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LETTER FROM THE EDITOR-IN-CHIEF

Dear Reader,

The Editorial Board and Staff of the *University of Baltimore Law Forum* are pleased to present the second issue of the 2025-2026 academic year. As Maryland's premier legal journal, our Staff strives to provide legal professionals with thoughtful insights to facilitate meaningful discussions on Maryland law.

This issue focuses on the new and rapidly evolving intersection of the law and Artificial Intelligence ("AI"). Our first Article explores how AI-driven drone programs outpace existing legal precedents and advocates that Maryland must enact comprehensive legislation to embed Fourth Amendment protections directly into the technical design and operational limits of autonomous police surveillance. The following article argues that "Deceptive Deepfakes" lack First Amendment value and should be subject to specific criminal prohibitions modeled on historical common-law prohibitions on forgeries. We conclude the Article selections by exploring the ethical responsibilities that lawyers should uphold when integrating AI into their practice.

The publication then showcases a curated selection of student scholarship, determined by the Editorial Board. All the student-written comments discuss AI and the energy infrastructure required to sustain it. Caroline Bryd discusses potential biases in AI stemming from legacy systems, specifically in Maryland's mortgage lending. Michael Zelley advocates for the expansion of nuclear power in Maryland, providing strategic guidance for the Maryland Legislature. Additionally, Marisa Basignani fights against the Maryland Piedmont Reliability Project's plan to build power lines for data centers across farmland in agricultural preservation. Beyond these features, Issue Two presents six recent developments in Maryland law from the Supreme Court of Maryland. These essays, written by our Staff Editors, discuss some of Maryland's most significant rulings and their impact on the legal community. For more work from our Staff this year, please visit ublawforum.com to read our Hot Topics.

This publication reflects the extraordinary work of our Staff Editors, Associate Editors, and Editorial Board. To the dedicated Staff of *Law Forum*, thank you for your tireless commitment and meticulous attention to detail throughout the production of this volume. As I conclude my tenure with this final issue for Volume 56, I am incredibly grateful for all the *Law Forum* team has achieved. I look forward to seeing the innovative scholarship and dedication these Staff Editors will undoubtedly bring to future volumes as they continue to advance the legal conversation in Maryland. Thank you, also, to the many faculty members who have encouraged and guided our Staff throughout this issue.

On behalf of the *University of Baltimore Law Forum*, we thank our readers for your lasting support and interest in our publication. We hope you enjoy this issue.

Sincerely,
Michaela "Odi" Odian, Editor-in-Chief
University of Baltimore Law Forum, Volume 56, Issue 2

Member, National Conference of Law Reviews

UNIVERSITY OF BALTIMORE LAW FORUM

VOLUME 56 SPRING 2026 ISSUE TWO

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ARTICLE

WHEN DRONES DECIDE: AI, PERSISTENT AERIAL SURVEILLANCE, AND MARYLAND LAW

By: Simon Caine*

ABSTRACT.

This Article examines how AI-assisted drone programs—exemplified by Montgomery County, Maryland's Drone as First Responder initiative—are rapidly outpacing the constitutional doctrines meant to restrain government surveillance. As autonomous functions, intelligent tracking, and cloud-based video archives migrate from military systems into domestic policing, traditional Fourth Amendment frameworks built around human perception and episodic observation no longer suffice. Supreme Court precedents on aerial views, sense-enhancing technologies, and long-term tracking—*Ciraolo*, *Riley*, *Kyllo*, *Jones*, and *Carpenter*—offer partial guidance, but none anticipated algorithmic reacquisition, supervised autonomy, or the mosaic-building power of persistent archives. The Fourth Circuit's en banc decision in *Leaders of a Beautiful Struggle v. Baltimore Police Department* underscores the constitutional stakes: access to a multi-week aerial archive is itself a search requiring judicial oversight.

Against this doctrinal backdrop, this Article argues that Maryland stands at a pivotal moment. The DFR program's rapid-response value is undeniable, yet its technical architecture—semi-autonomous routing, AI-assisted tracking, high-resolution imaging, and cloud retention—creates the latent capacity for persistent, programmatic surveillance. The constitutional question, therefore, shifts from isolated drone flights to system design: who or what initiates surveillance; how long data is retained; when software may track, reacquire, or analyze; and how proximity to the home triggers enhanced protections.

To address these challenges, this Article proposes a comprehensive Maryland statute modeled on, but substantially updating, Illinois's Freedom from Drone Surveillance Act. The statute would impose a warrant-first regime for investigative uses; bar facial recognition and appearance-based re-identification absent judicial authorization; codify curtilage-specific minimization; establish audit-logging, retention, and secondary-use limits; and require human-in-the-loop confirmation for AI-triggered tracking and analytic queries. It further integrates reliability, cybersecurity, and FAA-

mandated safety considerations into the constitutional concept of "reasonableness," recognizing that flawed autonomy or unvalidated analytics can render state surveillance unlawful in both design and effect.

Ultimately, this Article contends that Maryland must legislate before autonomy becomes entrenched and archives become default. By embedding constitutional values into technical parameters—rather than relying solely on *post-hoc* adjudication—the state can ensure that AI-enabled policing enhances public safety without eroding fundamental privacy protections. When drones begin to decide, they must do so within a constitutional framework deliberately built for the machine age.

I. INTRODUCTION.

Two days, two podiums, one warning: artificial intelligence's ("AI") speed is outpacing both reliability and the law.[1] In September 2025, two headlines told the same uneasy story.[2] First, senior Air Force officials publicly acknowledged the limits of contemporary AI including accuracy problems, bias, "hallucinations,"[3] and the extensive human oversight and data

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[1] *See* discussion *infra* notes 4–7, 13–15.

[2] *See* discussion *infra* notes 4-10.

[3] AI hallucination is a phenomenon where, in a large language model ("LLM") often a generative AI chatbot or computer vision tool, perceives patterns or objects that are nonexistent or imperceptible to human observers, creating outputs that are nonsensical or altogether inaccurate. *What Are AI Hallucinations?*, IBM, https://www.ibm.com/think/topics/ai-hallucinations (on file with the University of Baltimore Law Forum) (last visited Apr. 14, 2026).

infrastructure required to keep these tools safe and useful.[4] At the Air & Space Forces Association's 2025 Air, Space & Cyber Conference, it was man versus machine.[5] The task was to draft a course of action ("COA") on how to proceed with a complex issue.[6] The AI system generated a COA in roughly ten seconds, compared to about sixteen minutes for a human operator; yet, as Maj. Gen. Robert Claude, the Space Force representative to the Advanced Battle Management System ("ABMS") Cross-Functional Team, cautioned that the resulting COAs "weren't necessarily completely viable."[7]

The next day at the United Nations, Ukrainian President Volodymyr Zelenskyy warned that AI-accelerated warfare, including drones, was propelling the world toward the most destructive arms race in human history.[8] He predicted that in the near term, unmanned aerial systems will likely engage one another in combat, conduct operations against critical infrastructure, and select and strike human targets without a human operator in the decision loop—save for limited oversight by those managing the underlying AI systems—and, on that basis, he called for the establishment of internationally binding rules governing the development and use of AI-enabled weapons.[9] Those global warnings of the future of AI matter locally: the same classes of autonomy, perception, and decision support migrate rapidly from battlefields to domestic public-safety systems.[10]

In Maryland, this fusion of AI-powered drones is no abstraction.[11] Montgomery County's "Drone as First Responder" ("DFR") program now provides rapid aerial response to 911 calls, and the county publicly reports its

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[4] Shaun Waterman, *Air Force Grapples with Limitations of AI*, AIR & SPACE FORCES MAG. (Sept. 23, 2025), https://www.airandspaceforces.com/air-force-grapples with-limitations-of-ai/ (on file with the University of Baltimore Law Forum).

[5] *See id.*

[6] *Id*. ("At a recent experiment staged by the Advanced Battle Management System Cross-Functional Team, vendors and Air Force coders used AI to do the work of [battle managers]—deciding which platforms and weapons systems should be used against a particular target and generating Courses of Action, or COAs, to achieve a military objective.") (citing Greg Hadley, *What Does the Future Look Like for Battle Managers?*, AIR & SPACE FORCES MAG. (Feb. 16, 2024), https://www.airandspaceforces.com/usaf-c2-battle-managers-future/ (on file with the University of Baltimore Law Forum)).

[7] *Id.*

[8] Alex Leff, *Ukraine's Zelenskyy issues a stark warning about a global arms race and AI war,* NPR (Sept. 24, 2025, at 11:41 ET), https://www.npr.org/2025/09/24/nx-s1-5552206/ukraine-zelenskyy-un-general-assembly-trump (on file with the University of Baltimore Law Forum).

[9] *Id.*

[10] *See* Morris Tidball-Binz (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Autonomous Weapons Systems*, at 7, 9, U.N. Doc. A/HRC/56/CRP.5 (Apr. 16, 2024).

[11] *See infra* notes 12-19.

activity.[12] In September 2025 alone, the department logged 198 flights on its dashboard.[13] In its first year, the program responded to well over 1600 calls and was frequently first on scene—often within one minute.[14] "Quicker situational awareness and faster response times are meaningful gains that can, in turn, reduce risk, permit call cancellations, and generate probative video in contested cases.".[15]

However, scale and machine assistance change the constitutional question.[16] The Supreme Court's aerial surveillance decisions, namely *California v. Ciraolo* and *Florida v. Riley*, permit brief, naked-eye observations from lawful airspace, with *Dow Chemical Co. v. United States* addressing the separate issue of imaging industrial complexes.[17] The Court later clarified this doctrine in *Kyllo v. United States*, establishing that using sense-enhancing technology to monitor a home constitutes a search.[18] More recently, the line of cases from *United States v. Knotts* to *Carpenter v. United States* shows the Court's growing concern with long-term, technology-enabled tracking.[19] Most salient for Maryland, the Fourth Circuit's en banc decision in *Leaders of a Beautiful Struggle v. Baltimore Police Dep't* held that access to a multi-week aerial archive is itself a search requiring a warrant.[20] AI-assisted drone operations sit at the intersection of these lines: what begins as incident-tethered overflight can, without guardrails, drift toward persistent, automated surveillance.[21]

This Article contends that Maryland should not leave AI-enabled drone operations to general Fourth Amendment doctrine and *ad hoc*

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[12] *Montgomery County Police Drone Program Marks One Year Milestone*, MONTGOMERY CNTY. POLICE DEP'T: NEWS RELEASES (Nov. 20, 2024), https://www2.montgomerycountymd.gov/mcgportalapps/Press_Detail_Pol.aspx?Item_ID=46189 (on file with the University of Baltimore Law Forum) [hereinafter *MCPD Press Release*]; *see Drone as First Responder - Flight Maps & Data Page*, MONTGOMERY CNTY. POLICE DEP'T, https://dashboard.dronesense.com/mcpddfr (on file with the University of Baltimore Law Forum) (last visited Nov. 12, 2025) [hereinafter *DFR Public Dashboard*].

[13] *DFR Public Dashboard*, *supra* note 12 (showing a total of 198 flights for September 2025).

[14] *MCPD Press Release*, *supra* note 12.

[15] *See id.*

[16] *See* discussion *infra* notes 17-19.

[17] *See, e.g.*, California v. Ciraolo, 476 U.S. 207, 215 (1986); Florida v. Riley, 488 U.S. 445, 455 (1989); Dow Chem. Co. v. United States, 476 U.S. 227, 232 (1986); Kyllo v. United States, 533 U.S. 27, 40 (2001); United States v. Knotts, 460 U.S. 276, 284-85 (1983); United States v. Karo, 468 U.S. 705, 721 (1984); United States v. Jones, 565 U.S. 400, 412-13 (2012); Carpenter v. United States, 585 U.S. 296, 320 (2018).

[18] *See* cases cited *supra* note 17.

[19] *See* cases cited *supra* note 17.

[20] Leaders of a Beautiful Struggle v. Balt. Police Dep't, 2 F.4th 330, 333 (4th Cir. 2021) (en banc).

[21] *See infra* Parts II-IV.

departmental policy.[22] The General Assembly should enact a comprehensive statute, modeled on Illinois's framework; yet expressly tailored to govern drones and their use of AI, and likely autonomy.[23] Such an act would adopt a warrant-first rule for investigative uses with narrow, time-limited exceptions (exigency, missing persons, disasters, scene documentation); prohibit facial recognition and person re-identification on drone-gathered imagery absent a warrant and minimization order; cabin thermal use around homes and curtilage; require human-in-the-loop confirmations for automated tracking; specify retention, secondary-use, and audit-log duties for video and coordinate metadata; and provide exclusionary and civil remedies.[24]

The harder question—and the title's provocation—is what happens when drones begin to decide for themselves.[25] As supervised autonomy replaces moment-to-moment human input, constitutional reasonableness must account for programmatic choices regarding delegating sensing, target selection, and routing to software, as well as the retrospective power of cloud archives.[26] Part II situates Maryland's Drone as First Responder program against this backdrop, framing the core constitutional problem and the Article's contributions.[27] Part III then translates contemporary AI-assisted capabilities into concrete surveillance powers and reliability risks.[28] Part IV maps those powers onto existing doctrine, from the aerial-observation and sense-enhancement cases to the long-term tracking and mosaic line.[29] Part V explains why autonomy and archive queries press toward warrants, minimization, and heightened protections near the home.[30] Part VI advances a Maryland statute, adapted from Illinois's Freedom from Drone Surveillance Act and expressly tailored to AI and autonomy.[31] Part VII integrates safety, cyber- and navigation-reliability, and institutional practice into the reasonableness analysis,[32] and Part VIII concludes by situating Maryland's model within the broader national project of designing constitutional limits for the machine age.[33]

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[22] *See infra* Parts V-VI.
[23] *See infra* Part VI; Freedom from Drone Surveillance Act, 725 ILL. COMP. STAT. ANN. 167/10, /15 (West 2025).
[24] *See infra* Part VI.
[25] *See supra* Abstract.
[26] *See infra* Part II.
[27] *See infra* Part II.
[28] *See infra* Part III.
[29] *See infra* Part IV.
[30] *See infra* Part V.
[31] *See infra* Part VI.
[32] *See infra* Part VII.
[33] *See infra* Part VIII.

Moreover, this Article makes two contributions.[34] First, it reframes contemporary drone deployments—particularly those employing Smart Track, PinPoint, and mission replays—as legally distinct from traditional overflight or fixed-camera surveillance.[35] These tools are not passive recorders.[36] They perceive, decide, and act with measurable independence, effectively transforming aerial observation into an AI-mediated investigative process.[37] As integration with cloud orchestration systems such as DJI's FlightHub *2* matures, the shift from operator aid to supervised autonomy will accelerate, further blurring the boundary between human oversight and machine initiative.[38]

Second, this Article advances a legislative blueprint.[39] Drawing from Illinois's amended Freedom from Drone Surveillance Act, it proposes a Maryland statute that: (1) requires warrants for any drone operation involving thermal imaging near a home, person tracking, or archive querying; (2) bars facial recognition and person re-identification absent judicial approval and minimization; (3) mandates real-time flagging of AI activations and retention of override logs; and (4) provides both exclusionary and civil remedies for violations.[40] Together, these measures would align state practice with constitutional principle, ensuring that AI-enhanced policing remains bounded by law rather than by technical capacity.[41]

II. FRAMING THE PROBLEM AND THE CONTRIBUTION.

This Part narrows the lens from global warnings about AI-accelerated warfare to Maryland's concrete experiment with AI-assisted policing.[42] Specifically, it traces how Montgomery County's DFR program already embodies the fusion of autonomy, rapid aerial response, and cloud-based archives, and it shows why those operational choices strain existing Fourth Amendment doctrine and Article 26.[43] Furthermore, this Part outlines the dual challenge facing Maryland, doctrinal and institutional, and distills the Article's core contributions: reconceptualizing AI-enabled drone deployments as qualitatively different from traditional aerial surveillance,

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[34] *See* discussion *infra* notes 35-41.
[35] *See infra* Parts II–III.
[36] *See infra* Part II.
[37] *See infra* Part IV.
[38] *See infra* Part III.
[39] *See infra* Part VI.
[40] *See infra* Part VI; Freedom from Drone Surveillance Act, 725 ILL. COMP. STAT. ANN. 167/10, /15 (West 2025).
[41] *See infra* Part VI.
[42] *See infra* Part II.
[43] *See infra* Part II.

and sketching a legislative blueprint to govern autonomy, archives, and analytics before they harden into unchecked practice.[44]

Today, Maryland stands at the legal edge of a technological transformation.[45] Police drones are no longer speculative or experimental—they are operational, AI-assisted, and increasingly semi-autonomous.[46] Since November 2023, the Montgomery County Police Department ("MCPD") has deployed its DFR program using the DJI Matrice 350 RTK equipped with Zenmuse H20-series sensors.[47] In the month of September 2025 alone, the MCPD logged 198 DFR flights, publicly reported on a live dashboard that catalogs deployments, mission types, and response times.[48] The DFR program's utility is unquestionable: it offers near-instant overhead situational awareness, automates target tracking, and delivers probative video in contested environments.[49] As a matter of operational design, the DFR program reduces response time, allows for rapid call triage, and when coupled with analytics provides an evidentiary and geographic context that traditional patrols cannot match.[50]

Yet technological capacity does not equate to constitutional compliance.[51] The same features that make these systems efficient also make them constitutionally fraught.[52] Automated person tracking ("Smart Track"), waypoint mission replay, and persistent archival mapping ("PinPoint") collectively generate surveillance capabilities that exceed the contemplation of earlier Fourth Amendment jurisprudence.[53] The doctrinal lineage running from *California v. Ciraolo* and *Florida v. Riley* to *Dow Chemical Co. v. United States* tolerated brief, naked-eye overflights

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[44] *See infra* Part II.

[45] *See* discussion *infra* notes 46-50.

[46] *See MCPD Press Release*, *supra* note 12; *DFR Public Dashboard*, *supra* note 12.

[47] *MCPD Press Release*, *supra* note 12; *Drone as First Responder (DFR) Program,* MONTGOMERY CNTY. POLICE DEP'T, https://www.montgomerycountymd.gov/pol/howdoI/drone-as-first-responder.html (on file with the University of Baltimore Law Forum) (last visited Nov. 15, 2025) [hereinafter *MCPD DFR Program*]; *DJI's New Matrice 350 RTK Redefines the Ultimate Tool for the Job,* DJI ENTER. (May 18, 2023), https://enterprise.dji.com/news/detail/matrice-350-rtk (on file with the University of Baltimore Law Forum) [hereinafter *DJI, Latest Update on the Matrice 350 RTK*].

[48] *DFR Public Dashboard*, *supra* note 12.

[49] *See MCPD Press Release*, *supra* note 12; *MCPD DFR Program*, *supra* note 47; *DJI, Latest Update on the Matrice 350 RTK*, *supra* note 47.

[50] *See* Henry White, *DFR in action: Inside Montgomery County PD's Drone as First Responder program,* POLICE1 (Feb. 25, 2025, at 16:28 ET), https://www.police1.com/drones/dfr-in-action-inside-montgomery-county-pds-drone-as-first-responder-program (on file with the University of Baltimore Law Forum).

[51] *See infra* Part III.

[52] *See infra* Parts III-IV.

[53] *See* discussion *infra* notes 54-56; *infra* Part IV.

from lawful airspace.[54] Those precedents presumed episodic human observation such as fleeting glances from the sky, not continuous, automated monitoring.[55] They did not imagine algorithmic reacquisition, multi-day replay, or machine learning models trained to detect, track, and catalog patterns of human movement.[56]

The Supreme Court has begun to address the constitutional limits of advanced surveillance, signaling a potential framework for analyzing algorithmic reacquisition.[57] Modern cases such as *United States v. Jones*, where location-tracking technology crossed the line from merely augmenting to impermissibly enhancing and allowing police to use a GPS-tracking device to remotely monitor and record a vehicle's movements over 28 days, and *Carpenter v. United States*, held that a person does not surrender all Fourth Amendment protection by venturing into the public sphere, do imagine a somewhat more advanced algorithmic reacquisition.[58] These later decisions recognize that aggregation itself, the persistent tracking and data-driven reconstruction of life's patterns, can constitute a search.[59]

Most recently, the Fourth Circuit's en banc decision in *Leaders of a Beautiful Struggle v. Baltimore Police Department* applied that logic to Maryland, holding that access to a multi-week aerial archive opened "an intimate window" into a person's associations and activities, and thereby violated the reasonable expectation of privacy individuals have in the whole of their movements.[60] The opinion serves as both a constitutional compass and a cautionary tale: it signals that Maryland's tolerance for AI-enhanced aerial surveillance cannot rest on federal precedent that never contemplated autonomy.[61]

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[54] California v. Ciraolo, 476 U.S. 207, 213-14 (1986); Florida v. Riley, 488 U.S. 445, 449-50 (1989); Dow Chem. Co. v. United States, 476 U.S. 227, 236 (1986).

[55] *See Ciraolo*, 476 U.S. at 209 (showing aerial surveillance using private airplane at 1,000 feet altitude for naked-eye observation and photography of defendant's backyard); *Riley*, 488 U.S. at 451 (showing police helicopter surveillance at 400 feet altitude using naked-eye observation through greenhouse roof openings); *Dow Chem.*, 476 U.S. at 238 (showing EPA aerial surveillance of industrial complex using standard floor-mounted precision aerial mapping camera from altitudes of 12,000, 3,000, and 1,200 feet).

[56] *Compare* sources cited *supra* note 55 (technology with human oversight), *with MCPD DFR Program*, *supra* note 47 (automatic AI-assisted drones).

[57] United States v. Jones, 565 U.S. 400, 403 (2012); Carpenter v. United States, 585 U.S. 296, 310 (2018).

[58] *Jones*, 565 U.S. at 403; *Carpenter*, 585 U.S. at 310.

[59] *See, e.g.*, *Jones*, 565 U.S. at 411-13; *Carpenter*, 585 U.S. at 309.

[60] Leaders of a Beautiful Struggle v. Balt. Police Dep't, 2 F.4th 330, 345–52 (4th Cir. 2021) (en banc).

[61] *See id.*

The policy posture mirrors the doctrinal one.[62] MCPD's current rules limit DFR launches to 911 calls or officer requests; prohibit audio recording and facial recognition; and require that drone video be managed like body-worn camera footage.[63] These commitments demonstrate commendable restraint but still remain internal, voluntary, and reversible, as they are not law.[64] No Maryland statute presently codifies limits on autonomous sensing, mandates human-in-the-loop confirmation before initiating AI tracking, or regulates the retention and secondary use of coordinate metadata.[65] This statutory vacuum is not trivial.[66] As autonomy expands, the locus of governmental intent shifts from discrete officer decisions to system configurations.[67] When software, in place of an officer, decides when to begin, continue, or modify surveillance, the Fourth Amendment's traditional focus on an individual's intent to search must evolve.[68] In this environment, constitutional reasonableness depends as much on programmatic design as on officer conduct.[69] Maryland's challenge, therefore, is dual: doctrinal and institutional.[70]

Doctrinally, courts must adapt the "search" inquiry to address AI-driven perception and decision-making, acknowledging that persistent algorithmic tracking constitutes a search in both effect and design.[71] Institutionally, lawmakers must move from reactive adjudication to proactive governance, ensuring that autonomy operates under law rather than precedent-by-analogy.[72] As the Fourth Circuit's decision in *Leaders*

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[62] *See id.*; *infra* notes 63-64.
[63] *See MCPD DFR Program*, *supra* note 47.
[64] *See id.*
[65] *See Police Drones Are Flying Over Maryland. Will State Lawmakers Regulate Them?*, CITYBIZ (Jan. 24, 2025), https://www.citybiz.co/article/652346/police-drones-are-flying-over-maryland-will-state-lawmakers-regulate-them/ (on file with the University of Baltimore Law Forum); *infra* Part VI.
[66] *See infra* notes 67-70.
[67] Marvin Hanisch et al., *Digital governance: A conceptual framework and research agenda*, J. OF BUS. RSCH., at § 3.2 (Jul. 2023) (first citing Alexander Benlian et al., *Algorithmic Management: Bright and Dark Sides, Practical Implications, and Research Opportunities*, 64 BUS. & INFO. SYS. ENG'G 825 (2022); and then citing Ronan Renwick & Robert Gleasure, *Those Who Control the Code Control the Rules: How Different Perspectives of Privacy Are Being Written into the Code of Blockchain Systems*, 36 J. OF INFO. TECH. 16 (2021)).
[68] Maneka Sinha, *The Automated Fourth Amendment*, 73 EMORY L. J. 589, 630 (2024); *see infra* Part V.
[69] Sinha, *supra* note 66, at 630; *see infra* Part V.
[70] *See* discussion *infra* notes 71-73.
[71] *See infra* Parts III-V.
[72] *See infra* Parts V-VI.

illustrates, waiting for litigation to define constitutional limits invites after-the-fact remedies for harms that are technologically irreversible.[73]

If Maryland fails to act while the DFR program remains in its formative stage—before autonomy becomes default and data archives self-referential—it risks the same reactive posture that has characterized much of Fourth Amendment adaptation in the digital era.[74] By legislating early, Maryland can establish durable norms of transparency, warrant accountability, and privacy that outlast particular vendors and platforms.[75] A statute designed for autonomy would not impede responsible drone use; it would enable it, grounding operational legitimacy in law and public trust rather than discretionary policy.[76]

Having framed the constitutional and statutory stakes of Maryland's emerging drone infrastructure, the next task is to translate those abstractions into technical and operational realities.[77] The constitutional argument cannot be understood apart from the hardware, software, and data pipelines that define how these systems actually function.[78] What the law calls a "search" depends on what the machine is engineered to perceive, record, and decide.[79] Part III, therefore, grounds the discussion in the concrete mechanics of MCPD's DFR program—the platform's architecture, its built-in intelligent functions, and the reliability and safety risks that accompany its increasing autonomy.[80] By tracing the progression from human-directed assistance to supervised autonomy, Part III establishes the technological foundation for the doctrinal and legislative analysis that follows.[81]

III. CONTEMPORARY AI-ASSISTED CAPABILITIES: CONCRETE POWERS AND RELIABILITY RISKS.

Having established Maryland's doctrinal and statutory gap, this Part turns from principle to mechanism; from what the law must address to what it must regulate.[82] Constitutional reasonableness and statutory design hinge

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[73] Leaders of a Beautiful Struggle v. Balt. Police Dep't, 2 F.4th 330, 333 (4th Cir. 2021) (en banc).
[74] *See infra* Part III.
[75] *See infra* Parts V-VI.
[76] *See infra* Part VI. *See generally* Freedom from Drone Surveillance Act, 725 ILL. COMP. STAT. ANN. 167/10, /15 (West 2025) (prohibiting the use of drones except as provided in Section 15 of the statute).
[77] *See infra* Part III.
[78] *See infra* Part III.
[79] *See infra* Part III.
[80] *See infra* Part III.
[81] *See infra* Part III.
[82] *See infra* Part III.

on the technical details of how the MCPD's DFR program actually works.[83] The platform's architecture, hardware, onboard intelligence, and network integration, defines both the reach and risk of police aerial operations.[84] Understanding autonomy, analytics, and sensing functions thus becomes a prerequisite to evaluating whether a drone's behavior constitutes a "search," who performs it, and when it becomes persistent enough to invoke the Fourth Amendment.[85]

A. Autonomy (In-the-Loop / On-the-Loop / Out-of-the-Loop).

"Autonomy" in public-safety aviation denotes the capacity of a system to perceive its environment, make decisions, and execute actions with reduced or no continuous human control.[86] Operationally, agencies distinguish three modes: (1) human-in-the-loop, in which a pilot must approve each action; (2) human-on-the-loop, where the system acts subject to human supervision and override; and (3) human-out-of-the-loop, in which humans review outcomes only after the fact.[87]

Maryland's DFR deployments exemplify the middle ground.[88] Using DJI Pilot 2 and FlightHub 2, operators can pre-program missions, monitor them in real time, and intervene if needed, but most routine functions, from waypoint replay to return-to-home, proceed automatically.[89] Built-in obstacle avoidance, intelligent landing, and route optimization further minimize pilot input.[90] Although the Federal Aviation Administration ("FAA") still requires a certificated Remote Pilot in Command to retain ultimate authority, the technical reality is that algorithmic assists increasingly determine what the drone perceives and records.[91]

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[83] *See MCPD DFR Program*, *supra* note 47; *supra* Part II.
[84] *See infra* Part III.
[85] *See infra* Sections III.A-C.
[86] *Artificial Intelligence Risk Management Framework (AI RMF 1.0)*, NAT'L INST. OF STANDARDS & TECH. 40 (U.S. Dep't of Com. Jan. 2023), https://nvlpubs.nist.gov/nistpubs/ai/nist.ai.100-1.pdf (on file with the University of Baltimore Law Forum) [hereinafter NIST, *Artificial Intelligence Risk Management Framework*].
[87] U.S. Dep't of Def., DOD Directive 3000.09, Autonomy in Weapon Sys. (2023).
[88] *MCPD DFR Program*, *supra* note 47.
[89] *FlightHub 2 Overview, One-Stop Aircraft Task Management Cloud Platform*, DJI ENTER., https://enterprise.dji.com/flighthub-2 (on file with the University of Baltimore Law Forum) (last visited Nov. 20, 2025) [hereinafter *FlightHub 2 Platform*].
[90] *See id.*
[91] *See* 14 C.F.R. § 107.19 (2021).

Autonomy also encodes intent.[92] Policy choices about autonomy modes, geofences, altitude caps, dwell limits, and object-tracking thresholds effectively program investigative scope and duration.[93] When the system itself executes a search behavior, such as reacquiring a tracked vehicle, orbiting a coordinate, or logging metadata without a fresh human command, the constitutional act is embedded in design.[94] The traditional focus on an officer's subjective "intent to search" must therefore evolve to include the agency's configuration of its autonomous systems.[95]

B. Predictive Analytics (Detection, Re-Identification, Trajectory, Anomaly).

Beyond flight control, modern police drones perform analytics once limited to forensic labs.[96] "Predictive analytics" describes a pipeline that ingests live video and sensor data, extracts features, runs trained models, and outputs inferences, including object detection, appearance re-identification, motion forecasting, or anomaly alerts.[97] On the Matrice 350 RTK platform (the current drone model used for the DRP), these capabilities operate both at the edge, through the camera payload and in the cloud and through DJI's Mobile SDK and Cloud API.[98] Each analytic layer introduces governance variables: model versioning, decision thresholds, false-positive and false-negative rates, and human-override logging.[99] Bias in computer-vision systems is well documented; the National Institute of Standards and Technology's ("NIST") Face Recognition Vendor Test series shows

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[92] *See* NIST, *Artificial Intelligence Risk Management Framework*, *supra* note 86, at 40.
[93] *See id.* at 4.
[94] *See id.* at 39.
[95] *See supra* Section III.A.
[96] Lee Lerussi, *Drone forensics: How police use digital evidence from drones to fight crime and terrorism*, POLICE1 (Aug. 23, 2025, at 17:15 ET), https://www.police1.com/investigations/drone-forensics-how-police-use-digital-evidence-from-drones-to-fight-crime-and-terrorism (on file with the University of Baltimore Law Forum).
[97] *See* Teaganne Finn & Ian Smalley, *What is predictive analytics?,* IBM, https://www.ibm.com/think/topics/predictive-analytics (on file with the University of Baltimore Law Forum) (last visited Apr. 8, 2026).
[98] *Mobile SDK V5*, DJI DEV., https://developer.dji.com/mobile-sdk/ (on file with the University of Baltimore Law Forum) (last visited Nov. 20, 2025); *Cloud API*, DJI DEV., https://developer.dji.com/cloud-api/ (on file with the University of Baltimore Law Forum) (last visited Nov. 20, 2025).
[99] NIST, *Artificial Intelligence Risk Management Framework*, *supra* note 86, at 14.

demographic differentials even in top-performing algorithms.[100] Unvalidated analytics risk disproportionate surveillance of particular populations or environments.[101]

Illinois's Freedom from Drone Surveillance Act reflects this concern by restricting identity-based analytics and requiring reporting and retention controls adaptable to any model-driven workflow.[102] For Maryland, the constitutional implication is clear: predictive analytics shatters the temporal gap between observation and inference.[103] When software flags an individual or a vehicle based on probabilistic models, the "decision to search" may already have occurred before any officer consciously intervenes.[104] These concerns, however, are not merely theoretical with recent Maryland arrests demonstrating how algorithmic surveillance systems already operate beyond traditional constitutional constraints.[105] Specifically, two recent Maryland cases demonstrate exactly how predictive analytics collapse the temporal gap between observation and inference in real-world scenarios.[106] The first is the Silver Spring Stabbing Case.[107] In this Montgomery County case, the drone footage enabled a conviction "almost exclusively based on drone footage" without calling the victim as a witness.[108] The drone captured the stabbing and then followed the perpetrator as he walked away, with police apprehending him minutes later.[109] This exemplifies how the decision to search occurred algorithmically—the drone's tracking capabilities automatically flagged and followed the suspect before any conscious officer intervention in the arrest decision.[110]

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[100] U.S. Dep't of Com., Nat'l Inst. of Standards & Tech., Face Recognition Vendor Test (FRVT), Part 3: Demographic Effects (2019) (on file with the University of Baltimore Law Forum) [hereinafter NIST, *FRVT Part 3*].
[101] *Id.* at 7.
[102] Freedom from Drone Surveillance Act, 725 ILL. COMP. STAT. ANN. 167/10, /20, /35 (West 2025).
[103] *See* discussion *infra* notes 106-18.
[104] *See* Josh Rosenthal, *Police drone helps convict man in Silver Spring stabbing*, FOX 5 DC (Nov. 1, 2024, at 22:15 ET), https://www.fox5dc.com/news/police-drone-helps-convict-man-silver-spring-stabbing (on file with the University of Baltimore Law Forum); *see also* Mike Hellgren, *2 juveniles arrested in Harford County as more police departments use drones to fight crime*, CBS BALT. (Nov. 28, 2024, at 18:28 ET), https://www.cbsnews.com/baltimore/news/maryland-harford-county-drone-arrest-juvenile-crime-prevention/ (on file with the University of Baltimore Law Forum).
[105] Rosenthal, *supra* note 104; Hellgren, *supra* note 104.
[106] *See* discussion *infra* notes 107-18.
[107] Rosenthal, *supra* note 104.
[108] *Id.*
[109] *Id.*
[110] *See id.*

The second case is the Harford County Juveniles Case.[111] Here, the police used thermal imaging technology that demonstrates even more sophisticated algorithmic inference.[112] The drone's heat vision pinpointed the suspects hiding in dense woods, with the technology making the identification decision before officers could visually locate them.[113] Deputies found the juveniles had broken into at least twenty vehicles and possessed a loaded firearm.[114] Here, the algorithmic analysis of heat signatures determined the search targets before human officers made conscious decisions about where to look.[115] Both cases illustrate how predictive policing does not merely detect crime but actively codes it into existence, with algorithmic suspicion becoming the basis for preemptive action.[116] DFR operates from a command center in Rockville, with drones tracking suspects and returning to rooftop stations to await the next 911 call, showing the automated, always-ready nature of these systems.[117] These examples underscore the need for Maryland's statutory governance to extend to algorithmic inference itself, thereby requiring transparency, validation, and auditability of the analytic models used in these law-enforcement flight systems.[118]

C. Facial Recognition (1:1 Verification vs. 1:N Identification).

Facial recognition extends the analytic continuum from detection to identity.[119] Technically, it entails (1) detecting a face; (2) extracting a numerical embedding; and (3) comparing that vector to one or more stored templates.[120] One-to-one verification tests a claimed identity, defined as matching a suspect to a mugshot, whereas one-to-many identification searches a gallery for any match.[121] Performance metrics, such as false-accept and false-reject-rates, vary with demographic composition and imaging

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[111] Hellgren, *supra* note 104.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *See* sources cited *supra* notes 104.
[117] Rosenthal, *supra* note 104.
[118] *See* discussion *supra* notes 106-17; *supra* Section III.B.
[119] *Face Recognition Technology Evaluation (FRTE) 1:1 Verification*, NAT'L INST. OF STANDARDS & TECH., https://pages.nist.gov/frvt/html/frvt11.html (on file with the University of Baltimore) (last visited Nov. 20, 2025) [hereinafter NIST, *FRTE 1:1 Verification*].
[120] NIST, *FRVT Part 3*, *supra* note 100, at 2–4; NIST, *FRTE 1:1 Verification*, *supra* note 119.
[121] NIST, *FRTE 1:1 Verification*, *supra* note 119.

conditions.[122] Mounted on drones, facial recognition multiplies both reach and risk.[123] The combination of aerial scale, long-range optics, and continuous recording enables identity-at-scale: a capability to re-identify individuals across multiple scenes and times.[124] Illinois, for example, prohibits equipping public-safety drones with facial-recognition or weapon systems absent express statutory authorization and narrow exceptions.[125] That prohibition reflects a constitutional instinct toward categorical rules that once identification becomes dragnet-capable the particularized suspicion evaporates.[126]

Maryland has taken a narrower but significant step on facial-recognition transparency outside the drone context.[127] In 2024, the General Assembly enacted Chapter 808, creating a new Criminal Procedure subtitle on Facial Recognition Technology that, among other safeguards, requires the State to disclose in criminal and juvenile discovery: whether facial recognition technology was used in an investigation, the name of each system employed, the databases searched, and the results that led to further investigative action.[128] That statutory disclosure duty recognizes identity analytics as a distinct, discovery-worthy investigative technique.[129] If Maryland contemplates any biometric analytics in law-enforcement drone programs, it should build on that foundation and adopt a warrant-first regime that treats facial or appearance re-identification as a separate search event requiring judicial authorization, minimization, and human verification.[130] Additionally, gallery composition, model accuracy, and deletion protocols must be judicially reviewable.[131] Without such limits, AI-driven

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[122] *Id.*

[123] *See* Leaders of a Beautiful Struggle v. Baltimore Police Dep't, 2 F.4th 330, 347 (4th Cir. 2021) (en banc); NIST, *FRVT Part 3*, *supra* note 100.

[124] See Comment*, Fourth Circuit Holds Warrantless Access of Aerial Surveillance Data Unconstitutional: Leaders of a Beautiful Struggle v. Baltimore Police Department*, 135 HARV. L. REV. 920, 923 (2022) [hereinafter *Fourth Circuit Holds Warrantless*].

[125] *See* Drones as First Responders Act, Pub. Act 103-0101 § 5, 2023 Ill. Laws (codified as amended at 725 ILL. COMP. STAT. 167/15 (West 2024)) (prohibiting law enforcement from equipping drones with weapons or facial recognition technology, subject to narrow exceptions).

[126] *See id.*

[127] *See* discussion *infra* notes 128-32.

[128] Criminal Procedure – Facial Recognition Technology – Requirements, Procedures, and Prohibitions, ch. 808, 2024 Md. Laws 1 (codified at MD. CODE ANN., CRIM. PROC. §§ 2-501-510 (West 2024)) (emphasizing § 2-504, which imposes disclosure duties in criminal and juvenile proceedings).

[129] *See* CRIM PROC. § 2-510.

[130] *See* generally *id.* (requiring law enforcement agencies using facial recognition technology to publish annual reports disclosing certain information).

[131] *See* Insun Park, *Beyond the Face: Examining Legal Regulations for Law Enforcement Facial Recognition Technology*, 58 AKRON L. REV. 251, 277–78 (2025).

identification risks transforming every flight into a general search for identity rather than evidence.[132]

D. Tech → Legal Issue Map (Capabilities to Legal Triggers).

Each capability described above triggers a distinct constitutional concern.[133] First, autonomy shifts the inquiry from momentary officer conduct to programmatic design, making autonomy-mode selection and safety envelopes relevant to whether a search is "reasonable" and "particularized."[134] Second, persistence, which is enabled by repeated sorties, data retention, and analytics, renders aggregated observation functionally equivalent to long-term tracking, invoking *Carpenter v. United States* and *Leaders of a Beautiful Struggle v. Baltimore Police Department*.[135] Third, sense enhancement through thermal or high-gain optical zoom triggers *Kyllo v. United States* when directed toward homes and curtilage, requiring warrants and minimization.[136] Finally, because the FAA governs flight safety but not privacy, states remain free to legislate purpose, retention, transparency, and biometric limits, including discovery regimes like Maryland's facial-recognition statute, without intruding on navigable-airspace federal regulation.[137] The result is a complex, but navigable, map linking technical affordances to legal triggers.[138] By codifying these relationships through warrants, narrow exceptions, analytic-use restrictions, deletion schedules, and reporting requirements, Maryland can operationalize constitutional values in statutory form, rather than relying on ex post judicial correction.[139]

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[132] *See, e.g.*, *Fourth Circuit Holds Warrantless*, *supra* note 124, at 920-21 (describing Baltimore's aerial program as capable of tracking movements of virtually all city residents).
[133] *See supra* Sections III.A–C.
[134] *See supra* Part III.
[135] Carpenter v. United States, 585 U.S. 296, 309-15 (2018); Leaders of a Beautiful Struggle v. Baltimore Police Dep't, 2 F.4th 330, 338–40 (4th Cir. 2021) (en banc).
[136] Kyllo v. United States, 533 U.S. 27, 34–40 (2001).
[137] *See, e.g.*, Cong. Rsch. Serv., R47660, LAW ENFORCEMENT AND TECHNOLOGY: USE OF UNMANNED AIRCRAFT SYSTEMS (UAS), at 4, 7–9 (2023) (explaining that FAA regulation principally addresses airspace safety, leaving privacy regulation largely to states and localities).
[138] *Id.*
[139] *See supra* Section III.D.

IV. CONSTITUTIONAL FRAME: FROM GLANCES TO MOSAICS.

Part III established the technological foundations of autonomy, analytics, and sensing.[140] This Part turns to the doctrine that must govern them.[141] The Supreme Court's precedents on aerial observation, sense enhancement, and long-term tracking were built for human perception in discrete moments, not for continuous, algorithmic surveillance.[142] Yet those cases provide the constitutional scaffolding from which Maryland must now legislate and adjudicate.[143] The doctrinal story runs from brief, naked-eye glances in *Ciraolo*, *Riley*, and *Dow Chemical*; through the home-protective logic of *Kyllo*; and culminates in the mosaic theory of *Jones, Carpenter*, and *Leaders of a Beautiful Struggle*.[144] Together, these cases chart a movement from observation to aggregation and momentary oversight to programmatic surveillance—the constitutional frame within which AI-assisted drones must now be judged.[145]

A. Aerial Observation Precedents: Ciraolo, Riley, Dow Chemical.

The Court's early aerial-surveillance cases tolerated warrantless observation from lawful airspace.[146] In *California v. Ciraolo*, the police flew a private aircraft over a fenced backyard at 1,000 feet, spotted marijuana plants with the naked eye, and used those observations to secure a warrant.[147] The Court held that because the officers were in navigable airspace and used only unaided vision, the defendant's expectation of privacy was not one that society would recognize as reasonable.[148] Similarly, in *Florida v. Riley*, the Court found no search when an officer observed the interior of a greenhouse from a helicopter 400 feet above ground, emphasizing that the vantage point was lawful and that any member of the public could have seen the same thing.[149] Finally, in *Dow Chemical Co. v. United States*, the Court permitted

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[140] *See supra* Part III.
[141] *See infra* Part IV.
[142] *See* California v. Ciraolo, 476 U.S. 207, 211-12, 221-23 (1986); Florida v. Riley, 488 U.S. 445, 455 (1989); Dow Chem. Co. v. United States, 476 U.S. 227, 235–36 (1986); United States v. Jones, 565 U.S. 400, 404-05 (3023); Carpenter v. United States, 585 U.S. 296, 300-03 (2018); Leaders of a Beautiful Struggle v. Balt. Police Dep't, 2 F.4th 330, 339-41 (4th Cir. 2021) (en banc).
[143] *See infra* Part IV.
[144] *See infra* Part IV.
[145] *See infra* Part IV.
[146] *See* discussion and cases cited *infra* notes 147–51.
[147] *Ciraolo*, 476 U.S. at 211–12, 221–23.
[148] *Id.* at 213–14.
[149] Florida v. Riley, 488 U.S. 445, 451 (1989).

the Environmental Protection Agency's use of aerial mapping cameras to photograph an industrial complex, distinguishing between the home's intimate curtilage and a commercial facility's open areas.[150] Together, these cases created a rule of visual neutrality: what is seen from lawful airspace with the naked eye is not a search.[151]

However, that rule assumed a fleeting, human glance.[152] None of these cases envisioned continuous imaging, data retention, or algorithmic enhancement.[153] They also predated the commercial availability of high-zoom optics and networked drones.[154] The doctrinal logic that treats brief observation from public vantage as constitutionally benign becomes unstable when those observations persist, replay, and recombine through AI-assisted systems.[155] What begins as *Ciraolo*'s one-off flyover risks maturing into a standing aerial presence that continuously documents human life below.[156]

B. Sense Enhancement and the Home: Kyllo and the Warrant Threshold.

The constitutional boundary between permissible observation and search becomes most salient at the home.[157] In *Kyllo v. United States,* the Court held that when the government uses a device not "in general public use" to explore details of a home otherwise unknowable without physical intrusion, it conducts a search.[158] There, officers used a thermal imager to detect heat patterns emanating from a private residence suspected of housing

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[150] Dow Chem. Co. v. United States, 476 U.S. 227, 239 (1986).
[151] *See* discussion and cases cited *supra* notes 147-50.
[152] *See* discussion *supra* notes 153-56.
[153] *See* Kyllo v. United States, 533 U.S. 27, 34–40 (2001); Carpenter v. United States, 585 U.S. 296, 309-15 (2018); Leaders of a Beautiful Struggle v. Baltimore Police Dep't, 2 F.4th 330, 338–40 (4th Cir. 2021) (en banc).
[154] *See* cases cited *supra* notes 130-33 (explaining various technology used previously before 2013, when new more affordable and accessible technology became available); *The Complete History of Drone Technology*, ZENATECH, https://www.zenatech.com/history-of-drone-technology/ (on file with the University of Baltimore) (last visited Dec. 7, 2024) (explaining the proliferation of affordable, camera-equipped quadcopters beginning with Parrot AR Drone in 2010 followed by DJI Phantom 1 in 2013, marking widespread consumer drone adoption).
[155] *See supra* Part IV.
[156] *Compare* cases cited *supra* notes 135-37 (explaining various technology used previously before 2013, when new more affordable and accessible technology became available), *with MCPD DFR Program*, *supra* note 47 (noting that the entity may have the future capability for continuous surveillance).
[157] *See infra* Section IV.B.
[158] *Kyllo*, 533 U.S. at 40.

a marijuana grow operation.[159] Specifically, in 1991, Agent William Elliott of the United States Department of the Interior suspected that marijuana was being grown in Danny Kyllo's home, part of a triplex in Florence, Oregon.[160] Since indoor marijuana growth typically requires high-intensity lamps, at 3:20 a.m. on January 16, 1992, Agents Elliott and Dan Haas used an Agema Thermovision 210 thermal imager to scan the triplex.[161] Thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye.[162] The scan showed that Kyllo's garage roof and a side wall were relatively hot compared to the rest of his home and substantially warmer than the neighboring units.[163] Based in part on the thermal imaging, a Federal Magistrate Judge issued a warrant to search Kyllo's home, where the agents found marijuana growing.[164]

The Court reasoned that the use of thermal imaging technology to detect heat emanating from a home constitutes a search under the Fourth Amendment because it intrudes upon the privacy of the home, a constitutionally protected area. [165] The Court emphasized that the Fourth Amendment's protection of the home is not contingent on the type or amount of information obtained.[166] Instead, it is the act of obtaining information about the interior of the home through sense-enhancing technology, which could not otherwise be obtained without physical intrusion and constitutes a search.[167] The Court further held that employing thermal imaging technology, then not commonly available to the public, intruded upon a reasonable expectation of privacy.[168] The ruling emphasized safeguarding the home from governmental surveillance as technology advances, ensuring the Fourth Amendment's protections remain strong against emerging monitoring techniques.[169] This principle applies particularly when the technology used is not in general public use, as it ensures the preservation of privacy against government intrusion that existed at the time the Fourth Amendment was adopted.[170]

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[159] *Id*. at 29.
[160] *Id*.
[161] *Id.*
[162] *Id.*
[163] *Id.* at 30.
[164] *Kyllo*, 533 U.S. at 30.
[165] *Id.* at 34.
[166] *Id.* at 37.
[167] *Id*. at 40.
[168] *Id.* at 34.
[169] *Id.* at 35-36.
[170] *See Kyllo,* 533 U.S. at 40; Jardines v. State, 73 So. 3d 34, 43 (2011); United States v. Hay, 95 F.4th 1304, 1317 (2024).

Additionally, the Court rejected the government's argument that thermal imaging was constitutional because it did not detect private activities or intimate details.[171] The Court clarified that all details within the home are considered intimate, as the home is held safe from prying government eyes.[172] It further noted that allowing such surveillance without a warrant would leave homeowners vulnerable to advancing technology, eroding the privacy guaranteed by the Fourth Amendment.[173] The *Kyllo* decision underscored that the use of such technology to explore details of the home, even if it only reveals heat patterns, crosses the threshold of privacy and is presumptively unreasonable without a warrant.[174]

Lastly, the Court highlighted that the Fourth Amendment's protection extends beyond physical intrusion, encompassing technological surveillance that reveals details of the home.[175] This approach aligns with the principle that the Fourth Amendment protects against both physical and technological encroachments on privacy.[176] The Court's reasoning reflects a broader concern about the impact of advancing technology on privacy rights, emphasizing the need to adapt constitutional protections to modern contexts.[177]

Police drones equipped with high-resolution zoom, infrared, or thermal sensors squarely implicate Kyllo.[178] Even if commercially available, such tools are not "in general public use" when mounted on government platforms for investigative purposes.[179] When a drone lingers over a residence, scanning through foliage or detecting heat signatures, it converts observation into search.[180] Under *Kyllo*, the constitutional test is not the altitude of the aircraft but the intimacy of the information obtained.[181] In Maryland, Article 26 of the Declaration of Rights is interpreted consistently with, and sometimes more broadly than, the Fourth Amendment and amplifies that protection.[182]

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[171] *Kyllo*, 533 U.S. at 37.
[172] *Id*.
[173] *Id*. at 35-36.
[174] *See id*. at 40; *Jardines*, 73 So. 3d at 43; *Hay*, 95 F.4th at 1317.
[175] *Kyllo*, 533 U.S. at 37-38.
[176] *Id*. at 34.
[177] *Id*. at 36.
[178] *See* discussion *infra* notes 179-82.
[179] *See Kyllo*, 533 U.S. at 40 (explaining implications of using an object not in the general public use for surveillance).
[180] *Id.* at 35-37.
[181] *Id.* at 37-38.
[182] MD. CONST. DECL. OF RTS., art. 26.; *see also* Richardson v. State, 274 A.3d 1143, 1149 (Md. 2022) (explaining the Fourth Amendment analysis).

C. Long-Term Tracking and Aggregation: Knotts, Karo, Jones, Carpenter, Leaders of a Beautiful Struggle.

The next doctrinal evolution concerns duration and aggregation.[183] The first set of tracking cases involved beepers to monitor a suspect; in those cases, the courts distinguished between observation of public travel and intrusion into private space.[184] In *United States v. Knotts*, the Court upheld the limited use of a beeper transmitter to track a vehicle along public roads, reasoning that the movements were visible to anyone.[185] The Court emphasized that a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another, as those movements are "voluntarily conveyed to anyone who wanted to look."[186] The beeper merely augmented police efficiency, enabling officers to follow the vehicle more easily, but did not expose any private facts or information otherwise shielded from public view.[187] Crucially, the Court declined to address whether "dragnet-type law enforcement practices" involving prolonged or comprehensive electronic tracking might implicate different constitutional concerns, expressly reserving that question for another day.[188]

Conversely, one Term later, in *United States v. Karo*, the Court held that monitoring a beeper inside a private residence violated the Fourth Amendment because it revealed information not otherwise observable.[189] In *Karo*, the Court drew a constitutional line when beeper monitoring disclosed information from within a private residence, holding that such monitoring constituted a search requiring a warrant.[190] Although the initial installation of the beeper in a container with the original owner's consent did not violate the Fourth Amendment, the subsequent monitoring revealed facts, specifically the presence of the container inside a home, that could not have been obtained through visual surveillance from a lawful vantage point.[191] The Court underscored the heightened constitutional protection afforded to the home, reasoning that electronic monitoring which substitutes for physical intrusion impermissibly invades a reasonable expectation of privacy.[192] Unlike *Knotts*, where monitoring tracked public movements only, *Karo* established that

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[183] *See infra* Section IV.C.
[184] *See infra* Section IV.C.
[185] United States v. Knotts, 460 U.S. 276, 285 (1983).
[186] *Id.* at 281.
[187] *Id*. at 282–83.
[188] *Id.* at 283–84.
[189] United States v. Karo, 468 U.S. 705, 734-35 (1984).
[190] *Id.* at 714–15.
[191] *Id.* at 712–13, 715.
[192] *Id.* at 714–16.

sense-enhancing technology becomes constitutionally significant when it exposes information about the interior of the home that would otherwise remain unknowable without entry.[193]

Three decades later, *United States v. Jones* confronted GPS tracking.[194] The majority found that attaching and monitoring a GPS device on a suspect's car for 28 days constituted a search.[195] Writing for the majority, Justice Scalia revived a property-based understanding of the Fourth Amendment and reasoned that the physical trespass on Jones's vehicle, an "effect" enumerated in the Amendment, combined with the purpose of obtaining information, was sufficient enough to trigger constitutional scrutiny.[196] The Court distinguished earlier beeper cases such as *Knotts* and *Karo* on the ground that they involved no physical occupation of private property by the government.[197] While the majority resolved the case on trespass grounds, five Justices separately emphasized that long-term, continuous tracking impinges on reasonable expectations of privacy by enabling the government to assemble a comprehensive record of a person's public movements, raising concerns about aggregation, duration, and the qualitative difference between short-term observation and prolonged surveillance.[198] This Fourth Amendment rationale further matured in *Carpenter v. United States*.[199] In *Carpenter,* the Court held that accessing 127 days of historical cell-site location data was a search because it created "a detailed chronicle of a person's physical presence."[200] The Court recognized that technological persistence transforms what might once have been fleeting public exposure into comprehensive surveillance.[201] Applied to drones, the *Carpenter* holding is direct: a mosaic of repeated or automated overflights can reveal more about a person than any single flight viewed in isolation.[202]

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[193] *Id.* at 715.
[194] United States v. Jones, 565 U.S. 400, 402 (2012).
[195] *Id.* at 412-13.
[196] *Id.* at 404–06.
[197] *Id.* at 408–09.
[198] *Id*. at 415–18 (Sotomayor, J., concurring); *id*. at 430–31 (Alito, J., concurring in the judgment).
[199] *See* Carpenter v. United States, 585 U.S. 296, 296-97 (2018).
[200] *Id.* at 311, 315.
[201] *Id.* at 320.
[202] *See* Leaders of a Beautiful Struggle v. Balt. Police Dep't, 2 F.4th 330, 342 (4th Cir. 2021) (en banc).

D. Mapping AI-Drone Functions to Doctrine: From Discrete Overflights to Continuous Algorithmic Observation.

The doctrinal arc from *Ciraolo* to *Leaders* converges on a simple truth: persistence and enhancement redefine the constitutional event.[203] AI-enabled drones collapse the distinctions among the precedents.[204] They combine *Ciraolo*'s lawful vantage with *Kyllo*'s sense-enhancement capacity and *Carpenter*'s aggregation power.[205] When autonomy allows a drone to reacquire a target automatically, or when predictive analytics mine stored footage to trace movements, the resulting surveillance is no longer "plain view"—it is algorithmic observation with constitutional consequences.[206]

The Fourth Circuit's en banc decision in *Leaders of a Beautiful Struggle v. Baltimore Police Department* illustrates how persistent aerial surveillance can implicate Fourth Amendment protections.[207] In that case, the Baltimore Police Department's Aerial Investigation Research ("AIR") program, which flew planes over 90% of the city during daylight hours, was deemed an unconstitutional "search" because it enabled retrospective tracking of individuals across space and time, revealing behavioral patterns and associations otherwise unknowable without technology.[208] Drawing on the Supreme Court's mosaic theory articulated in *Carpenter v. United States* and *United States v. Jones*, the court emphasized that aggregated surveillance of public movement can violate reasonable expectations of privacy when it enables law enforcement to construct "an intimate window into a person's life."[209]

MCPD's DFR program, however, differs significantly from the AIR program; in *Leaders*: drones are launched reactively to specific 911 calls, remain airborne for only minutes per incident, and do not continuously blanket geographic areas or record round-the-clock coverage.[210] Still, DFR missions are logged and video is retained for evidentiary review, and depending on how such data is combined or reused, even individually innocuous deployments could collectively generate a privacy-invasive surveillance mosaic over time.[211] Unlike AIR, DFR surveillance is narrower

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[203] *See supra* Sections IV.A-C.
[204] *See infra* Section IV.D.
[205] *See supra* Sections IV.A-C.
[206] *See infra* Section IV.D.
[207] *Leaders of a Beautiful Struggle,* 2 F.4th at 342.
[208] *Id.* at 334, 340-42.
[209] *Id.* at 342–43 (first citing Carpenter v. United States, 585 U.S. 296, 310-12 (2018); and then citing United States v. Jones, 565 U.S. 400, 429 (2012)).
[210] *See* Interview with Capt. Victor A. Galladora, Montgomery Cnty. Police Dep't (Oct. 31, 2025) (conducted via Microsoft Teams) (notes on file with author).
[211] *Id.*

and event-driven, more analogous to the short-term aerial flyovers upheld in *California v. Ciraolo* and *Florida v. Riley*.[212]

However, as the *Leaders* majority held, the constitutional line is not merely technological capability but what law enforcement deduces from the aggregate data.[213] Therefore, DFR's use of zoom, thermal imaging, and object tracking tools, especially when used near residential areas, raises questions about curtilage and incidental capture, even if policies exist to minimize such exposures.[214]

In this doctrinal gray zone between permissibly brief public observation and constitutionally suspect aggregate tracking, DFR's legality cannot rest on analogy alone.[215] There is a compelling need for legislative action to establish clearer statutory guardrails: defining acceptable flight parameters, limiting data retention, clarifying public reporting, and institutionalizing oversight mechanisms to ensure that police drone programs do not drift into constitutionally impermissible mass surveillance.[216]

V. AUTONOMY, ARCHIVES, AND THE CASE FOR WARRANTS.

The doctrinal trajectory traced above demonstrates both the strength and the limits of constitutional adjudication.[217] *Ciraolo, Kyllo, Carpenter,* and *Leaders of a Beautiful Struggle* together delineate when aerial surveillance becomes a "search," but they do not specify how an autonomous or AI-assisted system must be designed, monitored, or audited to remain lawful.[218] The Fourth Amendment sets boundaries *ex post*—after injury, litigation, or precedent slowly adapts.[219] Legislatures, by contrast, can operationalize those principles *ex ante,*[220] by embedding warrant procedures,

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[212] *See* California v. Ciraolo, 476 U.S. 207, 213 (1986); Florida v. Riley, 488 U.S. 445, 451 (1989); *see also Leaders of a Beautiful Struggle*, 2 F.4th at 342 (distinguishing AIR's broad coverage from these precedents).

[213] *Leaders of a Beautiful Struggle*, 2 F.4th at 333.

[214] *See* Interview with Capt. Victor A. Galladora, *supra* note 210, at Sections VI-VII (detailing internal restrictions on zoom and thermal imaging near residences, training on constitutional limits, and privacy policies); *infra* Part V.

[215] *See supra* Part IV; *infra* Part V.

[216] *See infra* Parts V-VI.

[217] *See supra* Part IV.

[218] *See supra* Part IV.

[219] Orwin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 868 (2004).

[220] Latin for "before the event." *See Ex ante*, LEXISNEXIS, https://www.lexisnexis.co.uk/legal/glossary/ex-ante (on file with the University of Baltimore Law Forum) (last visited on Apr. 15, 2026). This refers to the prospective establishment of rules, as opposed to *ex post* ("after the event") judicial review that analyzes

retention rules, and oversight mechanisms directly into statutory code.[221] Furthermore, the legislative process can be proactive, instead of the reactive process that is required by leaving these issues to the judiciary.[222] Having established the constitutional limits on surveillance, this Part turns from doctrine to design.[223] Specifically, the following Part advocates for the Legislature to take a proactive approach to protect the privacy of its citizens before they are further eroded.[224]

The challenge for Maryland lies not merely in recognizing when AI-enabled observation becomes a "search," but in constructing procedural safeguards that prevent unlawful searches from occurring in the first place.[225] The task is to convert the Fourth Amendment's retrospective remedies into *ex ante* controls—rules governing how autonomy is delegated, how archives are accessed, and how proximity to the home triggers heightened protections.[226] Together, these parameters define a warrant-based architecture for lawful drone use in the age of artificial intelligence.[227]

A. When Drones Decide: Delegation from Human to Software.

Autonomy fundamentally reconfigures the question of "who" conducts a search.[228] Traditional Fourth Amendment analysis presumes a human actor—one who forms intent, exercises judgment, and can be held accountable for reasonableness.[229] However, as Part III illustrated, modern drones perform many of these functions through AI-Assisted Capabilities, such as facial recognition, trajectory, and object redetection.[230] When drones decide—when they initiate tracking, reacquire targets, or select camera modes based on algorithmic inference—the government has effectively delegated its surveillance authority to software.[231] This delegation raises two interrelated concerns: accountability and reasonableness.[232]

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conduct after it has occurred. *Ex post facto*, JUSTIA, https://dictionary.justia.com/ex-post-facto (on file with the University of Baltimore Law Forum) (last visited on Apr. 15, 2026).
[221] Kerr, *supra* note 219, at 868.
[222] *Id*. at 870.
[223] *See supra* Part IV; *infra* Part V.
[224] *See infra* Parts V-IV.
[225] *See infra* Part V.
[226] *See infra* Part V.
[227] *See infra* Part V.
[228] *See infra* Section V.A.
[229] *See supra* Sections IV.A-C.
[230] *See supra* Part III.
[231] *See supra* Section IV.D; *infra* Section V.A.
[232] *See* discussion *infra* notes 233-37.

Accountability demands a discernible record of who or what made each surveillance decision.[233] Without audit logs documenting human authorization, AI activations, and overrides, it becomes impossible to trace responsibility when constitutional lines are crossed.[234] Reasonableness, in turn, depends on the foreseeability of the system's behavior.[235] If a department deploys an autonomous function known to generate false identifications or to persistently track non-targets, that risk should inform the Fourth Amendment analysis.[236] Just as the Court in *United States v. Leon* conditioned good-faith reliance on objectively reasonable conduct, so too should constitutional "reasonableness" in the AI context encompass the agency's programming choices.[237]

Delegation without procedural safeguards also implicates separation-of-powers principles.[238] The Constitution vests the warrant function in the judiciary, not in software capable of unreviewed surveillance decisions.[239] AI tools are now able to apply object recognition, re-identification, or trajectory modeling to historical footage, performing new acts of perception that were technologically impossible at the time of capture.[240] These actions are the functional equivalent of a search and the warrant process must adapt—requiring human confirmation before any AI-generated tracking or reacquisition occurs.[241] Human-in-the-loop design thus becomes not only a technical specification but a constitutional mandate.[242]

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[233] Madalina Busuioc, *Accountable Artificial Intelligence: Holding Algorithms to Account*, 81 PUB. ADMIN. REV. 825, 828 (2021).
[234] *See infra* Section VI.B.2.
[235] *Foreseeability: Explained*, CLEAR LEGAL (Oct 28, 2024), https://clearlegal.com/glossary/foreseeability/ (on file with the University of Baltimore Law Forum).
[236] Kelsey Y. Santamaria, *Facial Recognition Technology and Law Enforcement: Select Constitutional Considerations,* LIBR. OF CONG. (Sept. 24, 2020), https://www.congress.gov/crs-product/R46541 (on file with the University of Baltimore Law Forum).
[237] *See* United States v. Leon, 468 U.S. 897, 922 (1984).
[238] *See infra* Section V.A; *see also* U.S. CONST. amend. IV (requiring probable cause to be founded upon oath or affirmation, which is granted through a detached judge).
[239] *See generally* U.S. CONST. amend. IV (explaining that in order to effectuate a reasonable search, one must obtain a warrant through probable cause supported by oath, granted by the courts).
[240] *See supra* Sections III.A-C.
[241] *See supra* Section IV.D.
[242] *See supra* Section V.A.

