The prevailing tripartite framework categorizing global AI governance into state-centric (China), market-driven (US), and rights-based (EU) models suffers from fundamental analytical deficiencies when scrutinized through Albert O. Hirschman's linkage theory and Dani Rodrik's institutional diagnostics. This taxonomy mischaracterizes the dynamic institutional equilibria across jurisdictions by imposing static ideological binaries that obscure three critical realities: China's strategic sequencing of innovation and regulation manifests not as authoritarian control but as institutional elasticity—a deliberate calibration where phased legal frameworks (exemplified by the 2017 *Next-Generation AI Development Plan*[5]'s three-stage roadmap: technological breakthroughs by 2020, ethical scaffolding by 2025, and mature legal systems by 2030) create space for technological experimentation while containing systemic risks. This approach aligns with Hirschman's concept of unbalanced growth, where temporary institutional asymmetries (e.g., local regulatory sandboxes preceding national legislation) generate forward linkages to industrial upgrading while avoiding developmental traps.

Contrary to the "market-led" narrative, U.S. AI governance reveals a Rodrikan institutional paradox: federal abstention from domestic regulation (codified in H.R.1's §43201 prohibition on state-level AI laws) coexists with aggressive extraterritorial containment via instruments like the CHIPS Act and FIRRMA. It is, in practice, characterized by deliberate regulatory voids in domestic artificial intelligence technologies and industries, preserving expansive latitude for indigenous industrial development. The *One Big Beautiful Bill Act* (H.R.1), proposed by House Republicans in early 2025, codifies this non-interventionist stance under Section 43201, imposing a statutory mandate prohibiting any state or political subdivision thereof from enacting or enforcing any law or regulation pertaining to artificial intelligence models, AI systems, or automated decision-making systems.[6] Concurrently, nearly all federal-level legislative measures invoke "national security imperatives" to restrict the advancement of perceived competitors—primarily China. From the foreign investment screening targeting AI enterprises under the *Foreign Investment Risk Review*

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[5] The State Council, *Next-Generation AI Development Plan* (《新一代人工智能发展规划》), July 2017, https://www.gov.cn/zhengce/content/2017-07/20/content_5211996.htm.

[6] 119th Congress of the United States, *H.R.1 - One Big Beautiful Bill Act*, Section 43201. https://www.congress.gov/bill/119th-congress/house-bill/1/text.

*Modernization Act* (FIRRMA)[7] to the *Innovation and Competition Act of 2021*[8]'s reinforcement of domestic supply chains under the guise of "technological sovereignty," market mechanisms remain embedded within a national security framework.

The EU AI Act's four-tier risk pyramid, while rhetorically anchored in fundamental rights, operates under TFEU Article 114's internal market logic—exposing a Rodrikan institutional mismatch. Its prohibitions on "unacceptable risk" systems (e.g., social scoring) function as non-tariff barriers while lacking positive innovation incentives, thereby stifling technological sovereignty. This regulatory performativity—prioritizing risk avoidance over capability-building—has culminated in implementation delays (2024) and enforcement uncertainties,[9] validating Hirschman's warning that premature institutional rigidity triggers development reversals. When compliance costs (averaging €400,000 per firm) outpace technological dividends, rights protection becomes an empty signifier—a paradox starkly evident in Europe's declining AI competitiveness relative to China and the U.S.

China's 2025 *"AI+" National Strategy*[10] operationalizes a Hirschman-Rodrik synthesis through three institutional innovations: (1) Sequenced experimentation: Provincial pilot zones (e.g., Shenzhen's algorithmic governance sandboxes) precede national legislation, creating feedback loops for iterative policy refinement. (2) Hybrid steering: "Red lines" (data security veto thresholds) coexist with "green corridors" (tax incentives for AI-industrial integration), balancing control with market vitality. (3) Linkage cultivation: Public-private R&D consortia (e.g., Baidu's autonomous driving partnerships) generate Hirschmanian backward linkages to upstream innovation and forward linkages to manufacturing upgrades.

This framework transcends Acemoglu's deterministic "inclusive-extractive" binary by demonstrating how directed institutional plasticity—state-guided but market-embedded—can accelerate capability-building while mitigating transition costs. The "AI+" policy's tripartite focus (infrastructure, application, governance) exemplifies Rodrik's "diagnostic approach": context-specific institutional solutions tailored to technological readiness.

The collapse of the state-market-rights trichotomy necessitates a new analytical lens: developmental institutionalism. This paradigm, illuminated by China's AI governance, recognizes that: (1) Institutions are technologies: Legal frameworks evolve through iterative adaptation (Hirschman's "reform-mongering") rather than ideological blueprints. (2) Regulation is innovation: Risk control mechanisms (e.g., China's

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[7] *Foreign Investment Risk Review Modernization Act of 2018*, https://home.treasury.gov/sites/default/files/2018-08/The-Foreign-Investment-Risk-Review-Modernization-Act-of-2018-FIRRMA_0.pdf.

[8] *United States Innovation and Competition Act of 2021*, https://www.congress.gov/bill/117th-congress/senate-bill/1260.

[9] Daphné Leprince-Ringuet and Miriam Partington, "EU could pause AI Act rollout amid industry backlash: 'It's really toxic'," *Sifted*, May 29, 2025.

[10] The State Council, *Guidance on Thorough Implementation of the 'AI Plus' Initiative*（《国务院关于深入实施"人工智能+"行动的意见》）, August 26, 2025, https://www.gov.cn/zhengce/content/202508/content_7037861.htm.

algorithmic impact assessments) enable rather than constrain technological upgrading when calibrated to local capability thresholds (Rodrik). (3) Sovereignty is capability: Technological self-determination (evident in China's "East Data, West Computing" project) supersedes abstract rights as the foundation of developmental security. Acemoglu's institutional determinism fails to capture this dynamism, reducing AI governance to static typologies while ignoring how strategic institutional elasticity—as practiced in China's "ordered innovation"—can reconcile state steering, market vitality, and rights protection through evolutionary co-adaptation.

This article advances its thesis through three interconnected trajectories of inquiry, situated at the intersection of law and development theory. First, it deconstructs the analytical limitations of Anu Bradford's Digital Empires paradigm through close reading of legislative texts, policy trajectories, and judicial practices across jurisdictions. This examination reveals how Bradford's tripartite framework obscures critical pragmatic adaptations and strategic calibrations embedded in national AI governance models—particularly the dialectical tension between innovation facilitation and risk containment that characterizes China's institutional approach. Second, employing comparative case studies of emblematic regulatory interventions—including China's localized autonomous vehicle legislation, the contested evolution of U.S. algorithmic accountability bills, and the EU's risk-pyramid architecture under the AI Act—the analysis demonstrates the explanatory power of the "ordered innovation-national security-risk aversion" typology. This framework illuminates how divergent value orientations fundamentally shape legislative motivations, instrument selection, and enforcement efficacy across political economies. Finally, the article reflects upon the implications of these governance models for global technological ordering as AI becomes increasingly enmeshed in great-power competition. It argues that legislative paradigms represent existential survival strategies in the technological revolution: China exemplifies active order-shaping through institutional elasticity; the EU embodies defensive risk containment; while the U.S. pursues hegemonic advantage through techno-nationalist containment masked as market liberalism. This tripartite struggle underscores Dani Rodrik's contention that development pathways emerge from context-specific institutional innovations rather than universal templates—a reality obscured by Bradford's reductionist categorization.

The argument proceeds with Albert Hirschman's principle of "possibilism"[11] in development theory, which recognizes how constrained actors navigate institutional limitations through creative adaptation. China's regional legislative experiments in autonomous driving epitomize such adaptive sequencing—local pilots inform national frameworks while maintaining policy flexibility. Conversely, Daron Acemoglu's

[11] Albert Hirschman's principle of "possibilism" asserts that social actors can creatively identify and exploit latent alternatives within structural constraints to achieve transformative outcomes, rejecting deterministic fatalism in favor of agency-driven incremental reform. See Albert O. Hirschman, *A Bias for Hope: Essays on Development and Latin America*, New Haven and London: Yale University Press, 1971, pp.1-37; Albert O. Hirschman, "In Defense of Possibilism." In *Rival Views of Market Society and Other Recent Essays*, New York: Viking. pp.171–175. In this article, Hirschman's possibilism functions as the theoretical bedrock for China's AI governance model, wherein state-steered *developmental sequencing* (e.g., tolerating transitional asymmetries like algorithmic deployment before privacy safeguards) deliberately exploits institutional ambiguities to catalyze innovation while containing risks, thereby transcending deterministic "inclusive vs. extractive" institutional binaries.

institutional determinism[12] fails to account for such dynamic institutional learning, instead positing a rigid dichotomy between "inclusive" and "extractive" institutions that cannot explain China's simultaneous advancement in AI capability-building and regulatory control. The U.S. case further challenges Acemoglu's market-centric assumptions: Congressional deadlock on domestic AI regulation coexists with aggressive extraterritorial controls through instruments like the CHIPS Act, revealing how security exceptionalism creates market advantages—a phenomenon Hirschman might term "perverse linkage effects." Europe's risk-aversion model, while rhetorically committed to rights protection, ultimately prioritizes market harmonization under TFEU Article 114, demonstrating Rodrik's insight that institutional forms often diverge from nominal functions. When examined through these theoretical lenses, the global AI governance landscape reveals not three distinct models but a spectrum of statecraft strategies navigating technological uncertainty—where China's "ordered innovation" represents a distinctive third path between American techno-nationalism and European precautionary paralysis.

Table 1: Global Artificial Intelligence-Related Legislation Models

| ***Mode*** | ***Core Value Orientation*** | ***Legislative Goals*** | ***Primary Legislative Tools & Features*** | ***Representative Practices & Cases*** |
|---|---|---|---|---|
| China Model | Ordered Innovation | Balancing technological development and risk control, enhancing industrial competitiveness | Progressive legislation, local experimental rules (e.g., fault-tolerant mechanisms), phased planning; emphasizing public-private collaboration and institutional flexibility | *Next-Generation Artificial Intelligence Development Plan* (Three-Step Strategy), local regulations (e.g., Shenzhen's *AI Industry Promotion Ordinance*) |
| U.S. Model | Pan-Securitization | Maintaining technological hegemony, addressing geopolitical challenges | Domestic light-touch regulation (relying on industry self-regulation and soft law), external hardline sanctions (export controls and investment screening); security exception mechanisms | *CHIPS and Science Act* (technology blockade), *Foreign Investment Risk Review Modernization Act* (foreign investment screening) |
| EU Model | Risk Aversion | Minimizing social risks, safeguarding fundamental rights | Preemptive preventive rules (high-risk classification), mandatory compliance (e.g., impact assessments), ethics-driven legislation; emphasizing regulatory redundancy | GDPR (Data Protection Impact Assessment), AI Act (four-tier risk classification and prohibited list) |

[12] "Institutional determinism" is not explicitly coined by Daron Acemoglu, but is a critical term applied to his theory by scholars analyzing his work. The core arguments attributed to this label originate from: Daron Acemoglu, Simon Johnson, & James A. Robinson, "The Colonial Origins of Comparative Development: An Empirical Investigation," *American Economic Review*, 91(5), December 2001, pp.1369–1401. The key thesis of that article is: historical institutions (e.g., colonial extractive vs. inclusive systems) persistently determine long-run economic outcomes, with geography/human capital as secondary factors.

# I. THE CHINESE MODEL: ORDERED INNOVATION

China's artificial intelligence governance system exhibits a distinct paradigm of "ordered innovation" (有序创新), which transcends simplistic categorizations as either state-dominant or market-centric. This approach synthesizes multi-tiered institutional designs to equilibrate technological advancement with risk mitigation, constituting a *sui generis* model within comparative technology governance frameworks. Despite the absence of omnibus AI legislation, a de facto comprehensive regulatory architecture has crystallized through the synergistic integration of ministerial rules, subnational legislation, and national statutes, collectively addressing three core regulatory objectives:

## A. Sectoral Precision Governance through Ministerial Rulemaking

China's regulatory approach manifests as a vertically specialized framework led primarily by the Cyberspace Administration of China (CAC), characterized by technology-specific ministerial decrees that dynamically calibrate oversight to distinct algorithmic functionalities. [13] This paradigm exemplifies decentred regulation [14] through four evolutionary instruments:

1. The *Ecological Governance Rules for Network Information Content* (《网络信息内容生态治理规定》，2019) institutionalized platform primary liability by mandating human intervention mechanisms against algorithmic amplification of harmful content—prefiguring the EU's DSA content moderation obligations while uniquely embedding socialist core values.

2. The landmark *Algorithmic Recommendation Management Provisions* (《互联网信息服务算法推荐管理规定》，2021) pioneered morphological regulation by categorizing recommendation systems (e.g., personalized newsfeeds, e-commerce rankings), explicitly prohibiting price discrimination via collaborative filtering and combating behavioral addiction through engagement-time limits—establishing what Frank Pasquale terms "algorithmic accountability by design."

3. The *Deep Synthesis Management Provisions* (《互联网信息服务深度合成管理规定》，2022) introduced synthetic media traceability requirements, subjecting GAN-based face/voice generation to registration-based oversight and compulsory watermarking—anticipating the EU's AI Act deepfake provisions while exceeding U.S. voluntary standards.

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[13] For the understanding of China's governance framework on digital technologies and industry, two recent books are especially helpful: Martin Chorzempa, Mei Danowski, Hunter Dorwart, Jamie Horsley, Genia Kostka, John Lee, & Gianluigi Negro, *The Emergence of China's Smart State*, Rowman & Littlefield Publishers, 2023; Cuihong Cai, *Cyber Governance in China Balancing State Centrism and Collaborative Dynamics*, Taylor & Francis, 2025.

[14] Julia Black, "Critical Reflections on Regulation," *Australian Journal of Legal Philosophy*, 27, 2002, pp.1–35.

4. The *Generative AI Service Measures* (《生成式人工智能服务管理办法》, 2023) operationalized developmental constitutionalism through dual obligations: training data legitimacy audits and output alignment with constitutionally enshrined core socialist values—creating what Jacques deLisle identifies as "value-laden technological sovereignty."

Collectively, this regulatory scaffolding demonstrates adaptive sequencing through iterative rulemaking that responds to technological discontinuities while maintaining normative coherence. Development is an evolutionary process of trials, errors, learning and adaptation. The keystone is that learning which shoudn't be foreclosed by rigid rules. The CAC's "agile governance" approach—characterized by provisional rulesets with sunset clauses—contrasts with the EU's ex ante conformity assessments under the AI Act, representing a distinct institutional innovation in the law and development paradigm.

This sectoral governance model embodies Dani Rodrik's principle of institutional diagnostics: rather than importing regulatory templates, China developed context-specific solutions addressing local technological externalities. The graduated regulatory intensity—from recommendation algorithms (medium-risk) to generative AI (high-risk)—parallels but predates the EU's risk-based pyramid, suggesting convergent evolution in techno-governance despite divergent value foundations.

## B. Subnational Catalytic Legislation for Innovation Empowerment

China's local legislative experiments epitomize a distinctive model of developmental legal engineering, wherein municipal ordinances function as policy laboratories to recalibrate the innovation-governance equilibrium. The *Shanghai AI Industry Promotion Ordinance* (《上海市促进人工智能产业发展条例》, 2022) pioneered a regulated sandbox mechanism permitting enterprises to conduct high-risk technology trials within predefined compliance boundaries—effectively creating what Katharina Pistor terms "adaptive sequencing spaces" for institutional learning. Concurrently, Shenzhen's counterpart legislation (《深圳经济特区人工智能产业促进条例》, 2023) established a dual-track support architecture: a *specialized venture fund* targeting SME algorithm R&D and *mandatory ethics committees* providing real-time compliance guidance, thereby operationalizing Amartya Sen's capability approach through legal-institutional means.

These subnational initiatives strategically de-emphasize ex ante approvals while amplifying enabling infrastructures—exemplified by Shanghai's strategic deployment of intelligent computing clusters and Shenzhen's conditional public data authorization framework that grants qualified enterprises tiered access to municipal datasets. This represents a deliberate institutional shift from *regulatory gatekeeping* to *ecosystem cultivation*, materially reducing innovation transaction costs through what Dani Rodrik identifies as "coordinated infrastructure provisioning." The essence of this approach lies in its *institutional entrepreneurship*—transforming local governments into what Douglass North conceptualized as "adaptively efficient institutions"[15] that lower

[15] See Douglass C. North, Understanding the Process of Economic Change, Princeton University Press, 2005, p.114.

technological entry barriers while maintaining normative coherence with national developmental objectives.

This local legislative stratum embodies the core tenets of *experimentalist governance*, where municipal ordinances serve as "testing grounds" for regulatory innovations later scaled nationally. The Shanghai-Shenzhen dyad demonstrates *federated learning* in legal design: localized solutions to algorithm governance challenges (e.g., ethical review institutionalization) inform central policymaking while preserving contextual adaptability—a dynamic that transcends the EU's rigid harmonization model and the U.S.'s fragmented state-level approaches. By converting cities into what Annelise Riles calls "regulatory nodes," China has created a distinctive pathway in law and development that marries strategic industrial policy with reflexive legal adaptation.

## C. Foundational Legislation for Rights Preservation and Security Architecture

China's strategic deployment of national statutes embodies what Katharina Pistor terms "preemptive juridification"—constructing constitutional-grade safeguards that envelop artificial intelligence ecosystems through calculated legal interventions. This tripartite legislative core operates as a *techno-legal truss* supporting the nation's AI governance edifice:

### 1. Cyber-Physical Infrastructure Safeguards

The *Cybersecurity Law* (《网络安全法》，2016) engineers what Sheila Jasanoff calls "anticipatory governance"[16] by designating critical information infrastructure operators as responsibility anchors. Beyond mandating security audits and multi-factor authentication protocols, its Article 37 institutes extraterritorial data sovereignty requirements[17] that counterbalance the CLOUD Act's cross-border jurisdictional assertions, establishing what Anu Bradford identifies as "regulatory counterweight" in digital geopolitics.

### 2. Data Resource Governance Innovation

With its *lex specialis* classification/grading architecture, the *Data Security Law* (《数据安全法》2021) pioneers algorithmic input governance—institutionalizing differentiated protection matrices for training datasets while creating restricted data categories paralleling the U.S. EAR (Export Administration Regulations)'s controlled technology tiers. This bifurcated framework enables what Dani Rodrik characterizes as

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[16] Sheila Jasanoff, *The Ethics of Invention: Technology and the Human Future*, London and New York: W.W. Norton & Company, Inc., 2016, p.253.

[17] Article 37 of China's Cyberspace Security Law provides: "Personal information and important data collected or generated during the operations of Critical Information Infrastructure Operators (CIIOs) within the territory of the People's Republic of China shall be stored within China. Where cross-border data transfers are genuinely necessary for business purposes, a security assessment conducted in accordance with procedures formulated by the Cyberspace Administration of China (CAC) in conjunction with relevant State Council authorities shall be required."

calibrated openness[18]: permitting academic non-sensitive data flows while walling off industrial biometric datasets under Article 21, thus resolving regulatory arbitrage dilemma in multinational AI development.

### 3. Human-AI Interface Codification

The *Personal Information Protection Law* (《个人信息保护法》, 2021) delivers a tectonic shift in human-digital relations through Article 24—establishing algorithmic empowerment including refusal powers against automated profiling and explanation demands for high-impact decisions. This institutionalizes countervailing powers within platform-user relationships, realizing what Shoshana Zuboff envisioned as instrumentarian resistance capabilities,[19] while Article 58's gatekeeper obligations on major platforms[20] predate the EU DSA's comparable requirements by 18 months.

These statutes exhibit what we may call "indirect techno-governance" by regulating constitutive elements of AI systems: *Computational substrates* via CII certification under CSL; *Algorithmic fuel* through data categorization under DSL; *Decision targets* via personal information sovereignty under PIPL.

This framework creates a closed-loop control system comparable to the FDA's device lifecycle oversight but uniquely adapted to China's innovation-security dialectic. The absence of an AI-centric nomenklatura constitutes deliberate legislative craftsmanship—eschewing technology-specific obsolescence through what Lawrence Lessig advocates as "architecture-neutral regulation."[21]

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[18] See Dani Rodrik, The Globalization Paradox: Democracy and the Future of the World Economy, Oxford University Press, 2011, p.248: “the economic fortunes of individual nations are determined largely by what happens at home rather than abroad. If open economy policies are desirable, it’s because openness is in a nation’s own self-interest—not because it helps others.” Rodrik himself doesn’t coined the phrase “calibrated openness”, I coined it on the basis of his essential argument: Nations must navigate a trilemma: hyperglobalization, democratic sovereignty, and national self-determination cannot coexist fully. Successful economies adopt *calibrated* integration—opening strategically while retaining policy autonomy.

[19] See Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, New York: PublicAffairs, 2018, Part III.

[20] Article 58 of China’s *Personal Information Protection Law* provides: “Personal information processors that provide essential internet platform services, have a significant number of users, or engage in complex business operations shall fulfill the following obligations:

1. Establish and improve a personal information protection compliance system in accordance with national regulations, and set up an **independent body composed primarily of external members** to oversee personal information protection practices;
2. Formulate **platform rules** based on the principles of openness, fairness, and impartiality, clarifying standards for processing personal information and obligations for protecting personal information by product or service providers within the platform;
3. **Cease providing services** to product or service providers within the platform that seriously violate laws or administrative regulations in processing personal information;
4. Regularly publish **social responsibility reports on personal information protection** and accept public supervision.”

[21] Lawrence Lessig, *Code: And Other Laws of Cyberspace, Version 2.0*, New York: Basic Books, 2006, p.292. Lessig put it with a question mark: “We are remaking the values of the Net, and the question is: Can we commit ourselves to neutrality in this reconstruction of the architecture of the Net?”

This Chinese approach diverges significantly from dominant Western paradigms: In contrast with EU Rights-Based Model, China's sector-partitioned regulation avoids GDPR's rights absolutism, instead creating contextualized rights modules deployable against algorithmic harms without stifling industrial R&D. Counterpoint to U.S. sectoral fragmentation, the tripartite framework prevents the accountability voids seen in the U.S.'s FTC-CFAA-NIST[22] patchwork, constructing regulatory consolidation without codification. By demonstrating how middle-income economies can establish binding AI constraints without comprehensive statutes, China offers an institutional template for what David Trubek heralds as "developmental regulatory state" alternatives to Washington Consensus prescriptions.[23]

China's legislative triad operationalizes Philip Selznick's proposition that “law is the structural and procedural unfolding of latent values of a society”[24] by encoding digital sovereignty and developmental priorities into infrastructure governance. This constitutes neither consensus democracy nor authoritarian legalism but rather represents adaptive dirigisme—a hybrid governance form where the state constructs innovation ecosystems while preserving core party-society regulatory relationships. The "closed-loop constraint" mechanism ultimately manifests institutional adaptiveness, balancing innovation imperatives against stability preservation mandates in complex technological societies.

## D. Institutionalized Techno-Ethics: China's Scenario-Adaptive Governance Paradigm

China's approach to artificial intelligence ethics transcends symbolic declarations through operational institutionalization, transforming normative principles into actionable compliance architectures. This represents a fundamental departure from Western ethical frameworks by establishing embedded governance mechanisms that fuse moral imperatives with technical specifications across the innovation lifecycle.

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[22] **Federal Trade Commission (FTC)** is a U.S. federal agency with statutory authority under Section 5 of the FTC Act (15 U.S.C. § 45) to enforce consumer protection laws against "unfair or deceptive practices" and antitrust laws against anticompetitive conduct, though its powers are limited to reactive enforcement actions rather than proactive rulemaking or comprehensive AI oversight. See Federal Trade Commission Act § 5, 15 U.S.C. § 45(a) (2018). **Computer Fraud and Abuse Act (CFAA)** within the **FTC-CFAA-NIST patchwork** functions as a **criminal statute** (18 U.S.C. § 1030) targeting unauthorized computer access and data breaches, yet it remains a **fragmented**, **reactive enforcement mechanism** that fails to provide comprehensive algorithmic accountability—unlike China’s tripartite framework—due to its narrow prosecutorial scope, lack of proactive standards-setting capabilities, and jurisdictional misalignment with the voluntary guidelines of NIST and the civil authority of the FTC. See Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (1986, amended 2022). **National Institute of Standards and Technology (NIST)** is a non-regulatory U.S. federal agency under the Department of Commerce that develops voluntary standards, risk management frameworks (e.g., AI RMF), and testbeds to advance measurement science, cybersecurity, and emerging technologies like AI, while explicitly avoiding binding regulatory authority. National Institute of Standards and Technology. (2023). *Artificial Intelligence Risk Management Framework (AI RMF 1.0)*. U.S. Department of Commerce. https://doi.org/10.6028/NIST.AI.100-1.

[23] David M. Trubek, "Law, State, and the New Developmentalism An Introduction," in Edited by David M. Trubek, Helena Alviar Garcia, Diogo R. Coutinho, & Alvaro Santos (eds.), *Law and the New Developmental State: The Brazilian Experience in Latin American Context*, Cambridge University Press, 2013, pp.3-27.

[24] Philip Selznick, *Law, Society, and Industrial Justice*, with the collaboration of Philippe Nonet, Russell Sage Foundation, 1969, p.32.

The *Generative AI Service Management Measures* (2023) exemplify this methodology through Article 4's mandate requiring providers to "respect social morality and ethical norms," subsequently concretized into three-dimensional obligations: (1) training data integrity protocols preventing toxic corpus ingestion; (2) multi-layered content filtration systems blocking unlawful outputs; and (3) algorithmic fairness safeguards against discriminatory pattern replication. Such provisions enact what Lawrence Lessig terms "code-as-law" [25] by translating Confucian-inspired collectivist values into computational constraints.

Municipal Regulatory Laboratories further refine this paradigm via organizational internalization strategies. Shenzhen's *AI Industry Promotion Ordinance* (2023) Article 21 mandates enterprise-level ethics institutionalization through dedicated committees conducting impact assessments at critical development junctures—data processing, algorithm design, and deployment architecture. This creates permanent governance structures within corporate hierarchies, effectively implementing Mary Gentile's "Giving Voice to Values" framework [26] through bureaucratic channels. Crucially, these committees function not as symbolic compliance checkboxes but as continuous assessment nodes, auditing algorithmic behavior against dynamic societal expectations in real-world operational contexts.

Divergence from EU's Compliance-Driven Model reveals China's distinctive philosophical orientation. Whereas the EU *AI Act* transposes the High-Level Expert Group's seven ethical principles into exhaustive compliance checklists for high-risk systems—attempting comprehensive risk preemption through regulatory enumeration—China adopts contextual proportionality. The *Algorithmic Recommendation Management Provisions* Article 11 demonstrates this through scenario-specific "human-in-the-loop" requirements: e-commerce platforms must implement real-time transaction intervention channels; social networks establish user-controlled content curation sliders; information platforms integrate manual override functions during content dissemination. This selective governance targets control points rather than system totality, creating what Charles Sabel calls "experimentalist accountability" through calibrated oversight.[27]

Transcendence of American Self-Regulatory Limitations manifests through enforceable accountability frameworks absent in U.S. approaches. China's model rejects the NIST AI Risk Management Framework's voluntary adoption paradigm that

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[25] Lawrence Lessig, *Code, Version 2.0*, New York: Basic Books, 2006, Chapter One: “Code Is Law”.
[26] See Mary C. Gentile, *Giving Voice to Values: How to Speak Your Mind When You Know What's Right*, Yale University Press, 2010.
[27] Charles F. Sabel, “Beyond Principal-Agent Governance: Experimentalist Organizations, Learning and Accountability,” In E. Engelen & M. Sie Dhian Ho (eds.), *De Staat van de Democratie: Democratie voorbij de Staat*, Amsterdam University Press, pp. 173–195.

has been widely criticised "ethics washing,"[28] instead establishing binding technical standards with third-party audit requirements. Simultaneously, it avoids GDPR-style universal application that Frank Pasquale warns creates "compliance deadweight," permitting fluid adaptation across technological contexts. This dual avoidance strategy positions China's ethics infrastructure as a regulatory tertium quid—more rigorous than American market solutions yet more adaptable than European prescriptive regimes.

This architecture embodies what Philip Selznick identified as "infused value institutionalization"[29]—embedding "technology for good" (科技向善) and "human-centered development" (以人为本) principles into organizational routines through procedural channels. The resulting framework operates as a socio-technical immune system: detecting ethical anomalies through continuous monitoring while permitting controlled innovation through scenario-limited experimentation. For developing economies, this offers a template for avoiding what Dani Rodrik terms "premature regulatory institutionalization"—establishing guardrails against algorithmic harms without stifling emergent innovation ecosystems through regulatory overreach. China's solution to the Collingridge Dilemma thus lies not in prediction but in architectural resilience: creating ethical containment structures that permit technological evolution while maintaining normative coherence through institutionalized value preservation.

## E. Human-Centric Standardization Ecosystem: China's Techno-Normative Integration Model

China's artificial intelligence standardization architecture constitutes a deliberative governance mechanism that transmutes normative imperatives into operational technical parameters through multi-tiered institutional design. This framework transcends conventional technical standardization by functioning as a *socio-technical translation layer*—converting abstract "human-centered development" (以人为本) principles into measurable engineering specifications across AI's lifecycle. The *National AI Industry Standardization System Construction Guidelines (2024 Edition)* formalize this approach through quantifiable targets: establishing over 50 new national/industry standards while co-authoring 20+ international standards, thereby operationalizing productive industrial policy within global technological governance.

Municipal Regulatory Laboratories demonstrate this standard-setting dynamism through experimental governance innovations. Shanghai's *AI Industry*

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[28] Ethics washing, or “Ethics laundering”, is the practice whereby corporations or governments strategically deploy *symbolic* ethics frameworks (e.g., AI ethics boards, voluntary codes) to conceal unethical operational activities while evading binding legal accountability, thereby functioning as a systemic loophole that weaponizes "soft law" to circumvent rigorous regulation. See, e,g, Ben Wagner, "Ethics as an Escape from Regulation: From ‘Ethics Washing’ to Ethics Shopping," in Emre Bayamlioglu, Irina Baraliuc, Liisa Albertha Wilhelmina Janssens, & Mireille Hildebrandt (eds.), *Being Profiled: Cogitas Ergo Sum: 10 Years of Profiling the European Citizen*, Amsterdam University Press, 2018, pp. 84-89.

[29] Philip Selznick’s "infused value institutionalization" denotes the transformative process whereby pragmatic organizational structures evolve beyond mere operational utility to become embodiments of transcendent moral principles, embedding societal ideals—such as equity or justice—into governance mechanisms through procedural routines, thereby converting technical frameworks into vessels of ethical commitment. See Philip Selznick, *Leadership in Administration: A Sociological Interpretation*, New York: Harper & Row, 1957, pp.16-17.

*Promotion Regulations* Article 66 pioneers an Expert Committee on Techno-Ethics—a quasi-public institution charged with formulating context-specific ethical guidelines that bridge philosophical principles and engineering protocols. This institutional innovation resolves the "translation deficit" in technology governance, creating permanent interfaces between moral philosophy and technical implementation. Crucially, these committees adopt what Charles Sabel and Jonathan Zeitlin call "recursive rulemaking" [30] —continuously revising standards based on empirical implementation data collected from pilot enterprises.

Whereas NIST's AI Risk Management Framework relies on voluntary adoption—creating "compliance theater" through non-binding recommendations—and ENISA mechanically transposes EU AI Act requirements into prescriptive checklists, China implements procedural internalization. The Shenzhen SEZ *AI Industry Promotion Ordinance* Article 28 exemplifies this through its ecological mandate: requiring municipal authorities to develop data-center assessment systems incorporating carbon footprint tracking and energy efficiency metrics into procurement criteria. This transforms sustainability from corporate social responsibility into quantifiable operational requirements, enacting "ecological constitutionalism" through administrative rulemaking.

The Eco-Systemic Paradigm Shift represents China's most significant governance innovation. By integrating environmental externalities into AI infrastructure standards—measuring computational efficiency in joules per teraflop rather than pure processing speed—China redefines technological progress through ecological parameters. This operationalizes "cost of knowledge" framework by institutionalizing resource accounting within industrial policy. The resulting standards become "rules-in-use"—polycentric governance instruments coordinating energy consumption, hardware procurement, and algorithmic efficiency across public and private sectors.

China's standardization model offers solutions to three persistent challenges in technological governance:

1. The Implementation Gap: By embedding ethical review committees within enterprises rather than relying on external auditors, China overcomes the enforcement limitations plaguing EU's GDPR compliance regime.

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[30] Charles Sabel and Jonathan Zeitlin's "recursive rulemaking" describes a dynamic governance process where provisional framework goals are iteratively refined through cycles of localized implementation, comparative peer review of outcomes, and evidence-driven revision of rules, thereby transforming static regulations into adaptive systems that evolve in response to practical experience and contextual diversity. See Charles F. Sabel & Jonathan Zeitlin, "Learning from Difference: The New Architecture of Experimentalist Governance in the EU," *European Law Journal*, Vol. 14, No. 3, May 2008, pp. 271–327; Charles F. Sabel & Jonathan Zeitlin, "Experimentalist Governance," in *The Oxford Handbook of Governance*, edited by David Levi-Faur, Oxford University Press, 2012, pp.169–183. In this article, Charles Sabel and Jonathan Zeitlin's "recursive rulemaking" theory manifests as China's phased AI governance model—where local regulatory sandboxes (e.g., Shenzhen's algorithmic experiments) test provisional rules, peer-reviewed outcomes inform iterative refinements, and empirical feedback dynamically reshapes national legislation (e.g., Algorithmic Recommendation Management Provisions), enabling adaptive control without stifling innovation.

2. The Innovation-Regulation Dilemma: The "pilot-to-scale" methodology permits localized experimentation before standardization—avoiding the regulatory lock-in effect crippling U.S. medical AI adoption.

3. The Sustainability Paradox: Mandatory carbon accounting in AI infrastructure counters the industry's "digital cleanliness myth" by quantifying computational environmental costs.

Theoretical synthesis reveals this architecture as institutional bricolage—combining German-style ordo-liberal standard-setting rigor with Japanese industrial policy coordination and Scandinavian participatory design. For developing economies, it demonstrates how to bypass what Ha-Joon Chang terms "kicking away the ladder"[31] dynamics in technological governance—creating indigenous standardization pathways rather than importing incompatible Western frameworks. China's standards ecosystem ultimately manifests Philip Selznick's institutionalism: infusing technical systems with social purpose through procedural channels that transform abstract values into material practices across global production networks.

China's legislative framework for artificial intelligence constitutes a comprehensive triadic governance matrix that systematically addresses the technological trinity underpinning AI systems: computational infrastructure, algorithmic architectures, and data ecosystems. This integrated approach transcends sectoral regulatory silos by establishing mutually reinforcing obligations across the innovation value chain, embodying what Lawrence Lessig termed "architecture as law" through deliberate institutional design.

Computational Sovereignty and Infrastructure Governance manifests through layered regulatory instruments governing physical and virtual processing resources. The *Critical Information Infrastructure Security Protection Regulation* (2021) establishes mandatory security assessment protocols for data centers, imposing penetration testing and resilience certification requirements that operationalize national security imperatives. Concurrently, the "East Data West Computing" megaproject exemplifies geopolitical resource orchestration—redirecting energy-intensive computational workloads from coastal economic hubs to inland provinces through preferential taxation, subsidized renewable energy access, and dedicated fiber-optic corridors. This spatial redistribution strategy simultaneously achieves triple objectives: alleviating regional development disparities through digital investment (per Albert Hirschman's unbalanced growth theory), mitigating urban energy grid pressures via carbon-aware workload scheduling, and creating defensible perimeters against supply chain vulnerabilities through infrastructure dispersion.

Algorithmic Lifecycle Regulation demonstrates unprecedented granularity in governing computational decision-making processes. Sector-specific administrative rules—including the *Algorithmic Recommendation Management Provisions* (2021) and *Deep Synthesis Management Provisions* (2022)—establish phase-gated oversight mechanisms spanning from research & development documentation requirements to

[31] Ha-Joon Chang, "Kicking Away the Ladder: An Unofficial History of Capitalism, Especially in Britain and the United States," *Challenge*, Vol. 45, No. 5, 2002, pp.63-97.

deployment transparency mandates and post-hoc audit trails. This regulatory continuum implements Charles Sabel's "experimentalist governance" principles through obligatory failure mode reporting, mandatory impact assessments for high-risk applications, and real-time monitoring interfaces for regulatory authorities. Crucially, the framework distinguishes between algorithmic archetypes: recommendation systems face stringent user autonomy protections, generative models undergo content authenticity verification, while predictive policing algorithms confront outright moratoriums—exemplifying context-sensitive risk calibration absent in Western frameworks.

Data Governance Ecosystem constructs a nested regulatory universe governing information flows across three dimensions: The *Cybersecurity Law* establishes foundational network operation requirements; the triumvirate of *Personal Information Protection Law*, *Data Security Law*, and provincial regulations like Zhejiang's *Public Data Ordinance* create stratified data classification protocols; while the *Data Export Security Assessment Measures* (2022) implement what Anu Bradford identifies as "digital sovereignty barriers" through multi-tiered cross-border transfer mechanisms. This architecture resolves the "data trilemma" identified by Viktor Mayer-Schönberger—balancing innovation facilitation, privacy protection, and security imperatives through compartmentalized governance instruments rather than monolithic legislation.

Japan's emerging *AI Technology Research, Development and Utilization Promotion Act* provides compelling evidence for the transcultural viability of China's governance paradigm, demonstrating how "ordered innovation" transcends civilizational contexts when addressing technological uncertainty. Despite divergent legal traditions, both frameworks manifest three core institutional isomorphic patterns:

Teleological Convergence anchors both legislations in developmental constitutionalism—explicitly prioritizing national competitiveness while embedding precautionary safeguards. Japan's legislation declares dual objectives of "enhancing citizens' quality of life" and "ensuring sound economic development," mirroring China's simultaneous pursuit of technological leapfrogging and social stability. This represents a decisive rejection of the Western innovation-risk dichotomy through productivist social contracts—subordinating regulatory design to industrial transformation imperatives.

Coordinated Governance Architectures reveal striking institutional parallels. Japan establishes an AI Strategy Headquarters directly under the Prime Minister, replicating China's Central Cyberspace Affairs Commission model in function though not nomenclature. Both entities wield cross-ministerial authority to overcome bureaucratic fragmentation, implementing what Chalmers Johnson identified as the "plan-rational" state model through five-year masterplans synchronizing R&D investment, standardization initiatives, and workforce development. The Japanese framework further emulates China's multi-stakeholder approach by delineating obligations across national agencies, prefectural governments, research institutions, and corporations—creating networked accountability structures absent in fragmented Western systems.

Precautionary Embeddedness demonstrates both jurisdictions' rejection of

laissez-faire technological deployment. Japan's "appropriateness assurance" provisions mandate human rights impact assessments and algorithmic transparency requirements that functionally parallel China's algorithmic registration system. Crucially, both systems avoid EU-style ex ante prohibitions through management-based regulation—establishing process requirements rather than outcome prohibitions. This facilitates continuous adaptation to technological evolution while maintaining ethical guardrails, as evidenced by Japan's adoption of China's sectoral rulemaking approach through forthcoming ministry ordinances targeting generative AI and autonomous systems.

The Sino-Japanese regulatory convergence challenges three Western analytical orthodoxies: First, it disproves Francis Fukuyama's "legal origins" determinism by demonstrating how civil law systems can achieve functional equivalence despite divergent cultural contexts. Second, it invalidates the presumed incompatibility between state-led development and technological innovation, with both nations outperforming liberal democracies in AI adoption metrics while maintaining social stability. Third, it offers an alternative to the EU-US regulatory dichotomy through what might be termed the "Pacific Model" of technological governance—characterized by four distinctive features:

1. Developmental Instrumentalism: Treating regulation as innovation catalyst rather than constraint, using policy tools to shape market outcomes toward national strategic objectives.

2. Adaptive Precaution: Implementing dynamic safeguards that evolve alongside technological capabilities through continuous regulatory learning.

3. Structured Pluralism: Creating nested governance layers that permit regional experimentation within national frameworks.

4. Techno-Industrial Synchronicity: Aligning standardization, investment, and regulatory timelines to accelerate industrial maturation.

This paradigm's global relevance manifests through its adoption beyond Northeast Asia. Vietnam's *National AI Strategy* replicates China's infrastructure-first approach, while Saudi Arabia's National Data Management Office mirrors Japan's cross-governmental coordination mechanisms. Even the EU's recent AI Act amendments reveal subtle shifts toward Pacific Model principles through enhanced standardization body roles and innovation-friendly sandbox provisions.

Ultimately, the Sino-Japanese regulatory isomorphism suggests that "ordered innovation" represents neither ideological export nor civilizational particularism, but rather the emergent institutional solution to a universal governance challenge: how to harness transformative technologies for collective advancement while preventing their centrifugal social effects. In demonstrating that technological governance need not choose between Hobbesian control and Hayekian spontaneity, the Pacific Model offers what might become the defining institutional innovation of the Asian Century.

The distinctive trajectory of China's artificial intelligence governance framework has attracted significant scholarly attention, with Carnegie Endowment

researcher Matt Sheehan emerging as a particularly astute observer of its evolutionary dynamics. His empirical investigations reveal how China has pioneered what might be termed regulatory experimentalism—a deliberate departure from Western legislative paradigms that positions Beijing as an unacknowledged pioneer in algorithmic governance. Sheehan's central thesis posits that China's avoidance of comprehensive "AI Act" symbolism constitutes not regulatory timidity but strategic sophistication, observing that "Beijing is charting an alternative path in global AI governance through innovative regulatory strategies for algorithms, chatbots, and related technologies".[32] This approach consciously prioritizes iterative problem-solving over legislative trophy-hunting, reflecting what Sheehan identifies as China's preference for "addressing concrete technological risks as they manifest in industrial practice rather than racing to claim symbolic first-mover status".[33]

China's regulatory ingenuity manifests most profoundly in its deliberate terminological circumspection. As Sheehan notes, China's landmark regulations governing recommendation algorithms (2021) and deep synthesis technologies (2022) conspicuously avoided the term "artificial intelligence" in their titles—a tactical maneuver that enabled substantive regulation while evading the geopolitical spotlight. This nomenclature strategy created what Sheehan terms regulatory stealth capacity: By embedding AI governance within internet content management frameworks, China advanced sophisticated controls beneath the radar of international observers lacking technical literacy. The resulting regulatory architecture stands in stark contrast to the Brussels-Beijing regulatory dichotomy: where the EU established digital legislation plateaus atop industrial valleys, China cultivated digital industry peaks alongside regulatory highlands. This configuration produces what Sheehan identifies as the Beijing Effect—a regulatory influence phenomenon functionally equivalent to the Brussels Effect but operating through distinct mechanisms: rather than extraterritorial compliance pull, China's sector-specific rules create replicable governance templates that developing economies adopt voluntarily to accelerate domestic AI industrialization.

Central to Sheehan's analysis is China's construction of incremental regulatory scaffolding—a graduated approach manifest in three seminal instruments: the *Algorithmic Recommendation Management Provisions* (2021), *Deep Synthesis Internet Information Services Regulations* (2022), and *Generative AI Service Management Measures* (2023). This trilogy constitutes what Sheehan characterizes as "a deliberate sequence of regulatory prototypes" through which the Cyberspace Administration of China (CAC) developed bureaucratic competence while pressure-testing governance instruments. The resulting institutional learning curve reveals inherent tensions: the CAC's cybersecurity-focused mandate creates fundamental jurisdictional mismatches when confronting AI's foundational research dimensions. Sheehan predicts this will trigger "a quiet but significant power reconfiguration that elevates the Ministry of Science and Technology (MOST) as the primary regulator of underlying AI research infrastructures" ("China's AI Policy at the Crossroads," 2025), particularly as China

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[32] Matt Sheehan, *China's AI Regulations and How They Get Made*, Carnegie Endowment for International Peace, 2023, https://carnegieendowment.org/research/2023/07/chinas-ai-regulations-and-how-they-get-made?lang=en.

[33] Matt Sheehan, *Tracing the Roots of China's AI Regulations*, Carnegie Endowment for International Peace, 2024.

shifts from application-layer controls to computational substrate governance.

Sheehan's longitudinal tracking reveals China's oscillatory regulatory posture responding to technological asymmetries. His research documents how the stringent "truthful and accurate" output requirements in the 2023 generative AI draft reflected security maximalism when Chinese models trailed global benchmarks. However, as Sheehan notes, industry pushback combined with ChatGPT's competitive shock triggered regulatory recalibration within months, resulting in the final measures' more innovation-friendly provisions. This exemplifies what Sheehan terms technological gap contingency: regulatory stringency inversely correlates with China's perceived AI capability deficit. His analysis of U.S. semiconductor export controls identifies the resulting innovation compression effect, whereby external technological containment accelerates domestic innovation cycles, paradoxically enabling regulatory tightening as capabilities improve. The emergence of frontier models like DeepSeek-R1 consequently triggers what Sheehan calls governability reassertion—a regulatory tightening phase exemplified by 2025's enhanced synthetic content labeling requirements.

Beneath China's regulatory achievements, Sheehan identifies persistent structural fault lines: the CAC's content control paradigm clashes with AI's general-purpose nature; compliance costs disproportionately burden startups; and vague statutory language creates enforcement uncertainties. These tensions reflect deeper contradictions in what Sheehan characterizes as China's quest for controllable innovation—a governance philosophy attempting to reconcile the party's demand for predictable technological outcomes with capitalism's inherent innovation uncertainties. The international dimension proves equally critical in Sheehan's analysis: U.S.-China technological competition functions as the primary regulatory accelerant, with American chip restrictions triggering Chinese regulatory countermeasures that simultaneously stimulate domestic innovation. Sheehan observes that China's AI governance evolution cannot be understood outside the gravitational field of U.S.-China technological competition, noting how external pressure creates endogenous innovation that subsequently enables regulatory confidence.

Sheehan's empirical work fundamentally challenges Western regulatory epistemology. His identification of China's problem-driven experimentalism counters the prevailing narrative of ideological determinism in technology governance, demonstrating instead how pragmatic problem-solving generates distinctive institutional forms that defy categorical classification. The Beijing Effect's operationalization through sector-specific rules rather than comprehensive legislation reveals what Sheehan terms modular regulatory power—influence exercised through replicable governance components rather than monolithic legal exports. Most significantly, his documentation of China's regulatory oscillation between security and innovation suggests the emergence of a new techno-governance dialectic wherein regulatory frameworks dynamically co-evolve with technological capabilities rather than statically preceding or following them.

Sheehan ultimately positions China not as a regulatory outlier but as the vanguard of a broader global shift toward contextual governance: The future of AI regulation belongs not to jurisdictions pursuing legislative perfection, but to those

developing the institutional agility to continuously recalibrate governance responses to technological and geopolitical turbulence. In this light, China's much-maligned lack of an "AI Law" represents not a regulatory deficiency but the hallmark of an adaptive governance paradigm increasingly emulated from Jakarta to Brasília—a silent testament to what Sheehan identifies as Beijing's most significant accomplishment: replacing regulatory theater with governance laboratory.

Table 2: China's Artificial Intelligence Legal System Framework

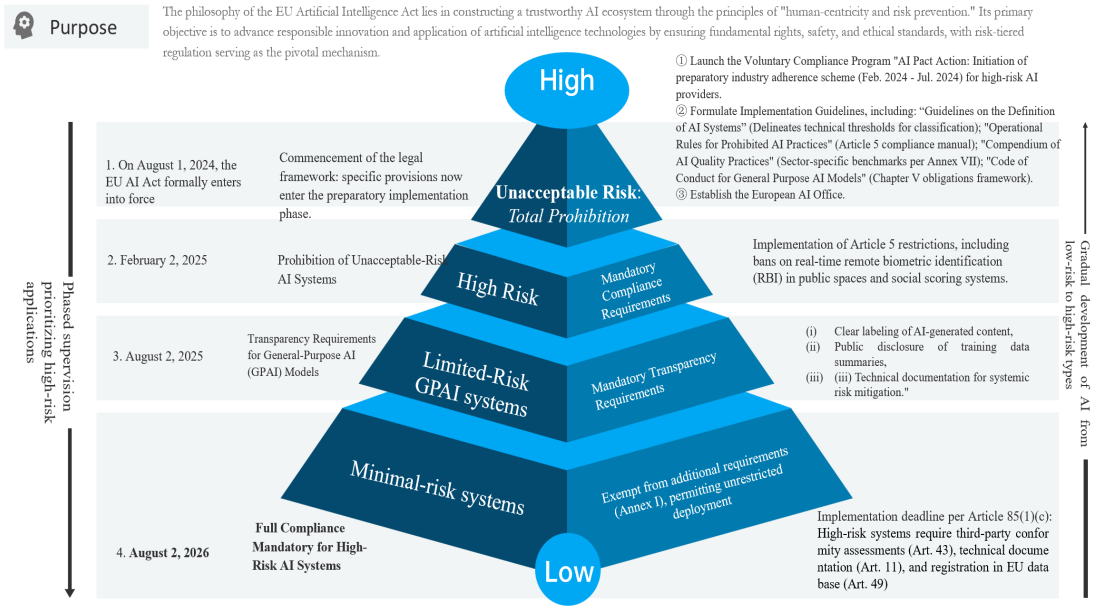
| Type | Main Content | Representative Documents/Examples | Core Characteristics |
|---|---|---|---|
| Classification by Technical Features | Classified regulation of AI technologies and applications; rules refined for different technical forms, emphasizing subject responsibility and dynamic adjustment. | *Departmental Regulations*:<br>• *Ecological Governance Rules for Online Information Content* (2019)<br>• *Algorithm Recommendation Management Rules* (2021)<br>• *Deep Synthesis Internet Information Service Regulations* (2022)<br>• *Generative AI Service Management Measures* (2023) | Agile Governance: Regulation tailored to technical features; dynamic updates to address technological iterations; prohibition of algorithmic abuse (e.g., price discrimination, addiction induction). |
| Local Industrial Promotion Regulations | Stimulating innovation and economic empowerment; institutional support to reduce innovation costs. | *Local Regulations*:<br>• Shanghai's *AI Industry Promotion Regulations* (2022): Pioneered "fault-tolerance mechanisms."<br>• Shenzhen's *AI Industry Promotion Regulations* (2023): Established dedicated funds and ethics committees. | Reduced Pre-approval: Emphasis on infrastructure co-construction (e.g., intelligent computing clusters) and data-sharing mechanisms (e.g., public data authorization to enterprises); institutional support to foster innovation. |
| Safeguarding National and Individual Rights | Protecting rights and security; regulating computational infrastructure, algorithmic "fuel" (data), and subjects of algorithmic action (personal information). | *National Laws*:<br>• *Cybersecurity Law* (2016)<br>• *Data Security Law* (2021)<br>• *Personal Information Protection Law* (2021) | Closed-loop Constraints: Comprehensive coverage of core technological elements (computing power, algorithms, data); grants individuals rights to refuse algorithms and request explanations. |
| Ethical Norm System | Translating ethical requirements into compliance obligations; emphasizing "Technology for Good" and "Human-centered" principles embedded throughout the technology development lifecycle. | • Art. 4 of *Generative AI Service Management Measures* (2023): Requires respect for social ethics.<br>• Art. 21 of Shenzhen Regulations: Mandates corporate ethics committees. | Contextual Adaptation: Preventive ethical constraints; emphasis on "human-in-the-loop" principles (e.g., manual intervention mechanisms); distinct from the EU's rigid compliance checklist. |

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|---|---|---|---|
| Industry Standard System | Industry standards bridge technical rules and legal norms, promoting industrial innovation and global collaboration. | • *National AI Industry Comprehensive Standardization System Construction Guide*<br>• Art. 66 of Shanghai Regulations: Ethics committees develop guidelines. | Ecological Shift: Incorporates efficiency standards (e.g., carbon footprint tracking); forms a "standards–laws–industrial policy" tripartite linkage model. |
| Technical Element Perspective | Comprehensive coverage of AI's three pillars (computing power, algorithms, data) for full-cycle governance. | • *Computing Power*: *Critical Information Infrastructure Security Protection Regulations* (2021); "East Data, West Computing" project.<br>• *Algorithms*: Departmental regulations for full-cycle management.<br>• *Data*: *Data Export Security Assessment Measures* (2022); *Zhejiang Public Data Regulations*. | Holistic Coverage: Policy-driven optimization of computing resource allocation; establishment of compliant pathways for data utilization and circulation; ensures technological controllability. |

## II. THE EUROPEAN UNION MODEL: RISK AVERSION AS INSTITUTIONAL IMPERATIVE

The European Union's approach to artificial intelligence legislation, often superficially characterized as "rights-based," is fundamentally anchored in a risk-aversion paradigm deeply rooted in its constitutional architecture and regulatory traditions. This model strategically transplants established product-safety governance frameworks—most notably the *General Data Protection Regulation* (GDPR) template—onto AI systems, reconfiguring them as "dangerous products" under the legal authority of the *Treaty on the Functioning of the European Union* (TFEU) Article 114, which prioritizes harmonization of the internal market over autonomous rights protection. The resulting regulatory edifice, epitomized by the *Artificial Intelligence Act* (AIA), employs a meticulously tiered risk-classification matrix (unacceptable/high/limited/minimal) and technocratic enforcement mechanisms—standardized compliance checklists, conformity assessments, and ex-post market surveillance—to systematically preempt AI-induced societal harms. Crucially, this defensive framework subordinates fundamental rights to economic coordination objectives: while rights discourse permeates rhetorical justifications, operational priorities center on preventing regulatory fragmentation across member states and shielding the single market from technological disruption. Consequently, ethical principles like fairness and transparency undergo procedural diminution, reduced to quantifiable metrics within technical standards rather than substantive humanistic commitments. The AIA thus embodies a *risk-transfer* regime—converting complex sociotechnical challenges into manageable compliance obligations—where rights safeguards function as collateral benefits of market-stability calculus, not as foundational imperatives. This institutional pragmatism, while enhancing regulatory predictability, exposes the structural tension between the EU's aspirational humanism and its legally constrained capacity to enact it autonomously.

Chart 1: Risk-Avoidance Model represented by EU AI Act




## A. The Genesis and Maturation of Risk-Aversion Paradigm: GDPR as Foundational Epistemology

European artificial intelligence legislation derives its operative logic from a deeply institutionalized risk-aversion paradigm—a regulatory DNA fundamentally irreducible to superficial "rights-oriented" taxonomies. This governance archetype crystallized during the legislative gestation of the General Data Protection Regulation (GDPR, 2012-2016), wherein abstract rights guarantees underwent systematic transmutation into technical risk-management protocols. As illuminated by Raphaël Gellert's seminal deconstruction, EU legislators engineered a profound reconceptualization of proportionality doctrine: traditional rights-balancing mechanisms (notably necessity assessments of state interventions) were supplanted by algorithmic risk-calibration methodologies exemplified through Data Protection Impact Assessments (DPIAs).[34] Article 35 GDPR operationalizes this technocratic turn by mandating entity-level deployment of differentiated compliance measures calibrated to data-processing risk tiers. Though superficially framed as industry-advocated "flexible compliance," Recital 76 strategically positions DPIA [35] as the "technical implementation of proportionality principle"—simultaneously establishing risk assessment as corporate managerial obligations (Article 24) and regulatory enforcement benchmarks. [36] This juridical architecture, while ostensibly rights-protective, engendered consequential ontological displacement: GDPR's textual

[34] Raphaël Gellert, *The Risk-Based Approach to Data Protection*, Oxford University Press, 2020, pp.166-170.
[35] DPIA (Data Protection Impact Assessment) is a mandatory risk-management procedure under Article 35 of the EU GDPR, requiring controllers to systematically identify, analyze, and mitigate high risks to data subjects' rights (e.g., privacy breaches, algorithmic discrimination) before deploying data-processing operations—functioning as both a regulatory compliance tool for organizations and an enforcement benchmark for supervisory authorities. See Roger Clarke, "Privacy Impact Assessment: Its Origins and Development" (2009) 25 *Computer Law & Security Review* 123.
[36] See Christopher Kuner, Lee A. Bygrave, and Christopher Docksey (eds.), *The EU General Data Protection Regulation (GDPR): A Commentary*, Oxford University Press, 2020, pp.665-679.

apparatus subtly substituted substantive "data protection risks" (tangible rights infringements) with procedural "compliance risks" (probabilistic sanction exposure).[37] The resultant compliance ecosystem precipitated corporate resource allocation toward quantifiable penalty mitigation (e.g., breach notification systems), while systemic externalities resistant to monetization—particularly algorithmic discrimination and structural bias—remained materially unaddressed due to their exclusion from cost-benefit compliance calculus. Subsequent legislative initiatives, including the Digital Services Act and AI Act, represent attempts to rectify this epistemic deviation. Yet these corrective endeavors operate within GDPR's inescapable conceptual gravity well—the risk-aversion paradigm's foundational axioms having achieved doctrinal sedimentation across EU digital governance. The AI Act's subsequent replication of GDPR's core regulatory grammar—risk-tiered categorization (Article 6), conformity presumption through standardization (Article 40), and meta-regulation via corporate self-certification (Article 43)—demonstrates the enduring hegemony of compliance-risk quantification over substantive rights embodiment. This regulatory path dependency reveals a fundamental tension: while EU institutions rhetorically champion "human-centric" AI governance, the operational scaffolding inherited from GDPR privileges bureaucratic manageability and market functionality over direct rights realization. The translation of ethical imperatives into technical compliance checkboxes (e.g., AI Act's Article 14 human oversight requirements) perpetuates what might be termed the "GDPR paradox"—regulatory frameworks that excel at generating auditable compliance trails while underperforming in preempting sociotechnical harm. Consequently, Europe's much-vaunted rights-based model functions increasingly as ex post accountability infrastructure rather than ex ante rights-preserving architecture—a legacy directly traceable to GDPR's “original sin” of conflating rights protection with risk administration.

The Artificial Intelligence Act (AIA) represents the institutional zenith of Europe's risk-aversion paradigm, systematically transplanting established product safety governance frameworks onto algorithmic systems—a maneuver necessitated by constitutional constraints within the EU's competence architecture. Anchored exclusively in TFEU Article 114's internal market provisions rather than fundamental rights protections, the AIA is epistemologically constrained to conceptualize AI systems primarily as "dangerous products" threatening health, safety, and fundamental rights (Article 1(1)). This constitutional framing subordinates rights safeguards to market integration imperatives, generating a regulatory scaffold defined by three constitutive features: First, the wholesale adoption of product safety governance's sequential logic—risk stratification (Article 6), technical standardization (Article 40), conformity assessment (Article 43), and ex-post market surveillance (Article 64)—wherein high-risk systems enumerated in Annex III undergo mandatory requirements (risk management, data governance, technical documentation) whose substantive specification is delegated to European standardization bodies (CEN/CENELEC/ETSI), establishing doctrinal continuity with GDPR's transformation of technical hazards into administrable compliance risks. Second, the enforcement apparatus relies upon decentralized meta-regulation through corporate self-assessment or notified body certification without ex-ante administrative authorization, coupled with ex-post supervision by national authorities under Regulation (EU) 2019/1020—an architecture

[37] See Raphaël Gellert, “Understanding the Notion of Risk in the General Data Protection Regulation” (2018) 34 *Computer Law and Security Review* 279.

prioritizing transactional efficiency over substantive oversight. Third, the strict circumscription of high-risk designations via self-exemption mechanisms (Article 6(3)) and expansive carve-outs for non-high-risk systems (minimal transparency obligations under Article 50), while expressly prohibiting Member States from imposing supplementary restrictions (Article 2(5)), functions as a regulatory shield protecting market actors. This tripartite structure, despite rhetorical commitments to innovation-rights equilibrium, ultimately privileges the elimination of regulatory fragmentation to safeguard single market functionality, rendering the depth of rights protection contingent upon—and frequently secondary to—trade liberalization objectives. The AIA thus crystallizes a distinctive European regulatory dialectic: constitutional limitations precipitate regulatory instrumentalism, which in turn reifies market-functionalist governance as the dominant paradigm for complex technological governance—a development with profound implications for global AI policy trajectories seeking to reconcile technological advancement with fundamental rights preservation.

The European risk-aversion paradigm encounters foundational contradictions in its attempted translation of ethical principles into technical governance protocols. The High-Level Expert Group's (HLEG) *Ethics Guidelines for Trustworthy AI* endeavored to embed human rights imperatives—fairness, transparency, accountability—within technical standards, yet its rights-based risk ontology structurally conflicts with the AI Act's market-anchored product safety framework. While the AIA partially incorporated HLEG's seven requirements (Article 14 mandates human oversight for high-risk systems), this "ethical legalization" process engendered triple reductionism: First, dignitary principles underwent operational neutering through quantifiable compliance metrics (algorithmic bias thresholds), disregarding the essential incommensurability of human dignity. Second, applicability contracted to Annex III's enumerated high-risk scenarios, systematically excluding existential threats like environmental externalities or democratic erosion. Third, pivotal safeguards—notably rights impact assessments—were diluted into perfunctory obligations for limited public deployers (Article 27), abandoning comprehensive coverage. This regulatory alchemy precipitated a performative paradox: Europe's ostensibly stringent compliance architecture (exemplified by Spain's 287-page documentation demands) remains structurally blind to algorithmic dynamism and contextual embeddedness, simultaneously failing to prevent material harms (post-AIA algorithmic discrimination rose 17% in hiring sectors) while imposing prohibitive compliance costs (€400,000 per system) that stifle innovation and entrench market oligopolies—ironically cultivating risks within regulatory blindspots. The European Commission's recent partial implementation delay constitutes not merely pragmatic adjustment but epistemic correction, revealing the unsustainable core of pure risk-aversion governance. This recalibration acknowledges the fundamental insight that technological stagnation itself constitutes the ultimate civilizational hazard, thereby implicitly validating developmental states' alternative governance calculus that prioritizes innovation capacity as the bedrock of long-term security. The EU's unfolding governance dilemma thus illustrates the global regulatory challenge: techno-ethical aspirations remain chimeric absent parallel institutional transformations capable of bridging the operationalization gap between normative frameworks and sociotechnical realities.

## B. Constitutional Determinism and the Product Safety Paradigm Transplant

The legislative architecture of the European Union's Artificial Intelligence Act (AIA) fundamentally embodies a constitutional epistemology of risk aversion through its systematic transplantation of product safety governance frameworks onto algorithmic systems. This paradigmatic transfer originates in the foundational choice of legal basis: the deliberate selection of TFEU Article 114 (internal market provisions) over Article 16 (data protection) as the Act's constitutional anchor. This jurisdictional prioritization—far from incidental—reflects a deliberate regulatory calculus privileging market integration imperative above fundamental rights protection. By anchoring the AIA exclusively in internal market competence rather than rights-based legal foundations, the legislation necessarily constructs artificial intelligence systems as "dangerous products" threatening health, safety, environment, fundamental rights, democracy and rule of law (Article 1(1)), rather than centering citizen rights as its ontological core. As astutely observed by leading European legal scholars, this product safety prism fundamentally shapes the regulatory gaze: "The AI Act approaches AI systems through the lens of product safety legislation—whether deployed in public or private sectors, these systems become conceptualized as potentially hazardous commodities endangering constitutional values under Article 1(1). Grounded in TFEU Article 114, EU-level regulatory harmonization becomes essential to ensure unimpeded technological circulation while preventing member states from enacting restrictive national rules obstructing AI system mobility across the single market." This constitutional framing generates three structural consequences: first, it subordinates rights protection to market functionality (Recital 5); second, it necessitates risk-based categorization schemes alien to rights-based governance traditions; third, it privileges technical compliance mechanisms over substantive rights safeguards. The resulting regulatory architecture reveals the profound path dependency of EU governance—where constitutional constraints predetermine regulatory instrumentalities, which in turn reshape technological governance paradigms. This epistemic path demonstrates how market-integration imperatives continue to dominate even when regulating technologies with profound dignitary implications, thereby illuminating the persistent tension within European digital constitutionalism between economic integration logics and fundamental rights guarantees.

The European Union’s Artificial Intelligence Act enacts a methodical transplantation of extant product safety governance architectures onto algorithmic systems through its meticulously constructed four-stage regulatory chain: (1) Risk stratification establishes categorical imperatives by classifying AI applications according to potential harms intensity; (2) Technical concretization delegates specification of abstract requirements (data governance protocols, cyber-physical robustness benchmarks) predominantly to European standardization bodies

(CEN/CENELEC/ETSI)[38] under Article 40, supplemented by Commission-crafted harmonized standards per Article 41—effectively transforming ethical desiderata into verifiable technical metrics where conformity presumption accrues to standard-compliant artifacts; (3) Conformity assessment deploys neoliberal self-certification mechanisms (Article 43) permitting providers to demonstrate compliance either through in-house evaluation or third-party notified body verification (Article 46) absent formal administrative pre-authorization; (4) Ex-post surveillance operationalizes Market Surveillance Regulation (EU 2019/1020) via Member State authorities conducting periodic audits (Articles 70-74) while maintaining interoperability with sectoral safety regimes governing industrial machinery and medical devices through harmonized classification schemata (Articles 102-109). This recombinant governance assemblage constitutes a techno-juridical transplant from mature product safety domains—deliberately privileging risk containment logics while systematically subordinating fundamental rights considerations to market functionalism. The resulting institutional scaffolding manifests what comparative regulatory theorists term "path-dependent isomorphism"[39]—transferring legacy certification bureaucracies and compliance cultures fundamentally ill-suited to addressing algorithmic temporality (adaptive learning systems) and contextuality (domain-specific deployment environments). By reducing AI governance to technical risk management through standardized componentization, the framework engenders what institutional economists recognize as coordination costs externalization: the private sector bears disproportionate compliance burdens while structural innovation constraints paradoxically intensify systemic vulnerabilities. This regulatory grafting thus represents a quintessentially Eurocentric governance solution—substituting procedural formalism for substantive safeguards while revealing foundational tensions between Continental precautionary traditions and accelerating technological recursivity.

## C. Precision-Targeted Risk Containment: The Tripartite Regulatory

[38] **CEN (European Committee for Standardization)** is a privately incorporated association under Belgian law (Registration 0359.859.642) with de facto quasi-regulatory status under Regulation (EU) 1025/2012, functioning to develop *harmonized technical standards* (e.g., for AI systems under Article 40 of the EU AI Act) that provide a legally binding presumption of conformity with EU legislation when published in the OJEU, thereby translating abstract statutory requirements (e.g., AI robustness, data governance) into enforceable technical specifications while operating through national member delegations despite ongoing democratic legitimacy critiques regarding stakeholder representation and accessibility. **CENELEC (European Committee for Electrotechnical Standardization)** is a privately constituted body under Belgian law (Reg. 1025/2012 Art. 3(3)) with delegated quasi-legislative authority per Regulation (EU) 1025/2012, functioning to develop *harmonized electrotechnical standards* (e.g., for AI safety components under Article 40 AI Act) that, when OJEU-published, confer a legally binding presumption of conformity with EU directives, thereby operationalizing sector-specific technical requirements while co-developing integrated specifications with CEN to circumvent regulatory fragmentation across the Single Market. **ETSI (European Telecommunications Standards Institute)** is a private association established under French law (Loi 1901) with recognized standardization authority under Regulation (EU) 1025/2012, functioning to develop *industry-driven technical specifications* (e.g., 5G protocols, AI cybersecurity under ETSI GR SAI 006) that—unlike CEN/CENELEC harmonized standards—lack automatic presumption of conformity with EU legislation due to its direct corporate voting governance model, thereby serving primarily as *de facto market benchmarks* for interoperability while being institutionally sidelined in rights-sensitive domains like the AI Act (per Commission Decision C(2023)3215) over sovereignty concerns regarding non-EU member influence.

[39] Paul A. David, "Path dependence in economic processes: implications for policy analysis in dynamical system contexts," in Kurt Dopfer (ed.), *The Evolutionary Foundations of Economics*, Cambridge University Press, 2005, pp.149-194.

