PLEASE DON'T LEAVE ME HANGING: A RIGHT TO PRIVACY ARGUMENT FOR INSURANCE PROTECTION AGAINST AUTOEROTIC ASPHYXIATION DEATH

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INTRODUCTION

On the morning of June 25, 1996, Charles Simmons passed out drunk on train tracks in Terre Haute, Indiana.[1] Simmons was hit by a train and killed, but rather than deny accidental death benefits, the Indiana Court of Appeals ordered the insurance company to pay Simmons' beneficiary under his accidental death policy.[2]

On October 28, 2000, 63-year-old Peter Paulissen was climbing the Himalayan Mountains when he died of high-altitude pulmonary edema ("HAPE").[3] Despite the known risk involved in hiking at a high altitude, and that HAPE is completely treatable if the victim "descends to a lower altitude," the United States Court for the Central District of California ordered the insurance company to pay Paulissen's beneficiary under his accidental death policy.[4]

On August 9, 2016, when LeTran Tran found her husband hanging from the ceiling, dead due to autoerotic asphyxiation, the Seventh Circuit Court of Appeals held that the insurance company did not have to pay Tran under her husband's accidental death policy.[5] Instead, the Seventh Circuit applied the subjective/objective test[6] and held for the insurance company.[7] In doing so, the Seventh Circuit deviated from existing circuit opinions and created a split with the Second and Ninth Circuits, both of which hold that autoerotic asphyxiation is not a self-inflicted injury for purposes of accidental death policies.[8]

Tran not only deviates from existing circuit opinions, it also stands in stark contrast to *Russell* and *Paulissen*. *Russell* and *Paulissen* both involved the deceased engaging in behaviors they knew were risky and could lead to death.[9] Despite this, the *Russell* and *Paulissen* courts allowed the beneficiaries to

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1. Am. Fam. Life Assur. Co. v. Russell, 700 N.E.2d 1174, 1175 (Ind. Ct. App. 1998).
2. *Id.* at 1177-78.
3. Paulissen v. U.S. Life Ins. Co., 205 F. Supp. 2d 1120, 1123-24 (C.D. Cal. 2002).
4. *Id.*
5. Tran v. Minn. Life Ins. Co., 922 F.3d 380, 386 (7th Cir. 2019).
6. *See* discussion *infra* Part III.B.2.a (subjective/objective test is the current test for insurance cases in federal court).
7. *Tran*, 922 F.3d at 386.
8. *See id.* at 383-84; *see also* Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246 (2d Cir. 2004); *see also* Padfield v. AIG Life Ins. Co., 290 F.3d 1121 (9th Cir. 2002).
9. *See* Am. Fam. Life Assur. Co. v. Russell, 700 N.E.2d 1174 (Ind. Ct. App. 1998); *see also* Paulissen v. U.S. Life Ins. Co., 205 F. Supp. 2d 1120 (C.D. Cal. 2002).

recover.[10] The *Tran* court, meanwhile, denied recovery.[11] Arguably, judges lack a fundamental understanding or respect[12] for people who engage in sex acts that many people call "deviant"[13] sex.[14] By denying Tran's beneficiary claim, the Seventh Circuit provided a framework for other circuits to shame and denigrate[15] the deceased and their beneficiaries, while also stigmatizing non-mainstream acts of pleasure.[16] The *Tran* precedent is dangerous because it has the potential to further divide the circuits and cause more harm to insureds and their beneficiaries via denied insurance claims.

This Note argues that the Supreme Court should resolve the current circuit split in favor of the Second and Ninth Circuit's treatment of autoerotic asphyxiation as a non-self-inflicted injury. By analyzing state and federal insurance law and the Due Process and Equal Protection clauses of the Fourteenth Amendment,[17] this Note posits that the Court should resolve the split under the framework of *Lawrence v. Texas,*[18] in addition to the current subjective/objective test.[19] In doing so, the Court will affirm its commitment to maintaining the Fourteenth Amendment substantive due process right to privacy.[20] Part I of this Note provides a primer on autoerotic asphyxiation. Part II summarizes and explains the three federal court cases that comprise the current circuit split between the Second, Ninth, and Seventh Circuits. Part III gives the reader a background on the insurance and contract law principles that create space for litigation in insurance law. Part IV introduces the right to privacy and argues for the protection of autoerotic asphyxiation under the Fourteenth Amendment. Part V discusses ways that some people safely engage in non-partner sex. This Note concludes by arguing the Seventh Circuit's approach, and the current federal court test for Employment Retirement Income Security Act (ERISA) policies, are incorrect. The Supreme Court should resolve this split to protect insureds and their beneficiaries by implementing a new, Fourteenth Amendment based test in

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10. *Russell,* 700 N.E.2d 1174; *Paulissen,* 205 F. Supp. 2d 1120.

11. *See Tran*, 922 F.3d at 386.

12. *See* discussion *infra* Part II.C.2 (discussing *Tran* dissent and majority's explicit refusal to consider "sexual nature and pleasurable aim" and "popularity" of autoerotic asphyxiation).

13. Richard Tewksbury, *Sexual Deviance*, BLACKWELL ENCYC. SOCIO. (Oct. 26, 2015). "Normal sex" is better defined by what is considered "sexually deviant." "Sexual deviance" generally refers to behaviors where an individual seeks erotic gratification through means that are considered odd, different, or unacceptable to either most or influential persons in one's community. *Id.*

14. For an example of a so-called deviant sex act, see *Tran*, 922 F.3d at 380.

15. *See* discussion *infra* Part III.A.2 (discussing federal insurance law and consequences of denial of benefits).

16. *See Tran*, 922 F.3d at 386.

17. U.S. Const. amend. XIV, §§ 1-2.

18. 539 U.S. 558 (2003).

19. *See* discussion *infra* Part III.B.2.a.

20. U.S. Const. amend. XIV, § 2; *see* Legal Info. Inst., *Substantive Due Process,* CORNELL L. SCH. (2022), https://www.law.cornell.edu/wex/substantive_due_process [https://perma.cc/Q39K-CC2K].

addition to the existing test.

I. AUTOEROTIC ASPHYXIATION: A PRIMER

Autoerotic asphyxiation is the "practice of sexual self-stimulation while causing oneself to experience [a state in which oxygen is not available in sufficient amounts], which is believed to heighten the sexual experience."[21] Autoerotic asphyxiation is usually engaged in via "hanging, strangulation, suffocation, neck or chest compression, or the inhalation of volatile chemicals."[22] The most common form of the behavior is to reduce oxygen to the brain by applying pressure to the veins that carry blood to the head.[23]

Essentially, applying minimal pressure to the neck prevents blood from leaving the brain, "which continues to use oxygen until the oxygen in the blood is depleted enough to give the desired euphoric effect."[24] By stimulating nerve centers in the brain, the state of asphyxia causes the individual to experience simultaneous states of hypercapnia and hypoxia, which result in an "increased intensity of sexual gratification."[25] Chemicals, often "volatile nitrate[s] that produce[] temporary decrease[s] in brain oxygenation by peripheral vasodilation," may be used to heighten or cause the effect.[26]

When performed successfully, autoerotic asphyxiation results in a temporary decrease in oxygen levels, causing light-headedness and typically leaves no "visible marks."[27] However, autoerotic asphyxiation can lead to death[28] despite the fact that death is not the actor's intent.[29] Rather, most deaths occur due to "equipment malfunction, errors in the placement of the noose or ligature, or other mistakes."[30]

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21. Paul Gosink et al., *Autoerotic Asphyxiation in a Female,* 21 AM. J. FORENSIC MED. & PATHOLOGY 2, 114 (June 2000).

22. *Id.*

23. *See* Am. Bankers Ins. Co. v. Gilberts, 181 F.3d 931, 933 (8th Cir. 1999).

24. *Id.*

25. Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1125 (9th Cir. 2002) (citing Conn. Gen. Life Ins. Co. v. Tommie, 619 S.W.2d 199, 202 (Texas Ct. App. 1981); Sims v. Monumental Gen. Life Ins. Co., 778 F. Supp. 325, 326 n.1 (E.D. La. 1991) (hypercapnia is an increase in carbon dioxide in the blood. Hypoxia is a decrease in oxygen in the blood).

26. Joel S. Milner et al., *Paraphilia Not Otherwise Specified: Psychopathology and Theory in* SEXUAL DEVIANCE: THEORY, ASSESSMENT, AND TREATMENT 401 (D. Richard Laws et al. eds., 2nd ed. 2012).

27. *Gilberts*, 181 F.3d at 933.

28. *See* Anna Coluccia et al., *Sexual Masochism Disorder with Asphyxiophilia: A Deadly Yet Underrecognized Disease,* 2016 CASE REP. PSYCHIATRY 1 (there are approximately 250 to 1000 deaths per year in the United States due to autoerotic asphyxiation).

29. *See* ROBERT R. HAZELWOOD ET AL., AUTOEROTIC FATALITIES 49 (1983) (finding that the "use of asphyxia to heighten sexual arousal [often does not have a fatal] outcome").

30. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-4, at 529 (4th ed. 1994).

Ultimately, autoerotic asphyxiation is not an attempt at suicide, nor does one engaging in the act intend to inflict self-harm. Rather, it is an act of self-pleasure, engaged in to increase one's sexual experience while masturbating.

A. History & A Practitioner's Profile

Autoerotic asphyxiation is not a new phenomenon. In fact, the concept first entered medical literature in 1821, when a German forensic pathologist, Dr. Josef Bernt, wrote about the death of an elderly, naked man who was found hanged with his hands and genitals tied up.[31] In his paper, Dr. Bernt could not correctly identify the man's cause of death.[32] But a century later, in 1926, a German forensic scientist, Dr. Ziemke, finally identified and consistently described a series of deaths caused by "strangulation as a means [of] sexual arousal" and concluded that the deaths were not suicides, but accidental.[33] In non-medical literature, however, mentions of sexual asphyxia as a means of pleasure can be found as early as 1791.[34]

Despite a long history in the medical and literary world, there is a significant lack of first-hand information from practitioners of autoerotic asphyxiation. This is likely due to two reasons. First, practitioners of autoerotic asphyxiation are typically ashamed of their sexual preferences.[35] Second, practitioners are usually discovered simultaneously with their dead bodies.[36] However, in 1985, *The Washington Post* conducted an interview with "Dave."[37] Dave, like most practitioners of autoerotic asphyxiation, was a young, white male.[38] Dave states no one influenced him to engage in the practice; rather, he had "fantasies . . . of people choking each other or me choking somebody else."[39] At the time of the interview, Dave was in the practice of using a women's leotard to choke himself and had been engaging in the practice for about two years.[40] "[I am] not trying to

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31. Knud Romer Joergensen, *Please Be Tender When You Cut Me Down*, BDSM CAFÉ (1995), https://bdsmcafe.com/resources/bdsm-activities-guides-tutorials/viewpoints-concerning-erotic-asphyxiation/ [https://perma.cc/D9A8-9UPD].

32. *Id.*

33. *Id.*

34. *Id.* A prominent example is Marquis de Sade's novel, *Justine*, in which a man achieves an orgasm by hanging. MARQUIS DE SADE, JUSTINE (1791).

35. Katherine Seigenthaler, *No Intention of Killing Themselves*, WASH. POST (June 12, 1985), https://www.washingtonpost.com/archive/lifestyle/wellness/1985/06/12/no-intention-of-killing-themselves/f82af43a-72b4-4fe0-bbb4-9c447001e624/ [https://perma.cc/P3BQ-M2E9].

36. Jay Wiseman, *The Medical Risks of Breath Control Play*, HOUSE OF GASPERS (Dec. 30, 1995), http://houseofgaspers.com/library/bc_jay.html [https://perma.cc/DC5M-TM4B].

37. Seigenthaler, *supra* note 35 (the man agreed to the interview only on the condition of anonymity).

38. *Id.* Women have also been found to engage in autoerotic asphyxiation, but most reported deaths or self-reported practitioners are young, white men.

39. *Id.*

40. *Id.*

commit suicide," Dave said, "but sometimes I come so close to the edge."[41]

Dave illustrates the motives of practitioners of autoerotic asphyxiation and other sexually deviant acts—the point is not to harm themselves, but to engage in a sexual fantasy for pleasure.

II. OVERVIEW OF CIRCUIT SPLIT

The following three cases—*Padfield*, *Critchlow*, and *Tran*—comprise the current circuit split. While federal courts heard insurance cases related to autoerotic asphyxiation before and after these three cases, these are the only cases in which federal courts applied the Employee Retirement Income Security Act of 1974 ("ERISA"), the governing law of insurance cases, in federal court.[42] Federal courts heard all previous and subsequent cases under diversity jurisdiction and generally applied state law.

A. Ninth Circuit: Padfield v. AIG Life Insurance Co.

In 1999, the Ninth Circuit heard the first case involving autoerotic asphyxiation under ERISA-governed federal common law, *Padfield v. AIG Life Insurance Company*.[43]

1. Facts & Procedural History.—On February 12, 1999, Gerald Alan Padfield was found dead on the back-seat floor of his family's van.[44] Mr. Padfield was "naked from the waist down . . . sitting in an upright position behind the front passenger seat with his back against the sliding door."[45] Mr. Padfield had one end of a necktie tied around his neck; the other end of the necktie was tied to the hinge of the sliding door.[46] Next to Mr. Padfield, on the folded down backseat, "were numerous sexual devices and a backpack" which contained "pornographic materials" and a small bottle of Cholorhexanol, an industrial solvent.[47] The coroner in Padfield's case ruled the death to be the "'accidental' result of autoerotic asphyxiation" because Mr. Padfield's body showed no signs of trauma other than a "deep ligature mark around the neck."[48] The official death certificate listed Padfield's cause of death as "hanging."[49]

Following Mr. Padfield's death, his widow, Mrs. Padfield, claimed benefits

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41. *Id.* In his use of "the edge," Dave was referring to death.

42. *See* Patrick Begos, *Autoerotic Asphyxiation and ERISA*, ERISA CLAIM DEF. BLOG (May 7, 2012), https://www.erisaclaimdefense.com/autoerotic-asphyxiation-and-erisa/ [https://perma.cc/AV2N-BP9R]; *see also* Jacklyn Wille, *Autoerotic Asphyxiation Circuit Split Won't Get Second Look,* BLOOMBERG L. (July 12, 2019), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XDODLL8K000000 [https://perma.cc/6YE6-Z2SL].

43. 290 F.3d 1121 (9th Cir. 2002).

44. *Id.* at 1123.

45. *Id.*

46. *Id.*

47. *Id.* at 1123-24.

48. *Id.* at 1124.

49. *Id.*

under Mr. Padfield's ERISA-governed accidental death insurance policy provided through his employer.[50] The policy provided payment for accidental death benefits "if Injury to the Insured . . . results in death."[51] The policy defined "injury"[52] and contained an exclusion for "loss[es] caused [or resulting], in whole or in part by. . . suicide . . . any attempt at suicide . . . intentionally self-inflicted injury or any attempt at self-inflicted injury."[53] The insurer, AIG Life Insurance Company ("AIG"), invoked the exclusion and rejected Mrs. Padfield's claim.[54] Mrs. Padfield filed an administrative appeal and a subsequent complaint in district court under ERISA.[55] The district court granted AIG's motion for summary judgment, holding that Mr. Padfield's death by autoerotic asphyxiation fell within the exclusion for death resulting from "intentionally self-inflicted injury."[56] Mrs. Padfield appealed the decision to the Ninth Circuit Court of Appeals.[57]

2. The Circuit Court & Supreme Court Appeal.—Ultimately, the Ninth Circuit reversed the district court, ruling Mrs. Padfield was not excluded from recovery under the suicide exclusion or the intentionally self-inflicted injury exclusion.[58] The Ninth Circuit applied the subjective/objective test[59] and the "golden rule of contracts"—i.e. that ambiguous terms in a contract are interpreted against the drafter.[60] Here, the policy was unclear as to the meaning of "accidental death or injury" as it related to autoerotic asphyxiation, so the policy had to be read in the light most favorable to the insured.[61] Thus, the Ninth Circuit stated, because Mr. Padfield engaged in a pattern of autoerotic asphyxiation without prior injury, he did not intend to kill or harm himself; rather, he made a "fatal mistake."[62] And, generally, an insured purchases accident insurance for the "very purpose" of protecting himself and his beneficiaries from his own "miscalculations and misjudgments."[63]

After the opinion from the Ninth Circuit, AIG petitioned the Supreme Court

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50. *Id.*

51. *Id.*

52. *Id.* (policy defined "injury" as "bodily injury caused by an accident . . . resulting directly and independently of all other causes in a covered loss").

53. *Id.*

54. *Id.*

55. *Id.* (ERISA requires exhaustion of internal appeals process before insured or beneficiary may file in court).

56. *Id.*

57. *Id.*

58. *See id.* at 1130.

59. *See* discussion *infra* Part III.B.2.a (explaining application of subjective-objective test).

60. *See* discussion *infra* Part III.A.2 (explaining "Golden Rule of Contracts" in insurance setting).

61. *See Padfield*, F.3d 1121 at 1130.

62. *Id.* (internal citations omitted).

63. *Id.* (internal citations omitted).

for certiorari.[64] The Court denied the petition without an accompanying opinion, allowing the Ninth Circuit's decision and reasoning to stand.[65] As a result, the Ninth Circuit became the first to rule that, under ERISA-governed federal common law, autoerotic asphyxiation was not a self-inflicted injury or suicide for the purposes of accidental death payouts.