B. Persistent Aerial Archives: Cloud Retention, Retrospective Searches, and Warrants.

If autonomy transforms "who" searches, then persistence transforms "when" the search occurs.[243] The shift from real-time flight to continuous archival retention has profound constitutional consequences.[244] A drone that records every sortie to a cloud server creates a searchable time machine—a dataset that can be queried long after the original event.[245]

In *Carpenter v. United States*, the Court recognized that retrospective access to cell-site location data constitutes a search because it reveals "the whole of individuals' movements."[246] Moreover, the Fourth Circuit's decision in *Leaders of a Beautiful Struggle v. Baltimore Police Department* extended that logic to aerial imagery, holding that accessing a citywide, multi-week archive was a search requiring a warrant.[247]

The case law in this area is clear, data, whether it be aerial imagery or cell-site location data, that can reveal the whole of individual movements requires a warrant.[248] Yet, Maryland's DFR platform already stores video and coordinate metadata through Dronesense and FlightHub 2 for operational review.[249] While these functions serve legitimate accountability and training purposes, they also create the potential for retroactive investigation outside of judicial oversight.[250] Once stored, video can be queried by time, location, or object—turning operational footage into a de facto database of movements.[251] The constitutional question thus shifts from the moment of flight to the moment of retrieval.[252]

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[243] *See infra* Section V.B.
[244] *See infra* Section V.B.
[245] *See FlightHub 2 Platform*, *supra* note 89 (providing a cloud management platform for drone surveillance procedures); discussion *infra* notes 246-47; *see also DFR Public Dashboard*, *supra* note 12 (providing logs and data of previously tracked drone surveillance paths).
[246] Carpenter v. United States, 585 U.S. 296, 313 (2018).
[247] Leaders of a Beautiful Struggle v. Balt. Police Dep't, 2 F.4th 330, 346 (4th Cir. 2021) (en banc).
[248] *Carpenter*, 585 U.S. at 316; *Leaders of a Beautiful Struggle*, 2 F.4th at 346.
[249] *MCPD Press Release, supra* note 12; s*ee also FlightHub 2 Platform*, *supra* note 89 (providing a cloud management platform for drone surveillance procedures); *DFR Public Dashboard*, *supra* n ote 12 (providing logs and data of previously tracked drone surveillance paths).
[250] *MCPD Press Release, supra* note 12; *see infra* Section V.B.
[251] *MCPD Press Release, supra* note 12; s*ee also FlightHub 2 Platform*, *supra* note 89 (providing an account for storing surveillance); *DFR Public Dashboard*, *supra* note 12 (providing access to prior drone surveillance).
[252] *See* discussion *infra* notes 253-57.

Under *Carpenter* and *Leaders*, accessing or querying an archive to reconstruct an individual's path should be treated as a discrete search event, subject to a warrant and minimization order.[253] The warrant requirement must also extend to analytic enhancements of archived data.[254] When AI tools apply object recognition, re-identification, or trajectory modeling to historical footage, they perform new acts of perception that were technologically impossible at the time of capture.[255] A warrant authorizing a live flight does not implicitly authorize future algorithmic analysis of the resulting data.[256] Therefore, Maryland's framework should require a separate judicial order—akin to a "secondary use warrant"—for any analytic operation performed on stored imagery.[257]

C. Heightened Protections Near the Home: Curtilage Safeguards and Thermal Limits.

Nowhere is the balance between autonomy and privacy more delicate than at the threshold of the home.[258] The Fourth Amendment and Article 26 of the Maryland Declaration of Rights both treat the home and its curtilage as zones of heightened expectation.[259] Even when said data is obtained without a physical trespass into the area of the homeowner.[260]

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[253] *See Carpenter*, 585 U.S. at 316; *Leaders of a Beautiful Struggle*, 2 F.4th at 346.
[254] *See Carpenter*, 585 U.S. at 316; *Leaders of a Beautiful Struggle*, 2 F.4th at 346.
[255] Lerussi, *supra* note 96.
[256] *See* Orin S. Kerr, *Executing Warrants for Digital Evidence: The Case for Use Restrictions on Nonresponsive Data*, 48 TEX. TECH L. REV. 1, 9 (2015) (arguing that subsequent use of lawfully seized digital data for a different investigative purpose is not inherently constitutional and should require renewed judicial authorization). *See generally* Emily Berman, *When Database Queries Are Fourth Amendment Searches*, 102 MINN. L. REV. 577, 637-38 (2017) (claiming that developing technology requires new legal framework to combat new issue, including subsequent queries derived from over seized data).
[257] *See supra* Section V.B; Kerr, *supra* note 256, at 4. A commonly cited doctrinal foundation for secondary-use warrant requirements—particularly where law enforcement seeks to repurpose lawfully obtained data for a new investigative objective—derives from Fourth Amendment limits on scope, duration, and purpose. *See* Kerr, *supra* note 256, at 4 (stating that it "is time for courts to interpret the Fourth Amendment as imposing a use restriction on nonresponsive files seized during the execution of a warrant for digital evidence. Interpreting the Fourth Amendment as imposing a use restriction on nonresponsive data seized under a warrant can restore the needed limits on the warrant authority in light of the new facts of computer searches").
[258] *See infra* Section V.C.
[259] U.S. CONST. amend. IV; MD. CONST. DECL. OF RTS., art 26.; Collins v. Virginia, 548 U.S. 586, 592-93 (2018) (citing California v. Ciraolo, 476 U.S. 207, 212–213 (1986)).
[260] Kyllo v. United States, 533 U.S. 27, 34 (2001) (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)).

For instance, in *Kyllo v. United States*, the Court held that using a thermal imager to detect details within a home constituted a search because it revealed information "that would previously have been unknowable without physical intrusion."[261] That reasoning applies with equal force to drones equipped with infrared or high-zoom optics capable of penetrating the home's spatial boundary.[262] Accordingly, any drone operation targeting residential areas should be subject to automatic warrant requirements and technical minimization.[263]

Statutory rules should codify altitude ceilings, geofenced buffer zones, and automated "pause" functions whenever a flight path intersects curtilage.[264] These measures function as digital analogs to physical warrants—mechanical enforcements of constitutional restraint.[265] Drones conducting non-emergency missions should also be prohibited from activating thermal, infrared, or zoom functions near residences absent judicial approval.[266] This approach harmonizes constitutional doctrine with technical design.[267] *Kyllo* teaches that sense enhancement near the home demands judicial supervision; *Leaders* warns that persistent observation becomes a search; and *Carpenter* instructs that data aggregation magnifies privacy risk.[268] Together, these principles justify statutory codification of "home-adjacent minimization"—a set of automated parameters that prevent surveillance technologies from inadvertently crossing the constitutional boundary.[269]

Having articulated the constitutional imperatives of autonomy, archives, and curtilage, the analysis now moves from a judicial doctrine to legislative design.[270] Part VI advances a Maryland statute, which is modeled on *Illinois's* Freedom from Drone Surveillance Act but expressly updated for artificial intelligence and supervised autonomy and that operationalizes these

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[261] *Id*. at 40.
[262] *Id*. at 36-38.
[263] *See* discussion and cases cited *supra* notes 258-62; *see also infra* Parts VI-VII (discussing suggested changes to Maryland's statute to reflect drone surveillance, artificial intelligence, and supervised autonomy concerns).
[264] *See* discussion *infra* notes 265-69.
[265] See Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1906 (2013) (emphasizing that mechanical or systemic controls can enforce constitutional norms).
[266] *See* Amy Sherry Fischer et al., *Drones: A New Front in the Fight Between Government Interests and Privacy Concerns*, 84 DEF. COUNS. J. 1, 4, 13 (2017); *see, e.g.*, Freedom from Drone Surveillance Act, 725 ILL. COMP. STAT. ANN. 167/15(6) (West 2023) (limiting law enforcement drone use to emergency or disaster-related purposes and implicitly requiring authorization for non-emergency surveillance).
[267] *See* discussion *infra* notes 268-69; *infra* Part VI.
[268] *See supra* Part IV.
[269] *See supra* Section V.A; *infra* Sections VI.A-B.
[270] *See supra* Part V; *infra* Part VI.

principles through warrant rules, analytic limits, retention schedules, and civil remedies.[271]

VI. LEGISLATIVE DESIGN: A MARYLAND STATUTE FOR AI-ENABLED DRONE OPERATIONS.

Part VI operationalizes those imperatives.,[272] that Maryland cannot rely on case-by-case adjudication to regulate AI-assisted drone use; it must legislate.[273] Fortunately, an instructive model already exists.[274] Illinois's Freedom from Drone Surveillance Act offers a statutory framework that, if updated for artificial intelligence and supervised autonomy, can anchor Maryland's next generation of privacy protection.[275]

A. Baseline Model: Illinois's Freedom from Drone Surveillance Act.

Illinois became the first state to enact a comprehensive statute governing police drone use.[276] The Freedom from Drone Surveillance Act embodies a warrant-first structure with narrow, enumerated exceptions.[277] Law enforcement may deploy drones pursuant only to a warrant issued by a court on probable cause, except in circumstances of imminent danger to life,

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[271] *See infra* Part VI.
[272] *See infra* Part VI.
[273] *See supra* Sections V.A-C; *infra* Part VI.
[274] *See generally* Freedom from Drone Surveillance Act, 725 ILL. COMP. STAT. ANN. 167/1 (West 2025) (demonstrating that Illinois has an existing statutory framework regulating police drone use).
[275] *See infra* Sections VI.A-C; Freedom from Drone Surveillance Act, 725 ILL. COMP. STAT. ANN. 167/1, et seq. (West 2025).
[276] *See Chicago the First City to Get Serious about Drone Injuries*, LERNER & ROWE (Aug. 25, 2020), https://lernerandrowe.com/chicago-first-city-drone-laws/ (on file with the University of Baltimore School Law Forum); *see also* Anne Toomey McKenna & Clifford S. Fishman, *Wiretapping and Eavesdropping*, § 28:130. Illinois—Unmanned Aircraft Surveillance (2025) (discussing the Illinois Freedom from Drone Surveillance Act as comprehensive, because it regulates the retention and disclosure of collected data). However, several states enacted statutes regulating police drone use prior to Illinois, though those statutes did not establish comprehensive regulatory frameworks. *See* Va. S.B. 1331, 2013 Gen. Assemb., Reg. Sess. (approved Apr. 3, 2013) (2-year moratorium on drone use by law enforcement, except in emergencies); 2013 Idaho Laws Ch. 328 (S.B. 1134) (requiring police to obtain a warrant before conducting surveillance, except in emergencies); Fl. Stat. § 934.50 (2013) (prohibiting law enforcement from using drones to gather evidence except in specified circumstances); *see also* 2015 North Dakota Laws Ch. 239 (H.B. 1328) (imposing warrant and evidentiary restrictions on governmental drone surveillance, subject to limited statutory exceptions).
[277] *See* 725 ILL. COMP. STAT. ANN. 167/10, /15 (West 2025).

high-risk search-and-rescue, disaster response, or missing-persons investigations.[278] The Act also imposes temporal limits such as requiring that flights conducted under emergency exceptions cease once the exigency ends and mandates deletion of non-evidentiary data within thirty days.[279]

The Illinois statute provides several key architectural lessons.[280] First, it embeds judicial authorization at the front end of drone operations, converting what might otherwise be discretionary policy into a matter of legal obligation.[281] Second, it prohibits biometric surveillance, including facial recognition and weaponization, absent specific legislative approval.[282] Third, it establishes public-reporting duties, requiring annual disclosure of drone use, mission categories, and data retention.[283] Collectively, these provisions implement the warrant requirement *ex ante*: they make privacy protection a structural feature of program design, rather than a reactive judicial remedy.[284]

Additional justification for Maryland to follow Illinois lead regarding constitutional alignment is strong.[285] Both states interpret their declaration of rights to mirror the Fourth Amendment's reasonableness test while allowing the legislature to impose stricter standards.[286] Maryland therefore stands on firm doctrinal ground to adopt Illinois's framework as a baseline while adapting it for the unique risks of AI autonomy and cloud-based analytics.[287]

B. Maryland Adaptation: Explicit AI Coverage, Human Confirmation, Logging, and Oversight.

A Maryland statute modeled on Illinois's law must explicitly recognize that AI and autonomy constitute distinct regulatory categories.[288] DFR already employs algorithmic tracking and mission replay; therefore, future deployments will only deepen that integration.[289] Accordingly, Maryland's adaptation should expand the statutory text in four dimensions:

1. Explicit AI Coverage. The law should define "autonomous or

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[278] *See id.* 167/10; *id.* 167/15(2)-(6).
[279] *See id.* 167/20.
[280] *See* discussion *infra* notes 281-84.
[281] *See* 725 ILL. COMP. STAT. ANN. 167/10, /15 (West 2025).
[282] *See id.* 167/17 (West 2025).
[283] *Id.* 167/25.
[284] *See* discussion and sources cited *supra* notes 281-83.
[285] *See* discussion *infra* note 286-87.
[286] U.S. CONST. amend. IV; MD. CONST. DECL. OF RTS., art. 26 (West 2025); Ill. CONST. 1970, art. I, § 6 (West 2025).
[287] *See* discussion *supra* notes 285-86; *infra* Section VI.B.
[288] *See infra* Section VI.B.
[289] *MCPD Press Release*, *supra* note 12.

AI-assisted drone operation" as any mission in which software initiates, continues, or modifies surveillance without contemporaneous human control.[290] This definition ensures that the statute reaches not only human-directed flights but also automated tracking and post-hoc analytic processing.[291]

2. Human Confirmation and Audit Logging. Any AI-triggered surveillance action, such as automated target reacquisition or facial re-identification, must receive affirmative human confirmation before proceeding.[292] Agencies must maintain immutable audit logs recording time stamps, operator identities, AI activations, and overrides.[293] Such logs become the evidentiary backbone for accountability and are analogous to chain-of-custody documentation in digital forensics.[294]

3. Oversight and Transparency. Maryland should establish a centralized oversight entity, which either could be within the Office of the State Public Defender or the Inspector General, to review drone mission data, audit retention compliance, and publish anonymized quarterly reports.[295] This ensures that transparency is not discretionary but institutionalized.[296]

4. Integration with Existing Statutes. The law should harmonize with Maryland's Public Information Act and data-protection statutes

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[290] *See* Freedom from Drone Surveillance Act, 725 ILL. COMP. STAT. ANN. 167/5 (West 2025) (illustrating Illinois's practice of expressly defining surveillance-related technology, including "drone," as "any aerial vehicle that does not carry a human operator").

[291] *See supra* Sections III.A-B.

[292] *See supra* Section V.A.

[293] *See generally* Freedom from Drone Surveillance Act, 725 ILL. COMP. STAT. ANN. 167/20(b)(1)-(4) (West 2025) (authorizing retention of information under certain circumstances, which necessarily entails maintaining persistent, time-stamped operational logs).

[294] *See* discussion *supra* notes 233-57; *see also* Karen Kent et al., *Guide to Integrating Forensic Techniques into Incident Response*, NIST Spec. Publ. 800-86 at ES-1 (2006), https://nvlpubs.nist.gov/nistpubs/legacy/sp/nistspecialpublication800-86.pdf (on file with the University of Baltimore Law Forum) (explaining that documentation and logging are essential to maintaining chain of custody and evidentiary integrity in digital forensics).

[295] *See* Freedom from Drone Surveillance Act, 725 ILL. COMP. STAT. ANN. 167/35 (West 2025) (reflecting legislative recognition that law-enforcement drone use requires standardized policies and public accountability mechanisms).

[296] *See supra* Section III.B (arguing that statutory governance must extend to the analytic models used in law enforcement flight systems); *see, e.g.*, MD. CODE ANN., GEN. PROVISIONS, § 4-103 (West 2024) ("All persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees.").

to ensure that citizens can access records of drone activity, subject to narrow security exceptions.[297]

Through these adaptations, Maryland's statute would do what Illinois's cannot: regulate not merely the use of drones but the decision logic embedded within them.[298] The Fourth Amendment's focus on "reasonableness" thus becomes concretized in code design and administrative process.[299]

C. Enforcement: Exclusionary Rule, Civil Action, and Administrative Sanctions.

Statutory rights are hollow without remedies.[300] Illinois's Act provides a civil enforcement mechanism and requires suppression of unlawfully obtained evidence.[301] Maryland should preserve and expand these remedies across three dimensions: first, through the exclusionary rule.[302] Courts must suppress any evidence derived from drone surveillance conducted in violation of the statute, consistent with *Mapp v. Ohio's* application of the exclusionary principle to states.[303] The exclusionary rule serves not merely to deter misconduct but to maintain judicial legitimacy in the face of pervasive, technology-driven surveillance.[304]

Secondly, it should allow for a Private Right of Action.[305] Individuals whose images, metadata, or location histories are captured without lawful

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[297] *See* MD. CODE ANN., GEN. PROVISIONS § 4-103 (West 2024); *see also* Freedom from Drone Surveillance Act, 725 ILL. COMP. STAT. ANN. 167/25 (West 2025) (illustrating Illinois statutory formatting that Maryland could mirror under the Public Information Act).

[298] *Compare* discussion *supra* notes 290-97 (Maryland should adapt their statutory text to cover: (1) Explicit AI Coverage, (2) Human Confirmation and Audit Logging, (3) Oversight and Transparency, and (4) Integration with Existing Statutes), *with* Freedom from Drone Surveillance Act, 725 ILL. COMP. STAT. ANN. 167/10 (West 2025) (prohibiting law enforcement use of drones to gather information, but not providing for operational safeguards, such as human confirmation or audit logging).

[299] *See supra* Section V.A.

[300] Marbury v. Madison, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

[301] 725 ILL. COMP. STAT. ANN. 167/10, /30 (West 2025).

[302] *See* discussion *infra* notes 303-04; Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[303] *Mapp*, 367 U.S. at 655.

[304] *See id.* at 657; discussion *supra* notes 184-203.

[305] *See* Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001) (explaining that a private right of action exists only when Congress manifests an intent to create both a private right and a private remedy); discussion *infra* notes 306-07; *infra* Attachment A § 9; *see also* Cannon v. Univ. of Chi., 441 U.S. 677, 688–89 (1979) (discussing the role of private rights of action in

authorization should have standing to seek injunctive relief and statutory damages.[306] Such a remedy extends Fourth Amendment values into the administrative state, offering a concrete path for redress even when criminal prosecution is absent.[307]

Lastly, administrative sanctions should be available.[308] Agencies that fail to maintain required logs, delete data, or obtain proper warrants should face penalties enforced by the State Ethics Commission or the Inspector General.[309] Sanctions may include budgetary withholding, license suspension for operators, and referral for disciplinary proceedings.[310] Together, these enforcement mechanisms ensure that constitutional principles are not left to post-hoc judicial interpretation.[311] They embed privacy accountability within Maryland's administrative fabric, transforming statutory compliance into a condition of operational legitimacy.[312]

By marrying Illinois's statutory model to Maryland's constitutional culture, the proposed Act moves privacy protection from abstraction to architecture.[313] Part VII extends that integration further—linking reliability, safety, and cyber-integrity to the standard of constitutional reasonableness and ensures that drone regulation addresses not only what is seen but also how it is seen.[314]

VII. INTEGRATING SAFETY, RELIABILITY, AND REASONABLENESS.

A statutory framework can only be as effective as the systems and institutions that implement it.[315] Part VI proposed a Maryland statute

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ensuring statutory compliance); *cf.* Daniel J. Solove & Paul M. Schwartz, *Privacy Law Fundamentals* 121–23 (6th ed. 2022) (describing private rights of action as a critical accountability mechanism in privacy and surveillance statutes).

[306] *Overview of the Privacy Act: 2020 Edition*, OFF. OF PRIV. & C.L. https://www.justice.gov/opcl/overview-privacy-act-1974-2020-edition/remedies?utm_source=chatgpt.com (on file with the University of Baltimore Law Forum) (last visited Apr. 7, 2026).

[307] *See* Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1043–44 (2016) (arguing that vindicating Fourth Amendment values in an era of programmatic surveillance requires administrative governance mechanisms, including tools independent of criminal procedure).

[308] *See* discussion *infra* notes 309-14; *infra* Attachment A § 9.

[309] Freedom from Drone Surveillance Act, 725 ILL. COMP. STAT. ANN. 167/45 (West 2025).

[310] *See id.*

[311] *See supra* Part IV.

[312] *See infra* Part VII.

[313] *See supra* Part VI (articulating the proposed statutory framework for autonomous drone governance).

[314] *See infra* Part VII.

[315] *Understanding Policy Implementation*, IMPLEMENTATION GUIDES (describing how implementation frameworks shape policy outcomes),

modeled on Illinois's Freedom from Drone Surveillance Act.[316] This Part explains why the legitimacy of that framework ultimately depends on technical reliability and procedural integrity.[317] The constitutional measure of "reasonableness" under the Fourth Amendment and Article 26 of the Maryland Declaration of Rights cannot be divorced from the technological soundness of the tools the government uses.[318] When software autonomy, navigation accuracy, or cybersecurity flaws distort what the state perceives, reasonableness collapses.[319] The same principle applies institutionally: training, auditing, and transparency transform constitutional ideals into operational practice.[320]

Reliability and safety are not merely engineering concerns, they are constitutional predicates.[321] The Fourth Amendment's reasonableness inquiry has always incorporated the manner of the search and seizure; and errors in perception, execution, or record-keeping bear directly on whether government conduct is "reasonable."[322] For AI-enabled drones, that inquiry extends to cyber integrity, airworthiness, and compliance with federal safety regulations.[323]

Under 14 C.F.R. § 107 and the FAA's reliability standards, every unmanned aircraft must be maintained to ensure "safe operating condition."[324] FAA advisory circulars governing Beyond Visual Line of Sight ("BVLOS") operations further require that any autonomous or semi-autonomous function be tested, validated, and documented prior to use.[325] These requirements are not merely bureaucratic, they delineate the technological boundary of constitutional reasonableness.[326] A surveillance

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https://implementation.effectiveservices.org/context/policy-implementation (on file with the University of Baltimore Law Forum) (last visited Apr. 1, 2026).

[316] *See supra* Part VI.

[317] *See infra* Part VII.

[318] *See supra* Part II.

[319] *See supra* Part III; *infra* Part VII.

[320] *See infra* Part VII.

[321] *See* discussion *infra* notes 322-23.

[322] *See infra* Part IV; Wilson v. Arkansas, 514 U.S. 927, 934 (1995) (holding that Fourth Amendment reasonableness includes consideration of the manner of execution of a search).

[323] *See* discussion *infra* notes 324-34.

[324] 14 C.F.R. § 107.19 (2025); 14 C.F.R. § 107.15 (2025); *see, e.g. Advisory Circular 120-17B*, FED. AVIATION ADMIN. (Dec. 19, 2018), https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_120-17B.pdf (on file with the University of Baltimore Law Forum).

[325] FAA, Advisory Circular 107-2B: Small Unmanned Aircraft Systems Operations § 7.3 (2024).

[326] *See* discussion and cases cited *supra* notes 324-25.

program that knowingly deploys unreliable autonomy or untested object-recognition models risks unreasonable error akin to an unlawful search.[327]

Maryland law reinforces this link between technological integrity and legal responsibility.[328] Under Md. Econ. Dev. § 14-301, the State, not local governments, retains exclusive regulatory authority over the testing and operation of unmanned aircraft systems.[329] That preemption means the State must also bear responsibility for ensuring that any system it authorizes meets baseline reliability and cybersecurity standards.[330] Likewise, Md. Transp. §§ 5-1001 & 5-104 recognize a public right of flight conditioned on safety: air transit is lawful only if conducted at altitudes and in manners that are not "imminently dangerous to persons or property."[331] These provisions effectively codify reliability, so operational safety becomes a precondition to lawful surveillance.[332] Integrating FAA and state safety frameworks into constitutional analysis ensures that "reasonableness" evolves with technology.[333] A drone that navigates erratically, loses telemetry, or transmits unsecured video cannot form the factual foundation of a constitutionally valid search.[334]

Reliability is as much institutional as technical.[335] Just as *United States v. Leon* conditioned good-faith reliance on objectively reasonable conduct, constitutional reasonableness in the age of autonomy requires reasonable administration.[336] Maryland can institutionalize reliability

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[327] *See generally* International AI Safety Report 2026 (warning that general-purpose AI systems can remain unreliable, produce inconsistent and incorrect outputs, and make it difficult to assess system behavior in real-world conditions, which poses safety and governance risks), International AI Safety Report (Feb 3, 2026), https://internationalaisafetyreport.org/publication/international-ai-safety-report-2026 (on file with the University of Baltimore Law Forum).

[328] *See* MD. CODE ANN., ECON. DEV. § 14-301 (West 2024).

[329] *Id.*

[330] *See id.*; Jim Dempsey, *Preemption of State Cybersecurity Laws: It's Complicated*, LAWFARE (Aug. 24, 2022, at 08:01 ET), https://www.lawfaremedia.org/article/preemption-state-cybersecurity-laws-its-complicated (on file with the University of Baltimore Law Forum).

[331] *See* MD. CODE ANN., TRANSP. § 5-1001(b)(2) (West 2024).

[332] *See* ECON. DEV. § 14-301 (West 2024) (conditioning state authorization of certain technological activities on compliance with statutory regulatory safeguards, thereby linking operational integrity to lawful deployment); TRANSP. § 5-1001(b)(2) (West 2024) (requiring compliance with statutory operational and safety standards as a prerequisite to lawful operation of regulated systems).

[333] *See* discussion *supra* notes 322-32.

[334] *See* discussion *supra* notes 321-33.

[335] *See* discussion *infra* notes 336-49.

[336] United States v. Leon, 468 U.S. 897, 922 (1984).

through three mutually reinforcing mechanisms: operator training, AI validation, and periodic audits.[337]

The first is operator training.[338] The Md. Public Safety § 3-506 precedent for mandatory eyewitness-identification policies provides an instructive analogue.[339] Just as every law-enforcement agency must adopt Department of Justice–compliant eyewitness procedures to ensure accuracy, every agency employing drones should be statutorily required to adopt standardized AI-use protocols approved by the Maryland Police Training and Standards Commission.[340] Certification should include both technical proficiency and legal comprehension-ensuring that operators understand how warrant rules, curtila ge protections, and minimization requirements apply to AI-enabled sensors.[341]

The second is AI validation.[342] Before deployment, all machine-learning models used for object detection, person re-identification, or trajectory prediction should undergo documented validation testing akin to evidentiary reliability under *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[343] Validation results should be retained as part of the system's audit file and made available for judicial review when AI outputs form part of probable-cause or evidentiary determinations, similar to breath analyzers, or Radar speed guns.[344]

The third mechanism is the use of reliability audits.[345] Annual third-party audits should review each agency's compliance with FAA maintenance requirements, cybersecurity controls, and AI-model updates.[346] These findings should be transmitted to the oversight body established under the

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[337] *See* discussion *infra* notes 338-49.
[338] *See* discussion *infra* notes 339-41.
[339] MD. CODE ANN., PUB. SAFETY § 3-506 (West 2025).
[340] Dawn Zoldi, *Drone Training is Critical for Public Safety Now More Than Ever*, AUTONOMY GLOB. (Mar. 27, 2025), https://www.autonomyglobal.co/drone-training-is-critical-for-public-safety-now-more-than-ever/ (on file with University of Baltimore Law Forum).
[341] Mateusz Dolata & Gerhard Schwabe, *Moving Beyond Privacy and Airspace: Guidelines for Just Drones in Policing*, 40 GOV'T INFO. Q. 1, 15 (2023); *see supra* Part V.
[342] *See* discussion *infra* notes 343-44.
[343] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 587-88 (1993).
[344] *See The Science Behind Breathalyzer Tests in Maryland DUI Cases*, ALPERT SCHREYER CRIMINAL DEFENSE ATTORNEYS (Mar. 19, 2024), https://andrewalpert.com/blog/the-science-behind-breathalyzer-tests-in-maryland-dui-cases/ (on file with University of Baltimore Law Forum) (highlighting the need to preserve records as a means to challenge reliability and accuracy on appeal).
[345] *See* discussion *infra* notes 346-48.
[346] *See* Thomas Black, *Increasing Use of Drones by Police Will Need Rules*, HERALD NET (Sep. 24, 2025), https://www.heraldnet.com/opinion/comment-increasing-use-of-drones-by-police-will-need-rules/ (on file with the University of Baltimore School of Law); *supra* notes 213-16.

proposed statute.[347] Regular audits ensure that reliability is not a one-time certification but a continuing constitutional practice.[348]

Transparency converts reliability into legitimacy.[349] Constitutional reasonableness depends not only on internal accuracy but also on public trust.[350] Maryland's Transportation statutes already acknowledge a public right of air transit; that right should be paired with a public right of information.[351] Agencies operating drones should publish annual reports detailing flight counts, mission types, warrant authorizations, retention statistics, and any AI-model changes.[352] Civilian oversight bodies—whether nested within the Inspector General or constituted as an independent Privacy and Technology Commission—should possess subpoena power to inspect logs, audit compliance, and investigate complaints.[353] Public summaries of such audits, anonymized for security, create the transparency that sustains democratic legitimacy.[354] Finally, transparency must extend to intergovernmental communication.[355] Federal preemption and state sovereignty coexist uneasily under Md. Transp. § 5-104, which vests airspace sovereignty in the State subject to federal delegation.[356] Regular coordination with the FAA, combined with public reporting, ensures that Maryland's regulatory scheme remains consistent with federal standards while

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[347] *See* Robert Kane & Jordan Hyatt, *Lessons from 'Stop and Frisk' Can Help Police Use Drones Without Compromising Civil Liberties*, ROUTE FIFTY (Jan. 22, 2025), https://www.route-fifty.com/public-safety/2025/01/lessons-stop-and-frisk-can-help-police-use-drones-without-compromising-civil-liberties/402398/ (on file with the University of Baltimore Law Forum); *supra* Sections VI.B-C.

[348] *See* Prajwal Gowda, *What Can Go Wrong When Compliance Stops at a One-Time Audit*, AMPCUS CYBER (Dec. 23, 2025), https://www.ampcuscyber.com/blogs/what-can-go-wrong-when-compliance-stops-at-a-one-time-audit/(on file with the University of Baltimore Law Forum).

[349] Dolata & Schwabe, *supra* note 341.

[350] *Id*.; *see supra* Part V.

[351] *See* MD. CODE ANN., TRANSP. § 5-1001(a) (West 2024).

[352] *See* Freedom from Drone Surveillance Act, 725 ILL. COMP. STAT. ANN. 167/25(b) (West 2025).

[353] Marie-Rose Sheinerman, *Police nationwide are embracing a new first responder: Drones*, THE WASHINGTON POST (Aug. 4, 2025), https://www.washingtonpost.com/nation/2025/08/04/drones-first-responders-police-departments/ (on file with the University of Baltimore Law Forum).

[354] Faine Greenwood, *How to Regulate Police Use of Drones*, BROOKINGS INST. (Sept. 24, 2020), https://www.brookings.edu/articles/how-to-regulate-police-use-of-drones/ (on file with the University of Baltimore Law Forum).

[355] *See* discussion *infra* notes 356-58.

[356] MD. CODE ANN., TRANSP. § 5-104(b) (West 2024); *Drone Security in Law Enforcement: Opportunities and Policy Challenges*, ARES (Feb. 17, 2023), https://aressecuritycorp.com/2025/02/17/drone-security-in-law-enforcement-opportunities-and-policy-challenges/ (on file with the University of Baltimore Law Forum).

responsive to local privacy expectations.[357] In this sense, transparency is not ancillary to reasonableness, rather it is reasonableness, expressed institutionally.[358]

As AI autonomy and cloud analytics redefine the scope of surveillance, safety and reliability become the new grammar of constitutional reasonableness.[359] The proposed Maryland statute cannot succeed unless its operational ecosystem of technical, institutional, and public, is equally sound.[360] The final Part concludes by situating Maryland's model within the broader national movement toward anticipatory governance, where the rule of law adapts at the speed of the machine.[361]

VIII. CONCLUSION: DESIGNING CONSTITUTIONAL REASONABLENESS FOR THE MACHINE AGE.

Maryland's moment mirrors the very arc that opened this Article.[362] In the span of two days, Air Force officials and President Zelenskyy warned that the speed of AI now outstrips the speed of human judgment—and that autonomy, once embedded in sensing and targeting systems, reshapes the moral and legal premises on which decision making occurs.[363] What begins on foreign battlefields rarely stays there.[364] The same classes of perception, prediction, and task-level autonomy that now drive military planning cycles migrate quickly into domestic public-safety tools.[365] Montgomery County's DFR program already illustrates this dynamic: rapid launch, automated stabilization, intelligent tracking, and cloud-based video create operational value, but also the architecture for persistent monitoring if left unguided.[366]

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[357] Brittney D. Kohler et al., *Drones Above Your City – How Cities Engage with Federal Officials on Drones*, NAT. LEAGUE OF CITIES (Jan. 3, 2025), https://www.nlc.org/article/2025/01/03/drones-above-your-city-how-cities-engage-with-federal-officials-on-drones/ (on file with the University of Baltimore Law Forum); *see* ARES, *supra* note 356; *supra* Section III.D.

[358] *See* discussion *supra* notes 349-57.

[359] *See supra* Part VI.

[360] *See supra* Sections VI.A-B.

[361] *See infra* Part VIII.

[362] *See supra* Part I.

[363] *See* discussion and sources cited *supra* notes 1-10.

[364] *See* discussion *infra* notes 365-66.

[365] Jamiles Lartey, *It's a Bird. It's a Plane. It's the Police Responding to 911*, THE MARSHALL PROJECT (July 29, 2023, at 12:00 ET), https://www.themarshallproject.org/2023/07/29/police-drone-california-911#:~:text=In%20a%20report%20published%20on,of%20people%20who%20sign%20up (on file with the University of Baltimore Forum).

[366] *See DFR Public Dashboard*, *supra* note 12.

The constitutional doctrines canvassed throughout this Article, including *Ciraolo* and *Riley*'s tolerance for brief aerial glances, *Kyllo*'s protection for the home and curtilage, *Jones* and *Carpenter*'s concern with long-term technological tracking, and the Fourth Circuit's recognition in *Leaders of a Beautiful Struggle* that access to an aerial archive is itself a search, were never designed for autonomous systems capable of sustaining continuous presence, generating probabilistic inferences, or delegating targeting decisions to software.[367] The doctrinal guardrails exist, but they were built for pilots, not programs, and for officers whose observations are episodic, but not for drones whose senses and memory never fatigue.[368]

As this Article has argued, the doctrinal mismatch creates a narrow window in which Maryland can act.[369] The DFR program is still young; its technical stacks still malleable, and its institutional norms are still forming.[370] This is precisely the moment when statutory architecture can shape technological evolution rather than merely respond to it.[371] A comprehensive drone statute that is adapted from Illinois' but expressly tailored to AI-assisted and autonomy-capable platforms, would do more than codify warrant requirements or retention limits.[372] It would constitutionalize system design;[373] embed minimization into software parameters; require audit logs for every analytic query; prohibit person-reidentification and facial recognition without judicial authorization; and tether automated tracking to human-in-the-loop confirmation.[374] These are not after-the-fact remedies.[375] They are the engineering-level equivalents of the Fourth Amendment's core commitments.[376]

Designing reasonableness for autonomous systems therefore involves more than constraining police conduct.[377] It requires specifying how systems perceive, what they remember, and when they may act.[378] It requires aligning software defaults with constitutional values before scale, automation, and institutional inertia make such alignment impossible.[379] Additionally, it requires public transparency through dashboards, retention disclosures, and

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[367] *See supra* Part IV.
[368] *See supra* Parts IV-V.
[369] *See supra* Part VI.
[370] *See* discussion *supra* notes 46-50.
[371] *See* discussion *supra* notes 46-50.
[372] *See supra* Part VI.
[373] *See supra* Part VI.
[374] *See supra* Part VI.
[375] *See supra* Parts V-VI.
[376] *See supra* Section IV.B.
[377] *See supra* Part II.
[378] *See supra* Part II and Section III.D.
[379] *See supra* Section V.A.

audit reports so affected communities can see, not only what drones captured, but how and why.[380]

If Maryland adopts such a framework, it will not simply harmonize drone operations with existing federal doctrine.[381] It will lead.[382] The state can model a form of anticipatory governance that recognizes both the promise of AI-enabled response and the peril of unbounded, machine-driven surveillance.[383] It can demonstrate that innovation and constitutional fidelity are not opposing forces but mutually reinforcing conditions for public trust.[384] Furthermore, it can show that in the machine age, legitimacy derives not only from lawful outcomes but also from lawful architectures—systems whose constraints are as transparent as their capabilities.[385]

The future of public safety will increasingly involve software that perceives, recommends, and, eventually, acts.[386] The question is whether that software will be shaped by constitutional principles or merely judged against them after the fact. By acting now, before autonomy becomes entrenched and before persistent archives become the default, Maryland can ensure that when drones begin to decide, they do so within a constitutional frame that the legislature, the courts, and the public helped build.[387] In doing so, Maryland will not only comply with the Fourth Amendment but it will also help define the state's next chapter.[388]

ATTACHMENT A: MODEL MARYLAND AI-ENABLED DRONE SURVEILLANCE STATUTE

Section 1. General Warrant Requirement.

(a) Except as provided in Section 2, a law enforcement agency may not operate an unmanned aircraft system for surveillance, investigation, evidence gathering, or data collection unless the agency has obtained a valid warrant based on probable cause.

Section 2. Exceptions to Warrant Requirement.

(a) A law enforcement agency may operate an unmanned aircraft system without a warrant only under the following circumstances:

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[380] *See supra* Section IV.D.
[381] *See supra* Sections IV.A-B.
[382] *See supra* Sections IV.A-B.
[383] *See supra* Part VI.
[384] *See supra* Part VI.
[385] *See supra* Part VI.
[386] *Drones with Artificial Intelligence: What Can We Expect in the Coming Years*, HPDRONES (Oct. 24, 2025), https://hp-drones.com/en/drones-with-artificial-intelligence-what-can-we-expect-in-the-coming-years/ (on file with the University of Baltimore Law Forum).
[387] *See supra* Part VI.
[388] *See supra* Part VI.

(1) **Exigent Circumstances.** When a law enforcement officer reasonably believes that immediate deployment is necessary to:
   (i) Prevent imminent danger of death or serious bodily injury to any person;
   (ii) Forestall the imminent escape of a suspect; or
   (iii) Prevent the imminent destruction of evidence of a felony offense.

(2) **Search and Rescue.** To locate a missing person, provided that:
   (iv) There is reasonable suspicion that the person's safety is at risk;
   (v) The deployment is limited in duration and geographic scope to the area where the person is reasonably believed to be located; and
   (vi) Any footage or data collected incidentally to the search is subject to the retention and deletion requirements.

(3) **Disaster and Emergency Management.** To assess damage, coordinate emergency response, or protect public safety during a natural disaster, fire, hazardous materials incident, or other emergency officially declared by a competent authority.

(4) **Crime Scene Documentation.** To photograph or document a crime scene, collision scene, or other site requiring forensic preservation, provided that:
   (i) The deployment occurs only after law enforcement has lawfully secured the scene;
   (ii) The unmanned aircraft does not surveil persons or areas beyond the secured perimeter; and
   (iii) Sense-enhancement technologies are not activated outside the lawful perimeter.

(5) **Drone As First Responders.** To photograph or document a crime scene, collision scene, or other site requiring forensic preservation, provided that:
   (i) The deployment occurs only after law enforcement has lawfully secured the scene;
   (ii) The unmanned aircraft does not surveil persons or areas beyond the secured perimeter; and

(iii) Sense-enhancement technologies are not activated outside the lawful perimeter.

(b) For deployments under subsection (a)(1) (exigent circumstances), the law enforcement agency must:

(1) Document specific facts constituting the exigency in a written report filed within 48 hours of the deployment;

(2) Apply for a warrant as soon as practicable if continued surveillance is necessary; and

(3) Terminate the operation immediately upon cessation of the exigent circumstances.

Section 3. Restrictions on Artificial Intelligence, Biometric, and Sense-Enhancement Technologies.

(a) **Prohibition on Facial Recognition and Person Re-Identification.** A law enforcement agency may not:

(1) Equip an unmanned aircraft system with facial recognition technology or biometric identification technology; or

(2) Use person re-identification algorithms or predictive analytics to identify, track or correlate individuals across multiple unmanned aircraft deployments or archived data, unless the agency obtains a court order authorizing such use pursuant to Subsection 3.

(b) **Court Authorization for Biometric Technologies.**

(1) A law enforcement agency seeking to use biometric identification technology or person re-identification analytics in connection with unmanned aircraft operations must obtain a court order based on probable cause.

(c) **Prohibition on Sense-Enhancement Technologies Nears Homes and Curtilage.**

(1) A law enforcement agency may not activate thermal imaging, infrared sensors, or other sense-enhancement technology to observe the interior of dwelling or its curtilage unless:

(i) The agency has obtained a warrant specifically authorizing use of sense-enhancement technology; or

(ii) Exigent circumstances exist as defined in Section 2.

(d) **Any order issued under this section must:**

(1) Specify the duration of authorization, which may not exceed 30 days without judicial review;
(2) Require the law enforcement agency to file periodic compliance reports; and
(3) Include conditions ensuring human verification of all algorithmic identification before investigative or enforcement action is taken.

Section 4. Human-in-the-Loop Requirements for Autonomous Operations.

(a) A law enforcement agency employing autonomous or AI-assisted unmanned
aircraft operations must ensure that:
(1) Any surveillance, tracking or targeting action initiated by artificial intelligence
receives affirmative human confirmation before execution;
(2) A certified remote pilot in command retains real time-time override capability
throughout the operation; and
(3) ------

Section 5. General Retention, Deletion, and Aerial Archive Requirements.

(a) Non-evidentiary data must be automatically deleted within 30 days.
(b) Querying or analyzing stored UAS footage or metadata to reconstruct a person's movements constitutes a search and requires a warrant.
(c) AI-based analysis of archived data requires:
(1) A warrant; and
(2) Compliance with Section 5.
(d) Data collected under exigent or emergency exceptions may not be used for unrelated investigations.

Section 6. Civil Action for Damages.

(a) An individual whose image, biometric data, location information, or coordinate
metadata is collected, retained, analyzed or disseminated in violation of the statute may bring a civil action in a court of competent jurisdiction against
(1) The law enforcement agency responsible for the violation; and
(2) Any officer, employee, or agent who knowingly,

recklessly, or negligently caused or contributed to the violation.

(b) A plaintiff who prevails in an action under this section is entitled to:

Section 7. Security, Cyber-Integrity, and System Reliability Requirements.

(a) All UAS systems must comply with FAA reliability and maintenance standards.

(b) Agencies must implement:

(1) Encryption of all transmitted and stored UAS data;

(2) Access-control logs; and

(3) Annual third-party audits.

(c) Evidence obtained through unreliable or unvalidated AI models is inadmissible.

Section 8. Transparency, Public Reporting, and Oversight.

(a) Each agency shall publish quarterly public reports including:

(1) Number of deployments;

(2) Mission categories;

(3) Warrants obtained;

(4) Use of analytic or biometric technologies; and

(5) Retention and deletion statistics.

(b) The Maryland Inspector General for Public Safety shall:

(1) Conduct annual audits;

(2) Possess subpoena authority; and

(3) Publish an annual public report.

Section 9. Enforcement; Remedies; Exclusionary Rule.

(a) Evidence obtained in violation of this Act, and any derivative evidence, shall be
suppressed.

(b) Any individual whose data is unlawfully collected may bring a civil action against:

(1) The responsible agency; and

(2) Any officer who knowingly, recklessly, or negligently caused the violation.

(c) Remedies include:

(1) Actual damages or statutory damages of $1,000 per violation;

(2) Punitive damages for willful violations;

(3) Injunctive or declaratory relief; and

(4) Attorney's fees and costs.

(d) Agencies may face budgetary penalties or operator-license suspension.

Section 12. Severability.

(a) If any provision of this Act is held invalid, the remaining provisions remain in force.

Section 13. Definitions.

(a) "Unmanned Aircraft System" (UAS) means an aircraft operated without the possibility of direct human intervention from within or on the aircraft, including any associated elements such as communication links, onboard sensors, data storage, and remote-control equipment.

(b) "AI-Assisted Operation" means any UAS function in which software performs perception, tracking, reacquisition, routing, or analytic tasks that materially influence surveillance or data collection.

(c) "Autonomous Operation" means any UAS function that initiates, continues, or modifies surveillance, tracking, or data capture without contemporaneous human command.

(d) "Biometric Identification Technology" means facial recognition, person re-identification, gait recognition, or any algorithmic system that identifies or attempts to identify a specific individual.

(e) "Curtilage" has the same meaning as recognized under Article 26 of the Maryland Declaration of Rights.

(f) "Sense-Enhancement Technology" includes thermal imaging, infrared sensors, telescopic or ultra-zoom optics, or other devices not in general public use that can reveal details of a dwelling or its curtilage otherwise unknowable without physical intrusion.

(g) "Surveillance" means the intentional collection, recording, or retention of images, audio, coordinate metadata, or other data relating to persons, structures, or vehicles.

Section 14. Effective Date.

(a) This Act shall take effect October 1, 2026.

ARTICLE

CRIMINALIZING DECEPTIVE DEEPFAKES: A NOVEL APPROACH ROOTED IN COMMON LAW TRADITION

By: Benjamin Yelin, JD
Christopher Webster, JD*

I. DECEPTIVE DEEPFAKES ARE A NEW AND WORSENING PROBLEM.

In January 2024, the community in Pikesville, a suburb of Baltimore, Maryland, was in turmoil.[1] An audio recording purporting to show the principal of Pikesville High School making racist and antisemitic remarks had spread on social media.[2] In a community with a large population of African-American and Jewish students, the outcry was swift and severe.[3] The principal faced social media abuse, death threats, and was put on paid administrative leave while the school system investigated the audio recording.[4]

However, it turned out that the audio recording was a deepfake allegedly generated by the school's athletics director, using modern artificial intelligence tools.[5] Critically, the creation and distribution of this deceptive deepfake was not, in and of itself, a crime.[6] The County Prosecutor testified at a state legislative hearing that: "When that incident happened, I picked up this book, *Criminal Laws*, and searched and searched and found nothing

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1 Marianna Spring, *The racist AI deepfake that fooled and divided a community*, BBC NEWS (Oct. 4, 2024), https://www.bbc.com/news/articles/ckg9k5dv1zdo (on file with the University of Baltimore Law Forum).

2 *Id*.

3 *Id*.

4 *Id.*

5 *Id*.

6 *Written Testimony of Scott D. Shellenberger, State's Att'y for Balt. Cnty., in Support of S.B. 362 Forged Digital Likenesses — Distribution —Prohibition*, 2025 Leg., 446th Sess. (Md. 2025) (statement of Scott D. Shellenberger, State's Att'y for Balt. Cnty.).

directly on point to what they did."[7] Prosecutors were able to bring other charges against the athletics director, including theft, witness retaliation, and stalking.[8] These charges on their face do not directly relate to the distribution of the deepfake and might not be applicable to other incidents of harmful deepfake distribution.[9] The alleged perpetrator took an *Alford* plea and agreed to serve a four-month sentence for interrupting school operations.[10]

The incident caused immense damage to both the principal and the community.[11] The principal left the school, and the broader community was forced to not only grapple with losing its high school principal, but also the broader pain caused by hearing an offensive screed, which while entirely fake, felt real and was particularly upsetting to those who had experienced real instances of bigotry in the past.[12]

This incident highlights the profound impact that deepfakes have in the real world, not just for the individuals depicted, but for communities writ large.[13] Deepfakes encompass a "full range of hyper-realistic digital falsification of images, video, and audio."[14] The advent of deepfake technology brings, as Professors Danielle Citron and Robert Chesney predicted, "a disturbing array of malicious uses."[15] Recently, deepfake technology was used: to convince a finance worker at a multinational corporation to pay $25 million to fraudsters posing as the company's chief

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[7] *Id.*

[8] *Athletic Director Charged in Pikesville High School AI Case,* BALT. CNTY. GOV. (Apr. 25, 2024), https://www.baltimorecountymd.gov/departments/police/news/athletic-director-charged-pikesville-high-school-ai-case (on file with the University of Baltimore Law Forum).

[9] *Id*.

[10] Barry Simms, *Former Pikesville HS athletic director takes plea on state charges on release of AI recording,* WBAL-TV (Apr. 28, 2025, at 19:30 ET), https://www.wbaltv.com/article/dazhon-darien-alford-plea-former-pikesville-athletic-director/64608407 (on file with the University of Baltimore Law Forum).

[11] Spring, *supra* note 1.

[12] *See id*.

[13] *See id*.

[14] Danielle K. Citron & Robert Chesney, *Deepfakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1757 (2019). The authors are nationally recognized legal scholars on deepfake technology. *See id*. Professor Chesney serves as the Dean of the University of Austin, Texas School of Law and also holds the James A. Baker III Chair in the Rule of Law and World Affairs. *See id*. He specializes in Cybersecurity, Constitutional Law, International Law and National Security Law. *See id*. Professor Citron serves as the Jefferson Scholars Foundation Schenck Distinguished Professor of Law and Martha Lubin Karsh and Bruce A. Karsh Bicentennial Professor of Law at the University of Virginia School of Law. *See id*. She also is the inaugural director of law school's LawTech Center. Her areas of expertise include privacy, free expression, and civil rights. *See id*.

[15] *Id.*

financial officer;[16] to impersonate former President Joe Biden telling New Hampshire Democratic voters not to vote in an upcoming primary election;[17] and to trick voters in Slovakia into thinking that one of their top political candidates had admitted to rigging an election.[18] Advances in artificial intelligence tools make deepfakes easier and less expensive to create, and they are increasingly indistinguishable from genuine audio or video content.[19] According to a recent study from Utah Valley University, 56% of 244 participants believed that a deepfake video was real, while 50% of participants believed a deepfake audio was real.[20] These percentages were only slightly lower than those identifying *non-deepfake videos* as real.[21]

This Article argues that criminal law should address the harm caused by a particularly offensive subset of deepfakes: (a) images, audio and video media that appear authentic to a reasonable person and (b) are created with the intent to deceive or distributed *as if genuine* (hereinafter referred to as "Deceptive Deepfakes").[22] Part II details which types of deepfakes should be banned and discusses the specific harm they cause.[23] Part III explores the history of common law prohibitions on fakes and forgeries, and its relevance to this new form of fakery.[24] Part IV reviews relevant First Amendment case law and argues that Deceptive Deepfakes do not merit First Amendment protection.[25] Part V considers approaches to criminalizing Deceptive Deepfakes, informed by common law history and First Amendment considerations.[26] This Article makes the case that centuries of law affirm the

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[16] Heather Chen & Kathleen Magramo, *Finance worker pays out $25 million after video call with deepfake 'chief financial officer'*, CNN (Feb. 4, 2024, at 02:31 ET), https://www.cnn.com/2024/02/04/asia/deepfake-cfo-scam-hong-kong-intl-hnk/index.html (on file with the University of Baltimore Law Forum).

[17] Shannon Bond, *A political consultant faces charges and fines for Biden deepfake robocalls*, NPR (May 23, 2024, at 14:58 ET), https://www.npr.org/2024/05/23/nx-s1-4977582/fcc-ai-deepfake-robocall-biden-new-hampshire-political-operative (on file with the University of Baltimore Law Forum).

[18] Curt Devine et al., *A fake recording of a candidate saying he'd rigged the election went viral. Experts say it's only the beginning*, CNN (Feb. 1, 2024, at 06:09 ET), https://www.cnn.com/2024/02/01/politics/election-deepfake-threats-invs/index.html (on file with the University of Baltimore Law Forum).

[19] Citron & Chesney, *supra* note 14, at 1758.

[20] *Deepfake Media Study*, UTAH VALLEY UNIV. (Oct. 2024), https://www.uvu.edu/news/2024/10/media/deepfake-presentation.pdf (on file with the University of Baltimore Law Forum).

[21] *See id*. For the *non-deepfake video*, 70% of study participants believed it were real, and for the *non-deepfake audio*, 64% of study participants believed it was real. *See id*.

[22] *See infra* Parts II–VI.

[23] *See infra* Part II.

[24] *See infra* Part III.

[25] *See infra* Part IV.

[26] *See infra* Part V.

notion that the government can combat "fakes", and that the Supreme Court has excluded speech that has no societal value from First Amendment protection.[27] Finally, Part VI considers selected scenarios and evaluates the legality of each scenario under the proposed approaches.[28]

II. NOT ALL DEEPFAKES ARE CREATED EQUAL.

The definition of "deepfake" is broad enough to encompass many different types of media creations.[29] Not all deepfakes are created equal, and this paper only addresses a very specific kind of deepfake that should be criminalized to address a very specific evil.[30] This Part will describe different types of deepfakes and their uses and clarify the exact type of deepfake that this paper advocates can and should be criminalized.[31]

There are multiple, well-documented beneficial uses of deepfakes.[32] In the classroom, deepfakes can be used to portray historical figures as speaking to students by video.[33] Deepfakes can also be used as a new form of artistic expression,[34] and as a form of humor or satire.[35] Perhaps most impressively, artificial intelligence tools have proved an invaluable assistive technology.[36] For example, former Virginia Congresswoman Jennifer Wexton suffers from a rare neurological disorder that limits her ability to speak clearly.[37] Trained with speeches Wexton gave before her neurological condition emerged, a new artificial intelligence tool allows Wexton to give speeches on the floor of the House of Representatives in her own voice.[38]

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[27] *See infra* Part V.
[28] *See infra* Part VI.
[29] Citron & Chesney, *supra* note 14, at 1757.
[30] *See infra* Parts II-VI.
[31] *See infra* Part II.
[32] Citron & Chesney*, supra* note 14, at 1769.
[33] *Id.*
[34] Ranam, *Generative AI: From Deepfakes to Creating Never-Before-Seen Art*, MEDIUM (May 31, 2024), https://medium.com/%40ranam12/generative-ai-from-deepfakes-to-creating-never-before-seen-art-61ccae71d194 (on file with the University of Baltimore Law Forum).
[35] Matt Kenyon, *An AI walks into a bar… Can artificial intelligence be genuinely funny?*, BBC (July 29, 2024), https://www.bbc.com/future/article/20240724-can-artificial-intelligence-be-genuinely-funny (on file with the University of Baltimore Law Forum).
[36] *See* Dan Merica, *A neurological disorder took Rep. Jennifer Wexton's voice. AI helped her bring it back to the House floor*, PBS (July 25, 2024, at 18:34 ET), https://www.pbs.org/newshour/politics/a-neurological-disorder-took-rep-jennifer-wextons-voice-ai-helped-her-bring-it-back-to-the-house-floor (on file with the University of Baltimore Law Forum).
[37] *Id*.
[38] *Id.*

There are, however, many harmful uses of deepfake technology.[39] Much of the original outcry about deepfake technology came from its well-documented use to create fake pornography.[40] Malign actors use real, non-intimate audio and video images of individuals and use artificial intelligence tools to depict those individuals engaging in sexual acts.[41]

Pornographic deepfakes harm famous celebrities[42] and non-celebrities alike.[43] One study estimated that since 2018, between 90-95% of all deepfakes were fake pornographic content, almost exclusively portraying women, and of those, 90% were without the permission of those depicted.[44]

The potential harm of deepfakes is not limited to non-consensual pornography.[45] Professors Citron and Chesney discussed the myriad of ways that deepfakes can be used to trick people into believing that someone said or did something that they did not actually say or do.[46] Deepfakes could be used to distort democratic discourse through false depictions of real political figures saying false or malicious things.[47]

They could also be used to undermine faith in our electoral system itself.[48] During the 2024 United States Presidential Election, deepfakes sought to trick voters into believing that Taylor Swift had endorsed President Trump (she had not)[49] and that President Biden had sent federal troops to the United States and Mexico border (he had not).[50] Deepfakes, such as the aforementioned, erode faith in our institutions in both the public and private

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[39] Citron & Chesney, *supra* note 14, at 1771.

[40] Kat Tenbarge, *Found through Google, bought with Visa and Mastercard: Inside the deepfake porn economy*, NBC NEWS (Mar. 27, 2023, at 11:56 ET), https://www.nbcnews.com/tech/internet/deepfake-porn-ai-mr-deep-fake-economy-google-visa-mastercard-download-rcna75071 (on file with the University of Baltimore Law Forum).

[41] Citron & Chesney, *supra* note 14, at 1758.

[42] *Id.*

[43] *See* Karen Hao, *Deepfake Porn Is Ruining Women's Lives. Now the Law May Finally Ban It*, MIT TECH. REV. (Feb. 12, 2021), https://www.technologyreview.com/2021/02/12/1018222/deepfake-revenge-porn-coming-ban/ (on file with the University of Baltimore Law Forum).

[44] *Id.*

[45] Citron & Chesney, *supra* note 14, at 1776.

[46] *Id*. at 1757.

[47] *Id.* at 1776.

[48] *Id.* at 1779.

[49] Terence Kwok, *Deepfakes and Bots: The Growing Threat to Election Integrity in 2024*, AI BUS. (Oct. 29, 2024), https://aibusiness.com/responsible-ai/deepfakes-and-bots-the-growing-threat-to-election-integrity-in-2024 (on file with the University of Baltimore Law Forum).

[50] *Id.*

sector[51] and as seen in the Pikesville incident, they can be used to exacerbate pre-existing social divisions.[52]

In each of these examples, the harm flows directly from *the deception*.[53] If any of these Deceptive Deepfakes had come with a disclosure that they had been created using artificial intelligence tools, or if they were so cartoonish as to be unbelievable to a person of ordinary intelligence and gullibility, then the harm would have been greatly reduced.[54] It is the inability to distinguish real from fake, or truth from falsity, that attacks the "foundation of shared facts and truth" necessary to sustain our democracy.[55]

With that in mind, the best approach is to ban *harmful* deepfakes, as opposed to a blanket ban on all deepfakes.[56] This paper advocates for the criminalization of one particularly harmful use of deepfakes: those that are both (a) images, audio, and video media that appear authentic to a reasonable person, and (b) are created with the intent to deceive or distributed *as if genuine*.[57]

This approach immunizes people from prosecution for the distribution of deepfakes in several common scenarios.[58] A person could not be charged if they include a disclaimer that the audio or visual depiction was generated through artificial intelligence.[59] Nor could a person be charged for creating a deepfake video of a historical figure long since deceased commenting on contemporary affairs because no reasonable person would be deceived into thinking that recording was genuine.[60]

While state and federal legislators are concerned about Deceptive Deepfakes, few have attempted a broad-based ban as advocated here.[61]

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[51] Citron & Chesney, *supra* note 14, at 1779.
[52] *See* Spring, *supra* note 1.
[53] *See, e.g.*, Kwok, *supra* note 49 ("[A deepfake audio clip of President Biden] spread quickly on social media before being debunked, but by the time fact-checkers identified it as fake, the damage had already been done. Voters exposed to the clip, especially if they encountered it in isolation, may not have seen the debunking at all, which creates lasting mistrust."); *see also supra* notes 39–52 and accompanying text (discussing real world examples of deepfakes and their impact).
[54] *See* Andrew Lewis et al., *Deepfake Detection With and Without Content Warnings*, 10 ROYAL SOC'Y OPEN SCI. 1, 11 (2023).
[55] Citron & Chesney, *supra* note 14, at 1777.
[56] *Id.* at 1790.
[57] *See infra* Parts IV-VII.
[58] *See infra* Part V.
[59] *See infra* Part V.
[60] *See infra* Part V.
[61] *See Tracker: State Legislation on Deepfakes in Elections*, PUB. CITIZEN (Mar. 10, 2025), https://www.citizen.org/article/tracker-legislation-on-deepfakes-in-elections (on file with the University of Baltimore Law Forum) [hereinafter *Tracker: State Legislation on Intimate Deepfakes*].

Rather, most bills have focused on their use in a narrow context.[62] For example, bills relating to deepfakes surrounding elections were enacted in more than half of all U.S. states.[63] California Governor Gavin Newsom signed bills prohibiting the use of deepfake election content during election season,[64] as well as a bill aimed at curtailing sexually explicit deepfakes by requiring watermarks for certain deepfake content.[65] These bills only apply to election-related content, and in many cases, only apply within a certain time window prior to an election.[66] Even more states (over 40, as of September 2025) have enacted deepfake legislation to address nonconsensual deepfake pornography.[67] In May 2025, President Donald Trump signed the TAKE IT DOWN Act, which prohibits the nonconsensual online publication of intimate visual depictions of individuals, including AI-generated content, and requires online platforms to promptly remove such depictions upon receiving notice of their existence.[68] Congress has proposed, but not enacted, bills requiring creators to digitally watermark deepfake content and to criminally punish creators for failing to properly identify malicious deepfakes.[69]

Many of these enacted laws immediately faced legal challenges under the First Amendment to the United States Constitution.[70] A Federal District Court judge for the Eastern District of California issued a preliminary

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[62] *See id.*

[63] *See id.*

[64] Press Release, Off. of Governor Gavin Newsom, Governor Newsom signs bills to combat deepfake election content (Sept. 17, 2024), https://www.gov.ca.gov/2024/09/17/governor-newsom-signs-bills-to-combat-deepfake-election-content/ (on file with the University of Baltimore Law Forum).

[65] *Id.*

[66] *See id*.

[67] *Tracker: State Legislation on Intimate Deepfakes*, *supra* note 61.

[68] Tools to Address Known Exploitation by Immobilizing Technological Deepfakes on Websites and Networks Act, Pub. L. No. 119–12, 139 Stat. 55 (2025). Note that these bills generally apply only if the image or video portrays "intimate parts, sexual act, sexual contact, and sexual penetration" or similar. *See* MINN. STAT. § 604.32 (West 2025) (explaining the cause of action for nonconsensual dissemination of a deep fake depicting intimate parts or sexual acts); S.B. 25-288, 75th Gen. Assemb., 1st Reg. Sess. (Colo. 2025).

[69] Press Release, Off. of Congresswoman Yvette D. Clarke, Clarke Leads Legislation to Regulate Deepfakes (Sept. 21, 2023), https://clarke.house.gov/clarke-leads-legislation-to-regulate-deepfakes/ (on file with the University of Baltimore Law Forum).

[70] *See*, *e.g.*, Siladitya Ray, *Federal Judge Halts California's New Anti-Deepfakes Law—Musk Says Its 'Score One' for Free Speech*, FORBES (Oct. 3, 2024, at 07:03 ET), https://www.forbes.com/sites/siladityaray/2024/10/03/federal-judge-halts-californias-new-anti-deepfakes-law-musk-says-its-score-one-for-free-speech/ (on file with the University of Baltimore Law Forum). The court issued a permanent injunction against enforcement of the law against the plaintiffs. *See* Kohls v. Bonta, 797 F.Supp.3d 1177, 1191-92 (E.D. Cal. 2025).

injunction halting enforcement of the California election deepfakes bill, claiming that it almost certainly violated the First Amendment.[71] Similar statutes in other states have also faced First Amendment challenges, as plaintiffs have argued that regulations on deepfakes represent unconstitutional prior restraints on First Amendment speech.[72] While none of these challenges concern the approaches discussed herein, they do indicate that any law restricting deepfakes, particularly broad bans, are likely unconstitutional.[73] As Chesney and Citron put it, because deepfakes "implicate freedom of expression," blanket bans are "unlikely . . . to withstand . . . a constitutional challenge."[74] The Supreme Court generally looks upon prior restraints on speech with great skepticism.[75] In *Nebraska Press Assn. v. Stuart*,[76] Chief Justice Burger opined that in contrast to something like a criminal penalty or civil judgement for defamation, prior restraint "has an immediate and irreversible sanction" that "freezes" speech for a time.[77] As such, prior restraints "are the most serious and the least tolerable infringement on First Amendment rights."[78] However, as explained in the following sections, the common law has a long tradition of banning speech related to "fakes" and "forgeries", and Deceptive Deepfakes should not be considered a form of "protected speech" under the First Amendment.[79]

III. COMMON LAW HAS A LONG TRADITION OF BANNING SPEECH RELATED TO FAKES.

Common law has a long history of criminalizing different forms of fakes, from early Roman laws against falsification to English prohibitions on

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[71] Ray*, supra* note 70.

[72] Elizabeth Nolan Brown, *Minnesota "Acting as a Ministry of Truth" With Anti-Deep Fake Law, Says Lawsuit*, REASON (Oct. 2, 2024, at 11:30 ET), https://reason.com/2024/10/02/minnesota-acting-as-a-ministry-of-truth-with-anti-deep-fake-law-says-lawsuit/ (on file with the University of Baltimore Law Forum). The case was dismissed at the district court due to lack of standing, and the court's decision was affirmed by the Eighth Circuit Court of Appeals. *See* Kohls v. Ellison*,* 166 F.4th 728, 733-34 (8th Cir. 2026).

[73] *See*, *e.g.*, Brown*, supra* note 72.

[74] Citron & Chesney, *supra* note 14, at 1790.

[75] *See, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.").

[76] Nebraska Press Assn. v. Stuart, 427 U.S. 539, 539 (1976).

[77] *Id*. at 559.

[78] *Id*.

[79] *See infra* Part III.

