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Editor's Note

It is our honor to introduce *Chapman Law Review's* second Issue of Volume Twenty-Four. This Issue is the second of two general topic Issues in this year's Volume, and publishes scholarship with a wide array of topics that span many legal areas.

This Editor's Note is co-authored by the women who served on the 2020–2021 Executive Board of the *Chapman Law Review*, three of whom are being published in this Issue. Following last year's *Chapman Law Review* Symposium which celebrated the 100th anniversary of women's suffrage, we want to reflect on women's crucial scholarly and leadership contributions to the legal profession. We recognize that inequalities and discrimination in representation persist, but we also want to acknowledge and celebrate the growing trend of women in law review memberships, specifically in leadership roles.

Women bring thoughtful and decisive perspectives to any positions they hold. They are intuitive and responsive when working with others and leading groups—which is why their adequate representation is so crucial. This year, as women on the Executive Board, we recognized the gravity of our current social and political climate and allowed it to influence our decisions and actions related to the publication. We prioritized compassion, empathy, and kindness as we implemented diversity initiatives within our publication, created *Chapman Law Review's* first-ever Executive Diversity Editor position, hosted our first virtual symposium, revamped our journal's structure, and published three Issues in this year's Volume.

The first Article in this Issue is by Professor Daniel Harris. Professor Harris' Article closely examines recent Supreme Court decisions paying particular attention to the Supreme Court's newest members' clash over Federal regulation and criminal justice. Professor Harris' Article is based on his thesis that there is a pattern to the disagreements between Supreme Court Justices Kavanaugh and Gorsuch that can be discerned from their opinions and is consistent with their differing personal backgrounds.

Professor Hannibal Travis' Article is the second Article published in this Issue. In his Article, Professor Travis argues that the freedom of expression protects crypto coin software and

related economic and technical speech from being treated like a simple offering of stock in a bank or an oil company. The Article lays out how crypto coin white papers are not strictly commercial speech, and blockchain networks are not traditional corporations or limited partnerships, but rather that crypto coins and their white papers promote information sharing, open-source software, insights in computer science and peer-to-peer networking technologies, and new socio-economic and political models of decentralized collaboration.

Next in this Issue is a Comment by Ms. Emily C. Hoskins. Ms. Hoskins graduated from Chapman University Dale E. Fowler School of Law in 2021 and was a *Chapman Law Review* member. As a law review member, Ms. Hoskins served as a dedicated Staff Editor, Executive Board member, and Senior Articles Editor of the law review. Without Ms. Hoskins' countless hours of work, adaptability, and perseverance, the publication of this Volume would not have been possible. Ms. Hoskins' Comment focuses on the legal duty of institutions as it pertains to the sexual molestation and assault of children involved in youth programs by third parties working for the institution. Her Comment analyzes the law of negligence, specifically the duty arising from a special relationship and other policy considerations, and uses it to simplify and enunciate a test which should be used to determine when a duty exists.

Ms. Ariel J. Romero wrote the following Comment in this Issue. Ms. Romero graduated from Chapman University Dale E. Fowler School of Law in 2021 and was a *Chapman Law Review* member. As a law review member, she served as a dedicated Staff Editor, and Executive Board member. In her last year of law school, Ms. Romero held the critical position of Managing Editor and, in that capacity, was instrumental in the editing and production of this Volume. Ms. Romero's Comment proposes amending United States laws dealing with victim rights and remedies specifically for victims who survive public mass shootings. Her Comment provides a short history of mass shootings and the relevant law pertaining to victims' remedies in a civil and criminal law context, discusses the deficiencies in these remedies, and proposes a stronger interdisciplinary approach to victims' rights to more effectively address these deficiencies.

Ms. Yara Medhat Wahba is the author of the last Comment of this second Issue. Ms. Wahba graduated from Chapman University Dale E. Fowler School of Law in 2021 and was a *Chapman Law Review* member. As a law review member, she served as a dedicated Staff Editor, Executive Board member, and Senior Notes and Comments Editor. Her work and contribution to the *Chapman Law Review* were invaluable in the publication of this Volume.

Ms. Wahba's Comment takes a closer look at the very timely debate revolving around the cash bail system. Her Comment surveys the history of bail, addresses the problems caused by cash bail, evaluates the two main schools of thought on bail reform, and proposes a comprehensive solution to the identified problems.

The *Chapman Law Review* recognizes the continued support of the members of the administration and faculty that made the publication of this Issue possible, including: Dean of Chapman University Dale E. Fowler School of Law, Matthew Parlow; our faculty advisor, Professor Celestine Richards McConville; and our faculty advisory committee members, Professor Deepa Badrinarayana, Professor Ernesto Hernandez, Professor Kenneth Stahl, Professor Richard Redding, and Professor Lan Cao. A special thank you to the Research Librarians of the Hugh & Hazel Darling Law Library for their tireless work for the *Chapman Law Review*.

Last but certainly not least, we thank the staff of the 2020–2021 *Chapman Law Review*. Your remarkable, committed, and tireless work was paramount to the publication of this Volume. We feel truly honored and privileged to have been part of this journal and for being allowed to serve and lead the *Chapman Law Review* this past year.

Finally, remembering Justice Ruth Bader Ginsburg's wise words, "Real change, enduring change, happens one step at a time," we thank the women that came before us and look forward to the success of the women that come after us on the Executive Board of the *Chapman Law Review*.

The women of the 2020–2021
Executive Board of the *Chapman Law Review*:

Sirine Maria Yared, Ariel J. Romero, Yara Medhat Wahba,
Brie E. Barry, Emily C. Hoskins, Melody Morales,
Darlene M. Morris, and Maha Ghazvini

Supreme Court Justices Neil Gorsuch and Brett Kavanaugh Clash Over Federal Regulation and Criminal Justice

*Daniel Harris**

U.S. Supreme Court Justices Neil Gorsuch and Brett Kavanaugh are turning out to be quite different from each other. During the Court's October 2018 term (ending in June 2019), in cases with at least one dissent, Justice Brett Kavanaugh and Justice Neil Gorsuch were on opposite sides 49% of the time. In the October 2019 term, the two Trump-appointed Justices again disagreed in significant cases. The thesis of this Article is that there are themes to the differences between Justice Kavanaugh and Justice Gorsuch that can be discerned from their votes and opinions.

The first theme relates to jurisprudential style. Justice Gorsuch follows the tenets of legal formalism, originalism, and textualism. He is apt to find definite, fixed rules established in the past that he follows to their logical conclusions, regardless of practical consequences or policy considerations. By contrast, Justice Kavanaugh tends to be pragmatic and flexible. Less interested in original intent or logical rigor and more deferential to precedent and convention, he tends to balance competing interests and strives for reasonable solutions that make common sense in the here and now.

The second area of difference lies in the Justices' attitudes toward the federal government. Justice Kavanaugh has a positive view of the federal government and federal power. He resolves ambiguities in favor of giving federal officials reasonable discretion to address contemporary problems and meet the needs of society. In disputes between the federal government and individuals, he is inclined to vote for the government. By contrast, Justice Gorsuch has a skeptical view of the federal government. He prefers to limit the discretion of federal officials through formal rules that establish clear individual rights. In disputes between individuals and the federal government, Justice Gorsuch is more apt to side with the individual.

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The split between Justice Kavanaugh and Justice Gorsuch has enormous potential ramifications because it moderates their collective influence on the Court. In addition, the jurisprudential conflict between the new appointees, as expressed in their opinions, is a fascinating study in how different two Justices appointed by the same President can be.

INTRODUCTION

Confounding expectations,¹ it turns out President Trump's first two appointees to the Supreme Court are quite different from each other.² In their first term together, in cases with at least one dissent, Justice Brett Kavanaugh and Justice Neil Gorsuch were on opposite sides 49% of the time,³ an unusually high rate of disagreement for a pair of new Justices appointed by the same President.⁴ In their second term together, the two Trump-appointed Justices agreed more often, but they still parted company several times,⁵ often in significant cases. For example, Justice Gorsuch and Justice Kavanaugh wrote opinions on opposite sides of the case holding that discrimination based on sexual orientation violates Title VII of the Civil Rights Act of 1964.⁶

The splits between the two Justices did not track the familiar right-to-left political spectrum. Both Justices were willing to side with the Court's Democratic appointees. For example, in the October 2018 term, Justice Kavanaugh voted with Obama appointee Justice Elena Kagan 70% of the time and 51% of the time in divided cases (just as often as he agreed with Justice Gorsuch).⁷ For his part, in five to four cases in the October 2018 term, Justice Gorsuch voted with Justice Ginsburg 35% of the time and with Justice Sotomayor 35% of the time.⁸

¹ See Jeremy Kidd, *New Metrics and Politics of Judicial Selection*, 70 ALA. L. REV. 785 (2019) (showing quantitative analysis that Justice Gorsuch and Justice Kavanaugh had very similar conservative predictive scores).

² See Adam Liptak & Alicia Parlapiano, *Supreme Court Term Marked by Shifting Alliances and Surprise Votes*, N.Y. TIMES (June 29, 2019), <http://www.nytimes.com/2019/06/29/us/supreme-court-decisions.html> [<http://perma.cc/7NR7-C9VS>] (“[T]he two newest justices are a study in contrasts.”).

³ See Adam Feldman, *Final Stat Pack for October Term 2018*, SCOTUSBLOG (June 28, 2019, 5:59 PM), <http://www.scotusblog.com/2019/06/final-stat-pack-for-october-term-2018/> [<http://perma.cc/P4EH-6UMN>].

⁴ See Robert Barnes, *Trump's Justices Aren't Always on Same Page*, WASH. POST, June 30, 2019, at A1 (“Gorsuch and Kavanaugh have disagreed more often than any pair of new justices chosen by the same president in decades.”).

⁵ See Adam Feldman, *Final Stat Pack for October Term 2019*, SCOTUSBLOG (July 10, 2020, 7:36 PM), <http://www.scotusblog.com/wp-content/uploads/2020/07/Justice-agreement-7.10.20.pdf> [<http://perma.cc/7A57-GL8Y>].

⁶ See *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

⁷ See Feldman, *Final Stat Pack for October Term 2018*, *supra* note 3.

⁸ See *id.*

The thesis of this Article is that there is a pattern to the disagreements between Justice Kavanaugh and Justice Gorsuch that can be discerned from their opinions and is consistent with their differing personal backgrounds. As discussed in detail below, the two Justices have very different attitudes toward the federal government and different jurisprudential philosophies.⁹ Discussed below is a quick preview.

Justice Kavanaugh has lived in the Washington, D.C., area almost all of his life, the exceptions being seven years at Yale for college and law school and a one-year judicial clerkship on the West Coast. He has spent his career in federal service.¹⁰ After clerking for Supreme Court Justice Anthony Kennedy, he became a federal prosecutor in the Whitewater investigation.¹¹ He later served in the George W. Bush White House where he met his wife, who was then a secretary for the President.¹²

Justice Kavanaugh has a positive, insider attitude toward the federal government. He sees it as a force for good. He approaches problems from the perspective of the establishment in his hometown. To facilitate the beneficial use of federal power, Justice Kavanaugh takes a flexible, pragmatic, public policy approach to the judicial role.¹³ He interprets laws in a modern, common-sense way. While cautious about change and sensitive to conservative values, Justice Kavanaugh believes judges should, within reasonable and limited bounds, modernize the law when necessary to further underlying policy goals. Justice Kavanaugh tends to resolve ambiguities in favor of giving federal officials reasonable discretion.¹⁴ He sympathizes with those who exercise federal authority or need the protection of federal power. He has far less sympathy for those subject to federal power.¹⁵

⁹ For a short essay introducing this idea, see Daniel Harris, *New Swing Votes on U.S. Supreme Court*, 114 NW. U.L. REV. ONLINE 258 (2020). The approach follows other scholarship. See, e.g., Joshua B. Fischman & Tonja Jacobi, *Second Dimension Supreme Court*, 57 WM. & MARY L. REV. 1671 (2016) (dividing the Supreme Court Justices into pragmatic and legalistic groups); C. Herman Pritchett, *Divisions Opinion Among Justices U.S. Supreme Court, 1939–41*, 35 AM. POL. SCI. REV. 890, 890 (1941) (finding that Supreme Court Justices “are influenced by biases and philosophies of government, . . . which to a large degree predetermine the position they will take on a given question. Private attitudes, in other words, become public law.”).

¹⁰ See MOLLIE HEMINGWAY & CARRIE SEVERINO, JUSTICE ON TRIAL 9, 19 (2019).

¹¹ See Matthew Nussbaum, *Brett Kavanaugh: Who is He? Bio, Facts, Background and Political Views*, POLITICO (July 9, 2018, 2:11 PM), <http://www.politico.com/story/2018/07/09/brett-kavanaugh-who-is-he-bio-facts-background-and-political-views-703346> [http://perma.cc/3TDJ-BDSK].

¹² See *id.* at 18–19.

¹³ See, e.g., *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335 (2020).

¹⁴ See, e.g., *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1478 (2020) (Kavanaugh, J., concurring).

¹⁵ See, e.g., *Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986 (2019).

Justice Gorsuch is cut from a different cloth. A native of Colorado, his experience with the nation's capital in his early teens was difficult.¹⁶ In 1981, his mother (Anne Gorsuch), after a successful career in Colorado state government,¹⁷ became President Reagan's first Director of the Environmental Protection Agency.¹⁸ In that position, she clashed with the D.C. establishment over her deregulatory efforts.¹⁹ Accused of dismantling her agency and cited for contempt of Congress, Anne Gorsuch was eventually forced from office.²⁰ At his Senate confirmation hearing in 2017, Justice Gorsuch said his mother taught him "that headlines are fleeting—courage lasts."²¹ The subtext was that Justice Gorsuch believes in following principles even if they lead to unpopular conclusions.

For most of his pre-judicial legal career, Justice Gorsuch worked in the private sector.²² After a Supreme Court clerkship for Justice Byron White and Justice Anthony Kennedy, Justice Gorsuch spent about a decade (including eight years as a partner) as a litigator at Kellog Huber, an elite D.C. law firm that represented private parties, often in opposition to the federal government.²³ When George W. Bush was President, Justice Gorsuch spent a year in the Justice Department, working mainly on national security matters,²⁴ before his appointment to the U.S. Court of Appeals for the Tenth Circuit, based in Denver, Colorado, where he served for about a decade prior to joining the Supreme Court.²⁵ It is also worth noting that Justice Gorsuch has a doctorate in moral philosophy from Oxford²⁶ and met his wife when he was a student there.²⁷

¹⁶ See Heather Elliott, *Gorsuch v. The Administrative State*, 70 ALA. L. REV. 703, 711 (2019).

¹⁷ See NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 317 (2019).

¹⁸ See *Biography of Anne M. Gorsuch (Burford)*, EPA (May 20, 1981), <http://archive.epa.gov/epa/aboutepa/biography-anne-m-gorsuch-burford.html> [<http://perma.cc/3MYK-6X8B>].

¹⁹ See Brady Dennis & Chris Mooney, *Neil Gorsuch's Mother Once Ran EPA. It Didn't go Well*, WASH. POST (Feb. 1, 2017, 4:33 AM), <http://www.washingtonpost.com/news/energy-environment/wp/2017/02/01/neil-gorsuchs-mother-once-ran-the-epa-it-was-a-disaster/> [<http://perma.cc/XN4N-C92F>].

²⁰ See Elliott, *supra* note 16.

²¹ GORSUCH, *supra* note 17, at 317.

²² See Elliott, *supra* note 16.

²³ See *id.*

²⁴ See *id.*

²⁵ Matt Ford, *Trump Nominates Neil Gorsuch for the U.S. Supreme Court*, ATLANTIC (Jan. 31, 2017), <http://www.theatlantic.com/politics/archive/2017/01/gorsuch-trump-supreme-court/515232/> [<http://perma.cc/M8NF-DQTY>].

²⁶ See Christopher R. Green, *Justice Gorsuch and Moral Reality*, 70 ALA. L. REV. 635, 636 (2019).

²⁷ Joey Bunch, *Louise Gorsuch Goes Down in History, Sharing Marmalade Recipe in Supreme Court Book*, COLO. POLITICS (Dec. 28, 2017), http://www.coloradopolitics.com/news/louise-gorsuch-goes-down-in-history-sharing-marmalade-recipe-in-supreme-court-book/article_c888b00d-d724-5913-8dea-d21bffd2da6c2.html [<http://perma.cc/M8ZC-NWBQ>].

Justice Gorsuch has a wary, outsider attitude toward the federal government.²⁸ He fears its unauthorized encroachment on democratic self-governance and the traditional common law.²⁹ He opposes judges or federal agencies updating the law to conform to modern policy or popular sentiment.³⁰ Instead, Justice Gorsuch believes judges must follow the law as it *is*, not as they want it to be.³¹ In his mind, this means reasoning from (his vision of) the basic precepts of the American Republic, the common law, and Western Civilization—such as respect for the individual and the rule of law, as supplemented by duly enacted legal texts construed in accordance with the interpretative tools that judges have used for centuries.³² While this philosophy usually leads to narrowing constructions of federal power, Justice Gorsuch will follow his (often literalist) understanding of the written law to its logical conclusion even if that means an expansion of federal authority.³³

To demonstrate this thesis about the differences between the two Justices, this Article proceeds in six parts plus a conclusion. Part I considers a case in which Justice Kavanaugh and Justice Gorsuch wrote opposing opinions that illustrate their differing attitudes toward the federal government and conflicting jurisprudential approaches. Part II discusses four cases from the October 2018 term in which Justice Kavanaugh voted with Justice Ginsburg in support of federal regulation and Justice Gorsuch was on the other side. Part III discusses four cases from the October 2018 term in which Justice Gorsuch voted with Justice Ginsburg in support of parties opposed to the federal government and Justice Kavanaugh was on the other side. Part IV looks at cases from the October 2018 term in which Justice Gorsuch and Justice Kavanaugh were in agreement. Part V looks at six cases from the Supreme Court's October 2019 term in which Justice Kavanaugh and Justice Gorsuch were on opposite sides and one or both wrote opinions. Part VI makes generalizations comparing the pragmatic insider jurisprudence of Justice Kavanaugh with the formalist outsider approach of Justice Gorsuch. Part VII briefly concludes by considering what the differences between the two Justices might mean for the future of United States law.

²⁸ Daniel Harris, *The New Swing Votes on the U.S. Supreme Court*, 114 NW. L. REV. ONLINE 258, 260 (2020).

²⁹ *Id.*

³⁰ GORSUCH, *supra* note 17, at 10.

³¹ *Id.*

³² *See, e.g.*, *Kisor v. Wilkie*, 139 S.Ct. 2400, 2442 (2019) (Gorsuch J., concurring).

³³ *See, e.g.*, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

I. THE JURISPRUDENTIAL CONFLICT

The jurisprudential conflict between Justice Gorsuch and Justice Kavanaugh is best illustrated by *United States v. Davis*, a five-to-four decision in which the majority coalition consisted of the Court's four Democratic appointees plus Justice Gorsuch.³⁴ In *Davis*, the defendants "Maurice Davis and Andrew Glover committed a string of gas station robberies in Texas."³⁵ They were caught, prosecuted in federal court, and convicted of violations of the federal Hobbs Act and conspiracy to violate the Hobbs Act.³⁶ Because they used a shotgun to commit their crimes, they were also convicted of carrying or using a firearm to violate the Hobbs Act and using or carrying a firearm in connection with their conspiracy.³⁷ The question before the Supreme Court involved the validity of that last conviction.³⁸

The governing statute, 18 U.S.C. § 924(c), mandated "heightened criminal penalties" for using or carrying a firearm in connection with a federal "crime of violence."³⁹ The term "crime of violence" had alternative definitions set forth in § 924(c)(3).⁴⁰ According to § 924(c)(3)(A), a crime of violence was a felony that had "the use, attempted use, or threatened use of physical force" as one of its elements.⁴¹ Alternatively, § 924(c)(3)(B) defined a "crime of violence" as a felony "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."⁴²

The defendants' convictions for carrying or using a firearm in connection with their Hobbs Act violations were valid under § 924(c)(3)(A) because the use or threatened use of force was an element of the Hobbs Act crime.⁴³ But § 924(c)(3)(A) did not work for the defendants' convictions for carrying or using a firearm in connection with the conspiracy charge because the use or threatened use of force was not an element of conspiracy.⁴⁴ To justify those convictions, the government needed to use § 924(c)(3)(B).⁴⁵

³⁴ *United States v. Davis*, 139 S. Ct. 2319 (2019).

³⁵ *Id.* at 2324.

³⁶ *Id.* at 2324–25.

³⁷ *See id.*

³⁸ *Id.*

³⁹ *Id.* at 2324.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 2324.

⁴³ *Id.* at 2523, 2336.

⁴⁴ *Id.* at 2325.

⁴⁵ *Id.* at 2327.

That was a problem. Courts and the government construed § 924(c)(3)(B) to require what was called the “categorical approach”—an inquiry into the potential for harm inherent in the category of offense that the defendant committed (e.g., whether wire fraud is the type of crime that has a substantial risk of harm).⁴⁶ In 2018, the Supreme Court held that a virtually identical statutory definition of “crime of violence” also mandated that same categorical approach and it was unconstitutionally vague because it required courts “to picture the kind of conduct that the crime involves in the ordinary case, and to judge whether that abstraction presents some not-well-specified-yet-sufficiently-large degree of risk.”⁴⁷

To get rid of the vagueness problem and thereby save the convictions and the statute, the government asked the Supreme Court to reinterpret § 924(c)(3)(B) so that its definition of a crime of violence would depend on what defendants actually did and not on the hypothetical potential for harm associated with their category of crime.⁴⁸ The Supreme Court, in a five-to-four decision, ruled against the government.⁴⁹ The five Justices in the majority were the Court’s four Democratic appointees plus Justice Gorsuch, who wrote the majority opinion.⁵⁰

Justice Gorsuch began his opinion by making it clear that he did not consider the statute a first draft that the Court could rework, stating: “In our constitutional order, a vague law is no law at all. Only the people’s elected representatives in Congress have the power to write new federal criminal laws.”⁵¹ Justice Gorsuch went on to explain that: “When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again.”⁵²

Taking his task as statutory interpretation, not revision, Justice Gorsuch said § 924(c)(3)(B) meant what it appeared to say.⁵³ For purposes of the section, a crime of violence was to be determined using the categorical approach, which involved assessing the potential for harm associated with the abstract category of the defendant’s offense.⁵⁴ Because this inquiry provided “no reliable way to determine which offenses qualify as

⁴⁶ *See id.* at 2326.

⁴⁷ *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1211, 1216 (2018) (internal quotation marks omitted).

⁴⁸ *See Davis*, 139 S. Ct. at 2327.

⁴⁹ *Id.* at 2336.

⁵⁰ *Id.* at 2323.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 2323–24.

⁵⁴ *Id.* at 2324.

crimes of violence,” the language was “unconstitutionally vague.”⁵⁵

Justice Gorsuch explained that the government’s alternative reading of the statute could not “be squared with the statute’s text, context, and history.”⁵⁶ Were the Supreme Court to adopt the government’s revised version of the statute, Justice Gorsuch said, the Supreme Court Justices would be “stepping outside [their] role as judges and writing a new law rather than applying the one Congress adopted.”⁵⁷

Justice Gorsuch emphasized that the defendants would still receive substantial prison time because they “did many things that Congress had declared to be crimes” and would “face substantial prison sentences for those offenses.”⁵⁸

Justice Gorsuch also noted that the government’s new reading of Section 924(c)(3)(B) would criminalize some conduct that was not made criminal by the law as it was actually written (such as a defendant’s use of a firearm in connection with an offense that does not normally involve the use of force).⁵⁹ Expanding the statute through interpretation “would risk offending the very same due process and separation-of-powers principles on which the vagueness doctrine itself rests.”⁶⁰ Therefore, despite the general reluctance of courts to declare Acts of Congress unconstitutional, “a court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe.”⁶¹

Justice Kavanaugh wrote the dissent, joined in whole by Justices Thomas and Alito and in part by Chief Justice Roberts.⁶² The dissenting opinion, like the majority opinion, began with a discussion of important considerations: “Crime and firearms form a dangerous mix. From the 1960s through the 1980s, violent gun crime was rampant in America.”⁶³ Emphasizing the practical needs of modern American society,⁶⁴ Justice Kavanaugh noted that “The wave of violence destroyed lives and devastated communities, particularly in America’s cities. Between 1963 and 1968, annual murders with firearms rose by a staggering 87 percent, and annual

⁵⁵ *Id.* at 2323–24.

⁵⁶ *Id.* at 2324.

⁵⁷ *Id.* (alteration in original).

⁵⁸ *Id.* at 2333.

⁵⁹ *Id.* at 2332.

⁶⁰ *Id.* at 2332–33.

⁶¹ *Id.* at 2333.

⁶² *Id.* at 2336.

⁶³ *Id.*

⁶⁴ *Id.*

aggravated assaults with firearms increased by more than 230 percent.”⁶⁵

Continuing in a pragmatic vein, Justice Kavanaugh went on to describe how “[f]aced with an onslaught of violent gun crime and its debilitating effects, the American people demanded action.”⁶⁶ Justice Kavanaugh explained that gun control laws, such as 18 U.S.C. § 924(c), were passed in response.⁶⁷ “Over the last 33 years, tens of thousands of § 924(c) cases have been prosecuted in the federal courts. Meanwhile, violent crime with firearms has decreased significantly.”⁶⁸

Justice Kavanaugh then attacked as surprising and extraordinary the Supreme Court’s decision to strike down a key provision of § 924(c)—“a federal law that has been applied so often for so long with so little problem.”⁶⁹ Justice Kavanaugh warned that “[t]he Court’s decision . . . will make it harder to prosecute violent gun crimes in the future.”⁷⁰ Further, he stated “[t]he Court’s decision also will likely mean that thousands of inmates who committed violent gun crimes will be released far earlier than Congress specified when enacting § 924(c). The inmates who will be released . . . are offenders who committed violent crimes with firearms, often brutally violent crimes.”⁷¹

Justice Gorsuch responded to Justice Kavanaugh’s first argument by saying that there was nothing “surprising” or “extraordinary” about striking down a statute when even the government conceded the law would be unconstitutional if it continued to mean what it had meant through thousands of prosecutions.⁷² On the contrary, Justice Gorsuch said, it would be surprising and extraordinary if the Supreme Court could save the statute by suddenly giving it “a new meaning different from the one it has borne for the last three decades.”⁷³

Justice Kavanaugh’s dissent argued that the most sensible approach for a statute such as § 924(c)(3)(B) was to focus on what the defendant had actually done and not to employ the categorical approach of looking at the potential for harm associated with the abstract crime.⁷⁴ Justice Kavanaugh quoted a lower court opinion: “If you were to ask John Q. Public whether a

⁶⁵ *Id.* at 2336 (Kavanaugh, J., dissenting).

⁶⁶ *Id.* at 2337.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 2333 (majority opinion).

⁷³ *Id.*

⁷⁴ *Id.* at 2343 (Kavanaugh, J., dissenting).

particular crime posed a substantial risk of violence, surely he would respond, ‘Well, tell me how it went down—*what happened?*’”⁷⁵ The majority opinion by Justice Gorsuch responded that the language of the statute before the Supreme Court was not “the language posited in the dissent’s push poll. Section 924(c)(3)(B) doesn’t ask about the risk that ‘a particular crime posed’ but about the risk that an ‘offense . . . by its nature, involves.’”⁷⁶

The dissent by Justice Kavanaugh said that it did not matter that the government had for many years taken the position that § 924(c)(3)(B) mandated the (now unconstitutional) categorical approach, noting that the government’s position came “after the courts settled on a categorical approach—at a time when it did not matter for constitutional vagueness purposes”⁷⁷ In response, Justice Gorsuch asked: “Isn’t it at least a little revealing that, when the government had no motive to concoct an alternative reading, even it thought the best reading of § 924(c)(3)(B) demanded categorical analysis?”⁷⁸

The dissent by Justice Kavanaugh noted that the word “offense” in § 924(c)(3) could be read to refer to what the defendant had actually done,⁷⁹ and that “an ambiguous statute must be interpreted, whenever possible, to avoid unconstitutionality.”⁸⁰ Therefore, Justice Kavanaugh said, “it is fairly possible to interpret § 924(c)(3)(B) to focus on the defendant’s actual conduct” and that reading would make the statute constitutional.⁸¹

In response, Justice Gorsuch pointed out that the dissent’s new reading of the law would criminalize conduct that was not criminal under the categorical approach—the interpretation of the law that fit best with the statute’s language and history.⁸² Justice Gorsuch chided the dissent for “not even try[ing] to explain how using the canon to criminalize conduct that *isn’t* criminal under the fairest reading of a statute might be reconciled with traditional principles of fair notice and separation of powers.”⁸³ Justice Gorsuch noted that “the dissent seem[ed] willing to consign thousands of defendants to prison for years . . . because it [was] merely possible Congress might have

⁷⁵ *Id.* (quoting *Ovalles v. United States*, 905 F.3d 1231, 1241 (11th Cir. 2018)).

⁷⁶ *Id.* at 2334 (majority opinion).

⁷⁷ *Id.* at 2355 (Kavanaugh, J., dissenting).

⁷⁸ *Id.* at 2334 (majority opinion).

⁷⁹ *Id.* at 2347–48 (Kavanaugh, J., dissenting).

⁸⁰ *Id.* at 2350.

⁸¹ *Id.* at 2351.

⁸² *Id.* at 2335 (majority opinion).

⁸³ *Id.*

[ordained those penalties].”⁸⁴ Justice Gorsuch concluded: “In our republic, a speculative possibility that a man’s conduct violated the law should never be enough to justify taking his liberty.”⁸⁵

The last section of the dissent returned to the theme that “[t]he Court’s decision means that people who in the future commit violent crimes with firearms may be able to escape conviction under § 924(c).”⁸⁶ After giving an example of a horrible crime that might go unpunished, Justice Kavanaugh argued that “when the consequences [of a statutory interpretation] are this bad,” the Court should “double-check” its legal analysis.⁸⁷ That double-checking, Justice Kavanaugh went on, would show that the statute did not really compel the Court’s decision in *Davis*.⁸⁸ Justice Kavanaugh concluded: “I am not persuaded that the Court can blame this decision on Congress. The Court has a way out, if it wants a way out.”⁸⁹

The majority opinion by Justice Gorsuch addressed the dissent’s public policy arguments by asking: “[W]hat’s the point of all this talk of ‘bad’ consequences if not to suggest that judges should be tempted into reading the law to satisfy their policy goals?”⁹⁰ Justice Gorsuch went on to note the various ways Congress could fix the problem and then concluded: “[T]hese are options that belong to Congress to consider; no matter how tempting, this Court is not in the business of writing new statutes to right every social wrong it may perceive.”⁹¹

The *Davis* decision illustrates the philosophical differences between Justice Gorsuch and Justice Kavanaugh. Justice Gorsuch construed the statute based on its text, history, and prior construction. Justice Kavanaugh focused on the general purpose of the statute, common sense, and the practical consequences of alternative interpretations. Justice Gorsuch’s focus was on the rights of the individual; he resolved doubts about the meaning of the law against the government and in favor of liberty. Justice Kavanaugh’s concern was with the welfare of society; he resolved ambiguities in favor of the government and against wrongdoers.

Justice Gorsuch treated the statute’s meaning as objective and fixed; something individuals could ascertain and rely on, not

⁸⁴ *Id.* (internal quotations omitted).

⁸⁵ *Id.*

⁸⁶ *Id.* at 2353 (Kavanaugh, J., dissenting).

⁸⁷ *Id.* at 2355.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 2335 (majority opinion).

⁹¹ *Id.* at 2336.

something government officials could manipulate based on their notions of the best interests of society. Justice Kavanaugh saw the law's meaning as malleable; something the government and the Court could and should alter in order to serve the public interest.

II. JUSTICE KAVANAUGH WITH JUSTICE GINSBURG AGAINST JUSTICE GORSUCH

In cases involving assertions of federal power, Justice Kavanaugh often sided with the Court's liberal Justices and against Justice Gorsuch. This section provides four examples. Two of the cases discussed below involved federal regulation of private business, and two involved constitutional challenges to state actions. In all four cases, Justice Kavanaugh took the side of the parties invoking federal power while Justice Gorsuch sided with parties resisting federal power. Justice Kavanaugh justified his rulings with pragmatic and progressive arguments consistent with the modern norms of Washington, D.C. Justice Gorsuch made a variety of counterarguments in support of local self-governance and the traditional common law.

A. *Apple Inc. v. Pepper*⁹²

Apple Inc., an antitrust case, arose out of Apple's practice of requiring its customers to purchase applications ("app") for Apple devices through the Apple App Store.⁹³ Several customers sued Apple for allegedly using its monopoly power to charge higher prices than Apple customers would otherwise have paid.⁹⁴ The gist of Apple's defense was that it did not set the allegedly unlawful prices.⁹⁵ Although Apple imposed a uniform 30% commission on the developers, Apple argued that it should not be blamed for the prices because the developer of each app ultimately set the price for that app.⁹⁶

The company invoked a 1977 Supreme Court precedent, *Illinois Brick Co. v. Illinois*,⁹⁷ which held that customers who did not purchase directly from the alleged antitrust violator did not have standing to sue that party for damages under the federal antitrust laws. Apple argued that the general principle of *Illinois Brick* should apply because, similar to the facts in that case, the

⁹² *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019).

⁹³ *Id.* at 1518–19.

⁹⁴ *See id.* at 1518.

⁹⁵ *See id.* at 1519.

⁹⁶ *See id.* at 1519, 1521–22.

⁹⁷ *See id.* at 1519; *see also* *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 728–29 (1977).

consumer plaintiffs were suing a party that did not set the prices that caused the alleged antitrust injury.⁹⁸

The district court agreed with Apple and dismissed the case.⁹⁹ The Court of Appeals reversed, holding that the consumers had standing to sue under *Illinois Brick* because they purchased their apps directly from Apple.¹⁰⁰ The question before the Supreme Court was whether to adopt a broad construction of the Sherman Act and a narrow construction of the *Illinois Brick* exception (as the plaintiffs wanted) or, conversely, a narrow construction of the Sherman Act and a broad construction of the *Illinois Brick* exception, as Apple urged.¹⁰¹

By a five-to-four vote, the Supreme Court sided with the consumer plaintiffs.¹⁰² The majority consisted of the Court's four liberal Justices plus Justice Kavanaugh, who wrote the majority opinion.¹⁰³ The opinion twice emphasized that the Sherman Act should be construed broadly to achieve its purpose of protecting consumers from monopolists.¹⁰⁴ Early on, the opinion noted: "A claim that a monopolistic retailer (here, Apple) has used its monopoly to overcharge consumers is a classic antitrust claim."¹⁰⁵ The opinion went on to say that it would be inconsistent with the statutory scheme to immunize monopolistic retailers from antitrust litigation in the scenario where the retailers have their suppliers set the base prices.¹⁰⁶ "We refuse to rubber-stamp such a blatant evasion of statutory text and judicial precedent."¹⁰⁷

The opinion by Justice Kavanaugh brushed aside Apple's argument that the proper parties to bring a monopolization claim were the suppliers who dealt directly with Apple, noting: "Leaving consumers at the mercy of monopolistic retailers simply because upstream suppliers could *also* sue the retailers makes little sense and would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases."¹⁰⁸ Justice Kavanaugh also dismissed Apple's argument about the potential complexity of damage calculations, stating: "*Illinois Brick* is not a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated."¹⁰⁹

⁹⁸ *See id.*

⁹⁹ *See id.*

¹⁰⁰ *See In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 325 (9th Cir. 2017).

¹⁰¹ *See Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1520 (2019).

¹⁰² *Id.* at 1519.

¹⁰³ *Id.* at 1515.

¹⁰⁴ *See id.* at 1520, 1525.

¹⁰⁵ *Id.* at 1519.

¹⁰⁶ *See id.* at 1523–24.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1524.

¹⁰⁹ *Id.*

In its close, Justice Kavanaugh's opinion returned to the theme that the Sherman Act should be interpreted consistently with its pro-consumer purposes.¹¹⁰ Justice Kavanaugh said: "The plaintiffs seek to hold retailers to account if the retailers engage in unlawful anticompetitive conduct that harms consumers who purchase from those retailers. That is why we have antitrust law."¹¹¹ The opinion went on to note that from the Sherman Act's inception "protecting consumers from monopoly prices' has been 'the central concern of antitrust.'"¹¹²

Justice Gorsuch wrote a dissent, joined by Chief Justice Roberts, Justice Thomas, and Justice Alito.¹¹³ He treated *Illinois Brick* as an application of the general rule that statutory causes of action are "limited to plaintiffs whose injuries are proximately caused by violations of the statute."¹¹⁴ Justice Gorsuch reasoned that *Illinois Brick* rejected a suit by indirect purchasers because the plaintiffs in that case were relying on pass-on theory of damages that was inconsistent with the common law proximate cause rule.¹¹⁵ Justice Gorsuch then criticized the majority for allowing "a pass-on case" based on a formalistic and overly narrow interpretation of *Illinois Brick*.¹¹⁶

The dissent by Justice Gorsuch also noted the practical difficulties of adjudicating the plaintiffs' antitrust claim: "Will the court hear testimony to determine the market power of each app developer, how each set its prices, and what it might have charged consumers for apps if Apple's commission had been lower?"¹¹⁷ In addition, Justice Gorsuch criticized Justice Kavanaugh for preferring a broad reading of the Sherman Act to "the well-trodden path of construing the statutory text in light of background common law principles of proximate cause."¹¹⁸

For purposes of this Article, the important takeaway from *Apple Inc.* is how differently Justice Kavanaugh and Justice Gorsuch viewed federal regulation. Justice Kavanaugh favored a liberal construction of the Sherman Act that would ensure that all of the law's regulatory goals could be achieved.¹¹⁹ Justice Gorsuch did not worry about incomplete enforcement.¹²⁰ His

¹¹⁰ *See id.* at 1525.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* (Gorsuch, J., dissenting).

¹¹⁴ *Id.* at 1527 (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014)).

¹¹⁵ *See id.* at 1525–26.

¹¹⁶ *See id.* at 1526.

¹¹⁷ *Id.* at 1528.

¹¹⁸ *Id.* at 1530.

¹¹⁹ *See id.* at 1525.

¹²⁰ *See id.* at 1525–31.

concern was with the law going too far, so he preferred reading into the statute principles taken from common law traditions to make sure the federal statute limited damages liability to private parties that had actually caused the alleged harm.¹²¹

Justice Kavanaugh wanted to protect society from the machinations of big companies, particularly those companies that violate the spirit of the law in crafty ways and then seek shelter in made-up technical defenses.¹²² He sympathized with those seeking to enforce the law and with the people the statute was intended to protect.¹²³ He had much less concern for the supposed rights of alleged law-breakers.¹²⁴ By contrast, Justice Gorsuch took a skeptical attitude toward law enforcement and its tendency toward mission creep.¹²⁵ His sympathies were with those subject to federal regulation.¹²⁶

B. *Air and Liquid Systems Corp. v. DeVries*¹²⁷

A similar conflict between Justice Kavanaugh and Justice Gorsuch took place in *DeVries*, a case involving the application of federal maritime law to a products liability claim.¹²⁸ Two sailors, John DeVries and Kenneth McAfee, were exposed to asbestos while serving in the U.S. Navy (DeVries in the 1950s and McAfee in the 1980s).¹²⁹ They later developed cancer, allegedly caused by asbestos exposure.¹³⁰ The former sailors did not sue the asbestos manufacturers because those companies were in bankruptcy, and they believed they could not sue the Navy because of a 1950 Supreme Court precedent.¹³¹ Instead, the sailors and their wives filed suit against companies that had supplied the Navy with products such as pumps, blowers, and turbines to which the Navy had later added asbestos.¹³² The theory of liability was that the defendant companies should have warned them about the dangers of asbestos insulation, so that the former sailors would have known to wear respiratory masks and avoid the hazard.¹³³

¹²¹ *See id.* at 1530.

¹²² *See id.* at 1524 (majority opinion).

¹²³ *See id.* at 1524–25.

¹²⁴ *See id.*

¹²⁵ *See id.* at 1525–31 (Gorsuch, J., dissenting).

¹²⁶ *See id.* at 1529–30.

¹²⁷ *See Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986 (2019).

¹²⁸ *Id.* at 991.

¹²⁹ *See id.*

¹³⁰ *See id.*

¹³¹ *See id.* at 992 (citing *Feres v. United States*, 340 U.S. 135 (1950)) (concluding “that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service”).

¹³² *See id.*

¹³³ *Id.*

The cases were commenced in state court and later removed to federal court because they fell within the federal maritime jurisdiction.¹³⁴ The district court granted the defendants' motions for summary judgment, relying on the traditional common law "bare-metal" defense, under which product manufacturers have no duty to warn about the dangers of materials that are not in their products at the time of sale.¹³⁵ The U.S. Court of Appeals for the Third Circuit reversed in accordance with a modern products liability rule that requires manufacturers to warn about the dangers of added materials if it is foreseeable that the materials might be added to the product after sale.¹³⁶

On review, the Supreme Court rejected both the "bare-metal" defense followed by the district court and the "foreseeable risk" test of the Court of Appeals.¹³⁷ Instead, the Court adopted a somewhat less plaintiff-friendly, modern rule followed in some jurisdictions under which "a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product's users will realize that danger."¹³⁸

The majority opinion was written by Justice Kavanaugh and joined by Chief Justice Roberts and the Court's four liberal Justices.¹³⁹ Justice Kavanaugh began by emphasizing that federal courts have great freedom to shape federal maritime law, noting: "When a federal court decides a maritime case, it acts as a federal 'common law court,' much as state courts do in state common-law cases."¹⁴⁰ Justice Kavanaugh went on to emphasize that in formulating maritime law, courts were not bound by what was done in the past, but instead may consider "judicial opinions, legislation, treatises, and scholarly writings."¹⁴¹

Justice Kavanaugh said that while there was a general duty to warn about risks in one's products, there were disagreements among courts as to what that entailed when the risks came from added materials.¹⁴² Some jurisdictions followed the "bare-metal" defense under which there was no duty to warn about the risks of materials added after sale, some jurisdictions went by the

¹³⁴ *See id.*

¹³⁵ *See id.*

¹³⁶ *See id.* (citing *In re Asbestos Prods. Liab. Litig.*, 873 F.3d 232, 240–41 (3d Cir. 2017)).

¹³⁷ *See id.* at 991.

¹³⁸ *Id.*

¹³⁹ *Id.* at 986.

¹⁴⁰ *Id.* at 992 (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 507 (2008)).

¹⁴¹ *Id.*

¹⁴² *See id.* at 993.

foreseeable risk approach, and some courts followed what Justice Kavanaugh described as an intermediate approach.¹⁴³ Justice Kavanaugh decided that the intermediate approach would be the best policy choice, reasoning that the foreseeability test would be too costly and result in “overwarning” users (with an overwhelmingly long list of potential hazards), while the bare-metal defense would not do enough to promote safety.¹⁴⁴

Justice Kavanaugh explained why it was a good idea for the Supreme Court to use its discretion to shape maritime law to provide plaintiffs with more protection than afforded by the traditional common law, noting: “Maritime law has always recognized a ‘special solicitude for the welfare’ of those who undertake to ‘venture upon hazardous and unpredictable sea voyages.’”¹⁴⁵ Justice Kavanaugh went on: “The plaintiffs in this case are the families of veterans who served in the U.S. Navy. Maritime law’s longstanding solicitude for sailors reinforces our decision to require a warning in these circumstances.”¹⁴⁶

Justice Gorsuch wrote the dissent, which was joined by Justice Thomas and Justice Alito.¹⁴⁷ He argued that the traditional common law bare-metal defense was the proper rule whereas the more modern standard adopted by the majority did not enjoy “meaningful roots in the common law.”¹⁴⁸ Justice Gorsuch cited the *Restatement (Third) of Torts* from 1997 for the proposition that “the supplier of a product generally must warn about only those risks associated with the product itself, not those associated with the ‘products and systems into which [it later may be] integrated.’”¹⁴⁹

Justice Gorsuch argued that “the traditional common law rule still makes the most sense today” because “[t]he manufacturer of a product is in the best position to understand and warn users about its risks” and therefore should be the one who has the duty to warn about product hazards.¹⁵⁰ Expanding the duty to warn was not a good idea, Justice Gorsuch explained because “we dilute the incentive of a manufacturer to warn about the dangers of its products when we require other people to share the duty to warn and its corresponding costs.”¹⁵¹

¹⁴³ See *id.* at 993–94.