## Topography of the AI Act

The EU Artificial Intelligence Act crystallizes its risk-aversion paradigm through a meticulously stratified regulatory topography that partitions algorithmic systems across three juridical zones demarcated by escalating intervention intensity. At the prohibitive apex, Article 5 establishes an *absolute exclusion perimeter* banning eight categories of "unacceptable risk" applications—including subliminal manipulation technologies, exploitation of vulnerable groups, social credit scoring systems, predictive policing absent factual basis, indiscriminate biometric harvesting, emotion recognition in sensitive contexts (education/workplace/law enforcement), and real-time remote biometric identification in public spaces (with narrowly construed exceptions). These categorical proscriptions surgically excise applications deemed intrinsically corrosive to fundamental rights, functioning as preemptive containment against algorithmic dignitary harms. The regulatory core constitutes a *high-risk containment zone* enumerated in Annex III—spanning critical infrastructure, educational admissions, employment screening, public benefit allocation, law enforcement, and migration control—where Articles 8-15 impose mandatory conformity regimes requiring documented risk management systems, data governance protocols, technical documentation, logging mechanisms, transparency interfaces, human oversight provisions, and cybersecurity safeguards, all subject to pan-European registration per Article 71. Crucially, the Act constructs a vast *innovation preserve* through Article 6's risk-threshold modulation: Annex III's restrictive taxonomy narrowly targets public-sector decision systems while permitting providers to self-certify non-material risk impacts (Article 6(3)) through simplified filings (Article 6(4)), thereby exempting the majority of commercial AI deployments from substantive obligations. Minimal-risk systems face only residual transparency duties (Article 50's interaction disclosures) or voluntary codes of conduct (Article 95), shielded from Member State augmentation by the Act's regulatory preemption clause. This tripartite architecture reveals the AIA's foundational regulatory geometry—not comprehensive technological governance but precisely calibrated risk circumvention. By concentrating compliance burdens on narrowly circumscribed high-risk applications while constructing regulatory firebreaks around prohibited uses and innovation zones, the framework manifests what administrative law scholars term "targeted containment governance": maximizing political control over perceptible threats while minimizing friction for commercial experimentation. The resulting regulatory landscape thus functions less as a unified governance ecosystem than as a partitioned containment field—where algorithmic risk management supersedes rights-based frameworks through geometrically precise jurisdictional partitioning.

The Artificial Intelligence Act's approach to public sector applications epitomizes the fundamental tension between its risk-aversion paradigm and the complex realities of algorithmic governance in administrative systems. Despite profound scholarly debates surrounding automated decision-making (ADM)—including foundational questions about algorithmic legitimacy, machine learning interpretability constraints, pre-judicial review mechanisms, and liability frameworks for autonomous systems—the Act conspicuously avoids establishing dedicated procedural safeguards or substantive rights architectures for public administration. Instead, it awkwardly grafts public sector obligations onto its product safety framework through Articles 26-27, creating fragmented accountability islands. These provisions

mandate that governmental deployers of Annex III[40] high-risk systems conduct fundamental rights impact assessments (Article 27, notably stripped of mandatory consultation requirements compared to parliamentary proposals), register deployments in the EU database (Article 26(8) with restricted transparency for law enforcement systems), ensure human supervisors possess requisite competence (Article 26(2)), maintain input data representativeness (Article 26(4)), preserve operational logs (Article 26(6)), provide exposure notifications to affected individuals (Article 26(11)), and deliver *ex officio* "clear and meaningful explanations" of algorithmic role in consequential decisions (Article 86)—extending this transparency obligation to legal persons while implicitly prohibiting fully opaque "black box" systems.

These represent incremental advances in administrative transparency, particularly Article 86's linkage to traditional statement-of-reasons doctrines. Yet the regulatory architecture suffers from critical limitations: the narrow Annex III scope excludes vast swaths of municipal algorithms from scrutiny; delayed implementation timelines (extending to 2030 for public sector compliance) create dangerous governance vacuums; and law enforcement opacity provisions undermine accountability. Most revealingly, Article 26(3) explicitly permits Member States to impose stricter safeguards—including ADM prohibitions, machine learning restrictions, or enhanced explanation rights—effectively acknowledging the Act's minimalist baseline as insufficient for public sector realities. This sovereignty override mechanism inadvertently demonstrates the regulation's core deficiency: its product safety origins render it fundamentally misaligned with administrative law's normative foundations, substituting targeted risk containment for comprehensive governance. The resulting framework constitutes what comparative public lawyers term "regulatory avoidance"—deploying sectoral instruments to circumvent deeper constitutional questions about algorithmic authority in democratic systems. By treating governmental AI as merely another high-risk product category rather than reconceptualizing administrative procedures for algorithmic age, the Act reveals its profound institutional timidity in addressing state power's digital transformation.

In summary, the Artificial Intelligence Act crystallizes the European Union's distinctive risk-aversion governance model through its systematic transplantation of product safety regulatory frameworks, implementation of stratified risk classification, and targeted intervention architecture that simultaneously prohibits high-risk applications while deregulating low-innovation zones. This legislative geometry—prioritizing market functionality over rights protection—produces a minimalist regulatory baseline particularly evident in its approach to public sector AI deployment. While Articles 26-27 introduce nominally significant obligations (impact assessments, registration protocols, and explanation rights), these provisions remain fundamentally constrained by the legislation's core market-harmonization logic under TFEU Article 114. The resulting framework constitutes what comparative regulatory scholars term a "lowest common denominator" approach: prioritizing systemic risk containment and internal market coherence while relegating fundamental rights safeguards and administrative due process considerations to subsidiary status. By avoiding comprehensive rights-based frameworks for automated decision-making and instead grafting limited procedural requirements onto its product-safety foundation, the Act

[40] EU, *Artificial Intelligence Act, Annex III: High-Risk AI Systems Referred to in Article 6(2)*, https://artificialintelligenceact.eu/annex/3/.

effectively institutionalizes regulatory avoidance of deeper constitutional questions surrounding algorithmic state power. Consequently, the legislation's practical efficacy in mitigating public sector risks will be determined less by its own provisions than by subsequent Member State enhancements—a delegation that simultaneously reveals the regulation's inherent limitations and transforms national legislatures into crucial laboratories for testing the viability of Europe's fragmented algorithmic governance model. This structural compromise underscores the central paradox of the EU's approach: a regulation ambitious in its jurisdictional reach yet fundamentally constrained by its institutional DNA as a market-harmonization instrument ill-suited to govern algorithmic exercises of state authority.

### D. Constitutional Reinforcement of the Risk-Averse Paradigm Embedded in the EU AI Act

The Artificial Intelligence Act's adoption of product safety governance reflects the EU's constitutional architecture of limited conferred competences—a structural determinant that fundamentally constrains algorithmic governance innovation. As enshrined in Article 5(2) TEU's principle of conferral, "the Union shall act only within the limits of the competences conferred upon it by the Member States," creating constitutional paradox of digital rights protection wherein fundamental rights cannot independently trigger legislative action. This competence bifurcation manifests acutely in Article 51(2) of the Charter of Fundamental Rights, which explicitly states the Charter does not extend the field of application of Union law beyond the powers of the Union, rendering rights protection perpetually subsidiary to market functionality. Consequently, EU legislative instruments must perpetually navigate the treacherous waters between rights rhetoric and competence reality," resulting in regulatory frameworks that systematically privilege economic harmonization over constitutional innovation.[41] The Court of Justice's jurisprudence further crystallizes this constraint through its "dual objectives test," requiring that any rights-protective measure must demonstrate internal market harmonization as its primary purpose—a constitutional straightjacket forcing regulations like the AIA to camouflage rights protections as market-corrective mechanisms.

Within this constitutional architecture, TFEU Article 114 operates not merely as legal basis but as institutional camouflage—enabling rights-adjacent governance while avoiding competence overreach. The provision's requirement that legislation must primarily aim to "establish or maintain internal market functioning" compels regulatory ventriloquism: articulating rights protections through market-harmonization vocabulary.[42] This explains the AIA's framing as eliminating "regulatory disparities [that] create obstacles to the free movement of AI systems" rather than establishing positive rights frameworks. The Court's jurisprudence in *Digital Rights Ireland* and *Schrems* confirms that even where regulations produce significant rights protections, such outcomes remain constitutionally valid only as "incidental effects" rather than primary objectives—a doctrinal position of "constitutional avoidance through market

[41] Hans-W. Micklitz, Oreste Pollicino, Amnon Reichman, Andrea Simoncini, Giovanni Sartor, and Giovanni De Gregorio, *Constitutional Challenges in the Algorithmic Society*, Cambridge University Press, 2022, p.29.
[42] Giovanni De Gregorio, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society*, Cambridge University Press, 2022, p.112.

instrumentalism". Consequently, Article 86's explanation right exists not as autonomous transparency guarantee but as market-corrective measure against "regulatory uncertainty hindering cross-border AI deployment." This constitutional ventriloquism extends to the legislation's risk classification system, where prohibitions on social scoring or real-time biometric surveillance derive legitimacy not from inherent rights violations but from "market-distorting practices." The structural outcome is rights protection trapped in market-functionalist logic—a constitutional compromise preventing comprehensive algorithmic governance.

The competence constraints produce three constitutional pathologies in algorithmic governance: regulatory fragmentation, rights minimalism, and institutional timidity. First, the market-harmonization imperative fragments digital constitutionalism into sectoral regimes—data protection (GDPR), platform governance (DSA), and now AI regulation—preventing holistic approaches to algorithmic power. Second, the "incidental effects" doctrine creates "lowest common denominator constitutionalism": rights protections calibrated to minimally satisfy market functionality rather than maximally secure democratic values. This explains the AIA's exclusion of non-market-relevant public sector applications like social welfare algorithms from high-risk classification. Third, the competence limitations institutionalize constitutional timidity—avoiding direct confrontations with member state sovereignty that might trigger competence challenges. This manifests in regulations that address symptoms of algorithmic power while avoiding root causes," particularly regarding public sector deployment where national prerogatives remain sacrosanct. The resulting governance model exemplifies Europe's constitutional adaptation dilemma: attempting 21st-century algorithmic governance through 20th-century constitutional frameworks—producing regulations simultaneously ambitious in jurisdictional reach yet constrained in normative vision.

## E. Ethics Run First: HLEG's Tripartite Mechanism for Institutionalizing AI Governance

The High-Level Expert Group on Artificial Intelligence (HLEG) functioned as the catalytic architect in transmuting abstract ethical principles into binding legislative architecture within the EU's regulatory ecosystem. Its seminal Ethics Guidelines[43] established a tripartite construct—legality (adherence to existing law), ethicality (dynamic value alignment), and robustness (socio-technical safeguards)—that reconceptualized technological risk as systemic societal hazard. By anchoring this framework in fundamental rights jurisprudence, HLEG expanded conventional risk parameters beyond technical failures to encompass three-dimensional threats: individual rights infringements, institutional corrosion, and environmental externalities. This ethical reframing manifested through seven operational imperatives spanning human agency oversight to environmental wellbeing—effectively constructing what might be termed constitutional ethics for algorithmic governance. Crucially, this framework rejected sectoral siloes, instead proposing integrated oversight mechanisms applicable across public and private domains, reflecting Europe's precautionary

[43] High-Level Expert Group on AI, *Ethics Guidelines for Trustworthy AI,* https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai.

constitutionalism in digital transformation.

HLEG's transformative contribution materialized through its development of the Assessment List for Trustworthy AI (ALTAI)—a reflexive governance tool bridging ethical abstraction and regulatory concreteness. By translating ethical requirements into context-specific assessment protocols, ALTAI mandated full lifecycle ethical impact assessments, instituting no-compromise deployment thresholds. This operational schema introduced three radical innovations: first, it embedded continuous ethical auditing throughout development pipelines, prefiguring ex-ante conformity assessments; second, its risk-tiering methodology calibrated obligations to harm criticality, establishing the conceptual foundation for prohibited/high-risk taxonomies; third, it incorporated strong precautionary principles against unacceptable ethical trade-offs, directly informing categorical prohibitions. Through ALTAI, HLEG pioneered participatory constitutionalism—democratizing ethical governance through accessible self-assessment tools while preserving regulatory oversight. However, this vision exceeded constitutional competence boundaries, foreshadowing legislative compromises.

The final legislative text reveals profound constitutional constraints on HLEG's ethical architecture through selective incorporation and substantive dilution. While Article 1 nominally enshrines core objectives, it surgically excises the tripartite construct, reducing it to diluted principles. Similarly, recital provisions reference foundational requirements but demote them to non-binding considerations. Most significantly, the Act narrows systemic risk paradigms to individual rights violations, constructing a tiered hierarchy that excludes collective societal/environmental harms. Consequently, mandated safeguards apply only to enumerated high-risk systems, excluding environmental impact assessments despite their prominence in preparatory documents.[44] This epistemic narrowing reflects competence ventriloquism—distorting normative ambitions to fit internal market legal frameworks. The fundamental rights impact assessment mechanism exemplifies this contraction: comprehensive evaluations proposed for significant-impact systems became restricted to public-sector deployers of narrowly defined high-risk applications. Stakeholder participation and third-party auditing—cornerstones of democratic governance models—were relegated to voluntary codes and limited consultations, completing the procedural evisceration of algorithmic accountability.

The ethical framework established by the High-Level Expert Group (HLEG) fundamentally operates as a mechanism for the pre-distribution of risks. It translates abstract human rights discourse into concrete technical metrics—quantifying "fairness" as algorithmic bias detection standards, and materializing "accountability" through specifications for log recording and audit interfaces. This transformation extracts ethical principles from philosophical debates and integrates them into the product design lifecycle. The European Commission explicitly acknowledged in its AI Act proposal that "HLEG's work provides the scientific basis for classifying high-risk AI

[44] Nathalie A. Smuha, "The Work of the High-Level Expert Group on AI as the Precursor of the AI Act," in Ceyhun, Necati Pehlivan, Nikolaus Forgó and Peggy Valcke (eds), *AI Governance and Liability in Europe: A Primer*, Wolters Kluwer, 2025, chapter 3.

systems."[45] Article 6 of the Act designates eight application scenarios as high-risk domains, with classifications such as recruitment screening, credit assessment, and predictive policing directly deriving from HLEG's conceptualization of "societally critical fields." Crucially, Article 15 mandates high-risk systems to implement risk management systems, data governance mechanisms, and automated logging—constituting the regulatory codification of HLEG's principle of technical robustness.

The ethically-prefixed legislative trajectory reflects the EU's regulatory philosophy: deploying moral legitimacy to cloak techno-regulatory trade barriers. The HLEG Guidelines' emphasis on "European-values-oriented AI" manifests provisions demonstrably skewed toward protecting entrenched industrial interests. For instance, "transparency" mandates requiring disclosure of training data sources ostensibly safeguard informational rights, yet operationally inflate compliance costs to undermine the competitive advantage of US data-driven enterprises. Concurrently, "environmental well-being" clauses mandating computational energy disclosures directly target energy-intensive North American large model manufacturers. This strategic continuity materializes in the AI Act's tiered regulatory architecture: General-Purpose AI (GPAI) models face prescriptive obligations—including model evaluation and systemic risk monitoring—whose stringency substantially exceeds international benchmarks like OECD standards. While EU institutions recurrently proclaim "ethics as Europe's distinctive AI advantage," this rhetoric functionally reconstructs global competition rules through moral discourse, transmuting ethical standards into de facto market access barriers.

However, ethicalized legislation confronts three intrinsic tensions. First, the disjuncture between principles and praxis: While HLEG mandates algorithmic decisions to "avoid unfair bias," predictive policing systems like the Netherlands' SyRI—widely deployed across EU law enforcement agencies—have been repeatedly deemed non-compliant by courts due to ethnic discrimination, exposing the absence of binding enforcement mechanisms for ethical standards in the public sector. Second, governance cost-shifting effects: Small and medium enterprises bear burdens like third-party compliance assessments and data governance documentation, whereas large corporations satisfy requirements merely through internal ethics committees, thereby exacerbating market concentration. Third, conceptual ambiguity in ethical constructs: Article 5 of the AI Act prohibits subliminal techniques distorting human behavior, yet the European Parliament sanctioned Germany's use of Precobs predictive crime analysis software—which infers individual criminal propensity from environmental markers, constituting behavioral manipulation in essence. This contradiction reveals the subjectivity inherent in ethical boundaries, ultimately necessitating reliance on regulatory discretion.

The European regulatory paradigm demonstrates how the elevation of risk aversion to a legislative lodestar facilitates the instrumentalization of ethics as technopolitical apparatus. While the High-Level Expert Group (HLEG) framework ostensibly provided the theoretical blueprint for the Artificial Intelligence Act, its substantive legacy resides in constructing a Eurocentric governance discourse that

[45] P*roposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, COM/2021/206 final.

enables Brussels to pursue digital sovereignty expansion under the legitimizing guise of human rights protection. This strategic positioning—epitomized by the co-option of ethical rhetoric to advance unilateral regulatory standards—effectively transforms moral imperatives into market access barriers through the so-called "Brussels Effect." Such regulatory entrepreneurship carries significant developmental consequences: by codifying ethical principles into rigid compliance checklists (exemplified by Annex III's prescriptive requirements for high-risk systems), the framework drastically constricts technological iteration space. Innovation becomes confined to risk-averse incrementalism within predetermined regulatory grids, as evidenced by the prohibitive conformity assessment burdens placed on general-purpose AI models under Articles 52-55. The resultant compliance-industrial complex disproportionately advantages incumbent entities with established legal infrastructure while erecting de facto entry barriers for emergent economies' technological leapfrogging—a paradoxical outcome wherein Europe's ethics-centric posture ultimately functions as industrial policy by other means, privileging regulatory capital accumulation over genuine ethical leadership in the global AI development landscape.

## F. Risk-Averse Compromises Stemming from Divergent Institutional Agendas in EU Policymaking

The legislative trajectory of the European Union's Artificial Intelligence Act (AI Act) reveals fundamental tensions arising from the tripartite institutional architecture governing EU decision-making, where competing value orientations and jurisdictional competencies generate regulatory compromises privileging risk minimization over substantive rights protection. As the initiating body, the European Commission anchored its proposal exclusively in Article 114 of the Treaty on the Functioning of the European Union (TFEU), which provides legal basis for internal market harmonization measures. This foundational choice predetermined the Act's conceptual architecture as an instrument for eliminating regulatory fragmentation across member states rather than establishing autonomous human rights safeguards. Consequently, the risk-tiered regulatory model functions primarily as an economic coordination mechanism to standardize product safety requirements, reducing fundamental rights considerations to derivative obligations (Recital 5). The Commission's circumscribed approach manifests in Annex III's selective enumeration of high-risk domains, where politically sensitive sectors—particularly law enforcement and border control applications—were strategically omitted to accommodate national sovereignty concerns. This institutional self-limitation exposes a constitutive paradox: when attempting to classify technologies like facial recognition as high-risk, regulators must demonstrate direct impediments to cross-border trade rather than prove substantive rights violations, forcing market logic to supersede normative protections.

The Council of the European Union, representing member state interests, further entrenched this defensive regulatory posture through provisions prioritizing national discretion over collective security. Its introduction of the "pure ancillary exception" clause (Article 6(3)) enables commercial entities to self-certify exemption from high-risk classification through subjective risk assessments, fundamentally undermining regulatory predictability. More critically, during intergovernmental negotiations, the Council secured sweeping exemptions for real-time remote biometric identification—limiting prohibitions to narrowly defined public spaces—while instituting a six-year transitional period (until 2030) for migration management systems. These concessions

institutionalize asymmetrical accountability: private-sector recruitment algorithms face comprehensive transparency mandates, whereas law enforcement deployments of analogous technology require only minimal disclosure. The Council's most consequential intervention remains Article 2(3)'s categorical exclusion of national security applications, which wholly removes military and intelligence systems from the regulatory purview. This exemption demonstrates the structural subordination of risk governance principles when confronted with assertions of sovereign prerogative, revealing the Act's limited capacity to constrain state power even where AI systems pose demonstrable threats to democratic integrity.

Countervailing pressures emerged from the European Parliament, which sought to recalibrate the legislation toward fundamental rights protection through expanded risk classifications and enhanced oversight mechanisms. Parliamentarians advocated for including predictive policing and biometric surveillance within prohibited practices while proposing stringent ex-ante conformity assessments for public-sector AI deployments. Yet these efforts confronted immutable constraints of the EU's constitutional framework: attempts to anchor the legislation in TFEU Article 16 (requiring stronger fundamental rights justification) were overruled, preserving the internal market legal basis that structurally limits rights-based obligations. The Parliament's most significant achievement—mandating fundamental rights impact assessments for high-risk public applications—was diluted through discretionary implementation clauses and exempted critical infrastructure systems. Consequently, while the final text incorporates rhetorical commitments to democratic values, its operational provisions lack effective enforcement mechanisms, reducing rights protection to procedural formalism rather than substantive guarantee. This institutional triangulation produced a regulatory framework that ritualistically invokes ethical principles while codifying market-preserving compromises that privilege risk-averse incrementalism over transformative governance.

The AI Act's negotiated outcomes carry profound implications for global AI governance trajectories and technological sovereignty. By enshrining national security exemptions and sectoral carve-outs, the EU has effectively created jurisdictional arbitrage opportunities that incentivize high-risk AI development within exempted domains. This regulatory fragmentation risks catalyzing "governance havens" where member states can deploy societally consequential systems without transnational oversight—potentially undermining the single market integrity the Act purports to protect. Moreover, the six-year implementation grace period for migration systems creates perverse developmental incentives: it allows continuous refinement of automated border technologies while deferring compliance costs, effectively subsidizing innovation in high-risk applications through temporal exemptions. Such sectoral and temporal asymmetries distort innovation pathways toward ethically contested domains while postponing accountability frameworks.

The institutional compromises manifest in the AI Act reveal broader tensions in transnational technology governance between risk regulation and innovation ecosystems. Europe's pursuit of standardized risk mitigation—while normatively ambitious—creates compliance architectures disproportionately burdensome for smaller economies seeking technological catch-up. The complex conformity assessment protocols for general-purpose AI systems (Articles 52-55) necessitate specialized legal and technical infrastructures inaccessible to many developing

jurisdictions. Consequently, the Brussels Effect—whereby EU regulations become de facto global standards—may inadvertently erect market entry barriers that consolidate technological advantages among incumbent economies while restricting policy space for alternative developmental approaches. This regulatory stratification risks calcifying global AI innovation hierarchies rather than fostering equitable technological diffusion.

Ultimately, the AI Act exemplifies how multilayered governance structures generate regulatory lowest common denominators when confronting politically contested technologies. Its risk-averse compromises reflect institutional path dependencies more than principled governance innovation, with significant implications for how emerging economies might navigate the tension between technological adoption and regulatory sovereignty in the age of algorithmic governance.

The European Parliament's aspirational posture as a guardian of fundamental rights ultimately proved institutionally constrained, as its normative ambitions became subsumed within the Act's product safety paradigm. Parliamentary efforts to reconstitute the legal foundation through TFEU Article 16—which would have established algorithmic transparency and non-discrimination as autonomous rights rather than derivative compliance objectives—foundered against the EU's constitutional architecture governing competence allocation. While successfully embedding Fundamental Rights Impact Assessments (FRIAs) into Article 27,[46] their operational substance was hollowed out through implementation mechanisms that privilege technical standardization over normative deliberation. By delegating assessment criteria to bodies like CEN/CENELEC—entities possessing industry-aligned expertise profiles but deficient in human rights jurisprudence—the framework reduces complex rights interrogations to engineering checklists. Similarly, the individual redress mechanism under Article 78 creates illusory empowerment: by funneling complaints through national market surveillance authorities rather than enabling direct judicial recourse, it institutes bureaucratic filtration that systematically disintermediates citizens from substantive justice. This structural subordination of rights enforcement exposes the Act's core contradiction: its translation of ethical principles into quantifiable technical parameters (such as algorithmic bias thresholds) facilitates the reduction of human rights adjudication to compliance auditing, transforming fundamental freedoms into mere checkbox exercises within risk management protocols. The resulting procedural formalism signifies not merely institutional compromise but epistemological capitulation—where the metricization of rights protection evacuates their substantive constitutional content.

The intricate institutional negotiations surrounding the EU Artificial Intelligence Act culminated in legislation that functions substantively as a product safety framework cloaked in fundamental rights rhetoric. This legislative outcome represents the convergence of three distinct institutional imperatives: the European Commission's unwavering commitment to market integration through regulatory harmonization, the Council's staunch defense of national sovereignty through expansive exemptions, and the Parliament's aspirational but institutionally constrained ethics agenda. These competing vectors compressed the regulatory ambition into a

[46] "Article 27: Fundamental Rights Impact Assessment for High-Risk AI Systems", *EU Artificial Intelligence Act*, https://artificialintelligenceact.eu/article/27/.

constitutional least common denominator—producing an instrument that prioritizes technical compliance over substantive rights protection. This outcome starkly illustrates the inherent limitations of risk-aversion governance models while exposing a foundational dilemma in EU digital policymaking: absent explicit competence to legislate directly on human rights (as constrained by the principle of conferral under TEU Article 5), attempts to retrofit product safety frameworks to serve fundamental rights objectives inevitably generate regulatory incoherence. The structural mismatch between market-making legal bases (TFEU Article 114) and rights-protective aspirations creates an irreconcilable tension that manifests as institutional self-defeat—where procedural compliance displaces normative commitment, and algorithmic governance becomes reduced to box-ticking exercises that privilege risk management over emancipatory potential.[47] This constitutional bind ultimately reveals the Act as a monument to the EU's constrained capacity to reconcile economic integration with rights-based technological governance.

Table 3: Positions and Compromises of the Three EU Institutions in the Drafting of the AI Act

| Institution | Value Position | Regulatory Approach | Impact and Compromise Outcomes |
|---|---|---|---|
| **European Commission** | "AI Market Values": Positions the AI Act as internal market legislation aimed at creating an AI market aligned with EU values (including fundamental rights protection), balancing innovation and rights. | Risk-based classification: High-risk AI systems subject to strict requirements (e.g., ex-ante conformity assessment, post-market monitoring). Provider-centric regulation: Obligations primarily target AI providers; limited direct individual rights. Exception management: Limited exceptions permitted in law enforcement and national security domains. | Impact: Initial proposal established an AI risk classification framework (Art. 6), though fundamental rights protections were weak and individuals lacked direct redress. Compromise: Core risk classification retained but modified (e.g., transition from "automatic list" to hybrid methodology in final Art. 6). |

[47] Francesca Palmiotto, "The AI Act Roller Coaster: The Evolution of Fundamental Rights Protection in the Legislative Process and the Future of the Regulation," *European Journal of Risk Regulation* (2025), 1–24, doi:10.1017/err.2024.97.

| | | | |
|---|---|---|---|
| **Council of the EU** | "Balanced AI": Prioritizes national security, law enforcement, and migration control; views AI as a "tool" rather than a threat. Advocates trade-offs between fundamental rights and public safety, reducing regulatory burdens to enhance operational efficiency. | Self-assessment of risk: Introduces "purely ancillary" exception (Art. 6(3)), allowing providers to self-determine high-risk status. Broad exceptions: Expands exemptions in law enforcement, migration, defense, and national security (e.g., biometrics, database exclusions). Reduced transparency: Opposes public registration of high-risk AI systems to protect sensitive information. | Impact: Successfully expanded exception scope (Art. 2(3) excludes national security); removed law enforcement use cases (e.g., crime analysis, document verification) from high-risk list. Compromise: Dominated trilogue outcomes:<br>– Real-time biometrics partially permitted in public spaces (law enforcement excluded);<br>– Transition period granted for migration management AI systems (until 2030);<br>– Resulted in "double standards"*: weaker fundamental rights protection in law enforcement/migration domains. |
| **European Parliament** | "Human-Centric AI": Centers fundamental rights, democracy, and rule of law; emphasizes comprehensive societal risks of AI. Advocates strict protection of individual rights, prohibition of harmful practices, and global promotion of EU values. | Rights-oriented: Introduces new individual rights (e.g., right to explanation, complaint mechanism) and Fundamental Rights Impact Assessment (FRIA). Expanded prohibitions: Bans social scoring, emotion recognition, etc., and restricts exceptions. Enhanced transparency: Mandates public registration of high-risk AI systems, including public authorities. Proposed legal basis shift: Sought to replace Art. 114 TFEU (internal market) with Art. 16 TFEU (fundamental rights). | Impact: Pushed for social scoring ban, FRIA (Art. 29a), and individual rights (e.g., right to explanation). Compromise: Partial success:<br>– Social scoring fully prohibited;<br>– FRIA and individual complaint rights incorporated into final text;<br>– Key concessions: Legal basis unchanged (Art. 114 retained); law enforcement exceptions maintained (e.g., emotion detection permitted); public registration transparency limited in national security contexts. |
| Overall Compromise<br>Trilogue Outcomes: Key compromises reached among the three institutions:<br>1. Risk Classification: Hybrid methodology (provider self-assessment + monitoring mechanisms), balancing automatic listing (Commission) and flexibility (Parliament/Council).<br>2. Rights Protection: Enhanced individual rights (explanation, complaints) but entrenched "double standards" in law enforcement/migration.<br>3. Exception Management: National security fully excluded (Council influence); broad law enforcement exceptions (e.g., biometrics); migration systems granted transition period.<br>4. EDPB-EDPS Recommendations: 10 fully implemented (e.g., FRIA), 7 partially implemented (e.g., transparency), 5 not implemented (e.g., inclusion of international law enforcement cooperation). | | | |

Note: *"Double standards"* denotes significantly weaker fundamental rights safeguards in law enforcement and migration contexts compared to commercial/private sectors.

## III. THE PRIMACY OF SECURITY IN THE U.S. GOVERNANCE PARADIGM

The legislative architecture governing artificial intelligence in the United States crystallizes as a *security-first* paradigm, strategically deploying regulatory restraint to preserve technological hegemony while institutionalizing security exceptions for systemic containment. While Anu Bradford's characterization of the U.S. approach as "market-led" accurately reflects domestic industrial dynamism, it obscures a foundational contradiction: market vitality arises not from proactive policy design but from deliberate federal inaction. The absence of comprehensive federal AI legislation constitutes a calculated institutional vacuum—engineered through platform liability exemptions (*Communications Decency Act* § 230), attenuated antitrust enforcement, and unconstrained cross-border data flows—to minimize compliance burdens for domestic enterprises. This regulatory arbitrage consolidates U.S. dominance across global AI value chains, transforming legislative abstention into an industrial policy instrument.

As the National Security Commission on Artificial Intelligence (NSCAI)[48] underscores, this framework serves transcendent strategic objectives: "We know adversaries are determined to turn AI capabilities against us. We know China is determined to surpass us in AI leadership. We know advances in AI build on themselves and confer significant first-mover advantages. Now we must act. The principles we establish, the federal investments we make, the national security applications we field, the organizations we redesign, the partnerships we forge, the coalitions we build, and the talent we cultivate will set America's strategic course." [49] Congressional assessments reinforce this duality, observing that domestic deregulation accelerates innovation cycles while export controls on semiconductor manufacturing equipment and CFIUS screening mechanisms enforce strategic denial against competitors.[50]

The operationalization of security exceptions manifests through extraterritorial instruments like the *CHIPS and Science Act*'s "guardrails," which condition subsidies on export restrictions targeting advanced semiconductor technologies. [51] Such measures exemplify targeted decoupling—preserving global innovation networks while constraining adversarial access to dual-use capabilities. Concurrently, the *Belfer Center* documents how data flow liberalization, framed as market freedom, functionally enables intelligence advantages through extraterritorial data access (*CLOUD Act*

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[48] The **National Security Commission on Artificial Intelligence (NSCAI)** was a **statutory federal advisory commission** established under Section 1051 of the *John S. McCain National Defense Authorization Act for Fiscal Year 2019* (Pub. L. 115-232) to conduct a comprehensive assessment of AI's implications for U.S. national security and competitiveness, culminating in its authoritative 756-page Final Report (2021) that provided strategic recommendations—including the creation of the JAIC and export controls on semiconductor manufacturing equipment—directly shaping U.S. AI policy until its statutory expiration in October 2021.

[49] National Security Commission on Artificial Intelligence, *Final Report*, p.14, https://reports.nscai.gov/final-report/.

[50] Congressional Research Service, *Artificial Intelligence and National Security*, updated August 26, 2020, https://www.congress.gov/crs_external_products/R/PDF/R45178/R45178.8.pdf.

[51] *CHIPS and Science Act*, Pub. L. 117-167 §10302 (2022).

provisions).[52] This bifurcated governance architecture—domestic permissiveness coupled with externalized security barriers—transcends the "market-led" descriptor, revealing security imperatives as the axial force shaping America's AI trajectory.

Ultimately, the U.S. model exemplifies *techno-strategic statecraft*: market freedoms are instrumentalized to sustain structural asymmetries in the global technological order, while security mechanisms enforce hierarchical control over foundational infrastructure. This calibrated imbalance reflects not regulatory failure but sophisticated geoeconomic design—where innovation ecosystems become vectors for perpetuating systemic advantage in an era of algorithmic statecraft.

## A. Make No Law: Strategic Non-Legislation as Industrial Policy

The United States' deliberate abstention from comprehensive federal artificial intelligence legislation constitutes a calculated regulatory vacuum—a geoeconomic instrument designed to preserve structural advantages in the global technological hierarchy. While superficially characterized as "market-led," this paradigm operates through a doctrine of *strategic non-legislation*: systematic avoidance of binding federal frameworks governing data governance, algorithmic accountability, and computational infrastructure. This institutional void manifests through three mutually reinforcing mechanisms:

First, the persistent rejection of omnibus legislation creates jurisdictional fragmentation. Without federal standards, regulatory authority defaults to state legislatures, yielding a patchwork of contradictory requirements—from New York City's algorithmic bias audits to Connecticut's data privacy opt-outs. Large technology companies disproportionately influence state-level rulemaking through concentrated lobbying resources, effectively exporting California's permissive standards nationwide.[53]

Second, federal agencies substitute binding rules with voluntary frameworks. NIST's AI Risk Management Framework operates as a technical fig leaf—providing normative cover while preserving industry autonomy. Similarly, the White House's *Blueprint for an AI Bill of Rights* (2022)[54] explicitly disclaims regulatory intent,

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[52] Greg Allen and Taniel Chan, *Artificial Intelligence and National Security, A study on behalf of Dr. Jason Matheny, Director of the U.S. Intelligence Advanced Research Projects Activity (IARPA)*, Harvard Kennedy School Belfer Center for Science and International Affairs, 2017, https://www.belfercenter.org/sites/default/files/pantheon_files/files/publication/AI%20NatSec%20-%20final.pdf.

[53] California Privacy Protection Agency (CPPA), *Annual Report on AI Governance*, 2025.

[54] The White House's Blueprint for an AI Bill of Rights (October 2022) is a non-binding white paper published by the Office of Science and Technology Policy (OSTP) that outlines five aspirational principles—Safe and Effective Systems, Algorithmic Discrimination Protections, Data Privacy, Notice and Explanation, and Human Alternatives—to guide ethical AI development in the United States, explicitly disclaiming legal enforceability (*Legal Disclaimer*: "non-binding and does not constitute U.S. government policy") while functioning as a sector-agnostic toolkit for policymakers and industry to align automated systems with democratic values. See The White House, *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People*. Washington, DC: Office of Science and Technology Policy, 2022, https://bidenwhitehouse.archives.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf

functioning instead as "aspirational guidance" without enforcement mechanisms. This soft governance architecture intentionally cultivates compliance asymmetries: while small enterprises struggle with divergent state requirements, multinationals navigate regulatory heterogeneity through centralized legal teams.

Third, statutory carve-outs immunize core revenue models. Section 230 of the *Communications Decency Act* remains the doctrinal linchpin, insulating platform operators from liability for algorithmically amplified content. This immunity creates a perverse innovation incentive: firms prioritize engagement-optimizing architectures precisely because legal accountability remains surgically exempted. Concurrent relaxation of antitrust enforcement—particularly regarding data aggregation—further entrenches incumbency advantages.

This tripartite strategy achieves what we may call "innovation through institutional vacuum": deregulation becomes de facto industrial policy, lowering marginal costs for domestic firms while externalizing compliance burdens onto global markets. The resulting equilibrium—fragmented domestic governance coupled with extraterritorial security controls—epitomizes America's techno-strategic statecraft: leveraging legal absence as competitive advantage in the algorithmic century.

This posture of legislative restraint fundamentally trades institutional elasticity for innovation capacity. Repeated congressional deferrals of proposals such as the *Algorithmic Accountability Act* and *Facial Recognition Technology Ban Act* stem from a core calculus: avoiding rigid frameworks that might constrain technological iteration velocity. Silicon Valley capital's catalytic role in this strategy remains pivotal—venture capital firms leverage political contributions and lobbying networks (e.g., TechNet) to pressure legislators toward "innovation-friendly" regulatory designs. During the drafting of the Biden administration's *Executive Order on Safe, Secure, and Trustworthy AI Development and Use* (EO 14110), corporations including Microsoft and Google successfully negotiated the replacement of mandatory safety testing with voluntary commitment mechanisms.

This capital-policy feedback loop effectively anoints market forces as de facto regulatory arbiters, externalizing social costs onto the public sphere: algorithmic discrimination claims rely on the anachronistic *Civil Rights Act of 1964*, while consumer privacy protections hinge on the structurally inadequate *Fair Credit Reporting Act of 1970*. Such jurisprudential misalignment creates a governance chasm where legal remedies lag exponentially behind technological realities, institutionalizing asymmetric accountability regimes. The resulting paradigm exemplifies regulatory capture through temporal arbitrage—where statutory obsolescence becomes instrumentalized as competitive advantage.

At the federal level, the United States exhibits pronounced legislative restraint in domestic AI governance—a façade of "market-led" policy that masks institutional design subservient to national security imperatives. The H.R.1 Bill (*One Big Beautiful Bill Act*) epitomizes this duality through its AI provisions (Subtitle C, Part II), with Section 43201 crystallizing the inherent contradiction. While ostensibly promoting AI innovation through regulatory burden reduction, the clause entrenches regulatory voids via three mechanisms:

First, it enshrines non-mandatory framework primacy by directing NIST to develop a voluntary artificial intelligence risk management framework while explicitly prohibiting its conversion into binding standards, rendering compliance entirely contingent on corporate self-regulation.

Second, it establishes a symbolic coordination mechanism—an Interagency Task Force on Artificial Intelligence—whose mandate is confined to "studying regulatory gaps" and "proposing non-binding recommendations" without rulemaking authority.

Third, it grants innovation exemption privileges through safe harbor provisions that immunize enterprises from state-level algorithmic transparency litigation, effectively constricting consumer redress channels. Crucially, subsection (c) institutes a decade-long legislative "Moratorium," prohibiting states and localities from enacting any restrictions on AI technology development or industrial expansion.

The resulting regulatory dualism—domestic permissiveness coupled with extraterritorial containment—epitomizes techno-strategic statecraft: leveraging regulatory asymmetry to maintain primacy. This bifurcated regime operationalizes market liberalization at home as the soft-power counterpart to hard-power technological containment abroad, creating a self-reinforcing cycle of innovation dominance.

## B. The Jurisprudence of Pan-Securitized Federal AI-Related Legislation

The United States' federal AI governance paradigm operates through a dialectic of domestic deregulation and extraterritorial techno-containment—a duality that crystallizes competitive securitization. While championing market freedom internally, America's external legal architecture functions as a geostrategic containment apparatus. The 2022 *CHIPS and Science Act* weaponizes national security discourse to prohibit subsidized enterprises from expanding advanced semiconductor capacity in China, while the 2024 *Protecting Americans' Data from Foreign Adversaries Act* mandates ByteDance's divestiture of TikTok—a move validated by the Supreme Court's invocation of the "national security exception" doctrine.[55] This regulatory bifucation exposes the core logic underpinning the U.S. model: domestic legislative voids reduce corporate compliance overhead to accelerate technological iteration, while extraterritorial constraints neutralize strategic competitors.

Consequently, the "market-led" characterization constitutes an epistemological misreading of American techno-governance. When Anu Bradford categorizes the U.S. approach as market-driven, she overlooks the causal relationship between federal regulatory abstention and global market dominance—the institutional vacuum that enables unfettered corporate expansion. This paradigm now confronts an autophagic paradox: enhanced external controls (e.g., AI chip export bans) intended to suppress China's technological ascent compel American enterprises toward accelerated domestic innovation under deregulated conditions, systematically subordinating civil liberties to strategic competition. The Tesla autopilot litigation crisis exemplifies this tension: corporate invocations of trade secret privilege obstructed plaintiffs' access to

[55] *TikTok v. Garland*, 145 S. Ct. 57, 2025.

algorithmic evidence, demonstrating how security imperatives erode traditional accountability mechanisms.

Contrasting sharply with domestic permissiveness, federal power assumes interventionist postures when technological development intersects with national security redlines. Contemporary legislative practice reveals security imperatives fully colonizing U.S. AI governance pathways: The *CHIPS Act* constructs semiconductor "small yard, high fences" against Chinese technological access; TikTok legislation pioneers data sovereignty-based platform restrictions; Judicial validation of executive emergency powers (*TikTok v. Garland*) establishes unprecedented digital domain discretion. This legal triad exhibits acute selectivity in targeting Chinese-affiliated entities, deploying unilateral instruments like export controls and CFIUS screening, while prioritizing technological competition over risk governance. The resulting governance architecture constitutes not market facilitation but a new mercantilism wrapped in national security rhetoric.

America's techno-legal paradigm ultimately reveals an innovation-security nexus—a recursive system wherein:

(1) Domestic deregulation fuels asymmetric R&D advancement.

(2) Export controls weaponize technological disparities.

(3) Judicial doctrines sanctify executive extraterritorial authority.

This structure operates through deliberate institutional uncoupling: divorcing innovation policy from rights protection frameworks while fusing technological development with national security apparatuses. The resultant governance model transcends conventional market-state binaries, constituting instead a form of *algorithmic realpolitik* where legislative silence functions as geoeconomic artillery in the twenty-first-century arms race.

This "internal deregulation-external rigidity" legislative duality reveals the core logic of the American model: the liberalized façade of domestic markets rests upon systematic extraterritorial constraints. By framing China's AI advancement as an existential national security threat, the United States legitimizes market-principle deviations. Semiconductor controls erode competitors' technological foundations, the TikTok prohibition disrupts cross-border data flows, and judicial rulings constitutionalize security exceptions—collectively forming a regulatory closed-loop that operates "under the banner of security for the purpose of containment." This generates a functional paradox: intensified external security legislation necessitates sustained domestic deregulation to accelerate technological iteration, ultimately subordinating user rights protection and algorithmic accountability to strategic competition imperatives. Such security-dominant unilateralism not only contrasts sharply with the EU's risk governance framework but exposes the Bradford model's structural misapprehension of legislative motives and institutional functions.

The roots of America's AI pan-securitization policy trace to Cold War techno-hegemony architectures. ENIAC's 1946 inception for Army ballistic calculations

inaugurated computing's entanglement with national security.[56] The 1950s RAND Corporation-developed JOHNNIAC system—funded by the Air Force—extended nuclear strategy's systemic analytics to computing, embedding "security as control" paradigms.[57] The 1970 Ware Report pioneered multi-user system security classification,[58] technically establishing the confidentiality-integrity-availability (CIA) triad while advancing "technological supremacy as security advantage" as policy orthodoxy.[59] The 1984 Cooperative Research and Development Act institutionalized defense technology transfer mechanisms, enabling Pentagon entities like DARPA to cultivate disruptive technologies including AI. Post-9/11, Section 215 of the Patriot Act authorized mass data surveillance, incorporating commercial data streams into national security frameworks. The 2013 Snowden revelations exposed PRISM—manifesting Schneier's "architecture hegemony" through internet infrastructure-based global surveillance networks.[60] The 2015 Cybersecurity Information Sharing Act dissolved public-private data barriers, permitting tech firms to channel user data to security agencies.

The NSCAI Final Report marked pan-securitization's theoretical maturation, incorporating microelectronics supply chains (TSMC dependence), talent flows (STEM visas), and open-source ecosystems (PyTorch) into security assessments. Its "Democratic Technology Alliance" concept functionally reconstructs exclusionary technical standards coalitions. This securitization paradigm's essence lies in converting technological ecosystem advantages into rule-making authority—achieving closed-loop control of global technology flows through EAR export controls, CFIUS screenings, and CLOUD Act extraterritoriality. As the Belfer Center notes, this constitutes rule-locking through legal instruments, completing America's transformation from market actor to regulatory architect.

The most salient manifestation of techno-securitization emerges in semiconductor and advanced computing controls. The 2022 CHIPS and Science Act—ostensibly designed to revitalize domestic chip manufacturing through $52.7 billion in subsidies—operationalizes a dual-vector containment strategy. Its "guardrail provisions" (Sections 102-107) prohibit recipients of federal funding from undertaking substantial expansion of advanced node semiconductor fabrication (sub-28nm logic chips, 128+ layer NAND/18nm half-pitch DRAM) or joint R&D initiatives in "foreign countries of concern," principally targeting China. This legislative architecture transcends conventional industrial policy, functioning as a security instrument camouflaged within economic stimulus frameworks.

Complementing this statutory regime, the Commerce Department's Bureau of Industry and Security dynamically recalibrated export controls under the Export

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[56] Scott McCartney, *ENIAC: The Triumphs and Tragedies of the World's First Computer*, New York: Walker, 1999, p.5.
[57] Paul E. Ceruzzi, *A History of Modern Computing*, Cambridge, MA: MIT Press, 2003, pp.15-28.
[58] Willis H. Ware, *Security Controls for Computer Systems: Report of Defense Science Board Task Force on Computer Security*, Santa Monica, CA: RAND, 1970, https://www.rand.org/pubs/reports/R609-1.html.
[59] Andrew J. Stewart, A Vulnerable System: The History of Information Security in the Computer Age, Cornell University Press, 2021, p.21.
[60] Barton Gellman, *Dark Mirror: Edward Snowden and the American Surveillance State*, New York: Penguin Press, 2020.

Administration Regulations (EAR). Through successive regulatory updates (15 CFR §744.23), BIS escalated computational performance thresholds for AI accelerator chips—from aggregate processing performance metrics to floating-point operations per second (FLOPS) benchmarks exceeding $3.2\times10^{19}$ operations—while introducing novel restrictions on model weight parameter transfers. These technical specifications constitute calibrated instruments to inhibit Chinese development of high-performance computing capabilities. The regulatory architecture employs adaptive thresholds that automatically capture next-generation technologies through performance-based rather than design-specific parameters, creating perpetually moving compliance targets.

Though implemented through administrative rulemaking, these controls reflect deep institutional alignment between executive agencies and legislative priorities. The bipartisan consensus underpinning this approach manifests in the "small yard, high fence" doctrine articulated in NSCAI's final recommendations (2021, pp. 152-157)—a containment philosophy prioritizing surgical restrictions on foundational technologies rather than blanket prohibitions. This calibrated governance toolkit achieves three interdependent objectives:

1. Fragmenting semiconductor supply chains through investment barriers

2. Constraining parallel computation development via algorithmic transfer controls

3. Institutionalizing technological asymmetry through self-updating performance thresholds

The cumulative effect constitutes a regulatory feedback loop where security imperatives continuously reshape trade governance mechanisms, transforming export controls from market-regulation instruments into geostrategic weapons systems. This paradigm exemplifies what the Belfer Center terms "weaponized interdependence" (2020)—leveraging American dominance in foundational technologies to enforce compliance beyond territorial jurisdictions.

The legislative targeting of specific applications manifests an equivalent national security justification paradigm. Congressional initiatives against TikTok—mandating divestiture of U.S. operations by its parent company ByteDance under penalty of prohibition—invoke purported "data security risks" and "foreign influence operations" as operative premises. This constitutes the direct application of primacy-of-national-security logic within data and content platform governance. Notwithstanding constitutional challenges under the First Amendment’s free speech protections, the legislation secured expedited bipartisan passage, underscoring the hegemonic weight accorded to national security imperatives within contemporary U.S. legislative politics.

Of particular jurisprudential significance is the U.S. Supreme Court’s disposition in related litigation. While eventual rulings may hinge on procedural or statutory interpretation grounds, the Court’s emergent doctrinal inclination—toward recognizing expansive federal discretion in countering perceived threats from foreign technology platforms—effectively legitimizes such legislation’s constitutionality, or at

minimum erects no substantive barriers. The judiciary thus functions not as a guardian of market liberties, but as a de facto collaborator in security-centric governance frameworks. This judicial posture crystallizes what legal scholars term "security exceptionalism"[61] in digital sphere regulation, wherein conventional rights protections yield to executive-branch threat narratives concerning foreign technologies.

Within the domain of military and intelligence applications of artificial intelligence, national security imperatives function as the unequivocal determinant of legislative and policy formulation. The U.S. Department of Defense leverages authority under the Defense Production Act (DPA) to mandate private entities developing high-risk AI models—particularly those with potential military or intelligence applications—to submit security testing data to governmental authorities. This statutory mechanism operationalizes what the National Security Commission on Artificial Intelligence (NSCAI) identifies as preemptive threat mitigation through industry co-option. Executive Order 14110, promulgated by the Biden administration, institutionalized this paradigm through its core provision requiring developers of foundation models deemed critical to national security, economic security, or public health to disclose safety test results pre- and post-deployment.

Despite the Trump administration's 2025 revocation of mandatory domestic testing requirements—framed as deregulation to "unleash innovation vitality"—the underlying strategic posture remained fundamentally aligned with containment objectives. Policy recalibration focused exclusively on reducing domestic compliance burdens while intensifying extraterritorial constraints, exemplified through reinforced export controls on advanced AI semiconductors and "America First" supply chain localization mandates. This regulatory choreography demonstrates what the Belfer Center characterizes as "tactical deregulation in service of strategic containment", wherein apparent policy oscillations ultimately consolidate technological asymmetry.

The persistent duality of domestic deregulation and extraterritorial restriction crystallizes the axial principle of U.S. AI governance: preservation of technological superiority vis-à-vis strategic competitors. NSCAI's foundational assertion that AI constitutes "the future core of military and economic power" (Interim Report, p. 7) manifests in concrete policy outcomes—from the algorithmic targeting of semiconductor supply chains to the extraterritorial application of data governance regimes under the CLOUD Act.

This governance architecture operates through defensive innovation ecosystems—a framework privileging security objectives over market efficiency or ethical considerations. The White House's advocacy for "democratic technology alliances" functionally legitimizes exclusionary technical standards that bifurcate global AI development pathways. Consequently, commercial entities become instruments in what the Belfer Center identifies as "supply chain weaponization", wherein private sector innovations are systematically channeled toward great-power competition objectives. This structural realignment transforms AI development from an economic enterprise into a geostrategic instrumentarium, with profound implications

[61] Aziz Z. Huq, "Against National Security Exceptionalism," *The Supreme Court Review*, Vol. 2009, No. 1 (2009), pp. 225-273.

for global technological equity and multilateral governance frameworks.

The institutional architecture and strategic documentation of U.S. artificial intelligence governance further substantiate the axial prioritization of national security imperatives. Specialized entities such as the White House AI Special Committee and the Department of Defense's Joint Artificial Intelligence Center (JAIC) embody operational mandates intrinsically tethered to security preservation—a structural alignment the National Security Commission on Artificial Intelligence (NSCAI) characterizes as "whole-of-government mobilization for technological supremacy". Foundational policy instruments, including successive administrations' *National AI R&D Strategic Plans* and Executive Orders on maintaining U.S. AI leadership, explicitly enshrine tripartite objectives: perpetuating global technological hegemony, preempting strategic competitors' access to critical technologies, and shaping international norms to insulate American advantages. This doctrinal consistency manifests what the Congressional Research Service identifies as "the securitization of innovation policy".

Complementing this framework, NIST's *AI Risk Management Framework 1.0* designates generative AI and dual-use technologies as high-risk domains, advancing a threat-mitigation paradigm that the Belfer Center notes "subordinates technical standards to containment logics". The convergent effect of these institutional mechanisms and declarative policies constitutes an integrated governance ecosystem wherein security considerations functionally override market efficiency, ethical deliberation, and multilateral cooperation—validating NSCAI's assertion that AI advancement is inseparable from national power projection".

The legislative architecture governing artificial intelligence in the United States manifests a superficially paradoxical yet fundamentally coherent dual-track system. Domestically, federal authorities deliberately exercise regulatory restraint, cultivating an innovation-enabling ecosystem through soft-law instruments, industry self-regulation, and decentralized state-level legislation. This deliberate deregulatory posture aims to maximize private-sector dynamism—ultimately serving expansive national security interests by sustaining economic competitiveness and technological primacy. Conversely, in extraterritorial engagements—particularly concerning strategic technological rivalry with peer competitors—the federal apparatus unhesitatingly deploys legislative and executive powers to erect precisely calibrated containment mechanisms under national security justifications.

This bifurcated approach constitutes an integrated strategic calculus: domestic deregulation functions as the instrumental means for preserving innovation momentum, while extraterritorial containment operates as the teleological end for securing asymmetric advantages. Both tracks find doctrinal unity within an "America First" security paradigm that subordinates market principles and ethical considerations to supremacy preservation imperatives. Such governance logic fundamentally diverges from the European Union's systemic oversight grounded in preemptive risk aversion, as well as China's developmental model emphasizing dynamic equilibrium between security and innovation. The U.S. framework instead represents a uniquely securitized innovation ecosystem where technological advancement serves as handmaiden to geopolitical primacy—a structural reality evidenced by the persistent escalation of

targeted export controls and supply chain weaponization even amidst domestic deregulatory waves.

Characterizing America's AI regulatory paradigm as "market-led" constitutes a fundamental misdiagnosis that obscures its core strategic logic.[62] The vibrancy of the U.S. domestic AI ecosystem reflects historical path dependencies and institutional legacies rather than deliberate regulatory design choices. At the federal legislative level, the defining feature is precisely calibrated bifurcation: strategic restraint in domestic oversight paired with aggressive extraterritorial technology containment—particularly targeting strategic competitors. This dualism operates synergistically—domestic deregulation preserves innovation velocity while external controls neutralize competitive threats—to advance the overarching objective of perpetuating U.S. technological supremacy.

Consequently, "security primacy" constitutes the master key to deciphering this governance architecture, transcending reductive state-market dichotomies to reveal how geopolitical contestation reconstitutes technological governance. The domestic innovation ecosystem functions instrumentally as the engine for maintaining asymmetric advantages, while extraterritorial restrictions manifest as the teleological purpose of safeguarding those advantages. This securitized innovation paradigm fundamentally reorients market mechanisms toward supremacy preservation—evidenced by escalating semiconductor export controls even amid domestic regulatory rollbacks. Such structural realities render analyses neglecting this security imperative analytically incomplete, as they fail to apprehend how national power objectives systematically reconfigure governance logics in the AI domain.

Global AI legislation manifests profound divergences in foundational value paradigms, where normative presuppositions crystallize through distinct configurations of legislative objectives, instrumental selections, and enforcement modalities. China's "ordered innovation" model institutionalizes dynamic equilibrium between technological advancement and risk containment via elastic governance architectures—phased legislation, local regulatory sandboxes, and developmental staging—that strategically leverage innovation capacity to hedge systemic vulnerabilities. Exemplified by Shenzhen's AI Industry Promotion Ordinance establishing dual mechanisms for algorithmic R&D funding and ethics committee oversight, this framework engineers public-private synergy to optimize developmental resilience.

Contrastingly, America's "security primacy" doctrine constructs a bifurcated regime: domestic deregulation (e.g., Section 230 immunities preserving data fluidity) coexists with extraterritorial containment (e.g., CHIPS Act export controls), weaponizing market mechanisms for technological hegemony. The EU's "risk aversion" paradigm transplants product-safety governance through quadripartite risk stratification—reframing AI systems as "hazardous products" under TFEU Article 114's market harmonization logic—while relegating fundamental rights to derivative compliance obligations (e.g., Article 15's mandatory logging).

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[62] See Aziz Z. Huq, "The Geopolitics of Digital Regulation," 92 *The University of Chicago Law Review* 833 (2025).

## CONCLUSION: INSTITUTIONAL ELASTICITY AS DEVELOPMENTAL POSSIBILISM

The analytical trajectory of this article originates in a fundamental critique of neoliberal institutional determinism—epitomized by Daron Acemoglu's teleological dichotomy between "inclusive" and "extractive" institutions—which fails to apprehend the dynamic adaptability of state-steered governance in technological latecomer contexts. *Ironically, while Acemoglu's taxonomy would reflexively classify U.S. institutions as "inclusive" and China's as "extractive," our empirical analysis reveals the inverse operational reality: China's governance exhibits greater functional inclusivity in fostering AI-driven development across socioeconomic strata, whereas America's deregulatory paradigm entrenches innovation oligopolies that increasingly concentrate technological benefits—a contradiction that unravels the very coherence of his institutional binary.* Drawing upon Albert O. Hirschman's legacy of *possibilism* and Dani Rodrik's institutional diagnostics, our framework demonstrates how China's AI governance exemplifies what Hirschman termed "unbalanced growth" through deliberate sequencing: manufacturing automation precedes labor protections, infrastructure scaling anticipates environmental compliance, and algorithmic governance evolves prior to privacy safeguards. This state-orchestrated elasticity, manifested in regulatory sandboxes and phased legislation, operates not as centralized coercion but as a Hirschmanian "linkage mechanism"—where forward linkages (e.g., AI-driven judicial efficiency) catalyze innovation while backward linkages (e.g., enhanced party-state oversight) contain systemic risks.

Crucially, China's approach resonates with Hirschman's probabilistic worldview—recently echoed in my theorization of AI as an *inherently probabilistic tool*—which embraces uncertainty as constitutive of development. [63] Unlike Acemoglu's static institutional typologies, Hirschmanian *probabilism* recognizes that institutions evolve through context-specific trial-error cycles rather than conforming to predetermined liberal templates. China's tolerance for transitional institutional asymmetries—permitting localized experimentation while strategically deferring comprehensive rights frameworks—embodies this very ethos. Where neoliberal theory prescribes institutional convergence, China's model reveals developmental viability through *governed contingency*: a synthesis of state capacity and market-embedded innovation that redefines the institutional possibilities of latecomer technological modernization.

The tripartite frameworks proliferating in Western scholarship—exemplified by Anu Bradford's *Digital Empires* taxonomy—function as ideological palimpsests, superimposing static binaries ("state-centric," "market-driven," "rights-based") upon the dynamic institutional mosaics governing AI. Like the culturally contingent outputs revealed in *Nature*'s analysis of generative AI, these classifications encode unexamined presuppositions: Bradford's schema implicitly positions Western liberal democracy as the teleological endpoint of institutional evolution while reducing China's governance to authoritarian monolithism. Yet just as GPT's responses bifurcate along linguistic lines—producing individualistic analytics in English and collectivist holism in

[63] Ge Zheng, "Zuowei huoranxing gongju de rengongzhineng jiqi falu tiaozhan" ("Artificial Intelligence as a Probabilistic Tool and Its Legal Challenges"), *Tansuo yu zhengming (Exploration and Free Views)*, No.8, 2025, pp.32-46.

Chinese[64]—Bradford's model reflects its own cultural embeddedness, mistaking Euro-American institutional preferences for universal governance logic.

Our case studies dismantle this reductionism. China's regulatory architecture—simultaneously permitting Shenzhen's algorithmic sandboxes while enforcing national "red lines"—transcends the state-market dichotomy through institutional entrepreneurship. Where Bradford sees centralized control, we observe adaptive sequencing: provincial AI funds incubating startups precede national ethics committees, creating innovation corridors within normative guardrails. This elasticity—state-steered yet context-responsive—invalidates the tripartite straitjacket much as *Nature*'s research exposes AI's linguistic determinism: both demonstrate how *a priori* categories obscure the contingent realities of technological governance. When theoretical frameworks become self-referential artifacts—untethered from legislative praxis yet masquerading as analytical tools—they cease to explain institutions and instead replicate the very cultural biases generative AI unwittingly exposes.

The institutional elasticity demonstrated by China's AI governance—simultaneously embracing Shenzhen's algorithmic sandboxes while enforcing national "red lines"—transcends reductive taxonomies through institutional entrepreneurship. Where Bradford's tripartite straitjacket imposes static binaries, China's adaptive sequencing reveals governance as an evolutionary art: provincial innovation funds incubate startups before national ethics committees crystallize, creating corridors where technological possibility and normative guardrails coexist. This calibrated elasticity—state-steered yet contextually responsive—embodies Hirschman's possibilism in its purest form, rejecting Acemoglu's teleological determinism through deliberate unbalanced growth.

Herein lies the profound inversion: China's model achieves functional inclusivity precisely by tolerating transitional asymmetries—manufacturing automation precedes labor protections, infrastructure scaling anticipates environmental compliance—thus reconciling technological leapfrogging with social stabilization. For Global South nations navigating the algorithmic age, this governed contingency offers neither ideological export nor civilizational exceptionalism, but a laboratory proving that developmental viability emerges from context-specific institutional innovations, not universal templates. The lesson resonates beyond AI: Governance thrives not by choosing between control and freedom, but by designing institutions that stretch to meet uncertainty—transforming elasticity into the ultimate institutional technology.

[64] Jackson G. Lu, Lesley Luyang Song, and Lu Doris Zhang, "Cultural Tendencies in Generative AI," *Nature Human Behaviour* 9 (7), 2025: 872–885. https://doi.org/10.1038/s41562-025-02242-1.

# IS THE AI INDUCED DEMISE OF THE LEGAL PROFESSION OVERSTATED?

Cristina Fackler*

**Abstract**: This article critically examines the accelerating integration of artificial intelligence into the legal profession and evaluates whether warnings of its demise are overstated. It argues that while AI is unlikely to instantly displace lawyers, the profession is on the brink of transformative disruption that demands urgent adaptation. Drawing on developments in AI-powered legal research, document review, predictive analytics, and generative legal drafting, the paper analyzes both the practical efficiencies AI brings and the existential threats it poses—particularly in areas of bias, transparency, access to justice, and the erosion of independent legal judgment. The paper reviews recent ethics opinions from the ABA, California, and Florida Bars, highlighting emerging regulatory standards. It further explores the global legislative landscape, focusing on the European Union's risk-based AI framework, and offers comparative insights for U.S. policymakers. Finally, the article proposes educational and legislative reforms to prepare lawyers and law students for a future where generative and predictive AI tools will be indispensable, but must be harnessed with caution, competence, and a commitment to justice.

**Keywords**: AI; AI in the Law

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## INTRODUCTION

No. But the process is not immediate. AI is already transforming the legal profession, just as it is in other areas. However, lawyers and judges, as trained critical thinker, are uniquely equipped to harness and adapt this change, if they decide to collectively act to do so. While today's manifestations of AI in the legal realm involve mostly research, document review and preparation, and negotiation positions, tomorrow's AI is likely to manifest as actual attorneys and

Imagine a near future where the legal profession is vastly dominated by hyper efficient, integrated AI systems, that evolved from their 2025 utilization to dictating not only litigation strategy, but also influence judicial decision, all based on opaque algorithms trained on – likely – biased historical data. Attorneys, robbed of the need for deep analysis and creative thinking, become mere AI managers overseeing inputs and outputs, being forced to defer to the algorithmic recommendations for fear of malpractice claims due to deviating from the statistically "optimal" track.

The Judiciary is also not immune to these developments. Overburdened courts will increasingly rely on AI for sentencing and bond recommendations, possibly even preliminary decisions, insidiously shifting the decision-making process from human judges to AI agents. The reasoned judgement is eroded and replaced by statistical outputs lacking transparency and meaningful challenge.

Moreover, there is a divide between the civil and criminal law fields that perhaps makes AI reliance more palatable in the former and less so in the latter – given express constitutional concerns over criminal prosecutions. Nevertheless, ethical considerations underlie both. Below, I navigate the complexities of these layered concerns after reviewing what the current state of play is for AI in the legal profession.

## I. CURRENT LANDSCAPE OF AI LEGAL PRODUCTS AND REGULATION IN THE UNITED STATES

### A. AI Legal Products

One of the largest areas for current AI products utilization in the law is legal research. [1] Traditional case research online providers already have AI-powered platforms, which allow for streamlining of legal research and deliver natural language search, citation analysis, and predictive analytics.[2]

A second important segment for current AI developments in law is document review and drafting. AI platforms today offer contract and legal documents review.[3] They extract key clauses, identify risks, and ensure compliance, significantly reducing the time required for manual review.[4] Some specialize in analyzing contracts for risks,

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[1] Bob Ambrogi, *ABA Tech Survey Finds Growing Adoption of AI in Legal Practice, with Efficiency Gains as Primary Driver* (March 7, 2025), https://www.lawnext.com/2025/03/aba-tech-survey-finds-growing-adoption-of-ai-in-legal-practice-with-efficiency-gains-as-primary-driver.html.

[2] Alan Z. Rozenshtein and Kevin Frazier, *Large Language Scholarship: Generative AI in the Legal Academy* (April 01, 2025), Minnesota Legal Studies Research Paper No. 25-26, https://ssrn.com/abstract=5200768.

[3] *Supra*.

[4] *Supra.*

deviations, and compliance issues. Other platforms offer drafting and management of legal documents including pre-approved templates, clause libraries, and real-time collaboration features.

Certain AI platforms help in e-discovery by automating the identification, collection, and analysis of electronically stored information.[5]

Other AI tools in practice today use predictive analytics to forecast case outcomes, analyze judicial behavior, and come up with a case strategy.[6]

## B. Existing Legal Framework Governing Utilization of AI by Lawyers

Key regulatory bodies such as the American Bar Association (ABA) nationally, the State Bar of California and The Florida Bar locally, have issued guidance and opinions on the use of AI in the legal practice. Other state bars have followed suit, however this article will only address the two ante - enumerated jurisdictions.

The American Bar Association, through its Standing Committee on Ethics and Professional Responsibility, issued Formal Opinion 512 in July 2024, offering an overview of attorneys' ethical obligations when using AI.[7] The opinion emphasizes that existing ethical rules remain applicable, stating, "To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including their duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees."[8]

Central to the ABA's guidance is the duty of competence under Model Rule 1.1. Crucially, the opinion clarifies that competence does not require lawyers to become AI experts, but to "competently use a GAI tool in a client representation, lawyers need not become GAI experts. Rather, lawyers must have a reasonable understanding of the capabilities and limitations of the specific GAI technology that the lawyer might use."[9]

However, the ABA cautions against uncritical reliance, noting the propensity of GAI tools to "hallucinate" or generate inaccurate information.[10] Furthermore, the opinion stresses that professional judgment cannot be entirely delegated: "lawyers may not abdicate their responsibilities by relying solely on a GAI tool to perform tasks that

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[5] Nicole Black, *From automation to generative AI, how e-discovery tools are evolving* (February 24, 2025), https://www.abajournal.com/columns/article/from-automation-to-generative-ai-how-e-discovery-tools-are-evolving#:~:text=As%20the%20technology%20improves%2C%20deeper,that%20might%20otherwise%20go%20unnoticed.

[6] *See* LexisNexis' description of its new Lex Machina AI product from April 8, 2025, https://www.lexisnexis.com/community/insights/legal/lex-machina/b/lex-machina/posts/introducing-lexisnexis-protege-in-lex-machina.

[7] American Bar Association Standing Committee on Ethics and Professional Responsibility, *Formal Opinion 512: Lawyers' Ethical Obligations When Using Generative Artificial Intelligence in the Practice of Law* (July 2024).

[8] *Id*. at p.1.

[9] *Id*. at p.2.

[10] *Id*. at p.3.

call for the exercise of professional judgment."[11] Yet, it also hints at an evolving standard of care, suggesting that future competence might eventually necessitate the use of AI for certain tasks.[12]

The State Bar of California's Standing Committee on Professional Responsibility and Conduct issued "Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law" in November 2023, adopting a more structured format organized by specific Rules of Professional Conduct.[13] This guidance highlights the "unique challenges" posed by GAI, including its use of vast data, the opacity surrounding its functioning, and its ability to emulate human responses convincingly, which risks encouraging over-reliance.[14]

California places significant emphasis on the duty of confidentiality (Rule 1.6), offering more specific technical advice than the ABA. It explicitly warns, "A lawyer must not input any confidential information of the client into any generative AI solution that lacks adequate confidentiality and security protections."[15] The guidance mandates anonymizing client information and avoiding identifying details, recommending consultation with IT or cybersecurity experts to ensure AI systems meet stringent security standards. Regarding competence (Rule 1.1), California echoes the ABA's sentiment that professional judgment remains paramount and cannot be delegated, stating that "Overreliance on AI tools is inconsistent with the active practice of law and application of trained judgment by the lawyer."[16]

Moving over to the opposite coast, Florida Bar issued Ethics Opinion 24-1 in January 2024.[17] This opinion offers concise, practical advice, summarizing key obligations: "Lawyers may use generative artificial intelligence (AI) in the practice of law but must protect the confidentiality of client information, provide accurate and competent services, avoid improper billing practices, and comply with applicable restrictions on lawyer advertising."[18]

Florida addresses the financial aspects of AI use, explicitly stating that "these standards require a lawyer to inform a client, preferably in writing, of the lawyer's intent to charge a client the actual cost of using generative AI. In all instances, the lawyer must ensure that the charges are reasonable and are not duplicative."[19] This focus on billing reflects a practical concern about how lawyers charge for services where AI is employed. Additionally, the Florida opinion provides specific rules for AI chatbots used for communication or advertising, requiring compliance with advertising rules and clear disclaimers identifying the chatbot as an AI program, not a human lawyer.[20]

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[11] *Id*. at p. 4.
[12] *Id.* at p.14.
[13] State Bar of California Standing Committee on Professional Responsibility and Conduct, *Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law* (November 2023).
[14] *Id*. at p. 1.
[15] *Id*.at p. 2.
[16] *Id*. at p. 2.
[17] Florida Bar Professional Ethics Committee, *Ethics Opinion 24-1* (January 2024).
[18] *Id.* at p. 1.
[19] *Id*. at p.6.
[20] *Id*. at p.5.