"public cheats", to the more familiar crimes of counterfeiting and forgery.[80] This history strongly supports the notion that banning Deceptive Deepfakes would be consistent with common law tradition.[81]

Therefore, criminalizing fakes and forgeries, "can conveniently be taken to begin at Rome with a *lex Cornelia de falsis*"[82] enacted around 81 B.C.[83] This law, "contemplated several kinds of falsification, but it was mainly concerned with falsification of testamentary dispositions."[84] Under early English common law, it was illegal to defraud the public with a false token whose "nature, form, or appearance would deceive people generally."[85] By 1541, the Statute of 33 Hen. VIII, punished wrongs "wrought by [private] tokens and false letters."[86] Over two hundred years later, Sir William Blackstone, in his consideration of cheating, pointed out that "any deceitful practice, in cozening another by artful means, whether in matters of trade or otherwise, as by playing with false dice, or the like, is punishable."[87] After considering the evolution of common law cheating, William L. Burdick concluded that the essential elements of common law "public cheats" were: "(1) Defrauding the government or the public in general; (2) by any deceitful and illegal act or practice; [and] (3) such act or practice affecting the public and beyond the protection of common prudence."[88] For centuries the law has criminalized acts and practices intended to deceive the public by "some deception against which common prudence cannot guard."[89]

Note that from these earliest days, prohibitions on deceptive speech focused on the *form* of the falsehood, as opposed to the substance or content of the lie itself.[90] Put another way, the speech was banned on the basis of its deceptive nature, not because of the nature of the message it carried.[91] It is this focus on the deceptive form and nature of the speech, not its content, that ensures bans on public cheats, fakes, forgeries, or other deceptive speech do

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[80] *See* 2 WILLIAM L. BURDICK, THE LAW OF CRIME § 624, at 458, § 627, at 462, § 652, at 516 (1946).
[81] *See id.*
[82] This term is translated as "[t]he Cornelian Law respecting forgery or counterfeiting." *See Lex Cornelia de falsi*s, BLACK'S LAW DICTIONARY (11th ed. 2019).
[83] J. W. Cecil Turner, *"Documents" in the Law of Forgery*, 32 VA. L. REV. 939, 941 (1945-1946).
[84] *Id.*
[85] BURDICK, *supra* note 80, § 624, at 458.
[86] *Id.* § 625, at 459.
[87] *Id.* § 626, at 460.
[88] *Id.* § 630, at 466.
[89] *Id.*
[90] *See* 2 EDWARD HYDE EAST, PLEAS OF THE CROWN 861 (P. Byrne, Law Bookseller 1806) ("[B]ut it is plain that the objection would be to the [fib], and not to the form of the writing, for the fraud and intention to deceive con[s]titute the chief ingredients of this offence.").
[91] *See id.*

not become tools of censorship and thought policing.[92] Deceptive Deepfakes, like public cheats before them, are problematic because of their deceptive *form* and not the content of the message they carry.[93]

As the law of cheats evolved, more specific forms of 'fake speech' were defined and criminalized.[94] Forgery developed as a crime involving the creation and use of fraudulent coins, deeds, writs, charters, and royal seals.[95] What these all have in common is that society so relies upon their veracity to function properly that creating fake versions is punishable.[96] It is so important that the public be able to rely on these items to be true that it is illegal to produce a fake.[97]

As the law of forgery evolved, the scope of items that could not be legally faked broadened to include, "counterfeiting of any writings with a fraudulent intention, whereby another might be prejudiced."[98] This broader scope is the one that appears in Blackstone's Commentaries: "Forgery, or the *crimen falsi*, may . . . be defined at common law to be the fraudulent making or alteration of a writing to the prejudice of another man's right."[99] The modern definition of common law forgery would come to center the crime around a fraud and a "false document": "the act of fraudulently making a false document or altering a real one to be used as if genuine."[100] The crime of forgery, initially aimed at protecting Roman coinage, has come to be broadly defined in the common law as, "the fraudulent making of a false writing having apparent legal significance."[101] J. W. Cecil Turner, a mid-20th Century English legal scholar of criminal law and Roman law at the University of Cambridge, points out that for, "documents of a public character, . . . it is a

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[92] *See* Citron & Chesney, *supra* note 14, at 1790-91.
[93] *See* BURDICK, *supra* note 80, § 629, at 465-66 (defining the elements of a public cheat).
[94] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 247-50 (1769) (discussing the various forms of speech prohibited under forgery laws, including deeds, wills, seals, bonds, bank bills and notes); BURDICK, *supra* note 80, § 631, at 467, § 661, at 527-28, § 661(b), at 530 (discussing the various forms of speech prohibited under forgery laws, including tokens, stamps, and seals).
[95] *See* BLACKSTONE, *supra* note 94, at 247-50 (discussing the various forms of speech prohibited under forgery laws, including deeds, wills, seals, bonds, bank bills and notes); BURDICK, *supra* note 76, § 631, at 467, § 661, at 527-28, § 661(b), at 530 (discussing the various forms of speech prohibited under forgery laws, including tokens, stamps, and seals).
[96] *See* BURDICK, *supra* note 80, § 624, at 458, § 627, at 462-63.
[97] *Id*.
[98] EAST, *supra* note 90, at 861.
[99] BLACKSTONE, *supra* note 94, at 247.
[100] *Forgery*, BLACK'S LAW DICTIONARY (12th ed. 2024).
[101] State v. Reese, 388 A.2d 122, 125 (Md. App. 1978).

crime to fabricate or alter merely with the intention of deceiving. . . ."[102] In the common law tradition, it has been long accepted that certain personal expressions of fake speech, from counterfeit coins, to fake writs, and eventually to fake letters of recommendation and any other forged documents, can and should be banned.[103]

It is worth considering, then, if common law forgery could be used in its present form to prosecute sharing Deceptive Deepfakes or if a new statutory law is needed.[104] Burdick points out that, "common law and statutory definitions may contain the phrase 'any writing',[105] but it is limited to writings which would 'prejudice another's right', or which would be apparently of some legal efficacy if genuine."[106] This requirement is quite logically applied to forgery to ensure that the prohibition stays closely aligned with its premise—that only fake speech that undermines a critical function of society should be banned.[107] Common law forgery in its present form, therefore, would not criminalize most Deceptive Deepfakes, as they are not "of some legal efficacy."[108]

This is not to say though, that a state could not build upon the base of common law forgery to outline a broader set of offenses—in fact, they can and have.[109] In one particularly apt example from the early 1900s, the New York Court of Appeals upheld a conviction under the following statute:

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[102] *See* Turner, *supra* note 83, at 954. Which he contrasts with, "documents of a private nature such as personal letters, which it is no crime to falsify unless there be an intention to defraud thereby." *Id.*

[103] *See* BLACKSTONE, *supra* note 94, at 247-50 (discussing laws prohibiting the forgery of various items, including deeds, wills, seals, bonds, bank bills and notes); People v. Abeel, 75 N.E. 307, 307-08 (N.Y. 1905) (affirming conviction for forgery where the defendant forged a letter of introduction); *see also* BURDICK, supra note 80, § 631, at 467, § 661, at 527–28, § 661(b), at 530 (discussing laws prohibiting the forgery of various items, including tokens, stamps, and seals).

[104] *See infra* Part V; *see also* BURDICK, *supra* note 80, § 661, at 528 (describing the elements of common law and statutory forgery).

[105] BURDICK, *supra* note 80, § 661, at 528. Note that common law forgery requires there be a false writing of apparent legal significance. *See Reese*, 388 A.2d at 125. The digital nature of a deepfake as not a traditional 'writing' is a distinction that should make no difference. *See* Turner, *supra* note 83, at 950. In his analysis of what constitutes a 'writing' in the context of forgery law, J. W. Cecil Turner concludes that, "the real and sole test of a writing is whether it conveys to the mind of the reader a message of the spoken word." *Id.* at 952. In this way, a deepfake video, or piece of forged audio, is not so different. Its primary purpose is to convey the meaning of the speaker to another, and so when forged, results in similar ills that forgery law seeks to address. *See id*.

[106] BURDICK, *supra* note 80, § 661, at 528.

[107] *Id.* § 624, at 458, § 627, at 462-63.

[108] *Id.* § 661, at 528.

[109] *See, e.g.*, People v. Abeel, 75 N.E. 307, 308-09 (N.Y. 1905) (describing a New York law that expanded common law forgery).

> [A] person who . . . shall alter, or who shall cause, aid, abet, or otherwise connive at, or be a party to the uttering of any letter, . . . purporting to have been written or signed by another person, . . . which said letter, . . . as aforesaid, the person uttering the same shall know to be false, forged or counterfeited, and by the uttering of which the sentiments, opinions, conduct, character, prospects, interests or rights of such other person shall be misrepresented or otherwise injuriously affected, . . . is guilty of forgery. . . .[110]

The fake speech in question was a forged letter of introduction purportedly from a Vice President of the Western Union Telegraph Company, used by the forger as part of a scheme to woo a young woman who was employed as a telegraph operator.[111] Under the common law formulation of forgery, the creation of this fake letter would not be forgery, as the letter has no legal significance.[112] The New York statute in question, however, expanded the crime of forgery to include a broader set of circumstances.[113] It was noted by one commentator that, in this case, "the mere misrepresentation is made the gist of the offense, and proof of injury to the one whose name is forged, or intent to defraud on the part of the defendant, is held not necessary to convict."[114]

Critically, the law did not view the victim in this case as the Western Union executive whose identity was used in the forged letter, but instead the young woman who was duped by the fake and, in a broader sense, anyone who relies on the veracity of letters of introduction.[115] Other courts have honed in on the nature of forgery as being independent of a specific victim being harmed.[116] As early as 1831, the Court of Appeals in Maryland noted

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[110] *Id.* at 308.
[111] *Id.* at 307-08.
[112] *Id.* at 308; *see* State v. Reese, 388 A.2d 122, 125 (Md. App. 1978) ("Forgery is the fraudulent making of a false writing having apparent legal significance.").
[113] *See Abeel,* 75 N.E. at 308-09 ("Its first subdivision deals with the corrupt falsification, alteration, erasure, obliteration, and destruction of corporate, copartnership, and individual books of account. Subdivision 2 relates to the forging, alteration, or counterfeiting of letters, telegrams, etc., with intent to injure or defraud, when the act injures any other person in his good name, standing, position, or general reputation. The third subdivision is the one relied upon by the prosecution, and the fourth deals with the forgery of tickets of admission and the like, in which the element of fraud is also an essential ingredient.").
[114] Case Comment, *Forgery at Common Law and Its Extension Under Statutes*, 15 YALE L.J. 89, 89-90 (1905).
[115] *Abeel*, 75 N.E. at 309 (explaining that forgery may apply where the victim is the misrepresented or where the victim is the person to whom the misrepresentation was made).
[116] *See e.g.,* Arnold v. Cost, 3 G. & J. 219, 228 (Md. 1831) ("The only inquiry then, is, whether the paper set forth in the declaration, had, under the circumstances detailed, *a*

that, "it is not now held to be essential to the offence of forgery . . . that someone must have been injured.[117] It is sufficient, if the instrument forged, supposing it to be genuine, might have been prejudicial."[118]

As technology has changed, it has offered forgers new tools to create different forms of fakes, and new tools to share them.[119] From simple fake signatures and phony seals to complex micro-print on counterfeited currency, the law has sought to punish these fresh forms of forgery.[120] Deepfake technology should be seen as the latest in a long line of forger's tools for the law to address.[121] What makes Deceptive Deepfakes a broader concern is that they do not simply undermine trust in a particular registration or transactional system that relies on the veracity of writings, but instead undermine the basic trust individuals have in the testimony of their fellow citizens in nearly all contexts.[122] Forgery laws aim not to keep people from lying or attacking the truth, but to keep them from producing fake speech and presenting it as genuine, an act that by its very nature attacks the social, legal, and political systems upon which democracy relies.[123] Deceptive Deepfakes, by allowing forgers to present fake speech as genuine, fit the definition of such an act, and as such, would survive constitutional scrutiny.[124]

IV. DECEPTIVE DEEPFAKES SHOULD NOT BE CONSIDERED PROTECTED SPEECH.

Given the similarities between Deceptive Deepfakes and other well-established areas where the Supreme Court has held that speech does not merit First Amendment protection because of its *nature,* this Part argues that

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capacity to work an injury, or a prejudice to any person. For, if it had, it is the subject of forgery at common law, *though no injury did actually occur*.") (emphasis added).

[117] *Id.* at 220.

[118] *Id.*

[119] *See* Citron & Chesney, *supra* note 14, at 1759-68.

[120] *See* 18 U.S.C. § 505 (1994) (explaining the legal consequences of forgery in court-related documents).

[121] Adrienne D. Ruiter, *The Distinct Wrong of Deepfakes*, 34 PHIL. TECH. 1311, 1313, 1319 (2021).

[122] *Id.*

[123] *See generally* 18 U.S.C. § 471 (2001) (describing obligations or securities of the United States in terms of counterfeit and forgery); U.S. CONST. amend. I (stating Congress shall make no law abridging the freedom of speech).

[124] *See Testimony in Support of SB0362 – Forged Digital Likeness – Distribution – Prohibition: Before the Senate of M.D.* (Md. 2025) (statement of Katie Fry Hester, Senator, Howard and Montgomery County) (stating that deepfakes would likely pass First Amendment scrutiny).

Deceptive Deepfakes should fall outside of First Amendment protection.[125] This Part will explore the similarities between Deceptive Deepfakes and other types of speech that do not merit First Amendment protection, and will also discuss why these deepfakes should not be considered constitutionally protected false speech or parody.[126]

The First Amendment to the United States Constitution states that Congress shall make no law "abridging the freedom of speech."[127] The right to free speech has been incorporated against the states under the Fourteenth Amendment's Due Process Clause.[128] As state legislatures have enacted various restrictions on deepfakes, these laws have been challenged on the grounds that they unconstitutionally burden the exercise of free speech.[129] Legal commentators have noted that deepfake regulations that are seen as content-based restrictions on speech face the uphill battle of being presumptively unconstitutional as they are subjected to strict scrutiny.[130] However, the Constitution only requires a strict scrutiny review for content-based restrictions on *constitutionally protected speech*.[131] While the definition of "constitutionally protected speech" in First Amendment jurisprudence is expansive, it is not absolute.[132] There are some categories of speech that fall outside of First Amendment protection entirely.[133] Deceptive

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[125] *See infra* Part IV; *see also* United States v. Stevens, 559 U.S. 460, 481-82 (2010) (holding that federal statute criminalizing the commercial creation, sale, or possession of depictions of animal cruelty was substantially overbroad, and thus, the statute was facially invalid under the First Amendment protection of speech).

[126] *See infra* Part IV.

[127] U.S. CONST. amend. I.

[128] U.S. CONST. amend. XIV, § 1 ("No State shall deprive any person of life, liberty, or property without due process of law."). *See generally* Gitlow v. New York, 268 U.S. 652 (1925) (explaining how freedom of speech—which is protected by the First Amendment from abridgment by Congress—is among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States).

[129] *See* Kohls v. Bonta, 752 F.Supp.3d 1187, 1191 (E.D. Cal. 2024) (arguing that Minnesota state law that prohibits making materially false statements with intent to prevent someone from voting was unconstitutional under the First and Fourteenth Amendments); s*ee also* Isaiah Poritz, *Hawaii Deepfake Election Law is Unconstitutional, Court Says*, BLOOMBERG L. (Jan. 30, 2026), https://news.bloomberglaw.com/us-law-week/hawaiis-deepfake-election-law-violates-free-speech-court-finds? (on file with the University of Baltimore Law Forum) (invalidating Hawaii's election deepfake law as an unconstitutional, content-based restriction).

[130] Citron & Chesney, *supra* note 14, at 1757.

[131] *See Kohls*, 797 F.Supp.3d at 1185.

[132] *See* U.S. v. Alvarez*,* 617 F.3d 1198, 1219-30 (9th Cir. 2010) (explaining how courts recognize that certain categories of speech are fully outside the protection of the First Amendment).

[133] *Id.* at 1218.

Deepfakes, by their very nature, are not properly subject to First Amendment protection.[134]

First, as a matter of constitutional interpretation, the common law *crimen falsi*, such as forgery, fakery, and cheating, predates the enactment of the United States Constitution.[135] If the drafters of the Constitution had intended to protect fakes or forged documents under the First Amendment, they would have done so explicitly or in contemporaneous writing.[136]

Second, over time, the Supreme Court has acknowledged a set of "limited categories of speech that are unprotected."[137] In doing so, the Court recognizes that there are certain types of speech that are so harmful, so wholly lacking in value to our collective marketplace of ideas, that even the broad sweep of the First Amendment should not cover them.[138] The list of categories of speech that are unprotected is short, but illustrative:

- Obscenity,
- Defamation,
- Fraud,
- Fighting Words,
- True Threats,
- Speech Integral to Criminal Conduct, and
- Child Sexual Abuse Material.[139]

As Justice Alito wrote in *United States v. Stevens,* categories of speech that fall outside of First Amendment protection are "historical and traditional categories long familiar to the Bar."[140] In other words, there are no specific balancing tests that the courts can use to establish new categories of speech that fall outside of First Amendment protections.[141] Rather, those categories are well-defined and come from common law traditions that predate the enactment of our Constitution and have "a historical foundation

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[134] *See Kohls,* 752 F.Supp.3d at 1191; Minn. Voters All. v. Ellison*,* 749 F.Supp.3d. 983, 986-88 (2024).
[135] BLACKSTONE, *supra* note 94, at 143.
[136] *See* Mattox v. United States, 156 U.S. 237, 243 (1895) ("We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted. . . .").
[137] Victoria L. Killion, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH (2024) (explaining the limited categories of speech that are unprotected).
[138] *Id.*
[139] *Id.*
[140] United States v. Stevens, 559 U.S. 460, 468 (2010) (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment)).
[141] *Id.* at 472.

in the Court's free speech tradition."[142] Deceptive Deepfakes, due to their similarities to common law false representation or forgery crimes, should be considered unprotected speech.[143]

Deceptive Deepfakes share a key characteristic with several already existing categories of unprotected speech: they are problematic due to their *deceptive nature* and not their specific content.[144] A prohibition against Deceptive Deepfakes is a ban on *how you can say certain things,* not a ban on *what you can say.*[145] The same is true for fraud.[146] In *Donaldson v. United States,* the Supreme Court held that with respect to outlawing fraud, "governmental power has always been recognized in this country and is firmly established."[147] With fraud, it is not the *content* of the words spoken that are problematic, it is the context and the way they are presented that puts them outside First Amendment protection.[148] This contrasts with bans on true threats, obscenity, and child sexual abuse material, which prohibit specific types of content.[149]

Similarly, the Court has held that defamation against private individuals does not merit free speech protection.[150] This is another example of speech prohibited because of its deceptive form.[151] The Court held that, subject to certain exceptions,[152] false statements of fact regarding non-public figures are not protected under the First Amendment as "neither the intentional lie nor the careless error materially advances society's interest in

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[142] United States v. Alvarez*,* 567 U.S. 709, 718 (2012).

[143] *See generally Testimony In Support of SB0362 – Forged Digital Likeness – Distribution – Prohibition Judicial Proceedings,* CHHS (Jan. 29, 2025), https://mgaleg.maryland.gov/cmte_testimony/2025/jpr/1et2JFdI6_USzHQvZR5MkvtfxZsPUasoR.pdf (on file with the University of Baltimore Law Forum) (arguing that a law criminalizing deceptive deepfakes should be found constitutional).

[144] *See generally id.* (arguing that deceptive deepfakes are not protected speech because they undermine truth seeking and democratic trust).

[145] Hisham Osman, *Required Deepfake Labeling: Contradicting or Supporting The First Amendment?*, COLUMBIA UNDERGRADUATE L. REV. (Dec. 6, 2025), https://www.culawreview.org/journal/required-deepfake-labeling-contradicting-or-supporting-the-first-amendment? (on file with the University of Baltimore Law Forum).

[146] *Alvarez*, 567 U.S. at 719.

[147] Donaldson v. Read Magazine, 333 U.S. 178, 190 (1948).

[148] *See Alvarez*, 567 U.S. at 719.

[149] *See* Victoria L. Killion, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH (2024) (detailing the categories of speech that prohibit specific types of content). As is evidenced by the extensive discussion in case law around the specific definition of that which is prohibited. *See Alvarez*, 617 F.3d at 1215-39.

[150] Gertz v. Robert Welch, Inc., 418 U.S. 323, 361-62 (1974).

[151] *Victoria* L. Killion, CONG. RSCH. SERV., IF11072, THE FIRST AMENDMENT: CATEGORIES OF SPEECH (2024).

[152] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 297-98 (1964) (holding that false speech relating to public figures is protected as long as it is not made with "actual malice").

uninhibited, robust, and wide-open debate on public issues."[153] Both libel and slander, in the Court's view, "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[154] Again, this type of speech falls outside of First Amendment protection, not because of the substance of the words spoken, but the deceptive nature of saying something about someone else that is not true.[155]

Finally, consider the case of false advertising.[156] The Supreme Court has held that while commercial speech is protected generally under the First Amendment, "government may ban forms of communication more likely to deceive the public than to inform it."[157] It is hard to think of a clearer example of a form of communication "more likely to deceive the public than to inform it" than Deceptive Deepfakes.[158] The substance of the words in a false advertisement are not the reason why they fall outside of First Amendment protection.[159] Rather, they are likely to deceive the public because they are untrue statements presented to the public as if genuine.[160]

A. Deceptive Deepfakes Are Not Protected False Speech.

The Supreme Court has recognized that, in most contexts, even false speech is necessary to have a robust marketplace of ideas.[161] The Supreme Court has pointed out that, "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the

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[153] *Gertz*, 418 U.S. at 340.
[154] *Id*.
[155] *Id.* at 374, 389-90.
[156] *See* Cent. Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 558 (1980) (challenging the constitutionality of a regulation of the New York Public Service Commission which completely banned promotional advertising by the utility).
[157] *Id.* at 563.
[158] *Id.*
[159] *Id.* at 564.
[160] *Id.* at 563-64.
[161] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964) (quoting Speiser v. Randall, 357 U.S. 513, 525-26 (1958)) ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker.").

'breathing space' that they 'need . . . to survive. . . .'"[162] However, Deceptive Deepfakes are distinct from constitutionally-protected false speech.[163]

It is critical to understand that the evil of Deceptive Deepfakes is not in that they tell lies.[164] Deliberate lying is largely protected by the First Amendment under the theory that those hearing the lie have ample opportunity to (1) judge the veracity of the source, and (2) seek other sources.[165] If someone is lying about the government, for example, the government is afforded ample room in the public square to correct the record.[166] Deceptive Deepfakes are not simple lies, though.[167] They are more akin to providing false firsthand testimony, but in a way that does not offer those deceived an opportunity to judge the veracity of the source, because the source is fake, and does not prompt them to seek other sources for verification, because they believe it to be the primary source.[168] Modern society relies upon the veracity of images, video, and audio recordings to function properly.[169] From police camera footage to political interviews, individuals rely heavily on believing firsthand recordings.[170] When a suggestion is made that something happened in a certain way, or somebody said a certain thing, the gold standard of evidence to prove the case is an image, audio, or video recording of the event in question.[171] It is important that the public be able to rely on these testimonial recordings to be true, and that it should be illegal to knowingly present a fake one as genuine.[172]

The nature of Deceptive Deepfakes is fundamentally different than those of the lies protected in cases like *United States v. Alvarez*.[173] Deceptive Deepfakes masquerade as authentic; their deception is not a deception of speech or expression, but instead a deception of form and presentation.[174]

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[162] *Id.* at 271-72.
[163] *See Forged Digital Likenesses – Distribution – Prohibition: Testimony in Support of S.B. 0362 Before the Jud. Proc. Comm.*, 2025 Leg., 447th Sess. (Md. 2025) (testimony of Ben Yelin) [hereinafter Yelin, *Forged Digital Likenesses*].
[164] *See* de Ruiter, *supra* note 121, at 1321 (explaining that deepfakes are similar to misleading and are highly influential).
[165] *See* Yelin, *Forged Digital Likenesses*, *supra* note 163.
[166] *See New York Times Co.*, 376 U.S. at 279-80.
[167] de Ruiter, *supra* note 121, at 1321.
[168] *See id.* at 1314-15 (describing what deepfakes are, how they are made, and why there are convincing to viewers).
[169] *See* Regina Rini, *Deepfakes and the Epistemic Backstop*, 20 PHILOSOPHERS' IMPRINT 1, 1 (2020).
[170] *See id.* at 1-2.
[171] *See id.* at 4.
[172] *See* Yelin, *Forged Digital Likenesses, supra* note 163.
[173] United States v. Alvarez*,* 567 U.S. 709, 719 (2012) (holding that false statements alone do not violate the First Amendment unless they cause legally cognizable harm).
[174] *See* Tobias Flattery & Christian B. Miller, *Deepfakes and Dishonesty*, 37 PHIL. TECH. 120 (2024) (explaining the subtle differences between lies and deception).

A close analysis of *Alvarez* proves instructive to highlight this distinction.[175] In that case, Alvarez was arrested for having falsely claimed that he had served in the Marines and earned a Congressional Medal of Honor.[176] His false claim violated the Stolen Valor Act, which made it a federal crime to, among other things, falsely claim to have received a Congressional Medal of Honor.[177] Therefore, Alvarez was convicted under the statute and appealed on First Amendment grounds.[178] Subsequently, the Ninth Circuit Court of Appeals reversed.[179] In a controlling plurality opinion, Justice Kennedy held that the Stolen Valor Act, as applied, was an unconstitutional content-based restriction on speech.[180] The mere fact that the speech was false, in Justice Kennedy's view, was insufficient to claim that the speech lacked First Amendment protection.[181] Permitting the government to "control and suppress all false speech" in "this one context" would endorse government authority to compile a list of subjects about which false statements are punishable.[182]

However, the underlying rationale presented in Justice Kennedy's plurality opinion in *Alvarez* is not applicable to Deceptive Deepfakes because it focused on the substance of the speech itself instead of its authenticity.[183] Kennedy points out the Court's decision in *Hustler Magazine, Inc v. Falwell* that*,"*[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas."[184] Then Kennedy goes on to note that there is no categorical rule against falsehoods in First Amendment jurisprudence.[185] In previous cases where the Supreme Court held that false speech was unprotected by the First Amendment, there was some "legally cognizable harm," such as an "invasion of privacy" or the "costs of vexatious litigation."[186] The falsity of speech, while not irrelevant to First Amendment jurisprudence, is not determinative without these attendant harms.[187]

Unlike the falsities in *Alvarez*, Deceptive Deepfakes do not merely interfere with the truth-seeking function of the marketplace of ideas; their

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[175] *Alvarez*, 567 U.S. at 719-20.
[176] *Id.* at 713-14.
[177] *Id*. at 714; 18 U.S.C. § 704 (2018).
[178] *Alvarez*, 567 U.S. at 714.
[179] *Id.*
[180] *Id.* at 730.
[181] *Id.* at 722.
[182] *Id.* at 723.
[183] *Id.* at 719.
[184] *Alvarez*, 567 U.S. at 718 (quoting Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 52 (1988)).
[185] *Id.* at 719.
[186] *Id*.
[187] *Id.*

very nature, as a form of fake testimony indistinguishable from the truth, completely subverts that marketplace.[188] It is a well-known fact that some people lie, some of them even lie about being war heroes, and it is up to reasonable people to be skeptical in choosing what to believe.[189] But when speech takes the form of a "deception against which common prudence cannot guard," reasonable skepticism is no protection.[190] A photo-realistic video of a person doing or saying something they did not say or do is more problematic than a false news report or false eyewitness account, in that it prompts less skepticism.[191] After all, news reporters sometimes err and witnesses can be lying, confused, or forgetful.[192] Deceptive Deepfakes proport, by their very nature, to be above such reproach.[193] They prompt no reasonable follow-up or healthy debate.[194] In fact, (under the definition proposed herein)[195] Deceptive Deepfakes are created and presented with the intent of circumventing natural skepticism, in that they are created to deceive, and/or are presented as if genuine.[196]

The harm done by Deceptive Deepfakes to the marketplace of ideas is what the First Amendment seeks to protect.[197] When practically irrefutable mass-produced falsehood is indistinguishable from truth, the marketplace cannot function.[198] The only societal mechanism to remedy this confusion is the criminalization advocated here.[199] A criminalization not of the lies or falsehoods contained in the Deceptive Deepfake, but a criminalization of the form and manner of the expression itself.[200] Criminalization would serve as a proper deterrent to the creation and distribution of these deepfakes and would provide a denunciation so that the public knows that the deepfake is, in fact, fake.[201]

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[188] Jack Langa, *Deepfakes, Real Consequences: Crafting Legislation to Combat Threats Posed by Deepfakes*, 101 B.U. L. REV. 761, 781 (2021).
[189] *See* Christian B. Miller, *This is How Often People Lie in a Day*, SCI. AM. (Oct. 31, 2023), https://www.scientificamerican.com/article/people-lie-1-08-times-a-day/ (on file with the University of Baltimore Law Forum).
[190] BURDICK, *supra* note 80, § 630, at 467.
[191] de Ruiter, *supra* note 121, at 1321.
[192] *Id*.
[193] *Id*.
[194] Citron & Chesney, *supra* note 14, at 1778.
[195] *See infra* Section V.
[196] Citron & Chesney, *supra* note 14, at 1771–72.
[197] *Id*. at 1777–78.
[198] *Id*.
[199] *Id*. at 1791.
[200] *Id*. at 1801–03.
[201] *Id*. at 1801–03.

This contrast is also brought into greater focus when we consider the proposed (non-legal) remedy to the falsehood relied upon in *Alvarez*.[202] According to the plurality opinion there, the "remedy for speech that is false is speech that is true."[203] The First Amendment gives people the right to respond to false speech with true speech, and that serves as a market-based mechanism to ensure that the truth eventually emerges.[204] A false statement can be countered with a true one.[205] The same, however, cannot be said of a Deceptive Deepfake, just as the presence of a real twenty-dollar bill does nothing to discredit an indistinguishable fake twenty in the same cash register.[206] As the Supreme Court once said about counterfeit money, regulation is critical to preserve "the uniformity and purity to such a standard of value."[207] Unlike useful lies that can occasionally guide us Socratically to a truth, Deceptive Deepfakes promise only to undermine the marketplace of ideas by making all real testimony seem potentially fake, and all fake testimony seem potentially real.[208] In that sense, the "uniformity and purity" of actual testimonial evidence becomes muddled.[209] While forgeries and false testimony will always plague truth-seeking societies, they need not, and should not, enjoy First Amendment protection.[210]

B. Deceptive Deepfakes Are Not Parody.

At first glance, some Deceptive Deepfakes could be confused with parody, which is a "form of artistic expression protected by the First Amendment."[211] However, Deceptive Deepfakes, by definition, cannot be parody.[212] Wex Legal Dictionary defines "parody" as something that "takes a piece of creative work–such as art, literature, or film–and imitates it in an exaggerated, comedic fashion."[213] The definition goes on to discuss that parody is generally offered as a critique or commentary on the original work.[214] This definition precludes parody from describing Deceptive

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[202] United States v. Alvarez, 567 U.S. 709, 727 (2012).
[203] *Id.*
[204] *Id.*
[205] Yelin, *Forged Digital Likenesses, supra* note 163.
[206] *Id.*
[207] United States v. Marigold*,* 50 U.S. 560, 567 (1850).
[208] Yelin, *Forged Digital Likenesses, supra* note 163.
[209] *Id.*
[210] *Id.*
[211] Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Grp., Inc., 886 F.2d 490, 493 (2d Cir. 1989).
[212] *Parody*, CORNELL LEGAL INFORMATION INSTITUTE (2020).
[213] *Id.*
[214] *Id.*

Deepfakes.[215] Deceptive Deepfakes that are presented *as genuine,* by definition, do not present the original "work" (in this case, the manipulated images, audio, or video) in an exaggerated or comedic fashion.[216] Parody, by definition, is an attempt to "mimic,"[217] rather than re-create, an original work for "comic effect or ridicule."[218] The humor inherent in parody is the obvious inauthenticity.[219] Therefore, Deceptive Deepfakes, because they are presented as authentic and genuine, would not in any context qualify as a parody.[220] Having shown that Deceptive Deepfakes fall squarely within longstanding prohibitions on deceptive forms of speech and outside First Amendment protection, the paper now turns to how criminal statutes should address them in practice.[221]

V. CRIMINALIZING DECEPTIVE DEEPFAKES.

As discussed above, common law and Constitutional precedent provide a rich history and a wide array of prohibitions against false speech, cheats, fakes, and forgeries.[222] There are multiple approaches for criminalizing Deceptive Deepfakes that would be consistent with this history and precedent.[223] The remainder of this paper will explore two of these—a general prohibition of the *creation* of Deceptive Deepfakes, and a ban on their *distribution*.[224] For each of these the *mens rea* of the potential crime is considered, assessing what level of intent should be required.[225] Finally, a potential harm requirement is discussed.[226]

A. Banning the Creation of Deceptive Deepfakes.

The creation of Deceptive Deepfakes could be banned.[227] Such a ban would be akin to the prohibition against counterfeiting U.S. currency, which punishes whoever, "with intent to defraud, falsely *makes*, forges,

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[215] *Id.*
[216] *Id.*
[217] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994).
[218] *Id.* at 580 (quoting American Heritage Dictionary 1317 (3d ed. 1992)).
[219] *Parody*, *supra* note 212.
[220] *Id.*
[221] *See infra* Part V.
[222] *See supra* Parts III-IV.
[223] *See infra* Sections V.A-B.
[224] *See infra* Sections V.A-B.
[225] *See infra* Sections V.A-B.
[226] *See infra* Section V.C.
[227] *See infra* Section V.A.

counterfeits, . . . any obligation . . . of the United States."[228] In both cases, it is possible for people to create potential fakes (counterfeit bills or Deceptive Deepfakes) in the privacy of their own home without harming anyone at all.[229] The harm is done by the deception, *not* the creation.[230]

However, there are compelling reasons to outlaw the creation of fakes, not the least of which is that if production is legal until distribution, prosecutors will need to prove the person intended to eventually pass off the fakes as real.[231] This could be a difficult hurdle to jump, as the accused would be able to claim they were merely generating the fakes for personal collection or entertainment.[232]

As tempting as a similar bright line prohibition on production might be in the realm of Deceptive Deepfakes, the analogy is not perfect.[233] Legitimate security researchers may have very good reasons to create potentially Deceptive Deepfakes as part of deepfake detection or prevention research.[234] Any prohibition on the production of potentially deceptive deepfakes would need to provide exceptions for such legitimate purposes.[235] This can be embodied in the *mens rea* of a prohibition as creation *with intent to deceive*, an approach consistent with modern counterfeiting statutes.[236] With respect to counterfeiting, courts have noted that: "It is well settled that a general intent to defraud unknown third parties will suffice under these

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[228] *Cf.* 18 U.S.C. § 471 (2001) (analogizing the current prohibition on counterfeiting which is creating a "fake" to a prohibition on deepfakes which creates false visuals) (emphasis added).

[229] Yizhi Liu et al., *What Exactly is a Deepfake?,* U. OF MD., COLL. PARK, Oct. 25, 2025, at 2.

[230] *Id.*

[231] *The Deepfakes Accountability Act and Current Laws,* LEGAL CLARITY (Dec. 13, 2025), https://legalclarity.org/the-deepfakes-accountability-act-and-current-laws (on file with the University of Baltimore Law Forum).

[232] *Id.*

[233] *Compare* 18 U.S.C. § 471 (2025) (prohibition against counterfeiting U.S. currency only requires "intent to defraud," showing a bright line prohibition on production), *with supra* Part II (defining Deceptive Deepfakes and emphasizing the importance of intent to deceive others in criminalization).

[234] *See* Rajesh Kumar & Hitesh Sharma, *A GAN-Based Model of Deepfake Detection in Social Media*, 218 PROCEDIA COMPUT. SCI. 2153 (2023), https://www.sciencedirect.com/science/article/pii/S1877050923001916?via%3Dihub (on file with the University of Baltimore Law Forum) (illustrating the complexity of deepfakes and the struggle in developing a well-rounded regulation).

[235] *See id.* (showing legitimate purposes for Deceptive Deepfakes, that, if prohibited, would damage the development of anti-deepfake research).

[236] 18 U.S.C. § 513 (2025) ("Whoever makes, utters or possesses a counterfeited security of the State . . . with intent to deceive another . . . shall be fined under this title or imprisoned[.]").

statutes; and . . . that the requisite intent need not include an intent to defraud solely by passing, uttering, or otherwise transferring the counterfeit."[237]

Pairing creation with an intent to deceive or defraud also helps contend with the thorny issue of determining *who* exactly can be prosecuted for illegal deepfake creation.[238] Without such a requirement, bans on creation could easily reach tech firms whose AI models are responsible for generating potentially Deceptive Deepfakes.[239] Imagine a firm uses its generative AI model to create a video based on a user prompt specifically requesting a Deceptive Deepfake, for example, "generate a photorealistic image of the President of the United States falling down the stairs in an embarrassing way."[240] However, may that firm, in responding to the prompt, then illegally created a Deceptive Deepfake.[241] This seems to pivot on whether "creation with an intent to deceive" can be viewed broadly enough to include purposeful creation of "a photorealistic image", the salient point being that the word "photorealistic" implies an output indistinguishable from an authentic photo.[242] Any output short of one that could be used to deceive

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[237] United States v. Wilkerson, 469 F.2d 963, 969 (5th Cir. 1972) (first citing Riggs v. United States, 280 F.2d 750, 752 (5th Cir. 1960); and then citing Barbee v. United States, 392 F.2d 532, 538 (5th Cir. 1968)).

[238] *See* 18 U.S.C. § 471 (2025) (requiring "intent to defraud" for counterfeiting, showing a bright line prohibition on production, focusing on creation of the counterfeit); *see also* 18 U.S.C. § 513 (2025) (highlighting "intent to deceive" in counterfeiting).

[239] *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Sues to Stop Air AI from Using Deceptive Claims about Business Growth, Earnings Potential, and Refund Guarantees to Bilk Millions from Small Businesses (Aug. 25, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/08/ftc-sues-stop-air-ai-using-deceptive-claims-about-business-growth-earnings-potential-refund (on file with the University of Baltimore Law Forum) (showing example of tech firm whose AI models may have resulted in deception and misrepresentations being sued by the Federal Trade Commission).

[240] *See* Matt O'Brien, *Tech Companies Try to Take AI Image Generators Mainstream with Better Protections Against Misuse*, THE BUS. J. (Sept. 21, 2023), https://thebusinessjournal.com/tech-companies-try-to-take-ai-image-generators-mainstream-with-better-protections-against-misuse/#:~:text=Earlier%20this%20month%2C%20both%20Adobe,automatically%20blocked%20at%20this%20time.%E2%80%9D&text=AP%20business%20writers%20Cora%20Lewis%20and%20Haleluya%20Hadero%20contributed%20to%20this%20report (on file with the University of Baltimore Law Forum) (testing OpenAI by asking the model to "generate a photorealistic image of the President of the United States falling down the stairs in an embarrassing way").

[241] *See* TAKE IT DOWN Act, Pub. L. No. 119-12, 139 Stat. 55 (2025) (highlighting the current legal state of deepfakes and the requirement to remove nonconsensual intimate imagery).

[242] *Compare* 18 U.S.C. § 513 (2025) (specifying existing "intent to deceive" language in modern statute), *with* Qiyao Peng et al., *Crafting Synthetic Realities: Examining Visual Realism and Misinformation Potential of Photorealistic AI-Generated Images*, RSCH. GATE: INDUS. DESIGN (Apr.

would not live up to the prompt's request.[243] Therefore, the law governing counterfeiting is here again informative.[244] With respect to faked money: "***Mere possession with knowledge of the counterfeit*** character of the currency will not suffice. . . . There must be knowing possession and intent to defraud someone."[245] This logic should likely apply to any prohibition on the creation of Deceptive Deepfakes.[246] Similar to counterfeit money, the harm to be remedied is not in its mere existence or character, but in its character plus the intent to defraud.[247] Moreover, this would ensure that in the scenario above, the user who prompted the AI to cause the creation of the deepfake with intent to defraud and not the firm offering the AI generative model, who had no affirmative intent to defraud, would be punished.[248]

The inclusion of an intent to deceive limits the ability of a simple ban on creation to get at the root of the deepfake proliferation—that they are cheap and easy to create with widely available tools.[249] It might be beneficial to society to regulate the use, or outputs of generative AI tools, but such regulations would likely need to be rooted in a different legal theory than the one presented here.[250] Laws that require deepfake tool creators to ensure their outputs are labeled or watermarked as AI-created[251] could be rooted in market

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2025), https://www.researchgate.net/publication/391268935_Crafting_Synthetic_Realities_Examining_Visual_Realism_and_Misinformation_Potential_of_Photorealistic_AI-Generated_Images (on file with the University of Baltimore Law Forum) (providing insight into the impact of photorealism through AI on the spread of misinformation through scientific study).

[243] *See* Benjamin Yelin & Christopher Webster, OpenAI, "Generate a photorealistic image of the President of the United States falling down the stairs in an embarrassing way" (Oct. 31, 2025) (on file with the Authors) (testing OpenAI by asking the model to generate photorealistic images of potentially sensitive topics).

[244] 18 U.S.C. § 471 (2025).

[245] United States v. Wilkerson, 469 F.2d 963, 969 (5th Cir. 1972) (citing Barbee v. United States, 392 F.2d 532 (5th Cir. 1968)) (emphasis added).

[246] *Id.*; *see supra* Part II (explaining "intent to defraud" in Deceptive Deepfakes).

[247] *See* 18 U.S.C. § 471 (2025).

[248] *See supra* Section V.A; *see also* 18 U.S.C. § 471 (2001) (explaining "intent to defraud"). *See generally* Sneha Solanki, *What is Criminal Liability?*, THOMSON REUTERS (Jan. 23, 2024), https://legal.thomsonreuters.com/blog/what-is-criminal-liability/#general-principles (on file with the University of Baltimore Law Forum) (discussing criminal law and importance of following basic *actus reus* and *mens rea* principles in criminal law).

[249] Stuart A. Thompson, *Making Deepfakes Gets Cheaper and Easier Thanks to A.I.*, N.Y. TIMES (Mar. 12, 2023), https://www.nytimes.com/2023/03/12/technology/deepfakes-cheapfakes-videos-ai.html (on file with the University of Baltimore Law Forum).

[250] *See* Shreyansh Rane, *Why is Controlling the Output of Generative AI Systems Important?*, ADVANT (Dec. 26, 2025), https://advantailabs.com/blog/why-is-controlling-the-output-of-generative-ai-systems-important (on file with the University of Baltimore Law Forum) (explaining the importance of controlling the output of generative AI).

[251] *See, e.g.*, CAL. BUS. & PROF. CODE § 22757 (2024).

regulation, consumer protection, or other legal theories beyond the scope of this paper.[252] Worth noting, is that (at the time of publication) most, if not all, public firms offering generative AI services to the public have voluntarily declined to produce images in response to prompts like the one provided in the example above.[253] Regulations of the AI models themselves or their authors, or businesses deploying them, etc., may very well be required to staunch the flow of Deceptive Deepfakes.[254] However, with the existence of opensource generative AI models, people can modify and run on their own devices, as well as tools to crop out or remove labels and watermarks, meaning that it will always be possible for the enterprising individual to create Deceptive Deepfakes outside of such a regulatory regime.[255] It, therefore, makes sense to pursue both a ban on the creation of Deceptive Deepfakes, as well as regulation on generative AI tools.[256] That said, holding generative AI model owners guilty of Deceptive Deepfake creation is as illogical and inconsistent with common law tradition as holding printer manufacturers responsible for rogue users printing fake currency.[257]

B. Banning the Distribution of Deceptive Deepfakes.

The harm done by fakes is not done until those fakes enter the ecosystem of trust.[258] It makes sense then that a law against Deceptive

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[252] *See* Matt Bracken, *Bipartisan House Bill Seeks Labeling and Disclosures for AI Deepfakes*, FEDSCOOP (Mar. 21, 2024), https://fedscoop.com/ai-generated-deepfakes-house-bill/ (on file with the University of Baltimore Law Forum) (disclosing AI-created content through watermarks and other means has been a widely discussed topic under theories of consumer protection).

[253] *See* Catherine Thorbecke & Clare Duffy, *Google Halts AI Tool's Ability to Produce Images of People After Backlash*, KSL TV 5: NAT'L NEWS (Feb. 22, 2024), https://ksltv.com/national-news/google-halts-ai-tools-ability-to-produce-images-of-people-after-backlash/624792/ (on file with the University of Baltimore Law Forum) (showing impact of controversy about misrepresenting race and ethnicity in Google AI, or Gemini, image generation results and how Google shut down image generation function).

[254] *See* O'Brien, *supra* note 240 (listing public firms offering generative AI services that decline to produce controversial images and answers, including Amazon, Google, Microsoft, and OpenAI).

[255] *See* Thompson, *supra* note 249 (describing availability and ease of using AI on personal devices).

[256] *See* O'Brien, *supra* note 240 (explaining regulations on generative AI tools applied to major AI providers); 18 U.S.C. § 471 (2025).

[257] *See* Solanki, *supra* note 248 (charging the manufacturer of a product criminally for the misuse of another goes against basic *actus reus* and *mens rea* principles); 18 U.S.C. § 471 (2025).

[258] *See Increasing Threat of Deepfake Identities*, U.S. DEP'T OF HOMELAND SEC. (2023), https://www.dhs.gov/sites/default/files/publications/increasing_threats_of_deepfake_identities_0.pdf (on file with the University of Baltimore Law Forum) (describing the

Deepfakes could prohibit the act of distribution.[259] In common law, the act of offering, passing, or publishing forgeries is a separate and distinct offense from creation called "uttering."[260] After all, "the one who utters the instrument need not be the forger of it, and may not have had anything to do with the actual forgery."[261] It is not uncommon for statutes to adopt an approach that allows for a conviction for forgery upon only proof of an uttering.[262] Effectively combatting Deceptive Deepfakes will require a prohibition on sharing, as modern digital tools make the duplication of deepfakes trivial, and social media platforms profoundly amplify their negative effects on the marketplace of ideas.[263]

Defining the *actus reus* as the distribution of a Deceptive Deepfake increases the importance of the definition of *mens rea*.[264] Basic concepts of justice require that to be guilty of the distribution of a Deceptive Deepfake one would need to know the deepfake was fake.[265] It makes no sense to criminalize those who unwittingly pass on a deepfake.[266] This logic would extend to social media companies whose platforms are used to distribute

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damage deepfakes cause to public relationship with media and the government after entering a trusting space and explaining the pendulum effect of public trusting and suspecting their sources after public knowledge of deepfakes increases).

[259] *Deceptive Audio of Visual Media ('Deepfakes') 2024 Legislation*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 22, 2024), https://www.ncsl.org/technology-and-communication/deceptive-audio-or-visual-media-deepfakes-2024-legislation (on file with the University of Baltimore Law Forum) (outlining bills proposed in the United States criminalizing deepfakes and the required intent or actions required for illegal activity to exist).

[260] *See* 37 C.J.S. *Forgery* § 30 (2024) (explaining modern uttering, passing, or publishing forged instruments and how the terms interact in law); BURDICK, *supra* note 80, § 667, at 557-58 (noting that "ordinarily, the meaning of the verb 'to utter' means to speak, publicly declare, publish, or pronounce . . . . In later times, 'utter' took their place, and came to mean to put in circulation in the case of counterfeit money, or to put to use or to put upon the public in connection with a forged instrument").

[261] BURDICK, *supra* note 80, §664, at 555.

[262] *See, e.g.,* NEV. REV. STAT. § 205.110 (West 2025) (allowing for conviction for forgery upon only proof of an uttering). *See generally* 37 C.J.S. *Forgery* § 30 (2024) (describing function of forgery and uttering in statutory context).

[263] *See* Thompson, *supra* note 249 (describing digital tools available to general population and ease of replicating and spreading deepfakes via social media).

[264] *See* Solanki, *supra* note 248 (discussing the relationship between criminal law, *actus reus*, and *mens rea*).

[265] *See generally id.* (discussing basic concepts of justice in relation to criminal law).

[266] *See* John Villasenor, *Artificial Intelligence, Deepfakes, and the Uncertain Future of Truth*, BROOKINGS (Feb. 14, 2019), https://www.brookings.edu/articles/artificial-intelligence-deepfakes-and-the-uncertain-future-of-truth/ (on file with the University of Baltimore Law Forum) (describing the dangerous balance between overly broad protections to victims of deepfakes and excessive protections for distributors of deepfakes, emphasizing the importance of intent in criminality).

Deceptive Deepfakes, without actual knowledge on the part of these platforms that the deepfakes are fake.[267] Practically though, this creates a significant prosecutorial hurdle of affirmatively overcoming the *'I thought it was real'* defense.[268]

Resolving that one must know the deepfake is fake, does not fully settle the issue of defining the requisite criminal intent.[269] A narrow approach would only prohibit instances where a deepfake was shared *with the intent to induce reliance*.[270] Such an approach would look similar to common law fraud, which requires a showing that the fraudster sought to influence the victim's actions with their misrepresentation.[271] The limitation of using this relatively high level of intent is that it narrowly cognizes the harm caused by the deception as harm to a specific identifiable victim, and fails to acknowledge that the harm could be to systems of trust and the marketplace of ideas.[272]

A broader approach to intent is, therefore, warranted;[273] one that requires only the intent *to distribute a deepfake as if it were genuine,* even in the absence of an intent to specifically deceive an identifiable victim.[274] Given how quickly false information can spread via social media, once the Deceptive Deepfake has been "uttered," it has entered the public sphere for legal purposes.[275] As Wes Hendrickson writes in his law review article on "fraud to the public," disinformation "exacts a heavy toll on society," because, "social media, email, and other digital advances and technologies have allowed disinformation to spread faster than ever before."[276] These broader societal harms, separate and apart from harms to the individuals depicted, require a careful consideration of whether a specific articulable

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[267] *See id.*; 47 U.S.C. § 230 (2025) (showing that an approach criminalizing the existence of deepfakes without requiring knowledge of their falsity would be congruent with § 230 of the Communications Decency Act, which immunizes platforms from liability for user-generated content, subject to narrow exceptions).

[268] Herbert B. Dixon Jr., *The "Deepfake Defense": An Evidentiary Conundrum*, 63 JUDGES' J. 38 (2024), https://www.americanbar.org/content/dam/aba/publications/judges_journal/vol63no2-jj2024-tech.pdf (on file with the University of Baltimore Law Forum).

[269] *See* Solanki, *supra* note 248 (describing criminal intent).

[270] *See* RESTATEMENT (SECOND) OF TORTS § 525 (A.L.I. 1977).

[271] *Id.*

[272] *See* Villasenor, *supra* note 266 (describing various approaches to anti-deepfake legislation, including various levels of intent and their potential implications).

[273] *But cf.* RESTATEMENT (SECOND) OF TORTS § 525 (1977) (comparing a broader approach to a narrow approach that fails to recognize some harms).

[274] *Id.;* Wes Henricksen, *Disinformation and the First Amendment: Fraud on the Public*, 96 ST. JOHN'S L. REV. 543, 553 (2022).

[275] *See supra* notes 259–61 and accompanying text.

[276] Henricksen, *supra* note 274, at 554–55.

harm should be a required element of a law criminalizing Deceptive Deepfakes.[277]

C. Considering a Harm Requirement.

Finally, for both creation and distribution it is important to consider whether a showing of actual harm should be required.[278] Deceptive Deepfakes can potentially cause harm to three distinct groups of victims.[279] First, there are some instances where the primary victims of a deepfake are the individuals it falsely depicts.[280] Second, there are other instances in which the harm is not concentrated on the individuals depicted, but rather the victim is a third-party who is deceived by the deepfake.[281] Finally, and most broadly conceived, the victims of Deceptive Deepfakes are the systems of trust upon which society relies.[282] Requiring prosecutors show that a Deceptive Deepfake created actual harm could be important in limiting frivolous prosecutions.[283] However, measuring the harm of a Deceptive Deepfake is not trivial, especially to society as a whole, and the inclusion of a harm requirement could make prosecution practically impossible.[284] Therefore, it makes sense not to require a showing of harm in order to sustain a conviction.[285] The lack of a harm requirement may present some edge case scenarios that require a deeper analysis of this paper's approach.[286]

VI. A CONSIDERATION OF POTENTIAL SCENARIOS.

It is helpful to consider potential scenarios in light of the approaches described in this Article.[287] First, consider the Pikesville High School case involving a deepfake of an individual making hateful and offensive comments.[288] This would be illegal under both a prohibition on the creation

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[277] *See id*.
[278] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).
[279] *See supra* Parts I–II (discussing harms caused by deepfakes).
[280] *See, e.g.*, *supra* notes 40-45 and accompanying text.
[281] United States v. Wilkerson, 469 F.2d 963, 969 (5th Cir. 1972).
[282] Citron & Chesney, *supra* note 14, at 1776-85.
[283] *See id*. (describing legality issues).
[284] *See id.* (describing issues that can make successful prosecutions challenging).
[285] *See id.* (describing potential solutions).
[286] *See supra* Part VI.
[287] *See supra* Part V.
[288] *See* Spring, *supra* note 1 (describing Pikesville High School's deep fake incident).

of Deceptive Deepfakes, as it was created with the intent to deceive, as well as a prohibition against distribution as it was presented as genuine.[289]

A more complicated scenario would be the resharing of a social media post containing a deepfake, perhaps one of a modern-day presidential candidate wading through hip-deep flood waters, holding a kitten under each arm, perfectly quaffed and dressed in a suit and tie.[290] This image would not be considered a Deceptive Deepfake, as it is not created to deceive or presented as genuine.[291] The farcical nature of the situation depicted is not a "deception against which common prudence cannot guard."[292]

Consider a similar scenario, in which the deepfake depicts the same modern-day political candidate shaking hands with Adolf Hitler.[293] Similarly, this image would not be considered a Deceptive Deepfake, as it is not presented as genuine.[294] Adolf Hitler is dead, and so this image cannot, under any circumstances, be real.[295] Again, this is not a "deception against which common prudence cannot guard."[296]

Now consider a deepfake video of that modern-day political candidate repeating famous Adolf Hitler quotes at a political rally.[297] Imagine the

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[289] *See supra* Sections V.A-B (criminalizing the creation and distribution of Deceptive Deepfakes).

[290] *See, e.g.,* Kalhan Rosenblatt, *Fake Images of Hurricane Survivors Have Become a Bizarre Meme,* NBC NEWS (Oct. 10, 2024, at 08:32 ET), https://www.nbcnews.com/tech/fake-images-hurricane-survivors-bizarre-meme-rcna174874 (on file with the University of Baltimore Law Forum) (describing image of Trump with puppies in hurricane waters); Jordan King, *Donald Trump Cat Photos Flood Internet After Migrant Pet-Eating Claims,* NEWSWEEK (Sep. 10, 2024, at 11:52 ET), https://www.newsweek.com/donald-trump-cats-ducks-ai-images-migrants-eating-pets-springfield-ohio-1951485 (on file with the University of Baltimore Law Forum) (describing AI-generated images illustrating Trump's pet-eating comment). This scenario is premised loosely on AI generate meme images of Donald Trump that were circulated in the fall of 2024 mashing up the current events post-Hurricane Helene and comments he made during the Presidential Debate about migrants eating pets. *See* Staff Writer, *Fact Check: Did Trump rescue cats from floodwaters?*, THE FLA. TIMES-UNION (Sept. 23, 2017), https://www.jacksonville.com/story/news/reason/2017/09/23/fact-check-did-trump-rescue-cats-floodwaters/985436007/ (on file with the University of Baltimore Law Forum) (last modified Oct. 1, 2024, at 8:32 ET).

[291] *See supr*a Section V.B (explaining proposed approach to the intent element).

[292] BURDICK, *supra* note 80, § 630, at 466.

[293] *See* Citron & Chesney, *supra* note 14, at 1776 (describing examples of types of AI-generated memes that may cause societal harm if generated and distributed).

[294] *See supra* Section V.B (describing proposed approach to the intent element).

[295] Keith Huxen, *The Death of Adolf Hitler*, THE NAT.'L WWII MUSEUM NEW ORLEANS (Mar. 30, 2020), https://www.nationalww2museum.org/death-of-adolf-hitler (on file with the University of Baltimore Law Forum).

[296] BURDICK, *supra* note 80, § 630, at 466.

[297] *See* Citron & Chesney, *supra* note 14, at 1776 (illustrating more examples of types of AI-generated memes that may cause societal harm if generated and distributed).

creator of this deepfake felt that such a composition would have artistic value and prompt a larger discussion on the state of politics in America.[298] The legality of this deepfake would depend on its composition and presentation.[299] If it bore a label, warning, or other indicator that it was not genuine, then it would not be criminalized as a Deceptive Deepfake.[300] Contrastingly, if it was posted to the Internet without such a disclosure, that could be considered the criminal distribution of a Deceptive Deepfake.[301] This is true, even if the artist in question meant it to be satire.[302] If the broadest views of intent are adopted, the artist's desire to prompt discussion would be irrelevant, as what they have created is a harmful deepfake and presented it as genuine.[303] Such a Deceptive Deepfake could be shared and reshared easily, prompting confusion and poisoning the marketplace of ideas.[304]

Finally, consider the seemingly innocuous: Would a deepfake of a real person eating an ice-cream cone, when in fact that person did not eat that cone, be problematic?[305] Presenting this deepfake as genuine, with no label, disclaimer, or warning, should be illegal.[306] This, however, seems to be a victimless crime, as the veracity of claims about ice-cream cone consumption seems afield from protecting democracy and our way of life.[307] However, it is important to recall that the mere existence and propagation of these types of deepfakes undermines the trust individuals have in all types of recorded evidence.[308] So, while it is unlikely a prosecutor would bring up charges, this could still be considered an illegal Deceptive Deepfake.[309] These hypothetical scenarios highlight the normative stakes and future implications of Deceptive Deepfakes in many forms, and they frame the conclusions that follow.[310]

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[298] *See id.* (explaining the potential motivations behind users creating deepfakes as a way of expression).
[299] *See supra* Section V.A (discussing proposed deepfake distribution ban elements).
[300] *See supra* Section V.A.
[301] *See supra* Section V.A.
[302] *See supra* Section V.A (discussing intent element of proposed deepfake distribution ban).
[303] *See supra* Section V.A (discussing intent to deceive).
[304] *See supra* Part IV (describing protected versus unprotected categories of speech).
[305] *See* Citron & Chesney, *supra* note 14, at 1776 (illustrating examples that seem relatively harmless).
[306] *See supra* Part V (describing intent to deceive).
[307] *See supra* Part V (describing elements of deepfake distribution crimes).
[308] *See supra* Parts III, V.
[309] *See supra* Part V.
[310] *See supra* Part V.

VII. CONCLUSION.

Deepfake technology has given rise to a new and dangerous form of fake: the Deceptive Deepfake.[311] People are already being harmed by the publication of Deceptive Deepfakes, which are indistinguishable from genuine images, video, or audio recordings.[312] Many states have attempted to regulate deepfakes using other approaches, but these laws are frequently criticized as violating First Amendment protections.[313] Unlike the broader group of deepfakes, the narrow subset of Deceptive Deepfakes should not enjoy protection under the First Amendment, upholding a long tradition of banning fake speech.[314] What makes Deceptive Deepfakes so concerning is that they do not simply undermine trust in a particular registration or transactional system that relies on the veracity of writings, but instead undermine the basic trust individuals have in the testimony of their fellow citizens in nearly all contexts.[315] This danger warrants a prohibition on creating and/or distributing Deceptive Deepfakes that is consistent with common law traditions of banning fake speech.[316]

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[311] *See supra* Parts I, II.
[312] *See supra* Part I (describing dangers of AI Deceptive Deepfakes).
[313] *See supra* Parts II and V.
[314] *See supra* Parts III–V (describing First Amendment protections and whether Deceptive Deepfakes should be considered protected speech).
[315] *See supra* Part III.
[316] *See supra* Parts I–V (describing worsening problems from Deceptive Deepfakes, the potential for harm from Deceptive Deepfakes, the common law tradition banning fakes, and why Deceptive Deepfakes should not be protected speech).

ARTICLE

PRACTICAL AI FOR LAWYERS: MEETING THE CHALLENGES OF COMPETENCE, CONFIDENTIALITY, AND CANDOR

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While the use of AI does come with several ethical and practical concerns, attorneys can readily and confidently navigate these challenges.

I. INTRODUCTION.

Artificial Intelligence ("AI") has become integrated into everyday life with extraordinary speed.[1] According to OpenAI, their model, ChatGPT, had an estimated eight hundred million active users in September 2025, three years after launch.[2] Recent statistics reveal that adult use of ChatGPT has roughly doubled over two years to thirty-four percent (34%), while workplace adoption has tripled from eight percent (8%) to twenty-eight

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[1] *See* James M. Manyika, *Getting AI Right: Introductory Notes on AI & Society*, 151 DÆDALUS 5 (AM. ACAD. ARTS & SCI. 2022) (discussing the pervasive and transformative impacts of artificial intelligence across multiple sectors of society).

[2] Lauren Edmonds, *3 Years Old, 800 Million Users, 29,000 Prompts a Second: ChatGPT's Meteoric Rise, by the Numbers*, BUS. INSIDER (Dec. 1, 2025), https://www.businessinsider.com/chatgpt-by-the-numbers-2025-11 (on file with the University of Baltimore Law Forum).

percent (28%) in the same period.[3] Another survey reveals, however, that roughly half of Americans fear that AI will destroy creativity, ruin people's ability to form meaningful relationships with one another, and extinguish critical thinking skills.[4]

For the legal profession, these concerns are not abstract.[5] Hundreds of news articles have discussed the rising phenomenon of attorneys accidentally citing fake cases in their legal briefs after utilizing AI to conduct legal research.[6] Legitimate questions persist about the "black box"[7] processes underlying many AI models, the persistence of AI "hallucinations,"[8] and the privacy risks posed by models that store and reuse inputted data for refinement.[9] Notwithstanding ongoing improvements to model accuracy, hallucinations have contributed to a considerable spike in misinformation over the past three years.[10] Moreover, given how certain AI models and service tiers use and store data for model refinement and later generation,

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[3] Olivia Sidoti & Colleen McClain, *34% of U.S. Adults Have Used ChatGPT, About Double the Share in 202*3, PEW RSCH. CTR. (June 25, 2025), https://www.pewresearch.org/short-reads/2025/06/25/34-of-us-adults-have-used-chatgpt-about-double-the-share-in-2023/#:~:text=The%20survey%20found%20that%20Americans%20have%20used,say%20they've%20heard%20a%20lot%20about%20it (on file with the University of Baltimore Law Forum.

[4] Brian Kennedy et al., *How Americans View AI and Its Impact on People and Society*, PEW RSCH. CTR. (Sept. 17, 2025), https://www.pewresearch.org/science/2025/09/17/how-americans-view-ai-and-its-impact-on-people-and-society/ (on file with the University of Baltimore Law Forum).

[5] *See infra* Parts II-III, IV.

[6] *See, e.g.*, Sara Merken, *Trouble with AI 'hallucinations' spreads to big law firms*, REUTERS (May 23, 2025, at 17:01 ET), https://www.reuters.com/legal/government/trouble-with-ai-hallucinations-spreads-big-law-firms-2025-05-23/ (on file with the University of Baltimore Law Forum).

[7] "Black box" is a term coined to identify the uncertainties surrounding the process by which AI platforms arrive at particular outputs based on user input. *See* Matthew Kosinski, *What is Black Box Artificial Intelligence (AI)*?, IBM (Oct. 29, 2024), https://www.ibm.com/think/topics/black-box-ai (on file with the University of Baltimore Law Forum).

[8] Conor Murray, *Why AI 'Hallucinations' Are Worse Than Ever*, FORBES (May 6, 2025, at 13:12 ET), https://www.forbes.com/sites/conormurray/2025/05/06/why-ai-hallucinations-are-worse-than-ever/ (on file with University of Baltimore Law Forum). While hallucinations may become less frequent in the future as models improve, there has already been a considerable spike in the spread of misinformation within the last three years because of them. Angela Yang*, Ai Image Misinformation Has Surged, Google Researchers Find*, NBC NEWS (May 29, 2024), https://www.nbcnews.com/tech/tech-news/ai-image-misinformation-surged-google-research-finds-rcna154333 (on file with the University of Baltimore Law Forum) (tracing the beginning of the spike to spring 2023).

[9] Kosinski, *supra* note 7; Nikki Goth Itoi, *Be Careful What You Tell Your AI Chatbot*, STAN. UNIV. (Oct. 15, 2025), https://hai.stanford.edu/news/be-careful-what-you-tell-your-ai-chatbot (on file with the University of Baltimore Law Forum).

[10] Yang, *supra* note 8 (explaining a study tracing the beginning of the spike to spring 2023).

legitimate concerns have arisen regarding the privacy and confidentiality of client data.[11] Together, these issues can seriously undermine an attorney's ability to practice law efficiently, professionally, and ethically.[12]

Combining these concerns with the lack of clear current guidance available to attorneys from bar associations, the ultimate responsibility for determining appropriate AI use currently rests upon the attorneys themselves.[13]

Of course, AI is not the first new technology lawyers have faced.[14] Lawyers have already gone from typewriters, DOS, and floppy disks to SharePoint cloud storage, emails, and electronically filed court documents.[15] Each technological development brought its own wave of concern and resistance.[16] For example, attorneys once worried that sending confidential

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[11] A.B.A. Standing Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-512.pdf (on file with the University of Baltimore Law Forum) (explaining that AI may improperly disclose confidential information).

[12] *See Artificial Intelligence: Ethics General Points*, UIC L., https://libraryguides.law.uic.edu/c.php?g=1431863&p=11039800 (on file with the University of Baltimore Law Forum) (last visited Apr. 6, 2026).