¹⁴⁴ See *id.* at 994–95.

¹⁴⁵ *Id.* at 995 (quoting *Am. Exp. Lines, Inc. v. Alvez*, 446 U.S. 274, 285 (1980)).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 996 (Gorsuch, J., dissenting).

¹⁴⁸ See *id.* at 996–97.

¹⁴⁹ *Id.* at 997.

¹⁵⁰ *Id.*

¹⁵¹ See *id.* at 997–98.

Justice Gorsuch also argued that the traditional common law fit consumer expectations. “A home chef who buys a butcher’s knife may expect to read warnings about the dangers of knives but not about the dangers of undercooked meat. Likewise, a purchaser of gasoline may expect to see warnings at the pump about its flammability but not about the dangers of recklessly driving a car.”¹⁵²

Justice Gorsuch criticized the majority for replacing a clear common law rule with an opaque standard that courts would find hard to administer.¹⁵³ Justice Gorsuch then raised a fairness argument: “Decades ago, the bare metal defendants produced their lawful products and provided all the warnings the law required. Now, they are at risk of being held responsible retrospectively for failing to warn about other people’s products.”¹⁵⁴ He argued that “[i]t is a duty they could not have anticipated then and one they cannot discharge now. They can only pay. Of course, that may be the point.”¹⁵⁵ Justice Gorsuch then went on to argue that the Court might be “motivated by the unfortunate facts of this particular case, where the sailors’ widows appear to have a limited prospect of recovery from the companies that supplied the asbestos (they’ve gone bankrupt) and from the Navy that allegedly directed the use of asbestos (it’s likely immune under our precedents).”¹⁵⁶

Nevertheless, Justice Gorsuch went on, sympathy for the plaintiffs did not justify imposing liability on innocent manufacturers: “how were they supposed to anticipate many decades ago the novel duty to warn placed on them today? People should be able to find the law in the books; they should not find the law coming upon them out of nowhere.”¹⁵⁷

Once again, Justice Kavanaugh sympathized with those seeking to enforce federal law, and those needing the protection of federal law. Justice Gorsuch’s sympathies were with those who needed protection from federal law. Justice Kavanaugh saw the law as something flexible that judges should update for the better protection of the people. Justice Gorsuch saw the law as fixed; something that private parties could count on, not something that could be changed years later so as to punish defendants for conduct that was legal at the time it was done.

Justice Kavanaugh preferred a modern, consumer-protective version of the common law that expanded the scope of corporate

¹⁵² *Id.* at 998.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 999–1000.

¹⁵⁶ *Id.* at 1000.

¹⁵⁷ *Id.*

responsibility, although he was careful to adopt an intermediate step and not the most plaintiff-friendly approach. Justice Gorsuch opted for the traditional common law rule that limited the duty to warn to the party best situated to fulfill that duty, even though that construction of the law meant ruling against sympathetic plaintiffs.

C. *Tennessee Wine and Spirits Retailers Assoc. v. Thomas*¹⁵⁸

In *Tennessee Wine and Spirits*, a Tennessee statute required people applying for a license to operate a retail liquor store to have lived in the state for at least two years prior to their application.¹⁵⁹ Normally, laws that impose durational residency requirements on citizens seeking state benefits are deemed unconstitutional because they violate the free trade and free travel principles of the Dormant Commerce Clause.¹⁶⁰ The question before the Supreme Court in *Tennessee Wine and Spirits* was whether there was an exception to that general rule based on Section 2 of the Twenty-First Amendment.¹⁶¹ Section 2 was enacted as part of the deal that repealed the Eighteenth Amendment (the Prohibition Amendment) and, by its terms, gives states the power to regulate the transportation or importation of liquor.¹⁶²

The Supreme Court struck down the state law by a vote of seven-to-two. The majority opinion by Justice Alito followed modern precedents to construe Section 2 of the Twenty-First Amendment narrowly.¹⁶³ According to the majority, Section 2 authorized states to enact “alcohol-related public health and safety measures” but was “not a license to impose all manner of protectionist restrictions on commerce in alcoholic beverages.”¹⁶⁴ The opinion concluded that “[b]ecause Tennessee’s 2-year residency requirement for retail license applicants blatantly favors the State’s residents and has little relationship to public health and safety, it is unconstitutional.”¹⁶⁵

Justice Gorsuch wrote a dissenting opinion that was joined only by Justice Thomas. While agreeing that Section 2 did not give states the power to violate all manner of constitutional rights, Justice Gorsuch argued that the constitutional provision did allow states to escape the free trade principles the Supreme Court

¹⁵⁸ *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449 (2019).

¹⁵⁹ *Id.* at 2457.

¹⁶⁰ *See id.*

¹⁶¹ *See id.* at 2459.

¹⁶² *Id.*

¹⁶³ *See id.* at 2476.

¹⁶⁴ *Id.* at 2457.

¹⁶⁵ *Id.*

had read into the Dormant Commerce Clause.¹⁶⁶ Invoking history, Justice Gorsuch said that both before the Prohibition Amendment and after its repeal, “one thing has always held true: States may impose residency requirements on those who seek to sell alcohol within their borders to ensure that retailers comply with local laws and norms.”¹⁶⁷

The bulk of the dissent was spent debating the majority’s take on history and modern precedents under the dormant Commerce Clause and Section 2 of the Twenty-First Amendment.¹⁶⁸ But in its closing paragraph, the dissent spoke to the philosophical issues that prompted Justice Gorsuch to disagree with the majority of the Court.¹⁶⁹ The paragraph began: “As judges, we may be sorely tempted to ‘rationalize’ the law and impose our own free-trade rules for all goods and services in interstate commerce.”¹⁷⁰ That temptation should be resisted, Justice Gorsuch argued, because “real life is not always so tidy and satisfactory, and neither are the democratic compromises we are bound to respect as judges. Like it or not, those who adopted the Twenty-first Amendment took the view that reasonable people can disagree about the costs and benefits of free trade in alcohol.”¹⁷¹ Justice Gorsuch went on: “Under the terms of the compromise they hammered out, the regulation of alcohol wasn’t left to the imagination of a committee of nine sitting in Washington, D.C., but to the judgment of the people themselves and their local elected representatives.”¹⁷²

In a footnote, the majority opinion by Justice Alito addressed this passage in Justice Gorsuch’s dissent, characterizing it as “empty rhetoric” and noting that even the dissent strayed “from a blinkered reading” of Section 2 by conceding that the provision did “not abrogate all previously adopted constitutional provisions, just the dormant Commerce Clause.”¹⁷³

The *Tennessee Wine and Spirits* decision illustrates key differences between Justice Kavanaugh and Justice Gorsuch. Justice Kavanaugh favors national norms over provincial interests. Justice Gorsuch prefers to defend localities from the (supposed) overreach of the federal government. Justice Kavanaugh is happy to be part of the Washington, D.C., consensus. Justice Gorsuch will go out of his way to defy it. He is also willing to use sweeping anti-Washington, D.C., rhetoric, even

¹⁶⁶ *Id.* at 2477. (Gorsuch, J., dissenting).

¹⁶⁷ *Id.*

¹⁶⁸ *See id.* at 2476–84.

¹⁶⁹ *Id.* at 2484.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 2468 n.15 (majority opinion).

when the logic of that rhetoric might go further than he actually wants to go. It is also worth noting that Justice Gorsuch is sympathetic to state regulation of business; his anti-government sentiment seems to be limited to the federal authorities.

D. *Flowers v. Mississippi*¹⁷⁴

The defendant in *Flowers*, Curtis Flowers, was convicted in Mississippi state court of murdering four people in Winona, Mississippi, in 1996.¹⁷⁵ It was his sixth trial for the crime.¹⁷⁶ The first three trials resulted in convictions that were reversed by the Mississippi Supreme Court because of prosecutorial misconduct.¹⁷⁷ The fourth and fifth trials resulted in hung juries.¹⁷⁸ The question before the Supreme Court was whether, in Flowers' sixth trial, the prosecutor improperly struck Carolyn Wright, a black prospective juror, for racially discriminatory reasons in violation of the Equal Protection Clause as interpreted by the Supreme Court in 1986 in *Batson v. Kentucky*.¹⁷⁹

The Supreme Court reversed the Mississippi Supreme Court and ruled for the defendant by a vote of seven-to-two.¹⁸⁰ The majority opinion by Justice Kavanaugh concluded that “[f]our critical facts, taken together, require reversal.”¹⁸¹ The first fact was that “in the six trials combined, the State employed its peremptory challenges to strike 41 of the 42 black prospective jurors that it could have struck.”¹⁸² The second critical fact was that in Flowers' sixth trial, the one that had resulted in the conviction under review, “the State exercised peremptory strikes against five of the six black prospective jurors.”¹⁸³ The third fact was that at the sixth trial, “in an apparent effort to find pretextual reasons to strike black prospective jurors, the State engaged in dramatically disparate questioning of black and white prospective jurors.”¹⁸⁴ The fourth critical fact, according to Justice Kavanaugh, was that “the State then struck at least one black prospective juror, Carolyn Wright, who was similarly situated to white prospective jurors who were not struck by the State.”¹⁸⁵

¹⁷⁴ *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

¹⁷⁵ *Id.* at 2234–35.

¹⁷⁶ *Id.* at 2235.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹⁸⁰ *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

¹⁸¹ *Id.* at 2235.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

Justice Kavanaugh emphasized the narrow, fact-bound basis of the Court's decision, noting: "We need not and do not decide that any one of those four facts alone would require reversal." He stated ". . . all that we do decide, is that all of the relevant facts and circumstances taken together establish that the trial court committed clear error in concluding that the State's peremptory strike of black prospective juror Carolyn Wright was not 'motivated in substantial part by discriminatory intent.'"¹⁸⁶

Justice Kavanaugh went on: "In reaching that conclusion, we break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case."¹⁸⁷

Justice Thomas wrote a dissent. In its first three sections, which Justice Gorsuch joined, Justice Thomas went over the factual record of jury selection for the six trials in detail.¹⁸⁸ Noting that the defendant and the victims came from a small town with connections to many in the jury pool, Justice Thomas discussed the prosecutor's nondiscriminatory reasons for forty of the forty-one peremptory challenges that he used against black prospective jurors.¹⁸⁹ Justice Thomas also noted that the one improper peremptory challenge had been used twenty years earlier in a trial that did not result in the conviction under review.¹⁹⁰

With respect to the most recent trial and the striking of Wright, Justice Thomas noted that, shortly after the murders, Wright was sued by Tardy Furniture, a business that was owned by one of the victims and later, at the time of the suit against Wright, by that victim's son and daughter.¹⁹¹ The store's suit against Wright resulted in a garnishment order against her.¹⁹² Justice Thomas concluded that Wright's potential bias was "obvious," so that it was not unconstitutional racial discrimination for the prosecution to strike her.¹⁹³

Justice Thomas said that the Court should have followed its normal practice of not granting certiorari to review fact-specific cases.¹⁹⁴ He speculated that the Court might have granted review "because the case [had] received a fair amount of media

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *See id.* at 2252–69 (Thomas, J., dissenting). The last section, which Justice Gorsuch did not join, called for overruling *Batson v. Kentucky*. *See id.* at 2269–74.

¹⁸⁹ *See id.* at 2266–69.

¹⁹⁰ *See id.*

¹⁹¹ *Id.* at 2255.

¹⁹² *See id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 2254.

attention.”¹⁹⁵ Alternatively, Justice Thomas speculated, the Court might have taken the case for review because it came “from a state court in the South.”¹⁹⁶ Justice Thomas noted that “[t]hese courts are ‘familiar objects of the Court’s scorn,’ especially in cases involving race.”¹⁹⁷

This decision illustrates Justice Kavanaugh’s support for civil rights and willingness to use federal power to hold state governments to national standards. It also shows his pragmatic, fact-bound approach to adjudication. On the other hand, Justice Gorsuch’s willingness to join the portions of Justice Thomas’ dissent that questioned the factual basis of the Court’s decision illustrates that Justice Gorsuch is apt to challenge the dominant narrative and defy Washington, D.C., norms. His opposition is not all that conservative. Justice Gorsuch did not want to overrule the *Batson* precedent and he seems generally supportive of modern civil rights law. But in a factual dispute over the reach of federal law, Justice Gorsuch rejected the views of the D.C. establishment and sided with an object of its scorn.

III. JUSTICE GORSUCH WITH JUSTICE GINSBURG AGAINST JUSTICE KAVANAUGH

Justice Gorsuch’s skepticism about federal power often put him on the same side as Justice Ginsburg and opposite Justice Kavanaugh.¹⁹⁸ This section examines four examples—all with a connecting theme. In each of these cases, Justice Gorsuch opposed the federal government (or, in one case, a party that was acting as the U.S. government’s successor in interest) while Justice Kavanaugh took the side of the federal government (or its successor in interest).¹⁹⁹

A. *Biestek v. Berryhill*²⁰⁰

In *Biestek*, Michael Biestek (a former carpenter suffering from degenerative disc disease, Hepatitis C, and depression) applied for social security disability benefits.²⁰¹ Even though Biestek was no longer able to perform his customary construction work, the Social Security Administration opposed his application on the theory that there were other jobs in the economy he could perform.²⁰²

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (citations omitted).

¹⁹⁸ *See infra*, Part III.A–D.

¹⁹⁹ *See id.*

²⁰⁰ *Biestek v. Berryhill*, 139 S. Ct. 1148 (2019).

²⁰¹ *Id.* at 1152.

²⁰² *Id.* at 1153.

At a hearing before an Administrative Law Judge, a vocational expert hired by the government testified that there were “240,000 bench assembler jobs and 120,000 sorter jobs” available to someone with Biestek’s education and disabilities.²⁰³ On cross-examination, Biestek’s lawyer asked for the data supporting that conclusion.²⁰⁴ The Administrative Law Judge ruled that the supporting data was not necessary and then relied on the expert’s testimony in her decision, which granted Biestek disability benefits beginning in May 2013 (when he turned fifty) but denied prior benefits because of the availability of the other jobs.²⁰⁵

Biestek filed suit in federal court to recover the denied benefits, arguing that because the data supporting the expert’s report had not been disclosed, the decision of the Administrative Law Judge was not supported by substantial evidence and therefore should be overturned.²⁰⁶ The district court rejected this argument, as did the U.S. Court of Appeals for the Sixth Circuit.²⁰⁷ On review, the Supreme Court affirmed by a vote of six-to-three.²⁰⁸

The majority opinion was written by Justice Kagan and joined by Chief Justice Roberts, Justice Thomas, Justice Breyer, Justice Alito, and Justice Kavanaugh. The majority opinion reasoned that the substantial evidence standard is flexible and does not require “a categorical rule, applying to every case in which a vocational expert refuses a request for underlying data.”²⁰⁹ Rather, judicial review of whether an administrative decision was supported by substantial evidence should be “case-by-case” under a standard that “takes into account all features of the vocational expert’s testimony, as well as the rest of the administrative record” and “defers to the presiding ALJ, who has seen the hearing up close.”²¹⁰

The three dissenters were Justice Ginsburg, Justice Sotomayor, and Justice Gorsuch. In his dissent, Justice Gorsuch employed the striking rhetorical device of presenting the case from the plaintiff’s perspective.²¹¹ His opinion began: “Walk for a moment in Michael Biestek’s shoes. As part of your application for disability benefits, you’ve proven that you suffer from serious

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 1157.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 1158 (Gorsuch, J., dissenting).

health problems and can't return to your old construction job." The opinion continued, "Like many cases, yours turns on whether a significant number of other jobs remain that someone of your age, education, and experience, and with your physical limitations, could perform."²¹²

The opinion by Justice Gorsuch then went on to describe how the government introduced evidence that there were other jobs available, and how Biestek asked for the supporting data: "[b]ut rather than ordering the data produced, the hearing examiner, herself a Social Security Administration employee, jumps in to say that won't be necessary."²¹³ The narrative concluded then, "Even without the data, the examiner states in her decision on your disability claim, the expert's say-so warrants 'great weight' and is more than enough to evidence to deny your application. Case closed."²¹⁴

Justice Gorsuch reviewed precedents under the substantial evidence standard and then argued: "If clearly mistaken evidence, fake evidence, speculative evidence, and conclusory evidence aren't substantial evidence, the evidence here shouldn't be either."²¹⁵ Not only was the expert's testimony conclusory, Justice Gorsuch noted, "for all anyone can tell it may have come out of a hat—and, thus, may wind up being clearly mistaken, fake, or speculative evidence too."²¹⁶

In his closing, Justice Gorsuch emphasized the values at stake.²¹⁷ "The principle that the government must support its allegations with substantial evidence, not conclusions and secret evidence, guards against arbitrary executive decision[-]making. Without it, people like Mr. Biestek are left to the mercy of a bureaucrat's caprice."²¹⁸

Justice Kavanaugh did not write in this case, but he joined a majority opinion that saw a dispute between the federal government and an individual from the perspective of the government.²¹⁹ Justice Gorsuch, by contrast, saw the same case from the perspective of the individual fighting with the government.²²⁰ For the majority, the federal government was treated as a positive force that should be given substantial

²¹² *Id.*

²¹³ *Id.* at 1158–59.

²¹⁴ *Id.* at 1159.

²¹⁵ *Id.* at 1160.

²¹⁶ *Id.*

²¹⁷ *Id.* at 1162–63.

²¹⁸ *Id.* (citations omitted).

²¹⁹ *Id.* at 1152 (majority opinion).

²²⁰ *Id.* at 1161–63 (Gorsuch, J., dissenting).

leeway to do its good work.²²¹ For Justice Gorsuch, the federal government was an arrogant Leviathan that should be subject to close scrutiny and hemmed in by rules.²²² For the majority, the Social Security Administration hearing examiner was someone whose discretionary judgment deserved deference.²²³ Justice Gorsuch, by contrast, regarded that same discretion as a “bureaucrat’s caprice.”²²⁴

B. *Gamble v. United States*²²⁵

In *Gamble*, Terance Gamble was pulled over by police officer in Mobile, Alabama, for driving a car with a damaged headlight.²²⁶ Smelling marijuana, the officer searched the car and found not only marijuana but also a handgun, which Gamble as an ex-convict was not allowed to possess.²²⁷ Gamble pleaded guilty in state court to drug charges and possessing a gun while a convicted felon in violation of Alabama law.²²⁸ He was sentenced to ten years imprisonment, all but one year of which was suspended.²²⁹ Thinking his state punishment too light, federal authorities indicted Gamble for possession a gun while an ex-convict in violation of federal law and Gamble received nearly three more years in prison.²³⁰

Gamble challenged his federal conviction as violative of the Double Jeopardy Clause of the Fifth Amendment, which provides that “no person may be ‘twice put in jeopardy’ ‘for the same offence.’”²³¹ The lower courts rejected Gamble’s argument, following long-standing Supreme Court precedent that violations of the laws of two different sovereigns are not “the same offence” within the meaning of the Double Jeopardy Clause.²³² The Supreme Court affirmed by a vote of seven-to-two.²³³

The majority opinion by Justice Alito noted the textual basis for the dual-sovereignty doctrine, which allows state and federal prosecution of the same conduct if that conduct separately violates state and federal law.²³⁴ The Fifth Amendment does not

²²¹ *Id.* at 1152 (majority opinion).

²²² *Id.* at 1162–63 (Gorsuch, J., dissenting).

²²³ *Id.* at 1164.

²²⁴ *Id.* at 1163.

²²⁵ *Gamble v. United States*, 139 S. Ct. 1960 (2019).

²²⁶ *Id.* at 1964.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 1989 (Ginsburg, J., dissenting).

²³⁰ *Id.*

²³¹ *Id.* at 1963–64 (majority opinion).

²³² *Id.* at 1964.

²³³ *Id.* at 1960.

²³⁴ *Id.* at 1963–64.

prohibit dual prosecutions for the same conduct.²³⁵ It prohibits dual prosecutions for the same “offence.” Justice Alito’s majority opinion explained: “an ‘offence’ is defined by a law, and each law is defined by a sovereign. So where there are two sovereigns, there are two laws, and two ‘offences.’”²³⁶

The majority opinion went on to argue that the dual-sovereignty rule was also consistent with the ethos of the founding generation.²³⁷ One of the grievances against George III in the Declaration of Independence was that he used acquittals of British troops in English courts to bar their prosecution in the colonies.²³⁸ Justice Alito noted it did not make sense that “the same Founders who quite literally *revolted* against the use of acquittals abroad to bar criminal prosecutions here would soon give us an Amendment allowing foreign acquittals to spare domestic criminals.”²³⁹

The majority opinion reviewed the Supreme Court case law establishing the dual-sovereignty doctrine in the 1840s and then reaffirming the dual-sovereignty doctrine in numerous later decisions.²⁴⁰ Justice Alito went on to argue that the old precedents and treatises that Mr. Gamble cited to support his contrary position were a “muddle” or “spotty” or “equivocal” and therefore not enough to establish that the Framers intended to “bar successive prosecutions under different sovereigns’ laws—much less do so with enough force to break a chain of precedent linking dozens of cases over 170 years.”²⁴¹

Justice Thomas wrote a concurring opinion, which said “the historical record [did] not bear out [his] initial skepticism of the dual-sovereignty doctrine.”²⁴² The opinion went on to say that while the case presented “knotty issues about the original meaning of the Fifth Amendment,” it did not appear that the common law had “coalesced” around the defendant’s interpretation of double jeopardy right at the time the Fifth Amendment was ratified.²⁴³

The two dissenters were Justice Ginsburg and Justice Gorsuch. The dissent by Justice Gorsuch began: “A free society does not allow its government to try the same individual for the same crime until it’s happy with the result. Unfortunately, the

²³⁵ *Id.* at 1965.

²³⁶ *Id.*

²³⁷ *Id.* at 1983–84 (Thomas, J., concurring).

²³⁸ *Id.* at 1965–66 (majority opinion).

²³⁹ *Id.* at 1966.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 1969.

²⁴² *Id.* at 1980 (Thomas, J., concurring).

²⁴³ *Id.* at 1987.

Court today endorses a colossal exception to this ancient rule against double jeopardy.”²⁴⁴

The next paragraph of the dissent started with a quote from a 1959 dissenting opinion by Justice Hugo Black.²⁴⁵ Justice Gorsuch then stated the same thought in his own words: “Throughout history, people have worried about the vast disparity of power between governments and individuals, the capacity of the state to bring charges repeatedly until it wins the result it wants, and what little would be left of human liberty if that power remained unchecked.”²⁴⁶

The dissent by Justice Gorsuch traced the history of the double jeopardy prohibition, starting with ancient Athens and the Old Testament and then proceeding through the English common law to early American precedents,²⁴⁷ and argued that the term “offence” was and should be understood broadly.²⁴⁸ Justice Gorsuch buttressed this view with common sense, noting that: “Most any ordinary speaker of English would say that Mr. Gamble was tried twice for ‘the same offence,’ precisely what the Fifth Amendment prohibits.”²⁴⁹

Justice Gorsuch went on to argue that early American law was consistent with this understanding of double jeopardy, the Supreme Court’s adoption of the dual-sovereignty doctrine was a mistake, and there was no legitimate reason to perpetuate the error.²⁵⁰ The dissent noted: “In the era when the separate sovereigns exception first emerged, the federal criminal code was new, thin, modest, and restrained. Today, it can make none of those boasts.”²⁵¹ According to some estimates, the dissent observed, “the U.S. Code contains more than 4,500 criminal statutes, not even counting the hundreds of thousands of federal regulations that can trigger criminal penalties.”²⁵² Justice Gorsuch went on: “Still others suggest that ‘[t]here is no one in the United States over the age of 18 who cannot be indicted for some federal crime.’”²⁵³

In a closing paragraph of his dissent, Justice Gorsuch returned to his main themes. The paragraph began: “Enforcing the Constitution always bears its costs. But when the people

²⁴⁴ *Id.* at 1996 (Gorsuch, J., dissenting).

²⁴⁵ *Id.* (quoting *Bartkus v. Illinois*, 359 U.S. 121, 151 (1959) (Black, J., dissenting)).

²⁴⁶ *Id.* at 1996.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 1997.

²⁵⁰ *Id.* at 2008.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* (footnote omitted) (some internal quotation marks omitted).

adopted the Constitution and its Bill of Rights, they thought the liberties promised there worth the costs. It is not for this Court to reassess this judgment to make the prosecutor's job easier."²⁵⁴ Justice Gorsuch went on to explain the importance of the double jeopardy rule: "When governments may unleash all their might in multiple prosecutions against an individual, exhausting themselves only when those who hold the reins of power are content with the result, it is 'the poor and the weak,' and the unpopular and controversial, who suffer first"²⁵⁵

Thus, Justice Kavanaugh joined a majority opinion that took the side of law enforcement, the federal government, the welfare of society, and the status quo.²⁵⁶ Justice Gorsuch, by contrast, resolved ambiguities in favor of liberty and against the federal government.²⁵⁷ His overriding concern was with the rights of individuals.²⁵⁸ Moreover, Justice Gorsuch was willing to overturn 170 years of precedent, based on a historical record that even a sympathetic Justice Thomas saw as inconclusive, in order to restrain federal power.²⁵⁹ The opinion illustrates the selectivity of Justice Gorsuch's originalism. He embraces those parts of the past that protect individual liberty from an arbitrary or overzealous federal government. He is not a reactionary, seeking to restore some actual period in the past. His devotion is to an ideal.

As a matter of literary style, it is also worth noting that Justice Alito's majority opinion referred to the defendant as "Gamble"²⁶⁰ (which is normal), while Justice Gorsuch's dissenting opinion referred to the defendant as "Mr. Gamble,"²⁶¹ in much the same way that Justice Gorsuch's dissent in the *Biestek* case referred to the plaintiff as "Mr. Biestek." The addition of the honorific illustrates Justice Gorsuch's tendency to show greater respect for the individual.

C. *United States v. Haymond*²⁶²

In *Haymond*, Andre Haymond was convicted of possessing child pornography in violation of federal law.²⁶³ The statute authorized a punishment of zero to ten years in prison, plus

²⁵⁴ *Id.* at 2009.

²⁵⁵ *Id.* (footnote omitted) (quoting *Bartkus v. Illinois*, 359 U.S. 121, 163 (1959)).

²⁵⁶ *See id.* at 1963 (majority opinion).

²⁵⁷ *Id.* at 2000 (Gorsuch, J., dissenting).

²⁵⁸ *See id.* at 1996.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 1964.

²⁶¹ *Id.* at 1997.

²⁶² *United States v. Haymond*, 139 S. Ct. 2369 (2019) (plurality opinion).

²⁶³ *Id.* at 2373.

supervised release for a period of five years to life.²⁶⁴ “Because Mr. Haymond had no criminal history and was working to help support his mother who had suffered a stroke, the judge . . . sentenced him to a prison term of 38 months, followed by 10 years of supervised release.”²⁶⁵

Haymond served his prison term but ran into problems during supervised release.²⁶⁶ An unannounced government search of his computers and cell phone turned up fifty-nine images of what the government claimed to be child pornography. Subsequently, the government initiated supervised release revocation proceedings.²⁶⁷ The district court judge held a hearing without a jury and found that it was more likely than not that Haymond had knowingly downloaded thirteen images of child pornography.²⁶⁸

Normally, revocation of supervised release means that the district court judge has discretion to resentence the defendant to a period of imprisonment within the limits of the original sentencing range.²⁶⁹ But a provision added to the Sentencing Reform Act in 2003 and amended in 2006, 18 U.S.C. § 3583(k), created a special rule.²⁷⁰ Under § 3583(k), if a defendant “on supervised release committed one of several enumerated offenses, including the possession of child pornography, the judge *must* impose an additional prison term of at least five years and up to life without regard to the length of the prison term authorized for the defendant’s initial crime of conviction.”²⁷¹

Because of the statutory provision, the federal district court judge felt bound to sentence Haymond to five more years in prison, but he added that were it not for § 3583(k), he probably would have added a prison term “in the range of two years or less.”²⁷² On appeal, the U.S. Court of Appeals for the Tenth Circuit held that § 3583(k) violated the Sixth Amendment’s guarantee of trial by jury in criminal cases because it mandated a new and higher statutory minimum based on facts that had not been proven to a jury.²⁷³

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 2374.

²⁶⁷ *Id.*

²⁶⁸ *See id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.* (using a preponderance of the evidence standard).

²⁷² *Id.* at 2375.

²⁷³ *See id.*

On review, the Supreme Court ruled for Haymond by a vote of five-to-four.²⁷⁴ There were three opinions. Justice Gorsuch wrote a plurality opinion, joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan.²⁷⁵ Justice Breyer wrote a solo concurrence.²⁷⁶ Justice Alito wrote a dissent, joined by Chief Justice Roberts, Justice Thomas, and Justice Kavanaugh.²⁷⁷

Justice Gorsuch began the plurality opinion with a statement of first principles: “Only a jury, acting on proof beyond a reasonable doubt, may take a person’s liberty. That promise stands as one of the Constitution’s most vital protections against arbitrary government.”²⁷⁸ After recounting the background of the case, the plurality opinion returned to this theme. Quoting the papers of John Adams, the opinion said: “Together with the right to vote, those who wrote our Constitution considered the right to trial by jury ‘the heart and lungs . . .’ of our liberties, without which ‘the body must die; . . . the government must become arbitrary.’”²⁷⁹ Justice Gorsuch went on, again relying on the Adams papers: “Just as the right to vote sought to preserve the people’s authority over their government’s executive and legislative functions, the right to a jury trial sought to preserve the people’s authority over its judicial functions.”²⁸⁰ Justice Gorsuch then explained that, to secure this goal, “the Framers adopted the Sixth Amendment’s promise that ‘[i]n all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury.’ In the Fifth Amendment, they added that no one may be deprived of liberty without ‘due process of law.’”²⁸¹ He continued, “Together, these pillars of the Bill of Rights ensure that the government must prove to a jury every criminal charge beyond a reasonable doubt, an ancient rule that has ‘extend[ed] down centuries.’”²⁸²

Applying these principles, Justice Gorsuch held that § 3583(k) was unconstitutional because it mandated a minimum sentence of five years in prison for Haymond for new misconduct without giving him the right to a jury trial and without requiring the government to prove the charges against him beyond a reasonable doubt.²⁸³ Justice Gorsuch rejected the government’s argument that

²⁷⁴ *Id.* at 2385–86.

²⁷⁵ *See id.* at 2373.

²⁷⁶ *See id.* at 2385 (Breyer, J., concurring).

²⁷⁷ *Id.* at 2386 (Alito, J., dissenting).

²⁷⁸ *Id.* at 2373 (plurality opinion).

²⁷⁹ *Id.* at 2375 (quoting Letter from The Earl of Clarendon to William Pym (Jan. 27, 1766), in 1 PAPERS OF JOHN ADAMS 164, 169 (Robert J. Taylor ed., 1977)).

²⁸⁰ *Id.* (citation omitted).

²⁸¹ *Id.* at 2376 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 476–77 (2000)).

²⁸² *Id.*

²⁸³ *See id.* at 2373.

revocation of supervised release under § 3583(k) was not a criminal prosecution within the meaning of the Sixth Amendment.²⁸⁴ Citing precedent, Justice Gorsuch said that “any ‘increase in a defendant’s authorized punishment contingent on the finding of a fact’ requires a jury and proof beyond a reasonable doubt ‘no matter’ what the government chooses to call the exercise.”²⁸⁵

Justice Breyer’s concurrence indicated that he did not believe jury trials were normally required for revocation of supervised release, but that § 3583(k) was an exception because the statute only applied to a discrete set of criminal offenses, took away the judge’s discretion to determine whether supervised release should be revoked, and required a mandatory minimum of five years in prison.²⁸⁶ Justice Alito’s dissent took mild issue with Justice Breyer, saying he was wrong but giving him credit for a narrow opinion that “saved [their] jurisprudence from the consequences of the plurality opinion”²⁸⁷ Justice Alito then trained his heavy artillery on the opinion written by his fellow Republican appointee: “[The plurality opinion] . . . is not based on the original meaning of the Sixth Amendment, is irreconcilable with precedent, and sports rhetoric with potentially revolutionary implications. The plurality opinion appears to have been carefully crafted for the purpose of laying the groundwork for later decisions of *much* broader scope.”²⁸⁸

Justice Alito attacked Justice Gorsuch’s sweeping language about the Sixth Amendment jury trial right because it suggested that jury trials might be required for all supervised release revocation proceedings and not just those under § 3583(k).²⁸⁹ Justice Alito warned that this was impractical.²⁹⁰ In 2018, Justice Alito noted, the “federal district courts completed 1,809 criminal jury trials” and “16,946 revocations of supervised release.”²⁹¹ Justice Alito said there was “simply no way that the federal courts could empanel enough juries to adjudicate all those [supervised release revocations]”²⁹²

Turning to Justice Gorsuch’s legal analysis, Justice Alito dismissed his historical support as irrelevant, noting: “John Adams was not writing about the Sixth Amendment when he made a diary entry in 1771 or when he wrote to William Pym in

²⁸⁴ *See id.*

²⁸⁵ *Id.* at 2379 (quoting *Ring v. Arizona*, 536 U.S. 584, 602 (2002)).

²⁸⁶ *See id.* at 2385–86 (Breyer, J., concurring).

²⁸⁷ *Id.* at 2386 (Alito, J., dissenting) (alteration in original).

²⁸⁸ *Id.* (alteration in original).

²⁸⁹ *See id.* at 2388.

²⁹⁰ *See id.*

²⁹¹ *Id.*

²⁹² *Id.* (alteration in original).

1766.”²⁹³ Citing the language of the Sixth Amendment and various precedents, Justice Alito argued that a defendant was the “accused” within the meaning of the Sixth Amendment only through the initial prosecution.²⁹⁴ After a judgment of conviction, the defendant became the “convicted,”²⁹⁵ and the “criminal prosecution” for purposes of the Sixth Amendment jury trial right was over.²⁹⁶ Justice Alito buttressed his interpretation with historical practice of parole and probation revocation hearings to conclude that it was “a clear historical fact” that “American juries have simply played ‘no role’ in the administration of previously imposed sentences.”²⁹⁷

Justice Gorsuch responded by taking a broad view of the policies animating the Sixth Amendment, stating: “The Constitution seeks to safeguard the people’s control over the business of judicial punishments by ensuring that any accusation triggering a new and additional punishment is proven to the satisfaction of a jury beyond a reasonable doubt.”²⁹⁸ Justice Gorsuch criticized the dissent for giving the government too much power, noting: “If the government and dissent were correct, Congress could require anyone convicted of even a modest crime to serve a sentence of supervised release for the rest of his life. At that point, a judge could try and convict him of any violation of the terms of his release under a preponderance of the evidence standard, and then sentence him to pretty much anything.”²⁹⁹

Justice Gorsuch responded to the dissent’s practical objections with the argument that, “like much else in our Constitution, the jury system isn’t designed to promote efficiency but to protect liberty.”³⁰⁰ He went on to quote from William Blackstone’s *Commentaries*, an 18th Century treatise on English law, that threats to the jury trial right would come in the form of subtle machinations and that no matter how “*convenient*” these incursions “may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters.”³⁰¹

²⁹³ *Id.* at 2392.

²⁹⁴ *Id.*

²⁹⁵ *See id.*

²⁹⁶ *See id.* at 2393.

²⁹⁷ *Id.* at 2398 (quoting *Oregon v. Ice*, 555 U.S. 160, 168 (2009)).

²⁹⁸ *Id.* at 2380 (plurality opinion).

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 2384.

³⁰¹ *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 344 (1769)).

Once again, Justice Gorsuch resolved doubts in favor of liberty and against the federal government. He scoured the treatises of the past, finding support for his understanding of their ideals. He favored the rights of individuals over the supposed welfare of society. Justice Gorsuch sought to protect people like Andre Haymond from the U.S. government. Justice Kavanaugh took the opposing view, joining Justice Alito's defense of federal power and recognizing the practical needs of law enforcement. Unlike Justice Gorsuch, Justice Kavanaugh sought to protect society from people like Andre Haymond.

D. *Washington State Department of Licensing v. Cougar Den, Inc.*³⁰²

Another illustration of Justice Gorsuch and Justice Ginsburg taking the same side, with Justice Kavanaugh opposed, is *Washington State Department of Licensing*. The State of Washington taxed the importation of motor fuel through ground transportation.³⁰³ The question before the Supreme Court was whether an 1855 treaty between the Yakama Nation and the U.S. Government barred the State from imposing that tax on Cougar Den, a company owned by a member of the Yakama Nation and incorporated under Yakama law that trucked motor fuel over public highways to the Yakama reservation.³⁰⁴

In exchange for ten million acres of Yakama land (a quarter of what is now the State of Washington), the 1855 treaty gave members of the Yakama Nation various rights.³⁰⁵ The treaty promised the Yakamas, *inter alia*, “the right, in common with citizens of the United States, to travel upon all public highways.”³⁰⁶ Cougar Den argued that this meant Yakamas could import fuel by highway without being subject to state taxes.³⁰⁷ The State of Washington argued that the treaty simply meant that the State could not discriminate against the Yakamas and that since the motor fuel importation tax applied to all citizens it was proper.³⁰⁸

By a vote of five-to-four, the Supreme Court ruled for Cougar Den.³⁰⁹ The majority coalition consisted of the Court's four liberal Justices and Justice Gorsuch. The plurality opinion by Justice Breyer, joined by Justice Kagan and Justice Sotomayor, was careful to limit its scope to protecting the Yakamas from the

³⁰² Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (2019).

³⁰³ *Id.* at 1006.

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 1007.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 1009.

³⁰⁹ *See id.* at 1000.

particular tax at issue and not to impugn State power over the Yakamas in a variety of other circumstances.³¹⁰

Justice Gorsuch wrote a concurring opinion, joined by Justice Ginsburg, that was far more sweeping in its scope.³¹¹ His opinion began by noting that “[t]he Yakamas have lived in the Pacific Northwest for centuries,”³¹² and observed that they gave up ten million acres of their land in exchange for rights under the 1855 treaty with the United States.³¹³ He described the Court’s task as the “modest one” of construing the treaty to adopt “the interpretation most consistent with the treaty’s original meaning.”³¹⁴ That meaning, Justice Gorsuch was careful to emphasize, was not what the government might have understood, but rather what the treaty meant to the Yakamas. Quoting precedent, Justice Gorsuch noted that the Supreme Court “must ‘give effect to the terms as the Indians themselves would have understood them.’”³¹⁵ He explained the basis for this rule: “After all, the United States drew up this contract, and we normally construe any ambiguities against the drafter who enjoys the power of the pen.”³¹⁶

Focusing on the language of the treaty, Justice Gorsuch acknowledged that “[t]o some modern ears, the right to travel in common with others might seem merely a right to use the roads subject to the same taxes and regulations as everyone else.”³¹⁷ However, he went on to note that the modern understanding of the words did not matter, because that was “not how the Yakamas understood the treaty’s terms”³¹⁸ at the time the 1855 treaty was signed. Citing factual findings from another treaty case, he explained that “[i]n the Yakama language, the phrase ‘in common with’ . . . suggest[ed] public use or general use without restriction.”³¹⁹

Justice Gorsuch argued that this reading of the treaty also made the most sense given the huge amount of land that the Yakamas surrendered pursuant to the deal. He noted that, under the government’s interpretation, the right to travel promised to tribal members under the treaty extended only to “the right to

³¹⁰ *See id.* at 1015 (plurality opinion of Breyer, J.).

³¹¹ *Id.* at 1016. (Gorsuch, J., concurring).

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* (quoting *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999)).

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.* at 1017 (quoting *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1265 (E.D. Wash. 1997)) (alteration in original).

venture out of their reservation and use the public highways like everyone else. But the record shows that the consideration the Yakamas supplied was worth far more than an abject promise they would not be made prisoners on their reservation.”³²⁰

In his closing summation, Justice Gorsuch put the decision in a larger context, noting that the case really told “an old and familiar story.”³²¹ The federal government took millions of acres of tribal land in exchange for “a handful of modest promises.”³²² Now, he observed, the government was dissatisfied with what it gave up in the deal: “It is a new day, and now it wants more.”³²³ Justice Gorsuch gave the Supreme Court credit for holding the government to the terms of its bargain and further opined: “It is the least we can do.”³²⁴

The main dissent was written by Chief Justice Roberts and joined by Justices Thomas, Alito, and Kavanaugh.³²⁵ Justice Kavanaugh also wrote a separate dissent in which Justice Thomas joined.³²⁶ In that dissent, Justice Kavanaugh interpreted the treaty language using a plain, common sense approach, reasoning that “[t]he treaty’s ‘in common with’ language means what it says. The treaty recognizes tribal members’ right to travel on off-reservation public highways on equal terms with other U.S. citizens.”³²⁷ He noted that the Yakamas had reason to accept this deal because in 1855 the government could have required the Yakamas to obtain special licenses before travelling off-reservation.³²⁸

Justice Kavanaugh conceded that, under this reading, “the treaty as negotiated and written may not have turned out to be a particularly good deal for the Yakamas.”³²⁹ But in his view, that was not a legitimate concern for the Supreme Court because “[a]s a matter of separation of powers, . . . courts are bound by the text of the treaty.”³³⁰ Besides, Justice Kavanaugh noted, Congress later did many things to help the Yakamas.³³¹ Therefore, he concluded, “lament about the terms of the treaty negotiated by the Federal Government and the Tribe in 1855 does not support

³²⁰ *Id.* at 1018.

³²¹ *Id.* at 1021.

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Id.* at 1021 (Roberts, C.J., dissenting).

³²⁶ *Id.* at 1026 (Kavanaugh, J., dissenting).

³²⁷ *Id.*

³²⁸ *Id.* at 1027.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ *Id.* at 1028.

the Judiciary (as opposed to Congress and the President) rewriting the law in 2019.”³³²

Once again, Justice Gorsuch leaned to the side of the individual and the group, while Justice Kavanaugh leaned toward the federal government. Justice Gorsuch was interested in what the treaty meant to those subject to federal power, while Justice Kavanaugh looked at the treaty language from a perspective sympathetic to the government. Justice Gorsuch resolved doubts against the federal government, while Justice Kavanaugh resolved ambiguities in its favor. Justice Gorsuch saw the federal government as the Yakamas’ exploiter; Justice Kavanaugh saw it as their benefactor.

IV. JUSTICE KAVANAUGH AND JUSTICE GORSUCH, TOGETHER

To balance this discussion of the differences in judicial philosophy between Justice Kavanaugh and Justice Gorsuch, it is informative to examine cases in which the two Justices’ views were aligned. Indeed, there exist many cases in which Justice Kavanaugh and Justice Gorsuch are in substantial agreement.³³³ However, even where the Justices agree in the judgment, their reasoning often differs greatly.³³⁴ Justice Kavanaugh tries to express his views in a pragmatic, limited, moderate way that the D.C. community would likely find acceptable. Justice Gorsuch, by contrast, expresses his opinions in terms perhaps more pleasing to an intellectually conservative audience.

A. Limiting Federal Power

Justice Kavanaugh often agrees with Justice Gorsuch that particular applications of federal power are inappropriate. For example, in *Iancu v. Brunetti*,³³⁵ a six-to-three decision, both Justice Kavanaugh and Justice Gorsuch joined an opinion by Justice Kagan holding that a provision of the Lanham Act denying trademark status to marks that were “immoral or scandalous” violated the First Amendment. In *Dutra Group v. Batterton*,³³⁶ another six-to-three opinion, Justice Kavanaugh and Justice Gorsuch joined an opinion by Justice Alito holding that punitive damages were not available on an unseaworthiness claim brought under federal maritime law. In *Rucho v. Common*

³³² *Id.*

³³³ See *infra*, Part IV.A–C.