B. Second Circuit: Critchlow v. First UNUM Life Insurance Co.

In 2004, the Second Circuit heard the second case involving autoerotic asphyxiation under ERISA-governed federal common law.[66]

1. Facts & Procedural History.—On the morning of February 27, 1999, Daniel Critchlow was found dead in his bedroom.[67] Critchlow was naked on the floor, with "ligatures tying various parts of his body."[68] Critchlow had attached the cords to a set of counterweights that appeared to be a safety mechanism, meant to give him an "out" if he "started to lose consciousness."[69] Further, Critchlow's father provided evidence that Critchlow had engaged in the act previously, describing an incident in Critchlow's teens where he had found Critchlow after Critchlow had "bound himself up."[70] Citing the escape measures Critchlow had built and his history of autoerotic asphyxiation, the coroner ruled out suicide as the cause of death, ultimately concluding Critchlow died because of autoerotic asphyxiation.[71]

Following Critchlow's death, his mother, Shirley, applied for benefits as the beneficiary of Critchlow's employer-sponsored accidental-death-and-dismemberment insurance policy provided by First UNUM Life Insurance Company of America ("UNUM").[72] UNUM denied the claim, stating Critchlow's death was not accidental and was caused by intentionally self-inflicted injuries.[73] UNUM cited an exclusion in the policy, which stated the company would not pay if "the loss is caused by . . . [i]ntentionally self-inflicted injuries."[74]

After filing an administrative appeal, Shirley filed suit in the district court under ERISA, arguing the policy provided for payment of the benefit because Critchlow's death was an accident for which UNUM had wrongfully denied her claim.[75] Although UNUM failed to prove that Critchlow intended to die or harm himself on the night of his death, the district court granted summary judgment in

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64. AIG Life Ins. Co. v. Padfield, 537 U.S. 1067 (2002).
65. *Id.*
66. Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246 (2d Cir. 2004).
67. *Id.* at 249.
68. *Id.* at 249-50.
69. *Id.* at 250.
70. *Id.*
71. *Id.*
72. *Id.* at 249-50.
73. *Id.* at 250.
74. *Id.*
75. *Id.* at 251.

favor of UNUM.[76] Shirley appealed.[77]

2. Circuit Court Opinion.—Here, like the Ninth Circuit in *Padfield,* the Second Circuit held Shirley's claim was not excluded from coverage because "exclusion clauses should be read narrowly" and ambiguous terms should be "viewed objectively by a reasonably intelligent person . . . [in] the context of the entire . . . agreement."[78] The *Critchlow* court dug deeper into the subjective/objective test, stating explicitly which two questions the court was required to answer.[79] First, whether Critchlow lacked a subjective expectation of death or injury, and second, if so, whether the suppositions that underlay that expectation were reasonable from Critchlow's perspective, considering Critchlow's own personal characteristics and experiences.[80]

The Second Circuit found that first, there was never any dispute that Critchlow subjectively did not expect nor intend to harm or kill himself.[81] Second, no rational fact-finder could find that Critchlow's subjective intent to survive was objectively unreasonable.[82] The evidence sufficiently demonstrated that Critchlow never intended to totally strangle himself.[83] Rather, he intended to maintain consciousness while inducing temporary euphoria.[84] This was demonstrated by Critchlow's complicated escape mechanism and history of engaging in autoerotic asphyxiation.[85] Further, Critchlow died due to "total strangulation," while the goal of autoerotic asphyxiation is "partial strangulation."[86] Thus, the Second Circuit followed the Ninth Circuit, finding that autoerotic asphyxiation is not an intentionally self-inflicted injury or death for the purposes of accidental death benefits under ERISA.[87]

C. Seventh Circuit: Tran v. Minnesota Life Insurance Co.

Finally, in 2019, the Seventh Circuit decided *Tran*, breaking from the Ninth and Second Circuits, and creating the current split.[88]

1. Facts & Procedural History.—On August 9, 2016, LeTran Tran came

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76. *Id.* at 253.

77. *Id.* at 255.

78. *Id.* at 256.

79. *Id.* at 257-58 (quoting Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1126 (9th Cir. 2002)).

80. *Id.* at 259.

81. *Id.*

82. *Id.* at 260.

83. *Id*.

84. *Id*.

85. *Id*. (escape mechanism was meant to save him "if he began to lose consciousness" and he had "survived the practice . . . for 20 years . . . [without] evidence of [injury]").

86. *Id*. (stating "total strangulation" is "total loss of oxygen for a sustained period" and "partial strangulation" is "temporary lightheadedness . . . with no serious or lasting adverse impact on one's health").

87. *Id*. at 263.

88. Tran v. Minn. Life Ins. Co., 922 F.3d 380 (7th Cir. 2019).

home to find her husband, Linno Llenos, hanging from the ceiling of the home's basement.[89] Tran called the police, who pronounced Llenos dead at the scene.[90] While initially ruled a suicide, the medical examiner later concluded Llenos died performing autoerotic asphyxiation.[91] The medical examiner's explanation hinged on what appeared to be Llenos' attempts at safety mechanisms and the presence of sexual paraphernalia at the scene.[92] In an attempt to mitigate the risk of injury, Llenos had wrapped a towel around his neck and left his foot resting on a step stool.[93] Further, Llenos had rubber rings around his genitals, with his pubic hair shaved in a "semi-circular pattern consistent with prior use."[94] The record further indicated that Llenos had a history of engaging in autoerotic asphyxiation without resulting injury.[95]

After Llenos' death, Tran filed a claim with Minnesota Life Insurance Company ("Minnesota") under Llenos' ERISA-governed life insurance policies, both of which contained Accidental Death & Dismemberment policy riders, though neither the riders nor the original policy defined "injury."[96] Concluding Llenos' death was not accidental, Minnesota denied recovery, citing the exclusion for intentionally self-inflicted injury, which stated Minnesota would not pay the accidental death or dismemberment benefit where "an insured's death . . . results from or is caused directly by . . . intentionally self-inflicted injury or . . . attempt at self-inflicted injury, whether sane or insane."[97] Tran filed an administrative appeal.[98] After being denied, Tran filed an action under ERISA, arguing she was entitled to the payouts under the Accidental Death & Dismemberment policies.[99] The district court ruled in favor of Tran, finding that the policies were ambiguous and therefore ought to be interpreted against the drafter.[100] Minnesota appealed.[101]

2. Circuit Court Opinion.—Breaking from the persuasive authority of the Ninth and Second Circuits, the Seventh Circuit ruled against Tran, holding she could not recover under the accidental death policies.[102] Lacking a policy definition, the Seventh Circuit applied the "commonly understood" meaning of the word "injured."[103] The court found that an "ordinary person would consider choking oneself by hanging from a noose to be an injury, even if the strangulation

89. *Id*. at 381.
90. *Id.*
91. *Id.*
92. *Id.* at 381; *id.* at 388 (Bauer, J., dissenting).
93. *Id.* at 388 (Bauer, J., dissenting).
94. *Id.*
95. *Id.*
96. *Id.* at 381-82 (majority opinion).
97. *Id.* at 382.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 386.
103. *Id.* at 383-84.

is only 'partial.'"[104] Citing criminal codes,[105] the Seventh Circuit reasoned that a failed attempt to strangle someone is still an injury.[106] Therefore, an attempt to strangle oneself, even if the intent was not to kill oneself, is still a self-inflicted injury.[107] Further, the court determined that the "sexual nature . . . pleasurable aim" and "popularity" of autoerotic asphyxiation was irrelevant.[108] Applying the subjective/objective test, the Seventh Circuit never reached the "objective" portion of the test.[109] The court interpreted Llenos' subjective intent to cut off oxygen to his brain as an effort to injure himself and die.[110] That alleged subjective intent was sufficient to end the analysis.[111]

Following the reversal, Tran petitioned the court for rehearing, arguing the court failed to mention the policy was ambiguous, meaning the court should have applied the "golden rule of contracts" and interpreted the policy against Minnesota.[112] The Seventh Circuit denied rehearing, stating there was no ambiguity.[113] Ultimately, the court stood by its assertion that Llenos meant to harm himself, therefore his widow was not entitled to insurance benefits.[114]

III. FEDERAL AND STATE INSURANCE LAW

Before an analysis of *Lawrence,* an explanation of state and federal insurance law provides the necessary background knowledge for a discussion of Fourteenth Amendment implications of accidental death policies.

A. General Contract Law Principles in Insurance

At their core, insurance policies are contracts.[115] Therefore, policies and policy disputes are subject to contract law principles.[116] This section provides an explanation of the contract law principles relevant to the issue at hand.

1. Standardization and Contracts of Adhesion.—Insurance contracts are largely standardized.[117] For both insurers and the insured, standardization provides security.[118] Standardization also means that, as a general matter, most

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104. *Id.* at 384.

105. *See, e.g.,* WIS. STAT. § 940.235 (2007); *see also* IND. CODE § 35-42-2-9 (2017).

106. *Tran*, 922 F.3d at 384.

107. *Id.*

108. *Id.* at 384-85.

109. *Id.* at 385-86.