Comparing these three influential sources reveals both convergence and divergence in early US approaches to AI regulation in law: all three emphasize the applicability of existing ethical rules, particularly competence and confidentiality. They uniformly caution against delegating professional judgment and stress the need for lawyers to understand the risks and benefits of the AI tools they employ.

Legislatures, mostly on state level, have enacted numerous AI-related enactments, however they don't target utilization of AI by lawyers and in the legal profession.[21]

While the profession is actively working to integrate a transformative technology while upholding its core ethical commitments, a nationally uniform standard remains elusive, leaving lawyers to navigate a patchwork of state-specific interpretations and evolving best practices.

## II. ANALYSIS OF AI'S VALUE AND VULNERABILITIES IN THE LEGAL PROFESSION

### A. Practical Value of AI in Legal Field

There seems to be broad consensus in the profession as to what the upsides of utilizing AI in the legal profession are: automation of labor intensive, tedious and less specialized tasks such as document review and summarization, case research, even contract analysis.[22]

Data review AI systems are great efficiency tools, scratching hundreds of (billable) hours off of document review during the due diligence phase or document review during discovery - think how many hours you've spent looking for the "smoking gun" in opposing party's discovery production. Their value proposition centers around reducing time and cost while maintaining or improving accuracy, thus freeing attorneys to focus on higher value work requiring judgement and creativity.[23]

Try to remember the last time you had to review thousands of medical records to find that *one* story told by the opposing party to that *one* medical provider which casts significant doubt on the current incident *really* having caused the injury, or was it actually caused by that one skiing accident in Vail? A correctly prompted AI law assistant would be able to find that information in a matter of minutes, versus the days it took us, skin lawyers to find it. When writing a memorandum answering a particular legal question, what an attorney may have done in 4 hours conducting legal research, summarizing case law findings and applying them to the case at hand, AI can do in less than 5 minutes. Summarizing depositions of 100 pages would have taken an attorney an hour and a half to two hours, AI can do it in 1 minute.

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[21] Compare Bill Kramer, *AI Legislation, By the Numbers*, (May 17, 2024), multistate.ai, https://perma.cc/D4M9-TBGF.

[22] Bob Ambrogi*, ABA Tech Survey Finds Growing Adoption of AI in Legal Practice, with Efficiency Gains as Primary Driver* (March 7, 2025), https://www.lawnext.com/2025/03/aba-tech-survey-finds-growing-adoption-of-ai-in-legal-practice-with-efficiency-gains-as-primary-driver.html.

[23] Heidi Turner*, Legal Innovation and AI: Risks and Opportunities* (December 9, 2024), https://www.clio.com/blog/legal-innovation/.

Of paramount significance is that in all these contexts, the focus remains on the present: organizing, summarizing and highlighting existing information to support human decision making, keeping lawyers fully in control of the work product.

## B. Dangers to AI in the Legal Field Inherent Bias and Unfairness in AI Models

AI systems employ statistical analysis, machine learning algorithms and pattern recognition to forecast future outcomes based on historical data. AI tools may inherit biases from training data, leading to inconsistent or unfair outcomes, when they attempt to derive insights and make probabilistic predictions on issues such as judicial behavior, recidivism risk, settlement values, case out comes.[24] For example, AI predictive models will be able to calculate the probability of success at trial or in motion practice by analyzing factors such as judge assignment, pool of juries in a certain jurisdiction and precedent. Similarly, judicial analytics AI platforms examine past rulings to predict how specific judges might decide future comparable cases.

These systems serve as strategic decision-making tools rather than mere information processors, influencing legal professional decision making.

Moreover, the "black box" nature of many advances AI algorithms raises concern about transparency and explicability, which are critical issues when the outputs influence strategic legal decisions.[25] Being able to see the reasoning behind a conclusion often matters as much as the conclusion itself, so when a judge or an attorney cannot understand why an algorithm reached a particular prediction, meaningful evaluation and oversight become nearly impossible.[26]

### 1. Access to Justice Disparity

Advanced AI tools are expensive, limiting their accessibility for smaller firms and organizations. The AI takeover will create a starkly stratified system, where big players wield proprietary AI systems offering personalized, predictive legal services to their affluent clients.[27] Big Law will be able to enhance efficiency while maintaining premium legal services, thus increasing their competitive advantage even further.[28] Meanwhile, the vast majority could face a justice system characterized by underfunded, standardized AI platforms, riddled with biases inherited from historical inequities, dispensing one size-fits all, automated and thus unjust outcomes, without any possibility of meaningful appeal. This technological divide would reduce client options and widen the "access to justice" gap, as sophistical legal services become concentrated among few providers.[29]

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[24] Yavar Bathaee, *The Artificial Intelligence Black Box and the Failure of Intent and Causation*, 31 HARV. J.L. & TECH. p. 920 (2018).
[25] *Supra* at p. 891.
[26] *Supra* at pp. 920, 921.
[27] Drew Simshaw, *Access to AI Justice: Avoiding an Inequitable Two-Tiered System of Legal Services*, 24 Yale J.L. & Tech 150 (2022), p. 174.
[28] *Supra* at p.175.
[29] *Supra* at p.177.

Access to justice could become access to superior algorithms, leaving the vulnerable prey to an opaque, unaccountable system, where there is no place for human empathy, nuanced understanding, or the pursuit of justice.

### 2. Compromise of Independent Professional Judgement

What happens when a predictive AI suggests that a particular motion has a 75% chance of success, but the attorney's experience and intuition suggest otherwise? Which standard of care applies?[30] If the attorney follows their own judgment against AI's recommendation and fails, has a duty been breached? Conversely, if the attorney defers to the algorithm despite their professional judgement to the contrary, has independent judgement been compromised? These questions strike at the heart of professional identity and responsibility.

As predictive AI becomes more widespread, the profession will need to determine whether consulting such tools or following their recommendations constitutes part of the reasonable standard of care.[31] The ABA's Formal Opinion 512 hints at this possibility, nothing that "As GAI tools continue to develop and become more widely available, it is conceivable that lawyers will eventually have to use them to competently complete certain tasks for clients."[32]

The dangers associated with predictive AI are exemplified by COMPAS (Correctional Offender Management Profiling for Alternative Sanctions). Used to predict recidivism risk through a 137 – item questionnaire covering factors such as criminal history, education and economic status, COMPAS falsely flagged black defendants as future criminals at nearly twice the rate of white defendants, while white defendants were mislabeled as low risk more often than black defendants.[33] This racial disparity persisted even when controlling for prior crimes, age and gender. Research by Dressel and Farid (2018) found that COMPAS achieved only 65% accuracy in predicting recidivism, barely better than the 66.7% accuracy achieved by random human participants with no criminal justice expertise.[34]

## III. OUTLOOK ON NEAR- TO MID-TERM DEVELOPMENTS AND ACTION PLANS

### A. AI Developments Overall and in the Legal Profession

The integration of AI into the legal field is poised for significant expansion, fueled by ongoing advancements in generative AI, machine learning, and data analytics. Key emerging trends suggest a future where generative AI increasingly automates the

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[30] *Supra* at p. 209, discussing the tension between relying on decisions dictated by data-driven AI in order to satisfy malpractice insurers and the risk of negligence if AI steers the attorney wrongly.
[31] American Bar Association Standing Committee on Ethics and Professional Responsibility, *Formal Opinion 512: Lawyers' Ethical Obligations When Using Generative Artificial Intelligence in the Practice of Law* (July 2024), p.4.
[32] *Supra* at p.5.
[33] Julia Dressel and Hany Farid, *The accuracy, fairness, and limits of predicting recidivi*sm, Science Advances 4, no. 1 (2018) https://www.science.org/doi/10.1126/sciadv.aao5580 ;
[34] *Supra*.

creation of legal documents and the synthesis of complex case information.[35] Concurrently, enhanced predictive analytics are expected to refine the accuracy of forecasting litigation outcomes, offering valuable strategic insights. Furthermore, a notable development involves the pursuit of greater accessibility, focusing on the creation of cost-effective AI-driven solutions designed to empower smaller law practices and broaden the availability of sophisticated legal technology.[36]

I submit to my reader that in order to competently speculate on the future of AI in the legal profession, one must look at the overall progress in AI technologies. Just recently, the "Godfather of AI" Geoffrey Hinton said that AI is advancing faster than experts once predicted – and that once it surpasses human intelligence, humanity may not be able to prevent it from taking control.[37] Hinton received the Nobel Prize in physics for his breakthroughs in machine learning. One reason for his concern is the rise of AI Agents, which don't just answer questions but can perform tasks autonomously.[38] The timeline for super intelligent AI may also be shorter than expected, as Hinton predicted a year ago, that it would be five to 20 years before the arrival of AI that can surpass human intelligence in every domain.[39] Now, he says "there's a good chance it'll be here in 10 years or less."[40]

Hinton's bleak view of the future of humanity under the threat of AI is shared by other relevant figures in the industry. Mo Gawdat, artificial intelligence (AI) expert and ex-chief business officer at Google X, has warned that by 2029, AI will be a billion times smarter than the human brain.[41] The risks are so bad, in fact, that when considering all the other threats to humanity, you should hold off from having kids if you are yet to become a parent," he told podcast host Steven Bartlett on the Diary of a CEO podcast.[42] If AI is truly set to outpace human cognition at an exponential rate, then the global AI arms race is no longer about dominance - it's about survival, said Gawdat.[43]

A scary yet comprehensive future scenario is proposed in "AI 2027', a future exercise presented to us by a former OpenAI researcher (whose previous AI predictions have held up well[44]) and other AI researchers. Their predictions are written through the prism of the US-China race for supremacy in the AI space. That race aside, key

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[35] Drew Simshaw*, Access to AI Justice: Avoiding an Inequitable Two-Tiered System of Legal Services*, 24 Yale J.L. & Tech 150 (2022), p. 154.
[36] *Supra* at p. 155.
[37] Effie Webb, *Godfather of AI' says he's 'glad' to be 77 because the tech probably won't take over the world in his lifetime* (April 28, 2025), https://www.businessinsider.com/ai-godfather-geoffrey-hinton-superintelligence-risk-takeover-2025-4 .
[38] *Supra*.
[39] *Supra*.
[40] *Supra*.
[41] Entrepreneur Middle East Staff, *AI Ethics to Gen Z: SEF 2025 Round Up* (February 3, 2025), https://www.entrepreneur.com/en-ae/technology/ai-ethics-to-gen-z-sef-2025-round-up/486477.
[42] Sarah Palmer, *Hold off from having kids if you are yet to become a parent', warns AI expert Mo Gawdat* (June 20, 2023), https://www.euronews.com/next/2023/06/20/hold-off-from-having-kids-if-you-are-yet-to-become-a-parent-warns-ai-expert-mo-gawdat.
[43] James Dargan, *Mo Gawdat on Deepseek and the AI Arms Race: a Future Rewritten* (February 11, 2025), https://theaiinsider.tech/2025/02/11/mo-gawdat-on-deepseek-and-the-ai-arms-race-a-future-rewritten/.
[44] Daniel Kokotajlo, Scott Alexander, Thomas Larsen, Eli Lifland, Romeo Dean, *AI 2027* (April 3, 2025), https://ai-2027.com/.

predictions are that by the end of 2027 humanity will have to grapple with Artificial Super Intelligence (ASI), which will dictate humanity's future.[45] The key take-away from this avant-garde thought experiment is that as ASI is approaching, the public will likely be unaware of the best AI capabilities, leading to little oversight over pivotal decisions made by a small group of AI company leadership and government officials.[46]

## B. Legislation Action Plan

As AI technologies continue to evolve, the legal profession must develop nuanced approaches that recognize the distinct implications of the two broad AI product categories: present oriented, data processing AI and future oriented, predictive AI. These approaches must acknowledge the different risk profiles of data review versus predictive applications, possibly analogous to the European Union's AI Act Regulations.[47] These regulations apply different tiers of requirements for different tiers of risks associated with AI technology.

The EU Artificial Intelligence Act (EU AI Act) which entered into force in August 2024 (with the member states having to adopt various parts into law at various times) represents the world's first binding, cross-sectoral regulation specifically targeting AI. This landmark legislation establishes a common legal framework for the development, deployment, and use of AI systems across the Union, employing a distinct methodology centered on risk assessment.[48] As the EU AI Act notes in Chapter I, Article I: "The purpose of this Regulation is to improve the functioning of the internal market and promote the uptake of human-centric and trustworthy artificial intelligence (AI), while ensuring a high level of protection of health, safety, fundamental rights enshrined in the Charter, including democracy, the rule of law and environmental protection, against the harmful effects of AI systems in the Union and supporting innovation."[49]

This European risk-based approach categorizes AI systems into four tiers. At the highest level, systems posing an "unacceptable risk" - such as those enabling social scoring by public authorities or manipulating vulnerable groups - are outright prohibited.[50] Below this, high-risk AI systems that can have a detrimental impact on people's health, safety or on their fundamental rights are authorized, but subject to a set of requirements and obligations to gain access to the EU market.[51] "AI system shall be considered to be high-risk where both of the following conditions are fulfilled:(a) the AI system is intended to be used as a safety component of a product, or the AI system is itself a product [..](b) the product whose safety component pursuant to point (a) is the AI system, or the AI system itself as a product, is required to undergo a third-party conformity assessment, with a view to the placing on the market or the putting into service of that product pursuant to the Union harmonization legislation [..]"[52]

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[45] *Supra*.
[46] *Supra*.
[47] Artificial Intelligence Act (Regulation (EU) 2024/1689), Official Journal version of 13 June 2024.
[48] *Id*.
[49] *Id*., Chapter I, Article 1.
[50] European Parliament Artificial Intelligence Act Briefing, pp. 8-10, https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)698792.
[51] *Id*.
[52] Artificial Intelligence Act (Regulation (EU) 2024/1689), Official Journal version of 13 June 2024, Chapter III, Section 1, Article 6.

These requirements include robust risk management, data governance, technical documentation, transparency, human oversight, and cybersecurity measures. Crucially for the legal sector, AI systems used in the administration of justice and law enforcement fall squarely into this high-risk category, demanding stringent compliance from developers and users.[53] The third tier encompasses "limited risk" systems, primarily those lacking transparency, such as chatbots or deepfake generators. These are permitted but "will be subject to information and transparency requirements," ensuring users are aware they are interacting with or viewing AI-generated content.[54] Finally, systems posing only "minimal risk," like AI-enhanced video games or spam filters, face no additional obligations beyond existing laws.[55]

## C. Legal Education and Legal Practice Action Plans

While in the past technological advances have supported lawyers' work rather than replace them, AI is of a different fabric. The traditional entry level attorney and clerkship models will collapse entirely as those entry-level tasks disappear, leaving a hollowed-out profession devoid of new legal talent capable of critical reasoning.

Perhaps no segment of the profession faces more immediate disruption than junior attorneys, whose traditional training path relies heavily of the main tasks taken over by automation.[56] Document review, legal research, contract analysis and document drafting, typically the foundational duties of entry level associates, are where AI demonstrates the most immediate utility.[57] So how will junior attorneys develop and learn skills possessed by mid and senior level attorneys, which include oversight of juniors, and now of AI? The solution our gild will come up with must focus around a fundamental change in the way we provide legal education to the next generation of lawyers. And we must do it fast.

According to former Google CEO Eric Schmidt during a panel discussion with Jeanne Meserve in April 2025, we will have "Artificial General Intelligence" (AGI) within three to five years.[58] AGI will be equal to, if not better than any human thinkers or creators today, Schmidt explaining that AGI can be defined as a system that is as smart as the smartest mathematician, physicist, artist, thinker, politician.[59] And Schmidt is not alone in his prediction, he is in the majority, with what Schmidt calls the "San Francisco consensus" (most AI developers and mavericks being located there) opining that we will have "Artificial Super Intelligence" (ASI) in about 6 years.[60] ASI is defined as a system being smarter than the sum of all AGIs, and as such of all humans. Elon Musk's predictions in an interview with Nicolai Tangen (Norway wealth fund

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[53] European Parliament Artificial Intelligence Act Briefing, p. 9, https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)698792.
[54] *Id*.
[55] *Id*.
[56] Joe Patrice, *The Emperor's New Associates: ALSOs Replacing Junior Lawyers,* (January 28, 2025), https://abovethelaw.com/2025/01/the-emperors-new-associates-alsps-replacing-junior-lawyers/.
[57] *Supra*.
[58] Daniel Tencer, *Ex-Google CEO Eric Schmidt: AI That is 'As Smart as the Smartest Artist' Will be Here in 3 to 5 Years',* (April 16, 2025), https://www.musicbusinessworldwide.com/ex-google-ceo-eric-schmidt-ai-that-is-as-smart-as-the-smartest-artist-will-be-here-in-3-to-5-years/.
[59] *Supra*.
[60] *Supra*.

CEO) in April 2025 are even more unsettling: AGI will be here within the next year or two.[61]

To be clear, AGI means for the law field, AI as smart as the smartest attorney. Within the next 1-3 years. Law students beginning their studies in 2025 will NOT be able to find employment in what the profession traditionally offered them even 2-3 years ago. Unless we equip them with skills that will allow them to transition into traditionally mid-level tasks right out of law school. And how do we do that? We start by teaching AI in law schools immediately. Law schools must *quickly* evolve beyond their traditional focus on doctrinal knowledge and case analysis to incorporate technological literacy, AI prompting and management skills. Some law schools already require that law students obtain a legal AI certification.[62]

A second pillar of adaptation to the new AI area in the legal field must include law school curricula that emphasize skills that remain (for now) innately human, such as interpersonal skills, ethical reasoning and creative thinking. Experiential learning opportunities, including clinics and externships must become central to legal learning. (most European countries, including the one where I obtained by first bar admission – Germany, require a two-year apprenticeship before granting membership into the state bar).

For practitioners, the AI rapid progression might mean creating specialized roles for junior attorneys to work alongside AI systems, developing expertise in AI oversight and validation, accelerating client interaction opportunities and building interpersonal skills that machines cannot replicate.

## CONCLUSION

The legal profession, once a bastion of logical reasoning and ethical debate, could transform into a cold, automated bureaucracy, where justice is calculated rather than emerging from thoughtful legal practice, and the human element that defines justice is lost in the machine.

The future of the legal profession is not attorneys who use AI and attorneys who don't. It is: attorneys who use AI and those who are left behind, to include law schools. We cannot stick our proverbial heads in the sand and continue with business as usual, while companies create and launch new AI products for the law industry weekly, devoid of any oversight or long-term vision for the future of the profession.

The legal profession's response to AI should neither uncritically embrace technological determinism, nor reflexively resist inevitable change. Lawyers, educators and law makers must actively shape AI's integration to preserve the profession's fundamental values – justice for all, fairness and independent professional judgement, while embracing useful innovation.

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[61] Sophie Baker, *Norway's Wealth Fund Chief Quizzes Elon Musk on AI, Tesla and his Legacy,* (April 9, 2024), https://www.pionline.com/sovereign-wealth-funds/elon-musk-gets-quizzed-ai-tesla-and-his-legacy-norways-wealth-fund-chief.

[62] *See*, e.g., Case Western Reserve University School of Law Becomes First Law School in the U.S. To Require Legal AI Education Certification for All First-year Law Students, the Daily (Jan. 23, 2025), https://thedaily.case.edu/case-western-reserve-school-of-law-becomes-first-law-school-in-the-u-s-to-require-legal-ai-education-certification-for-all-first-year-law-students/.

# TIME TO BREAK TRADITION: UNBUNDLING PSYCHEDELICS FROM PSYCHOTHERAPY

Chloe Connor, Daniel Karel & Benjamin Berkman*

**Abstract**: In the midst of a psychopharmacology crisis, psychedelics have re-emerged as a potential gamechanger for combatting the mental health epidemic. The FDA has granted breakthrough therapy designation to specific development programs including MDMA for PTSD and psilocybin for depression. These programs all involve psychedelic-assisted psychotherapy (PAT), a bundled model that includes preparatory, dosing, and integration sessions with a psychotherapist. By giving breakthrough therapy designation to a bundle of drugs and psychotherapy, the FDA departed from its focus on evaluating drugs alone, and essentially mandated psychotherapy for those seeking psychedelics in a medical setting. This paper questions the default presumption in favor of mandating PAT. While PAT has been the dominant delivery model, we argue that researching and regulating psychedelics as a standalone treatment would be clinically, regulatorily, and ethically preferable. Section I describes the current debate about the necessity of a bundled PAT model. In Section II we critically examine the two primary reasons that PAT is deemed by some to be clinically essential: safety and efficacy. Ultimately, neither reason is sufficient to justify mandatory inclusion of psychotherapy. In Section III we argue that unbundling PAT would be advantageous from a regulatory standpoint. In this section, we review FDA's prior history and legal authority and discuss how the inclusion of psychotherapy obscures FDA's authority and creates a situation where PAT is not fully regulatable without the creation of new regulatory regimes. In Section IV, we argue that not requiring PAT is ethically advantageous in that it promotes autonomy, expands access, improves resource allocation, and moves away from unsupported psychedelic exceptionalism. In Section V we briefly outline various policy options in the absence of mandated psychotherapy. In discussing the utility of several models, we propose on-site patient monitoring, rather than PAT, as our recommended minimum level of support.

**Keywords**: Psychedelics; Psychotherapy; PAT; FDA; Psilocybin; MDMA; Psychedelic-Assisted Therapy; Bioethics; Exceptionalism

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# I. PSYCHEDELICS: PROMISE AND CONTROVERSY

## A. Background

We are in the midst of a crisis of psychopharmacology.[1] Despite a global mental health epidemic,[2] psychiatric drug development has stagnated. Mental health disorders remain among the top 10 causes of health burden worldwide, with no evidence of improvement in the last 5+ years.[3] Newer treatments for schizophrenia, mood, and anxiety disorders are similarly as effective as the first-generation drugs introduced half a century ago.[4] Unlike other fields of medicine, progress to develop new treatments for psychiatric disorders has been labored,[5] with new drug candidates suffering the lowest success rates[6] in clinical development.[7] Even after Food and Drug Administration (FDA) approval, psychiatric drugs have among the highest rate of post-market safety issues.[8]

## B. Promise of Psychedelics

Amidst this milieu of disappointment and stalled progress, psychedelics have (re)emerged as a potential game-changing means of combatting the mental health crisis.[9] Some have argued that psychedelics may be the biggest advance in treating depression since the invention of Prozac.[10] Studies indicate that psychedelics may be up to four times as likely to be effective as SSRIs, with potentially more enduring benefits.[11] Psychedelics are believed to be beneficial in treating psychiatric disorders through their ability to enhance neuroplasticity, which may form the mechanism behind

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[1] See Nicholas Langlitz, *Psychedelic Innovations and the Crisis of Psychopharmacology*, 19 BIOSOCIETIES 37, (2024) (arguing that the possibility of psychedelic therapy is the most important response to the lack of psychopharmacologic innovation).

[2] See generally M.J. Friedrich, *Depression Is the Leading Cause of Disability Around the World*, 317 JAMA 1517 (2017).

[3] See generally GBD 2019 Mental Disorders Collaborators, *Global, Regional, and National Burden of 12 Mental Disorders in 204 Countries and Territories, 1990–2019: A Systematic Analysis for the Global Burden of Disease Study 2019*, 9 LANCET PSYCHIATRY 137, 137 (2022).

[4] Steven M. Paul & William Z. Potter, *Finding New and Better Treatments for Psychiatric Disorders*, 49 NEUROPSYCHOPHARMACOLOGY 3, 3 (2024).

[5] *Id.* at 3.

[6] In terms of likelihood of Phase I and Phase II approval and success as compared to other disease areas.

[7] See, e.g., Tong Zhu, *Challenges of Psychiatry Drug Development and the Role of Human Pharmacology Models in Early Development—A Drug Developer's Perspective*, FRONTIERS PSYCHIATRY, Jan. 2021, at 1, 3.

[8] See, e.g., Sydney Lupkin, *One-Third of New Drugs Had Safety Problems After FDA Approval*, NPR (May 9, 2017), https://www.npr.org/sections/health-shots/2017/05/09/527575055/one-third-of-new-drugs-had-safety-problems-after-fda-approval [https://perma.cc/QWR2-BQ8Y].

[9] See, e.g., I. Glenn Cohen, *Psychedelics, Psychosocial Support, and Psychotherapy: Why It Matters for the Law, Ethics, and Business of Medical Psychedelic Use*, 93 FORDHAM L. REV. 393, 394 (2024); I. Glenn Cohen & Mason Marks, *Psychedelic Medicine Exceptionalism*, AM. J. BIOETHICS, Jan. 2025, at 6, 6.

[10] Adam Piore, *Magic Mushrooms May Be the Biggest Advance in Treating Depression Since Prozac*, NEWSWEEK (Sep. 22, 2021), https://www.newsweek.com/2021/10/01/magic-mushrooms-may-biggest-advance-treating-depression-since-prozac-1631225.html [https://perma.cc/LV82-KUNY].

[11] See Nabil Al-Khaled, Note, *MDMA and Psilocybin for Mental Health: Deconstructing the Controlled Substances Act's Usage of "Currently Accepted Medical Use*," 99 Wash. U. L. Rev. 1023, 1027 (2021). (citing Alan K. Davis et al., Effects of Psilocybin-Assisted Therapy on Major Depressive Disorder a Randomized Clinical Trial, 78 JAMA PSYCHIATRY 481 (2021)).

the lasting symptom improvements observed in patients with a variety of psychiatric illnesses.[12] The medical potential of psychedelics has been embraced by even those at the highest rungs of power, with U.S. Health Secretary Robert F. Kennedy Jr. suggesting that psychedelic therapies could see widespread use in clinical settings as soon as 2026.[13]

Many believe that psychedelics are truly unlike any other treatment currently offered for psychiatric disorders.[14] The FDA has assigned a 'Breakthrough Therapy' designation to specific development programs including MDMA for treating post-traumatic stress disorder (PTSD), psilocybin for treating treatment-resistant depression (TRD) and major depressive disorder (MDD), among others. While a Breakthrough Therapy designation does not indicate that the FDA has approved psychedelics for psychiatric disorders, the designation expedites the development and review of the designated therapies.[15] It is promising that the FDA is showing interest in the therapeutic potential of psychedelics, however there is evidence that psychedelics may be unduly exceptionalized, resulting in overregulation that is practically, legally, and ethically problematic.[16]

## C. What Are Psychedelics?

Psychedelics generally refer to drugs that can induce altered thoughts, sensory perceptions, and hallucinations.[17] While psychedelics are a somewhat loosely and arbitrarily defined group,[14] they can be broadly distinguished into 2 groups: classic and non-classic psychedelics.[17] Classic psychedelics are typically defined as 5-HT2A agonists, and include LSD, DMT, psilocybin, and mescaline.[17] They directly activate the 5-HT2 serotonin receptor, which is central to psychedelic effects such as altered perception. Non-classic psychedelics are substances with varied pharmacological

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[12] See Yao et al., *Efficacy and Safety of Psychedelics for the Treatment of Mental Disorders: A Systematic Review and Meta-Analysis*, PSYCHIATRY RSCH., May 2024, at 1, 2; Lily R. Aleksandrova & Anthony G. Phillips, *Neuroplasticity as a Convergent Mechanism of Ketamine and Classical Psychedelics*, 42 TRENDS PHARMACOL. SCI. 929, 20 (2021).

[13] Matthew Perrone, *RFK Jr. and Other Trump Officials Embrace Psychedelics After FDA Setback*, AP NEWS (July 16, 2025), https://apnews.com/article/psychedelics-rfk-jr-kennedy-ibogaine-mdma-4e59a3eb2d23d98f2579d25c73c34e9b [https://perma.cc/J7P5-YLSQ].

[14] See, e.g., Cohen & Marks, *supra* note 9, at 6 (exploring the ethical and regulatory distinctions between psychedelics and other mental health treatments); Katherine Cheung et al., *Distinctive but Not Exceptional: The Risks of Psychedelic Ethical Exceptionalism*, AM. J. BIOETHICS, Jan. 2025, at 16, 16.

[15] See, e.g., 170 CONG. REC. E809-10 (daily ed. Aug. 9, 2024).

[16] See Cohen & Marks, *supra* note 9; Cheung et al., *supra* note 14.

[17] See generally Peter Grinspoon, *Back to the Future: Psychedelic Drugs in Psychiatry*, MIND & MOOD (June 22, 2021), https://www.health.harvard.edu/blog/back-to-the-future-psychedelic-drugs-in-psychiatry-202106222508 [https://perma.cc/7ZJ8-FF2J]. Note also that microdosing is outside of the scope for this paper. Furthermore, sometimes, the term hallucinogen is used somewhat interchangeably with psychedelic while other times psychedelics refers to a subset of hallucinogens. What distinguishes a psychedelic from a hallucinogen depends partly on the normative assumptions underlying the claim. Psychedelics are privileged with a relatively positive connotation in modern day medicine while hallucinogen has a much more negative connotation. Thus, whether a certain drug is a psychedelic is debatable and loaded with both physiological and social connotation. See Vincent Joralemon, *What Counts as a Psychedelic?*, BILL OF HEALTH (Jan. 26, 2024), https://petrieflom.law.harvard.edu/2024/01/26/what-counts-as-a-psychedelic/#:~:text=If%20you%20think%20drugs%20like,the%20label%20of%20%E2%80%9Cpsychedelics.%E2%80%9D [https://perma.cc/46AY-4R3D]; See David E. Nichols, *Psychedelics*, 68 PHARMACOL. REVS. 264, 266 (2016).

mechanisms that do not primarily act on 5-HT2A, and include ketamine, MDMA, and ibogaine.[18]

In this paper, we will use the FDA's definition of psychedelics, which includes both classic psychedelics and non-classic psychedelics.[19] While we do not wish to ignore the relevant nuances of each distinct psychedelic, we will frequently focus on the classic psychedelic psilocybin to illustrate our arguments. Psilocybin is a well-known and paradigmatic example of a psychedelic that is actively being investigated to treat mental health disorders.[20] Given its potential to be among the first psychedelics approved by the FDA,[21] it serves as a relevant case example.

### D. Psychedelic-Assisted Psychotherapy (PAT)

Most clinical trials on psychedelics for psychiatric disorders do not examine their effects in isolation. This is a departure from the way all other pharmacological agents have been investigated by the FDA for approval of medical usage.[22] Instead, these trials focus on psychedelic-assisted therapy (PAT), where psychedelics are administered alongside psychotherapy.

PAT has a strong emphasis on the traditional ways that psychedelics have been used to promote healing.[23] For the purposes of this paper, when we discuss the psychotherapy used in PAT we will be doing so generally unless otherwise specified. PAT usually takes the form of a preparation phase, a dosing phase where the patient ingests a psychedelic, and a subsequent integration session to discuss the psychedelic experience.[24] A preparation session is sometimes viewed as essential for psychoeducation, expectation-setting, establishing rapport and facilitating openness to the experience.[25] Dosing sessions involve psychedelic administration, typically in a relaxing environment paired with psychotherapeutic support.[26] The length of dosing

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[18] See, e.g., Fúlvio Rieli Mendes et al., *Classic and Non-Classic Psychedelics for Substance Use Disorder: A Review of Their Historic, Past and Current Research*, ADDICT. NEUROSCI., Sep. 2022, at 1, 1. Both classic and non-classic psychedelics lead to altered consciousness with profoundly affected perception and cognition. However, classic and non-classic are differentiated between their disparate mechanisms of actions.

[19] FDA, PSYCHEDELIC DRUGS: CONSIDERATIONS FOR CLINICAL INVESTIGATIONS GUIDANCE FOR INDUSTRY 4 (2023), https://www.fda.gov/media/169694/download [https://perma.cc/B5G5-VNVR].

[20] See, e.g., Robin L. Carhart-Harris et al., *Psilocybin with Psychological Support for Treatment-Resistant Depression: An Open-Label Feasibility Study*, 3 LANCET PSYCHIATRY 619 (2016).

[21] See, e.g., Will Stone, *FDA Gives Thumbs Down to MDMA for Now, Demanding Further Research*, NPR (Aug. 9, 2024), https://www.npr.org/sections/shots-health-news/2024/08/09/nx-s1-5068634/mdma-therapy-fda-decision-ptsd-psychedelic-treatment [https://perma.cc/8E79-3UHP].

[22] See Cohen & Marks, *supra* note 9, at 7.

[23] Guy M. Goodwin et al., *Must Psilocybin Always "Assist Psychotherapy"?*, 181 AM. J. PSYCHIATRY 20, 23 (2024). It must be acknowledged that this traditional emphasis originates from indigenous practices of using psychedelics, which are outside of the scope of this paper.

[24] See, e.g., Rosalind Watts & Jason B. Luoma, *The Use of the Psychological Flexibility Model to Support Psychedelic Assisted Therapy*, J. CONTEXTUAL BEHAV. SCI, Jan. 2020, at 92, 92; Jacob S. Aday et al., *Psychedelic-Assisted Psychotherapy: Where Is the Psychotherapy Research?*, 241 PSYCHOPHARMACOLOGY 1517, 1518 (2024); David M. Horton, Blaise Morrison & Judy Schmidt, *Systematized Review of Psychotherapeutic Components of Psilocybin-Assisted Psychotherapy*, 74 AM. J. PSYCHOTHERAPY 140, 142 (2021).

[25] See, e.g., Aday et al., *supra* note 24, at 1518.

[26] See, e.g., *Id.* at 1518.

sessions vary by drug, but are usually 6+ hours with psilocybin.[27] The integration session is thought to help patients process the psychedelic experience, draw out lessons and learn to incorporate them into daily life.[28] Each aspect of PAT is thought to involve a distinct approach, with more "traditional" (and often directed) psychotherapy offered during preparation and integration phases and typically a semi-structured, nondirective[29] approach during dosing.[30] The rationale behind PAT is often based on the hypothesis that the surge in neuroflexibility induced by psychedelics requires psychotherapy to fully harness and sustain therapeutic benefits.[31]

While, amongst psychiatric medications, psychotherapeutic assistance during drug administration is unique to psychedelics, there is a precedent for in-person patient monitoring during administration of some psychiatric medications, such as for Spravato (esketamine). [32] For the purposes of this paper patient monitoring refers to nontherapeutic support given to a patient under the influence of a psychedelic. PAT differs fundamentally from standard patient monitoring. PAT involves active therapeutic engagement between a patient and a clinician while patient monitoring merely involves support if needed. While PAT can be nondirective during a dosage session and could even look similar to a situation where a patient monitor is providing needed support, the processes have different aims. PAT is a formal process that employs psychotherapy to ensure safety and bolster outcomes, while patient monitoring is a safeguard intended to ensure a comfortable environment for a patient. The proposed qualifications required for these roles also differ significantly. PAT typically demands psychotherapeutic expertise and professional credentials, whereas safety monitoring requires far less specialized training, as its purpose is not to provide therapy. Additionally, unlike PAT, standard safety monitoring generally does not involve a preparatory session (although it does involve informed consent) or follow-up sessions.

Despite PAT's ubiquity within the medical administration of psychedelics, there is surprisingly little empirically-supported rationale given for the inclusion of psychotherapy.[33] Current approaches are largely the product of trial-and-error from earlier researchers or 'underground' practitioners, as opposed to scientifically rigorous trials.[34]

## E. The Debate Over Mandating PAT

Goodwin and colleagues (2023) broke tradition when they published a commentary proposing that psychedelic drugs such as psilocybin need not always be

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[27] See, e.g., *Id.* at 1518; Horton et al., *supra* note 24, at 143.
[28] See, e.g., Watts & Luoma, *supra* note 24, at 94; Aday et al., *supra* note 24, at 1518; Matthew W. Johnson, William A. Richards & Roland R. Griffiths, *Human Hallucinogen Research: Guidelines for Safety*, 22 J. PSYCHOPHARMACOLOGY 603, (2008) (Johnson et al broadly outlines the value of integration after a psychedelic experience).
[29] In this context, nondirective therapy refers to describe a therapist's minimal intervention stance (they do not typically guide, advise, or interpret), as opposed to a therapeutic orientation such as Rogerian therapy.
[30] Aday et al., *supra* note 24, at 1518.
[31] See, e.g., Watts & Luoma, *supra* note 24, at 94.
[32] *SPRAVATO® REMS*, SPRAVATO®, https://www.spravatorems.com/ [https://perma.cc/E5FB-39JW] (last visited May 7, 2025).
[33] See Aday et al., *supra* note 24, at 1517.
[34] *Id.* at 1523.

used with the goal to "assist psychotherapy".[35] The authors on this paper are influential in part due to their affiliation with Compass Pathways, a pharmaceutical company seeking FDA approval for the use of psilocybin to treat depression.[36] This commentary proved to be quite provocative,[37] with six reply letters in opposition,[38] expressing safety and efficacy concerns with unbundling PAT. In addition, replies to the commentary expressed grave concerns that Goodwin's approach could cause irreparable harm and potentially jeopardize the legitimacy of psychedelic medicine.[39] While we appreciate and will address concerns outlined in these response articles, we believe that Goodwin was correct in scrutinizing the potentially unfounded assumption that psychedelics must always be bundled with psychotherapy in a medical context. Of note, Goodwin and colleagues have sometimes been mischaracterized as opposing all forms of psychosocial support.[40] In fact, they do the opposite and explicitly endorse psychological support via patient monitoring as beneficial for patient safety.[41]

As evidenced by Cohen's (2024) work on the implications of various regulatory regimes for psychedelics and PAT, the conclusions drawn from this debate may significantly affect the experience a patient has when seeking psychedelics for psychological treatment. The decisions regulators make will massively impact the cost and format of the intervention, accessibility, scalability, insurance coverage and more.[42]

## F. Roadmap

We aim to build upon Goodwin's commentary by constructing a more comprehensive analysis of the reasons given in support of mandating PAT. Furthermore, we expand the argument to demonstrate that removing a PAT requirement is both ethically and legally advantageous. While we are not the first to argue for this approach, this is the first robust analysis we are aware of that *ethically* justifies unbundling psychotherapy from psychedelics. Our work is not intended to imply that psychedelics in isolation is *clinically* advantageous. In fact, we believe that PAT will likely be the preferred treatment modality for many patients. Our criticisms of PAT

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[35] Goodwin et al., *supra* note 23, at 20 (critiquing the assumption that psychedelics merely serve to facilitate psychotherapeutic approaches).
[36] Cohen, *supra* note 9, at 397.
[37] Aday et al., *supra* note 24, at 1519.
[38] Garrett Marie Deckel, Lauren A. Lepow & Jeffrey Guss, *"Psychedelic Assisted Therapy" Must Not Be Retired*, 181 AM. J. PSYCHIATRY 77(2024); Michael D. Alpert et al., *Psychotherapy in Psychedelic Treatment: Safe, Evidence-Based, and Necessary*, 181 AM. J. PSYCHIATRY 76(2024); Michael P. Bogenschutz, *Pharmacological and Nonpharmacological Components of Psychedelic Treatments: The Whole is Not the Sum of the Parts*, 181 AM. J. PSYCHIATRY 75, (2024); Mitch Earleywine et al., *Psilocybin Without Psychotherapy: A Cart Without a Horse?*, 181 AM. J. PSYCHIATRY 78, (2024); Kelley C. O'Donnell et al., *Misinterpretations and Omissions: A Critical Response to Goodwin and Colleagues' Commentary on Psilocybin-Assisted Therapy*, 181 AM. J. PSYCHIATRY 74, (2024); Eduardo Ekman Schenberg et al., *Is Poorly Assisted Psilocybin Treatment an Increasing Risk?*, 181 AM. J. PSYCHIATRY 75, (2024).
[39] See Guy Goodwin et al., *Psychological Support for Psilocybin Treatment: Reply to Letters on Our Commentary*, 181 AM. J. PSYCHIATRY 79, (2024).
[40] *Id.* at 80.
[41] *Id.* at 80.
[42] See Cohen, *supra* note 9, at 405; I. Glenn Cohen, *Branching Regulatory Paths and Dead Ends in Psychedelics*, REGUL. REV. (Apr. 15, 2024), https://www.theregreview.org/2024/04/15/cohen-branching-regulatory-paths-and-dead-ends-in-psychedelics/ [https://perma.cc/VGN5-54V9].

primarily relate to the regulatory bundling of psychedelics and psychotherapy and the ethical implications of *requiring* psychotherapy to access psychedelics.

In Section II we critically examine the two primary reasons that PAT is deemed by some to be clinically essential: safety and efficacy. We argue that safety risks of psychedelics use without PAT are within reason and have improperly overshadowed the comparative risks of psychotherapy, while efficacy concerns remain unsubstantiated and inconsistent with the U.S. standard of offering a broad spectrum of psychiatric treatments with varying levels of effectiveness. Ultimately, neither reason is sufficient to justify mandatory inclusion of psychotherapy. In Section III we argue that unbundling PAT would be advantageous from a regulatory standpoint. In this section, we review FDA's prior history and legal authority and discuss how the inclusion of psychotherapy obscures FDA's authority and creates a situation where PAT is not fully regulatable without the creation of new regulatory regimes. In Section IV, we argue that not requiring PAT is ethically advantageous in that it promotes autonomy, expands access, improves resource allocation, and moves away from unsupported psychedelic exceptionalism. In Section V we briefly outline various policy options in the absence of mandated psychotherapy: (1) a prescription approach, (2) a "medical card" model with at-home usage, (3) mandatory preparation, supervision, and integration sessions with a registered facilitator, and (4) in-person patient monitoring during the dosing session. In discussing the utility of several models, we will settle on in-person patient monitoring as our recommended minimum level of support, as opposed to requiring PAT. We will conclude with a brief overview of next steps.[43]

## II. PSYCHEDELIC SAFETY AND EFFICACY

There are two main reasons for requiring a bundled PAT model. First and foremost, commentators cite safety considerations.[44] The second reason is to bolster the efficacy of the psychedelic,[45] which some believe will only work in tandem with therapy.[46]

### A. Safety

Despite widespread concern, data indicates that psychedelics are generally safe. Unlike many other drugs, the primary risks are thought to be psychological rather than physiological in nature.[47] Psychedelics are not addictive.[48] Psychedelic dependence is

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[43] Our paper will focus exclusively on psychedelic use through medical pathways, which is one of 3 major pathways to legal usage of psychedelics. See Cohen, *supra* note 42. We recognize that therapeutic use of psychedelics in licensed medical settings does not encompass the majority of current psychedelic use, and that additional ethical and regulatory considerations may be warranted in religious, indigenous, and recreational settings. See Cheung et al., *supra* note 14, at 18. In addition, we want to acknowledge that the mainstream medical pathway within the scope of this paper is not by any means the only pathway for those using psychedelics for healing purposes.

[44] See, e.g., Goodwin et al., *supra* note 23, at 20; Aday et al., *supra* note 24, at 20.

[45] See, e.g., Aday et al., *supra* note 24, at 1517.

[46] See, e.g., Watts & Luoma, *supra* note 24, at 94. (Extrapolating from the metaphor: To use a metaphor, it's as if psychedelics coax open an oyster to reveal the precious pearl inside. However, it is subsequent experience that determines whether the oyster will remain open or close again.)

[47] Johnson, Richards & Griffiths, *supra* note 28, at 6.

[48] See, e.g., Nichols, *supra* note 17, at 266.

rare, with very few users reporting inability to control use.[49] Most researchers consider psychedelics to be nontoxic, even in very high doses.[50] No long-term neurocognitive deficits have been reported in contemporary psychedelics research.[51] As such, we will focus on the psychological risks that psychedelics may present.

In regards to psilocybin specifically, general risks of psilocybin-related harm have been evaluated by drug experts as low.[52] The risk of psilocybin dependence has been classified as lower than the risk of caffeine dependence.[53] The Substance Abuse and Mental Health Services Administration (SAMSA) characterized psilocybin as having low risk of dependency.[54] Tolerance develops rapidly and there is no known withdrawal syndrome.[55] For these reasons, the potential for abuse of psilocybin is low.[56] Earlier work (much of which has been refuted and/or retracted) has vastly overstated harms of psilocybin, which likely contributed to outsized concerns of psychedelics which may persist today.[57]

One large study found that psychedelics are not associated with increased risk of mental health disorders.[58] More specifically, psilocybin used in a therapeutic context or nonspecifically used in the general population is not correlated with enduring mental illness as a consequence of exposure.[59] Psilocybin has been found to be safe among people with psychiatric disorders.[60]

Unfortunately, many large scale or meta-analyses studies of psychedelics only include PAT,[61] obscuring safety data on psychedelics alone. Studies that do not isolate

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[49] See, e.g., Anne K. Schlag et al., *Adverse Effects of Psychedelics: From Anecdotes and Misinformation to Systematic Science*, 36 J. PSYCHOPHARMACOLOGY 258, 261 (2022).
[50] *Id.*, at 264.
[51] *Id.*, at 264.
[52] Jan van Amsterdam, Antoon Opperhuizen & Wim van den Brink, *Harm Potential of Magic Mushroom Use: A Review*, 59 REGUL. TOXICOL. PHARMACOL. 423, 423 (2011) (arguing that "the use of magic mushrooms rarely (if ever) leads to physical or psychological dependence, that acute and chronic adverse effects are relatively infrequent and generally mild, that public health and public order effects are very limited and that criminality related to the use, production and trafficking of magic mushrooms is almost non-existent"); David J. Nutt, Leslie A. King & Lawrence D. Phillips, *Drug Harms in the UK: A Multicriteria Decision Analysis*, 376 LANCET 1558, 1561 (2010).
[53] Robert S. Gable, *Toward a Comparative Overview of Dependence Potential and Acute Toxicity of Psychoactive Substances Used Nonmedically*, 19 AM. J. DRUG ALCOHOL ABUSE 251, 270-271 (1993).
[54] CTR. FOR BEHAV. HEALTH STAT. AND QUALITY, SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN., U.S. DEPARTMENT OF HEALTH AND HUM. SERV., & RTI INT'L, RESULTS FROM THE 2017 NATIONAL SURVEY ON DRUG USE AND HEALTH: DETAILED TABLES (2017).
[55] James J. H. Rucker, Jonathan Iliff & David J. Nutt, *Psychiatry & the Psychedelic Drugs. Past, Present & Future*, NEUROPHARMACOLOGY, Nov. 2018, at 200, 212.
[56] Matthew W. Johnson et al., *The Abuse Potential of Medical Psilocybin According to the 8 Factors of the Controlled Substances Act*, NEUROPHARMACOLOGY, Nov. 2018, at 143, 143.
[57] Schlag et al., *supra* note 49, at 264.
[58] Teri S. Krebs & Pål-Ørjan Johansen, *Psychedelics and Mental Health: A Population Study*, PLOS ONE, Aug. 2013, at 1, 1 (2013).
[59] Guy M. Goodwin, *Psilocybin: Psychotherapy or Drug?*, 30 J. PSYCHOPHARMACOLOGY 1201, 1201 (2016).
[60] Dana Kaminski & Justin P. Reinert, *The Tolerability and Safety of Psilocybin in Psychiatric and Substance-Dependence Conditions: A Systematic Review*, 58 ANN. PHARMACOTHERAPY 811, 811 (2024).
[61] Yao et al., *supra* note 12, at 2. (despite being a review about the safety and efficacy of psychedelics, they explicitly include studies where psychedelics are an "add-on" treatment in addition to psychotherapy)

the effects of therapy may understate adverse events that are mitigated by therapy or the presence of a therapist, or they may overstate adverse events by including adverse events triggered or exacerbated by therapy or the presence of a therapist. In addition, studies investigating the safety of psychedelics often lump different types of psychedelics together without well-powered subgroup analyses.

There are disagreements about whether often positively perceived experiences such as euphoria ought to be characterized as adverse events due to alleged abuse potential.[62] Given the current consensus that psychedelics have a low potential for abuse, we will focus on safety risks and adverse events that present a more clearly established danger or have broad agreement as significant safety concerns.

### 1. The "Bad Trip"

One of the most likely negative experiences with psychedelics is a "bad trip" (lay language) or a "challenging experience" (therapeutic language).[63] Challenging experiences can be characterized by anxiety, fear, panic, dysphoria, or paranoia.[64] These challenging experiences can be sensory, somatic, personal psychological, or metaphysical.[65] Challenging experiences may pose safety risks, as emotions may be intensified under a psychedelic, and unprepared individuals in uncontrolled environments can pose risks to themselves or others.[66] Dangerous consequences are rare, even in unsafe and uncontrolled environments.[67] Studies of patients admitted to emergency rooms after recreationally ingesting psilocybin typically report non-life threatening symptoms that require no treatment beyond a safe and reassuring environment.[68]

In one study of psilocybin use, over 30% of participants reported experiencing strong or extreme fear at some point during their sessions.[69] Over 20% of participants felt that a significant proportion of their experience was characterized by anxiety and/or dysphoria.[70] In this study, a longer preparatory period was not found to be protective against these negative experiences, which may weaken the justification for lengthy preparatory sessions in PAT.[71] Despite psychological struggles, most participants stated that the experience had personal meaning and no participant reported a decreased sense of wellbeing.[72]

Another study of almost 2000 recreational psilocybin users *who have experienced "bad trips"* found that, on their worst trip, 11% of respondents put

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[62] See **U.S. Food & Drug Admin.,** *June 4, 2024 Meeting of the Psychopharmacologic Drugs Advisory Committee (PDAC)* (YouTube, June 4, 2024), https://www.youtube.com/live/JqQKP8gcY1E.
[63] Johnson, Richards & Griffiths, *supra* note 28, at 609; Schlag et al., *supra* note 49, at 262.
[64] See, e.g., Johnson et al., *supra* note 56, at 147.
[65] See, e.g., Johnson, Richards & Griffiths, *supra* note 28, at 609.
[66] Johnson et al., *supra* note 56, at 143.
[67] *Id.*, at 159.
[68] Emma Honyiglo et al., *Unpredictable Behavior Under the Influence of "Magic Mushrooms": A Case Report and Review of the Literature*, 64 J. Forensic Sci. 1266, 1268 (2019).
[69] Roland R. Griffiths et al., *Psilocybin Can Occasion Mystical-Type Experiences Having Substantial and Sustained Personal Meaning and Spiritual Significance*, 187 Psychopharmacology 268, 278 (2006).
[70] *Id.*, at 281.
[71] *Id.*, at 279.
[72] *Id.*, at 277.

themselves or others at risk of physical harm, and only 2.6% behaved aggressively.[73] Estimated dose was correlated with risk of putting self or others at harm.[74] Of note, these prevalence rates are significantly higher than the rates would be in a general sample of psychedelic experiences, as the sample focused on the worst experiences among individuals who have had bad trips. Despite most participants endorsing the bad trip as one of the 10 most psychologically challenging experiences of their lives, 76% reported that the experiences during the bad trip led to increases in wellbeing, and only 8% reported decreases in wellbeing.[75] Interestingly, the degree of difficulty of the bad trip was positively related to attribution of personal meaning and increased life satisfaction.[47] Some use the concept of post-traumatic growth to characterize challenging experiences during psychedelic usage.[76] This highlights the nuance and difficulty of characterizing "bad trips" as bad or aversive in-and-of themselves. Psychedelic experiences are by design "challenging" in a multitude of ways, and the distinction between challenging and bad, difficult or adverse is blurred due to different usage of the term, and more broadly by our conceptual impoverishment in characterizing these experiences.[77] Nevertheless, any instance where an individual on psychedelics puts themselves or others at risk is a safety concern. Furthermore, our discussion of the benefits of challenging experiences is not intended to imply that every challenging experience on psychedelics is beneficial or that "bad trips" should be provoked.

### 2. Worsened Psychological Outcomes

Unfortunately, there are risks for worsened mental health after psychedelic use. One study of psychedelic use (recreational, spiritual, and medical) found that, among individuals with a history of psychiatric illness, 12.9% experienced a clinically meaningful negative psychological response to a psychedelic at 4-week follow-up.[78] Individuals with a history of a personality disorder diagnosis or a psychotic disorder were most likely to have negative responses (31% and 25%, respectively). Interestingly, in this study individuals with a personality disorder typically experienced improvements in wellbeing at the two week mark followed by marked decreases in weeks 3-4.[79] In addition to this study, there are reports of psychedelic participants achieving a reduction in symptoms for some psychological disorders, but an onset or increase in other psychological symptoms.[80] In what follows, we will discuss potential adverse events that persist beyond the acute psychedelic effect phase.

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[73] Theresa M. Carbonaro et al., *Survey Study of Challenging Experiences After Ingesting Psilocybin Mushrooms: Acute and Enduring Positive and Negative Consequences*, 30 J. PSYCHOPHARMACOLOGY 1268, 1268 (2016).
[74] *Id.*, at 1268.
[75] *Id.*, at 1271.
[76] Rachael Petersen, *A Theological Reckoning with 'Bad Trips'*, HARVARD DIVINITY BULLETIN (2022), https://bulletin.hds.harvard.edu/a-theological-reckoning-with-bad-trips/ (last visited Aug. 3, 2025).
[77] *Id.*
[78] Alessia Marrocu et al., *Psychiatric Risks for Worsened Mental Health After Psychedelic Use*, 38 J. PSYCHOPHARMACOLOGY 225, 228 (2024).
[79] *Id.*, at 229.
[80] Petersen, *supra* note 76; Sarah McNamee, Neşe Devenot & Meaghan Buisson, *Studying Harms Is Key to Improving Psychedelic-Assisted Therapy—Participants Call for Changes to Research Landscape*, 80 JAMA PSYCHIATRY 411, 412 (2023).

a. Suicidality and suicide

Adverse events commonly associated with psychedelics in the media include suicidality (suicidal thoughts, plans, gestures, or attempts)[81] and suicide. There are conflicting reports on whether psychedelics increase or decrease the risk of suicide. A systematic review found that PAT and classic (non-clinical) psychedelic use may reduce or be associated with reductions in suicide.[82] For example, psilocybin studies involving patients with major depressive order have found a decreased risk of suicide or suicide ideation.[83] At the same time, individual cases of attempted suicide or suicide ideation related to psychedelic use can occur during or after a psychedelic experience.[84] On rare occasions there have been suicides linked to classic psychedelic and early (but not modern day) PAT.[85] In recreational settings, there are case reports of attempted and completed suicide following psilocybin use.[86] These unfortunate cases occurred within unsafe and unmonitored settings.[87] There have also been cases involving increases in suicidality following psychedelic usage in a medical setting.[88] These results are congruent with the potential destabilizing effect of psychedelics and require further attention.[89]

While Zeifman and colleagues found potential reductions in suicidality, other studies have found increased risk or no effect.[90] Definitive conclusions on the link between suicidality and psychedelic use are difficult to make, as suicide is difficult to collect data on, study designs differ, and the population studied ranges from healthy psychedelically naive controls to individuals with multiple psychiatric comorbidities. In addition, many studies do not distinguish between different psychedelics. One study found that psilocybin reduced suicidal thoughts and behaviors, while LSD increased

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[81] See generally *Suicidality,* ANDERSON UNIV., https://anderson.edu/student-life/counseling/suicidality/#:~:text=What%20is%20Suicidality,plans%2C%20gestures%2C%20or%20attempts (last visited Aug. 2, 2025).

[82] Richard J. Zeifman et al., *On the Relationship Between Classic Psychedelics and Suicidality: A Systematic Review*, 4 ACS PHARMACOL. TRANSL. SCI. 436, 466 (2021).

[83] Robin L. Carhart-Harris et al., *Psilocybin with Psychological Support for Treatment-Resistant Depression: Six-Month Follow-Up*, 235 PSYCHOPHARMACOLOGY 399, 404 (2018); Alan K. Davis et al., *Effects of Psilocybin-Assisted Therapy on Major Depressive Disorder: A Randomized Clinical Trial*, 78 JAMA PSYCHIATRY 481, 486 (2021); Stephen Ross et al., *Acute and Sustained Reductions in Loss of Meaning and Suicidal Ideation Following Psilocybin-Assisted Psychotherapy for Psychiatric and Existential Distress in Life-Threatening Cancer*, 4 ACS PHARMACOL. TRANSL. SCI. 553, 533 (2021).

[84] Carbonaro et al., *supra* note 73, at 1268.

[85] Zeifman et al., *supra* note 82, at 445.

[86] See, e.g., Honyiglo et al., *supra* note 68, at 1266; Eric N. Kramer, Kalyn Reddy & Bryan Shapiro, *A Suicide Attempt Following Psilocybin Ingestion in a Patient with No Prior Psychiatric History*, PSYCHIATRY RSCH. CASE REPS., June 2023, at 1, 1.

[87] Zeifman et al., *supra* note 82, at 445.

[88] McNamee, Devenot & Buisson, *supra* note 80, at 412.

[89] *Id.*, at 411.

[90] Ragnar Nesvåg, Jørgen G. Bramness & Eivind Ystrom, *The Link Between Use of Psychedelic Drugs and Mental Health Problems*, 29 J. PSYCHOPHARMACOLOGY 1035, 1036 (2015); Pål-Ørjan Johansen & Teri S. Krebs, *Psychedelics Not Linked to Mental Health Problems or Suicidal Behavior: A Population Study*, 29 J. PSYCHOPHARMACOLOGY 270, 270 (2015). Interestingly, these studies used the same dataset to argue opposite conclusions.

suicidal thoughts and behaviors and MDMA had no association.[91] Studies that analyze psychedelics in aggregate may mask findings pertinent to specific drugs.

While we are unable to precisely determine the risk of suicidality in psychedelics without further research, it is likely that psychedelics tend to cause no effect or decrease suicidality in most individuals, with some important exceptions where psychedelic use has directly precipitated a suicide attempt. When considering the risks of suicide with psychedelic usage, however, it is necessary to also consider the increased risk of suicide when individuals are not being effectively treated for their mental health conditions.[92] Many individuals seek psychedelics for treatment of psychological disorders after other treatments have not benefited them.

The small risk of suicide attempts may justify a requirement to consume a psychedelic under supervision. However, these few cases are unlikely to be a compelling reason to mandate supervision from a therapist specifically, or to mandate psychotherapy. In addition, there is no current empirical evidence that the presence of a therapist would reduce the chance of a suicide attempt (as compared to an in-person monitor) during or after a psychedelic experience.

b. Hallucinogen-Persisting Perception Disorder and 'Flashbacks'

Another safety concern is continued hallucinogenic experiences post-administration. Hallucinogen-persisting perception disorder (HPPD) causes recurrent perceptual symptoms resembling the effects of the psychedelic following usage.[93] People use the term HPPD to characterize very different symptom presentations. Some characterize cases of individuals experiencing short-lived, mild flashbacks that are primarily perceived as pleasant and non-negative as "type 1 HPPD".[94] The DSM-V does not include these cases in its definition of HPPD. The more commonly used criteria for HPPD encompasses what some call "type 2 HPPD", which are characterized by more consistently present visual phenomena and can be experienced as distressing.[95] For the purposes of this paper, we refer to "type 1" HPPD as "flashbacks" and use "HPPD" to refer to "type 2" experiences that have been included in the DSM-V.

Both flashbacks and HPPD have been reported in numerous psychedelics including psilocybin.[96] In one controlled study of healthy participants, recurring drug-like experiences of psilocybin occurred in over 8% of participants.[97] However, in this

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[91] Grant Jones, Diego Arias & Matthew Nock, *Associations Between MDMA/Ecstasy, Classic Psychedelics, and Suicidal Thoughts and Behaviors in a Sample of U.S. Adolescents*, SCI. REPS., Dec. 2022, at 1, 1.

[92] See, e.g., Michael F. Grunebaum & John J. Mann, *Safe Use of SSRIs in Young Adults: How Strong Is Evidence for New Suicide Warning?*, CURR. PSYCHIATRY, Nov. 2007, at 27, 27; Richard A. Friedman, *Antidepressants' Black-Box Warning — 10 Years Later*, 371 NEJM 1666, 1666 (2014). (Extrapolating the argument from antidepressants to psychedelics)

[93] See generally Yao et al., *supra* note 12, at 22.

[94] See, e.g., Felix Müller et al., *Flashback Phenomena After Administration of LSD and Psilocybin in Controlled Studies with Healthy Participants*, 239 PSYCHOPHARMACOLOGY 1933, 1934(2022).

[95] *Id.*, at 1934.

[96] See, e.g., Laura Orsolini et al., *The "Endless Trip" Among the NPS Users: Psychopathology and Psychopharmacology in the Hallucinogen-Persisting Perception Disorder. A Systematic Review*, FRONTIERS PSYCHIATRY, Nov. 2017, at 1, 1.

[97] Müller et al., *supra* note 94, at 1933.

study most recurring experiences were flashbacks perceived as neutral or pleasant.[98] These flashbacks were most likely to occur while relaxing or before sleeping.[99] Several other studies have found similar results among healthy psilocybin users, who experienced mostly pleasant flashbacks that do not meet the criteria for HPPD under the DSM-V.[100] Of note, flashbacks may be more common in people with pre-existing psychiatric conditions.[101]

The non-negative perceptions of flashbacks from psilocybin mirror general perceptions of flashbacks from psychedelics.[102] One study found that 22% of psychedelic users experienced a flashback, but only 3% of the entire sample experienced a negative or very negative effect from the flashback.[103] For participants with persistent perceptual changes, only 11% percent reported being bothered by the changes, of which 1% of the total sample reported being extremely bothered.[104]

The DSM-V reports that 4.2% of those who use hallucinogens as having HPPD,[105] with this prevalence estimate developed from a single online study.[106] While most other studies have found much lower rates,[107] this may be because some of the studies excluded potential participants with psychiatric conditions.[108] These lower rate estimates are often well under 1 percent.[109] Since 2000, there is no documentation of a research participant experiencing HPPD.[110]

c. Psychosis

There have been instances where a psychedelic likely provoked the onset of psychosis.[111] It is not possible to determine if individuals in these cases would have eventually developed psychosis in the absence of psychedelics.[112] Cases of psychosis have been observed in individuals with and without known predispositions. There have been a few cases of individuals developing enduring psychotic symptoms after ingesting psilocybin mushrooms, sometimes after ingesting exorbitantly high doses.[113]

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[98] *Id.*, at 1937.
[99] *Id.*, at 1937.
[100] See, e.g., Erich Studerus et al., *Acute, Subacute and Long-Term Subjective Effects of Psilocybin in Healthy Humans: A Pooled Analysis of Experimental Studies*, 25 J. PSYCHOPHARMACOLOGY 1434, 1444 (2011).
[101] Müller et al., *supra* note 94, at 1934.
[102] Robin L. Carhart-Harris & David J. Nutt, *User Perceptions of the Benefits and Harms of Hallucinogenic Drug Use: A Web-Based Questionnaire Study*, 15 J. SUBSTANCE USE 283, 289-290 (2010).
[103] *Id.*, at 289.
[104] *Id.*, at 289-290.
[105] Müller et al., *supra* note 94, at 1934.
[106] Schlag et al., *supra* note 49, at 263.
[107] Müller et al., *supra* note 94, at 1940; Studerus et al., *supra* note 100, at 1448.
[108] Müller et al., *supra* note 94, at 1941.
[109] Schlag et al., *supra* note 49, at 263.
[110] *Id.*, at 263.
[111] Johnson, Richards & Griffiths, *supra* note 28, at 603.
[112] See *Id.*.
[113] See Carbonaro et al., *supra* note 73, 1268; Gregory Barber, Charles B. Nemeroff & Steven Siegel, *A Case of Prolonged Mania, Psychosis, and Severe Depression After Psilocybin Use: Implications of Increased Psychedelic Drug Availability*, 179 AM. J. PSYCHIATRY 892 (2022); Mariella Suleiman et al., *From Mushrooms to Myolysis: A Case of Rhabdo in Psilocybin-Induced Mood and Psychotic Disorder*, 210 J. NERV. MENT. DIS. 638, 638 (2022).

However, the risk for a psychosis triggered by psychedelics is much higher in other psychedelics such as LSD as compared to psilocybin. Due to these risks, studies on treating psychological disorders with psychedelics (including psilocybin) tend to exclude patients with a history or predisposition towards psychosis.[114] It is perhaps due to these screening that no psychotic episodes have been documented in modern clinical trials of psilocybin.[115]

### 3. Contextualizing the Risk of Psychedelics

There have been concerns that psychedelics pose exceptional psychiatric risks.[116] While not intended to minimize the significance of iatrogenic harm that psychedelics may cause, it may be valuable to contextualize this within a larger discussion of the safety risks of psychopharmacologic drugs. Beyond indirect risks caused by ineffective management of psychiatric illness, common psychopharmacologic drugs also have risks of worsened psychological outcomes, including suicidality and psychosis. In addition, other psychopharmacologic drugs carry risk of abuse, dependency, and addiction.[117]

Antidepressants, specifically SSRIs, have well-documented risks and adverse events which have been found to be comparable to the risks of psilocybin.[118] SSRIs have documented risks of suicidality.[119] The risk has resulted in an FDA black box warning, however it has not resulted in mandating psychotherapy for safety concerns.[120] Benzodiazepines, used to treat anxiety, are known to worsen depression and increase suicide risk.[121] They also have a high risk of dependence and addiction, and can be associated with psychosis during withdrawal.[122] Stimulants such as Ritalin and Adderall (used to treat ADHD) carry an abuse potential and a risk of dependence.[123]

Given that the risks of psychedelics are likely not outsized compared to the risk of existing psychopharmacologic treatments,[124] it seems like mandating PAT may be an example of potentially unwarranted psychedelic exceptionalism. Psychedelic exceptionalism occurs when psychedelics are viewed as so extraordinarily novel that they must be evaluated using different frameworks or rules than those applied to current

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[114] Robin Carhart-Harris et al., *Trial of Psilocybin Versus Escitalopram for Depression*, 384 NEJM 1402, 1403 (2021).
[115] *Id.*, at 1408. (An example of a trial with no documented psychotic episodes); Kevin Zannese, *High Time? Psychedelics on Cannabis-Like Fast Track to Legalization,* CMAJ, Dec. 19, 2022, at E1695, https://doi.org/10.1503/cmaj.1096029.
[116] See, e.g., Cheung et al., *supra* note 14, at 18-19.
[117] See, e.g., Miguel Angel Martínez-León, Jose Luis Carballo & Virtudes Pérez-Jover, *Prevalence and Risk Factors for Misuse of Prescription Psychotropic Drug in Patients with Severe Mental Illness: A Systematic Review*, 51 ACTAS ESP. PSIQUIATR. 229(2023)
[118] Carhart-Harris et al., *supra* note 114, at 1407.
[119] See generally Grunebaum & Mann JJ, *supra* note 92, at 28; Friedman, *supra* note 92.
[120] FDA. HIGHLIGHTS OF PRESCRIBING INFORMATION 2017; https://www.fda.gov/media/135185/download?utm_source. Accessed 23rd June, 2025.
[121] See generally Amber N. Edinoff et al., *Benzodiazepines: Uses, Dangers, and Clinical Considerations*, 13 NEUROL. INT'L 594, 594 (2021).
[122] *Id.*, at 599.
[123] See generally David B. Clemow & Daniel J. Walker, *The Potential for Misuse and Abuse of Medications in ADHD: A Review*, POSTGRAD. MED., Mar. 2015, at 64, 64.
[124] It is not possible to precisely compare the risks, as studies characterizing the precise magnitude or likelihood of these adverse events often conflate PAT with psychedelics or rely on data from recreational usage.

psychiatric treatments.[125] Arguably one may extrapolate to say that patient monitoring is also an example of psychedelic exceptionalism. As we discuss below, we disagree; patient monitoring is already used for existing psychopharmacologic treatments, and it represents a much more feasible, discrete, and limited measure to minimize acute risks.

### 4. Methods for Mitigating Safety Issues

There are several strategies for mitigating the safety risks of psychedelics, but it is important to recognize that psychedelics are not a monolithic category; the specific properties of each substance and dosage must be carefully considered. Johnson and colleagues (2008) outlined widely cited safety consideration for participants in psychedelic clinical trials that could be adapted for the clinical setting.[126] Of note, criteria for research participation may be more stringent than criteria for clinical participation. Johnson and colleagues' criteria do not indicate the need for a therapist. They do, however, recommend monitors who can provide strong interpersonal support that carefully observe the participant to minimize adverse psychological reactions.[127]

Careful participant and patient selection could minimize the risk of adverse events. Some common proposed exclusion criteria include disallowing patients who are taking certain medications or who have a history of psychotic disorders.[128] However, some scholars have suggested reconsidering the inclusion of historically excluded groups altogether. Those at potential increased risk of adverse events may still stand to benefit from psychedelic medicine, especially if their particular needs or vulnerabilities are taken into account.[129]

Risks that may present during the acute phase of psychedelic administration can be managed through proper dose administration, appropriate setting, and the presence of a knowledgeable patient monitor. While the inclusion of a patient monitor would likely reduce safety risks, there does not seem to be evidence that acute safety issues warrant the mandated presence of a mental health therapist specifically. Risks that present post-administration can be managed with psychiatric care if necessary. We have found no empirical evidence that the presence of a therapist specifically reduces risks, during or post-administration.