³³⁴ Compare *Am. Legion v. Am. Humanist Ass’n*, 139 S.Ct. 2067, 2093 (2019) (Kavanaugh, J., concurring) with *id.* at 2103 (Gorsuch, J. concurring).

³³⁵ 139 S. Ct. 2294, 2297 (2019).

³³⁶ 139 S. Ct. 2275 (2019).

Cause,³³⁷ a five-to-four case, both Justices joined an opinion by Chief Justice Roberts holding that federal courts should not attempt to adjudicate partisan gerrymandering claims.

In *Virginia Uranium, Inc. v. Warren*,³³⁸ Justice Kavanaugh joined a plurality opinion by Justice Gorsuch that held that a Virginia statute that banned the mining of uranium was not implicitly preempted by the federal Atomic Energy Act when the federal statute deliberately left the regulation of uranium mining to the States.³³⁹ The key reasoning of the opinion was that the Supreme Court was not free “to extend a federal statute to a sphere Congress was well aware of but chose to leave alone.”³⁴⁰ Justice Gorsuch went on to explain: “Invoking some brooding federal interest or appealing to a judicial policy preference should never be enough to win preemption of a state law; a litigant must point specifically to ‘a constitutional text or a federal statute’ that does the displacing or conflicts with state law.”³⁴¹ Despite his demonstrated sympathy toward federal power,³⁴² Justice Kavanaugh joined this rationale in the context of a State law prohibiting uranium mining.³⁴³

B. Abortion and the Death Penalty

The two Justices do not differ significantly on hot-button social issues, such as abortion and the death penalty. For example, in *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*,³⁴⁴ the Supreme Court denied certiorari review of a Court of Appeals decision that struck down an Indiana law prohibiting abortion clinics from knowingly providing sex-, race-, or disability-selective abortions.³⁴⁵ Both Justice Kavanaugh and Justice Gorsuch joined the decision, which was based on the absence of any disagreement among the circuit courts of appeal on the issue.³⁴⁶

In *June Medical Services, L.L.C. v. Gee*,³⁴⁷ the Supreme Court voted five-to-four to block implementation of a Louisiana statute that required doctors performing abortions to have admitting privileges at nearby hospitals.³⁴⁸ Justice Kavanaugh dissented, joined by Justice

³³⁷ 139 S. Ct. 2484 (2019).

³³⁸ 139 S. Ct. 1894 (2019).

³³⁹ *Id.* at 1900.

³⁴⁰ *Id.*

³⁴¹ *Id.* at 1901.

³⁴² *See, e.g.*, *United States v. Haymond*, 139 S. Ct. 2369 (2019).

³⁴³ 139 S. Ct. 1894 (2019).

³⁴⁴ 139 S. Ct. 1780 (2019).

³⁴⁵ *Id.* at 1781.

³⁴⁶ *See id.* at 1783–93 (Thomas, J., concurring).

³⁴⁷ 139 S. Ct. 663 (2019).

³⁴⁸ *Id.*

Thomas, Justice Alito and Justice Gorsuch.³⁴⁹ The dissent, however, was very narrow.³⁵⁰ Justice Kavanaugh noted that the decision of the Court of Appeals for the Fifth Circuit upholding the challenged law had predicted that the doctors who performed abortions would all be able to obtain the needed admitting privileges.³⁵¹ The dissent also noted that the Louisiana law had a “45-day regulatory transition” period in which the law would not be enforced while the doctors sought admitting privileges.³⁵² Therefore, Justice Kavanaugh concluded, he would deny the plaintiffs’ request to stay implementation of the law “without prejudice to the plaintiffs’ ability to bring a . . . motion for preliminary injunction at the conclusion of the 45-day regulatory transition period if the Fifth Circuit’s factual prediction about the doctors’ ability to obtain admitting privileges proves to be inaccurate.”³⁵³

In *Bucklew v. Precythe*,³⁵⁴ a five-to-four decision, the Supreme Court set forth the standard for adjudicating challenges to a particular mode of execution (e.g. lethal injection) based on the prisoner’s particular medical condition.³⁵⁵ The majority opinion by Justice Gorsuch struck a conservative tone, flatly asserting: “The Constitution allows capital punishment.”³⁵⁶ Justice Kavanaugh added a short concurring opinion that highlighted the liberal aspects of Justice Gorsuch’s opinion.³⁵⁷

C. Differences in Agreement

Sometimes, the daylight between Justice Kavanaugh and Justice Gorsuch is evident even when they are in agreement as to the result. For example, in *Kisor v. Wilkie*,³⁵⁸ the Veteran’s Administration denied retroactive disability benefits to a Vietnam veteran suffering from post-traumatic stress disorder based on the agency’s interpretation of its own regulation.³⁵⁹ Justice Gorsuch wrote an opinion that argued that federal courts should not defer to agency interpretations of agency regulations, except to the extent that deference was warranted by genuine technical expertise.³⁶⁰ Justice Gorsuch reasoned that

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ 139 S. Ct. 1112 (2019).

³⁵⁵ *Id.* at 1120–21.

³⁵⁶ *Id.* at 1122.

³⁵⁷ *Id.* at 1135–36 (Kavanaugh, J., concurring).

³⁵⁸ 139 S. Ct. 2400 (2019).

³⁵⁹ *Id.* at 2405.

³⁶⁰ *Id.* at 2442–43.

“foundational principles” of constitutional law³⁶¹ precluded deference to bureaucrats and required courts to utilize instead “the traditional tools of interpretation judges have employed for centuries to elucidate the law’s original public meaning.”³⁶² Justice Kavanaugh wrote a short opinion that concurred with Justice Gorsuch but used a modern, common sense analogy, noting: “Umpires in games at Wrigley Field do not defer to the Cubs manager’s in-game interpretation of Wrigley’s ground rules.”³⁶³

Another good example of how the two Justices’ reasoning can diverge, even when agreeing as to the result, is *American Legion v. American Humanist Ass’n*,³⁶⁴ a seven-to-two decision, that rejected an Establishment Clause challenge to the Bladensburg Peace Cross, a 94-year-old memorial raised on public land to honor World War I casualties.³⁶⁵ Justice Kavanaugh’s concurring opinion set forth a complex multi-element standard for courts to use in determining when government practices would “ordinarily” survive Establishment Clause challenge.³⁶⁶ Justice Kavanaugh then applied that standard to conclude the war memorial did not violate the Constitution because it was not coercive and was rooted in history and tradition.³⁶⁷ He professed “deep respect for the plaintiffs’ sincere objections to seeing the cross on public land”³⁶⁸ and further recognized a supporting amicus group’s “sense of distress and alienation.”³⁶⁹ Rather than endorse an Establishment Clause action, he instead suggested other methods by which these groups could secure removal of the cross.³⁷⁰

In contrast, Justice Gorsuch’s opinion bordered on dismissive. In concurrence, he wrote: “The American Humanist Association wants a federal court to order the destruction of a 94-year-old war memorial because its members are offended.”³⁷¹ Justice Gorsuch agreed the memorial was constitutional, but went one step further in noting that he would dismiss the case for lack of standing

³⁶¹ See *id.* at 2437–39 (Gorsuch, J., concurring).

³⁶² *Id.* at 2442.

³⁶³ *Id.* at 2448 (Kavanaugh, J., concurring).

³⁶⁴ 139 S. Ct. 2067 (2019).

³⁶⁵ *Id.* at 2074.

³⁶⁶ *Id.* at 2092–93.

³⁶⁷ *Id.* at 2093 (Kavanaugh, J., concurring).

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 2094.

³⁷¹ *Id.* at 2098 (Gorsuch, J., concurring).

without reaching the merits.³⁷² He explained: “This ‘offended observer’ theory of standing has no basis in law.”³⁷³

Justice Gorsuch considered the policy implications of the plaintiffs’ argument: “If individuals and groups could invoke the authority of a federal court to forbid what they dislike for no more reason than they dislike it, we would risk exceeding the judiciary’s limited constitutional mandate and infringing on powers committed to other branches of government.”³⁷⁴ Justice Gorsuch went on: “Courts would start to look more like legislatures, responding to social pressures rather than remedying concrete harms, in the process supplanting the right of the people and their elected representatives to govern themselves.”³⁷⁵

Justice Gorsuch also disagreed with the implication in the Court’s opinion that the Bladensburg Peace Cross might have survived constitutional scrutiny only because it was old.³⁷⁶ He explained that what matters when assessing a monument or practice “isn’t its age but its compliance with ageless principles. The Constitution’s meaning is fixed, not some good-for-this-day-only coupon, and a practice consistent with our nation’s traditions is just as permissible whether undertaken today or 94 years ago.”³⁷⁷

Allowing litigation by offended observers, Justice Gorsuch argued, courted disaster: “what about the display of the Ten Commandments on the frieze in our own courtroom or on the doors leading into it? Or the statutes of Moses and the Apostle Paul next door in the Library of Congress?”³⁷⁸ It would be better, Justice Gorsuch said, simply to deny standing to offended observers so that lower court judges “may dispose of cases like these on a motion to dismiss rather than enmeshing themselves for years in intractable disputes sure to generate more heat than light.”³⁷⁹

Also instructive is *Manhattan Community Access Corporation v. Halleck*,³⁸⁰ a five-to-four decision holding that a private company operating a public access channel was not a State actor for purposes of federal court regulation under the Fourteenth Amendment.³⁸¹ Justice Kavanaugh wrote the

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.* at 2099.

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 2102.

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 2103.

³⁷⁹ *Id.*

³⁸⁰ 139 S. Ct. 1921 (2019).

³⁸¹ *Id.* at 1926.

majority opinion, which Justice Gorsuch joined. In the opinion's closing section, Justice Kavanaugh discussed the philosophy behind the decision, but in a way that put distance between himself and that philosophy.³⁸² Justice Kavanaugh noted: "It is sometimes said that the bigger the government, the smaller the individual."³⁸³

Justice Kavanaugh went on to apply that principle in *Halleck*, stating: "Expanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise. We decline to do so in this case."³⁸⁴ Had Justice Gorsuch penned the opinion, its language would likely have been less diplomatic and far more emphatic.

V. DISAGREEMENTS IN THE OCTOBER 2019 TERM

Justice Gorsuch and Justice Kavanaugh continued to disagree in significant ways during the Supreme Court's October 2019 term (ending in July 2020). Consider the six cases below, in which the two Justices took opposite sides and one or both penned opinions.

A. *County Of Maui v. Hawaii Wildlife Fund*³⁸⁵

The Clean Water Act prohibits the "addition" of any pollutant from a "point source" to "navigable waters" without an appropriate permit from the Environmental Protection Agency.³⁸⁶ In *County of Maui*, the Supreme Court considered whether this permitting requirement applied to pollutants that travelled from a point source to navigable waters through the medium of ground water.³⁸⁷ By a six-to-three vote, the Court rejected the alternative answers of always and never, holding instead that a permit was required "if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from the point source into navigable waters."³⁸⁸ In an opinion by Justice Breyer, the Court went on to hold that in making this determination, courts should consider a variety of factors, such as the distance between the point source and the navigable waters and the time it takes the pollutant to travel that distance.³⁸⁹

³⁸² *Id.* at 1934.

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ *County of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462 (2020).

³⁸⁶ *Id.* at 1468 (referring to 33 U.S.C. §§ 1311(a), 1362(12)(A)).

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 1476.

Justice Kavanaugh wrote a concurring opinion that defended the Court's pragmatic, middle ground approach. He noted that a flexible standard was needed to prevent evasion of the statutory purpose.³⁹⁰ He further observed that the Court's opinion improved the law: "Although the statutory text does not supply a bright-line test, the Court's emphasis on time and distance will help guide application of the statutory standard going forward."³⁹¹

Justice Gorsuch joined a dissenting opinion by Justice Thomas, which took a formalistic approach. Justice Thomas said that he "would hold that a permit is required only when a point source discharges pollutants directly into navigable waters."³⁹² Justice Thomas argued that his approach was true to the statutory text (in particular, the words "addition," "from," and "to"),³⁹³ whereas the majority opinion departed from the text in favor of "an open-ended inquiry into congressional intent and practical considerations."³⁹⁴

This case illustrates the jurisprudential divide between the two Justices. Justice Kavanaugh prefers pragmatic standards that give federal courts and agencies reasonable discretion to balance opposing considerations and reach common sense solutions to practical problems. By contrast, Justice Gorsuch prefers formal rules derived from statutory texts that establish clear rights for private parties and restrict the discretion of courts and officials.

B. *Atlantic Richfield Co. v. Christian*³⁹⁵

Over the course of almost a century, Anaconda Copper Mining Company, a smelting operator in Montana, caused massive arsenic and lead pollution over a three hundred square mile area.³⁹⁶ To remedy the pollution, a group of homeowners in Montana sued Atlantic Richfield (Anaconda's corporate successor) in state court under state law, demanding that the company pay to have their land restored to its original, unpolluted condition.³⁹⁷ Because Atlantic Richfield had been working with the Environmental Protection Agency for thirty-five years on efforts to clear up pollution in the area pursuant to the federal Superfund

³⁹⁰ *Id.* at 1478 (Kavanaugh, J., concurring).

³⁹¹ *Id.* at 1479. (Thomas, J., dissenting).

³⁹² *Id.*

³⁹³ *See id.* at 1479–80.

³⁹⁴ *Id.* at 1479.

³⁹⁵ *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335 (2020).

³⁹⁶ *Id.* at 1345.

³⁹⁷ *Id.*

statute,³⁹⁸ the company argued that the state courts did not have jurisdiction to hear the case and that any restoration remedy required the approval of the federal Environmental Protection Agency (“EPA”).³⁹⁹

In an opinion by Chief Justice Roberts in which Justice Kavanaugh joined, the Supreme Court held that the plaintiffs could proceed with their state court suit but needed approval of the EPA for their restoration remedy.⁴⁰⁰ As a technical matter, the Court reasoned that the plaintiffs were “potentially responsible parties” within the meaning of the Superfund statute and therefore subject to EPA jurisdiction.⁴⁰¹ As a practical matter, the Court said that EPA supervision of private litigation was needed to facilitate settlements with polluters by protecting settling parties from third party claims.⁴⁰²

Justice Gorsuch, joined by Justice Thomas, dissented from the holding that the homeowners needed EPA approval. Citing a provision of the Superfund law that expressly preserved state law remedies, Justice Gorsuch argued that everything in the federal law “seeks to supplement, not supplant, traditional state law remedies and promote, not prohibit, efforts to restore contaminated land.”⁴⁰³ After arguing that the statutory language about potentially responsible parties did not support the Court’s conclusion,⁴⁰⁴ Justice Gorsuch challenged the policy arguments in Chief Justice Roberts’ opinion. Justice Gorsuch said: “Maybe paternalistic central planning cannot tolerate parallel state law efforts to restore state lands. But maybe, too, good government and environmental protection would be better served if state law remedies proceeded alongside federal efforts.”⁴⁰⁵ Having posed the question, Justice Gorsuch said that Congress made the policy decision when it chose to preserve state law remedies in general, while specifically allowing the federal government to seek injunctive relief if private or state cleanup efforts really do interfere with federal interests.⁴⁰⁶ Justice Gorsuch concluded: “Atlantic Richfield would have us turn this system upside down, recasting the statute’s presumption in favor of cooperative federalism into a presumption of federal absolutism.”⁴⁰⁷

³⁹⁸ 42 U.S.C. § 9601 et seq.

³⁹⁹ See *Atl. Richfield Co.*, 140 S. Ct. at 1345.

⁴⁰⁰ *Id.* at 1350.

⁴⁰¹ See *id.* at 1353–54.

⁴⁰² See *id.* at 1354–55.

⁴⁰³ *Id.* at 1363 (Gorsuch, J., concurring in part and dissenting in part).

⁴⁰⁴ See *id.* at 1365–66.

⁴⁰⁵ *Id.* at 1366.

⁴⁰⁶ *Id.* at 1367.

⁴⁰⁷ *Id.*

Once again, Justice Kavanaugh is apt to read statutes as conferring discretion on federal officials to do what they may need to do in order to accomplish their missions. Justice Gorsuch sees those same laws as preserving traditional individual rights and protecting private citizens from the will of bureaucrats.

C. *Thryv, Inc. v. Click-To-Call Techs., LP*⁴⁰⁸

A federal statute gives the U.S. Patent and Trademark Office authority to consider challenges to previously issued patents and, if the agency deems proper, to revoke the challenged patents.⁴⁰⁹ The statute further provides that these proceedings may not be instituted more than a year after suit against the requesting party for a patent infringement,⁴¹⁰ but also provides that the agency's decision to institute a proceeding is "final and nonappealable."⁴¹¹

In *Thryv, Inc.*, the Patent Office instituted a challenge proceeding more than a year after the requesting party was sued for infringement and then went on to rule for the challenger.⁴¹² By a seven-to-two vote, the Supreme Court held that Patent Office's decision to institute proceedings in apparent violation of the statutory deadline was not subject to judicial review.⁴¹³ The Court reasoned that Congress intended to immunize such agency decisions concerning challenge proceedings in order to achieve important goals, such as promoting efficiency, avoiding costly litigation and making patent revocation decisions effective more quickly.⁴¹⁴

Justice Kavanaugh joined the majority opinion by Justice Ginsburg. Justice Gorsuch dissented, joined only by Justice Sotomayor. In the opening paragraph of his dissent, Justice Gorsuch made his objections clear: "Today the Court takes a flawed premise—that the Constitution permits a politically guided agency to revoke an inventor's property right in an issued patent—and bends it further, allowing the agency's decision to stand immune from judicial review."⁴¹⁵ The dissent continued: "Most remarkably, the Court denies judicial review even though the government now concedes that the patent owner is *right* and this entire exercise in property-taking-by-bureaucracy was forbidden by

408 140 S. Ct. 1367 (2020).

409 *See* 35 U.S.C. § 314.

410 *See* 35 U.S.C. § 314(b).

411 35 U.S.C. § 314(d).

412 *See Thryv*, 140 S. Ct. at 1370.

413 *See id.*

414 *See id.* at 1374–75.

415 *Id.* at 1378 (Gorsuch, J., dissenting).

law.”⁴¹⁶ Justice Gorsuch argued that the relevant statute did not require this result, and therefore the Court should not have taken yet “another step down the road of ceding core judicial powers to agency officials and leaving the disposition of private rights to bureaucratic mercy.”⁴¹⁷

Justice Gorsuch went on to criticize what he perceived to be the Court giving unreviewable discretion to the politically-appointed head of the Patent Office. “No one can doubt that this regime favors those with political clout, the powerful and the popular. . . . Rather than securing incentives to invent, the regime creates incentives to curry favor with officials in Washington.”⁴¹⁸ Justice Gorsuch concluded: “Nothing in the statute commands this result, and nothing in the Constitution permits it.”⁴¹⁹

The *Thryv, Inc.* dissent provides a telling glimpse of the rationale underlying Justice Gorsuch’s jurisprudence. He thinks courts should prevent lawless federal bureaucrats from imposing upon individuals’ rights. Justice Kavanaugh, by contrast, has a much more positive view of the federal government and does not mind when Congress makes agency decisions unreviewable in order to promote efficiency.

D. *Barr v. American Association of Political Consultants, Inc.*⁴²⁰

In 1991, Congress passed the Telephone Consumer Protection Act, which prohibited (absent emergency or prior express consent) automated calls to cellphones. In 2015, Congress amended the statute to permit automated calls (also known as robocalls) to collect debts owed to or guaranteed by the United States.⁴²¹ In *Barr*, an opinion written by Justice Kavanaugh, the Supreme Court held by a vote of six-to-three that the amended law violated the First Amendment because it regulated speech on the basis of content.⁴²² The Court went on (by a vote of seven-to-two) to correct the constitutional infirmity by eliminating the 2015 amendment and restoring the general ban on robocalls to cellphones.⁴²³ Justice Gorsuch agreed that the amended law was unconstitutional, but said the proper remedy was to grant the plaintiffs an injunction against the ban’s enforcement, rather than to sever the statute.⁴²⁴

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *Id.* at 1388.

⁴¹⁹ *Id.* at 1389.

⁴²⁰ 140 S. Ct. 2335 (2020).

⁴²¹ *See* 47 U.S.C. § 227(b)(1)(A)(iii).

⁴²² *See Barr*, 140 S. Ct. at 2344.

⁴²³ *Id.* at 2342–44.

⁴²⁴ *See id.* at 2363–67 (Gorsuch, J., concurring in part and dissenting in part).

Barr further demonstrates how the two Justices diverge in their attitudes toward precedent. Justice Kavanaugh followed prior decisions holding that the Supreme Court should try to limit its remedy by striking down only the unconstitutional portions of a statute and saving as much of the law as possible.⁴²⁵ Justice Gorsuch preferred to reason from first principles, taking the position that the Court should simply enjoin enforcement of an unconstitutional statute, arguing that the Court's practice of severing the unconstitutional portions and preserving the rest amounted to impermissible judicial rewriting of the law.⁴²⁶ Justice Kavanaugh responded to this critique by noting that Justice Gorsuch's approach was a "wolf in sheep's clothing" that "would disrespect the democratic process, through which the people's representatives" expressed their will.⁴²⁷ Justice Kavanaugh preferred the approach dictated by the Court's precedents; to try to salvage as much of the statute as possible was, he wrote, "constitutional, stable, predictable, and commonsensical."⁴²⁸

The two Justices valued the competing interests of the parties differently. Justice Gorsuch expressed distaste that the Court would outlaw private speech—namely, robocalls to cellphones to collect debts owed to the government—when Congress had expressly made that speech lawful.⁴²⁹ For Justice Kavanaugh, protecting people from unwanted robocalls was the top priority: "Justice Gorsuch's remedy would end up harming . . . the tens of millions of consumers who would be bombarded every day with nonstop robocalls notwithstanding Congress's clear prohibition of those robocalls."⁴³⁰ Justice Gorsuch responded: "Having to tolerate unwanted speech imposes no cognizable constitutional injury on anyone; it is life under the First Amendment, which is almost always invoked to protect speech some would rather not hear."⁴³¹

As evidenced in *Barr*, Justice Kavanaugh prefers to follow precedent and preserve common sense federal regulations that protect the community from harm. This case provides yet another example of how both Justices differ in opinion. Justice Gorsuch prefers to reason from first principles and protect liberty.

⁴²⁵ See *id.* at 2350–51.

⁴²⁶ See *id.* at 2365 (Gorsuch, J., concurring in part and dissenting in part).

⁴²⁷ *Id.* at 2356 (majority opinion).

⁴²⁸ *Id.*

⁴²⁹ See *id.* at 2365–66 (Gorsuch, J., concurring in part and dissenting in part).

⁴³⁰ *Id.* at 2356 (majority opinion).

⁴³¹ *Id.* at 2366–67 (Gorsuch, J., concurring in part and dissenting in part).

E. *McGirt v. Oklahoma*⁴³²

In 1997, Jimcy McGirt, an enrolled member of the Seminole Nation, was convicted in Oklahoma state court of sexual assaults on his wife's four-year old granddaughter and sentenced to 1,000 years plus life in prison.⁴³³ In post-conviction proceedings, McGirt challenged the State's jurisdiction to prosecute him, and therefore his resulting conviction, on the ground that his crime took place on a Creek Reservation and, according to the federal Major Crimes Act, "[a]ny Indian who commits" certain enumerated offenses "within Indian country" may only be prosecuted in federal court.⁴³⁴ The key issue in the case was whether the land that McGirt claimed to be a Creek Reservation—an area that had been promised to the Creek Nation by the federal government in the 1830s⁴³⁵ and spanned three million acres, including most of the city of Tulsa⁴³⁶—was in fact still a Creek Reservation or whether the reservation status had been effectively abolished by Congress in a series of statutes enacted between 1890 and 1910.⁴³⁷

The Supreme Court ruled in favor of McGirt by a vote of five-to-four, the majority consisting of Justice Gorsuch plus the Court's four Democratic appointees.⁴³⁸ Justice Gorsuch wrote the opinion for the Court.⁴³⁹ The majority held that, while Congress had the power to break the federal government's promise to the Creeks, Congress had never expressly and formally done so. Therefore, the land in question remained a Creek Reservation, even though the State of Oklahoma had been exercising criminal jurisdiction over the area and treating the reservation as extinguished for more than one hundred years.⁴⁴⁰

Justice Gorsuch's opinion for the Court began: "On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever."⁴⁴¹ The opinion acknowledged that Congress had the power to break that promise, but said the repudiation had to be express, not simply inferred from a pattern of encroachment

⁴³² 140 S. Ct. 2452 (2020).

⁴³³ *Id.* at 2482 (Roberts, C.J., dissenting).

⁴³⁴ 18 U.S.C. § 1153(a).

⁴³⁵ *See McGirt*, 140 S. Ct. at 2459.

⁴³⁶ *Id.* at 2482 (Roberts, C.J., dissenting).

⁴³⁷ *See id.* at 2464, 2466 (majority opinion).

⁴³⁸ *See id.* at 2458.

⁴³⁹ *See id.*

⁴⁴⁰ *See id.* at 2481–82.

⁴⁴¹ *Id.* at 2459.

on tribal rights: “So it’s no matter how many other promises to a tribe the federal government has already broken. If Congress wishes to break the promise of a reservation, it must say so.”⁴⁴²

The opinion went on to review the language of the federal statutes regarding the Creeks enacted between 1890 and 1910 and found that none of them, in so many words, abolished the Creek Reservation.⁴⁴³ In these circumstances, Justice Gorsuch said, arguments based on contemporaneous understanding of the laws were irrelevant: “There is no need to consult extratextual sources when the meaning of a statute’s terms is clear. Nor may extratextual sources overcome those terms.”⁴⁴⁴ It was similarly irrelevant, Justice Gorsuch wrote, that the State of Oklahoma had, in fact, been exercising criminal jurisdiction over the land in question for more than a century and that allowing the status quo to continue would have practical advantages.⁴⁴⁵ Allowing State practice to overcome the written law, Justice Gorsuch said, “would be the rule of the strong, not the rule of law.”⁴⁴⁶

Justice Gorsuch reiterated that sentiment at the conclusion of the majority opinion: “If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law.”⁴⁴⁷ He stated, “To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.”⁴⁴⁸

Justice Kavanaugh, along with Justice Alito and Justice Thomas, joined the dissent by Chief Justice Roberts. That opinion began by noting that the majority’s reasoning meant not only a rediscovered reservation for the Creeks, but also rediscovered reservations for other tribes in Oklahoma.⁴⁴⁹ The dissent observed: “The rediscovered reservations encompass the entire eastern half of the State—19 million acres that are home to 1.8 million people, only 10%-15% of whom are Indians.”⁴⁵⁰

The dissent pointed out the majority opinion would hobble the State’s ability to prosecute serious crimes in a vast area, possibly invalidate decades of past convictions, and profoundly destabilize the governance of eastern Oklahoma.⁴⁵¹ The opinion

⁴⁴² *Id.* at 2462.

⁴⁴³ *See id.* at 2463–66.

⁴⁴⁴ *Id.* at 2469.

⁴⁴⁵ *See id.* at 2471, 2474.

⁴⁴⁶ *Id.* at 2474.

⁴⁴⁷ *Id.* at 2482.

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.* at 2482 (Roberts, C.J., dissenting).

⁴⁵¹ *See id.*

went on to say that none of this disruption was warranted. “What has gone unquestioned for a century remains true today: A huge portion of Oklahoma is not a Creek Indian reservation. Congress disestablished any reservation in a series of statutes leading up to Oklahoma statehood at the turn of the 19th century.”⁴⁵²

Chief Justice Roberts described the relevant Congressional action as follows:

What Congress actually did here was enact a series of statutes beginning in 1890 and culminating with Oklahoma statehood that (1) established a uniform legal system for Indians and non-Indians alike; (2) dismantled the Creek government; (3) extinguished the Creek Nation’s title to the lands at issue; and (4) incorporated the Creek members into a new political community—the State of Oklahoma. These statutes evince Congress’s intent to terminate the reservation and create a new State in its place.⁴⁵³

The dissent accused the majority of taking a “blinker approach” that considered each statute in isolation and “nitpick[ed] discrete aspects of Congress’s disestablishment effort while ignoring the full picture our precedents require us to honor.”⁴⁵⁴ That approach was inconsistent, Chief Justice Roberts said, with the Supreme Court’s numerous reservation disestablishment precedents that required the Court to consider, along with the statutory texts, “the contemporaneous understanding of those Acts and the historical context surrounding their passage; and the subsequent understanding of the status of the reservation and the pattern of settlement there.”⁴⁵⁵

Thus, Chief Justice Roberts said, the majority was wrong to focus on statutory text alone. “Every single one of our disestablishment cases has considered extratextual sources, and in doing so, none has required the identification of ambiguity in a particular term. That is because . . . we have expressly held that the appropriate inquiry does not focus on the statutory text alone.”⁴⁵⁶ The Chief Justice went on: “there is no ‘magic words’ requirement for disestablishment.”⁴⁵⁷ He reasoned: “In this area, ‘we are not free to say to Congress: ‘We see what you are driving at, but you have not said it, and therefore we shall go on as before.’”⁴⁵⁸

⁴⁵² *Id.*

⁴⁵³ *Id.* at 2490.

⁴⁵⁴ *Id.* at 2494.

⁴⁵⁵ *Id.* at 2485.

⁴⁵⁶ *Id.* at 2487.

⁴⁵⁷ *Id.* at 2489.

⁴⁵⁸ *Id.* (citations omitted).

Chief Justice Roberts responded to the majority's argument that supposedly drastic consequences do not justify disregarding the law by pointing out that "when those consequences are drastic precisely because they depart from how the law has been applied for more than a century—a settled understanding that our precedents demand we consider—they are reason to think the Court may have taken a wrong turn in its analysis."⁴⁵⁹

Chief Justice Roberts concluded: "As the Creek, the State of Oklahoma, the United States, and our judicial predecessors have long agreed, Congress disestablished any Creek reservation more than 100 years ago. Oklahoma therefore had jurisdiction to prosecute *McGirt*."⁴⁶⁰

The *McGirt* case illustrates how Justice Gorsuch prefers to reason from first principles rather than precedent, following his reading of a text to its logical conclusion without regard to practical consequences, and justifying his formalistic approach as required by the rule of law. Justice Kavanaugh's decision to join the dissent demonstrates that Justice Kavanaugh is less swayed by statutory texts and more inclined to look to legislative purpose, follow precedent, and aim for a common sense, minimally-disruptive result.

F. *Bostock v. Clayton County*⁴⁶¹

In *Bostock*, the Supreme Court held by a vote of six-to-three that discrimination based on sexual orientation or transgender status constituted discrimination "because of sex" prohibited by Title VII of the Civil Rights Act of 1964.⁴⁶² The majority opinion by Justice Gorsuch stated its rationale in its opening paragraph: "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."⁴⁶³

To justify this conclusion, Justice Gorsuch eschewed precedents, policy analysis, and popular understandings of what Title VII meant.⁴⁶⁴ Instead, he treated the question as a logic puzzle.⁴⁶⁵ His opinion posed the hypothetical of an employer with a male employee and a female employee, both of whom were

⁴⁵⁹ *Id.* at 2502.

⁴⁶⁰ *Id.*

⁴⁶¹ *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

⁴⁶² *See id.* at 1736–37; 42 U.S.C. § 2000e-2(a)(1).

⁴⁶³ *Bostock*, 140 S. Ct. at 1737.

⁴⁶⁴ *See id.* at 1738–42.

⁴⁶⁵ *See id.* at 1750–54.

attracted to men.⁴⁶⁶ Suppose the employer were to fire the male employee for being attracted to men when the employer would not fire the female employee for being attracted to men.⁴⁶⁷ As a matter of common parlance, that would be called discrimination based on sexual orientation.⁴⁶⁸ But, as a matter of formal logic, it would also be discrimination against the male employee because of his sex, in addition to his sexual orientation, and therefore prohibited by Title VII. As Justice Gorsuch explained, in answering his hypothetical: “If the employer fires the male employee for no reason other than the fact that he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.”⁴⁶⁹

Justice Gorsuch went on to apply this logic to discrimination against transgender individuals in a hypothetical involving an employer who fired a transgender person who identified as a male at birth but who now identified as a female: “If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.”⁴⁷⁰ He continued, “Again, the individual employee’s sex plays an unmistakable and impermissible role in the discharge decision.”⁴⁷¹

Justice Gorsuch brushed aside the argument that Congress was not contemplating discrimination based on sexual orientation or transgender status when it enacted Title VII.⁴⁷² He instead placed value upon the meaning of the words that Congress enacted, not what they might have been thinking.⁴⁷³ As he put it: “the limits of the drafters’ imagination supply no reason to ignore the law’s demands.”⁴⁷⁴ Justice Gorsuch went on: “When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. Only the written word is the law, and all persons are entitled to its benefit.”⁴⁷⁵

Justice Gorsuch expanded on this idea later in his opinion, rejecting the argument that given popular attitudes in 1964 Congress could not have really intended to prohibit

⁴⁶⁶ *Id.* at 1741.

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* at 1741–42.

⁴⁷¹ *Id.*

⁴⁷² *Id.* at 1741.

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* at 1737.

⁴⁷⁵ *Id.*

discrimination against homosexuals.⁴⁷⁶ He explained that to refuse to enforce the letter of the law for the benefit of a group of people who “happened to be unpopular at the time of the law’s passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law’s terms.”⁴⁷⁷

Justice Gorsuch then invoked the tenets of legal formalism to justify the Court’s expansive interpretation of Title VII by stating, “. . . [O]ur role is limited to applying the law’s demands as faithfully as we can in the cases that come before us. . . . And the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them.”⁴⁷⁸

Justice Gorsuch explained that courts are bound to follow statutory texts whichever way they lead, regardless of what Congress may have had in mind, noting: “Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations.”⁴⁷⁹

Justice Alito wrote a dissent, joined by Justice Thomas, accusing the majority of writing “legislation” in the guise of a judicial opinion.⁴⁸⁰ Justice Alito declared: “A more brazen abuse of our authority to interpret statutes is hard to recall.”⁴⁸¹ He continued: “The Court’s opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is . . . the theory that courts should ‘update’ old statutes so that they better reflect the current values of society.”⁴⁸²

Justice Alito went on to criticize the majority’s opinion for focusing on a literal and logical meaning of the phrase “because of sex” rather than considering what the words meant to the drafters and their original audience.⁴⁸³ His dissent said: “Textualists do not read statutes as if they were messages picked up by a powerful radio telescope from a distant and utterly unknown civilization.”⁴⁸⁴ Rather: “Statutes consist of communications between members of a particular linguistic community, one that existed in a particular place and at a particular time, and these communications must

⁴⁷⁶ *Id.* at 1752.

⁴⁷⁷ *Id.* at 1751.

⁴⁷⁸ *Id.* at 1753.

⁴⁷⁹ *Id.* at 1754.

⁴⁸⁰ *See id.* at 1754 (Alito, J., dissenting).

⁴⁸¹ *Id.* at 1755.

⁴⁸² *Id.* at 1755–56.

⁴⁸³ *Id.* at 1756–67.

⁴⁸⁴ *Id.* at 1767.

therefore be interpreted as they were understood by that community at that time.”⁴⁸⁵ If the Court followed this method of construing statutes, Justice Alito concluded, “[t]he answer could not be clearer. In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity.”⁴⁸⁶

Justice Kavanaugh wrote a separate dissent and saw the case as presenting the practical, legal process question of whether the Court should extend Title VII’s prohibition against sex discrimination to discrimination based on sexual orientation.⁴⁸⁷ Starting from the premise that there is a difference between discrimination based on sex and discrimination based on sexual orientation.⁴⁸⁸ Justice Kavanaugh’s dissent began: “Like many cases in this Court, this case boils down to one fundamental question: Who decides?”⁴⁸⁹ He opined: “The question here is whether Title VII should be expanded to prohibit employment discrimination because of sexual orientation. Under the Constitution’s separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court.”⁴⁹⁰

Justice Kavanaugh made it plain that, if the decision were his, he would probably vote to amend the law.⁴⁹¹ “The policy arguments for amending Title VII are very weighty. The Court has previously stated, and I fully agree, that gay and lesbian Americans ‘cannot be treated as social outcasts or as inferior in dignity and worth.’”⁴⁹² But public policy alone, Justice Kavanaugh said, was not sufficient to justify a momentous changing of the law by the Court: “Under the Constitution’s separation of powers, our role as judges is to interpret and follow the law as written, regardless of whether we like the result.”⁴⁹³ And interpreting the Civil Rights Act of 1964 based on the common sense meaning of its words, Justice Kavanaugh said: “Title VII does not prohibit employment discrimination because of sexual orientation.”⁴⁹⁴

Justice Kavanaugh went on to reject the majority’s logical, literalist interpretation of the statute in favor of a common-sense

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.*

⁴⁸⁷ *See id.* at 1822–37 (Kavanaugh, J., dissenting).

⁴⁸⁸ *Id.* at 1824.

⁴⁸⁹ *Id.* at 1822.

⁴⁹⁰ *Id.*

⁴⁹¹ *See id.* at 1837.

⁴⁹² *Id.* at 1823.

⁴⁹³ *Id.*

⁴⁹⁴ *Id.*

approach.⁴⁹⁵ According to Justice Kavanaugh, “courts must follow ordinary meaning, not literal meaning. And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.”⁴⁹⁶ Justice Kavanaugh explained: “Citizens and legislators must be able to ascertain the law by reading the words of the statute. Both the rule of law and democratic accountability badly suffer when a court adopts a hidden or obscure interpretation of the law, and not its ordinary meaning.”⁴⁹⁷

In support of common sense interpretation of statutory words, Justice Kavanaugh cited numerous precedents that, he said, “exemplify a deeply rooted principle: When there is a divide between the literal meaning and the ordinary meaning, courts must follow the ordinary meaning.”⁴⁹⁸ Similarly, Justice Kavanaugh noted, the Court’s precedents made it clear that courts should follow “the ordinary meaning *of a phrase*, rather than the meaning of words in the phrase.”⁴⁹⁹ He recalled: “In the words of Learned Hand: ‘a sterile literalism . . . loses sight of the forest for the trees.’ The full body of a text contains implications that can alter the literal meaning of individual words.”⁵⁰⁰ In other words, Justice Kavanaugh said: “Do not simply split statutory phrases into their component words, look up each in a dictionary, and then mechanically put them together again, as the majority opinion today mistakenly does.”⁵⁰¹ Justice Kavanaugh concluded: “Statutory interpretation 101 instructs courts to follow ordinary meaning, not literal meaning, and to adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.”⁵⁰²

Justice Kavanaugh then applied this standard to the issue at hand: Does the ordinary meaning of the phrase “discriminate because of sex” necessarily “encompass discrimination because of sexual orientation? The answer is plainly no.”⁵⁰³ Rather, in Justice Kavanaugh’s view: “Both common parlance and common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination—back in 1964 and still today.”⁵⁰⁴

495 *See id.* at 1825.

496 *Id.*

497 *Id.*

498 *Id.* at 1826.

499 *Id.* at 1826–27.

500 *Id.* at 1827.

501 *Id.*

502 *Id.* at 1828.

503 *Id.*

504 *Id.*

Justice Kavanaugh observed that many federal statutes prohibit sex discrimination *per se*, while many other statutes prohibit discrimination based on sexual orientation, implying that Congress saw a distinction between the two.⁵⁰⁵ “To this day, Congress has never defined sex discrimination to encompass sexual orientation discrimination. Instead, when Congress wants to prohibit sexual orientation discrimination in addition to sex discrimination, Congress explicitly refers to sexual orientation discrimination.”⁵⁰⁶ “In short,” Justice Kavanaugh concluded, “an extensive body of federal law both reflects and reinforces the widespread understanding that sexual orientation discrimination is distinct from, and not a form of, sex discrimination.”⁵⁰⁷

At the close of his dissent, Justice Kavanaugh described the majority opinion as an act of “judges latching on to a novel form of living literalism to rewrite ordinary meaning and remake American law.”⁵⁰⁸ Taking a more conciliatory tone than Justice Alito, Justice Kavanaugh went on “to acknowledge the important victory achieved today by gay and lesbian Americans.”⁵⁰⁹ “They have advanced powerful policy arguments and can take pride in today’s result. Under the Constitution’s separation of powers, however, I believe that it was Congress’s role, not this Court’s, to amend Title VII.”⁵¹⁰

The *Bostock* case provides yet another telling glimpse of the jurisprudential divide between the Justices. Justice Gorsuch interprets texts formally and literally, without regard to precedents, practical consequences, or what the drafters may have intended. He takes pride in following the written law, as he understands it, to its logical conclusion. Justice Kavanaugh reads statutes in a practical, common sense way. His goal is to give legal language the meaning intended by its drafters, understood by ordinary audiences, and generally accepted by policymakers. He eschews literalism and logical formalism.

VI. PRAGMATIC INSIDER VERSUS FORMALIST OUTSIDER

In July 2019, Justice Ginsburg described the Supreme Court as “the most collegial place” she ever worked.⁵¹¹ In that same talk, she described her “newest colleagues” as “very decent and very smart

⁵⁰⁵ *Id.* at n.66.

⁵⁰⁶ *Id.* at 1829.

⁵⁰⁷ *Id.* at 1830.

⁵⁰⁸ *Id.* at 1836.

⁵⁰⁹ *Id.* at 1837.

⁵¹⁰ *Id.*

⁵¹¹ Robert Barnes, *Ginsburg Gently Pushes Back at Criticism of the Supreme Court and Her Fellow Justices*, WASH. POST, July 26, 2019, at A2.

individuals.”⁵¹² Justice Ginsburg had reasons to be pleased. Contrary to expectations, Justice Gorsuch and Justice Kavanaugh provided Justice Ginsburg with key votes in important cases.

It is also noteworthy that (in divided cases) the two Justices’ support for Justice Ginsburg’s majorities rarely came together; it was almost always one or the other.⁵¹³ That is because, despite attending the same high school and clerking together for the same Supreme Court Justice,⁵¹⁴ Justice Kavanaugh and Justice Gorsuch represent two different brands of conservative judicial philosophy.⁵¹⁵ What is more, their differences run orthogonal to the familiar fault line between liberals and conservatives. One Justice is a pragmatic insider, while the other is a formalist outsider.

A. The Pragmatic Insider

A native of the Washington D.C. area, who returned to the locale after college and law school at Yale and a one-year judicial clerkship on the West Coast,⁵¹⁶ Justice Kavanaugh seems imbued with the ideals of his hometown. He sees the U.S. government as a force for good with a moral obligation to make the world a better place. He has a positive, insider view of the federal government and federal power.

A veteran of the George W. Bush White House who has spent his career in federal service,⁵¹⁷ Justice Kavanaugh is sensitive to the practical needs of the federal government. He tends to resolve ambiguities in its favor and in favor of facilitating enforcement of federal law. He sympathizes with those who exercise federal power as well as those who need its protection. He has much less concern for those who are subject to federal power and still less for those who violate federal law.

Justice Kavanaugh is also sensitive to the moral sentiments of his hometown. When he can go along with those feelings (such as by holding that a Mississippi prosecutor engaged in racial

⁵¹² *Id.*

⁵¹³ *See infra*, Part VI.A–B.

⁵¹⁴ Apparently, the two got along well when they clerked together for Justice Kennedy. In 2017, then-Judge Kavanaugh said of his former co-clerk: “He’s just an easy guy to get along with. He doesn’t have sharp elbows.” Adam Liptak and Nicholas Fandos, *How Gorsuch the Clerk Met Kennedy the Justice: A Tale of Luck*, N.Y. TIMES (March 3, 2017), <https://www.nytimes.com/2017/03/03/us/politics/neil-gorsuch-anthony-kennedy-supreme-court.html> [<http://perma.cc/2ZNW-FDLX>].

⁵¹⁵ For an informative discussion of the opposing brands, *see* Margaret H. Lemos, *Book Review, The Politics of Statutory Construction*, 89 NOTRE DAME L. REV. 849 (2013).