110. *Id.*

111. *Id.*

112. *See* Wille, *supra* note 42.

113. *Id.*

114. *See id.*

115. KENNETH S. ABRAHAM & DANIEL SCHWARCZ, INSURANCE LAW AND REGULATION 33 (6th ed. 2015).

116. *Id.*

117. *Id.*

118. *See id.* at 36-37.

insurance policies provide the same coverage, using the same language.[119] Thus, standardization largely eliminates search costs for the insured and helps keep the insurer profitable.[120] This profitability is due to the fact that the insurer is not entering negotiations, or pricing and coverage discussions, with individual insureds.[121]

Furthermore, due to standardization, insurance policies are almost always contracts of adhesion.[122] Only one party drafts a contract of adhesion for which little to no bargaining of terms occurs.[123] Typically, a party with more bargaining power uses a contract to control the contract's terms and conditions.[124] Insurers use adhesion contracts because the insurer has substantially more power than the insured.[125] The most significant consequence of industry standardization is that insureds cannot find coverage that differs substantially from the template coverage.[126]

In contrast, major corporations can typically negotiate for better coverage and coverage costs.[127] For example, corporations can ask for specific meanings of terms, inclusions of non-typical coverage, and corporations can negotiate for lower prices on policies with removed terms.[128] Meanwhile, individual persons are at the mercy of the insurance company, forced to accept policies without negotiation of terminology, necessary or unnecessary coverage, or discussions of price. Thus, as a matter of industry practice, average individuals wield relatively little power for input into their coverage while wealthy corporations and individuals can demand much more.

2. Denial of Benefits, Policy Exclusions and "The Golden Rule".—Courts review a denial of benefits under an ERISA-governed plan under a de novo standard, unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.[129] This system dictates that an appellate court decides the issues "without reference to any legal conclusion or assumption made by the previous court to hear the case."[130] If the ERISA-governed plan grants discretionary authority to the

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119. *Id.*

120. *See id.* at 34, 36.

121. *See id.*

122. *See id.* at 33-34 ("almost" because individual insureds have little to no negotiating power, while large corporation clients are able to enter into coverage discussions).

123. *See* Legal Info. Inst., *Adhesion Contract (Contract of Adhesion)*, CORNELL L. SCH. (2021), https://www.law.cornell.edu/wex/adhesion_contract_(contract_of_adhesion) [https://perma.cc/LH2S-3LMA].

124. *See id.*

125. *See id.*

126. *See* ABRAHAM & SCHWARCZ, *supra* note 115, at 34-38.

127. *Id.* at 37.

128. *See id.*

129. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 102 (1989).

130. Legal Info. Inst., *De Novo*, CORNELL L. SCH. (2022), https://www.law.cornell.edu/wex/de_novo# [https://perma.cc/5GAH-4C7P].

administrator, decisions are instead reviewed under a heightened "abuse of discretion" standard.[131] Under the abuse of discretion standard, a court will reverse a plan administrator's discretionary decision only if the decision is "arbitrary or capricious."[132]

In the context of insurance, an "exclusion" is a provision of an insurance policy that refers to "hazards, perils, circumstances, or property not covered by the policy."[133] "Exclusions are usually contained in the coverage form or causes of loss form" insurers use to contract for the insurance policy.[134]

When a policy exclusion becomes the focus of a litigation dispute, a court must apply a complex structure of burdens.[135] Initially, the insured bears the burden of showing coverage under the insurance policy.[136] The insured must "plead facts [that create] coverage, present evidence at trial of facts that . . . establish coverage, and obtain the necessary . . . findings to show . . . there is a claim that falls within the coverage of the policy."[137] If the insurer believes the policy excludes coverage, the insurer must prove why the exclusion applies.[138] However, if an insured believes they are the exception to this exclusion, the burden switches to the insured to demonstrate the existence of facts that support an exception.[139] Finally, the insured must prove that coverage has been triggered under a policy.[140] Thus, when an insurer denies a claim on the basis of a policy exclusion, the burden is usually on the insurer to prove the exclusion applies, but on the insured to prove they are an exception to the exclusion.[141] This burden structure is applicable in ERISA cases.[142]

Courts often use the golden rule of contracts, referred to as the "golden rule

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131. Sarah Fask et al., *Congress Considers Banning Discretionary Clauses in ERISA Plans*, LITTLER MENDELSON P.C. (May 19, 2022), https://www.littler.com/publication-press/publication/congress-considers-banning-discretionary-clauses-erisa-plans [https://perma.cc/YN9G-TCS8].

132. *Id.*

133. *Exclusion,* INT'L RISK MGMT. INST. (2022), https://www.irmi.com/term/insurance-definitions/exclusion [https://perma.cc/L2Z2-UG6K].

134. *Id.*

135. Mario v. P & C Food Markets, Inc., 313 F.3d 758, 765 (2d Cir. 2002).

136. R. Brent Cooper, *Burden of Proof in Coverage Litigation (Part 1),* INT'L RISK MGMT. INST., INC. (Oct. 1, 2013), https://www.irmi.com/articles/expert-commentary/burden-of-proof-in-coverage-litigation [https://perma.cc/6AFH-JVV7].

137. *Id.*

138. *Mario*, 313 F.3d at 765.

139. R. Brent Cooper, *Burden of Proof in Coverage Litigation (Part 3),* INT'L RISK MGMT INST., INC. (Apr. 2014), https://www.irmi.com/articles/expert-commentary/burden-of-proof-in-coverage-litigation-part-3 [https://perma.cc/Y27X-T9ES].

140. R. Brent Cooper, *Burden of Proof in Coverage Litigation (Part 4),* INT'L RISK MGMT INST., INC. (July 19, 2014), https://www.irmi.com/articles/expert-commentary/burden-of-proof-in-coverage-litigation-part-4 [https://perma.cc/YJY8-E897].

141. *Mario*, 313 F.3d at 765.

142. *Id.*

of interpretation," to determine the outcome of insurance cases.[143] Some states have enacted laws that treat the rule as a sort of "last resort," to be applied only after all other methods of interpretation have failed.[144] Thus, there are several steps before a court will apply the golden rule to a contract.[145] First, the court must "agree that [a] clause is ambiguous, difficult to discern, or subject to multiple interpretations."[146] Then, if this is found, the court will examine numerous forms of evidence, including previous performance under the contract and verbal or written statements regarding the meaning of the contract.[147] The court will apply the golden rule and interpret the contract in favor of the insured, only after the court has examined all evidence.

In insurance law, this means the court's first step is to examine the policy as a whole, and attempt to determine if the policy clarifies or defines the term at any point.[148] In doing so, the court considers the reasonable expectations of the insured.[149] Examining the reasonable expectations of the insured includes examining how a reasonable person would interpret the term in the policy, evidence of discussions between the insured and insurer/insurer's agent, and outcomes/coverage results of similarly decided cases.[150]

It is vital to understand the exceptions and potential interpretations of insurance contracts because there are important consequences when benefits are denied. Insureds take out life insurance policies to provide some sort of benefit to those they name as policy beneficiaries. Potential benefits often include replacement income for dependents; money to pay for final expenses (such as funeral and burial costs or other non-covered expenses); an inheritance for heirs; money to pay for federal and state death taxes; and, to create a source of savings.[151] When benefits are denied upon the insured's death, the beneficiary is deprived of whatever it is the insured intended the beneficiary to receive. For some families, the consequences of a denial of benefits can be life altering.[152]

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143. *See* ABRAHAM & SCHWARCZ, supra note 115.

144. Brad Lambert, *Construing the Contract Against the Drafter,* LAMBERT L. (2016), https://www.lambertplc.com/articles/contracts/construing-the-contract-against-the-drafter/ [https://perma.cc/G6FV-F5QE].

145. *Id.*

146. *Id.*

147. *Id.*

148. *See* Jason Gordon, *Ambiguity Principle (Insurance)—Explained,* BUS. PROFESSOR (Apr. 8, 2023), https://thebusinessprofessor.com/en_US/insurance-risk-law/ambiguity-principle-insurance-definition [https://perma.cc/U5JU-MZFK]; *see also, e.g.,* Rosen v. State Farm Gen. Ins. Co., 70 P.3d 351 (Cal. 2003).

149. *See* Gordon, *supra* note 148.

150. *See, e.g., id.*

151. *Why Should I Buy Life Insurance?*, INS. INFO. INST., https://www.iii.org/article/why-should-i-buy-life-insurance [https://perma.cc/WT9W-2KL4] (last visited Nov. 20, 2022).