[13] A.B.A. Standing Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024). For some, this has proven disastrous, resulting in sanctions and referrals to the Attorney Grievance Commission. Pamela Langham, *Maryland Lawyer Referred to Attorney Grievance Commission for Citing Fake AI Cases*, MSBA (Nov. 3, 2025), https://www.msba.org/site/site/content/News-and-Publications/News/General-News/Maryland_Lawyer_Referred_to_Attorney_Grievance_Commission_for_Citing_Fake%20AI_Cases.aspx (on file with the University of Baltimore Law Forum) [hereinafter *Lawyer Referred]*; Pamela Langham, *Massachusetts Lawyer Sanctioned for AI-Generated Fictitious Case Citations*, MSBA (Mar. 4, 2024), https://www.msba.org/site/site/content/News-and-Publications/News/General-News/Massachusetts_Lawyer-Sanctioned_for_AI_Generated-Fictitious_Cases.aspx (on file with the University of Baltimore Law Forum).

[14] *See Evolution of Legal Tech: Past, Present, & Future of Data Management*, LITIG. MGMT., INC., https://www.lmiweb.com/blog/evolution-legal-technology-past-present-and-future-data-management (on file with the University of Baltimore Law Forum) (last visited Jan. 17, 2025) [hereinafter *Evolution of Legal Tech*].

[15] *Id.*; Ron Friedman, *Back to the Future: A History of Legal Technology*, PRISM LEGAL Dec. 2004, https://prismlegal.com/back_to_the_future-a-history-of-legal-technology/ (on file with the University of Baltimore Law Forum); *Leveraging Microsoft SharePoint for Attorneys and Law Firms: A Comprehensive Guide*, CLARUS COMMC'NS, https://www.clarusco.com/leveraging-sharepoint-for-attorneys-and-law-firms/ (on file with the University of Baltimore Law Forum) (last visited Jan. 17, 2026); Peter Zver, *Exploring Proper Courtroom Preparedness with Electronic Document Bundling*, A.B.A. (Feb. 28, 2023), https://www.americanbar.org/groups/law_practice/resources/law-technology-today/2023/exploring-proper-courtroom-preparedness-with-electronic-document-bundling/ (on file with the University of Baltimore Law Forum).

[16] *See generally Why are many firms still reluctant to implement legal technology?,* A.B.A. (Nov. 10, 2021), https://www.abajournal.com/advertising/article/why-are-many-firms-still-

information via email and storing client files in the cloud violated their duties of confidentiality.[17] Yet, such technology is now widely adopted, not because of ethical rules changed, but because the profession came to understand the technology and applied that understanding to the long-standing, flexible rules already governing attorneys' ethical obligations.[18] As this Article will show, while the use of AI does come with several ethical and practical concerns, attorneys can address them by adopting clear methods and safeguards that allow them to use AI confidently and ethically in their practice.[19]

This Article serves as a practical guide for lawyers seeking to implement AI ethically, outlining the key concerns and the methods available to address them..[20] Beginning with an explanation about how AI works, this Article then discusses AI's limitations and risks in both a general and legal context.[21] Using the Maryland Rules of Professional Conduct as a guideline, this Article demonstrates how attorneys can ethically adopt AI by staying informed and exercising independent judgment and due diligence to validate any AI output.[22] In recognition of the lack of existing rules or regulations, this Article closes with a discussion of the informed adoption approach used by Maryland's executive and legislative branches to suggest that the Supreme Court of Maryland create a new ethics rule on technology that incorporates a similar model.[23]

Please note that AI changes rapidly; as bar associations, legislators, and attorneys learn to grapple with this new technology, they may not be able to provide reliable guidance.[24] While this will also change as the legal field fully embraces AI, readers of this Article should remain acutely aware of the need to apply critical judgment to the information provided by this Article,

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reluctant-to-implement-legal-technology (on file with the University of Baltimore Law Forum) (explaining why practitioners are hesitant to adapt with new technological advancements) [hereinafter *Why are many firms still reluctant*].

[17] *See id.*; *Email Confidentiality: The Elephant in the Room*, PISHEVAR & ASSOCS., https://www.afshinpishevarlaw.com/resources/email-confidentiality-the-elephant-in-the-room/#_ftn1 (on file with the University of Baltimore Law Forum) (last visited Jan. 17, 2026).

[18] PISHEVAR & ASSOCS., *supra* note 17.

[19] *See infra* Part IV.

[20] *See infra* Parts III-IV.

[21] *See infra* Parts II-III.

[22] *See infra* Parts II-III.

[23] *See infra* Part IV.

[24] *See* Jason M. Loring & Andrew R. Lee, *From Enhancement to Dependency: What the Epidemic of AI Failures in Law Means for Professionals*, JONES WALKER (Aug. 19, 2025), https://www.joneswalker.com/en/insights/blogs/ai-law-blog/from-enhancement-to-dependency-what-the-epidemic-of-ai-failures-in-law-means-for.html?id=102l04x (on file with the University of Baltimore Law Forum).

seek legal counsel for any ethical concerns, and stay up to date on any new legal guidance.[25]

II. WHAT ATTORNEYS NEED TO KNOW ABOUT HOW ARTIFICIAL INTELLIGENCE WORKS.

It is important for attorneys to first understand what AI is and how it operates.[26] In Maryland, an attorney has a duty to provide competent representation,[27] and that duty includes the attorney's use of technology.[28] Further, the American Bar Association ("ABA") stated that it was instrumental for lawyers to "have a reasonable understanding of the capabilities and limitations of the specific [AI] technology that [they] might use."[29] This requires either acquiring such understanding directly or drawing on the expertise of others, including through continued legal education resources.[30]

AI has been defined in a variety of ways, including in legal and public policy contexts.[31] Under federal law, specifically 15 U.S.C. § 9401(3), AI is described as "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations[,] or decisions influencing real or virtual environments."[32]

Generative AI is a subset of artificial intelligence.[33] Governor Wes Moore in a 2024 Executive Order on AI defined generative AI as "AI algorithms and models that can create new content, including audio, code, images, text, and video, based on the data they are trained on."[34] Here is how it works: Prior to any input from a user, a generative AI model is trained on

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[25] *See id.*

[26] Andrea Martin & April Garbuz, *The Ethical Imperative to Embrace AI in Commercial Litigation*, 49 BOS. BAR J. (May 22, 2022), https://bostonbar.org/wp-content/uploads/2025/05/BBJ-2025-Spring.pdf (on file with the University of Baltimore Law Forum).

[27] MD. CODE ANN., MD. RULES § 19-301.1 (West 2025).

[28] Pamela Langham, *Navigating Ethical Concerns for Lawyers Using AI*, MSBA (May 14, 2024), https://www.msba.org/site/site/content/News-and-Publications/News/General-News/Navigating_Ethical_Concerns_for_Lawyers_Using_AI.aspx (on file with the University of Baltimore Law Forum) [hereinafter *Navigating Concerns*].

[29] A.B.A. Standing Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024).

[30] *Id.*

[31] David Inserra, *Artificial Intelligence Regulation Threatens Free Expression*, CATO INST. (July 16, 2024), https://www.cato.org/briefing-paper/artificial-intelligence-regulation-threatens-free-expression (on file with the University of Baltimore Law Forum).

[32] 15 U.S.C. § 9401(3) (2021) (defining "artificial intelligence").

[33] *Generative AI*, COGNIZANT, https://www.cognizant.com/us/en/glossary/generative-ai (on file with the University of Baltimore Law Forum) (last visited Jan. 17, 2025).

[34] MD. CODE REGS. 01.01.2024.02(A)(2) (2024).

large datasets pulled from across the internet, including labeled datasets that teach or establish a particular pattern, and unlabeled datasets that encourage the model to locate patterns on its own.[35] The AI then uses a pre-designed algorithmic architecture to generate text by predicting the sequence of words most likely to respond to that prompt, based on patterns learned during training.[36] With non-confidential AI models, after the AI generates a prediction, it then compares its prediction to its dataset, allowing for further model fine-tuning.[37] By adding bigger and better datasets, and through continuous refinement of the underlying algorithms by AI developers, the model can make better predictions, thus generating better content.[38]

AI's output is based on user questions or prompts.[39] After the user types in their question or request, they click an arrow and submit it.[40] The AI processes the request and writes out its response, often in a quirky, conversational, and overtly positive tone.[41] For instance, if the user submits "write a motion to reconsider a motion to suppress, based on statistical probabilities," the AI might output: "The Defendant filed a motion to suppress. The court ruled that. . . ."[42] Critically, while this output may read like it reflects comprehension, the model produces output based solely on recognized statistical patterns, structured into a probable, responsive

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[35] *See Data Labeling: The Authoritative Guide*, SCALE (July 18, 2025), https://scale.com/guides/data-labeling-annotation-guide (on file with the University of Baltimore Law Forum).

[36] *See* Olga Pereverzia, *Language Models, Explained: How GPT and Other Models* Work, ALTEXSOFT (July 12, 2025), https://www.altexsoft.com/blog/language-models-gpt/ (on file with the University of Baltimore Law Forum).

[37] Tom Krantz & Alexandra Jonker, *What is ground truth?*, IBM, https://www.ibm.com/think/topics/ground-truth (on file with the University of Baltimore Law Forum) (last visited Jan. 17, 2026).

[38] Veronika Samborska, *Scaling up: how increasing inputs has made artificial intelligence more capable*, OUR WORLD IN DATA (Jan. 19, 2025), https://ourworldindata.org/scaling-up-ai/ (on file with the University of Baltimore Law Forum).

[39] *Effective Prompts for AI: The Essentials*, MIT SLOAN TEACHING & LEARNING TECH., https://mitsloanedtech.mit.edu/ai/basics/effective-prompts/ (on file with the University of Baltimore Law Forum) (last visited Jan. 17, 2026).

[40] *See AI Generated Responses: How They Work and Why They Matter*, DUMPLING AI (Mar. 6, 2025), https://www.dumplingai.com/blog/ai-generated-responses-how-they-work-and-why-they-matter (on file with the University of Baltimore Law Forum) (explaining that an AI-generated response requires the user to input text).

[41] MIT SLOAN TEACHING & LEARNING TECH., *supra* note 39.

[42] *See generally* Smirutula Kumar, *The Math Behind the Magic – How Language Models Generate Convincing Text?,* MEDIUM (Jan 31, 2024), https://medium.com/%40smirutulak09/the-math-behind-the-magic-how-language-models-generate-convincing-text-0d3995048786 (on file with the University of Baltimore Law Forum) (explaining how AI language models, patterns, and structure work).

sentence.[43] AI, however, is not strictly limited to writing motions; it can also apply the same learned patterns to other tasks, such as reviewing contracts and leases, analyzing and summarizing large quantities of documents, or even organizing information from one document into a spreadsheet.[44] A task that might ordinarily take days to complete, might take minutes using AI.[45]

The idea is simple: submit a prompt to AI and it provides an output based on learned probabilities.[46] Yet AI is a forecaster, not a thinker.[47] Understanding this distinction helps to explain why there are currently so many limitations and inaccuracies with AI and why some users, including attorneys, find themselves in trouble for inaccurate submissions.[48] That said, AI remains a viable tool for legal practice despite its limitations, provided attorneys approach it with a clear understanding of its constraints and appropriate professional caution.[49]

III. HOW ATTORNEYS CAN RESPONSIBLY AND ETHICALLY USE AI.

This Part examines the most pressing of those limitations, as well as the ethical obligations governing AI's use in legal practice.[50] It also addresses the ethical implications and rules as to each issue and how attorneys can meet these challenges using the Model Rules of Professional Conduct.[51]

A. AI Hallucinations.

In *Mezu v. Mezu*, the Appellate Court of Maryland addressed an appeal arising from a motion to invalidate portions of a marital settlement

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[43] *See How Does Generative AI Work?,* MICROSOFT, https://www.microsoft.com/en-us/ai/ai-101/how-does-generative-ai-work (on file with the University of Baltimore Law Forum) (last visited Jan. 16, 2026).

[44] *See generally The Rise of AI in Our Everyday Lives,* ARTSYL, https://www.artsyltech.com/blog/the-rise-of-ai-in-our-everyday-lives (on file with the University of Baltimore Law Forum) (last visited Jan. 16, 2026) (outlining top uses of AI).

[45] Markus Brinsa, *Why AI Models Always Answer – Even When They Shouldn't,* MEDIUM (July 29, 2025), https://medium.com/@markus_brinsa/why-ai-models-always-answer-even-when-they-shouldnt-e95081e3f46b (on file with the University of Baltimore Law Forum) (explaining how AI is built to answer everything, regardless of if the response is truthful, and thus normally drawn out tasks would yield a quick AI response that is not necessarily accurate).

[46] *See* discussion *supra* notes 39-42.

[47] *See* Kumar, supra note 42.

[48] Mezu v. Mezu, 346 A.3d 181, 187-89 (Md. App. 2025).

[49] *See infra* Part III.

[50] *See infra* Part III.

[51] *See infra* Part III.

agreement.[52] Attorney Adam Hyman signed a brief prepared by ChatGPT and submitted it to the court, with eleven (11) out of the twenty-seven (27) cases cited either not existing or not stating what the brief purported them to state.[53] The court noted that cases addressing such issues "typically would not result in a reported opinion," but decided to "report this case . . . to address a problem that is recurring in courts around the country[.]"[54] The court was not wrong, as *Mezu* touches on one of the most notorious issues with AI: its tendency to hallucinate.[55]

Another example involved three attorneys from Bulter Snow, LLP, who were representing a former Alabama Department of Corrections Commissioner in a federal lawsuit.[56] While working on drafts of filings, a partner at the firm, Matthew Reeves, utilized ChatGPT to generate citations for the pleadings and inserted them without verifying their accuracy.[57] Two other partners working on the case, William Cranford and William Lunsford, then signed their names onto the filings and submitted them to the court without checking any of the citations added by Reeves.[58] Though the court did not impose monetary sanctions against the three attorneys, it did issue public reprimands, disqualified them from the case, and referred them to the Alabama State Bar.[59] Butler Snow narrowly escaped sanctions itself, but it

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[52] *Mezu,* 346 A.3d at 186.

[53] *Id.* at 187-88; Dylan Segelbaum, *Fake AI citations get Maryland lawyer called out in court,* THE BALT. BANNER (Oct. 13, 2025, at 16:00 ET), https://www.thebanner.com/politics-power/appellate-court-of-maryland-artificial-intelligence-oral-argument-SH6QNXC6K5BL5MKYFYEBXDKQOU/ (on file with the University of Baltimore Law Forum).

[54] *Mezu,* 346 A.3d at 187-88.

[55] *Id.* at 189. Attorney Hyman's reliance on unverified AI-generated citations did not go without consequence; the court issued an Order to Show Cause. *See id*. at 187. The Appellate Court issued an Order to Show Cause directing Attorney Hyman to appear before the court and explain why he should not be sanctioned or referred to the Attorney Grievance Commission. *Id*. An Order to Show Cause is a court directive requiring a party or attorney to appear and justify conduct that the court has identified as potentially improper; failure to respond adequately can result in sanctions, monetary penalties, disqualification, or disciplinary referral. *See Enforcing Court Orders – Overview of Contempt of Court*, THE PEOPLE'S L. LIBR. OF MD., https://www.peoples-law.org/enforcing-court-orders-overview-contempt-court (on file with University of Baltimore Law Forum) (last visited Apr. 6, 2026). Ultimately, the court referred Attorney Hyman to the Attorney Grievance Commission for potential violations of Rules 19-301.1, 19-303.1, and 19-305.3. *Mezu*, 346 A.3d at 189.

[56] Sara Merken, *Judge Disqualifies Three Butler Snow Attorneys from Case Over AI Citations,* REUTERS (July 24, 2025, at 13:22 ET), https://www.reuters.com/legal/government/judge-disqualifies-three-butler-snow-attorneys-case-over-ai-citations-2025-07-24/ (on file with the University of Baltimore Law Forum).

[57] *Id*.

[58] *Id*.

[59] *Id*.

was unable to escape the nationwide embarrassment, media ridicule, and client loss.[60]

These, however, are not isolated cases.[61] A database organized by French legal scholar and researcher, Damien Charlotin, shows that there have been more than five hundred (500) cases across the world where AI hallucinated content appeared in pleadings.[62] Some attorneys walked away with warnings.[63] Many, however, received monetary sanctions, suspensions from practice, referrals to their state grievance commission, and even dismissal of their clients' case.[64]

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[60] *Id.*

[61] Damien Charlotin, *AI Hallucination Cases,* https://www.damiencharlotin.com/hallucinations/ (on file with the University of Baltimore Law Forum) (last visited Jan. 15, 2026) (explaining that at least 806 cases have been identified where attorneys used generative AI that produced hallucinated content).

[62] *Id.* (explaining that one 150 cases have been identified where American attorneys have used hallucinated citations generated by AI).

[63] *Id*. (explaining how the judge dismissed all claims with prejudice and issued a warning in *Desmond Cunningham v. Pentagon Federal Credit Union, et al*.; in *Christian Dusablon v. Hugh A. Gibbs. & Union Logistics, LLC*, a judge in New York issued a warning and an order to certify the validity of future citations; in *Jackson v. BOK Financial Corp. et al.*, a judge in Oklahoma, granted a motion to strike without prejudice and issued a warning; in *Sarah and Regina Alanso v. James Jackson et al*., the U.S. District Court for the Western District of Washington noted that plaintiffs' counsel cited a case that did not exist, and while it was unclear if AI was used, warned them that they could face sanctions if it happened again; and then in *Edwin Terrell Brown v. Mississippi*, the Court of Appeals of Mississippi declined sanctions or explicit reprimand for the appellant, but nonetheless noted that the appellant's counsel had improperly cited "phantom cases" in his brief, which was later acknowledged by appellant's counsel in a replay brief).

[64] *Id.* (demonstrating the Southern District Court of Mississippi issued monetary sanctions of $5,000 in *Pauliah v. Univ. of Mississippi Med. Ctr*.; a Florida court suspended an attorney for one year in *In re* Thomas Grant Neusom; and an Ohio court dismissed with prejudice in *Damilola Obembe v. Droisys, Inc*.; that in *Joel A. Rivera v. Triad Properties Corp., et al*., the U.S. District Court for the Northern District of Alabama, Southern Division issued a number of sanctions against plaintiff's attorney who cited hallucinated cases – and attempted to conceal and avoid responsibility – including temporary suspension from practice of law, disqualification from the case, referral to licensing authorities, monetary sanctions, and a public reprimand of the attorney and his firm; that in *Joanne Couvrette et al. v. Mark A. Wisnovsky et al.*, the U.S. District Court for the District of Oregon sanctioned plaintiffs' attorneys after they were caught citing fifteen hallucinated cases and eight fictious quotations, ordering the briefs containing the citations stricken, monetary sanctions, ordering the attorney to show cause for the hallucinated citations, and dismissing the Plaintiffs' claims with prejudice; and that in *Stephen McCarthy, P.A. v. United States Drug Enforcement Administration*, the United States Court of Appeals for the Third Circuit reprimanded an attorney who submitted a brief with false legal authority, provided to him by a non-attorney staff, and reported the attorney's conduct to all courts where the attorney was licensed and the National Disciplinary Data Bank – ultimately declining monetary sanctions).

These false citations occur because of AI's tendency to "hallucinate," or otherwise to produce misleading, inaccurate, non-existent, and/or nonsensical content due to some error in the technology.[65] Hallucinations can occur for several reasons[66] and, as the court noted in *Mezu v. Mezu*, may happen as often as 30 to 50 percent of the time.[67] Unsurprisingly, models designed to be faster often have higher hallucination rates, while models designed to be slower thinkers have less hallucinations.[68] Hallucinations are also more likely when a user poses a complex question, which requires the model to combine, compare, and/or synthesize many sources of information.[69] A limited dataset can further compound the hallucination problem.[70]

Whereas a human being might simply answer "I don't know" when faced with a question that exceeds their knowledge, AI models typically do not admit defeat.[71] Maximized to provide an answer, AI is more likely to make something up rather than admit to something it does not know.[72] Researchers are actively addressing this problem by implementing strategies like Retrieval-Augmented Generation ("RAG"), where AI fetches and cites supporting information from reliable sources before responding.[73] Ironically, as models evolve through more complex algorithms, the rates of hallucinations and inaccuracy can paradoxically increase.[74] This five-steps

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[65] *See What are AI hallucinations?*, IBM, https://www.ibm.com/think/topics/ai-hallucinations (on file with the University of Baltimore Law Forum) (last visited Jan. 15, 2026).

[66] *Id.* (explaining that hallucinations may result from biased or inaccurate training data and model complexity).

[67] Mezu v. Mezu, 346 A.3d 181, 189 (Md. App. 2025); Murray, *supra* note 8.

[68] Murray, *supra* note 8.

[69] *Id.*

[70] *See id.* (explaining that because AI models are trained using specific data, they tend to "hallucinate" answers when asked questions beyond that data); John Brandon, *I asked Google Gemini to fact-check ChatGPT. The results were hilarious,* DIGITALTRENDS (Nov. 10, 2015), https://www.digitaltrends.com/computing/i-asked-google-gemini-to-fact-check-chatgpt-the-results-were-hilarious/ (on file with the University of Baltimore Law Forum) (explaining Google's Gemini is a down and dirty starting point for fact checking ChatGPT output since Gemini is drawn from Google's acknowledged, extensive internet database).

[71] Brinsa, *supra* note 45.

[72] *See* Murray, *supra* note 8; Adam Tauman Kalai et al., *Why Language Models Hallucinate* (Sep. 4, 2025), https://arxiv.org/abs/2509.04664 (on file with the University of Baltimore Law Forum) (arguing that AI models may hallucinate because AI is "rewarded" by feedback from users, whom tend to prefer (and in turn, reinforce) guesses rather than acknowledgements of uncertainty).

[73] *What is retrieval augmented generation (RAG)?,* IBM, https://www.ibm.com/think/topics/retrieval-augmented-generation (on file with the University of Baltimore Law Forum) (last visited Jan. 16, 2026).

[74] *See* Youngwhan Nick Lee, *The AI Hallucination Paradox: The Smarter AI Becomes, the More it Hallucinates*, MEDIUM (May 28, 2025),

forward, one-step backward phenomenon ultimately reveals that the possibility of misinformation still remains.[75]

The threat of hallucinations and misinformation directly implicates professional ethics.[76] An attorney has a duty of competent representation to their client under Maryland Attorney's Rules of Professional Conduct ("MRPC"), Rule 19-301.1.[77] Competent representation not only means possessing the skills and knowledge to adequately and reasonably represent a client, but also means to remain knowledgeable and up to date on changes in the law and its practice.[78] Not surprisingly, competent representation also includes a lawyer reading the cases cited in their briefs.[79]

Under MRPC Rule 19-303.3, Maryland attorneys are also prohibited from knowingly making a false statement of fact or law to a tribunal or failing to correct such falsity through reasonable remedial measures.[80] It goes without saying then, that hallucinated citations violate an attorney's duty of candor toward the tribunal.[81]

However, the danger of hallucinated legal cases and citations can be easily avoided if an attorney exercises their duty of competency and due diligence.[82] AI cannot replace an attorney's judgment, knowledge, or

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https://medium.com/@youngwhannicklee/the-hallucination-paradox-the-smarter-ai-becomes-the-more-it-hallucinates-b82fc2a3df9d (on file with the University of Baltimore Law Forum).

[75] *See id*.

[76] *See Navigating Concerns*, *supra* note 28 ("Lawyers in Maryland have to remain cognizant of their obligations under the Maryland Attorneys' Rules of Professional Conduct when using AI.").

[77] MD. CODE ANN., MD. RULES § 19-301.1 (West 2026).

[78] *See Navigating Concerns*, *supra* note 28; *see also* MD. CODE ANN., MD. RULES § 19-301.1 (West 2026) ("An attorney shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

[79] Mezu v. Mezu, 346 A.3d 181, 190 (Md. App. 2025).

[80] MD. CODE ANN., MD. RULES § 19-301.1 (West 2026).

[81] *See Navigating Concerns*, *supra* note 28; s*ee also* MD. CODE ANN., MD. RULES § 19-301.1 (West 2026) (explaining that attorneys may not knowingly make or offer false statements of law). Beyond the possibility of violating rules of professional conduct, hallucinations can adversely affect both the attorney's case and the attorney personally. *See* Riana Pfefferkorn, *Who's Submitting AI-Tainted Filings in Court?*, STAN. L. SCH. CTR. FOR INTERNET & SOC'Y. (Oct. 15, 2025, at 15:52 ET), https://cyberlaw.stanford.edu/blog/2025/10/whos-submitting-ai-tainted-filings-in-court/ (on file with the University of Baltimore). Hallucinations also undermine the credibility of the judicial system, at a time when public faith in it is already low. *See* Charlotin, *supra* note 61; s*ee also* Pfefferkorn, *supra* note 81 (explaining a more in-depth analysis of Charlotin's database).

[82] A.I. TASK FORCE, MD. ST. BAR ASS'N, AN OVERVIEW OF ETHICAL CONSIDERATIONS FOR ATTORNEY USE OF GENERATIVE ARTIFICIAL INTELLIGENCE TECHNOLOGIES 3 (2025) (on file with the University of Baltimore Law Forum) [hereinafter ETHICAL CONSIDERATIONS]; *see also* MD. CODE ANN., MD. RULES § 19-301.1 (West 2026) (citing for purposes in which this

expertise.[83] In the end, AI is merely a forecaster, whereas a lawyer must be a thinker—a highly specialized, proficient one at that.[84] As aptly noted by legal researcher and librarian Baylee Suskin, the law requires specific skills that AI simply cannot replicate, including the ability to distinguish questions of fact from those of law, or to identify and apply specific precedents, principles, and standards to unique situations.[85]

Attorneys must remain attentive to AI's limitations by carefully reviewing each pleading that AI produces, cross-referencing and reading any citations that AI relies upon, and perhaps even challenging any analysis performed by it.[86] Critically, even when AI provides proper case citations, its legal conclusions from that case may be flawed.[87] Accordingly, this must also be carefully verified.[88] AI frequently creates false quotes when asked to cite cases, apparently synthesizing quotes by summarizing the opinion.[89] Similarly, false quotes can be verified and avoided by prompting for a hyperlink and carefully *reading* the case.[90]

In addition to verifying the accuracy of outputs, attorneys should also maintain competency through continuing education on AI technology and its developments.[91] This can be done by reading articles, white papers, and bar association publications, or taking Continuing Legal Education courses.[92] Maryland attorneys can also take advantage of the legal AI resources and information provided by the Maryland State Bar Association ("MSBA").[93]

Article uses the term "due diligence" in the sense of competence under MPRC Rule 19-301.1, including careful investigation and thoroughness); *id.* § 19-301.3 (citing for purposes not to be confused with an attorney's duty of diligence under MPRC Rule 19-301.3, which requires prompt action in representation).

[83] ETHICAL CONSIDERATIONS, *supra* note 82, at 4.

[84] *Id*. at 7.

[85] Baylee Suskin, *AI In Legal Practice*, 54 COLO. L. 18, 20 (2025).

[86] *Navigating Concerns*, *supra* note 28.

[87] ETHICAL CONSIDERATIONS, *supra* note 82, at 7.

[88] *Id*.

[89] Danielle L. Kuck & Diana L. Ramirez Vielman, *California Court Issues First Published Opinion on AI-Fabricated Citations in Legal Briefs*, WOOD, SMITH, HENNING & BERMAN LLP (Oct. 29, 2025), https://www.wshblaw.com/publication-first-published-opinion-on-ai-fabricated-citations-in-legal-briefs (on file with the University of Baltimore Law Forum).

[90] Oliver Roberts, *Preventing Fabricated AI Legal Authorities: The Case for a Mandatory "Hyperlink Rule*," NAT'L L. REV., Dec. 2025, https://natlawreview.com/article/preventing-fabricated-ai-legal-authorities-case-mandatory-hyperlink-rule (on file with the University of Baltimore Law Forum).

[91] ETHICAL CONSIDERATIONS, *supra* note 82, at 7.

[92] *Id*.

[93] *See* Pamela Langham, *Lawyers Beware! The Jabberwocky Fictitious Case is Still Out There Lurking!!!,* MSBA (May 29, 2025), https://www.msba.org/site/content/News-and-Publications/News/General-News/Lawyers_Beware_The_Jabberwocky_Fictitious_Case_Is_Still_Out_There_Lurking.

Ultimately, the slip-up in *Mezu* did not occur because the offending attorney was innocently misled about ChatGPT's accuracy.[94] Instead, the error stemmed from an attorney who obviously failed to conduct a meaningful review of the brief and citations before filing.[95] In reality, however, the value of AI to attorneys greatly outweighs the hallucinations that sometimes come with it.[96] Therefore, *Mezu* should not deter attorneys from using AI.[97] Rather, the case should be viewed as a cautionary tale underscoring the need to exercise due diligence and competency.[98]

B. The Charismatic Song of the AI Siren.

AI models can also be surprisingly charismatic, generally answering in a well-written, friendly, and user-affirming tone.[99] This tone, however, has an unfortunate lulling effect on users, leading them into a trap of unearned complacency and trust.[100] In this respect, AI's responses resemble the soothing, lulling songs of the sirens of legend, which infamously lured sailors to their watery graves, hereinafter called "The Song of the AI Siren."[101]

The Song of the AI Siren has two distinct but equally dangerous components: its self-affirming tone and its believable content.[102] The tone comes first, creating a sense of trust and rapport with the user.[103] This charisma stems from generative AI's inherent training model, which relies on

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aspx (on file with the University of Baltimore Law Forum); *see also AI Insights & Resources HUB*, MSBA (July 16, 2025), https://www.msba.org/site/site/content/Resources-and-Tools-Content/AI-Insights-Resources-HUB.aspx (on file with the University of Baltimore Law Forum) (explaining the MSBA AI Insights and Resources online Hub, and, courtesy of its AI Task Force, released a short document designed to provide Maryland attorneys with practical insights).

[94] Mezu v. Mezu, 346 A.3d 181, 190 (Md. App. 2025).

[95] *Id*. at 190-91 (concluding that counsel violated Maryland Rules 19-303.1, 19-301.1, and 19-305.3(b) by citing fabricated authority, delegating legal research to a non-lawyer without adequate supervision, and failing to independently review or verify the cited cases, thereby rendering the representation incompetent and non-meritorious); *see also* MD. CODE ANN., MD. RULES § 19-305.3 (West 2026) (explaining the duties required of Maryland lawyers with respect to non-attorney assistants).

[96] *Mezu*, 346 A.3d at 189.

[97] *See Lawyer Referred*, *supra* note 13.

[98] *See id.*

[99] Benj Edwards, *Annoyed ChatGPT users complain about bot's relentlessly positive tone*, ARS TECHNICA (Apr. 21, 2025, at 12:22 ET), https://arstechnica.com/information-technology/2025/04/annoyed-chatgpt-users-complain-about-bots-relentlessly-positive-tone/ (on file with the University of Baltimore Law Forum).

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

existing datasets, coupled with its own outputs.[104] Since users tend to prefer more positive or friendly responses, the model learns to continue providing similar outputs, resulting in a casual, familiar, and overly positive tone.[105] Another explanation for generative AI's friendliness is its developers' efforts to enhance marketability and sustain user engagement.[106] Together, these factors help explain the tendency of AI models to deliver responses in positive, definitive tones that ultimately reinforce inputted ideas, rather than changing or challenging them—even if those beliefs are false.[107]

The second component of the Song of the AI Siren is the quality and believability of its written content.[108] However, AI does not merely produce isolated false citations.[109] It weaves them seamlessly into comprehensive legal arguments that sound persuasive and authoritative as if drawn from legitimate cases, making the fabricated positions and citations nearly impossible to detect without carefully verifying each source.[110] Indeed, when three presumably experienced lawyers at a large southern law firm filed their brief on behalf of an officer of the State of Alabama, the AI-generated legal content appeared sufficiently well-written and convincing to prompt its filing, despite its fabricated citations.[111] The combination of an affirming tone and polished, professional, and believable writing creates a powerful spell that has already lulled hundreds of attorneys, and countless other users, into believing the authenticity and accuracy of AI output without independent verification.[112]

The Song of the AI Siren problem is real and has caused significant problems across society, particularly for individuals experiencing mental health issues or crises.[113] Many technology and psychology experts have

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[104] *Id.*
[105] Edwards, *supra* note 99.
[106] Marlynn Wei, *The Emerging Problem of "AI Psychosis,"* PSYCH. TODAY (Sep. 4, 2025), https://www.psychologytoday.com/us/blog/urban-survival/202507/the-emerging-problem-of-ai-psychosis (on file with the University of Baltimore Law Forum).
[107] *Id.*
[108] Keyvan Vakili & Florence Wilkinson, *Why is AI so persuasive – even when it's wrong?,* THINK – LOND. BUS. SCH. (Sep. 7, 2025), https://www.london.edu/think/5-things-to-know-about-ai (on file with the University of Baltimore Law Forum).
[109] *Id.*
[110] *Id.* (discussing AI's persuasiveness).
[111] Johnson v. Dunn, 792 F.Supp.3d 1241, 1247-48 (N.D. Ala. 2025); Sanctions Order, No.: 2.:21-cv-1701-AMM, 4–5 (2025) (citing the following hallucinated authorities: United States v. Baker, 539 F. App'x 937, 943 (11th Cir. 2013); Kelly v. City of Birmingham, 2021 WL 1118031, at *2 (N.D. Ala. Mar. 24, 2021); Greer v. Warden, FFC Coleman I, 2020 WL 3060362, at *2 (M.D. Fla. June 9, 2020); Wilson v. Jackson, 2006 WL 8438651, at *2 (N.D. Ala. Feb. 27, 2006); Williams v. Asplundh Tree Expert Co., 2006 WL 3343787, at *4 (M.D. Fla. Nov. 17, 2006)).
[112] Sanctions Order, No.: 2.:21-cv-1701-AMM, at 8-9, 11, 20.
[113] Wei, *supra* note 106.

cautioned that generative AI outputs can reinforce, mirror, or worsen delusional or disorganized thinking, resulting in what has been called "AI Psychosis."[114] Many users noted that ChatGPT or other models had "praised them for believing their family was responsible for 'radio signals coming through the wall,'" while others received responses that endorsed and provided instructions for terrorism.[115] In California, there is already a lawsuit pending against OpenAI, in which a family claims that ChatGPT advised and encouraged their teenage son to commit suicide, and further taught him how to write a suicide note and prepare a noose.[116]

AI Psychosis, however, has spread beyond those with pre-existing mental health conditions.[117] In one case reported by both *The New York Times* and *CNN*, Brooks Allan, a reasonable man in Toronto, went on a three-week delusional spiral using ChatGPT, despite no history of psychosis, delusion, or mental health crisis, beginning with a prompt involving the number pi.[118] Eventually, ChatGPT told Brooks that he had uncovered a national security threat and needed to contact authorities and went as far as to generate a list of government authorities and academics, along with their contact information.[119] This nonsensical directive arose despite Brooks' repeated requests that ChatGPT perform "reality checks."[120]

While these AI psychosis cases are extraordinarily rare, the phenomenon does reveal the ways in which AI can shift and reshape anyone's way of thinking, including that of attorneys.[121] By always confirming and affirming what a user tells it, AI trains the user to avoid thinking critically or

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[114] *Id.*; *see also* Victor Tangermann, *ChatGPT Users Are Developing Bizarre Delusions*, FUTURISM (May 5, 2025, at 12:11 ET), https://futurism.com/chatgpt-users-delusions (on file with the University of Baltimore Law Forum) (suggesting that interactions with ChatGPT can trigger or exacerbate psychotic or delusional thinking in some users).

[115] Angela Yang, *ChatGPT adds mental health guardrails after bot 'fell short in recognizing signs of delusion*,' NBC NEWS (Aug. 4, 2025, at 18:07 ET), https://www.nbcnews.com/tech/tech-news/chatgpt-adds-mental-health-guardrails-openai-announces-rcna222999 (on file with the University of Baltimore Law Forum).

[116] Rob Kuznia et al., *'You're not rushing. You're just ready:' parents say ChatGPT encouraged son to kill himself*,"
CNN (Nov. 20, 2025), https://www.cnn.com/2025/11/06/us/openai-chatgpt-suicide-lawsuit-invs-vis (on file with the University of Baltimore Law Forum).

[117] Wei, *supra* note 106.

[118] Hadas Gold, *They thought they were making technological breakthroughs. It was an AI-Sparked delusion*, CNN (Sept. 5, 2025), https://www.cnn.com/2025/09/05/tech/ai-sparked-delusion-chatgpt (on file with the University of Baltimore Law Forum); *see* Kashmir Hill & Dylan Freedman, *Chatbots Can Go Into a Delusional Spiral. Here's How it Happens*, N.Y. TIMES (Aug. 7, 2025), https://www.nytimes.com/2025/08/08/technology/ai-chatbots-delusions-chatgpt.html (on file with the University of Baltimore Law Forum).

[119] Hill & Freedman, *supra* note 118.

[120] *Id.*

[121] Wei, *supra* note 106.

to stop pushing beyond what the user already believes.[122] In an obvious sense, this produces confirmation bias, which can cause issues for attorneys using AI who fail to competently test the strength of their legal theory, evaluate the merits of their case, or determine the utility of a key piece of evidence.[123]

When AI's tendency to create confirmation bias is coupled with complex legal prompting, its attendant risks a hallucinated output, leading attorneys towards the rocks of legal and ethical peril.[124] Since AI models are trained on vast amounts of publicly available internet content, which can include the writings of lawyers, judges, and learned scholars, AI can weave the law and citations naturally and beautifully into an often convincing legal argument.[125] But when its legal analysis is faulty, AI's charismatic tone and polished output can tempt attorneys away from professional judgment and toward the rocks of complacency and sanctions.[126]

However, the Song of the AI Siren problem should not deter attorneys from using AI, as it can be addressed with the same straightforward countermeasure used to manage hallucinations.[127] When using AI, attorneys must exercise due diligence, judgment, and professional competence, lest they be led astray by AI's charismatic, but untrustworthy, siren song.[128]

C. Confidentiality Concerns.

Due to the way that models are developed and refined, AI also introduces several challenges that implicate attorneys' duty of confidentiality.[129] Because AI uses user data to train, information fed into the models becomes part of a growing dataset and used to generate new responses.[130] This allows for private information from previous users to be, potentially, exposed in the outputs of new users, which is then saved for

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[122] *Id.*
[123] Kennedy et al., *supra* note 4.
[124] Wei, *supra* note 106.
[125] *How ChatGPT and our foundation models are developed*, OPENAI (Feb. 10, 2026), https://help.openai.com/en/articles/7842364-how-chatgpt-and-our-foundation-models-are-developed (on file with the University of Baltimore Law Forum).
[126] Vakili & Wilkinson, *supra* note 108.
[127] *See Lawyer Referred*, *supra* note 13.
[128] *Id.*
[129] Vakili & Wilkinson, *supra* note 108.
[130] *Id.*

training purposes.[131] This creates a constant feedback loop whereby the risk of exposure remains even if the original training data is eventually deleted.[132]

Another unintended consequence of the self-training AI model is membership interference, where sophisticated users can locate training data by analyzing how a model responds to various inquiries.[133] This is a greater risk with Large Language Models like ChatGPT, where training data is so memorized that models may exactly recite the data.[134]

It goes without saying that concerns about confidentiality directly implicate MRPC Rule 301.6, which prohibits attorneys from revealing "information relating to representation of a client," absent informed consent or excepted circumstances (the "Rule").[135] That said, the Rule itself is vague as to how diligent attorneys must be in their efforts to safeguard client information; there is no explicit direction on whether all risks to client confidentiality, no matter how minimal, must be avoided, or whether reasonable efforts are sufficient.[136] Such vagueness introduces a question of whether any use of generative AI is ethical at all, when there is a risk of inadvertent disclosure of sensitive client information.[137]

Other sources of legal authority point to a "reasonableness" standard.[138] Comment 20 to the Rule states that attorneys are required to "take reasonable precautions" to prevent unauthorized or inappropriate disclosure.[139] Similarly, ABA Model Rules state that "a lawyer shall make *reasonable* efforts to prevent the inadvertent or unauthorized disclosure of,

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[131] A.B.A. Standing Comm. on Ethics & Pro. Resp., Formal Op. 512 (2024) (explaining that AI may improperly disclose confidential information); s*ee also Lawyer Referred*, *supra* note 13 (noting that user inputs may inform future AI outputs).

[132] *See Lawyer Referred*, *supra* note 13; Stephen Pastis, *A.I's un-learning problem: Researchers say it's virtually impossible to make an A.I. model 'forget' the things it learns from private user data*, FORTUNE (Aug. 30, 2023), https://fortune.com/europe/2023/08/30/researchers-impossible-remove-private-user-data-delete-trained-ai-models/ (on file with the University of Baltimore Law Forum).

[133] *Membership Inference Attack Risk for AI*, IBM (Oct. 23, 2025), https://www.ibm.com/docs/en/watsonx/saas?topic=atlas-membership-inference-attack (on file with the University of Baltimore Law Forum); *see also* Conor Bronsdon, *Why Membership Inference Attacks Are the Biggest AI Privacy Risk*, GALILEO (Aug. 1, 2025), https://galileo.ai/blog/membership-inference-attacks (on file with the University of Baltimore Law Forum) (explaining that membership inference attacks can reveal whether particular data was used to train a model).

[134] *See* Bronsdon, *supra* note 133.

[135] MD. CODE ANN., MD. RULES § 19-301.6 (West 2026).

[136] *Id.* at cmt. 19.

[137] *Id*.

[138] *Id.* at cmt. 4.

[139] *Id.* at cmt. 20.

or unauthorized access to, information relating to the representation of a client."[140]

While Maryland has not adopted Model Rule 1.6(c), the ABA's reasonableness standard provides persuasive authority for interpreting Maryland's requirement and has been applied in other previous debates and new technologies.[141] For example, the ABA previously found that use of unencrypted emails was ethical and reasonable in ordinary cases, as there was no greater confidentiality risk than using regular mail or telephone.[142] Other examples include the approval of cloud storage, SaaS, and third party vendors with access to sensitive client data, on the condition that *reasonable efforts* are used to protect confidentiality.[143] Lawyers are not required to guarantee absolute security or avoid any technology that poses a risk to confidentiality, but rather to make reasonable efforts to utilize technology with appropriate safeguards in place to protect client information.[144]

The ABA applied this reasonableness approach to evaluate the ethics of using AI in the legal profession back in July 2024, when many AI models were still relatively new.[145] In its Formal Opinion 512, the ABA found that "self-learning" AI tools posed a serious disclosure risk, stating that "information relating to one client's representation [could be] input into the tool, then later revealed in response to prompts by lawyers working on other matters, who then share that output with other clients, file with the court, or otherwise disclose it."[146] Because of this risk, the ABA concluded that an attorney could not reasonably ensure client information was protected and accordingly advised attorneys to obtain informed consent from their client prior to inputting any of their information into an AI tool.[147]

It is important to know, however, that the AI landscape has evolved[148] and that many self-learning AI models have since implemented data privacy

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[140] MODEL RULES OF PRO. CONDUCT r. 1.6(c) (A.B.A. 2025).
[141] MD. CODE ANN., MD. RULES § 19-301.6 n. 20 (West 2026).
[142] *Id.*; *see* A.B.A. Comm. on Pro. Ethics & Grievances, Formal Op. 477, at 2, 5 (2017).
[143] *See* A.B.A. Comm. on Pro. Ethics & Grievances, Formal Op. 477, at 2, 5 (2017); Cal. State Bar Formal Op. 2010-179, at 3 (2010); Fla. Bar Prof'l Ethics Comm. Op. 12-3, at 2 (2013); N.C. State Bar 2011 Formal Ethics Op. 6 (2012); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 842, at 3 (2010).
[144] *See* A.B.A. Comm. on Pro. Ethics & Grievances, Formal Op. 477, at 2, 5 (2017); Cal. State Bar Formal Op. 2010-179, at 3 (2010); Fla. Bar Prof'l Ethics Comm. Op. 12-3, at 2 (2013); N.C. State Bar 2011 Formal Ethics Op. 6 (2012); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 842, at 2-3 (2010).
[145] A.B.A. Comm. on Pro. Ethics & Grievances, Formal Op. 512, at 1 (2024).
[146] *Id.* at 6.
[147] *Id.* at 7.
[148] *Introducing ChatGPT Team*, OPENAI (Jan. 10, 2024), https://openai.com/index/introducing-chatgpt-team/ (on file with University of Baltimore Law Forum) [hereinafter *Introducing ChatGPT Team*].

standards in their "Business" and "Enterprise" plans, which make it reasonable for attorneys to use.[149] As one of many examples, ChatGPT has since introduced a Business plan, designed for and marketed to small and midsized businesses in the marketing, engineering, finance, strategy, IT, and legal industries,[150] which keeps user data secure and private.[151] It does not train on using business data and encrypts data at rest and in transit,[152] and is also compliant with several international regulatory guidelines on data security and privacy.[153] Further, OpenAI promises that businesses own and control their data and determine who has access to that data.[154] Arguably then, an attorney who uses paid, higher-tiered models like ChatGPT Business has taken a reasonable effort to protect client privacy and therefore meets their duty of confidentiality.[155]

In addition to ChatGPT Business, several other general-purpose AI platforms offer reasonably confidential protections and are recommended for attorney use by the MSBA, including Anthropic's Claude Team, Microsoft

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[149] *Id.* At the time of that opinion, those secure offerings were generally not well known or expensive enterprise level tiers. *Id*. Around the time that Formal Opinion 512 was published, AI models were beginning to gear up their security features and release paid-tiers with greater privacy levels. *Id.* As one example, ChatGPT Enterprise was released in August 2023, while ChatGPT Business (formerly called ChatGPT Team) was released in January 2024. *See Introducing ChatGPT Team, supra* note 148. Other models like Anthropic's Claude Pro and Max came out in September 7, 2023, and April 9, 2025, respectively. *Introducing Claude Pro*, ANTHROPIC (September 7, 2023), https://www.anthropic.com/news/claude-pro (on file with the University of Baltimore Law Forum); Hayden Field, *Anthropic Steps up Competition, Rolls out $200 per Month Subscription*, CNBC (Apr. 9, 2025), https://www.cnbc.com/2025/04/09/anthropic-steps-up-openai-competition-with-claude-max-subscription.html (on file with the University of Baltimore Law Forum); *Enterprise Privacy at OpenAI*, OPENAI (June 4, 2025), https://openai.com/enterprise-privacy/ (on file with the University of Baltimore Law Forum) [hereinafter *Enterprise Privacy at OpenAI*].

[150] *Enterprise Privacy at OpenAI*, *supra* note at 149; *Get More Done Together with ChatGPT Business*, OPENAI (Nov. 18, 2025), https://chatgpt.com/business/ (on file with the University of Baltimore Law Forum) [hereinafter *Get More Done Together with ChatGPT Business*]; *Think Bigger: How Small Teams Win with ChatGPT*, OPENAI (Jan. 9, 2026), https://cdn.openai.com/business-guides-and-resources/how-small-teams-win-with-chatgpt.pdf 2-7 (on file with the University of Baltimore Law Forum) [hereinafter *Think Bigger: How Small Teams Win with ChatGPT*].

[151] *Get More Done Together with ChatGPT Business*, *supra* note 150.

[152] *Id*.

[153] *Enterprise Privacy at OpenAI*, *supra* note 149; *Think Bigger: How Small Teams Win with ChatGPT, supra* note 150.

[154] *Enterprise Privacy at OpenAI*, *supra* note 149; *Think Bigger: How Small Teams Win with ChatGPT, supra* note 150.

[155] *Enterprise Privacy at OpenAI*, *supra* note 149; *Think Bigger: How Small Teams Win with ChatGPT, supra* note 150.

Copilot Business, and Google's Gemini for Workspace.[156] For the confidentiality reasons discussed above, Claude Pro and Max, are no longer acceptable for confidentiality, absent turning off default model training.[157] The MSBA also recommends Microsoft Copilot's paid versions, though emphasizes that only one of its paid subscription versions, 365 Copilot Business, is designed for businesses and organizations like law firms; it integrates with Microsoft Word, PowerPoint, Excel, and other Microsoft Applications, while incorporating security features and compliance with regulatory standards and encrypting user data that it does not use to train.[158]

That said, it is important to be aware that not all the paid service tiers provide confidentiality.[159] For instance, whereas ChatGPT Business offers

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[156] *Enterprise Privacy at OpenAI, supra* note 149; *Think Bigger: How Small Teams Win with ChatGPT*, *supra* note 150; *AI Tools, AI Insights & Resources Hub*, MSBA (Nov. 18, 2025), https://www.msba.org/site/content/Resources-and-Tools-Content/AI-Resource-Hub-Tabs/AI-Tools.aspx (on file with the University of Baltimore Law Forum) [hereinafter *AI Tools, AI Insights & Resources Hub*].

[157] *Updates to Consumer Terms and Privacy Policy,* ANTHROPIC (Feb. 9, 2026), https://www.anthropic.com/news/updates-to-our-consumer-terms (on file with the University of Baltimore Law Forum). It's worth noting that Claude Pro and Claude Max do train using user data. *Id.* While both Claude Pro and Claude Max formerly used to not use users' data to train its models, on October 8, 2025, they began using Ma1.1 users' data from Claude Free, Pro, and Max accounts, unless users explicitly opted out. *See Updates to Consumer Terms and Privacy Policy,* ANTHROPIC (Aug. 28, 2025), https://www.anthropic.com/news/updates-to-our-consumer-terms (on file with the University of Baltimore Law Forum)*; How Does Anthropic Protect the Personal Data of Claude for Users,* ANTHROPIC (Feb. 25, 2026) https://privacy.claude.com/en/articles/10458704-how-does-anthropic-protect-the-personal-data-of-claude-users (on file with the University of Baltimore Law Forum). It does still appear that Claude Free, Pro, and Max have the other security features previously discussed, including automatic data encryption while in transit and at rest, and complies with global privacy laws (as recognized by the European Commission). S*ee Is my Data Used for Model Training*, ANTHROPIC (Feb. 25, 2026), https://privacy.claude.com/en/articles/7996868-is-my-data-used-for-model-training (on file with the University of Baltimore Law Forum). Anthropic has other models, including Claude for Work and Anthropic API, which are designed for commercial users. *See id*. Claude for Work and Anthropic API do not, by default, use user data to train their models. *See id*. Any attorney interested in using Claude for Work and Anthropic API should carefully review Anthropic's specific privacy policy for these models to ensure compliance with their ethical responsibilities under the Maryland Rules of Professional Conduct. *AI Tools, AI Insights & Resources Hub*, *supra* note 156. Ultimately, the changes in Claude's privacy policy and training practices illustrate the need for attorneys to remain vigilant about changes to AI, to ensure that they do not accidentally breach their ethical responsibilities. *Id.*

[158] *AI Tools, AI Insights & Resources Hub, supra* note 156.

[159] *Subscribe to Nexis and Nexis+ AI*, LEXISNEXIS (Feb. 9, 2026), https://store.lexisnexis.com/nexis?gad_source=1&gad_campaignid=22699475925&gbraid=0AAAACky6BAsntpoT-S4_hHYi5wSSWSoY&gclid=CjwKCAiAz_DIBhBJEiwAVH2XwC6QN9t4DN0hwChY1

confidentiality and privacy protections in addition to better access and faster processing speed, a slightly cheaper model, ChatGPT Pro, does not include these confidentiality protections by default.[160] Also the 365 Copilot Business model is not to be confused with the standard Copilot model bundled with Microsoft 365, and an additional subscription for the secure model is a must.[161]

There are also several AI tools that are designed specifically for the legal field, which include the MSBA-recommended Westlaw Precision with CoCounsel, Nexis+ AI, Harvey AI, and Spellbook, which are designed to keep information secure and do not use data to train their models.[162] These models are developed for legal use and likely provide better results, but they are relatively expensive compared to the paid tiers of the general models, which typically cost less than fifty (50) to one hundred (100) dollars per month.[163]

Looking beyond paid and legal-specific tools, there are several free generative AI models offered by the paid platforms discussed above that may assist with legal research, drafting, or other tasks.[164] While free and seemingly effective, lawyers should be cautious using these tools and avoid inputting any sensitive client data without first sanitizing any identifying information.[165] Best practices suggest that attorneys not use unpaid AI platforms and use caution even when using paid platforms to ensure compliance.[166]

Regardless of what platform is selected, there may still exist circumstances where additional precautions or complete avoidance of AI may

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_Y6VAKFdIAw8WiYVDXeJj2cSPRK0jzypbfmyhoC5-UQAvD_BwE (on file with the University of Baltimore Law Forum).

[160] *See e.g.*, *ChatGPT Pricing*, OPENAI (Jan. 8, 2026), https://chatgpt.com/pricing/ (on file with the University of Baltimore Law Forum) (explaining how enterprise-grad AI has advanced data privacy which costs more than Business package, with less security protections, costing $25 per month).

[161] *What's the difference between Microsoft Copilot (free) and Copilot in Microsoft 365*, MICROSOFT, https://support.microsoft.com/en-us/topic/what-s-the-difference-between-microsoft-copilot-free-and-copilot-in-microsoft-365-cfff4791-694a-4d90-9c9c-1eb3fb28e842 (last updated Apr. 2026) (on file with the University of Baltimore Law Forum).

[162] *AI Tools, AI Insights & Resources Hub*, *supra* note 156.

[163] *Id*.

[164] *Id*.

[165] Attorney Professionalism Forum, *Using AI in Your Practice? Proceed With Caution*, NYSBA (Aug. 7, 2023), https://nysba.org/using-ai-in-your-practice-proceed-with-caution/ (on file with the University of Baltimore Law Forum).

[166] Joe Stephens, *Legal AI: ABA & State Legal Ethics Guidance on Artificial Intelligence*, STENO: THE BRIEF (Apr. 1, 2025), https://brief.steno.com/legal-ai-rules-by-state (on file with the University of Baltimore Law Forum).

be necessary.[167] This could include high-profile celebrity representation or cases that present an unusually high risk of targeted intrusion.[168] Given such possibilities, lawyers should continue to evaluate other confidentiality risks on a fact-specific basis, including data security, unauthorized access, and the specific terms of service for each platform, to ensure case-specific compliance with MRPC 19-301.6, regardless of whatever platform they decide to use.[169]

Given the confidentiality risk with free AI models,[170] attorneys should also ensure that their staff members are educated on generative AI and only use approved models and tiers, for approved purposes.[171] To do so, attorneys should consider implementing a firmwide AI policy that addresses ethical and responsible use.[172] This policy should include guidelines to protect confidentiality, such as instructions on permissible platforms, what information can be put into which platforms, as well as how to handle information and prevent unauthorized data sharing within a platform.[173] The policy should also include guidelines on how to conduct accurate legal research with AI, such as verifying and checking any output or informing the

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[167] *See In the Dark: Understanding the Implications of "Shadow AI"*, HOSCH & MORRIS, PLLC (June 20, 2024), https://www.hoschmorris.com/privacy-plus-news/shadow-ai (on file with the University of Baltimore Law Forum) ("[I]n benefits administration matters—it may be advisable to restrict the use of AI tools altogether"); *see also* Brandon Pugh & Steven Ward, *What Does AI Need? A Comprehensive Federal Data Privacy And Security Law*, IAPP (July 12, 2023), https://iapp.org/news/a/what-does-ai-need-a-comprehensive-federal-data-privacy-and-security-law (on file with the University of Baltimore Law Forum) (explaining that different datasets require implementation of different privacy methods); *GDPR and Artificial Intelligence: Challenges and Ethical Considerations*, GDPR ADVISOR, https://www.gdpr-advisor.com/gdpr-and-artificial-intelligence-challenges-and-ethical-considerations/ (on file with the University of Baltimore Law Forum) ("[S]ensitive areas like healthcare or criminal justice. . . . [M]ay involve refraining from using AI altogether[.]").

[168] HOSCH & MORRIS, PLLC, *supra* note 167.

[169] A.B.A. Standing Comm. on Ethics & Prof. Resp., Formal Op. 477, at 1-5 (2017). In Formal Opinion 477R, the ABA noted that "particularly strong protective measures are warranted to guard against the disclosure of highly sensitive matters" and citing mergers and acquisitions as examples of matters that "may warrant greater security measures than is typical." *Id.* (stating that lawyers must "constantly analyze how they communicate electronically about client matters, applying the Comment [18] factors to determine what effort is reasonable" on a "case-by-case basis").

[170] Gleb Tsipursky, *Justice Meets Algorithms: The Rise of Gen AI in Law Firms*, NYSBA (Mar. 7, 2025), https://nysba.org/justice-meets-algorithms-the-rise-of-gen-ai-in-law-firms/ (on file with the University of Baltimore Law Forum).

[171] *See Lawyer Referred*, *supra* note 13.

[172] Pamela Langham, *Generative AI in Law Firms: Balancing Innovation and Responsibility*, 6 NO. 3 MD. B.J. 1, 56 (2025) [hereinafter *Generative AI in Law Firms*]; *see Lawyer Referred*, *supra* note 13.

[173] *Generative AI in Law Firms*, *supra* note 172, at 56.

lead attorney that AI was used and a careful review is required.[174] As noted by the MSBA, implementing an AI policy ensures transparency, can help mitigate potential liability, and ensures that attorneys and their staff fulfill their ethical obligations, including that of confidentiality.[175]

D. The Risk of Bias and Discrimination.

Many researchers have also studied how AI models can perpetuate forms of bias, including discrimination.[176] After all, when an AI model's dataset is not diverse, it cannot make diverse predictions.[177] Indeed, there have already been several incidents where AI models that are trained on skewed, incomplete, or biased datasets have caused discrimination.[178] In one well known example, back in 2014, Amazon accidentally discriminated against women who applied for technical positions.[179] This was because Amazon used an artificial intelligence system, trained on the resumes of past hires, to automate the process of hiring for new positions.[180] Because most of their previous applications and subsequent hires for technical positions were men, the system was more inclined to select men over women as potential candidates.[181] Similar instances have also been observed in healthcare, academic, criminal risk assessment, and facial recognition applications.[182] Attorneys have an ethical duty, under MRPC 19-308.4(d) and (e), not to engage in discriminatory conduct that is "prejudicial to the administration of justice."[183] Like other AI concerns, this problem can readily be addressed by the exercise of independent judgment and due diligence with respect to any AI output.[184]

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[174] *Id*. at 57.
[175] *Id*. at 56-57.
[176] Christine Polek & Shastri Sandy, *The Disparate Impact of Artificial Intelligence and Machine Learning*, 21 COLO. TECH. L.J. 85, 85 (2023).
[177] *Id.* at 88; *The Lack of Diversity in Datasets And Why We Should Care*, AYA DATA (Sept. 9, 2024), https://www.ayadata.ai/the-lack-of-diversity-in-datasets-and-why-we-should-care/ (on file with the University of Baltimore Law Forum).
[178] Sergio Brotons, *Generative AI Limitations,* LINGARO (Mar. 2026), https://lingarogroup.com/blog/the-limitations-of-generative-ai-according-to-generative-ai# (on file with the University of Baltimore Law Forum); Polek & Sandy, *supra* note 176, at 92.
[179] Polek & Sandy, *supra* note 176, at 92-93.
[180] *Id.* at 93.
[181] *Id*.
[182] *Id.* at 91-92.
[183] MD. CODE ANN., MD. RULES § 19-308.4 (West 2026).
[184] Tsipursky, *supra* note 170.

E. Client Perception and Consent.

Lawyers also confront issues related to client perceptions and informed consent in the use of AI.[185] Because confidentiality is now addressed by secure models, the requirement of obtaining client consent contemplated by ABA Formal Rule 512[186] no longer appears necessary, just as lawyers do not need consent for their use of email, cloud-based services and storage.[187]

However, the public remains wary of AI use in general.[188] In addition, a client may question the need for her attorney if her attorney relies on the same AI tools available to the client.[189] Clients might feel that the attorney is not personally reviewing or preparing documents, leading to concerns about a lack of sensitivity to their needs.[190] Other clients might view the attorney's use as reckless since AI is known for errors and misinformation.[191] Such concerns are important.[192] Therefore, discussions with the client regarding the attorney's use of AI can minimize these concerns, particularly as they relate to competence, privacy, and efficiency.[193]

Best practices suggest that attorneys discuss their use of AI at the beginning of the representation.[194] An attorney might consider including an AI-use disclosure in engagement agreements that explains how the firm uses AI, notes its potential risks, and emphasizes that all AI-assisted work is

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[185] A.B.A. Standing Comm. on Ethics & Pro. Resp., Formal Op. 512, at 7 (2024).
[186] *Id*. Notably, ABA Formal Opinion 512, published in July 2024 does state that informed consent is required when using client data and AI, given the risks of data leaks. *Id.* at 6. This opinion was written at a time when the confidentiality protections now afforded on most platforms did not exist, as noted by the opinion's focus on the leak of data because of the use of data for training purposes: Improper disclosure of client information "can occur when information relating to one client's representation is input into the tool, then later revealed in response to prompts by lawyers working on other matters, who then share that output with other clients, file it with the court, or otherwise disclose it." *Id.*
[187] *See Navigating Concerns*, *supra* note 28 ("It remains to be seen whether the rules collectively require an attorney to consult with a client before using AI in their representation. After all, consent from a client is not necessarily required to use email, the traditional electronic legal research platforms or other technology.").
[188] Kennedy et al., *supra* note 4 (citing 50% of Americans are "more concerned than excited about the increased use of AI in daily life, up from 37% in 2021").
[189] Richard Demaio, *Ethics and AI: What Lawyers Need to Know*, CAMPOLO, MIDDLETON, & MCCORMICK LLP (June 26, 2025), https://Cmmllp.Com/Ethics-Ai-Law-Lawyers/ (on file with the University of Baltimore Law Forum).
[190] *Id.*
[191] *Id.*
[192] *Id.*
[193] A.B.A. Standing Comm. on Ethics & Pro. Resp., Formal Op. 512, at 9 (2024).
[194] *Id.*

carefully reviewed and supervised by an attorney.[195] A sample disclaimer for an engagement letter may look like the following:

> This firm uses artificial intelligence tools to assist with legal research, document review, and drafting to improve efficiency and reduce costs. While these tools can enhance productivity, AI-generated content may contain inaccuracies and does not replace the professional judgment of an attorney. All AI-assisted work is reviewed and supervised by an attorney, who remains fully responsible for the accuracy, quality, and legal soundness of all advice and work product.[196]

By being transparent about AI use, attorneys can address client concerns before they arise and reinforce that AI does not replace the attorney's judgment and work on their matter.[197]

F. Evidence Fabricated by AI.

Another concern with the rise of AI in the legal context is the possibility of intentionally altered or fabricated evidence using AI.[198] Indeed, this concern has already found its way into appellate opinion.[199] In an appeal of a criminal case arising from a non-fatal shooting, the Supreme Court of Maryland discussed whether a video, gathered from a nearby Ring Camera, was properly authenticated under several theories of authentication—including circumstantial evidence.[200] The opinion opined that, with the increased availability of AI, authentication may be harder in the future:

> Video footage, like social media evidence, is susceptible to alteration, and the increased availability of new technology, particularly the advent of image-generating artificial intelligence, may present unique challenges in authenticating videos and photographs. As we have noted, "[p]hotographic manipulation, alterations, and fabrications are nothing new,

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[195] *Id.*
[196] *Navigating Concerns*, *supra* note 28 ("[Attorneys should] add language to their legal services agreement notifying clients that they may use AI to deliver legal services [as well as] consider explaining the role of AI when providing legal services, including the potential risks and benefits, to ensure informed consent.").
[197] *Id*.
[198] Mooney v. State, 321 A.3d 91, 109-11 (Md. 2024).
[199] *See generally id*. (noting that image-generating artificial intelligence may present unique challenges for authenticating videos and photographs under existing evidence rules).
[200] *Id.* at 94-95.