### 5. Risks of Psychotherapists

Despite the fact that psychotherapists are often argued as being necessary for ensuring safety, others argue that psychotherapists themselves constitute the highest risk in PAT.[130] While there are a variety of reported psychotherapy-related harms, such

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[125] See, e.g., Edward Jacobs, *Transformative Experience and Informed Consent to Psychedelic-Assisted Psychotherapy*, FRONTIERS PSYCHOLOGY, May 2023, at 1, 7; William R. Smith & Paul S. Appelbaum, *Novel Ethical and Policy Issues in Psychiatric Uses of Psychedelic Substances*, NEUROPHARMACOLOGY, Sep. 2022, at 1, 1. (Smith & Appelbaum offer an example of psychedelic exceptionalism in context)

[126] See Johnson, Richards & Griffiths, *supra* note 28.

[127] *Id.*, at 610.

[128] *Id.*, at 609.

[129] See Smith & Appelbaum, *supra* note 125.

[130] McNamee, Devenot & Buisson, *supra* note 80, at 411.

as overdependency on therapists in the MAPS clinical trial,[131] one of the most severe and frequently discussed issues is sexual abuse during PAT.

a. Sexual Abuse in PAT

Harrison and colleagues conducted a comprehensive review of recent sexual abuses within underground and clinical trial PAT.[132] A recent phase 2 clinical trial of MDMA has footage of therapists overpowering and sexually abusing a participant.[133] This iatrogenic abuse is worsened by the fact that participants seeking PAT are often among the most vulnerable in society, and are often having acute mental health crises.[134] Some individuals may even be seeking PAT for PTSD caused by sexual trauma.[135] Although the perpetrators were condemned for their actions in the MDMA trials, historically there have been inconsistent responses to such violations.[136] The risk of sexual exploitation is still present and under-addressed in PAT.[137]

Sexual abuse of PAT patients using MDMA in the US has been documented since the early 1980s, and there is recent evidence of sexual misconduct known among the psychedelic professional community.[138] Those who speak out about their experience are sometimes silenced as they are seen as impediments to the advance of psychedelics and a potential reinstitution of the deleterious war on drugs.[139]

Sexual abuse in PAT cannot be attributed up to a few bad actors; it is a risk inherent in the currently overly flexible protocols and systemic failures in regulatory mechanisms.[140] However, beyond the aspects of PAT that can be improved, the inherent "radical vulnerability" patients experience under the influence of psychedelics—often considered the central therapeutic benefit—also constitutes its greatest risk.[141] Essentially, the same mechanisms that create the potentially unique opportunity for therapeutic progress during psychedelics also lay the groundwork for

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131 *Id.*, at 412.
132 See Tahlia R. Harrison et al., *Wolves Among Sheep: Sexual Violations in Psychedelic-Assisted Therapy*, AM. J. BIOETHICS, Jan. 2025, at 40.
133 *Statement: Public Announcement of Ethical Violation by Former MAPS-Sponsored Investigators,* MULTIDISCIPLINARY ASS'N FOR PSYCHEDELIC STUD. (Mar. 25, 2022), https://maps.org/2019/05/24/statement-public-announcement-of-ethical-violation-by-former-maps-sponsored-investigators/.
134 David J. Nutt & Michael Sharpe, *Uncritical Positive Regard? Issues in the Efficacy and Safety of Psychotherapy*, 22 J. PSYCHOPHARMACOLOGY 3, 5 (2008). (extrapolating that if psychotherapy serves particularly vulnerable people, PAT also does)
135 Olivia Goldhill, *Psychedelic Therapy Has a Sexual Abuse Problem*, QUARTZ (July 20, 2022), https://qz.com/1809184/psychedelic-therapy-has-a-sexual-abuse-problem-3 [https://perma.cc/JF7F-F6P2].
136 Harrison et al., *supra* note 132, at 43.
137 McNamee, Devenot & Buisson, *supra* note 80, at 412.
138 Goldhill, *supra* note 135.
139 See Harrison et al., *supra* note 132, at 46.
140 McNamee, Devenot & Buisson, *supra* note 80, at 412.
141 Christopher Kochevar, *Clarifying the Ethical Landscape of Psychedelic-Assisted Psychotherapy*, PHIL. PSYCHOL., June 2024, at 1.

potential iatrogenic harms.[142] Heightened suggestibility in particular increases vulnerability to sexual misconduct by healthcare professional.[143]

b. Epistemic Vulnerability

Beyond sexual motivations, there have been concerns that in the absence of oversight, a therapist can attempt to nefariously alter the values of a participant in a state of heightened suggestibility.[144] In psychotherapy in general, there have been documented incidents, including the potential acquisition of "false memories" that have irreparably harmed families.[145] Given the neuropsychological effects of psychedelics, there are concerns that psychedelics *may* increase the risk of false memories related subsequent harms.[146]

Kochevar (2024) argues that the risks extend beyond heightened suggestibility and can be best understood as an epistemic vulnerability.[147] Beyond mere responsiveness to suggestion, there is "a broad inability to resist the sensory, affective, and epistemic influence of one's environment".[148] This creates a challenging scenario where, even if informed consent is achieved prior to PAT, maintaining voluntary consent throughout the psychedelic experience is extremely difficult.[149] Unfortunately, because this issue stems from the phenomenology of the psychedelic experience, it cannot be easily mitigated.[150] One way to do so is through minimizing "external controlling forces" that can bring manipulation, deception, and coercion.[151] Kochevar believes that this requires forgoing a directive therapy approach (the more traditional psychotherapy method) in favor of a nondirective approach that preserves patients agency.[152] However, as we discuss later, the justification for mandating a nondirective approach is weak when considering the lack of scientific evidence for nondirective approaches.

**6. Risks of Psychotherapy**

While psychotherapy has an indisputably important role as an option for patients with psychiatric disorders, it can cause harm even in the absence of misconduct.[153] Unlike psychotropic medications which are closely monitored by the FDA, there is no equivalent regulatory body for monitoring the safety of psychological

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[142] Jacob S. Aday, Robin L. Carhart-Harris & Joshua D. Woolley, *Emerging Challenges for Psychedelic Therapy*, 80 JAMA PSYCHIATRY 533, 533 (2023).
[143] *Id.*, at 533.
[144] *Id.*, at 533.
[145] Nutt & Sharp, *supra* note 134, at 135.
[146] Saga Briggs, *Hidden trauma: Do psychedelics reveal memories or create fake ones?,* BIG THINK (Mar. 4, 2022), https://bigthink.com/neuropsych/hidden-trauma-do-psychedelics-reveal-memories-or-create-fake-ones/.
[147] Kochevar, *supra* note 141.
[148] *Id*.
[149] *Id.*
[150] *Id*.
[151] *Id.*
[152] *Id.*
[153] See Scott O. Lilienfeld, *Psychological Treatments That Cause Harm*, 2 PERSPS. ON PSYCHOL. SCI. 53, (2007). (This source points to potentially harmful psychotherapies which are harmful by their nature as opposed to how an individual psychotherapist acts)

interventions.[154] While lack of data collection and measurement difficulties complicate estimates, it has been found that around 10% of patients worsen as a result of therapy.[155] A more recent estimate found that between 5-20% of patients are generally dissatisfied with psychotherapy.[156] Beyond worsening outcomes or causing dissatisfaction, psychotherapy can occasionally even retraumatize patients.[157]

Potential patients seeking psychedelics for their psychiatric disorders tend to have previously engaged with other treatment modalities. For current clinical trials, patients are eligible only if they are "treatment-resistant". Given that psychotherapy is often the first-line treatment, it is likely that the patient population seeking psychedelics is overrepresented in the 5-20% of patients dissatisfied with psychotherapy. Relatedly, those seeking psychedelics due to lack of success with psychotherapy may be especially unlikely to benefit from future psychotherapy, even if they do not experience direct harm from psychotherapy. One of the main reasons for declining psychotherapy is a past negative experience,[158] and mandating psychotherapy through PAT may create a scenario where patients decline psychedelic treatment due to concerns with the psychotherapy components. In the absence of robust evidence that psychotherapy is necessary to pair with psychedelics, it is both damaging and arbitrary to create another barrier for treatment by mandating psychotherapy.

Cases involving PTSD highlight the potential harms of mandating psychotherapy. Treatments for PTSD have documented risks of retraumatization,[159] and are generally deeply uncomfortable. A patient with a past experience of retraumatization may understandably decline any treatment that involves psychotherapy. This could result in patients forgoing psychedelic treatment they are interested in and would likely benefit from.

Of note, we are not ignoring the potential iatrogenic harms that could be caused by psychedelics. Psychedelics can also lead to dissatisfaction and retraumatization. This does not preclude the fact that potential patients can be well-informed of the risks of psychedelics, PAT, and psychotherapy, and rationally opt for psychedelics alone.

## B. Efficacy

Psychedelics can create powerful experiences that lead to emotional breakthroughs, not unlike what many psychotherapists aspire for during psychotherapy.[160] However, this resemblance does not necessarily mean that

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[154] *Id.*, at 53; Nutt & Sharp, *supra* note 134, at 4.
[155] Charles M. Boisvert & David Faust, *Leading Researchers' Consensus on Psychotherapy Research Findings: Implications for the Teaching and Conduct of Psychotherapy*, 34 PRO. PSYCHOL. RSCH. PRAC. 508, 511 (2003).
[156] Camilla von Below & Andrzej Werbert, *Dissatisfied Psychotherapy Patients: A Tentative Conceptual Model Grounded in the Participants' View*, 26 PSYCHOANAL. PSYCHOTHER. 211, 211 (2012).
[157] Nutt & Sharp, *supra* note 134, at 4. (Retraumatization from 'flooding')
[158] Maria Barnes et al., *Exploring Patients' Reasons for Declining Contact in a Cognitive Behavioural Therapy Randomised Controlled Trial in Primary Care*, 62 BRIT. J. GEN. PRAC. e371, e371 (2012); Yvonne Schaffler et al., *Perceived Barriers and Facilitators to Psychotherapy Utilisation and How They Relate to Patient's Psychotherapeutic Goals*, HEALTHCARE, Nov. 2022, at 1, 1.
[159] Sharon L. Mailloux, *The Ethical Imperative: Special Considerations in the Trauma Counseling Process*, 20 TRAUMATOLOGY 50, 50 (2014).
[160] Goodwin et al., *supra* note 23, at 23.

psychedelics must always include psychotherapy to reap the therapeutic benefits. While there has long been speculation that psychedelics could accelerate psychotherapy,[161] reports are largely anecdotal.[162] There are no uniform standards related to therapist training or therapeutic methodology.[163] There is a lack of rigorous evidence for optimal ways to conduct preparation[164] or integration.[165] Even more concerning, data on the efficacy of integration are scant.[166] For example, benefits of psychedelics, such as reduction in depressive symptoms among depressed participants, have been documented prior to integration, potentially suggesting that integration is unnecessary.[167]

Goodwin and colleagues' review of psilocybin assisted psychotherapy found that therapists almost exclusively utilized a nondirective approach—despite no evidence that the conditions being targeted are effectively treated by nondirective counseling.[168] In addition, clinical trials of MDMA utilized a nondirective approach.[169] Without empirically-based psychotherapy during psychedelic administration, therapists typically follow a set of unscrutinized principles based on traditions of earlier psychedelic researchers.[170] Some of these principles, such as the importance of touch, are merely defended anecdotally despite being linked to abuses of patients.[171]

Unfortunately, it is unlikely that pivoting to evidence-based therapies over nondirective counseling will resolve concerns about unproven efficacy.[172] Evidence-based therapies require therapeutic engagement that is not feasible when under the influence of certain psychedelics such as psilocybin. Furthermore, McNamee and colleagues argue that psychotherapy requires an ongoing, dynamic consent that is not possible when participants are taking psychedelics that enhance suggestibility and/or

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[161] R.W. Crocket, *Hallucinogenic Drugs and Their Psychotherapeutic Use,* in HALLUCINOGENIC DRUGS AND THEIR PSYCHOTHERAPEUTIC USE 19 (R.A. Sandison ed., C.C. Thomas 1963), https://wellcomecollection.org/works/z7rty6as.

[162] Johnson, Richards & Griffiths, *supra* note 28, at 607.

[163] Aday et al., *supra* note 24, at 1519,1521; Daniel Rosenbaum et al., *Experiential Training in Psychedelic-Assisted Therapy: A Risk-Benefit Analysis*, HASTINGS CTR. REP., July–Aug. 2024, at 32. (Rosenbaum illustrates the lack of uniform standards when reviewing different training program requirements)

[164] Sascha B. Thal et al., *Therapeutic (Sub)stance: Current Practice and Therapeutic Conduct in Preparatory Sessions in Substance-Assisted Psychotherapy—A Systematized Review*, 36 J. PSYCHOPHARMACOLOGY 1191, 1191 (2022).

[165] Sascha B. Thal et al., *Therapeutic Frameworks in Integration Sessions in Substance-Assisted Psychotherapy: A Systematised Review*, CLIN. PSYCH. PSYCHOTHER., Jan–Feb. 2024, at 1, 1.

[166] Goodwin et al., *supra* note 23, at 21; Aday et al., *supra* note 24, at 1520

[167] Guy M. Goodwin et al., *Single-Dose Psilocybin for a Treatment-Resistant Episode of Major Depression*, 387 NEJM 1637, 1643 (2022). (Graph showing the reduction in depressive symptoms prior to the first integration session); Goodwin et al., *supra* note 39, at 79. (Goodwin interpreting his study to indicate that drug dosage, not psychological support including integration, drove outcomes).

[168] Goodwin et al., *supra* note 23, at 20.

[169] Kochevar, *supra* note 141.

[170] McNamee, Devenot & Buisson, *supra* note 80, at 411.

[171] Neşe Devenot et al., *A Precautionary Approach to Touch in Psychedelic-Assisted Therapy,* BILL OF HEALTH (Harv. L. Sch. Petrie-Flom Ctr., Mar. 9, 2022), https://blog.petrieflom.law.harvard.edu/2022/03/09/precautionary-approach-touch-in-psychedelic-assisted-therapy/ (last visited Aug. 26, 2024).

[172] See McNamee, Devenot & Buisson, *supra* note 80, at 411. (in pointing out that a psychotherapy with proven efficacy as a standalone does not necessarily have the same efficacy in the context of PAT).

impair capacity.[173] At the very least, existing evidence-based psychotherapies need to be evaluated for safety and efficacy in the PAT context for them to be justified.[174] This requires a paradigm shift from the current approaches that focus on the safety and efficacy of psychedelics without closely examining the psychotherapy component.

To be clear, we are not claiming that psychotherapy cannot or does not increase the efficacy of psychedelics. Perhaps a single nondirective integration session can substantially bolster the therapeutic potential of a psychedelic. Similarly, a more rigidly applied psychotherapy can capitalize on the heightened neuroplasticity window that psychedelics facilitate.[175] Recent promising psilocybin trials for substance use disorders contain more directive elements such as CBT.[176] Of note, more structured psychotherapy may require many additional specializations and hours of therapy time, making PAT even less accessible.[177] However, the incremental benefit of more structured psychotherapy (or any psychotherapy at all) is unclear because of the lack of research comparing the different interventions.[178] Aday and colleagues have called for standardizing treatments, identifying mechanisms of change, and optimizing trial designs to include dismantling studies, comparative efficacy trials, and cross-lagged panel designs when evaluating the psychotherapy in PAT.[179]

Earleywine and colleagues acknowledge that research may even find that patients improve without psychotherapy.[180] Given the current lack of data, their proposal is to continue with a PAT approach unless emerging evidence suggests otherwise.[181] While we understand the appeal of sticking to the status-quo, we believe that this approach erroneously assumes that PAT is the cautious approach.[182] Given the risks of the psychotherapy aspect of PAT, we do not believe that PAT is necessarily a safer approach nor should it be the default.

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[173] *Id.*, at 411.
[174] *Id.*, at 411.
[175] Goodwin et al., *supra* note 23, at 22.
[176] Michael P. Bogenschutz et al., *Percentage of Heavy Drinking Days Following Psilocybin-Assisted Psychotherapy vs Placebo in the Treatment of Adult Patients with Alcohol Use Disorder: A Randomized Clinical Trial*, 79 JAMA PSYCHIATRY 953, 953 (2022); Matthew W. Johnson, Albert Garcia-Romeu & Roland R. Griffiths, *Long-Term Follow-Up of Psilocybin-Facilitated Smoking Cessation*, 43 AM. J. DRUG ALCOHOL ABUSE 55, 55 (2017).
[177] Goodwin et al., *supra* note 23, at 23.
[178] *Id.*, at 23.; Aday et al., *supra* note 24 (illustrating the lack of research comparing different interventions).
[179] Aday et al., *supra* note 24, at 1517.
[180] Earleywine et al., *supra* note 38, at 78.
[181] *Id.*, at 78.
[182] *Id.*, at 78. (Implied when Earleywine indicates that PAT prioritizes safety over psychedelics in isolation).

The only modern psychedelic trial that has manipulated levels of psychotherapy[183] was by Griffiths and colleagues (2018).[184] This psilocybin study involved healthy volunteers, comparing participants who received standard vs. high support. Both groups who received a high-dose of psilocybin experienced large positive changes at 6 month follow-up, and while participants with higher support experienced higher rating of spiritual experiences (which was expected since their higher support related to spirituality) there were more similarities than differences.[185] According to Aday and colleagues, this suggests that the drug dose was more pertinent than the manipulated psychotherapeutic elements.[186] Separately, Goodwin and colleagues believe that the most parsimonious explanation of data from a Compass trial was that differences in psychedelic dose drove differing therapeutic results.[187]

More trials are needed to discern and distinguish the impact of the psychedelic from the impact of the psychotherapy. At present, we are at equipoise about whether psychotherapy bolsters the safety and efficacy of psychedelics. As such, we can ethically conduct RCT trials comparing PAT with psychedelics in isolation for the treatment of psychiatric disorders.[188]

Even if rigorous trials find that psychotherapy does bolster efficacy of psychedelics in the treatment of psychological conditions, this still may not justify a bundling requirement. It is well established that certain drugs are bolstered by therapies in the treatment of psychological disorders,[189] however this has not led to requiring psychotherapy. For example, treatment outcomes for patients using SSRIs to treat depression are improved when patients simultaneously utilize psychotherapy.[190] However, psychotherapy is not required to be used in conjunction with SSRIs. This logic holds even if the effects of psychedelics and psychotherapy are found to be multiplicative, as has been hypothesized before.[191] Holding psychedelics to a different standard through requiring additional therapeutic elements such as psychotherapy due to evidence that it increases efficacy constitutes psychedelic exceptionalism.

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[183] But this trial did not have a group without psychotherapy.

[184] See Roland R. Griffiths et al., *Psilocybin-Occasioned Mystical-Type Experience in Combination with Meditation and Other Spiritual Practices Produces Enduring Positive Changes in Psychological Functioning and in Trait Measures of Prosocial Attitudes and Behaviors*, 32 J. PSYCHOPHARMACOLOGY 49, (2018); Another trial compared different types of music during psychedelic therapy for smoking cessation, however this trial did not manipulate the psychotherapeutic support offered. See Justin C. Strickland, Albert Garcia-Romeu & Matthew W. Johnson, *Set and Setting: A Randomized Study of Different Musical Genres in Supporting Psychedelic Therapy*, 4 ACS PHARMACOL. TRANSL. SCI. 472, (2021).

[185] See Griffiths et al., *supra* note 184.

[186] Aday et al., *supra* note 24, at 1523.

[187] Goodwin et al., *supra* note 39, at 79.

[188] Gregory S. Barber & Charles C. Dike, *Ethical and Practical Considerations for the Use of Psychedelics in Psychiatry*, 74 PSYCHIATRIC SERVS. 838, 840 (2023). (In arguing that we are at equipoise in psychedelics research)

[189] Pim Cuijpers et al., *Adding Psychotherapy to Antidepressant Medication in Depression and Anxiety Disorders: A Meta-Analysis*, 13 WORLD PSYCHIATRY 56, 56 (2014); Rachel Manber et al., *Faster Remission of Chronic Depression with Combined Psychotherapy and Medication Than with Each Therapy Alone*, 76 J. CONSULT. CLIN. PSYCH. 459, 460 (2008).

[190] Cuijpers et al., *supra* note 189, at 56; Jeffrey R. Strawn et al., *Combining Selective Serotonin Reuptake Inhibitors and Cognitive Behavioral Therapy in Youth with Depression and Anxiety*, J. AFFECT. DISORD., Feb. 2022, at 292, 292.

[191] Deckel, Lepow & Guss, *supra* note 38, at 78.

## III. REGULATORY ADVANTAGES OF UNBUNDLING PSYCHEDELICS AND PAT

### A. Why Unbundle Psychedelics and PAT?

In this section, we will focus on the difficulties of regulating PAT through the FDA. We focused on the FDA in part because it has previously reviewed a PAT application, despite its limited ability to regulate the psychedelic and psychotherapy components together. We will then discuss the regulatory and pharmaceutical company history. Following this, we will explore avenues for the FDA to evaluate psychedelics alone while maintaining the ability to recommend an adjunct psychotherapy or patient monitoring. Finally, we will discuss regulatory precedents that demonstrate how treatments not neatly fitting into traditional, binary pharmacologic vs. therapeutic support categories can still be creatively accommodated by the current system.

While we will not focus on Drug Enforcement Agency (DEA) drug scheduling, it is relevant that most psychedelics are regulated as Schedule 1 drugs, meaning they allegedly have no currently accepted medical use and a high potential for abuse. We join many others in advocating for rescheduling efforts,[192] however substantive rescheduling content is outside the scope of this paper. Nevertheless, an FDA approval of a psychedelic treatment would prompt the DEA to reschedule that particular psychedelic.[193] Rescheduling a psychedelic would likely affect its accessibility and the range of options available for providing parallel psychotherapy or patient monitoring.

### B. The FDA Regulatory Problem

For a psychedelic to be approved for medical use, it needs to be approved by the FDA. If PAT is bundled in a new drug application (NDA), there are 2 main FDA-related regulatory hurdles: (1) the FDA does not regulate the practice of medicine, and (2) it is difficult to isolate the efficacy of a psychedelic when evaluated alongside psychotherapy.[194] Both challenges stem from the confusion about whether PAT should be classified as a drug, a therapy, or both.[195] This distinction is crucial, as regulatory pathways have historically treated drugs and therapies as separate entities, making PAT an unprecedented case.

Beginning with the first challenge, the FDA does not regulate the practice of medicine, including psychotherapy.[196] The FDA's authority derives from the Federal Food, Drug, and Cosmetic Act, which regulates products as opposed to practices. The

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[192] See, e.g., Al-Khaled, *supra* note 11, at 1023; Amy L. McGuire et al., *Developing an Ethics and Policy Framework for Psychedelic Clinical Care: A Consensus Statement*, JAMA NETW. OPEN, June 2024, at 1, 3.

[193] See, e.g., Cohen & Marks, *supra* note 9, at 9.

[194] See Cohen, *supra* note 9, at 406.

[195] See, e.g., Kai Kupferschmidt, *FDA Rejected MDMA-Assisted PTSD Therapy. Other Psychedelics Firms Intend to Avoid That Fate*, SCIENCE (Aug. 12, 2024), https://www.science.org/content/article/fda-rejected-mdma-assisted-ptsd-therapy-other-psychedelics-firms-intend-avoid-fate [https://perma.cc/TT2B-CJF8].

[196] See, e.g., *Id.*; Sara Reardon, *FDA Rejects Ecstasy as a Therapy: What's Next for Psychedelics?*, NATURE (Aug. 13, 2024), https://www.nature.com/articles/d41586-024-02597-x [https://perma.cc/TKH9-TFKC].

regulation of medical practice is a state prerogative under the 10th Amendment.[197] In the case of PAT, the FDA regulates only the pharmacological component, so it cannot properly provide oversight for the psychotherapy component.[198] If the FDA does evaluate a PAT application, it would give rise to a situation where the agency can only legitimately examine and regulate one half of the approved treatment.[199] The absence of a regulatory infrastructure to monitor PAT exacerbates a problematic situation where unevaluated and potentially harmful psychotherapy is imposed on potential patients seeking psychedelics as treatment for their psychiatric disorder.[200]

As a second challenge, the FDA must evaluate the isolated efficacy of a drug when deciding whether to approve an application, which becomes difficult when the application includes therapy alongside the drug being assessed. Any complex interaction between the two complicates interpretation of outcomes.[201] In the FDA's proposed standards for clinical trials involving psychedelics, they state that sponsors should justify the inclusion of psychotherapy and quantify the contribution of psychotherapy to overall treatment effect.[202] The FDA's suggestion was to utilize a factorial design to characterize the separate contributions of the psychedelic and the psychotherapy.[203] To date, no factorial designs for PAT have been run.

## C. Regulatory and Pharmaceutical Company History

In December 2023, Lykos Therapeutics submitted their NDA for MDMA-assisted psychotherapy for the treatment of PTSD.[204] The proposal suggested that MDMA facilitates greater patient receptivity to trauma processing in therapy, functioning as both a pharmacological agent and a therapeutic aid.[205] Because the FDA regulates only the pharmacological agent, it could not fully account for the psychotherapy component, making it difficult to evaluate this claim.[206] Since the necessity of psychotherapy was assumed in the Breakthrough Therapy MDMA development program, all clinical trial data included a psychotherapy component.[207] However, as anticipated, the complex interaction between the psychedelic and the psychotherapy complicated the interpretation of outcomes.[208] This was a central issue raised at an FDA advisory committee meeting for Lykos's application of MDMA for the treatment of PTSD.[209]

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197 Gonzales v. Or., 546 U.S. 243 (2006) (holding that federal laws cannot "prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide under state law permitting the procedure").
198 See, e.g., Reardon, *supra* note 196.
199 McNamee, Devenot & Buisson, *supra* note 80, at 411.
200 *Id.*, at 411.
201 See, e.g., Goodwin et al., *supra* note 23, at 20.
202 FDA, *supra* note 19, at 9.
203 *Id.*
204 See, e.g., Kupferschmidt, *supra* note 195.
205 **U.S. FOOD & DRUG ADMIN.**, *supra note* 62.
206 See, e.g., Reardon, *supra* note 196.
207 **U.S. FOOD & DRUG ADMIN.**, *supra note* 62.
208 Cohen & Marks, *supra* note 9, at 7.
209 Kupferschmidt, *supra* note 195.

It was implied that, if approved, Lykos's product would come with a label[210] that specified that the MDMA must be in conjunction with psychotherapy.[211] In practice this would mean that the indications and usage section of the prescribing information would specify that the MDMA is indicated as an adjunct to psychotherapy.[212] However, because the FDA does not regulate psychotherapy, it would be limited in its ability to specify elements of psychotherapy in product labelling.[213] To further enumerate PAT requirements, Lykos proposed Risk Evaluation and Mitigation Strategies (REMS) which specified that MDMA would be restricted to healthcare setting certified in the REMS.[214] The certification could include mandatory specified training or specific psychotherapy protocols.[215] Lykos would be responsible for developing and implementing the REMS as well as ensuring that the facilities adhere to the FDA's specifications.

Despite widespread enthusiasm and expectations that this NDA would lead to the first approval of PAT, the FDA rejected the application in August 2024 after the Psychopharmacologic Drugs Advisory Committee recommended against approval.[216] This was due to multiple concerns including issues of functional unblinding, difficulties distinguishing between the effects of the drugs and the therapy, insufficient data collection, and a high-profile incident of a participant being abused.[217] The FDA has requested that another phase 3 clinical trial be conducted and the application resubmitted,[218] indicating that, despite the initial rejection of Lykos's application, the FDA continues to be interested in psychedelics and PAT.[219]

While the initial rejection was disappointing to many, the broader effort for approval of psychedelic drugs is ongoing. In the aftermath of FDA's rejection, companies may begin shifting away from PAT due to the regulatory complications discussed above, though this is controversial.[220] Compass Pathways and Usona Institutes are conducting phase 3 clinical trials using psychedelics as a standalone drug therapy for treating depression.[221] Mindmed ran a phase 2b study of LSD for anxiety and atai Life Science is planning to begin a phase 2 trial of DMT for depression; both exclude psychotherapy components.[222] The CEO of atai has even speculated that psychotherapy may not add much, as the benefit from psychedelics comes from internal work.[223] This is in direct contrast with Rick Doblin, the founder of the non-profit

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[210] FDA product labelling allows for specifications that a drug should only be used in conjunction with another mode of therapy, per 21 CFR 201.57(c)(2)(i)(A). See **U.S. FOOD & DRUG ADMIN.**, *supra note* 62.
[211] **U.S. FOOD & DRUG ADMIN.**, *supra note* 62.
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] See, e.g., Cohen, *supra* note 9, at 410.
[216] See, e.g., Kupferschmidt, *supra* note 195.
[217] Stone, *supra* note 21.
[218] Lykos has indicated that they will conduct a new trial and resubmit their NDA. See James Waldron, *Lykos Accepts FDA's View That Reviving Rejected MDMA Therapy's Fortunes Requires Fresh Phase 3 Trial*, FIERCE BIOTECH (Oct. 21, 2024), https://www.fiercebiotech.com/biotech/lykos-accepts-fdas-view-reviving-mdma-treatnents-fortunes-requires-fresh-trial [https://perma.cc/ZY5Z-KUGL].
[219] Stone, *supra* note 21.
[220] Kupferschmidt, *supra* note 195.
[221] *Id.*
[222] *Id.*
[223] *Id.*

organization that created Lykos, who believes that the psychedelic's effect is inseparable from the paired psychotherapy.[224] Cohen, while conceding that excluding psychotherapy would make FDA approval easier, argues that such an approach "is contrary to the ethos of many who have been pressing for approval and acceptance of these substances."[225]

We argue that moving away from FDA evaluation of PAT would be beneficial. However, moving away from FDA evaluation of PAT does not necessarily mean completely unbundling psychedelics and psychotherapy. Companies submitting NDAs for psychedelics may anticipate or advocate for PAT to remain a mandatory bundle, either via the FDA or through other regulatory bodies. Alternately, companies could anticipate or advocate for patient monitoring through the same regulatory mechanisms. These avenues are explored further below.

## D. Potential Solutions Involving the FDA

### 1. REMS

We will first discuss the possibility of the FDA adding REMS to approved treatments as the literature has recognized this regulatory regime as a very plausible path forward.[226] With REMS, the FDA negotiates with a sponsor during the approval process to prevent, monitor, or manage specific serious risks. REMS can take many forms, including requiring adherence to the treatment protocol under which efficacy has been established.[227] If the protocol involved PAT, then a REMS could require adherence to that protocol.[228] However, it is much more likely that a REMS would instead require patient monitoring. This is because REMS are intended to serve a safety function, not an efficacy function,[229] and adequate safety can be ensured merely through patient monitoring. In addition, the complicated interpretation of PAT would still pose an issue for FDA evaluation if psychotherapy were again included in all treatment arms. As the purpose of patient monitoring is safety, it would not be evaluated as an integral mechanism of the pharmacologic agent.

REMS can be mandated following the submission of an NDA, or any time post-approval, and can be removed if deemed unnecessary.[230] The majority of REMS additionally include Elements to Assure Safe Use (ETASU), which require a minimum level of training or accreditation for prescribing or administering a drug.[231] Through an ETASU, the FDA can require screening for specified comorbidities or patient characteristics prior to prescribing a drug, and can require monitoring post-drug administration.[232] While the FDA decides whether to require REMS, the drug

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[224] Reardon, *supra* note 196.
[225] *Id.*
[226] Cohen, *supra* note 9, at 410.
[227] See *Id*.
[228] See *Id.*.
[229] *Id.*, at 408.
[230] *REMS Patents: The Next Frontier in the Psychedelics Patent Skirmish?,* PSYCHEDELIC ALPHA (Sept. 24, 2021), https://psychedelicalpha.com/news/psychedelic-bulletin-are-rems-patents-the-next-frontier-in-the-psychedelics-patent-skirmish-johns-hopkins-researcher-scores-u-s-government-grant [https://perma.cc/5XUQ-ZB3P].
[231] *Id.*
[232] *Id.*

manufacturer is the entity designing the REMS program.[233] There is a history of REMS involving patient monitoring or related psychosocial support for psychiatric drugs, however the specifications have typically been vague.[234] Zyprexa Relprevv (used to treat schizophrenia) is one example of the use of REMS, specifying that the drug must be administered in a certified healthcare facility and that patients will undergo 3 hours of observation by a healthcare professional post-injection.[235] When the FDA was evaluating Lykos's MDMA proposal, they suggested including a REMS which would require at least two healthcare providers onsite.[236] They also suggested that the administration of MDMA should be restricted to certain healthcare settings certified to administer MDMA. Lykos's proposed REMS required licensed facilities to be able to monitor patients for 8 hours or longer. While the final form of Lykos's REMS was never realized due to their NDA denial, the input already given by the FDA is likely indicative of its current vision for REMS.[237] Notably missing from FDA's recommendations were any psychotherapy requirements, which bolsters evidence that REMS for the first approved psychedelic may only require patient monitoring.[238] If a similar REMS is crafted for the first approved psychedelic, then inpatient monitoring will likely be specified, effectively prohibiting unsupervised use or telehealth monitoring.[239] PAT would not be prohibited by a REMS similar to Lykos's proposal, as the psychotherapist could function as the patient monitor.

Of note, REMS has several drawbacks. As the brand manufacturers create REMS themselves, they are patentable.[240] This can effectively block out generic competition.[241] Even if a generic manufacturer obtains their own REMS, they may still be infringing on the patented REMS program.[242] There is growing concern that the patenting of REMS will affect psychedelics. Eleusis has several patent applications on the screening and monitoring of patients during psychedelic therapies.[243] In addition, a drug sponsor may be able to impose a REMS requirement that those supervising the psychedelic experience undergo a particular therapy training program, effectively creating a training monopoly.[244] While REMS programs have been designed to prevent undue burdens on patient access,[245] this would undoubtedly affect drug cost and ultimately patient access.[246]

### 2. Guidance Documents

A softer method that the FDA can employ is producing nonbinding guidance documents related to psychedelics or PAT. A guidance document could recommend

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233 *Id.*
234 Cohen, *supra* note 9, at 411.
235 PSYCHEDELIC ALPHA, *supra* note 230.
236 Cohen & Marks, *supra* note 9, at 11.
237 Cohen, *supra* note 9, at 412.
238 *Id.*, at 412.
239 See Cohen & Marks, *supra* note 9, at 11.
240 PSYCHEDELIC ALPHA, *supra* note 230.
241 *Id.*
242 *Id.*
243 *Id.*
244 Cohen, *supra* note 9, at 408.
245 Sean J. Belouin et al., *Policy Considerations That Support Equitable Access to Responsible, Accountable, Safe, and Ethical Uses of Psychedelic Medicines*, NEUROPHARMACOLOGY, Nov. 2022, at 1, 7.
246 See Cohen, *supra* note 9.

PAT or patient monitoring. To state the obvious, a shortfall of nonbinding guidance is that it can theoretically be ignored by regulated entities without consequence.

The FDA's first draft guidance for psychedelic drugs came out in June 2023.[247] This guidance was generally well-received,[248] and was seen as a promising demonstration of FDA's interest in psychedelics for medical usage. However, some believe that the guidance unduly de-emphasizes or even fundamentally misunderstands the psychotherapy aspect of PAT.[249]

The guidance documents approach has been increasingly used as a mechanism for propagating agency intentions and expectations.[250] However, this approach has come under criticism for multiple reasons.[251] While allegedly voluntary, guidance documents are often effectively interpreted as a requirement, as agencies often seem to expect that regulated entities will follow their announcements.[252] Even if the FDA has the authority to *require* what they are *recommending* in guidance documents, the nonbinding guidance route can be problematic in that it essentially bypasses procedural safeguards dictated by the legislative, executive, and judicial branches with this backdoor approach.[253] For example, under the Administrative Procedure Act, "interpretive rules" or "general statements of policy" do not require notice-and-comment rulemaking which would be standard for FDA requirement setting.[254] Given the complexities of psychedelic regulation, the FDA ought to avoid minimizing important political oversight and public participation.

## E. Regulatory Analogues Beyond the FDA

While there is no direct precedent for regulating psychedelics, it may be useful to consider other approved drugs that share certain parallels. While somewhat analogous situations are unlikely to yield perfect solutions, borrowing from them may address regulatory limits. In addition, they elucidate avenues to creatively regulate psychedelics within the US's existing regulatory infrastructure.

Psychedelics differ in psychological effects and current medical application from currently approved opioid use medications such as methadone or buprenorphine. However, there are some important similarities between psychedelics and opioid use medications:[255] both serve to address complicated public health problems and patients with complex needs. In fact, psychedelics are being investigated to treat opioid use disorder (OUD), so they may eventually be added to the arsenal of approved

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[247] See FDA, *supra* note 19.
[248] Saumya Sinha, Comment, *Regulating the Psychedelic Renaissance: FDA's Critical Role in the Push for Scheduling Reform to Expand Research into Psychedelic Medicines*, 76 ADMIN. L. REV. 731, 751 (2024).
[249] Mason Marks & I. Glenn Cohen, *How Should the FDA Evaluate Psychedelic Medicine?*, 389 NEJM 1733, 1734 (2023).
[250] Lars Noah, *Governance by the Backdoor: Administrative Law(lessness?) at the FDA*, 93 NEB. L. REV. 89, 91 (2014).
[251] See *Id.*.
[252] *Id.*, at 93.
[253] *Id.*, at 90.
[254] *Id.*, at 91.
[255] Cohen & Marks, *supra* note 9, at 11; Marks & Cohen, *supra* note 249, at 1734.

treatments.[256] Additionally, both types of treatments are (or will likely be) frequently provided alongside counselling.[257] For these reasons, there may be lessons learned from the regulation of OUD treatments which may provide insight on the regulation of psychedelics.

Methadone treatment for OUD is an instance where adminsitration of a medicine requires concurrent counseling. However, the FDA is not the regulatory body which mandates counseling. The FDA approved methadone, but because it is labelled a Schedule II controlled substance by the DEA, it is required to be dispensed by licensed opioid treatment programs (OTPs). OTPs are federally regulated by The Substance Abuse and Mental Health Services Administration (SAMHSA), which mandates that patients receiving methadone for OUD must also undergo counseling or therapy.[258] This is an example of a mandated bundling of a drug with a form of therapy, but it differs from the proposed FDA regulation of PAT in that there are different entities that regulate each aspect of the methadone counselling combination. The purpose of these bundled programs is to ensure holistic care. However, there are drawbacks to the mandated bundling which have led to criticism of the practice. Critics point to research which has shown that medication for OUD is effective without counselling.[259] For this reason these regulations have drawn scrutiny, with some going as far as labelling them as non-evidence-based.[260] Unfortunately, states have used required counseling to mandate inflexible requirements such as adhering to a non-personalized prescribed number of sessions, which has been shown to reduce retention in treatment.[261] Although this regulatory solution avoids the dilemma of requiring FDA to regulate a component of treatment it cannot (since counseling falls under SAMHSA's oversight) it does not completely resolve the regulatory puzzle. Regardless of which agency mandates the psychosocial component, such as psychotherapy or counseling, the requirement still introduces significant challenges, including increased cost, logistical complexity, and reduced access, without clear evidence that it is necessary for efficacy.

On the other hand, buphrenorphine is an FDA-approved medication which does not have the same mandatory bundling, despite being offered alongside counselling. Buphrenorphine is also offered at OTPs with a SAMHSA requirement that patients must also undergo therapy. However, since the DEA classified buphrenorphine as a Schedule III drug, it is subject to looser restriction and can be prescribed and dispensed in outpatient setting by specially certified physicians. In these non-OTP settings, patients frequently have an induction phase where they take the medication under supervision, but they are permitted to take buprenorphine at home once dose stabilized. In non-OTP settings, counselling is frequently recommended but is not required.

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[256] See Jeremy Weleff et al., *From Taboo to Treatment: The Emergence of Psychedelics in the Management of Pain and Opioid Use Disorder*, 90 BRIT. J. CLIN. PHARMACOL. 3036, (2024).
[257] Marks & Cohen, *supra* note 249, at 1734.
[258] U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-833, *Opioid Addiction: Laws, Regulations, and Other Factors Can Affect Medication-Assisted Treatment Access* (Sept. 27, 2016), https://www.gao.gov/products/gao-16-833.
[259] Sheri Doyle, *Overview of Opioid Treatment Program Regulations by State,* PEW CHARITABLE TRS. (Sept. 19, 2022), https://www.pew.org/en/research-and-analysis/issue-briefs/2022/09/overview-of-opioid-treatment-program-regulations-by-state.
[260] *Id.*
[261] *Id.*

These two scenarios demonstrate how medication can be bundled with a psychotherapeutic component without FDA having to regulate the practice of medicine. They also show how DEA scheduling nuances can de facto impact whether psychotherapy is required versus recommended for patients. Regardless of whether requiring counselling is the best way to regulate methadone or buphrenorphine, these examples demonstrate that bundling can be done more appropriately though actors other than the FDA. These examples also reflect a historical resistance by the FDA against strictly regulating counseling elements that are often combined with drug therapies.[262]

In fact, the FDA has previously opposed the mandatory bundling of a drug with counseling, even when it recognized counseling as beneficial. The FDA has stated through a prescribing label that buprenorphine ought to be administered alongside therapy.[263] However, in May 2023, the FDA publicly criticized the requirement of counselling for patients seeking buprenorphine for opioid use disorder.[264] The FDA cited concerns about access, as well as the complex nature of PTSD, emphasizing the need for a person-centered approach in treatment. This approach encourages practitioners to meet patients where they are to better support sustained recovery.[265] Of note, the FDA still believed that counseling may benefit many patients and should be offered as an option.[266] Given that the same concerns exist about treatment access, the complex nature of psychiatric illnesses including PTSD, and the need for a person-centered approach in treatment, it seems that there may be a similar justification against mandating PAT.

This section has discussed the challenges associated with the process for approving and regulating PAT. An alternative approach would be for the FDA to approve a psychedelic treatment and include a REMS or issue a guidance document that supports either PAT or patient monitoring. Although REMS and guidance documents are not perfect solutions, they offer a better regulatory framework than directly approving PAT which creates a problematic situation where the FDA cannot fully regulate the psychotherapy component of the treatment protocol.

Even if the obstacles to regulating PAT are overcome through REMS or guidance documents, this does not fully resolve the issue of whether PAT should be made mandatory. Either patient monitoring or PAT could be incorporated within these frameworks. In what follows, we argue for the ethical advantages of an approach that may involve patient monitoring but does not require psychotherapy.

## IV. ETHICAL ADVANTAGES OF NOT REQUIRING PAT

Beyond the lack of evidence for bundling psychedelics and PAT, and the regulatory hurdles that mandating PAT would pose, there are also a range of ethical

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[262] Marks & Cohen, *supra* note 249, at 1734.
[263] Bogenschutz, *supra* note 38, at 75; McGuire et al., *supra* note 192, at 5; Reardon, *supra* note 196.
[264] SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *Dear Colleague Letter* (Oct. 2023) (letter from Marilyn Delphin-Rittmon, Assistant Secretary and Patrizia Cavazzoni, Director), https://www.fda.gov/media/168027/download.
[265] *Id.*
[266] *Id.*

advantages that would come with unbundling the two: population-level benefits and individual-level benefits, including the promotion of access and autonomy.

## A. Population-Level Benefit: Improved Resource Allocation

Removing the requirements for psychotherapy may enhance resource allocation within the mental health system. Offering PAT optionally would clarify whether patients are genuinely interested in PAT specifically or medical psychedelics more broadly, identifying the true demand for different modes of psychedelic interventions. With this information, the medical system can allocate resources for PAT appropriately, avoiding the potential over-allocation that may occur if PAT was universally required for patients seeking medical psychedelics. As an example, given that there is a current shortage of mental health professionals in the US,[267] removing the requirement for psychotherapy for patients who do not wish to engage in it would reduce unnecessary strain on this limited workforce. Additionally, for patients currently engaged with mental health professionals but experiencing limited progress, a successful psychedelic intervention might alleviate their need for continued mental healthcare, thereby reducing the overall demand on practitioners and freeing up resources for others in need. With improved resource allocation likely also would include large cost savings to the healthcare system.

On the other hand, some have predicted that PAT would be cost-saving as compared to psychedelics in isolation.[268] The validity of this claim is unproven, as the only cost-effective analyses that have been done are ones comparing PAT to the current standard of care for psychiatric disorders, rather than a comparison to psychedelics in isolation.[269] Even if PAT was shown to be more cost-effective than psychedelics alone, if the savings were merely marginal, they would be unlikely to justify a burdensome requirement for PAT. Furthermore, in psychiatric medicine, treatments have not historically been approved with additional regulatory requirements based on cost effectiveness.[270]

## B. Individual-Level Benefit: Improved Affordability and Accessibility

For individual patients, forgoing therapy would substantially lower the cost of psychedelics. While the exact price of psychedelic treatments will likely vary depending on the substance, frequency of administration, and required qualifications of the supervising healthcare professional, cost estimates from the MDMA-assisted therapy protocol recently rejected by the FDA ranged from $13,000-15,000. Much of that cost is attributed to monitoring the patient and providing psychotherapy.[271] One

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[267] See generally Kathleen C. Thomas et al., *County-Level Estimates of Mental Health Professional Shortage in the United States*, 60 PSYCHIATRIC SERVS. 1323, 1323 (2009; Tracy Butryn et al., *The Shortage of Psychiatrists and Other Mental Health Providers: Causes, Current State, and Potential Solutions*, 3 INT'L J. ACAD. MED. 5, 5 (2017).

[268] Alpert et al., *supra* note 38, at 77.

[269] Elliot Marseille, Jennifer M. Mitchell & James G. Kahn, *Updated Cost-Effectiveness of MDMA-Assisted Therapy for the Treatment of Posttraumatic Stress Disorder in the United States: Findings from a Phase 3 Trial*, PLOS ONE, Feb. 2022, at 1, 1; Elliot Marseille, et al., *The Cost-Effectiveness of MDMA-Assisted Psychotherapy for the Treatment of Chronic, Treatment-Resistant PTSD*, PLOS ONE, Oct. 2020, at 1, 1.

[270] For example, antidepressant medications do not come with a requirement for psychotherapy.

[271] Marks & Cohen, *supra* note 249, at 1734.

study determined that over 90% of the cost of PAT was for the clinician.[272] This high cost underscores the need for a strong evidence base to justify an access-limiting requirement such as mandatory psychotherapy.[273] Of course, removing the PAT requirement would not necessarily result in psychedelics costing one-tenth the price of PAT, as patient monitors (while significantly cheaper) also create additional costs.[274]

Beyond cost considerations, removing psychotherapy requirements could make psychedelics more geographically accessible, particularly for patients in areas with limited access to mental health professionals. For instance, rural areas often face a shortage of therapists, making it challenging for patients to schedule in-person sessions. Given that many psychedelic protocols will likely require in-person monitoring during the treatment session, less stringent requirements for the person monitoring the patient could reduce geographic barriers. However, there is some concern that offering psychedelics in isolation would foreclose development of PAT, making the intervention less accessible to the patients who do want it.[275] We share the belief that it is essential to continue to develop and offer PAT, but we do not believe that approving psychedelics in isolation would threaten this goal. As O'Donnell and colleagues point out, many patients who receive PAT in research settings seek support outside of the study, suggesting a demand for psychotherapy.[276] Without countervailing evidence, we do not believe that this demand will fade. If demand remains high, as we predict, a market for PAT will remain strong, and accessibility to PAT will not radically diminish.

Another related concern is that insurance companies may capitalize on the opportunity to deny coverage of psychotherapy.[277] This is a serious concern, as psychotherapy is likely beneficial for and wanted by many patients. However, we believe this can be mitigated by establishing an AMA billing code for psychedelics and ensuring there are ways to document and bill for PAT as a dual treatment. As Cohen (2024) outlines, in 2024 the AMA promulgated a psychedelic medication therapy code.[278] However, there is currently no code for a 90-minute psychotherapy session which is the typical length for preparatory and integration sessions.[279] There is a more robust code in development and a placeholder code now which only certain healthcare providers can use.[280] In the meantime, BrainFuture's report outlines suggestions for how to use preexisting codes for PAT.[281] Insurance coverage for PAT as well as psychedelics with psychosocial support will likely depend on the specific regulatory rollout and the strength of evidence that PAT improves efficacy.[282] It is almost certain that PAT will cost more than psychedelics paired with psychological support.[283]

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[272] Marseille, Mitchell & Kahn, *supra* note 269, at 6.
[273] See Marks & Cohen, *supra* note 249, at 1734.
[274] See Cohen, *supra* note 9, at 416.
[275] See O'Donnell et al., *supra* note 38, at 74.
[276] *Id.*, at 74.
[277] Aday et al., *supra* note 24, at 1523
[278] Cohen, *supra* note 9, at 420.
[279] Cohen, *supra* note 9, at 420; BrainFutures, A GUIDE TO CPT AND HCPCS CODES FOR PSYCHEDELIC-ASSISTED THERAPY 7 (2023), https://www.brainfutures.org/wp-content/uploads/2023/09/A-Guide-toCPT-and-HCPCS-Codes-for-Psychedelic-Assisted-Therapy.pdf [https://perma.cc/A2BH-P4GY].
[280] See Cohen, *supra* note 9, at 420; BrainFutures, *supra* note 279.
[281] BrainFutures, *supra* note 279.
[282] Cohen, *supra* note 9, at 421.
[283] *Id.*, at 416-419.

However, this does not serve as justification against psychedelics with psychological support and may even further provide evidence for the need for lower cost options.

### C. Individual-Level Benefit: Patient Autonomy

One of the most fundamental principles of ethical medical care is respect for patients' autonomy, or their capacity to determine how their life goes.[284] Beyond moral imperatives, the value of autonomy in healthcare has been upheld in core legal cases as well. Malette v. Shulman affirmed that a patient has a right to refuse specific treatments or to select an alternate form of treatment even if the decision could entail serious risks and is ill-advised by healthcare providers.[285] Similarly, Cruzan v. Director established the right to refuse medical treatment in the US.[286]

Respect for autonomy demands not only that healthcare professionals fulfill a negative obligation to not unjustifiably constrain the autonomous actions of their patients, but also a positive obligation to promote their patient's autonomous actions where possible.[287] As such, one important benefit of not mandating psychotherapy is that it would offer potential patients a wider range of treatment options. This promotes patient autonomy since greater choice in treatment approaches allows individuals to make medical decisions better aligned with their unique preferences, values, and circumstances. This ability to select a treatment that aligns with their personal needs can foster a sense of control, which is particularly important for patients who may feel disenfranchised by their mental health struggles.

Relatedly, offering flexibility in the medical use of psychedelics can make treatments more culturally sensitive, thus aligning treatment with patients' values and promoting more autonomous decision-making. Mandatory psychotherapy may reflect Western assumptions about mental health treatment that prioritize formalized one-on-one psychotherapy, which might not align with the needs or preferences of patients from diverse cultural backgrounds. For instance, some cultural groups may place greater trust in family involvement, community support, or collaborative decision-making in medical care, rather than relying solely on individual psychotherapy. By allowing patients to access medical psychedelics without the requirement of psychotherapy, healthcare providers can better accommodate cultural preferences while still adhering to medical safety standards.

Additionally, since psychiatric disorders are stigmatized, psychotherapy could deter individuals from seeking treatment, unnecessarily diminishing the treatment options from which they can choose. This could be due to a particular internalized stigma against psychotherapy or a reluctance to extensively discuss psychiatric difficulties with a therapist. Removing psychotherapy as a mandatory component may

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[284] U.S. DEP'T OF HEALTH, EDUC. & WELFARE, *The Belmont Report* (1979), https://www.hhs.gov/ohrp/sites/default/files/the-belmont-report-508c_FINAL.pdf; TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 13 (7th ed. 2009).

[285] *Malette v. Shulman,* [1990] 72 O.R.2d 417 (C.A.) (Can.) (holding that federal laws cannot "prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide under state law permitting the procedure").

[286] *Cruzan v. Dir., Mo. Dep't of Health,* 497 U.S. 261 (1990) (holding that a state may "require that evidence of an incompetent's wishes as to the withdrawal of life-sustaining treatment be proved by clear and convincing evidence").

[287] BEAUCHAMP & CHILDRESS, *supra* note 284, at 107.

remove a barrier to an option for care patients would otherwise deem viable. And again, offering patients more viable treatment options to choose from bolsters their ability to make autonomous decisions.

Such treatment flexibility can benefit all patients, even those who opt for PAT or a different, non-psychedelic treatment since providing more options can be empowering, validating the patient's role as an active participant in their own care, enhancing their confidence in the treatment process, and increasing engagement with the chosen approach.

Lastly, providing psychedelics without mandating that a patient engage in psychotherapy may be more ethically justified considering, as discussed earlier, patients may be unable to provide ongoing, dynamic consent while under the influence of psychedelics. Given how much acquiring informed consent from patients bears on their autonomy interests,[288] avoiding medical practices that subvert informed consent, where possible, is critical.[289] It has been argued that achieving informed consent for psychedelics is easier than maintaining it,[290] and opting against psychotherapy minimizes the risk that a patient's epistemic vulnerability is exploited. Given the limits to providing informed consent during psychedelic use, and the centrality of informed consent to patients' autonomy interests, it seems especially important to protect against potentially unwanted treatment.

## D. Against Psychedelic Exceptionalism

As we have discussed throughout this paper, the bundling of psychotherapy with psychedelics is an example of psychedelic exceptionalism.[291] Researchers have boldly claimed that psychedelics and PAT are "arguably unlike anything else in psychiatry" and could be "paradigm-shifting".[292] Psychedelic exceptionalism occurs when psychedelics are viewed as so extraordinary that they must be evaluated using different frameworks or rules than those applied to current psychiatric treatments, either positively or negatively.[293]

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[288] RUTH R. FADEN & TOM L. BEAUCHAMP, A HISTORY AND THEORY OF INFORMED CONSENT 235 (1986); ROBERT E. GOODIN, CONSENT MATTERS 19 (2024).

[289] One may wonder if debates over informed consent to psychedelic treatments are moot on the basis that such treatments are so transformative that it would be impossible to provide patients with sufficient information for them to give properly informed consent. See Jacobs, *supra* note 125; However, we follow Villiger (2024) in arguing that patients can have adequate understanding of transformative treatment because a) empirical evidence demonstrates that such experiences can, at least to an extent, be imagined and b) the understanding requirement for informed consent merely requires that a patient understand the risks and benefits of the treatment and the arguments for and against it. Thus, questions about informed consent bear on the debate over a PAT mandate. See Daniel Villiger, *Informed Consent Under Ignorance*, AM. J. BIOETHICS, Jul. 2025, at 126, 131-34.

[290] Kochevar, *supra* note 141.

[291] See Cohen & Marks, *supra* note 9, at **7**.

[292] Cheung et al., *supra* note 14, at 16; Aday et al., *supra* note 24, at 1517; See Eduardo E. Schenberg, *Psychedelic-Assisted Psychotherapy: A Paradigm Shift in Psychiatric Research and Development*, FRONTIERS PHARMACOLOGY, July 2018, at 1, 1; Emmanuelle A. D. Schindler & Deepak Cyril D'Souza, *The Therapeutic Potential of Psychedelics*, 378 SCIENCE 1051, 1051 (2022).

[293] Jacobs, *supra* note 125, at 7; Smith & Appelbaum, *supra* note 125 (for example of psychedelic exceptionalism).

In positive exceptionalism, excessive "hype" exists, wherein people incorrectly view psychedelics as a magic bullet.[294] Sometimes, psychedelics are viewed as being so exceptional that the "usual rules" in psychiatric treatments do not apply.[295] Positive psychedelic exceptionalism has resulted in many harms and has been used to justify inappropriate behavior from psychotherapists and healthcare professionals that would be seen as inappropriate in the context of any other treatments. For example, the importance of "therapeutic" touch has been repeatedly defended, despite being linked to abuses against patients.[296] In a survey of naturalistic psychedelic users, 8% of reported that they or someone they know was the victim of inappropriate sexual contact by a psychedelic monitor, guide, or practitioner.[297] As a high-profile example, in the aforementioned Lykos trial one patient experiencing the effects of MDMA was inappropriately touched by two therapists, under the guise of 'exposure therapy' unique to psychedelic medicine.[298] Many people are aware of the risks of positive psychedelic exceptionalism and work to dispel myths such as the idea that psychedelics will end mental health issues.

Still, psychedelics are far from the only psychiatric drug that have experienced such positive exceptionalism. When it first came to market, Prozac was heralded as a paradigm-shifting drug for the treatment of depression.[299] In 1990, Newsweek ran an issue of their magazine where the title page read: 'Prozac: A Breakthrough Drug for Depression.'[300] Popular psychiatrist Peter D. Kramer wrote *Listening to Prozac*, which speculated about the use of the drug not just for clinical use, but as a personality enhancer.[301] Like with psychedelics, Prozac exceptionalism, and SSRI exceptionalism more broadly, resulted in harm. Many commentators and researchers worried that the drug was being substantially overprescribed; one survey showed 80% of general practitioners believed SSRIs, chief among them Prozac, were being overprescribed.[302] A later study found that SSRIs accounted for about half of all antidepressant overprescriptions.[303]

On the other hand, while negative psychedelic exceptionalism has generally received less attention, it also carries significant risks. With negative psychedelic

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294 Cheung et al., *supra* note 14, at 18.
295 *Id.*, at 18.
296 See Harrison et al., *supra* note 132, at 48.
297 Daniel J. Kruger et al., *Psychedelic Therapist Sexual Misconduct and Other Adverse Experiences Among a Sample of Naturalistic Psychedelic Users*, 3 PSYCHEDELIC MED. 41, 41 (2025).
298 Will Stone, *Transformation or Trouble? Research into MDMA Plagued with Allegations of Misconduct*, NPR (May 13, 2024), https://www.npr.org/sections/health-shots/2024/05/13/1250580932/ecstasy-mdma-ptsd-fda-approval [https://perma.cc/H7RH-892S].
299 Peter E. Stokes & Aliza Holtz, *Fluoxetine Tenth Anniversary Update: The Progress Continues*, 19 CLIN. THERAPEUTICS 1135, 1139 (1997); David T. Wong, Kenneth W. Perry & Frank P. Bymaster, *The Discovery of Fluoxetine Hydrochloride (Prozac)*, 4 NATURE REVS. DRUG DISCOV. 764, **764** (2005).
300 Editorial, *Psychiatric Drug Discovery on the Couch*, 6 NATURE REVS. DRUG DISCOV. 171, **171** (2007).
301 See PETER D. KRAMER, LISTENING TO PROZAC (1993).
302 James Mauro, *And Prozac for All..*, PYSCH. TODAY (July 1, 1994), https://www.psychologytoday.com/us/articles/199407/and-prozac-for-all [https://perma.cc/GEF5-6DU7]; Sarah Boseley, *Doctors 'Forced' to Overprescribe Antidepressants*, GUARDIAN (Mar. 30, 2004), https://www.theguardian.com/science/2004/mar/30/drugs.sciencenews [https://perma.cc/LWH6-5QLZ].
303 Rena Conti, Alisa B. Busch & David M. Cutler, *Overuse of Antidepressants in a Nationally Representative Adult Patient Population in 2005*, 62 PSYCHIATRIC SERVS. 720, 725(2011).

exceptionalism, psychedelics are seen as uniquely powerful, dangerous, and almost magical.[304] This could lead to outsized caution in the form of excessive regulatory and ethical demands, as opposed as being compared to the risks of current psychiatric interventions.[305] Exceptionally demanding ethical or evidentiary standards could also result in superfluous overregulation or the unnecessary bundling of psychedelics with psychotherapy to ground the novel treatment within a status-quo intervention.

### E. Distinct but Not Unique

As Cheung and colleagues (2025) argue, psychedelics have distinctive elements but are not exceptional, and there may not be a need for a paradigm shift in the way that we conduct ethical and regulatory oversight for these treatments.[306] Regulating psychedelics like the more intensive side of psychiatry would involve patient monitoring, as is already standard for certain other psychiatric treatments. However, PAT diverges from this continuum by embedding not only safety measures but also a built-in efficacy initiative, resulting in a uniquely burdensome model. The safety and regulatory challenges posed by psychedelics are more appropriately addressed within the current psychiatric and regulatory infrastructure, rather than through entirely novel frameworks.

## V. ALTERNATIVES TO MANDATING PAT

In this section, we will focus on clinical, medicalized pathways to access psychedelics, and discuss several options that do not mandate PAT. Given that there is currently no approved medical model for psychedelics or PAT, there are several different paths that regulators and companies can take.[307] Our proposals aim to demonstrate alternatives to mandating PAT *within the current regulatory landscape*. While existing regulatory infrastructure has clear weaknesses which some believe are particularly exacerbated by the difficulties of regulating psychedelics or PAT, we believe that these can be overcome by a proactive and purposeful regulatory approval strategy.

One potential avenue would be to pursue a non-medical approach. One could argue that potential patients seeking psychedelics in treatment of psychiatric disorders should access psychedelics not through healthcare provider, but rather through a religiously-protected organization or the underground market. The religious pathway is an important and federally protected pathway for psychedelics, however it is potentially inappropriate for treatment of psychiatric disorders, especially for non-spiritual individuals. Potential patients may be unable to access the underground market or be exploited and charged exorbitant amounts of money. Potential patients may also be sold substandard products that are the wrong dosage or even covertly contain potentially harmful substances. Potential patients ingesting psychedelics in a non-medical setting will not benefit from informed consent or personalized dosage recommendations.

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[304] Cheung et al., *supra* note 14, at 19.
[305] See *Id.*, at 19.
[306] *Id.*, at 19-20.
[307] Of note, there is sometimes confusion between medical models and supported adult use models. Oregon and Colorado both have supported adult use models, which are not allowed to make medical claims and allow people to access psychedelics for general wellness. However, while not allowing *medical* usage, Oregon allows for *therapeutic* usage. When psychedelics are approved within the medical model both avenues will coexist. See McGuire et al., *supra* note 192, at 6.

Those seeking supervision during ingestion are at risk of being taken advantage of. Furthermore, all of these potential harms are exacerbated by the illegality of the practice, which would preclude the ability to seek remediation for harm and could open the patient to the risk of criminal charges.

The numerous ethical and practical challenges presented by non-medical pathways suggest the need to pursue a medicalized approach instead. Thus, we turn to examining the several plausible medical approaches for FDA approval of psychedelics, using cases analogous to each proposed approach to demonstrate the benefits and risks of each model. In doing so, we ultimately conclude that in-person patient monitoring during the psychedelic experience is the best approach for FDA approval of psychedelics under the current regulatory framework.

## A. The Prescription Approach (Case: Psychedelics in Australia)

In 2023, Australia controversially became the first country to allow psilocybin and MDMA to be prescribed by doctors as a psychiatric treatment.[308] The drugs can be prescribed by psychiatrists using the Authorised Prescriber Scheme, which allows prescription of drugs not yet on Australia's therapeutic good register.[309] Similar to the US's FDA, Australia has the Therapeutic Goods Administration (TGA), which regulates medicines and medical devices and is not intended to regulate the practice of medicine.[310] Subsequently, Australia regulates psychedelics as medications and does not stipulate psychotherapy requirements.[311] The head of the TGA stated that regulating the clinical setting was outside of the agency's purview, and that clinical professional societies (e.g., the Royal Australian and New Zealand College of Psychiatrists)[312] will likely release guidance. Additionally, for psychiatrists to enter the Authorised Prescriber Scheme, they must have approval from a human research ethics committee and have evidence that robust protocols have been established.[313] Some have interpreted this to mean that PAT is essentially required in order to receive human research ethics approval or to provide evidence of robust protocols.[314] This is supported by the fact that, despite the lack of strict clinical practice requirements, the

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[308] Rich Haridy, *Australia to Prescribe MDMA and Psilocybin for PTSD and Depression in World First*, NATURE (June 30, 2023), https://www.nature.com/articles/d41586-023-02093-8 [https://perma.cc/3YGR-BYQN].
[309] *Id*.
[310] *Id.*
[311] *Id.*
[312] THE ROYAL AUSTL. & N.Z. COLL. OF PSYCHIATRISTS, *Psychedelics*, RANZCP (June 25, 2025), https://www.ranzcp.org/clinical-guidelines-publications/in-focus-topics/psychedelics.
[313] AUSTRALIAN GOV'T, THERAPEUTIC GOODS ADMINISTRATION, *Re-scheduling of Psilocybin and MDMA in the Poisons Standard: Questions and Answers* (Feb 10, 2023), https://www.tga.gov.au/resources/publication/scheduling-decisions-final/notice-final-decision-amend-or-not-amend-current-poisons-standard-june-2022-acms-38-psilocybine-and-mdma/re-scheduling-psilocybin-and-mdma-poisons-standard-questions-and-answers; Daniel Perkins, *A New Era of Psychedelic Medicine in Australia*, REGUL. REV. (Apr. 23, 2024), https://www.theregreview.org/2024/04/23/perkins-a-new-era-of-psychedelic-medicine-in-australia/ [https://perma.cc/4M6A-ZRQU].
[314] Alicia Pyke, *Prescription Psychedelics Explained,* MY DOCTOR (2023), https://mydr.com.au/mental-health/prescription-psychedelics-in-australia-what-you-need-to-know/ (last visited Aug. 26, 2024).

TGA specifically states that MDMA and psilocybin have been approved for use in PAT.[315]

One benefit of Australia's model is that it does not require the TGA to move beyond its role and directly regulate the practice of medicine. The FDA may be well-suited to a similar approach, where it regulates the psychedelic but uses its influence to promote PAT as the preferred approach. This would solve many of the *regulatory* issues with PAT. Soft guidelines through professional societies may be appropriate if more evidence accumulates pointing to the importance of psychotherapy. However, if psychotherapy is essentially required, many of the same *ethical* challenges persist. While preferable to a situation where the FDA regulates the practice of medicine, mandating psychotherapy retains the associated individual and social costs, restricts autonomy, and exposes patients to risks of psychotherapy and psychotherapists without providing an alternative way to access psychedelics for treatment of psychiatric disorders.

### B. The Medical Card Approach (Case: Medical Marijuana in Some US States)

A medical card approach bears some similarities to a prescription approach in that a healthcare provider serves as the person who can make the substance available. In some US states, medical marijuana is made accessible via a medical marijuana card, not a prescription. This typically takes the form of a doctor providing a recommendation or certification which allows a patient to apply for a medical marijuana card through their state, typically from a dispensary.

At the permissive end of the spectrum of approaches to regulating psychedelics, medical use of psychedelics could work similarly to medical use of marijuana. Importantly, this mechanism would still involve receiving authorization from a healthcare professional. However, beyond the logistics of acquiring a medical card, the actual setting and experience of ingesting a psychedelic under this approach may closely resemble recreational use of psychedelics, which typically occurs privately at home.[316] Litman (2024) argues that psychedelic dispensaries should be further considered, especially given that increasing demand for psychedelics may drive people to underground use given the hurdles that an on-site only model creates.[317] In a way, the dispensary model would serve as a harm reduction approach, which would funnel more people into the medical pathway over underground use.[318]

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[315] AUSTRALIAN GOV'T, THERAPEUTIC GOODS ADMINISTRATION, *Update on MDMA and Psilocybin Access and Safeguards from 1 July 2023* (July 3, 2023), https://www.tga.gov.au/news/news/update-mdma-and-psilocybin-access-and-safeguards-1-july-2023; AUSTRALIAN GOV'T, THERAPEUTIC GOODS ADMINISTRATION, *Change to Classification of Psilocybin and MDMA to Enable Prescribing by Authorised Psychiatrists* (Feb. 3, 2023), https://www.tga.gov.au/news/media-releases/change-classification-psilocybin-and-mdma-enable-prescribing-authorised-psychiatrists.

[316] See generally Claire Walker et al., *From Chaos to Kaleidoscope: Exploring Factors in Psychedelic Self-Treatment for Mental Health Conditions*, 38 J. PSYCHOPHARMACOLOGY 749 (2024).

[317] Victoria Litman, *Why We Need to Talk About Psychedelic Dispensaries*, REGUL. REV. (Apr. 18, 2024), https://www.theregreview.org/2024/04/18/litman-why-we-need-to-talk-about-psychedelic-dispensaries/ [https://perma.cc/R7Q3-L8BF].

[318] Litman, *supra* note 317.

Some argue that the current underground usage of self-medicating psychiatric disorders with psychedelics appears to be working. A medical card approach would build on this foundation by adding increased safeguards, patient education, and communication with healthcare professionals.