152. *Tricks of the Trade: How Insurance Companies Deny, Delay, Confuse and Refuse,* AM. ASS'N FOR JUST. (2017), https://www.decof.com/documents/insurance-company-tricks.pdf [https://perma.cc/WNW9-GNRS] (discussing the case of Mary Rose Derks, whose family had to sell

"[T]he bottom line is that insurance companies make money when they don't pay claims . . . [t]hey'll do anything to avoid paying[.][153]

B. Employee Retirement Income Security Act of 1974

ERISA is the federal law that sets minimum standards in the private industry for most voluntarily established retirement and health plans.[154] ERISA requires that plan participants be provided with important plan information, including:

> features and funding; . . . minimum standards for participation, vesting, benefit accrual, and funding; . . . fiduciary responsibilities for those who manage and control plan assets; . . . grievance and appeals process[es] for participants to get benefits from their plans; . . . right[s] to sue for benefits and breaches of fiduciary duty; and, if a defined benefit plan is terminated, guarantee[d] payment of certain benefits through a federally chartered corporation, known as the Pension Benefit Guaranty Corporation (PBGC).[155]

As a general matter, ERISA covers only plans provided by employers to employees.[156] Notably, "ERISA does not cover plans established or maintained by governmental entities, churches for their employees, or plans . . . maintained solely to comply with applicable workers compensation, unemployment or disability laws."[157]

1. Employer-Sponsored Plans & Group Insurance.—Employer-sponsored plans are also referred to as "group coverage" because the employer provides the insurance to a group of people—its employees.[158] Because ERISA is a federal law, cases brought under ERISA are heard in federal court where ERISA and federal common law are applied. ERISA provides two forms of pre-emption in regard to state laws and regulations that attempt to circumvent ERISA.[159]

The first form of pre-emption is ERISA express pre-emption.[160] Based on ERISA § 514, this provision pre-empts all state laws that relate to employee benefit plans, but exempts from this pre-emption any state law that "regulates

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their small business when Conseco denied a claim for long-term care insurance).

153. *Id.* (quoting Mary Beth Senkewicz, the former senior executive at the National Association of Insurance Commissioners).

154. *Employee Retirement Income Security Act (ERISA)*, U.S. DEPT. OF LABOR, https://www.dol.gov/general/topic/retirement/erisa [https://perma.cc/GNF6-ZV9V] (last visited Oct. 11, 2022).

155. *Id.*

156. *See id.*

157. *Id.*

158. *See What's the Difference Between Group & Individual Coverage?,* BLUE CROSS BLUE SHIELD BLUE CARE NETWORK OF MICH., https://www.bcbsm.com/index/health-insurance-help/faqs/topics/buying-insurance/difference-between-group-and-individual-coverage.html [https://perma.cc/VB6A-2V64] (last visited Oct. 11, 2022).

159. ABRAHAM & SCHWARCZ, *supra* note 115, at 79.

160. *Id.*

insurance."[161] The exception is known as the "savings clause."[162] The savings clause is important in insurance litigation because it "saves" state laws and directives that regulate the "substantive terms of insured ERISA health plans[.]"[163]

The second type of ERISA pre-emption is ERISA complete pre-emption.[164] ERISA complete pre-emption is based on § 502(a) and pre-empts state laws and regulations relating to remedies for denied insurance benefits.[165] The purpose of complete pre-emption is to avoid a multiplicity of regulations to permit the nationally uniform administration of employee benefit plans.[166]

It is important to note that express pre-emption analysis is subservient to complete pre-emption.[167] The subservience of express pre-emption to complete pre-emption means that any "state law cause of action that duplicates, supplements, or supplants" ERISA civil enforcement remedies is pre-empted under § 502, "irrespective of how that provision would be analyzed under § 514."[168] A crucial implication of this rule is that ERISA's complete pre-emption of state remedies applies to all employer-sponsored insurance, regardless of whether the employer plan is self-insured.[169] Thus, § 502 is broad, but it is not unlimited.[170]

2. Federal Common Law, Policy Exclusions & Denial of Benefits.—Federal courts apply federal common law when addressing questions of insurance policy interpretation under ERISA.[171] Federal common law requires courts to "interpret terms in ERISA insurance policies in an ordinary and popular sense as would a person of average intelligence and experience."[172]

a. The subjective/objective test.—Developed as part of ERISA-governed federal common law, the subjective/objective test is the current test for ERISA cases in federal court.[173] Under the test, the court first asks whether the insured

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161. *Id.*

162. *ERISA Preemption Primer*, NAT'L ACAD. FOR STATE HEALTH POL'Y 3 (Mar. 31, 2009), https://eadn-wc03-6094147.nxedge.io/cdn/wp-content/uploads/sites/default/files/ERISA_Primer.pdf [https://perma.cc/5BER-Z2LJ].

163. Beverly Cohen, *Saving the Savings Clause: Advocating a Broader Reading of the Miller Test to Enable States to Protect ERISA Health Plan Members by Regulating Insurance*, 18 GEO. MASON L. REV. 125, 126 (2010).

164. ABRAHAM & SCHWARCZ, *supra* note 115, at 79.

165. *Id.*

166. *Id.* at 291, 381.

167. *See, e.g.,* Aetna Health Inc. v. Davilla, 542 U.S. 200 (2004).

168. ABRAHAM & SCHWARCZ, *supra* note 115, at 291, 405.

169. *Id.*

170. *Id.*

171. *See, e.g.,* Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989).

172. Babikian v. Paul Revere Life Ins. Co., 63 F.3d 837, 840 (9th Cir. 1995) (quoting Evans v. Safeco Life Ins. Co., 916 F.2d 1437, 1441 (9th Cir. 1990)).

173. *See* Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 257 (2d Cir. 2004) (quoting Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1126 (9th Cir. 2002)).

lacked a subjective expectation of death or injury.[174] "If so, the court asks whether the suppositions that underlay the insured's expectation were reasonable, from the perspective of the insured, allowing the insured a great deal of latitude and taking into account the insured's personal characteristics and experiences."[175]

For those who regularly practice autoerotic asphyxiation, the subjective intent is not to die, but to experience an orgasm. Michael Decker, a long-time practitioner of autoerotic asphyxiation, stated his own practice is about "chasing . . . sensations . . . and creating a context that allows suspension of disbelief . . . to orgasm."[176] For Decker, like many practitioners, "[g]etting close to panic and death" is exciting.[177] "Do I want to die?" Decker asks.[178] "No. I want to live so I can keep pursuing the pleasures[.]"[179]

If the subjective expectation of the insured cannot be ascertained, the court turns to objective analysis and "asks whether a reasonable person, with background and characteristics similar to the insured, would have viewed the resulting injury or death as substantially certain to result from the insured's conduct."[180] The medical community is somewhat divided on the ability of autoerotic asphyxiation to be safely practiced. Many professionals, including Jay Wiseman (a former paramedic who currently offers basic and advanced first aid and CPR training to the sadomasochism[181] community), firmly believes there is no safe way to practice "suffocation and/or strangulation done in an erotic context" because there is "no way whatsoever that either suffocation or strangulation can be done in a way that does not intrinsically put the recipient at risk[.]"[182] However, Wiseman also states that there is a "great deal of ignorance regarding what actually happens to a body when [it is] suffocated or strangled . . . the actual degree of risk associated with [the practice] is far greater than most people believe."[183] Thus, according to Wiseman, it is difficult to objectively find that even the typical practitioner would be aware that death is "substantially certain," particularly if the practitioner has a history of safely engaging in the act.[184]

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174. *Padfield*, 290 F.3d at 1126.

175. *Id.*

176. Michael Decker, *When All Is Said and Done, Life Kills Your Ass*, BDSM CAFÉ (May 7, 1991), https://bdsmcafe.com/resources/bdsm-activities-guides-tutorials/viewpoints-concerning-erotic-asphyxiation/ [https://perma.cc/D9A8-9UPD].

177. *Id.*

178. *Id.*

179. *Id.*

180. *Padfield*, 290 F.3d 1121 at 1126.

181. *Sadomasochism*, MERRIAM-WEBSTER'S ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/sadomasochism [https://perma.cc/8NZ2-2VH4] (last updated Sept. 19, 2023) (defining "sadomasochism" as "the derivation of sexual gratification from the infliction of physical pain or humiliation either on another person or on oneself").

182. Wiseman, *supra* note 36.

183. *Id.*

184. *Id.*

Ultimately, the application of the subjective/objective test to autoerotic asphyxiation cases would involve the court first analyzing the individual, with consideration given to whether the individual had a history of the act, and attempting to determine, based on the facts, the individual's intent at the time the individual engaged in autoerotic asphyxiation. In applying the objective analysis, the court would simply look at the reasonable expectations of individuals who regularly engage in autoerotic asphyxiation.

IV. THE SUPREME COURT & *LAWRENCE V. TEXAS:* RESOLVING THE SPLIT TO PROTECT AUTOEROTIC SEX ACTS

The current circuit split on its own requires a resolution by the Supreme Court in favor of the outcomes of the Second and Ninth Circuits.[185] The subjective/objective test alone leaves room for decisions like *Tran*, which incorrectly find that autoerotic asphyxiation is an intentional injury.[186] So, to resolve this, the Court must strengthen the subjective/objective test by instituting a second test under the framework of *Lawrence v. Texas*. Such a "Lawrence Test" would explicitly protect the right to privacy of individuals engaging in non-procreative sex or "risky" sexual activity. Using both the subjective/objective test and the new *Lawrence* Test will strengthen insureds' claims and maintain the current path through litigation if the Court decides to adopt Justice Thomas' *Dobbs* concurrence and overturn all right-to-privacy cases.[187] Further, the combined test will prevent insurance companies from presenting insureds and their beneficiaries with the inherent choice of engaging in their preferred acts of self-pleasure or losing their insurance.