⁵¹⁶ *See generally* CNN Editorial Research, *Brett Kavanaugh Fast Facts*, CNN, <http://www.cnn.com/2018/07/16/us/brett-kavanaugh-fast-facts/index.html> [<http://perma.cc/T7QG-PE2L>] (last updated Mar. 5, 2020, 5:54 PM).

⁵¹⁷ *Id.*

discrimination),⁵¹⁸ he is happy to do so. When he goes against a significant number of local opinion leaders (such as by rejecting a constitutional challenge to the Bladensburg Peace Cross),⁵¹⁹ he does so with apologies, expressions of respect for the losing plaintiffs, and overtures that he might be open to similar claims in the future. While he may reject particular federal interventions as unwise, he makes it clear he understands the moral imperative of federal oversight to ensure human rights and justice.

Justice Kavanaugh subscribes to the public policy approach to jurisprudence that is dominant in Washington D.C. and the legal academy.⁵²⁰ He believes judges make law and sees that exercise as a pragmatic process for the protection and improvement of society. He thinks judges should update the law as needed to advance the policies behind modern statutes and decisions.⁵²¹ He believes laws should be construed flexibly based on practical needs, within the bounds of ordinary, common sense understanding.⁵²² In his opening remarks at his confirmation hearing, he told the Senate Judiciary Committee that “[i]n deciding cases, a judge must always keep in mind what Alexander Hamilton said in Federalist 83: ‘the rules of legal interpretation are rules of common sense.’”⁵²³

At the same time, Justice Kavanaugh is a careful, prudential conservative. He worries about the practical consequences of his decisions far more than he cares about their theoretical provenance. He is wary of disrupting the status quo. He likes to follow precedent and stay close to consensus. His writing style, consistent with these values, is solid, conventional, institutional, careful, qualified and matter-of-fact.⁵²⁴ His opinions take the tone of reasonable policy decisions rather than logical arguments.

Justice Kavanaugh is deferential to his colleagues, Congress, and the Executive Branch. He takes pains to avoid offending the conservative or liberal establishments. While sympathetic to the general idea of federal oversight, he is open to arguments that

⁵¹⁸ See *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

⁵¹⁹ See *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019).

⁵²⁰ See generally STEPHEN B. PRESSER, *LAW PROFESSORS: THREE CENTURIES OF SHAPING AMERICAN LAW* (2017).

⁵²¹ For academic support of this approach, see Ethan J. Leib, David L. Ponet & Michael Serota, *A Fiduciary Theory of Judging*, 101 CAL. L. REV. 699 (2013).

⁵²² For academic support, see William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1016 (1989).

⁵²³ Jeffrey F. Addicott, *Reshaping American Jurisprudence in the Trump Era – The Rise of “Originalist” Judges*, 55 CAL. W. L. REV. 341, 362 (2019) (some internal quotation marks omitted).

⁵²⁴ See Greg Johnson, *Write-On: Assessing the Legal Writing Style of Brett Kavanaugh*, 44 VER. BAR J. 30, 30 (2018).

particular expansions of federal power would be impractical, unwarranted, unnecessary, or unwise.

B. Formalist Outsider

A native of Colorado, whose early experience with the nation's capital was the public shaming of his mother,⁵²⁵ Justice Gorsuch has a wary, outsider view of Washington, D.C. Unlike those who worry about the federal government's possible sins of omission, Justice Gorsuch's focus is on the federal government's sins of commission. In particular, he thinks the federal bureaucracy should take greater care to stay within the limits of its authority and respect the traditions and liberties of others.

Justice Gorsuch sympathizes with those on the receiving end of federal power or otherwise at odds with the federal government. He cares about those who need protection from federal authorities. He has much less sympathy for those who exercise or seek to invoke federal power. The practical consequence of this approach is a series of votes that do not seem coherent from a liberal or conservative perspective. In the October 2018 term, he took the side of armed robbers,⁵²⁶ Apple Inc.,⁵²⁷ equipment manufacturers,⁵²⁸ the Tennessee state legislature,⁵²⁹ a Mississippi state prosecutor,⁵³⁰ a former carpenter seeking federal disability benefits,⁵³¹ an ex-offender convicted of illegal possession of a gun,⁵³² a federal criminal defendant convicted of possession of child pornography,⁵³³ and the Yakama Nation.⁵³⁴ In some ways, Justice Gorsuch may be likened to a small-town lawyer whose willingness to challenge the establishment attracts an odd collection of clients.

Justice Gorsuch has an “engaging and readable writing style”⁵³⁵ that is much more affable than that of his predecessor, Justice Scalia, and much more folksy than Justice Kavanaugh's

⁵²⁵ See Heather Elliott, *Gorsuch v. The Administrative State*, 70 ALA. L. REV. 703, 711 (2019) (describing how Anne Gorsuch Burford was accused of dismantling her agency and “forced to resign after she was cited for contempt of Congress for refusing to turn over Superfund records” on the ground of executive privilege” and noting that it “is not hard to imagine these events shaping the then-teenage Neil Gorsuch's views of the Executive Branch”).

⁵²⁶ See *United States v. Davis*, 139 S. Ct. 2319 (2019).

⁵²⁷ See *Apple Inc. v. Pepper*, 139 S. Ct. 1514 (2019).

⁵²⁸ See *Air and Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986 (2019).

⁵²⁹ See *Tenn. Wine and Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019).

⁵³⁰ See *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019).

⁵³¹ See *Biestek v. Berryhill*, 139 S. Ct. 1148 (2019).

⁵³² See *Gamble v. United States*, 139 S. Ct. 1960 (2019).

⁵³³ See *United States v. Haymond*, 139 S. Ct. 2369 (2019).

⁵³⁴ See *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000 (2019).

⁵³⁵ Hillel Y. Levin, *Justice Gorsuch's Views on Precedent in the Context of Statutory Interpretation*, 70 ALA. L. REV. 687, 701 (2019).

institutional tone. Consistent with his anti-establishment attitudes, Justice Gorsuch starts sentences with conjunctions, writes in the second person, and uses contractions, sentence fragments, and alliteration.⁵³⁶ At the same time, consistent with his doctorate from Oxford, Justice Gorsuch employs the tropes of classical rhetoric, such as syllogism, pathos, hyperbole, and rhetorical questions.⁵³⁷ He prioritizes logical reasoning over modern policy analysis.

Justice Gorsuch follows a deontological theory of jurisprudence that works well for those who wish to restrain federal power⁵³⁸ but has limited support in the legal academy⁵³⁹ and Washington D.C. A key premise of that theory, in the words of a recent article by Gillian E. Metzger, is the “highly formalist” “classical image of law as fixed, determinate, and categorically distinct from policy.”⁵⁴⁰

In his recent book, Justice Gorsuch described the formalist theory more colloquially as the precept that judges “should apply the Constitution or a congressional statute as it *is*, not as [they] think[] it *should be*.”⁵⁴¹ This approach is necessary, Justice Gorsuch explains, because “sticking to the law’s terms is the very reason we have independent judges: not to favor certain groups or guarantee particular outcomes, but to ensure that *all* persons enjoy the benefit of equal treatment under existing law as adopted by the people and their representatives.”⁵⁴² According to Justice Gorsuch, judges should not exercise political discretion or look for the fair solution; rather: “Judges aren’t supposed to compromise principle but reach their decisions through the consistent application of logical premises to a natural end.”⁵⁴³

⁵³⁶ See Johnson, *supra* note 519.

⁵³⁷ See Christopher Fitzpatrick Cannataro, *The New Scalia? An Aristotelian Analysis of Judge Gorsuch’s Fourth Amendment Jurisprudence*, 17 GEO. J.L. & PUB. POL’Y 317 (2019).

⁵³⁸ See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 410 (1991) (“Formalism . . . embodies a relatively antigovernmental philosophy.”); Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659–60 (2009) (“[E]xalting originalism was part of a deliberate effort by the Reagan Justice Department to rally Americans against a Federal Judiciary it perceived as frustrating its conservative political agenda.”).

⁵³⁹ For academic support for this approach, see Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1 (2018). For an article summarizing opposing scholarship, see Jason Iuliano, *The Supreme Court’s Noble Lie*, 51 U.C. DAVIS L. REV. 911 (2018).

⁵⁴⁰ Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1, 28.

⁵⁴¹ NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 10 (2019).

⁵⁴² *Id.*

⁵⁴³ *Id.* at 133.

In practice, for Justice Gorsuch, applying the law as it is means construing laws using the traditional interpretative tools that judges have used for centuries.⁵⁴⁴ He rejects the pragmatic idea that judges should update laws to fit current needs or modern sensibilities. This may sound like positivist deference to the legislature, but it is actually closer to natural law.⁵⁴⁵ The traditional interpretative tools Justice Gorsuch prescribes include a strong presumption that laws embody the basic precepts of Western Civilization, the traditional common law and the foundational principles of the American Republic. These are the originalist ideas he holds most dear. Whenever possible, he construes laws in accordance with his idealized vision of these norms.⁵⁴⁶ This means giving a liberal construction to provisions of the Bill of Rights that protect liberty (particularly from intrusion by the federal government) and a narrow construction to statutes that run contrary to the ideals of the founders.

At the same time, as the *Bostock* case illustrates, Justice Gorsuch regards the Civil Rights Act of 1964 (and likely some other modern statutes as well) as establishing new first principles akin to those recognized by the Bill of Rights. He is willing to follow the logic of their texts to expand individual rights or promote equality under the law.

Justice Gorsuch is not a prudential conservative. He does not mind defying consensus or convention. He does not worry all that much about the practical consequences of his decisions, being content to dismiss possible costs as part of the price for liberty that the Framers of the Constitution believed to be justified or otherwise outside the purview of the judicial role.⁵⁴⁷ While happy to support tradition when it is consistent with his philosophy, Justice Gorsuch is also happy to follow his principles to overturn precedent, upset the status quo, challenge the establishment, and relieve the oppressed.

⁵⁴⁴ For a good discussion of originalism, see Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L. REV. 507, 529 (2019).

⁵⁴⁵ See Richard A. Epstein, *Our Implied Constitution*, 53 WILLAMETTE L. REV. 295 (2017).

⁵⁴⁶ Interestingly, the seventeenth century English resistance to royal absolutism followed a similar ideological strategy. See Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651, 1688 (1994) (“[Sir Edward] Coke was not a reactionary but a radical conservative, who reached back into the remote past not only to strike down innovations of the preceding century of accumulating royal power but also to justify wholly new legal principles.”); Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence*, 21 LAW & HIST. REV. 439, 439 (2003) (describing Coke as “the seventeenth-century mythologist of the ‘ancient constitution’”).

⁵⁴⁷ See *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

VII. CONCLUSION

The philosophical differences between Justice Kavanaugh and Justice Gorsuch have made their collective impact on the Supreme Court less conservative, less partisan, less predictable, and more representative of the country than most people expected when Justice Kavanaugh joined the Court in 2018. While this turn of events may disappoint some, on balance it is good news for the Supreme Court as an institution—and good news for the nation.

Crypto Coin Offerings and the Freedom of Expression

*Hannibal Travis**

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I. INTRODUCTION

Open, peer-to-peer, privacy-enhancing networks of software resources power massive digital economies in the form of crypto coin protocols and their users. A coin is an item that operates as a medium of exchange, or a currency, and therefore deserves to be exempt from regulation as a security or commodity in the view of many sellers of digital tokens.¹ The Telegram Group, led by the founder of social media giant VKontakte, attempted to build such a token, the Gram coin and the TON Blockchain, promising “a decentralized platform for everyone.”² Initially planned as a public offering like Ether, Ripple, TRON, and other popular tokens, Telegram transitioned Gram into a private offering restricted to accredited wealthy investors, purported to restrict the resale of Grams, disclaimed any obligation to govern or maintain the coin or the TON Blockchain or to create any applications for it, and stated that the TON Foundation would not vote Grams it retained.³ Even so, the Securities and Exchange Commission (SEC) enjoined any offer to sell Grams not registered as securities.⁴

¹ See, e.g., Defs.’ Br. in Opp. to Pl.’s Mot. for a Prelim. Inj. and in Supp. of Defs.’ Mot. for Summ. Judg. at 25–28, *SEC v. Telegram Group Inc.*, No. 19-cv-09439 (S.D.N.Y. brief filed Jan. 15, 2020), <http://bridgingtheweek.com/ckfinder/userfiles/files/Defendants Motion for SJ Telegram.pdf> [<http://perma.cc/8VPP-VNCA>] (arguing that a coin as an item used for exchange is exempt from regulation as a security under 15 U.S.C. § 78c(a)(10) (collecting cases); *CFTC v. McDonnell*, 287 F. Supp. 3d 213, 227–29 (E.D.N.Y. 2018) (discussing, but rejecting, argument that exchanges of cryptocurrencies involve “actual delivery” of a currency or commodity and are exempt under 7 U.S.C. § 2(c)(2)(C)(i)(II)(bb)(AA) from regulation by Commodity Futures Trading Commission) (citing *CFTC v. Gelfman Blueprint, Inc.*, No. 17-7181, 2017 WL 4228737 (S.D.N.Y. filed Sept. 21, 2017)).

² Defs.’ Br. in Opp. to Pl.’s Mot. for a Prelim. Inj. and in Supp. of Defs.’ Mot. for Summ. Judg., *supra* note 1, at 9–10, 17–20, 28.

³ See *id.* at 1, 7–20, 28–29. *But see* *SEC v. Telegram Group Inc.*, 448 F. Supp. 3d 352 (S.D.N.Y. 2020) (finding that Telegram stated that it intended to use investor funds to develop the TON Blockchain, that Grams could be purchased en masse as cryptocurrency and return value to purchasers as a result), *final judgment entered*, (S.D.N.Y. June 26, 2020) (enjoining defendants Telegram Group, Inc. and TON Issuer, Inc. from offering security without an effective registration statement or applicable exception to registration requirement); Complaint at ¶¶ 2, 52, 54, 79, 86, 89, 104, *SEC v. Telegram Group Inc.*, No. 19-cv-9439 (S.D.N.Y. complaint filed Oct. 11, 2019) (alleging that Telegram at least indirectly sold Grams to the public, sold them regardless of whether purchasers would use TON Blockchain, indicated that it would integrate Grams with Telegram Messenger under its control, did not restrict all resales at a profit, and sold more than \$424 million in Grams in the U.S.).

⁴ See *Telegram*, 448 F. Supp. 3d 352. While recognizing the existence of an exemption for private offerings to accredited investors by which Telegram could sell Grams without registering them, the SEC contended that given Telegram’s intention that Grams reach the public to fuel the TON Blockchain, this exemption could not apply, so this exemption could not apply to Grams or seemingly any other cryptocurrency.

The government's pursuit of Kik Interactive for marketing a crypto coin as an unregistered security heightened the tension between permissionless software development and potentially crushing regulation.⁵ While Section 5 of the Securities Act of 1933 (Securities Act) and Section 12(g) of the Securities Exchange Act of 1934 (Exchange Act) require that certain securities and stocks be registered before they are offered to large segments of the public, Kik's coin does not necessarily represent stock in a company but rather a ticket to enter a decentralized ecosystem of digital services.⁶ Kik is a software and social media company.⁷ If it can be prosecuted for offering a cryptocurrency, relics of banks' checkered past will haunt most blockchain enterprises.

See id. at 358–59; Pl.'s Mem. in Supp. of Emerg. Appl. for Order to Show Cause, Temp. Restr. Ord., and Ord. Granting Exped. Discov. and Other Relief, at 23–25, *Telegram* (S.D.N.Y. brief filed Oct. 11, 2019). Some lawyers in this area opine that one of the three main routes to make an ICO, Regulation D, requires issuers to specify that tokens issued under such an exemption cannot be sold for at least a year. *See, e.g.,* Bonnie J. Roe, *Regulation A: A Pathway for the ICO?*, LEXOLOGY (July 26, 2018), <http://www.lexology.com/library/detail.aspx?g=c208268c-bd8a-4b19-8dff-aaa828c99293> [<http://perma.cc/RFG2-WP8G>] (citing Regulation D, 17 C.F.R. § 230.500 *et seq.*); Jennifer A. Connors et al., *Offering Exemptions Available to Companies Issuing ICOs*, LEXOLOGY (May 14, 2018), <http://www.lexology.com/library/detail.aspx?g=bbfe3e00-9cc4-4eb5-9886-08b245062a0f> [<http://perma.cc/7FKF-AH8M>] (citing Rule 506, 17 C.F.R. § 230.506). Regulation A, which does not impose the one-year restriction on issuers or purchasers, requires the issuer to prepare potentially complex equity or debt arrangements in addition to the terms and conditions for the token itself. *See* Roe, *supra*.

⁵ *See, e.g.,* SEC v. Kik Interactive Inc., No. 19-cv-5244, 2020 WL 5819770 (S.D.N.Y. Sept. 30, 2020) (granting summary judgment to SEC on claim that unregistered offering of blockchain-based digital currency called “Kin,” which could be used to buy and sell copyrightable works among other things, and instructing parties to file proposed injunctive and monetary judgment for plaintiff), *subsequent proceedings* at slip op. (S.D.N.Y. final judgment filed Oct. 21, 2020) (entering consent judgment, from which defendant waived any appeal, enjoining defendant from issuing any security without filing a registration statement, and requiring it to pay a \$5 million civil penalty and to notify SEC of any sale or transfer of three million Kin tokens and any new digital asset or token); Complaint, SEC v. Kik Interactive Inc., No. 19-cv-5244 (S.D.N.Y. complaint filed June 4, 2019), <http://www.courtlistener.com/recap/gov.uscourts.nysd.516941/gov.uscourts.nysd.516941.1.0.pdf> [<http://perma.cc/V479-64XU>]; Br. of Amicus Curiae The Blockchain Association, at 20, SEC v. Telegram Group Inc., No. 19-cv-09439 (2d Cir. brief filed Apr. 3, 2020, refilled May 13, 2020) (arguing that settlements like the one in *Kik Interactive*, along with “limited and opaque statements, speeches, no action letters, [and] closed-door meetings,” are “prejudicing firms trying to comply with the law and depriving the public of any [administrative] notice or comment”); *see also* ADAM THIERER, PERMISSIONLESS INNOVATION: THE CONTINUING CASE FOR COMPREHENSIVE TECHNOLOGICAL FREEDOM 8–13 (2016).

⁶ *See* Defendant's Answer at ¶¶ 77, 112–19, 122, 190, SEC v. Kik Interactive Inc., No. 19-cv-5244 (S.D.N.Y. Aug. 6, 2019), <http://www.courtlistener.com/docket/15722539/22/us-securities-and-exchange-commission-v-kik-interactive-inc/> [<http://perma.cc/YFA6-ZBF9>].

⁷ *See id.* ¶¶ 5, 37.

Federal courts have concluded that cryptocurrencies could fall under the federal securities laws, the commodities laws, or other statutes.⁸ Courts have also found state statutes and

⁸ See, e.g., SEC v. NAC Foundation, LLC, No. 20-cv-04188-RS, 2021 U.S. Dist. LEXIS 4079 (N.D. Cal. Jan. 8, 2021) (claims stated under Securities Act and Exchange Act for fraudulent and unregistered offerings of AML Bitcoin); Zakinov v. Ripple Labs, Inc., No. 18-cv-06753, 2020 U.S. Dist. LEXIS 32982 (N.D. Cal. Feb. 26, 2020) (claim stated under Securities Act for unregistered sale of Ripple token); SEC v. Telegram Group Inc., No. 19-cv-09439 (S.D.N.Y. Oct. 11, 2019) (restraining digital token sale or promotion as unregistered sale of securities); SEC v. Titanium Blockchain Infrastructure Servs., Inc., No. CV18-4315, slip op. at § IV (C.D. Cal. May 30, 2018), *subsequent proceedings at* (C.D. Cal. May 23, 2019) (enjoining blockchain business from, inter alia, violating Section 5 of the Securities Act, 15 U.S.C. § 77e, by directly or indirectly, in the absence of any applicable exemption, selling securities by means of prospectus or otherwise in interstate commerce without a registration statement being in effect with SEC); Solis v. Latium Network, Inc., No. 18-10255, slip op. (D.N.J. Dec. 10, 2018) (claim stated under Securities Act for \$25,000 investment in digital token with limited platform “functionality”); Rensel v. Centra Tech, Inc., No. 17-24500, 2018 U.S. Dist. LEXIS 100720 (S.D. Fla. June 14, 2018) (one plaintiff of two adequately pleaded claim for selling unregistered securities); SEC v. PlexCorps, No. 17 Civ. 7007, 2017 WL 6398722 (E.D.N.Y. Dec. 14, 2017) (finding that likelihood of success existed that SEC would establish that “PlexCoin Tokens” were investment contracts under Securities Act and Exchange Act that should not be sold in interstate commerce without registration statement being in effect with the SEC as to them); CFTC v. McDonnell, 287 F. Supp. 3d 213 (E.D.N.Y. 2018) (declining to dismiss claim that cryptocurrency constituted regulated commodity under Commodities Exchange Act); Audet v. Fraser, No. 16-CV-940, 2017 U.S. Dist. LEXIS 167830 (D. Conn. Oct. 11, 2017) (declining to dismiss claim that cryptocurrency offering violated Securities Act); Press Release, SEC, SEC Halts Alleged \$1.7 Billion Unregistered Digital Token Offering (Oct. 11, 2019), <http://www.sec.gov/news/press-release/2019-212> [<http://perma.cc/FQL7-KL98>] (SEC ordered promoters of Telegram token, the Gram, to halt offering as unregistered offering of securities); No-Action Letter re: Pocketful of Quarters, Inc., SEC, Div. of Corp. Fin. (July 25, 2019), <http://www.sec.gov/corpfin/pocketful-quarters-inc-072519-2a1> [<http://perma.cc/H6ZX-4NJQ>] (suggesting that digital token sale might be a security if proceeds are used “to build the . . . [p]latform,” if the platform is not “fully functional and operational,” or if it is possible to transfer tokens to wallets); Letter from Jay Clayton, SEC Chairman, to the Hon. Ted Budd, U.S. House of Representatives (Mar. 7, 2019), <http://www.coincenter.org/app/uploads/2020/05/clayton-token-response.pdf> [<http://perma.cc/B3PL-27L8>] (Securities Act and Exchange Act may cover ICOs because they “encompass virtually any instrument that *may* be sold as an investment”) (emphasis added); No-Action Letter re: TurnKey Jet, Inc., SEC, Div. of Corp. Fin. (Apr. 3, 2019), <http://www.sec.gov/divisions/corpfin/cf-noaction/2019/turnkey-jet-040219-2a1.htm> [<http://perma.cc/VZX9-WFQR>] (similar to Pocketful of Quarters, *supra*); Press Release, SEC, Two ICO Issuers Settle SEC Registration Charges, Agree to Register Tokens as Securities (Nov. 16, 2018), <http://www.sec.gov/news/press-release/2018-264> [<http://perma.cc/33DY-J6LM>] (Airfox and Paragon agreed to consent orders barring their unregistered token sales, refunding money to previous purchasers, and agreeing to register); Press Release, SEC, SEC Obtains Emergency Order Halting Fraudulent Coin Offering Scheme (May 29, 2018), <http://www.sec.gov/news/press-release/2018-94> [<http://perma.cc/Y7VR-T386>]; Br. of SEC in Supp. of U.S. in Opp. to Def.’s Mot. to Dismiss Indictment at 11–17, United States v. Zaslavskiy, No. 17-CR-0647 (E.D.N.Y. Mar. 19, 2018) (arguing that defendant’s RECoin tokens were securities despite being classified as a cryptocurrency); Public Statement, SEC, Div. of Enft and Trading Mkts., Statement on Potentially Unlawful Online Platforms for Trading Digital Assets (Mar. 7, 2018), <http://www.sec.gov/news/public-statement/enforcement-tm-statement-potentially-unlawful-online-platforms-trading> [<http://perma.cc/9USG-R9RG>]; Press Release, SEC, SEC Suspends Trading in Three Issuers Claiming Involvement in Cryptocurrency and Blockchain Technology (Feb. 16, 2018), <http://www.sec.gov/news/press-release/2018-20> [<http://perma.cc/UZH5-T3M7>]; Public Statement, Jay Clayton, SEC Chairman, Statement on Cryptocurrencies and Initial Coin Offerings (Dec. 11, 2017), <http://www.sec.gov/news/public-statement/statement-clayton-2017-12-11> [<http://perma.cc/X5WZ-LZWA>]; Munchee Inc., No. 10445 (Dec. 11, 2017),

common-law theories applicable to some token-related disputes.⁹ With the SEC and state securities regulators warning that the

<http://www.sec.gov/litigation/admin/2017/33-10445.pdf> [<http://perma.cc/VQB3-WW9Q>] (enforcement action against smartphone app developer who issued tokens to public); Complaint, *Plexcorps*, No. 17-CV-07007 (E.D.N.Y. complaint filed Dec. 1, 2017) (contending that token was a security whose offering should have been registered); SEC Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, Release No. 81207, 2017 WL 7184670 (July 25, 2017); *Investor Bulletin: Initial Coin Offerings*, SEC (July 25, 2017), http://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_coinofferings [<http://perma.cc/D5X6-BJWM>]; Investor Alert: Public Companies Making ICO-Related Claims, SEC (Aug. 28, 2017), http://www.sec.gov/oiea/investor-alerts-and-bulletins/ia_icorelatedclaims [<http://perma.cc/DM82-LEP2>]; Investor Alert: Bitcoin and Other Virtual Currency-Related Investments, SEC Off. of Inv. Educ. & Advoc. (May 7, 2014), <http://www.investor.gov/additional-resources/news-alerts/alerts-bulletins/investor-alert-bitcoin-other-virtual-currency> [<http://perma.cc/Y8GK-JJMU>] (Bitcoin investment opportunities could be securities); *see also* In the Matter of AWAX Ltd., No. CD-2019-00006 (Feb. 25, 2019), <http://asc.alabama.gov/Orders/2019/CD-2019-0006.pdf> [<http://perma.cc/T7V2-KF2T>]; News Release, Alabama Securities Commission, Alabama Securities Commission Updates Coordinated Crypto Crackdown (Aug. 28, 2018), http://www.asc.state.al.us/news_detail.aspx?ID=12943 [<http://perma.cc/LC53-94FB>] (describing state administrative orders as part of “Operation Cryptosweep”); ALABAMA SECURITIES COMMISSION, ADMINISTRATIVE ACTIONS - 2018, <http://asc.alabama.gov/2018.aspx> [<http://perma.cc/JNL7-XFQL>] (listing five cease and desist orders issued between April 20 and May 18, 2018, targeting blockchain projects Extrabit, Leverage, Pool Trade, Platinum Coin, and Chain Group Escrow); ShipChain, Inc., No. 20182574 (May 21, 2018), <http://2hsvz0l74ah31vgcm16peuy12tz.wengine.netdna-cdn.com/wp-content/uploads/2018/05/ShipChain-Inc-Administrative-Order-to-Cease-and-Desist-COS-01685821xD2C78-1.pdf> [<http://perma.cc/P999-C9AS>] (identifying tokens sold by ShipChain as securities); Press Release, Ohio Department of Commerce, Ohio Division of Securities Participates in “Operation Cryptosweep,” a Coordinated International Cryptocurrency Crackdown (May 21, 2018), <http://apps2.com.ohio.gov/admn/pressroom/View?FileName=3655.pdf> [<http://perma.cc/2K3T-T38W>] (noting that the North American Securities Administrators Association (NASAA) brought about nearly seventy state or Canadian provincial inquiries and investigations and thirty-five enforcement actions related to ICOs or cryptocurrencies); LeadInvest, No. ENF-18-CDO-1760 (Tex. State Secs. Bd. Feb. 26, 2018), <http://www.ssb.texas.gov/sites/default/files/ENF-18-CDO-1760.pdf> [<http://perma.cc/CR5D-CZK5>] (issuing emergency cease and desist order, finding that a “technology company that specializes in the development of trading software” was offering a cryptocurrency lending program to Bitcoin miners that, inter alia, was an unlawful unregistered offering of securities in Texas); Caviar & Kirill Bensonoff, No. E-2017-0120 (Mass. Secs. Div. Jan. 17, 2018), http://www.morrisoncohen.com/siteFiles/files/2018_01_17%20-%20In%20the%20Matter%20of%20Caviar%20and%20Krill%20Bensonoff.pdf [<http://perma.cc/RR7Q-U92G>] (seeking to stop unregistered ICO and obtain refunds); *Cryptocurrency Enforcement*, TEX. STATE SECS. BD., <http://www.ssb.texas.gov/cryptocurrency-enforcement> [<http://perma.cc/WWF2-EWP2>] (“The Texas State Securities Board was the first state securities regulator to enter an enforcement order against a cryptocurrency firm and to date the Securities Commissioner has entered 26 administrative orders involving 79 individuals and entities.”).

⁹ *See, e.g.,* Zakinov v. Ripple Labs, Inc., 369 F. Supp. 3d 950, 952 (N.D. Cal. Feb. 28, 2020) (discussing claims stated under Securities Act and California Corporations Code for unregistered sale of Ripple token); Fabian v. Lemahieu, No. 19-cv-00054, 2019 WL 4918431, at *13–14 (N.D. Cal. Oct. 4, 2019) (declining motion to dismiss state law claims for fraud, negligence, and negligent misrepresentation in marketing Nano Coins); Audet v. Fraser, No. 16-CV-940, 2017 WL 4542386, at *9–11 (D. Conn. Oct. 11, 2017) (declining to dismiss claims that cryptocurrency offering violated Securities Act and amounted to common law fraud and aiding/abetting thereof); Shin v. Time Squared Global, LLC, No. SACV 15-0943, 2016 WL 8856653, at *2–3 (C.D. Cal. Feb. 8, 2016) (declining to dismiss claims for intentional misrepresentation, breaches of contract, and promissory estoppel respecting blockchain business).

securities laws apply to many cryptocurrencies,¹⁰ token and appcoin promoters may subject themselves to long prison sentences for offering or selling unregistered securities, operating unregistered “exchanges,” transacting in tokens, advising those who transact in tokens as “investments” as to which tokens are best or when it is time to buy or sell them, or even publishing articles or books on the topic.¹¹ In other countries—notably China, India, Russia, and South Korea—similar laws threatened, for at least a time, to decimate cryptocurrency trading.¹²

¹⁰ See *Investor Bulletin: Initial Coin Offerings*, *supra* note 8; Statement on Potentially Unlawful Online Platforms for Trading Digital Assets, *supra* note 8; Public Statement, Jay Clayton, SEC Chairman, Statement on NASAA’s Announcement of Enforcement Sweep Targeting Fraudulent ICOs and Crypto-asset Investment Products (May 22, 2018), <http://www.sec.gov/news/public-statement/statement-nasaas-announcement-enforcement-sweep-targeting-fraudulent-icos-and> [<http://perma.cc/MC5C-95KG>]; see also Andres Guadamuz & Chris Marsden, *Blockchains and Bitcoin: Regulatory Responses to Cryptocurrencies*, FIRST MONDAY (Dec. 7, 2015), <http://firstmonday.org/ojs/index.php/fm/article/view/6198> [<http://perma.cc/KT5E-PPPR>] (citing Investor Alert: Bitcoin and Other Virtual Currency-Related Investments, *supra* note 8); Press Release, SEC, SEC Sanctions Operator of Bitcoin-Related Stock Exchange for Registration Violations (Dec. 8, 2014), <http://www.sec.gov/news/press-release/2014-273> [<http://perma.cc/N634-MME7>]; Investor Bulletin: Exchange-Traded Funds (ETFs), SEC Off. of Inv. Educ. & Advoc. (Aug. 2012), <http://www.sec.gov/files/etfs.pdf> [<http://perma.cc/R4QD-BR2Z>].

¹¹ See, e.g., 15 U.S.C. § 77e(a), (c); 15 U.S.C. § 78u(d)(1); *Investor Bulletin: Initial Coin Offerings*, *supra* note 8; William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 173, 182, 192 (1933); Malcolm A. MacIntyre, *Criminal Provisions of the Securities Act and Analogies to Similar Criminal Statutes*, 43 YALE L.J. 254, 254–55 (1933); Bernard Susman, *Exempted Transactions Under the Securities Act of 1933*, 24 WASH. U. L. Q. 383, 383–84 (1939).

¹² See Evelyn Cheng & Cheang Ming, *Bitcoin Briefly Falls 11% after South Korea Moves to Ban New Cryptocurrency Trading Accounts*, CNBC (Dec. 28, 2017, 7:45 PM), <http://www.cnbc.com/2017/12/28/bitcoin-drops-11-percent-as-south-korea-moves-to-regulate-cryptocurrency-trading.html> [<http://perma.cc/KYQ4-9RZ9>]. South Korea reversed course in large part. See Swapna Krishna, *South Korea Won’t Ban Cryptocurrency Trading After All*, ENGADGET (Feb. 20, 2018), <http://www.engadget.com/2018/02/20/south-korea-no-ban-on-cryptocurrency-bitcoin-trading/> [<http://perma.cc/MVG9-KJR2>]. The China story is more complicated; authorities reportedly banned banks and payment processors from providing any direct or indirect Bitcoin-related services, including clearing transactions, exchanging Bitcoins for government currencies, or registering Bitcoin-related customers. See Guadamuz & Marsden, *supra* note 10; U.S. LIBR. OF CONG., GLOB. LEGAL RSCH. CTR., *Regulation of Bitcoin in Selected Jurisdictions* (Jan. 2014), <http://www.loc.gov/law/help/bitcoin-survey/regulation-of-bitcoin.pdf> [<http://perma.cc/T48J-HJQ7>]. The Central Bank of the Russian Federation warned against all transactional use of Bitcoins as potentially linked to illegal conduct. See *id.* India’s banking regulators reportedly issued notices or rules that prompted cryptocurrency exchanges to shutter themselves. See U.S. LIBR. OF CONG., *supra* (citing Anuj Srivas, *Bitcoin Exchanges Shut Shop in India*, HINDU (Dec. 26, 2013), <http://www.thehindu.com/business/Industry/bitcoin-exchanges-shut-shop-in-india/article5504407.ece> [<http://perma.cc/F5HX-KPTL>]; Abhiram Nandakumar & Ratnika Maruvada, *RBI Puts the Brakes on the Bitcoin Train*, REUTERS (Jan. 17, 2014), <http://blogs.reuters.com/india/2014/01/17/rbi-puts-the-brakes-on-the-bitcoin-train-in-india/> [<http://perma.cc/3ZH8-TNAN>]). See Nirupama Devi Bhaskar et al., *Bitcoin IPO, ETF, and Crowdfunding*, in CHUEN, HANDBOOK 315 (David L. K. Chuen ed., 2015) (discussing Russia); Kenneth Rapoza, *Will Russia Make Any Waves In Crypto This Year?*, FORBES

Concerns about the SEC's role are slowing down crypto coin offerings, even as some publishers of software and digital content struggle with arbitrary bans and large deductions from their revenue to app stores' operators.¹³ Digital tokens and appcoins solve historical dilemmas of software licensing—including traditional app stores' closed systems for app approval, high advertising costs as a percentage of initial revenue, low levels of participation in in-app economies, and high intermediary charges reducing developers' margins.¹⁴ Millions of app users can

(Jan. 2, 2019), <http://www.forbes.com/sites/kenrapoza/2019/01/02/will-russia-make-any-waves-in-crypto-this-year/#717e9d8c4271> [<http://perma.cc/P9V7-ZW82>] (“[R]ussian ICOs have come and gone. That market is dead. STOs are the new thing, but the Russians looking to raise money that way are setting up shop in Singapore or here in the U.S.”). Enforcement seemed to be lax in 2018, however, with allegedly fraudulent Russian ICOs continuing in existence until they were shut down by North Dakota and Texas, and crypto exchanges opening offices in Russia, a blockchain platform operating in Moscow, and apparent ICO promoters from Russia being active in Ukraine and New York. *See id.*; Waves Platform, BITCOIN WIKI (2019), http://en.bitcoinwiki.org/wiki/Waves_Platform [<http://perma.cc/N3BQ-A2K3>]. Interestingly, one exchange that has or had an office in Russia was originally from another ICO-skeptical jurisdiction, China, i.e. Binance, and it has had meetings in Shanghai, Shenzhen, and Hong Kong. *See Rapoza, supra; Binance Weekly Report: Binance Research, CZ Cryptokitties, and More*, BINANCE (Jan. 6, 2019), <http://www.binance.com/en/blog/288965342777069568/Binance+Weekly+Report:+Binance+Research,+CZ+Cryptokitties,+and+More> [<http://perma.cc/H9AZ-66PB>] (reporting activity in Shanghai); Olga Kharif, *Biggest Crypto Exchange Takes on Tether With Own Stablecoins*, BLOOMBERG (June 5, 2019, 11:19 AM), <http://www.bloomberg.com/news/articles/2019-06-05/biggest-crypto-exchange-takes-on-tether-with-own-stablecoins> (noting that Binance was largest crypto exchange in mid-2019 and made announcements from Hong Kong); *see also* REUTERS, *China's Bitcoin Market Alive and Well as Traders Defy Crackdown*, EXPRESS TRIBUNE (Sept. 30, 2017), <http://tribune.com.pk/story/1520086/chinas-bitcoin-market-alive-well-traders-defy-crackdown/> (noting more than three years after Bitcoin and other coins were made illicit, or at least suspect, China waited until September 4, 2017 to formally ban ICOs and even weeks after that, “the three largest players OkCoin, Huobi and BTCChina . . . announced that they will close their mainland businesses by the end of September”).

¹³ *See How Can the Blockchain Disrupt the App Store Business?*, MEDIUM (Oct. 31, 2017), <http://medium.com/@appcoins/how-can-the-blockchain-disrupt-the-app-store-business-13f0321bb48a> [<http://perma.cc/9B2D-83TK>] (“Whenever a user makes a purchase inside a game or an app, the developer only gets 70% of the transaction value. AppCoins will change that by rewarding the developer with 85% of the tokens spent by the user.”); Laurel Deppen, *Android Developers: Here are 4 Types of Apps Google Just Banned from the Play Store*, TECHREPUBLIC (July 27, 2018), <http://www.techrepublic.com/article/android-developers-here-are-4-types-of-apps-google-just-banned-from-the-play-store/> [<http://perma.cc/D987-2SAP>] (discussing seemingly vague ban on apps that are repetitive of other apps in experience and are not unique in store's eyes); Jason Pontin, *Why Publishers Don't Like Apps*, MIT TECHNOLOGY REVIEW (May 7, 2012), <http://www.technologyreview.com/s/427785/why-publishers-dont-like-apps/> [<http://perma.cc/AS3X-UDNR>] (noting a thirty percent share demanded by app stores); James Titcomb, *Murdoch-backed App Opens Feud with Google after Android Ban*, TELEGRAPH (U.K.) (Apr. 16, 2018, 4:29 PM) (describing allegation that app store breached British law by banning app that pays users for viewing ads upon unlocking mobiles) (on file with author).

¹⁴ *AppCoins: Redesigning the App Economy*, APPCOINS 1 (Dec. 14, 2017), http://web.archive.org/web/20180330084054/https://appcoins.io/pdf/appcoins_white_paper.

potentially use digital tokens to exchange game content or unlock game developers' upgrades.¹⁵ Banking law's past could therefore slow down software and internet inventions.

Enter regulatory competitors. Regulatory competition—sometimes criticized as a “race to the bottom”—involves efforts by jurisdictions to match or surpass the attractiveness of other jurisdictions' laws from the standpoint of companies and investors.¹⁶ On some occasions, countries such as Australia, Brazil, Singapore, Switzerland, Belarus, and Lithuania, and states such as New Hampshire, Nevada, and Wyoming, have reassured some types of token promoters that they will not be targeted or amended their laws to attract initial coin offering (ICO) promoters, rather than chasing them away with vague bans.¹⁷ The European Union is slowly gaining a reputation for trying not to scare off ICOs.¹⁸ Like Singapore, it has taken a light-touch approach by vaguely

pdf [<http://perma.cc/Y769-X7SN>].

¹⁵ Reinaldo Ferreira, *\$18 Million ICO: Social Android App Store Aptoide Launches AppCoins*, EU STARTUPS (Nov. 8, 2017), <http://www.eu-startups.com/2017/11/social-android-app-store-aptoide-launches-appcoins-with-a-e60-million-ico/>

[<http://perma.cc/2CER-N84H>] (explaining one million apps downloaded more than four billion times by 200 million users of Aptoide app store, which was subsequently involved in launch of AppCoins to enable payments by developers to users for viewing ads, and trade digital and/or user-generated content in-game).

¹⁶ See, e.g., Thomas Apolte, *Jurisdictional Competition For Quality Standards: Competition of Laxity?*, 30 ATL. ECON. J. 389, 402 (2002).

¹⁷ See James Gatto, *Nevada Passes Pro-blockchain Law*, SHEPPARD MULLIN (June 13, 2017), <http://www.lawofthelevel.com/2017/06/articles/virtual-currency/nevada-blockchain-law/> [<http://perma.cc/6DZC-GUJX>] (explaining Nevada prohibited municipalities from requiring licenses from blockchain-based businesses “or imposing any other requirement relating to the use of a blockchain by any person or entity”); Bhaskar et al., *supra* note 12, at 318–19 (noting Australia and Brazil planned to but did not regulate cryptocurrencies as payments etc. in 2014); Jennifer Post, *Wyoming Signs Cryptocurrency Bills into Law*, THOMPSON COBURN (Apr. 11, 2018), <http://www.thompsoncoburn.com/insights/publications/item/2018-04-11/wyoming-signs-cryptocurrency-bills-into-law> [<http://perma.cc/933L-39L9>] (indicating that Wyoming law amendments in 2018 included explicit exemption from money transmitter regulations, and exempting “utility tokens” from state securities law as long as they can be exchanged for products or services, are not sold as investments, and their issuers are not involved in supporting a secondary market for trading them). See also DAVID L. K. CHUEN & LINDA LOW, INCLUSIVE FINTECH: BLOCKCHAIN, CRYPTOCURRENCY AND ICO 106, 113 (2018); Diego Zuluaga, *Should Cryptocurrencies Be Regulated like Securities?* 3, (Ctr. for Monetary & Fin. Alts. Inst., Briefing Paper No. 1 June 25, 2018), <http://www.cato.org/sites/cato.org/files/pubs/pdf/cmfa-briefing-paper-1-updated.pdf>

[<http://perma.cc/LH2U-JYLN>] (discussing why some regulatory approaches will squelch ICOs or at least make them inaccessible to startups or non-bankers); Franklin R. Edwards, Kathleen Hanley, Robert Litan & Roman L. Weil, *Crypto Assets Require Better Regulation: Statement of the Financial Economists Roundtable on Crypto Assets*, 75 FIN. ANALYSTS J. 14, 15–17 (2019) (discussing friendlier approaches to ICOs on part of Japan, South Korea, etc.).

¹⁸ Gina Conheady, *The EU Approach to ICO Regulation: A Friendly Regulatory Framework for ICOs?*, BLOOMBERG LAW (Mar. 23, 2018, 11:19 AM), <http://news.bloomberglaw.com/securities-law/the-eu-approach-to-ico-regulation-a-friendlier-regulatory-framework-for-icos> [<http://perma.cc/FZ5C-NLVV>] (explaining that,

warning that some ICOs could be subject to prospectus requirements, without finding specific tokens in violation of them.¹⁹ Such moves may explain why the SEC announced in 2018 that Bitcoin and Ether, two cryptocurrencies with the most users and largest market capitalizations, are not securities, despite previously announcing that ICOs may involve securities and require registration of all parties involved.²⁰

The ICO market has grown more than 1,000% annually by value, and perhaps even faster by units, with more than 1,100 coins being founded in less than a decade.²¹ Should Congress or other U.S. states consider adopting an approach like that of Singapore or New Hampshire? If so, where will the deregulatory push end, and at what cost? Will the European Union or Asian Tigers divert investment from the U.S., or could lax regulation harm U.S. investors while China, EU members, India, and Russia protect their investors by taking a hard line on ICOs?²² Will ICO authors follow the original “bitcoin refugees” into exile in Asia, Canada, or island nations ranging from the Bahamas and Bermuda to Cyprus and Malta?²³

while European Securities and Markets Authority has concluded that ICOs “could, potentially,” be securities offerings that must be preceded by a prospectus and registered unless exempt, the European Central Bank has stated that for purposes of currency and payments laws, “in the EU, virtual currency is not currently regulated and cannot be regarded as being subject to the (current) Payment Services Directive or the E-Money Directive”).