Walker and colleagues (2024) analyzed a large study involving people with psychiatric disorders who were self-medicating with psychedelics and found that participants experienced perceived symptom improvement.[319] The authors argued that their findings suggest a reduced need for medically supervised pharmacological interventions.[320] Similarly, Nayak and colleagues (2023) explored naturalistic psilocybin use and found that participants reported lasting improvements in psychiatric symptoms.[321] Another study of naturalistic psychedelic use found that half or more of participants report adequate preparation before, support during, and subsequent integration of psychedelic experiences.[322] This suggests that individuals are obtaining relevant information on psychedelics and have reasonable access to sufficient interpersonal support.[323] In addition, participants who disclosed psychedelic usage to medical providers reported higher levels of preparation and support, suggesting that communication with healthcare providers may improve outcomes.[324]

A medical dispensary model could capitalize on the relatively high levels of support available to potential patients in naturalistic settings. However, while this approach certainly avoids overregulation, we worry that it may add clinical risks. We have argued that psychedelics may not be so exceptional to warrant an entirely new clinical framework, but psychedelics may be distinct in ways that require more oversight than a medical card approach provides. Indeed, while the evidence regarding the importance of psychotherapists delivering psychotherapy is dubious, unlike many other psychiatric treatments, there is substantial evidence that the set and setting of a psychedelic experience is important.[325] The set and setting hypothesis holds that the effects of a psychedelic are greatly influenced by set (personality of patient, level of preparation, expectation regarding experience, and the intention of the patient) and setting (the physical and sociocultural environment in which the psychedelic experience occurs).[326] Beyond being fundamental to the therapeutic potential of psychedelics, appropriate set and setting has been identified as an important means of reducing potential harms associated with psychedelics.[327] Allowing patients to be

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[319] Walker et al., *supra* note 316.
[320] *Id.*, at 749.
[321] See Sandeep M. Nayak et al., *Naturalistic Psilocybin Use Is Associated with Persisting Improvements in Mental Health and Wellbeing: Results from a Prospective, Longitudinal Survey*, FRONTIERS PSYCHIATRY, Sep. 2023, at 1.
[322] Kevin F. Boehnke et al., *Slouching Towards Engagement: Interactions Between People Using Psychedelics Naturalistically and Their Healthcare Providers*, FRONTIERS PSYCHIATRY, Aug. 2023, at 1, 4.
[323] *Id.*, at 6.
[324] *Id.*, at 6.
[325] See, e.g., See Litman, *supra* note 317; Ido Hartogsohn, *Set and Setting, Psychedelics and the Placebo Response: An Extra-Pharmacological Perspective on Psychopharmacology*, 30 J. PSYCHOPHARMACOLOGY 1259, (2016).
[326] See, e.g., Ido Hartogsohn, *Constructing Drug Effects: A History of Set and Setting*, DRUG SCI. POL'Y L., Jan. 2017.
[327] Ido Hartogsohn, *Set and Setting for Psychedelic Harm Reduction*, *in* CURRENT TOPICS IN BEHAVIORAL NEUROSCIENCES 1, 1 (Bart A. Ellenbroek, Thomas R. E. Barnes, Martin P. Paulus & Jocelien Olivier eds. Springer 2024).

under the influence of psychedelics in uncontrolled environments poses unnecessary risks, especially when considering that patients with psychiatric disorders (especially personality disorders and psychotic disorders) may be especially vulnerable to adverse events or wrongdoing from others.[328] Thus, while this approach would avoid *regulatory* pitfalls of PAT, it would raise numerous safety and ethical concerns. Given existing concerns within the psychedelic community and statements made by the FDA, it is highly unlikely that an at-home approach would be approved at this time.[329]

### C. Preparation, Supervision, and Integration with a Facilitator (Case: Oregon Supported Adult Use)

In November 2020, Oregon approved supported adult use for psilocybin.[330] Supported adult use is similar to "adult use" in states where an adult can buy marijuana for a multitude of non-medical reasons.[331] However, it is much more structured than regular adult use: First, psilocybin can only be dispensed at a licensed service center. Second, Oregon requires a licensed administrator of the drug, though they need not be a healthcare professional.[332] Under this model, this administrator serves merely as a 'facilitator' and does not perform the duties of a formal monitor such as monitoring the patient's vital signs or evaluating them for symptoms like respiratory depression.[333]

In order to access psilocybin, an initial preparation session is required.[334] Once dispensed, the psilocybin needs to be ingested at the service center.[335] In theory, someone can skip the post-use integration sessions, but it is expected they agree to attend prior to administration of the psychedelic.

An approach that more closely mirrors traditional usage of psychedelics could mirror the current supported adult use model. While requiring additional time (and likely cost), patients who do not want psychotherapy may be drawn to this option for multiple reasons. For one, the experience of a psychedelic can be potentially intimidating beforehand or feel unusual or isolating afterward. Patients may want to talk to someone who can understanding and discuss these feelings.[336] In addition, while patients can be briefly assessed for unusual persistent beliefs or potentially impulsive intentions immediately following the psychedelic session, having an added safeguard in the form of an integration session could prevent rash financial or interpersonal decisions.

While this approach would likely be of interest to many patients, requiring it creates similar problems to requiring PAT. While not possessing the same intensity as

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[328] A controlled setting need not be distinctly medical in the form of a cold and impersonal hospital room, in fact that would likely be considered a poor setting. See Hartogsohn, *supra* note 326. A controlled setting is often constructed to be a peaceful room with a reclining chair, music, headphones and an eye mask available.

[329] See Cohen, *supra* note 9, at 413.

[330] Mason Marks, *The Varieties of Psychedelic Law*, NEUROPHARMACOLOGY, Mar. 2023, at 1, 3.

[331] *Id.*, at 3.

[332] *Id.*, at 3; They need only have completed the requisite training programs.

[333] *Id.*, at 3.

[334] OR. HEALTH AUTH., *Oregon Psilocybin Services – Access Psilocybin Services* (2025), https://www.oregon.gov/oha/ph/preventionwellness/pages/psilocybin-access-psilocybin-services.aspx (accessed May 8, 2025).

[335] *Id.*.

[336] Goodwin et al., *supra* note 23, at 22.

engaging in psychotherapy, patients may understandably have similar qualms about sharing their personal psychedelic experience or with discussing traumas and/or psychiatric challenges that they worked through while under the influence of a psychedelic. This hesitance to share personal information may be exacerbated by the fact that facilitators will often have relatively fewer qualifications as compared to a psychotherapist. In addition, adding preparation and integration phases adds additional time and cost, which would reduce accessibility.

Another potential concern with the preparation, supervision, and integration facilitator model is that its similarity to the supportive adult use model may essentially crowd out supported adult use systems.[337] This is especially true if the medical pathway is covered by health insurance but the supported adult use pathway is not, even if they look the same in practice with a facilitator.[338] Erasing the supported adult use pathway by forcing those interested in using the medical pathway may lead to overmedicalization of people that may want to use the supported adult pathway. In summary, this approach is undesirable as it may represent merely a worse form of PAT that could also lead to conflating with the supported adult use model.

### D. Supervision During Psychedelic Experience (Case: Spravato (Esketamine) in the US)

Esketamine is one of two molecules that make up ketamine, and bears similarities to non-classical psychedelics.[339] The FDA has approved Spravato (esketamine) for treatment resistant depression (TRD) and major depressive disorder (MDD). Similarly to psychedelics, there are concerns about the vulnerability patients face when under the influence of the drug. To mitigate safety concerns, a REMS arrangement is in place requiring that esketamine is administered in a mode akin to a directly observed therapy (DOT) (i.e., under the direct supervision of a healthcare provider, in a certified healthcare setting).[340] The pharmacies, practitioners, and healthcare setting that distribute the drug must have specific certification to do so, per the ETASU.[341] Each dose must be consumed in a certified clinic where patients must stay in the clinic for safety monitoring for at least 2 hours.

Discussions leading up to the finalized REMS weighed the risks of potential under-regulation against the risks of potentially limiting access to the drug (which may be in high demand due to the dearth of approved treatments for TRD and MDD).[342] Initially, legislators required that esketamine be taken alongside an oral antidepressant

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[337] Cohen, *supra* note 42.
[338] *Id.*
[339] Some clinicians and researchers consider ketamine psychedelic-adjacent or even a non-classical psychedelic, and a subset of people consider esketamine a psychedelic. The FDA does not currently classify esketamine as a psychedelic.
[340] SPRAVATO®, *supra* note 32; Of note, the purpose of traditional directly observed therapies (to ensure medication adherence) differ from the primary purpose of patient monitoring during esketamine usage (a safety measure).
[341] CTR. FOR DRUG EVALUATION & RESEARCH, U.S. FOOD & DRUG ADMIN., *Risk Assessment and Risk Mitigation Review(s)* (Mar. 4, 2019), https://www.accessdata.fda.gov/drugsatfda_docs/nda/2019/211243Orig1s000RiskR.pdf.
[342] *Id.*

drug. This was justified based on safety and efficacy concerns.[343] However, this was criticized as many patients had unsuccessfully tried antidepressants before and had a variety of reasons for wanting to explore alternative treatments.[344] It was likely that people who were interested in esketamine did not pursue that treatment because of their reluctance to have concurrent antidepressants. In January 2025, the FDA expanded approval of esketamine to be a standalone treatment, which has facilitated access.[345] While never a requirement, psychotherapy has been allowed as a concomitant treatment,[346] and is sometimes recommended to boost outcomes.[347] Relatedly, some practices offer esketamine in the same format as PAT, with a preparation, dosing, and integration phase.[348]

Given the current regulatory options, we believe that in-person session monitoring, as mandated through a REMS mechanism, and without required psychotherapy, is the best approach for regulating psychedelics. In this proposal, the psychedelic of interest is evaluated independently of the variety of PATs which may be offered post-approval.

Most experts agree that patients should administer psychedelics with some form of support and supervision from clinicians.[349] The in-person session monitoring approach follows this conventional wisdom, however, it falls on the more permissive end on the nature and extent of support which needs to be required. It does not go as far as a 'virtual' session monitoring approach due to previously outlined concerns regarding the importance of set and setting. While requiring an in-person monitor does increase cost and exacerbate access concerns as compared to a virtual monitor, it reduces cost and access concerns as compared to PAT. In the future, virtual session monitoring may be deemed appropriate if adequate data shows that safety can still be prioritized.

While clinicians would be especially well suited for patient monitor roles, patient monitors need not be master's or doctoral level. While the FDA initially suggested that clinicians with a variety of educational backgrounds supervise patients in psychedelic trials,[350] they expanded beyond psychologists and physicians to include

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[343] Johnson & Johnson*, Rationale for Use of SPRAVATO in Conjunction with Oral Antidepressant During Phase 3 Studies*, J&J MEDICAL CONNECT (Jan. 20, 2025), https://www.jnjmedicalconnect.com/products/spravato/medical-content/rationale-for-use-of-spravato-in-conjunction-with-oral-antidepressant-during-phase-3-studies; Claire Bugos, *Spravato Nasal Spray Can Now Be Used Alone for Treatment-Resistant Depression*, VERY WELL HEALTH (Jan. 28, 2025), https://www.verywellhealth.com/fda-expands-approval-for-spravato-nasal-spray-8781088 [https://perma.cc/P2ZB-DW9T].

[344] Bugos, *supra* note 343.

[345] *Id.*

[346] Johnson & Johnson, *Concomitant Use of SPRAVATO with Cognitive Behavioral Therapy or Psychotherapy*, J&J MEDICAL CONNECT (Mar. 10, 2025), https://www.jnjmedicalconnect.com/products/spravato/medical-content/concomitant-use-of-spravato-with-cognitive-behavioral-therapy-or-psychotherapy; *SPRAVATO®: What to Expect,* VICTORY CLINICS, https://victoryclinics.com/spravato-esketamine/spravato-what-to-expect/ (last visited May 7, 2025).

[347] Bugos, *supra* note 343.

[348] Brittany Albright, *Six Powerful Ways to Maximize Your SPRAVATO / Esketamine Treatment Through Integration Therapy,* SWEETGRASS PSYCHIATRY, https://brittany-albright-fdhh.squarespace.com/blog/2024/3/4/six-powerful-ways-to-maximize-your-spravato-esketamine-treatment-through-integration-therapy (last visited May 7, 2025).

[349] Cohen & Marks, *supra* note 9, at 11.

[350] *Id.*, at 11.

licensed social workers, nurse practitioners, and physician assistants.[351] We agree that this group would be excellent patient monitors. In addition, we believe that individuals with a bachelor's degree and clinical licensure, such as a psychiatric RN, would also be well-suited and qualified for the role.[352]

There are a range of proposed psychedelic-specific qualifications for a psychedelic monitor. Whatever qualification required would need to ensure that the monitor can preserve an appropriate interpersonal environment and effectively evaluate the patient's reaction to the psychedelic during administration and the subsequent observation period.[353] Johnson (2008) argues that monitors do not necessarily need to meet stringent educational requirements, but they do need to demonstrate clinical sensitivity.[354] Johnson also recommends the use of two monitors to ensure the participant using psychedelics is never alone.[355] Of note, while two monitors likely reduces that likelihood of monitor misconduct, the high profile sexual assault of patient during the MAPS MDMA Phase 3 clinical trial involved both session monitors.[356] Relatedly, one may wonder if this approach falls prey to a similar criticism as PAT: the risks of monitor misconduct. The risk of misconduct is present anytime there is someone in the room with the patient while they are under the effects of a psychedelic. Still, we believe this risk is diminished with a patient monitoring approach compared to PAT since patient monitoring requires less vulnerability on the patient's part and PAT often involves touch therapy, which opens the door to patient abuse.[357]

Before a patient ingests a psychedelic, it is essential that they go through a robust informed consent process. There is evidence that current approaches (within and beyond the medical pathway) may be inadequate. Current informed consent materials in Oregon's supported adult use programs do not appropriately emphasize the vulnerability of external influence that users face.[358] In addition, informed consent documents on clinicaltrials.gov have similar issues.[359] Marks and colleagues (2024) have outlined seven elements of informed consent that ought to be incorporated in informed consent in medical settings for PAT.[360] This guidance could be adapted for a setting where psychotherapy is not given. There is some concern that "overzealous" warnings could be counterproductive, leading to patient skepticism or paranoia. However, that is not a reason to withhold important information, and it is certainly not a unique problem for psychedelics.[361]

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[351] *Id.*, at 11.
[352] Litman (2024) shares our belief that current proposed qualifications may be too stringent, and further argues for the potential appropriateness of chaplains as patient monitors. See Victoria Litman, *Facilitating the Sacred: The Role of Chaplains in Psychedelic Law and Policy*, *in* PSYCHEDELIC INTERSECTIONS: 2024 CONFERENCE ANTHOLOGY 69, 70 (Jeffrey Breau and Paul Gillis-Smith eds., 2025).
[353] Johnson, Richards & Griffiths, *supra* note 28, at 613.
[354] *Id.*, at 613.
[355] *Id.*, at 613.
[356] Cohen & Marks, *supra* note 9, at 11.
[357] See Logan Neitzke-Spruill et al., *Supportive Touch in Psychedelic Assisted Therapy*, AM. J. BIOETHICS, Jan. 2025, at 29, (To demonstrate that supportive touch is often used with PAT) .
[358] Kochevar, *supra* note 141.
[359] Mason Marks et al., *Essentials of Informed Consent to Psychedelic Medicine*, 81 JAMA PSYCHIATRY 611, 612 (2024).
[360] See *Id.*
[361] Kochevar, *supra* note 141.

This model has several advantages. Involving in-person patient monitors would ensure that psychedelics are ingested in an appropriate set and setting. In addition, it would mitigate safety concerns that arise when individuals are unsupervised under the influence of a psychedelic. A monitor would function primarily to ensure the short-term safety of the participant and flag any potential warning signs of continued danger. During the session, a monitor could provide psychosocial support if necessary, and should be able to quickly bring in a healthcare professional if the need arose. Another advantage of this approach is that it is not mutually exclusive with PAT. For an individual who wants PAT, the psychotherapist would be able to function as the patient monitor.

Moreover, though this approach falls on the more resource-intensive end of the spectrum of safety measures for psychiatric treatments, it would still be less intensive than PAT. And, while prolonged clinical supervision is rare for psychiatric treatments[362] such clinical supervision in the form of session monitoring may be particularly justified for psychedelics. The first reason is that, while psychedelics are not exceptional enough to warrant a completely different clinical and ethical structure, they are distinct enough to be placed into the category of psychiatric drugs requiring a higher level of safety measures. Secondly, session monitoring may be particularly appropriate because psychedelics are consumed infrequently.[363] While SSRIs and other psychiatric medications require daily use, psychedelic administration sessions are likely to be spaced several weeks apart.[364] This creates an opportunity to monitor usage that is not practically feasible with other psychiatric treatments.

And, considering that we raised the concern that PAT may not be cost-effective, it is important to consider the relative cost of a patient monitor compared to a psychotherapist. While direct comparisons between the costs are difficult, we postulate that patient monitoring would be more cost-effective because it would not require preparation and integration phases required by PAT.

Beyond our recommended approach, we believe that pharmacovigilance and ethical vigilance is necessary to protect patients post-approval, meaning that there ought to be careful attention paid to potential adverse events, risks, or ethical issues that are exacerbated or identified post-approval.[365] Patients should be informed of the potential for adverse events and be aware of how to report them. Strong pharmacovigilance would include expedited reporting, data aggregation, and the identification of potential safety signals to improve the safety of psychedelic drugs.[366] However, pharmacovigilance is not enough. Given the vulnerability patients face while under the influence of psychedelics, there needs to be a strong focus on ethical vigilance.[367] It is necessary to have a strong reporting system for professional violations as well as a procedure for appropriate investigation and sanctions.[368] While psychedelic use is

[362] Prolonged clinical supervision where a clinician physically monitors a patient after taking a psychiatric medication is not possible, as most psychiatric medications are taken at home (often daily).
[363] As stated earlier, microdosing is outside of the scope of this paper.
[364] Cohen & Marks, *supra* note 9, at 11.
[365] Belouin et al., *supra* note 245, at 8.
[366] *Id.*, at 8.
[367] 170 CONG. REC. E809-10 (daily ed. Aug. 9, 2024); Belouin et al., *supra* note 245, at 4.
[368] Belouin et al., *supra* note 245, at 8.

becoming increasingly accepted, there is stigma and secrecy that could hinder public, transparent reporting of adverse events or ethical abuses.[369]

## CONCLUSION

In conclusion, we believe that psychedelics should be unbundled from psychotherapy, with PAT remaining an option in the arsenal of choices to treat psychiatric disorders. Instead of the FDA approving PAT, the FDA is better suited to evaluate and eventually approve psychedelics as standalone treatments. These standalone treatments would likely come with REMS, which could require in-person patient monitoring by a healthcare professional. Our proposed regulatory solution would benefit from additional empirical study to illuminate the safety and efficacy profile of psychedelics as a standalone treatment for psychiatric disorders. Separately, future work comparing the relative safety and efficacy profiles of psychedelics in isolation and PAT could lead to more informed decisions by patients and healthcare providers. More broadly, further needs to be done regarding the legal aspects of the medical rollout of psychedelics, as legal scholarship has not kept pace with the medical and commercial momentum.[370]

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[369] *Id.*, at 8.
[370] Al-Khaled, *supra* note 11, at 1029.

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# JUDICIALIZATION OF MEGA-POLITICS AND INSTITUTIONAL IMBALANCE IN PAKISTAN: A CRITICAL ANALYSIS OF LEADING POLITICAL CASES AND LESSONS FROM THE USA

Bakht Munir*

**Abstract**: The Superior judiciary of Pakistan has often been accused of judicial overreach, eventually leading to the judicialization of mega-politics. Critics of judicial activism regarded it as detrimental not only to the integrity of democratic institutions but also to the spirit of tripartite governance, compromising the objective standing of judicial structure. With qualitative research methodology, this work conceptualizes the judicialization of politics in Pakistan and the potential challenges associated with this transition. The research paper examines the rational and modern trend of Pakistani judges' involvement in mega-politics, its complexities in the institutional balance of power, and its association with the unstable constitutionalism in Pakistan. This work provides the US framework of constitutional construct, its recent judicial reforms, and how Pakistan may consider the US experience in reforming its judicial fabric.

**Keywords**: Constitutionalism; Judicial Activism; Judicialization of Politics; Politicization of judiciary; Regime Change; US judicial Reforms; Article III of the US Constitution

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## INTRODUCTION

The superior judiciary of Pakistan is no stranger to controversies for its judicial overreach under the pretext of the rule of law and guardians of the constitution. Due to its self-conception of the representative of public will, the judiciary has penalized the elected Prime Minister and considered it an action from the public. The judiciary has established itself beyond fair criticism and elevated itself to an unaccountable position. Under the shield of judicial activism, the judiciary overstretched its constitutional bounds through *Suo motu* actions, significantly impacting the trichotomy of powers. Despite its constitutional constructs to the contrary, both law and politics function as co-terminus institutions. This can be attributed to the fact that a distinct bifurcation between politics and law is not conceivable. In its most generic sense, the law can be described as a set of rules and procedures designed to preserve social interests by regulating the social conduct of the general populace. On the other hand, politics can be aptly categorized as a social institution that identifies and channelizes public interests to set out national interests. A parallel comparison of the two notions would suggest that the workings of one would inevitably affect the operation of the other. However, despite their inevitable coterminous, states have attempted to separate the two to minimize their overlapping in the interests of effective governance. This is why ever since the inception of the doctrine of separation of powers states have endeavored to distinguish between the judicial and executive organs of the government.

The research has been divided into the following segments: The first part introduces and defines the judicialization of politics. The second examines the emergence of the concept in Pakistan by dividing constitutional history into two phases: from 1954 to 2000 and from 2000 to date. The third evaluates the lawyers' movement supplemented by *Suo motu* actions and the judicialization of mega-politics in Pakistan. The fourth explains the judicialization of politics and institutional imbalance. The fifth examines lessons from history. The sixth assesses how to roll back the judicialization of mega-politics and elaborates on how to learn from the US experience of judicial restraints. Part seven concludes the research paper by contemplating new global trends leading to judicial imperialism.

Before discussing the judicialization of mega-politics in Pakistan, it is imperative to comprehend the concept of mega-politics, coined by Ran Hirschl. This concept refers to discussing matters of absolute significance that often divide whole polities and mega-politics cases, or cases where courts decide fundamental questions that define a polity's identity.[1] The concept is further broadened by incorporating social, economic, and political conflicts that create a split at the national and international levels. It is described as adjudicating legal issues that divide domestic outcomes and disappoint social and political groups.[2] Judicialization of politics is the enlargement of the judicial province at the expense of the other state organs whereby policymaking authority is transferred from the legislature, the cabinet, or the executive

[1] Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93, 93 (2008), https://www.annualreviews.org/content/journals/10.1146/annurev.polisci.11.053006.183906.

[2] Karen j. Alter and Mikael Rask Madsen, *The International Adjudication of Mega-Politics*, 84, LAW AND CONT. POL., 1, 1 (2021), https://scholarship.law.duke.edu/lcp/vol84/iss4/2/.

to the courts.[3] It encompasses the stretching of legalism into the political arena and policymaking by expanding the sphere of courts in defining public policy through judicial review. It can be referred to as the reliance on judges in dealing with core politics or mega-politics defining the whole polities.[4] The judicialization of politics can be conceptualized as the government's dependence on the judiciary to address core political issues or policy matters rooted in political frameworks. In the same breath the phrase "judicialization of politics" can also refer to the active political role played by judicial institutions operating outside the ambit of their conventionally understood province when they play influential roles in deciding political matters. The phrase can be used in its broadest sense to generalize any judicial behavior that has extra judicial and specifically political repercussions.

It is critical to differentiate whether the resolution of certain issues comes under the judicialization of politics. For instance, recourse to the judiciary as a means of challenging the rules for the conduct of elections and political campaigns, election results, or prosecution of political enemies. Though the court's involvement can affect the political transition, these are core democratic values and play a significant role in the long-term consolidation of democracy. The court should be used as a last resort to address such issues. Additionally, military interference in political matters that need validation, the government's opponents utilizing the judiciary for political objectives, and the imbalance of power sharing among state organs are compelling factors leading to judicial intervention in political matters, resulting in the judicialization of politics.

The term judicialization of politics indicates the ever-increasing role played by the judiciary in national or mega-politics to settle political matters. This phenomenon has been observed in nearly every state; however, the difference lies in the frequency of such occurrences. The judiciary of Pakistan has been accused of a political role, but it continues to play a decisive role in conducting national affairs.

The separation of powers among governmental organizations has been translated as a key indicator for assessing good governance and the rule of law. In the US, one function of the separation of power is to promote the operation of the rule of law, i.e., the government power and government officials derive their powers from the law and are constrained by it. Countries with established divisions among state organs indicate effective and independent institutions, good governance, transparency, accountability, and distinct jurisdictions. The contrary has been observed in states having overlapped executive and judicial organs which naturally indicates jurisdictional ambiguities, compromised institutional capacity, and politico-legal controversies. Therefore, contemporary legal jurisprudence, especially constitutional jurisprudence, and political science have categorized effective separation of judicial and political spheres as a key component for good governance and have classified judicialization of politics as detrimental. Speaking realistically, this phenomenon can be considered a phase in the political maturation of government structures and Pakistan is no exception. This paper aims to develop a comprehensive understanding of the concept of judicialization of politics and its impacts on tripartite governance and how the judiciary has played a crucial role in such a development.

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[3] Torbjorn Valli, *The Judicialization of Politics-A World-wide Phenomenon: Introduction,* 55, IPSR, 91, 91 (1994), https://www.jstor.org/stable/1601557.

[4] See supra note 1, 97.

## I. EMERGENCE OF JUDICIALIZATION OF POLITICS IN PAKISTAN – A CASE STUDY

In the government structure, the political transition has been a challenging problem. The Superior Judiciary of Pakistan significantly contributed to the evolution of politics. The implicit constitutional trichotomy of powers can also be categorized as a contributing factor to the judicialization of politics in Pakistan. Unlike the US Constitution, the constitutional structure in Pakistan does not explicitly provide the doctrine of separation of powers, but this is now an established fundamental aspect of the constitutional law.[5] In Pakistan's context, it is referred to as a trichotomy of powers, established by the court in the following cases: Jurists Foundation v. Federation of Pakistan[6], it was regarded as a fundamental principle of our constitutional construct. In another case, Dr. Mubashir Hassan v. Federation of Pakistan[7], the court referred to several decisions and set out the doctrine in its traditional form: the constitution envisages trichotomy of powers among three organs each assigned a distinct task, and none is allowed to intrude others. In State v. Zia ur Rehman[8], the Court described that where a government is established under a written constitution, state affairs are distributed amongst the state functionaries as defined by the constitution. The constitutional scheme we are familiar with is the trichotomy of powers where each organ may exist in different shapes. The constitution outlines the functions of each organ, and it would be inherent under such a scheme not to interfere in the legitimate spheres of others. Even though the doctrine is not expressly exhibited in textual form, it is entrenched and merged into the spirit of constitutional law. Conversely, Article I of the US Constitution vests legislative authority in Congress, Article II confers executive authority in the President, and Article III gives judicial powers to the Supreme Court and other subordinate courts established by Congress.[9]

Hence, for all practical intents, the application of this doctrine is left to be determined by statutory interpretation undertaken by the courts. Nevertheless, the superior judiciary in Pakistan has interpreted this doctrine liberally thereby diluting its true essence at times. Such interpretations have led to ambiguities between the provinces of the three branches of the government with the inevitable consequence that the judiciary has occasionally stepped in those governmental gaps to supplement them. Such judicial practice has effectively expanded the jurisdictional sphere of the Supreme Court, leading to the predominance of judicial structures over other institutions.

A critical examination of the constitutional history of Pakistan is inevitable to understand the nature of the judicialization of politics. To conceptualize the judicial role in regime change, Pakistan's political and constitutional history may be divided into two historical periods: the first period between 1954 to 2000 wherein the judiciary has been used to decide on the legitimacy of regime change. In the second period (2000

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[5] Bakht Munir, et al., *Separation of Powers and System of Checks and Balances: A Debate on the Functionalist and Formalist Theories in the Context of Pakistan,* V, GPR, 1, 1 (2020), Separation of Powers and System of Checks and Balances: A Debate on the Functionalist and Formalist Theories in the Context of Pakistan by Bakht Munir: SSRN.

[6] Jurists Foundation v. Federation of Pakistan, (2020) 1 PLD SC 40 (Pak.).

[7] Dr. Mubashir Hassan v. Federation of Pakistan, (2010) 265 PLD (SC) 374 (Pak.).

[8] State v. Zia ur Rehman, (1973) 49 (PLD) 66 (Pak.).

[9] Suo Motu Case No.4 of 2021, P. 13.

– to date), the judiciary significantly contributed, and the regime change transpired because of judicial intervention.[10]

Coining its roots in politics, the Superior Judiciary of Pakistan validated extra-constitutional regimes at the cost of the elected governments. The superior judiciary was dragged into politics by compelling to validate extraconstitutional acts of the military dictators or certain unavoidable circumstances that compelled the judiciary to decide political matters: the dissolution of the first constituent assembly was legitimized by the Federal Court whereby an unlawful act could be made lawful by necessity. By referring to Bracton's maxim, the Court imported a novel doctrine to the judicial scholarship of Pakistan.[11] In another case, the Supreme Court legitimized Ayub Khan's martial law of 1969.[12] The Court validated Zulfiqar Bhutto as the first civilian martial law administrator.[13] Likewise, the Supreme Court legalized martial law imposed by Zia ul Haq.[14] From 1988 to 1997, the Court while relying on Article 58 (2) (b) legalized the dissolution of assemblies in various cases with one exception in 1993 against the dissolution of the PML(N) government whereby the Court struck down the dissolution order.[15] Moving further towards the judicialization of politics, the Court upheld martial law imposed by Musharraf in 1999.[16]

Afterward, the judiciary transformed from regime legitimization to a crucial instrument of regime change, which can be witnessed in the following cases: the verdict in the Iftekhar Chaudhry restoration case and the anticipated judgment in the presidential election of Musharraf resulted in the imposition of martial law of 2007. To become an active participant in political matters, the Court punished the then Prime Minister, Yousaf Raza Gillani, in contempt proceedings which led to his removal from office.[17] Likewise, the judgment in the Panama Papers scandal in 2017 led to the removal of Prime Minister, Nawaz Sharif.[18] Further intruding, the Court ordered the removal of Nawaz as a party leader, quashed all his decisions as a party head after his removal from office, and directed the Election Commission to remove his name from

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[10] Faisal Siddiqi, Judicialization of regime change, (March 26, 2022), https://www.thenews.com.pk/print/944646-judicialization-of-regime-change.

[11] Maulvi Tamizuddin Khan v. Federation, (1955) 240 PLD (FC) (Pak.).

[12] State v. Dosso, (1958) 533 PLD (SC).

[13] Miss Asma Jilani v. The Government of the Punjab and another, (1972) 139 PLD (SC) (Pak.).

[14] Begum Nusrat Bhutto v. Chief of Army Staff and Federation of Pakistan, (1977) 657 PLD (SC (Pak.).

[15] Osama Siddique, *The Jurisprudence of dissolutions: presidential power to dissolve assemblies under the Pakistani Constitution and its discontents*, 23, *Ariz. J. Int'l & Comp. L,* 622, 634 (2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2207010.

[16] Bakht Munir & Ataullah Khan Mahmood, *Evolution of Democracy in Pakistan: A Case Law Study of the Superior Courts Judgments, 56,* JRSP*,* 271, 272-76 (2019), 25_56_1_19.pdf (pu.edu.pk); see also, Zafar Ali Shah v. Musharraf, (2000) 869 PLD (SC) 1218 (Pak.).

[17] See supra note 7; see also, Suo Motu Case No. 04 OF 2010 (Contempt proceedings against Syed Yousaf Raza Gillani, the Prime Minister of Pakistan regarding non-compliance of this Court's order dated 16.12.2009).

[18] Imran Ahmad Khan Niazi v. Mian Muhammad Nawaz Sharif, (2017) 265 PLD (SC) (Pak.).

all the relevant records of the PMLN.[19] In a subsequent case, however, the Court overturned the disqualification for life and reduced it to five years.[20]

The judicial transformation has been backed by the political opposition of the government and entrenched political establishment, which utilized the judiciary resulting in an institutional shift in the political transition. The judicialization of regime change has been used as a tool against the elected governments, it created long-term challenges to the institutional structure: an institutional shift of political powers from political elites to judicial elites coupled with an entrenched establishment. Between 1954 – 2000, the judiciary was labeled as an establishment judiciary. From 2007 to date, the judiciary has been labeled as a political engineer utilizing the pretext of constitutionalism, which consequently transformed its role from judicialization of regime change to politicization of the judiciary. It is worth noting that the political issues involve constitutional questions, which the Court cannot avoid. The emphasis, however, is not to avoid political questions, but on the judicial approach in dealing with such political issues. Its latest instance is manifested from the presidential reference to the interpretation of Article 63A of the Constitution whereby the government intended to utilize the judiciary for political gains.[21]

At the expense of three constitutional arrangements, 1956, 1962, and 1973, the military establishment, backed by political opponents, has ushered different generals into power. Regime changes required legitimization of the new political order and most of the judges were willing to oblige on the pretext of the doctrine of necessity. Pakistan has witnessed regime legitimization through judicial endorsement during direct military rule in the 1950s, 1960s, 1970s, and 1990s, which have been regarded as the most obvious examples. The frequent regime change witnessed no enduring civilian government hence no elected government could complete its constitutional tenure by 2013. For regime legitimization, the superior judiciary has been utilized and molded into a potent tool for the transformative preservation of the military government.

In the 1990s, indirect military control of politics was witnessed, which resulted in undesirable judicialization of politics. General Zia brought about structural changes in the constitution whereby the President was allowed to sit in subjective judgment over the elected government. The President was allowed to dissolve the government unilaterally (8th Amendment Act, 1985). This amendment changed the basic structure of the Parliamentary form of government and transformed it into a hybrid form of government with a powerful and unaccountable President.

Moving forward to further judicialization of politics, four successive governments were dissolved between 1988 to 2007. The first government was dissolved by Zia himself and the others having association with the military establishment and its civilian allies. For its legitimacy, these actions were taken to the courts based on

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[19] *Sami Ullah Baloch Vs. Abdul Karim Nousherwani & others,* C.A. No. 233 of 2015, Ayesha Tanzeem, Pakistan's Sharif Declared Ineligible to Head his Party, VOA, (Feb. 21, 2018), https://www.voanews.com/a/pakistans-sharif-declared-ineligible-to-head-his-party/4264212.html; see also, Haseeb Bhatti, Disqualification under Article 62 (1)(f) is for life, SC rules in historic verdict, (April, 13, 2018), https://www.dawn.com/news/1401362.

[20] Hamza Rasheed Khan v. Election Appellate Tribunal and others, Civil Appeal No. 982 of 2018; see also, SC strikes down a lifetime ban on MPs (Jan. 08, 2024), https://tribune.com.pk/story/2452580/sc-strikes-down-lifetime-ban-on-mps.

[21] See supra note 10.

conventional allegations and took place where the elected governments were fragile and besieged by the challenges inherited from the military regime and its political oppositions. The motivation for being political resulted in judicial dispensation of a political nature.

The new form of judicialization of politics whereby civilian governments were controlled through constitutionally cloaked mechanisms lasted around a decade and was characterized by unstable constitutionalism. The government elected after the fourth dissolution repealed Article 58 (2) (b). Consequently, the civilian government was replaced by Musharraf in 1999. Even though it was again repealed by the civilian government that succeeded Musharraf's regime, it has inherited the same legacy including the judges. This is how the military establishment entrenched its authority in its direct rule and transformed and preserved its authority during civilian governments. Transformative preservation is always supported by political opposition and the judiciary. Civilian governments are kept in check by providing a constitutional mechanism. Nevertheless, the judiciary emerged as a new entity after the lawyers' movement and transformed its role by directly indulging in political matters.

## II. LEGACY OF THE LAWYERS' MOVEMENT AND A NEW CHAPTER OF SUO MOTU ACTIONS TOWARDS FURTHER JUDICIALIZATION OF MEGA-POLITICS IN PAKISTAN

Through its authority of judicial review, the Court transpired as a leading force in Pakistani politics by overriding legislation and acts of the chief executive. The judiciary was hyperactively involved in political matters, resulting in the removal of elected prime ministers. This hyper-activism has been witnessed since 2007 and resulted in the disqualification of an elected PM. Despite the self-realization of judicial restraints following the tenure of Iftekhar Chaudhry, the Court ousted Nawaz Sharif on an allegation of corruption charges.[22] Further entrenching its authority, the Court took *Suo motu* action on the Deputy Speaker's ruling on the vote of no confidence against the former PM, Imran Khan, which led to his removal.[23] These cases drew severe criticism from different quarters on the substance and lack of due diligence in the amorphous case selection process.

Post Lawyers' movement (2007-2009) witnessed a contemporary form of judicial activism. Even though the judiciary has been considered the brainchild of a mass movement, it could not change the impression of being controlled by the establishment. Article 184 (3) of the Constitution of Pakistan, whereby the Supreme Court assumed *suo motu* powers, has been used as a tool for constitutional check of legislative and executive actions. In some matters of public policy, the judiciary went beyond the confines of the petitions by allowing its personal view to influence decisions. For instance, the Court suspended 28 lawmakers in response to the petitions of by-polls challenged by the PTI and the PPP on the pretext of fake entries in the

[22] Waris Husain, The Judicialization of Politics in Pakistan: A Comparative Study of Judicial Restraint and its Development in India, the US and Pakistan (2018).
[23] Suo Motu Case No. 1 of 2022, Microsoft Word - Short Order SMC No.1 of 2022 (supremecourt.gov.pk).

electoral rolls in the general elections of 2008.[24] By exceeding the confines of the petitions, the Court questioned the formation of the ECP and linked their reinstatement with the passage of the 20th constitutional amendment, which resulted in further political confrontation and set an alarming precedent of setting aside the election's result.

The recent phase of judicialization of politics emerged after the ousting of former Prime Minister, Nawaz Sharif, by Musharraf on 12th October 1999 and issued Provisional Constitutional Order (PCO), a tool for displacing the constitution in whole or in part, which required the incumbent judges to take oath under it. The Court legitimized the coup on the pretext of the orthodox doctrine of necessity and backed his disdain for politics by proposing a mechanism and empowering him to amend the Constitution.[25] Consequently, Musharraf took over as president while remaining the Army Chief, he brought forth legal, political, and structural changes to secure his authority.[26]

This marked another transition of judicialization of politics wherein Iftekhar Chaudhry was appointed as the youngest Chief Justice and the longest-serving Chief Justice of Pakistan. His tenure can be divided into the following periods: the initial period lasting from 2000 to 2005 when he was inducted as judge of the SC and was no different from the regime legitimization-driven judicialization of politics of the past. The second period started with his appointment as a Chief Justice of Pakistan in 2005, which witnessed activist interventions that helped develop his integrity. The third period involved dramatic events ranging from his removal and reinstatement to the declaration of emergency and removal of 60 judges, and subsequent lawyers' movement for judicial independence, which embarked on another chapter of judicial activism.

The judicial activism for holding concerned authorities accountable for missing people drew public and media attention while some regarded it as self-aggrandizement. The most characteristic feature of the Court was its proactive involvement in mega-politics. Iftikhar Chaudhry took unprecedented steps, which can generally be categorized into the following: those cases that were of great significance were dealt with by the benches led by Chaudhry and shared common features such as thoughts, reasons, and results. Despite the controversial and complex issues involving mega-politics, these judgments are absent from any dissenting notes, which inferred the impression of like-minded judges in a bench to achieve preconceived verdicts.

The new form of judicialization of mega-politics has been witnessed with the unilateral and retroactive disqualification of the democratically elected Prime Minister, Yousaf Raza Gilani through contempt of court in 2012, Nawaz Sharif on allegation of corruption charges in 2017, and *suo moto* against Imran Khan on the vote of no

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[24] Nasir Iqbal, Supreme Court suspends 28 legislators, (Feb. 07, 2012), https://www.dawn.com/news/693641/hafeez-sheikh-asim-hussain-made-advisers-sc-suspends-28-legislators.

[25] Zafar Ali Shah v. General Pervez Musharraf, (2000) 869 PLD (SC) (Pak.).

[26] Taiyyaba Ahmed Qureshi, *State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan*, 35, N.C. J. Int'l L. & Com. Reg., 485, 491 (2009), https://scholarship.law.unc.edu/ncilj/vol35/iss2/7/?utm_source=scholarship.law.unc.edu%2Fncilj%2Fvol35%2Fiss2%2F7&utm_medium=PDF&utm_campaign=PDFCoverPages.

confidence in 2022. To redress the concerns raised by the opposition where the Deputy Speaker of the National Assembly refused to administer the vote motion of no confidence on the pretext of a foreign conspiracy, the cipher. Prime Minister Imran Khan advised the President to dissolve the National Assembly to hold early elections in the country. Through *sou moto* action, the Supreme Court invalidated the proceedings of Parliament and subsequent dissolution of the National Assembly and directed for carrying a vote of no confidence on 9th April 2022. The critics claimed that by dictating the rule of procedure, the judiciary undermined the constitutional mandate of the legislative body. The late-night opening of the courts due to the Speaker's reluctance to proceed with a vote of no confidence led to further politicization of the judiciary and drew widespread criticism.

Recent history is replete with instances of political intervention and policy-driven judicial activism. The interpretation of Article 63-A of the Constitution, surprise hospital visits, the construction of the hydro-electric dam and regulation of its fund, permanent disqualification under Article 62 (1) (f), and conviction of the former PM, Yousaf Raza Gillani, questioned the integrity and working mechanism of the judiciary as an institution. Likewise, the Court received criticism on the recent *suo motu* action over the delay in the elections of the Punjab and KP, and directing the ECP to conduct elections within 90 days for the matter was sub judice at the Lahore High Court. The inclusion of like-minded judges in the constitution of the benches, at the expense of the seniority principle, created questions on its institutional structure giving the impression of partiality and favoritism defeating the very objective of the justice system.

One of the reasons for judicial controversy is its involvement in political matters that otherwise should have political solutions. The most recent example of such controversy is the vote of no confidence against the former PM, Imran Khan. Even though the restoration of the NA after its dissolution by the President was regarded as a noble cause because the Court rejected the conventional doctrine of necessity but drew widespread criticism for the late-night opening of the courts in response to the Speaker's reluctance to proceed with the vote of no confidence. Generally, judicial actions are reactive and not proactive. Nevertheless, in the instant case, the judiciary proactively involved in the matter before its contempt by the Speaker for the Court might have considered itself a final arbiter of the rule of law.

## III. JUDICIALIZATION OF POLITICS AND INSTITUTIONAL IMBALANCE

The judicialization of politics provides significant literature regarding the development of judicial power including its proactive involvement in mega-politics. The recent jurisprudence on political cases has witnessed that the courts are neither forced by political circumstances nor compelled by public opinion rather the judges have calculated that such interventions may extend the ambit of judicial review backed by public support. Such activism is driven by self-proclaimed authority on the pretext of matters of national significance, despite increasing criticism from various quarters and weak jurisdictional justifications. It looks contrary to the conventional judicialization of politics, whereby dictators or unavoidable crises drag the judiciary

into politics. The courts strived that its interference should be broadly publicized and celebrated – a tool for self-glorification.[27]

The judicialization of politics occurs at three levels: by imposing substantive limits on parliament's legislative authority, intruding into the formulation of substantive policymaking, and shaping political activity.[28] Resultantly, the judiciary assumed a distinct role in constitutional polity. The modern trends of judicial activism have swept away the concept of tripartite governance. Because of the decisions of the superior judiciary, the political landscape has been reshaped: the legitimization of the extra-constitutional acts and military regimes, and the disqualification of the elected Prime Ministers and the legislatures. The judiciary has established its authority as a key player in the political transition.[29]

Excessive judicial interference in public policy matters has raised questions about the constitutional role of the Supreme Court.[30] It is worth noting that a proactive judiciary supposed to be trampling institutional limits would be criticized for political decisions that have polarizing reactions. As a mechanism of institutional accountability, the legislature and the executives are entrusted with public welfare and are open to criticism. Nevertheless, where the judiciary is involved in politics or makes political decisions, public criticism is redirected towards the judiciary. Judicial activism comes at the cost of Parliamentary supremacy as the legislature becomes dependent on the courts for the legitimacy of its actions, thereby compromising its institutional capacity.

## IV. LESSONS FROM HISTORY

As evident from the above discussion, regime change can be broadly categorized into two phases: where the judiciary was required to decide on the legality of regime change. In this phase, the judiciary was utilized to validate extra-constitutional acts and has been labeled a pro-establishment judiciary. In the second phase, the judiciary was regarded as a key instrument of regime change for its hyper-activism. In the later phase, the political opposition also utilized the judiciary to attain political ends, which resulted in a major institutional shift in the political process. Using the judiciary as a tool against political opponents may have short-term political gains but may result in long-term strategic consequences for the politicians. The issue of regime change should be resolved through negotiations and public mobilization, which has been considered an appropriate mechanism in the political process. Here is a critical question: can this proactive judicial role be defended? If, for example, the political system is corrupt and the judiciary is not, would the judiciary have an obligation to intervene to stem corruption? Its recent example is the disqualification of Nawaz Sharif

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[27] Bakht Munir, et al., *Authoritarianism and Judicial Efforts for Securing Autonomy: A Case Study of Pakistan,* 4, JPDC, 267, 280 (2020), Authoritarianism and Judicial Efforts for Securing Autonomy: A Case Study of Pakistan by Bakht Munir, Zaheer Iqbal :: SSRN.

[28] John Ferejohn, Judicializing Politics, Politicizing Law, 65, Law and Cont. Prob., 41, 41 (2002), https://scholarship.law.duke.edu/lcp/vol65/iss3/3/.

[29] Muhammad Fahd Amin, Constitutionalism and Judicialization of Politics in Pakistan, 5, JLSS, 211, 213 (2023), https://www.advancelrf.org/wp-content/uploads/2023/07/Vol-5-No.-2-8.pdf.

[30] Farah Amir, et al., *Judicial Activism at the Cost of Separation of Power in Pakistan: A Comparison of Justice Iftikhar Chaudhry and Justice Saqib Nisar's Era*, 4, PJSR, 589, 595 (2022), https://pjsr.com.pk/wp-content/uploads/2022/10/61.-Vol.-4-No.-3-September-2022-Amir-Muhammad-Jan-Judicial-Activism-at-the-Cost-of-Separation.pdf.

in the Panama Paper case.[31] The Court disqualified the elected Prime Minister from holding office under Article 62 (1) (f) and barred him for life to hold any public office. Likewise, the Court disqualified PTI Secretary General, Jehangir Tareen under Article 62 (1) (f) and Sec. 99 of the Representation of Public Act for non-declaration of his assets and false statement before the Court for having no interest in an offshore company, SVL. It is a critical test for politicians. Resolution of political disputes through courts has an enduring impact on power structure. The court cannot avoid addressing legal questions motivated by political objectives. Utilizing the judiciary as an instrument of regime change is a tool to empower the judiciary at the cost of parliament. For instance, the political opponents (PTI) that utilized the judiciary for regime change during the PML (N) government became victims of the same process during their government. With this transition, a major shift has been witnessed in politics whereby the judicial elite assumed political powers from the political elites, backed by the establishment and the judiciary has been labeled as a political engineer.[32] The transition of power shift to the judiciary has been witnessed through its hyper-activism and surrender of authority by politicians for short-term political gains at the cost of long-term political loss, resulting in unstable constitutionalism and consolidation of democracy in Pakistan. The following segment explains how to diminish judicialization politics and its associated concepts.

## V. ROLLING BACK THE JUDICIALIZATION OF MEGA-POLITICS – LESSONS FROM THE USA

Pakistan can learn from the US experience to secure its institutional identity and how to avoid being part of political transition. In the USA, parties must bring the case and there is no provision for justification of sue motu actions. The court evolved certain standards for taking up a matter: the existence of a legal dispute between adverse parties under the justiciability doctrine, which imposes limits on the federal courts to hear cases under Article III of the US Constitution. The following are four main justiciability doctrines that the court considers before accepting the case for hearing: standing, ripeness, mootness, and political question. Standing is the determination of the proper party to initiate a case for adjudication. The US SC has declared the question of standing is whether the litigant is entitled to have the court decide the merits of the controversy.[33] By restricting the power of judicial review, the standing doctrine advances the division of powers and helps ascertain jurisdictional provinces.[34] The Court considered standing as a basic notion of separation of powers.[35] Its ultimate purpose is to prevent the judicial process from appropriating the powers of the political branches.[36] The Supreme Court has declared several prerequisites that must be complied with to adjudicate a case by the federal court and declared some of the standing requirements to be constitutional – derived from Article III of the Constitution – which cannot be overridden through a statute, focusing on the following three prerequisites: the litigant must allege to have suffered or will suffer an injury; the injury is traceable to the

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[31] See supra note 18.
[32] See supra note 10.
[33] Warth v. Seldin, 422 US 490, 498 (1975).
[34] Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17, Suffolk L. Rev. 881 (1983).
[35] Allen v. Wright, 468 US 737, 752 (1984)
[36] Clapper v. Amnesty International, 133 S. Ct. 1138 (2013).

defendant's conduct; and the adjudication is likely to redress the injury.[37] In Pakistan, however, the requirement of an aggrieved person to initiate a case is disregarded. Anyone can invoke the original jurisdiction of the SC where there is a violation of fundamental rights affecting the public.[38]

Ripeness is a justiciability doctrine that deals with when review is appropriate, and separates matters that are premature for review, based on speculation that may never occur. It overlaps with the standing where no injury is sustained, the plaintiff might be denied standing, or the petition might be dismissed as not ripe.[39] Mootness is a limitation on the power of judicial review. Controversy must exist at all stages of proceedings. A case, for instance, should be dismissed as moot where the events after the filing of the case resolve the controversy.[40] The political question is another significant justiciability doctrine. The Court refused to entertain allegations of unconstitutional government conduct despite meeting all jurisdictional and other justiciability requirements. The Court left these areas for the constitutional interpretation of the politically accountable branches of the government, i.e., the President and Congress. The court determines whether the case involves political controversy or should be resolved through political discourse and prefers such disputes for political resolution under the political question doctrine. Justification for political question doctrine is given on the pretext that it enables the judiciary to avoid controversial constitutional questions and limits the courts' role in a democratic society.[41] The US SC has evolved these doctrines to restrain its authority and circumvent overreach – passive virtues.[42]

In the recent past, the US SC has overturned precedents protecting fundamental rights and granted presidential immunity from prosecution for crimes committed during office. Further, ethics scandals have raised questions about the fairness and autonomy of the courts. To reinforce democracy and to protect the rule of law, President Biden calls for three reforms: the supremacy of law, no one is above the law so no immunity for crimes a former president committed in office. To impose age limits on the Supreme Court Judges. Code of conduct and ethics rules for the Supreme Court where judges must disclose gifts, refrain from political activities, and rescue themselves from cases involving monetary or any other interest.[43] In April 2021, President Biden formed a presidential Commission to reform the US Supreme Court in three areas: the Court's role in the nomination process, the historical background of previous attempts to reform

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[37] Erwin Chemerinsky, Constitutional Law: Principles and Policies, 5th ed., 61, (2015).

[38] *See* Art. 184 (3) of the Constitution of Pakistan, 1973. *See also,* Bakht Munir, et al., *Judicial Activism in Pakistan and its Impacts on Tripartite Governance: Lessons from the US Constitutional Construct, IX,* GPR, 44, 53-45, (2024), GPR - Global Political Review (gprjournal.com).

[39] *See* supra note 38, at 107-108.

[40] Ibid. 118.

[41] Alexander Bickel, The Supreme Court, 1960 Term: Forward: The Passive virtues, 75, Harv. L. rev. 40, 46 (1961); Alexander Bikel, The Least Dangerous Branch 184 (1962).

[42] Bakht Munir, et al., *The Concept, Philosophy, and Development of Judicial Activism: A Case Study of USA and Pakistan,* 8, IRSS, 331, 340 (Dec. 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4916392.

[43] The White House, Fact Sheet: President Biden Announces Bold Plan to Reform the Supreme Court and Ensure No President is above the Law, (July 29, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/07/29/fact-sheet-president-biden-announces-bold-plan-to-reform-the-supreme-court-and-ensure-no-president-is-above-the-law/#:~:text=Binding%20Code%20of%20Conduct%20for,spouses%20have%20financial%20or%20other.

the Court, and the review of public response on the SC reforms. The Commission submitted its report to the President in December 2021, which comprises the following five chapters: Chapter One examines previous attempts to reform the court. Chapters two and three consider increasing the number of judges and term limits. Chapter four aims to reduce judicial powers such as jurisdiction stripping and supermajority requirements for decision-making. Chapter five explains how the court handles emergency orders, regulates its own ethics requirements, and public access to arguments and decisions.[44]

Pakistan may consider these standards to reform the judiciary. Judicial self-restraint and legislative oversight could keep a reasonable check on the judiciary and help draw a line between the state organs to avoid potential intrusion. In addition to the reforms, the political parties should not use the judiciary as a tool for political ends at the cost of its institutional strength. Moreover, the dispensation of political issues creates a split in the Supreme Court compromising its impartiality. For instance, the government's recent attempt to bring constitutional amendments aims to alter the process of judicial appointments and the jurisdiction of the superior courts, which will shift powers to the political executive.[45] The government initiated these reforms to secure its tenure and structure the court to favor its political interest. Pakistan Bar Council has challenged the proposed amendments in the Supreme Court alleging it disrupts judicial independence and the trichotomy of powers.[46] However, the Registrar of the SC returned the petition on the ground that the proposed constitutional amendments are yet to be passed by the parliament and hence cannot be challenged at this stage.[47]

Hence, a new power game is starting where the Court will be used as a potent tool. To roll back the judicialization of mega-politics, the following initiatives are indispensable: institutionalization of the authority. In appointments and removal of judges, composition of benches, and exercise of *suo motu* powers, the administrative hegemony of the CJP must be diminished. The recent legislation[48] to regulate Article 184(3) of the Constitution is the right direction towards institutionalizing *suo motu* powers of the Chief Justice. Through its policy guidelines, the legislature and the executive must also stop dragging the courts into political issues.

Judges should realize they are not above criticism and should present themselves accountable for their individual and institutional growth. The court should not curb valid and necessary criticism in the guise of judicial independence and institutional integrity. While targeting the military for institutional abuse of power, the judicial acts of granting licenses to validate extraconstitutional actions often go unnoticed as they serve as a proxy for the establishment. Critical appraisal of history depicts the dire consequences of the judicialization of politics. Without institutional

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[44] Matt Germer, Opinions on Judicial Reform: A Review of the 2021 Supreme Court Commission, Policy Studies Governance, (April 27, 2022), Opinions on Judicial Reform: A Review of the 2021 Supreme Court Commission - R Street Institute.

[45] Abid Hussain, What are Pakistan's controversial constitutional amendments about?, (Sep. 17, 2024), What are Pakistan's controversial constitutional amendments about? | Explainer News | Al Jazeera.

[46] Proposed constitutional amendment challenged in Supreme Court, (Sep. 16, 2024), Lawyers challenge proposed constitutional amendment in Supreme Court (tribune.com.pk).

[47] Nasir Iqbal proposed' constitutional amendments can't be challenged: SC, Dawn News, (Sept. 20, 20204), 'Proposed' constitutional amendments can't be challenged: SC - Pakistan - DAWN.COM.

[48] The Supreme Court (Practice and Procedure) Act, 2023.

reforms, we cannot expect anything different. For enduring democracy and constitutionalism in Pakistan, it is high time to break the vicious circle of institutional transgressions.

In its latest legislative developments, Parliament introduced the 26th Amendment to the Constitution, [49] restructuring the mechanism of judicial appointments and original jurisdiction of the Supreme Court, which are the indicators of the kinds of political responses we might see if the Supreme Court's activism goes too far. The amendment was passed by the Senate on October 20, 2024, by the National Assembly on the next day, and then assented to by the President on the same day. It brought forth significant changes to the appointment of judges to the Superior Courts, specifically, the Chief Justice of Pakistan who was to be appointed based on the seniority principle, is now to be nominated among the three most senior judges of the Supreme Court by a 12-member Special Parliamentary Committee. The amendment also shifted the Suo Motu prerogative of the Chief Justice to the Constitutional Benches of the Supreme Court, established under Article 191A of the Constitution.[50] This novel mechanism received severe criticism and was challenged in the Supreme Court of Pakistan for the legislative attempt to fetter judicial autonomy on the following grounds: the judges will strive to protect the government's vested interest to secure themselves a term as the Chief Justice of Pakistan and bypassing the seniority principle compromises individual competence of the judges.

Even though it is hard for the judiciary to avoid being part of the political issues involving constitutional questions, it becomes unavoidable once parties approach the court. The remedy is not necessarily to elude such questions but how to deal with them. For a case study, a recent example of a constitutional question having political objectives has been witnessed in the recent presidential reference regarding Article 63A under Article 186 of the Constitution. The purpose was to pressure its dissidents, which have been regarded as politics by judicial means or utilizing the judiciary for political ends. A non-politicized judicial approach could have been facilitating the democratic process and not being its active participant. In the instant case, the Court should have ensured freedom to cast a vote without coercion by ensuring its subsequent counting and leaving aside the rest of the issue.[51] Nevertheless, the Court went beyond its constitutional mandate while interpreting the proposed article and drew criticism from different quarters. Even in the dissenting note of the reference, the proposed interpretation was regarded as a re-writing of the constitution.[52]

The Superior judiciary of Pakistan has been at the forefront of every significant political dispute. The Court indulges in political controversies on the touchstone of its association with the fundamental rights affecting public interest under Article 184(3) of the Constitution. By doing so, the Supreme Court has exceptionally widened its jurisdictional bonds at the cost of the other state organs. The fruits of constitutionalism can be best achieved when each governmental branch acts within its jurisdictional sphere for constitutionalism never grants primacy to one branch at the expense of the other. It is a crucial time for all the stakeholders to re-evaluate constitutional

[49] The Constitution (Twenty-sixth Amendment) Act, 2024.
[50] Article 191A of the Constitution of Pakistan, 1973.
[51] Ibid.
[52] Supreme Court Bar Association of Pakistan v. Federation of Pakistan, (2022), the Constitution Petition No. 2 of 2022, at 7. (Pak.).

jurisprudence and comply with the effective model of constitutionalism, which could roll back existing judicial hegemony and discourage further judicialization of politics. Constitutional democracy could be reinforced where each governmental organ respects the constitutional mandate of the other organs.[53] Further, the judiciary has yet to consider a self-restraint doctrine or comply with a procedure to assess the justiciability of the petitions before granting overall hearings. The absence of legislative policy while selecting cases under Article 184(3) may lead to judicial remedies for political ends. The new legislation is a ray of directing the superior judiciary to correct its course, though it has inherent challenges. Nevertheless, the latest 26th constitutional amendment embarked upon a new confrontation with the parliament – a transition of a vicious cycle of power gain shifting over time without defining the real spirit of constitutionalism.

## CONCLUSION

To conclude, the judicialization of mega-politics is a global phenomenon and Pakistan stands with no exception. New tendencies in judicial activism have been established that led to judicial imperialism. Juristocracy, a new political order, has been established wherein judges become the final arbitrators of mega-political and social conflicts. Another global trend has emerged that in post-Cold War emerging democracies, constitutional courts have been entrusted with the task of ensuring that democracies are safeguarded against one-party political takeovers and protecting vulnerable minority groups or individuals from majoritarianism. In other words, constitutional courts protect democracies against democratic or popular forces. Both these trends exhibit that political sovereignty is now being colonized by judicial sovereignty. Whether or not judges cure mega-politics and social conflict is considered through the following three elements: state capacity and force, rule of law, and democracy. Any political system that translates political and social conflicts into legal disputes and seeks its solution through court is a dysfunctional society.[54]

In the context of Pakistan, the superior judiciary has strived to ensure and maintain the authority of judicial scrutiny over the affairs of the government. Such efforts are not only backed by constitutional justifications but have standard procedures that are applied liberally by the courts. The courts have repeatedly maintained that such actions are undertaken to safeguard fundamental rights but impact the consolidation of democracy and constitutionalism. Institutional imbalance and political controversies can be regarded as inevitable consequences of the judicialization of politics. By doing so, the judiciary not only undermines the dignity of its institution but also adversely affects its ability to operate within the ambit of law. This can naturally lead the courts to utilize “policy” rather than the “law” as their preferred tool to dispense their duties, and such policy-driven judicial activism must be opposed diligently.

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[53] See supra note 29, at 220.
[54] Faisal Siddiqi, Judicialization of everything, (Nov. 17, 2022), https://www.dawn.com/news/1721418.

# EXPLORING THE CHINESE GOOD SAMARITAN LAW: AN INTERDISCIPLINARY APPROACH

Haoliang Zhang & Siwei Wang*

**Abstract**: Volunteering emergency assistance has a very extensive connotation, involving civil law, administrative law, criminal law, and other fields. Article 184 of the Chinese Civil Code adds a systemic design of absolute exemption from liability, which breaks the delicate balance between specific laws. For example, it is inconsistent with the correctional mechanism of excessive defense and necessity, and it cannot completely exempt the rescuer from criminal liability for serious injury or death in the process of assistance. Therefore, it is necessary for a normative integration of the law to strike a new balance again. As for the civil law, the norms of management without cause, justifiable defense, necessity, and self-risk should be applied in accordance with different circumstances, and the appropriate civil liability of the rescuer should be pursued, while the burden of proof should be reversed. In the criminal law, the method of substantive interpretation should be adopted, and the function of existing rules such as defense of others should be taken into action. Emergency assistance should be regarded as a mitigating sentencing condition. To administrative counterpart, measures such as administrative assistance, administrative confirmation, administrative incentives, and compensation should be comprehensively carried out to grant rescuers the claim to being exempted from liability under public law, to protect and reward them. This multi-dimensional collaborative regulatory model can not only achieve a balance among different branches of law in regulating good Samaritan act but also enable a truly systematic reshaping of such acts and their corresponding legal liabilities.

**Keywords**: Volunteering Emergency Assistance; Good Samaritan Act; Urgent *negotiorum gestio*; Justifiable Defense; Substantive Interpretation; Administrative Assistance; Immunity

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## INTRODUCTION

The Good Samaritan law origins from the biblical parable in the Gospel of Luke,[1] where a Samaritan aids an injured traveler, establishing an ethical precedent for altruistic assistance. In Western societies, this principle has evolved into legal institution designed to encourage individuals to provide help during emergencies without fear of legal repercussions. Contemporarily, Good Samaritan laws are frequently applied within the medical field. Non-professional responders, as well as medical personnel acting outside their professional duties, are protected when providing emergency care. This legal framework is especially relevant in situations like traffic accidents or natural disasters, where immediate assistance can prevent severe injury or death.

In line with global trends and China's national conditions, Article 184 of the Civil Code of the People's Republic of China (hereinafter as the Civil Code) stipulates the top-level design of volunteering emergency assistance. The article exempts emergency rescuers from civil liability, playing a crucial role in promoting social justice. However, it also brings several drawbacks to the legal order. Within civil law, the design of absolute immunity of this Article ignores the subjective mood of the rescuer, and may condone irresponsible assistance and put the aided person in peril. This is inconsistent with the corrective mechanism of excessive defense and risk avoidance,[2] and also deviates from the principle of unifying rights and obligations. This further undermines the proper application of criminal law, as the rescuer's reckless actions may give rise to the offenses of negligent grievous bodily harm or negligent homicide. However, such acts are exempted from liability in the civil sphere, resulting in a discrepancy between civil liability and criminal liability. Some scholars have even suggested the introduction of a misunderstanding of illegality. Based on the exemption provision of Article 184 of the Civil Code, the suspect could not reasonably foresee that Good Samaritan behavior might result in criminal consequences. As a cause of decriminalization, the misunderstanding of the illegality of the exemption from liability for volunteering emergency assistance led to a joint between the civil and criminal laws.[3] However, this kind of defense is not a statutory sentencing circumstance; therefore, its application encounters obstacles. There is disorder in the area of administrative recognition and awards, too. It is not uncommon for a grossly negligent actor to be recognized as a role model or hero, and receiving compensation or reward from the Good Samaritan Fund. There are also people who fabricate and openly hype

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[1] Good Samaritan is derived from the Parable of the Good Samaritan (New Testament, Luke 10: 25-37), which refers to a selfless man who rescues another who has been harmed. Qingxiu Bu, The Good Samaritan in the Chinese Society: Morality vis-a-vis Law, (38) LIVERPOOL LAW REVIEW 135, 135 (2017).

[2] Zhang Haoliang (张浩良), Wei Jianyi Yongwei Dianding Falv Zhiji (为见义勇为奠定法律之基) [Lay Foundation of the Law for Volunteering Emergency Assistance], Zhongguo Shehui Kexuebao (中国社会科学报) [JOURNAL OF CHINESE SOCIAL SCIENCE], 2024.

[3] Chen Junxiu & Lin Yajie (陈俊秀，林雅洁), Haoren Mianze Tiaokuan De Guifan Chanshi Yu Sifa Shiyong Yi Minfadian Di 184 Tiao WeiZhongxin ("好人免责条款"的规范阐释与司法适用——以<民法典>第 184 条为中心)[The Normative Interpretation and Application of the Good Person Exemption Clause——Centered on Article 184 of Civil Code], Fuzhou Daxue Xuebao Zhexue Shehui Kexueban (福州大学学报 哲学社会科学版) [JOURNAL OF FUZHOU UNIVERSITY, PHILOSOPHY AND SOCIAL SCIENCE] , no. 3, 2022, at 116-122.

up emergency assistance in order to be acquitted of other crimes. The chaos and violation of the legal system are caused by the institutional design of exception clause.

In fact, as a branch of law, civil law is primarily concerned with compensating the rescuer for losses (Article 183) and conferring immunity exemption from civil liability (Article 184). The criminal law mainly uses the crimes of fraud and extortion to defeat false accusations, frame-ups and extorting property. The administrative law mainly provides certain protection and rewards to the rescuer through specific administrative acts such as administrative assistance, administrative guidance, administrative confirmation, administrative reward, and compensation. Put it a little further, through administrative punishment, the behavior of blackmailing rescuers is appropriately punished by coercive forces, thus the modernization of the grassroots governance system and its capacity has been realized. Administrative law, as the mediator, supports the civil law on the one side and connects the criminal law on the other. In short, above-mentioned three laws, which have distinctive characteristics and different tasks, play a role in encouraging good Samaritan actions through positive incentives (to rescuers) and negative punishments (to malicious rescuees). However, as it is mentioned above that the complete liability exemption in Article 184 is an established fact, the challenge of bridging the gaps in the legal order and achieving the integration of legal norms through interpretation has emerged as a significant theoretical and practical issue.

## I. INTEGRATING THE NORMS OF GOOD SAMARITAN IN THE CIVIL LAW

Since the clause about the exemption of liability for voluntary emergency rescue is stipulated in the General Provisions of the Civil Code, it is necessary to deal with the conflict between it and the reasons for exemption and reduction of liability such as management without cause, justifiable defense, emergency avoidance,[4] as well as the conflict between it and the reasons for exemption and reduction of liability in various parts of the specific provisions (mainly the part on tort liability) such as voluntarily carrying risk and self-help.

### A. The Good Samaritan Should be Held Liable in Accordance with the Stipulation of Urgent *negotiorum gestio*

Undoubtedly, there are significant similarities between volunteer emergency assistance and negotiorum gestio, evident in their constituent elements and legal consequences. According to Articles 184 and 121 of the Civil Code, the objective element of the former is the voluntary act of providing emergency assistance to others, while the latter involves the management of other's affairs without a statutory or contractual obligation. Although "rescue" and "management" seem like different terms, they are essentially similar, both reflecting the socialist core values of harmony and friendliness by helping others. In terms of legal consequences, in accordance with Article 183 of the Civil Code and Article 34 of Law Interpretation [2022] No. 6, a courageous rescuer may request the infringer or beneficiary to bear the liability for

[4] Wo Yun & Qiao Pengfei (沃耘, 乔鹏飞), Zhonghua Youxiu Chuantong Wenhua Zhi Jianyiyongwei De Xiandai Minfa Jinlu (中华优秀传统文化之"见义勇为"的现代民法进路) [The Traditional Chinese Excellent Culture and The Modern Civil Approach of Volunteering Emergency Assistance], Nanhai Faxue (南海法学) [THE SOUTH CHINA SEA LAW JOURNAL] , no. 3, 2024, at 22.

damages or compensation. Similarly, in accordance with first paragraph in Article 979 of the Civil Code, the manager may request appropriate compensation from the beneficiary. Both give rise to statutory rights to compensation or claims.[5]Therefore, some scholars have correctly pointed out that "volunteering emergency assistance belongs to a special form of management without obligation."[6]

However, the differences between the two institutions are also clear, mainly regarding the exemption from liability for harmful relief or management. According to Article 184 of the Civil Code, a person who voluntarily provides emergency assistance is not liable for any damage caused to the aided person. Yet, based on Article 981 of the Civil Code, the manager shall fulfill appropriate managing obligations in handling others' affairs. When the manager adopts a method that is unfavorable to the beneficiary for the management act, or interrupts the managing process without justifiable reasons, he or she shall be liable for damages. Comparing the two legal designs, the former offers absolute liability exemption. Once the constitutive elements are met, the actor is completely absolved of liability. The latter is another vision. The obligations and exemptions of the two are very different.[7] So how to reconcile the difference or even the conflict between the two? As a Western proverb goes, "there is no law in emergency". Considering its scenario, volunteering emergency assistance can be theoretically equivalent to urgent negotiorum gestio. According to Article 680 of the German Civil Code, the administrator of affairs is liable only for intent and gross negligence when managing affairs to avoid danger.[8] The Chinese Civil Code goes a step further by stipulating that volunteering emergency assistance acts are generally not liable. Although features exist in Chinese legal system, it is no doubt that it should be an urgent management without cause. Therefore, when reconciling volunteer emergency assistance and negotiorum gestio, the following principle should apply: for ordinary negotiorum gestio, the actor bears fault-based liability; for Good Samaritan acts or urgent negotiorum gestio, the actor is exempt from compensation liability.