> nor are such changes unique to digital imaging, although it might be easier in this digital age." . . . Nonetheless, *at this time*, video footage can be authenticated through vigilant existing methods for authentication of evidence.[201]

Chief Judge Fader's concurring opinion expresses a similar, but more urgent, concern about the impacts of artificial intelligence.[202] He emphasizes that, although there was no evidence or indication that the video in *Mooney v. State* had been fabricated, altered, or otherwise tampered with:

> The evidentiary concerns associated with the growth and proliferation of artificial intelligence, especially generative artificial intelligence, are real and pressing. Courts should be alert to claims that evidence has been altered by the use of artificial intelligence, and artificial intelligence technology may ultimately require us to adjust our rules and procedures for authenticating electronic evidence.[203]

Highlighting the judiciary's concern with fabricated evidence, in his dissenting opinion, Judge Gould expressed concern that the court improperly lowered the authentication of videos in this "age of artificial intelligence," where "the risk of fabricated or altered evidence has never been greater, and that risk will only increase as technology advances."[204] While not having any reason to believe that the video was altered, he argued that the majority too "optimistically posits" that existing theories of authentication can be used to authenticate video footage.[205] His dissent implicitly suggests that the rise of generative AI and other technology may prompt the need for re-evaluated, if not entirely new, methods of evidence authentication in the future.[206]

Critically, all the judges in *Mooney*, whether agreeing, concurring, or dissenting, implicitly suggested that the fast development and use of AI will greatly impact the future authentication of evidence.[207] Legal scholars have expressed similar concerns about the "coming evidentiary crisis" as a result of generative AI, and how the prevalence of content like "deepfakes"[208] and

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[201] *Id.* at 110-11 (emphasis added) (citation omitted).
[202] *Id.* at 111 (Fader, C.J., concurring).
[203] *Id.*
[204] *Id*. (Gould, J., dissenting).
[205] *Mooney*, 321 A.3d at 111 (Gould, J., dissenting).
[206] *Id*. at 114-16.
[207] *Id*. at 110-11 (majority opinion; Fader, C.J., concurring; Gould, J., dissenting).
[208] A deepfake is an image or recording of an individual, which depicts the individual doing something or saying something that they did not actually do or say. Pamela Langham, *Deep Fakes and Voice Cloning: The Upcoming Evidentiary Crisis*, MSBA (Mar. 21, 2024),

"voice cloning technologies"[209] will likely complicate the verification and authentication of evidence in the future.[210]

Even outside the procedural practice of law, deepfakes and voice clones can have disastrous consequences.[211] In January 2024, a video circulated that showed the principal at Pikesville High School in Baltimore County, Maryland, making racist and antisemitic comments.[212] Although the principal denied the comments, he was investigated and placed on administrative leave, all while receiving threats of violence and outrage from the community.[213] It was later discovered that the video, which nearly ruined the principal's career and deeply impacted his life, was a deepfake made by the school's soon-to-be-released athletic director.[214] The athletic director was eventually arrested, charged, and convicted for his actions, but the incident nonetheless reveals how generative AI can produce realistic evidence with drastic consequences.[215]

Mooney and the incident discussed above show concern with AI's ability to create highly convincing fabricated evidence.[216] Attorneys intending to rely upon images or videos for use in court must accordingly exercise caution, use professional judgment, and independently verify such

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https://www.msba.org/site/site/content/News-and-Publications/News/General-News/Deepfakes_and_Voice_Cloning.aspx (on file with the University of Baltimore Law Forum).

[209] Similarly, a voice clone is a piece of media or content that replicates how an individual sounds or talks to make them say something that they did not say. *Id.*

[210] *Id.*

[211] *See, e.g.*, Thomas Lake, *A school principal faced threats after being accused of offensive language on a recording. Now police say it was a deepfake*, CNN (Apr. 26, 2024, at 14:25 ET), https://edition.cnn.com/2024/04/26/us/pikesville-principal-maryland-deepfake-cec (on file with the University of Baltimore Law Forum); Jaclyn Diaz, *A Baltimore-area teacher is accused of using AI to make his boss appear racist*, NPR (Apr. 26, 2025, at 05:00 ET) https://www.npr.org/2024/04/26/1247237175/baltimore-ai-generated-racist-audio-crime (on file with the University of Baltimore Law Forum).

[212] Lake, *supra* note 211.

[213] *Id.*

[214] *Id.*; Diaz, *supra* note 211.

[215] Associated Press, *Former School Athletic Director Gets 4 Months in Jail in Racist AI Deepfake Case*, U.S. NEWS (Apr. 29, 2025, at 11:05 ET), https://www.usnews.com/news/us/articles/2025-04-29/former-school-athletic-director-gets-4-months-in-jail-in-racist-ai-deepfake-case (on file with the University of Baltimore Law Forum).

[216] *See* Mooney v. State, 321 A.3d 91, 110-11 (Md. 2024) ("Video footage, like social media evidence, is susceptible to alteration, and the increased availability of new technology, particularly the advent of image-generating artificial intelligence, may present unique challenges in authenticating videos and photographs."); Lake, *supra* note 211 (reporting the story of a high school faculty member creating a deepfake video of the school's principal making racist and antisemitic comments).

evidence.[217] This obligation applies not only to media submitted by opposing parties but also to the media provided by their own clients, as attorneys must ensure compliance with their obligations of candor to the tribunal under MRPC Rule 19-303.3.[218]

IV. THE EVOLUTION OF ATTORNEY GUIDANCE AND MARYLAND STATE REGULATIONS.

While there are many ethical concerns surrounding the use of AI in the legal field, it is entirely possible for attorneys to avoid or mitigate these concerns through exercising careful judgment, recognition of the risks and limitations of AI, and independent verification.[219] That said, there is a lack of regulation or binding guidance that governs how attorneys and other law professionals utilize AI, which places this responsibility firmly on the attorneys themselves.[220] Without regulation, AI's dangers regarding hallucinations, the Song of the AI Siren, and confidentiality can cause substantial disaster for attorneys and clients alike.[221] Beyond simply affecting professional ethics, the Supreme Court of Maryland and Appellate Court of Maryland have already devoted opinions to contemplating how AI will impact the practice of law, from the greater level of verification and supervision needed to guard against hallucinations to heightened standards of authentication for evidence.[222] Indeed, the extent to which AI has impacted the law, and will continue to do so, introduces a question of whether attorneys' self-regulation is truly enough.[223]

This dilemma about self-regulation is further compounded by the fact that regulating AI use is fundamentally difficult.[224] Part of this difficulty comes from AI's nature, which is broad, wide-reaching, and rapidly developing.[225] Stated simply, it is hard to apply the right level of regulation to technology that is employed in a wide variety of different contexts and industries, reaches beyond state and national borders, and changes constantly.[226] There are also concerns about how overregulation of this

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[217] *Mooney*, 321 A.3d at 111.
[218] MD. CODE ANN., MD. RULES § 19-303.3 (West 2026).
[219] *Navigating Concerns*, *supra* note 28.
[220] Amy B. Cyphert, *Confronting the Challenges of Regulating Artificial Intelligence*, 20 FIU L.R. 82, 92 (2025).
[221] *See supra* Sections III.A-C.
[222] Mezu v. Mezu, 346 A.3d 181, 189 (Md. App. 2025); *Mooney*, 321 A.3d at 110-11.
[223] *See Mezu*, 346 A.3d at 189-90 (discussing the self-regulation attorneys must do under Maryland Attorney's Rules of Professional Conduct).
[224] Cyphert, *supra* note 220, at 85-86.
[225] *Id.* at 86.
[226] *Id.* at 86-88, 90-92.

nascent industry could curtail or halt AI development and all the advances that may come with it.[227] As legal scholar Amy B. Cyphert noted:

> Any such regulation is a fraught endeavor. It will require avoiding overly onerous rules that stunt innovation and harm national and personal security while at the same time avoiding overly lax rules, which can ironically result in the same harms.[228]

Despite these challenges, Cyphert notes that the alternatives to regulation, including self-regulation by technology companies, reliance on existing regulations, and private tort actions, are inadequate to address the issues and problems that come with AI.[229] While it will not be easy, she emphasizes that legislators attempt to do "something in this moment," while public support, experts, and AI companies themselves are supportive of, or at least acknowledge the need for, regulation.[230]

As this Part explores, Maryland lawmakers and leaders have already begun to conceptualize and develop how the state government should use AI to best serve its constituency.[231]

A. Maryland Executive Branch Action on AI.

On January 8, 2024, Maryland Governor Wes Moore signed an Executive Order establishing a comprehensive framework for ensuring ethical and practice use of generative AI by the state government and related agencies.[232] Titled "Catalyzing the Responsible and Productive Use of Artificial Intelligence in Maryland State Government," the Executive Order emphasized that as AI continues to rapidly and exponentially transform society as we know it, the "State must begin its work to ensure [that] the use of AI in Maryland state government is responsible, ethical, beneficial, and trustworthy."[233] To do so, Governor Moore outlined several specific principles to guide the state government's use of AI and generative AI technology; as well as established a Subcabinet to promote these principles, advise and generate recommendations to the Governor on matters related to

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[227] *Id.* at 95.
[228] *Id.* at 84.
[229] *Id.*
[230] Cyphert, *supra* note 220, at 112-13.
[231] *See, e.g.,* 51:2 Md. Reg. 71 (Jan. 26, 2024) (codified as MD. CODE REGS. 01.01.2024.02) (stating how Maryland's state government should use AI).
[232] *Id.*
[233] *Id.*

AI, and to facilitate statewide coordination "on the responsible, ethical, and productive use of AI."[234] While designed to guide Maryland state government's use of AI, the concepts outlined in this Executive Order can certainly be applied more broadly across society, including law firms.[235]

The six principles enumerated in the Executive Order reconcile concerns about overregulation with AI's known issues.[236] The first principle outlined by the Executive Order is "Fairness and Equity," which addresses issues related to AI Bias by emphasizing the need for the state to avoid or mitigate any use of AI technology that discriminates or has a disparate impact on individuals or communities based on their identity.[237]

The second principle is "Innovation," which outlines the importance of utilizing AI in a way that improves State services and outcomes for Maryland residents, "when used responsibly and in human-centered and mission-aligned ways."[238] This principle expresses Maryland's cautious yet optimistic perspective that balances the use of generative AI with ethics and practical considerations.[239]

The third and fourth principles are "Privacy" and "Safety, Security, and Resiliency," which discusses the need to employ data collection, storage, and uses practices that are secure and in compliance with law, while also adopting the best guidelines for AI use that avoid or mitigate any safety risks from AI.[240] These two principles directly address concerns about confidentiality and generative AI, while also broadly encompassing any negative impact or disadvantage from use of AI technology that may result in harm.[241]

The fifth principle is "Validity and Reliability," which requires Maryland to "have mechanisms to ensure that . . . [AI] systems are working as intended, with accurate outputs and robust performance."[242] This principle of ensuring accuracy and reliability addresses the concerns of misinformation that can arise from unintentional hallucinations or intentional uses of AI to mislead, defraud, or tamper with information.[243]

The sixth and final principle is "Transparency, Accountability, and Explainability," emphasizing the need to establish accountability, ensure use of AI systems are explainable and interpretable, and have "clear human

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[234] *Id.*
[235] *See id.*
[236] *Id.*
[237] MD. CODE REGS. 01.01.2024.02.
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] MD. CODE REGS. 01.01.2024.02; *see* Kosinski*, supra* note 7; Lee, *supra* note 74.

oversight."[244] Again, much like the fourth principle, this sixth principle is broad, though specifically notes the importance of utilizing human judgment—a guiding principle to address most, if not all, of the problems with AI technology.[245]

Aside from specifically providing broad principals to address current and potential future problems with AI, the Executive Order also established the AI Subcabinet of the Governor's Executive Council (the "AI Subcabinet").[246] The AI Subcabinet is comprised not of highly specialized technology leaders or experts,[247] but rather members from a variety of government agencies, across several sectors."[248] The inclusion of members from a variety of governmental agencies addresses the widespread integration of generative AI into multiple sectors and industries, which provides the opportunity for the state to ensure an even, broad application of any policies or procedures that may eventually be adopted by the Subcabinet.[249]

The overarching quality of the Executive Order, however, is its breadth.[250] Besides the six outlined principles, the Subcabinet is given broad advisory and executive powers, with the discretion to "develop and implement a comprehensive action plan," charging them with the knowledge that "global practices and standards in AI governance are still being formulated and evolving."[251] While no specific regulations or directives are stated, these broad powers establish a flexible framework for regulation that allows the state to address current challenges as well as shifting or novel ones

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[244] MD. CODE REGS. 01.01.2024.021.
[245] *Id.*
[246] *Id.*
[247] *Id.*
[248] *Id.* (noting that the Subcabinet is led by the Secretary of the Department of Information Technology; includes the Chief Privacy Officer, Chief Data Officer, and Senior Adviser for Responsible AI; and is comprised of the Secretaries of the Departments of Budget and Management, General Services, Labor, and Commerce, the Director of the Governor's Office of Homeland Security, and "any additional member of the Governor's Executive Council at the discretion of the Chair").
[249] *Id.* Although the Executive Order is arguably broad enough to cover all aspects of Maryland's life, whether social, economic, or political, there is a current emphasis—or perhaps, a concern—on how generative AI will impact labor, security, and the economy. *Id*. Such concerns is stressed in the first recital of the Executive Order, which states, "[AI] is transforming society and work in myriad ways . . . unlocking new opportunities for Maryland's residents, workers, and economy." *Id.* That said, the Executive Order allows for the appointment of any other member of the Governor's Executive Council, emphasizing that should an additional concern about a particular emerge, the body of the Subcabinet will shift to encompass that concern. *Id*.
[250] *See generally* MD. CODE REGS. 01.01.2024.02 (describing the overarching framework and goals for Maryland's approach to and implementation of best practices for AI usage).
[251] *Id.*

in the future, thus resolving the practical regulatory issues that come with the widespread, integrated, and rapidly developing nature of generative AI.[252]

B. Maryland Legislative Action on AI.

Parallel to Governor Moore's Executive Order, the legislature passed the Artificial Intelligence Governance Act of 2024 (the "AIG Act").[253] This Act provides an extensive directive to Maryland agencies to adopt policies regarding the development, procurement, deployment, use, ongoing assessment, and inventory of high-risk AI systems.[254] Notably the AIG Act defines high-risk systems as AI that is a risk to individuals or communities, including their rights or safety.[255] In turn, it requires that any AI system procured or deployed after July 1, 2025, must have adequate guardrails to protect individuals and communities from harm.[256] This includes ensuring data privacy and providing notification in the event of breach.[257]

The AIG Act also codified the Governor's AI Subcabinet,[258] as well as a working group made up from a broad swath of stakeholders, including legislators, corporate executives, unions, and members of the health sector.[259] This working group is tasked, *inter alia*, with protecting consumer rights, and making recommendations on regulation of AI used in decisions that impact the livelihood of citizens as well as disclosure of use and even when used to determine government benefits.[260] Perhaps not surprisingly, the Maryland legislature has begun passing and proposing legislation addressing the improper use of AI, focusing so far on privacy and misrepresentation concerns.[261]

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[252] *Id.*
[253] *See generally* S.B. 818, 2024 Gen. Assemb., 446th Sess. (Md. 2024) (establishing the "Artificial Intelligence Governance Act of 2024," implemented under Subtitle 8 of Section 3.5 of the State Finance and Procurement Article, outlining state policies and procedures on AI governance).
[254] *Id.*
[255] MD. CODE ANN., STATE FIN. & PROC. § 3.5-801(d)(1)-(2) (West 2024).
[256] *See id.* §§ 3.5-804(b)(3), 3.5-805(a).
[257] *See id.* § 3.5-804(b)(4)-(5).
[258] *See id.* § 3.5-806(a).
[259] *See id.* § 3.5-807.
[260] *See id.* § 3.5-807(g).
[261] *See generally* S.B. 818, 2024 Gen. Assemb., 446th Sess. (Md. 2024) (establishing a flexible framework for how Maryland will regulate and approach artificial intelligence, known as the "Artificial Intelligence Governance Act"). Through Md. Code, Criminal Law § 3-809(a)(6)(ii), Maryland has expanded its revenge porn criminal statute to include "computer-generated images," as actual images, thus encompassing deepfakes or other AI-fabricated evidence. MD. CODE ANN., CRIM. LAW § 3-809(a)(6)(ii) (West 2025). Other bills have been introduced to both the Maryland House of Representatives and the Senate but have

These legislative initiatives, combined with Governor Moore's Executive Order, signal an attempt by Maryland to understand AI's benefits and risks, and then develop appropriate policies for its use.[262] This is done in a way that promotes safe, ethical adoption and integration, while mitigating the concerns about AI's security, accuracy, and misuse.[263] Moreover, one characteristic of these legislative and executive initiatives are their flexibility, which allow the state the ability to adapt to AI technology as it shifts, changes, and potentially creates new problems.[264] Notably, however, neither the Executive Order nor the AIG Act directly address, guide, or regulate how Maryland residents, including Maryland attorneys, can and should utilize AI.[265]

What makes the Executive Order and the AIG Act relevant to attorneys, however, is the state's informed adoption approach to AI use.[266] Both embrace AI technology as a tool to improve the lives of Maryland residents while recognizing that the technology introduces new challenges and problems.[267] Additionally, both are broad, which permits the government to use of AI as it grows and develops without overlooking moral responsibilities.[268] They both display cautious optimism, careful consideration of the risks, and the development of adoption based on those risks.[269]

In the absence of regulation or binding guidance, attorneys too should be cautiously optimistic.[270] They should carefully weigh the risks of utilizing AI against the enormous potential to save time and money for both

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not yet been passed. *See* H.B. 1425, 2025 Gen. Assemb., 448th Sess. (Md. 2025) (proposing legislation establishing a legal cause of action and remedy for those harmed by identity fraud, including deepfakes and other representations made using artificial intelligence). *See generally* H.B. 1331, 2026 Gen. Assemb., 1448th Sess. (Md. 2026) (proposing legislation regarding artificial intelligence and consumer protection).

[262] *See* MD. CODE REGS. 01.01.2024.02. *See generally* S.B. 818, 2024 Gen. Assemb., 446th Sess. (Md. 2024) (establishing a flexible framework for how Maryland will regulate and approach artificial intelligence, known as the "Artificial Intelligence Governance Act").

[263] S.B. 818, 2024 Gen. Assemb., 446th Sess. (Md. 2024).

[264] *See id*.; MD. CODE REGS. 01.01.2024.02 ("Given the rapid rate of change in AI technologies and industry, the State must chart a principled yet adaptable, pragmatic path forward. . . .").

[265] *See supra* Section IV.B.

[266] *See supra* Section IV.B.

[267] MD. CODE REGS. 01.01.2024.02; MD. CODE ANN., STATE FIN. & PROC. § 3.5-806 (West 2024).

[268] MD. CODE REGS. 01.01.2024.02; MD. CODE ANN., STATE FIN. & PROC. § 3.5-806 (West 2024).

[269] *See* MD. CODE REGS. 01.01.2024.02; MD. CODE ANN., STATE FIN. & PROC. §§ 3.5-801-807.

[270] *See supra* Part III and Sections IV.A-B.

themselves and their clients.[271] They should approach AI with a steadfast commitment to existing traditions and their ethical responsibilities, without rejecting AI altogether.[272] Ultimately, attorneys must recognize that AI is not going away.[273] The Governor's and legislature's informed adoption approach gives attorneys an effective strategy to use when implementing AI.[274]

To that end, the Supreme Court of Maryland should consider adopting a rule based on an informed adoption approach to govern the use of technology by attorneys.[275] Rather than having rules or guidance with specifics on how attorneys can meet their ethical obligations when using a particular technology like AI, the rule should be broad.[276] Rather than enumerating specific technological uses that are acceptable, the rule should be one that encompasses all technology, even those that have not yet been imagined.[277] This rule should be modeled around ABA Model Rule 1.6(c)'s concept of "reasonableness," which would provide the flexibility necessary to address current and future technology.[278] This also encourages attorneys to adopt technologies by education, first understanding the risks and limitations of a technology, then implementing it guided by that knowledge.[279] Again, an informed adoption.[280]

V. CONCLUSION.

The integration of AI into the legal profession marks a transformative technological moment, promising unprecedented efficiency.[281] For clients, this will bring a reduction in legal fees and, for some, an attendant growth in access to justice.[282] This moment also brings with it legitimate concerns for the profession regarding AI's accuracy, confidentiality, and professional responsibility.[283] Lawyers have been here before, having seen the adoption

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[271] *See supra* Part III.
[272] *See supra* Part III.
[273] *See supra* Part III; *infra* Part V.
[274] *See supra* Sections III.A-B.
[275] *See supra* Sections I.A-B; ETHICAL CONSIDERATIONS, *supra* note 82.
[276] *See supra* Part IV (discussing the difficulties regulating AI given its broad reach and that it continues to evolve).
[277] *See supra* Part IV (discussing the difficulties regulating AI given its broad reach and that it continues to evolve).
[278] MODEL RULES OF PRO. CONDUCT r. 1.6 (A.B.A. 2023).
[279] ETHICAL CONSIDERATIONS, *supra* note 82.
[280] *Id.*
[281] *Id.*
[282] *Id.*
[283] *Id.*

of the fax machine, email, cloud storage, and electronic filing systems, all of which brought both promise and peril.[284]

This Article began by examining how AI works, emphasizing its role as a forecaster, not a thinker, relying on statistical probabilities rather than true comprehension.[285] It then addressed AI's most pressing challenges: the risk of hallucinations that can lead to fabricated case citations and sanctions; the charismatic "Siren Song" that lulls users into unearned trust and confirmation bias; confidentiality concerns, algorithmic bias and discrimination; and questions about client perception and the emerging threat of AI-fabricated evidence.[286]

Throughout each of these challenges, however, a consistent solution emerged.[287] Attorneys can successfully navigate AI risks through education, careful platform choice, and diligently reviewing and verifying output, while always exercising professional judgment.[288] Using this solution, attorneys can readily meet their ethical obligations in their AI adoption.[289] Maryland's government reinforces this informed adoption approach by articulating, across all three branches, the need to understand AI, its risks and how to safely and responsibly use it in our society.[290] Given the rapid evolution of AI today, attorneys must also remain vigilant, proactive, and informed as the technology continues to develop.[291]

AI is not a tool to replace lawyers.[292] Attorneys can still do what AI cannot: comprehend nuanced arguments, apply caselaw to a unique set of facts, and understand how a specific judge might react to an argument.[293] These abilities remain and will always remain uniquely human.[294] However, when used responsibly, AI can free attorneys from tedious tasks, accelerate their research, digest large document sets, and ultimately allow attorneys to focus their time on the highly valued thought and judgment that the law requires.[295]

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[284] *Evolution of Legal Tech*, *supra* note 14; Friedman, *supra* note 15; *Why are many firms still reluctant*, *supra* note 16.
[285] *See supra* Part II.
[286] *See supra* Part III.
[287] *See supra* Part III.
[288] ETHICAL CONSIDERATIONS, *supra* note 82.
[289] *Id*.
[290] *See supra* Part IV.
[291] ETHICAL CONSIDERATIONS, *supra* note 82.
[292] *Id.*
[293] *See supra* Section III.A.
[294] *See* discussion *supra* Section III.A (pointing out the various manners in which AI cannot function without human oversight or is incapable of replicating the uniquely human nature of the profession).
[295] *See supra* Part II and Section III.C.

COMMENT

PREDICTIVE PREJUDICE: REGULATING ARTIFICIAL INTELLIGENCE IN MORTGAGE LENDING THROUGH MARYLAND'S DATA PRIVACY FRAMEWORK

By: Caroline Byrd*

I. INTRODUCTION.

Artificial intelligence ("AI") has become a transformative force in the financial industry, particularly in mortgage lending, where algorithms are increasingly used to assess creditworthiness and manage risk.[1] AI in predictive mortgage lending refers to the use of advanced computational techniques, such as machine learning, natural language processing, and computer vision, to analyze vast datasets and forecast borrower behavior.[2] Proponents argue that AI can expand access to credit and reduce human bias by relying on objective data-driven processes, particularly in mortgage underwriting where such technologies are already in use.[3] However, AI lending systems often rely on historical data and non-traditional data points—

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[1] Roman Bevz, *The Role of AI and ML in Transforming Credit Risk Mgmt. in Banking*, AVENGA (Apr. 29, 2025), https://www.avenga.com/magazine/ai-for-credit-risk-management (on file with the University of Baltimore Law Forum). Mortgage lending refers to the process by which financial institutions extend credit to borrowers for the purchase or refinancing of real property, typically secured by the property itself. *Mortgages: Types, How They Work, and Examples*, INVESTOPEDIA (Dec. 21, 2025), https://www.investopedia.com/terms/m/mortgage.asp (on file with the University of Baltimore Law Forum).

[2] Kris van Beever, *All Abord the AI Train: Prac. Roadmap for Lenders*, STRATMOR GROUP (Feb. 2025), https://www.stratmorgroup.com/all-aboard-the-ai-train-a-practical-roadmap-for-lenders (on file with the University of Baltimore Law Forum).

[3] Michele Gilman, *The Impact of Proptech and the Datafication of Real Estate on the Human Right to Housing*, 9 GEO. L. TECH. REV. 444, 469 (citing William Magnuson, *Artificial Financial Intelligence*, 10 HARV. BUS. L. REV. 337, 349 (2020)).

such as geolocation, social media activity, and online shopping habits—which can inadvertently replicate and exacerbate the systemic inequities of traditional redlining.[4] In Baltimore, a city where the housing market has been deeply shaped by the legacy of redlining, these risks are especially pronounced.[5]

Redlining, the discriminatory practice of denying loans or insurance based on the racial composition of neighborhoods, was formally outlawed by the Fair Housing Act of 1968.[6] Yet, its impact persists, as historically marginalized communities continue to face limited access to financial resources and economic opportunity.[7] With the rise of AI, this exclusionary practice has taken on a new form—digital redlining—where algorithms unintentionally perpetuate the same patterns of discrimination embedded in historical data.[8] This is particularly evident in Baltimore, where decades of systemic inequities have left Black neighborhoods underinvested and economically disadvantaged.[9]

This Comment explores how AI lending practices contribute to digital redlining, focusing on Baltimore as a case study.[10] Part II provides a historical background, examining how Baltimore became a model for redlining in the early 20th century, the long-term impact of housing segregation, and how the evolution of AI in mortgage lending has the potential to either mitigate or reinforce these discriminatory patterns.[11] Part III analyzes the key issues contributing to AI-driven redlining, including the reliance on alternative data, the risks of algorithmic bias, the lack of transparency in AI decision-making, and the challenges of regulating AI-driven lending practices under current legal frameworks.[12] Part IV then assesses the Maryland Online Data Privacy Act ("MODPA") as a potential tool to address AI-driven discrimination.[13]

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[4] Maria Sarah, *Using Alt. Data and Artificial Intelligence to Expand Fin. Inclusion: Evidence Based Insights*, J-PAL (Mar. 21, 2024), https://www.povertyactionlab.org/blog/3-21-24/using-alternative-data-and-artificial-intelligence-expand-financial-inclusion-evidence#:~:text=In%20contrast%20to%20traditional%20credit,data%E2%80%9D%E2%80%94to%20make%20predictions (on file with the University of Baltimore Law Forum).

[5] Dario Toval, *Was Baltimore the Proving Ground for Redlining?*, READING PARTNERS (June 12, 2024), https://readingpartners.org/blog/was-baltimore-the-proving-ground-for-redlining/#:~:text=People%20in%20historically%20redlined%20areas,communities%20never%20having%20been%20disrupted (on file with the University of Baltimore Law Forum).

[6] *Id.*

[7] *Id.*

[8] Jason Jia-Xi Wu, *Algorithmic Fairness in Consumer Credit Underwriting: Towards a Harm-Based Framework for AI Fair Lending*, 21 BERKELEY BUS. L.J. 65, 90 (2024).

[9] Toval, *supra* note 5.

[10] *See infra* Parts II-III.

[11] *See infra* Part II.

[12] *See infra* Part III.

[13] *See infra* Part IV.

However, this Comment argues that MODPA does not go far enough in regulating AI lending practices because it exempts credit reporting data, leaving a critical gap that allows financial institutions to continue using biased data in mortgage decisions.[14] Part IV proposes reforms to MODPA to ensure it effectively curbs modern redlining and provides meaningful consumer protections against AI-driven discrimination in lending.[15]

The central thesis of this Comment is that while AI holds the promise of innovation and efficiency in financial services, it also poses significant risks to equity and fairness, particularly in historically marginalized communities.[16] By leveraging MODPA and implementing additional safeguards, policymakers can create a regulatory framework that mitigates bias, promotes transparency, and ensures that AI serves as a tool for inclusion rather than exclusion.[17]

II. HISTORICAL BACKGROUND.

A. The Birthplace of Redlining: Baltimore's Role in Segregation Practices.

On December 19, 1910, the Mayor of Baltimore, J. Barry Mahool, passed an ordinance compelling the separation of races by residential zones.[18] As the first of its kind in the United States, it marked the beginning of a dark legacy for the city.[19] Citing the rationale of the ordinance, Mahool claimed that "Blacks should be quarantined in isolated slums in order to reduce the incidents of civil disturbance," "prevent the spread of communicable diseases," and "protect property values among the White majority."[20] These ideas quickly permeated across the country inciting similar ordinances in large cities.[21]

Baltimore's 1910 ordinance was issued in response to growing complaints from White neighbors after W. Ashbie Hawkins, a prominent African American lawyer, purchased a home on McCulloh Street, one of the

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[14] *See infra* Part IV.
[15] *See infra* Part IV.
[16] *See infra* Part III; Gilman, *supra* note 3, at 3-4.
[17] *See infra* Part IV.
[18] *Baltimore Tries Drastic Plan of Race Segregation*, N.Y. TIMES (Dec. 25, 1910), https://timesmachine.nytimes.com/timesmachine/1910/12/25/105900067.html?pageNumber=34 (on file with the University of Baltimore Law Forum).
[19] *Id.*
[20] SHERYLL CASHIN, WHITE SPACE, BLACK HOOD: OPPORTUNITY HOARDING AND SEGREGATION IN THE AGE OF INEQUALITY 10 (2021).
[21] *Id*.

city's most desirable residential areas.[22] After Mahool's 1910 ordinance, Hawkins became one of the leaders in advocating for racial equality.[23] He challenged racial zoning ordinances across the country, and in 1917 his efforts culminated in *Buchanan v. Warley*, where the Supreme Court struck down municipally mandated residential segregation.[24] In a majority opinion, the Supreme Court struck down racial zoning ordinances by holding them as an unconstitutional use of the state's police power.[25] Fueled by this win, Hawkins continued to advocate for further advancements in racial equality across the country and at home in Baltimore.[26]

In the wake of *Buchanan,* segregationists had to resort to other methods of exclusion to ensure residential segregation.[27] A popular exclusionary method was restrictive covenants in deeds—language which prohibited the sale of the property to Black people.[28] Roland Park, a suburb outside of Baltimore, set forth yet another segregationist legacy by becoming one of the first neighborhoods in the U.S. to utilize racial restrictive covenants.[29] Deed restrictions became a way for White Baltimoreans to continue enforcing the racial zones established by Mahool's 1910 ordinance.[30] The Federal Housing Administration ("FHA") encouraged the use of racial restrictive covenants in its 1939 Underwriting Manual declaring them necessary "for a neighborhood to maintain any stability."[31]

Racially restrictive covenants faced backlash from fair housing activists and as legal challenges multiplied across the country, the Supreme Court was pressured to address the issue in *Shelley v. Kraemer*.[32] The Court found that while the racial covenants were constitutional as they stand,

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[22] *Id.*

[23] *See generally* Domonique Flowers, *Passing the Mantle: The Transformative Initiatives of Harry Commings, Ashbie Hawkins, and the Next Generation of African American Lawyers in Maryland, to Utilize the Legal System and Advance the Racial Progress of African American Citizens*, 54.1 U. BALT. L. F. 22 (2023) (describing Hawkins' efforts in advocating for racial equality).

[24] CASHIN*, supra* note 20, at 12.

[25] *See generally* Buchanan v. Warley, 245 U.S. 60, 82 (1917) (holding that a racial zoning ordinance was an unconstitutional exercise of the state's police power in violation of the Fourteenth Amendment).

[26] CASHIN, *supra* note 20, at 12.

[27] *Id.* at 15.

[28] *Id.*

[29] *Id.* at 13.

[30] *Id.* at 15.

[31] Sarah Jacobson*, A Brief Hist. of Hous. Segregation in Balt.*, INTL. MAPPING (Oct. 29, 2021), https://internationalmapping.com/blog/a-brief-history-of-housing-segregation-in-baltimore/ (on file with the University of Baltimore Law Forum).

[32] DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 188 (8th ed. 1998).

judicial enforcement of the covenants violated the Equal Protection Clause of the Fourteenth Amendment due to the state action doctrine.[33]

The Supreme Court's rulings in *Buchanan* and *Kramer* ousted two key methods of exclusionary zoning and forced wealthy White landowners to become less overt in their promotion of segregation.[34] Banks and realtors became leading actors for the promotion of segregation in the private sector by denying credit to Black homebuyers.[35] In the public sector, local governments, under the guise of urban renewal, constrained the expansion of Black neighborhoods encroaching on White institutions and used government money to build housing projects that confined displaced Black residents.[36]

The practice of denying credit to Black people further grew after the mapping of Baltimore by the Home Owner's Loan Corporation ("HOLC").[37] To recover from the economic impact of the Great Depression, the FHA developed a mortgage insurance program where a buyer could provide a ten percent downpayment on their home and the bank would issue a mortgage following a risk assessment.[38] This program extended only to the White homebuyer, further entrenching Black homebuyers in a cycle of poverty.[39] To determine creditworthiness, the FHA and HOLC created maps which designated certain residential areas with grades associated with their risk level.[40] This mapping method gave way to what we now refer to as "redlining"—the "D grade" or "hazardous" ratings given to predominately Black neighborhoods and colored red on the maps.[41]

Once a neighborhood received a "hazardous" rating, creditors routinely denied loans and Black buyers were forced to stay put or buy elsewhere.[42] In effect, Black buyers who wanted to buy in "desirable" areas were denied access due to exorbitant pricing while simultaneously being denied loans in areas labeled "hazardous" by HOLC and therefore, forced to

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[33] *See generally* Shelly v. Kraemer, 334 U.S. 1, 20 (1948) (explaining that although private parties may enter such agreements, the Constitution prohibits the state from giving them legal effect through judicial enforcement).
[34] CASHIN, *supra* note 20, at 13.
[35] *Id.* at 14.
[36] MASSEY & DENTON, *supra* note 32, at 188-89.
[37] CASHIN, *supra* note 20, at 15.
[38] Jacobson, *supra* note 31.
[39] *Id.*
[40] *Id.*
[41] CASHIN, *supra* note 20, at 14-15.
[42] *A Brief Hist. of Redlining*, NYC.GOV (Jan. 2, 2021), https://a816-dohbesp.nyc.gov/IndicatorPublic/data-stories/redlining (on file with the University of Baltimore Law Forum).

pay twenty percent more than their White counterparts.[43] Only two Black neighborhoods on HOLC's map avoided the D rating.[44] The financial barrier pushed the Black population to the east and west sides of the city, while the White population occupied the desirable city center.[45] The resulting pattern forms what Lawrence Brown, professor at Morgan State University, coined as the "Black Butterfly" and the "White L"—whose shapes persist to this day.[46]

B. The Long-Term Effects of Housing Segregation Despite Federal Legal Improvements.

The Fair Housing Act of 1968 (the "Act") was finally enacted in the fallout of Dr. Martin Luther King's assassination and major civil rights movements.[47] The Act prohibited discrimination concerning the sale, rental, and financing of housing based on "race, color, religion, sex, national origin, familial status, and disability."[48] In effect, racially motivated redlining in mortgage lending became illegal.[49] Another win for the Black community came after the enactment of the Equal Credit Opportunity Act in 1974 ("ECOA"), which expanded protections for minority groups by outlawing discrimination in mortgage transactions and requiring lenders to explain why applicants were denied.[50] However, these improvements in the law failed to end the cycle of poverty that was established by early racist housing practices and Baltimoreans have struggled to overcome these economic disparities to this day.[51]

In the seminal book *American Apartheid,* sociologists Douglas Massey and Nancy Denton credit "opportunity hoarding" as a key reason why the cycle of segregation and poverty exists in cities like Baltimore.[52] Opportunity hoarding occurs when one group restricts access scarce resources through exclusionary tools.[53] This lack of resources is symptomatic

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[43] CASHIN, *supra* note 20, at 14-15.
[44] *Id.* at at 14.
[45] *Id.* at 15.
[46] Marceline White, *Baltimore: the Black Butterfly*, NATL. COMTY. REINVESTMENT COALITION (Oct. 8, 2020), https://ncrc.org/the-black-butterfly (on file with the University of Baltimore Law Forum)
[47] *Hist. of Fair Hous.*, U.S. DEPT. OF HOUS. AND URBAN DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history (on file with the University of Baltimore Law Forum) (last visited Nov. 18, 2024).
[48] 42 U.S.C. § 3604 (1988).
[49] Jacobson, *supra* note 31.
[50] 15 U.S.C. § 1691, 1691(d) (2010).
[51] Jacobson, *supra* note 31.
[52] MASSEY & DENTON, *supra* note 32.
[53] *Id.*

of redlining and can include underfunded schools, food deserts, and lack of public transportation in addition to decreased credit lending.[54] According to the Urban Institute, between 2011 and 2016, predominately White neighborhoods in Baltimore received more than four times the investment of neighborhoods that are predominately Black.[55] By protecting the wealthiest population from economic competition, it becomes impossible for struggling neighborhoods to get the necessary traction they need for upward mobility, and the result is fewer and fewer middle class neighborhoods and, an ever widening class division.[56]

C. The Rise of AI in Mortgage Lending.

The rise of AI has had a great impact in a variety of industries such as healthcare, education, marketing, real estate, and banking.[57] This is due to AI's ability to automate tasks and enhance decision-making which can have cost saving benefits.[58] Therefore, banks have implemented AI machine learning into their lending decisions in order to measure creditworthiness and manage risk.[59] Advocates of financial technology ("Fintech") propose that computer algorithms running AI decision-making are less biased than humans.[60] However, this optimistic outlook has faced significant criticism, as many scholars argue that algorithmic processes can reinforce existing inequalities and evade fair lending laws due to their lack of transparency.[61] While decisions are made by computer algorithms, those algorithms are built by humans who have the ability to insert their own discriminatory biases, both conscious and unconscious.[62] These learning models are fed data that

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[54] White, *supra* note 46. *See generally* CASHIN, *supra* note 20, at 21–37 (2021) (chronicling the transit activism in Baltimore during the Hogan Administration).

[55] Lionel Foster, *The Black Butterfly, Racial Segregation and Inv. Patterns in Baltimore*, URBAN INST. (Feb. 5, 2019), https://apps.urban.org/features/baltimore-investment-flows (on file with the University of Baltimore Law Forum).

[56] CASHIN, *supra* note 20, at 119.

[57] Akash Takyar, *AI Use Cases & Applications Across Major Indus.*, LEEWAYHERTZ, https://www.leewayhertz.com/ai-use-cases-and-applications (on file with the University of Baltimore Law Forum) (last visited July 13, 2024).

[58] *Id.*

[59] *Id.*

[60] Gilman, *supra* note 3, at 469 (first citing Matthew Adam Bruckner, *The Promise and Perils of Algorithmic Lenders' Use of Big Data*, 93 CHI.-KENT L. REV. 3, 11-13 (2018); and then citing Vincent Di Lorenzo, *Fintech Lending: A Study of Expectations Versus Market Outcomes*, 38 REV. BANKING & FIN. L. 725, 728 (2019)).

[61] Wu, *supra* note 8, at 69-70.

[62] Gilman, *supra* note 3, at 469 (citing Sian Townson, *AI Can Make Bank Loans More Fair*, HARV. BUS. REV. (Nov. 6, 2020), https://hbr.org/2020/11/ai-can-make-bank-loans-more-fair (on file with the University of Baltimore Law Forum)); *see also* Andreas Fuster et al.,

"can embed the same existing social disparities reflected in traditional scoring models."[63] Machine learning models have the capability to pick out data points and carry out decision making in ways that go against lenders' best practices.[64] Additionally, the algorithms operate within "black boxes," offering little transparency to both lenders and borrowers who seek explanations for loan denials due to their adaptive and unpredictable nature.[65] Many have qualified algorithmic lending as "a new form of digital redlining" because the technology relies on pre-existing norms and "staple" decisions that tend to protect the status quo.[66] As law professor, Sheryll Cashin, simply stated: "technology exacerbates anti-Black bias."[67]

III. ISSUE: AI IN MORTGAGE LENDING IS REINFORCING MODERN REDLINING THROUGH BIAS AND REDUCED TRANSPARENCY.

In Baltimore, where the effects of historical redlining are deeply entrenched, the implementation of AI in mortgage lending raises significant concerns.[68] For example, the use of alternative data can inadvertently disadvantage Black and low-income communities, as many of these data points may correlate with socio-economic factors tied to systemic discrimination.[69] Furthermore, this reliance on alternative data, such as a consumers social media network, can reinforce segregation patterns, effectively creating a digital version of redlining.[70] This Part examines how AI has become a central tool in the mortgage lending process, explores the

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Predictably Unequal? The Effects of Machine Learning on Credit Markets, 67 J. FIN. 5 (2022), https://doi.org/10.1111/jofi.13090 (on file with the University of Baltimore Law Forum) (demonstrating that machine learning in credit markets can produce disparate outcomes by incorporating patterns from historically biased data).

[63] Gilman, *supra* note 3, at 469.

[64] Wu, *supra* note 8, at 91.

[65] *Id.* at 70-71; Gilman, *supra* note 3, at 470. A "black box" model is one in which the internal logic of the algorithm is not readily interpretable, limiting transparency into how outputs are generated from given inputs. Gilman, *supra* note 3, at 470.

[66] Wu*, supra* note 8, at 90-91.

[67] CASHIN, *supra* note 20, at 189.

[68] *See, e.g.*, Jacobson, *supra* note 31; *see supra* Section III.B.

[69] Lorena Rodriguez, *All Data is not Credit Data: Closing the Gap Between the Fair Housing Act and Algorithmic Decisionmaking in the Lending Industry*, 120 COLUM. L. REV. 1843, 1857 (2020).

[70] *See* Robinson Meyer, *Could a Bank Deny Your Loan Based on Your Facebook Friends?*, THE ATLANTIC (Sep. 25, 2015), https://www.theatlantic.com/technology/archive/2015/09/facebooks-newpatent-and-digital-redlining/407287/ (on file with the University of Baltimore Law Forum).

inherent risks of bias and discrimination embedded within these technologies, and discusses the challenges to regulating these AI models.[71]

A. The Use of Alternative Data in AI Models.

Traditionally, creditworthiness was explicitly based on an individual's credit score.[72] Now, in modern lending practices, loan officers can consider a wider pool of customer data known as "non-traditional data" when determining creditworthiness.[73] This non-traditional data consists of personal information, such as past rent payments, childcare payments, online shopping habits, social media usage, etc.[74] One of the main motivations for using more holistic alternative data, beyond traditional risk assessment, is to expand access to credit for borrowers who may not qualify under traditional credit scoring.[75] However, there are legitimate privacy concerns when using alternative data, such as website or social media activity, and additional ethical concerns raised due to the introduction of potential bias into the decision process.[76]

AI models take the use of non-traditional data a step further by analyzing vast datasets to identify patterns and predict borrower behavior.[77] Non-traditional data is collected by third-party "data brokers" that mine for personal data and sell it to credit bureaus.[78] Credit lenders then rely on machine learning algorithms to process data points such as zip codes, spending habits, or even where an applicant's alma mater to determine creditworthiness.[79] Proponents argue that this allows for more comprehensive assessments and potentially reduces human bias.[80] The use of non-traditional data presents ethical concerns, as bias can be inadvertently introduced by

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[71] *See infra* Part III.

[72] Tom Sullivan, *6 Types of Alt. Credit Data for Better Loan Decisions*, PLAID (Feb. 25, 2025), https://plaid.com/resources/lending/alternative-credit-data (on file with the University of Baltimore Law Forum).

[73] Terri Bradford, *Give me Some Credit: Using Alt. Data to Expand Credit Access*, FED. RSRV. BANK OF KAN. CITY (June 28, 2023), https://www.kansascityfed.org/research/payments-system-research-briefings/give-me-some-credit-using-alternative-data-to-expand-credit-access (on file with the University of Baltimore Law Forum).

[74] *Id*.

[75] Sullivan, *supra* note 72.

[76] *Id.*

[77] Wu, *supra* note 8, at 78 (noting that alternative data, including online activity and behavioral data, may involve the collection of sensitive information without clear consumer awareness or consent, raising concerns about surveillance and data misuse).

[78] *Id.*

[79] Rodriguez, *supra* note 69, at 1856, 1858.

[80] Gilman, *supra* note 3, at 469.

programmers into AI algorithms at various stages of development.[81] Many data points used by these models serve as proxies for socio-economic or racial characteristics, which can inadvertently reinforce existing inequalities.[82] While the ECOA prohibits creditors from discriminating based on "race, color, religion, national origin, sex, marital status, age," or receipt of public assistance, lenders now have a large universe of unprohibited proxy data that could lead to unintended discriminatory effects on minority groups.[83]

B. The Risks of Algorithmic Bias in AI Lending Models.

AI models, while powerful, are only as unbiased as the data they are trained on and the parameters programmed into them.[84] When AI systems are built on historical data or use non-traditional data as proxies, they can inadvertently replicate and even amplify existing disparities, creating significant risks of algorithmic bias in mortgage lending.[85] AI lending tools employ predictive algorithms which "are built by observing past patterns of behavior, and one of the enduring patterns in American economic life is the unequal distribution of opportunities along the lines of race, gender, and other personal characteristics."[86] These algorithms in turn reflect decades of discriminatory practices, such as redlining.[87] For example, if an algorithm is trained using historical loan approval data that disproportionately excluded minority groups, it will learn to replicate those same exclusionary patterns.[88] This is particularly concerning in cities like Baltimore, where the legacy of redlining has left deep racial and economic divides.[89]

Therefore, AI systems built on biased data may further entrench these divides by denying loans or offering less favorable terms to residents of historically marginalized neighborhoods.[90] The impact of algorithmic bias extends beyond individual borrowers to entire communities, however, fair lending laws only protect against individual discrimination and not systemic

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[81] Rodriguez, *supra* note 69, at 1856.
[82] *Id.* at 1857.
[83] *The Equal Credit Opportunity Act*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/equal-credit-opportunity-act-3 (on file with the University of Baltimore Law Forum) (last visited Jan. 2, 2025); Rodriguez, *supra* note 69, at 1860-61.
[84] Gilman, *supra* note 3, at 469.
[85] Rodriguez, *supra* note 69, at 1857.
[86] Gilman, *supra* note 3, at 474 (quoting Pauline T. Kim, *Manipulating Opportunity*, 106 VA. L. REV. 867, 869–70 (2020)).
[87] Wu, *supra* note 8, at 90.
[88] Gilman, *supra* note 3**,** at 469.
[89] Jacobson, *supra* note 31; Gilman, *supra* note 3**,** at 468.
[90] Wu, *supra* note 8, at 91.

discrimination.[91] In Baltimore, where minority neighborhoods are still struggling with underinvestment, biased AI models can perpetuate cycles of economic exclusion.[92] Residents of predominantly Black neighborhoods may face higher rates of loan denials or be offered less favorable terms, further limiting their ability to access credit and build wealth.[93] This not only reinforces systemic inequality[94] but also undermines the potential of AI to create a more equitable financial system.[95]

To address these risks and avoid perpetuating patterns of exclusion, such as the Black Butterfly in Baltimore, it is critical to recognize the inherent limitations of AI and to implement safeguards that mitigate algorithmic bias.[96] Without proper oversight, AI lending systems risk perpetuating the very inequalities they aim to resolve, particularly in vulnerable communities such as those in Baltimore.[97]

C. Lack of Transparency in Decision Making.

The "black box" issue commonly referenced regarding AI decision making refers to the lack of transparency that customers have.[98] The nature of the predictive algorithm is that it offers no insight into why a customer is approved or denied for a loan.[99] Lack of transparency is so prevalent in the Fintech industries that "almost seventy percent of companies [surveyed]

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[91] *Id.* at 92 (noting that federal fair lending laws, such as the Equal Credit Opportunity Act and the Fair Housing Act, are primarily designed to address discrimination against individual applicants or protected classes, and are less equipped to address systemic or structural discrimination that arises from facially neutral policies or algorithms).

[92] Jacobson, *supra* note 31.

[93] Sienna Duran-Kneip, *Black, White, and Redlining All Over: How Maryland's Appraisal Gap From Historic Redlining Financial Assistance Program Aims to Ameliorate the Lasting Effects of Discriminatory Property Practices*, U. BALT. L.F. (Apr. 26, 2024), https://ublawforum.com/2024/04/26/appraisal-gap/ (on file with the University of Baltimore Law Forum).

[94] Gilman, *supra* note 3, at 472.

[95] Regina Curry & Deep Ratna Srivastav, *Dimensions & Insights: AI's Transformative Impact—Broadening Financial Inclusion*, FRANKLIN TEMPLETON (July 23, 2024), https://www.franklintempleton.com/articles/2024/strategist-views/dimensions-insights-ais-transformative-impact-broadening-financial-inclusion (on file with the University of Baltimore Law Forum).

[96] Rodriguez, *supra* note 69, at 1882.

[97] Omogbeme Angela & Oyindamola Modupe Odewuyi, *AI-Powered DEI Metrics in Financial Institutions: Driving Inclusive Growth*, 5 INTL. J. OF RSCH. PUBL'N & REVS. 3089, 3094 (2024).

[98] Lou Blouin, *AI's Mysterious 'Black Box' Problem, Explained*, U. OF MICH.-DEARBORN NEWS (Mar. 6, 2023), https://umdearborn.edu/news/ais-mysterious-black-box-problem-explained (on file with the University of Baltimore Law Forum).

[99] Gilman, *supra* note 3, at 470.

could not explain how AI decisions predict certain outcomes."[100] In response, the Consumer Financial Protection Bureau ("CFPB") issued guidance *Circular 2022-03*, requiring all lenders to give specific reasoning for their decisions, in compliance with the ECOA, regardless of how "complex" and "opaque" their algorithms may be.[101] However, there has been no guidance as to how AI credit decision-making tools pass muster in order to comply with ECOA anti-discrimination standards.[102]

To establish a claim of lending discrimination under the Equal Credit Opportunity Act ("ECOA"), plaintiffs must demonstrate one of the following: (1) overt discrimination, where unlawful bias is evidenced through explicit and unambiguous statements; (2) disparate treatment, where lenders intentionally treat certain applicants less favorably than others based on a protected characteristic; or (3) disparate impact, where facially neutral lending practices result in a disproportionate and adverse effect on groups protected by the ECOA.[103] However, due to the lack of transparency in "black box" algorithms, it is nearly impossible to show that a plaintiff's suffered injury was directly or proximately caused by an AI algorithm.[104] Therefore, complaining parties face issues collecting evidence sufficient to prove an ECOA violation or even negotiating more competitive loan terms.[105]

D. Regulatory Challenges in Addressing AI Bias.

The rise of AI in mortgage lending has outpaced the development of regulatory frameworks to address its unique challenges.[106] Existing laws, such as the FHA and the ECOA, prohibit discrimination in lending, but these

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[100] *Id*. (citing Jonathan Greig, *Report Finds Startling Disinterest in Ethical, Responsible Use of AI Among Business Leaders*, ZDNET (May 25, 2021, at 05:00 PT), https://www.zdnet.com/article/fico-report-finds-startling-disinterest-in-ethical-responsible-use-of-ai-among-business-leaders/ (on file with the University of Baltimore Law Forum)).
[101] *Consumer Financial Protection Circular 2022-03*, CFPB (May 26, 2022), https://www.consumerfinance.gov/compliance/circulars/circular-2022-03-adverse-action-notification-requirements-in-connection-with-credit-decisions-based-on-complex-algorithms/ (on file with the University of Baltimore Law Forum).
[102] Wu, *supra* note 8 at, 125-26.
[103] Winnie Taylor, *Proving Discrimination and Monitoring Fair Lending Compliance: The Missing Data Problem in Nonmortgage Credit*, 31 REV. OF BANKING & FIN. L. 199, 208-11 (2011-2012).
[104] Rodriguez, *supra* note 69, at 1872.
[105] Wu, *supra* note 8, at 133.
[106] Michael Neal et al., *AI Could Alter Mortgage Lending, but Government Leadership Is Needed*, URBAN INST. (Nov. 6, 2023), https://www.urban.org/urban-wire/ai-could-alter-mortgage-lending-government-leadership-needed (on file with the University of Baltimore Law Forum).

frameworks were not designed with AI in mind.[107] As a result, they often fail to address the complexity of algorithmic bias and its impact on minority borrowers.[108] This regulatory gap creates significant challenges for ensuring fairness and equity in AI-driven lending practices.[109] Unlike traditional lending practices, which rely on static criteria, AI systems continuously adapt based on new data, making it challenging to establish clear regulatory standards.[110] Without a robust framework to oversee these systems, there is a risk that discriminatory practices will persist unchecked, particularly in cities like Baltimore, where historical inequities remain deeply embedded.[111]

AI faces increasing political barriers to regulation as well.[112] The Biden administration made headway with its AI Executive Order, which promoted "safe, secure, and trustworthy development" of AI and paved the way for states enacting their own AI executive orders and regulations.[113] However, following the transition in administration in 2025, President Trump rescinded Biden's Executive Order on his first day in office and replaced it with his own directive, signaling a shift in federal AI policy priorities.[114] Additionally, Andrew Ferguson, the current FTC Chairman, as been vocal about "terminat[ing] all initiatives involving so called . . . AI 'bias'", "end[ing] politically motivated investigations," and "not investigat[ing] conduct 'under lawless disparate impact discrimination theories.'"[115] The changed political landscape will likely see an even larger push over the next

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[107] Wu, *supra* note 8, at 69.
[108] *Id.*
[109] *Id.* at 125.
[110] *Id.* at 124.
[111] *Id.* at 87.
[112] Marc S. Martin & Sydney Veatch, *What to Expect from the New Administration on AI Policy*, PERKINS COIE (Dec. 6, 2024), https://perkinscoie.com/insights/update/what-expect-trump-administration-ai-policy (on file with the University of Baltimore Law Forum).
[113] *FACT SHEET: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence*, THE WHITE HOUSE (Oct. 30, 2023), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/ (on file with the University of Baltimore Law Forum).
[114] David Shepardson, *Trump revokes Biden Executive Order on Addressing AI risks*, REUTERS (Jan. 21, 2025), https://www.reuters.com/technology/artificial-intelligence/trump-revokes-biden-executive-order-addressing-ai-risks-2025-01-21 (on file with the University of Baltimore Law Forum) (reporting that President Trump revoked Biden's AI Executive Order addressing safety and bias concerns and issued a new order prioritizing deregulation and limiting federal oversight of artificial intelligence).
[115] *Id.* (quoting Ferguson's leaked FTC agenda on social media platform X); Shylah R. Alfonso et al., *Insight into the Upcoming Trump Administration's Antitrust Policy*, PERKINS COIE (Jan. 10, 2025), https://perkinscoie.com/insights/update/insight-upcoming-trump-administrations-antitrust-policy (on file with the University of Baltimore Law Forum)).

three years to de-escalate policy initiatives for AI regulations over all industries, including Fintech.[116]

IV. SOLUTION: MODPA MUST BE AMENDED TO ADDRESS AI REDLINING IN MORTGAGE LENDING.

To address the challenges outlined above, Maryland state policymakers must adopt a proactive approach to regulating AI in lending.[117] This includes implementing transparency requirements, such as mandating that lenders provide explanations for AI-driven decisions and conducting regular audits of algorithms to identify and mitigate bias.[118] Furthermore, laws like MODPA could play a critical role in limiting the use of discriminatory data, ensuring that AI systems do not rely on variables that serve as proxies for race or socioeconomic status.[119] By addressing these regulatory gaps, policymakers can help ensure that AI lending models promote fairness and equity rather than exacerbating existing disparities.[120]

A. MODPA's Exemption for Credit Reporting Data and its Implications.

The Governor of Maryland, Wes Moore, signed MODPA into law on May 9, 2024, to take effect on October 1, 2025.[121] The enactment of MODPA made Maryland the eighteenth state of twenty to adopt comprehensive data

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[116] Martin & Veatch, *supra* note 112.

[117] *See, e.g.*, *Consumer Financial Protection Circular 2022-03*, CFPB (May 26, 2022), https://www.consumerfinance.gov/compliance/circulars/circular-2022-03-adverse-action-notification-requirements-in-connection-with-credit-decisions-based-on-complex-algorithms (on file with the University of Baltimore Law Forum) (emphasizing the need for oversight of algorithmic decision-making in lending); Cary Coglianese & Alicia Lai, *Algorithm vs. Algorithm*, 71 DUKE L.J. 1281, 1333-39 (2021) (highlighting the need for regulatory approaches to manage risks posed by algorithmic systems); WHITE HOUSE OFF. OF SCI. & TECH. POL'Y, BLUEPRINT FOR AN AI BILL OF RIGHTS: MAKING AUTOMATED SYSTEMS WORK FOR THE AMERICAN PEOPLE 5 (2022), https://marketingstorageragrs.blob.core.windows.net/webfiles/Blueprint-for-an-AI-Bill-of-Rights.pdf (on file with the University of Baltimore Law Forum) (calling for safeguards against algorithmic discrimination).

[118] *See infra* Part IV.

[119] *See infra* Part IV.

[120] *See infra* Part IV.

[121] F. Paul Pittman & Abdul M. Hafiz, *Md. Enacts Comprehensive Data Privacy Law*, WHITE & CASE (May 14, 2024), https://www.whitecase.com/insight-alert/maryland-enacts-comprehensive-data-privacy-law (on file with the University of Baltimore Law Forum).

privacy legislation in the United States.[122] Overall, MODPA mirrors many of the other state data privacy acts with some notable differences, including unique data minimization requirements.[123] The data minimization provision in MODPA states that personal data collection must be limited "to what is reasonably necessary and proportionate *to provide or maintain a product or service requested by the consumer* to whom the data pertains."[124] This means that MODPA primarily regulates data collection that extends beyond personal data deemed "reasonably necessary" to provide or maintain the requested product or service.[125] This safeguard to personal data has the potential to prevent the collection of alternative data points in lending that are unnecessary for determining creditworthiness (such as whether a consumer graduated college) and potentially curb digital redlining effects.[126]

However, a significant limitation of MODPA lies in its explicit exemption for credit reporting data.[127] This carve-out allows lenders to bypass MODPA's stricter requirements when using data associated with credit reporting, such as credit scores and certain alternative data points tied to creditworthiness assessments.[128] While the intention behind this exemption may have been to align MODPA with existing federal frameworks, such as the Fair Credit Reporting Act ("FCRA") and the Graham Leach Bliley Act ("GLBA"), it creates a regulatory gap that undermines MODPA's broader goal of protecting consumer data.[129]

The CFPB warns that federal regulatory frameworks, such as FCRA and GLBA, do not properly protect consumers from modern data surveillance and that state laws like MODPA that carve out exceptions for financial institutions fail to address the gap in existing privacy laws.[130] The CFPB

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[122] *Which States Have Consumer Data Privacy Laws?,* BLOOMBERG L. (Apr. 7, 2025), https://pro.bloomberglaw.com/insights/privacy/state-privacy-legislation-tracker/#map-of-state-privacy-laws (on file with the University of Baltimore Law Forum).

[123] Kate Lucente et. al., *US: Maryland Online Data Privacy Act Summary and Comparative Analysis*, DLA PIPER (July 2, 2024), https://www.dlapiper.com/en-us/insights/publications/2024/07/us-maryland-online-data-privacy-act-summary-and-comparative-analysis (on file with the University of Baltimore Law Forum).

[124] H.B. 567, 2024 Gen. Assemb., 446th Sess. (Md. 2024).

[125] David Stauss, *Maryland Legislature Passes Consumer Data Privacy Bill,* HUSCH BLACKWELL (Apr. 8, 2024), https://www.bytebacklaw.com/2024/04/maryland-legislature-passes-consumer-data-privacy-bill (on file with the University of Baltimore Law Forum).

[126] *See supra* Section III.A.

[127] H.B. 567 § 14-4603(B), 2024 Gen. Assemb., 446th Sess. (Md. 2024).

[128] *See Report Details Carveouts for Financial Institutions in State Data Privacy Laws*, CFPB (Nov. 12, 2024), https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-details-carveouts-for-financial-institutions-in-state-data-privacy-laws/#:~:text=The%20current%20federal%20framework%20for,collection%20of%20especially%20sensitive%20data (on file with the University of Baltimore Law Forum).

[129] *Id.*

[130] *Id.*

encourages state legislators to reconsider exempting financial institutions from their data privacy laws.[131] It is important to note, that the CFPB has advised state lawmakers that if they amend their data privacy laws to remove exceptions for financial institutions, they will not be preempted by FCRA and GLBA.[132] This is because both FCRA and GLBA expressly preserve from preemption state regulations consistent with, and that provide greater privacy protections than, their own requirements.[133] Therefore, as long as state privacy laws are not less protective than FCRA and GLBA, there is no risk of preemption.[134]

B. Evaluating MODPA's Potential as a Tool Against AI-Driven Redlining.

One of MODPA's most notable provisions is its data minimization requirement, which mandates that personal data collection be limited to what is "reasonably necessary and proportionate to provide or maintain a product or service requested by the consumer."[135] In theory, this provision could safeguard against AI lending models relying on *excessive* alternative data points—such as social media activity, educational background, and online purchases—that may reinforce existing biases.[136]

Digital civil rights groups, such as Access Now, have identified data minimization as a core principle of data protection.[137] The group opposes excessive corporate data collection practices that contribute to discriminatory outcomes.[138] Access Now recommends implementing robust data minimization requirements to mitigate discriminatory effects, while allowing a narrow exception for collecting data from protected groups solely for civil rights auditing aimed at identifying and eliminating harm.[139]

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[131] *Id.*
[132] Kevin M. Toomey et al., *CFPB Report Highlights Gaps in Privacy Protections for Financial Services Consumers; Suggests State Action*, ARNOLD & PORTER (Dec. 11, 2024), https://www.arnoldporter.com/en/perspectives/advisories/2024/12/cfpb-report-highlights-gaps-in-privacy-protections#:~:text=In%20the%20CFPB's%20view%2C%20neither,than%20the%20federal%20laws'%20requirements (on file with the University of Baltimore Law Forum).
[133] *Id.*
[134] *Id.*
[135] Stauss, *supra* note 125.
[136] *See supra* Part III (referencing the overuse of alternative data in lending decisions).
[137] Eric Null et al., *Data Minimization Report: Key to Protecting Privacy and Reducing Harm*, ACCESS NOW 4 (May 2021), https://www.accessnow.org/wp-content/uploads/2021/05/Data-Minimization-Report.pdf (on file with the University of Baltimore Law Forum).
[138] *Id.* at 7-8.
[139] *Id.*

However, without specific guidance on AI lending, financial institutions may still justify collecting such data under the premise of improving risk assessment models.[140] Since AI models can detect correlations between non-traditional data and default risks, lenders may argue that these data points are "reasonably necessary" for evaluating creditworthiness, thereby skirting MODPA's intended protections.[141] When making machine learning models, programmers decide "what variables to use, how to define categories or thresholds for sorting information, and which datasets to use to build algorithms."[142] To address this issue, policymakers should consider amending MODPA to explicitly prohibit certain categories of alternative data from being collected, thereby pressuring programmers to recategorize which datasets to base their AI decision-making on.[143]

Another provision of MODPA prohibits the collection of consumer data for discriminatory purposes, which, on its face, could serve as an important tool in addressing AI-driven redlining.[144] If enforced correctly, this provision could prevent mortgage lenders from relying on data that disproportionately harms certain racial or economic groups.[145] However, the challenge lies in defining and enforcing discrimination in AI models.[146] Many AI lending systems do not explicitly factor in race or protected characteristics but rely on alternative data points that correlate with them, such as zip codes, commuting patterns, and social networks.[147] Because discrimination in AI lending often manifests as disparate impact rather than intentional bias, financial institutions may argue that their data collection practices are neutral even when they disproportionately exclude marginalized borrowers.[148] To make this provision effective, MODPA should be amended to require AI-specific audits and transparency reports.[149] Lenders should have to prove that

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[140] *See supra* Section III.B; Ritesh Shetty, *The Role of AI in Transforming Credit Risk Assessment Process*, ARYA.AI (May 30, 2024), https://arya.ai/blog/ai-in-credit-risk-assessment (on file with the University of Baltimore Law Forum).
[141] Shetty, *supra* note 140.
[142] A.R. Lange & Natasha Duarte, *Understanding Bias in Algorithmic Design*, MEDIUM (Sept. 6, 2017), https://medium.com/impact-engineered/understanding-bias-in-algorithmicdesign-db9847103b6e (on file with the University of Baltimore Law Forum).
[143] *See supra* Part III and Section IV.A (discussing the benefits of amending MODPA).
[144] *See generally* H.B. 567 § 14-4607, 2024 Gen. Assemb., 446th Sess. (Md. 2024) (prohibiting the collection of consumer data for discriminatory purposes).
[145] *Id.*
[146] *See supra* Section III.B (explaining the transparency challenges between the back-end algorithm and the loan decision).
[147] *See supra* Section III.A (explaining the migration to alternative data collection from traditional data collection).
[148] Wu, *supra* note 8, at 92 (explaining the need to move past typical disparate impact liability when examining algorithmic discrimination issues).
[149] *See supra* Section III.C.

their data collection and AI models do not result in discriminatory outcomes, particularly for historically marginalized communities like those in Baltimore.[150]

C. Strengthening Enforcement and Accountability.

Another weakness in MODPA is its lack of a private right of action, meaning that only the Maryland Attorney General (the "AG") has the authority to enforce the law.[151] Without the ability for individuals or advocacy groups to bring lawsuits against non-compliant financial institutions, the effectiveness of MODPA's protection is entirely dependent on the AG's willingness to investigate and prosecute violations.[152]

This enforcement structure poses a substantial risk: if the AG does not prioritize AI-driven discrimination in lending, MODPA's anti-discrimination provisions will remain largely symbolic.[153] Historically, fair lending violations have been difficult to detect and enforce due to the opacity of AI systems and the difficulty of proving discrimination.[154]

To strengthen enforcement, MODPA should be amended to include a private right of action, allowing consumers and civil rights organizations to challenge discriminatory lending practices in court.[155] This would increase accountability for financial institutions and provide borrowers with a legal avenue to contest unfair lending decisions.[156]

D. The Need for State Level Action in the Absence of Federal Oversight.

Trump's second presidential term brings little hope for federal regulation of AI-driven lending discrimination.[157] In his last term as

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[150] *See supra* Section III.C (showing the need for more transparency in algorithmic decision-making).
[151] Lucente et al., *supra* note 123.
[152] *Id.*
[153] *Id.*
[154] *See supra* Section III.C (discussing the "black box" issue).
[155] Becky Chao et al., *Enforcing a New Privacy Law: A Private Right of Action is Key to Ensuring that Customers Have their Own Avenue for Redress*, NEW AM. 2, 16 (Nov. 20, 2019), https://www.newamerica.org/oti/reports/enforcing-new-privacy-law/a-private-right-of-action-is-key-to-ensuring-that-consumers-have-their-own-avenue-for-redress/#:~:text=A%20private%20right%20of%20action%20is%20critical%20for%20aggrieved%20individuals,relying%20on%20the%20federal%20enforcer (on file with the University of Baltimore Law Forum).
[156] *Id.*
[157] Martin & Veatch, *supra* note 112.