¹⁹ See *id.*; see also JONES DAY, *Initial Coin Offerings—A Singapore Perspective*, White Paper 2, 4–5 (Nov. 2017), <http://www.jonesday.com/files/upload/initial-coin-offerings-a-singapore-perspective.pdf> [<http://perma.cc/9BGS-WM3E>]; cf. Zuluaga, *supra* note 17, at 3 (describing exemption of ICO tokens that can be redeemed for services and are not marketed as investments as “lighter”). See generally Nikolei M. Kaplanov, *Nerdy Money: Bitcoin, the Private Digital Currency, and the Case Against Its Regulation*, 25 LOY. CONSUMER L. REV. 111 (2012).

²⁰ See, e.g., *All Cryptocurrencies*, COINMARKETCAP, <http://coinmarketcap.com/all/views/all> [<http://perma.cc/8QHW-G87N>] (last updated Dec. 21, 2020).

²¹ See CHUEN & LOW, *supra* note 17, at 111–13; David Rohret & Michael Vella, *Crypto Currency: Expanding the Underground Cyber Economy*, PROQUEST, <http://search.proquest.com/openview/048f46b1c47681eb0f1d928fe435f79e/1?pq-origsite=gscholar&cbl=396500> (noting a count of 1,147 “crypto coins” by 2017), in *PROCEEDINGS OF THE 13TH INTERNATIONAL CONFERENCE ON CYBER WARFARE AND SECURITY (ICCWS 2018)* 645 (John S. Hurley & Jim Q. Chen eds., 2018), <http://toc.proceedings.com/38822webtoc.pdf> [<http://perma.cc/2HPM-34A4>].

²² See CHUEN & LOW, *supra* note 17, at 106–12.

²³ See Jeffrey Gogo, *Bahamas Releases Discussion Paper on Crypto-Asset Regulation*, BITCOIN.COM (Nov. 10, 2018), <http://news.bitcoin.com/bahamas-releases-discussion-paper-on-crypto-asset-regulation/> [<http://perma.cc/GPC2-BVX3>]; see also Jasper Hamill, *Canadian Regulators Welcome US Bitcoin Refugees with Open Arms*, REGISTER (May 20, 2013, 15:57 UTC), http://www.theregister.co.uk/2013/05/20/canada_welcomes_bitcoin_traders_fintrac_letter/ [<http://perma.cc/7LXA-4JJ3>]; Nathaniel Popper, *Have a Cryptocurrency Company? Bermuda, Malta or Gibraltar Wants You*, N.Y. TIMES (July 29, 2018), <http://www.nytimes.com/2018/07/29/technology/cryptocurrency-bermuda-malta-gibraltar.html> [<http://perma.cc/RHC7-5N39>].

This Article explores precedents that exist within U.S. securities and consumer protection laws for a light touch approach for use by the U.S. in the context of global regulatory competition for ICOs. The novelty of its approach lies in surveying the treatment of specific types of statements to investors or consumers in areas outside of federal securities law. Some of these statements closely resemble those that ICO and appcoin promoters use to sell tokens, gain followers, attract developers, and tout their respective ecosystems. In Part II, the Article examines typical ICO white paper statements and their regulatory implications.²⁴ The law of commercial speech and intermediate First Amendment scrutiny undergirds Part III, which analyzes First Amendment issues arising out of cryptocurrency and ICO promotion.²⁵ Part IV contains a brief survey of statutory and constitutional principles supporting light-touch regulatory regimes, including principles that shape the law of federal securities fraud, securities registration, false advertising of goods or services, common-law fraud, and products liability.²⁶

Crypto coin offerings are similar to relatively unregulated provision of information in securities law and in other fields, including vague boasts and “ad speak,” genuine optimistic statements about the future, subjective ratings of securities or commodities, software “upgrades,” search-engine speech, and the creation of economies in virtual worlds. This Article highlights the First Amendment and other constitutional issues that onerous regulations may confront and draws analogies to how legislatures and the courts have reconciled the freedom of economic expression and the cause of consumer protection under the Exchange Act, the Lanham Act, consumer fraud law, and the law of warranties. Several themes in the case law in these areas are ripe for application to ICOs: the need for precision and proportionality in framing regulation, the proscription against regulatory overkill and one-size-fits-all approaches, and the duty of courts and regulators to preserve basic freedoms.²⁷

²⁴ *Cf.* 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality opinion) (discussing “the less than strict standard that generally applies in commercial speech cases”); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) (calling this “‘intermediate’ scrutiny”); *see* *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 183 (1999) (assessing substantial state interest to justify extensiveness); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002) (stating that *Central Hudson* scrutiny is “significantly stricter than the rational basis” analysis).

²⁵ The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” U.S. CONST. amend. I; *see infra* Part III.

²⁶ *See infra*, Part IV.

²⁷ *See id.*

II. THE STRUCTURE OF CRYPTO SPEECH

A. Software's Historically Deregulated Domain

Regulation exists on a sort of spectrum. On one side there is what the Supreme Court has referred to in constitutional terms as “comprehensive federal system[s]” of regulation.²⁸ Further, in the deregulatory direction are multistakeholder approaches, like the regulation of the internet under the light-touch (initially) of the U.S. Department of Commerce,²⁹ or the regulation of the early ICOs.³⁰ In early ICOs, participants in building markets and infrastructures mostly regulate their own “ecosystems” using standards, protocols, shared applications, and research communication, while the common law and statutes stand in reserve for the more severe disputes that arise.³¹ A multistakeholder approach to internet governance gained prominence with the operations of the Internet Corporation for Assigned Names and Numbers.³² Next comes self-regulation, which is sometimes merely an adjunct to public regulation in a multistakeholder approach.³³ At the other extreme from fully

²⁸ See P.R. Dep't of Consumer Affs. v. Isla Petrol. Corp., 485 U.S. 495, 502–503 (1988) (involving federal petroleum pricing law); cf. Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 454–55 (1977) (federal occupational health and safety law).

²⁹ See generally Adamantia Rachovitsa, *Rethinking Privacy Online and Human Rights: The Internet's Standardisation Bodies as the Guardians of Privacy Online in the Face of Mass Surveillance*, UNIV. GRONINGEN FAC. L. RSCH. PAPER SERIES NO. 01/2017 (2017), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2911978; see also Michael L. Rustad, *Internet Law in a Nutshell*, SUFFOLK UNIV. L. SCH. RSCH. PAPER NO. 09-05 8–10, 44–48, 196–206, 217, 366 (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1329092 (describing multistakeholder approach and roles of Department of Commerce, FTC, Federal Communications Commission, state attorneys general, and Internet Corporation for Assigned Names and Numbers, among others).

³⁰ See P.R. Dep't of Consumer Affs. v. Isla Petrol. Corp., 485 U.S. 495, 502–03 (1988) (involving federal petroleum pricing law); cf. Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 454–55 (1977) (federal occupational health and safety law).

³¹ See DON TAPSCOTT & ALEX TAPSCOTT, *HOW THE TECHNOLOGY BEHIND BITCOIN AND OTHER CRYPTOCURRENCIES IS CHANGING THE WORLD* loc. 68 (2018) (ebook), <http://books.google.com/books?id=NqBiCgAAQBAJ&pg=PT68>.

³² See Kieren McCarthy, *Read the Letter than Won the Internet Governance Battle*, REGISTER, (Dec. 2, 2005, 09:07 UTC), http://www.theregister.co.uk/2005/12/02/rice_eu_letter [<http://perma.cc/6TA6-ZNB4>]; see also STEWART PATRICK, *THE SOVEREIGNTY WARS: RECONCILING AMERICA WITH THE WORLD* 168–9 (2018).

³³ See generally Alejandro Komai & Gary Richardson, *A Brief History of Regulations Regarding Financial Markets in the United States: 1789 to 2009*, (Nat'l Bureau of Econ. Resch., Working Paper No. 17443, 2011), <http://www.nber.org/papers/w17443> [<http://perma.cc/M9Q7-S3Q9>]; Saule T. Omarova & Margaret E. Tahyar, *That Which We Call a Bank: Revisiting the History of Bank Holding Company Regulation in the United States*, 31 REV. BANKING & FIN. L. 113 (2011); Matthew P. Allen, *A Lesson from History, Roosevelt to Obama—The Evolution of Broker-Dealer Regulation: From Self-Regulation, Arbitration, and Suitability to Federal Regulation, Litigation, and Fiduciary Duty*, 5 ENTREPRENEURIAL BUS. L.J. 1 (2010). Cf. Rustad, *supra* note 29, at 49.

regulated industries are unregulated bazaars, anarchy, anonymous speech-making, and internet content in some respects.³⁴

Polycentric approaches to regulation help organize the internet's potential chaos, using a multistakeholder approach. In polycentric systems of regulation, multiple nodes enforce norms on a semi-autonomous basis. Nodes may include states, nongovernmental organizations, corporations, voluntary associations, and other actors.³⁵ A polycentric model is driving aspects of U.S. cybersecurity policy.³⁶

³⁴ See Restoring Internet Freedom, 82 Fed. Reg. 25568 (proposed May 23, 2017) (describing internet interconnection services, as opposed to retail internet service for a monthly or hourly fee, as “historically unregulated”); FCC Report to Congress, Federal-State Joint Board on Universal Service, 13 FCC Rcd. 11501, 11524 para. 43 (Apr. 10, 1998) (“The language and legislative history of both the House and Senate bills indicate that the drafters of each bill regarded telecommunications services and information services as mutually exclusive categories.”); Letter from Five Senators to Honorable William E. Kennard, Chairman, FCC, at 1 (Mar. 20, 1998) [<http://perma.cc/67U8-DZNR>] (“[N]othing in the 1996 [Telecommunications] Act or its legislative history suggests that Congress intended to alter the current classification of Internet and other information services or to expand traditional telephone regulation to new and advanced services.”); Comments of AT&T Services, Inc., Protecting and Promoting the Open Internet; Framework for Broadband Internet Services, before the FCC, GN Docket Nos. 14-28, 10-127, at 59 (July 15, 2014) [<http://perma.cc/VL7W-53RA>] (describing “backbone Internet access and content-delivery services to thousands of large and small businesses and edge providers” as “historically unregulated peering and transit arrangements” under federal law); see also Sarah Castle, *Cyberbullying on Trial: The Computer Fraud and Abuse Act and United States v. Drew*, 17 J.L. & POL’Y 579, 597 (2009) (“After all, [internet speech] involves the expression of words and thoughts through an historically unregulated medium.”); Ann Daniels, *The Online Gun Marketplace and the Dangerous Loophole in the National Instant Background Check System*, 30 J. MARSHALL J. INFO. TECH. & PRIV. L. 757, 760, 766–67 (2014) (noting that websites such as Armslist operate as “unregulated bazaar[s]” because federal law exempts secondary sales of firearms from regulations applicable to primary sales with licensed gun dealers); Philipp Paech, *The Governance of Blockchain Financial Networks*, 80 MOD. L. REV. 1073 (2017), http://eprints.lse.ac.uk/87569/1/Paech_Governance%20of%20Blockchain_Author.pdf [<http://perma.cc/5SRS-LJ45>] (attributing “the original, highly disruptive concept underlying *Bitcoin* or *Ethereum*” to “open, largely anonymous, unregulated peer-to-peer networks that eliminate the need for financial intermediaries”). For example, on bulletin boards organized by Usenet or services such as Yahoo!, young people and others could anonymously post their thoughts for the world at large to potentially read. See Castle, *supra*, at 583 n.24.

³⁵ See Elinor Ostrom, *Coping with Tragedies of the Commons*, 2 ANN. REV. POLI. SCI. 493, 528 (1999) [<http://perma.cc/EP7W-7TDQ>]; see also Elinor Ostrom, Polycentric Systems as One Approach for Solving Collective-Action Problems 1–2 (2008) (Ind. Univ. Sch. Pub. & Env’t Aff., Research Paper No. 2008-11-02), http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/4417/W08-6_Ostrom_DLC.pdf [<http://perma.cc/V9DM-9AFV>]; VINCENT OSTROM, THE MEANING OF AMERICAN FEDERALISM: CONSTITUTING A SELF-GOVERNING SOCIETY 17–18 (1991); VINCENT OSTROM, *Federalism, Polycentricity, and Res Publica: Some Reflections on the American Experiments in Republican Government*, in THE PRACTICE OF CONSTITUTIONAL DEVELOPMENT: VINCENT OSTROM’S QUEST TO UNDERSTAND HUMAN AFFAIRS 49 (Filippo Sabetti, Barbara Allen & Mark Sproule-Jones eds., 2008); see generally Vincent Ostrom, *Polycentricity*, Paper Presented at 1972 Annual Meeting of the American Political Science Association, Washington, D.C. (Sept. 5, 1972) <http://hdl.handle.net/10535/3763> [<http://perma.cc/Z5QN-3WXH>].

³⁶ See CCIA Urges Senate to Improve Cybersecurity Information Sharing Act, COMPUT.

Cryptocurrencies may be well-suited to polycentric regulatory responses. Crypto coin networks are not traditional properties or companies that could ever be controlled by an executive officer or board of directors; they bring together dispersed creative and technical contributors. Bitcoin is a “concept” and “network” like the internet, as well as a quantum of measurement or value for various transactional purposes.³⁷ Altcoins, appcoins, and ICOs involve opportunities to access or deploy segments of digital code.³⁸ The Monetary Authority of Singapore describes coins and tokens as “cryptographically—secured representation[s]” of the right to obtain something or do something, presumably something that the issuer of the coin or token can influence.³⁹

As the first cryptocurrency, Bitcoin has a fascinating history. It was launched in January 2009 with a reference to the second bailout of the British banks.⁴⁰ A paper attributed to Satoshi Nakamoto was subtitled “A Peer-to-peer electronic cash system.”⁴¹ Just as Napster and Limewire replaced vulnerable websites for hosting music files with a distributed network of user file libraries, Bitcoin would distribute the transaction ledger in a permissionless and transparent way, while eliminating inflation by restricting the number of coins and requiring increasingly complex math problems to be solved to issue them as supply runs out.⁴² It is thought that the PayPal blockade of Wikileaks—a move towards coordinated corporate censorship that presaged recent initiatives to ban social media users—contributed to online support for an alternative to corporate systems.⁴³ In that respect, the rise and fate of

& COMMC’NS INDUS. ASS’N (Oct. 15, 2015), <http://www.ccianet.org/2015/10/ccia-urges-senate-to-improve-cybersecurity-information-sharing-act> [<http://perma.cc/TF9V-3JZB>]; see generally *Vulnerabilities Equities Policy and Process for the United States Government*, WHITE HOUSE (Nov. 15, 2017), <http://www.whitehouse.gov/sites/whitehouse.gov/files/images/External%20-%20Unclassified%20VEP%20Charter%20FINAL.PDF> [<http://perma.cc/4PKH-TVFY>].

³⁷ See *Some Bitcoin Words You Might Hear*, BITCOIN, <http://bitcoin.org/en/vocabulary> [<http://perma.cc/9A9B-8LXM>]; Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN, <http://bitcoin.org/bitcoin.pdf> [<http://perma.cc/7JNK-NNF8>].

³⁸ See *Cryptocurrencies: Oversight of New Assets in the Digital Age: Hearing Before the H. Comm. on Agric.*, 115th Cong. (2018) (statement of Lowell D. Ness, Managing Partner of Perkins Coie LLP); Nathan Schneider, *Decentralization: An Incomplete Solution*, J. CULT. ECON. 1, 7 (2019) (discussing altcoins); Zuluaga, *supra* note 17, at 2 (discussing ICOs and AppCoins as code); cf. *Policing the Wild Frontier*, ECONOMIST (Apr. 26, 2018), <http://www.economist.com/finance-and-economics/2018/04/26/regulating-virtual-currencies-and-icos> [<http://perma.cc/3GGM-DN6R>] (ICOs involve investments in “virtual tokens,” a form of “technology,” specifically based on “blockchain technology”).

³⁹ JONES DAY, *supra* note 19, at 2.

⁴⁰ Coryanne Hicks, *The History of Bitcoin*, U.S. NEWS (Sept. 1, 2020), <http://money.usnews.com/investing/articles/the-history-of-bitcoin>.

⁴¹ Nakamoto, *supra* note 37.

⁴² See *id.*

⁴³ See Yochai Benkler, *A Free Irresponsible Press: WikiLeaks and the Battle over the*

cryptocurrencies is fundamentally tied to the great political controversies of our century.⁴⁴ Bitcoin and crypto coin software in general embody a form of political association and organizing for collective freedom.⁴⁵

Cryptocurrencies and blockchains are in their infancy. They are like the internet in 1989 or 1990. In their world, Amazon and Google have not been invented yet. Innovators are trying to solve problems with transaction costs and delays, energy consumption, theft, and lack of trust.⁴⁶

Part of the case for crypto coins involves promoting economic efficiency.⁴⁷ Blockchains could reduce the costs of wire transfers, private ledgers, and other financial costs dramatically by some estimates.⁴⁸ One method of enabling frictionless commerce is to deploy automated smart contracts to pay out tokens based upon conditions triggered by Internet of Things devices or other technologies.⁴⁹ Cryptocurrency-enabled sectors of the economy in the near future could include software, social media, logistics, hospitality, wallets, payments, capital markets and investment banking, real estate, and many others.⁵⁰

Soul of the Networked Fourth Estate, 46 HARV. CIV. RTS.-CIV. LIB. L. REV. 311, 312–15 (2011) (describing blockades of Wikileaks donations); Mark Jansen, *Bitcoin: The Political Virtual of an Intangible Virtual Currency*, 17 INT'L J. CMTY. CURRENCY RSCH. 8, 10 (2012) (describing links of BitCoin's rise to Wikileaks blockade); Benjamin Wallace, *The Rise and Fall of Bitcoin*, WIRED (Nov. 23, 2011, 2:52 PM), <http://www.wired.com/2011/11/mf-bitcoin/> [<http://perma.cc/29SW-XHR7>].

⁴⁴ See Benkler, *supra* note 43, at 313; Philip Di Salvo, *Whistleblowers*, in THE INTERNATIONAL ENCYCLOPEDIA OF JOURNALISM STUDIES 1, 1–3 (2019); KATHLEEN HALL JAMIESON, CYBERWAR: HOW RUSSIAN HACKERS AND TROLLS HELPED ELECT A PRESIDENT: WHAT WE DON'T, CAN'T, AND DO KNOW 1 (2018); Peter Osborne, *He's a Hero, not a Villain*, 30 BRIT. JOURNALISM REV. 43, 44 (2019); Brian Rappert, *Leaky Revelations: Commitments in Exposing Militarism*, 60 CURRENT ANTHROPOLOGY S148, S148 (2019).

⁴⁵ See Ashutosh Bhagwat, *When Speech Is Not "Speech,"* 78 OHIO STATE L.J. 839, 884 (2017) (arguing that "First Amendment protection should extend only to collective, communicative activity that has relevance to democratic citizenship and self-governance (defined broadly)" and surveying related case law). It is noteworthy that the sale of violent video games to minors and the operation of commercial adult websites constitute "speech," even though such conduct offers little in terms of argumentation or analysis that is important for political or economic progress. See *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011); see *Ashcroft v. Am. Civ. Liberties Union*, 542 U.S. 656, 666–67 (2004).

⁴⁶ See, e.g., Nicola Atzei, Massimo Bartoletti & Tiziana Cimoli, *A Survey of Attacks on Ethereum Smart Contracts*, in 6TH INTERNATIONAL CONFERENCE ON PRINCIPLES OF SECURITY AND TRUST 164–86 (Matteo Maffei & Mark Ryan eds., 2017).

⁴⁷ See DAVID MILLS ET AL., FED. RSRV. BD., 2016-095, DISTRIBUTED LEDGER TECHNOLOGY IN PAYMENTS, CLEARING, AND SETTLEMENT (2016).

⁴⁸ See PRIMAVERA DE FILIPPI & AARON WRIGHT, BLOCKCHAIN AND THE LAW: THE RULE OF CODE 64 (2018); see RACHEL F. FEFER, CONG. RSCH. SERV., IF10810, BLOCKCHAIN AND INTERNATIONAL TRADE 1 (2019); see MILLS ET AL., *supra* note 47.

⁴⁹ See DE FILIPPI & WRIGHT, *supra* note 48, at 72–76, 81, 88.

⁵⁰ See, e.g., *infra* Tables 1 and 2; see also Eric Johnson, *Logistics Startup ShipChain Hit with Cease-and-Desist Order*, JOC.COM (May 23, 2018, 12:48 PM),

B. Crypto Coin White Papers as Speech

ICOs are solicitations to buy or subscribe to systems of digital code, or to accept them for various forms of informational or commercial exchanges.⁵¹ Bitcoins are computer files that share certain characteristics of currencies, such as being tradable for goods or services or for official currencies, and being accepted for deposit in online accounts (wallets, i.e. other computer files).⁵² Application tokens, known as appcoins, coordinate rights of access to content, programs, networks, or online democracies, most famously in the way that semi-autonomous code-based economic agents known as “smart contracts” operate on the Ethereum network to unlock content or resources in an ecosystem, the “Cryptocosm.”⁵³

Bitcoin transactions, like those in the banking system, are recorded on ledgers.⁵⁴ A ledger is a database, and a database is a form of speech. Blockchains are public ledgers of transactions, and differ from bank ledgers in being more public, more comprehensive of all transactions in a given cryptocurrency or

http://www.joc.com/international-logistics/logistics-startup-shipchain-hit-cease-and-desist-order_20180523.html (discussing an example of a logistics project); Abhimanyu Krishnan, *4 Blockchain Projects That Will Change the Real Estate Industry*, INV. IN BLOCKCHAIN (Mar. 13, 2018), <http://www.investinblockchain.com/blockchain-projects-real-estate/> [<http://perma.cc/3BGG-V6MV>] (discussing hospitality and real estate project examples); LBRY (@LBRYcom), TWITTER (2019), <http://twitter.com/LBRYcom> (providing updates on a social media project); *Ledger Fever: 95 Bitcoin & Blockchain Startups in One Market Map*, CB INSIGHTS (Feb. 23, 2017), <http://www.cbinsights.com/research/bitcoin-blockchain-startup-market-map/> [<http://perma.cc/3BGG-V6MV>] (listing capital markets and wallets/payments projects); Matt Levine, *The SEC Gets a Token Fight*, BLOOMBERG (Jan. 29, 2019, 5:35 AM), <http://www.bloomberg.com/opinion/articles/2019-01-28/the-sec-gets-a-token-fight> [<http://perma.cc/M59E-DJW7>] (discussing apps).

⁵¹ See Future Tech Podcast, *Cooley LLP Marco Santori Fintech Bitcoin and Blockchain Attorney*, YOUTUBE (July 11, 2017), <http://www.youtube.com/watch?v=tPGQS0Aiu5Q>; see Zuluaga, *supra* note 17, at 2, 4; cf. *Policing the Wild Frontier*, *supra* note 38, at 67 (explaining that ICOs involve buying or subscribing to “blockchain technology”).

⁵² See Fed. Election Comm’n, Advisory Opinion 2014-02 (May 8, 2014), at 2, <http://www.fec.gov/files/legal/aos/2014-02/2014-02.pdf> [<http://perma.cc/V53G-SPK4>] (citing U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-516, VIRTUAL ECONOMIES AND CURRENCIES 5 (2013), <http://www.gao.gov/assets/660/654620.pdf> [<http://perma.cc/CM9W-WDN4>]); see François R. Velde, *Bitcoin: A Primer*, CHI. FED LETTER (Fed. Rsrv. Bank of Chi., Chi., Ill.), no. 317, Dec. 2013, at 1, http://www.chicagofed.org/digital_assets/publications/chicago_fed_letter/2013/cfldecember2013_317.pdf [<http://perma.cc/R9L7-YDLR>].

⁵³ See Jonathan Rohr & Aaron Wright, *Blockchain-Based Token Sales, Initial Coin Offerings, and the Democratization of Public Capital Markets*, 70 HASTINGS L.J. 463, 474–78 (2019); see also *How Can the Blockchain Disrupt the App Store Business?*, *supra* note 13; Future Tech Podcast, *supra* note 51; GEORGE GILDER, *LIFE AFTER GOOGLE: THE FALL OF BIG DATA AND THE RISE OF THE BLOCKCHAIN ECONOMY* (2018).

⁵⁴ Benjamin Wallace, *The Rise and Fall of Bitcoin*, WIRED (Nov. 23, 2011, 2:52 PM), <http://www.wired.com/2011/11/mf-bitcoin/> [<http://perma.cc/29SW-XHR7>].

token, and semi-private in that in many instances the transacting parties' names, addresses, countries of residence, and IP addresses are not reliably linked to each transaction record.⁵⁵ Blockchains are often touted as being "immutable," but "forks" of a particular chain, such as the Ethereum blockchain, may change the ledger after a vote or other decision by the token's subscribers, foundation, or other controlling parties.⁵⁶ They promote the integrity of cryptocurrencies like Bitcoin by providing a radically distributed, yet richly transparent index of transactions.⁵⁷

ICOs involve the sale of cryptocurrency tokens based largely on white papers, or extended arguments for why a new way of organizing economic relations, assembling and deploying assets, or exchanging messages or entitlements could benefit the buyers of tokens.⁵⁸ An ICO white paper typically strikes four major themes: bold and optimistic predictions for the future, summaries of the cryptographic solution employed, indications of how the coin or asset will unlock content or network resources, and arguments about how peer-to-peer production of that content or resource will help secure a better or more efficient future. Table 1 presents examples of future-predictive themes from influential white papers for ICOs.⁵⁹

⁵⁵ See Fed. Election Comm'n, *supra* note 52, at 2; DEP'T OF COM., NAT'L INST. OF STANDARDS & TECH., NISTIR 8202, BLOCKCHAIN TECHNOLOGY OVERVIEW (2018); Rebecca Lewis et al., *Blockchain and Financial Market Innovation*, ECON. PERSPS. (Fed. Rsrv. Bank of Chi., Chi., Ill.), no. 7, 2017, at 1; see also 2 ANDREAS M. ANTONOPOULOS, THE INTERNET OF MONEY 59–60 (2017).

⁵⁶ See Vitalik Buterin, *Hard Fork Completed*, ETHEREUM FOUND. BLOG (July 20, 2016), <http://blog.ethereum.org/2016/07/20/hard-fork-completed/> [<http://perma.cc/2VJP-6UFJ>]; see DAVID MILLS ET AL., *supra* note 47, at 17.

⁵⁷ See Ty McCormick, *The Darknet: A Short History*, FOREIGN POL'Y (Dec. 9, 2013, 5:44 PM), <http://foreignpolicy.com/2013/12/09/the-darknet-a-short-history/> [<http://perma.cc/288Y-SKWN>].

⁵⁸ See *Investor Bulletin: Initial Coin Offerings*, *supra* note 8 (referring to use of white papers in ICOs).

⁵⁹ While Bitcoin did not hold an ICO, it offered coins in return for mining, or contributions of computing power to the network, so it is included here as offering something for coins for that reason, as well as for the sake of completeness.

Table 1: ICO White Paper Predictions

Bitcoin ⁶⁰	In payment systems, security and privacy will come into conflict as increases in computing power may necessitate a public history of transactions that is too large and complex to tamper or forge; the public record of transactions could threaten privacy while hacks will threaten payment security.
Ethereum ⁶¹	In the future, autonomous agents will exist on blockchains to allocate resources and currency balances, offering an alternative to centralized corporations.
Ripple ⁶²	There is a need for a global, distributed payment-processing system, which would resist not only fraud but also authentic transactions that conflict (presenting the double-spending problem).
EOS ⁶³	Blockchain users typically write distributed applications or DApps for customers in finance, logistics, media, retail sales, or the sharing economy, and want a decentralized and open-entry community in which to do so, secured with cryptography and a “Constitution” for dispute-resolution.
TRON ⁶⁴	By partnering with BitTorrent, a decentralized userbase adopting the same crypto token can empower creators to distribute their work directly to fans without incurring intermediary charges.

⁶⁰ Nakamoto, *supra* note 37, at 1.

⁶¹ Vitalik Buterin, *A Next Generation Smart Contract & Decentralized Application Platform*, <http://web.archive.org/web/20140126001912/http://www.ethereum.org/ethereum.html> [<http://perma.cc/5G52-ELAE>].

⁶² David Schwartz, Noah Youngs & Arthur Britto, *The Ripple Protocol Consensus Algorithm*, http://ripple.com/files/ripple_consensus_whitepaper.pdf [<http://perma.cc/LPS5-XX6Q>].

⁶³ Ian Grigg, *EOS - An Introduction*, 7 (July 5, 2017), <http://whitepaperdatabase.com/wp-content/uploads/2018/03/EOS-Introduction-whitepaper.pdf> [<http://perma.cc/CR4J-3BU9>]; see also *EOS.IO Technical White Paper v2*, GITHUB (Mar. 16, 2018), <http://github.com/EOSIO/Documentation/blob/master/TechnicalWhitePaper.md> [<http://perma.cc/CZ4G-NJEY>]; GITHUB, <http://github.com> [<http://perma.cc/MNX6-LLA9>]. BitCoin, Ether, Ripple, and EOS were among the top 200 coins by market capitalization in early 2020. See, e.g., *All Cryptocurrencies*, *supra* note 20.

⁶⁴ *Tron: Whitepaper*, TRON 16 (2018), <http://web.archive.org/web/20180104232249/https://dn-peiwoweb-qbox.me/Tron-Whitepaper-1031-V18-EN.pdf> [<http://perma.cc/K9CX-2T8Q>]. See also *Tron: Advanced Decentralized Blockchain Platform*, TRON 4 (Dec. 10, 2018), http://tron.network/static/doc/white_paper_v_2_0.pdf [<http://perma.cc/7GXU-WE78>]; Ailsa Sherrington, *TRON Answers Our Questions About Project Atlas*, THENEXTWEB (Dec. 5, 2018), <http://thenextweb.com/hardfork/2018/12/05/tron-answers-our-questions-about-project-atlas> [<http://perma.cc/77DD-WSNJ>]. TRON was among the top 200 coins by market capitalization in early 2020. See, e.g., *All Cryptocurrencies*, *supra* note 20.

Golem ⁶⁵	Instead of subscribing to expensive corporate cloud service providers, digital artists and others in need of sophisticated computing resources will rent them from a decentralized supercomputer fueled by microservices rendered in exchange for token transfers.
Kin ⁶⁶	Creative people with internet access, by building cooperative content platforms using tokens, will be liberated from dependence on large advertising-based social media corporations.
Filecoin ⁶⁷	Internet users, by using encrypted and decentralized storage of their content provided in exchange for the network's coin, will evade censorship and interception of data while enjoying reliability of files.
Steem ⁶⁸	Contributors to the vast advertising businesses of major social media platforms will take control of their creativity by using smart tokens to rapidly and efficiently earn money from fan communities.
Musicoin ⁶⁹	Hundreds of thousands of musicians can collaborate independently on the same blockchain-powered platform to sell or license their music and get paid rapidly and reliably.
Bancor ⁷⁰	An "Internet of Value" will enable anyone to adopt a digital token that will help them get paid for writing articles, commenting in discussions, or selling goods or services.
Gram ⁷¹	A social media application can integrate an advanced multi-blockchain architecture that can handle thousands of distributed applications for the network's users.

⁶⁵ *The Golem Project: Crowdfunding Whitepaper*, GOLEM (Nov. 2016), <http://golem.network/crowdfunding/Golemwhitepaper.pdf> [<http://perma.cc/8JH2-6RXB>]. Golem was among the top 100 coins by market capitalization in early 2020. See, e.g., *All Cryptocurrencies*, *supra* note 20.

⁶⁶ *Kin: A Decentralized Ecosystem of Digital Services for Daily Life*, KIN 6 (May 2017), http://www.kin.org/static/files/Kin_Whitepaper_V1_English.pdf [<http://perma.cc/Q6HK-5VNG>]. See also Levine, *supra* note 50 (describing Kik Interactive's dispute with the SEC over registration of this white paper).

⁶⁷ *Filecoin: A Decentralized Storage Network*, PROTOCOL LABS 1 (July 19, 2017), <http://filecoin.io/filecoin.pdf> [<http://perma.cc/QT2A-5KL8>]. Filecoin was among the top 200 coins by market capitalization in early 2020. See, e.g., *All Cryptocurrencies*, *supra* note 20.

⁶⁸ *Steem: An Incentivized, Blockchain-based, Public Content Platform*, STEEM 5 (June 2018), <http://steem.com/SteemWhitePaper.pdf> [<http://perma.cc/SA96-AXTU>].

⁶⁹ *Musicoin: A Decentralized Platform Revolutionizing Creation, Distribution and Consumption of Music*, MUSICOIN 12 (Oct. 2017), <http://drive.google.com/file/d/1KVvcwPKUngMNffgWW65k1p4UvKg5QG0u/view> [<http://perma.cc/626S-MDGH>].

⁷⁰ Eyal Hertzog, Guy Benartzi & Galia Benartzi, *Bancor Protocol: Continuous Liquidity for Cryptographic Tokens Through Their Smart Contracts*, 3 (Mar. 18, 2018), http://storage.googleapis.com/website-bancor/2018/04/01ba8253-bancor_protocol_whitepaper_en.pdf [<http://perma.cc/LDB7-39VS>]. Bancor was among the top 200 coins by market capitalization in early 2020. See, e.g., *All Cryptocurrencies*, *supra* note 20.

⁷¹ Nikolai Durov, *Telegram Open Network*, 3, 79, 101, 124 (Mar. 2, 2019), <http://test.ton.org/ton.pdf> [<http://perma.cc/E8TD-Q7Y6>].

OpenST ⁷²	Individuals and companies will mint and issue branded, digital tokens that users can easily exchange for other branded tokens or for a “Simple Token”—a convertible store of value across many brands.
Syncfab ⁷³	In the Industrial Internet of Things (IIOT), tokens will incentivize manufacturers and supply chain vendors to exchange time-sensitive supply and demand information more rapidly, as well as competitively sensitive data, like purchase histories, to decentralize and revolutionize manufacturing.
Smart VALOR ⁷⁴	Memberships in a new form of stock exchange will be made available in a token sale, with the members then participating in a Swiss-based marketplace for crypto coins—including asset-backed tokens relating to emerging companies, venture capital, private equity, and real estate funds.
Gram ⁷⁵	All information, including photo and video, will be sold at its market-clearing price using a token that approximates in value a share of all the information available for purchase with the token; miners will maintain the metadata on available information and its pricing to earn tokens.
Fetch.ai ⁷⁶	Using a new platform for trading machine intelligence, data can “sell itself” over a decentralized protocol that operates more efficiently, and in more dimensions, than traditional software retailers.

The Bitcoin paper initiated the tradition of crypto coin offerings heralding a new form of economic organization in which the users of a public network, by joining the processing power and storage capacity of their collective computing resources, would forge an alternative to government-backed financial intermediaries keeping currency users “honest.”⁷⁷

⁷² Benjamin Bollen et al., *OpenST Protocol White Paper*, 22 (June 1, 2018), <http://drive.google.com/file/d/0Bwgf8QuAEOb7Z2xIeU1Ld21DSjQ/view> [<http://perma.cc/MY7Q-NUQV>]. See also GITHUB PAGES, [github.io](https://github.com) [<http://perma.cc/2BWB-WW6H>].

⁷³ *Decentralized Manufacturing*, SYNCFAB 7 (Aug. 3, 2018), http://syncfab.com/SyncFab_MFG_WP.pdf [<http://perma.cc/3Y84-Z73Q>].

⁷⁴ *Decentralized Marketplace for Tokenized Alternative Investments*, SMART VALOR 2, 9–10, 60 (Nov. 2018), <http://res.smartvalor.com/pblic/SMART-VALOR-WhitePaper.pdf> [<http://perma.cc/4PJJ-E2XJ>] (arguing that it is a basic human right for people all over the world to possess and make their own decisions about their money and investments).

⁷⁵ Durov, *supra* note 71, at 45.

⁷⁶ Toby Simpson, Arthur Meadows & Humayun Sheikh, *Fetch.AI: Token Overview: A Decentralised World for the Future Economy*, 7, 22 (Feb. 2019), <http://fetch.ai/wp-content/uploads/2019/10/Fetch.AI-Token-Overview.pdf> [<http://perma.cc/G5EC-6GAW>]. Fetch.ai was among the top 200 coins by market capitalization in early 2020. See, e.g., *All Cryptocurrencies*, *supra* note 20.

⁷⁷ See Nakamoto, *supra* note 37, at 1 (arguing that the decentralized public ledger of

Altcoins and other crypto coins continue to argue in their vein, speculating that and providing reasons why peer-to-peer administration of a collective resource such as a payment, storage, or media network will benefit coin holders. Table 2 presents examples of peer-to-peer arguments from influential or otherwise noteworthy white papers for ICOs.

Table 2: P2P Arguments in White Papers

Bitcoin ⁷⁸	A peer-to-peer network could document a public record of token spending, using cryptographic proof-of-work timestamps to distribute the role of verifying transactions and token status to computer nodes distributed across a network, rather than using a ledger controlled by a trusted central party.
Ethereum ⁷⁹	In the future, autonomous agents will exist on blockchains to allocate resources and currency balances, offering an alternative to centralized corporations.
Ripple ⁸⁰	There is a need for a global, distributed payment-processing system which would resist both fraud and authentic but conflicting (double-spent) transactions.
EOS ⁸¹	Blockchain users typically write distributed applications or DApps for customers in finance, logistics, media, retail sales, or the sharing economy, and want a decentralized and open-entry community in which to do so, secured with cryptography and a “Constitution” for dispute-resolution.
TRON ⁸²	By acquiring the BitTorrent software and protocol, the TRON token founders are bringing DApps and smart contracts to end users who can now directly exchange information or value without trusted central intermediaries.

token spending, maintained simultaneously at many nodes and updated on a peer-to-peer basis, would be computationally too voluminous to tamper with if user nodes remain “honest” for the most part: “The system is secure as long as honest nodes collectively control more CPU power than any cooperating group of attacker nodes.”)

⁷⁸ *See id.*

⁷⁹ Buterin, *supra* note 56.

⁸⁰ Schwartz et al., *supra* note 62; *see also* ARVIND NARAYANAN ET AL., BITCOIN AND CRYPTOCURRENCY TECHNOLOGIES: A COMPREHENSIVE INTRODUCTION 36 (2016); STEFAN LOESCH, A GUIDE TO FINANCIAL REGULATION FOR FINTECH ENTREPRENEURS 31 (2018); BERNARDO NICOLETTI, THE FUTURE OF FINTECH: INTEGRATING FINANCE AND TECHNOLOGY IN FINANCIAL SERVICES 4 (1st ed. 2017); Robert Pemberton, THE RISE OF RIPPLE - THE STARTER GUIDE TO UNDERSTANDING RIPPLE CRYPTOCURRENCY AND WHAT YOU NEED TO KNOW (2018),

<http://www.scribd.com/read/367903350/The-Rise-of-Ripple-The-Starter-Guide-to-Understanding-Ripple-Cryptocurrency-and-What-You-Need-to-Know> [<http://perma.cc/KN5C-CZBP>].

⁸¹ Grigg, *supra* note 63, at 7.

⁸² *Tron: Advanced Decentralized Blockchain Platform*, *supra* note 64, at 4–5, 7, 37.

Golem ⁸³	Computers assembled in a peer-to-peer network can share the network's applications, computing capacity, and other infrastructure, unrestricted by the rules of proprietary cloud solutions or payment processors. When combined with storage coins like Filecoin and the capabilities of other Ethereum tokens, the Golem network could enable even large streaming services to run in decentralized ways.
Kin ⁸⁴	The Kin token will be a "decentralized ecosystem of digital services for daily life," enabling creators for social media and other industries and even casual browsers to be paid for their contributions to public discourse.
Filecoin ⁸⁵	A "peer-to-peer algorithmic market[]" for storage will be more efficient than "monolithic" options.
Steem ⁸⁶	Social media intermediaries such as Facebook and YouTube could be replaced with a blockchain for attribution and payments, with fast-launching digital assets maintained using a decentralized blockchain and open-source software.
Musicoin ⁸⁷	A Pay Per Play Smart Contract will harness peer-to-peer file sharing's efficiency while promoting remuneration of musicians at higher levels than the record labels or streaming giants plan to allow.
Bancor ⁸⁸	A "Smart Token" network will facilitate a multiplicity of highly liquid low-fee mechanisms of digital exchange.
OpenST ⁸⁹	Users who join an open network of networks can leverage "crypto-economics" to mint and issue their own tokens that may be tethered to a convertible crypto-assets backed by a "value blockchain."
Syncfab ⁹⁰	In the Industrial Internet of Things (IIOT), tokens will incentivize manufacturers and supply chain vendors to exchange time-sensitive supply and demand information more rapidly, as well as competitively sensitive data like purchase histories, to decentralize and revolutionize manufacturing.
Smart Valor ⁹¹	A peer-to-peer marketplace for tokens and token-backed investments achieves scale by incentivizing issuers and investors to participate and then leveraging the transactional relationships among its participants, thereby promoting the

⁸³ GOLEM, *supra* note 65.

⁸⁴ Defendant's Answer at 82, SEC v. Kik Interactive Inc., No. 19-cv-5244 (S.D.N.Y. Aug. 6, 2019) <http://www.courtlistener.com/recap/gov.uscourts.nysd.516941/gov.uscourts.nysd.516941.22.0.pdf> [<http://perma.cc/YD6G-U73W>].

⁸⁵ PROTOCOL LABS, *supra* note 67, at 1.

⁸⁶ STEEM, *supra* note 68, at 31.

⁸⁷ MUSICOIN, *supra* note 69, at 12.

⁸⁸ Hertzog et al., *supra* note 70, at 5.

⁸⁹ Bollen et al., *supra* note 72, at 5.

⁹⁰ SYNCFAB, *supra* note 73, at 18.

⁹¹ SMART VALOR, *supra* note 74, at 9, 58.

	“basic human right for people all over the world to possess and make their own decisions about their money and investments.”
Gram ⁹²	A multi-blockchain infrastructure, potentially integrated with a social messaging application, could execute and secure millions of transactions per second, scaling up crypto applications.
Fetch.ai ⁹³	Decentralized software agents collaborating in an “ <i>economic Internet</i> ” will offer themselves and seek out their brethren to perform computing tasks including machine learning, in exchange for tokens.

C. AppCoins as Microtransactions to Access Expressive Content

With appcoins, software developers will enjoy more open and social—and perhaps more fair and just—ways of finding users.⁹⁴ Cryptocurrencies and token standards enable investors and startup founders to collaborate smoothly and quickly.⁹⁵ A market for apps worth an estimated \$200 billion annually in this decade will be revolutionized, and become more efficient.⁹⁶ The West Coast credo of “beg for forgiveness, don’t ask for permission” has ensured that work on ICOs has continued despite many warnings and great uncertainty, with those from the East Coast and other regions who are more cautious being left behind.⁹⁷

Appcoins could serve as decentralized versions of the ubiquitous microtransactions that dominate video games

⁹² See Durov, *supra* note 71, at 3, 101.

⁹³ See Simpson et al., *supra* note 76, at 7.

⁹⁴ See APPCOINS OFFICIAL, *AppCoins ICO is Closed—Hardcap Reached!*, MEDIUM (Dec. 21, 2017), <http://appcoins.medium.com/appcoins-ico-is-closed-hardcap-reached-3a653e6b9208> [<http://perma.cc/6WJY-L5SU>] (“AppCoins is a new cryptocurrency that all Aptoide users can earn and spend inside app stores. Once the protocol is implemented, AppCoins can be adopted by any app store, regardless of the operating system. The protocol creates a new shared ecosystem among all app stores, powered by the blockchain. AppCoins is to become the new universal language of the global app economy.”); see also *AppCoins: Redesigning the App Economy*, *supra* note 14, at 1, 4–6, 16–18 (explaining how AppCoins will target problems facing traditional app stores such as their closed systems for app approval, high advertising costs as a percentage of initial revenue, low levels of participation in in-app economies, and high intermediary charges reducing developers’ margins).