### B. The Exemption Clause of Volunteering Emergency Assistance Shall Precede over Justifiable Defense in Application

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[5] Feng Degan (冯德淦), Jianyiyongwei Zhong Jiuzhuren Sunhai Jiuji Jieshilun Yanjiu——Jianping Minfadian Caoan Di 979 Tiao Diyikuan (见义勇为中救助人损害救济解释论研究——兼评<民法典(草案)>第 979 条第 1 款) [Research on the Interpretation of Relief for Rescuers' Damages in the Volunteering Emergency Assistance Acts, and a Review of the First Paragraph of Article 979 of the Draft Civil Code], Huadong Zhengfa Daxue Xuebao (华东政法大学学报) [JOURNAL OF THE EAST CHINA UNIVERSITY OF POLITICS & LAW], no. 2, 2020, at 130-147. Song Zongyu & Zhang Chenyuan(宋宗宇, 张晨原), Jiuzhu Taren Shoudao Sunhai Sifa Jiuji De Fazhi Gouzao——Jianping Minfadian Caoan Di 183 Tiao(救助他人受到损害私法救济的法制构造——兼评<民法典(草案)>第 183 条)[The legal Structure of Private Law Remedies for Rescuing Others Who Have Suffered Damages, a Review on Article 183 of the Draft Civil Code], Faxue Pinglun (法学评论) [LAW REVIEW], no. 3, 2020, at 147-157.

[6] HUANG WEI (黄薇), ZHONGHUA RENMIN GONGHEGUO MINFADIAN SHIYI (中华人民共和国民法典释义) (2020). FANG SHIRONG, SUN CAIHUA & WANG LILI (方世荣,孙才华, 王莉莉), JIANYI YONGWEI JIQI XINGZHENGFA GUIZHI (见义勇为及其行政法规制) (2009).

[7] Zhang Haoliang (张浩良), Jianyiyongwei Xiangdui Mianze Zhi Tichang (见义勇为相对免责之提倡) [Volunteering Emergency Assistance are Relatively Exempt From Accountability], Shenyang Gongye Daxue Xuebao Shehui Kexue Ban (沈阳工业大学学报(社会科学版)) [JOUANAL OF SHENYANG UNIVERSITY OF TECHNOLOGY, SOCIAL SCIENCE EDITION], no. 2, 2023, at 186.

[8] CHEN WEIZUO YIZHU (陈卫佐译注), DEGUO MINFADIAN DIWUBAN (德国民法典(第五版)) (2020).

Justifiable defense refers to a defensive measure taken by an actor when the personal or property rights of oneself or others are being unlawfully infringed.[9] Provided in Article 181 of the Civil Code, it is a ground for exemption or mitigation of liability. There are several elements of justifiable defense, two of which are relevant to the righteousness and urgency of volunteer emergency assistance: first, justifiable defense must be directed against an ongoing unlawful offense; Second, the perpetrator carries out an act of self-defense before he has time to request assistance from the authority (or police). This coincides with the urgency of the volunteering emergency assistance scene. More importantly, although justifiable defense generally only causes damage to the tortfeasor, it may also harm the victim (recipient). Such harm falls within the scope of Article 184 of the Civil Code. Therefore, a potential contradiction arises: some practical cases may constitute both justifiable defense and volunteer emergency assistance, especially when the actor exceeds the necessary limit and causes undue harm—including harm to the aided person. Then, according to Article 181, Paragraph 2 of the Civil Code, "if undue damage is caused, the justified defender shall bear appropriate civil liability." At least, the perpetrator bears civil liability. However, volunteer emergency assistance entails absolute liability exemption, creating a conflict between the two institutions that requires legal interpretation.

Generally speaking, in the assumption of civil liability, when there are both mitigating reasons (excessive defense) and immunity defenses (good Samaritan acts), an interpretation with less harsh responsibility for the perpetrator should be adopted. This is reflected in the ultrahazardous liability. Article 1243 of the Civil Code stipulates that entering an area of ultrahazardous activities without permission….if the manager can prove that it has taken adequate security measures and fulfilled its obligation to give adequate warnings, it's liability may be mitigated or not liable at all. This is primarily a mitigating reason. However, if the circumstances of the case are also in accordance with the victim's intent under Article 1174, for instance, the victim climbs or trespasses into a high-risk area on his own, Article 1174 shall prevail and the administrator shall be exempted from liability. In the same way, when an act satisfies both excessive defense and courageous action, the exemption from liability for volunteering emergency assistance action should be applied. This is also consistent with the rule of interpretation that the legal design less burdensome to the debtor should be chosen when determining the debt. This is also recognized in Article 1, Paragraph 3 of Law Interpretation (2023) No. 13. In short, in the event of a competition between Article 181, paragraph 2, and Article 184, the exemption clause of Article 184 shall get the dominance. This is not to say, however, that defenders should be exempted from responsibility. The possible path is that the judge also applies the provisions of Article 31, Paragraph 3 of Law Interpretation [2022] No. 6, when the person who committed the tort proves that the defensive act caused undue damage at first. If it cannot be proven, the judge will then apply Article 181 or Article 184 of the Civil Code to exempt the actor (or rescuer) from civil liability.

### C. When Contradicting to Volunteering Emergency Assistance the Defense of Necessity Should be Invoked

[9] HUANG WEI (黄薇), ZHONGHUA RENMIN GONGHEGUO MINFADIAN SHIYI (中华人民共和国民法典释义) (2020).

According to Article 32 of Legal Interpretation [2022] No. 6, necessity refers to emergency measures taken as a last resort to protect legitimate rights and interests from imminent dangers, which may cause damage to smaller interests. In a typical scenario, necessity involves a tripartite relationship: the danger causer (natural or man-made), the actor taking emergency measures, and the victim. The exception to this is a two-party relationship, such as amputation of a traffic accident to prevent death from massive bleeding in the arteries of the legs. There is only a doctor-patient relationship here. Coincidentally, volunteering emergency assistance are generally a tripartite relationship: the tortfeasor, the rescuer, and the rescuee. However, there are also bilateral relationships, such as between the helper and the recipient. When voluntary emergency assistance causes harm to the recipient, it mirrors the situation in the amputation example above. Therefore, in such a two-party structure, there is an overlap between necessity and Good Samaritan acts. When the actor rescues a person who is comatose due to gas poisoning and performs cardiopulmonary resuscitation,[10] there may be a conflict between the defense of necessity and Good Samaritan behavior. When the actor causes serious personal injury or even death to the victim due to improper operation, the people's court shall determine whether it constitutes excessive risk avoidance based on factors such as the nature of the danger, the degree of urgency, the protected rights and interests, and the resulting harm. However, in this case, the actor is clearly acting out of good faith and may be exempt from liability according to the latter part of Article 184 of the Civil Code. To conclude, the question boils down to whether the rescuer should be held liable.

In fact, the problem can be re-framed: whether the rescuer bears responsibility or not can be equal to whether the recipient's (plaintiff's) litigation claim is supported by the people's court. When claims coexist, applying the theory of claim competition reveals options such as claim aggregation and combination. The mainstream opinion gradually adopts the theory of claim competition under certain principles.[11] A rigorous study of the normative intention of Articles 182 and 184 of the Civil reveals that the legal provisions on necessity are designed to avoid the imminent danger to legitimate interests by choosing the lesser of two evils. Volunteering emergency assistance lies in doing good deeds and helping others in perils. From the perspective of the legal interests protected by the two institutions, the actor cannot conduct good Samaritan act only for his or her own interests. Intentional (or incidental) self-sacrifice seems to be more noble. Moreover, considering the legislative intent and historical context, the absolute liability exemption was established to "cultivate a good social custom of being brave and helpful",[12] the legislator has set up a law here that is absolutely exempt from liability. In terms of the level of effectiveness, Article 184 should be taken precedence.

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[10] Jia Xinran (贾欣然), 2024Nian Dier Jidu Jianyiyongwei Yongshibang Shiji (2024 年第二季度见义勇为勇士榜事迹) [The Deeds of the Volunteering Emergency Assistance Warrior List in the Second Quarter of 2024], ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN JIANCHAYUAN (中华人民共和国最高人民检察院) [SUPREME PEOPLE'S PROCURATORATE OF THE PEOPLE'S REPUBLIC OF CHINA]. https://www.spp.gov.cn/spp/zdgz/202407/t20240726_661518.shtml

[11] WANG ZEJIAN (王泽鉴), QIYUE ZEREN YU QINGQUAN ZEREN ZHI JINGHE (契约责任与侵权责任之竞合) [COMPETING CONTRACTUAL AND TORTIOUS LIABILITY], MINFA XUESHUO YU PANLI YANJIU(DIYICE) BEIJING DAXUE CHUBANSHE (民法学说与判例研究(第一册),北京大学出版社)) [CIVIL LAW DOCTRINE AND PRECEDENTS RESEARCH(VOLUME 1), PEKING UNIVERSITY PRESS], 2009, at 218.

[12] LI SHISHI (李适时), ZHONGHUA RENMIN GONGHEGUO MINFA ZONGZE SHIYI (中华人民共和国民法总则释义) (2017).

However, if we carefully consider the commonalities between the two laws (such as the spirit of excessive risk aversion), the answer seems to be that legislators prefer rational risk avoidance or rescue. Therefore, it can be concluded that the normative purpose of these two claims is to protect responsible rescue efforts, while reckless rescue remains liable. When seeking legal grounds, judges should apply Article 182 of the Civil Code and Articles 32 and 33 of law interpretation [2022] No. 6. Some may argue that if the provisions of emergency avoidance are always applied when there is a competition between volunteering emergency assistance and emergency avoidance, it is suspected that Article 184 of the Civil Code will be violated. However, we believe that when the subjective fault of the rescuer cannot be proved, there is still room for application of this article. Moreover, the constitutive elements of the volunteering emergency assistance barely overlap with emergency avoidance. In practice, a significant number of cases do not involve danger avoidance. Therefore, Article 184 retains its independent significance.

### D. Priority Should be Given to Particular Defenses when Overlapping with Good Samaritan Action

Generally speaking, volunteering emergency assistance have the attribute of altruism, involving actions from the rescuer to the recipient and excluding self-interested mechanisms such as assumption of risk and self-help behavior. However, there is still some overlap in the standard settings of these defenses. For example, in a football match, after A is shoveled down by B's sliding shovel, he was pushed by C, who rescued into the field, causing some injury. Player C's actions may fall under both the voluntary emergency assistance provision of Article 184 and the assumption of risk exemption under Article 184 of the Civil Code and adventure-taking exemption under Article 1176. In this case, based on the legal technique of extracting the common factor in the Civil Code, the content of the sub-provisions should be applied in priority in the order of application between the general provisions and the sub-provisions. Therefore, C should bear the civil liability for intentional or gross negligence as stipulated in the latter part of paragraph 1 of Article 1176. In the same way, self-help acts referred to Article 1177 of the Civil Code can also be intervened by a third party, such as a hot-pot restaurant waiter who accidentally injured a customer when he helped the owner of the restaurant to detain the property of the customer who dines and dash. In such a case, the waiter may be eligible for exemption from liability under both Article 184 (voluntary emergency assistance) and Article 1177 (self-help) of the Civil Code. However, according to paragraph 2 of Article 1177, self-help behavior defense is restricted, and the waiter shall bear appropriate civil liability. This differs from liability for intentional or gross negligence in the context of assumption of risk, as the private remedies stipulated in Article 1177 are supplementary to public remedies and may easily exceed the limit--for instance, *lynching*. From the perspective of individual well-being, the general provisions of Article 1165 of the Civil Code on tort liability for fault shall apply.

In summary, it can be argued that within the civil law system, the emergence of the absolute exemption clause for volunteering emergency assistance has led to the confusion of the mitigation clause. When applying the law, judges should consider the normative purpose of the provisions related to negotiorum gestio, justifiable defense, necessity, assumption of risk, and self-help, and interpret the legislative intent to reach more reasonable conclusions. In brief, granting exemption from civil liability to the

defendant in accordance with Article 184 of the Civil Code without considering different situation may ignore the exceptions for other reasons, which likely leads to criticism of mechanical justice and handling the case too simply.[13]

## II. UNIFYING THE STIPULATIONS OF GOOD SAMARITAN IN THE CRIMINAL LAW

Although the provision on the exemption from liability for volunteering emergency assistance is mainly provided in Article 184 of the Civil Code, this provision has a significant spill - over effect and influences criminal law. As a "basic law that consolidates the fundamentals, stabilizes expectations, and benefits the long-term", [14]the Civil Code plays the role of a baseline for the rule of law. By criminalize some serious perpetration, criminal law incorporates a multitude of other laws into its normative framework and fulfills the role of the law's safeguard.

### A. The Criminal Law Lacks Systematic Sentencing Circumstances

According to the general theory, the sentencing circumstances of the Criminal Law are categorized into statutory sentencing circumstances and discretionary sentencing circumstances. For example, a person who has limited capacity for responsibility commits a crime, a person who is deaf and dumb or a blind person commits a crime, and who defends himself excessively or avoids danger excessively. The latter are such as confession and restitution for property crimes. However, the application of statutory sentencing circumstances is strictly constrained, while discretionary sentencing circumstances are prone to issues of excessive judicial discretion and often result in unjust verdicts. Therefore, in recent years, some scholars have tried to activate the provision of Article 13 of the Criminal Law of the People's Republic of China (hereinafter referred to as the "Criminal Law"), establishing a position of substantive interpretation, and create space for the exculpation of minor crimes.[15] Strictly speaking, Article 13 of the Criminal Law only defines the concept of crime. Moreover, many crimes, such as theft and fraud, are defined based on specific circumstances. These plot elements mainly include amounts, means, consequences, targets, etc. The courts have also gradually explored the corresponding circumstances for the application of many crimes, and imposed appropriate penalties. Therefore, the provision of Article 13 as the cause of substantive offence may be suspected of the

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[13] Huang Hailong & Pan Weilin (黄海龙, 潘玮璘), Lun Chuantoushi Shenpan De Jiben Neihan Yu Shijian Fangfa (论"穿透式审判"的基本内涵与实践方法) [Research on the Basic Connotation and Practical Methods of Penetrating Trial], Falv Shiyong (法律适用) [LAW APPLICATION], no. 7, 2023, at 03.

[14] Huang Zhong (黄忠), Cong Minshi Jiben Falv Dao Jichuxing Falv: Minfadian Diweilun (从民事基本法律到基础性法律:《民法典》地位论) [From the Basic Civil Law to the Fundamental Law: the Civil Code Status], Faxue Yanjiu (法学研究) [LAW RESEARCH], no. 6, 2023, at 53.

[15] Qian Yeliu (钱叶六), Xingshi Weifa De Neihan Yu Panduan Luoji--Jiyu Weifa Panduanlun De Lichang (刑事违法的内涵与判断逻辑——基于违法多元论的立场) [The Connotation and Judgment Logic of Criminal Offenses--Based on the Position of Pluralistic Theory of Offense], Faxue (法学) [LAW SCIENCE], no. 7, 2024, at 62. Zheng Chao (郑超), Yizhong Shizhi De Jieshi Fangfa--Xingshi Kefaxing Lilun De Gongneng Jiupian Yu Zaizao (一种实质解释的方法——刑事可罚性理论的功能纠偏与再造) [A Substantive Explanatory Method--the Function Correction and Reconstruction of the Theory of Criminal Punishability], Dangdai Faxue (当代法学) [CONTEMPORARY LAW], no. 4, 2024, at 61.

offence of divergence from reality. However, it is also an undeniable fact that the Criminal Law has limited sentencing circumstances. In an era where the genera theory of the composition of crime is showing a tendency to flatten the four constituent elements, the theory of the composition of crime of the three levels also has certain merits. An example of this is the unlawful obstruction and the liability obstruction. After the constituent elements are satisfied, the objective illegality of the act and the reasons for the illegal obstruction are then explored, and finally the reasons for the responsibility are investigated. Typical reasons for illegal obstruction are legitimate defense, emergency avoidance, victim's commitment, etc. In contrast, it must be acknowledged that existing criminal law norms lack systematic sentencing circumstances, resulting in confusion or even arbitrary sentencing in practice. This requires us to codify the norms of the criminal law again to include more sentencing circumstances and reasons for mitigation of liability.

### B. The Existing Sentencing Circumstances Cannot Replace the Immunity for Volunteering Emergency Assistance

Upon examining the sentencing circumstances in existing criminal law, neither statutory nor discretionary sentencing circumstances include any normative provisions for voluntary emergency assistance. We believe this stems from the fact that criminal law lags behind civil law in this regard. The most similar of these is nothing more than the justifiable defense in Article 20 of the Criminal Law and the emergency avoidance in Article 21. As a legitimate defense in current hot topics, because it involves the issue of crime and non-crime, it is easy to trigger sensational public opinion and social events (such as the Yu Huan case). To address these issues, the supreme court has successively issued relevant judicial interpretations and guiding cases, such as the Guiding Opinions on the Lawfully Applicable of the Justified Defense System (Law Interpretation [2020] No. 31) and Guiding Case No. 144–Zhang Namula's Just Defense Case in the Notice on the Release of the 26th Bundle of Guiding Cases (Law Interpretation [2020] No. 352). These judicial interpretations have provisions on the conditions for the cause, time, object, intent, and even special defense. However, as previously stated, justifiable defense pertains to the confrontation between right and wrong, and the defender acts against the perpetrator. Voluntary emergency assistance is constituted only when the act of defense simultaneously harms the rights and interests of the recipient. On the contrary, acting bravely out of righteousness may also be situation the rescuer diving into the water to save people, and there is no unlawful infringement.[16] Therefore, on the whole, there is only an intersection between justifiable defense and Good Samaritan behavior, and the Article 20 of the Criminal Law cannot substitute for the institutional design of immunity for voluntary emergency assistance. To elaborate, defending others or the public interest is both justifiable defense and volunteering assistance in emergency. However, the Criminal Law does not distinguish between self - defense and defense of others, resulting in identical legal consequences. In comparative legal studies,

[16] Jia Xinran (贾欣然), 2024Nian Dier Jidu Jianyiyongwei Yongshibang Shiji (2024 年第二季度见义勇为勇士榜事迹) [The Deeds of the Volunteering Emergency Assistance Warrior List in the Second Quarter of 2024], ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN JIANCHAYUAN (中华人民共和国最高人民检察院) [SUPREME PEOPLE'S PROCURATORATE OF THE PEOPLE'S REPUBLIC OF CHINA]. https://www.spp.gov.cn/spp/zdgz/202407/t20240726_661518.shtml

a distinction is typically drawn between self-defense and defense of others.[17] In general, the requirements for defending others are higher, and the defender may need to provide more evidence to prove the justification and necessity of his or her actions.[18] Therefore, the application of the rule of justifiable defense is even more unfavorable to defenders than volunteering emergency assistance, concerning both constitute elements and legal effect. Similarly, Article 21 of the Criminal Law stipulates the circumstances under which an actor may be exempted from liability for necessity. The Guiding Opinions of the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security on Punishing Illegal and Criminal Acts Impeding the Safe Driving of Public Transport also have special provisions on the circumstances in which drivers driving public transport constitute the defense of necessity. However, as previously mentioned, necessity only partially overlaps with voluntary emergency assistance, and the two remain mutually irreplaceable. Therefore, the dilemma that may exist in judicial practice is that in civil law, acts that are exempted from liability due to voluntary emergency assistance may need to bear criminal liability in the field of criminal law. Such a conclusion is unacceptable in any way. Therefore, we should explore a new interpretive approach to achieve harmony and unity between the criminal and civil law systems.

### C. The Implantation of the Norm of Volunteering Emergency Assistance in Criminal Law Should Take a Method of Substantive Interpretation

There are divergent views within the academic community regarding the distinction between the formal interpretation theory and the substantive interpretation theory of criminal law. For example, Professor Ruan Qilin pointed out that "under the principle of nulla poena sine lege, the formal aspects of criminal law will occupy the primary and dominant position."[19] Professors Zhang Mingkai and Liu Yanhong insist on the view of substantive interpretation, arguing that "if the composition of the crime is only explained in form, some trivial matters will conform to the composition of the crime (and in some cases, it may also cause the opposite adverse consequences); only by substantively interpreting the constitute elements of a crime can the conduct that meets the requirements of the crime become an act that seriously endangers society.[20] However, Professor Qu Xinjiu reached a compromising position and said, "the

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[17] Jia Xinran (贾欣然), 2024Nian Dier Jidu Jianyiyongwei Yongshibang Shiji (2024 年第二季度见义勇为勇士榜事迹) [The Deeds of the Volunteering Emergency Assistance Warrior List in the Second Quarter of 2024], ZHONGHUA RENMIN GONGHEGUO ZUIGAO RENMIN JIANCHAYUAN (中华人民共和国最高人民检察院) [SUPREME PEOPLE'S PROCURATORATE OF THE PEOPLE'S REPUBLIC OF CHINA]. https://www.spp.gov.cn/spp/zdgz/202407/t20240726_661518.shtml

[18] Homicide is also justifiable when committed by any person in any of the following cases: (3) When committed in the lawful defense of such person, or of a spouse, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished. (California Code, Penal Code - 197). Others like, Texas Penal Code - 933. Defense of Third Person.

[19] Liu Shude (刘树德), Lizu Laiyuan Yujing Zhunque Lijie Xingshijieshi Yu Shizhi Jieshilun (立足来源语境准确理解形式解释与实质解释论) [Accurately Understand Formal Interpretation and Substantive Interpretation Based on the Source Context], Jiancha Ribao (检察日报) [PROCURATORIAL DAILY], 2020.

[20] Liu Shude (刘树德), Lizu Laiyuan Yujing Zhunque Lijie Xingshijieshi Yu Shizhi Jieshilun (立足来源语境准确理解形式解释与实质解释论) [Accurately Understand Formal Interpretation and Substantive Interpretation Based on the Source Context], Jiancha Ribao (检察日报) [PROCURATORIAL DAILY], 2020.

interpretation of the criminal law needs to be oriented to the essence of the problem and choose an appropriate interpretating method…depending on the situation one may use formal, substantive or compromising explanatory methods."[21] Under the principle of nulla poena sine lege, the people's courts should not only determine the conviction in accordance with the charges in the specific provisions of the Criminal Law, but should also apply the expressly provided grounds for mitigation of responsibility when sentencing. To some extent, this reflects the concept of formal interpretation. However, the arguments proposed by the proponents of the substantive interpretation theory should not be overlooked. The reason is that what we are pursuing is the punishment proportional to the crime, and some minor and trivial matters that are not harmful to society should not be punished as crimes even if they meet the requirements. This is especially true when it comes to Good Samaritan behavior. Even though the Criminal Law includes provisions for Medical Liability for Accidents (Article 335), Major Liability for Accidents (Article 134), Negligent Homicide (Article 233), and Negligent Injury (Article 235), if a person's actions, such as performing an amputation to save a critically ill patient, rescuing a worker from danger which leads to a building collapse, or moving a traffic accident victim resulting in fractures, were taken in good faith, then it would be inappropriate for the People's Court to convict the individual of a crime. We propose three possible paths to exoneration: first, within the composition of the crime, it is determined that the relevant conduct does not meet the requirements of the elements such as fault, serious consequences, and heinous circumstances, so it does not constitute a crime; the second is to refer to Article 13 of the Criminal Law, which comprehensively compares the damage caused and the loss avoided, and it can be decided that the circumstances are obviously minor and the harm is not great, and it is not a crime at all. The third is to introduce a misunderstanding of illegality, arguing that since Article 184 of the Civil Code is absolute exemption from liability for acts of volunteering emergency assistance, based on the theory of consistent evaluation, the perpetrator cannot predict that the illegal act is prohibited by the Criminal Law. And the unavoidable mistake will prevent the perpetrator from being liable. These three paths differ in their assessment of the perpetrator, with the degree of culpability increasing sequentially. In the first scenario, the perpetrator did not commit an offence and did not constitute a crime. In the second scenario, the perpetrator has committed an illegal act, which is only significantly minor, and does not constitute a crime. In the third option, the perpetrator has committed an illegal act, which constitutes a crime, but is exempted from liability based on a wrong understanding of the illegality. Therefore, the last option is particularly disadvantageous to the perpetrators. When hearing cases in which the rescuee is seriously injured or passes away due to volunteering emergency assistance, the people's courts should try to adopt the first two paths, and may at the same time cite articles 183 and 184 of the Civil Code to explain the reason for judgement. This approach adheres to the stance of substantive interpretation of criminal law and also achieves the unity of legal and social effects.

### D. It is Unadvisable to Criminalize Bystander Apathy

[21] Liu Shude (刘树德), Lizu Laiyuan Yujing Zhunque Lijie Xingshijieshi Yu Shizhi Jieshilun (立足来源语境准确理解形式解释与实质解释论) [Accurately Understand Formal Interpretation and Substantive Interpretation Based on the Source Context], Jiancha Ribao (检察日报) [PROCURATORIAL DAILY], 2020.

Whenever there is a conflict between law and morality, the nature of their relationship becomes a subject of intense debate. But there is almost a consensus that ethics is high and legal is lower--the law is the bare minimum of morality. We often say that volunteering emergency assistance are good and righteous deeds, and the public should be encouraged to act bravely. However, legislators should never impose such a duty through coercion. The criminal law may face two drawbacks in setting up the crime of failing to save when the rescuee is in danger: first, the subject of the crime is too generalized. Whenever there is breaking news, there are always a lot of onlookers. If this crime is established, the scope of accountability will be too broad. The law will not hold all walks of people accountable, and the criminal law will inevitably not be enforced. [22] Second, some technical issues may arise when pursuing criminal responsibility. Judicial authorities are holding those who fail to save others in danger accountable, for which they need to test the skills of potential suspects, such as whether they have swimming skills, first aid skills, etc. Volunteering without self-harm and not willing to work is not a simple empirical judgment.[23] This will inevitably make it more difficult to detect the perpetration. Moreover, bystanders, as rational individuals, have numerous factors to consider when deciding whether to rescue, and there are various reasons for not intervening. This further compounds the challenge of establishing guilt. Therefore, the criminal law should not introduce the crime of failing to save the person who is in danger by means of mandatory law. This viewpoint has gradually become a common theory in academia.[24] Some scholars have asserted that "providing legal protection for rescue acts is preferable to creating legal obligations."[25] Legislators may grant liability immunity in appropriate circumstances. For example, many provincial-level people's congresses and standing committees with local legislative power have now formulated regulations on pre-hospital treatment in medical institutions, which can eliminate minor negligence in diagnosis and treatment.[26] To some extent, this alleviates

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[22] Zhang Haoling (张浩良), Wei Jianyi Yongwei Dianding Falv Zhiji (为见义勇为奠定法律之基) [Lay Foundation of the Law for Volunteering Emergency Assistance], Zhongguo Shehui Kexue Bao (中国社会科学报) [JOURNAL OF CHINESE SOCIAL SCIENCE], 2024.

[23] Dong Yuting & Li Fangfang (董玉庭,李芳芳), Jushou Bulao Xing Jianweibujiu Ruxing Zhi Sibian ("举手不劳"型见危不救入刑之思辨) [Thoughts on the "Raising Hands Without Work Type of Seeing Danger and not Saving and Being Punished], Beifang Faxue (北方法学) [NORTHERN LEGAL SCIENCE], no. 3, 2023, at 69-80.

[24] Liang Wencai (梁文彩), Dui Jianweibujiu Fanzuihua De Helixing Zhiyi (对"见危不救"犯罪化的合理性质疑) [Questioning the Rationality of Criminalization in the Face of Danger Without Help), Gansu Zhengfa Xueyuan Xuebao (甘肃政法学院学报) [JOURNAL OF GANSU UNIVERSITY OF POLITICAL SCIENCE AND LAW], no. 2, 2013, at 126. Xu Jiusheng & Ma Shengkun (徐久生,马圣昆), Jianweibujiu Ruxing Zhi Fouding (见危不救入刑之否定) [The Denial of Imprisonment for not Being Rescued in Danger], Zhengfa Xuekan (政法学刊) [JOURNAL OF POLITICAL SCIENCE AND LAW], no. 5, 2020, at 96.

[25] Sang Benqian (桑本谦), Litazhuyi Jiuzhu De Falv Ganyu (利他主义救助的法律干预) [Legal Intervention in Altruistic Bailouts), Zhongguo Shehui Kexue (中国社会科学) [CHINESE SOCIAL SCIENCES], no. 10, 2012, at 123.

[26] For example, paragraph 3 of Article 20 of the *Regulations of Nanjing Municipality on Pre-hospital Medical Emergency* stipulates that "individuals with professional skills in medical emergency medical care are encouraged to provide emergency on-site care to patients in need of emergency care before the arrival of emergency personnel." The act of emergency on-site rescue is protected by law, and where damage is caused to patients due to emergency on-site rescue, legal responsibility is not borne in accordance with law. Paragraph 3 of Article 44 of the *Regulations of Tianjin Municipality on Pre-hospital Emergency Medical Services* stipulates that "if the aided person suffers damage due to the voluntary implementation of emergency rescue, the rescuer shall not bear civil liability in accordance with the law."

the concerns of rescuers and effectively encourages the public to act bravely. It is also more practical to implement compared to the stringent measure of criminalizing failure to rescue. A possible way to amend the law is to rewrite the Criminal Law to add liability immunity to some crimes, such as Medical Liability for Accidents (Article 335), Major Liability for Accidents (Article 134), Negligent Homicide (Article 233), and Negligent Injury (Article 235). A person who conducts emergency rescue in the course of their duties or professional activities shall be legally exempt from liability. This achieves legal consistency within the criminal law system and avoids the detour of invoking Article 184 of the Civil Code by leading to normative or even substantive interpretations.

In short, in order to achieve the unity of the system of volunteering emergency assistance within the criminal law and fulfill the basic legal functions of the Civil Code, the people's courts should adopt the methods of substantive interpretation when criminalizing some action, and decriminalize acts that meet the requirements of Articles 183 and 184. This is not only in line with the purpose of legislators, but also in harmony with the jurisprudence that acts of volunteering emergency assistance are handled similarly to similar legitimate incidents such as necessity and justifiable defense.

## III. INCORPORATING THE RULES OF GOOD SAMARITAN INTO THE ADMINISTRATIVE LAW

Volunteering emergency assistance is primarily a civil law concept, yet it also exhibits characteristics of administrative law. According to our research, it is the responsibility of the police to handle the emergency and save the people from danger.[27] However, the police can sometimes be late to arrive at crime scene. When the police, firefighters, and other first responders are unable to respond promptly to emergencies, citizens come forward to assist those in need, which can be regarded as a form of administrative rescue in practice. The public security department and its agency's announcement of the reward and the administrative subjects' provision of clues or the transfer of the criminal suspects constitute an administrative contract. When the situation is dangerous, they are also considered Good Samaritans under civil law. In addition, volunteering emergency assistance is an honorary title, which can also bring certain administrative rewards. When a rescuer is seriously injured or dies, he or she (or his close relatives) can apply for certain compensation from the Good Samaritan Foundation. Therefore, we should incorporate the rules of volunteering emergency assistance into administrative law in order to achieve the harmony of civil law and public law.

### A. Volunteering Emergency Assistance Is Meanwhile the Administrative Assistance

Scholars discuss the nature of rescue in emergency in the context of public law.[28] They believe that Articles 6 and 19 of People's Police Law of the People's Republic of China (hereinafter referred to as the "People's Police Law") stipulate that

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[27] Haoliang Zhang, The Balance of Interests between the Volunteering Rescuer and the Rescue in Emergency Assistance, 2 LAW SCI. 938 (2023).

[28] Fu Changqiang & Gan Qinyou (傅昌强, 甘琴友), *Jianyiyongwei De Xingzhengfa Sikao* (见义勇为的行政法思考) [*Reflections on Administrative Law for Volunteering Emergency Assistance*], Xingzheng Faxue Yanjiu (行政法学研究) [ADMINISTRATIVE LAW REVIEW], no. 2, 2002, at 33-39.

the police have the obligation to aid in distress, which shows that assistance in emergency is within the scope of public services provided by the authorities to members of society, and is not a legal obligation of other citizens. However, the world is unpredictable, and life is fraught with uncertainties. Despite their best efforts, the police may sometimes be off-duty or inadequately equipped. At this time, the act of citizens' assistance is a necessary supplement to the lack of relief by public power. The rescuer is essentially assisting the administration of the state, that is, the act of administrative assistance. Administrative assistance in the common sense only refers to the cooperation between administrative agencies. For example, Professor Ye Bifeng believes that (administrative assistance) refers to the act of using authority to assist an administrative entity that has no jurisdiction over a certain matter based on the request of the administrative entity with the right to manage it.[29] *Cross-enforcement* in civil litigation occurs when enforcement officers from a court with jurisdiction entrust an enforcement agency without jurisdiction to execute a civil case verdict, aiming to overcome local protectionism and strengthen deterrence. However, it is not unreasonable to position citizens as actors who cooperate with the administrative authorities.[30] Since Good Samaritan acts refer to situations where ordinary citizens, who are not obligated to provide assistance or go beyond general duties, help others, voluntary emergency assistance does not apply to individuals who have a duty to assist [31](such as on-duty military personnel, firefighters, licensed physicians, guardians).[32] In Japanese law, it is also recognized that when an accident occurs, the primary duty of assistance lies with the state. If ordinary people take action, this forms a public-law relationship between the state and private individuals. Anyone who incurs losses as a

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[29] YE BIFENG (叶必丰), XINGZHENG FAXUE (行政法学) (1996). Tang Zhen (唐震), Xingzheng Xiezhu Xingwei Jiben Yaosu Jiexi (行政协助行为基本要素解析) [Analysis of the basic elements of administrative assistance behavior], Zhengzhi Yu Falv (政治与法律) [POLITICS AND LAW], no. 4, 2013, at 70.

[30] In fact, many government departments are involved in the work of rewarding and guaranteeing those who have done justice and courage. For example, Article 5 of the *Regulations on Rewards and Guarantees for Volunteering Emergency Assistance Personnel in Henan Province* states that "the people's governments at or above the county level shall be responsible for rewarding and guaranteeing the personnel who are volunteering emergency assistance, and shall establish and improve the coordination mechanism for the linkage of various departments." Routine affairs are handled by the public security organs. The relevant departments of people's governments at the county level or above, such as for public security, education, civil affairs, finance, human resources and social security, housing and urban-rural construction, health, and family planning, as well as people's organizations such as trade unions, Communist Youth Leagues, women's federations, and disabled persons' federations, shall, in accordance with their respective duties, do a good job of rewarding and guaranteeing those who serve for volunteering emergency assistance. For example, Article 5 of the *Regulations of Tianjin Municipality on the Reward and Protection of Volunteering Emergency Assistance Personnel* provides that "the municipal and district people's governments shall be responsible for rewarding and protecting the volunteering emergency assistance personnel within their respective administrative areas, and shall include the required funds in the financial budget at the same level."

[31] Zhang Chenyuan & Song Zongyu (张晨原，宋宗宇), Jianyiyonwei Xingzheng Zeren De Panduan Biaozhun(见义勇为行政责任的判断标准) [The Criteria for Judging Administrative Responsibility of Volunteering Emergency Assistance], Guangdong Shehui Kexue (广东社会科学) [SOCIAL SCIENCE IN GUANGDONG], no. 2, 2020, at 235-244.

[32] Zhang Haoliang (张浩良), Jianyiyongwei Xiangdui Mianze Zhi Tichang (见义勇为相对免责之提倡) [Volunteering Emergency Assistance are Relatively Exempt From Accountability], Shenyang Gongye Daxue Xuebao Shehui Kexueban (沈阳工业大学学报(社会科学版)) [JOUANAL OF SHENYANG UNIVERSITY OF TECHNOLOGY, SOCIAL SCIENCE EDITION], no. 2, 2023, at 189.

result of a Good Samaritan act may be eligible for administrative compensation based on the principle of equal *public burden sharing*.[33]

## B. Administrative Confirmation for Volunteering Emergency Assistance Should have a Lawful Procedure of Investigation and Declaration

Since the 18th National Congress of the Communist Party of China, President Xi Jinping has repeatedly emphasized that "when the class of grassroots is strong, the country is strong, and when the common people are safe, the country is safe, and we must do a good job in the basic work of modernizing grassroots' governance".[34] As previously stated, common people's rescue affairs supplement the police's mobile ability, deserving both material and spiritual rewards, but before that, we need strict reporting and investigation procedures. After an emergency rescue incident, "the rescuer, the rescuee, and other witnesses at the scene can come forward for granting procedure."[35] When the rescuer is seriously injured and fells unconscious, his or her good deeds may be reported by a close relative. Based on the notion of administrative assistance, the entity designated for declaring volunteering emergency assistance is generally the administrative organ (or the functional department responsible for the comprehensive management of social security) that is being assisted.[36] If it is a situation such as helping to arrest bandits or rescuing people who have fallen into the water, it should be determined by the local public security organs. If the fire is extinguished and the people trapped in the flood disaster are rescued, the fire department will determine it, and so on. In the approval process, the competent authorities should broadly interpret urgency or situations involving significant personal risk, so as to include numerous good deeds within the scope of rewards, thereby achieving a demonstrative effect. If applicants are dissatisfied with the determination, they may apply for administrative reconsideration to the supervisory authority. If they are still dissatisfied with the result of the administrative reconsideration, they may file an administrative lawsuit. In cases where there is a dispute between the rescuer and the rescued regarding exemption from civil liability, the court in the jurisdiction where the incident occurred will handle the matter to determine whether it constitutes Articles 183 and 184 of the Civil Code. During the civil litigation, judges should apply the

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[33] The opinion is that the rescuers' damage should be distributed to the public. The compensation for such damage is administrative compensation. Zhang Cheng(章程), Jianyiyongwei De Minshi Zeren--Ribenfa Zhuankuang Qiji Dui Woguofa De Qishi(见义勇为的民事责任——日本法的状况及其对我国法的启示) [The Civil Liability of Volunteering Emergency Assistance--the State of Japan Law and Its Implications for our Law], Huadong Zhengfa Daxue Xuebao (华东政法大学学报) [JOURNAL OF THE EAST CHINA UNIVERSITY OF POLITICS & LAW], no. 4, 2014, at 48.

[34] Xi Jinping Zongshuji Zai Guizhousheng Guiyangshi Guanshanhuqu Jinyuanshequ Kaocha Diaoyan Shi De Jianghua (习近平总书记在贵州省贵阳市观山湖区金元社区考察调研时的讲话) [Speech by President Xi During the Investigation of Jinyuan Community, Guanshanhu District, Guiyang City, Guizhou Province] (2021).

[35] Xun Rihua (孙日华), Jianyiyongwei Rending De Fali Fansi Yu Zhidu Goujian(见义勇为认定的法理反思与制度构建) [Reflection on the Legal Principles and System Construction of the Recognition of Volunteering Emergency Assistance], Dongbei Daxue Xuebao Shehui Kexueban (东北大学学报(社会科学版)) [JOURNAL OF NORTHEASTERN UNIVERSITY(SOCIAL SCIENCE)], no. 1, 2013, at 90.

[36] For example, Article 9 of the *Sichuan Provincial Regulations on Protecting and Rewarding Acts of Volunteering Emergency Assistance* stipulates that "after being reviewed by the functional departments responsible for the comprehensive management of social security, the acts of volunteering emergency assistance shall be reported to the people's government at the same level for confirmation and announced to the public."

preponderance of evidence rule[37] and may hold hearings in local to render a credible judgment. For example, if witnesses or CCTV footage present preliminary evidence, the aided party should present rebuttal evidence.[38] In cases of fabricated acts of Good Samaritan assistance or fraudulent claims for compensation or rewards, the people's court should determine whether the behavior constitutes unjust enrichment or fraud, based on the severity of the case, and assign the appropriate civil or even criminal liability.[39] The court's rulings should link to entitlements such as work insurance benefits or martyr honors, serving as a basis for actions by social security or public security authorities. When necessary, the people's court may issue judicial recommendations to the related entities. Good Samaritans whose legitimate rights have not been promptly recognized may also apply for legal aid.

### C. The Good Samaritan Shall Enjoy Immunity from Liability under Public Law

Legislators confer liability immunity for certain acts primarily to balance interests or encourage such acts. For example, Article 1176 of the Civil Code grants a certain degree of immunity to participants in risky events, and attempts to balance interests in order to promote the high-risk, high-confrontational, and exciting charm of competitive sports. Another example is paragraph 3 of Article 20 of the Regulations on Pre-hospital Emergency Medical Care in Nanjing and paragraph 3 of Article 44 of the Regulations on Emergency Pre-hospital Medical Services in Tianjin, which are to encourage the public to voluntarily provide emergency assistance. Similarly, as mentioned above, those who act bravely in the face of risk have the nature of making up for preparedness of administrative organs, realizing the optimal integration of social resources, and have the legitimacy of liability exemption. Meanwhile, this aligns with the purpose of administrative guidance. Administrative agencies, such as public security organs, as well as administrative entities, such as schools, may encourage the public to act courageously and wisely by widely publicizing the right to be exempt from liability. For example, if a citizen rescues an injured person carelessly and causes burns to the victim, if it is confirmed volunteering emergency assistance act, the private entity shall have full immunity from liability. Since those with administrative authority generally have rescue skills, if they bear fault liability,[40] the private entity should only bear the responsibility for intentional or gross negligence. This is in line with the balance of power (or rights) between private and public legal entities. According to the

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[37] Zuigao Renmin Fayuan Guanyu Shiyong (Zhonghua Renmin Gongheguo Minshisusongfa) De Jieshi (最高人民法院关于适用<中华人民共和国民事诉讼法>的解释).

[38] An elder, after becoming drunk and falling on the road, was helped up by a young man whom he then mistakenly accused of causing the fall. Surveillance footage later proved the young man's innocence. Xiaoping Huang & Shuai Li, Teen Assisting an Elder Is Wrongfully Accused and Slapped! Jiangxi Police: 9-Day Detention, Jiangxi Release (last visited Aug. 27, 2025), https://www.zgfznews.com/news.html?aid=867830.

[39] Xun Rihua (孙日华), Jianyiyongwei Rending De Fali Fansi Yu Zhidu Goujian (见义勇为认定的法理反思与制度构建) [Reflection on the Legal Principles and System Construction of the Recognition of Volunteering Emergency Assistance], Dongbei Daxue Xuebao Shehui Kexueban(东北大学学报(社会科学版)) [JOURNAL OF NORTHEASTERN UNIVERSITY(SOCIAL SCIENCE)], no. 1, 2013, at 90.

[40] For example, paragraph 2 of article 13 of the *People's Police Law* stipulates that "public security organs need to investigate crimes..... where losses are caused, compensation shall be made. Article 50 stipulates that "where the people's police infringe upon the lawful rights and interests of citizens or organizations in the course of performing their duties, causing harm, they shall...Indemnification is granted."

social compensation theory, the losses (such as the infringement of the rescued person's personal rights) caused by voluntary emergency assistance should be covered through tax. This is also in harmony with the altruistic attribute of volunteering emergency assistance. As previously mentioned, this situation should be governed by the provisions on justifiable defense, necessity, and management without cause, without incurring good Samaritan's administrative (compensatory) liability. If the Good Samaritan is exempt from liability and the person being assisted suffers some loss, the loss should be fully or partially compensated by the Good Samaritan Fund or a social assistance fund. This approach effectively removes any concerns or worries the rescuer may have.

### D. The Good Samaritan Should be Fully Protected and Rewarded

There are a lot of benefits to rewarding rescuers. The government's practice of compensating rescuers on behalf of those being assisted is also a strategy that leverages public authority and mass media to strengthen the signaling mechanism of rescue actions. Since taxpayers ultimately bear the cost of the rewards, government rewarding implicitly function as a form of mild insurance.[41] Currently, public welfare organizations such as Good Samaritan foundations at both central and local levels are actively conducting their work. For example, the selection and recognition program for Good Samaritan heroes, hosted by the Central Political and Legal Affairs Commission and organized by the China Good Samaritan Foundation, has published seven quarterly lists of Good Samaritan heroes since September 2022, with a total of 388 heroes receiving awards.[42] The Good Samaritan Association of Puyang City, Henan Province, has included Wang Xiangnan, a driver who rescued others on the Meida Expressway, in its care and support program. On the eve of Army Day in 2024, Good Samaritan foundations at various levels in Jiangsu organized visits to honor military personnel who demonstrated acts of bravery.[43] In the future, the government should take the lead in actively raising funds from the public to strengthen the foundation's financial resources and promote the safe and effective use of funds through various means, such as providing personal accident insurance for Good Samaritans.[44] Meanwhile, all localities should strengthen legislative efforts, especially by enacting special legislation

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[41] Sang Benqian (桑本谦), Litazhuyi Jiuzhu De Falv Ganyu(利他主义救助的法律干预) [Legal Intervention in Altruistic Bailouts), Zhongguo Shehui Kexue (中国社会科学) [CHINESE SOCIAL SCIENCES], no. 10, 2012, at 138.

[42] Xiong Feng (熊丰), Zhongyang Zhengfawei Fabu 2024 Nian Dier Jidu Jianyiyongwei Yongshibang (中央政法委发布 2024 年第二季度见义勇为勇士榜) [The Central Political and Legal Commission Released the List of Volunteering Emergency Assistance Warriors in the Second Quarter of 2024], XINHUA WANG (新华网) [XINHUA NEWS],

http://www.xinhuanet.com/politics/20240726/a195e0371c504861ba38a9c83e5ae9fe/c.html.

[43] Li Yang (李旸), Xiang Junren Zhijing!Jiangsu Geji Jianyiyongwei Jijinghui Kaizhan Zoufang Weiwen Jianyiyongwei Junren Huodong (向军人致敬!江苏各级见义勇为基金会开展走访慰问见义勇为军人活动) [Salute to the Military! Volunteering Emergency Assistance Foundations at all Levels in Jiangsu have Carried out Activities to Visit and Express Condolences to Volunteering Emergency Assistance Soldiers], ZHONGGUO JIANGSUWANG (中国江苏网) [JSCHINA.COM.CN]. https://jsnews.jschina.com.cn/zt2019/jsjyyw/zhyw/202407/t20240730_3439848.shtml.

[44] FANG SHIRONG, SUN CAIHUA & WANG LILI (方世荣, 孙才华, 王莉莉), JIANYI YONGWEI JIQI XINGZHENGFA GUIZHI (见义勇为及其行政法规制) (2009).

to protect those who act bravely in the face of danger.[45] In practice, attention should also be given to the special provisions in the Martyrs' Commendation Regulations and the Work Injury Insurance Regulations. For instance, Article 15, Item 2 of the Work Injury Insurance Regulations stipulates that 'injuries sustained while participating in activities to protect national or public interests, such as disaster relief,' shall be treated as work injuries under Good Samaritan provisions. According to Article 18 of this regulation, the application materials for work injury recognition include a work injury determination application form, documentation of an employment relationship (including de facto employment), medical diagnosis, and proof from civil affairs or other relevant departments. Similarly, Article 8, Item 2 of the Martyrs' Commendation Regulations states that citizens who sacrifice their lives during disaster relief or while rescuing and protecting national, collective, or individual property shall be recognized as martyrs. Such individuals are entitled to martyrs' commendation benefits and preferential treatment for the families of martyrs. Article 34, Paragraph 2 of the People's Police Law contains similar provisions. If a person cannot be recognized as a work injury or martyr, they may still receive a certain level of social assistance, and during the recovery phase, their current salary and benefits should remain unchanged to ensure that those who do good are not left to suffer both physically and mentally.

## CONCLUSION

The legal concept of good Samaritan undoubtedly lends itself to an interdisciplinary approach. The distinctions between civil, criminal, and administrative law do not exist in all legal fields.[46] The values of righteousness and courage also carry rich ethical and moral significance, making them subjects of study in ethics, sociology, and other social sciences. In this article, an attempt was made to conduct research within the confined scope of specific law. Within the civil law framework, good Samaritan acts fall under emergency management without cause. If the rescuer acts with slight negligence, they are exempt from civil liability. However, if the rescuer acts with intent or gross negligence, they should bear appropriate civil liability, with a reversed burden of proof applied. Since justifiable defense serves as a partial exemption from liability, which is less favorable than the Good Samaritan rules, the latter should generally take precedence in application. However, considering normative legislative purposes, the provisions on necessity should prevail. Given that the Civil Code adopts an abstracting approach, specific laws in particular chapters should take precedence over general laws, so there are reasons for judges to prioritize provisions on voluntary assumption of risk or self-help actions. To uphold the foundational role of the Civil Code, it is also important to ensure consistency between criminal law and civil law. As the Criminal Code lacks a systematic framework for sentencing circumstances, and current circumstances cannot replace the functional purpose of exemption for Good Samaritan acts, the People's Court should take a substantive interpretative stance, excluding actions in accordance with Articles 183 and 184 of the Civil Code from the realm of crime. When the time is proper, provisions for Good Samaritan exemptions should be integrated into the Criminal Code when the law is revised. Law represents the minimum

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[45] Up to now, Anhui, Guangdong, Hubei, Hunan, Sichuan, Hebei, Chongqing, Zhejiang, Guizhou, Beijing and other provinces and cities have issued regulations on rewarding and guaranteeing those who serve righteously and bravely.

[46] Sang Benqian(桑本谦), Litazhuyi Jiuzhu De Falv Ganyu (利他主义救助的法律干预) [Legal Intervention in Altruistic Bailouts), Zhongguo Shehui Kexue (中国社会科学) [CHINESE SOCIAL SCIENCES], no. 10, 2012, at 136.

standard of morality; therefore, the Criminal Code should not impose a legal duty to rescue in emergencies, as this would excessively interfere with citizens' freedom of action. However, acts of assault, retaliation, or false accusations against Good Samaritans should be subject to administrative sanctions by public security organs, and, if constituting a crime, should be prosecuted by procuratorates. To support grassroots governance systems and modernization of governance capabilities, the reach of administrative power should be appropriately extended. Citizens should be encouraged to render administrative assistance when the police or first-aid agencies are unable to respond promptly. Although Good Samaritan acts are benevolent, and sometimes anonymous, it is essential to establish certain reporting, investigation, and verification procedures within the framework of rule of law. To alleviate the concerns of emergency responders, we should also consider providing public-law liability immunity, like the provisions in the People's Police Law, to give civilians a degree of preferential protection. Finally, legislators should weave a comprehensive legal framework to protect and reward Good Samaritans, thereby fostering a culture of mutual assistance, public support, and reinforcing the ethical values of goodwill and solidarity within our communities.

# A PLAUSIBLE MODERN MEGA ECHO OF THE CULTURAL REVERBERATIONS OF THE YUEHUAHU ANTI-SUBORDINATION VOICES

James Li*

**Abstract**: Maxine Kingston's award-winning books written in the 1970s provide more insight on why Chinese immigrants have always tended to have a higher volume of social capital, enabling generations of Chinese immigrants and their children tending to exceed expectations in socio-economic achievements. Maxine Kingston's books, along with historical and cultural evidence, provide more texture to the notion that early Chinese immigrants had some idea that Taishan was the epicenter of Yuan empire power infrastructure at the more southern half of south China. The name "Ho Chi Minh" may provides greater insight on Chinese immigrants' social capitalism experience, past and present, analogously to American literary classic *The Woman Warrior*. This investigation further enforces the notion in the primary article *The Reverberations of the Yuehuahu Anti-subordination Voices* that the judiciary is not competent at resolving cultural conflicts.

**Keywords**: Cultural Experience; Chinese American Constitutional Experiences; Constitutional Law; *Yick Wo*; Law and Society; Constitutional Jurisprudence; Dissenting Opinions in *Obergefell v. Hodges* and *Romer v. Evans*; Ho Chi Minh's Plausible Literal Meaning

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## INTRODUCTION

"To keep his identity secret, Nguyen Ai Quoc traveled as a Chinese journalist using a new name, Ho Chi Minh (He Who Enlightens)."

*Ho Chi Minh*[1], 248-249

What cultural and sociological information discernable from a name choice depends a lot on the context for that choice.[2] Because of geographical contiguity[3], Vietnamese language and culture significantly overlap with Chinese's,[4] and both Chinese and Vietnamese like to adopt aliases and name their children with inspiring word combinations[5], such as the name "Ho Chi Minh" widely understood to mean "he who enlightens"[6]. As another example, Mr. Ho Chi Minh's ("Ho") birth name was "Nguyen Sinc Cung",[7] with the name "Sinc Cung" probably meaning "engendering respect"[8]. Because the word combination "Ho Chi Minh" ("HCM")[9] has been adopted as the name of a major metropolis in Southeast Asia,[10] the cultural effects of that city name are obviously significant, as people having some knowledge of the Vietnam War[11]

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[1] By William J. Duiker (Hyperion, 2000) ("Duiker"; in the text, "*HCM*"). To avoid unnecessary verbiage, an abbreviation will be used after identifying the abbreviation with (" ") hereinafter.

[2] *Cf.* Kenneth Burke, Philosophy of Literary Form viii-ix (Vintage Books, 1957) (a literary expression, such as a name, conveying different meanings, depending on contexts).

[3] *See* Patricia Buckley Ebrey, The Cambridge History of China 11 (Cambridge University Press, 2006) ("Ebrey")(a map showing Vietnam and China as connected to each other by land and sea).

[4] *See* Duiker, 10 (Chinese language runs deep in Vietnamese language).

[5] Chinese and Vietnamese languages are monosyllabic languages, with every syllable having multiple shades of meaning. *See* Nguyen Du, *The Song of Kieu, A New Lament* 43 (translated by Timothy Allen) (Penguin Classics, 2019) ("Allen") for an example in Vietnamese, as in "ba" meaning "uncle" or "to embrace". *See* English-Chinese Chinese-English Dictionary 600 (Szechwan Language Publishing, 2021) ("E-C-C-E-D") for an analogous example in Chinese, as in "bo" meaning "uncle" or "to win". As a result, each person's name potentially a meaning.

[6] Incidentally, "Ai Quoc", Mr. Ho's most known alias as a younger person, means "patriot". *See* Duiker, 59. It sounds like the Taishan dialect of Chinese for "loving [one's] country. *See* E-C-C-E-D 576, 699 (based on mandarin phonetization), respectively. Unfortunately, there is not dictionary on phonetized Taishan dialect, and the reader has to take a leap of faith on the author's knowledge of Taishan dialect.

[7] Duiker, 17.

[8] "Sinc Cung" actually sounds like the Taishanese dialect for the mandarin words phonetized as "Sheng" and "Gong", respectively, meaning "growing" and "congratulation", respectively, *see* E-C-C-E-D 895, 691, respectively. "Engendering respect" is, however, the more idiomatic translation. The reader is also asked to take a leap of faith in the author's knowledge of Chinese idioms.

[9] Unless otherwise specified, for purpose of ease of reading in this article, "[initials]" refers to a word combination. However, for ease of reference, the full word combination precede an initialized word used for the first time in each part. When something is attributed to HCM, the person, "Ho" is used.

[10] *See* below a map of southern Vietnam showing the location of Ho Chi Minh City.




Image A, *available at* googling "Ho Chi Minh City Map". *Cf.* https://www.hochiminhcity.gov.vn/vi/web/hcm-en[g].

[11] 1960-1973 if the initial presence of 685 American troops as advisors is treated as the beginning. *See* Jill Lepore, THESE TRUTHS, a History of the United States 603, 642 (W.W. Norton & Company, Inc., 2018) ("Lepore").

easily recognize the politically motivation behind its adoption[12]. Because words often have different shades of meanings, such as the word "can",[13] this article identifies a much less known shade of meaning of "HCM". Because "HCM" was initially adopted while Ho was traveling under a Chinese identity, this article then investigates a plausible specie of cultural and sociological information about 100 years ago plausibly discernable from "HCM" in the context of some historical and cultural information in that era.[14] Hopefully, this investigation contributes to a sharper understanding of social capitalism experiences in Chinese immigrant communities[15] a century ago and reveals a plausible specie of cultural-psychological, sociological and cultural effects resulting from "Ho Chi Minh City" ("HCMC") now certain to appear somewhere in waiting lobbies in airports with scheduled flights to and from major destinations in Asia.[16]

The notion of "HCM" having a shade of meaning different from "He who enlightens" described in *HCM* has some initial purchase arising from the word combination Ho had adopted as an alias, "Hu Guang" ("HG"), about two years before ultimately adopting "HCM" as his new alias,[17] and "HG", written in Chinese, having two different shades of meaning. *The Reverberations of Yuehuahu Anti-subordination*

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[12] *Cf.* Duiker, xiv (north Vietnamese troops capturing Saigon in 1975).
[13] *See* https://www.merriam-webster.com/dictionary/can.
[14] *See* Part II. below.
[15] *See* footnote 18, first paragraph below.
[16] A Cathay Pacific Airline schedule web page, *at* https://www.cathaypacific.com, partial screenshots showing the Chinese characters for Hong Kong and HCMC,



Image B



Image C

Incidentally and, as we shall see, significantly, the Chinese characters for "HCM" all appear within one episode of a Chinese language TV lecture, *see* screenshots of word captions below,

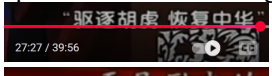


Image D, "Ho" is the third word;

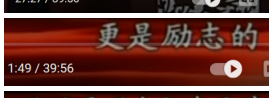


Image E, "Chi", the fourth word;



Image F., "Minh", the fourth word.

*See* Zhu Yuanzhang Lecture, Episode 1 ("ZL E1"), https://www.youtube.com/watch?v=Vu23DU13u_8&list=PLlD7SeKBB31csZi0ry6-xY05c6qMWhgpP&index=1, *at* 27:27, 1:49, 0:58, respectively.
[17] *See* Duiker, 231 ("HG" adopted in 1938), 248-249 ("HCM" adopted in 1940).

*Voices* ("*The Reverberations*") [18] makes the points that "HG" could literally mean "Mongolian light" and was plausibly inspired by Ho's personal knowledge about the Yuan empire's apparent honorable ending in Guangdong ("Yeah-e-G") story.[19] *The Reverberations* makes the point that the plausibility of "HG" meaning "Mongolian light" makes some sense when placed in the context of two historical events, with insight from modern mind science confirmation that awareness of one event may trigger or prime memory of another related event[20]. The two events providing the basis for the plausibility through the logic of triangulation were a surprising development months

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[18] Forthcoming at a Catholic university law review [an assumption based on Catholic communities' known opposition to same-sex marriage]. It is apparently the first article to introduce the topic, i.e., Chinese immigrants from Guangdong to America having enjoyed a unique set of cultural experiences tending to facilitate social capital production. *See The Reverberations*, Part II, B., C. As such, it contains empirical claims supportable only through deduction from other fields of knowledge, such as known aspects of Chinese cultural history and research findings in mind science, behavioral science and sociological research. *See id.*, Part II, A.B.
Unfortunately, much empirical evidence was screened out to meet the space limitation for a law review article. *See, e.g.*, https://www.uclalawreview.org/ucla-law-review-submission-guidelines-for-scholars/ (UCLA Law Review preferring a 25,000-word limit on articles). A copy of the original article with the same title and over 50,000 words is on file at [a Catholic university law review]. This article addresses a point of the screened-out empirical evidence and more specific evidence of mechanism of popular folklore-like circulating, *see* Part II and Part III, A. below, respectively.
The word "Yuehuahu" is a coined word for the purpose of facilitating discourse of a set of cultural experiences unfamiliar to American academia. *See The Reverberations*, Part II, A.2.c. The word signifies the blending of three ethnic groups giving rise to the historical developments which were the underlying force for the cultural experiences. "Yue" in the past, about 2000 years ago, referred generally to people south of Yangzi River, the river roughly dividing eastern China in north-south halves. *See* Ebrey, 40, 11. "Hua" means "Chinese". *See E-C-C-E-D*, 711. "Hua" generally referred to people living between the Yellow River, *see* Ebrey 11, and the Yangzi River, and had apparently been adopted as the ethnic identity for a majority of people in the Pearl River delta region. *Cf.* Xiaojian Zhang, Remaking Chinese America: Immigration, Family, and Community, 1940-1965 101 (Rutgers University Press, 2002)(Chinese Americans using the word "Hua" to express ethnic identify in the 1930s). "Hu" generally referred to people living north of the Yellow River. Professor Wang's article, *Ming foreign relations: Southeast Asia*, provides, an example of how the "Hu" was used 600 years ago, the first Ming emperor's use of the word "hu" to describe people in the north of his empire, certainly referring mostly to Mongolians. The Cambridge History of China, Vol. 8, 312 (Cambridge University Press 1988) ("CHOC"). *See* Part I, A.1.b.(1). below about the Ming empire. "Yuehua" was the name of a high school, apparently coined to refer to the blending of ethnic "Yue" group and ethnic "Hua" group. *See* Yuehua High School, *available at* https://baike.baidu.com/item/%E8%B6%8A%E5%8D%8E%E4%B8%AD%E5%AD%A6/15408292, para. 1. The word "Yuehuahu" was coined through attaching "hu" to "Yuehua" to reflect the notion of ethnic blending, culturally and genealogically. *See The Reverberations*, Part II, A.2.c.

[19] *The Reverberations*, Part II, A.1., 3rd paragraph; Part II, A.3.b.(3).(a). The other plausible literal meaning is that "he lightens". *See* E-C-C-E-D, 697. *See* Part I, A.1.b. below for a Yeah-e-G review. A person's knowledge about Yeah-e-G could be a result of hearing folklores about it or studying it as a student.
In *The Reverberations*, "reverberations of the Yuehuahu anti-subordination voices" represents political, cultural, socio-psychological, behavioral, sociological, and economic impacts arising from the events that hastened shedding off a conquest mentality, resulting in inspiring developments, and is initialized as "RYAVs". *See id*., Part II, B, introductory paragraph. "Yeah-e-G" is a subset of "RYAVs" and represents a set of political history developments in the 14th century.

[20] *See* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1492-1493 (2005) ("*Trojan*") (a study showing information tending to prime something perceived to be connected to Asia tending to boost female Asian American performance in math tests). Much of social psychology finding merely confirms what people experience regularly, such as what to drink in a gathering of friends being influenced by all the beer ads one sees on TV. *Cf*, Richard H. Thaler and Cass R. Sunstein, Nudge, Improving Decisions about Health, Wealth, and Happiness 60 (Penguin Books, 2009) ("*Nudge*") (successful Texas campaign against littering from ads featuring a football star).

earlier and a cultural choice months later, both plausibly indicating that Guangdong-ans[21], coping with Japanese military advances deep inside China, had been inspired by cultural memory of the successful struggle against the ethnically-oppressive Yuan empire.[22] The information associated with the inspiration might have triggered Ho's own cultural memory of the Yeah-e-G story as a result of regionally enlightened policies, motivating Ho choosing an alias literally meaning "Mongolian light".[23] Because "Hu" and "Ho" are different phonetizations of the same Chinese words,[24] that alias choice in turn indicates the potential of harvesting some cultural and sociological information about the generation of Guangdong-ans in Ho's era in the under-investigated sphere about knowledge[25] about the effects of hearing some Yeah-e-G aspect ("Yeah-e-G-a")[26] folklores from information about "HCM", even though all people born at the end of the 19th century[27]are now dead, with the added benefit of evaluating--with insights from modern mind science research--some plausible ongoing miniscule cultural-psychological effects that plausibly have tangible cumulative impacts on ongoing Chinese immigrant experiences in America.

Some words about the larger epistemic context are now in order to facilitate further understanding the epistemic value of harvesting the just-mentioned set of cultural, sociological, and cultural-psychological information for readers unfamiliar with the topic. *The Reverberation*, an article written with the primary objective of criticizing the foundation of the current constitutional gay jurisprudence, *i.e., Romer v. Evans*[28], as based on epistemic bias insensitive to the structurally disadvantaged's struggles,[29] argues that *Yick Wo v. Hopkins*[30] and other favorable Chinese American

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[21] Guangdong is the Chinese province providing vast majority of Chinese immigrants to America until immigration reform in 1964. *See* Peter Kwong & Dusanka Miscevic, Chinese America 19-20 (The New Press, 2005) ("Kwong"; in the text, "*Chinese America*"). *See* Part II, A.2.b.(1). below for traditional close ties between Guangdong and Vietnam.

[22] *See The Reverberations*, Part II, A.3.b.(3).(a). (Guangdong-an troops successfully frustrating Japanese army advance long enough to completely foil Japan's military strategy in 1938), A2.b.(3). (a high school named "Yuehua" established in the Pearl River delta region ("PRdr") to send message of determined resilience against Japanese occupation of Guangzhou, Guangdong's capital), respectively. It is plausible that Ho had an actual discussion about how Guangdong-an troops had been inspired with a Guangdong-an general he was traveling with. *See id*., footnote 195.

[23] *See id.,* Part II, A.3.b.(3).(a)., 6th sentence. *See also* Part I, B. below about the crude Taishan-Hu-Guang-*The-Woman-Warrior* mosaic, and Part II, A.2.b.(1). below about evidence of large-scale PRdr migration to present-day Vietnam after the Yuan empire's ending, likely over a million in the course of a hundred years.

[24] *See* Allen, viii-ix.

[25] In *Chinese America*, the Yuan dynasty was not even mentioned. *See* Kwong, 20-22 (mentioning only impacts on PRdr in Tang dynasty and Ming dynasty). Likewise, in The Making of Asian America, only the phrase "Pax Mongolica" was mentioned in connection with Marco Polo. *See* Lee, Erika, The Making of Asian America: a History 16 (Simon & Schuster, 2015) ("Erika Lee").

[26] "Yeah-e-G-a folklores" in this article refer to a sub-set of the RYAVs folklores, *see* footnote 19 above, about good works and good decisions by the Yuan empire's Guangdong imperial faction ("YeGif"), excluding the sub-set of the RYAVs folklores about rebellions and/or protests contributing to YeGif shedding off its conquest mentality early.
A distinction between a story and a folklore needs be made. A "story" in this article means a reconstruction of the past based on reasonable inferences from reliable evidence, where as a "folklore" is a story embellished with under-informed speculation and/or fiction.

[27] HCM was born in 1890. Duiker, 17.

[28] 517 U.S. 620 (1996) ("*Romer*").

[29] *The Reverberation*, Part III, B.

[30] 118 U.S. 356 (1886) ("*Yick Wo*").

experiences [31] happened, despite of structural disadvantages faced by Chinese immigrants,[32] in part because Chinese immigrants have always enjoyed high volumes of social capital[33].[34]It argues that the high volumes of social capital have resulted in part from the recycling beneficial cultural-socio-psychological effects arising from hearing (and talking) about the circulating Yeah-e-G-a (and other related aspects) folklores (and their more entertaining echoes) in Guangdong[35] despite of the dynastic changing war to end a regime with a dark inter-ethnic relation record.[36] Admittedly, that is a large empirical claim on a newly broached topic[37], with many vertical layers of empirical sub-claims, each with great potential to benefit from more affirming empirical research and insights. For the purpose of enabling a better understanding of this article's thesis and epistemic value, a ballpark list[38] of the empirical sub-claims made in *The Reverberations* is made below,

| | |
|---|---|
| 1. | Information about Guangdong exceptionalism during the Yuan dynasty being available.[39] |
| 2. | Folklores coming out of the available regional information.[40] |
| 3. | The folklores being interesting enough to circulate around in the region's general population.[41] |

[31] For example, Chinese Americans enjoy the highest life expectancy despite not having the highest socio-economic statistics. *See* Darwin A. Baluran & Evelyn J. Patterson, *Examining Ethnic Variation in Life Expectancy Among Asians in the United States, 2012-2016*, 58(5) Demography 1613 ("Baluran"), 1643, Table 2 (2021).

[32] In the past, they faced both legalized racism and language barriers. *See* Charles J. McClain, In Search of Equality, The Chinese Struggle against Discrimination in Nineteenth-Century America *passim* (University of California Press, 1994) ("McClain"). Presently, they face language barriers. *See* Kwong, 319-320.

[33] Defined by Professor Putnam as "[S]ocial capital refers to connections among individuals—social networks and the norms of reciprocity and trustworthiness that arise among them [that has effects similar to physical capital and human capital]." *See* Robert D. Putnam, Bowling Alone (Simon & Schuster, 2000) ("Putnam"), 19.