Finally, while it is possible that individual states could pass laws that mandate a test or interpretation of accidental death clauses relating to autoerotic asphyxiation and other risky sexual behaviors, this would not suffice to protect every individual who chooses to engage in "risky" sexual behavior. Furthermore, it is likely multiple states would rule that a state law protecting risky sexual activity would fall outside the savings clause exception to ERISA pre-emption.[188] Thus, it is paramount that the Supreme Court use the Fourteenth Amendment to protect practitioners of autoerotic asphyxiation.

A. The Fourteenth Amendment: Right to Privacy & Equal Protection

The Supreme Court first recognized the right to privacy in 1965 when it decided *Griswold v. Connecticut*.[189] In *Griswold*, the Court used the "personal protections expressly stated in the First, Third, Fourth, Fifth and Ninth

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185. *See* Critchlow v. First UNUM Life Ins., 378 F.3d 246 (2d Cir. 2004); *see also Padfield*, 290 F.3d 1121.

186. *See* Tran v. Minn. Life Ins. Co., 922 F.3d 380, 383-85 (7th Cir. 2019).

187. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301-02 (2022) (Thomas, J., concurring).

188. *See* discussion *supra* Part III.B.1.

189. 381 U.S. 479 (1965) (holding married couples have right to purchase contraceptives).

Amendments" to find the Constitution contained an "implied right to privacy."[190] After *Griswold,* the Supreme Court continued to expand the right to privacy, under the Fourteenth Amendment Due Process Clause,[191] in notable cases such as *Eisenstadt v. Baird*[192] and *Lawrence*.

While the Constitution does not expressly mention a right to privacy, this interpretation of the Fourteenth Amendment Due Process Clause is an important part of American jurisprudence.[193] It protects personal autonomy and prevents the government from infringing on that freedom.[194]

1. Dobbs v. Jackson Whole Women's Health.—It would be remiss for this Note to discuss the right to privacy and fail to mention *Dobbs*.[195] In overruling *Roe*,[196] the Supreme Court stated it was returning the authority to "regulate abortion . . . to the people and their elected representatives."[197] And, despite an explicit concurrence from Justice Clarence Thomas,[198] the majority ensured its decision to strip bodily autonomy away from half of the population was not an invasion or elimination of the constitutional right to privacy.[199]

Given the Court's assurance that it will not overturn other privacy cases, this Note takes the majority at its word. It assumes *Lawrence* and *Obergefell*[200] will remain good law. However, should the Court reverse and overturn all right-to-privacy cases, the Equal Protection Clause[201] safeguards people who engage in autoerotic asphyxiation.

2. The Equal Protection Clause.—The Equal Protection Clause of the Fourteenth Amendment is broadly worded. It mandates that a "governing body . . . must treat an individual in the same manner as others in similar conditions and circumstances."[202] Courts analyze Equal Protection claims using "rational

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190. *See* Legal Info. Inst., *Right to Privacy*, CORNELL L. SCH., https://www.law.cornell.edu/wex/right_to_privacy [https://perma.cc/T3UA-AWPS] (last visited Oct. 13, 2022) [hereinafter *Right to Privacy*]. It is important to note that in subsequent privacy cases, the Court has relied on Justice John Marshall Harlan II's concurrence, which focused on the Fourteenth Amendment, rather than Douglas' majority, which relied on "penumbras and emanations". *Id.*; *see also Griswold,* 381 U.S. 479; *see* U.S. Const. amend. I, III-V, IX.

191. *See* U.S. CONST. amend. XIV, § 2.

192. 405 U.S. 438 (1971) (holding unmarried couples have right to purchase contraceptives).

193. *See* U.S. CONST. amend. XIV, § 2; *see also Right to Privacy*, supra note 190.

194. *See Right to Privacy,* supra note 190; *see also* Legal Info. Inst., *14th Amendment*, CORNELL L. SCH., https://www.law.cornell.edu/constitution/amendmentxiv [https://perma.cc/DU4L-KSG6] (last visited Oct. 13, 2022).

195. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

196. Roe v. Wade, 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. 2228, *holding modified by* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992)).

197. *Dobbs*, 142 S. Ct. at 2279.

198. *See id.* at 2301-02 (Thomas, J., concurring).

199. *See id.* at 2280-81 (majority opinion).

200. Obergefell v. Hodges, 576 U.S. 644 (2015) (holding same-sex couples have right to marry).

201. U.S. CONST. amend. XIV, § 1.

202. Legal Info. Inst., *Equal Protection*, CORNELL L. SCH., https://www.law.cornell.edu/wex/

basis scrutiny," where any "plausible and legitimate reason for the discrimination is sufficient to render it constitutional."[203] However, some claims receive "heightened scrutiny," in which case the government "must have important or compelling reasons to justify the discrimination, and the discrimination must be carefully tailored to serve those reasons."[204] Laws based on "suspect classifications" receive heightened scrutiny.[205] Whether someone's desired method of sexual gratification qualifies them as a sexual minority within a suspect classification remains unclear. However, the Court has suggested that sexual orientation is a suspect classification.[206]

Under rational basis review, autoerotic asphyxiation practitioners could be likened to those who practice extreme sports. Insurers do not deny insurance protection to extreme sport enthusiasts.[207] Indeed, extreme sports enthusiasts often purchase additional policies or coverage.[208] These insurance options are seemingly unavailable to practitioners of autoerotic asphyxiation. Furthermore, when accidental death policies in the context of extreme sports are litigated, a court can—and will—find in favor of providing coverage where the insured has certainly breached their policy.[209] Why does one small group of people who engage in potentially dangerous acts in their free time receive protection but another does not? Indeed, the failure to insure should be considered discriminatory.

Furthermore, one can compare a refusal to find coverage for beneficiaries of those who die from autoerotic asphyxiation to discrimination evidenced in anti-sodomy laws. Legislators initially designed sodomy laws to prevent non-procreative sex and any sex outside of marriage.[210] However, sodomy laws became the weapon of choice against gay people in the late 1960s.[211] Authorities invoked the sodomy laws as a "justification for discrimination."[212] Further, authorities used anti-sodomy laws to prevent gay people from engaging in the ordinary aspects of life, including and especially with whom and how they had

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equal_protection [https://perma.cc/6EPW-6G93] (last visited Jan. 25, 2023).

203. Brian T. Fitzpatrick & Theodore M. Shaw, *The Equal Protection Clause: Common Interpretation*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/702 [https://perma.cc/532M-NUFE] (last visited Jan. 25, 2023).

204. *Id.*

205. *Id.* (U.S. Supreme Court has held race, national origin, gender, immigration status, and wedlock status at birth qualify as suspect classifications).

206. *Id.*

207. *See* discussion *infra* Part IV.D (discussing use of riders and additional policies for sports and travel insurance).

208. *See id.*

209. *See* Paulissen v. U.S. Life Ins. Co., 205 F. Supp. 2d 1120 (C.D. Cal. 2002).

210. *Why Sodomy Laws Matter*, ACLU (June 26, 2003), https://www.aclu.org/other/why-sodomy-laws-matter [https://perma.cc/3PRC-49FT].

211. *Id*.

212. *Id.*

sex.[213]

The Equal Protection Clause forbids both obvious and subtle discrimination. When a court denies recovery to the beneficiary of an autoerotic asphyxiation practitioner, that court engages in subtle discrimination in violation of the Equal Protection Clause. A court's refusal to acknowledge or examine the popularity, sexual nature, and pleasurable purpose of autoerotic asphyxiation engages in discrimination just as much as a court denying individuals the right to engage in anal sex or extreme sports. Thus, the Equal Protection Clause provides an additional method of protection for practitioners of autoerotic asphyxiation and strengthens the argument that denial of benefits or coverage is discrimination.