⁹⁵ See generally *Why Aptoide?*, APTOIDE (2020), <http://en.aptoide.com/company/> [<http://perma.cc/QEG7-R5U4>] (providing information on “[a]ll the advantages of the blockchain technology” for over three hundred million users in addition to stating that “[r]ecent studies prove that Aptoide is the safest Android app store”).

⁹⁶ See *AppCoins: Redesigning the App Economy*, *supra* note 14, at 19.

⁹⁷ Future Tech Podcast, *supra* note 51; see also *Our Clients: Angellist*, COOLEYGO (2020), <http://www.cooleygo.com/clients/angellist/> [<http://perma.cc/B5KT-YFPE>] (describing the “ask for forgiveness, not permission” approach as the corporate policy of Angellist, a California-based company designed to help startups change the world through permissionless innovation); see generally ADAM THIERER, PERMISSIONLESS INNOVATION: THE CONTINUING CASE FOR COMPREHENSIVE TECHNOLOGICAL FREEDOM 7 (2016).

marketed on a freemium model, or as existing in persistent online multiplayer worlds. As of nearly five years ago, Electronic Arts earned about two-thirds of a billion dollars in revenue from microtransactions in sports games such as *FIFA 16*.⁹⁸ In 2019, the top five free-to-play video games each made more than \$1.5 billion in revenue, driven largely by microtransactions.⁹⁹ There was an estimated \$90 billion in freemium revenue in 2019.¹⁰⁰ Cryptocurrencies may make microtransactions more lucrative and efficient for developers of games, or other creative works, because the administrative costs and intermediary fees may be reduced.¹⁰¹

Using units such as the Satoshi, one hundred million of which equal one Bitcoin, gatherers or curators of data to which others might like to subscribe—like sports data for fantasy football players or financial data for market timers—could be paid in efficient microtransactions, including subscription or usage fees.¹⁰² Microtransactions of this kind establish a persistent market in virtual worlds alongside the traditional market in game graphics and engines sold on recorded media, such as CDs or DVDs.¹⁰³ In addition, combining microtransactions with crypto coins liberates players from the arbitrary discretion of the publisher in the traditional model, which results in days and days of work on characters and buildings being deleted.¹⁰⁴ An appcoin enables the players of

⁹⁸ See Matthew R. Yost, *Video Game Gambling: Too Big a Bet for New Jersey*, 70 RUTGERS UNIV. L. REV. 335, 341 (2017); see also Rebecca E. McDonough, *Loot Boxes: "It's a Trap!"*, 46 N. KY. L. REV. 62, 85 (2019) (defining microtransactions and identifying them as responsible for "81% of the approximately \$36 billion generated in revenue for the video game industry" in 2017 alone).

⁹⁹ See Eric Griffith, *2019's Top 'Free' Games Each Made \$1.5 Billion-Plus*, PCMAG (Jan. 13, 2020), <http://www.pcmag.com/news/2019s-top-free-games-each-made-15-billion-plus> [<http://perma.cc/3UVN-UG9E>].

¹⁰⁰ See *id.*

¹⁰¹ See MARC ANDREESSEN, *Why Bitcoin Matters*, NEW YORK TIMES (Jan. 21, 2014, 11:54 AM), <http://dealbook.nytimes.com/2014/01/21/why-bitcoin-matters> [<http://perma.cc/YA6S-QDQ9>]; Ioannis Lianos, *Blockchain Competition: Gaining Competitive Advantage in the Digital Economy—Competition Law Implications*, in REGULATING BLOCKCHAIN: TECHNO-SOCIAL AND LEGAL CHALLENGES 329, 335 (Philipp Hacker et al. eds. 2019); see also PEDRO FRANCO, UNDERSTANDING BITCOIN: CRYPTOGRAPHY, ENGINEERING, AND ECONOMICS 187 (2014) ("It is often said that Bitcoin makes micropayments viable, given Bitcoin's low fees.").

¹⁰² See SUREDBITS, *Micro-Transactions with Crypto*, MEDIUM (Aug. 17, 2018), <http://medium.com/suredbits/micro-transactions-with-crypto-117d6b72eebf> [<http://perma.cc/3SFU-5X8M>].

¹⁰³ Cf. Kirill Shilov, *3 Innovative Ways the Blockchain Can Ramp Up Your In-game Revenue*, HACKER NOON (Mar. 12, 2018), <http://hackernoon.com/3-innovative-ways-the-blockchain-can-ramp-up-your-in-game-revenue-c00cc92c661e> [<http://perma.cc/A4AR-BF99>] (stating that players are "more than happy to pay for in-game extras" and spend as much as they want because they can access otherwise unavailable characters and items).

¹⁰⁴ See BITGUILD, *BitGuild: Changing Games Forever*, MEDIUM (Mar. 1, 2018),

some games to secure their creations on the blockchain, protecting players from these abrupt losses.¹⁰⁵

Appcoins can help check the power of what regulators suggest is an emerging monopoly or oligopoly concerning the monetization of online content.¹⁰⁶ The market power of prominent

<http://medium.com/the-notice-board/bitguild-changing-games-forever-132d97332f00>
[<http://perma.cc/882S-HHNV>].

¹⁰⁵ See *id.* (“On the BitGuild platform, everything you earn in-game belongs to you and exists securely on the blockchain. As long as you control your private key, passphrase, and any secure information tied to your wallet, everything you’ve collected while playing is owned by you.”); see also *BitGuild: Blockchain Gaming Platform*, BITGUILD 10–12 (2018), http://static1.squarespace.com/static/5d522e48bfd7c300010f2c3c/t/5e27ed4400949e3e253e0541/1579674994414/BitGuild_Whitepaper_v0.73_EN.pdf [<http://perma.cc/J2A5-L6AR>]; *Meet Your New Blockchain Wallet*, ENJIN (2020), <http://enjin.io/software/wallet> [<http://perma.cc/8UZ7-2VFQ>] (“Securely store, buy, and sell blockchain assets and collectibles.”); Jeffrey Kaufmann, (July 2016) (LBRY Plan 6-10 on file with author) (offering an example of a blockchain-based social media platform that allows for content monetization); cf. Tim Copeland, *Taking Ethereum Mainstream: Social Media App Pepo Goes Live at Devcon 5*, DECRYPT (Oct. 8, 2019), <http://decrypt.co/10091/taking-ethereum-mainstream-social-media-app-pepo-goes-live-at-devcon-5> [<http://perma.cc/43XL-5WA3>] (describing Pepo, a crypto app that “allows for fast, cheap micropayments” on the Ethereum blockchain so users can “get paid in crypto when people upvote [or like their] 30-second videos”) (alteration in original); Jason Goldberg, *Thanks to Better UX, This Year Dapps Will Go Mainstream*, YAHOO FINANCE (Dec. 30, 2019), <http://finance.yahoo.com/news/thanks-better-ux-dapps-mainstream-103954527.html> [<http://perma.cc/R6VK-7XE5>] (“In Pepo, every tap of the ‘like’ button transfers a token—giving a whole new meaning and value to likes. Suddenly, content creators can be instantly rewarded by their fans and earn real money for their creations, without any middlemen.”); Gabriel Rubinstein, *This Blockchain-Based Social Media Network is the First Apple Pay Approved DApp*, COINTELEGRAPH (Nov. 15, 2019), <http://cointelegraph.com/news/this-blockchain-based-social-media-network-is-the-first-apple-pay-approved-dapp> [<http://perma.cc/3UTF-87LX>] (noting that Pepo “tokens are used to tip the creators [chosen by the user], but also can be spent on [gift cards via] the marketplace”) (alteration in original).

¹⁰⁶ See, e.g., FIN. TIMES LTD., *Big Tech Chiefs Cast as 21st Century Robber Barons at US Hearing*, IRISH TIMES (July 30, 2020, 12:31 AM), <http://www.irishtimes.com/business/technology/big-tech-chiefs-cast-as-21st-century-robber-barons-at-us-hearing-1.4317722> [<http://perma.cc/Z29K-MKB3>] (“The hearing cast the leaders of 21st century corporate America as modern robber barons”); Keach Hagey & Rob Copeland, *Justice Department Ramps up Google Probe, with Heavy Focus on Ad Tools*, WALL ST. J. (Feb. 5, 2020), http://www.wsj.com/articles/justice-department-ramps-up-google-probe-with-heavy-focus-on-ad-tools-11580904003?reflink=share_mobilewebshare&shareToken=stb1a208f43b2d40b2b3ad302dd94fde86 (noting that an inquiry by the Justice Department into antitrust violations involving the Internet is focusing on Google’s presence “at every link in the complex chain between online publishers and advertisers, giving it unique power over the monetization of digital content”); Pontin, *supra* note 13 (describing Internet intermediaries taking a large share of app developers’ online earnings); see also Taylor Hatmaker & Devin Coldewey, *Secret Documents from US Antitrust Probe Reveal Big Tech’s Plot to Control or Crush the Competition*, TECHCRUNCH (July 31, 2020, 12:07 PM), <http://techcrunch.com/2020/07/31/house-antitrust-investigation-documents> [<http://perma.cc/7YQU-J8N3>] (suggesting that internal Google documents produced “during the House Judiciary’s marathon hearing” may support some legislators’ theory that Google strove to “control or crush” competitors like YouTube because Google officials expressed “alarm about the ‘orthogonal threat’ posed by social networks and other websites with ‘high entertainment value’”) (emphasis added); Rachel Denney, *Will Antitrust Probe into Google Start Crackdown on Big Tech?*, IMPACT (Feb. 13, 2020),

platforms upon which creators rely to earn a living is even being compared to the railroad monopolies of the nineteenth century, which treated farmers and shippers arbitrarily and charged unjust and discriminatory rates in the years prior to the Interstate Commerce Act, thereby increasing enforcement of the Sherman Act.¹⁰⁷

Unlike corporate stock, which is an investment that will pay off or not based on the efforts of corporate management and does not confer an entitlement to use of a product or service, ICOs and appcoins such as Ether unlock network assets or application data.¹⁰⁸ Ether, as the Ethereum network token, leverages computing power for applications to use.¹⁰⁹ Most ICOs are not typical business shares or partnership contracts sold as investments without any utility in terms of software or content.¹¹⁰ Crypto coins are uniquely valuable because they are linked to creatively-developed applications and reams of networked data, as a result of which commentators use phrases such as “utility tokens” and “functional cryptocurrencies.”¹¹¹

<http://www.impactbnd.com/blog/will-antitrust-probe-into-google-start-crackdown-on-big-tech> [<http://perma.cc/G25H-LNS9>] (“Google controls multiple key platforms that companies use to place advertisements, such as YouTube, Google’s search engine, and a host of platforms that fall under ‘Google Network.’”); *id.* (“Google Ad Manager—which is comprised of DoubleClick Ad Exchange and DoubleClick for publishers—controls a significant portion of the infrastructure for monetizing digital content.”); Pares Dave & Sheila Dang, *Explainer: Advertising Executives Point to Five Ways Google Stifles Business*, REUTERS (Sept. 11, 2019, 1:29 PM), <http://www.reuters.com/article/us-tech-antitrust-google-explainer/explainer-advertising-execs-point-to-five-ways-google-stifles-business-idUSKCN1VW2L9> [<http://perma.cc/ZP6P-8SAH>] (“The ubiquity of Google’s ad server provides virtually total control over which ads are shown and monetized for the majority of the Internet[.]”) (alteration in original); Gerrit De Vynck, *Google’s Chrome Becomes Web ‘Gatekeeper’ and Rivals Complain*, BLOOMBERG (May 28, 2019, 5:00 AM), <http://www.bloomberg.com/news/articles/2019-05-28/google-s-chrome-becomes-web-gatekeeper-and-rivals-complain> (programmers of rival internet browsers argue that Google stifles competition with its Chrome browser); Benjamin Edelman, *Does Google Leverage Market Power Through Tying and Bundling?*, 11 J. COMPETITION L. & ECON. 365, 365–66 (2015) (arguing that Google dominates some aspects of internet use by tying practices in order “to expand its dominance into additional markets”).

¹⁰⁷ See ELEC. FRONTIER FOUND., *Before the Federal Trade Commission: Hearings on Competition and Consumer Protection in the 21st Century*, FED. TRADE COMM’N 1, 7–10 (Nov. 15, 2018), http://www.ftc.gov/system/files/documents/public_comments/2018/11/ftc-2018-0076-d-0021-162495.pdf [<http://perma.cc/64GP-LGS8>] (comparing dominant internet platforms to “essential [railroad] facilities, resources, and services,” with user data and connections serving as the virtual “bridge[s]” from market to market within the analogy) (alteration in original).

¹⁰⁸ See Marco Santori, *Appcoin Law: ICOs the Right Way*, COINDESK (Nov. 9, 2016, 12:11 PM), <http://www.coindesk.com/appcoin-law-part-1-icos-the-right-way> [<http://perma.cc/7E3K-QRGG>].

¹⁰⁹ See Zuluaga, *supra* note 17, at 2, 6 n.22.

¹¹⁰ See *id.* at 2–3.

¹¹¹ See *id.* at 1, 4; DE FILIPPI & WRIGHT, *supra* note 48, at 100–01.

III. CATEGORIZING CRYPTO COIN OFFERINGS AS EXPRESSION

Cryptocurrency offerings and appcoins in particular have proliferated in a cloudy regulatory environment.¹¹² Yet increasingly, vague criminal statutes threaten coders who offer computer files that operate in some ways like money, in other ways like software, and in still other ways like the stuff of cryptography or futurism in literature.¹¹³ This Part explains the First Amendment standards applicable to crypto coin speech, and advocates narrowing the scope of securities laws.

A. First Amendment Analogies

Analogies often prove to be critical to the resolution of important First Amendment cases. For example, is a ban on selling pharmacies' data on doctors' prescription trends more like a "ban on the sale of cookbooks" (as the Supreme Court held), or more like a ban on the sale of private medical records to other

¹¹² See Gian Volpicelli, *The \$3.8bn Cryptocurrency Bubble Is a Huge Deal. But It Could Break the Blockchain*, WIRED UK (July 14, 2017), <http://www.wired.co.uk/article/what-is-initial-coin-offering-ico-token-sale> [<http://perma.cc/E3XH-4S3A>]; see also Bhaskar et al., *supra* note 12, at 554 (suggesting that most ICOs involve incentivizing labor that builds out a network of content or transactions, by enabling the laborers to "exit" after selling coins on an exchange or to another company in a merger or acquisition, or after coins are exchanged for stock subject to an Initial Public Offering (IPO)); cf. Marco Santori, *Appcoin Law: ICOs the Right Way*, COINDESK (Nov. 9, 2016, 11:11 AM), <http://www.coindesk.com/appcoin-law-part-1-icos-the-right-way> [<http://perma.cc/7E3K-QRGG>] (defining appcoins as ICOs that are not securities because, inter alia, they are useful to access network or encrypted application assets—like condominium shares, their "sellers" may not be the ones creating the trading market that could lead buyers to profit from coin trading, or the profits from trading will vary due to the efforts of appcoin buyers who are the ones building out the user-generated content in a computer network, game, or virtual world); Reinaldo Ferreira, *\$18 Million ICO: Social Android App Store Aptoide Launches AppCoins*, EU-STARTUPS (Nov. 8, 2017), <http://www.eu-startups.com/2017/11/social-android-app-store-aptoide-launches-appcoins-with-a-e60-million-ico/> [<http://perma.cc/GD5S-WQ7Q>] (explaining how AppCoins compatible with the Aptoide app store will enable video-game and virtual-world players to be rewarded with virtual currency for their time, which they can then use to access new or better games or world content, or to engage in trades with other players).

¹¹³ See *Winters v. New York*, 333 U.S. 507 (1948) (statute prohibiting publishing pattern of stories promoting "bloodshed" was void for vagueness under First Amendment despite being justified by state as preventing criminal incitement); cf. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 805 (2011) (statute making it a crime to sell violent video games to minors was overly restrictive of protected software-encoded speech, as well as underinclusive with respect to other violent content); *Ent. Software Ass'n v. Blagojevich*, 469 F.3d 641, 650 (7th Cir. 2006) (statute making it a crime to sell sexually explicit video games to minors "sweeps too broadly" in violation of First Amendment, although court did not reach vagueness issue discussed by lower court); *James v. Meow Media, Inc.*, 300 F.3d 683, 699 (6th Cir. 2002) (warning that imposing tort liability on violent video games would raise First Amendment concerns). Futurism is a genre or movement that concerns "events and trends of the future, or which anticipate[s] the future." *Futurism*, LEXICO (last visited Nov. 16, 2020), <https://www.lexico.com/en/definition/futurism> [<http://perma.cc/4YM5-HHYU>].

doctors in search of new patients?¹¹⁴ Does a regulation prohibiting the use of corporate funds in the creation of videos attacking a likely presidential candidate justified as preventing bribery, or does it amount to government censorship of political speech, even on advocacy websites?¹¹⁵ Is an inaccurate credit report, bond rating, or search engine result more like a defamatory statement or more like profit-seeking ad activity?¹¹⁶

Commercial speech is accorded less protection than non-commercial speech.¹¹⁷ Indeed, the Court has recognized that the Government has wider latitude to regulate the former.¹¹⁸ However, commercial speech is not inherently undeserving of protection; the Court has observed: “It is clear . . . that speech does not lose its First Amendment protection because money is

¹¹⁴ Sorrell v. IMS Health Inc., 564 U.S. 552, 570–72 (2011); *id.* at 586–90 (Breyer, J., joined by Ginsburg, J., and Kagan, J., dissenting) (analogizing regulation at issue to regulation of privacy of patient records generated by provider participation in federal insurance programs and to how “FDA oversees the form and content of labeling, advertising, and sales proposals of drugs, but not of furniture” as content-neutral regulation subject to lesser scrutiny).

¹¹⁵ See Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 337 (2010) (pressing the website analogy as a “classic example[] of censorship”); *id.* at 447 (Ginsburg, J., joined by Breyer, J., and Sotomayor, J., concurring in part and dissenting in part) (analogizing case at bar to political corruption through “selling access,” an act mere degrees away from bribery).

¹¹⁶ Compare Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762 (1985) (analogizing credit reports to advertising regulation for purposes of First Amendment limitations on actions for libel and slander relating to a matter of public concern); *with id.* at 788–90 (Brennan, J., joined by Marshall, J., Blackmun, J., and Stevens, J., dissenting) (pressing the analogy between credit reports and more political speech or press writing). See also *id.* at 762 n. 8 (plurality opinion) (“The dissent suggests that our holding today leaves all credit reporting subject to reduced First Amendment protection. This is incorrect. The protection to be accorded a particular credit report depends on whether the report’s ‘content, form, and context’ indicate that it concerns a public matter.”). See also *Compuware Corp. v. Moody’s Invs. Servs., Inc.*, 499 F.3d 520, 529–30 (6th Cir. 2007) (applying First Amendment actual malice standard to claim based on credit rating of a public company); *Search King Inc. v. Google Tech., Inc.*, No. CIV-02-1457, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003) (rejecting argument that accuracy of search engine results could be regulated as purportedly objective service offered for profit); Paula Lauren Gibson, *Does the First Amendment Immunize Google’s Search Engine Results from Government Antitrust Scrutiny?*, 23 COMPETITION: J. OF ANTITRUST & UNFAIR COMPETITION L. SECTION STATE BAR CAL., no. 1, 2014, at 125 (citing, *inter alia*, *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007)); Frank Pasquale, *Rankings, Reductionism, and Responsibility*, 54 CLEV. ST. L. REV. 115 (2006).

¹¹⁷ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 562–63 (1980) (“The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”).

¹¹⁸ *Id.* at 563 (“The First Amendment’s concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it . . .”).

spent to project it, as in a paid advertisement of one form or another.”¹¹⁹

Speech may be denied First Amendment protection if it offers or facilitates a transaction that is itself illegal.¹²⁰ Speech, however, is not denied First Amendment protection simply because it invites or induces a payment of funds.¹²¹ An advertisement for ordinary products or services may deserve some manner of constitutional protection because it serves the public interest.¹²² For this reason, speech inviting a money-for-content transaction may enjoy protection akin to that recognized for strictly political or non-profit speech.¹²³ In addition to information touching upon ethical and political considerations, such as whether goods are “Made in the USA” or produced without animal cruelty, price and quality information is similarly important to consumers in a capitalist democracy.¹²⁴ As a result, even the laws of commercial libel and deceptive advertising are hemmed in by free speech law.¹²⁵

Crypto coin speech is quite unlike that of a lawyer, accountant, or other professional, whose speech is ripe for regulation.¹²⁶ In First Amendment case law relating to lawyers, the Supreme Court and the lower federal courts have stressed the fiduciary relationship between lawyers and their clients.¹²⁷ Advice rendered by a fiduciary

¹¹⁹ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 761 (citing *Buckley v. Valeo*, 424 U.S. 1, 35–59 (1976); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964)).

¹²⁰ *See Va. State Bd. of Pharmacy*, 425 U.S. at 759 (citing *Pittsburgh Press Co. v. Pittsburgh Comm’n on Hum. Relations*, 413 U.S. 376, 384 (1973)) (although advertisements for employment may be “commercial speech,” they can be prohibited if discriminatory, because discriminatory hiring is an illegal transaction).

¹²¹ *See id.* at 761; *see also NAACP v. Button*, 371 U.S. 415, 429 (1963); *Jamison v. Texas*, 318 U.S. 413, 417 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 306–07 (1940); *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988) (striking down state statute compelling disclosure of contributors’ actual contributions and imposing a licensing requirement on professional fundraisers).

¹²² *See Va. State Bd. of Pharmacy*, 425 U.S. at 764 (citing *Bigelow v. Virginia*, 421 U.S. 809 (1975)); *Chicago Joint Bd. v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970); *Fur Info. & Fashion Council, Inc. v. E. F. Timme & Son*, 364 F. Supp. 16 (S.D.N.Y. 1973)).

¹²³ *See Va. State Bd. of Pharmacy*, 425 U.S. at 761 (citing *Bigelow v. Virginia*, 421 U.S. 809 (1975)).

¹²⁴ *See id.* at 765; *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 603–604 (1967) (Harlan, J., concurring).

¹²⁵ *See Va. State Bd. of Pharmacy*, 425 U.S. at 762–65.

¹²⁶ *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 n.5 (1985) (stating in dicta that “the power of the State to license lawyers, psychiatrists, and public school teachers—all of whom speak for a living—is unquestioned”) (citing *Thomas v. Collins*, 323 U.S. 516 (1945)).

¹²⁷ *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250–52 (2010) (while “[u]njustified or unduly burdensome disclosure requirements offend the First Amendment by chilling protected speech,” regulation of advertising at issue was constitutional because its requirements “govern only professionals who offer bankruptcy-

is often delivered in private rather than in a public forum like a newspaper or a website, and therefore does not implicate the public's weighty interest in the "free flow of . . . information."¹²⁸ Moreover, the patient or other client has a greater interest in informed, accurate disclosures from an existing fiduciary than a person whose will is not overborne by in-person solicitation of specialized services.¹²⁹ This interest is attenuated when it comes to solicitation by strangers, or advice received from them.¹³⁰

related services to consumer debtors."); *Va. State Bd. of Pharmacy*, 425 U.S. at 770 ("Virginia is free to require whatever professional standards it wishes of its pharmacists . . ."); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 631 (1995) (Florida Bar may regulate timing of attorney direct-mail solicitations to forestall "the demonstrable detrimental effects that such 'offense' has on the profession it regulates"); *Ibanez v. Fla. Dep't of Bus. & Prof'l Reg.*, 512 U.S. 136, 139 (1994) (upholding regulation of attorney advertising under scheme suggesting that "only licensed CPA's may 'practice public accounting'" (citing *Fl. Stat. § 473.322(1)(a)*); *Zauderer v. Office of Disciplinary Couns. of the Sup. Ct. of Ohio*, 471 U.S. 626, 629 (1985) (discussing professional regulation); *Lowe v. SEC*, 472 U.S. 181, 229–30 (1985) (noting that although licensing of professional speech—often arising in fiduciary relationships—does not trigger heightened First Amendment scrutiny, "a regulation of speech" rather than the "profession" would necessitate increased scrutiny) (citing *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980)); *Riley*, 487 U.S. at 813 (Rehnquist, J., joined by O'Connor, J., dissenting) ("For example, bar admission requirements may have some incidental effect on First Amendment protected activity by restricting a petitioner's right to hire whomever he pleases to serve as his attorney, but we have never suggested that state regulation of admission to the bar should generally be subject to strict scrutiny.").

¹²⁸ *Dun & Bradstreet*, 472 U.S. at 762; *see also Lovell v. Griffin*, 303 U.S. 444, 452 (1938) ("The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets.").

¹²⁹ *See, e.g., Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (discussing state law requiring doctors to disclose certain risks while advising patients regarding services related to childbirth and abortion); *Wollschlaeger v. Governor*, 848 F.3d 1293, 1308–09 (11th Cir. 2017) (en banc) (where there is a law regulating a professional who has a "personal nexus" to a particular client and is not "speaking generally," rational basis review may apply) (citing *Lowe*, 472 U.S. at 232 (White, J., dissenting)); *Pickup v. Brown*, 740 F.3d 1208, 1229–31 (9th Cir. 2013) (as amended on rehearing) (upholding a law providing a certain form of therapy and distinguishing it from a law regulating abstract medical speech including "recommending" that same therapy); *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011) ("There is a difference, for First Amendment purposes, between regulating professionals' speech to the public at large versus their direct, personalized speech with clients."); *Pearson v. McCaffrey*, 139 F. Supp. 2d 113, 121 (D.C. Cir. 2001) ("During a doctor-patient conversation, physicians are engaging in the practice of medicine, which has a long history of being regulated to protect the public safety."); *but see Wollschlaeger*, 848 F.3d at 1309–10 (holding, in striking down a state law prohibiting certain forms of medical advice or discussions, that "characterizing speech as conduct is a dubious constitutional enterprise" because, for example, "doctor-patient communications *about* medical treatment receive substantial First Amendment protection") (internal citation omitted); *Conant v. Walters*, 309 F.3d 629, 637–39 (9th Cir. 2002) (rejecting an attempt to regulate ways in which "a doctor's 'recommendation' of marijuana may encourage illegal conduct by the patient," and holding that professionals "have rights to speak freely subject only to the government regulating with 'narrow specificity.'") (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

¹³⁰ *See infra* notes 206–207.

Professional speech and reports by hired experts (such as credit bureaus) are also purportedly objective and therefore verifiable.¹³¹ By contrast, the utility and ultimate value of any particular crypto coin depends upon many debatable premises and unpredictable future trends. While attorney and other professional advertising may involve similarly subjective and unverifiable claims about qualifications, respective track records, and likelihood of various outcomes including large damages recoveries in the case of personal-injury lawyers in particular, such advertising is unlike crypto white papers in that it is often “solely motivated by the desire for profit”¹³² and “[does] no more than propose a commercial transaction.”¹³³

Professional regulation does not dictate an orthodox viewpoint in a “matter[] of opinion or force citizens to confess by word or act their faith therein.”¹³⁴ By contrast, regulating crypto white papers may censor calls for fundamental economic and social change, a form of speech that has been deemed “the essence of self-government.”¹³⁵ It is a matter of great public concern whether an alternative to the fraud-prone system of banking and investment (a system arguably driving historic levels of inequality) can be built, just as it was of great import whether the Internet would make everyone a publisher. Thus, crypto speech should take its place “on the highest rung of the hierarchy of First Amendment values.”¹³⁶ For speech at that level, the constitutional presumption should be that “more speech” is preferable to less, unless an “emergency” is threatened.¹³⁷

¹³¹ *See id.*

¹³² *Dun & Bradstreet*, 472 U.S. at 762.

¹³³ *Pittsburgh Press Co. v. Pittsburgh Com. on Human Rels.*, 413 U.S. 376, 385 (1973). *See also Dun & Bradstreet*, 472 U.S. at 791–92 (Brennan, J., joined by Marshall, J., Blackmun, J., and Stevens, J., dissenting) (“In every case in which we have permitted more extensive state regulation on the basis of a commercial speech rationale the speech being regulated was pure advertising—an offer to buy or sell goods and services or encouraging such buying and selling.”).

¹³⁴ *Zauderer*, 471 U.S. at 651.

¹³⁵ *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964). *See also New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

¹³⁶ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)).

¹³⁷ *44 Liquormart v. Rhode Island*, 517 U.S. 484, 498 (1996); *compare id.* at 497 (discussing situations in which less speech might be permissible as a state-law mandate). *See also Citizens United v. Fed. Election Comm’n.*, 558 U.S. 310, 361 (2010) (“[I]t is our law and our tradition that more speech, not less, is the governing rule.”); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001) (“The First Amendment . . . constrains state efforts to limit advertising of tobacco products, because so long as the sale and use of tobacco is lawful for adults, the tobacco industry has a protected interest in communicating information about its products and adult customers have an interest in

Investment fraud and other misleading commercial speech may be regulated without running afoul of the First Amendment.¹³⁸ In this regard, it is useful to compare price regulation of a goods and services with more general, quasi-political statements about a company's business practices or its working environment, including matters subject to collective bargaining. Statements relating to price, the contents of goods, the qualifications of a person to perform a service for a fee, and the like, do little more than propose a commercial transaction, and often do *not* contain more general or political opinions.¹³⁹ On the other hand, compelled disclosures of controversial statements of opinion or belief raise different and heightened levels of constitutional scrutiny.¹⁴⁰ The Supreme Court, for example, has distinguished between a basic, factual disclosure that a fundraiser is paid to raise funds, from a disclosure of more

receiving that information."); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (observing that "more speech and a better informed citizenry are among the central goals of the Free Speech Clause."); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 800 (1988) (explaining that public education is less speech-restrictive alternative to compelling or dictating the content of speech by adding unwanted disclosures or other verbiage).

¹³⁸ See, e.g., *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities . . ."); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 64 (1973) (stating in dicta that "neither the First Amendment nor 'free will' precludes States from having 'blue sky' laws to regulate what sellers of securities may write or publish about their wares."); *Bulldog Inv. Gen. P'ship v. Sec'y of the Commonwealth*, 460 Mass. 647, 663, 668 (2011) (concluding that because Supreme Court authority declares securities regulation to be consistent with First Amendment rights in commercial speech area, it passed First Amendment muster to require disclosure statements).

¹³⁹ See, e.g., *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 193–94 (1999) (broadcasting of casino advertising may be regulated to prevent harm to gamblers or the public, in part because "It is well settled that the First Amendment mandates closer scrutiny of government restrictions on speech than of its regulation of commerce alone.") (citing *Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)); *N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 132 (2d Cir. 2009) (holding that state requirement that restaurants post caloric content data on menus was permissible under First Amendment because "Commercial disclosure requirements are treated differently from restrictions on commercial speech because mandated disclosure of accurate, factual, commercial information does not offend the core First Amendment values of promoting efficient exchange of information or protecting individual liberty interests.") (quoting *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 114–15 (2d Cir. 2001); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 308–11 (1st Cir. 2005) (upholding pharmaceutical benefit manager disclosure requirements as regulating only "expression related solely to the economic interests of the speaker and its audience.") (quoting *El Dia, Inc. v. P. R. Dept. of Consumer Affairs*, 413 F.3d 110, 115 (1st Cir. 2005), and citing *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N. Y.*, 447 U.S. 557, 561 (1980); *Anschutz Corp. v. Merrill Lynch & Co.*, 785 F. Supp. 2d 799, 824, 830 (N.D. Cal. 2011) (negligent misrepresentation claims related to investing are not subject to dismissal under First Amendment); *Abu Dhabi Com. Bank v. Morgan Stanley & Co.*, 651 F. Supp. 2d 155, 176 (S.D.N.Y. 2009) (similar).

¹⁴⁰ *Riley*, 487 U.S. at 796.

complex ideas and claims with which the speaker may disagree.¹⁴¹ Requiring a credit rating agency to adopt standards might also rise to the level of compelled speech.¹⁴² As a result, not every statement by an agency that harms another business or investor can be silenced or corrected without abridging the freedom of speech.

In addressing a case involving the publication of an article relating to a security within the SEC's jurisdiction, the D.C. Circuit in 1988 rejected the notion that enjoining such an article would constitute a forbidden prior restraint or an impermissible intrusion of securities law into protected commercial speech under the First Amendment.¹⁴³ The court reasoned that "areas of extensive economic supervision," such as securities and competition law, are subject to the deferential scrutiny of commercial speech regulations.¹⁴⁴ Moreover, the court analogized the regulation of such articles—even those that resembled journalism rather than proxy or offering statements—to the regulation of attorney conduct.¹⁴⁵

However, the continued viability of the D.C. Circuit's 1988 ruling is questionable. While at the time misleading speech seemed to be completely outside the First Amendment's impact zone, recent cases undermine this view.¹⁴⁶ In *Ibañez v. Florida*

¹⁴¹ See *id.* at 796–99, n.11 (making this distinction). See also *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 559, 577 (1995) (explaining that it violates the First Amendment to force a speaker to be associated with a message with which the speaker does not agree); *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (holding that newspapers may not be required to serve as a neutral forum in which candidates for public office may respond to attacks); *Thomas v. Collins*, 323 U.S. 516, 539–40 (1945) (observing that a regulation which merely requires a speaker to present identification might be permissible, while one that more aggressively censors or shapes the speech would not be absent some commercial nexus); *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 481 (1997) (Souter, J., dissenting) (noting that "compelling cognizable speech officially is just as suspect as suppressing it, and is typically subject to the same level of scrutiny."); *Compuware Corp. v. Moody's Invs. Servs., Inc.*, 499 F.3d 520, 533–34 (requiring company to change its rating of company offering would violate First Amendment); *Jefferson Cty. Sch. Dist. v. Moody's Invs. Servs., Inc.*, 175 F.3d 848, 856–58 (requiring company to change its ratings of a bond would be impermissible under First Amendment); *Wollschlaeger v. Governor*, 848 F.3d 1293, 1308 (observing that courts are "properly skeptical of the government's ability to calibrate the propriety and utility of speech on certain topics."); *Search King Inc. v. Google Tech., Inc.*, No. CIV-02-1457, 2003 WL 21464568, at *4 (requiring Google to up-rank website to avoid interfering with site's business interests might infringing Google's freedom of speech) (citing *Mia. Herald*, 418 U.S. at 256).

¹⁴² See *Compuware*, 499 F.3d at 533–34.

¹⁴³ *SEC v. Wall St. Publ'g Inst., Inc.*, 851 F.2d 365, 369–73 (D.C. Cir. 1988).

¹⁴⁴ See *id.* at 373 (citing *Meese v. Keene*, 481 U.S. 465 (1987); *Zauderer v. Office of Disciplinary Couns. of the Sup. Ct. of Ohio*, 471 U.S. 626, 650).

¹⁴⁵ *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 149 F.3d 679, 686 (7th Cir. 1998).

¹⁴⁶ See Rebecca Tushnet, *Truth and Advertising: The Lanham Act and Commercial*

Department of Business & Professional Regulation, the Supreme Court distinguished between categories of “potentially” and *actually* misleading speech, stating that only the latter is subject to prohibition even in professional contexts of advertising services offered for a fee.¹⁴⁷ In *United States v. Alvarez*,¹⁴⁸ the Court deemed efforts to boost one’s image with an inflated and misleading military record to be a potentially First Amendment-protected part of “dynamic” public debates.¹⁴⁹ In *Expressions Hair Design v. Schneiderman*, the Court rejected an effort to regulate the prices displayed or announced by retailers, even though the Solicitor General of the United States warned that the law regulated conduct alone and that such a ruling might jeopardize false advertising law.¹⁵⁰ The following year, the Court concluded that regulating the manner in which unlicensed pro-life “pregnancy centers” masqueraded as medical clinics at the expense of unwitting patients violated the First Amendment. The state of California had passed a law requiring such centers to disclose that they were not licensed medical centers and did not employ doctors. California defended the law, arguing that the centers were affected as “treatment” providers or advertisers of treatment for a fee.¹⁵¹ The disclosure requirement was justified only by a fear of potential harm, according to the Court, and therefore imposed an unjustified burden.¹⁵² In short,

Speech Doctrine, TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH, 294–99 (Graeme Dinwoodie & Mark Janis eds. 2008), <http://ssrn.com/abstract=1014418> [<http://perma.cc/BX2R-USM9>] (citing, inter alia, Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 22 (2000)); cf. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 464 (1978).

¹⁴⁷ 512 U.S. 136, 136–51, 152 (1994).

¹⁴⁸ 567 U.S. 709, 710 (2012).

¹⁴⁹ *Id.* at 728; see also *id.* at 735–39 (Breyer, J., joined by Kagan, J., concurring in the judgment) (noting that lying without foreseeable injury to others may be protected speech); *id.* at 733, 749 (Alito, J., joined by Scalia, J., and Thomas, J., dissenting) (conceding that lying to “further philosophical or scientific debate” might be constitutionally protected); Louis W. Tompros et al., *The Constitutionality of Criminalizing False Speech Made on Social Networking Sites in a Post-Alvarez, Social Media-Obsessed World*, 31 HARV. J.L. & TECH. 65, 92–102 (2017) (suggesting that criminalizing false statements on Internet that do not cause foreseeable harm is unconstitutional after *Alvarez*). Whether the defendant in *Alvarez* stood to gain commercially from the statement at issue is debatable. See *Alvarez*, 567 U.S. at 714 (he was not applying for a job or “financial benefits”); *id.* at 744 (Alito, J., joined by Scalia, J., and Thomas, J., dissenting) (claiming to have been awarded a military honor could lead to “other material rewards, such as lucrative contracts”).

¹⁵⁰ 137 S. Ct. 1144, 1150–51 (2017); see Br. of Amicus Curiae, at 20–31, *Expressions Hair Design, v. Schneiderman*, 137 S. Ct. 1144 (U.S. brief filed Nov. 21, 2016) (No. 15-1391), <https://www.scotusblog.com/wp-content/uploads/2016/11/15-1391-amicus-neither-party-U.S.pdf> [<http://perma.cc/22W7-DH9L>] (arguing that the law passed First Amendment muster by halting “potentially or demonstrably misleading advertising”).

¹⁵¹ *Nat’l Inst. of Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2369–78 (2018), *rev’g Nat’l Inst. of Family & Life Advocs. v. Harris*, 839 F.3d 823 (9th Cir. 2016).

¹⁵² *Id.* at 2377.

contemporary First Amendment doctrine relies on “counterspeech” as an available method of resolving the potential harms of unregulated public discourse, and disfavors preemptive bans.¹⁵³

While registration of traditional securities might therefore add to the body of information available to the public,¹⁵⁴ registration requirements for coins such as Ether or Bitcoin would chill a substantial amount of coin speech without necessarily adding much information to the marketplace.¹⁵⁵ Disclosure of the information required to register a traditional securities offering may be primarily factual and uncontroversial, but forcing a utility coin, service coin, or appcoin promoter to call a coin a “security” and to call itself a shareholder or founder of a company mandates a controversial statement of a subjective legal conclusion.¹⁵⁶ Such decisions present serious First Amendment dangers by allowing government officials to determine whether a potential speaker has satisfied “necessarily subjective” standards to qualify as an eligible speaker.¹⁵⁷ Even in the context of advertising services to the general public, a disclosure requirement violates the freedom of speech if it relates to *someone else’s* services or is “unduly burdensome.”¹⁵⁸ It is improper under *Zauderer* and its progeny to mandate a disclosure that is inaccurate or one that is controversial.¹⁵⁹ A

¹⁵³ *Alvarez*, 567 U.S. at 726; Dan L. Burk, *Patents and the First Amendment*, 96 WASH. U.L. REV. 197, 248–50 (2018) (arguing that patents issued on methods or systems of “digital writing” or “Internet communications” warrant strict scrutiny regardless of the purpose of Congress in regulating such methods or systems under *Reed*); Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381, 431–41 (2008) (arguing that trademark doctrines trigger strict scrutiny by discriminating based upon subject matter via content-based speech restrictions).

¹⁵⁴ See *SEC v. Wall St. Publ’g Inst., Inc.*, 851 F.2d 365, 374–76 (D.C. Cir. 1988).

¹⁵⁵ See *Thomas v. Collins*, 323 U.S. 516, 539 (1945) (“As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly.”); *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) (requiring one to apply for a permit to speak “strikes at the very foundation of the freedom of the press by subjecting it to license and censorship”); William Hinman, Director, Bur. of Corp. Fin., SEC, Digital Asset Transactions: When Howey Met Gary (Plastic) (June 14, 2018), <https://www.sec.gov/news/speech/speech-hinman-061418> [<http://perma.cc/B7VP-LNMS>] (Bitcoin and Ether) (questioning value of requiring registration of Bitcoin, for example, as security regulated by SEC).

¹⁵⁶ See *infra* note 202 and accompanying text.

¹⁵⁷ *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981); see also *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

¹⁵⁸ Nat’l Inst. of Family & Life Advocs., 138 S. Ct. at 2372, 2377–78.

¹⁵⁹ See *American Beverage Ass’n v. City & County of San Francisco*, 916 F.3d 749, 764–67 (9th Cir. 2019) (Christen, J., joined by Thomas, J., concurring in the result) (inaccurate or scientifically controversial disclosure fails under *Zauderer*); *National Ass’n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015) (holding that a non-factual or ideologically-loaded disclosure fails muster under *Zauderer*); *Ent. Software Ass’n v.*

compelled statement that Bitcoin or a utility token is a security might be inaccurate, while a compelled statement that a particular cryptocurrency can be subject to an accounting of revenue or profits like a typical corporation would certainly be controversial.

Major crypto coin white papers are starkly dissimilar to IPO registration statements or other corporate proxy statements, which may be regulated extensively with little fear of First Amendment challenges to the regulatory scheme, or at least under traditional First Amendment doctrine predating the widespread adoption of the Internet.¹⁶⁰ Unlike corporations issuing stock, but like other open source software projects, many cryptocurrencies lack a centralized issuer.¹⁶¹ Although other tokens are explicitly marketed as investments and lose all their value due to the incompetence or criminality of their founders and/or promoters, so-called “service tokens” or appcoins as well as payment or “currency” tokens operate less like corporations and more like subscriptions or monies.¹⁶² Consumers do not

Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006) (questioning a mandate of somewhat subjective “18” label on “sexually explicit” video games as when not being a mere factual disclosure); *Wash. Post v. McManus*, 355 F. Supp. 3d 272, 282, 296–300 (D. Md. 2019) (A disclosure requirement for paid digital communications on online platforms, such as political ads on news websites, could not be sustained as a requirement to disclose uncontroversial information under *Zauderer*. The court noted that “laws compelling publishers to make election-related disclosures [do not] have much of a history in this country.”), *aff’d*, 944 F.3d 506 (4th Cir. 2019).

¹⁶⁰ See, e.g., *supra* note 146.

¹⁶¹ See, e.g., ARVIND NARAYANAN, JOSEPH BONNEAU, EDWARD FELTEN, ANDREW MILLER, & STEVEN GOLDFEDER, *BITCOIN AND CRYPTOCURRENCY TECHNOLOGIES: A COMPREHENSIVE INTRODUCTION* 25 (2016); cf. Philip Oettinger and Andrew Ellis, *Preparing a Successful IPO in 2018*, HARVARD LAW SCH. FORUM ON CORP. GOV. (Jan. 30, 2018), <https://corpgov.law.harvard.edu/2018/01/30/preparing-a-successful-ipo-in-2018/> [<http://perma.cc/B8QR-FRFM>] (companies considering an IPO typically have accounting standards, corporate governance and committee charters, chief financial officers, and the like).