[34] *See The Reverberations*, Part II, B-C; Part III, A.1.

[35] Guangdong's most important city is Guangzhou, often known as Canton in older reference about China. *See* Kwong, 19.

[36] *See The Reverberation*, Part II, B.

[37] The phrase "Yuan dynasty" is not even mentioned in *Chinese America*. *See* Kwong, 20 (mentioning only Tang dynasty (618-907) and Ming dynasty (1368-1644)).

[38] The list is likely a lot longer if every empirical assumption or claim is counted. However, for this article, only the most saliently relevant for this article's thesis are listed.

[39] In *The Reverberations*, what made to CHOC, Vol. 7 indicates the most prominent, Guangdong experiencing a peaceful Yuan-Ming dynastic transition. *See id*., Part II, A.2.a.(2).

[40] In *The Reverberations*, the historical evidence for this empirical sub-claim comes in part from the well-known Ming-dynasty-era literary creation, *The Romance of Three Kingdoms*. *See id*., Part II, A.3.b.(2).

[41] In *The Reverberations*, an indirect evidence of this empirical sub-claim is the Fa Mulan story. A big part devotes to shore up the empirical sub-claim through choices by people in position of experiencing them. *See id*., Part II, A.3.b.(3)., A2.b.(3).

| | |
|---|---|
| 4. | Trying to be smart about the folklores tending to trigger the ideas of ethnic-mixing/ancestor-honoring, ethnic harmony, and collective action synergy.[42] |
| 5. | The ideas triggered tending to steer individuals to make healthy, family-conscious, community-conscious behavioral choices.[43] |
| 6. | Healthy, family-conscious, community-conscious behavioral choices tending to facilitate social capital production.[44] |

Each of the empirical sub-claim has a lot of room for substantiation, as each being hypothesis founded upon undisputed facts in much larger contexts and/or science developed through researches grounded on the general American population.[45] This article hopes to provide some additional empirical substantiation on the 3rd empirical sub-claim, circulating interesting folklores, through identifying a specie of ongoing cultural and cultural-psychological experiences, complementing two previous articles enhancing the empirical sub-sub-claim that at the first half of last century, there was robust circulation of the Yeah-e-G-a folklores in the Pearl River delta region ("PRdr") [46]. Hopefully, through the vertical causal link identified above, this article contributes

[42] In *The Reverberations*, this empirical sub-claim is a hypothesis based on mind science research findings. *See id*., Part II, B.1. Perhaps social psychologists can devise clinical tests for this hypothesis. Incidentally. *The Woman Warrior* by Maxine Hong Kingston (Alfred A Knopf, New York, 1976) ("Warrior"; in the text, "*The Woman Warrior*") provides an instance of empirical support to the notion that people try to be smart about what they hear, as it contains this passage in page 5-6,

> Those of us in the first American generations have had to figure out how the invisible world the emigrants built around our childhoods fits in solid America. … Chinese-Americans, when you try to understand what things in you are Chinese, how do you separate what is peculiar to childhood, to poverty, insanities, one family, your mother who marked your growing with stories, from [/] what is Chinese? What is Chinese tradition and what is the movies?

[43] In *The Reverberations*, this empirical sub-claim is a hypothesis based on mind science research about behavioral consequences. *See The Reverberation*, Part II, B.2. Perhaps social psychologists can also devise clinical tests for this hypothesis.

[44] This empirical sub-claim is a hypothesis based on analogy to social science finding about social capitalism and informed speculations about the forming of conditions facilitating social capital production. *See id*., Part II, B.2.

[45] *See, e.g*., *Nudge*. *The Reverberations* also addresses the cultural bi-products of rumors and jokes. To avoid unnecessary confusion. That aspect of *The Reverberations*, important to this article, will be reviewed in Part III, A.1. below.

[46] *See Some Plausible Printed Echoes of the Cultural Reverberations of the Yuehuahu Anti-subordination Voices in an American Literary Classic* ("*Some Echoes*") (arguing that *The Woman Warrior* contains echoes of a Yeah-e-G-a folklore), forthcoming in [likely Asian-American journals, a mere assumption on the basis a journal's usual scope of coverage], and *The Constitutive Expression behind the Silence about the Meaning of "Taishan"* ("*Constitutive Expression*") (arguing that both the name change from "Xinning" to "Taishan" and the subsequent silence about it indicate that in early 20th century, the people of Taishan were aware of the Yeah-e-G story), forthcoming in The International Journal of Law, Ethics, and Technology. As we shall see, the cultural experience described in this article may be a bigger version of that identified in *Some Echoes*. Evidence of robust circulation in one particular general period is valuable circumstantial evidence of robust circulation in prior and later periods if a folklore tends to entertain the listeners and make them feel good at the same time.

to make all other empirical sub-claims more robust,[47] ultimately enhancing the purchase of the larger hypothesis, i.e., Chinese American communities enjoying extra fountains of social capital arising from a set of unique cultural experiences, and the jurisprudential point, i.e., resolution of gay issues being more properly carried out through the political process, arising from them.

Because *The Reverberations* identifies many historical and cultural facts within the word limits of a typical law review article to make a very large empirical claim, phrasing the role of "HG's" literal meaning in *The Reverberations* in a metaphor familiar to the readers may be another way of appreciating this article's complementary epistemic value. It is a piece in a Jigsaw puzzle of many, many pieces showing a still vague—awaiting to be developed[48]--mosaic picture of a set of cultural and cultural-psychological experiences resulting in high volumes of social capital empowering Chinese Americans' relatively high level of social citizenship experiences[49], which provided the empirical basis for many Chinese immigrants to perceive a robust empirical connection between hetero-normality and higher quality of life.[50] As in a complex jigsaw puzzle of many pieces to be found,[51] identifying a piece complementary to existing identified pieces contributes to making a mosaic of the

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[47] *Some Echoe*s acknowledges that the first—and the seminal--article contains a lot of empirical gaps requiring the readers to take leaps of instinct and/or faith in order to embrace the first article's conclusion that Chinese immigrants had problem with deprivileging hetero-normality because they had been perceiving a strong empirical connection between hetero-normality and high levels of intangible asset available to them, in part as a result of circulating RYAVs folklores and their more entertaining echoes. *See Some Echoes*, Introduction, 2nd paragraph. *Some Echoes* also points out that the empirical gaps were smaller than the empirical gaps in connection with the claim that Chinese American experiences support constitutionalizing same-sex marriages. *See id.*, Introduction, 3rd paragraph. This article contributes to fill the empirical gaps associated with the just-mentioned *The Reverberations* conclusion to make them even smaller.

[48] Because of the apparent novelty of the topic, all the mechanisms described were hypotheses built on applying known social and mind sciences to available empirical information deduced from reported historical facts, such as Guangdong's regional policy to accept inter-ethnic marriage despite the Yuan empire's policy banning it, *see Reverberations*, Part II, A.2.b.(2).(c)., first paragraph. Incidentally, as a tangential support for the point of moral reasoning being often handicapped by epistemic oversight, *see* Part III, B. below, all information is available in a large American public library, such as the Los Angeles Library.

[49] *See* William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 1 (1999) (asserting that the constitution-writing/adopting generations of Americans valued the importance of a minimum level of living standard as a component of citizenship). That *Yick Wo* happened within 4 decades of first large group of Chinese migration, *see* Sucheng Chan, Asian Americans: an Interpretive History 25, 95 (Twayne, 1991) ("Chan"), indicates many early Chinese immigrants had succeeded in becoming members of the American middle class because the attorneys they hired apparently did not work for free, *see* McClain, 47-48.

[50] *See Reverberations*, Part III, A.2. (incorporating the point that male homosexual acts had been known to cause public health problems, *see, e.g.,* Ian Ayres & Katharine K. Baker, *A Separate Crime of Reckless Sex*, 72 The University of Chicago Law Review 599, 603-617 (2005).) ("Ayres").

[51] As an illustration to the challenges to this project, the parameters of the culture impacts of Mrs. Kingston's childhood dream are relatively easy to ascertain because it was reduced in writing and the book has been published by many publishing houses. Although *Chinese America* does not allude to the cultural impact of that dream, one can get an idea about it from knowing that *The Woman Warrior* was a national bestseller and is a stable for modern American literature, *see* Kwong, 303. Other pieces are not so easy to identify. For example, one might need to read Volume 8 of *CHOC* on an article about Ming empire's relationship with southeast Asia to realize that the Chinese word "Hu" could mean "Mongolian" in the 14th century. *Cf.*, CHOC, Vol. 8, 312 (The first Ming emperor incorporating the word "Hu" in connection with his ancestral injunction).

plausible complete picture clearer,[52] though the more significant pieces still waiting to be discovered and/or demonstrated clinically. Under that reasoning, this article, like the two previous articles complementing *The Reverberations*, contributes to a clearer mosaic of the plausible complete picture of an unique extra set of culturally-grounded fountains of social capital in Chinese immigrant communities in America by identifying an aspect of Ho's legacy as support for both the empirical sub-sub-claim of robust Yeah-e-G-a folklore circulation in PRdr in the first half of last century[53], and a point about the mechanism of idea-evoking/schema-priming facilitating the production of social capital[54] within the Chinese immigrant communities, past and present. Hopefully, the even bigger picture, the constitutional gay jurisprudence being this century's *Lochner v. New York*[55],[56] becomes clearer as a result.[57] This article proceeds in three parts to advance that contribution. The first part reviews the challenges associated with supporting more robustly the empirical sub-claim of circulating Yeah-e-G-a folklores in PRdr up to at least the first half of the last century. The second part investigates the linguistic plausibility of "HCM", when written in Chinese, could literally mean "Mongolian for Ming [Dynasty]", followed by acknowledging public information significantly undermining that plausibility's relevance to the empirical sub-claim and an attempt to rehabilitate the relevance through cultural and historical evidence, and concludes by discussing "HCM's" potential for enhancing the mosaic of robust circulation anchoring partly on "HG". The third part evaluates the nuanced insights for a better understanding of the mechanism enabling Chinese American communities to enjoy high levels of social citizenship experiences and about the socio-economic bias embedded in the moral reasoning of the American constitutional gay jurisprudence.

## I. THE CHALLENGE OF PROVING ROBUST CIRCULATION OF FOLKLORES ABOUT ASPECTS OF YUAN EMPIRE'S APPARENT HONORABLE ENDING IN GUANGDONG IN THE FIRST HALF OF LAST CENTURY

With the benefit of being able to find historical support from widely available credible authorities published during the long post-World-War-II world peace[58], such as *The Cambridge History of China*, the notion of widespread circulation of folklores about aspects of Yuan empire's apparent honorable ending in Guangdong ("Yeah-e-G-a folklores") in the Pearl River delta region ("PRdr") is tenable because those folklores would fit in the cultural experiences with literary products based on skeletal historiography since at least 16th century in the Ming dynasty[59], and would tend to make

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[52] As an analogy, the high performance in law school by a student with a high LSAT score indicates a correlation. A sample size of 10 students and their scores provides a more robust indication. A sample size of 100 students provides still more robust indication. *Cf*. https://www.lsac.org/data-research/research/lsat-still-most-accurate-predictor-law-school-success (Law school admission board asserting LSAT scores to be the most reliable indicator of law school success).

[53] *See* the table one paragraph ago above for the relevance of the empirical sub-claim of popular circulation.

[54] *See id*. for the relevance of the empirical sub-claim of steering individuals toward healthy, family-conscious, and community-conscious choices.

[55] 198 U.S. 45 (1905).

[56] Justice Roberts' dissent in *Obergefell* actually compares *Obergefell* to *Lochner*. *See Obergefell*, 686 (Roberts dissenting), 687-688.

[57] The modern constitutional gay jurisprudence builds upon *Romer v. Evans* as the foundation. *Romer* asserts at 635 that there is no legally cognizable benefit associated with the Colorado law.

[58] The post-World War I peace lasted only 20 years. *See* Lepore, 398, 474-476.

[59] *See* Ebrey, 202-203 (known cultural popularity with story-telling in 15th and 16th centuries).

people feel good, just like the Fa Mulan story[60], though perhaps not as entertaining[61]. There are, however, significant challenges to prove widespread circulation of the Yeah-e-G-a folklores affecting Chinese immigrants to America in the first half of last century ("Fhlc"), a time window coinciding with conditions leaving behind some detectable traces preserved in books[62]—thus providing possibly the best time period to form a mosaic that sheds light for earlier times. Conducting a survey of people living during that period is impossible because people old enough to have heard a version of the Yeah-e-G-a folklores with an impression strong enough so as to engage in conscious cultural reflections[63] about it have either all died or dispersed at different locations for living out the remaining lives to make a survey insurmountable challenging.[64] The only way to plausibly prove widespread circulation of the Yeah-e-G-a folklores affecting Chinese immigrants in the Fhlc is through historical and cultural information from that period surviving through time. A book about the 14th century based on a Yeah-e-G-a folklore would help, but *The Reverberations*' author has not been able to identify such a book.[65] Unfortunately, there are historical bases to think that not even a physical trace of such a book written before 20th century will ever be found, and with so much publication having taken place since the beginning of 20th century,[66] an attempt to find a physical trace of such a book published during Fhlc would be like finding a needle through a haystack[67] without knowing that there is actually a needle in the haystack because the political and social turmoil of the same period might have resulted in destruction of any such a physical trace or a similar trace from an earlier period.[68] This set of reality leaves circumstantial proof based on known cultural information to be more practical and likely more reliable on the point of robust circulation because

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[60] *See* Jonathon H. X. Lee, editor, Chinese Americans, The History and Culture of a People 380 (Bloomsbury, 2024) (the Fa Mulan story affecting cultural experiences in growing up in a Chinese American community).

[61] A story of about peace-making, *see* Part I, A.1.b.(2).(b). below, might not easily be written to rival in excitement value as a story about glory in the battlefield. *The Romance of the Three Kingdoms*, the famous Ming-era literary creation based on skeletal historical accounts of historical developments over 1000 years before, is mostly about a war among fractions contesting for supremacy. *See* Luo Guanzhong, The Romance of the Three Kingdoms xxi-xxii (Translated by Martin Palmer, Penguin Books, 2018) ("Palmer").

[62] For example, the civil rights movements in America probably created the conditions facilitating Mrs. Kingston writing a book in part about a childhood dream affected by her mother's story telling. Fortunately, it contains some echoes of a Yeah-e-G-a folklore. *See Some Echoes*, Part II.

[63] *See* Part III, A.1. below for a review of plausible cultural reflection involved.

[64] *Cf.* Adam J. Hirsch, A Battle of Wills: *The Uniform Probate Code Versus Empirical Evidence*, 33 Southern California Interdisciplinary Law Journal 277, 281-283 (assessing sociological experiences on many issues in relation of transfer of wealth upon death being very difficult).

[65] The author has only been able to identify vague plausible echoes of two aspects, support by the governed and peaceful dynastic transition, in *The Woman Warrior*. *See Some Echoes*, Part II, B.

[66] The general publishing business in America had apparently blossomed before the 19th century, inferable from the well-known publishing of politically oriented newspapers, *see* Lepore, 145. The improved versions of pre-19th century technology had likely spread to China by beginning of 20th century.

[67] *Cf.* https://www.lapl.org/books-emedia (Los Angeles Public Library claiming to have millions of books).

[68] In the case of *The Tale of Kieu*, a Vietnamese literary classic, past popularity could be inferred from mention of a reliable film list that a film based on it had been made. *Cf.* Allen, x, footnote (a copy of the film of the movie based on *The Tale of Kieu* has not been found, even though its existence was documented by a reliable source). It is plausible that a trace be found through going through military archives in China or Taiwan because of circumstantial evidence that during the Second Sino-Japanese War, Guangdong-an troops had been inspired by the Yeah-e-G-a stories, *see* the text accompanying footnotes 21-22 and the footnotes above.

finding a physical trace of something existing in the past is still very far from proving the content be popularly known in the past. Both as an instantiation of the practical challenges and as a more detailed introduction of the topic of Guangdong exceptionalism during the Yuan empire to readers not familiar with *The Reverberations*, this part will first discuss a depressing legacy of book ban and turmoil making it unlikely that a physical copy of a book about a Yeah-e-G-a folklore published before the second half of last century will ever be found, followed by a review of the previously identified circumstantial evidence plausibly forming a crude cultural mosaic of robust circulation of Yeah-e-G-a folklores in Fhlc under the lenses of larger historical and cultural circumstances, and concludes by a review of efforts made thus far to enhance the initial crude mosaic and a discussion about the value of more pieces to the veritable mosaic to counter the notion that it could all be a regionally ethno-centric and/or politically motivated view based on co-incidences.

## A. A Depressing Legacy of Book Ban and Turmoil

Not surprising to people who value the first amendment to the American constitution, a past official book ban contributes to explain why a targeted book would be systematically destroyed out of existence. Unfortunately, there was such a ban by a highly effective Qing[69] emperor making it certain that the book ban would last beyond the emperor. Even after the book ban was lifted, the turmoil that followed the demise of the Qing empire made it unlikely that a physical copy printed before the middle of last century will ever be found.

### 1. Historical Circumstances Contributing to the Unlikelihood that a Copy of a Pre-19th-century Printed Book Based on a Folklore about Aspects of Yuan Empire's Apparent Honorable Ending in Guangdong Passing Down to the 20th Century

The historical explanation for the possibility that a pre-20th century printed version of the Yeah-e-G-a folklores may never be found is a depressing one with an inspiring implication as a form of consolation. That depressing development is discussed first, followed by discussing the inspiring implication that plausibly has contributed to drive the cultural and sociological forces that have been sources of significant cultural capital[70] and social capital for Chinese immigrant communities in America[71].

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[69] The Qing dynasty lasted from 1664 to 1912. Ebrey, 220, 266.

[70] Cultural capital is a concept related to social capital. It is environmental factors tending to have effects associated with money. Cultural capital and social capital are often interchangeable. *See* Pierre Bourdieu, *The forms of capital, in Education: Culture, Economy, Society 46 (*Halsey AH, Lauder H, Brown P, et al. eds., Oxford University Press, 1997) ("Bourdieu").

[71] *See* Part III, A.1. below.

### a. The Qing Dynasty Era of Burning All Books Perceived to Be Subversive

The Qing Qianlong emperor[72] ordered a book ban on books perceived to be subversive to the Qing empire.[73] Because the Qing dynasty was an ethnic-minority-rule dynasty founded upon conquest from a tribe from Manchuria[74] and the Yuan dynasty was an ethnic-minority-rule dynasty founded upon conquest from a tribe in Mongolia,[75] a book about the Yuan empire's apparent honorable ending in Guangdong ("Yeah-e-G") story, likely contained content such as people in position of power giving up ethnically-based privileges for the initial goal of reducing ethnic tension and the all-ethnicity-benefitting goal of a regional peaceful dynastic transition,[76] would be perceived as subversive by Qianlong emperor's censors. Books touching on that topic, even very obliquely, would likely be banned and systemically destroyed with the goal of leaving no physical trace behind by the Qianlong regime. The circumstantial evidence of the Yuan empire's Guangdong imperial faction ("YeGif") rallying for the replacing regime's success likely survived over time because true historical events described in boring forms, such as an annal of regional developments,[77] would not likely be noticed by censors with a mission to end first circulation of books tending to have some entertaining quality driving the circulation,[78] thus potential influence among the mass. Moreover, the Qianlong emperor is known as a highly effective emperor,[79] and he likely was conscientious enough to leave at least some historiographical information intact to serve as reference for his own goal of contributing to the empire he inherited to last for a long time. The circumstantial evidence of the opposition-to-gratuitous-oppression inspiring historical developments in Guangdong during the Yuan dynasty is significant, probably more so to folklore-makers of the Ming era as a result of recency in time, and the lack of a book about it just adds to the historical developments' inspiring quality in light of the known Qing-era policy of book ban against that kind of stories.

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[72] The same emperor who fatefully rejected British overture for initiating trade ties at the end of the 18th century, *see* Ebrey, 236, contributing to historical developments ultimately resulting in the technically peaceful ending of the Qing dynasty, *see id*., 265-266. Unfortunately, the apparent peaceful ending was qualified by episodic regional civil wars in China erupting in the two decades following the peaceful regime transition. *See id.*, 266-267.

[73] *Id*., 225. A list of the book titles has apparently survived overtime. Perhaps the list contains trace evidence about circulating Yeah-e-G-a folklores similar to *The Woman Warrior*. *Cf*. Part I, B. below.

[74] *See* Ebrey, 220-221, generally about the origin of the Qing empire.

[75] *See id*., 169-172.

[76] *See* Part I, A.1.b.(2). below.

[77] *Cf*. CHOC, Vol. 7, 781 (describing significant historical writing during the Ming dynasty, including much with questionable reliability, surviving the course of time for 20th century historians to consult in their scholarship about the Ming dynasty).

[78] This is based on assumption informed by the fact that Qianlong is known as an effective emperor. *See* the next sentence. Presumably official assigned with an important assignment would approach it in a cost-effective manner.

[79] *See* Ebrey, 225 (describing his reign as known for fiscal disciplines and himself known for setting an example of adhering to filial piety); *see also* China History, Episode 70, https://www.youtube.com/watch?v=zjBc9Bkbgrg&list=PLSyuJLM8uqBYm_VaFMZPkk9E3UUxtaR0E&index=68 ("CH E70"), 25:02 (naming him as an emperor almost as impactful as the first Ming emperor).

b. The Circumstantial Evidence to Folklore-makers That the Yuan Empire's Guangdong Imperial Faction Rallied for the Ming Empire's Goal of Winning the Peace after Winning the War to Overthrow Ethnic Minority Rule

The circumstantial historical evidence generally available to the public in a large American metropolitan area[80] suggesting the Yeah-e-G story, culminating in YeGif making critical contributions to the Ming empire's remarkably successful founding reign is significant and robust,[81] thus likely also available to folklore-makers during the Ming dynasty's long reign. Because the relevance of underlying themes of advancing economic justice and inter-ethnic harmony to this article's theme of enforcing the criticism of the American constitutional gay jurisprudence amounting to a regressive social capital taxation scheme[82], a primer on why the Ming dynasty outlasted the Yuan dynasty by almost three times is appropriate to shed light on the moral force of the critical contributions, addressed in (2). below, that would cause Qing empire's censors to perceive the Yeah-e-G-a folklores as subversive.

(1) A Primer on Why the Ming Dynasty Lasted Three Times as Long as the Yuan Dynasty Did

The Yuan dynasty in China came about as a result of outgrowth of the Mongol empire's expansionist conquests.[83] The Yuan dynasty was founded by Khubilai khan, Ghengis khan's grandson.[84] As a ethnic-minority-rule dynasty founded upon conquest mentality, the Yuan dynasty was a dark time in inter-ethnic relation for most of the time for most people in China.[85] Marco Polo, a person of Khubilai's time, observed that the ethnic majority were treated like slaves.[86] Although inter-ethnic relations improved significantly over time,[87] it did not improve fast enough to offset the cumulative effects of years of gratuitous ethnic oppression policies and bad administrative habits that had grown out of such policies.[88] It is no surprising that the Yuan empire was overthrown

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[80] *The Reverberations* cites extensively CHOC, which has most of 1 volume devoted to the Yuan dynasty and 2 full volumes devoted to the Ming dynasty, and they are available at Los Angeles city public library system. The TV lecture about the remarkably successful Ming dynasty founder is also available in Youtube. *See* footnotes 16 above and 93 below.

[81] *Constitutive Expression* argues that development in Vietnam in the 15th century had also been influenced by both YeGif's success and the Ming empire's initial success. *See Constitutive Expression*, Part II, A.2.c.(2).

[82] *The Reverberations* may be the first article to express a criticism of the American constitutional gay jurisprudence in those terms. *Cf*. Terry Skolnik, Criminal Justice and the Erosion of Constitutional Rights, 66 *Boston College Law Review* 1679 (making the point that constitutional criminal procedure in reality imposes hidden costs on indigent criminal defendants).

[83] Ebrey, 169-172.

[84] *Id.*,172.

[85] *See id*., 175 (Khubilai khan classified subjects of the Yuan empire into 4 classes, with people under South Song's rule being classified as the lowest class). South Song was a dynasty ruling present southeast China, including Guangdong. *See id.*, 137.

[86] *See id,* 174.

[87] *See* CHOC Vol. 7, 58.

[88] *See id.* (using the phrase "a long history of Chinese resentment against Mongol rule" to describe the cause for the Yuan empire's downfall).

through rebellions, after rebellions consolidated under one banner through years of bloody competition for supremacy among the rebel camps.[89]

In a stark contrast to the Yuan dynasty, the Ming dynasty (1368-1644)[90] was founded by person of a very humble beginning.[91] In a policy choice that would contribute to his becoming known of one of the greatest Chinese emperors of all time,[92] the first Ming emperor, Zhu Yuanzhang (before coronation, "Zhu"; after coronation, "Emperor Zhu") after defeating the major Yuan forces within a year, announced a national policy against ethnic retaliation,[93] likely for both moral reasoning[94] and his policy priority of national economic recovery after a long period of wars of rebellion, competition among rebels, and finally the war to overthrow the Yuan empire.[95] The successful execution of the enlightened policy and the policy benefitting the mass apparently laid the foundation for the Ming empire to last for 276 years, nearly 3 times as long as the Yuan dynasty[96]. Known historical facts indicate that YeGif made critical contributions to Emperor Zhu's success by delivering Guangdong peacefully to him,[97] followed by providing administrative talent and technical expertise to enable his ambitious economic recovery programs to come to fruition and contribute to stabilizing an ethnic and politically diverse huge part of the Ming empire—at least to folklore-makers interested in telling good-feeling folklores for a profit.

### (2) The Significant Evidence to Folklore-makers That the Yuan Empire's Guangdong Imperial Faction Rallied for Emperor Zhu's Goal of National Rebuilding

The evidence that YeGif rallied for Emperor Zhu is significant, and is evaluated for this article's purpose from three historical angles, YeGif's apparent actual contributions to Emperor Zhu's national rebuilding success, Emperor Zhu's practical needs to win over YeGif, and the apparent very valuable inducement for YeGif to rally for the Ming empire. Evidence supporting the three angles, likely available to Ming-era folklore makers because Emperor Zhu was so successful that Chinese people generally

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89 *See* CHOC, Vol. 7, 72-88.
90 *See* Ebrey, 190-214.
91 *See id*, 190.
92 *See* CH E70, 24:59; *Cf*., Ebrey, 190 ("Seldom has the course of Chinese history been as influenced by a single personality as much as it was by the founder of the Ming dynasty, Zhu Yuanzhang[.]).
93 "The Brotherhood of Different Nationalities" is an idiomatic translation of the Chinese phrase phonetized as "Hua Yi Yi Jia", succinctly communicating the Ming dynasty's founding emperor's policy of non-retaliation against ethnic minorities privileged under the previous Yuan dynasty. The phrase appears in ZL E1 28:50. "Hua" means "Chinese". E-C-C-E-D, 711. The two "Yi"s are pronounced differently and represent different Chinese characters. The first "Yi" means "foreigner". *See* Ebrey, 56. The second "Yi" means "Same". E-C-C-E-D, 1024. "Jia" means "Family". E-C-C-E-D, 725. The literal translation of "Hua Yi Yi Jia" is "Chinese, foreigners, same family".
94 The moral reasoning was likely aided by one of his wives being an ethnic Mongolian, giving birth to the future Ming Yong-lo emperor. The Chinese conception of ancestor-honoring had only a very slight patrilineal bias. *See The Reverberations*, Part II, A.2.b.(2).(d).
95 *See* Ebrey, 190-192.
96 Ming dynasty lasted from 1368-1644, *see id*., 190, and Yuan dynasty lasted from 1271-1368. *see id*., 172, 190.
97 *See* CHOC, Vol. 7, 24-25.

enjoyed over 200 years of relative peace and prosperity after Ming empire's founding,[98] is addressed in that order.

### (a) Emperor Zhu's Apparent Reliance on the Yuan Empire's Guangdong Imperial Faction's Talent and Expertise for Important Aspects of National Rebuilding

Emperor Zhu entrusted Ho Chen ("Chen"), the YeGif governor, with very critical assignments for national rebuilding, belying whether the term "surrender" is the proper word to describe Chen's ending of his official relationship with the Yuan empire[99]. First, Emperor Zhu appointed Chen the governor of Zhejiang province,[100] an important contributing province to the important policy initiative of transferring wealth from the richer provinces to the poorer provinces,[101] an initiative fraught with potential for social unrest with far-reaching implications if not carried out with sensitivities to the regional economy[102]. As Chen had been just a peasant-turned-soldier before rising to essentially become a military governor at a period of Yuan empire implosion,[103] he could not by himself have the sophistication and knowledge to handle such an important and complex assignment. The only reasonable explanation for Emperor Zhu to trust Chen with such a critical assignment was that his advisors had recognized Chen to have an unique ability of assembling a team of experts and administrative talents able to actually carry out the critical assignment at all stages. Since Chen's unique governing asset was contacts with administrators reporting to him as the YeGif military governor, that indicates YeGif administrators had expertise beyond Guangdong, thus providing further circumstantial evidence that a supra-regional Yuan imperial structure had exited in Guangdong.[104] Chen's team's success at carrying out the initial critical and complex assignment can be inferred from Emperor Zhu entrusting Chen with a second important assignment with its own complexity of a very different nature, governing Hu-Guang

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[98] *See* CHOC, Vol. 7, 1; *see also* Ebrey, 195 (China's population doubling during the Ming dynasty).

[99] *See* CHOC, Vol. 7, 25 (using the word "surrender").

[100] *See* Zhu Yuanzhang Lectures, Episode 10 ("ZL, E10"), https://www.youtube.com/watch?v=_-uOlfsDUn8, 37:45-38:29 (Ho Chen served as the governor of present-day Zhejiang and then the governor of present-day Hubei and Hunan region). Image G. below is a map of Yuan empire's southeastern provinces. Image H. below is map of modern China's southeastern provinces, largely corresponding to that of Ming empire, Image I.



Image G




Image H




Image I

Screenshots are respectively from CH E70, 9:18; https://davida.davivienda.com/viewer/printable-map-of-china-provinces.htm[l]; and https://jp.pinterest.com/pin/784963410034301115[/].

[101] *See* Ebrey, 192.

[102] *Cf.* Ebrey, 242 (the destructive Taiping rebellion in the mid-19th century fueled in part by disruption of southern China's economy as a result of many ports in China being forced open by European powers).

[103] *See* CHOC, Vol. 7, 24.

[104] *See* the text accompanying footnote 131 below for the point that YeGif apparently hosted a major sub-office of the central government.

province,[105] an ethnically diverse, [106] completely landlocked province,[107] thus with an economic bases significantly different from the coastal provinces of Guangdong and Zhejiang. As Hu-Guang had been the base of an anti-Yuan rebellious force that had bloodily contested with Zhu for supremacy among rebel groups,[108] failure at that assignment could also seriously destabilize the Ming empire. Emperor Zhu's trust to Chen with that assignment, best explained as out of recognition of Chen's unusual ability to assemble another effective team of sophisticated, knowledgeable administrative talents, further indicates the existence of a successful supra-regional Yuan imperial infrastructure in Guangdong. Chen apparently carried that assignment out successfully as well because Emperor Zhu awarded him the hereditary title of an earl.[109]

### (b) Historical Evidence to Folklore-makers of Zhu Adopting the Advice of Winning the Peace by Winning Guangdong Peacefully

As Emperor Zhu had come from a very humble background and had risen through leading a rebellion, his initial rebellion followers naturally did not know anything about governing, and he succeeded because he had gotten the idea of relying on people with experiences on governing for help.[110] With the benefit of hindsight, the decision to win Guangdong peacefully in order to gain YeGif's experiences and knowledge for his ambitious national rebuilding effort was undoubtedly brilliant. However, Guangdong exceptionalism was likely very transparent to many Yuan empire observers. Zhu's most important advisor, Liu Zhi ("Liu"), likely had the most insight because of his apparent professional relation with YeGif while he was a mid-level Yuan official in a neighboring province.[111] It is highly likely that he advised Zhu to lay an important foundation for winning the peace after overthrowing the Yuan empire by winning YeGif over peacefully. For the purpose of shedding light on this insight, likely apparent to folklore-makers during the long, relatively stable Ming dynasty, the apparent Yuan-era Guangdong exceptionalism is discussed first, followed by exploring Liu's apparent official ties to YeGif.

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[105] ZL, E10, 38:01-05.
[106] *See* CHOC, Vol. 7, 107.
[107] *See* map at CHOC, Vol. 7, xxiv-xxv; *see also* image D. above, with Hu-Guang roughly overlapping present Hubei and Hunan provinces, *see* image C. above.
[108] CHOC, Vol. 7, 72-88.
[109] *See* CHOC, Vol. 7, 25. A point about information synthesis is in order for the purpose of illustrating a plausible path of literary creation with its own effect on cultural history. Neither the Zhu lecture nor CHOC goes into the specifics on whether Chen got the Zhejiang assignment first. This article merely makes assumption on the basis of the statement "Zhejiang and Hu-Guang provinces" coming from Mr. Zhan's lecture, *see* ZL, E10, 38:01-38:07. (The late Mr. Zhan was the president of scholars on Ming dynasty and a member of the Chinese Academy of Social Science. *See id*., 1:31.) The author did not have the resource to check which assignment happened first. That, however, does not distract the fact that Chen and his teams of talents made critical contribution to Emperor Zhu's success. That overall record would encourage literary fleshing to energize folklore circulation, with detectable traces in *The Woman Warrior*, an American literary work, *see Some Echoes*, Part II.
[110] *See* Zhu Yuanzhang Lectures, Episode 7 ("ZL, E7"), https://www.youtube.com/watch?v=VChq4JLwipM&t=1571s , 17:02 -17:14.
[111] *See* CHOC, Vol. 6, 583 (he had risen all the way to the registrar of the Chiang-Che Branch Bureau of Military Affairs). "Chiang-Che" corresponds to modern Zhejiang and Fujian provinces. *See* maps in footnote 100 above.

### i. Circumstantial Evidence to Folklore-makers of Guangdong Exceptionalism During the Yuan Dynasty

Historical circumstances likely more than human beings' natural revulsion against gratuitous oppression channeled YeGif toward exceptional success within the Yuan empire. Because of Guangdong's terrains and geography, YeGif had to adopt enlightened ethnic policies and other practical approaches in order to govern effectively. Because Guangdong likely hosted an important sub-office of the central government in order for more effective administration of a vast empire, and was very important to Yuan empire's sea trade and projection of power by sea, YeGif would naturally gain exceptional influence in central government if it had sound policies enabling Guangdong to be a major contributor to the central government's financial coffer instead of a drain on the empire's resources.

Although Khubilai Khan was able to conquer Guangdong, he was not able to conquer Annam and Champa.[112] Because Guangdong was geographically similar to Annam[113] and was likely the base of very hardened resistance to Khubilai's conquest[114], it was very likely that in order to pacify Guangdong, the Yuan empire's representatives in Guangdong had to restrain on the conquest arrogance in order to end the costs associated with conquest in Guangdong.[115] In order to project power in the South China Sea, to prevent a military alliance between the Red River delta region ("RRdr") and PRdr,[116], and to protect the important sea trade with the Arab world[117], the Yuan empire likely had a large military base in Taishan as a result of both being in the middle of the two deltas and having natural fortress-like coastal geographic

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[112] *See* CHOC, Vol. 6, 485, 487. Annam was the old name for a state roughly modern northern Vietnam, *see* Christopher Goscha, Vietnam, a New History xxi (Basic Books, 2016) ("Goscha") (in the text, "*Vietnam*") (map of Annam); Champa, an old state at roughly modern central Vietnam, *see id*., 28 (describing Cham states as south to Annam coast).

[113] *See* John King Fairbank, CHINA, A NEW HISTORY 191-192 (The Belknap Press of Harvard University Press, 1992) ("Fairbank"); map on Ebrey, 11.

[114] The last known large-scale Song resistance battle took place at present Xinhui County. *See* CHOC, Vol. 6, 432, *comparing with* map in Chan, 6. Xinhui is one of the Sze Ip counties providing most early Chinese immigrants to America. *See* Kwong, 19.

[115] A scholar of the Yuan dynasty in fact made such an assertion in Song-Yuan Yaishan Sea Battle, https://www.youtube.com/watch?v=IKzk1q-SPHs, at 22:41-22:48.

[116] *See* Goscha, 23 (PRdr and north Vietnamese coast traditionally belonging to a natural maritime zone); *see* Part II, A.2.b.(1). below for the likely practice for many people to have families on both deltas because of seasonal-wind-driven sea trade between the two deltas.

[117] Sea trade was important because of bad relation with Chaghadai khanate of Central Asia, *see* CHOC, Vol. 6, 424-425, resulting in the valuable land silk road being cut off. *See id*., 442-443.

features.[118] As the Yuan empire was an empire based on ethnic minority rule and the further a place was from Mongolia, the thinner the Mongolian population in comparison to native population in a particular location would be,[119] making an important military base in Guangdong also the likely epicenter of Yuan imperial power in Guangdong.[120] Under this reasoning, Taishan, literally meaning "High Office Mountain,"[121] would be the likely YeGif's geographic epicenter. As Guangdong was geographically isolated from the rest of the Yuan empire, YeGif would be doomed in a rebellion involving military alliance between the peoples of the two deltas.[122] Thus, YeGif had the motivation to adopt sensitive ethnic policies for self-preservation interest, including accepting inter-ethnic marriages, resulting in its shedding off the conquest mentality relatively early.[123] Enlightened ethnic policies would naturally lead to stronger economy,[124] which would naturally translate into higher level of influence in an empire built on ethnic privileges and oppression and suffering from repeating succession crises at the central government[125].

Historical evidence indicates that YeGif toward the last third of the Yuan dynasty had a high level of influence on Yuan empire's central government, as it played an apparently important supporting role in a successful coup to change the central

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[118] The shortest sea route from the Arab world to China's east cost had to go through the northeast part of the Guangdong coast. *See* the map on trade route through southeast Asia below, from a screenshot based on China History, Episode 73 ("CH E73"), https://www.youtube.com/watch?v=oWLKZXBA-L4&list=PLOrf2h5ONlwUTW9etWK4b3xQiz8LdgkKS&index=73 , 7:24,

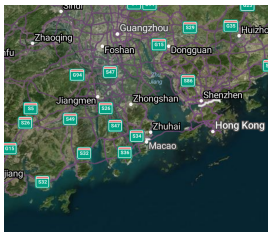



Image J




Image K

Archeological and cultural evidence also supports the geography-suggested notion. *See Constitutive Expression*, Part I, A.2., 4. *See also* photos below at Part I, C. showing Taishan coast having features similar to Singapore coast and the Pearl Harbor. Image K is a PRdr satellite photo.

[119] The ethnic Mongolian population in the Yuan empire was less than 3% of the total population. *See* CHOC, Vol. 6, 428.

[120] *The Reverberations* argue that Guangdong hosted a major office of an important branch of the Yuan empire central government, the Giang-nan Hsing Yushitai, *See id*., Part II, A.3.b.(1).

[121] *Constitutive Expression* argues that the name "Taishan" had its origin in sailors' need for landmarks to facilitate sailing communication, as "Taishan" was named for the mountains at the coast with paths, by land or river, to reach the actual site of a high office, plausibly a sub-office of a supra-regional administrative organization, the Chiang-nan Hsing Yushitai. *See id.*, Part I, A.2.

[122] *Cf.* CHOC, Vol 6, 523 (a minor rebellion in southern Chiang-hsi, present Guangdong, *see* the map at CHOC, Vol. 6, 438-441, resulting in some reform).

[123] Because Guangdong's distance from regions with high percentage ethnic Mongolian population, the only to maintain a Mongolian-identity population significant enough to have sustained control was through permitting inter-ethnic marriages. Moreover, neither Chinese culture nor Mongolian had significant patrilineal bias when it came to ancestral honoring culture. *See The Reverberations*, Part II, A.2.b.(2).(c).,(d).

[124] *Cf.* Lepore 595-597 (an American presidential commission finding that race discrimination to be economically wasteful).

[125] After Khubilai khan, the central government was significantly paralyzed by succession crises. That would create opportunity for a regional faction to gain influence. *See* CHOC, Vol. 6 557-560 (the succession struggle resulting in a series of weak emperors relying on increasingly powerful military men and administrators, who were frequently purged after different factions came to power).

government's regressing ethnic policies.[126] The developments leading to that dramatic event likely caused government observers at that era to conclude that Guangdong had been exceptional in the Yuan empire, in both inter-ethnic relationship and ability to adopt and implement sensible policies[127]. In an era of dark time in inter-ethnic relation for most parts of China for most people, accompanied by increase in trade, words in relation to characters associated with the apparent Guangdong exceptionalism would likely pass around like words of a surprisingly good movie today.

### ii. The Apparent Personal Connection between Zhu's Most Important Advisor and YeGif

Yuan empire's Guangdong exceptionalism would likely be noticeable in much greater depth by neighboring provincial officials who came into contact with YeGif regularly in their official capacities. Emperor Zhu's most important advisor, Liu[128], had been such an official. Until becoming disillusioned with the Yuan empire, Liu had served for four times as a mid-level official in Chiang-che province,[129] neighboring Chiang-hsi province directly under YeGif's administration[130]. As Chiang-che province would logically be under the supervision of a sub-office of the central government's (The) High Office of Imperial Representatives ("THOIR") hosted by YeGif[131], in his capacity as a mid-level Chiang-Che official, Liu likely developed extensive knowledge about YeGif, including the THOIR's sub-office's expertise over a region far bigger than Guangdong, through personal contacts. Because he was Zhu's adviser with highest level of experiences in government while Zhu was competing for supremacy among

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126 *See Constitutive Expression*, Part I, A.1.b., d. and *The Reverberations*, Part II, A.2.b.(1).

127 With factionalism in the northern part of the empire, the empire's physically isolated southern faction would naturally become more able to adopt policies of its own, such as avoiding politics that would undermine the wealth-generating sea trade for all ethnic groups, including staying out of the succession struggles in the central government, *see* CHOC, Vol. 6, 490-560 (the geography logically under YeGif's influence rarely mentioned in an entire chapter in *CHOC* about mid-Yuan dynasty politics).

128 Liu had been perceived to Zhu's most important advisor that there had been a myth about his having gotten a heaven book. *See* ZL, E7, 6:35-6:36. An entire episode of Zhu lectures was devoted to his backgrounds and effort by Zhu to recruit him. *See* ZL, E7. *Cf*. CHOC, Vol. 7, 112 ("[Liu Chi's] career has been extravagantly mythologized in popular writings from that time into the present century.").

129 *See* ZL, E7, 17:18-22. Apparently, in his last stint, he served as a mid-level Yuan civilian administrator of the provincial army. *See* CHOC, Vol. 6, 583. In that capacity, he probably answered in some way to the Chiang-nan Hsing Yushitai, with possibly a major sub-office in Taishan, *see* footnote 121 above.

130 *See* CHOC, Vol. 6, 438-441 (Yuan empire map).

131 *See* footnote 121 above. "THOIR" written in Chinese is phonetized as Yushitai, translated in CHOC as "censorate", *see* CHOC, Vol. 6, 427, but "The High Office of Imperial Representatives" is a both more literal and more idiomatic translation, *see The Reverberations*, the text accompanying footnotes 40, 41. By the 2nd half of Yuan dynasty, it apparently functioned also as a shadow government, ready to take over an administration, upon the emperor's perception of ineffectiveness or untrustworthiness of an existing administration. *See* China History, Episode 75, https://www.youtube.com/watch?v=o5wtBLgoKuA&list=PLOrf2h5ONlwUTW9etWK4b3xQiz8LdgkKS&index=75, 16:43-19:26 (the coup to end reversion to Khubilai khan's policies had come from Yushitai, with the head of Yushitai becoming the new prime minister); *cf.* CHOC, Vol. 6, 563-564 (a professor opining that Yushitai's true influence having been understated). The name of one of two THOIR branches is "Chiang-nan". *See* CHOC, Vol.6, 603. "Chiang-nan" indicates the branch supervised all territory originally under South Song empire's administration, as "Giang" was the likely shorted form "Yangtz Giang", known in Cambridge China History as "Yangtze River", and "Nan" means "south". *See The Reverberations*, Part II, A.3.b.(1).

rebellions,[132] it is highly likely that with all the insights in his former official capacity for the Yuan empire, Liu recommended Zhu to plan for winning the peace after winning the dynastic-changing war by winning Guangdong peacefully so that all the administrative talent and technical expertise associated with YeGif[133] would be able to serve the nascent Ming empire, including administering Liu's family home region, the present-day Zhejiang province,[134] and the land-locked region on the other side of the Chiang-hsi province[135]. He would also likely recommend inducement more concrete than simply a promise against ethnic retaliation.[136] There is circumstantial evidence, at least to folklore-makers looking back to that era, that Zhu's advisors had advised Zhu to provide significant economic assurance to vested economic interests related to the YeGif community to induce a mutually beneficial peaceful transition in Guangdong.

(c) A Huge Reason and a Possible Second Reason to Folklore-makers of Guangdong Mongolians to Rally for Ming Empire's Success

There is significant circumstantial evidence that in the process of negotiating for a peaceful dynastic transition in Guangdong, Chen insisted on the basic maritime trade-relation structures in Guangdong[137] be left largely undisturbed, with the Guangdong ethnic Mongolian minority receiving significant benefit from such a policy because they likely had a huge advantage in getting the Guangdong economy's most lucrative parts in light of the Yuan empire's policy of favoritism toward ethnic Mongolians[138]. This hypothesis is supported by the fact that Emperor Zhu apparently entrusted Chen with critical assignments,[139] as a person who turned side against his patron would not be perceived as a trustworthy person, unless in the process of negotiating the apparent act of treason against his patron, he demonstrated an unusual trustworthy character of loyalty.[140] This hypothesis is further supported by Emperor Zhu actually leaving an ancestral injunction against extending the Ming empire to Annam and Cham states, all being Guangdong's natural trade partners and logical destinations for partial migration of YeGif-connected families out of fear of ethnic

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[132] Others had just been scholars or education administrators at county level. *See* ZL, E7, 23:30-28:09.

[133] After the coup to remove Bayan, YeGif would certainly take part in filling positions in the national government to implement the new policies. That experience likely enhanced YeGif's administrative pool's insights about issues beyond southern China.

[134] *See* ZL, E7, 15:08-21, 2:24 (showing map of Liu Zhi's home region in blue), corresponding to present Zhejing province in image C. in footnote 100.

[135] *See* the map images at footnote 100.

[136] A school of neo-Confucianism emphasizing practical approaches to all kinds of problems had arisen in present-day Zhejiang province during the South Song dynasty in response repeated failures in coping with challenges from nomadic tribes from the north. *See* China history Episode 61, https://www.youtube.com/watch?v=uB9EI5XCLFQ&list=PLOrf2h5ONlwUTW9etWK4b3xQiz8LdgkKS&index=61 ("CH E61"), 38:59-39:41. Liu Zhi's success is highly attributed to his having been under that strand of neo-Confucianism. *See* ZL, E7, 23:30-28:09. It is highly likely that YeGif succeeded as a result of influence by that strand of neo-Confucianism, further contributing to Liu Zhu's favorable impression of YeGif, increasing the likelihood that he recommended Zhu to win Guangdong peacefully.

[137] *Cf*. CHOC, Vol. 7, 303 (maritime trade being valuable to the Yuan empire).

[138] *Cf*. CHOC, Vol. 6, 515-517 (a very large preference for Mongolians for entering the officialdom through examination).

[139] *See* Part I, A.1.b.(2).(a). above.

[140] Chen had a reputation of valuing loyalty. *See* ZL, E10, 10, 35:49.

retaliation,[141] in 1373, within 6 years after coronation.[142] Both the known policy against ethnic retaliation and the hypothesized policy to leave the YeGif-connected families' likely largest economic interest untouched were consistent with the critical but all too often elusive goal of winning the peace after winning a war.[143] Once it became credible that Emperor Zhu would keep his promises, it would be natural for the Guangdong Mongolians to rally for his success for economic reasons as well, thus entering a new phase of support for the infant Ming dynasty.[144]

The apparent happy ending in Guangdong with evidence that it had come about as a result of the YeGif's enlightened policies and continued further with YeGif making critical contributions to the Ming dynasty's remarkable initial success after sparing Guangdong of a bloody dynastic changing war would be interesting bases for folklore-makers to flesh up with feel-good content, enabling people in Guangdong and places they settled, including present-day central Vietnam[145] to talk about for generations.[146]

Both fortunately and unfortunately, the Yeah-e-G-a folklores reflected poorly against the Qing empire which had its own policies of ethnic discrimination, though not nearly as severely as the one initiated by Khubilai Khan,[147] and formal prohibition against inter-marriage between the conquering ethnic minority and conquered ethnic majority[148]. The folklores might cause the Qing rulers to avoid some gratuitous ethnic

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[141] *See* text accompanying footnotes 227-228 and footnotes below.

[142] *See* CHOC, Vol. 8, 311-312. It states in relevant part,

> The overseas foreign countries like An-nan [Vietnam], Champa, … are separated from us by mountains and seas and far away in a corner. … If they gave us no trouble and we moved troops to fight them unnecessarily, it would be unfortunate for us. I am concerned that future generations might abuse China's wealth [/] and power and covert the military glories of the moment to send armies into the field without reason and cause a loss of life. May they be sharply reminded that this forbidden. As for the *hu* and *jung* barbarians who threaten China in the north and west, they are always a danger along our frontiers.

[143] For an example of losing the peace after winning the war is the war in Europe that started 20 years after a peace treaty, *see* Lepore, 400 (many doubted that the 1919 peace treaty would in fact secure peace).

[144] That socio-political development might have been described as "Yue Hu Zhi Ming", meaning "Guandong Mongolians for Ming [Dynasty]" in an episode in a Yeah-e-G-a folklore. This is a completely educated guess based on a Chinese story-tellers' tradition of naming an episode with four-word phrases, *see, e.g.*, Zhu Lecture 1 being titled "Zhi Long Tang Song", meaning "governing well above any era in Tang or Song", *see The Reverberations*, Part II, A.4., 2nd sentence. *See* ZL, E1, 13:24. "Yue" is the phonetization of a Chinese character referring Guangdong, written differently from the character for "Viet" as in Vietnam. That could be an inspiration for Ho adopting a name phonetized in mandarin as "Hu Zhi Ming" while inside China.

[145] *See* Part II, A.2.b.(1). below for cultural evidence of large-scale PPdr migration to present-day central Vietnam during the 500 years before first large group of Chinese immigration to the U.S. and the natural and cultural forces driving it.

[146] *See* Part III, A.1.b. below about embellished folklores having downstream cultural-psychological effects likely cumulatively even stronger than dry recitation of historiographical facts that move people.

[147] *See* Ebrey, 224-225 (Qing dynasty winning support of Chinese gentry class through respecting Chinese culture despite clear ethnic favoritism for Manchus in important government posts).

[148] *See* China History Episode 99, https://www.youtube.com/watch?v=UwpdQmVw3fI&list=PLSyuJLM8uqBYm_VaFMZPkk9E3UUxtaR0E&index=97, 29:45. Purportedly, the ban against inter-ethnic marriage was lifted as a result of an attempt at reforms after Qing empire's humiliation by foreign powers after the Boxer Rebellion.

oppression policies they would not otherwise have. Their perceived subversive nature would likely also cause any printed version of the Yeah-e-G-a story be banned by Qianlong emperor's censors, with lingering effects for at least a century because Qianlong emperor was known as a successful emperor[149]. Ironically, when something was banned officially, it often enhanced its value as a commodity in channels beyond the reach of the officialdom.[150] As such, there is basis to believe that the oral versions of the Yeah-e-G-a story would survive, perhaps with even more embellishments facilitated by the absence of a standard written version.[151]

### 2. The Likely Lingering Book Ban Effects and the Effects of Turmoil throughout the End of the First Half of the Twentieth Century

The Qianlong emperor's perceived success meant that his overall policies would be perceived as effective, likely resulting in his book ban be continued until Qing empire ended in 1912[152]. After that, the compelling evidence of the Yeah-e-G story would likely be talked about openly.[153] There would likely be books having some mention about it.[154] Unfortunately, there have been many conflicts and social upheavals affecting Guangdong since that time,[155] likely resulting in the loss of any version printed before the middle of last century. Fortunately, there is significant historical and cultural evidence from Fhlc to form a crudely vague cultural mosaic of robust circulation of the Yeah-e-G-a folklores, surviving passage of time and Qianlong emperor's censorship. As a crudely vague mosaic, there is value at identifying more pieces of plausible historical and cultural evidence.

## B. The Initial Effort to Meet the Challenge through the Crude Taishan-Hu-Guang-The-Woman-Warrior Mosaic

Because apparently, the only feasible way at the present time to show robust circulation of the Yeah-e-G-a folklores in Fhlc was through cultural mosaic evidence.[156] In *The Reverberations*, the idea that PRdr-ans had been hearing the Yeah-e-G-a folklores was supported by the Taishan-Hu-Guang-*The Woman Warrior* ("TH*T*") mosaic, a crude mosaic formed by a limited but selective collection of historical and cultural evidence centering around two names chosen in the first four decades of last

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[149] *See* footnote 79 and text accompanying it above.
[150] *Cf.* CHOC, Vol. 7, 781-782 (some banned books preserved for today precisely because being banned enhancing their collection value).
[151] *Cf*. Lepore, 177 (the self-restraint by founders of constitutional debate causing a lot of speculation during first 50 years.
[152] Ebrey, 265-266.
[153] As an example, it made its way to a televised Zhu lecture about Zhu's achievement. *See* ZL, E10, 35:49-38:29. There was in fact a revival in scholarly interest in ancient folklores in China after World War I. *See* Ebrey, 272.
[154] *Cf*. Palmer, introduction (*The Romance of Three Kingdoms* being popular even in 21st century).
[155] As an example of war frustrating material preservation, the Taishan railroad, built by contributions from Chinese immigrants to the U.S., was intentionally destroyed to frustrate movement of Japanese troops in Taishan. *See* Judy Yung, Gordon H. Chang, and Him Mark Lai (editors), Chinese American Voices, from the Gold Rush to the Present (University of California Press, 2006), 128.
[156] Perhaps, there is a copy accidentally hidden somewhere, just like the dead sea scroll, *see* https://www.deadseascrolls.org.il/learn-about-the-scrolls/discovery-and-publication.

century[157] and some content of *The Woman Warrior*.[158] The significance of the cultural information was discussed through the lenses of the Yeah-e-G story as suggested by reliable sources[159] and known Chinese literary tradition of making up entertaining stories about the past through creatively fleshing up skeletal reported events[160].

The significance of two new names is discussed here first. "Xinning", the name of the coastal county with apparent important strategic value to the Yuan empire was changed to "Taishan", respectively meaning "New Harmony" and "High Office Mountain", in 1914.[161] That indicates cultural awareness by people at Taishan that it had been an important place in PRdr history. Ho, after news of Guangdong-an divisions' surprising results in a pivotal battle in the war with Japan in 1938 and significant time with a Chinese general who had served as an officer in the Guangdong-an army[162], adopted the alias "Hu Guang", literally meaning "Mongolian Light".[163] The speculation that Ho knew about his alias's inspiring reference, is based on the educated guess that Ho got information about Guangdong-an soldiers having been inspired by the successful armed struggle to end the Yuan empire[164], and that in turn triggered Ho's cultural memory of a version of the Yeah-e-G-a folklores containing praises for YeGif's enlightened ethnic policies.[165] The adoption of the name "Yuehua" for a high school established in an apparent act of defiance against Japanese occupation of PPdr's most important parts was mentioned to enhance the "Mongolian Light" shade of meaning

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[157] Because of the apparent novelty of the topic in the American legal community, only the historical and cultural information encountering no readily non-confirming information were selected, with one exception. The notion that people in position to know understood "Taishan" meant "High Office Mountain" encountered non-confirming information from a source anchored around entertainment rather than reputable scholarship, and a sub-segment was devoted to address that issue to make the point that the non-confirming information might be a result of epistemic oversight. *See The Reverberations*, Part II, A.3.c. *Constitutive Expression* was written to further bolster the point that "High Office Mountain" was the intended meaning. *See id.,* Part II.

[158] *See The Reverberations*, Part II, A.3.

[159] *See* Part I, A.1.b.(2).(b).(i). above.

[160] *See* the text accompany footnote 40 and footnote 40 above.

[161] *The Reverberations*, Part II, A.3.a., second paragraph.

[162] The Chinese general was Ye Jiangying, the Chinese communist party representative to the Chinese military command, *see* Duiker, 230-231, 236, and he had served as a commander for one of the division about a decade earlier, *see* CHOC, Vol. 12, 691.

[163] *See* the text accompanying footnotes 20-22 above.

[164] *The Reverberations* argues that although Guangdong experienced a peaceful Yuang-Ming dynastic transition, Guangdong-ans would have a cultural memory of the successful armed struggle against the Yuan empire because Emperor Zhu would certainly send his most royal, battle-hardened troops to occupy an important region. *See id*., Part II, A.3.b.(3).(a)., 8th sentence. This point makes more sense under the lens of hetero-normality because most of them likely married local women to form families and passed the story of the successful armed struggle to their offsprings.

[165] *See* the text accompanying footnotes 19-23 above.

through the logic of triangulation.[166] *The Woman Warrior*, published in the 1970s was cited to bolster the vertical dimension of the crude mosaic because of its apparent allusion to Ming dynasty's founding from armed rebellion against the Yuan empire and a different outcome for a Mongolian prince in the south.[167] Two complementary articles have been written to refine to some extent the initial crudely vague mosaic with more easily verifiable circumstantial facts.

## C. Limitations to Made Efforts at Enhancing the Mosaic

*Some Plausible Printed Echoes of the Cultural Reverberations of the Yuehuahu Anti-subordination Voices in an American Literary Classic* ("*Some Echoes*"), was written to bolster the point that *The Woman Warrior* actually contains relevant background echoes of a Yeah-e-G-a folklore in addition to a plausible allusion to the peaceful Yuan-Ming dynastic transition in Guangdong. *Some Echoes* introduced compelling geographical evidence that Taishan, the Chinese county possibly providing a majority of early Chinese immigrants to the U.S. all by itself,[168] was the site of both a major military installation and a supra-regional administrative installation for the Yuan empire.[169] Additionally, *Some Echoes* introduced the Chinese cultural concept of "mandate of the heaven" to explain why an ethnic minority rule with apparent effective policies to enable the ruled majority to feel economically empowering would have support from the population.[170] *Some Echoes* tends to increase the purchase for the point that early Chinese immigrants had heard about the Yeah-e-G-a folklores because Mrs. Kingston apparently became acquainted to some significant Yeah-e-G aspects and Chinese culture through story-telling by her mother.[171]

In line with the goal of increasing the purchase for the point that early Chinese immigrants had heard about the Yeah-e-G-a folklores, another article, *The Constitutive Expression behind the Silence about the Meaning of "Taishan"* ("*Constitutive Expression*"), was written to enhance the point made in *The Reverberations* that the claim on a Chinese national geography show about "Taishan" just meaning "chunks of mountain" was based on epistemic oversight.[172] To support that thesis, *Constitutive Expression* presents more circumstantial historical evidence of YeGif's remarkable success through introducing circumstantial evidence that its success left behind legacies on Vietnam as well.[173] *Constitutive Expression* argues that the phrase "Taishan" was

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[166] *See* footnote 18, para. 3, above for the point that Yue is now usually word describing the largest ethnic group in Vietnam and Hua, the largest ethnic group in China. There had been a long period of members of two ethnic group intermarrying before educational institutions participating in influencing children's ethnic identity. *See* Part II, A.2.b.(1)., para.2, below for the point of trade-driven blended families before steam power rendered wind-driven sailing obsolete. During the Yuan dynasty, the Mongolian rulers classified people under South Song as "southerners". *See* Ebery, 175. Many ethnically-mixed people in the Pearl River delta region were probably comfortable with both the Yue identify and the Hua identity. Thus, the phrase "Yuehua" would have two shades of meaning, the ethnic mixing that had been driven by economic conditions and different ethnic groups uniting to oppose gratuitous oppression.

[167] *See The Reverberations*, Part II, A.3.b.(3).(c).

[168] *See* Kwong, 19-20. The phrase "early Chinese immigrants" refer to Chinese immigrants who came before lifting the Chinese Exclusionary Act.

[169] *See Some Echoes*, text accompanying footnotes 101-105 and the footnotes.

[170] *See id*., Part II, A.2.b.

[171] *See id*., Part II.

[172] *See Constitutive Expression passim*.

[173] *See id*., Part II, A.2.c.

originally coined to facilitate navigational needs as a result of increasing sea trade through, into, and out of the Yuan-era PRdr, probably in recognition of the present-day Taishan County hosting a THOIR sub-office.[174] *Constitutive Expression* also argued that the name "Xinning" had not been perceived as prestigious because its adoption in the end of 15th century was apparently connected to the Ming empire's likely policy to orient PRdr-ans more culturally with central China and that policy likely left behind some unhappy memories.[175]

Acknowledging-ly, as articles to shed more light on specific aspects of the initial crude mosaic, they have their own obvious limitations. *Some Echoes* is clearly subject to criticism that it only supports successfully that Mrs. Kingston's mother was an exceptional well educated Chinese woman[176]. *Constitutive Expression* obviously has to cope with a different understanding by a cultural institution with no apparent region-ethnocentric biases.[177] Of course, both articles are subject to the claim that they are much ado about co-incidences. Hopefully, a satellite photo of Taishan having physical features associated with both Singapore and Pearl Harbor, respectively important for the former British empire[178] and modern American security[179], significantly blunts the criticism that the TH*T* mosaic is just a region-ethnocentrically driven fantasy on the basis of co-incidences, with an ideological taint[180].



Image L

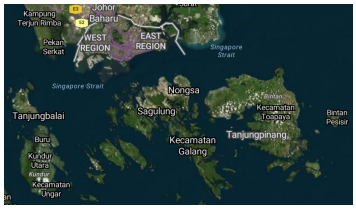



Image M

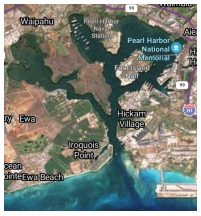



Image N

Satellite photos of Taishan, Singapore, and Pearl Harbor, images L., M., N., respectively

Reasonable people, however, at least agree with the point that when there are many co-incidences, a pattern of non-co-incidence emerges. Fortunately, there is another potentially revealing piece to the crude TH*T* mosaic that both makes the mosaic more robust and contributes to the point that even in the modern era of inundation with interesting information and entertainment alternatives, the Yeah-e-G-a folklores and their more entertaining echoes continue to be extra fountains of social capital for Chinese immigrant communities.

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174 *See id*., Part I, A.2.
175 *See id*., Part II, A., B.
176 Mrs. Kingston's mother had a midwifery school training in China. Warrior, 57.
177 *Constitutive Expression* makes the point that because the TV program was a regularly scheduled program with coverage primarily on modern uniqueness over many different Chinese counties for rating-driven entertaining value, the research for the program probably did not go very deep into the local political and cultural history of centuries ago. *See id*., Part I, C.; Part II, C.
178 Britain defended it with over 90,000 troops. *See* https://www.britannica.com/event/World-War-II/The-fall-of-Singapore.
179 Japan attempted to dominate the Pacific by bombing Pearl Harbor. *See* Lepore, 484.
180 *The Reverberations*' asserted most relevance to modern American law is that the current constitutional gay jurisprudence had been based on biased moral reasoning. *See The Reverberations*, Part III, B.

## II. THE LINGUISTIC PLAUSIBILITY THAT "HO CHIH MINH" LITERALLY MEANS "MONGOLIAN FOR MING [DYNASTY] AND ITS POTENTIAL FOR FURTHER ENHANCING THE TAISHAN-HU-GUANG-THE-WOMAN-WARRIOR MOSAIC

Perhaps almost every reader in an American law review article who has not had a high-school-level education in history in China feels surprised at the cultural notion that "Ho Chi Minh" ("HCM") actually sounds like the Taishan dialect[181] for Chinese word combination meaning "Mongolian for Ming [Dynasty]". This part explores that cultural experience and its potential for enhancing the still crude Taishan-Hu-Guang-*The-Woman-Warrior* ("TH*T*") mosaic from an angle different from that of a Chinese American child growing up in California and that of individuals desiring to be associated with a prestigious geographical name. It begins with addressing the plausibility that "HCM", written in Chinese character, 胡志明,[182] literally means "Mongolian for Ming [Dynasty]", a likely episode of the Yuan empire's honorable ending in Guangdong ("Yeah-e-G") story[183]; then addresses the significant public information seemingly making that plausibility irrelevant; and attempts to rehabilitate the potential for different dimensions of relevance substantially with cultural and historical information possibility indicating the significant public information to have been influenced by interest limited under existence of larger historical forces. It concludes by discussing a historical development plausibly indicating that many educated Guangdong-ans in the 1940s recognized that linguistic plausibility and were affected by it.

### A. The Linguistic Plausibility That "Ho Chih Minh" Literally Means "Mongolian for Ming [Dynasty]

"HCM", written in Chinese, 胡志明,[184] literally meaning "Mongolian for Ming [Dynasty]" can be detected from the Zhu Lectures' opening episode[185] and a standard Chinese-to-English dictionary. The mandarin-Chinese-based phonetization of the same words is "Hu Zhi Ming".[186] "Hu" and "Ho" refer to the same Chinese character.[187] The Chinese character for "Hu" had been used in the past to mean

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[181] According to Mrs. Kingston's *China Men* (Alfred A. Knopf, 1980), "Big Uncle", is phonetized as "Dai Bak" in the Chinese dialect she was familiar with. *See id*., 15. According to a Vietnamese dictionary, "Big" is represented by the word "Dai", and "uncle" is represented by the word "bac". *See Periplus Pocket Vietnamese Dictionary* 28, 141 (Periplus, 2017) ("Periplus"), respectively. As "c" and "k" are often pronounced the same, as in "cat" and "key", "Dai Bak" provides an indication of the similarity of the Chinese dialect she grew up speaking to the component of the Vietnamese language originated from the Chinese language. Because Mrs. Kingston's parents were from a village one river away from Taishan, her speaking Chinese likely sounded closely to the Taishan dialect. *See Some Echoes*, footnote 110, for a satellite photo.

[182] *See* footnote 16 above.

[183] *See* Part I, A.1.b.(2). above.

[184] This set of photo-ed characters are copied from a Cathay Pacific scheduling page screenshot posted at footnote 16 above. *Cf*., Duiker, 10 (Chinese language sinking deep in Vietnam).

[185] *See* footnote 16 above. In Chinese expression, often times, the word "dynasty" is omitted when the name of the dynasty is identified, similar to "Trump" is understood to mean "Donald Trump". *Cf*. Duiker, 14 (containing an example of a Vietnamese person naming Chinese dynasties with just the dynasty's mono-symbolic name).

[186] *See* E-C-C-E-D, 709, 1088, 802, respectively.

[187] *See* Allen, viii-ix.

"Mongolians".[188] Mr. Ho certainly had the Chinese language in mind when he adopted that name because he was traveling in China at that time under the disguise of being a Chinese journalist.[189] Chinese language and Vietnamese language significantly overlap because present northeast Vietnam was a part of a series of Chinese empires for 1000 years,[190] and the present Vietnam had evolved from that part of Vietnam generally known as the Red River delta region ("RRdr").[191] "Chi" and "Zhi" are respectively the Vietnamese and the mandarin phonetization for the same Chinese character meaning "will".[192] "Minh" and "Ming" are respectively the Vietnamese and the mandarin phonetization for the same Chinese character meaning "brightness".[193] The new dynasty that came out of the rebellions resulting in overthrowing the Yuan empire chose the name "Brightness", made up of the Chinese characters for "sun" and "moon",[194] correlating with the concept of the mandate of heavens.[195] Just as Guangdong history might have inspired the alias meaning "Mongolian light",[196] it might have also inspired the name plausibly meaning "Mongolian for Ming [D]ynasty". There is, however, significant public information undermining that plausibility's relevance in the effort to get a clearer idea of how robust the circulation of the folklores about aspects of the Yuan empire's honorable ending in Guangdong ('Yeah-e-G-a") had been 100 years ago, and that public information needs to be acknowledged, analyzed, and responded to.