3. Lawrence v. Texas.—*Lawrence* overruled over two decades of Supreme Court precedent upholding anti-sodomy laws.[214] Using both clauses of the Fourteenth Amendment, *Lawrence* was a major substantive due process victory.[215]

a. Facts and procedural history.—In *Lawrence,* Houston police arrested Lawrence and another adult man after police found the two men engaging in anal sex in the privacy of Lawrence's apartment.[216] The court convicted the men of deviate sexual intercourse in violation of a Texas statute that prohibited two people of the same sex from engaging in certain intimate sexual conduct.[217] The State Court of Appeals held the statute was constitutional under *Bowers v. Hardwick*.[218] Lawrence appealed.[219]

At the Supreme Court, the majority overruled its previous decision in *Bowers,*[220] finding the Texas statute unconstitutional.[221] The majority opinion, penned by Justice Anthony Kennedy, provides that the "State is not omnipresent in the home . . . there are . . . spheres of our lives and existence . . . where the State should not be a dominant presence . . . Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[222] The majority reached its decision using Fourteenth Amendment substantive due process.[223] It also relied on Sandra Day O'Connor's concurring opinion, which reasoned that the Texas statute violated the Fourteenth Amendment Equal Protection Clause.[224]

In her opinion, O'Connor stated she would strike down the law because it

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213. *Id.*

214. *Id.*

215. Lawrence v. Texas, 539 U.S. 558 (2003).

216. *Id.* at 563.

217. *Id.*

218. *Id.*; *see* Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

219. *Lawrence*, 539 U.S. 558.

220. *Bowers*, 478 U.S. 186.

221. *Lawrence*, 539 U.S. at 578.

222. *Id.* at 562.

223. *Id.* at 564.

224. *Id.* at 579-85 (O'Connor, J., concurring).

criminalized a sexual act between two men, but not a man and a woman.[225] This disparate treatment demonstrated that Texas was not treating all citizens equally under the law. The majority in *Lawrence* agreed with O'Connor, but also employed the due process reasoning to provide additional protection.[226]

Much like the sodomy law in *Lawrence,*[227] a court's refusal to allow recovery by beneficiaries of deceased practitioners of autoerotic asphyxiation inhibits sexual freedom and demonstrates a moral disapproval of a specific group. Thus, both the right to privacy and equal protection implications in *Lawrence*[228] provide the basis of the *Lawrence* Test.

B. Proposing a Framework Under Lawrence

While *Lawrence* explicitly invalidated a Texas anti-sodomy law and ruled that same-sex sexual activity was legal,[229] the case had a greater impact. In a general sense, *Lawrence* found the Constitution protects "personal decisions relating to marriage, procreation, contraception, family relationships, [and] child-rearing[.]"[230] However, Kennedy makes it clear that *Lawrence* deals only with sexual conduct in a private setting, and can be understood as protecting only the right to consensual sex acts that occur within one's home.[231] Because anal sex is not engaged in for procreative purposes, this framework would protect non-procreative sex acts consensually engaged in within the privacy of one's home—including sex acts such as autoerotic asphyxiation.

Further, *Lawrence* provides that all intimate relationships must be treated equally under the law, regardless of the gender of the participants or the nature of the sex act.[232] The failure to protect intimate conduct with oneself constitutes discrimination against individuals who engage in acts of self-pleasure.

C. Applying the Lawrence *Framework to Insurance Claims*

Without the *Lawrence* framework, a big question looms over insurance disputes: if the insurer can deny a claim for an autoerotic sex act, what other sexual activity can the insurer, and in turn, the courts, consider harmful and unnecessarily risky?

Imagine the following hypothetical, taken from the movie *Looking for Mr. Goodbar*.[233] A woman goes to a bar and meets a man.[234] Despite the fact that they

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225. *Id.* at 580-81.
226. *Id.* at 574-75 (majority opinion).
227. *Id.* at 558.
228. *Id.*
229. *Id.* at 578.
230. *Id.* at 574.
231. *Id.* at 567.
232. *Id.* at 574.
233. LOOKING FOR MR. GOODBAR (Freddie Fields Productions 1977).
234. *Id.*

just met, the man and woman agree to have sex.[235] The woman takes the man to her apartment, and while they are having sex, the man murders the woman.[236] Suppose the woman had an accidental death policy through her employer, similar to those in *Tran*, *Padfield,* and *Critchlow*.[237] In this situation, the insurance company refuses to pay because the insurance company believes the woman has engaged in risky sexual behavior—sex with an unknown partner—that directly led to the woman's death. Alternatively, what if the man and woman met on a dating app, such as Tinder or Bumble? Is online dating, and the agreement to meet, or have sex with, a stranger a risky sexual behavior for which an insurer can deny payment?

Consider these additional hypotheticals. What if a person engages in self-flagellation[238] and is harmed or dies? What if a couple engages in anal sex or pegging,[239] and one of them is harmed or dies? What if you engage in group sex,[240] polyamorous relationships,[241] or any form of sexual relationship that is not traditional monogamy?[242] Furthermore, what if someone experiences sudden cardiac death during sex due to a pre-existing heart condition?[243] If *Tran* applies to other types of non-traditional sex acts, questions arise as to how limited insurance coverage is, and how far insurers can intrude upon a person's sex life.

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235. *Id.*

236. *Id.*

237. *See* Tran v. Minn. Life Ins. Co., 922 F.3d 380 (7th Cir. 2019); *see also* Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246 (2d Cir. 2004); *see also* Padfield v. AIG Life Ins. Co., 290 F.3d 1121 (9th Cir. 2002).

238. Cambridge Univ. Press & Assessment, *Flagellation*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/flagellation [https://perma.cc/Q695-5M4S] (last visited Nov. 15, 2022) (defining "flagellation" as "the practice of whipping yourself or someone else, especially as a religious practice, for punishment, or for sexual pleasure").

239. Gigi Engle, *What Is Pegging? This Sex Act Is on the Rise Among Straight Men*, MEN'S HEALTH (Aug. 7, 2018), https://www.menshealth.com/sex-women/a22665228/what-is-pegging/ [https://perma.cc/K7PD-TWFC] (defining "pegging" as "a practice in which a woman anally penetrates a man with a strap-on").

240. Collins English Dictionary*, Group Sex*, HARPERCOLLINS PUBLISHERS, https://www.collinsdictionary.com/us/dictionary/english/group-sex [https://perma.cc/MTN5-NNHS] (last visited Nov. 15, 2022) (defining "group sex" as "sexual activity involving three or more people").

241. Sian Ferguson, *Throuple, Quad, and Vee: All About Polyamorous Relationships*, PsychCentral (Nov. 23, 2021), https://psychcentral.com/health/polyamorous-relationship [https://perma.cc/R5GQ-WHZ8] (defining "polyamory" as "a form of ethical non-monogamy that involves committed relationships between two or more people").

242. *Monogamy*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/monogamy [https://perma.cc/KN6A-9FG7] (last visited Nov. 15, 2022) (defining "monogamy" as "the state or practice of having only one sexual partner at a time").

243. Cristina Mondello et al., *An Unusual Case of Sudden Cardiac Death During Sexual Intercourse*, 86 MEDICO-LEGAL J. 188 (2018) (sudden cardiac death during sex is more common in men but has been seen in women).

Furthermore, do courts discriminate against people for being "sexual explorers"[244] (i.e., people who venture outside the "regular" and into the "deviant")?

The *Lawrence* framework, applied to autoerotic asphyxiation cases, in combination with the subjective/objective test, provides better protection to the deceased and their beneficiaries. First, this framework recognizes all forms of private sexual intimacy. Therefore, it would recognize a class of sexual explorers who engage in autoerotic asphyxiation. Second, if *Lawrence* protects the act itself as a form of intimate self-pleasure, insurance companies could no longer deny benefits, and courts would no longer misinterpret exclusions. Additionally, courts could not permit insurers to discriminate against sexual explorers. Finally, if applied to other forms of potentially dangerous or risky sex acts, this framework would ensure that policyholders could freely engage in their preferred methods of pleasure without disclosure to insurance companies.

D. The Counterargument

Several counterarguments undermine a framework under *Lawrence*. First, one could argue that *Lawrence* does not apply to autoerotic sex acts because *Lawrence* concerned consensual sex acts between two people; however, that focus ignores the broader case meaning. *Lawrence* validated consensual intimacy between same-sex partners, another subset of sexual explorers.[245]Autoerotic asphyxiation is a consensual intimate act.[246] As in *Griswold* and *Eisenstadt*, a protected right belongs to the individuals, not just a couple.[247] Neither *Lawrence* nor subsequent cases have indicated the intimate act must be between two people. The constitutional privacy right belongs to the consenting individual.

A second impediment lies in the legitimate state interest in protecting individuals from death by autoerotic asphyxiation. This argument, like the Seventh Circuit's in *Tran,* fails to consider the popularity and purpose of autoerotic asphyxiation and the relative rarity of death.[248] A state interest that punishes the heir of a person who masturbates conflicts with the personal freedoms of the innocent individual and punishes innocent heirs. Furthermore, one might also argue that many more automobile drivers die each year in auto accidents than die of autoerotic asphyxiation.[249] However, no one suggests

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244. E-mail from Jennifer Drobac, Samuel R. Rosen Prof. of L., McKinney Sch. of L. (Nov. 28, 2022, 12:46 EST) (crediting Professor Drobac with coining "sexual explorers" via emailed edits).

245. Lawrence v. Texas, 539 U.S. 558 (2003).

246. *See* discussion *supra* Part I (discussing the practice and purpose of autoerotic asphyxiation).

247. Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

248. *See* discussion *supra* Part I.