¹⁶² See DMITRI BOREIKO, *BLOCKCHAIN-BASED FINANCING WITH INITIAL COIN OFFERINGS (ICOS): FINANCIAL INDUSTRY DISRUPTION OR EVOLUTION?* 141–155 (2019) (describing varying functional use cases and characteristics of cryptocurrencies, including to purchase a service or serve as a medium of exchange); Phillip Hacker & Chris Thomale, *Crypto-Securities Regulation, ICOs, Token Sales and Cryptocurrencies under EU Financial Law*, 15 EURO. CO. & FIN. L. REV. 645, draft at 33–37 (2018), <http://ssrn.com/abstractid=3075820> (similar); see also Philipp Maume & Mathias Fromberger, *Regulation of Initial Coin Offerings: Reconciling U.S. and E.U. Securities Laws*, 19 CHI. J. INT’L L. 548, 558–59, nn. 70–75 (2019); see also Aurelio Gurrea-Martinez & Nydia Remolina León, *The Law and Finance of Initial Coin Offerings, in CRYPTOASSETS: LEGAL, REGULATORY, AND MONETARY PERSPECTIVES* 117, 120–29 (Chris Brummer ed., 2019) (citing, inter alia, Hacker & Thomale, *supra*); cf. Andrea Ordanini et al., *Crowd-funding: Transforming Customers Into Investors Through Innovative Service Platforms*, 22 J. SERV. MGMT. 443, 444 (2011) (predicting that certain types of services would lend themselves to having their development funded by their own customers, via crowdfunding); see generally Dirk A. Zetzsche, Ross P. Buckley, & Douglas W. Arner, *The*

“invest” in money or services, but rather earn or buy them; a coin without an “enterprise” is therefore not a “security” that should have to be registered unless exempt, among other requirements.¹⁶³ While the distinction might be lost if crypto coins also had to preregister, this is an argument against enacting such a requirement in the first place.

A crypto white paper, in many ways, is like computer scientists’ research output, or (less charitably) like an article in a magazine quoting a corporate executive touting his or her corporation, or else a scientific study funded by a corporation to boost its sales by praising its products.¹⁶⁴ This is highly significant, for it supports the contention that a white paper or other crypto coin article or social media post does not “retain[] its commercial character when it is inextricably intertwined with otherwise fully protected speech.”¹⁶⁵ Unlike a pure advertisement (e.g. for a specific car at a specific price), many white papers do not state a price, and instead read like lengthy tracts of peer-to-peer software coding, coupled with arguments for decentralized economic power and new forms of online activity and human relationships.¹⁶⁶ The paper that popularized the digital coin movement, the Bitcoin white paper, emphasized cybersecurity advantages of a digital cash system based on coins secured by a peer-to-peer methodology using a lot of work to make the ledger of transactions difficult to forge or mutilate as hackers array computer power against the ledger.¹⁶⁷ If cybersecurity in 2008 was a scholarly discipline (notably in computer science) related to reducing the perpetration of fraud using the Internet, Bitcoin promised to advance it by harnessing the users of the coin to generate a tamper-resistant chronological list of past Bitcoin transfers, preventing digital check kiting.¹⁶⁸ White

Distributed Liability of Distributed Ledgers: Legal Risks of Blockchain, 2018 U. ILL. L. REV. 1361 (2018).

¹⁶³ See, e.g., 15 U.S.C. § 77b(a)(1) (omitting money within definition of “security” even while defining “security” to include “investment contract” and providing numerous examples of such contracts or securities); 15 U.S.C. § 78c(a)(10) (excluding “currency” from definition of “security” even while defining “security” to include “investment contract”).

¹⁶⁴ See, e.g., Andreessen, *supra* note 101.

¹⁶⁵ Riley v. Nat’l Fed’n of the Blind, 487 U.S. 781, 796 (1988).

¹⁶⁶ See NARAYANAN ET AL., *supra* note 161, at 25 (exploring computer science of cryptocurrencies in depth); cf. Bernstein v. United States Dep’t of Just., 176 F.3d 1132, 1141 (1999) (finding that computer source code is protected as free speech).

¹⁶⁷ See Nakamoto, *supra* note 37, at 1.

¹⁶⁸ See Nakamoto, *supra* note 37, at 1; cf., e.g., *The Cybersecurity Partnership Between the Private Sector and Our Government: Protecting Our National and Economic Security: Joint Hearing Before the S. Comm. on Commerce, Sci., & Transp. and the S. Comm. on Homeland Sec. & Governmental Aff.*, 113th Cong. 11–12 (2013) (statement of Janet Napolitano, Secretary, U.S. Department of Homeland Security) (noting that fraud by

papers may also summarize other tokens or their own white papers, which is something not often seen in corporate disclosure filings.¹⁶⁹

Peer-to-peer payment systems often resemble labor unions' organizational structure to a greater extent than they resemble corporations or partnership shares. In attempting to evade the "excessive fees" of banks, payment processors, app stores dominated by oligopolistic Internet platforms, and the like, crypto coin founders and subscribers exercise their basic First Amendment rights to freedom of association and joint economic activism.¹⁷⁰ While the users of such systems may expect to earn a profit from successful management of their assets within the system, a potentially larger portion of the value of payment tokens derives from their utility in various marketplaces, rather than their being invested and earning a return like money that buys a share of stock.¹⁷¹ A union pension likewise depends on the

counterfeiting was a key cybersecurity priority during the Obama administration); PRESIDENT'S INFO. TECH. ADVISORY COMM., CYBER SECURITY: A CRISIS OF PRIORITIZATION 8 (2005), http://www.nitrd.gov/pitac/reports/20050301_cybersecurity/cybersecurity.pdf [<http://perma.cc/SXY4-ECHY>]. Check kiting is the informal name for obtaining money or assets in the control of a financial institution by knowingly and with the intent to defraud making a false representation of having enough funds to pay for a purchase or debt, such as by writing a completely bogus check with no funds there to cover the amount. *See, e.g.*, 18 U.S.C. § 1344; *United States v. Doherty*, 969 F.2d 425, 428 (7th Cir. 1992).

¹⁶⁹ *See generally, e.g.*, Paulo Trezentos & Diego Pires, *AppCoins: Distributed and Trusted App-based Transactions Protocol* (Aptoide, Working Paper No. 0.40d, 2017), http://web.archive.org/web/20171105090613/https://appcoins.io/pdf/appcoins_whitepaper.pdf [<http://perma.cc/DJ6G-6LCP>]; Buterin, *supra* note 56.

¹⁷⁰ *See* *United Transp. Union v. Mich. Bar*, 401 U.S. 576, 577–80, 586 (1971) (holding that union had right to offer Illinois attorneys to Michigan clients, in probable violation of Michigan laws governing unlicensed provision of legal advice by those lacking admission to the state bar, nonlawyers sharing or controlling a lawyer's fees, nonlawyer soliciting clients for lawyers, etc. Court invoked "the First Amendment principle that groups can unite to assert their legal rights *as effectively and economically as practicable.*") (emphasis added) (first citing *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217 (1967); then citing *Brotherhood of R.R. Trainmen v. Va. State Bar*, 377 U.S. 1 (1964); and then citing *NAACP v. Button*, 371 U.S. 415 (1963)); *see also*, *In re Primus*, 436 U.S. 412, 426 (1978) ("The Court has held that the First and Fourteenth Amendments prevent state proscription of a range of solicitation activities by labor unions seeking to provide low-cost, effective legal representation to their members."); *Talley v. California*, 362 U.S. 60, 64 (1960) (noting right to hand out information without regulation of one's identity); *United Transp. Union*, 401 U.S. at 586–600 (Harlan, J., concurring in part and dissenting in part) (reciting various potential violations of Michigan law governing attorney registration and conduct, and similar violations in *Brotherhood of R.R. Trainmen*); *State Emp. Bargaining Agent Coalition v. Rowland*, 718 F.3d 126, 133–34 (2d Cir. 2013) (noting First Amendment also protects economic or other "associations") (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–61 (1958)); *Boardman v. Inslee*, 354 F. Supp. 3d 1232, 1247 (W.D. Wash. 2019) (noting that "[c]onditioning public employment on union membership, no less than on political association, inhibits protected association and interferes with government employee's [sic] freedom to associate," justifying "strict" First Amendment scrutiny) (quoting *Rowland*, 718 F.3d at 133–35)).

¹⁷¹ *See Int'l Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 562 (1979) (concluding

efforts of the portfolio or investment managers to maximize the return on investment while minimizing risk, ensuring that the defined benefit or other retirement arrangement can be paid in the end.¹⁷² Still, focusing only on the extent to which pension funds are “invested” in order to mandate registration under securities laws improperly ignores other aspects of a union and its pension fund.¹⁷³ Requiring preregistration as an approved speaker on such topics as the trading of cryptocurrencies restricts “[t]he right thus to discuss, and inform people concerning, the advantages and disadvantages of [crypto coin open-source software projects] and joining them”; this right “is protected not only as part of free speech, but as part of free assembly.”¹⁷⁴ Moreover, the fact that some white papers might not require registration if they reject founder involvement in developing the token ecosystem on principle, or forswear any commercial use of the token under any circumstances, should trigger strict scrutiny of *Howey*-style tests for registration.¹⁷⁵

Crypto coin collectives also implicate the “right to work for a living.”¹⁷⁶ The right to work for some manner of compensation may be protected under the Fifth Amendment from federal interference, and under some combination of the Fifth and the Fourteenth Amendments at the state level.¹⁷⁷ Laws with

that a pension fund was not a security within meaning of anti-fraud provisions of Securities Acts because larger portion of its value came from employer contributions in exchange for labor than from investments by fund manager(s)).

¹⁷² See *id.* (noting that fund’s investments made tens of millions of dollars); see also *Manhattan Ford Lincoln, Inc. v. UAW Local 259 Pension Fund*, 331 F. Supp. 3d 365, 382–83, 393 (D.N.J. 2018) (noting that union pensions depend for viability on “long-term investment-return assumption[s] [as to] . . . how much its current assets will grow through investments” and are subject to federal law that makes plan sponsors liable to overage of vested benefits vs. contributions plus investment-generated assets) (first citing Kathryn J. Kennedy, *Pension Funding Reform: It’s Time to Get the Rules Right (Part 1)*, 108 TAX NOTES 907, Appendix A (Aug. 22, 2005); and then citing 29 U.S.C. § 1393(a)–(c)).

¹⁷³ See *Daniel*, 439 U.S. at 558–62.

¹⁷⁴ *Thomas v. Collins*, 323 U.S. 516, 519, 524–25, 532 (1945) (finding prohibition of union solicitation for compensation unless one registers and obtains an organizer’s card was unconstitutional for this reason); see also *id.* at 550 (Roberts, C.J., dissenting) (noting requirement to register for the card under Texas law).

¹⁷⁵ See *Barr v. Am. Ass’n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2347 (2020) (first citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64; and then citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563–64) (stating strict scrutiny applies to any law that “focuses on whether [a person] is *speaking* about a particular topic.”).

¹⁷⁶ *Examining Bd. of Eng’rs v. Otero*, 426 U.S. 572, 604 (1976).

¹⁷⁷ See *Otero*, 426 U.S. at 604 (noting the Fourteenth Amendment demands respect for right to earn a living) (citing *Truax v. Raich*, 239 U.S. 33, 41 (1915)); see also, e.g., *Greene v. McElroy*, 360 U.S. 474, 492 (1959) (“[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the ‘liberty’ and ‘property’ concepts of the Fifth Amendment.”); *Schwartz v. Bd. of Bar Exam’rs*, 353 U.S. 232, 246–47 (1957) (finding the Fourteenth Amendment’s Due Process Clause protects those pursuing legal occupations from

unpredictable reach or breadth may be void for vagueness as denials of due process of law; they may also violate equal protection principles if they fail to apply to all actors, instead singling out an unlucky few.¹⁷⁸

Increasingly since the 1960s, the Fifth Amendment has invalidated statutes or ordinances that (1) are framed indefinitely or (2) that invite random or discriminatory application to the detriment of economic or political activity.¹⁷⁹ As a criminally enforceable norm, the prohibition against selling “*Howey*” securities absent a registration or applicable exemption raises particularly acute vagueness concerns.¹⁸⁰ Additionally, the

irrational exclusion from it); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating the Fourteenth Amendment liberty interests under Due Process Clause extend “to engage in any of the common occupations of life”); *Truax*, 239 U.S. at 41 (“[T]he right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.”); Timothy Sandefur, *The Common Law Right to Earn a Living*, 7 INDEPENDENT REV. 69, 70, 75 (2002) (citing right recognized in Magna Carta to buy and sell and arguing that right to earn a living should be protected under Constitution’s Article IV, concerning “privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments.”) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.D.Pa. 1823) (No. 3230)); see generally Timothy Sandefur, *The Right to Earn a Living*, 6 CHAP. L. REV. 207 (2003) (exploring various sources of the right to pursue a lawful occupation).

¹⁷⁸ See *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (“[T]he purpose of the equal protection clause . . . is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.”) (internal quotation marks omitted).

¹⁷⁹ See, e.g., *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 451–52 (1983), *abrogated by* *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Kolender v. Lawson*, 461 U.S. 352, 353–54 (1983); *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 604 (1967); *AMA v. FTC*, 638 F.2d 443, 452–53 (2d Cir. 1980); *Standard Oil Co. v. FTC*, 577 F.2d 653, 661–62 (9th Cir. 1978) (quoting Joseph A. Kaplan & Sons, Inc. v. FTC, 347 F.2d 785, 791 (D.C. Cir. 1965)); Evan Bernick, *Towards a Consistent Economic Liberty Jurisprudence*, 23 GEO. MASON L. REV. 479, 481–89 (2016) (collecting cases). See also *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (striking down a “a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application”); *Hague v. C.I.O.*, 307 U.S. 496, 515–16 (1939) (“[U]ncontrolled official suppression of the privilege [of expression] is unconstitutional as “arbitrary suppression of free expression of views”).

¹⁸⁰ See *Mukong v. Cameroon*, Communication No. 458/1991, U.N. Doc. No. CCPR/C/51/D/458/1991, ¶9.8 (views adopted July, 21 1994) (detention under arbitrary legal norms that violate freedom of expression); Human Rights Committee, General Comment No. 34: Article 19: Freedoms of Opinion and Expression, ¶47, U.N. Doc. No. CCPR/C/GC/34 (Sept. 12 2011) (“Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression.”). See also *Gorji-Dinka v. Cameroon*, Communication No. 1134/2002, U.N. Doc. No. CCPR/C/83/D/1134/2002, ¶5.1 (Mar. 17 2005); *Van Alphen v. Netherlands*, Communication No. 305/1988, U.N. Doc. No. CCPR/C/39/D/305/1988, ¶5.6 (July, 23 1990).

international human right of freedom of expression is also infringed if civil or criminal sanctions are unpredictable or speech-suppressive, such as by imposing to jail terms or fines.¹⁸¹

B. Commercial Speech Challenges

The First Amendment provides little protection for false or misleading speech.¹⁸² For example, prior restraints on commercial speech may be permissible when false or misleading statements are made in connection with the marketing of pharmaceutical ingredients or testimonials about their effectiveness, as such speech does no more than propose a commercial transaction.¹⁸³

A “reasonable relationship” test, or form of rational basis review, applies to law governing an “ordinary” commercial sale.¹⁸⁴ This is similar to the “permissive” standard of review for disclosure rules, where a market actor is compelled by law to speak in a manner that includes “purely factual and uncontroversial information.”¹⁸⁵

There is a suggestion that speech “incidental” to unlawful “conduct” (whether an offer, sale, failure to register within a certain profession or trade, etc.) should be entirely excluded from First Amendment coverage.¹⁸⁶ If incitement of imminent lawless

¹⁸¹ See *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 871–73 (1997); *Semler v. Or. State Bd. of Dental Exam’r*, 294 U.S. 608, 609, 612 (1935). See also *Van Alphen*, CCPR/C/39/D/305/1988, at ¶5.6; *Mukong*, CCPR/C/5/D/458/1991, at ¶9.7; *Gorji-Dinka*, CCPR/C/83/D/1134/2002, at ¶5.1.

¹⁸² See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 n.24 (1976) (noting that “truthful information” may not be suppressed even when “wholly false” or merely “deceptive or misleading” speech may be subject to state or federal regulation to deal with its false or misleading character, for example “to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.”).

¹⁸³ See *id.* at 772 n.24 (“[G]reater objectivity and hardiness of commercial speech . . . may also make inapplicable the prohibition against prior restraints.”) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Donaldson v. Read Mag.*, 333 U.S. 178, 189–91 (1948); *FTC v. Standard Educ. Soc’y*, 302 U.S. 112, 116–17 (1937); *E.F. Drew & Co. v. FTC*, 235 F.2d 735, 739–40 (2d Cir. 1956)).

¹⁸⁴ See *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1152 (2017) (Breyer, J. concurring) (citing *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985)).

¹⁸⁵ See *id.* at 1152 (Breyer, J. dissenting) (quoting *Zauderer*, 471 U.S., at 651).

¹⁸⁶ See *id.* at 1151 (“[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”) (quoting *Rumsfeld v. F. for Acad. and Inst. Rts., Inc.*, 547 U.S. 47, 62 (2006)); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28–29 (2010); *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 813 (1988) (Stevens, J., dissenting in part); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 2–3, 22–24 (Yale Univ. Press) (2012) (suggesting that when Congress or a state legislature

conduct may be proscribed, as the Court has often stated, speech that is part of a pattern of such conduct cannot be protected.¹⁸⁷ On the other hand, when violence or factual fraud plays no part in the pattern of conduct, then speech incidental to such nonviolent conduct may not be banned.¹⁸⁸ Many scholars argue for heightened First Amendment scrutiny of content-based regulations such as those purporting to dictate how a particular commercial message must be communicated to the public.¹⁸⁹ Several justices of the Supreme Court, whose views were perhaps more representative of recent majorities in First Amendment cases, opined that it would violate the First Amendment to enjoin the publication of a newsletter dedicated to recommending the buying or selling of securities. Specifically, the violation was alleged to be that a publisher had violated the Investment Advisers Act by failing to disclose criminal convictions in the course of registering as an adviser before starting the newsletter.¹⁹⁰

To begin with the *Central Hudson* test for narrower possible regulations that would serve a governmental interest, there are numerous alternatives to prior restraints on ICOs in the form of

regulates a profession—or presumably also, another trade or business—this does not raise a constitutional issue under the First Amendment).

¹⁸⁷ See, e.g., *Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n*, 492 U.S. 115, 124–25 (1989); *Roth v. United States*, 354 U.S. 476, 485 (1957); *Chaplinsky v. N.H.*, 315 U.S. 568, 571–72 (1942). See generally *United States v. Stevens*, 559 U.S. 460, *passim* (2010) (declining to adopt categories of low-value speech in addition to fraud, obscenity, fighting words, malicious libel, etc.).

¹⁸⁸ See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 497–98; *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 292–93 (1941) (emphasizing “contemporaneously violent conduct” in affirming injunction against picketing nonunion retailers or retailers purchasing from nonunion producers).

¹⁸⁹ See Hillary Greene, *Muzzling Antitrust: Information Products, Innovation and Free Speech*, 95 B.U. L. REV. 35, 69–70 (2015) (discussing antitrust as being potentially content-based as prohibiting certain sales) (citing *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2569–70, 2661–67, 2670–71 (2011)); Hillary Greene & Dennis Yao, *Antitrust as Speech Control*, 60 WM. & MARY L. REV. 1215, 1218 (2019) (citing, inter alia, Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1765, 68 (2004)) (discussing both securities and antitrust laws as content-based regulations); Antony Page & Katy Yang, *Is Regulation Fair Disclosure Constitutional?*, 39 U.C. DAVIS L. REV. 1, 42–47, 63 (2005) (citing, inter alia, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980)) (discussing securities laws generally and Regulation Fair Disclosure in particular as being content-based and subject to heightened review); Bruce E. Johnson & Jeffrey L. Fisher, *Why Format, Not Content, Is the Key to Identifying Commercial Speech*, 54 CASE W. RES. L. REV. 1243, 1253–54 (2004).

¹⁹⁰ See *Lowe v. SEC*, 472 U.S. 181, 211 (1985) (White, J., joined by Rehnquist, J., and Burger, C.J., concurring). The lower court judges agreed. See also *SEC v. Lowe*, 725 F.2d 892, 906 (2d Cir. 1984) (Briant, J., dissenting); *id.* at 895; *SEC v. Lowe*, 556 F. Supp. 1359, 1371 (E.D.N.Y. 1983). The majority in *Lowe* did not reach the First Amendment issue.

registration as a security or commodity issuer/exchange. Under light touch approaches, narrower restrictions on crypto coin expression could regulate false but verifiable claims without suppressing subjective or unverifiable opinions. For example, the Federal Trade Commission (FTC) currently regulates misleading Internet access subscription advertisements or terms under the light touch approach adopted by the Federal Communications Commission in 2017 for broadband Internet access regulation.¹⁹¹ The FTC also has the power (although it presently defers to the ESRB) to regulate misleading claims in the marketing or terms of video games, email accounts, online marketplaces, and social media access contracts, without requiring such offerings to be preregistered with it.¹⁹² Similarly, the statutes and common-law

¹⁹¹ See, e.g., *Mozilla Corp. v. FCC*, 940 F.3d 1, 17–18, 49–50, 59, 71–72 (D.C. Cir. 2019) (citing *In re Restoring Internet Freedom*, 33 FCC Rcd. 311, ¶¶ 1, 4, 18, 152, 209, 217 (2018)); *id.* at 71–72 (“We do note that antitrust enforcement by the Commission’s sister agencies (the Department of Justice and the FTC . . . aims at generating and protecting competition, . . . [which] would tend to multiply the voices in the public square,” [promote transparency, and give teeth to] “ISP commitments [of open access to the Internet and minimum quality of service provided to users] backed up by FTC enforcement”) (quoting *Restoring Internet Freedom*, 33 FCC Rcd., at ¶ 153).

¹⁹² See *In re Take-Two Interactive Secs. Litig.*, 551 F. Supp. 2d 247, 263 (S.D.N.Y. 2008) (noting FTC investigation of video-game “Easter eggs,” or “hidden” mini-games); *St. Clair Shores Gen. Empl. Ret. Sys. v. Eibeler, Inc.*, No. 06 Civ. 688, 2008 WL 2941174, *3 (S.D.N.Y. July 30, 2008) (“On July 26, 2005, Take-Two announced that the [FTC] had commenced an investigation into the advertising for [Grand Theft Auto: San Andreas, a video game].”); see also Press Release, FTC, FTC Imposes \$5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook (July 24, 2019), <http://www.ftc.gov/news-events/press-releases/2019/07/ftc-imposes-5-billion-penalty-sweeping-new-privacy-restriction> [<http://perma.cc/YJ35-CJ2P>]; FTC, FILE NO. 092-3184, STATEMENT OF CHAIRMAN JOE SIMONS AND COMMISSIONERS NOAH JOSHUA PHILLIPS AND CHRISTINE S. WILSON, *IN RE FACEBOOK, INC.*, 3–4 (July 24, 2019), http://www.ftc.gov/system/files/documents/public_statements/1536946/092_3184_facebook_majority_statement_7-24-19.pdf [<http://perma.cc/2FRY-QBRB>]; Snapchat, Inc., File No. 132-3078, Docket No. C-4501, 8 (F.T.C. Dec. 23, 2014), <http://www.ftc.gov/system/files/documents/cases/141231snapchatcmpt.pdf> [<http://perma.cc/LJ6Z-TCAJ>] (complaint relating to marketing of social media access contracts); MySpace LLC, File No. 102-3058, Docket No. C-4369, 2012 WL 4101790, *4 (F.T.C. Aug. 30, 2012) (decision and order relating to marketing of social media access contracts); Facebook, Inc., File No. 092-3184, Case No. 19-cv-2184, Docket No. C-4365, 1–2, 4 (F.T.C. Aug. 10, 2012), <http://www.ftc.gov/sites/default/files/documents/cases/2012/08/120810facebookdo.pdf> [<http://perma.cc/BDB9-Q9MY>] (decision and order relating to marketing of social media access contracts); *In re Google Inc.*, 152 F.T.C. 435, 454–55 (2011) (decision and order relating to marketing of Google social networking service within Gmail); *In re Take-Two Interactive Software, Inc.*, 142 F.T.C. 1, 24–26 (2006) (consent order requiring compliance with video game marketing standards); *In re Microsoft Corp.*, 134 F.T.C. 709, 710–12 (2002) (complaint relating to Microsoft Windows operating system marketing); *In re Geocities*, 127 F.T.C. 94, 94, 96–98, 123–25 (1999) (decision and order relating to marketing of website hosting service); Press Release, FTC, Federal Court Finds Amazon Liable for Billing Parents for Children’s Unauthorized In-App Charges (April 27, 2016), <http://www.ftc.gov/enforcement/cases-proceedings/122-3238/amazoncom-inc> [<http://perma.cc/B6QT-59XU>] (online marketplace); Press Release, FTC, Four National

principles governing fraud, warranties, fiduciary duties, unjust enrichment, restitution, and related causes of action provide robust remedies—including incarceration and punitive damages far in excess of the remedies the SEC typically seeks—and do not require every transaction to be registered by a financial elite in advance.¹⁹³ In some cases, even counterspeech or public

Retailers Agree to Pay Penalties Totaling \$1.26 Million for Allegedly Falsely Labeling Textiles as Made of Bamboo, While They Were Rayon (Jan. 3, 2013), <http://www.ftc.gov/enforcement/cases-proceedings/102-3132/amazoncom-inc-united-states-america-federal-trade-commission> [<http://perma.cc/5PVS-AXE6>]; Press Release, FTC, FTC Finalizes Privacy Settlement with Myspace (Sept. 11, 2012), <http://www.ftc.gov/enforcement/cases-proceedings/102-3058/myspace-llc-matter> [<http://perma.cc/L9QH-WMNV>]; Press Release, FTC, Makers of Grand Theft Auto: San Andreas Settle FTC Charges (June 8, 2006), <http://www.ftc.gov/news-events/press-releases/2006/06/makers-grand-theft-auto-san-andreas-settle-ftc-charges> [<http://perma.cc/2PM5-T2AU>]; *cf. In re Gateway Learning Corp.*, 138 FTC. 443, 470 (2004) (decision and order relating to marketing of computer hardware and bundled software). *See generally* 15 U.S.C. § 45(n) (2006); FTC Policy Statement on Deception, appended to *Cliffdale Assocs., Inc.*, 103 FTC. 110, 174 (1984); FTC Policy Statement on Unfairness, appended to *Int'l Harvester Co.*, 104 F.T.C. 949, 1070 (1984), *available at* <http://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness> [<http://perma.cc/L45E-CG5Y>]; Letter from Jessica Rich, Director of FTC Bureau of Consumer Protection, to WhatsApp and Facebook (Apr. 10, 2014), *available at* <http://www.ftc.gov/public-statements/2014/04/letter-jessica-1-rich-director-federal-trade-commission-bureau-consumer> [<http://perma.cc/8L6H-XDGN>]; Complaint, *In the Matter of WhatsApp, Inc.*, (Aug. 29, 2016), *available at* https://epic.org/privacy/ftc/whatsapp/EPIC-CDD-FTC-WhatsApp-Complaint-2016.pdf?utm_source=rss&utm_medium=rss [<http://perma.cc/FT4M-5UWA>].

¹⁹³ *See, e.g.,* *Anschutz Corp. v. Merrill Lynch and Co., Inc.*, 785 F. Supp. 2d 799, 824 (N.D. Cal. 2011) (after-the-fact negligent misrepresentation claims related to investing not subject to dismissal under First Amendment despite issues of subjective ratings); *Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc.*, 651 F. Supp. 2d 155, 176 (S.D.N.Y. 2009) (similar); *In re Nat'l Century Fin. Enters.*, 580 F. Supp. 2d 630, 639–40 (S.D. Ohio 2008) (after-the-fact negligent misrepresentation claim could be brought against rating agency, despite First Amendment). The SEC typically seeks a cease-and-desist order, disgorgement of profits, and sometimes a commitment to issue refunds and/or a ban on trading or managing public companies. *See* LOUIS LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* 1054 (2003); *see also id.* at 1292–93 (punitive damages not available in civil suits under Exchange Act, although they would be in common-law fraud and deceit actions); *id.* at 97, 1239 (punitive damages not available under section 11 of Securities Act, the cause of action for omission of material facts from a registration statement or a misstatement of such facts in it). The FTC may seek similar remedies. *See, e.g.,* 15 U.S.C. §§ 45(m), (n), 57b; *FTC v. AMG Capital Mgmt.*, 910 F.3d 417, 428 (9th Cir. 2018) (affirming \$1.27 billion in equitable disgorgement relief in case involving misleading websites); Press Release, FTC, FTC Approves Final Settlement With Facebook (Aug. 10, 2012), <http://www.ftc.gov/news-events/press-releases/2012/08/ftc-approves-final-settlement-facebook> [<http://perma.cc/SLQ9-V49A>]; FTC, FILE NO. 092-3184, STATEMENT OF CHAIRMAN JOE SIMONS AND COMMISSIONERS NOAH JOSHUA PHILLIPS AND CHRISTINE S. WILSON, *IN RE FACEBOOK, INC.*, 3–4 (July 24, 2019), http://www.ftc.gov/system/files/documents/public_statements/1536946/092_3184_facebook_majority_statement_7-24-19.pdf [<http://perma.cc/2FRY-QBRB>]; *see generally* J. Howard Beales III & Timothy Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 ANTITRUST L.J. 1, 40 (2013); *cf.* Brief of Amici Curiae Chamber of Comm. of the United States of Am. & Nat'l Ret. Fed'n in Supp. of Pet'r, *AMG Cap. Mgmt. v. FTC*, 910 F.3d 417 (9th Cir. 2018) (No. 19-508) <http://www.scotusblog.com/case-files/cases/amg->

education efforts may be deemed adequate multi-stakeholder alternatives to harsh penalties for proven falsehoods.¹⁹⁴ The availability of such alternatives to prior restraints and difficult-to-satisfy preregistration requirements establishes a less restrictive means to regulate ICO speech under the First Amendment.

Regulation of commercial speech by means of keeping the public in ignorance of developments in a field of applied science or other commerce fails First Amendment scrutiny when less restrictive but equally or more effective regulations of conduct are available.¹⁹⁵ For example, the Supreme Court has struck down, because less restrictive means of regulation were available, certain prohibitions on the promotion of products and solicitation of new clients relating to prescriptions for “compounded drugs.”¹⁹⁶ Rather than enforced ignorance of products that may not violate the law in itself—in this case, an offer of compounded drugs—Congress should have directly regulated the prescription of such drugs to patients who do not need them or who might be harmed by them, either in isolation or as combined with their other medications.¹⁹⁷ Similarly, the First Amendment makes it unconstitutional to ban advertisements or labels that reference the low price or high alcohol content of beer or spirits.¹⁹⁸ Although this ban might

capital-management-llc-v-federal-trade-commission/ [http://perma.cc/XX79-PMYH] (arguing against broad restitutionary powers of FTC as statutory and constitutional matter); Berin Szóka & Geoffrey Manne, *The Federal Trade Commission: Restoring Congressional Oversight of the Second National Legislature* (2016), available at <http://docs.house.gov/meet-ings/IF/IF17/20160524/104976/HHRG-114-IF17-Wstate-ManneG-20160524-SD004.pdf> [http://perma.cc/W9KG-89RW] (exploring and ultimately criticizing scope of FTC’s remedial powers).

¹⁹⁴ Thus, in *Alvarez*, the less restrictive means available to regulators trying to preserve the incentive or expressive purposes of the military medal and honors systems was to public a database of confirmed awardees and their medals or honors. *United States v. Alvarez*, 567 U.S. 709, 735 (2012) (Breyer, J., concurring).

¹⁹⁵ See, e.g., *Ibanez v. Fla. Dep’t of Bus. & Pro. Regul.*, 512 U.S. 136, 152 (1994) (O’Connor, J., concurring) (“States may not completely ban potentially misleading commercial speech if narrower limitations can ensure that the information is presented in a nonmisleading manner.”); cf. *Bernstein v. U.S. Dep’t of Just.*, 176 F.3d 1132, 1139–41 (9th Cir. 2000) (speech on cryptography, including distribution of executable code, protected by First Amendment from export controls that unconstitutionally operated as prior restraint).

¹⁹⁶ *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 366, 375–76 (2002). *But see id.* at 382–83 (Breyer, J., joined by Roberts, C.J., Stevens, J., and Ginsburg, J., dissenting) (emphasizing the risk that patients will take “untested” compounds, which due to new drug combinations, differing absorption rates, or other factors “can, for some patients, mean infection, serious side effects, or even death”).

¹⁹⁷ *Thompson*, 535 U.S. at 374–75 (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumers Council, Inc.*, 425 U.S. 748 (1976)).

¹⁹⁸ 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505–08 (citing *Rubin v. Coors*

reduce alcohol abuse and implicitly subsidize alternatives like water or fruit juice, directly regulating the price or alcohol percentage of a beverage is a less restrictive and potentially more effective alternative to compelled ignorance of available options at alcohol retailers.¹⁹⁹ For these reasons, a regulation's relationship to the underlying governmental interest should not be indirect, immaterial, speculative, or disproportionate.²⁰⁰

Assuming that a form of rational basis review applies, the path towards a First Amendment defense to ICO or appcoin registration or other requirements will be more difficult.²⁰¹ Regulators or prosecutors are citing abuses to crack down on ICOs, as China, New York, and other jurisdictions are doing, in order to protect consumers from harm, banks from unfair competition, or investors and non-investors alike from instability.²⁰² Even as a "preventative" criminal statute triggered by speech, the Supreme Court might uphold it as advancing "urgent" national interests in consumer protection.²⁰³ The impact on speech of regulating the conduct would be incidental and the

Brewing Co., 514 U.S. 476, 491 (1995)).

¹⁹⁹ *Id.*

²⁰⁰ See *Ibanez*, 512 U.S. at 143–44 (quoting *Edenfield v. Fane*, 507 U.S. 761 (1993)) (speculation and conjecture insufficient basis to invoke governmental interest in First Amendment context); *United States v. Caronia*, 703 F.3d 149, 165–66 (2d Cir. 2012) (promotion of off-label drug use could lead to patient injury, medical malpractice, and civil claims for negligence, it may not be restrained simply due to these potential harms if true and non-misleading under First Amendment); cf. *Amarin Pharma, Inc. v. FDA*, 119 F. Supp. 3d 196, 236 (S.D.N.Y. 2015) (“[T]he FDA’s concern that future events may one day make [a promotional] claim misleading cannot justify treating [a] presently true and non-misleading statement as if it were unprotected speech.”).

²⁰¹ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (explaining that “regulatory legislation affecting ordinary commercial transactions” typically need only “rest[] upon some rational basis.”); see also *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1152 (Breyer, J., concurring) (contending that this precedent should apply to a regulation of how a business describes its prices and services to purchasers).

²⁰² See Franklin R. Edwards et al., *Crypto Assets Require Better Regulation: Statement of the Financial Economists Roundtable on Crypto Assets*, 75 FIN. ANALYSTS J. 14, 15 (2019) (emphasizing these risks in call for better regulation of ICOs and crypto-exchanges like Coinbase); Kelvin FK Low & Ernie Teo, *Bitcoins and Other Cryptocurrencies as Property?*, 9 LAW, INNOVATION & TECH. 235, 253–54 (2017) (describing risk that consumers will suffer cyberthefts measured in tens or hundreds of millions of dollars on unregulated cryptocurrency exchanges like Mt. Gox or Ethereum blockchain); Christian Rueckert, *Cryptocurrencies and Fundamental Rights*, 5 J. CYBERSECURITY 1, 4 (2019); Daniel Folkinshteyn & Mark Lennon, *Braving Bitcoin: A Technology Acceptance Model (TAM) Analysis*, 18 J. INFO. TECH. CASE & APPLICATION RSCH. 220, 226 (2016) (arguing that after traditional financial institutions lobbied for them, New York’s regulations had “their desired effect of causing many bitcoin businesses to pull out of New York State altogether”) (internal citations omitted).

²⁰³ *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34–35 (2010).

speech offering a prohibited transaction could be prohibited alongside the transaction itself.²⁰⁴

Contemporary commercial speech doctrine does not, in my view, support a rational basis review of the requirement that a registration statement is required before a crypto coin may be offered via a white paper, website, or social media account. Section 5 of the Securities Act²⁰⁵ does not simply mandate that coin promoters disclose “purely factual and uncontroversial information,” like the address of a law office or the names and bar affiliations of its partners.²⁰⁶ Instead, unless an exemption applies, it requires years of audited income and cash flow statements that have a contested and arguably speculative application to tokens such as Bitcoin.²⁰⁷ Thus, a law requiring a

²⁰⁴ See *Expressions Hair Design*, 137 S. Ct. at 1150–51 (observing that if a law regulated the price of a sandwich, it would regulate the speech announcing or evidencing the price of the sandwich, but holding that a “law’s effect on speech [may] be only incidental to its primary effect on conduct, and ‘it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed’”) (quoting *Rumsfeld v. F. for Acad. & Institutional Rights, Inc.*, 547 U.S. 47 (2006)).

²⁰⁵ 15 U.S.C. § 77e (2012).

²⁰⁶ See *Expressions Hair Design*, 137 S. Ct. at 1152–53 (Breyer, J., concurring) (suggesting that a statute that required a merchant to disclose its respective cash and credit-card prices for the same good or service would require such a disclosure of uncontroversial information) (citing *Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985)).

²⁰⁷ See Eric M. Sherbet, *Bridging the GAAP: Accounting Standards for Foreign SEC Registrants*, 29 INT’L L. 875, 880 (1995); Michael Vignone, *Inside Equity-Based Crowdfunding: Online Financing Alternatives for Small Businesses*, 91 CHI. KENT L. REV. 803, 822 (2016). Exemptions may limit the amount of value that circulates via the token by classifying such value as issued securities. 17 C.F.R. §§ 200, 227, 232 (1998) (one-million-dollar limit within certain twelve-month periods). An exemption for securities offered outside the United States may be placed at risk if there are resales back to persons in the United States. See 17 C.F.R. §§ 230, 249 (1998). Another exemption for private placements may not be suited to publicly available crypto coins. See 15 U.S.C. § 77d(a)(2) (exempting transactions by issuers not involving a public offering); SEC, *Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*, Release No. 33-10763 (proposed Mar. 4, 2020); SEC, *Concept Release on Harmonization of Securities Offering*, 84 Fed. Reg. 30, 460 (proposed June 18, 2019), <http://www.sec.gov/rules/concept/2019/33-10649.pdf> [<http://perma.cc/3VHN-YG8G>]. Regarding whether crypto coins can comply with SEC regulatory requirements, it is noteworthy that many of them—perhaps hundreds—may not have traditional operating profits at the time of launch; Bitcoin, Ether, Telegram, and Kik, for example, strained to avoid being classified as passive investments whereby token purchasers obtain shares in a traditional profit-making business, instead creating foundations and emphasizing tokens’ use cases or non-transferability. See, e.g., *Defs.’ Br. in Supp. of Defs.’ Mot. for Summ. Judg.*, at 6–12, 14–15, *Telegram*; *Defs.’ Answer*, at 9–16, 41–100, 121, *SEC v. Kik Interactive, Inc.*, No. 19-cv-5244 (S.D.N.Y. answer filed Aug. 6, 2019) (hundreds of coins, and Kik’s case); Wells Submission of Kik Interactive, Inc. at 17–26, No. 19-cv-05244 (S.D.N.Y. 2020); *In re Kik Interactive*, No. HO-13388 (SEC Div. of Enft., brief filed Nov. 16, 2018) (similar); Hinman, *supra* note 155; *infra* note 238 (noting heavy burden of applying accounting standards to crypto coins); *infra* note 338 (tokens

gas station to disclose a cash price of \$2.99 for a gallon of regular unleaded gasoline alongside a credit-card price of \$3.19 merely requires the credit-card price to be revealed, and “would not hinder the transmission of information to the public.”²⁰⁸ Strictly applying Section 5 of the Securities Act and Section 12(g) of the Exchange Act to crypto coins would hinder speech relating to them because, as explained below, such coins are frequently not amenable to traditional metrics of profitability, managerial control, and expectation of success.

Requiring pre-registration of all token offerings undermines a primary function of the First Amendment: “To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of constitutional guarantees.”²⁰⁹ Like the restriction on pharmaceutical effectiveness claims that have not been cleared with the FDA, an outright restriction on non-registered claims regarding crypto coin use cases or potential value is clearly unconstitutional.²¹⁰ Even someone with a criminal record should have the right to publish ideas that could become potential investments via a newsletter or its contemporary internet equivalent.²¹¹ Like a restriction on federal employees from receiving pay for speaking on topics on which they have expertise, a pre-registration requirement for ICO and AppCoin white papers would chill the formulation and growth of expression, while other regulations with lesser impacts on speech were available.²¹²

feel they must break law).

²⁰⁸ *Expressions Hair Design*, 137 S. Ct. at 1153 (Breyer, J., concurring).

²⁰⁹ *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939).

²¹⁰ See Lars Noah, *Off-Label Drug Promotion and the First Amendment*, 162 U. PA. L. REV. ONLINE 239, 251 (2014) (arguing that a “blanket prohibition on any statements concerning off-label uses sweeps broadly to prevent the dissemination of information even if it is presented in an entirely truthful and nonmisleading way . . . would strike First Amendment scholars as at least mildly perplexing, if not blatantly unconstitutional”) (citing, inter alia, *Wash. Legal Found. v. Henney*, 51 F. Supp. 2d 81, 83–87 (D.D.C. 1999), *vacated in part*, 202 F.3d 331 (D.C. Cir. 2000)).

²¹¹ *Lowe v. SEC*, 472 U.S. 181, 235 (1985) (White, J., concurring in the result) (person with criminal record should not be banned from advising others as to propriety of investments via a newsletter, because such a regulation would be contrary to the Court’s “commercial speech cases [which] have consistently rejected . . . drastic prohibitions on speech” even if justified by preventing “fraudulent” claims) (citing *Zauderer*, 471 U.S. 626); see also *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

²¹² See *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 476 (1995); Ned Snow, *Content-Based Copyright Denial*, 90 IND. L.J. 1473, 1481 (2015) (“The facts and reasoning of *National Treasury* seem to imply that Congress may not deny copyright to content creators. Denying copyright could be viewed as a denial of compensation for speech, where property rights in expression (i.e., a copyright) would represent a form of

It is not sufficient to say that advertisements or professional speech must be subject to some kind of legal oversight.²¹³ Rather, courts consider whether the mode of advertisement or solicitation can overbear the will of the recipient, rendering the recipient unable or unwilling to simply discard or ignore the contents.²¹⁴ Absent that kind of overpowering solicitation, the less restrictive alternative of remedying fraudulent crypto coin or other product offerings after the fact, shows that penalizing unregistered speech relating to the utility or value of crypto coins is disproportionate and unconstitutional.²¹⁵

compensation. Under *National Treasury*, . . . [Congress may not] chill speech before it ever happened.”) (citing *National Treasury*, 513 U.S. 454).

²¹³ Cf. Bhagwat, *supra* note 45, at 839–40.

²¹⁴ See *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 474–76 (1988) (noting that an advertisement from a lawyer, unlike an ongoing attorney-client relationship, “can readily be put in a drawer to be considered later, ignored, or discarded,” so the relevant inquiry is not whether advertisements harm “potential clients” but rather “whether the mode of communication poses a serious danger that lawyers will exploit any such susceptibility”); see also *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 637–40 (1995) (arguing that under *Shapero*, direct mail solicitations of clients within thirty days of their accidents may serve a “legitimate purpose” and recipients may simply throw them in the trash if they are not useful or helpful).