## 1. Public Information Undermining the Plausibility's Relevance

The notion that Thanh Pho Ho Chi Minh[197] literally contains "Mongolian for Ming [Dynasty]" is not supported by *HCM*, which asserts that "HCM" means "He who enlightens".[198] While Ho was still alive, a CBS documentary asserts that HCM literally means "He who enlightens".[199] The lack of evidence of Ho clarifying the "He who enlightens" meaning after the public claim of that to be its meaning[200] further undermines the plausibility's relevance on informing the present on how well-known the Yeah-e-G-a folklores had been a hundred years ago, requiring significant effort at

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[188] *See* CHOC, Vol. 8, 312.
[189] Duiker, 248-249.
[190] Goscha, 20.
[191] Goscha, xviii-xx, Maps 4 -6.
[192] *See Periplus*, 52; E-C-C-E-D, 802, respectively.
[193] *See* Duiker, 248-249; Allen, xxii. Obviously, there is significant meaning overlap between "enlightens" and "brightness".
[194] *Id.*
[195] *See* CHOC, Vol. 7, 109-110 (Zhu claiming just that).
[196] *See* the text accompanying footnotes 19-23 and the footnotes above.
[197] In actual Vietnamese, THÀNH PHỐ HỒ CHÍ MINH. It is translated into Ho Chi Minh City. *See* https://www.hochiminhcity.gov.vn/web/hcm-eng.
[198] *See* Duiker, 248-249. Professor Duiker is likely the most unbiased HCM biographer. If he asserted that Ho understood that his name could literally mean "Mongolian for Ming Dynasty", that would make this article's thesis a lot easier to support. The assertion that "HCM" means "He who enlightens" does not exclude other plausible meanings because words often have different meanings and shades of meaning. For example, the English word "can" can mean "be able" or a container or "laying off a person". Unfortunately, the author has not been able to reach Professor Duiker, apparently knowledgeable in Chinese, *see id*., xii (Professor Duiker expressing gratitude for receiving Chinese language information), to find out if he had heard about a different shade of meaning than "He who enlightens".
[199] *See* Biography of Ho Chi Minh - North Vietnamese Revolutionary Leader | Documentary, https://www.youtube.com/watch?v=iN60XZ6T83s, at 0:57.
[200] *Cf.* Duiker (no mention of any one making the point that Ho Chi Minh could mean "Mongolian for Ming [Dynasty]" in the entire book).

rehabilitation at that particular dimension of relevance.[201] Fortunately, there were cultural and historical circumstances making that rehabilitation plausible.

### 2. Circumstances Rehabilitating the Possibility of Different Dimensions of Relevance

The relevance of the plausibility that "HCM" could mean "Mongolian for Ming [Dynasty]" in terms of Ho actually knowing about that shade of meaning can be rehabilitated through the twin approaches of pointing out potential epistemic oversights in the significant public information undermining its relevance and identifying historical circumstances supporting it.

#### a. The Possibility of the Non-confirming Public Information under the Influence of External Factors

It is plausible that the "Mongolians for Ming [Dynasty]" shade of meaning just eluded western scholars of recent Vietnamese history, which had a big role in the world history of last century[202]. It is also plausible that Ho was just too busy to talk about a possible incomplete cognizance about the potential shades of meaning of his name. He was after all a leader of a movement facing many challenges.[203] Moreover, it is also plausible that scholars who recognized the alternate shade of meaning of "HCM" did not see enough connection with Guangdong history to publicly discuss about that plausibility, and academic time had been more professionally rewarding to write about the dramatic developments[204] in Vietnamese history since Ho adopted that name. Furthermore, it is plausible that cultural sensitivities contributed to the reluctance to publicly discuss the topic. The notion that migration from the Taishan region contributed to settling Thanh Hoa province and the more muscular Dai Viet[205] tended to complicate the view that the post-14th century Southern Advance[206] had been RRdr-centered.[207] As for the people of Guangdong, the topic of Yuan dynasty had been a difficult topic for many to talk about because many are descendants of individuals

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[201] *See* Part II, B. for the point that "Ho Chi Minh's" reported effects on some Guangdong-ans provide a separate insight about robust circulation of the Yeah-e-G-a folklores.

[202] *Cf.* https://time.com/archive/6735625/time-100-persons-of-the-century/ (Time Magazine naming HCM as one of the twenty most influential leaders and revolutionaries in the 20th century, along with Franklin Roosvelt and Winston Churchill.

[203] *See* Duiker, 3.

[204] *Cf. id*., 4-6 (Vietnam being in wars with Ho getting support from both China and Soviet Union).

[205] *See Constitutive Expression*, Part II, A.2.a. for the point that Dai Viet's expansion into Thanh Hoa, literally sounding like the Taishan dialect for the Chinese expression "new slate", overlapped with a period when prosperous families and families connected to the Yuan empire administration feared that they would face ethnic retaliation upon collapse of the Yuan empire. *See id.*, Part II, A.1. for the point that Taishan has the geography to be a hub for Vietnam's sea trade with China until steam power replacing wind power to make distant sea trade possible and that the Taishan coastal town of "Guanghai" being named for its economy based on facilitating trade with Vietnam's "Quang" provinces and port city of Haiphong. *See* Part II, A.2.b.(1). below for the point that traders and sailors in South China Sea probably had the common practice of having one family at each end of the Pearl-River-delta-Vietnam-coast trade because of the reality of needing to wait out the annual unfavorable wind condition for a particular direction of sailing.

[206] *See* Goscha, 406 (migration from southern China had made critical contribution to Vietnamese identity before gaining independence from China in 10th century).

[207] *See* Goscha, 414.

fleeing from the Mongol conquests[208] and so much of the Yuan dynasty's founding had been based on gratuitous violence[209] and gratuitous ethnic oppression[210]. Those conditions might have contributed to the apparent lack of public awareness of "HCM's" "Mongolians for Ming [Dynasty]" shade of meaning. More significantly for purpose of rehabilitation, there is significant historical circumstantial evidence and circumstantial historiographical evidence that Ho was aware of it.

b. Historical Circumstances

Historical circumstances, deeper and broader than Ho's adoption of the alias "Hu Guang" in 1938, point to the possibility that Ho knew about "HCM" relating to an episode in Guangdong history in connection to a larger honorable development. The historical circumstances are discussed from three different angles, the longstanding past close ties between the Pearl River delta region ("PRdr") and Vietnam making it likely that the Yeah-e-G-a folklores would pass to Vietnam, reported incidents indicating Ho having knowledge of the Yeah-e-G story, and inspirational and political benefits to Ho at evoking the story.

(1) Evidence of Past Close Ties between The Pearl River Delta Region and Vietnam

As known historical facts indicate that sea trade prospered during the Yuan dynasty and PRdr and the present-day Vietnam had been sea trading partners for at least over 300 years before,[211] it would be likely that the Yeah-e-G-a folklores would be known to many people in Vietnam, as a result of trade relation driven by seasonal wind conditions in the South China Sea. That likelihood would become almost certain in light of historical and cultural factors motivating PRdr migration to present-day Vietnam during the Little Ice Age[212].

Physical proximity, maturing of nautical technology, and the seasonal wind direction changes favored close ties between PRdr and RRdr, likely universally accepted as the cradle of modern Vietnam,[213] well before the Yuan dynasty. The fact that they are geographically relatively close to each other, separated the South China Sea,[214] means that the two regions would become natural trade partners upon development of nautical technology making it relatively safe and economically efficient for sea travel between the two regions.[215] The knowledge and technology about taking

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[208] *Constitutive Expression* makes the point about the lack of convincing public explanation for "Taishan's" literal meaning arising out of community value for both ancestor-honoring and ethnic harmony. *See id*., Part II, C.

[209] *See* Ebrey, 173 (Khubilai's troops engaging in war of terror in retaliation to resistance to their conquests).

[210] *See id.*, 174 (Marco Polo describing Chinese being treated like slaves).

[211] *See* Fairbank, 191-192.

[212] It lasted from 1300 to 1850. *See The Effects of the Little Ice Age (c. 1300-1850)*, https://www.science.smith.edu/climatelit/the-effects-of-the-little-ice-age/#:~:text=Evidence%20of%20cooling%20[c] ("*Ice Age Effects*").

[213] *See, e.g*., Goscha, 4 (modern Vietnam began its evolution from the Red River basin).

[214] *See* map in Ebrey, 11.

[215] See Goscha, 23 (describing Guangdong and Vietnam belonging to the same land and maritime zone).

advantage of the monsoon-related seasonal wind changes[216] likely developed at the same time, at a time before the 7th century.[217] The regular trade would likely take another giant leap upon the invention of the compass during the Song dynasty[218], making the sea trade safer and more efficient. Further facilitating the development of close relationship through sea trade between the two regions is the fact that PRdr was isolated from central China by a large mountain range.[219] Along with trade would come cross-migration between people in the two regions. Moreover, as changes in wind direction were annual,[220] it would be difficult, uneconomical, and unsafe to sail against the wind in a particular direction for several months in every year, creating the sociological conditions for many people relying on sea trade for livelihood to have two homes and two families, one on each side of the South China Sea trade route[221]. Thus, it comes as no surprise that there is significant overlap between spoken languages in PRdr and Vietnam. Those family connections would facilitate cross-migration in response to changes in political and natural climates, and the cultural evidence supporting that notion is significant.

The cultural evidence that PRdr-ans took a big part in the people movement resulting in the modern S-shape Vietnam[222] is almost self-inferable from the fact that the names of four central Vietnamese provinces Quang Binh, Quang Tri, Quan Nam, and Quang Ngai apparently share the first syllable of Kwangchou Fu, the name of Ming-era administrative region covering the entire Pearl River delta region.[223] That cultural evidence is further enhanced by the name of Taishan's most important port town, Guanghai, apparently named after its connection to trade with the Vietnamese Quang provinces and port city of Haiphong.[224] Thanh Hoa, the name of a province south of RRdr and north of the Quang provinces, provides more enforcing cultural

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[216] *See* Chan, 5 (wind favorable for sailing from China's southeast coast to Southeast Asia in January and February, and for return trip in August).

[217] *See* Fairbank, 191-192 (describing physical remnant of a ship with rudder in PPdr).

[218] *See* Ebrey, 142-143.

[219] *See* map in Ebrey, 11; *see also* Fairbank, 191-192.

[220] *See* Sea Conditions Guide, South China Sea and Southeast Asia 2 (DTN, 2019) *available at* https://www.dtn.com/wp-content/uploads/2020/03/wp_offshore_south-china-sea_1019.pdf.

[221] A family arrangement on the basis of one wealthy individuals with multiple wives had been quite common in China until at least 100 years ago. *Cf.* Duiker, 143 (HCM marrying to a Cantonese woman who was a daughter of a Cantonese merchant's third concubine.). Having two homes would likely logically follow for people required to stay at distant places seasonally. *Cf.* Ebrey, 235 (during the time of reliance on wind power, European traders stayed in Macao until winds changed).

[222] A development that was a part of the Vietnamese southward advance theme, *see* Goscha, 406.

[223] *See* CHOC, Vol. 7, xxiv-xxv (map). Also *See* a map of central Vietnam below. *The Reverberations* indirectly makes the point that immigrants often express emotional connection to region of origin by incorporating partly or wholly the name of a place of origin, such as "New Orleans" corresponding to Orleans in France. *See id.*, Part II, A.3.b.(3).(b)., 4th paragraph.



Image O

[224] See *Constitutive Expression*, Part II, A.1.

evidence because it sounds like the Taishan dialects dialect for "new slate"[225]. "New slate" provides another dimension of cultural evidence of PRdr-an taking part in building up the S-shape Vietnam. Because of fear of ethnic retaliation under a new regime,[226] Guangdong-ans with Mongolian roots or known to have vested interest with the Yuan empire had motivation to arrange family members to migrate to Vietnam under new identities.[227] That arrangement would likely be facilitated by traders and sailors already having families at both ends of the monsoon-driven sea trade route. This set of cultural information is at least well-founded informed speculation,[228] reinforced by geography, atmospheric science and undisputed sea trade tradition dating at least to first century BCE[229].

### (2) Three Reported Events Indicating Ho's Having Significant Knowledge of the Yuan Empire's Apparent Honorable Ending in Guangdong

As present-day central Vietnam was both a PRdr sea trade destination established long before the Little Ice Age and a logical Little-Ice-Age-driven PRdr migration destination after the peaceful Yuan-Ming dynastic transition, a person born in that part of Vietnam had a significantly higher chance to have heard about a Yeah-e-G-a folklore. Because Ho was born in the province of Nghe An,[230] a province between Thanh Hoa province and the "Quang" provinces,[231] that accident of birth would increase the chance of his having heard a Yeah-e-G-a folklore sometime before choosing an alias meaning "Mongolian light"[232] and then an alias meaning "Mongolian for Mingy [Dynasty]"[233]. If Ho had demonstrated some specific knowledge of Guangdong history around the time he made the decision to make his most famous name known to others, that is much stronger circumstantial evidence that he had heard the Yeah-e-G-a folklores. Besides choosing the "Hu Guang", plausibly literally meaning "Mongolian light", in a relative shot time interval after Guangdong-an divisions' inspiring performance at frustrating Japanese army's advance and foiling its strategic objective,[234] there were at least two reported occasions within 5 years thereafter in which he made statements indicating that he had specific knowledge of Guangdong history of several centuries ago at time of selecting the alias "HCM". In one occasion while seeking support from a Chinese audience, he lauded China as the

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[225] *See* E-C-C-E-D, 854, 711. It is based on Mandarin phonetization.
[226] Unfortunately, there had been reported precedents of that kind of emotionally driven tragedies. *See* Ebrey, 180 (reporting mobs of people engaging in killings of Jurchens upon Jin empire's fall.
[227] A very important part of ancestral honoring culture is the that ancestors no longer alive on earth have a greater chance of better after-lives if there are living descendants doing something to honor them. *See* Ebrey, 99.
[228] *See* Ebrey, 250 (millions of Fujianians and Guangdong-ans migrating to present-day Vietnam during the Little Ice Age, assimilating into local communities). Easily accessible web-based information about Thanh Hoa neither supports nor contradicts the informed hypothesis in *Constitutive Expression* that the name reflects it being destination of migration from Taishan in connection with Yuan empire's implosion, *see id*., Part II, A.2.a. *See,.e.g*., https://en-us.thanhhoa.gov.vn/portal/Pages/History.aspx.
[229] *See* Goscha, 1.
[230] Duiker, 19.
[231] *See* map in footnote 224 above.
[232] *See* footnotes 18-19 and the accompanying text above.
[233] *See* Part II, A., opening paragraph above.
[234] *See* the text accompanying footnotes 20-22 and the footnotes above.

elder brother of the Vietnamese people.[235] That indicates he had known about Vietnam's shared past with Guangdong because Guangdong was the logical geographical mediary for a sense of brotherhood between Vietnamese people and Chinese people. In another occasion, he praised the historical close relation between the Vietnamese people and the Chinese people.[236] That indicates an awareness of RRdr-ans and PRdr-ans having cross-migrated for centuries. Perhaps the conceivably perceived inspirational and political benefits to his cause shed the most illuminating light on whether he knew that his new alias could also mean "Mongolian for Ming [Dynasty]".

(3) The Inspirational and Political Benefits to Ho at Evoking the Apparently Inspiring Episode in Guangdong History

There were significant inspirational and political benefits to Ho at evoking a hope-inspiring episode in an inspiring period in Guangdong history to people who knew him. When Ho adopted his most famous name in about December, 1940,[237] his cause of his movement leading Vietnam to independence from France needed a major infusion of confidence because it had suffered two serious setbacks as insurrections against French colonial rule failed,[238] despite France's very apparent new weakness,[239] with many insurrection leaders either dead or having been rounded up into prisons[240]. A name sounding like the YeGif episode of a ruling minority embracing regime change would inspire hope, as it could convey the idea of different paths to accomplish the ultimate objective, including a ruling minority embracing regime change without bloodshed upon realizing that it was about to be rolled over by a historical tide[241]. When he adopted "HCM", he was in route to open an indoctrination training school for followers[242] of his cause inside China.[243] He plausibly found the new name inspiring to himself as well.[244]

Later events indicated that Ho had perceived political benefits to his cause under the alias "HCM". Ho apparently bonded with a powerful Guangdong-an general who developed a very favorable impression with Ho and provided political, economic, and

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[235] Duiker, 274.
[236] *Id*., 275.
[237] *See id.,* 248-249.
[238] *See id.,* 244, 247 (insurrection attempts in northern Vietnam and southern Vietnam, respectively, failed).
[239] France had been defeated by Nazi Germany. *See id.,* 242.
[240] *See id.,* 247.
[241] The simplest explanation for YeGif's quick surrender to the Ming army had likely been that it recognized that resistance would be futile—until one realizes that Emperor Zhu entrusted Chen with critical assignments for national rebuilding, *see* Part I, A.1.b.(2).(a). above.
[242] There is a co-incidental factual basis to hypothesize that some of Ho's disciples had heard about the Yeah-e-G-a folklores. The famous Vietnamese general Vo Nguyen Giap was born in Quang Binh, *see id*., 240, a regional name plausibly inspired by cultural memory of Kwangchou Fu migration, *see* text accompanying footnote 224 above, south of Nghe An, *see* map in footnote 224 above. As pointed out at Part I, last paragraph above, when there are many co-incidences, a mosaic of non-coincidence emerges.
[243] *Id*., 249.
[244] HCM could write poems in Chinese, *see id*., 265. That level of sophistication in the Chinese language made it likely that he understood that the Chinese character for "Ho" could idiomatically mean "Mongolian" in the past. *See* footnote 16 for an ordinary context in which a person today can plausibly learn about that past idiomatic use.

military aids to Ho.[245] The Guangdong-an general Zhang Fakui[246] was in 1943 the commander Chinese forces in a Chinese region bordering Vietnam in which Vietnamese nationalist movements operated overtly.[247] General Zhang had been sympathetic to Vietnamese people's cause for independence from France even before the all-out war with Japan in 1930s, and had planned to gain cooperation from Vietnamese nationalist movement in China's planned military offense against Japanese forces occupying Vietnam at that time.[248] An alias with a "Mongolian for Ming [D]ynasty" shade of meaning would facilitate the bonding process since an educated Guangdong-an had likely heard about Guangdong Mongolians migrating to present-day Vietnam, both out of fear of ethnic retaliation and responding to better opportunities.[249] As a simple matter of cultural cognizance, that alias could indicate to General Zhang that the Vietnamese person he was dealing with was familiar with Guangdong history. Emotionally, it could trigger the notion that Vietnamese people and Guangdong-ans are ethnically closely related, at an entirely different level than that between Vietnamese people and Chinese people generally.[250] General Zhang supported Ho politically and funding the pan-Vietnamese nationalist organization in which Ho became a vice-chairman.[251] General Zhang even assigned a Guangdong-an general known to be tolerant about communist political activity, Xiao Wen, to be the Chinese advisor to the organization.[252] A later major development provides even more to the plausibility that Ho knew "HCM" sounding like a feel-good Guangdong history episode with an inspiring underlying theme.

Announcing an independent Vietnamese government upon Japan's defeat was a momentous occasion for Ho's cause.[253] His name could be a rally point for his cause. Instead of publicly using a name most people had been familiar to be associated with his cause, Nguyen Ai Quoc,[254] Ho chose a name few Vietnamese people outside his inner circles had heard about but one the Guangdong-an generals supporting him had been most recently familiar with.[255] The most logical explanation for that apparently

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[245] Ho apparently started using "HCM" for public political events after the Chinese authorities realized that it was an alias of a well-known Vietnamese communist. *See id*., 271.

[246] *Id*., 272. He was highly respected, *id*., likely a result of his contribution to the surprising outcome in the Battle of Wuhan, *see* Zhang, Hongtao, *Guo Shang* 461 (Unity Press, 2004) (crediting him with making smart decisions critical to the surprising outcome).

[247] Duiker, 272-273.

[248] *Id*.

[249] *See* Part II, A.2.b.(1). above for cultural evidence of fear triggering migration to Vietnam and the point that until non-wind-power based sailing replacing wind-powered sailing, many people whose livelihood depended on inter-delta trade likely had families in both PRdr and Vietnam.

[250] For an example of names resulting in cultural cognition, applicants with African-American sounding names tend to get less invitations for job interviews. *See Trojan,* 1515-1516.

[251] *See* Duiker, 273. *HCM* makes reference to an interview of General Zhang in the United States years later, which apparently had not addressed "HCM's" literal meanings. *See id*., 271-272; *but see* footnote 16 above for the point that under a certain educational setting "HCM" sounding like an episode in Guangdong history could reveal itself. A Guangdong-an general likely had known about the Yeah-e-G story. *Cf*. *Some Echoes*, Part II (Mrs. Kingston having apparently heard a version of the Yeah-e-G-a folklores); *Constitutive Expression*, Part II, C. (people of Taishan, including those living in America, being aware that Taishan being an important place during the Yuan dynasty, a Yeah-e-G story aspect).

[252] *See* Duiker, 273.

[253] *See id*, 321-323.

[254] *Cf. id*., 320 (The last Vietnamese monarch had only heard of HCH only days early, suspecting him to be the long-known revolutionary, Nugyen Ai Quoc). France had in theory left central Vietnam under self-rule by the Vietnamese monarchy it had defeated militarily. *See* Goscha, 69.

[255] *See* Duiker, 271-273; *Cf. id*., 320.

peculiar choice is that he had perceived the name "HCM" could advance his cause further. The perception plausibly came about because he knew that "HCM" sounded like an episode in Guangdong history and he had perceived both that many Chinese troops advancing toward different cities in Vietnam at that time had been familiar with the story of peaceful Yuan-Ming dynastic transition and had also known that many descendants of people contributing to that outcome had migrated to Vietnam and many Vietnamese people had heard something about the developments leading to the peaceful Yuan-ming dynastic transition in Guangdong[256]. Triggering Chinese troops' collective memory of Vietnamese people being their ethnic cousins and also many Vietnamese people being descendants of individuals making valuable contribution to revitalization of Chinese civilization[257] would motivate a disciplined Chinese occupation of north Vietnam[258] and make it easier to plead to Chinese generals for supporting his cause. Triggering many Vietnamese people's cultural memory about the peaceful Yuan-ming dynastic transition[259] could also inspire the idea that a minority rule could be ended peacefully with the minority taking pride in the ending, thus inspiring belief in the eventual success of their hope that Vietnam winning independence from France.

Admittedly, reasonable people can differ as to whether the circumstantial evidence listed here pointing to Ho's actual knowledge of "Mongolian for Ming [Dynasty]" shade of meaning of "HCM" is sufficient to balance out the reasonable inference to the contrary associated with Ho's apparent silence in light of the publicized understanding by CBS news program-makers that "HCM" means "he who enlightens". Because the linguistic plausibility could exist in isolation from a respected source and the purported known silence would not be better known until at least 2 decades later,[260] there is still potential for "HCM" to enhance the TH*T* mosaic from a different angle.

## B. The Circumstantial Evidence That Many Having Perceived the Linguistic Plausibility

Knowing the plausibility that "HCM" can literally mean "Mongolian for Ming [Dynasty]" can potentially enhance the TH*T* mosaic through circumstantial evidence of others perceiving that shade of meaning. Thus, even if that literal meaning is entirely co-incidental, the evidence that Guangdong-an generals and Chinese audience acted sympathetically to his cause after being exposed to a name sounding like an inspiring

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256 This is not a fantastical notion because Maxine Hong Kingston had apparently heard something about the Yeah-e-G story while growing up in California. *See Some Echoes*, Part II (making the point that the female warrior dream in *The Woman Warrior* contains echoes of YeGif winning people support and experiencing a different ending). *See* Part II, A.2.b.(1). above for the point that likely over 1 million PRdr-ans migrating to Vietnam within the 100 years of Yuan empire beginning to show signs of implosion).

257 *See* Part II, A.2.b.(1). above for the point of likely high level of cross-migration and the likely custom of people taking part in the South China sea trade having families on both the PRdr and the present-day Vietnam during the time of wind-power sailing.

258 The most powerful members of the military alliance to defeat Japan had assigned China with the task of supervising Japan's surrender in north Vietnam and maintaining law and order there. See Duiker, 317-318. As Guangdong-an troops had been deployed at the region bordering Vietnam, *cf. id*. 272-273 (the top Chinese regional commander and his deputy being both Guangdong-ans), there would likely be a large Guangdong-an contingent in the Chinese force assigned to occupy north Vietnam.

259 *See* Part II, A.2.b.(1). above for the point of millions of PRdr-ans migrating to Vietnam during the Little Ice Age.

260 While Ho was alive or while people knowing him personally well were alive, it was possible that someone would point out about "HCM's" other shades of meaning.

episode in Guangdong suggests the possibility that many Guangdong-ans had heard the Yeah-e-G-a folklores. A larger historical development supports that possibility. Upon public knowing "HCM" through the media at the end of World War II, [261] the Chinese military occupation of north Vietnam, with Guangdong-an General Xiao second in command[262] with Guangdong-an troops likely disproportionately represented, was apparently an honorable one.[263] That positive development indicates that "HCM" helped winning sympathy to Ho's cause by many Guangdong-ans, perhaps as a result of being reminded that Vietnamese people and Guangdong-ans had been very close for thousands of years and that many Vietnamese people were direct lineal descendants of individuals who made valuable contributions to an era Guangdong-ans could take pride in. Undoubtedly, the connection just made is very tenuous by itself—perhaps to the point of being laughable[264]. However, when it is placed in the context of other mosaic information, it has some purchase, and contributes to enhance the existing vague TH*T* mosaic from a different angle.

Because Ho is not known to have commented that "HCM" had meaning other than "He who enlightens" after that meaning had gone public, and Guangdong-an generals had the independent motivation of contributing to defeating Japan and enhancing China's international standing, there is much purchase to the point that everything noted in this part is just co-incidence. However, when co-incidences add up, a mosaic of non-co-incidence emerges, similar to the apparent connection between high LSAT scores and law school successes as a result of a large data base supporting it. When a person experiences a mosaic of non-coincidence, he tends to begin making informed speculation that has downstream psychological effects.[265] Thus, even a coincidence has downstream effects if it primes existing mental schemas, and the effects are likely significantly greater if it causes perceivers to reflect consciously about the co-incidence. The fact that Ho Chi Minh City sounding like a wonderful episode in 14th century Guangdong history likely has ongoing cultural-psychological effects to individuals who are aware of "HCM" having the "Mongolian for Ming [D]ynasty" shade of meaning.

## III. MORE NUANCED INSIGHTS FOR THIS CENTURY

This investigation into a surprising plausibility to a vast majority of English readers, i.e., the plausible nuanced historical and cultural connections between two geographical names, Ho Chi Minh City ("HCMC") and Taishan, has some practical implication for some insight about present Chinese American cultural-psychological, sociological and cultural experiences because HCMC is a well-known today. Perhaps more significantly for the purpose of an article enhancing a small part of the empirical

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[261] Many people heard about "HCM" through the radio address by Ho on 9/2/1945. *See* Duiker, 322-323.

[262] *See id*., 273, 327.

[263] This is an impression from reading both *HCM* and *Vietnam*. Both reported Chinese troops actively prevented fractional violence and took risk to increase the Vietnamese nationalists' leverage with the French. *See* Duiker, 326-365; Goscha, 229-236.

[264] *See* Part III, A.1.c. below for the point that some circulating Yeah-e-G-a folklores might be so extravagant that they invited jokes. Even jokes might have unintended beneficial affect because they might provide background for people to think about some cultural information sounding related to the Yuan era.

[265] According to Professor Kang, repeated exposure to local news involving pictures of black suspects in violent crimes likely fuel the very demonstrable implicit bias toward black people. *See Trogen*, 1495.

grounding of the main law review article, *The Reverberations*, grappling with the implication sheds a nuanced light on *The Reverberations*' point about socio-economic bias in the moral reasoning[266] of the American constitutional gay jurisprudence.

## A. An Unidentified Cultural-Psychological Catalyst for Formation of More Fountains of Social Capital with Chinese Immigrant Communities in America

HCMC plausibly provides more bases for the kind of experiences hypothesized in *The Reverberations* as having unnoticed salutary effects on Chinese American cultural experiences, from the time "Ho Chi Minh" ("HCM") first appearing on a map to present, as a result of some people's cognition that it sounds like a pride-generating episode in Guangdong history[267]. Because "HCMC" appears from time to time to many people in the Pearl River delta region ("PRdr") in the non-political, non-historical contexts, such as destination signs for airlines with direct flight to HCMC at major airports, as a result, seeing "HCMC" plausibly tends to affect individuals who are aware of its "Mongolian for Ming [Dynasty]" shade of meaning, analogous to affecting individuals who know about the Vietnam War's outcome and Ho's role in it, though the cumulative effects of the latter scenario will likely remain forever much larger because the Vietnam War will be forever much more important to the living than the peaceful dynastic transition in Guangdong in the 14th century[268]. As argued in *The Reverberations*, both encountering folklores about aspects of Yuan empire's apparent honorable ending in Guangdong ("Yeah-e-G-a")[269] and encountering their more entertaining echoes, as in rumors and jokes, have salutary downstream sociological and cultural effects.[270] Encountering "HCMC" plausibly has effects on some individuals, ironically analogous to hearing a Yeah-e-G-a joke, subconsciously (but automatically) priming a schema about a prior folklore experience, which might in turn subconsciously (but automatically) priming schemas of wholesome behavioral choices[271]. To support this ironical hypothesis and to further hypothesize cumulative impact of some individuals experiencing the effects, this segment begins with a review about the

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[266] *Cf*., *Poe v. Ullman*, 367 U.S. 522 (Harlan dissenting).

[267] As an academic exercise to demonstrate the notion that the cognition is not a very challenging one for a Guangdong-an with a high school education, the Chinese words for "HCM" all surface ZL E1, *see* footnote 16 above, and the YeGif governor being highly trusted with important posts by Emperor Zhu appears at ZL E10, 37:45-38:29. Thus, one could plausibly experience the cognition just by watching two Zhu lecture episodes.

[268] *The Woman Warrior* mentions the Vietnam War's effect on a Chinese American family, but one has to know the requisite Chinese history and Guangdong history—likely plausible only through a formal high school education in Guangdong, or a college education majoring in history, or a lot of independent study in history--in order to recognize its allusion to the Yeah-e-G story.

[269] Yeah-e-G-a folklores belong to a subsect of RYAVs folklores discussed in *The Reverberations*. *See* footnote 19, 2nd paragraph above.

[270] If *The Reverberations* reader has done something healthy, family-conscious, or community-conscious that he or she would not otherwise have done, he or she has experienced a salutary downstream effect. For the author, trying to understand some Taishan jokes at least contributed to smoke only before written examinations.

[271] This is a hypothesis based on scientific evidence of implicit bias against black people. When racial blackness is primed, the schema of likely criminality is also primed. *See Trogen*, 1491-1492. There is also scientific evidence that wholesome behaviors can be primed too. *Cf. id*. 1557-1558 (seeing image of Martin Luther King tending to lessen implicit bias against black).

hypothesized mechanism of how hearing a Yeah-e-G-a joke plausibly facilitates social capital production.

### 1. A Review of the Nuanced Mechanism for Yeah-e-G-a Jokes Facilitating Social Capital Production

To review the apparently laughable notion of how hearing a Yeah-e-G-a joke potentially having downstream salutary effects, this segment begins by making something implicit in *The Reverberations* explicit, establishing an analytical framework for hypothesizing the existence of a socially beneficial cultural-psychological experience on the basis of a stylized hypothetical example. This segment then follows with a review of the informed speculation, on the basis of insights from modern social science research findings, about the mechanism of how hearing Yeah-e-G-a folklores in realistic scenarios facilitates social capital production. This segment concludes with reviewing the cultural and psychological bases for a nuanced subset of cultural experiences based on the Yeah-e-G-a folklores, the Yeah-e-G-a jokes, and how modern mind science findings on the basis of a very serious topic, unconscious behavioral consequences arising from implicit attitude toward African-Americans, supports the hypothesis that hearing the Yeah-e-G-a jokes potentially engenders even more cumulative downstream salutary effects than hearing the Yeah-e-G-a folklores.

#### a. The Paradigmatic Hypothesized Mechanism

The hypothesized case for purpose of developing a more explicit analytical framework for applying modern mind science findings to hypothesize the effects of more realistic exposures to the Yeah-e-G-a folklores is that analogous to hearing about YeGif governor Chen surrendering to the Ming army and then being entrusted by the Ming empire with critical national rehabilitation assignments in the televised lecture by a respected scholar.[272] The hearer hears about the Yuan empire's initial dark beginning, followed by the story of YeGif evolving over the conquest mentality, gaining support for the people under its rule, becoming a driving force for increasingly improving inter-ethnic relation within the Yuan empire, and finally choosing peace over war and rallying for the Ming empire's success,[273] and he or she believes what he or she has heard because the folklore-teller is a trusted person in the community. If the hearer has previously gotten information that he or she is a direct descendant of a Mongolian taking part in the conquest of China[274], he or she might suspect that his or her different ancestors during the Yuan dynasty might have both been implicated in Khubilai khan's troops' conquering violence[275] and contributed to aspects of the Yeah-e-G story, he or she may get the idea that he or she can contribute to honor his ancestors,[276] including the ones suffering directly from Khubilai khan's conquest, through increasing the proportion of the Yuan empire's good legacy over the dark one by being more able to

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[272] *See,* ZL E10, 37:45-38:29.
[273] *See* Part I, A.1.b. above.
[274] *Cf*. Chinese Locations through the Camera, Episode 521, Guangdong, Kaiping, https://www.youtube.com/watch?v=ODC1TCE4ccU, 7:20 (a significant portion of the Kaipin population self-identify as ethnic Mongolians).
[275] *See* Ebrey, 173 (Mongol troops reputed to have massacred the innocent where they met resistance).
[276] *The Reverberations* argues that after two generations, all individuals in control of YeGif were likely ethnically-mixed individuals. *See id*., text accompanying footnotes 135-139 and footnotes.

contribute to the welfare of the community he or she lives in.[277] As contribution to community welfare can take on very different forms, such as making healthy and family-conscious choices, as for example, learning how to be better at cooking rather than gambling.[278] Those choices tend to create both bonding social capital[279] and bridging social capital[280] because family-conscious choices are likely appreciated by family members, and community-conscious choices likely contribute to bridging with different families which may come from different group-classifications above the family level. However, most, if not all, people who have been exposed to the Yeah-e-G-a folklores, the path to salutary effects is likely much more nuanced, and due to modern behavioral science insights, they may experience, cumulatively, similar downstream salutary cultural-psychological, sociological and cultural effects facilitating social capital production.

b. The More Realistic Culturally-contingent Socio-psychological Mechanism

The vast majority of the people exposed to the Yeah-e-G-a folklores[281] for the first time likely experienced[282] the exposure in settings associated with someone trying to create a relaxing environment[283] or enhance his own status before others. Because embellished folklores are likely much more conducive to those goals or the goal of gaining some financial profit than the dry recitations of skeletal historiographical facts[284], the origins of the circulating Yeah-e-G-a folklores have likely been overwhelmingly informed speculations. Some individuals hearing a Yeah-e-G-a

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[277] The experiences of many white Americans might provide an analogy to this line of reasoning. Many Americans apparently became more committed to African American civil rights after taking part in the defeat of Nazism. *See* Lepore, 601-602 (President Kennedy announcing arrival of a war-tested generation in his inauguration), 622 (President Johnson appealing to history to rally support for Voting Rights Act). That increase in support of civil rights might be motivated by individually wishing to increase the portion of America's good legacy, emancipation of black slaves and liberation of many people in Nazi death camps, over its dark legacy, enslaving black people. *Cf.* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1035 (2003) (Human beings act on the basis of rational ignorance).

[278] Early Chinese immigrants were reputed to be good at cooking and support underground gambling industry. *See* Kwong, 144, 147.

[279] It is inward looking, such as based on same extended family. It is good for getting by lives' many challenges. *See* Putnam, 22-23.

[280] It is outward looking, such as non-family members who have connection to jobs. It is good for getting ahead. *See id*.

[281] People desire to have some entertainment in their lives and a market for books for fictionalized accounts of the past on the basis of skeletal historiography had developed at least by the Ming dynasty. *See* Ebrey, 202-203. *Cf.*, Palmer, xxi (*The Romance of the Three Kingdoms* being a novel plausibly based on true historical events). Real life experiences could in theory also be an origin if people living in 14th century wrote memoirs about the experiences and the memoir survived for centuries. *But cf.* Fairbank, 191 (noting that Chinese seafarers did not write memoirs). There would likely be folklores based on different levels of embellishment on the basis of skeletal historiography pointing to the Yeah-e-G story.

[282] The past tense is used because this part is about reviewing effects of something already happened in the past. When a reaction or effect depends on culture or nature, present tense is used.

[283] One such possibility is story-telling to children, as Mrs. Kingston's experience with story-telling by her mother, *see* Warrior, 19. Another such possibility is story sharing among gathering of adults in a social event, such as a fund raising event for a worthy cause, as in Chinese immigrants having fund-raising events for China during the Second Sino-Japanese War, *see* Kwong, 197.

[284] If events in Denmark of centuries before had not been embellished, *Hamlet* would not likely be a success. *Cf.* https://www.britannica.com/topic/Hamlet-by-Shakespeare (a play based on heard history).

folklore for the first time might consciously reflect on different experiences in order to see if what he or she had heard makes sense.[285] In order to try to see if the folklore made sense, three social-capital-friendly ideas and/or schemas[286], ethnic-mixing/ancestor-honoring-culture, social harmony, and synergy from collective action, were likely triggered.[287] Some might then find the Yeah-e-G-a folklore credible because ethnic mixing and ancestor-honoring would logically tend to enable people to turn the page on a dark beginning of oppression on the basis of ethnicity. Similarly, many people were familiar with the concept of harmony, and hearing a Yeah-e-G-a folklore likely evoked the idea of ethnic harmony since pursuing its benefits would be congruous with the conditions logically associated with events inspiring the Yeah-e-G-a folklore, increasing the credibility of the Yeah-e-G-a folklore. Similarly, as people have been familiar with the concept of collective action synergy, the Yeah-e-G-a folklore made more sense when the synergistic effects of collective action, such as massive complaints about Yuan empire's ethnic oppression policies, were taken into account. When any permutation of a combination of the three ideas was taken into account, the Yeah-e-G-a folklore likely made even more sense.[288] All three ideas, ethnic-mixing/ancestor-honoring-culture, ethnic harmony, and collective action synergy, tended to steer individuals to make behavioral choices that contribute to production of social capital, as cultural experiences, humility by the privileged, and shared interest are known to facilitate social capital production.[289]

Modern research about human behaviors shows human nature can be a blessing when it comes to encountering a Yeah-e-G-a folklore.[290] Because people act on rational ignorance, some folklore hearers might experience an effect resembling to some degree to the hypothesized scenario described in sub-segment a. above, and made habit-changing decision, such as stop gambling. Even for those who act on a different kind of rational ignorance and are predisposed to treat any feel-good story about developments occurring centuries ago as pure entertainment, some might evaluate why the folklore-teller had perceived the folklore to be credible enough to share at the risk of embarrassing himself/herself and trigger the same ideas in the process. Once a set of ideas have been activated in connection with a particular folklore version, when a different version is presented, even if the hearers do not consciously evaluate about the different version, the concepts associated with the set of ideas may be subconsciously

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[285] How one is affected by a piece of information depends on one has already known. *Cf*. Dan M Kahan, Cultural Cognition as a Conception of the Cultural Theory of Risk *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1123807 ("Kahan"), 37-38 (information affirming an individual's cultural identity tending to get more attention).

[286] "Idea" refers to a conscious conception. "Schema" refers to a notion foregrounded subconsciously. *See* Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130 (2000), 1141, footnote 33.

[287] This experience may be similar to American voters evoking their knowledge of economics, nationally, locally, and personally, upon hearing an U.S. presidential candidate's claims about how he or she can improve their lives. *Cf*. https://www.politifact.com/article/2024/sep/30/kamala-harris-2024-campaign-promises-here-are-her/ (presidential candidate Kamala Harris making promises about housing and price-gouging).

[288] *See The Reverberations*, Part II, B.

[289] *Cf*. Putnam, 329 (a study of an Italian American community finding that socially reinforced community-sensitive choices, family values, and good behavior resulted in unusual low heart attack rate despite of being above average on risk factors). Professor Putnam argues for a correlation between social capital and individual physical health. *See id*.

[290] *See* Volokh, 1035.

primed.[291] Even for individuals who concluded that what they had heard was completely fictional, when an idea was evoked to evaluate a piece of information, it was likely more robust than schemas foregrounded through subliminal background information.[292] As even the possibly less robust subconscious schemas foregrounded through subliminal background information can steer individuals to wholesome choices,[293] it is very plausible that everyone who has experienced the ancestor-honoring schema being primed makes some minor choices tending to be healthier and more family-conscious within 48 hours,[294] contributing to bonding social capital with people living together and cultural capital[295] to observers who perceive what they observe to be a social norm[296] and make more healthier and family-conscious choices. Similarly, he may be more inclined to make community-conscious choices, such as throwing a piece of trash at a public trash bin, rather than just on the street, and that also may convey normative information to seers who feel embarrassed about throwing trash on the street again. All the minor salutary behavioral effects thus induced through hearing the Yeah-e-G-a folklores can add up to big impacts as even minor actions can send normative messages to observers and make the messages more robust.[297]

Happily, human nature plausibly expands the paths to operationalize social capital production on the basis of the Yeah-e-G-a folklores in still other nuanced ways because some people experience irrational urges to attempt to raise their social statuses while others find entertainment in making jokes about experienced conditions.

### c. A Set of Nuanced Paths Leading to Similar Mechanism

Many folklore-tellers likely embellished the Yeah-e-G-a folklores according to the immediate audiences' perceived tastes, resulting apparently laughable extravagant versions being passed around.[298] People also liked to elevate themselves through

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[291] For example, being given the idea of an "Asian" tends to prime the notion of higher math ability. *See Trogen*, 1492-1493.

[292] *Compare Nudge*, 3 (attention often leads to action with impact) *with Trogen*, 1492-1493 (female Asian students at Harvard getting a boost on mathematic performance upon being primed about stereotype of being good at math through information about being an Asian).

[293] *See Trojan*, 1505. According to ideomotor theory, the surface of an idea about something causes individuals to act consistently with the idea, such as less likely making unhappy errors about African-Americans upon seeing an image of Martin Luther King. *See id*., 1557-1558.

[294] *Trojan*, 1505, fn. 60 (psychologists describe this process as "ideomotor action", with effects up to 48 hours).

[295] According Pierre Bourdieu, cultural capital is a form of capital that is generally earned. *See* Bourdieu, 46-47. One form of cultural capital is embodied in the person, arriving from informal education from others. *Id*. Preference for healthy, family-conscious choices is embodied in an individual, and is an asset because a healthier individual has the physical health to contribute more and a family-conscious choice contributes to other family members' abilities.

[296] *See* Volokh, 1077-1078 (the normative power of the actual); *see also Nudge*, 53-54 (repetition in seeing something tends to cause individuals to assume that it is the norm).

[297] *Cf.* Volokh, 1079 (People make normative assumptions about possession of plants regulated by legislative institutions they respect). Thus, as an analogy and an example, when impressionable boys see adult males doing cooking and dishwashing, they perceive those activities to consistent with manhood.

[298] *Cf*. ZL, E7, 6:35-6:36 (a folklore about Emperor Zhu's advisor having gotten a book from the heaven).

making claims to important lineages,[299] resulting in rumors about descending from high status individuals connected with the Yeah-e-G-a folklores.[300] Apparently extravagant versions of the Yeah-e-G-a folklores and rumors likely invited jokes about them,[301] which in turn also likely triggered the ethnic-mixing/ancestor-honoring and other ideas (or schemas), as people tried to be smart about the jokes. These more entertaining Yeah-e-G-a folklore echoes might just have even greater cumulative sociological impacts arising from subconscious experiences because entertaining information tended to pass around more and further.[302]

Having reviewed some nuanced paths for Yeah-e-G-a folklores and their more entertaining echoes to lead to more social capitalism for people from PRdr, the one path likely providing the deepest insight for the hypothesis of the apparently controversy-inviting "HCMC" catalyzing more formation of extra fountains of social capital for Chinese immigrants in America is, ironically, the one associated with the Yeah-e-G-a jokes, for the simple fact many funny jokes are three sentences or less, and they are funny when they cause the listeners to reflect[303].

### 2. Encountering "Ho Chi Minh" Plausibly Having Similar Effects as Encountering a Yeah-e-G-a Joke

For individuals familiar with the shade of the meaning of the word "Ho"--or phonetized according to mandarin Chinese as "Hu"[304]--referring to Mongolians in the past[305] and the 14th century Guangdong history or the Yeah-e-G-a folklores, they may notice the co-incidence of "HCM" sounding like a Yeah-e-G episode, and become intellectually connected to that episode consciously or subconsciously, similar to hearing a Yeah-e-G-a joke. If an individual with the pre-requisite culture exposure consciously notices the co-incidence,[306] even if he or she does not reflect further, that conscious notice may prime the schemas associated with having heard something very good about YeGif. That plausibly in turn primes the schemas associated with wholesome behavioral choices. Even if he or she notices the co-incidence only at a sub-

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[299] Purportedly, Emperor Zhu himself is known to have experienced such urge. *See* ZL E1, 36:29-38:35 (purportedly Emperor Zhu had felt embarrassed about his own humble background and had even after becoming an emperor claimed to have descended from an important lineage until feeling embarrassed about it).

[300] *Cf*. http://www.cnts.gov.cn/tssrmzf/zjts/lswh/xsyl/tsxs/content/post_2892023.html, para. 16 (a Taishan web page claiming Taishan to be the ancestral homeland of the Vietnamese Nguyen monarchs and insinuating that Ho descended from the same Taishan family).

[301] *Cf*. Manuel Komroff, *Introduction, in* The Travels of Marco Polo xxii (Liveright Publishing Corporation, 1953) (people joking about Marco Polo because they did not believe in his account of experiences in China).

[302] As an analogy, the fictional work, *The Woman Warrior* was a national bestseller. *In Search of Equality*, a book about early Chinese immigrants utilizing the American judicial process to seek remedies for discrimination they experienced, likely never even came close.

[303] Years ago, Jay Leno joked about a U.S. Supreme Court decision making more difficult for enacting race-based affirmative action policy with only a one liner, "Now, John Stockton will be the only white NBA player left." One needed to have some idea about NBA sociology in order to find the joke funny.

[304] *See* Allen, viii-ix.

[305] One can get that idea from ZL, E1, for example. *See* footnote 16, 3rd screenshot; footnote 18, 3rd para.

[306] This may happen much more frequently in an airport when one has nothing much to do than waiting, and even more frequently on a flight with a destination to HCMC because there is only so much one can do sitting inside an airplane.

conscious level,[307] the sub-conscious experience likely has the similar priming effects.[308]

### 3. Plausibly Multiplying Effects Arising from Frequent Encounters

Unlike a Yeah-e-G-a joke, which may never be heard again after hearing it for the first time, "HCMC" appears on destination boards at international airports frequently. The cumulative effect of repeated subconscious schemas of healthy, family-conscious choice being primed through a Yeah-e-G-a folklore being consciously surfaced or subconsciously primed as a result of seeing "HCMC" could be significant. Perhaps more impactfully, an individual experiencing a conscious surface of a Yeah-e-G-a folklore upon seeing "HCMC" may talk about the co-incidence to other individuals, especially when he gains confidence about the potential cultural or socializing value upon knowing about the Little Ice Age and cultural information apparently connecting central Vietnam to PRdr[309], similar to someone noticing the co-incidence deciding to write about it in the form of an American law review article[310]. Those other individuals may make conscious mental engagements about the co-incidence they may not otherwise have. For some individuals who have heard a Yeah-e-G-a folklore and dismissed it as just literary fantasy, they may re-evaluate that view, resulting in more conscious engagement about a memory of a Yeah-e-G-a folklore from a different angle, resulting in healthy, family conscious choices in the process—and plausibly making a commitment to learn more about 14th century Guangdong history. Likewise, for some individuals who have heard only a version of the Yeah-e-G-a folklores' more entertaining echoes, such as jokes about apparently extravagant Yeah-e-G-a folklores or claims of prestigious ancestral lineages to the Yuan empire, they may re-evaluate the joke, resulting in different kinds of conscious mental engagement similar to that arising from a Yeah-e-G-a folklore, having the same effect of making more wholesome choices.[311] Thus, the salutary effects described in the preceding segment have the potential of being exponentially enhanced. Because "HCMC" now

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[307] This probably occurs to people educated, formally or informally, in Guangdong's general history in the past 1000 years.

[308] *See Trogen*, 1557-1558 (science demonstrating up to a 24-hour effect from priming a schema).

[309] *See* footnote 224 and text accompanying it above.

[310] Incidentally, my first conscious exposure to the YeGif topic came from hearing, as a child, a mathematically impossible claim of being a Yuan royalty-counsin descendant, and many more conscious exposures from jokes about it.

[311] Some disbelieving individuals may decide to make more jokes about the disbelieved idea, triggering the process described above in Part III, A.1. above.

gets to people's attention frequently, the plausible hypothesized beneficial effects may actually multiply as a result of frequent encounters.[312]

Of course, the points in this segment are just informed speculation.[313] But if the reader evokes one of the three ideas, ethnic-mixing/ancestor-honoring, in the process of trying to make sense about the points, that instantiates the point in *The Reverberations* that some apparently extra fountains of social capital in Chinese American communities are culturally contingent, and cumulatively they contribute to Chinese Americans' high level of social citizenship experiences[314], resulting in more robust perception by many Chinese immigrants about the empirical connection between hetero-normality and higher quality of life.

## B. A Nuanced Insight about the Moral Reasoning in Jurisprudence over Cultural Issues

The newly nuanced insights about "HCM" and its potential cultural-psychological impacts also contribute to the point about judicial incompetence in resolving cultural conflicts made in *The Reverberations* and by many others in other contexts[315]. Besides a nuanced set of empirical support to *The Reverberations*, this investigation also sheds a nuanced light about the mechanism of unknown biases creeping into the moral reasoning on a cultural issue. The notion that "HCM" literally means "Mongolian for Ming [dynasty]" sounds fantastical, but when it is placed in the context of specialized knowledge of Guangdong history and Chinese language, a seemingly silly notion becomes plausible. Likewise, the notion that Ho might know that meaning also sounds fantastical, but when it is placed in the context of specialized knowledge of vivid cultural information that the people of Taishan and people of Vietnam had been close and satellite photos of the Taishan coast having geographical features similar to Singapore and Pearl Harbor, a fantastical notion becomes plausible.

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[312] Incidentally, as another indication of the historical closeness between the people of Taishan and the people of Vietnam, HCMC's former name "Saigon" sounds like the Taishan dialect for the Cantonese expression meaning "water bank with a sunrise view". Compare the map of Hong Kong's Sai Kung district to HCMC's district 1,

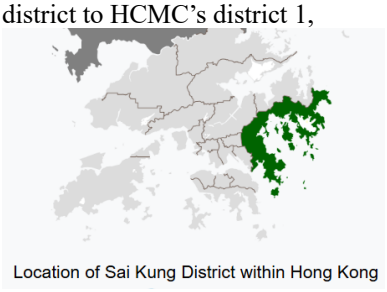



Image P

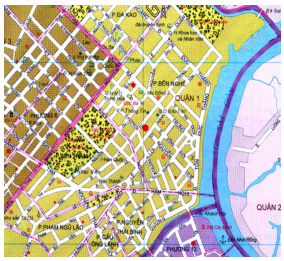


Image Q

Screenshots from https://en.wikipedia.org/wiki/Sai_Kung_District, https://virtual-saigon.net/Asset/Preview/vcMap_ID-1186_No-1.jpe[g], respectively.

[313] Because this line of speculation is informed by socio-psychology research, see, e.g., it is at least as informed as the socio-psychological testimony of several Chinese Americans in support of comparing same-sex marriages to inter-racial marriages on constitutional grounds. *Cf. Brief of Amici Curiae Asian American Bar Association of the Great Bay Area & 62 Asian Pacific American Organizations in Support of Respondents Challenging the Marriage Exclusion*, 14 Asian PAC. AM. L.J. 33 (2008) (reprinted in the law journal), 45-52 (asserting that Chinese American experiences support judicial constitutionalizing same-sex marriage on the basis of several individuals, all apparently from middle class backgrounds, testifying about their cultural-psychological and socio-psychological experiences).

[314] *See* footnotes 30-31 and accompanying text above.

[315] *See e.g.,* Justice Scalia's dissent in *Romer*. 636.

In the same line of reasoning extending further, the notion of a Southeast Asia geographical name in a non-political, non-historical context having potential downstream salutary behavioral effects, otherwise sounding completely ridiculous, becomes plausible under the lenses of the aforementioned set of specialized knowledge and the modern socio-psychological findings that mental schemas primed subconsciously affect behavioral choices. This line of reasoning of plausibility under specialized knowledge provides an analogy to argue that dismissing privileging hetero-normality as based on irrational fear is a concept based on socio-economically inflected epistemic bias. People from economically privileged backgrounds may view homo-sexual acts as no different from hetero-sexual acts, having high level of expressive value[316]. For the poor, the notion that sex has a high value in individual expression is a debatable concept because the poor cope with all kinds of physical deprivations as results of poverty all the time. From those experiences, many view sex for pleasure as no different from having ice-cream in a very hot day, it is something they like to have but can do without, and when they make the decision to do without, they get the twin benefits that resources preserved go to meet more urgent needs, such as having enough money to pay rent, and the psychological fulfillment of making good choices. The experience with the first benefit likely eludes the economically privileged because they never come close to experiencing homelessness personally;[317] and the experience with the second benefit comes much less frequently because they usually do not experience the deprivations and inconveniences associated with poverty. With the benefit of sex for pleasure being significantly less valuable for many poor individuals, the perception that male homosexual acts are unhealthy, supportable by widely available public information,[318] has less beneficial value to offset against. Thus, for many poor individuals, privileging hetero-normality is good policy because it tends to discourage people from experiencing homo-sexual acts, thus slowing down the pace of growth of public health problem associated with promiscuous male homo-sexual acts[319].

As a matter of doctrinal analysis for the 14th Amendment purpose, it is adequate to show that there is a good faith basis for an hypothesis that deprivileging hetero-normality could have negative downstream consequences.[320] Because that provides a legitimate ground to be cautious about deprivileging hetero-normality, it also provide legitimate concern about deprivileging hetero-normality having, as downstream consequences, even more severe negative effects for many disadvantaged individuals as results of their higher levels of reliance on social capital[321] and consequently higher levels of harm from its leakages. Just because judges did not know about plausibility of the severe negative effects did not mean that it did not exist, analogous to the fact

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316 *Cf. Lawrence v. Texas*, 539 U.S. 558 (2003), 562 ("Liberty presumes an autonomy of self that includes freedom of … expression, and certain intimate conduct").

317 As an analogy to support this point, scholars of American literature would not have been able to recognize that *The Woman Warrior* contains echoes of a Yeah-e-G-a folklore until someone with knowledge of the founding of the Ming empire, Chinese culture, and Guangdong history read it. If it were not for the unexpected availability of time (as a result of a crime in California State Bar court causing his wrongful disbarment), *Some Echoes* author would not likely have read *The Woman Warrior*, and it would probably take another 40 years for someone to recognize that *The Woman Warrior* contains some echoes of the inspiring YeGif story.

318 *See, e.g.*, Ayres, 614-615.

319 *See id.*

320 *See Heller v. Doe*, 509 U.S. 312, 319-320 (1993).

321 *See* Putnam, 299 (making the point that social capital is especially important to those lacking financial capital and human capital).

that the name "HCM" or "Hu Guang" has constitutive meaning potentially reflecting about past Chinese immigrant cultural experiences even though Chinese American studies scholars have only known the name "HCM" in connection with a city providing many immigrants fueling the continuing vitalities of old Chinatowns[322].

## CONCLUSION

This article introducing a small subset of ongoing cultural and cultural-psychological experiences by some Chinese immigrants provides slightly more empirical support to *The Reverberations*' thesis that because of an unique set of cultural experiences associated with cultural information arising from an unique set of historical developments in Guangdong in the 14th century, Chinese immigrant communities to America have always enjoyed culturally-based extra fountains of social capital, facilitating Chinese immigrants to enjoy high levels of social citizenship experiences exceeding socio-economic status expectations, past and present, despite of many disadvantages, vividly demonstrated in the quick impact Chinese immigrants had on American constitutional experiences through *Yick Wo* and the fact that Chinese Americans today enjoy the highest life expectancy despite not having the most glowing socio-economic-status statistics[323]. Hopefully, this probe increases the purchase in *The Reverberations*' criticism that the modern American constitutional gay jurisprudence amounted to regressive social capital taxation in favor of an influential political minority, resulting in more enlightenment-oriented—as expressed in Vietnamese, "chi minh"[324]—discussion of the longstanding criticism of the American constitutional gay jurisprudence[325].

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[322] *Cf., e.g.,* Lee, Erika, 326 (many Vietnamese refugees after Vietnam War were ethnic Chinese). Unfortunately, even Professor Lee's book overlooked a cultural phenomenon easily detectable to people with specialized knowledge in the Chinese language and finding Chinese language entertainment to have good economic value, as shown through the following screenshots from Youtube,


Image R


Image S



Image T

The first is a screenshot from a Chinese TV drama series about the initial phase of the Second Sino-Japanese War, with a Chinese communist officer holding at her bosom her lover, a Kuomintang officer, who had just died from a battle. The show was broadcasted in about 2013. *See* https://www.youtube.com/watch?v=mT_FLtw82ws&list=PLpOrKhctpA_IA41I_cIVlkOmPEzmuW4PF&index=40. The second is a screenshot of a war movie culminating in Kuomintang troops successfully defending against a major Japanese offense at northern China city. *See* https://www.youtube.com/watch?v=de4YAlcL-Q8&t=7477s, 2:04:38. The movie was made in the 1980s. The third screenshot is from a 2019 Chinese TV movie in which Chiang Kai-shek expressed his decision to respond militarily to Japan's aggression toward China. *See* https://www.youtube.com/watch?v=BK-sVKrzijI&t=4s, 4:49. These cultural experiences likely have cultural-psychological effects on Chinese immigrants that counsel against taking part at supporting a culture of disrespect for people's will.

[323] East-Asian-Americans have the highest level of socio-economic status. *See* Baluran,1644.

[324] *HCM* identifies it to mean "enlightens". Duiker, 248-249.

[325] *See, e.g.*, Justice Scalia's dissent in *Romer*. 636.

# A FEDERAL TORT FOR THE AGE OF ALGORITHMS: THE AI ACCOUNTABILITY AND PERSONAL DATA PROTECTION ACT

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**Abstract**: The AI Accountability and Personal Data Protection Act (AAPDPA) was introduced by U.S. Senators Josh Hawley and Richard Blumenthal on July, 21 2025. It marks a significant legislative initiative aimed at establishing a federal civil liability for the unauthorized use of personal data and copyrighted material in the development or deployment of artificial intelligence systems. This article analyzes the bill's scope, definitions and remedial framework. It also situates it within broader trends in U.S. privacy and AI regulation and assesses its implications for compliance, litigation risk, and federalism. This Senate bill reflects a profound evolution in the United States toward a more rights-centered approach with regards to the mass commercial and technological exploitation of personal data.

**Keywords**: AI; Personal Data; Digital Law; Federal Law; Comparative Legal Systems

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## INTRODUCTION

On July 21, 2025, senators Josh Hawley and Richard Blumenthal introduced the AI Accountability and Personal Data Protection Act, a bipartisan bill that would create a federal private right of action against entities that exploit personal data or copyrighted works in artificial intelligence (AI) systems without prior, express consent.

While the U.S. has traditionally approached privacy and technology regulation in a fragmented, sector-specific manner, the AAPDPA proposes a cohesive and enforceable liability structure for the use of sensitive data in emerging AI technologies.[1]

## I. LEGISLATIVE CONTEXT AND PURPOSE

The AAPDPA emerges amid increasing public concern over the opaque and largely unregulated data practices of generative AI platforms.[2] The bill's stated aim is to hold accountable "any entity that collects, processes, sells, or uses personal data or expressive works without express consent"[3], particularly in the development or deployment of artificial intelligence. Unlike earlier American privacy frameworks, this bill centers civil enforcement by individuals, rejecting the traditional model of agency-led oversight. The legislation reflects a notable convergence of civil liberties, consumer protection, and copyright discourse—particularly in light of ongoing litigation against firms such as OpenAI, Meta, and Stability AI for alleged unauthorized data use.[4] Some might see this as another Brussels effect.

## II. SCOPE AND DEFINITIONS

The bill outlines a set of definitions that shape its scope and reflect the lawmakers' intent to address personal data use comprehensively within the digital ecosystem.

It defines "artificial intelligence system" as "any data system, software, hardware, application, tool, or utility that operates, in whole or in part, using artificial intelligence."[5] This broad scope intentionally captures a wide spectrum of generative and predictive models and intends to encompass all emerging technologies that could exploit personal data for the purpose of automated content generation.

In terms of scope, the bill is meant to apply to all "covered data".[6] In a few words, this term includes all information, data or material that directly or indirectly "[…] identifies, relates to, describes, is capable of being associated with, or can reasonably be linked, directly or indirectly, with a specific individual"[7]; it constitutes an exceptionally broad definition, which is both novel and legally consequential for

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[1] Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583 (2014).
[22] Int'l Ass'n of Privacy Pros., *Consumer Perspectives on Privacy and Artificial Intelligence* (2024), https://iapp.org/resources/article/consumer-perspectives-on-privacy-and-artificial-intelligence (summarizing Pew Research Ctr. & KPMG findings).
[3] S. 2367, § 2(b), 118th Cong. (2025).
[4] Complaint, *Tremblay v. OpenAI, Inc.*, No. 3:23-cv-03223 (N.D. Cal. July 5, 2023).
[5] S. 2367, § 2(3).
[6] S. 2367, § 2(4).
[7] Id. § 2(4)(a)(i).

the American legal framework. Also, While the bill's primary aim is data privacy, it also applies to material that "is generated by an individual and is protected by copyright, regardless of whether the copyright has been registered with the U.S. Copyright Office or any other registration authority."[8] This broad definition applies not only to registered copyrighted works, but also to any work that is capable of copyright protection. While not explicitly defined *per se* further in the bill, the term may include expressive content (such as text, images, or audio), behavioral data, and other forms of human-derived input scraped or collected from public and private sources.[9] It emphasizes the human origin of the data that fuels AI systems and marks a legislative effort to distinguish such data from purely synthetic or machine-generated alternatives.

By emphasizing "human-generated" content, the bill expands the scope of liability to cover training datasets that include creative or personal information originally produced by individuals. This may encompass publicly available web content, unregistered works, or metadata associated with human behavior. As such, even non-identifiable or anonymized content may fall within the Act's protections if it originated from a human source.

The term introduces several legal and operational complexities. For instance, AI developers may struggle to determine what portion of their datasets qualifies as human-generated, and whether sufficient consent has been obtained. In cases where models are trained on mixed datasets (comprising both synthetic and human-generated inputs), the legal exposure may hinge on the presence and proportion of human-origin data.

Key terms include:

- "Covered data": encompassing personal identifiers, behavioral data, and biometric information. As explained earlier, this term is defined to encompass all information that identifies, or is reasonably capable of identifying, an individual, whether directly or indirectly. This includes personally identifiable information such as, for example: behavorial data, biometric information, browsing history, geolocation data, and even copyrighted content, such as artistic and intellectual works.

- "Express, prior consent ": The term "express, prior consent" means a clear, affirmative act by and individual, made in advance of any appropriation, use, collection, processing, sale, or other exploitation of covered data, indicating a freely given, informed, and unambiguous consent to the specific appropriation, use, collection, processing, sale, or other exploitation of covered data of the individual.[10] The consent required under the bill is characterized as "express and prior". this notion is very close to the notion of consent developed by the General Data Protection Regulation (GDPR) and moves away from popular concepts in American data-protection such as opt-out.[11] Probably inspired by the European conceptions (notably the General

[8] Id. § 2(4)(a)(iii).
[9] Margot E. Kaminski, *The Right to Explanation, Explained*, 34 Berkeley Tech. L.J. 189 (2019).
[10] S. 2367, § 2(5).
[11] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 Apr. 2016, art. 4(11), 2016 O.J. (L 119) 1 [hereinafter GDPR].

> Data Protection Regulation); it means a clear, affirmative, and unambiguous manifestation of the individual's will. This positioning expressly excludes any form of implied consent or consent obtained by default (for example, the consent by "opt-out"), which are popular concepts in the current American data-protection legal frameworks.

Regarding this bill's personal scope of application, it is broad and includes both natural persons and legal entities. "Any person who, in or affecting interstate or foreign commerce, appropriates, uses, collects, processes, sells, or otherwise exploits the covered data of an individual, without the express, prior consent of the individual, shall be liable to the individual."[12] Put differently, this proposed legislation would impose civil liability on anyone who, "in or affecting interstate or foreign commerce," uses covered data — including for training AI systems or reproducing it as an AI-generated output — without the individual's express, prior consent.

Notably, the bill makes no express exemption for academic, nonprofit, or research-based use, suggesting that all uses of personal or expressive data are presumptively unlawful without affirmative authorization. This is particularly noteworthy given ongoing debates within the scholarly community about the potentially unfair use of academic work by generative AI models. The rationale behind it must be that these kinds of exceptions could be a loophole beneficial for actors of the private sectors (some foreign systems who implemented such exceptions are currently struggling with their application, especially private-public research partnerships that allow private actors to process the data for commercial purposes).

## III. LIABILITY

At the heart of the AAPDPA is a newly established federal tort aimed at addressing harms arising from the use of covered data by any natural or legal person without obtaining the requisite consent.

This liability also encompasses entities that knowingly assist, facilitate, or derive benefit—direct or indirect—from such unauthorized exploitation. This includes, for example, those who provide tools, platforms, or services that enable or amplify the misuse of personal data.

The bill creates a private right of action in federal court, authorizing individuals to seek:

- Compensatory damages;
- Statutory damages (minimum $1,000 per violation);
- Treble profits derived from unauthorized data use;
- Punitive damages for egregious conduct;
- Injunctive relief;

[12] S. 2367, § 3(a).

- Attorney's fees and litigation costs.[13]

Further, the bill explicitly prohibits predispute arbitration agreements and class action waivers related to claims brought under the Act. This approach positions AAPDPA as a robust consumer-protective statute, one that mirrors the structural remedies found in antitrust or civil rights laws.

## IV. RELATIONSHIP TO EXISTING LAW AND FEDERALISM

Unlike prior federal privacy proposals, the AAPDPA adopts a non-preemptive posture. The bill allows state-level protections—such as California's CCPA/CPRA and Illinois's BIPA—to remain in force where they offer equal or greater protection.[14]

The Act also operates in parallel with existing federal statutes, including the Copyright Act and sector-specific laws such as HIPAA and COPPA. It does not require proof of copyright registration, thus enabling claims based solely on unauthorized use of expressive works. This structure reflects a growing federalist compromise: setting national baselines for rights, while allowing states to maintain or expand upon them. For AI practitioners, this implies a multi-jurisdictional compliance challenge.

## V. CRITICAL EVALUATION

The AAPDPA represents a shift toward rights-based data protection in the U.S., aligning in key respects with the GDPR. It enshrines express consent as a prerequisite for data processing, mirroring GDPR arts. 6(1)(a) and 9(2)(a) and imposes transparency obligations akin to GDPR arts. 12–14.

The AAPDPA offers several notable strengths. Most importantly, it empowers individuals to challenge unauthorized uses of their data directly, rather than relying exclusively on agency enforcement. By introducing statutory damages and treble profits, the bill creates powerful incentives for accountability and deterrence. Its decision not to preempt state law preserves robust protections in jurisdictions like California and Illinois, while also encouraging compliance mechanisms such as consent management and data provenance systems that may become industry standards.

At the same time, the proposal presents weaknesses that could complicate its effectiveness. The bill's reliance on private litigation raises concerns about uneven access to enforcement and potentially inconsistent outcomes. Its broad definitional reach risks sweeping in protected speech, fair use, or non-commercial activity, raising constitutional and policy questions. Moreover, the prospect of increased exposure to class actions—including "no-injury" suits premised on technical violations—creates significant litigation risk for companies developing or deploying AI systems.

For general counsel and compliance officers, these features of the bill translate into concrete operational challenges. They will have to determine how consent should be meaningfully captured and documented, what constitutes adequate due diligence when acquiring or licensing third-party datasets, and how can AI developers mitigate

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[13] Id. § 3(b)(2)(A).
[14] Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. Davis L. Rev. 1183 (2016).

legal risks across overlapping (state and federal and foreign) regimes. These questions illustrate both the promise and the complexity of embedding a private right of action at the heart of federal AI governance.

## CONCLUSION

The AAPDPA signals a clear legislative intent to regulate AI by reinforcing individual autonomy and control over personal and creative data.

This newly proposed bill could significantly affect which materials can be used as training datasets for AI systems (including LLMs) and, thus, have a profound impact on current methods of LLM training. Beyond prohibiting the use of personally identifiable information in model development, the bill would also impose liability for the use of potentially copyrighted content. Clarifying the liability issues associated with the use of AI systems is a major step toward ensuring the responsible deployment of this technology. Consequently, this Senate bill may represent a pivotal step in shaping the future legal framework governing AI.

Whether or not the bill passes in its current form, it represents a critical milestone in the evolution of American AI law. Legal departments, technology firms, and public interest advocates should prepare for a new era in which data accountability becomes enforceable not merely as policy—but as federal tort law.

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