President, Trump successfully rolled back fair lending protections, including weakening the Disparate Impact Rule under the Fair Housing Act, making it more difficult for consumers to challenge discriminatory lending practices.[158] If this pattern continues, any hopes for federal oversight of AI lending models will be minimal, leaving states like Maryland to take the lead.[159] Maryland policymakers must recognize that state-level action is the primary means of protecting borrowers from AI-driven discrimination.[160] By strengthening MODPA to regulate AI lending practices, Maryland can fill the gap left by federal inaction and set a precedent for other states to follow.[161]

V. CONCLUSION.

AI has significantly transformed mortgage lending, offering enhanced efficiency and data-driven decision-making.[162] However, without proper oversight, AI-driven systems risk perpetuating discriminatory practices reminiscent of historical redlining, particularly in cities like Baltimore.[163] These systems may inadvertently rely on biased credit reporting data and alternative data points that serve as proxies for race and socioeconomic status, thereby reinforcing existing disparities.[164]

MODPA, enacted on May 9, 2024, aims to protect consumer data privacy.[165] While MODPA introduces robust data minimization requirements, it notably exempts credit reporting data from its scope.[166] This exemption permits lenders to continue utilizing potentially biased data without adhering to MODPA's privacy safeguards, undermining the act's

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[158] Izzy Woodruff & Phoebe Plagens, *National Fair Housing Alliance Challenges Harmful Trump Administration Reversal of Fair Housing Rule*, NFHA (Oct. 22, 2020), https://nationalfairhousing.org/national-fair-housing-alliance-challenges-harmful-trump-administration-reversal-of-fair-housing-rule (on file with the University of Baltimore Law Forum).

[159] Danielle Ochs et al., *Trump Administration Unveils New AI Policy, Reverses Biden's Regulatory Framework*, OGLETREE DEAKINS (Feb. 7, 2025), https://ogletree.com/insights-resources/blog-posts/trump-administration-unveils-new-ai-policy-reverses-bidens-regulatory-framework (on file with the University of Baltimore Law Forum).

[160] *See generally* Seth Frothman & Brian Shearer, *Strengthening State-Level Consumer Protections*, CFPB (Jan. 14, 2025), https://www.consumerfinance.gov/about-us/blog/strengthening-state-level-consumer-protections (on file with the University of Baltimore Law Forum) (highlighting the role of states in advancing consumer protection efforts, particularly in areas where federal regulation may be insufficient).

[161] Toomey, *supra* note 132.

[162] *See supra* Section II.C (laying the background on technological advancements in the mortgage industry).

[163] *See supra* Section III.B.

[164] *See supra* Section III.B.

[165] *See supra* Section IV.A.

[166] *See supra* Section IV.A.

intent to prevent discriminatory practices.[167] Moreover, MODPA does not provide a private right of action, granting exclusive enforcement authority to the AG.[168] This centralized enforcement mechanism may limit the act's effectiveness, as it relies solely on the state's initiative to address violations.[169]

Ultimately, addressing these issues is not just a matter of fairness but a necessary step toward ensuring economic equity in Baltimore and beyond.[170] By holding AI lending systems accountable and closing regulatory loopholes, Maryland has the opportunity to lead the nation in protecting its most vulnerable communities from the harms of modern redlining and advancing a more just financial future.[171]

[167] *See supra* Section IV.A.
[168] *See supra* Section IV.C.
[169] *See supra* Section IV.C.
[170] *See supra* Sections II.C and III.B.
[171] *See supra* Section IV.D.

COMMENT

POWERING MARYLAND'S FUTURE: STRENGTHENING MARYLAND'S NASCENT NUCLEAR FRAMEWORK FOR AN ERA OF UNPRECEDENTED DEMAND

By: Michael Zelley*

I. INTRODUCTION.

Nuclear power stands at a critical turn in Maryland's energy future, as the state grapples with unprecedented growth in energy demand driven by rapid data center development and broader electrification initiatives.[1] While nuclear power represents one of humanity's most sophisticated methods for energy production, offering remarkable efficiency and reliability, Maryland's legislative framework has only recently begun to meaningfully support its development and integration into the State's broader energy strategy.[2] The state's sole nuclear facility, the Calvert Cliffs Nuclear Power Plant ("Calvert Cliffs"), has provided clean and efficient energy to Maryland's power grid

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[1] *See* Gabrielle Lewis, *Maryland Data Center Summit Draws Hundreds, Aims to Educate Different Stakeholders*, LOUDOUN TIMES-MIRROR (Sept. 4, 2024), https://www.loudountimes.com/0local-or-not/2state/maryland-data-center-summit-draws-hundreds-aims-to-educate-different-stakeholders/article_0ec5cd20-6b1e-11ef-b8b7-c738800c7770.html (on file with the University of Baltimore Law Forum).

[2] *See Nuclear Explained*, U.S. ENERGY INFO. ADMIN. (Aug. 21, 2023), https://www.eia.gov/energyexplained/nuclear (on file with the University of Baltimore Law Forum) [hereinafter *Nuclear Explained*]; *see also Nuclear Power is the Most Reliable Energy Source and It's Not Even Close*, U.S. DEP'T OF ENERGY: OFF. OF NUCLEAR ENERGY (Mar. 24, 2021), https://www.energy.gov/ne/articles/nuclear-power-most-reliable-energy-source-and-its-not-even-close (on file with the University of Baltimore Law Forum) [hereinafter U.S. DEP'T OF ENERGY: OFF. OF NUCLEAR ENERGY] (discussing the reliability of nuclear power); *Advantages and Challenges of Nuclear Energy*, U.S. DEP'T OF ENERGY: OFF. OF NUCLEAR ENERGY (June 11, 2024), https://www.energy.gov/ne/articles/advantages-and-challenges-nuclear-energy (on file with the University of Baltimore Law Forum) [hereinafter *Advantages and Challenges of Nuclear Energy*] (discussing the advantages of nuclear power); Next Generation Energy Act, 2025 Md. Laws chs. 625-26 (creating a comprehensive energy procurement framework that, for the first time, enables state-facilitated development and financing of new nuclear generation).

for over fifty years, yet until recently, efforts to expand the State's nuclear capacity were largely constrained by limited statutory support.[3]

This Comment argues that although Maryland has taken significant legislative steps in recent years to modernize its energy framework and enable new nuclear development, its statutory scheme remains incomplete, limiting the State's ability to fully meet its energy and decarbonization goals.[4] While recent legislation begins to incorporate nuclear energy into Maryland's broader energy planning framework, its exclusion from the State's core clean energy policy creates a structural inconsistency—one that can be remedied through the adoption of a clean energy standard that fully integrates nuclear power without compromising safety or regulatory oversight.[5] Specifically, this Comment proposes amending Maryland's Renewable Portfolio Standard to adopt an expanded Clean Energy Standard that incorporates nuclear generation into the State's primary compliance framework while preserving existing credit-based market mechanisms.[6] By aligning the State's procurement mechanisms with its compliance obligations, such a framework resolves the current statutory disconnect between recognizing nuclear power as carbon-free and excluding it from the State's core clean energy regime.[7] Although critics argue that incorporating nuclear energy into clean energy standards may distort renewable energy markets or increase costs to ratepayers,[8] these concerns can be addressed within the existing statutory framework through careful calibration of compliance mechanisms and credit structures.[9]

This Comment proceeds as follows, Part II explores the fundamental principles of nuclear power generation, including its benefits, and traces its historical development nationally and in Maryland.[10] Part III analyzes Maryland's recent legislative successes and remaining shortcoming in

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[3] *See* CONSTELLATION ENERGY, CALVERT CLIFFS CLEAN ENERGY CENTER 1 (Jan. 2023), https://www.constellationenergy.com/content/dam/constellationenergy/pdfs/fact-sheets/Calvert_Cliffs_Clean_Energy_Center_Fact_Sheet.pdf (on file with the University of Baltimore Law Forum); *see also* MD. POWER PLANT RSCH. PROGRAM, MD. DEP'T OF NAT. RES., NUCLEAR POWER IN MARYLAND: STATUS AND PROSPECTS 2, 6, 10-11, 83 (2020) [hereinafter MD. POWER PLANT RSCH. PROGRAM] (discussing the status and challenges of nuclear power in Maryland).

[4] *See infra* Parts II-V.

[5] *See infra* Parts III-IV.

[6] *See infra* Part IV.

[7] *See infra* Part IV.

[8] *Oppose SB 434 Empowering New Energy Resources and Green initiatives Toward a Zero-Emission (ENERGIZE) Act of 2025: Hearing on S.B. 434 Before the S. Comm. on Educ., Energy, and the Env't*, 2025 Leg., 447th Sess. (Md. 2025) (statement of Food & Water Watch).

[9] *See infra* Part IV.

[10] *See infra* Part II.

addressing nuclear energy within its evolving statutory framework.[11] Finally, Part IV advocates for the adoption of a clean energy standard, drawing from successful approaches in other states, as the necessary next step to align Maryland's energy policy with its long-term reliability and decarbonization objectives.[12]

II. HISTORICAL DEVELOPMENT.

A. What is Nuclear Power?

Nuclear power is one of the most sophisticated methods for energy production ever devised.[13] The process begins at the atomic level, where the basic building blocks of all matter contain tremendous potential energy within their nuclear bonds.[14] These atoms, which comprise every known substance, consist of three essential components: protons, neutrons, and electrons.[15] The protons and neutrons are clustered together in the atom's nucleus, while electrons orbit this central core in patterns that help determine the atom's chemical properties and behavior.[16]

The key to nuclear power generation lies in the manipulation of these atomic structures, specifically through a process known as nuclear fission.[17] During nuclear fission, the nucleus of an atom is deliberately split apart, releasing the immense energy contained within its nuclear bonds, that is, the bonds between the protons and neutrons.[18] This process primarily utilizes uranium atoms, which have proven particularly suitable for controlled nuclear fission reactions.[19] When a neutron collides with an intact uranium nucleus, it causes the nucleus to split, releasing several products: additional neutrons, radiation, and significant amounts of heat energy.[20] These newly

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[11] *See infra* Part III.
[12] *See infra* Part IV.
[13] *See Nuclear Explained*, *supra* note 2.
[14] *Id.*
[15] *Id.*
[16] *Id.* For a more thorough explanation of the atomic structure, *see Atomic structure*, AUSTL. RADIATION PROT. & NUCLEAR SAFETY AGENCY, https://www.arpansa.gov.au/understanding-radiation/what-is-radiation/ionising-radiation/atomic-structure (on file with the University of Baltimore Law Forum) (last visited Mar. 26, 2026).
[17] *Nuclear Explained*, *supra* note 2.
[18] *Id.*
[19] *Id.*
[20] *Id.*

liberated neutrons then continue the process by colliding with other uranium atoms, creating a nuclear chain reaction.[21]

The practical application of this atomic process occurs within nuclear power plants, where the chain reaction is carefully controlled.[22] These facilities employ sophisticated engineering systems to manage the rate of nuclear fission, ensuring that the reaction proceeds at an optimal rate to generate the desired amount of heat energy.[23] This controlled release of atomic energy represents a remarkable achievement in energy technology, allowing humans to tap into the fundamental forces that bind matter together.[24] The heat generated through this process is then converted into electrical energy through traditional power generation methods.[25]

Nuclear power's sophisticated atomic process not only demonstrates humanity's mastery over fundamental physical forces, but also delivers remarkable practical benefits as an energy source.[26] The controlled nuclear fission reactions that occur within nuclear power plants harness atomic energy with unprecedented efficiency, allowing facilities to operate at maximum capacity more than 92% of the time throughout the year, far surpassing the reliability of both fossil fuel and renewable alternatives.[27] The careful engineering that enables the precise management of nuclear chain reactions translates into extended operational periods, with plants typically requiring refueling only once every two years, making nuclear power an exceptionally dependable energy source.[28]

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[21] *Id.*

[22] *See id.* Nuclear fission in nature is extremely rare; it is the structural design of nuclear reactors that permits a sustained fission reaction to occur. *See id.*; *see also* Laura Gil, *Meet Oklo, the Earth's Two-billion-year-old only Known Natural Nuclear Reactor*, INT'L ATOMIC ENERGY AGENCY (Aug. 10, 2018), https://www.iaea.org/newscenter/news/meet-oklo-the-earths-two-billion-year-old-only-known-natural-nuclear-reactor (on file with the University of Baltimore Law Forum) (explaining how it was once believed to be impossible for nuclear fission to occur naturally).

[23] *Nuclear Explained*, *supra* note 2.

[24] *Id.*

[25] *Id.*; Electrical power is generated by spinning a magnet inside a coil of wire using a turbine driven by a moving fluid. *Electricity explained*, U.S. ENERGY INFO. ADMIN, https://www.iaea.org/newscenter/news/meet-oklo-the-earths-two-billion-year-old-only-known-natural-nuclear-reactor (on file with the University of Baltimore Law Forum) (last updated Oct. 1, 2023).

[26] *See* U.S. DEP'T OF ENERGY: OFF. OF NUCLEAR ENERGY, *supra* note 2.

[27] *Id.* (listing the percent of the year that various energy sources produce maximum power: Nuclear (92.5%), Geothermal (74.3%), Natural Gas (56.6%), Hydropower (41.5%), Coal (40.2%), Wind (35.4%), Solar (24.9%)).

[28] *Id.*; In contrast, coal powered plants have to be continuously fueled, with power plants typically maintaining a stockpile of 90 to 120 days' worth of coal on hand. Jonathan Church, *Coal-fired power plants are well-stocked this year*, U.S. ENERGY INFO. ADMIN. (July 23,

This consistent operation, rooted in the fundamental process of nuclear fission, positions nuclear power as America's leading source of emissions-free electricity, preventing the release of more than 471 million metric tons of carbon annually, while simultaneously supporting nearly half a million domestic jobs with competitive wages.[29] The sophisticated technology that harnesses the immense energy within atomic bonds not only demonstrates remarkable scientific achievement, but also provides a practical solution for meeting our growing energy needs while advancing national security interests by maintaining energy independence.[30] Despite these well-established advantages, nuclear energy has historically occupied an uncertain position within state energy policy, often recognized for its reliability and low emissions yet excluded from the primary statutory mechanisms used to promote clean energy development.[31]

B. Benefits of Nuclear Power.

i. Land Use Considerations.

The land use efficiency of nuclear power represents a compelling consideration in favor of expanding Maryland's nuclear energy capacity.[32] Nuclear power can generate massive amounts of electricity while requiring remarkably little land, particularly when compared to other carbon-free energy sources, like wind and solar.[33] As documented in a comprehensive 2021 land use analysis, a typical nuclear power plant producing 1000 megawatts for electricity requires approximately 1.3 square miles of land.[34] To put this in perspective, this single nuclear facility can power roughly 750,000 homes while occupying a footprint smaller than Baltimore

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2025), https://www.eia.gov/todayinenergy/detail.php?id=65787 (on file with the University of Baltimore Law Forum).

[29] *Advantages and Challenges of Nuclear Energy, supra* note 2 (explaining how much carbon would be released into the atmosphere if a non-clean source of energy was used to generate the same amount of power as nuclear currently produces).

[30] *Nuclear Explained*, *supra* note 2; *see Advantages and Challenges of Nuclear Energy, supra* note 2.

[31] *See infra* Part III.

[32] *See* Elizabeth Wachs & Bernard Engel, *Land Use for United States Power Generation: A Critical Review of Existing Metrics with Suggestions for Going Forward*, 143 RENEWABLE & SUSTAINABLE ENERGY REV. 1, 1 (2021).

[33] *See id.* at 7-8.

[34] *Id.* at 8.

Washington International Airport and the University of Maryland's campus in College Park.[35]

The concentrated nature of nuclear power generation provides distinct advantages from an environmental impact perspective.[36] While renewable energy sources like wind and solar require a large environmental footprint across vast geographic areas, nuclear plants concentrate their land use impact to a single, smaller location.[37] This concentrated footprint helps minimize habitat fragmentation and other ecological impacts.[38] Furthermore, nuclear power plants can often be sited on previously developed industrial land, whereas utility-scale renewable installations frequently require development of undisturbed natural areas.[39] These siting advantages, combined with nuclear power's superior space efficiency, make it an optimal choice for minimizing the land use impacts of Maryland's clean energy transition.[40]

ii. Job Creation.

Nuclear facilities serve as powerful employment engines, generating substantial direct and indirect job opportunities that persist for decades.[41] Each operational nuclear plant employs between 500 and 800 permanent workers, with salaries averaging fifty percent higher than other electricity generation sources.[42] During peak construction periods, a single reactor project can employ up to nine thousand workers.[43] More importantly, these

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[35] *See id.*; *BWI Airport Facts & Figures*, BWI AIRPORT, https://bwiairport.com/flying-with-us/about-bwi/facts-figures (on file with the University of Baltimore Law Forum) (last visited Apr. 10, 2026) (listing the size of the airport at 3,596.3 acres (~5.6 square miles)); *Introduction to the University of Maryland*, UNIV. OF MD., https://academiccatalog.umd.edu/graduate/introduction-university-maryland/ (on file with the University of Baltimore Law Forum) (last visited Apr. 10, 2026) (explaining that the university is situated on 1,300 acres (~2 square miles)).

[36] *See* Wachs & Engel, *supra* note 32, at 8.

[37] *Id.*

[38] *Id.*

[39] *See* J. HANSEN ET AL., INVESTIGATING BENEFITS AND CHALLENGES OF CONVERTING RETIRING COAL PLANTS INTO NUCLEAR PLANTS 71 (Idaho Nat'l Lab'y, INL/RPT-22-67964 Rev. 1, 2022) (finding that 80% of retired coal plant sites were suitable locations for conversion to nuclear power generation); Wachs & Engel, *supra* note 32, at 1 ("Renewable-energy systems have the potential to vastly increase the land devoted to energy thus drastically changing landscapes and habitats.").

[40] *See* J. HANSEN ET AL., *supra* note 39, at 71; Wachs & Engel, *supra* note 32, at 1.

[41] *Jobs: A Single Nuclear Power Plant Creates More Jobs Than Any Other Type of Energy Generation Facility*, NUCLEAR ENERGY INST.: ADVANTAGES, https://www.nei.org/advantages/jobs (on file with the University of Baltimore Law Forum) (last visited Nov. 3, 2024) [hereinafter *Jobs*].

[42] *Id.*

[43] *Id.*

positions span diverse skill levels and backgrounds.[44] The employment multiplier effect is also significant, with every one hundred nuclear plant jobs creating an additional 250 positions in the broader economy.[45]

iii. Grid Reliability.

From an infrastructure reliability perspective, nuclear power provides unique grid stability benefits that complement Maryland's renewable energy goals.[46] As the United States Department of Energy explains, energy reliability requires power systems that can withstand "instability, uncontrolled events, cascading failures, or unanticipated loss of system components."[47] Nuclear plants deliver this stability through consistent baseload generation that operates at approximately 90% capacity.[48] Unlike intermittent renewable sources, nuclear facilities can provide reliable power regardless of weather conditions or time of day, helping prevent disruptions that could impact critical infrastructure, such as hospitals and emergency services.[49]

iv. Cost Considerations.

While nuclear power projects require substantial upfront capital investments, various financing mechanisms and long-term operational economics make these costs manageable and ultimately cost effective.[50] The Biden Administration's recent nuclear initiatives, including significant United States Department of Energy loan guarantee commitments, demonstrate the availability of federal support for nuclear development.[51] These initial investments are offset by nuclear power's favorable long-term

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[44] *Id.*
[45] *Id.*
[46] *See* Off. of Energy Efficiency & Renewable Energy, *Energy Reliability and Resilience*, U.S. DEP'T OF ENERGY, https://www.energy.gov/eere/energy-reliability-resilience (on file with the University of Baltimore Law Forum) (last visited Nov. 3, 2024) [hereinafter *Energy Reliability and Resilience*].
[47] *Id.*
[48] Nadira Barkatullah & Ali Ahmad, *Current Status and Emerging Trends in Financing Nuclear Power Projects*, 18 ENERGY STRATEGY REV. 127, 132 (2017).
[49] *Energy Reliability and Resilience*, *supra* note 46.
[50] *See* Barkatullah & Ahmad, *supra* note 48, at 127.
[51] Press Release, Joseph R. Biden, The Whitehouse Briefing Room, Fact Sheet: Biden-Harris Administration Announces New Steps to Bolster Domestic Nuclear Industry and Advance America's Clean Energy Future (May 29, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/29/fact-sheet-biden-harris-administration-announces-new-steps-to-bolster-domestic-nuclear-industry-and-advance-americas-clean-energy-future (on file with Author).

operational profile, as facilities maintain remarkably low fuel and operational costs, with variable operational and maintenance expenses constituting only approximately 13% of total costs.[52] Additionally, nuclear facilities' potential operational lifespan of up to 80 years enables multi-generational returns that justify the upfront expenditure.[53]

This combination of available financing support and favorable long-term economics helps mitigate concerns about nuclear power's initial capital requirements.[54] The positive characteristics of nuclear power are directly relevant to modern energy policy, where increasing demand and decarbonization goals require both reliability and emissions reductions.[55] As a result, the extent to which statutory frameworks recognize and incorporate nuclear energy has significant implications for a state's ability to meet its long-term energy objectives.[56]

C. Potential Negatives Associated with Nuclear Power.

As with any industrial process, nuclear power is not free from concerns and criticisms.[57] The first concern is the possibility of a nuclear accident.[58] The most extreme example occurred on April 26, 1986, at the nuclear power facility at Chernobyl, Ukraine, which at the time was under the control of the Soviet Union.[59] The accident at Chernobyl killed 28 employes within 4 months of the accident and contaminated large areas of land with radioactive material.[60] While the accident was a terrible tragedy, the reality is that with the safety protocols in place and improvements in

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[52] Barkatullah & Ahmad, *supra* note 48, at 128.
[53] *Id.* at 127.
[54] *Id.*
[55] *See* INT'L ENERGY AGENCY, NUCLEAR POWER IN A CLEAN ENERGY SYSTEM 3 (Trevor Morgan & Caren Brown eds., 2019) (discussing the importance of nuclear power in clean energy transitions).
[56] *See id.* at 4-5 ("Without nuclear investment, achieving a sustainable energy system will be much harder.").
[57] *See Advantages and Challenges of Nuclear Energy*, *supra* note 2 (discussing challenges of nuclear power).
[58] *Id.*
[59] *Backgrounder on Chernobyl Nuclear Power Plant Accident*, U.S. NUCLEAR REGUL. COMM'N, https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/chernobyl-bg#:~:text=The%20accident%20released%20massive%20amounts%20of%20radioactive,of%20Belarus%2C%20the%20Russian%20Federation%2C%20and%20Ukraine (on file with the University of Baltimore Law Forum) (last updated Apr. 4, 2024) [hereinafter *Backgrounder on Chernobyl*].
[60] *Id.*

reactor design, the probability of another Chernobyl level accident occurring is extremely low.[61]

The second concern is what to do with the radioactive waste produced by nuclear reactors.[62] The most radioactive waste is the spent fuel assemblies, which can remain hazardous for thousands of years.[63] This concern, however, could be effectively eliminated through new technology, such as fast reactors.[64] From 1984 to 1994 the United States government at the Argonne National Laboratory worked on developing a fast reactor known as the Integral Fast Reactor ("IFR").[65] Even though the IFR was on track to address the major criticisms of nuclear power, the program was cancelled abruptly approximately 2 years before completion due to political pressure.[66]

While it is important to acknowledge these downsides to nuclear power, it is equally important to acknowledge that they have the ability to be reduced or eliminated with advancements in technology.[67] These concerns have historically shaped the regulatory treatment of nuclear energy, leading to a statutory focus on safety, oversight, and risk mitigation rather than on facilitating development or integrating nuclear power into broader energy policy frameworks.[68]

D. History of Nuclear Power Nationally and Globally.

Nuclear power began in 1942, when Nobel Prize-winning physicist Dr. Enrico Fermi successfully achieved the first controlled nuclear chain reaction using Chicago Pile-1, the world's first nuclear reactor.[69] In 1946, the

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[61] *Id.*

[62] *Advantages and Challenges of Nuclear Energy*, *supra* note 2.

[63] *Nuclear power and the environment*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/energyexplained/nuclear/nuclear-power-and-the-environment.php (on file with the University of Baltimore Law Forum) (last visited Mar. 26, 2026).

[64] Jeffrey Donovan, *Shrinking nuclear waste and increasing efficiency for a sustainable energy future*, 61-3 IAEA BULLETIN 14, 14-15 (Sept. 2020), https://www.iaea.org/sites/default/files/2025-09/cleanenergy_0.pdf (on file with the University of Baltimore Law Forum).

[65] CHARLES E. TILL & YOON IL CHANG, PLENTIFUL ENERGY: THE STORY OF THE INTEGRAL FAST REACTOR 1 (John Ackerman et al. eds., 2011), https://anl.box.com/s/y4meh5nse77r3b2to3lwwp2rzna7xtve (on file with the University of Baltimore Law Forum).

[66] *Id.* at 47.

[67] *Advantages and Challenges of Nuclear Energy*, *supra* note 2.

[68] *See id.*

[69] American Experience, *Meltdown at Three Mile Island: Timeline of Nuclear Technology*, PBS, https://www.pbs.org/wgbh/americanexperience/features/three-nuclear-technology (on file with the University of Baltimore Law Forum) (last visited Jan. 3, 2025) [hereinafter PBS]. While the purpose of Chicago Pile-1 was the development of a nuclear weapon, the technological knowledge gained was instrumental in the development of nuclear power.

United States' Atomic Energy Act was passed, creating the framework for governmental regulation of the newly privatized nuclear power industry, and the legislation established the first government regulatory body tasked with overseeing nuclear power.[70] The act made it federal policy to develop and use atomic energy "to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise."[71] The law created programs for research and development, information control, and promoting the aforementioned policies.[72] The 1946 act also created a comprehensive licensing system for civilian nuclear power, requiring companies to obtain commission approval before engaging in any nuclear-related activities.[73]

Federal support for nuclear power technology led to the establishment of several research facilities.[74] On December 20, 1951, the Argonne National Laboratory successfully converted nuclear power to electrical energy for the first time.[75] The further development of nuclear power inspired the Atoms For Peace program, announced in December 1953 by President Eisenhower, which sought to promote nuclear power by demonstrating its benefits.[76] President Eisenhower's vision for the world was to "tak[e] nuclear materials 'out of the hands of soldiers . . . (and placing them) into the hands of those who will . . . adapt (them) to the arts of peace.'"[77]

The next step in nuclear power development came with the first major change to federal regulation of the nuclear power industry came with the Atomic Energy Act of 1954.[78] This change granted even more access to technological information regarding nuclear power to the private energy sector.[79] The 1954 act also granted the Atomic Energy Commission broad authority to establish and enforce safety standards and regulations to protect

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Louise Lerner, *The first nuclear reactor, explained*, UNIV. OF CHI., https://news.uchicago.edu/explainer/first-nuclear-reactor-explained (on file with the University of Baltimore Law Forum) (last updated Dec. 2025).

[70] Lerner, *supra* note 69; *History*, U.S. NUCLEAR REGUL. COMM., https://www.nrc.gov/about-nrc/history#:~:text=Before%20the%20NRC%20was%20created,of%20commercial%20nuclear%20power%20possible (on file with the University of Baltimore Law Forum) (last updated Feb. 20, 2025).

[71] 42 U.S.C.A. § 2011 (West 1992).

[72] 42 U.S.C.A. § 2013 (West 1992).

[73] Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 (1946).

[74] Lerner, *supra* note 69.

[75] *Id.*

[76] PBS, *supra* note 69.

[77] *Id.*

[78] *Id.*

[79] *Id.*

health and minimize dangers in nuclear activities.[80] This new policy led to the first residential area powered by nuclear energy in 1955, in Arco, Idaho.[81] followed by the first civilian nuclear power plant two years later.[82]

Over the next two decades, nuclear power continued to expand, demonstrating its value through multiple energy crises.[83] However, in March of 1979, the Three Mile Island Nuclear Generating Station ("Three Mile Island") suffered the most severe nuclear incident in American history.[84] Even though the accident resulted in no adverse effects on the surrounding population, including zero deaths or injuries,[85] public sentiments shifted severely towards an anti-nuclear stance.[86] The political ramifications of the accident at Three Mile Island were evidenced by the termination of funding for other nuclear power projects, such as the Clinch River Breeder Reactor project.[87]

Public fears were crystalized in 1986, when a nuclear reactor at Chernobyl in the Soviet Union experienced the "worst nuclear accident in history."[88] This incident and its aftermath led to a rapid decline in new nuclear development, and even the dismantling of some active nuclear plants, regardless of the massive financial loss caused by those decisions.[89] This decline in new generation capacity has resulted in 96% of the United States'

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[80] Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919 (1954).

[81] PBS, *supra* note 69. This was a demonstration of the ability of nuclear power to be used for civilian purposes and only lasted approximately one hour. Press Release, U.S. Atomic Energy Comm., Idaho Town Gets Atomic Power and Light in Nuclear Power Demonstration (Aug. 12, 1955), https://www.ne.anl.gov/About/reactors/borax3/index.shtml (on file with the University of Baltimore Law Forum).

[82] PBS, *supra* note 69 ("The Sodium Reactor Experiment at Santa Susana, California becomes the first civilian nuclear power unit to go on-line. The unit continued to generate power until 1966.").

[83] *Id.*

[84] Off. of Nuclear Energy, *5 Facts to Know About Three Mile Island*, U.S. DEP'T OF ENERGY: OFF. OF NUCLEAR ENERGY (May 4, 2022), https://www.energy.gov/ne/articles/5-facts-know-about-three-mile-island#:~:text=Experts%20determined%20that%20the%20approximately,plant%20workers%20or%20surrounding%20public (on file with the University of Baltimore Law Forum) [hereinafter *5 Facts to Know About Three Mile Island*].

[85] *Id.*

[86] PBS, *supra* note 69.

[87] *Id.*

[88] *Id.* The accident at Chernobyl occurred when testing caused a runaway reaction leading to a steam explosion. *Backgrounder on Chernobyl*, *supra* note 51. The accident was caused by a combination of poor reactor designs, lack of proper procedures and controls, lack of competent staff, and lack of backup safety systems. *See id.* (explaining the concepts learned from the Chernobyl accident).

[89] PBS, *supra* note 69.

current nuclear capacity being developed between 1970 and 1990, including Maryland's nuclear power station.[90]

Overall, from the first commercial nuclear power plan coming online until the late 1980s, nuclear power enjoyed a meteoric rise in its development.[91] This rise was halted in its tracks by the fears brought about by the accident at Chernobyl.[92] As technology has substantially mitigated the basis of those fears, Maryland can look to the initial growth period for inspiration of how nuclear power can be expanded rapidly and safely.[93] This historical trajectory, marked by rapid early expansion followed by decades of stagnation driven by public perception and regulatory caution, continues to shape the modern legal and policy landscape surrounding nuclear energy, including the limited role it plays in contemporary state energy frameworks.[94]

E. History of Nuclear Power in Maryland.

Maryland's experience with nuclear power reflects both the promise of long-term, carbon-free energy generation and the regulatory, political, and economic barriers that have ultimately limited its development to a single facility.[95] On May 8, 1975, Unit 1 at Calvert Cliffs brought nuclear power to Maryland's power grid.[96] This marked the beginning of a near 50 year stretch of bringing clean and efficient energy to Maryland.[97] Unfortunately, Calvert Cliffs has remained the only source of nuclear energy in the state since.[98]

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[90] *Most U.S. Nuclear Power Plants Were Built Between 1970 and 1990*, U.S. ENERGY INFO. ADMIN. (Apr. 27, 2017), https://www.eia.gov/todayinenergy/detail.php?id=30972 (on file with the University of Baltimore Law Forum); *see also Deep Dive: Maryland's Nuclear Future,* MD. ASS'N. OF COUNTIES (Oct. 9, 2025), https://conduitstreet.mdcounties.org/2025/10/09/deep-dive-maryland-nuclear-future/#:~:text=Maryland's%20nuclear%20experience%20centers%20on,its%20most%20reliable%20power%20producers (on file with the University of Baltimore Law Forum) ("Maryland's nuclear experience centers on a single facility: the Calvert Cliffs Nuclear Power Plant in Calvert County. Commissioned between 1975 and 1977, the two-reactor facility remains the state's only nuclear station and one of its most reliable power producers.").

[91] *See supra* notes 60-90 and accompanying text.

[92] *See supra* notes 79-91 and accompanying text.

[93] *See supra* notes 60-84 and accompanying text.

[94] *See* DAVID TOKE ET AL., NUCLEAR POWER IN STAGNATION: A CULTURAL APPROACH TO FAILED EXPANSION 1-5 (2021) (discussing the stagnation of nuclear development due to safety concerns).

[95] *See infra* Section II.E.

[96] CONSTELLATION ENERGY, *supra* note 3.

[97] *Id.*

[98] MD. POWER PLANT RSCH. PROGRAM, *supra* note 4, at 2. While Calvert Cliffs is the only nuclear power plant located in Maryland, the state receives additional nuclear power from the Peach Bottom Atomic Power Station in York County, Pennsylvania through the regional

In May 1967, the Baltimore Gas and Electric Company ("BG&E") announced its plan to build a nuclear power plant in southern Maryland.[99] At the time, it was one of the largest planned commercial nuclear power plants in the country.[100] Funding for the project was provided not by the government, but through a private securities sale by BG&E.[101] The legislature's only contribution to the project was passing a bill that permitted BG&E to pay inventory taxes at the Calvert County rate, vice the Baltimore City rate.[102] While this methodology resulted in the completion of the project, public bond measures in place of corporate securities could have kept project costs lower.[103]

The process from inception to commercial operation was not smooth, as new federal environmental laws created some unforeseen problems.[104] At the time, a group of scientists were concerned that environmental impacts of Calvert Cliffs were not properly considered in the licensing process under the National Environmental Policy Act of 1969 ("NEPA").[105] The court agreed

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power transmission system. Greg Williams, *The Importance of Nuclear Energy to Maryland's Environment*, Maryland Energy Administration (May 21, 2020), https://news.maryland.gov/mea/2020/05/21/the-importance-of-nuclear-energy-to-marylands-economy-environment-and-its-electricity-needs/ (on file with the University of Baltimore Law Forum).

[99] Gene Smith, *Nuclear Unit Set by Baltimore Gas: Utility to Spend $302-Million on a 1.6-Billion-Kilowatt Plant in Maryland*, N.Y. TIMES (May 30, 1967), https://www.nytimes.com/1967/05/30/archives/nuclear-unit-set-by-baltimore-gas-utility-to-spend-302million-on-a.html (on file with the University of Baltimore Law Forum).

[100] *Id.*

[101] Jesse Glasgow, *Utility Plans Securities Sale to Finance Nuclear Plant*, THE BALT. SUN, May 30, 1967, at B9, ProQuest, Doc. No. 539500265.

[102] *Id.*

[103] *See* FED. HIGHWAY ADMIN., VALUE CAPTURE: CAPITALIZING ON THE VALUE CREATED BY TRANSPORTATION 1 (2023). Public bond financing reduces total project costs by allowing government entities to secure lower interest rates, a function of both the reduced risk profile of government backed debt and the tax-exempt status of such bonds. *See id*. ("Historically, interest paid on most municipal bonds has been exempt from federal income taxation, which allows states and political subdivisions to borrow at lower interest rates than a similarly creditworthy non-municipal borrower.").

[104] *See* Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971) (holding that the Atomic Energy Commission's licensing procedures violated NEPA by failing to adequately consider environmental impacts, and emphasizing that agencies must rigorously evaluate such impacts "to the fullest extent possible" before approving projects); *see also* Oliver Houck, *Unfinished Stories*, 73 U. COLO. L. REV. 867, 855, 886 (2002) (explaining that the Calvert Cliffs Coordinating Committee was comprised of concerned scientists, local residents, and environmentalists).

[105] *Calvert Cliffs' Coordinating Comm.*, 448 F.2d at 1111. The failure of the government to comply with NEPA and address the concerns of various powerful groups was a major setback not just for the Calvert Cliffs' project, but for new nuclear power construction generally. *See* John Gorham Palfrey, 74 COLUM. L. REV. 1375, 1380 (1974) ("*Calvert Cliffs* created

that the licensing rules of the Atomic Energy Commission did not meet their mandate under NEPA, therefore, the entire regulatory process had to be retooled.[106] This led to Calvert Cliffs being the first plant to produce an environmental impact statement, which delayed licensing by a year.[107]

Today, Calvert Cliffs remains the only nuclear power source in Maryland.[108] This status has remained unchanged, notwithstanding that Calvert Cliffs generates approximately 34% of Maryland's electricity and constitutes the state's largest source of carbon-free energy.[109] Unfortunately, nuclear development was stymied not just in Maryland, but nationwide, after the accident at Three Mile Island in 1979.[110]

However, in 2005, Calvert Cliffs was considered to be a strong candidate as the potential site for a new reactor.[111] The proposal made it well into the planning and design phase, projecting a 20 to 35% increase in Maryland's nuclear capacity.[112] Not only was the new reactor set to massively increase Maryland's carbon-free energy production, but its new design would recycle water instead of continuously flowing new bay water, further reducing environmental concerns about nuclear energy.[113] Unfortunately, poor federal energy loan practices led Constellation Energy[114] to walk away

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extraordinary difficulties for the Commission, both in conforming to the court's directives and licensing *any* nuclear reactors.") (emphasis in original).

[106] *Calver Cliffs' Coordinating Comm.*, 448 F.2d at 1128-29.

[107] Press Release, Constellation Energy, Calvert Cliffs Nuclear Power Plant Earns a Place in History (May 2007), https://www.nrc.gov/docs/ML0716/ML071640023.pdf (on file with the University of Baltimore Law Forum) [hereinafter Press Release, Constellation Energy].

[108] *See Power Plant Locations In and Around Maryland*, MD. DEP'T OF NAT. RES., https://dnr.maryland.gov/pprp/Pages/PowerPlant-Locations.aspx (on file with the University of Baltimore Law Forum) (last visited Nov. 20, 2024) [hereinafter *Maryland Power Plant Locations*].

[109] MD. POWER PLANT RSCH. PROGRAM, *supra* note 3, at 2.

[110] Gwyneth K. Shaw, *Bush to Speak at Calvert Cliffs*, THE BALT. SUN (June 22, 2005), https://www.baltimoresun.com/2007/12/25/nuclear-power-has-new-shape (on file with the University of Baltimore Law Forum).

[111] *Id.*

[112] Tom Pelton, *Nuclear Power Has New Shape: Proposed Reactor at Calvert Cliffs Would Recycle Water, Draw 98% Less From Bay*, THE BALT. SUN (Dec. 25, 2007), https://www.baltimoresun.com/2007/12/25/nuclear-power-has-new-shape (on file with the University of Baltimore Law Forum).

[113] *Id.* Calvert Cliffs uses water pumped from the Chesapeake Bay for cooling, a practice which kills fish and other microscopic organisms. *Id.* The new design would have reduce the necessary water flow by 98%, resulting in significantly fewer fish deaths. *Id.*

[114] In 1999, Constellation Energy is created with Baltimore Gas & Electric as a subsidiary. *History: Driving change in clean energy leadership*, CONSTELLATION ENERGY, https://www.constellationenergy.com/about/business-overview/history.html#:~:text=Constellation%20Navigator%2C%20a%20division%20of,2021 (on file with the University of Baltimore Law Forum) (last visited Mar. 27, 2026). In

from the project after expending $880 million towards the project.[115] This left Maryland without an expansion of clean energy and the loss of thousands of jobs projected to result from the project.[116] As of today, there are no nuclear projects under review by Maryland, continuing to leave Calvert Cliffs as Maryland's only nuclear power facility for the foreseeable future.[117]

F. Regulatory Framework.

The nuclear power industry is primarily regulated by the federal government through the Nuclear Regulatory Commission ("NRC") with state and local government playing a relatively minor role.[118] The NRC is the entity responsible for licensing nuclear reactors.[119] The NRC utilizes two distinct frameworks for the licensing of commercial nuclear power facilities.[120] The traditional pathway involves sequential approvals, while an alternative streamlined process established in 1989 offers a more integrated approach.[121]

The traditional sequential framework begins with the issuance of a construction permit, contingent upon the applicant's submission of three critical components: initial safety evaluations, environmental impact assessments, and economic documentation, including antitrust considerations.[122] Following the NRC's technical review and documentation of safety parameters, the process mandates public engagement through

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2012, Constellation Energy merged with Exelon. *Id.* Constellation Energy and Exelon separated into two independent corporations in 2022. *Id.*

[115] Gus G. Sentementes, *Calvert Cliffs 3 Project Halted: Constellation Energy Pulls Out of Federal Loan Talks, Miffs French Partner*, THE BALT. SUN (Oct. 10, 2010), http://proxybl.researchport.umd.edu/login?url=https://www.proquest.com/baltimoresun/newspapers/calvert-cliffs-3-project-halted/docview/757267750/sem-2?accountid=40537 (on file with the University of Baltimore Law Forum).

[116] *Id.*

[117] *See Projects Under Review*, MD. DEP'T OF NAT. RES., https://dnr.maryland.gov/pprp/Pages/Projects-Under-Review.aspx (on file with the University of Baltimore Law Forum) (last updated May 23, 2025) [hereinafter *Projects Under Review*]; *see also* MD. POWER PLANT RSCH. PROGRAM, *supra* note 3, at 2 ("Calvert Cliffs is the only nuclear power plant operating in Maryland.").

[118] U.S. NUCLEAR REGUL. COMM'N, NUCLEAR POWER PLANT LICENSING PROCESS 1 (2004), https://www.nrc.gov/docs/ML0421/ML042120007.pdf (on file with the University of Baltimore Law Forum) [hereinafter NUCLEAR POWER PLANT LICENSING PROCESS]; *see also infra* notes 121-28 and accompanying text (discussing the NRC's licensing process).

[119] NUCLEAR POWER PLANT LICENSING PROCESS, *supra* note 118, at 1. Every nuclear power generation facility in the United States is required to be licensed by the federal government. 42 U.S.C. § 2131 (West 1992).

[120] NUCLEAR POWER PLANT LICENSING PROCESS, *supra* note 118, at 1.

[121] *Id.*

[122] *Id.* at 2.

hearings overseen by the Atomic Safety and Licensing Board, comprised of three members with both legal and technical expertise.[123] Subsequently, as construction progresses, operators must secure an operating license through additional submissions, detailing final design specifications and updated environmental considerations.[124] This process can take well over a decade from start to finish.[125]

The 1989 reforms introduced an innovative combined license mechanism that consolidates construction and operational authorizations.[126] This modernized approach incorporates two preliminary approval instruments: the early site permit, which validates location suitability for up to two decades, and the standard design certification, which endorses reactor designs for fifteen-year intervals.[127] One notable efficiency of the combined license pathway lies in its ability to incorporate previously approved early site permits and standardized designs.[128] While this framework expedites the process by preventing the re-examination of settled matters, it maintains regulatory rigor through mandatory completion of specified inspections and acceptance criteria.[129] Throughout both pathways, the NRC emphasizes public participation through structured meetings and mandatory hearings.[130]

The NRC maintains a comprehensive regulatory structure governed primarily through Chapter I of Title 10 of the Code of Federal Regulations.[131] The NRC supplements these regulations with detailed guidance documents, particularly through its Regulatory Guide system, [132] with Division 1 focusing

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[123] *Id.* at 2-3.
[124] *Id.* at 4.
[125] Duke Energy, *NRC New Licensing Process*, NUCLEAR INFO. CTR. (Jan. 17, 2012), https://nuclear.duke-energy.com/2012/01/17/nrc-new-nuclear-licensing-process#:~:text=The%20licensing%20process%20%E2%80%93%20something%20that,for%20new%20nuclear%20power%20facilities (on file with the University of Baltimore Law Forum).
[126] NUCLEAR POWER PLANT LICENSING PROCESS, *supra* note 118, at 4.
[127] *Id.* at 6, 8.
[128] *Id.* at 9.
[129] *Id.* at 9-10.
[130] *Id.* at 1.
[131] *Operating Reactors Regulations, Guidance, and Communications*, U.S. NUCLEAR REGUL. COMM'N, https://www.nrc.gov/reactors/operating/regs-guides-comm.html (on file with the University of Baltimore Law Forum) (last updated Oct. 28, 2020) [hereinafter *Operating Reactors*].
[132] *NRC Regulatory Guides*, U.S. NUCLEAR REGUL. COMM'N, https://www.nrc.gov/reading-rm/doc-collections/reg-guides/index.html (on file with the University of Baltimore Law Forum) (last updated July 2, 2024) [hereinafter *NRC Regulatory Guides*] ("The Regulatory Guide series provides guidance to licensees and applicants on implementing specific parts of the NRC's regulations, techniques used by the NRC staff in evaluating specific problems or postulated accidents, and data needed by the staff in its review of applications for permits or licenses.").

on power reactor operations.[133] Key guidance includes addressing personnel qualifications and specifically detailing combined license applications.[134] Furthermore, the NUREG series[135] provides regulatory guidance, extensive technical documentation, and specialized knowledge catalogs addressing specific reactor types.[136] This multi-tiered regulatory approach ensures consistent standards while maintaining flexibility through regular public comment periods announced in the Federal Register, demonstrating the NRC's commitment to both rigorous oversight and public engagement.[137] As a result, states retain limited authority over the safety and operation of nuclear facilities, but maintain primary control over energy policy decisions, including whether and how nuclear energy is incorporated into electricity markets and clean energy frameworks.[138]

However, Maryland plays a very small part in the direct regulation of nuclear power in the state, as primary authority remains vested in the federal government.[139] Consistent with this framework, Maryland historically sought to strike a balance by "encourag[ing] the constructive uses of radiation" while also "protect[ing] the public from unnecessary and harmful exposure resulting from a nuclear incident."[140] Even within this limited framework, Maryland is required to maintain its standards in accordance with those established by the Nuclear Regulatory Commission ("NRC").[141] The majority of statutorily mandated regulations have focused on the potential

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[133] *Operating Reactors*, *supra* note 131 ("The guides most applicable to licensing operators are in Power Reactors (Division 1)."). There are 10 divisions in total which range from Power Reactors (as pertinent here) to Transportation. *NRC Regulatory Guides*, *supra* note 132.

[134] *Operating Reactors*, *supra* note 131.

[135] NUREG-Series Publications, U.S. NUCLEAR REGUL. COMM'N, https://www.nrc.gov/readingrm/doc-collections/nuregs/index.html (on file with the University of Baltimore Law Forum) (last updated July 8, 2020) (stating that NUREG-Series publications are "[r]eports or brochures on regulatory decisions, results of research, results of incident investigations, and other technical and administrative information").

[136] *Operating Reactors*, *supra* note 131; *see, e.g.*, U.S. NUCLEAR REGUL. COMM'N, NUREG/BR-0468, FREQUENTLY ASKED QUESTIONS ABOUT LICENSE APPLICATIONS FOR NEW NUCLEAR POWER REACTORS (2009), https://www.nrc.gov/docs/ML1004/ML100470391 (on file with the University of Baltimore Law Forum).

[137] *Operating Reactors*, *supra* note 131. This is, of course, the usual notice and comment procedure required by the Administrative Procedure Act. 5 U.S.C. § 553 (West 2023).

[138] *See* Pac. Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212, 222 (1983) ("[T]he federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states. . . . Congress has allowed the state to determine-as a matter of economics-whether a nuclear plant vis-vis a fossil fuel plant should be built.").

[139] *See* MD. CODE ANN., ENV'T §§ 8-101, 8-704 (West 2025).

[140] *Id.* § 8-102(b).

[141] *Id.* § 8-106(c).

impact and control of radiation, which is overseen by the Radiation Control Advisory Board.[142]

This historically narrow focus on radiation management, rather than energy development, left Maryland with few mechanisms to actively promote nuclear power as part of its energy strategy.[143] The General Assembly's recent enactment of the Next Generation Energy Act reflects a notable shift in legislative posture from regulating the risks of nuclear technology to affirmatively recognizing its role in the State's energy future.[144] Indeed, the Next Generation Energy Act declares that "it is the policy of the State to encourage the development of clean, carbon-free nuclear power," marking a departure from prior statutory language and signaling a more active role for Maryland in facilitating nuclear energy development.[145] Against this backdrop, Maryland's recent legislative developments warrant closer examination, both from the progress they represent and the gaps that remain.[146]

III. ISSUE – MARYLAND HAS FAILED TO FULLY ADDRESS ITS GROWING ENERGY DEMANDS AND CLEAN ENERGY COMMITMENTS WITHIN ITS CURRENT STATUTORY FRAMEWORK.

The Maryland General Assembly has increasingly recognized the growing strain on the State's electric grid driven by rising demand and evolving generation needs.[147] In response, the General Assembly has taken meaningful steps to address these challenges through recent legislation.[148] In particular, the enactment of the Next Generation Energy Act reflects a deliberate shift towards a more active, state-directed approach to energy planning, including the facilitation of new nuclear generation resources.[149] At the same time, Maryland's existing clean energy framework remains oriented toward renewable generation and does not fully incorporate all carbon-free

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[142] *See id.* § 8-205.
[143] *See generally* MD. POWER PLANT RSCH. PROGRAM, *supra* note 3 (identifying potential, but largely unimplemented, state policy mechanisms, including portfolio standards, procurement programs, and financial incentives, to support nuclear energy development).
[144] *See* Next Generation Energy Act, 2025 Md. Laws chs. 625-26 (moving beyond a purely regulatory framework by declaring a policy of encouraging nuclear development and authorizing state-directed procurement and financing mechanisms).
[145] *Id.*
[146] *See infra* Part III.
[147] Rachel Baye, *Maryland legislative leaders reveal plan to tackle rising electric bills*, WYPR (Feb. 3, 2025, at 17:15 EST), https://www.wypr.org/wypr-news/2025-02-03/maryland-legislative-leaders-reveal-plan-to-tackle-rising-electric-bills (on file with the University of Baltimore Law Forum).
[148] *See* Next Generation Energy Act, 2025 Md. Laws chs. 625-26.
[149] *See id.*

energy sources.[150] As a result, while recent legislative efforts represent significant progress, they reveal a broader structural gap between the State's energy objectives and the statutory mechanisms available to them.[151] More specifically, Maryland's statutory framework simultaneously recognizes nuclear energy as a carbon-free and reliability-critical resource while excluding it from the State's primary clean energy compliance mechanism.[152]

A. Emerging Energy Demands.

Maryland faces unprecedented growth in energy demand, driven primarily by the rapid expansion of data center[153] development and broader electrification initiatives.[154] Maryland's power infrastructure requires significant upgrades to meet these emerging needs.[155] As noted by State Senator Brian Feldman, who chairs the Maryland General Assembly's Education, Energy, and the Environment committee, Maryland's baseline power demands continue to rise while traditional generation sources, particularly fossil fuels, are being retired.[156] This creates a fundamental supply-demand mismatch that must be addressed through comprehensive

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[150] *See* MD. CODE ANN., PUB. UTIL. §§ 7-701 to 7-714 (West. 2025) (omitting nuclear power from Maryland's renewable energy portfolio standard).

[151] *Compare id.* (omitting nuclear power from Maryland's renewable energy portfolio standard), *with* Next Generation Energy Act, 2025 Md. Laws chs. 625-26 (expanding statutory framework for nuclear power expansion in Maryland).

[152] Next Generation Energy Act, 2025 Md. Laws chs. 625-26 ("The General Assembly finds and declares that it is the policy of the State to encourage the development of clean, carbon-free nuclear power, including development through innovative designs."); *see* PUB. UTIL. §§ 7-701 to 7-714.

[153] Stephanie Susnjara & Ian Smalley, *What is a Data Center?*, IBM (Sept. 4, 2024), https://www.ibm.com/think/topics/data-centers (on file with the University of Baltimore Law Forum) ("A data center is a physical room, building or facility that houses IT infrastructure for building, running and delivering applications and services. It also stores and manages the data associated with those applications and services."); *Data Centers and Servers*, U.S. DEP'T OF ENERGY, https://www.energy.gov/eere/buildings/data-centers-and-servers (on file with the University of Baltimore Law Forum) (last visited Feb. 15, 2025) [hereinafter *Data Centers and Servers*] ("Data Centers are one of the most energy-intensive building types, consuming 10 to 50 times the energy per floor space of a typical commercial office building.").

[154] *See* Lewis, *supra* note 1, at 3-4. Broader electrification initiatives include programs such as the Zero-Emission Vehicle Infrastructure Plan, which requires the Maryland Department of Transportation to implement strategies to expand Maryland's electric vehicle charging capabilities. *Maryland Zero Emission Vehicle Infrastructure Plan*, MD. DEP'T OF TRANSP., https://evplan.mdot.maryland.gov/?doing_wp_cron=1774656479.6923480033874511718750 (on file with the University of Baltimore Law Forum) (last visited Mar. 27, 2026).

[155] Lewis, *supra* note 1, at 3-4.

[156] *Id.* at 4.

planning.[157] While these baseline challenges are substantial on their own, they are only intensified by the growing prospect of large-scale data center development.[158]

The scale of an anticipated data center development presents a particularly acute challenge for Maryland's power grid.[159] PJM Interconnection ("PJM"), which coordinates electricity movement across multiple states, including Maryland, estimates that new data centers in Maryland and Virginia will require up to 7,500 megawatts of electricity.[160] This massive increase in demand coincides with the deactivation of more than 11,000 megawatts of power generation across PJM's grid.[161] The confluence of these factors–rising demand and decreasing generation capacity–creates urgent infrastructure needs that must be addressed through coordinated policy action.[162]

These pressures are not abstract, they are being realized in concrete, high-demand projects already underway.[163] The Quantum Loophole data center development in Frederick County, for example, illustrates the magnitude of individual projects driving this demand growth.[164] This single campus is expected to require up to 800 megawatts of power by mid-2027, with long-term growth projections reaching 3,000 megawatts by 2033.[165] To put this in perspective, a 20 megawatt data center consumes as much electricity as approximately 16,500 homes; at full projected capacity, the Quantum Loophole data center could require power equivalent to roughly 2.47 million homes.[166]

While this represents a substantial electrical load, the appropriate response is to meet the increased demand, not cancel the project.[167] This is because economic impact studies estimate that once complete, the campus will generate approximately $41 million in annual county tax revenue and nearly $197 million in state tax revenue, while employing 1,700 people.[168] This demonstrates that while data center expansion will place a strain on the

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[157] *Id.* at 3-4.
[158] *Id.*
[159] *Id.*
[160] *Id.* at 3.
[161] Lewis, *supra* note 1, at 3.
[162] *Id.* at 3-4.
[163] *See infra* notes 170-72 and accompanying text.
[164] *See* FIRSTENERGY, PJM LOAD ADJUSTMENT PUBLIC DOCUMENT 1 (2024).
[165] *Id.*
[166] *See* Sergio Toro, *20 MW data center consumer enough electricity to power approximately 16,500 average U.S. homes*, ATERIO (Jan. 20, 2025), https://www.aterio.io/blog/20-mw-data-center-consumes-enough-electricity-to-power-approximately-16-500-average-u-s-homes (on file with the University of Baltimore Law Forum).
[167] *See infra* notes 174-75 and accompanying text.
[168] Lewis, *supra* note 1, at 2.

power grid, the financial incentives for Maryland should promote governmental action on the grid.[169]

These trends underscore the increasing need for reliable generation resources capable of meeting sustained, large-scale demand.[170] Intermittent renewable sources alone are unlikely to satisfy these requirements, particularly as Maryland's energy consumption becomes more concentrated and continuous.[171]

B. Maryland's Legislative Response.

Maryland's enactment of the Next Generation Energy Act (the "Act") represents a significant shift in the State's approach to energy policy, moving away from a largely market-reliant framework toward a more active, state-directed role in electricity generation planning and procurement.[172] In doing so, the General Assembly responded directly to increasing concerns regarding grid reliability, rising demand, and the limitations of existing statutory mechanisms to ensure the development of sufficient generation capacity.[173] In effect, the Act creates a hybrid procurement and financing regime that substitutes state-directed contracting for traditional reliance on wholesale electricity markets.[174]

At the center of this shift, the Act establishes a new statutory framework authorizing the Public Service Commission to conduct competitive solicitation and approve long-term contracts for the development of dispatchable energy generation, large capacity resources, and nuclear energy generation projects.[175] This framework is implemented through the creation of a new subtitle governing energy solicitation and procurement, which sets forth procedures for bid evaluation, project approval and contract

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[169] *See id.* at 3-4.
[170] *See supra* notes 153-69 and accompanying text.
[171] *See* INT'L ENERGY AGENCY, *supra* note 55.
[172] *See* Danielle Powers & Lisa Quilici, *Developments in the energy industry - Maryland and Ohio*, CONCENTRIC ENERGY ADVISORS (Apr. 18, 2025), https://ceadvisors.com/developments-in-the-energy-industry-maryland-and-ohio/ (on file with the University of Baltimore Law Forum) ("Both Maryland and Ohio have recently advanced energy legislation aimed at regaining control of their energy resource mix, accelerating the development of new in-State generation, meeting the growing demand for electricity, and controlling rising rates.").
[173] *Id.*
[174] *See* MD. GEN. ASSEMBLY DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, H.B. 1035, 2025 Leg., 447th Sess. (2025) (describing the provisions and effects of the Next Generation Energy Act, including state-directed procurement of generation resources and ratepayer-back financing mechanisms).
[175] *Id.* at 14-21.

administration.[176] By formalizing these processes, the Act enables the State to directly influence the type, timing, and scale of new generation resources brought onto the grid.[177]

The Act also contains several provisions specifically designed to facilitate nuclear energy development, marking a departure from Maryland's historically limited engagement with nuclear power as an energy resource.[178] Among these provisions, the legislation authorizes the Public Service Commission to approve orders necessary to enable the financing of nuclear energy generation projects under specified conditions.[179] In addition, the Act requires electric companies to procure nuclear energy and associated zero-emission credits through structured mechanisms, including escrow-based arrangements, thereby creating a pathway for nuclear generation to participate in Maryland's electricity market.[180] By incorporating zero-emission credits and long-term pricing mechanisms, the Act represents Maryland's first meaningful effort to assign explicit economic value to the environmental and reliability attributes of nuclear generation.[181]

These nuclear-specific provisions reflect a broader legislative recognition that existing market structures may be insufficient, standing alone, to support the development of capital-intensive, dispatchable, and carbon-free generation resources.[182] Rather than relying exclusively on wholesale market signals, the Act introduces state-facilitated mechanisms designed to reduce financial risk and provide greater certainty for developers of new generation capacity.[183]

In addition to its generation-focused provisions, the Act addresses the growing impact of large-load customers, including data centers, on Maryland's electric system.[184] To that end, the legislation requires electric

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[176] *Id.*

[177] *Id.* at 10-13 (describing provisions that require the Public Service Commission to solicit, evaluate, and approve generation projects subject to capacity targets, resource mix requirements, and expedited timelines).

[178] *Id.* at 12-15, 17.

[179] *Id.* at 13-15.

[180] MD. GEN. ASSEMBLY DEP'T OF LEGIS. SERVS., *supra* note 174, at 14-15.

[181] *See supra* notes 172-80 and accompanying text.

[182] *See* MD. GEN. ASSEMBLY DEP'T OF LEGIS. SERVS., *supra* note 174, at 10-15 (describing State intervention to procure and finance resources not adequately supported by existing market structures).

[183] *Id.*; *see* INT'L ENERGY AGENCY, *supra* note 55, at 82 ("Long-term contracts and price guarantees can greatly improve the creditworthiness of a new nuclear project.").

[184] *See* MD. GEN. ASSEMBLY DEP'T OF LEGIS. SERVS., *supra* note 174, at 5 ("'Large load customer' means a commercial or industrial customer for retail electric service that has or is projected to have an aggregate monthly demand of at least 100 megawatts. . . ."); *see also* MARTIN C. OFFUTT, LING ZHU & ASHLEY J. LAWSON, CONG. RSCH. SERV., R48646, DATA CENTERS AND THEIR ENERGY CONSUMPTION: FREQUENTLY ASKED QUESTIONS 5 (2026)

companies to develop specialized rate structures for customers with substantial energy demands, including those with projected loads exceeding 100 megawatts.[185] The Act further directs the Public Service Commission to consider cost allocation and system impacts when approving such rate structures, reflecting a legislative intent to ensure that the costs associated with serving large-load customers are not borne by residential ratepayers.[186]

Taken together, the Act marks a meaningful evolution in Maryland's energy policy, transitioning from a framework focused primarily on regulating existing resources to one that actively facilitates the development, procurement, and integration of new generation capacity.[187] Despite this expanded statutory framework, the Act operates largely outside Maryland's existing Renewable Portfolio Standard, leaving nuclear energy enabled through procurement mechanisms but excluded from the State's primary clean energy compliance structure.[188]

C. Clean Energy Commitments.

Maryland's legislature has enacted aggressive clean energy planning policy in the Climate Solutions Now Act ("CSNA").[189] CSNA "requir[es] the State to reduce statewide greenhouse gas emissions through the use of various measures."[190] The ultimate requirement is that by 2045, Maryland is at net-zero greenhouse gas emissions.[191] While CSNA recognizes nuclear as one of six greenhouse gas free energy sources, it takes a major back seat to other sources of clean energy.[192] For example, the legislation creates 8 working groups, and the nuclear industry is only included on one.[193] Notably, while CSNA recognizes nuclear energy as a greenhouse gas-free resource, it does

("Another Report indicated that new hyperscale datacenters have been built with capacities from 100 MW to 1,000 MW each.").

[185] MD. GEN. ASSEMBLY DEP'T OF LEGIS. SERVS., *supra* note 174, at 2.

[186] *Id.* at 5.

[187] *See supra* notes 172-86 and accompanying text.

[188] *See infra* Section III.D.

[189] *See* Climate Solutions Now Act of 2022, 2022 Md. Laws ch.38.

[190] *Id.*

[191] *Id.* "Net-zero emissions means that the total [Greenhouse Gas] emissions from Maryland's economy will be equal to the [Greenhouse Gases] removed from the atmosphere through natural and technological systems annually." MD. DEP'T OF THE ENV'T, PRIORITY CLIMATE ACTION PLAN STATE OF MARYLAND 22 (2024).

[192] Climate Solutions Now Act of 2022, 2022 Md. Laws ch.38.

[193] *Id.* For comparison, the "Just Transition Employment and Retraining Working Group" includes members of the solar energy industry, wind energy industry, and geothermal energy industry, while the nuclear industry is left out. *Id.*

not incorporate nuclear generation into Maryland's primary compliance mechanisms for achieving its clean energy targets.[194]

CSNA has been described as creating "the most ambitious greenhouse gas reduction goals in the nation."[195] The plan is admirable but places the bulk of its focus on "[s]caling renewable infrastructure, including solar, wind and battery power."[196] Maryland government officials have acknowledged that this plan will require a massive upscaling of Maryland's power infrastructure.[197] The reality of the current state of energy in Maryland is that most clean energy must be imported from less densely populated areas of the country.[198] These current plans prioritize sources of clean energy that will not be able to meet Maryland's exponentially growing energy needs.[199] Maryland will be able to meet these goals only through policies that aggressively expand nuclear power capacity.[200]

D. The Remaining Structural Gap.

Maryland's Renewable Portfolio Standard ("RPS") remains the State's primary statutory mechanism for achieving its clean energy objectives, requiring electricity supplies to procure a specified percentage of

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[194] *Id.* ("[E]nergy facilities in the state that do not emit greenhouse gas, including: 1. Solar energy generating facilities; 2. Nuclear energy generating facilities; 3. Wind energy generating facilities; 4. Geothermal energy generating facilities; 5. Hydroelectric energy generating facilities; and 6. Biofuel energy generating facilities."); MD. CODE ANN., PUB. UTIL. §§ 7-701 to 7-714 (West. 2025) (omitting nuclear power from Maryland's renewable energy portfolio standard).

[195] Press Release, Md. Dep't of the Env't, Maryland Department of the Environment Releases Climate Pollution Reduction plan to Significantly Cut Greenhouse Gas Emissions by 2031 (Dec. 28, 2023), https://news.maryland.gov/mde/2023/12/28/maryland-department-of- the-environment-releases-climate-pollution-reduction-plan-to- significantly-cut-greenhouse-gas-emissions-by-2031 (on file with the University of Baltimore Law Forum) [hereinafter Greenhouse Gas Press Release].