249. *See* Shelby Simon, *How Many People Die From Car Accidents Each Year?,* FORBES ADVISOR (Oct. 10, 2022), https://www.forbes.com/advisor/legal/auto-accident/car-accident-deaths/ [https://perma.cc/V8QT-PK43] (estimating 1.3 million deaths worldwide, with 42,915 deaths in the United States in 2021).

dismantling the auto insurance industry.

Finally, it could be argued that extending coverage to acts within the right-to-privacy umbrella increases the cost of insurance for the general population. Here, an important parallel can be drawn between extreme sports—which are often excluded from insurance policies[250]—and exploratory sex. Insureds who engage in extreme sports can typically purchase special travel insurance,[251] "sports riders,"[252] or specialized policies from a dedicated insurer.[253] Insureds often pay extra for this coverage, and sometimes engage in long and expensive searches for such coverage, but the point is these specialized policies, riders, and companies exist. These extreme sport policies indicate society's tolerance for these activities by people willing to pay an additional fee. Moreover, when insureds engage in extreme sports, courts can order the insurer to provide coverage in the absence of a special rider or policy, if a reasonable person would interpret the policy to provide coverage.[254] For people who engage in exploratory sex, no such policies or specialized providers appear to exist. To prevent passing the costs of protection to insureds in the sexual mainstream, insurance companies should view exploratory sex as analogous to extreme sports. The insurer should provide "sex acts riders" for those who want one. Finally, courts will encourage insurers to provide similar coverage to sexual explorers if courts recognize the conduct as consensual sexual intimacy.

V. SEXUAL SAFETY: A SOLUTION

This Note acknowledges that sexual safety is critical to any discussion of sexual exploration. Insurance protection for exploratory sex acts, particularly acts engaged in alone, enhances the security of heirs and loved ones in the event of accidental death. As such, exploratory sex acts must have additional legal protection to ensure practitioners have the freedom to engage in the intimate acts of their choice.

A. Examining Safety Measures in Partner Sex

Safety measures in partner sex, regardless of orientation, often involve communication, the use of barriers, and birth control.[255] Communication usually

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250. *See* John M. Sadler, *Beware the Athletic Participant Exclusion,* SADLER SPORTS & RECREATION INS., https://www.sadlersports.com/blog/beware-athletic-participant-exclusion-in-sports-general-liability/ [https://perma.cc/F8S6-CMAG] (last visited Oct. 11, 2022).

251. Chauncey Crail & Jason Metz, *How Does Scuba Diving Insurance Work?*, FORBES ADVISOR (Nov. 22, 2022), https://www.forbes.com/advisor/travel-insurance/scuba-diving-insurance/ [https://perma.cc/B9WP-2CBS].

252. *Id.*

253. *See, e.g., Dive Accident Insurance,* DIVERS ALERT NETWORK, https://dan.org/membership-insurance/dive-insurance/ [https://perma.cc/3JRX-HV2M] (last visited Oct. 11, 2022).

254. *See, e.g.,* Paulissen v. U.S. Life Ins. Co., 205 F. Supp. 2d 1120 (C.D. Cal. 2002).

255. *See* Avi Varma & Zawn Villines, *What to Know About Safer Sex Practices,* MED. NEWS TODAY (Mar. 2, 2023), https://www.medicalnewstoday.com/articles/safe-sex-practices

involves talking with partners to establish limits, safe words, and expectations.[256] Communication also includes discussions about consent and activities that a partner does not want to engage in during sex,[257] discussions of sexual history, STI testing, and current STI status.[258] Barrier usage includes male and female condoms, dental dams, and lubricants.[259] Regarding anal sex, condoms and lubricants, particularly condom-friendly lubricants, are recommended to prevent microtears in the anus that can spread infection.[260] Finally, other methods include PrEp to prevent HIV, birth control, levonorgestrel,[261] and cycle tracking methods.[262] Most of these safety measures do not reduce the risks of autoerotic sex.

B. Examining Safety Measures in Autoerotic Sex

Autoerotic sexual safety usually relies on different techniques than partnered sex. In partner sex, both people can communicate and rely on each other to help if the sexual activity becomes dangerous. However, autoerotic sex generally lacks a partner as a safety mechanism. While suggestions of a "buddy"[263] in autoerotic sex are helpful, they are misguided and defeat one of the main goals of autoerotic activity—self-pleasure. A recommendation that sexual explorers engage in risky autoerotic sex with a partner would further delegitimize masturbation and self-pleasure.

Rather, society must work towards breaking down barriers, stigma, and sexual "taboos." In part, society should encourage explorers to be open and honest with others and to feel safe and comfortable explaining the nature of their interest in sexual exploration. Such a social change will encourage the creation and advertisement of autoerotic safety mechanisms.

In many cases of autoerotic asphyxiation, the decedent attempted to create a

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[https://perma.cc/NC95-F7VR].

256. *See id.*; *see also* Suzannah Weiss, *What Is a Safe Word, and How Do You Use One During Sex?,* MEN'S HEALTH (May 26, 2022), https://www.menshealth.com/sex-women/a40107095/safe-word/ [https://perma.cc/NU98-DJ5L].

257. *How Do I Talk About Consent?,* PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/relationships/sexual-consent/how-do-i-talk-about-consent [https://perma.cc/KQ6T-84XJ] (last visited Oct. 11, 2022).

258. *See* Villines, *supra* note 255.

259. *See id.*

260. *See id.*

261. *Morning-After Pill,* MAYO CLINIC (June 3, 2022), https://www.mayoclinic.org/tests-procedures/morning-after-pill/about/pac-20394730 [https://perma.cc/KKF2-JEQC] (levonorgestrel is the active ingredient in products like Plan B One-Step).

262. *See* Varma & Villines, *supra* note 255.

263. Christopher Beam, *Strangle With Care,* SLATE GRP. (June 5, 2009), https://slate.com/news-and-politics/2009/06/is-there-a-safe-way-to-perform-autoerotic-asphyxiation.html [https://perma.cc/PVQ9-7VC6].

safety mechanism that ultimately failed.[264] Practitioners of autoerotic asphyxiation should not be forced to rig or invent unreliable mechanisms from unrelated non-sex products. Instead, companies should innovate safety. Businesses should manufacture and sell specialized equipment with tested and reliable fail-safe mechanisms. Under the subjective/objective legal test, when an explorer has used the safety mechanisms of a specialized tool that failed, its use clearly demonstrates both a subjective and objective intent to avoid harm.

CONCLUSION

In *Tran v. Minnesota Life Insurance Company*, the Seventh Circuit became the first circuit to hold, under federal common law as related to ERISA, that autoerotic asphyxiation is an intentionally self-inflicted injury or death for purposes of accidental death payouts.[265] This decision created a circuit split from the Second and Ninth Circuits. While *Tran* was never appealed to the Supreme Court, the Court did rule on a certiorari petition from the Ninth Circuit case, *Padfield v. AIG Life Insurance Co.*[266] However, the Supreme Court declined to extend certiorari in *Padfield,* allowing the Ninth Circuit's ruling and reasoning that autoerotic asphyxiation is not an intentionally inflicted injury or death to stand.[267] The *Tran* case begs for Supreme Court resolution of the split circuits.

This Note examined the circuit split and how the circuit courts reached their holdings. It concludes that the Second and Ninth Circuits were correct in their outcomes, and the Seventh Circuit was not. This Note urges the Court to resolve the split. This Note also argues for the extension of the current federal approach to insurance cases beyond an implementation of the subjective/objective test. The Court must develop and apply a new test under the privacy framework of *Lawrence v. Texas*. The harm done to insureds who engage in risky sexual behavior, and the harm to their beneficiaries, reinforces that the Seventh Circuit's decision is misguided. Failure to protect and continued discrimination against those who engage in sex exploration harms all of society.

Furthermore, the Supreme Court will uphold the Constitution's guarantee of individual privacy by protecting individuals from being forced to choose between obtaining insurance or practicing their preferred method of sexual pleasure. This extension and recognition by the Court will both protect sexual explorers and discourage individual states from enacting a patchwork of laws that may or may not be preempted under ERISA.

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264. *See* Roger W. Byard, *Autoerotic Death: A Rare but Recurrent Entity*, 8 FORENSIC SCI. MED. PATHOLOGY 349 (2012).

265. Tran v. Minn. Life Ins. Co., 922 F.3d 380 (7th Cir. 2019).

266. 290 F.3d 1121 (9th Cir. 2002), *cert. denied sub nom.* AIG Life Ins. Co v. Padfield, 537 U.S. 1067 (2002).

267. *See Padfield,* 537 U.S. 1067.

Ultimately, whether an individual engages in autoerotic asphyxiation, polyamory, orgies, or other forms of partner-involved or self-pleasure, that individual should be free to engage in that practice safely. Individuals should not have to worry that their loved ones will be disadvantaged by a prudish legal system that imposes its antiquated morals on sexual exploration.