[196] *Id.*

[197] Gary Collins, *'Clean Energy' Goals Forcing Maryland to Double Size of Electric Grid, Moore Official Says*, FOX 45 NEWS (Aug. 29, 2024, at 20:47 ET), https://foxbaltimore.com/news/local/clean-energy-goals-forcing-maryland-to-double-size-of-electric-grid- moore-official-says-frederick-maryland-piedmont-reliability-project-mprp-power-transmission-line-carroll-county-baltimore-county (on file with the University of Baltimore Law Forum).

[198] *Id.*

[199] *See supra* Sections II.B and III.B. When considering factors such as land use and operating capacity of non-nuclear renewable sources, along with the exponentially increases energy demands, it becomes clear that Maryland will not be able to be its goals under the current framework. *See supra* Sections II.B and III.B.

[200] *See infra* Part IV.

their energy from qualifying renewable sources.[201] Although the RPS has played a central role in driving the development of renewable energy resources, its structure reflects a policy framework that prioritizes renewable generation rather than all carbon-free sources of electricity.[202] As a result, nuclear energy is excluded from the State's core compliance regime, despite its zero-emission characteristics and existing contribution to Maryland's clean energy supply.[203]

This exclusion creates a fundamental disconnect between Maryland's stated clean energy commitments and the statutory mechanism designed to achieve them.[204] As discussed above, Maryland has committed to achieving net-zero greenhouse gas emissions and has recognized nuclear power as a carbon-free energy source within its broader policy framework.[205] However, because nuclear generation does not qualify under the RPS, it does not generate renewable energy credits and therefore cannot be used by electricity suppliers to satisfy their statutory obligations.[206]

The consequences of this structural exclusion are particularly significant in light of the increasing energy demand and the State's recent legislative efforts.[207] While the Act established more mechanisms to facilitate the development and procurement of nuclear energy those mechanisms operate outside the RPS and therefore do not directly contribute to compliance with Maryland's clean energy mandates.[208] This results in a fragmented policy framework in which nuclear energy is simultaneously recognizes as necessary, enabled through procurement, yet excluded from the State's primary system of incentives.[209]

In practice, the RPS functions as the State's primary driver of investment in new energy resources, as compliance obligations create sustained demand for qualifying generation through the renewable energy credit market.[210] By excluding nuclear energy from this framework,

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[201] *See* MD. CODE ANN., PUB. UTIL. §§ 7-701 to 7-714 (West. 2025).
[202] *See* Janak Joshi, *Do renewable portfolio standards increase renewable energy capacity? Evidence from the United States*, 287 J. OF ENV'T MGMT. 112261 (2021) ("The results show that RPS adoption drives more than one third increase in overall renewable electricity capacity."); *see also* PUB. UTIL. §§ 7-701 to 7-714 (including only renewable resources).
[203] *See* PUB. UTIL. §§ 7-701 to 7-714; *see also* MD. POWER PLANT RSCH. PROGRAM, *supra* note 4 (demonstrating nuclear energy provides clean energy for Maryland).
[204] *See supra* notes 201-03 and accompanying text.
[205] *See* PUB. UTIL. §§ 7-701 to 7-714.
[206] *See id.*
[207] *See supra* Sections III.A-B.
[208] *See supra* Sections III.B-C.
[209] *See supra* Sections III.B-C.
[210] *See* ERIC O'SHAUGHNESSY, JENNY HEETER & JENNY SAUER, NAT'L RENEWABLE ENERGY LAB'Y 36 (Celina Bonugli et al. eds., 2018) ("Maryland subsequently increased RPS targets

Maryland effectively directs investment toward the intermittent renewable resources while failing to provide comparable incentives for a dispatchable, carbon-free generation.[211] This imbalance is particularly problematic given the reliability challenges associated with large-scale renewable deployment and the increasing need for firm generation capacity to support grid stability.[212]

Accordingly, Maryland's current statutory scheme reflects on a partial integration of nuclear energy, one that enables its development at the margins while excluding it from the State's core clean energy framework.[213] As energy demand continues to rise and the State pursues increasingly ambitious decarbonization goals, this structural inconsistency becomes more pronounced, undermining the effectiveness of both its energy policy and its climate commitments.[214]

Under these considerations, this Comment proposes the adoption of a Clean Energy Standard as a means of resolving this inconsistency and aligning Maryland's statutory framework with its long-term energy and environmental objectives.[215]

IV. SOLUTION: INTEGRATING NUCLEAR ENERGY INTO MARYLAND'S CLEAN ENERGY FRAMEWORK WILL BRIDGE THE GAP IN MARYLAND'S ENERGY POLICY.

The foregoing analysis demonstrates that Maryland's energy policy has evolved in meaningful ways to address increasing demand and facilitate new generation resources, including nuclear power.[216] Yet, despite this progress, the State's statutory framework remains internally inconsistent, as its primary clean energy compliance mechanism continues to exclude a category of generation it otherwise recognizes as essential.[217] This disconnect is not merely theoretical; it has direct implications for Maryland's ability to meet both its energy and decarbonization objectives.[218] Part IV turns to

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in 2017, which could eventually increase SREC prices and support community solar development.").

[211] *See id.*; *see also* PUB. UTIL. §§ 7-701 to 7-714 (omitting nuclear power from the state's RPS).

[212] *See supra* Section III.A.

[213] *See supra* notes 201-12 and accompanying text.

[214] *See supra* Sections III.A-C; *see also* INT'L ENERGY AGENCY, *supra* note 55, at 4-5 (discussing the importance of investment in nuclear power for a government to achieve its clean energy goals}.

[215] *See infra* Part IV.

[216] *See supra* Part III.

[217] *See supra* Part III.

[218] *See supra* Section III.D.

potential solutions, examining how other states have resolved similar structural gaps and proposing a clean energy standard as a means of aligning Maryland's policy goals with its regulatory framework.[219]

A. Lessons from Other States' Clean Energy Frameworks.

States that have transitioned from traditional RPS to broader clean energy standards provide useful models for addressing the structural limitations identified in Maryland's current statutory framework.[220] Unlike conventional RPS regimes, which limit compliance to renewable sources, these frameworks adopt a more expansive definition of qualifying energy sources, incorporating a wider range of carbon-free generation technologies.[221] This shift reflects a growing recognition that achieving deep decarbonization requires policies that are able to meet emissions goals and growing energy demands.[222]

Washington's Clean Energy Transformation Act ("CETA") provides a particularly illustrative example of this approach.[223] Under CETA, Washington has committed to transitioning its electricity supply to one hundred percent carbon-neutral by 2030 and one-hundred percent carbon-free by 2045, while simultaneously emphasizing the need to maintain system reliability and reasonable costs for consumers.[224] Importantly, the statute defines qualifying resources to include "non-emitting electric generation," a category that extends beyond traditional renewable energy sources and encompasses a broader range of carbon-free technologies.[225] By structuring compliance around carbon emissions rather than resource type, Washington's

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[219] *See infra* Sections IV.A-C.
[220] *See infra* notes 223-29 and accompanying text.
[221] Ryan Fitzpatrick et al., *Clean energy standards: how more states can become climate leaders*, THIRD WAY (June 28, 2018), https://www.thirdway.org/report/clean-energy-standards-how-more-states-can-become-climate-leaders (on file with the University of Baltimore Law Forum) ("A state could create a Clean Energy Standard (CES) instead of a Renewable Portfolio Standard, which would take advantage of renewables as well as existing and new nuclear, carbon capture and storage, waste-to-energy, and other technologies in its effort to eliminate carbon from the power sector. By putting additional clean energy options on the table, most states would be able to set much more ambitious targets for emissions reduction – often doubling their current RPS levels – and some unexpected states could rapidly become new leaders in the fight against climate change.").
[222] *Id.*
[223] *See* WASH. REV. CODE ANN. §§ 19.405.010-901 (West 2025).
[224] *Id.* § 19.405.010(2).
[225] *Id.* § 19.405.020(27).

framework aligns its regulatory mechanisms with its decarbonization objectives.[226]

Michigan has similarly moved toward a more inclusive statutory framework through its Clean and Renewable Energy and Energy Waste Reduction Act, which integrates both renewable and clean energy considerations within its energy standards.[227] Under this framework, utilities are required to have a clean energy portfolio of at least 80% by 2035 and 100% by 2040.[228] Although Michigan retains a renewable energy credit portfolio system, the addition of a clean energy standard vastly incorporates non-renewable clean energy sources into its long-term plans.[229]

These examples demonstrate that states have begun to move beyond the limitations of renewable only compliance regimes, adopting frameworks that better reflect the full spectrum of carbon-free generation technologies.[230] In doing so, they have addressed the precise structural issue present in Maryland's current statutory scheme: the misalignment between clean energy goals and the mechanisms used to achieve them.[231] By incorporating broader categories of non-emitting generation into their compliance frameworks, these states ensure that policy incentives align with the objective of reducing greenhouse gas emissions, rather than privileging specific resource types.[232]

B. A Clean Energy Standard for Maryland.

Maryland's existing framework, by contrast, continues to separate its recognition of nuclear energy as a carbon-free resource from its primary clean

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[226] *See id.* § 19.405.010; *see also* Fitzpatrick et al., *supra* note 221 ("A state could create a Clean Energy Standard (CES) instead of a Renewable Portfolio Standard, which would take advantage of renewables as well as existing and new nuclear, carbon capture and storage, waste-to-energy, and other technologies in its effort to eliminate carbon from the power sector. By putting additional clean energy options on the table, most states would be able to set much more ambitious targets for emissions reduction – often doubling their current RPS levels – and some unexpected states could rapidly become new leaders in the fight against climate change.").

[227] *See* MICH. COMP. LAWS §§ 460.1021-1054 (West 2025).

[228] *Id.* § 460.1051.

[229] *See id.* §§ 460.1028, 460.1051; *see also id.* § 460.1003(e)-(i) ("'Clean energy system' means an electricity generation facility or system or set of electricity generation systems that meets any of the following requirements: (*i*) Generates electricity or steam without emitting greenhouse gas, including nuclear generation.").

[230] *See supra* notes 223-29 and accompanying text.

[231] *Compare* WASH. REV. CODE ANN. §§ 19.405.010-901 (establishing Clean Energy Standards in Washington) *and* MICH. COMP. LAWS § 460.1051 (establishing Clean Energy Standards in Michigan), *with* MD. CODE ANN., PUB. UTIL. §§ 7-701 to 7-714 (establishing Maryland's Renewable Portfolio Standard).

[232] *See supra* notes 220-29 and accompanying text.

energy compliance mechanism.[233] While the Act takes meaningful steps to facilitate nuclear development through procurement and financing mechanisms, it does not incorporate nuclear energy into RPS or any equivalent compliance framework.[234] As a result, Maryland's statutory scheme lacks the integrated structure present in states like Washington, where policy goals and compliance mechanisms are aligned around carbon neutrality rather than resource classification.[235]

Adopting a clean energy standard that incorporates nuclear power would bring Marland back into alignment with these emerging state models, ensuring that its statutory framework reflects both its decarbonization commitments and the realities of modern energy demand.[236] Such an approach would not displace renewable energy development but rather complement it by enabling a more balanced and reliable portfolio of carbon-free generation resources.[237] In this way, Maryland can build upon the foundation established by the Next Generation Energy Act and complete the transition toward a fully integrated clean energy policy framework.[238]

A viable path forward is illustrated by the clean energy standard legislation introduced during the 2025 legislative session, commonly referred to as the ENERGIZE Maryland Act.[239] Although the bill did not ultimately pass, it provides a useful structural model for reform by proposing to replace Maryland's RPS with a broader Clean Energy Standard that recognizes a wider range of carbon-free generation resources.[240]

At its core, the proposed legislation redefines the State's compliance framework by shifting from a renewable-only standard to one based on carbon neutrality, allowing utilities to satisfy their obligations through a portfolio of qualifying clean energy resources rather than a fixed subset of

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[233] PUB. UTIL. §§ 7-701 to 7-714.
[234] *See* Next Generation Energy Act, 2025 Md. Laws chs. 625-26.
[235] *See supra* Section IV.A.
[236] *See* Fitzpatrick et al., *supra* note 221.
[237] *See id.*; *see also A new dawn for nuclear energy?*, INT'L ENERGY AGENCY, https://www.iea.org/energy-system/electricity/nuclear-power (on file with the University of Baltimore Law Forum) (last updated July 11, 2023) ("Nuclear power is an important low-emission source of electricity, providing about 10% of global electricity generation. For those countries where it is accepted it can complement renewables in reducing power sector emissions while also contributing to electricity security as a dispatchable power source.").
[238] *See* Fitzpatrick et al., *supra* note 221.
[239] ENERGIZE Maryland Act, S.B. 434, 2025 Gen. Assemb., 447th Sess. (Md. 2025). "ENERGIZE" is an acronym for "Empowering New Energy Resources and Green Initiatives Toward a Zero-Emission." *Id*.
[240] *See* MD. GEN. ASSEMBLY DEP'T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, S.B. 434, 2025 Leg., 447th Sess. 1 (2025) ("This Administration bill establishes a 100% Clean Energy Portfolio Standard (CEPS), establishes a ratepayer-funded incentive for new nuclear energy, and increases incentives for solar energy and offshore wind energy.").

renewable technologies.[241] Under such a framework, nuclear energy would be recognized alongside wind, solar, and other zero-emission sources, thereby eliminating the current statutory exclusion that limits its role in Maryland's clean energy strategy.[242]

Integrating nuclear energy into the State's primary compliance mechanism would also resolve the fragmentation identified in Part III by aligning Maryland's procurement and compliance frameworks.[243] Whereas the Act enables the development of nuclear generation through state-facilitated procurement, a Clean Energy Standard would create a sustained demand signal for that generation, ensuring that newly developed resources are not only constructed but also economically viable over the long term.[244]

Moreover, a Clean Energy Standard would better position Maryland to meet its statutory climate commitments by ensuring that all carbon-free generation contributes towards compliance obligations.[245] By aligning incentives with emissions outcomes rather than resource categories, the State can pursue a more efficient and effective decarbonization strategy that reflects both technological realities and evolving energy demands.[246] In this respect, the failure of the ENERGIZE Maryland Act does not undermine the viability of a Clean Energy Standard, but rather underscores the need for continued legislative refinement.[247] The framework it proposed demonstrates

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[241] *Id.* at 2.
[242] *Id.* at 2-3.
[243] *See supra* Part III.
[244] *Compare* Next Generation Energy Act, 2025 Md. Laws chs. 625-26 (creating a comprehensive energy procurement framework that, for the first time, enables state-facilitated development and financing of new nuclear generation), *with* ENERGIZE Maryland Act, S.B. 434, 2025 Gen. Assemb., 447th Sess. (Md. 2025) (proposing a modification of the RPS to a Clean Energy Standard); *see also* Fitzpatrick et al., *supra* note 221 ("[C]hoosing a broader CES would also provide encouraging signals to emerging carbon-free technologies that there is a market available if or when they become commercially viable.").
[245] *See* MD. GEN. ASSEMBLY DEP'T OF LEGIS. SERVS., *supra* note 240 at 2 ("The General Assembly finds and declares that: the State has a goal of achieving 100% clean electricity; as of January 1, 2025, the State RPS and offshore wind energy leases will not satisfy that goal; and to achieve its clean electricity goal, the State must facilitate the construction of at least 3,000 megawatts of electricity from clean energy generation projects to (1) reduce the adverse climate and health impacts of traditional fossil fuel energy sources; (2) promote the development of clean energy sources that increase the nation's independence from foreign sources of fossile fuels; (3) position the State to take advantage of the economic development benefits of the emerging small modular reactor industry; and (4) provide a long-term hedge against volatile prices of fossil fuels.").
[246] *See id.*; *see also* Fitzpatrick et al., *supra* note 221 ("There is ample research suggesting that a diverse combination of low-carbon electricity soruces, including options like nuclear power, can offer the most efficient and affordable path to drastically cutting emissions in the power sector."); *supra* Section III.A (discussing the emerging energy demands in Maryland).
[247] *See* sources cited *supra* note 244.

that Maryland already possesses both the institutional capacity and the statutory foundation necessary to implement such a system.[248] The remaining task is not to design an entirely new policy, but to complete the integration of nuclear energy into the State's existing clean energy framework.[249]

C. Aligning Maryland's Energy Policy with its Objectives.

The adoption of a Clean Energy Standard in Maryland can be accomplished through targeted amendments to the State's existing RPS.[250] Because Maryland's current statutory framework already establishes supplier obligations, credit-based compliance mechanisms, and Public Service Commission oversight the transition to a Clean Energy Standard does not require the creation of a new regulatory system, but rather the modification of existing definitions and compliance criteria.[251] This approach preserves institutional continuity while aligning the State's energy policy with its decarbonization objectives.[252]

The most significant changes would occur in Section 7-701, which defines the categories of qualifying energy resources.[253] Under a Clean Energy Standard, the existing definitions of "Tier 1 Renewable Source" and "Tier 2 Renewable Source" would be replaced or supplemented with a broader classification of "clean energy resources," organized into tiers based on emissions characteristics and system reliability.[254] Tier 1 would consist of a preferred zero-emission renewable resources, including solar, wind, offshore wind, geothermal, ocean energy, and small hydroelectric

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[248] *See* MD. GEN. ASSEMBLY DEP'T OF LEGIS. SERVS., *supra* note 240, at 1-2.

[249] *See id.*

[250] *See* ENERGIZE Maryland Act, S.B. 434, 2025 Gen. Assemb., 447th Sess. (Md. 2025).

[251] See *id*. The ENERGIZE Maryland Act proposed amending § 7-701 of the Public Utility Article of the Maryland code to define the term "Clean energy portfolio standard" as "the percentage of electricity sales at retail in the State that is to be derived from clean energy sources in accordance with § 7-703(B) of this subtitle" and "Clean energy source" to include Tier 1 and Tier 2 renewable sources, as well as "a nuclear energy generating station, including a small modular reactor, connected with the electric distribution grid serving the state." *Id.* The act also proposed amending § 7-703 of the Public Utility Article to meet an overall percentage of energy generation from clean energy sources by certain dates, retaining minimum requirements for Tier 1 and Tier 2 renewable sources within the overall clean energy goal. *Id.*

[252] *See id.*; *see also* Fitzpatrick et al., *supra* note 221 (discussing the propriety of using a Clean Energy Standard to achieve carbon reduction goals).

[253] *See* ENERGIZE Maryland Act, S.B. 434, 2025 Gen. Assemb., 447th Sess. (Md. 2025).

[254] *See id*. The ENEZERGIZE Maryland Act did not propose any amendment to the definitions of Tier 1 or Tier 2 renewable sources. *Id.* For the reasons discussed below, this comment proposes a more ambitious amendment to those definitions. *See infra* notes 255-58 and accompanying text.

generation.[255] Tier 2 would encompass firm, dispatchable zero-emission resources, including nuclear energy and large-scale hydroelectric generation, reflecting their distinct role in maintaining grid reliability and providing continuous baseload power.[256] Tier 3 would include transitional or low-carbon resources that, while renewable, are not strictly zero-emission, such as certain biomass and waste-to-energy technologies currently recognized under Maryland law.[257] This revised tier structure preserves Maryland's existing emphasis on renewable development while incorporating nuclear energy in a manner that reflects both its emissions profile and its operational characteristics.[258]

Section 7-703, which established Maryland's portfolio standard and compliance requirements would be amended to reflect a Clean Energy Standard based on carbon-free generation rather than renewable resource classification.[259] Under this framework, electricity suppliers would be required to achieve a fully clean electricity supply by 2045, with interim compliance targets structured to ensure a balanced and reliable generation mix.[260] Specifically, the statute could require that at least 50% of electricity sales be derived from Tier 1 resources and at least 30% from Tier 2 resources,

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[255] *See* ENERGIZE Maryland Act, S.B. 434, 2025 Gen. Assemb., 447th Sess. (Md. 2025). Under the current definition, Tier 1 renewable source currently includes non-zero-emission renewable energy sources such as biomass, methane, and poultry litter-to-energy. MD. CODE ANN., PUB. UTIL. § 7-701(S) (West 2025). While these renewable sources are recognized for their overall impact in emissions, they still emit greenhouse gases. *Biomass explained*, ENERGY INFO. ADMIN, https://www.eia.gov/energyexplained/biomass/biomass-and-the-environment.php (on file with the University of Baltimore Law Forum) (last visited Apr. 10, 2026) ("Using biomass and biofuels made from biomass has positive and negative effects on the environment.").

[256] *See* ENERGIZE Maryland Act, S.B. 434, 2025 Gen. Assemb., 447th Sess. (Md. 2025). Including large hydroelectric and nuclear generation in Tier 2 would maintain the legislative prioritization of resources such as wind and solar while giving due credit to hydroelectric and nuclear power's non-emitting qualities. *See* Off. of Nuclear Energy, *3 Reasons why nuclear is clean and sustainable*, U.S. DEP'T OF ENERGY (Mar. 31, 2021), https://www.energy.gov/ne/articles/3-reasons-why-nuclear-clean-and-sustainable (on file with the University of Baltimore Law Forum) ("Nuclear is often left out of the 'clean energy' conversation despite it being the second largest source of low carbon electricity in the world behind hydropower.").

[257] *See* ENERGIZE Maryland Act, S.B. 434, 2025 Gen. Assemb., 447th Sess. (Md. 2025).

[258] *Id.*

[259] *Id.*

[260] *See id*. The current RPS stops at a minimum requirement of 50% Tier 1 renewable sources by 2030. MD. CODE ANN., PUB. UTIL. § 7-703(b) (West 2025). The proposed amendment would mirror the Washington timeline and align it with Maryland's Climate Solutions Now Act's 2045 net-zero greenhouse gas emissions goal. *See* WASH. REV. CODE ANN. § 19.405.010(2); *see also* MD. CODE ANN., ENV'T § 2-1205(c)(2)(ii) (West 2025) (requiring the Maryland Department of the Environment to adopt a plan to achieve net-zero emissions by 2045).

with the remaining portion satisfied by any qualifying clean energy resources.[261] This structure maintains a strong commitment to renewable energy development while ensuring that sufficient dispatchable, zero-emission generation is available to support system reliability.[262]

The credit-based compliance system established under Section 7-704 would remain largely intact but would require modification to accommodate the new tiered system proposed above.[263] Under the current statutory framework, incentives for new wind are built in through increased value of wind and methane power generation established after 2003.[264] The Act has already introduced a parallel mechanism for incentivizing new nuclear through long-term pricing structures and zero-emission credit-like constructs.[265] As such, there is no need to provide increased incentives for nuclear under the revised credit system.[266]

A Clean Energy Standard would formalize and integrate these mechanisms by maintaining renewable energy credits for Tier 1 resources while incorporating a complementary system of clean energy credits for zero emission credits for Tier 2 resources, including nuclear energy.[267] Under this unified framework, electricity supplies would satisfy their compliance obligations through a combination of Tier-specific credits, reflecting both the emissions characteristics and operational roles of different generation sources.[268] This approach allows utilities to meet their obligations without specifically generating with that source, making it easier for the state to meet its overall energy goals.[269]

Integrating these credit structures within Subtitle 7 would also resolve the fragmentation identified in Part III by aligning Maryland's procurement

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[261] *See* ENERGIZE Maryland Act, S.B. 434, 2025 Gen. Assemb., 447th Sess. (Md. 2025). This proposed allocation maintains the current goal of 50% of Tier 1 renewable sources, while giving strong standing to nuclear in the newly proposed Tier 2 clean energy sources, and leaving 20% flexibility for increased Tier 1 and Tier 2 and remaining capacity from the newly defined Tier 3. *See* MD. CODE ANN., PUB. UTIL. § 7-703(b) (West 2025).

[262] *See supra* notes 259-61 and accompanying text.

[263] *See* ENERGIZE Maryland Act, S.B. 434, 2025 Gen. Assemb., 447th Sess. (Md. 2025).

[264] MD. CODE ANN., PUB. UTIL. § 7-704(c) (West 2025).

[265] Next Generation Energy Act, 2025 Md. Laws chs. 625-26.

[266] *See supra* notes 263-65 and accompanying text.

[267] *See* ENERGIZE Maryland Act, S.B. 434, 2025 Gen. Assemb., 447th Sess. (Md. 2025).

[268] *See id*. Illinois uses a multi-tiered credit system which includes renewable energy credits and zero emission credits to facilitate compliance with its energy standards. 20 ILL. COMP. STAT. 3855/1-75 (West 2025).

[269] *How do emissions trading programs work?*, ENV'T PROT. AGENCY (last updated Sept. 30, 2025), https://www.epa.gov/emissions-trading/how-do-emissions-trading-programs-work (on file with the University of Baltimore Law Forum) ("Emissions trading programs provide flexibility for emissions sources to select a compliance approach. The ability to trade allowances by selling or purchasing them from the market provides an incentive to reduce their emissions below the cap so that they can sell or bank surplus allowances.").

and compliance frameworks.[270] While the Act enables the development of nuclear generation through state-facilitated procurement and long-term pricing arrangements, those mechanisms currently operate outside the RPS.[271] A Clean Energy Standard would extend the value of nuclear generation beyond initial procurement by creating an ongoing compliance demand for its environmental attributes, thereby supporting long-term project viability.[272]

V. CONCLUSION.

Maryland stands at a pivotal moment in its energy future, facing record growth in power demands that calls for bold and decisive action in expanding nuclear capacity.[273] While the State has taken meaningful steps to modernize its energy framework through the enactment of the Act, its statutory scheme remains incomplete.[274] By facilitating nuclear development through procurement and financing mechanisms without integrating nuclear energy into its primary compliance framework, Maryland has created a structural disconnect between its energy policy objectives and the tools used to achieve them.[275]

As this Comment has demonstrated, this disconnect is not merely a theoretical inconsistency, but a practical limitation on Maryland's ability to meet both its reliability needs and its decarbonization commitments.[276] The State's increasing energy demand, combined with its ambitious climate goals, requires a framework that supports both the expansion of renewable energy

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[270] *See supra* Section III.D; *see also supra* notes 263-69 and accompanying text (listing the credit structures that should be integrated in Subtitle 7).
[271] *See* Next Generation Energy Act, 2025 Md. Laws chs. 625-26. The zero-emission credits created by the Next Generation Act are state-administered compliance instruments tied to long-term pricing obligations for nuclear generation, procured and allocated through the Public Service Commission and recovered through a non-by-passable ratepayer charges, rather than credits eligible for compliance under the RES. MD. GEN. ASSEMBLY DEP'T OF LEGIS. SERVS., *supra* note 174, at 14-15.
[272] *See* ENV'T PROT. AGENCY, *supra* note 269 (discussing how excess tradeable credits can be sold for financial gain); *see also* MD. GEN. ASSEMBLY DEP'T OF LEGIS. SERVS., *supra* note 174, at 15 ("A [Zero Emission Credit] is defined as the difference between the price that a nuclear energy generating station with a long-term pricing schedule approved in a PSC order under the bill may receive on the wholesale market and the cost of constructing the nuclear energy generating station.").
[273] *Maryland's Energy Future Should be Both Affordable & Reliable,* ENERGY FUTURE MD., https://www.energyfuturemd.com/ (on file with the University of Baltimore Law Forum) (last visited Dec. 9, 2025).
[274] *See supra* Part III.
[275] *See supra* Part III.
[276] *See supra* Part III.

and the inclusion of firm, dispatchable, carbon-free generation.[277] While recent legislation reflects a growing recognition of nuclear energy's importance, its continued exclusion from the RPS prevents it from playing a fully integrated role in Maryland's clean energy strategy.[278]

The adoption of a Clean Energy Standard offers a straightforward and achievable path forward.[279] By amending Maryland's existing statutory framework to incorporate nuclear energy into its primary compliance mechanism, the State can align its procurement efforts with its long-term policy objectives while preserving the market-based structures already in place.[280] Such a reform would not displace renewable energy development, but rather complement it, ensuring that Maryland's energy portfolio reflects both the realities of modern demand and the requirements of long-term decarbonization.[281]

Ultimately, Maryland does not need to reinvent its energy policy; it needs to complete it.[282] By integrating nuclear energy into its clean energy framework, Maryland can transition from a partially aligned system to a fully coherent one, capable of supporting economic growth, maintaining grid reliability, and achieving its climate goals.[283]

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[277] *See supra* Part III.
[278] *See supra* Part III.
[279] *See supra* Part IV.
[280] *See supra* Part IV.
[281] *See supra* Part IV.
[282] *See supra* Part IV.
[283] *See supra* Part IV.

COMMENT

EMINENT DOMAIN AND CORPORATE GAIN: MARYLAND'S BROAD APPLICATION OF PUBLIC USE SACRIFICES IT'S LANDOWNERS AND FARMS TO THE ALTAR OF CORPORATE PROFIT

By: Marisa Basignani*

I. INTRODUCTION.

In July of 2024, word of a new high voltage transmission line, its proposed path cutting through seventy miles of rural land, blindsided rural Maryland residents.[1] Without prior notice, residents of Baltimore, Carroll, and Frederick Counties found multiple yellow lines crisscrossing an online map of Maryland.[2] As this news quickly percolated across the community, it became clear the lines represented the many possible routes of a new transmission line project known as the Maryland Piedmont Reliability Project ("MPRP").[3] When Public Service Enterprise Group ("PSEG"),[4] an out-of-state energy and utility company that won the bid for construction of the

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[1] *The First 30 Days*, STOP MPRP, INC. (Aug. 9, 2024), https://stopmprp.com/f/the-first-30-days (on file with the University of Baltimore) [hereinafter *The First 30 Days*].

[2] *See Proposed Route*, PSEG, INC., https://corporate.pseg.com/aboutpseg/companyinformation/thepsegfamilyofcompanies/psegrenewabletransmission/mprp-proposed-route.ashx (on file with the University of Baltimore) (last visited Jan. 12, 2024) [hereinafter *Proposed Route*].

[3] *Id.*

[4] *See Who are PSEG & PJM*, PSEG, INC., https://corporate.pseg.com/aboutpseg/companyinformation/thepsegfamilyofcompanies/psegrenewabletransmission/mprp-pseg.ashx (last visited Sept. 15, 2025) (on file with the University of Baltimore Law Forum).

MPRP, published the map on its website, it was effectively the first notice to local residents.[5] The background information published alongside the route map in early July indicated that PSEG's internal process began more than six months earlier and involved routing and siting studies across central Maryland.[6] However, the MPRP's potentially affected residents remained unaware of the project until early July 2024, when PSEG completed its studies, published the possible routes and scheduled public information sessions in the three affected counties.[7] After the map went live, notice of the project spread quickly, but largely through community social media pages and word-of-mouth.[8] Notice was confined mostly to unofficial channels because PSEG followed an accelerated timeline releasing the map on its website on July 8, 2024, and scheduling the public information sessions for July 9, 10, and 11, 2024, one in each affected county.[9] The reality that PSEG had not directly notified any landowners whose property lay within the MPRP's possible routes compounded the immediate mistrust directed at PSEG.[10] While the available information at this early stage was limited, it did include an instantly explosive mention of eminent domain.[11]

By immediately including the possible use of eminent domain if landowner negotiations failed, PSEG kindled a firestorm of resistance to the MPRP project.[12] Most citizens understand eminent domain as a taking of

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[5] *See Proposed Route*, *supra* note 2 ("The resulting 10 Alternative Route corridors (labeled as Routes A – J) were released publicly on July 8, 2024 . . . . Public information sessions (held July 9th, 10th & 11th in the three counties within the Study Area) along with the online survey tool (open from July 8th to July 26th) were utilized to collect public comments.").

[6] *See id.* ("The route was developed earlier in 2023 by PSEG . . . . The resulting 10 Alternative Route corridors (labeled as Routes A – J) were released publicly on July 8, 2024.").

[7] *Id.*

[8] *See* Anonymous Member, FACEBOOK (Hereford Zone Community Group), *BLUF: What's our collective goal?* (July 9, 2024, at 10:05 ET), https://www.facebook.com/groups/344505095690044/posts/2864776220329573/ (on file with the University of Baltimore Law Forum); *see also* Rona Kobell, *Baltimore County Residents Fume over 70-mile Power Line*, THE BALT. BANNER (Aug. 22, 2024, at 14:36 EDT), https://www.thebanner.com/community/climate-environment/baltimore-county-maryland-piedmont-reliability-project-ZAFYD6KMCFDBZANBQU6FDZE5II/ (on file with the University of Baltimore Law Forum) (reporting Baltimore County residents' responses to the map).

[9] *See* Anonymous Member, *supra* note 8; Kobell, *supra* note 8.

[10] *See Proposed Route*, *supra* note 2; *see also* Anonymous Member, *supra* note 8 (explaining that the routes were not released to the public for months after their development).

[11] Image posted by Jen Frederick, FACEBOOK (Hereford Zone Community Group), *Is it possible PSEG will seek to acquire property via Eminent Domain?* (July 8, 2024, at 18:22 ET), https://www.facebook.com/photo.php?fbid=1173251837123383&set=p.1173251837123383&type=3 (on file with the University of Baltimore Law Forum).

[12] *See* Gabrielle Lewis, *Residents skeptical, raise objections to possible PSEG regional transmission line routes*, THE FREDERICK NEWS-POST (July 10,

private property by a government entity for a project directly benefitting the public, such as highways, schools, or public parks.[13] As more information emerged, it became clear that not only was the MPRP not that type of project, but in reality it would have very little, if any, benefit to the state of Maryland and its citizens.[14]

This Comment explores the harmful impact on Maryland's farmland and landowners resulting from the current broad definition of eminent domain, the potential legislative remedies to narrow Maryland's use of eminent domain, and the few, if any, restrictions on the delegation of the sovereign power of eminent domain to private entities in service of corporate profits.[15] Part II explains the evolution of eminent domain in United States caselaw and its current interpretation both nationally and in Maryland.[16] It

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2024), https://www.fredericknewspost.com/news/economy_and_business/residents-skeptical-raise-objections-to-possible-pseg-regional-transmission-line-routes/article_1488a76b-84f2-518c-a2a0-83d88a78ba6f.html (on file with the University of Baltimore Law Forum); Tyler Durden, *1000s Of Marylanders Furious About Eminent Domain Risk For New Transmission Line Powering AI Data Centers*, ZEROHEDGE (July 17, 2024, at 19:05 ET), https://www.zerohedge.com/markets/thousands-marylanders-furious-about-eminent-domain-risk-new-transmission-line-powering-ai?EdNo=222 (on file with the University of Baltimore Law Forum); Suzi Ford, FACEBOOK (Hereford Zone Community Group), *Our community came out in full force* (July 9, 2024), https://www.facebook.com/groups/344505095690044/posts/2865000680307127/ (on file with University of Baltimore Law Forum).

[13] *History of the Federal Use of Eminent Domain*, U.S. DEP'T OF JUST. (Jan. 30, 2024), https://www.justice.gov/enrd/condemnation/land-acquisition-section/history-federal-use-eminent-domain (on file with the University of Baltimore Law Forum) (explaining that its use was "traditionally to facilitate transportation, supply water, construct public buildings . . ." as well as creating and preserving open green spaces and "natural beauty" in the form of public parks).

[14] *See Frequently Asked Questions: Why is Stop MPRP Opposing the Project*, STOP MPRP, INC., https://stopmprp.com/about-the-mprp#0354927e-842d-4496-a50b-28733857f8fd (on file with the University of Baltimore Law Forum) (last visited Jan. 12, 2025) [hereinafter *Why is Stop MPRP Opposing the Project*] (explaining that the main impetus of the project is "the rapid growth of data centers in Virginia . . . "); *see also* PJM INTERCONNECTION, RELIABILITY ANALYSIS REP: 2022 RTEP WINDOW 3, at 4 (2023), https://www.pjm.com/-/media/DotCom/committees-groups/committees/teac/2023/20231205/20231205-2022-rtep-window-3-reliability-analysis-report.pdf (on file with the University of Baltimore Law Forum) (citing increased demand from data centers "particularly in northern Virginia" in its 2022 load forecast and indicating that "[s]ince then, data center loads *within northern Virginia* have been *increasing at an unprecedented rate*" (emphasis added)).

[15] *Maryland Eminent Domain Laws*, INS. FOR JUST., https://ij.org/issues/private-property/eminent-domain/maryland-eminent-domain-laws/ (last visited Jan. 10, 2024) (on file with the University of Baltimore Law Forum) [hereinafter *Maryland Eminent Domain Laws*] (explaining that the *Kelo* decision, Maryland lawmakers introduced more than forty bills regarding eminent domain, but the legislature passed only one bill that fails to substantively protect property rights).

[16] *See infra* Sections II.B-C.

also includes an explanation of how local and regional energy markets have changed.[17] Part III discusses Maryland's current approach to eminent domain, and how that power is delegated to private corporate interests.[18] It will also explore the ways in which the current laws fail to protect Maryland's large agriculture industry, putting generational family farms at risk and allowing corporate interests to negate state granted land preservation and conservation easements.[19]

Part IV explores potential legislative remedies that could protect Maryland's landowners and agriculture industry.[20] It will discuss alternative sources of energy, the regulation of data center construction and energy use, the "optimization" of existing grid infrastructures, and the prohibition of takings of lands in conservation or preservation easements.[21] Finally, this Comment will examine these proposals through the lens of how they might best support and protect Maryland's property owners and farmers.[22]

II. HISTORICAL BACKGROUND.

A. The Origins and Meaning of Eminent Domain.

The concept of eminent domain evolved from the feudal reality that a king could take property for any purpose without compensation.[23] In the European feudal system, ownership centered in the sovereign, who had no need to consider individual property rights.[24] This feudal understanding began to change in the late middle ages with the signing of the Magna Carta

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[17] *See infra* Section II.D.

[18] *See infra* Sections III.A-B.

[19] *See infra* Section III.C; *see also Articles & Updates, Impact*, STOP MPRP, INC., https://stopmprp.com/articles-and-updates?blogcategory=Impact (on file with the University of Baltimore Law Forum) (last visited Jan. 10, 2025) (highlighting the numerous families and landowners, whose farms they believed were safeguarded from sale or development through preservation easements, now threatened by the proposed route of the MPRP).

[20] *See infra* Part IV.

[21] *See infra* Part IV; *see also* Chris West, *Six Legislative Solutions to Maryland's Energy Crisis*, FRIENDS OF CHRIS WEST, https://senatorchriswest.com/sendy-01/w/fP8uoLKk1J8DpPQJAfMb8Q/xZr3K9nWTCj892Xmt7b621qQ/jvpbAAQyH77S892DOqKUGgNg (on file with the University of Baltimore Law Forum) (last visited Mar. 14, 2026) (summarizing the six bills introduced or co-sponsored by Senator Chris West during the General Assembly's 2025 session).

[22] *See infra* Section IV.B.

[23] Sondra A. Berchin, *Regulation of Land Use: From Magna Carta to Just Formulation*, 23 UCLA L. REV. 904, 906 (1976).

[24] William D. McNulty, *Eminent Domain in Continental Europe*, 21 YALE L.J. 555, 558 n.7 (1912).

in 1215.[25] This transformational document demonstrated the beginnings of the protection of property rights, stating "[n]o Freeman shall be . . . de-seized of his freehold . . . but by lawful judgment of his peers or by the Law of the Land."[26]

The term eminent domain itself, however, was first used by the Dutch scholar Hugo Grotius in his treatise *On the Law of War and Peace*.[27] Originally written in Latin, it described "*dominium eminens*" or "supreme ownership" as the sovereign authority of the state to "use . . . destroy . . . or alienate" the property of its citizens for the purposes of "public advantage."[28] Significantly, Grotius added that if the state does exercise this sovereign right, it should compensate the property owner "from the public funds."[29] However, because the law considers eminent domain a sovereign right, "it requires no constitutional authority for its existence[,]" and is only restricted by prevailing law.[30]

More than 150 years later, the Founding Fathers chose to include such a restriction in the Bill of Rights as they sought to protect citizens from the new Constitution's more powerful federal government.[31] In the Fifth Amendment, the drafters limited the new government's right to take private property only for "public use" and with "just compensation."[32] While this restriction was an integral ingredient in the collection of rights on which U.S. citizens continue to rely, the vague nature of the phrase "public use" allowed shifting interpretations of its meaning to take hold over the intervening centuries.[33]

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[25] Dale Orthner, *Toward A More "Just" Compensation in Eminent Domain*, 38 MCGEORGE L. REV. 429, 431 (2007).

[26] *Id.* (quoting Magna Carta ch. 39 (1215)).

[27] HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 63, 140 (Francis W. Kelsey et al. trans., Oxford Univ. Press 1925) (1625).

[28] *Id.* at 807.

[29] *Id.* at 385.

[30] Lore v. Bd. of Pub. Works, 354 A.2d 812, 814 (Md. 1976) (citing Riden v. Phila., Balt. & Wash. R.R. Co., 35 A.2d 99, 100 (Md. 1943)).

[31] *America's Founding Documents: The Bill of Rights*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/bill-of-rights (on file with the University of Baltimore Law Forum) (last visited Nov. 23, 2025).

[32] U.S. CONST. amend. V; *Just Compensation,* BLACK'S LAW DICTIONARY (12th ed. 2024) ("Under the Fifth Amendment, a payment by the government for property it has taken under eminent domain — usu. the property's fair market value, so that the owner is theoretically no worse off after the taking.").

[33] *See History of Eminent Domain and Its Abuse*, INST. FOR JUST., https://ij.org/issues/private-property/eminent-domain/eminent-domain-history (on file with the University of Baltimore Law Forum) (last visited Nov. 3, 2024) [hereinafter *History of Eminent Domain*] (defining eminent domain as the state's inherent power to take private property for public use).

B. Evolving Judicial Interpretations of "Public Use" in the U.S.

Until the mid-twentieth century, courts interpreted "public use" narrowly, restricting the government's exercise of eminent domain to situations involving true "public use."[34] This included taking private property for roads, bridges, parks, and public buildings and facilities.[35] Each of these public uses involved a clear public need for infrastructure, education, or recreation.[36] Therefore, the early interpretation of "public use" relied on a finding that the government needed a property for regular public use, typically understood to mean the public had access to the use.[37]

In *Berman v. Parker* (1954), the Supreme Court of the United States found the District of Columbia Redevelopment Act of 1945 constitutional, creating the first expansion of the definition of public use towards "public purpose."[38] Rather than identifying a need for a public space and then acquiring the necessary property through eminent domain, the Redevelopment Act flipped the traditional order on its head, declaring specific areas of the District essentially uninhabitable and in need of "sound replanning."[39] The Court reasoned that redeveloping blighted areas served a public purpose and a fair payment satisfied property owners' rights, justifying the takings.[40]

Almost thirty years later in *Poletown Neighborhood Council v. City of Detroit*, the Supreme Court of Michigan allowed a government taking of an entire community within the City of Detroit, condemning over one thousand residences and hundreds of businesses.[41] The holding in *Poletown* allowed a private corporation to condemn the properties for the "public

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[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] Berman v. Parker, 348 U.S. 26, 28, 36 (1954) (holding that properties may be taken to facilitate redevelopment of neighborhoods deemed unsafe, harmful to "public health, safety" and generally a blight on the nation's capital).
[39] *Id.* at 28-29.
[40] *Id.* at 28, 35-36 (defining blighted areas as "substandard housing . . . including the use of buildings in alleys as dwellings for human habitation" and explaining that "miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They . . . also suffocate the spirit . . . make living an almost insufferable burden . . . an ugly sore . . . on the community which robs it of charm").
[41] *See* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 457-59 (Mich. 1981); *see also History of Eminent Domain*, *supra* note 33 (explaining that the court allowed the City of Detroit "to bulldoze an entire neighborhood . . . to give the property to General Motors for an auto plant" without even the pretext of finding "blight").

purpose" of building a plant and promoting economic development.[42] This decision set a precedent for economic development and corporate profit to satisfy a broad definition of public use, not only in Michigan, but in courts across the country.[43]

In *Hawaii Housing Authority* (1984), the United States Supreme Court leaned into the definitional shift to public purpose that the Michigan court utilized in *Poletown*.[44] The Court explained that any taking of private property "for the benefit of another private person" must be supported by a "justifying public purpose."[45] However, "[w]here the exercise of eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."[46] The Court then clarified that the purpose of the taking, not the mechanics, determines its constitutionality.[47]

The Supreme Court's broad interpretation in *Hawaii Housing Authority* remained the accepted precedent for twenty years until two decisions, *County of Wayne v. Hathcock* and *Kelo v. City of New London*, shifted it again.[48] In *County of Wayne v. Hathcock*, the Michigan Supreme Court reversed its decision in *Poletown*, temporarily narrowing the definition of public purpose.[49] The Supreme Court of Michigan held that a private pursuit of profit does not constitute a public use.[50] However, as a state court opinion, the court's ruling in *Hathcock* did not hold authority outside of Michigan.[51]

Regardless, Michigan's narrowed holding did not persist because the next year, in *Kelo v. City of New London*, the Supreme Court of the United States established a broader definition for public purpose that still stands as precedent today.[52] Specifically, the Court held that private property can be

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[42] *Poletown*, 304 N.W.2d at 457 (reasoning that "promoting industry and commerce" would add jobs and taxes to state revenue, satisfying the need for a public purpose).

[43] *History of Eminent Domain*, *supra* note 33.

[44] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 243-44 (1984) (reasoning that the state's interest in remedying "the skewed residential fee simple market" and overpriced land values by compelling large landowners to break up their estates satisfied the public use clause even if the land was immediately transferred to other private individuals).

[45] *Id.* at 241.

[46] *Id.*

[47] *Id.* at 244.

[48] County of Wayne v. Hathcock, 684 N.W.2d 765, 770 (Mich. 2004); Kelo v. City of New London, 545 U.S. 469, 489-90 (2005).

[49] *Hathcock*, 684 N.W.2d at 770 (holding that the County's stated intention to condemn properties and then transfer to private interests was "inconsistent with the common understanding of public use").

[50] *Id.* at 786-87.

[51] *Id.*

[52] *Kelo*, 545 U.S. at 485.

taken for private profit, but that such a taking would need to serve a public purpose of economic development.[53] In *Kelo*, the Court upheld the condemnation of a large waterfront neighborhood in New London, Connecticut, by private corporation, displacing many residents who had lived there for decades.[54] The purpose of the condemnation was to build a large manufacturing plant and revitalize the entire "blighted" area.[55]

The *Kelo* decision gained national attention, sparking outrage and sympathy for Ms. Kelo and her co-plaintiffs, including several elderly residents who had lived in these homes most of their lives.[56] The tragedy of *Kelo* is that after the Court allowed the condemnation to proceed, the private corporation abandoned the redevelopment project.[57] While the project's cancellation did not help Ms. Kelo nor the other residents of New London, the publicity initiated a proliferation of eminent domain restrictions at the state level.[58] Responding to the public outcry, many state legislatures passed laws restricting the use of eminent domain by private interests for the purpose of economic development and corporate profit.[59] Notably, even some of the states that enacted restrictive legislation around eminent domain conspicuously omitted any limits on energy and transmission projects.[60]

C. Evolution of Maryland's Eminent Domain Laws.

Maryland's laws governing eminent domain underwent comparatively modest evolution, a consequence of the state judiciary's historically broad reading of public use.[61] In the nineteenth century,

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[53] *Id.* at 484-85.
[54] *Id.* at 475, 489.
[55] *Id.* at 472.
[56] Ilya Somin, *The story behind Kelo v. City of New London – how an obscure takings case got to the Supreme Court and shocked the nation*, THE WASH. POST (May 29, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/29/the-story-behind-the-kelo-case-how-an-obscure-takings-case-came-to-shock-the-conscience-of-the-nation/ (on file with the University of Baltimore Law Forum); *Kelo*, 545 U.S. at 475.
[57] *History of Eminent Domain*, *supra* note 33.
[58] *History of Eminent Domain*, *supra* note 33.
[59] *Eminent Domain*, INS. FOR JUST., https://ij.org/issues/private-property/eminent-domain (on file with the University of Baltimore Law Forum) (last visited Feb. 28, 2026); *see also* Elva E. Tillman, *The Use of Eminent Domain for Economic Develop. In Balt. Md.: Ten Years After Kelo*, 75 MD. L. REV. 815, 820-21 (2016) (explaining that after *Kelo*, 21 states enacted new legislation limiting the use of eminent domain and describing the contents of such legislation).
[60] Alexandra B. Klass, *Takings and Transmission*, 91 N.C. L. REV. 1079, 1094 (2013).
[61] *See* Barnett v. Charles County, 112 A.2d 492, 494-95 (Md. 1955) (explaining the expanding application of Maryland's eminent domain and condemnation laws and holding that current interpretations expanded that authority far too broadly).

Maryland's case law indicated that courts had already embraced a broad construction of public use.[62] As early as 1873, the Court of Appeals of Maryland found that stimulating economic growth for the state satisfied the public use requirement and allowed a private enterprise to condemn private land, effectively interpreting "public use" to include takings that primarily benefitted private rather than public interests.[63] Maryland courts' early willingness to apply a broad public use standard established this concept far earlier than many other states.[64] This expansive definition of public use continued through the twentieth century as Maryland courts, citing this early precedent, allowed for condemnation of private land for the benefit of private interests.[65]

In *P.G. County. v. Collington Crossroads*, the court held that "public use" is not restricted to instances where "the public literally or physically [is] permitted to use the property taken by eminent domain."[66] In *Baltimore v. Chertkof*, the Court of Appeals of Maryland held that "condemnation for urban renewal purposes embodies a broad concept of public use, not limited to actual use by the public, but rather to use benefitting the public."[67] *Chertkof* expressed the spirit of *Poletown*, and beyond Maryland, the country gradually realigned with the broader definition of public use, later culminating in the Supreme Court's decision in *Kelo*.[68]

Nationally, the legacy of *Kelo* informs how courts across jurisdictions decide whether a public or private entity's purpose in condemning land satisfies the public use requirement.[69] Now, individual states are left to

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[62] New Cent. Coal Co. v. George's Creek Coal & Iron Co., 37 Md. 537, 561 (1873) (holding that condemning private land to lay a privately owned section of railroad for the benefit of a private mining company qualified as a public use because "it has been the settled policy of the State . . . to stimulate [private mining] enterprise for the purpose of developing the large mineral resources in the western portion of the State").

[63] *Id.*

[64] *See* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 457 (Mich. 1981).

[65] *See* N.Y. Mining Co. v. Midland Co., 58 A. 217, 221 (Md. 1904); *see also* Baltimore v. Brengle, 81 A. 677, 678 (Md. 1911) ("It cannot be said that because some parties may receive more direct benefits than the public at large, it is . . . a private and not a public use."); *cf.* Marchant v. City of Baltimore, 126 A. 884, 887 (Md. 1924) ("The public character of the use to which the [properties] are devoted is not affected by the fact that they may not all be made available for the indiscriminate use of the public.").

[66] Prince George's County v. Collington Crossroads, 339 A.2d 278, 284 (Md. 1975).

[67] Mayor of Baltimore v. Chertkof, 441 A.2d 1044, 1050 (Md. 1982).

[68] *Id.*; *Poletown*, 304 N.W.2d at 459; Kelo v. City of New London, 545 U.S. 469, 469.

[69] DANA BERLINER, OPENING THE FLOODGATES: EMINENT DOMAIN ABUSE IN THE POST-KELO WORLD 5 (Inst. for Just. 2006), https://ij.org/wp-content/uploads/2015/04/floodgates-report.pdf (on file with the University of Baltimore Law Forum) (reporting that courts in many states are citing to *Kelo* in finding against property owners and using it to say "the

narrow their definition of "public use" at the state level, leading to varying success.[70] For example, Maryland's attempts to protect private property in the wake of *Kelo* were lackluster at best.[71] However, Maryland again has a chance to update its definition of "public use" and protect its residents in light of the proliferation of data centers and their insatiable appetite for power.[72]

D. The Restructuring of the Energy Transmission Industry.

A fundamental shift in the structure of the energy marketplace complicates what Maryland constitutes "public use" in eminent domain takings for energy transmission lines.[73] As regulations and energy needs changed, "merchant" transmission lines, and other similar entities not subjected to the same constraints as public utilities, increasingly enter state electricity markets.[74] Transmission needs and the focus on renewable energy continue to grow exponentially, creating more space in the electricity market for transmission lines built by merchant or out of state transmission companies.[75] As is currently true here in Maryland with PSEG and the MPRP, many transmission lines built by these other players cut across state lines to deliver electricity elsewhere without any measurable benefit to the land where they are built.[76] This occurs largely because states now regulate retail electricity sales, and the federal government, through FERC, regulates "wholesale markets that involve interstate commerce and interstate transmission of electricity.[77] These changes to federal and state regulations created an "electricity generation and transmission system [that] has become

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judiciary should not second guess city decisions and that instead they should rubber stamp any eminent domain action that comes across their bench") (internal quotations omitted).

[70] *Id.* at 5-6.

[71] *See infra* Section III.A.

[72] MARTIN C. OFFUTT & LING ZHU, CONG. RSCH. SERV., DATA CENTERS AND THEIR ENERGY CONSUMPTION: FREQUENTLY ASKED QUESTIONS 3-5 (2025), https://www.congress.gov/crs_external_products/R/PDF/R48646/R48646.1.pdf (on file with the University of Baltimore Law Forum); Klass, *supra* note 60, at 1120-22.

[73] *See* Klass, *supra* note 60, at 1120–21 (explaining that the Energy Policy Act of 1992, amended in 2005, changed industry requirements in a way that "created a market for private or 'merchant' transmission lines that compete with public utilities . . .").

[74] *Id.* at 1096.

[75] *Id.* at 1096, 1101.

[76] *Id.* at 1097 (explaining that these types of lines "cross multiple state boundaries, providing little, if any, electricity or other 'public use' to the citizens of the states through which the lines pass").

[77] DAVID P. TUTTLE ET AL., THE HISTORY AND EVOLUTION OF THE U.S. ELECTRICITY INDUSTRY 5 (Univ. of Tex. at Austin Energy Inst. 2016) https://energy.utexas.edu/sites/default/files/UTAustin_FCe_History_2016.pdf (on file with the University of Baltimore Law Forum).

more regional and national in nature."[78] Amid this increased regionalization, projects like the MPRP act as giant extension cords, connecting power stations in one state to locations with unmet electricity needs in non-adjacent states.[79] State courts and legislatures must support public service commissions and focus on the question of how to define public use within eminent domain law for transmission lines that provide no discernable service to their own citizens.[80] However, courts often find sufficient public use in a myriad of different circumstances when public use is not defined by statute but instead reserved for judicial interpretation.[81] The public must question how a state protects its rural lands and farms when the interpretation of public use are not substantively addressed by state law.[82]

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[78] OFFUTT & ZHU, *supra* note 72, at 1101; *see also RTOs and ISOs*, FED. ENERGY REGUL. COMM'N (Jan. 17, 2024), https://www.ferc.gov/power-sales-and-markets/rtos-and-isos (on file with the University of Baltimore Law Forum) (illustrating the regional nature of the nation's energy transmission system).

[79] *See* Rachel Levine & Swad Sathe, *What's Next? Breakthroughs and Roadblocks in electric transmission regulation*, NISKANEN CTR. (Feb. 14, 2025), https://www.niskanencenter.org/whats-next-breakthroughs-and-roadblocks-in-electric-transmission-regulation/ (on file with the University of Baltimore Law Forum); *National Interest Electric Transmission Corridor Designation Process*, U.S. DEP'T OF ENERGY, https://www.energy.gov/gdo/national-interest-electric-transmission-corridor-designation-process (on file with the University of Baltimore Law Forum) (last visited Mar. 30, 2025); *see also* Ethan Howland, *AEP, Dominion, FirstEnergy propose joint 765-kV transmission projects across PJM*, UTILITY DIVE (Oct. 8, 2024), https://www.utilitydive.com/news/aep-dominion-firstenergy-pjm-transmission-projects-rtep/729168/ (on file with the University of Baltimore Law Forum) (discussing the current state of regional transmission needs, how the federal government designates those regional needs, and the effect data centers have on regional electricity demands).

[80] *See, e.g.*, Miss. Power & Light Co. v. Conerly, 460 So. 2d 107, 113 (Miss. 1984) (holding that public use or purpose cannot apply because "not one Mississippi customer is to be served by the proposed transmission line") (internal quotations omitted); Clark v. Gulf Power Co., 198 So. 2d 368, 371 (Fla. Dist. Ct. App. 1967) (stating that use of the state's power of eminent domain was improper where it is for the "sole purpose of serving a public use in another state").

[81] *See, e.g.*, Montana-Dakota Utils. Co. v. Parkshill Farms, 905 N.W.2d 334, 338-39 (S.D. 2017).

[82] *See infra* Section III.A.

III. ISSUE: MARYLAND'S FARMLAND AND PRIVATE PROPERTY OWNERS ARE AT RISK FROM AN OVERREACH OF EMINENT DOMAIN POWER FOR CORPORATE PROFIT.

A. Maryland Law Does Little to Protect Private Property from Eminent Domain Takings by Private Interests.

During the fallout and public outcry following the *Kelo* decision, many states passed and amended state laws and constitutions to protect private property from government takings.[83] However, Maryland's legislature failed to accomplish anything so meaningful.[84] Maryland legislators introduced more than forty bills aimed at curbing the broad power of eminent domain for projects that only marginally qualified as "public use."[85] Ultimately, Maryland only passed one bill, SB 3, that was enacted into law.[86]

However, once codified, SB 3 did not substantively protect private property in the state.[87] The law merely restricted government condemnations to a timeline within four years of official authorization.[88] If the four year timeline expires, the condemner must seek new authorization.[89] This slight restriction does not accomplish meaningful change for Maryland's landowners, but only serves to extend the process by creating an easily surmountable barrier.[90]

With prior efforts to reform Maryland's eminent domain laws falling short of that goal, state law still contains several statutes involving a very broad definition of public use as it relates to the power of eminent domain.[91] This expansive definition provides a smooth process for government entities to take private property in Maryland for a variety of purposes.[92] Government

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[83] *See* BERLINER, *supra* note 69, at 5-6 (explaining that in response to *Kelo* "[e]very state legislature that has been in session since June 2005 has considered legislative or constitutional reform" and using Florida, Georgia, and Virginia as specific examples of good and bad law).

[84] *See Maryland Eminent Domain Laws*, *supra* note 15.

[85] *See id*.

[86] *See id*.

[87] *See id*.

[88] *See id*.; MD. CODE ANN., REAL PROP. § 12-105.1 (West 2024).

[89] REAL PROP. § 12-105.1.

[90] *See Maryland Eminent Domain Laws*, *supra* note 15 (explaining that while a restricted timeline of four years "may reduce speculative or unnecessary condemnations," Maryland still needs much more comprehensive protections for property rights, particularly a repeal of provisions in the state constitution authorizing "quick take" condemnations).

[91] MD. CODE ANN., ECON. DEV. § 12-803 (West 2024); LOCAL GOV'T § 5-215 (West 2024).

[92] *See* Bouton v. Potomac Edison Co., 383 A.2d 669, 674 (Md. 1978) (quoting Ligon v. Potomac Elec. Power Co., 149 A.2d 376, 377 (Md. 1959)) ("[T]he choice as to the extent

entities can easily tweak their purposes to fit into the broad statutory definition of public use, such as highlighting the economic benefits of a project for the community.[93]

First, Section 12-803 of the Economic Development Article of the Maryland Code allows government takings of private property for economic development purposes.[94] Economic development does not historically satisfy the original intent of public use and is arguably not a public purpose.[95] Including economic development in the definition of public use allows local governments to condemn homes and businesses if officials are convinced the new owner will create jobs, pay more taxes, and boost the local economy.[96] Maryland's use of "economic development" in its takings statute is precisely why many other states narrowed their public use definition after *Kelo*, in the effort to prevent corporate interests from profiting at the expense of landowners.[97]

A second example is Section 5-215 of the Local Government Article in the Maryland Code, which grants local government entities broad authority to take property through eminent domain for urban renewal.[98] This statute directly references eliminating blight as a justification for taking property and pushing urban renewal.[99] The language specifically states that a government entity may take a family dwelling, provided it can show current deterioration and a likelihood the dwelling will continue to deteriorate, causing blight on the neighborhood.[100] Sections 5-215 and 12-803 are exactly the type of broad public use definitions that allow government overstep in private property takings derived from the *Kelo* holding.[101]

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and type of taking must rest largely in the sound business judgment of the condemner and that such choice will not be set aside by the court unless it is so oppressive, arbitrary or unreasonable as to suggest bad faith.").

[93] MD. CODE ANN., ECON. DEV. § 12-803 (West 2024); LOCAL GOV'T § 5-215 (West 2024).

[94] ECON. DEV. § 12-803.

[95] *See Maryland Eminent Domain Laws*, *supra* note 15; *see also* U.S. DEP'T OF JUST., *supra* note 13 (explaining that the power of eminent domain is for public use).

[96] *See Maryland Eminent Domain Laws*, *supra* note 15.

[97] *Id.* (discussing how *Kelo* explicitly allowed takings for "economic development" and in response, states such as Florida, New Mexico, South Dakota, North Dakota, Michigan, and Virginia established some of the strongest property protections through a combination of legislation and constitutional amendments. Over twenty other states, including Oregon, Nevada, Wyoming, Vermont, and Delaware also restricted condemnations for private gain).

[98] MD. CODE ANN., LOCAL GOV'T. § 5-215 (West 2024).

[99] *Id.*

[100] *Id.*

[101] *History of Eminent Domain*, *supra* note 33.

B. The Process Through Which a Private Entity or Utility Secures the Right to Exercise Eminent Domain from the State.

Unlike state governments, private entities or individuals do not possess the right of eminent domain.[102] If a private entity seeks to use private land for any purpose, it can negotiate with the landowner with an offer to purchase.[103] However, unlike state governments, if an owner declines to sell, that entity cannot exercise the power of eminent domain to condemn the land.[104] That power belongs to the state alone to use or grant to other entities.[105] However, a private entity can exercise the power of eminent domain if, in the case of a utility, it can prove the necessity of the project to the Maryland Public Service Commission ("MPSC") through a process codified in state law.[106]

Section 7-207 of the Public Utilities Article of the Maryland Code outlines the process through which a power company, a private entity, must apply for approval to the MPSC.[107] First, the power company must request a certificate of public convenience and necessity ("CPCN") through official filing with the MPSC.[108] That certificate, once approved, grants that privately owned power company with the state's power of eminent domain should negotiations with landowners fail.[109] In theory, the MPSC approval process exists as a comprehensive administrative review before granting such power to a private entity like an electric or power company.[110] However, there is no substantive guidance in state law on how the MPSC should evaluate true public use, especially in the context of transmission lines and rural protected lands.[111]

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[102] *See supra* Section II.A.
[103] *See supra* Section II.A.
[104] *See supra* Section II.A.
[105] *Impacted Landowner Resource Hub*, STOP MPRP, INC., https://stopmprp.com/landowner-hub (on file with the University of Baltimore Law Forum) (last visited Feb. 12, 2025).
[106] MD. CODE ANN., PUB. UTIL. § 7-207.5 (West 2024).
[107] *Id*.
[108] *Id.*
[109] *Id.*
[110] *See* Potomac Elec. Power Co. v. Montgomery County, 560 A.2d 50, 54 (Md. 1989) (explaining the approval process includes comment from "other state agencies," a public hearing, consideration of the "recommendations of local governing bodies" and other various societal effects of the proposed project). *See generally* Bd. of Comm'rs of Wash. Cnty. v. Perennial Solar, LLC, 212 A.3d 868, 876-77 (Md. 2019) (describing the comprehensive procedures codified in the Commission's CPCN application and approval process).
[111] MD. CODE ANN., PUB. UTIL. § 7-207 (West 2024); *see also* CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY, MD. DEP'T OF NAT. RES., https://dnr.maryland.gov/pprp/pages/cpcn.aspx (on file with the University of Baltimore Law Forum) (last visited Mar. 1, 2026) (explaining in detail the process through which an

Unfortunately, this process typically favors private interests over local landowners.[112] States, localities, and private interests enter the process with superior knowledge and influence, far more than the average private citizen.[113] By using this knowledge to their advantage, localities often don't need to use the power of eminent domain at all.[114] Instead, merely the threat of eminent domain or condemnation proceedings can provide sufficient inducement to the landowners to capitulate and sell.[115] For example, sometimes landowners do not understand they do not need to sell willingly to the government or the entity seeking to buy their property.[116] However, even if a landowner is aware of their rights not to sell or their right to challenge in court the amount offered in just compensation, they may have little faith that a long, expensive court battle would conclude in their favor.[117] Regardless of the path these landowners take, in each case the result is the same, a relinquishment of private property to the government.[118] A landowner's property is either "voluntarily" sold in response to a threat of eminent domain or subject to a government taking for "just compensation," all in the name of corporate profits.[119]

C. Maryland's Agriculture Industry is Particularly Vulnerable to Government Takings for Large Utility Projects.

Under the current MPSC approval process Maryland's agricultural land is particularly vulnerable to government takings, particularly for transmission lines.[120] Agriculture has been an integral part of Maryland's

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applicant entity proceeds through the approval process for a certificate of necessity and convenience with the Maryland Public Service Commission).

[112] BERLINER, *supra* note 69, at 5.

[113] *Id.* at 2–3 ("The threat of condemnation for private development is just as much an abuse of eminent domain as the actual filing of condemnation proceedings.").

[114] *Id.*

[115] *Id.* at 2.

[116] *Id.*

[117] Holiday Hull et al., *Transmission Lines and Property Rights: A Maryland Landowner's Guide to Eminent Domain and the Piedmont Reliability Project*, UNIV. OF MD. COLL. OF AGRIC. & NAT. RES. (Nov. 20, 2025), https://agrisk.umd.edu/post/transmission-lines-and-property-rights-a-maryland-landowner-s-guide-to-eminent-domain-and-the-piedm (on file with the University of Baltimore Law Forum) (explaining landowners' rights and that they "are not obligated to accept the initial offer for an easement").

[118] *Id*. (explaining that landowners on a potential route should pool resources to hire an attorney specializing in eminent domain law due to the complicated and expensive nature of challenging the taking and/or the compensation).

[119] BERLINER, *supra* note 69, at 5.

[120] *See* Hull et al., *supra* note 117.

economy and identity for centuries.[121] Today, agriculture is the state's largest commercial industry, contributing $8.5 billion dollars to its economy annually.[122] Agricultural land encompasses over two million acres throughout the state: approximately twelve thousand and five hundred acres of farmland and eighty-one percent of those farms are family-owned.[123] Unfortunately, open farmland can be attractive to a utility planning a route for high voltage transmission lines, essentially becoming a blank canvas of land vulnerable to the power of eminent domain.[124]

Contrary to its broad eminent domain laws, Maryland is among the five states leading the nation in land conservation efforts.[125] In fact, over one million acres of farmland have been protected in just those five states.[126] In Maryland, these efforts involve the "state Purchase of Agricultural Conservation Easement[s]," or PACE programs, to mitigate the proliferation of large developments across Maryland's rural lands.[127] When the state purchases an agricultural conservation easement through PACE, the contract typically grants the easement in perpetuity, effectively protecting that land from any development, subdivision or sale into the foreseeable future.[128] Most landowners participate in the PACE program because they believe in the goals of the program and view the payment they receive from the state as

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[121] *Maryland at a Glance: Agriculture*, MD. MANUAL ON-LINE, https://msa.maryland.gov/msa/mdmanual/01glance/html/agri.html (on file with the University of Baltimore Law Forum) (last visited February 15, 2025).

[122] *Id.*

[123] *Id*.

[124] *Proposed Route*, *supra* note 2.

[125] Lori Sallet, *State Purchase of Agricultural Conservation Easement Programs Permanently Protect over 3.4 Million Acres as of January 2022*, AM. FARMLAND TR. (NOV. 18, 2022), https://farmland.org/state-purchase-of-agricultural-conservation-easement-programs-permanently-protect-over-3-4-million-acres-as-of-january-2022/ (on file with the University of Baltimore Law Forum).

[126] Julia Freedgood et al., *Farms Under Threat: The State of the States*, AM. FARMLAND TR., at 38 (2020), https://s30428.pcdn.co/wp-content/uploads/sites/2/2020/09/AFT_FUT_StateoftheStates_rev.pdf (on file with the University of Baltimore Law Forum) (reporting that Maryland alone has over 350,000 acres of preserved farmland).

[127] *Id.* at 13 (explaining that the state makes these purchases using public funds to "compensate agricultural landowners for permanently protecting their land with a conservation easement").

[128] U.S. DEP'T OF AGRIC. NAT. CONSERVATION SERV., AGRICULTURAL CONSERVATION EASEMENT PROGRAM: MINIMUM DEED TERMS FOR THE PROTECTION OF AGRICULTURAL USE 1, https://www.nrcs.usda.gov/sites/default/files/2022-10/ACEP%20ALE%20Minimum%20Deed%20Terms.pdf (on file with the University of Baltimore Law Forum) (last visited Sept. 13, 2025) [hereinafter MINIMUM DEED TERMS].

a bonus.[129] However, the unfortunate reality is that conservation easement contracts do not protect the land from takings by eminent domain.[130]

Essentially, when a landowner signs a conservation easement contract with the state, they are legally prevented from selling or subdividing their land in perpetuity.[131] Perversely, one of the only permissible transactions under such a contract is to grant an easement, either voluntarily or through eminent domain, to a private utility or other type of private or government entity.[132]

The effect of the PACE program effectively turns Maryland's open farmland into a prime target for a utility company seeking a clear development path across the state.[133] The unfortunate result of this contract exception follows a circular path: first, the state pays a landowner through the PACE program; next, that property remains protected undeveloped farmland in perpetuity; then, however, that land becomes far more attractive than developed land to utility companies conducting siting studies for new transmission lines.[134] Therefore, the landowner who contracted with the state for an agricultural conservation easement to protect their land has instead potentially placed themselves directly in the crosshairs of a taking through eminent domain.[135] Thus, despite decades of being at the forefront in its efforts to protect rural farmlands, Maryland's failure to remove the threat of eminent domain from such farmlands distinguishes it from the other states leading in rural land protection.[136]

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[129] Rachel Pacella, RURAL LEGACY FARMERS AND PARTNERS CELEBRATE 25 YEARS OF PRESERVING MARYLAND'S BUCOLIC LANDSCAPE AND WORKING FARMS, MD. DEP'T OF NAT. RES. (Oct. 17, 2024), https://news.maryland.gov/dnr/2024/10/17/rural-legacy-farmers-and-partners-celebrate-25-years-of-preserving-marylands-bucolic-landscape-and-working-farms/ (on file with the University of Baltimore Law Forum) (highlighting several Maryland families with farms in conservation easement specifically because they do not want to see the land converted to housing developments or other high density uses).

[130] *See* MINIMUM DEED TERMS, *supra* note 128, at 10-11.

[131] *See id*. at 1.

[132] *Id.*

[133] *See Proposed Route*, *supra* note 2.

[134] *See id.* (showing the proposed routes almost exclusively crossing rural Maryland and avoiding developed areas).

[135] *See* MINIMUM DEED TERMS, *supra* note 128.

[136] *See* Freedgood et al., *supra* note 126, at 35 (explaining Maryland enacted the first property tax relief program for farmland in the nation in 1956 and introduced the state PACE program in 1977); *id.* at 46 (explaining New Jersey, Pennsylvania, Utah, and Virginia all "empower authorities to prevent takings of enrolled lands through eminent domain").

D. Justifications for the use of eminent domain power for transmission lines.

In contrast to the arguments against Maryland's current use of eminent domain for energy transmission projects, some groups in support for such use argue it creates efficiency, increases the state's ability to support "critical infrastructure," and has a relatively "limited impact on landowners."[137]

First, the argument that the exercise of eminent domain creates efficiency in this context often refers to a project that cannot go forward due to one landowner refusing to negotiate or demanding "the entire economic surplus from the infrastructure proposal."[138] Without that one remaining plot of land, the government cannot build the requisite infrastructure, and if the holdout landowner understands this dynamic, they may ask for a larger sum than "just compensation."[139] Without the ability to exercise eminent domain, a state in this situation faces the possibility of rising project costs or project cancellation altogether.[140] Therefore, the government often views eminent domain as the only answer in these situations, justifying its use of eminent domain to take the plots of land for "just compensation" without interfering with the project.[141]

Supporters also argue that the state must retain the ability to "support critical infrastructure" which is equivalent to, and satisfies, the public use component of eminent domain law.[142] Critical infrastructure typically refers to vital systems within a state or nation, such as communications, emergency services, healthcare, and energy.[143] Because these critical systems are integral to the proper functioning of the state or nation, the government deems

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[137] James W. Coleman & Alexandra B. Klass, *Energy and Eminent Domain*, 104 MINN. L. REV. 659, 716 (2019); *see also* Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 529 (2009) ("[T]he takings power is . . . warranted by the need to overcome strategic barriers that would block the government's consensual acquisition of such property as would be used in the provision of the public good.").

[138] Coleman & Klass, *supra* note 137, at 716.

[139] *Id.*

[140] *Id.* (explaining that this is referred to as bilateral monopoly or holdout, which "raises transaction costs and may entirely prevent construction of efficient projects"); *see also* Bell, *supra* note 137, at 530–31 ("Each[, the government and the landowner,] knows that there is profit to be made in transferring the land to the government, and each side will try to maximize its own share of the profit.").

[141] *See* Bell, *supra* note 137, at 531.

[142] *See* Coleman & Klass, *supra* note 137, at 719.

[143] *Critical Infrastructure Sectors*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, https://www.cisa.gov/topics/critical-infrastructure-security-and-resilience/critical-infrastructure-sectors (on file with the University of Baltimore Law Forum) (last visited Feb. 18, 2026).

eminent domain necessary for the good of the whole.[144] However, this justification enters the murky waters of what constitutes proper public purpose and use.[145] The government must define how public use or purpose supports that transmission projects are critical infrastructures for it, even though the projects will only deliver power out of its jurisdiction.[146]

Finally, a strong argument exists that eminent domain takings for the sole purpose of transmission lines, pipelines, and other similar projects has a relatively limited impact on affected landowners because the land in question is not a landowner's entire parcel, but merely an easement on a portion of the land.[147] It is almost certain that landowners subjected to a taking of their entire property, as seen in *Poletown*, *Hawaii Housing Authority*, and *Kelo* likely experience a far greater impact than those from whom the government takes an easement.[148] However, the government's belief that a partial taking through a permanent easement is far less disruptive than a full taking potentially skews the analysis of the public use of the project.[149] If a state agency does not consider an easement to be a true taking in the same sense as when an entire property is taken, the government often will not place the same weight on the analysis of whether the use is truly public and justifies the use of eminent domain.[150] This reasoning also influences the amount of "just compensation" courts decide a landowner is owed for an easement that still allows continued use and control of most of the property.[151]

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[144] *See* Coleman & Klass, *supra* note 137, at 673.
[145] *Id.*
[146] *See generally id.* (discussing the potential impact that broad limits on eminent domain may have on renewable energy infrastructure and how to balance those needs with those of landowners and the environment in the context of defining public use).
[147] *See Why is Stop MPRP Opposing the Project*, *supra* note 14 ("Will PSEG need to purchase any land to complete this project? PSEG will need to acquire property rights for the project, mainly in the form of permanent easements, i.e. perpetual rights to construct, repair, maintain, replace, or remove the power lines and associated structures.").
[148] *See supra* Section II.B.
[149] *See generally* Jones v. City of Tallahassee, 304 So. 2d 528, 532 (Fla. Dist. Ct. App. 1974) (holding that landowners were entitled to compensation equal only to the value of the easement and not the full market value of the land within the easement, reasoning that the taken land remained usable for the owner's purposes); Carroll Elec. Co-op. Corp. v. Lambert, 403 S.W.3d 637, 642–46 (Mo. Ct. App. 2012) (reasoning that a permanent easement, as a partial taking, allows the property owner to retain almost complete control of the land and state law prevents expanded use of the easement absent further negotiation or condemnation proceedings); Otter Tail Power Co. v. Malme, 92 N.W.2d 514, 526 (N.D. 1958) (affirming the trial court's judgment and holding that the jury awarded damages were appropriate for the value of the easement and landowners were not entitled to compensation based on the "alleged damages by way of depreciation of the balance of the farm").
[150] *See Jones*, 304 So. 2d at 532; *Carroll Elec.*, 403 S.W.3d at 646.
[151] *See Jones*, 304 So. 2d at 532; *Otter Tail Power*, 92 N.W.2d at 526.

IV. SOLUTION: MARYLAND MUST PROTECT THE STATE'S RURAL LANDS THROUGH LEGISLATIVE ACTION.

A. The Maryland Public Service Commission Must Require Applicants to Consider Grid Optimization.

The current MPSC approval process requires certain environmental studies and a tacit acknowledgement that the applicant explored alternatives to new transmission lines in its planning process.[152] In light of the increasingly large demands on the electric grid resulting from data centers, new artificial intelligence technologies, and the general rapid growth of technology, the state must update the MPSC approval process with more rigorous standards.[153] Unfortunately Maryland's current relaxed requirements lack serious explorations of the potential to upgrade and optimize the existing grid to meet these needs.[154] Therefore, for-profit energy companies will continue to prey on Maryland's farmlands for their own gain until Maryland implements stronger CPCN application requirements.[155]

Various Maryland legislators are attempting to push reform and introduced many MPRP inspired bills during the 2025, and now the 2026, Maryland General Assembly legislative sessions.[156] This includes Senate Bill 0952: Certificate of Public Convenience and Necessity – Transmission Lines

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[152] *See supra* Section III.B.

[153] *See* West, *supra* note 21.

[154] *See supra* Section III.B; *see also* West, *supra* note 21 (discussing ways the Maryland Legislature can upgrade the existing grid infrastructures).

[155] *Enhancing the Grid: ITCS Solutions Without New Transmission*, STOP MPRP, INC., https://stopmprp.com/alternatives/f/enhancing-the-grid-itcs-solutions-without-new-transmission (on file with the University of Baltimore Law Forum) (last visited Sept. 13, 2025) ("This approach ensures grid reliability and state-level resource adequacy without the need for new greenfield transmission projects, aligning with both environmental considerations and community interests."); *see also Case Studies and Modeling on the Value of Grid Enhancing Technologies – January 2024*, STOP MPRP, INC., https://img1.wsimg.com/blobby/go/bea7ca9f-15d6-4b59-9636-83641861a7d8/downloads/Case-Studies-and-Modeling-on-the-Value-of-Grid.pdf (on file with the University of Baltimore Law Forum) (last visited Sept. 13, 2025) (explaining the various technologies available as alternatives to the disruptive and damaging construction of high voltage transmission lines across open greenfield and protected lands).

[156] *See* West, *supra* note 21; *see also* LEGISLATION: SENATE, MD. GEN. ASSEMB., https://mgaleg.maryland.gov/mgawebsite/Legislation/Index/senate (on file with the University of Baltimore Law Forum) (last visited Feb. 20, 2026) (discussing bills introduced in the 2026 Legislative Session relating to the MPRP closely mirror those from 2025 and include SB 0201, SB 0092, SB 0545, SB 0630).

– Grid Enhancing Technologies ("SB 0952").[157] If enacted, SB 0952 would require that CPCN applicants conduct, as part of their application, a "grid optimization study" exploring the potential for Maryland to increase its current transmission capacities without constructing new transmission lines.[158] The study, made public for comment once complete, must explore various possibilities in grid enhancement technologies.[159] Although SB 0952 ultimately did not pass in 2025, similar legislative efforts to reform and bolster the MPSC's CPCN process are an important piece of the puzzle in preventing the proliferation of new transmission line construction.[160] However, implementing additional protection in the CPCN application process alone cannot adequately safeguard vulnerable rural landowners.[161] Maryland must also amend its eminent domain statute to strengthen rural landowner rights and ensure fairer procedures during utility and transmission line developments.[162]

B. Necessary Changes to Maryland's Eminent Domain Statute.

Maryland's agriculture and farmlands are particularly vulnerable to takings for high voltage transmission lines.[163] Many of these vulnerable green spaces are currently in agricultural conservation easements and as such, deserve protection from the threat of eminent domain.[164] Sadly, neither Maryland's eminent domain statute nor the conservation easement contracts protect these lands from government takings.[165] Currently, conservation

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[157] LEGISLATION: SB0952, MD. GEN. ASSEMB., https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/sb0952?ys=2025RS (on file with the University of Baltimore Law Forum) (last visited Feb. 20, 2026).
[158] *See* West, *supra* note 21.
[159] *Id.* ("(a) the implementation of advanced grid technologies, including smart grid technologies and advanced battery storage systems; (b) optimization of existing transmission lines through reconductoring, dynamic line ratings, advanced power flow control and voltage optimization; (c) strategic deployment of distributed energy resources that reduce load on the grid, including battery storage measures; and (d) improvement of energy efficiency programs that reduce grid demand.").
[160] *Id.*
[161] *See supra* Section III.C (explaining that while creating larger hurdles within the CPCN application process might prevent some large transmission line projects, land in preservation would still be at risk if the MPSC approves such projects, and the only certain way to protect preserved and protected properties is to eliminate the loophole in the contract that allows them to be taken through eminent domain).
[162] *See supra* Section III.C.
[163] *See supra* Section III.C.
[164] *See supra* Section III.C.
[165] FISCAL AND POLICY NOTE: SB0955, MD. GEN. ASSEMB. DEP'T OF LEGIS. SERV. (2025), at 5, https://mgaleg.maryland.gov/2025RS/fnotes/bil_0005/sb0955.pdf (on file with the University of Baltimore Law Forum).

easement regulations facilitate the opposite outcome, allowing an "overlay easement" if the state grants a utility company "condemning authority."[166]

One potential solution is the passage of bills like SB 955.[167] During the 2025 Legislative Session, Senator Chris West introduced SB 955: The 2025 Eminent Domain Improvements Act ("SB 955").[168] SB 955 contained three changes to current eminent domain law.[169] However, most importantly, the proposal prohibits entities constructing overhead transmission lines from using a condemning authority on any property already in agricultural conservation easement.[170] Considering Maryland's large percentage of farm and rural lands in conservation easements, SB 955's provision prohibiting overhead transmission lines is necessary to protect those lands.[171] This, together with the bill's other provisions, will protect farms, relieve some of the financial burden associated with court proceedings and allow more landowners to fight condemnation.[172]

As a leader among the states in enacting policies that protect rural and agricultural lands, Maryland must not allow these lands to fall victim to unnecessary transmission line projects.[173] Permitting this transmission line encroachment on rural lands could slowly whittle away the state's progress towards preserving its agricultural heritage.[174] While it did not pass in 2025, Maryland should again attempt to pass a bill similar to SB 955 to protect its long-standing tradition of preserving agricultural and rural land.[175]

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[166] *Id.* (explaining that an "overlay easement" is an easement "over an existing agricultural preservation easement for utility infrastructure").

[167] LEGISLATION: SB0955, MD. GEN. ASSEMB., https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/sb0955?ys=2025RS (on file with the University of Baltimore Law Forum) (last visited Feb. 26, 2026).

[168] *Id.*; *see* West, *supra* note 21.

[169] LEGISLATION: SB0955, MD. GEN. ASSEMB.; *see* West, *supra* note 21.

[170] *See* West, *supra* note 21 (explaining "that in any eminent domain action brought to acquire land for an electrical transmission line pursuant to a [CPCN] issued by the [MPSC], not only will the owners of the land . . . have the right to be compensated . . . the owners of any land located within 150 feet of the acquired land will also have the right to be compensated for the diminution in value of their land" and that if the landowner wins in any associated court proceedings, they are entitled to reasonable attorney's fees and court costs).

[171] *See supra* Section III.C.

[172] *See* West, *supra* note 21.

[173] *Id.*; *see also* Freedgood et al., *supra* note 126, at 4 (discussing state policy mechanisms such as PACE programs, land-use planning, agricultural districts, tax incentives, farm link programs, and state agricultural leasing initiatives).

[174] *MPRP Landowner Impact Stories*, STOP MPRP, INC., https://stopmprp.com/what-is-at-stake (on file with the University of Baltimore Law Forum) (last visited Sept. 13, 2025).

[175] MARYLAND GENERAL ASSEMBLY, LEGISLATIVE SESSIONS: 2025, MD. MANUAL ON-LINE (MD. STATE ARCHIVES), https://msa.maryland.gov/msa/mdmanual/07leg/html/sessions/2025.html (on file with the University of Baltimore Law Forum) (last visited Sept. 13, 2025); *see also* AMERICAN

V. CONCLUSION.

Maryland's efforts to preserve farms and rural lands lead the nation and serve as an example to other jurisdictions.[176] The MPRP project brings to light the energy transmission challenges inherent in modern society.[177] The interplay between rural lands, a growing need for energy transmission, and the problems that arise from their relationship is not disappearing anytime soon.[178] If Maryland seeks to maintain and protect its rural and farm lands while addressing the state's modern energy challenges, it must enact legislation similar to SB 955 to balance growing energy needs with protecting rural residents.[179]

Protecting land in agricultural conservation easements has been the first step in protecting rural lands for decades.[180] Closing the easement contract loophole that allows government takings of those lands is paramount to their full protection.[181] However, that process is now insufficient and Maryland must also amend the MPSC approval process that is fast becoming an integral element in protecting Maryland landowners from corporate greed.[182] Mandating a more robust application and approval process will likely increase private entities' costs, particularly associated with conducting grid optimization studies.[183] Creating time and cost hurdles through the approval process will ideally help achieve Maryland's agricultural goals.[184]

However, PSEG currently demonstrates no interest in exploring alternatives because of its concerns that the alternatives may involve higher costs and will chip away at company profits.[185] Yet, regardless of PSEG's

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FARMLAND TRUST, *supra* note 125 (discussing how Maryland leads in the number of acres of land protected).

[176] *See* Freedgood et al., *supra* note 126, at 4.

[177] *See The First 30 Days*, *supra* note 1; *see also Enhancing the Grid: ITCS Solutions Without New Transmission*, STOP MPRP, INC., https://stopmprp.com/alternatives/f/enhancing-the-grid-itcs-solutions-without-new-transmission (on file with the University of Baltimore Law Forum) (last visited Sept. 13, 2025) (discussing the research and technology already being explored in response to increasing energy demands across the nation).

[178] *See* West, *supra* note 21.

[179] *See Why is Stop MPRP Opposing the Project*, *supra* note 14.

[180] *See* Freedgood et al., *supra* note 126, at 4.

[181] *Id.*; *see also supra* Section IV.B (explaining that Maryland's agriculture and farmlands are vulnerable to government takings).

[182] *See supra* Section IV.A.

[183] *See supra* Section IV.A.

[184] *See supra* Section IV.A.

[185] *See Proposed Route*, *supra* note 2 (discussing how alternative routes were reviewed but Route H was ultimately selected because it reduced costs).

concerns, Maryland must prioritize protecting its agricultural commerce, residents, and private land, not corporate greed for excess profit.[186]

[186] *See supra* Section IV.B.

RECENT DEVELOPMENT

REYES V. STATE: SENTENCES ARE NOT "IMPOSED" UNTIL THE HEARING CONCLUDES, ALLOWING COURTS TO MODIFY A SENTENCE WHILE THE PROCEEDING REMAINS ONGOING

By: Allie Burkinshaw

The Supreme Court of Maryland held that a judge retains jurisdiction to revise a sentence until the moment the sentence is imposed. *Reyes v. State*, 492 Md. 630, 641, 347 A.3d 428, 434 (2025). The court further explained that once a sentence has been imposed, Maryland Rule 4-345 governs and significantly restricts the trial court's authority to modify the sentence. *Id*. at 642, 347 A.3d at 435.

On July 26, 2023, a jury convicted Defendant Jefferey Reyes ("Reyes") of second-degree assault. At the sentencing hearing, although the trial judge indicated that she would accept the State's recommendation, she initially announced a sentence of one year incarceration, suspending all but nine months on home detention, followed by three years of supervised probation. While the court was advising Reyes of his post-trial rights, the prosecutor sought clarification regarding the announced sentence. The prosecutor explained that the pronounced sentence would leave only three months of active incarceration in the event of a probation violation. Upon realizing she had misunderstood the applicable sentencing guidelines, the judge revised the sentence to five years' imprisonment, suspending all but nine month on home detention, followed by three years of supervised probation. This revision occurred while Reyes remained present in the courtroom.

Reyes timely appealed to the Appellate Court of Maryland, alleging that the trial court illegally increased his sentence after its "imposition." Reyes then petitioned for certiorari, which the Supreme Court of Maryland granted to address two questions: (1) when a criminal sentence is "imposed" under Rule 4-345, and (2) whether the trial court illegally increased the defendant's sentence when it modified the original sentence during the same sentencing proceeding, before the proceeding had formally concluded.

The court began its analysis by examining the legal framework governing sentence modifications. *Reyes*, 492 Md. at 637, 347 A.3d at 432. A sentencing court generally lacks authority to increase a defendant's sentence after it has been imposed. *Id*. at 637, 347 A.3d at 432. Reyes argued that "once the sentence was announced, the court's authority to increase the sentence was circumscribed by Rule 4-345, which permits such an increase

only if the original sentence was illegal, if there was some fraud, mistake or irregularity, or if the court made a mistake in announcing the original sentence." *Id*. at 636, 347 A.3d at 431 (quoting Reyes v. State, 264 Md. App. 616, 620-21, 332 A.3d 637, 640 (2025)). However, the court rejected this claim, holding that a sentence is not "imposed" until the sentencing proceeding concludes. *Id.* at 636, 347 A.3d at 431. Because the trial court adjusted the sentence during the same proceeding, the court held that Rule 4-345 did not apply, and the increase was lawful. *Id.* at 636, 347 A.3d at 431. Before Rule 4-345, common law limited a circuit court's authority to revise sentences. *Id.* at 636, 347 A.3d at 431.

To remedy the practical challenges that arose when judges misstated sentences but lacked a clear mechanism for correction, the court amended Rule 4-345. *Reyes*, 492 Md. at 641, 347 A.3d at 434. The 1992 amendment permits correction of "an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the courtroom following the sentencing proceeding." *Id.* at 641, 347 A.3d at 434. This rule allows judges to clarify or fix sentencing mistakes on the record, while ensuring that a sentence cannot later be modified after it has been imposed. *Id*. at 641, 347 A.3d at 434.

Drawing on precedent, the court confirmed that trial courts retain authority to modify a sentence up until the point a sentence is imposed. *Reyes*, 492 Md. at 642, 347 A.3d at 435. In State v. Sayre, the court held that a sentence is "imposed" when the sentencing phase concludes—typically when the judge signals the case is over by remanding the defendant or calling the next case. *Id*. at 639, 347 A.3d at 433 (citing State v. Sayre, 314 Md. 559, 565, 552 A.2d 553, 556 (1989)). Any attempt to change the sentence after that point violates Rule 4-345, even if the initial pronouncement was a "slip of the tongue." *Id.* at 639, 347 A.3d at 433 (citing *Sayre*, 314 Md. at 562-65, 552 A.2d at 553). Therefore, in *Brown v. State*, the court upheld a mid-hearing sentence adjustment because the sentencing proceeding had not concluded and the court remained actively engaged in pronouncing the sentence. *Id.* at 639-40, 347 A.3d at 433 (citing Brown v. State, 83 Md. App. 24, 35, 573 A.2d 403, 408 (1990)).

By contrast, in *Simpkins v. State*, the court impermissibly increased a defendant's sentence after he had left the courtroom and the court had called the next case, as the sentencing proceeding had already concluded. *Reyes*, 492 Md. at 640, 347 A.3d at 434 (citing Simpkins v. State, 88 Md. App. 607, 624, 596 A.2d 655, 664 (1991)). Thus, the court adopted the holdings of these prior decisions and held that a judge has authority to revise a sentence at any point prior to its imposition. *Id.* at 642, 347 A.3d at 434-35.

After concluding that a sentence may be modified before it is imposed, the court further held that once imposition occurs, Rule 4-345 takes

effect and significantly limits the trial court's authority to revise the sentence. *Reyes*, 492 Md. at 642, 347 A.3d at 435. After imposition, Rule 4-345 permits sentence increases only if the original sentence was illegal, involved fraud, mistake, or irregularity, or to correct an evident mistake before the defendant leaves the courtroom. *Id*. at 642, 347 A.3d at 435. These limitations reflect concerns for finality and comity, and draw upon the Double Jeopardy Clause's protection against multiple sentences for a single offense. *Id*. at 642, 347 A.3d at 435.

Using this framework, the court reasoned that the trial judge modified Reyes' sentence during an "ongoing sentencing colloquy," while the hearing remained open and before the court had concluded the proceeding or turned to another case. *Reyes*, 492 Md. at 642, 347 A.3d at 435. While advising Reyes of his post-trial rights, the prosecutor raised a concern about sentence structure, prompting the judge to revise the term. *Id*. at 643, 347 A.3d at 435. Requiring strict finality at the moment a sentence is first announced would unduly limit a trial judge's ability to correct errors or clarify a sentence, whereas permitting adjustments until the conclusion of the hearing preserves accuracy, appropriateness, and judicial discretion. *Id*. at 643-44, 347 A.3d at 436.

The *Reyes* decision underscores that trial courts retain discretion to revise an announced sentence while the sentencing proceeding remains ongoing, and that Rule 4-345 does not apply until the sentence has been formally imposed. The decision strikes a balance between finality and the need to correct or clarify sentences in real time, promoting both fairness and flexibility. This framework provides clear guidance to trial courts and practitioners: under Rule 4-345, a sentence is not "imposed" until the sentencing proceeding concludes, and modifications made prior to that point do not trigger the rule's post-imposition limitations. Accordingly, practitioners must remain attentive throughout the entire sentencing hearing, recognizing that a sentence does not attain finality until the court formally concludes the proceeding.

RECENT DEVELOPMENT

DANSHIN V. STATE: A DEFENDANT IS ENTITLED TO A DEFENSE-OF-OTHERS JURY INSTRUCTION WHEN SOME EVIDENCE SUPPORTS EACH ELEMENT, EVEN IF THE DEFENDANT MAKES INCONSISTENT STATEMENTS ABOUT THE ACT

By: Katelin Carter

The Supreme Court of Maryland held that a defendant charged with murder is entitled to a jury instruction on the defense of others where there is some evidence supporting each element of the defense, even if the defendant offered inconsistent statements or denied being the perpetrator. *Danshin v. State*, 491 Md. 520, 541-51, 340 A.3d 199, 211-17 (2025). The court further held that statements made during a police interview, viewed in the light most favorable to the defendant, may constitute sufficient evidence to generate a defense-of-others instruction, and that credibility determinations and inconsistencies in those statements are matters for the jury to decide. *Id.* at 543-46, 340 A.3d at 213-14.

On June 22, 2022, Javier Gonzalez-Mena was shot and killed outside of a Red Roof Inn in Montgomery County, Maryland. At the time of the shooting, Gonzalez-Mena was in a tumultuous and violent relationship with Christina Jones, and Danshin had previously assisted Jones following a violent incident with Gonzalez-Mena. Jones told Danshin that Gonzalez-Mena had physically assaulted her and threatened to kill her.

After Gonzalez-Mena's death, Danshin participated in a recorded police interview that was later introduced at trial. During the interview, Danshin stated that he observed Gonzalez-Mena pull Jones by her hair while wielding a machete and expressed his belief that Gonzalez-Mena was going to kill her. Although Danshin repeatedly denied being the shooter, he also stated that if he had fired the shot, it would have been because he believed that Jones was in imminent danger of lethal bodily harm.

The State charged Danshin with first-degree murder, use of a firearm in the commission of a felony, and illegal possession of a firearm. At trial, defense counsel requested jury instructions on the perfect and imperfect defense of others, arguing that Danshin's statements provided some evidence to support the defense. The Circuit Court for Montgomery County denied the request, concluding that there was no evidence of an immediate or imminent threat to Jones. The Appellate Court of Maryland affirmed, holding that a defense-of-others instruction was unavailable because Danshin

never admitted to firing the fatal shot. The Supreme Court of Maryland granted certiorari to answer "the lone question of whether the trial court erred in declining to instruct the jury on the law of defense of others."

The court began by reaffirming that under Maryland Rule 4-325(c), a requested jury instruction must be given when it is: (1) a correct statement of the law, (2) is applicable under the facts, and (3) is not otherwise covered by the instructions actually given. *Danshin*, 491 Md. at 532-33, 340 A.3d at 206. To be applicable, the requesting party needs only to produce "some evidence" supporting each element of the defense, a standard the court described as a "low bar." *Id.* at 532-33, 340 A.3d at 206.

Applying that standard, the court rejected the appellate court's conclusion that Danshin's denial of the shooting foreclosed a defense-of-others instruction. *Danshin*, 491 Md. at 550-51, 340 A.3d at 217. The court explained that Maryland permits defendants to advance inconsistent theories of defense and that a defendant is entitled to an instruction on any defense fairly supported by the evidence, even if those theories are in tension with one another. *Id.* at 543-44, 340 A.3d at 213. Whether the jury ultimately credits the defendant's account is a separate matter that does not affect the defendant's entitlement to the instruction. *Id.* at 544, 340 A.3d at 213 (citing Roach v. State, 358 Md. 418, 432, 749 A.2d 787 (2000)).

The court further held that Danshin's police interview statements constituted "some evidence" supporting each element of the defense of others. *Danshin*, 491 Md. at 540-41, 340 A.3d at 210-11. Under Maryland law, the elements of perfect defense of others require some evidence that: (1) the defendant actually believed the person defended was in immediate or imminent danger of death or serious bodily harm; (2) that belief was objectively reasonable; (3) the defendant used no more force than reasonably necessary in light of the threatened or actual force; and (4) the defendant's purpose in using force was to aid or protect the person defended rather than to punish the aggressor. *Id*. at 532-33, 340 A.3d at 206. Applying Maryland's low "some evidence" threshold under Rule 4-325(c), the court analyzed each element separately. *Id*. at 538, 340 A.3d at 209.

First, the court determined that Danshin's statements provided some evidence that he subjectively believed that Jones was in imminent danger of death or serious bodily harm. *Danshin*, 491 Md. at 541-46, 340 A.3d at 212-14. During his recorded interview, Danshin stated that he saw Gonzalez-Mena dragging Jones by her hair while wielding a machete and that it appeared he was going to "cut her… head off." *Id*. at 528, 340 A.3d at 203. He further told detectives that he saw someone in "imminent threat of lethal bodily harm." *Id*. at 528, 340 A.3d at 204. Even though Danshin also denied being the shooter at various points during his interview, the court held that

inconsistent statements do not negate the existence of some evidence. *Id*. at 543-45, 340 A.3d at 213-14.

Second, the court determined that there was some evidence that Danshin's belief was objectively reasonable. *Danshin*, 491 Md. at 546-48, 340 A.3d at 214-16. The reasonableness inquiry must be evaluated from the defendant's perspective and includes consideration of prior knowledge that shapes perception of the event. *Id*. at 546-47, 340 A.3d at 213-15. A belief about imminent danger is necessarily informed by the defendant's sensory perception at the scene, often "shaded by knowledge or perceptions of ancillary or antecedent events." *Id*. at 546-47, 340 A.3d at 213-15. Here, Danshin's prior knowledge that Gonzalez-Mena had previously beaten and threatened to kill Jones was properly considered as part of the context in which he perceived the machete raised above her neck. *Id*. at 548, 340 A.3d at 215-16. The court emphasized that antecedent knowledge may inform whether a reasonable person in the defendant's position would perceive lethal danger, and that prior knowledge alone does not suffice; there must also be evidence that the relevant state of mind persisted to the moment of the use of force. *Id*. at 547-48, 340 A.3d at 215–16 (citing State v. Martin, 329 Md. 351, 365, 619 A.2d at 992 (1993)). Here, that requirement was met because Danshin linked his prior knowledge of Gonzalez-Mena's abuse to what he claimed to be witnessing in real time, Gonzalez-Mena dragging Jones by the hair while holding a machete above her neck. *Id.* at 547-48, 340 A.3d at 215–16.

Third, the court found some evidence that Danshin used no more force than reasonably necessary in light of the perceived threat. *Danshin*, 491 Md. at 549, 340 A.3d at 216. Drawing on *Guerriero v. State*, the court reiterated that a person defending another may use "the same degree and character of force" that the person attacked could have used in self-defense. *Id.* at 549, 340 A.3d at 216 (quoting Guerriero v. State, 213 Md. 545, 549, 132 A.2d 466 (1957)). Applying that rule, the court reasoned that if Danshin's account were believed, he saw Gonzalez-Mena manipulating a machete above Jones in a manner suggesting imminent decapitation. *Id.* at 549, 340 A.3d at 216. Because decapitation is plainly a fatal injury, the court concluded that gunfire could be viewed as a commensurate response to the lethal threat as Danshin perceived it. *Id.* at 549, 340 A.3d at 216. Thus, the evidence was sufficient to allow a jury to decide whether Danshin used the same degree and character of force with which Jones was allegedly threatened. *Id.* at 549, 340 A.3d at 216.

Fourth, the court held that there was some evidence that Danshin's purpose in using force was protective rather than punitive. *Danshin*, 491 Md. at 549–50, 340 A.3d at 216–17. In response to detectives' questions about why he shot Gonzalez-Mena, Danshin stated that he saw "someone in

imminent threat of not just bodily harm but imminent threat of lethal bodily harm" and tied that perception to his knowledge that Gonzalez-Mena had previously harmed Jones. *Id*. at 550, 340 A.3d at 217. The court also relied on Danshin's broader statement that he believed in protecting vulnerable people, explaining that his interview could reasonably be read to show that he acted out of a perceived duty to protect Jones when he saw her in danger, rather than out of retaliation for past abuse. *Id*. at 550, 340 A.3d at 217. Although whether that statement accurately reflected his actual motive was a question for the jury, it was sufficient to satisfy the low "some evidence" threshold. *Id.* at 550, 340 A.3d at 217.

The takeaway from *Danshin v. State* is that trial courts must faithfully apply the "some evidence" standard's low threshold when evaluating requests for defense-of-others jury instructions. Defendants need not provide consistent or uncontested proof, nor must they admit to every factual detail needed to support the defense, to place the issue before a jury. This decision reinforces the jury's role in assessing credibility and intent, while limiting the trial court's ability to withhold defense instructions based on its perceived weakness in the evidence presented. For criminal law practitioners, *Danshin* is a reminder and reinforcement of the importance of developing any record evidence, particularly police interview statements, that can support the elements of a justification defense and ensure the jury is permitted to consider it.

RECENT DEVELOPMENT

HOLLABAUGH V. MRO CORP.: HEALTH CARE PROVIDERS CANNOT CHARGE A FEE FOR THE RETRIEVAL OF MEDICAL RECORDS WHEN THE SEARCH DOES NOT YIELD ANY RECORDS FOR PRODUCTION

By: Allison Comess

The Supreme Court of Maryland held that a plaintiff has standing to sue under Health General Article § 4-304(c) when their attorney requested their medical records and initially paid a fee that the plaintiff later reimbursed. *Hollabaugh v. MRO Corp.*, 491 Md. 165, 176, 339 A.3d 188, 194 (2025). The court further held that Health General Article § 4-304(c) does not allow a health care provider to charge a fee for a medical records search that does not result in any records being retrieved. *Id*. at 183, 339 A.3d at 198.

In 2020, Petitioner Janice Hollabaugh ("Hollabaugh"), authorized her attorney to request her medical records from her health care provider to use in connection with potential personal injury claims. Her provider used a third party vendor, MRO Corporation ("MRO"). After conducting a search, MRO found no records and issued a cancellation invoice with a $22.88 fee for its search efforts. Ms. Hollabaugh's attorney paid the fee, and Ms. Hollabaugh reimbursed him in full.

In 2022, Ms. Hollabaugh filed a putative class action lawsuit in the Circuit Court for Baltimore County, arguing that the fee her attorney was charged violates § 4-304(c) of the Health-General Article, a provision of the Confidentiality of Medical Records Act. MRO moved to dismiss, arguing that "§ 4-304(c) authorizes a fee for records searches that do not result in the production of records, and that Ms. Hollabaugh lacks standing to sue because her attorney, not Ms. Hollabaugh herself, made the records request and paid the fee." The Circuit Court for Baltimore County granted MRO's motion to dismiss, finding that Ms. Hollabaugh had standing but that § 4-304(c) allowed the $22.88 fee. Ms. Hollabaugh then appealed to the Appellate Court of Maryland, which agreed with the circuit court that Ms. Hollabaugh had standing, but held that Ms. Hollabaugh's interpretation was inconsistent with the statute's purpose of permitting a reasonable cost-based fee. Ms. Hollabaugh then petitioned for a writ of certiorari to the Supreme Court of Maryland. The Supreme Court of Maryland granted certiorari to consider two issues: (1) whether Ms. Hollabaugh has standing and (2) whether the Confidentiality Act allows MRO's search fee.

The Supreme Court of Maryland considered the question of standing first and began its analysis by looking to § 4-309(f) of the Confidentiality Act, finding that the statute does not identify those who are able to bring such an action. *Hollabaugh*, 491 Md. at 174, 339 A.3d at 193. In the absence of statutory guidance, the court looked to common law standing principles. *Id*. at 174, 339 A.3d at 193. Under Maryland common law, standing requires that a plaintiff be aggrieved such that the plaintiff has a personal stake in the controversy and has been affected in a manner distinct from the general public. *Id*. at 175, 339 A.3d at 194 (citing Jones v. Prince George's County, 378 Md. 98, 118, 835 A.2d 632 (2003)). Although her attorney requested the records and initially paid the fee, the complaint alleged that Ms. Hollabaugh authorized the request and later reimbursed her attorney in full. *Id*. at 175, 339 A.3d at 194. The court thus concluded that she personally bore the financial injury arising from the fee and was therefore personally and specifically affected in a manner distinct from the general public, satisfying the Maryland common law aggrieved standard. *Id*. at 175, 339 A.3d at 194. Accordingly, the court held that Ms. Hollabaugh had standing to pursue her claim. *Id*. at 175, 339 A.3d at 194.

The court next addressed whether MRO was allowed to charge a preparation fee for an unsuccessful search. *Hollabaugh*, 491 Md. at 176, 339 A.3d at 194. The court began its analysis by looking at the relevant statute and applying principles of statutory construction. *Id*. at 177, 339 A.3d at 195. The court first noted that the statute is designed to ensure patient access to medical records and, in furtherance of that objective, requires health care providers to implement systems for processing records requests while preserving the confidentiality of those records. *Id*. at 177, 339 A.3d at 195.

The court then turned to § 4-304(c)(2), explaining that it permits fees only for the copying and providing medical records, both of which presuppose the existence of records responsive to the request. *Hollabaugh*, 491 Md. at 178, 339 A.3d at 195. Section 4-304(c)(3) further allows a preparation fee for the "retrieval and preparation" of records. *Id*. at 178, 339 A.3d at 195. Because the statute does not define the terms "retrieval" or "preparation," the court looked to their ordinary dictionary definitions, finding that both terms presuppose the existence of something capable of being obtained and made ready for use. *Id*. at 179, 339 A.3d at 196. The court explained that "retrieval" ordinarily refers to locating and obtaining something that exists, while "preparation" refers to making something ready for use or delivery. *Id*. at 179, 339 A.3d at 196. Both concepts thus presuppose the existence of records capable of being located and made ready for use. *Id*. at 179, 339 A.3d at 196. Where no records are found, nothing can be retrieved or prepared in the ordinary sense of those terms. *Id*. at 179, 339 A.3d at 196. The court also relied on the fact that the statute's use of the

conjunctive phrase "retrieval and preparation" to conclude that the fee may be charged only when both occur. *Hollabaugh*, 491 Md. at 179, 339 A.3d at 196. Even if a records search occurs before retrieval, the court explained that does not constitute either retrieval or preparation. *Id*. at 179, 339 A.3d at 196.

The court then rejected MRO's argument that it could charge the fee because searching for records is part of the retrieval process. *Hollabaugh*, 491 Md. at 180, 339 A.3d at 197. In doing so, the court reasoned that although a search may be a prerequisite to retrieval, it is a distinct step and does not itself amount to retrieval or preparation. *Id*. at 181, 339 A.3d at 197. The court further observed that each subsection of the statute regulates the process of producing existing medical records, and the fee provision lists specific tasks for which charges may be imposed, including retrieval, preparation, copying, handling, and mailing. *Id*. at 180, 339 A.3d at 196. Because the general assembly expressly authorized fees for those activities, the court declined to infer authorization for an additional fee for a records search not mentioned. *Id*. at 180, 339 A.3d at 196. Accordingly, the court held that § 4-304(c) does not permit a preparation fee when no medical records are retrieved and produced. *Id*. at 181, 339 A.3d at 197.

The decision in *Hollabaugh v. MRO Corp*. directly reduces financial barriers to obtaining medical records. Before *Hollabaugh*, patients and their attorneys were routinely charged search fees even when no records were produced. By holding that § 4-304(c) does not authorize fees for unsuccessful searches, the court prevents providers from shifting the cost of fruitless record searches onto patients. For Marylanders, this ruling ensures that patients are not penalized simply for attempting to access their own information. Moreover, the decision enhances statutory accountability by confirming that patients retain standing to sue even when attorneys act as intermediaries. Had the court accepted MRO's standing argument, enforcement of the Act would have been weakened, insulating providers from liability whenever fees were paid by attorneys in the ordinary course of representation. The holding ensures that patients remain the primary beneficiaries of its protections.

RECENT DEVELOPMENT

BIVENS V. CLARK: VACATUR OF A CONVICTION UNDERLYING MULTIPLE SENTENCES REQUIRES IMMEDIATE CREDITING OF TIME SERVED TO REMAINING SENTENCES AND SEPARATE TREATMENT OF ANY NEW CONVICTION

By: Riley Cummins

The Supreme Court of Maryland held that when one of a defendant's convictions contributing to a multi-sentence term is vacated, the Division of Correction must immediately credit time served against any remaining valid sentences, beginning at the date of the first vacated sentence. *Bivens v. Clark*, 491 Md. 345, 377, 339 A.3d 931, 949-50 (2025). The court further held that when a defendant is reprosecuted, any resulting conviction constitutes a new judgment whose sentence succeeds the sentences of the prior convictions. *Id*. at 377, A.3d at 950.

On January 7, 2016, Amondre Clark ("Clark") pled guilty to and was sentenced for three charges ("Sentences 'A,' 'B,' and 'C'") totaling 26 years of confinement, with all but 13 years suspended. On February 18, 2016, Clark was sentenced for a violation of probation to 3 years and 6 months ("Sentence D") to run consecutively to Sentences A, B, and C. Clark was further sentenced on October 20, 2022, to 1 year and one day ("Sentence E") for possession of prison contraband. A year later, Clark successfully moved to correct an illegal sentence because his plea to cases A, B, and C capped confinement at 15 years, but his sentence totaled 26 years. As relief, the Montgomery County Circuit Court permitted Clark to withdraw his guilty plea and retry his case. On April 17, 2024, Clark pled guilty to the charge associated with Sentence B, resulting in a new sentence of eight years, eight months, and 26 days. The court credited Clark with eight years, eight months, and 26 days as time served ("time-served sentence"). At the plea hearing, the court acknowledged Clark's release, and the State entered nolle prosequi on the cases tied to Sentences A and C, with no mention of Sentences D or E.

Despite the sentencing court's expectation of Clark's release, the Division of Correction ("Division") failed to release him. The Division treated the time-served sentence as replacing Sentence B and determined that Sentences D and E ran consecutively to it. The Division tolled Sentence D and held Clark for six months between the October 2023 vacatur and the April 2024 plea hearing with no active sentence running. Clark filed a habeas petition on June 11, 2024, asserting that, under Criminal Procedure § 6-218(d), Sentence D should have been immediately executed after his October

2023 convictions were vacated; the court agreed and released him. The Division appealed. Pending review, the Supreme Court of Maryland granted Clark's petition for a writ of certiorari to answer whether, upon vacatur of an individual's convictions, the Division must (1) immediately carry out any remaining sentence and credit an individual for time served under an invalidated conviction; and (2) regard any conviction resulting from reprosecution as an independent judgment, rather than a sentence modification.

The court first held that Clark was entitled to credit for time served under his vacated conviction towards his other active sentences, beginning at the start of the invalidated sentences. *Bivens*, 491 Md. at 366, 339 A.3d at 943. The court examined CP § 6-218(d), which entitles a defendant serving multiple sentences to receive credit for all time spent in custody under any sentence later invalidated. *Id.* at 365, 339 A.3d at 942. The court rejected the Division's argument that CP § 6-218(c) governed. *Id*. at 366, 339 A.3d at 943. Instead, it found that Clark's circumstances paralleled the unambiguous language of CP § 6-218(d), as Sentences A, B, and C were invalidated; therefore, section (d) applied and Clark was entitled to credit for time in custody under those sentences, beginning from the date of the first vacated sentence. *Id*. at 366, 339 A.3d at 943. Further, the court reasoned that crediting Clark for time served on invalid sentences was consistent with statutory intent. *Id*. at 367, 339 A.3d at 944. The purpose of CP § 6-218(d) is to ensure individuals receive credit for "'any time spent in custody' and to eliminate 'dead time.'" *Id*. at 367, 339 A.3d at 944 (quoting Fleeger v. State, 301 Md. 155, 165, 484 A.2d 490, 490 (1984)). The court held the Division's decision to toll Clark's sentence instead of crediting him immediately was inconsistent with this purpose. *Bivens*, 491 Md. at 367, 339 A.3d at 944.

The court further explained how § 6-218(d) and § 6-218(c) operate jointly. *Bivens*, 491 Md. at 366, 339 A.3d at 943. Section 6-218(c) applies to any surplus credit remaining after § 6-218 (d) is satisfied. *Id*. at 366, A.3d at 943. The Division has no discretion to toll the next valid sentence pending reprosecution, because § 6-218(d) contains no such authority, and a "wait and see" approach could leave a defendant with no credit if they are not reconvicted. *Id*. at 366-67, A.3d at 943-44. In Clark's case, proper application of § 6-218(d) would have fully satisfied Sentences D and E, leaving over four years surplus credit that § 6-218(c) should have applied toward his new April 2024 conviction. *Id*. at 374-75, A.3d at 948-49.

The court also grounded its statutory interpretation in foundational principles of criminal law. *Bivens*, 491 Md. at 367-68, 339 A.3d at 944. When a conviction is vacated, the clean slate rule erases the judgment and reinstates the defendant's presumption of innocence. *Id*. at 368, 339 A.3d at 944. The court reasoned that the Division's "wait and see" approach, withholding

credit pending reprosecution, was inconsistent with these principles. *Id*. at 367-69, 339 A.3d at 944-45.

Turning to the sequencing question, the court held that Clark's April 2024 conviction constituted an entirely separate judgment ("Sentence F"), not a modification of a prior sentence. *Bivens,* 491 Md. at 369, 339 A.3d at 945. The court reasoned that, as opposed to a modification that does not alter the underlying judgment, a vacated conviction erases a prior judgment. *Id*. at 369, 339 A.3d at 945. Consequently, because no "placeholder" remains in the sequence, the consecutive sentences run from the date of the first vacated sentence, and Clark's new conviction entered the chain at the end. *Id.* at 372, 339 A.3d at 947. Applying the "batting order" principle recognized in *State v. White* and *DiPietrantonio v. State*, the court determined that Sentence F, as a wholly new sentence of wholly new conviction, took last place in the sequence, behind Sentences D and E. *Id*. at 372-73, 339 A.3d at 947-48 (citing Scott v. State, 454 Md. 146, 164 A.3d 177 (2017); DiPietrantonio v. State, 61 Md. App. 528, 487 A.2d 676 (1985)).

Independent of the sequencing error, the court found the Division's reordering of Clark's sentences encroached on the judiciary's exclusive sentencing authority. *Bivens,* 491 Md. at 374, 339 A.3d at 948. The court explained that sentencing courts are vested with "virtually boundless discretion," including power to determine whether sentences run consecutively or concurrently. *Id*. at 374, 339 A.3d at 948. Therefore, by altering a judicial order, the Division attempted to usurp the role of the court. *Id.* at 374, 339 A.3d at 948.

Although the court concluded that (1) Clark was entitled to credit for time-served on his vacated convictions commencing on the date of his original conviction; and (2) Clark's April 2024 conviction was a separate judgment, the sentencing record was unclear as to whether the sentencing court, in imposing the time-served sentence, had accounted for the still outstanding Sentences D and E. *Bivens*, 491 Md. at 375-76, 339 A.3d at 949. As such, the court vacated the judgment of the habeas court and remanded the case. *Id.* at 376, 339 A.3d at 949.

Bivens clarifies for practitioners how the Division must calculate sentence credit when convictions are vacated, resolving a conflict over the Division's informal policy of tolling valid sentences pending reprosecution. *Bivens* also equips defense counsel with a stronger legal foundation to challenge improper sentence calculations and to ensure that clients receive full credit for time served, preventing unjustified prolonged confinement. Conversely, prosecutors must take caution when pursuing convictions involving consecutive sentences or reprosecution, carefully evaluating the practical effects of vacaturs on sentencing, plea negotiations, and overall

strategy, while recognizing that the authority to sequence sentences ultimately rests with the judiciary.

RECENT DEVELOPMENT

HYPERHEAL HYPERBARICS, INC., ET AL. V. ERIC SHAPIRO: MARYLAND'S MANDATORY INDEMNIFICATION STATUTE IS TRIGGERED WHEN A CORPORATION INVOKES A DIRECTOR'S STATUS AND THE DIRECTOR PREVAILS

By: James Gernhart

The Supreme Court of Maryland held that, under the plain language and statutory scheme of § 2-418 of the Corporations and Associations Article, mandatory indemnification under subsection (d) is required where a director who was made a party to a proceeding described in subsection (b) "by reason of service" in "that capacity" is "successful on the merits or otherwise." *Hyperheal Hyperbarics, Inc., et al. v. Eric Shapiro*, 491 Md. 432, 442, 339 A.3d 982, 988 (2025). Applying the nexus requirement previously established in *Kramer v. Liberty Property Trust*, the court found Shapiro was sued "by reason of" his service as director because Hyperheal Hyperbaric Inc.'s complaint relied, at least in part, on Shapiro's director status and fiduciary duties arising from it. *Id*. at 442-45, 339 A.3d at 988-89 (citing Kramer v. Liberty Property Trust, 408 Md. 1, 968 A.2d 120 (2009)).

In April 2018, Hyperheal Hyperbarics Inc. ("Hyperheal") sued its founder, director, and employee, Eric Shapiro ("Shapiro"), alleging intentional misrepresentation and common-law indemnification. Hyperheal sought recovery, alleging and arguing that Shapiro breached both employment-based obligations *and* the fiduciary duties arising from his director role. Following a successful defense, Shapiro sought indemnity for his legal fees, and after Hyperheal denied the request, Shapiro filed suit in the Circuit Court for Baltimore County.

The circuit court granted summary judgment to Hyperheal, finding Shapiro's director status was not the basis of the claims against him. The Appellate Court of Maryland reversed, holding Hyperheal's claims were based, at least in part, on Shapiro's duties as director. The Supreme Court of Maryland granted certiorari to address one question: whether § 2-418(d) require mandatory indemnification when a corporation's own allegations invoke a director's status or fiduciary duties and the director prevails?

The Supreme Court of Maryland proceeded in three steps: first, interpreting § 2-418(d) to establish when indemnification becomes mandatory upon a director's "success on the merits or otherwise;" second, applying *Kramer's* nexus requirement to determine whether Shapiro was sued "by reason of" his service as director; third, examining how Hyperheal

actually pled and argued its claims. *Hyperheal Hyperbarics, Inc.*, 491 Md. at 440-48, 339 A.3d at 987-91 (citing Kramer v. Liberty Property Trust, 408 Md. 1, 29, 968 A.2d 120, 135 (2009)).

The Supreme Court of Maryland began its analysis with statutory construction, emphasizing the statute's plain language and treating subsection (d) not as an isolated provision, but as part of a larger statutory scheme. *Hyperheal Hyperbarics, Inc.*, 491 Md. at 440-42, 339 A.3d at 986-88. The court read § 2-418(a)(3), (b), and (d) together, analyzing the meaning of "by reason of service" in subsection (b)(1) as it applied to subsection (d). *Id.* at 440-42, 339 A.3d at 986-88. Subsection (d) makes indemnification mandatory when the statutory predicates are met, while subsection (b) defines the type of proceeding that qualifies: one in which the director was made a party "by reason of service in that capacity . . . " *Id.* at 440-42, 339 A.3d at 987-88. Critically, the statute does not condition indemnification on whether the director's conduct was proper, but instead on whether the director was made a party in the relevant capacity (as a director) and was "successful on the merits or otherwise." *Id*. at 442-45, 339 A.3d at 988-89. Consequently, indemnification is mandatory where a director is sued in that capacity and succeeds on the merits or otherwise, regardless of whether the underlying conduct was proper. *Id.* at 442-45, 339 A.3d at 988-89.

Next, the Supreme Court of Maryland turned to the phrase "that capacity,"–a term drawn from subsection (b)(1)—explaining that its meaning is derived from subsection (a)(3)'s definition of "director," which is incorporated into subsection (b) and pulled into subsection (d). *Hyperheal Hyperbarics, Inc.*, 491 Md. at 441, 339 A.3d at 987. The court then applied *Kramer*'s nexus requirement, explaining "that capacity" is satisfied if the complaint seeks to impose liability, at least in part, based on the individual's corporate status or duties as a director. *Id*. at 444-45, 339 A.3d at 989 (citing Kramer v. Liberty Property Trust, 408 Md. 1, 29, 968 A.2d 120, 135 (2009)). The court emphasized that the merits of such allegations are irrelevant; the nexus is established if "any of the factual allegations, causes of action, and/or legal theories alleged or asserted by the plaintiff implicate the individual's role or status as a director." *Id*. at 444-45, 339 A.3d at 989.

Finally, the Supreme Court of Maryland applied that framework to Shapiro's case, concluding he was entitled to mandatory indemnification. *Hyperheal Hyperbarics, Inc.*, 491 Md. at 445-48, 339 A.3d at 990-91. The court rejected Hyperheal's argument that the court's inquiry should classify a director's conduct functionally (e.g., employee acts versus director acts) and instead held that the inquiry focuses on the plaintiff's theory of liability as pled. *Id*. at 445-47, 339 A.3d at 990-91. The court emphasized that Hyperheal's complaint and litigation strategies did not limit themselves to

Shapiro's conduct as an employee—they repeatedly invoked his director status and fiduciary duties. *Id.* at 445-48, 339 A.3d at 990-91.

In its pleadings, Hyperheal alleged Shapiro breached fiduciary duties owed as a director and relied on that status to satisfy the reasonable reliance element of its misrepresentation claim. *Hyperheal Hyperbarics, Inc.,* 491 Md. at 445-46, 339 A.3d at 990. In its motion for summary judgment, Hyperheal argued that Shapiro's director status created the "special relationship" necessary to support its implied indemnity theory. *Id.* at 446-47, 339 A.3d at 990-91. At trial, Hyperheal asked the jury to hold Shapiro liable for breach of his fiduciary duties as a director and officer. *Id.* at 447, 339 A.3d at 991. The Supreme Court of Maryland concluded its opinion stating, "this strategic choice came with the risk—now realized—that an adverse outcome would trigger Mr. Shapiro's indemnification right under section 2-418." *Id.* at 448, 339 A.3d at 991.

The *Hyperheal Hyperbarics, Inc.* decision is notable less for its substantive outcome—the underlying case proved straightforward—than for the procedural warning it sends. The Supreme Court of Maryland used this as an opportunity to signal that how a corporation frames its claims against a director has real downstream consequences. Casting a wide net and invoking a director's fiduciary duties and corporate status to strengthen a claim may seem advantageous at the pleading stage, but it comes with a risk. Even if the director status is implicated incidentally, the statute will not bend. Indemnification will be mandatory, and a successful director recovers their legal fees.

Going forward, practitioners representing corporations in suits against individuals serving in dual roles must consider whether invoking directorial status is worth the exposure. The decision makes clear that thoughtful pleading is no longer optional. Corporations that invoke a director's status to strengthen their case must now weigh that choice against the very real possibility of funding their opponent's defense. Yet practitioners should be equally aware of the inverse risk. A corporation that deliberately narrows its pleadings to avoid invoking directorial status may find itself unable to pursue its strongest theories, trading indemnification exposure for a weaker case.

RECENT DEVELOPMENT

PATTISON V. PATTISON: NO CONTRACT FOUND WHERE OFFEREE MISSES CONDITION PRECEDENT IN COVER LETTER, AND SILENCE ALONE DOES NOT CONSTITUTE WAIVER

By: Katelyn White

The Supreme Court of Maryland held that offerors may impose time condition precedents through accompanying settlement cover letters, and such condition precedents are enforceable under contract principles. *Pattison v. Pattison*, 491 Md. 551, 564, 340 A.3d 217, 224 (2025). The court also held that silence after receipt of executed contract documents does not constitute waiver where the offer was withdrawn because the offeree failed to satisfy a condition precedent requiring timely execution. *Id.* at 566, 340 A.3d at 225.

In 2019, Todd Pattison ("Husband") initiated divorce proceedings against Deborah Pattison ("Wife"). Wife's counsel hand-delivered a settlement package to Husband's counsel, which included a cover letter and a proposed settlement agreement ("Agreement"). The cover letter included a condition that the Agreement and promissory note ("Note") must be executed the same day it was sent, with the final guaranty ("Guaranty") to be signed by close of business the following Monday. Husband received the settlement packet by email on Friday but waited until the subsequent Monday to sign.

Husband filed an amended complaint to enforce the agreement, and Wife responded in opposition. The circuit court found a valid offer and acceptance and excluded the cover letter from evidence on hearsay grounds. On Wife's second appeal, the first of which the court dismissed for lack of final judgment, the Appellate Court of Maryland reversed. The appellate court held that no contract was formed because Husband failed to execute the Agreement by the deadline explicitly stated in the cover letter. The court also found no evidence that Wife had waived this condition due to silence. Husband petitioned and the Supreme Court of Maryland granted certiorari to address two issues: whether an offer and acceptance existed between the parties, and whether Wife waived the deadline as a result of her silence.

To begin their analysis, the court noted that the parties did not dispute the Agreement's terms and the fact that Wife was the offeror. *Pattison*, 491 Md. at 562, 340 A.3d at 223. Because the material facts were undisputed, the court applied a de novo standard of review as to the issue of contract formation. *Id.* at 562, 340 A.3d at 223.

First, the court applied a reasonable person standard to assess whether there was an offer and acceptance present. *Pattison*, 491 Md. at 563, 340 A.3d at 224. Specifically, the court stated that an offer is evaluated based on the understanding of a reasonable person in the parties' position. *Id.* at 563, 340 A.3d at 224. The court found that the cover letter expressly distinguished between the "Agreement" and "Note," which had to be signed by the end of business on Friday, versus the guaranty, which could be executed by end-of-business Monday. *Id.* at 564, 340 A.3d at 224. The court further found that the cover letter unambiguously imposed a Friday deadline. *Id.* at 564, 340 A.3d at 224. The court also determined that a reasonable person would find no flexibility in the deadlines set forth. *Id.* at 563-64, 340 A.3d at 224.

Similarly, the court was unconvinced by Husband's argument that the condition was invalidated because it was contained within the cover letter and not the Agreement itself. *Pattison*, 491 Md. at 564-65, 340 A.3d at 224-25. Regardless of the placement of the condition, the condition was part of Wife's offer. *Id.* at 565, 340 A.3d at 225. As such, the court found the condition unambiguous, concluding that a reasonable person would have understood the offer to only be valid if Husband signed the Agreement the day it was presented. *Id.* at 565, 340 A.3d at 225.

Second, the court analyzed traditional contract principles and found that Wife's silence after receiving Husband's signed documents did not constitute a waiver of the conditioned deadline in the cover letter. *Pattison,* 491 Md. at 566, 340 A.3d at 225. The court explained that withdrawal of a condition may be communicated in various ways but cannot appear in the proposed contract itself, as an offeror cannot simultaneously extend and withdraw an offer. *Id.* at 564-65, 340 A.3d at 224-25. Here, Wife communicated the expiration of the offer in advance, through the cover letter. *Id.* at 565, 340 A.3d at 225. Since Husband did not sign the documents until the following Monday, Wife's offer had already expired. *Id.* at 565, 340 A.3d at 225. Instead, the court opined that Husband made a counteroffer when he delivered the signed documents to Wife—giving her the power of acceptance. *Id.* at 565, 340 A.3d at 225. As such, Wife's silence was not a waiver of the condition, but instead a denial of Husband's counteroffer. *Id.* at 566, 340 A.3d at 226. Due to Husband's failure to adhere to Wife's deadline, the court found that no contract was formed between the parties. *Pattison*, 491 Md. at 567, 340 A.3d at 226.

Justice Killough, joined by Justice Eaves, dissented to criticize the majority offer-and-acceptance framework as misplaced. *Pattison*, 491 Md. at 570, 340 A.3d at 228 (Killough & Eaves, JJ., dissenting). The dissent argued that the parties had already reached a binding, enforceable agreement and that the majority improperly invalidated this based solely on a condition in a cover letter that had been excluded as inadmissible hearsay. *Id.* at 571,

340 A.3d at 228-29 (Killough & Eaves, JJ., dissenting). Further, the dissent rejected the majority's opinion that Husband's understanding was irrelevant, noting no evidence that he received notice of the deadline before Friday's end—viewing the issue as a factual one subject to clear-error review rather than de novo. *Id.* at 578-79, 340 A.3d at 233 (Killough & Eaves, JJ., dissenting). Lastly, the dissent found that the majority effectively announced a new rule of contract law that allows courts to disregard a fully executed, integrated settlement agreement, based on contemporaneous extrinsic communications. *Id.* at 583, 340 A.3d at 236 (Killough & Eaves, JJ., dissenting).

The *Pattison* decision reaffirms traditional contract principles in Maryland by emphasizing that when a condition precedent is not satisfied, no contract is formed. By disregarding a seemingly finalized agreement, the majority signals to practitioners the importance of identifying and complying with contractual conditions, since those conditions may determine whether an agreement becomes legally enforceable. This decision serves as a reminder that failing to satisfy a condition precedent can prevent an otherwise agreed-upon contract from taking effect.