²¹⁵ See, e.g., *Shapero*, 486 U.S. at 468, 476 (ban on “soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems” unconstitutional because less restrictive means existed: punishing “actual abuses” or “isolated abuses of mistakes,” and requiring filing of all solicitations with the bar or other regulator for investigative and information-gathering purposes related to such prosecutions and punishments); *In re R.M.J.*, 455 U.S. at 201–02 (noting overbearing or inherently misleading advertising may be banned, but truthful advertising of legal services may not be prohibited by state bars that could punish “inaccurate” solicitations plagued by major “omissions;” “the preferred remedy is more disclosure, rather than less”) (quoting *Bates*, 433 U.S. at 375); *Went For It*, 515 U.S. at 641–43 (Kennedy, J., joined by Stevens, J., Souter, J., and Ginsburg, J., dissenting) (objecting to “wild disproportion” of relatively narrow regulation on solicitation of legal business of accident victims within thirty days of accident, and emphasizing a less restrictive alternative that when a client “enters into a contract with an attorney and later regrets it, Florida, like some other States, allows clients to rescind certain contracts with attorneys within a stated time after they are executed”); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 462 n.20 (1978) (finding the Court has held that “a lawyer who engages in solicitation as a form of protected political association generally may not be disciplined without proof of actual wrongdoing that the State constitutionally may proscribe.”); *id.* at 476 (Marshall, J., concurring in part and concurring in the judgment) (while “misrepresentation” may occur in attorney solicitation, its prevention is among the “concededly legitimate interests [that] might well be served by more specific and less restrictive rules than a total ban on pecuniary solicitation”); *In re Primus*, 436 U.S. 412, 438–39 (1978) (imposing ethical discipline on attorney who solicits client—in furtherance of right of free association—violates the First Amendment unless there is actual misconduct). *But see Ohralik*, 436 U.S. at 456, 461, 464 (upholding “prophylactic” ban on in-person solicitation which might, among other evils, be misleading, even though presumably such “misrepresentation” could be punished after it actually occurs).

C. International Law Perspectives on Freedom of Expression

Human rights law recognizes the right of everyone “to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”²¹⁶ The Human Rights Committee—which is empowered to opine to signatories to a core human-rights convention as to the scope of the right to seek and impart ideas in the media—maintains that such infringements must be “provided by law,” and must be necessary “for respect of the rights or reputations of others” or “for the protection of national security or of public order (*ordre public*), or of public health or morals.”²¹⁷ Preregistration of crypto coin speech is of doubtful necessity to protect the rights of others, which could be protected by a variety of other means including FTC cease and desist orders and disgorgement of profits, civil litigation for fraud or other torts with the prospect of class actions and punitive damages, and criminal prosecution for a variety of fraud-related offenses.

Human rights law also recognizes the right to hold an opinion, and this is seen as so fundamental that it is “a right to which the Covenant permits no exception or restriction.”²¹⁸ The UN expert on the freedom of expression, David Kaye, announced in 2018 that his office sees “laws or arrangements” that “require the ‘proactive’ monitoring or filtering of content” as conflicting with the free expression norm against “prepublication censorship.”²¹⁹ He objected that “restriction of user-generated content before its publication subjects users to restrictions on freedom of expression without prior judicial review of the legality, necessity and proportionality of such restrictions.”²²⁰ Any disproportionate or unjustified restrictions on the freedom of expression violate the right to speak and communicate ideas recognized under human-rights law.²²¹

²¹⁶ G.A. Res. 14668, International Covenant on Civil and Political Rights art. 19 pt. 2 (Dec. 19, 1966).

²¹⁷ *Id.* at pt. 3.

²¹⁸ U.N. OHCHR, 102d Sess., General Comment No. 34, art. 19 ¶ 9, U.N. Doc. CCPR/C/GC/34, 9 (Sept. 12, 2011); *see also* Letter from the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression to European Commission, at 3 (June 13, 2018), <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=23907> [<http://perma.cc/GZB9-QJ4G>].

²¹⁹ Letter from Special Rapporteur, *supra* note 218, at 6 (quoting Human Rights Council, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, A/HRC/38/35, ¶ 67).

²²⁰ *Id.* at 7.

²²¹ *See* Eric Barendt, *Freedom of Expression in the United Kingdom Under the Human Rights Act 1998*, 84 *IND. L.J.* 851, 862 (2009) (finding that under ECHR Art.

Regional as well as universal human-rights treaties protect the right to earn a living and choose one's occupation.²²² They also protect the freedom of association, which frequently and by tradition includes the exchange of funds as dues, as well as the freedom of expression including the right to share ideas by any media regardless of national frontiers.²²³ As Christian Rueckert explains, there is a human right to build crypto coin ecosystems:

When a message is transmitted or information is embedded in the blockchain using a transaction of bitcoins, [for example], this transaction clearly falls within the scope of the right to freedom of expression and information. . . . Persons who provide software as an infrastructure for the transfer of information can also invoke the right to freedom of expression and information. This follows from the *Pirate Bay* decision of the [European Court of Human Rights] where the Court decided that providers of a file-sharing website can rely on Art. 10 [of the European Convention on Human Rights and Fundamental Freedoms]. . . . [A]ny restriction of the Bitcoin protocol's development and any regulatory guideline for developers interfere[s] with their right to freedom of expression.²²⁴

Like the securities laws and the other laws analyzed below, the freedom of expression may not protect the utterance of false facts, even in noncommercial speech—although nations may have more leeway to prevent misleading advertisements.²²⁵ Some

10(2), when a law limiting a right is “disproportionate and [not] justified by relevant and sufficient reasons” it gives rise to a “strong presumption” that the right should be protected) (citing [European] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, 213 U.N.T.S. 221, 230).

²²² See Charter of Fundamental Rights of the European Union, 2016 O.J. (C 202) 7.6.2016 at art. 15 ¶ 1; Rueckert, *supra* note 202, at 7–8; see also G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 6 ¶ 1, *adopted and opened for signature, ratification, and accession* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); Organization of American States, *Additional Protocol to The American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”*, at art. 6, <http://www.oas.org/juridico/english/sigs/a-52.html> [<http://perma.cc/4LU8-6MJF>]; Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, at 36 (Sept. 17, 2003); Hugh Collins, *The Impact of Human Rights Law on Contract Law in Europe*, 22 EUR. BUS. L. REV. 429 (2011); Michael Ramsden & Luke Marsh, *The ‘Right to Work’ of Refugees in Hong Kong: MA v. Director of Immigration*, 25 INT’L J. OF REF. L. 574, 582, 584–85 (2013).

²²³ See Charter of Fundamental Rights of the European Union, *supra* note 222, at arts. 10 ¶ 1, 12 ¶ 1; Rueckert, *supra* note 202, at 8–9.

²²⁴ Rueckert, *supra* note 202, at 9 (citing European Court of Human Rights, Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden, No. 40397/12.Ret (13 Mar. 2013), ¶ 11.27; Lorna Woods, *Article 11: Freedom of Expression and Information*, in THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY 311–340 (Steve Peers, Tamara Hervey, Jeff Kenner, & Angela Ward eds., 2014)).

²²⁵ See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456, 461, 464 (1978) (upholding “prophylactic” ban on in-person solicitation which might, among other evils, be misleading). *But see Ohralik*, 436 U.S. at 476 (Marshall, J., concurring) (observing that

incorrect factual statements, however, are inevitable in all domains and may fall within the freedom of expression.²²⁶

IV. REGULATING MISLEADING EXPRESSIONS WHILE DEREGULATING “ECOSYSTEM SPEECH”

One must distinguish commercial speech that makes an “easily verifiable” claim from speech that is subjective, quasi-political, or based on optimistic projections.²²⁷ Under the *Central Hudson* test, the “State cannot regulate speech that poses no danger to the asserted state interest, . . . nor can it completely suppress information when narrower restrictions on expression would serve its interest as well.”²²⁸ There is a real danger, as explained above, that speech relating to crypto coins as an alternative to traditional ways of conducting e-commerce or buying software will be completely banned.²²⁹ Requiring pre-registration of crypto white papers in this way strikes at the heart of the First Amendment. That is because all “sanctions on the publication of truthful information of public concern” threaten “the core purposes of the First Amendment.”²³⁰

blanket requirement that solicitation not be done in person could be unconstitutional in certain circumstances, such as those in *In re Primus*).

²²⁶ See European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10 ¶ 1, Nov. 4, 1950, 213 U.N.T.S. 221, 230; Rueckert, *supra* note 202, at 9 (citing GRABENWARTER, *THE EUROPEAN CONVENTION OF HUMAN RIGHTS* (2014)).

²²⁷ Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 772 n.24 (1976).

²²⁸ Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 565 (1980); see also *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 371 (2002) (“[I]f the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.”); 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (plurality opinion) (holding the state law ban on advertising the price of alcoholic beverages invalid under the First Amendment because “alternative forms of regulation that would not involve any restriction on speech,” such as counter-speech/education or taxation or limitation of sale of aggregate alcohol content per container or per consumer, might have been successful); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490–91 (1995) (finding law restricting advertising alcohol content of beer was invalid as suppression of information that would be less effective than “directly limiting the alcohol content of beers”); *Nat’l Ass’n of Mfrs. v. SEC*, 748 F.3d 359, 373 (D.C. Cir. 2014) (striking down regulation and stating: “Without any evidence that alternatives would be less effective, we still cannot say that the restriction here is narrowly tailored.”).

²²⁹ While some companies could file for registration with the SEC and/or CFTC and sell their tokens, the decentralized establishment and circulation of tokens by poorly funded, widely dispersed financial amateurs might make the typical crypto coin virtually impossible to launch under a restrictive securities or commodities law regime. See *infra* notes 250, 337.

²³⁰ *Bartnicki v. Vopper*, 532 U.S. 514, 533–34 (2001); see also *Central Hudson*, 447 U.S. at 565 (government may not “completely suppress information when narrower restrictions on expression would serve its interest as well.”) (emphasis added); Geoffrey Miller, *The SEC as Censor: Is Banning an Investment Newsletter a Prior Restraint of the Press?*, 11 *PREVIEW OF THE U.S. SUP. CT. CASES* 243, 243 (1985) (“The First Amendment . . . prohibits the government from unreasonably interfering with people’s ability to communicate . . . through speech. It

Regulation of securities may do no violence to the First Amendment if it is not targeted at speech or if such targeting is “necessary to achieve the goals of federal securities laws.”²³¹ Still, in framing regulations of software (and internet) speech, Congress, the states, the courts, and administrative agencies attempt to differentiate speech that governments regard as harmful from other speech that should be lawful.²³² They have drawn distinctions that support the conclusion, among others, that writing the Bitcoin or Ether white papers and launching these foundational crypto coins did not violate the Securities Act or amount to fraudulent activity. Similar distinctions are drawn in implementing other laws governing advertising, commerce, and commercial speech. Accordingly, this Part surveys federal and state law for distinctions and doctrines relevant to misleading ICO/AppCoin speech.

A. The Governmental Interest in Regulating Coin-Founding Speech

The governmental interest in preventing fraud and regulating professional conduct or complex economic systems is often said to be substantial and even compelling.²³³ Yet there is a reduced public interest in regulating vague boasts and wild-eyed boosterism. Throughout the law, legislatures and adjudicators tend to distinguish between vague or optimistic statements about oneself or one’s enterprise, and statements of existing or recent fact that could be verified as being true or false. This distinction supports statutory and constitutional principles embodying light-touch regulatory regimes, including principles of the law of federal securities fraud, securities registration and disclosure requirements, false

limits the power of the government to regulate the flow of information among individuals.”)

²³¹ Page & Yang, *supra* note 189, at 7 n.26 (quoting Regulation of Communications among Shareholders, Release Nos. 34–31, 326, IC-19031, 57 Fed. Reg. 48,276 (Oct. 22, 1992)).

²³² The agencies on which this Part will focus include the SEC and the FTC.

²³³ See, e.g., *Zauderer v. Off. of Disciplinary Couns. of Super. Ct. of Ohio*, 471 U.S. 626, 657–58 (1985) (substantial interest in preventing deception with reasonable regulation); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 460 (1978) (finding a “particularly strong” interest in “protecting consumers and regulating commercial transactions,” and “a special responsibility for maintaining standards among members of the licensed professions”); *SEC v. Wall Street Pub.*, 851 F.2d 365, 373–74 (D.C. Cir. 1988) (suggesting that government interest in preventing misleading statements about securities was either unquestionable or substantial enough under *Zauderer*); cf. *Janus v. Am. Fed’n of State & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2465–66 (2018) (peaceful relations between unions and management even in public employers is a compelling interest); *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328, 341 (1986) (consumer “welfare” a “substantial” governmental interest”).

advertising of goods or services, common-law fraud, and products liability.²³⁴

Crypto white papers tend to focus on projections and puffery. In that, they are similar to relatively unregulated provision of information in both securities law and in other fields, including over-the-top self-promotion, honest if flawed optimism about the future, subjective comparisons of securities or commodities, search-engine results or other rankings, and the creation of economies in virtual worlds.²³⁵ Depending on how the SEC conducts its enforcement and public-education campaigns, the law's solicitude for puffery will either buttress its regulatory forbearance, or stand in contrast to its potential overreaching.

B. Traditional Legal Principles Governing Optimistic Statements

1. The Securities Act and Exchange Act

Federal courts have concluded that cryptocurrencies could fall under the regulatory purview of the SEC under the Securities Act and the Exchange Act, as well as under other investment-related laws.²³⁶ Moreover, the ABA wants states to follow New York's lead in purporting to impose prior restraints on persons handling "virtual currencies."²³⁷ Such laws, however, threaten to make most cryptocurrency speech unlawful as it has

²³⁴ See TAPSCOTT & TAPSCOTT, *supra* note 31, at ch. 11 (observing that numerous legal scholars argue for a light touch approach to blockchain); *supra* note 34 (citing authorities on status of information services under communications law); *infra* notes 323, 325, 340 (citing treatment of puffery and forward-looking statements in securities law, puffery in false advertising and fraud law, etc.).

²³⁵ See, e.g., *supra* note 116; cf. VILI LEHDONVIRTA & EDWARD CASTRONOVA, VIRTUAL ECONOMIES: DESIGN AND ANALYSIS 96 (2014) (suggesting that certain sales of Facebook Credits by users to Facebook Platform developers, and even more marketplace sales of Linden dollars, a virtual currency in a virtual world, are unregulated); Iviane Ramos de Luna et al., *Analysis of a Mobile Payment Scenario: Key Issues and Perspectives*, in IMPACT OF MOBILE SERVICES ON BUSINESS DEVELOPMENT AND E-COMMERCE 22, 27 (Francisco Liébana et al. eds., 2019) (stating that European Central Bank regards Facebook Credits and virtual world currencies as unregulated virtual currencies).

²³⁶ See, e.g., Press Release, Two ICO Issuers Settle SEC Registration Charges, Agree to Register Tokens as Securities, *supra* note 8.

²³⁷ *Chino v. N.Y. Dep't of Fin. Servs.*, No. 101880/2015, slip op. 51908(U) (N.Y. Sup. Ct. N.Y. Cnty. Dec. 21, 2017) (citing N.Y. COMP. CODES R. & REGS. tit. 23, § 200.1 *et seq.*, noting that it requires filing lists of "the identity and physical address of parties to transactions," current financial statements, official background checks, verification of tax status of every applicant's household or business, fingerprints, etc., and holding that plaintiff had failed to file a cognizable challenge to its constitutionality); Plaintiff's Amended and Verified Complaint and Article 78 Petition, *Chino v. N.Y. Dep't of Fin. Servs.*, No. 101880/2015 (N.Y. Sup. Ct., N.Y. Cnty. complaint filed May 25, 2017) (challenging constitutionality of BitLicense regime, which allegedly drove out of business a service intending to provide computers and services needed to process cryptocurrencies at delis and bodegas).

historically been articulated and structured. The cost of reporting financial results with the SEC under the Exchange Act is more than most coins could bear, and it is unclear how Generally Accepted Accounting Principles apply to Ether or Bitcoin, not to mention other coins with artificial intelligence or social media integration.²³⁸ In other countries, notably China and South Korea, regulation drove much crypto coin activity underground.²³⁹

The principles of American consumer and investor protection law provide a basis for regulating misleading ICO promotions after the fact and only as to provably false factual claims, as opposed to punishing mere failures to register in advance. The SEC and CFTC initially took a somewhat hands-off approach to crypto coins, warning that transactions in them could satisfy the *Howey* test and the definition of capital gains, etc., but not pursuing enforcement actions in 99% or 99.9% of cases that their announcements might justify.²⁴⁰ The SEC Chairman has referred

²³⁸ See Justin Cooke, Jason Denisenko & Richard Cohen, *Initial Coin Offerings: A Comparative Overview of Securities Regulatory Environments in the US, UK and Asia Pacific*, Allen & Overy, in BLOCKCHAIN & CRYPTOCURRENCY REGULATION 2019 (Josias Dewey ed., Rory Smith, 1st ed. 2019), (“The extensive ongoing reporting and other obligations that accompany Exchange Act registration would prove far too burdensome for the typical ICO issuer.”). Since 2003, the use of Generally Accepted Accounting Standards has become more mandatory, with fewer available exceptions even for truthful departures from them. See 17 C.F.R. §§ 228.10–229.10 (2020); Conditions for Use of Non-GAAP Financial Measures, Securities Act Release No. 8176, Exchange Act Release No. 47, 226, 68 Fed. Reg. 4,820 (Jan. 30, 2003).

²³⁹ See Emily Parker, *Can China Contain Bitcoin?*, MIT TECH. REV. (Dec. 11, 2017), <https://www.technologyreview.com/s/609320/can-china-contain-bitcoin> [<http://perma.cc/7D3W-M49X>]; Elaine Ramirez, *Crazy For Cryptocurrency: Why South Koreans Are Risking It All*, FORBES (Aug. 2, 2017, 1:28 AM), <https://www.forbes.com/sites/elaineramirez/2017/08/02/crazy-for-cryptocurrency-why-south-koreans-are-risking-it-all-on-ethereum/> [<http://perma.cc/CWN6-9ZKL>]; cf. Steven Russolillo & Eun-Young Jeong, *South Korea’s Cryptocurrency Crackdown Isn’t Stopping This Bitcoin Exchange’s Launch*, WALL ST. J., (Jan. 22, 2018, 5:25 AM), <https://www.wsj.com/articles/south-koreas-cryptocurrency-crackdown-isnt-stopping-this-bitcoin-exchanges-launch-1516616723> [<http://perma.cc/NE3J-SQCW>].

²⁴⁰ See Letter from Llew Claasen, Exec. Dir., Bitcoin Found., to Uniform Law Commission San Diego Meeting (July 14, 2017) (noting early federal consensus that blockchain innovation typified by Bitcoin should continue), <https://www.scribd.com/document/353781110/07-14-2017-Letter-to-ULC-Regarding-Virtual-Currencies> [<http://perma.cc/8X33-Q2A8>]; Jay Clayton, Chairman, SEC, Testimony on “Oversight of the U.S. Sec. and Exch. Comm’n” (Dec. 11, 2018), <https://www.sec.gov> [<http://perma.cc/FN4T-PZN7>] (suggesting that SEC enforcement activity on unregistered digital token sales began in 2017, long after such sales began, and did not target promoters of Bitcoin or Ethereum, two of the largest token ecosystems, in first two years); see also Defendant’s Motion to Dismiss Indictment for Subject Matter Jurisdiction & Vagueness at 22, *United States v. Zaslavskiy*, No. 17 CR 647 (RJD), 2018 WL 4346339 (E.D.N.Y. Sept. 11, 2018); Angela Walch, *The Bitcoin Blockchain as Financial Infrastructure: A Consideration of Operational Risk*, 18 NYU J. LEGISL. PUB. POL’Y 837, 891 (2015).

to a period of educating ICO promoters being followed by a period of suing or prosecuting them.²⁴¹ Famously, SEC guidance relating to the DAO affair indicated that digital token investment schemes may be unregistered offerings of securities.²⁴² The SEC has sued several firms for unregistered ICOs and obtained consent decrees or injunctions against many, perhaps most, of them, as well as a short criminal sentence in one egregious case.²⁴³ Moreover, the CFTC warned of pump and dump practices in crypto markets, which is a manipulative device in connection with the sale of a security or a commodity.²⁴⁴

The Supreme Court has recognized a critical distinction between fraud in an investment offering versus a non-“investment” fraud, which would not be securities fraud.²⁴⁵ Thus, many

²⁴¹ See, e.g., Clayton, *supra* note 240.

²⁴² See, e.g., SEC Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934, *supra* note 8; Brief of SEC in Support of United States in Opposition to Defendant’s Motion to Dismiss Indictment, at 11-17, *United States v. Zaslavskiy*, No. 17 CR 647 (E.D.N.Y. Sept. 11, 2019) (discussing DAO report). See also *Zaslavskiy*, No. CR-647(S-1), slip op. at 1 (S.D.N.Y. sentence imposed Nov. 18, 2019) (resulting in SEC obtaining a sentence of incarceration of eighteen months, plus restitution).

²⁴³ See, e.g., SEC v. Titanium Blockchain Infrastructure Servs. Inc., No. CV18-4315-DSF, slip op. at § III (C.D. Cal. May 30, 2018), *subsequent proceedings at* (C.D. Cal. consent judgment filed May 23, 2019) (injunction against offering unregistered token as security); SEC v. PlexCorps, 2017 U.S. Dist. LEXIS 206145 (E.D.N.Y. Dec. 14, 2017) (finding SEC likely to be able to show that “PlexCoin Tokens” were securities that need to be registered); SEC v. Shavers, No. 4:13-CV-416, 2014 WL 4652121, at *1, *10 (E.D. Tex. Sept. 18, 2014) (investigating the SEC’s stated claim against promoter of Bitcoins Savings & Trust for selling unregistered securities, although promoter did not seem to have own coin or token); Press Release, Two ICO Issuers Settle SEC Registration Charges, Agree to Register Tokens as Securities, *supra* note 8; Press Release, SEC Obtains Emergency Order Halting Fraudulent Coin Offering Scheme, *supra* note 8; Press Release, SEC Suspends Trading in Three Issuers Claiming Involvement in Cryptocurrency and Blockchain Technology, *supra* note 8.

²⁴⁴ Press Release, Commodity Futures Trading Comm’n, CFTC Issues First Pump-and-Dump Virtual Currency Customer Advisory CFTC Warns Customers to Avoid Pump-and-Dump Schemes (Feb. 15, 2018); see also Press Release, Commodity Futures Trading Commission, CFTC Staff Issues Consumer Advisory on Digit. Tokens (July 16, 2018) (“Beware Virtual Currency Pump-and-Dump Schemes highlights virtual currency pump-and-dump schemes that occur in the largely unregulated cash market for virtual currencies and digital tokens, and typically on platforms that offer a wide array of coin pairings for traders to buy and sell.”); Oscar Williams-Grut, *Market Manipulation 101: ‘Wolf of Wall Street’-Style ‘Pump and Dump’ Scams Plague Cryptocurrency Markets*, BUS. INSIDER (Nov. 13, 2017, 11:00 PM), <https://www.businessinsider.com/ico-cryptocurrency-pump-and-dump-telegram-2017-11?op=1> [<http://perma.cc/N8Z9-5U7W>] (“Traders artificially inflate the price of small cryptocurrencies with the hope of making a quick profit . . .”). A pump and dump scheme traditionally involved the purchase of stock, the false touting of it online or elsewhere, and then its dumping or sale at the resulting inflated price. See SEC v. Whittemore, 659 F.3d 1, 4 (D.C. Cir. 2011); *United States v. Gordon*, 710 F.3d 1124, 1128 n.2 (10th Cir. 2013); *Schnell v. Consecro, Inc.*, 43 F. Supp. 2d 438, 441, 447 (S.D.N.Y. 1999); Hoke, Exchange Act Release No. 16266, 1999 WL 670961 (Aug. 30, 1999); *United States v. Hoke*, Dock. 99-CR-411-ALL (C.D. Cal. 1999).

²⁴⁵ See *Reves v. Ernst & Young*, 494 U.S. 56, 61 (1990) (“Congress did not . . . ‘intend

investments that are offered to others do not need to be registered as securities, including business and law partnerships and sales of businesses, software licenses useful in making the licensee's business more profitable, contracts to sell or lease items which the investor continues to control, union pension fund investments, condominiums and housing cooperatives, and certificates of deposit to earn a fixed interest rate on capital delivered to a bank—any fraud preceding such deals would not be fraud in connection with the sale of a “security” or “investment contract.”²⁴⁶ When an

to provide a broad federal remedy for all fraud.”) (quoting *Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982)).

²⁴⁶ See *Marine Bank*, 455 U.S. at 557 n.5 (explaining that for purposes of securities fraud action, a certificate of deposit did not qualify as a “certificate of deposit, for a security” under Exchange Act, 15 U.S.C. § 78c(a)(10), even though the plaintiff invested such a certificate in a slaughterhouse and retail meat-market refers, because a “certificate of deposit, for a security” *traditionally* refers to instruments issued “in the course of corporate reorganizations”); *Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Daniel*, 439 U.S. 551, 561–62 (1979) (indicating that entitlement to benefits paid under union pension fund whose size would be affected by success of fund's investments was not a “security” or “investment contract” under *SEC v. W.J. Howey Co.*, 328 U.S. 293, 300 (1946)); *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 845, 858–59 (1975) (stating that “shares” in a nonprofit housing cooperative are not “securities” or “investment contracts” under Securities Act/Exchange Act); *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 732–33 (11th Cir. 2005) (per curiam) (finding that investments in payphone leasing and placement business would only be securities if investors “retained minimal control over the telephones”); *Matek v. Murat*, 862 F.2d 720, 731–32 (9th Cir. 1988) (suggesting that investments in general partnership are not put into a security or “investment contract” when partners control enterprise using their voting rights and have access to information about partnership affairs otherwise than through protections of SEC filing requirements); *Goodwin v. Elkins & Co.*, 730 F.2d 99, 103 (3d Cir. 1984) (“An investment contract or interest may still be classed as a security even if the investor is required to perform some duties, as long as those duties are ‘nominal or limited and would have little direct effect upon receipt by the participants of the benefits promised by the promoters.’”) (citation omitted); *Williamson v. Tucker*, 645 F.2d 404, 419 (5th Cir. 1981) (holding that joint venturers or partners may not buy securities or investment contracts when their “powers” are “real one[s] which they are in fact capable of exercising”); *Odom v. Slavik*, 703 F.2d 212, 215 (6th Cir. 1983) (per curiam) (similar to *Williamson*); *Lino v. City Investing Co.*, 487 F.2d 689, 691–93 (3d Cir. 1973) (concluding that even when promoters contact investors to sell them franchises, franchises created by such sales are not securities when investors work to make the franchises profitable); *Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc.*, 650 F. Supp. 1378, 1383 (W.D. Va. 1986) (“In determining whether a partnership or joint venture comes under the securities law, courts have considered the powers that the investors or partners are legally entitled to, rather than what powers they exercised or expected to exercise” and “courts have uniformly refused to define investments as securities in cases where ‘the power retained by the investors is a real one which they are in fact capable of exercising’”) (quoting *Williamson*, 645 F.2d at 419); *Cryptocurrencies: Oversight of New Assets in the Digital Age: Hearing Before the Comm. on Agric.*, 115th Cong. 70 (2018) (statement of Lowell D. Ness, Managing Partner, Perkins Coie LLP) (“Ongoing software updates and upgrades constitute ongoing efforts of others under *Howey*, but they are not likely to rise to the requisite level of efforts to form an investment contract.”); Debevoise & Plimpton, A Securities Law Framework for Blockchain Tokens, COINBASE 20, 22 (Dec. 7, 2016), <https://www.coinbase.com/legal/securities-law-framework.pdf> [<http://perma.cc/AEL9-ZBG3>] (indicating that licenses of software should not be treated as security, because

investor continues to control the business in which he or she invests, as with a franchise of a national restaurant or retail chain that uses standard layouts or recipes, he or she may not purchase a security or investment control because the franchisor or other business partner is not in complete control.²⁴⁷ In the case of union pension funds, it is not a typical “investment” to labor under a collective bargaining agreement that calls for a share of one’s compensation to be diverted into a pension whose funds are invested for profit.²⁴⁸ With respect to condominiums and housing cooperatives, they are not securities when they are not marketed based “solely by the prospects of a return,” because units may be used for household purposes even though any shares in units and common areas may also be flipped for large profits.²⁴⁹

Crypto coin corporations are arguing in several pending lawsuits that because their token actually operates as a currency, it is excluded from the definition of security by statute.²⁵⁰ The Exchange Act states that a security or investment contract, by definition, “shall not include currency.”²⁵¹ To the extent that a crypto coin is useful in payments, just like euros and to a greater extent some foreign currencies (those of Venezuela or Zimbabwe, for example), this exemption should apply.

A narrowing construction of “security” would be appropriate in view of the principle of statutory construction known as *noscitur a sociis*, and perhaps also the one known as *eiusdem generis*, at least when it comes to crypto coins that are not marketed as shares of stock or securities using those precise words. The principle of *noscitur a sociis* states that one should

software used in a business is not directly controlled by licensor).

²⁴⁷ See *ETS Payphones, Inc.*, 408 F.3d at 732 (holding that investors in payphone leasing and placement business only purchased securities because they “retained minimal control over the telephones” and that “the more control investors retain, the less likely it becomes that the contract qualifies as a security”).

²⁴⁸ *Daniel*, 439 U.S. at 561–62.

²⁴⁹ *Forman*, 421 U.S. at 852–53 (emphasis added) (citing *Howey*, 328 U.S. at 300).

²⁵⁰ See, e.g., Defendants’ Memorandum of L. (1) in Support of Their Motion for Summary Judgment & (2) in Opposition to Plaintiff’s Application for a Preliminary Injunction at 5–6, *SEC v. Telegram Grp. Inc.*, No. 19 Civ. 9439 (PKC), 2020 WL 61528 (S.D.N.Y. Jan. 3, 2020); Answer to Complaint at 12, 22, 26–27, *U.S. SEC v. Kik Interactive Inc.*, No. 19 Civ. 5244 (AKH), 2020 WL 5819770 (S.D.N.Y. Sept. 30, 2020); Notice of Motion & Motion to Dismiss Consol. Complaint for Violations of Fed. & Cal. L. at 21 n.19, *Zakinov v. Ripple Labs, Inc.*, No. 18-cv-06753-PJH, 2020 WL 922815 (N.D. Cal. Feb. 26, 2020). A criminal defendant already mentioned above also has argued unsuccessfully that a currency used for payment, whether Bitcoin or some new coin, is not a security. Defendant’s Motion to Dismiss Indictment for Subject Matter Jurisdiction & Vagueness at 6, 9–10, *United States v. Zaslavskiy*, No. 17 CR 647 (RJD), 2018 WL 4346339 (E.D.N.Y. Sept. 11, 2018).

²⁵¹ 15 U.S.C. § 78c(a)(10) (2018).

construe a phrase like “investment contract” by its neighbors in a statute or statutory clause.²⁵² The principle of *ejusdem generis* requires a general term or phrase to be interpreted as within the same class or genus as the more specific terms that precede it in a statutory list.²⁵³ In the case of the Securities Act, the terms that precede and follow “investment contract” are relatively passive investments like stocks, bonds, mineral rights, and debt notes.²⁵⁴

An important consequence of paying attention to these basic rules of construction is that some crypto coins would be neither securities nor commodities. Protecting crypto coins from the prior restraints imposed by the Securities Act and the Exchange Act alone will not vindicate the freedom of expression when it comes to white papers and token ecosystems if any contract relating to a digital token remains unlawful unless it is sold by an entity regulated under the Commodities Exchange Act (CEA).²⁵⁵ Reading the catch-all clause of the CEA as being restricted by *ejusdem generis* and *noscitur a sociis* to commodities similar to the agricultural and precious mineral commodities listed in CEA is one way of ensuring that crypto coins are not subject to the CEA’s restraints.²⁵⁶

Congressional intent may also be relevant to the question of whether crypto coin white papers are offers of investment contracts. Congress intended the definition of “security” to capture “the ordinary concept of a security,” as of the 1930s, which was likely far removed from something like Bitcoin or other digital tokens.²⁵⁷ Likewise, the legislative history indicates that by “commodities,” Congress meant such tangible items like fruit, lumber, and metals.²⁵⁸ Both the Securities Act and the CEA were intended to apply to new instruments such as “irregular”

²⁵² ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 195 (2012).

²⁵³ Egon Guttman, *The Futures Trading Act of 1978: The Reaffirmation of CFTC-SEC Coordinated Jurisdiction over Security/Commodities*, 28 AM. U. L. REV. 1, 24–25 (1978); *Ejusdem Generis*, BLACK’S LAW DICTIONARY (4th ed. 1968) (citing *Goldsmith v. United States*, 42 F.2d 133, 137 (2d Cir. 1930)).

²⁵⁴ See *Forman*, 421 U.S. at 847 (citing 15 U.S.C. § 77b(a)(1) (2018)).

²⁵⁵ See 7 U.S.C. §§ 6(a), 6h (2018); *SEC v. Nat’l Sec., Inc.*, 393 U.S. 453, 463 (1969); Guttman, *supra* note 253, at 29.

²⁵⁶ See 7 U.S.C. §§ 6a(a)(1), 6h (2018); see also Andrew Verstein, *Crypto Assets and Insider Trading Law’s Domain*, 105 IOWA L. REV. 1, 20 (2019) (noting that if cryptocurrencies are still commodities, exemption from classification as securities may be of limited value, because it “takes crypto assets out of the frying pan of securities regulation and into the fire of commodities regulation”).

²⁵⁷ *Forman*, 421 U.S. at 847–48 (quoting H.R. REP. NO. 73-85, at 11 (1933)).

²⁵⁸ Guttman, *supra* note 253, at 24–25 (collecting authorities).

securities or futures contracts on ocean shipping rates or mortgages, but as mentioned above, they have not been applied to investments such as franchises, even though franchises resemble stocks or mineral rights, so there must be a limit to such laws' protective scope.²⁵⁹

Many crypto coins are unlike public corporations in which members of the general public passively own shares, because such coins require significant efforts by coin adopters to succeed. The mining of Bitcoin and other mined tokens, which can confirm the validity of ongoing transactions and assemble the blockchain while preventing fraud, is an obvious example of how crypto owners are non-passive investors who are more like franchisees than Apple or Wells Fargo shareholders.²⁶⁰ As a result of being, in part, dependent on the expertise and marketing efforts of token purchasers, as well as their "efforts to 'setup and maint[ain]'" a blockchain and token-based ecosystem, many token founders do not exploit purchasers who are "solely" reliant on their efforts.²⁶¹

When it is a license of software, or a partnership to control a protocol directly rather than via managers and boards of directors as intermediaries, a crypto coin investment should not be ruled to be a security because the community and the ecosystem it creates shapes a coin's value.²⁶² Software and real property, like certificates relating to the ownership of precious metals, are not securities because they fluctuate based on market conditions rather than solely due to the developer's or metals dealer's ongoing efforts.²⁶³ A lease of valuable property rights is

²⁵⁹ SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1946) (referring to new promotional schemes covered by definition of security, which is not formulaic); Guttman, *supra* note 253, at 11, 14–15 (citing SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351 (1968)) (indicating that "irregular" forms of investment are covered, including futures on mortgages or ocean shipping rates).

²⁶⁰ See Andreessen, *supra* note 101; Bhaskar et al., *supra* note 12, at 311–12; Notice of Filing of Proposed Rule Change Relating to the Listing and Trading of Shares of the EtherIndex Ether Trust Under NYSE Area Equities Rule 8.201, 2017 WL 149923 (Jan. 13, 2017). Some crypto coins, it must be noted, are more centralized and do not use miners, making them less susceptible to this particular defense to being classified as a "security." See Ying-Yingsieh, Jean-Philippe (JP) Vergne & Shawang, *The Internal and External Governance of Blockchain-Based Organizations: Evidence from Cryptocurrencies in BITCOIN AND BEYOND CRYPTOCURRENCIES, BLOCKCHAINS, AND GLOBAL GOVERNANCE* (Malcolm Campbell-Verduyn ed., 2017).

²⁶¹ Ne. Revenue Servs., LLC v. Maps Indeed, Inc., 685 F. App'x 96, 100–01 (3d Cir. 2017).

²⁶² See Debevoise & Plimpton, *supra* note 246, at 17–22; Ness, *supra* note 246, at 47–48.

²⁶³ See Noa v. Key Futures, Inc., 638 F.2d 77, 79–80 (9th Cir. 1980) (Certificates of ownership of silver bars are not a security because value "depended upon the fluctuations of the silver market," even though dealer in certificates might go out of business before actually delivering silver, making purchasers investors in their view.); Marini v. Adamo,

clearly not a security, even though it is needed to create or expand a profitable enterprise such as oil or gas drilling.²⁶⁴ A sale of a work of art as an investment, even under false pretenses, does not create an “investment contract.”²⁶⁵ Similarly, a note secured by a mortgage on residential real estate, even if as part of an investment, is not a security if there is a “commercial” purpose for it such as resolving cash flow difficulties, rather than selling a business to the public in parts.²⁶⁶

The Bitcoin protocol and founding documents operate as a copyright and trademark license, to compensate the developers of an extremely complex and ingenious open-source software project, and one of the most successful branding and marketing campaigns of all time.²⁶⁷ An expectation that a digital token will support a “business” related or underlying the token may be different than an “expectation of profits” from an “enterprise” directly controlled by another’s “efforts,” as required by securities law.²⁶⁸ At least one court has held that an expectation that the

812 F. Supp. 2d 243, 256–58 (E.D.N.Y. 2011) (questioning whether purchaser of rare coins through another is strictly dependent upon intermediary for success of that investment if purchaser could sell coins early); Defendants’ Memorandum of Law in Support of Their Motion for Summary Judgment and in Opposition to Plaintiffs’ Application for a Preliminary Injunction, at 31–39, Sec. & Exch. Comm’n v. Telegram Grp. Inc., 448 F. Supp. 3d 352 (S.D.N.Y. 2020) (No. 19-cv-9439).

²⁶⁴ See *Nolfi v. Ohio Ky. Oil Corp.*, 675 F.3d 538, 546–47 (6th Cir. 2012); see also *Odom v. Slavik*, 703 F.2d 212, 213–15 (6th Cir. 1983) (holding that a limited partnership agreement to develop a real estate community was not a securities transaction even if a minor partner was denied control of it, making him dependent on the other general partners); *SEC v. Crude Oil Corp. of Am.*, 93 F.2d 844, 845, 847–48 (7th Cir. 1937) (emphasizing that none of the purchasers of contracts for future delivery of oil actually expected or wanted to receive the oil, instead desiring merely a speculative profit, in finding “forward contract” to be a security); *Perry v. Gammon*, 583 F. Supp. 1230, 1231–33 (N.D. Ga. 1984) (holding the “ordinary sale of real estate” is not a “securities transaction” even if purchasers intend to rely on real estate’s existing management at time of sale); *Wabash Valley Power Ass’n v. Pub. Serv. Co. of Ind.*, 678 F. Supp. 757, 765–67 (S.D. Ind. 1988) (working through a similar analysis as to purchasers of interest in nuclear power project, who expected to use the power but also perhaps to profit from energy transactions).

²⁶⁵ See *Mechigian v. Art Cap. Corp.*, 612 F. Supp. 1421, 1424, 1428 (S.D.N.Y. 1985) (investor in a lithographic plate for work of art touted as being worth much more than it really was, due to ability to make and sell prints from it at a profit, did not purchase security because “we should not try to turn every ‘thing’ which might be purchased and sold into a ‘security’ or “every commercial contract would end up being enforced in . . . class actions.”).

²⁶⁶ See *Singer v. Livoti*, 741 F. Supp. 1040, 1048–49 (S.D.N.Y. 1990) (indicating that a “commercial or consumer purpose” would indicate that a “routine” consumer transaction, including a “note secured by a mortgage on a home,” is not regulated by securities laws); see also *Zolfaghari v. Sheikholeslami*, 943 F.2d 451, 455 (4th Cir. 1991) (noting that a note secured by a mortgage on one home held as an investment for a return would not be a security).

²⁶⁷ See Walch, *supra* note 240, at 876–80.

²⁶⁸ But see *Cryptocurrencies: Oversight of New Assets in the Digital Age: Hearing Before the H. Comm. on Agric.*, *supra* note 38 (statement of Lowell D. Ness, Managing

Blockvest digital token will support a “business” would not make it a security; the court refused to find that purchasers of the token were investors in securities.²⁶⁹ A subsequent decision finding the Blockvest tokens to be securities emphasized that the purchasers were described as “‘passive’ investors.”²⁷⁰ A more active investor is different, as illustrated by cases declining to find a securities transaction when a franchisee buys the right to use trademarks and trade secrets in exchange for paying royalties and fees while agreeing to abide by certain standards, or when a business buys complicated software like Photoshop or Salesforce that is subject to use terms.²⁷¹

Many crypto coins also serve as a license to use a privacy-preserving form of software, reminiscent in some ways of anonymous email accounts, network firewalls, or internet browsers with privacy modes.²⁷² The absence of a dominant central firm in permission-less token-funded ecosystems could reduce the level of distrust with which many people view new technologies such as e-commerce, digital subscriptions, or social networking.²⁷³ In the context of online purchases of creative

Partner of Perkins Coie LLP, arguing that some token purchasers rely on promoters to build token “network”).

²⁶⁹ See *SEC v. Blockvest, LLC*, No. 18CV2287-GPB(BLM), 2018 WL 6181408, at *6–*7 (S.D. Cal. Nov. 27, 2018).

²⁷⁰ See *id.* at *5, *8 (quoting ICO marketing materials). The ICO at issue was relatively egregious in terms of portraying itself as a security, including by adopting a name that mashed up “blockchain” and “invest,” using a “Blockchain Exchange Commission” logo with an eagle design purloined from the SEC itself, and in terms of promising passive investors strong returns. To view the logo, see Ross Todd, *Lawyers Sound Off on What SEC’s Early Loss Really Means for Crypto ICOs and Securities*, LAW.COM (Nov. 29, 2018, 2:51 PM), <http://www.law.com/nationallawjournal/2018/11/29/lawyers-sound-off-on-what-secs-early-loss-really-means-for-crypto-icos-and-securities/> [<http://perma.cc/84HW-CV3J>].

²⁷¹ See Debevoise & Plimpton, *supra* note 246, at 20–22. The analysis in this memorandum is based in part on *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473 (2d Cir. 1974), in which the court suggested that a promoter of an investment must retain “immediate control” for its contract with investors to qualify as “investment contract,” because “remote” control analogous to that of a franchisor over a franchisee’s format or décor would not qualify. *Id.* at 484–85. See also *Cont’l Mktg. Corp. v. SEC*, 387 F.2d 466, 470 (10th Cir. 1967) (to be a security, an investment must be “inescapably tied to the efforts of the ranchers and the other defendants and not to the efforts of the investors.”) (emphasis added).

²⁷² See Shlomit Azgad-Tromer, *Crypto Securities: On the Risks of Investments in Blockchain-Based Assets and the Dilemmas of Securities Regulation*, 68 AM. UNIV. L. REV. 69, 133 (2018); Benedikt Bünz et al., *Zether: Towards Privacy in a Smart Contract World*, in FINANCIAL CRYPTOGRAPHY AND DATA SECURITY 423, 424 (Joseph Bonneau & Nadia Heninger eds., 2020) (discussing tokenized “techniques for confidential and anonymous payments, such as Monero and Zcash”) (footnote omitted); Yong Yu et al., *Blockchain-Based Solutions to Security and Privacy Issues in the Internet of Things*, 25 IEEE WIRELESS COMM’NS 12 (2018).

²⁷³ See THIBAUT SCHREPEL & VITALIK BUTERIN, BLOCKCHAIN CODE AS ANTITRUST 4–5 SSRN 3597399 (2020); see also Charles Kim, *How Patreon Champions its Creators and Patrons’ Data Rights*, TRANSCEND (May 12, 2020), <http://transcend.io/blog/how->

content, ranging from films to software, such protection of the purchasers' privacy promotes their own right to read, exchange ideas, and participate in the benefits of intellectual and scientific advances.²⁷⁴

Moreover, like the owners of general partnerships, many token holders can vote to affirm or reject a particular protocol or transactions, thereby potentially forking or otherwise altering a blockchain.²⁷⁵ Just as importantly, many tokens operate on blockchains that are open to inspection and provide transparency without SEC filings, just like general partners or joint venturers have access to books, records, and important meetings, which assures them of transparency without classifying their partnership or venture interests as securities.²⁷⁶ Such

patreon-champions-its-creators-and-patrons-data-rights [http://perma.cc/B5MN-ETRU] (noting that digital subscriptions create considerable privacy risks in terms of sharing personal and payment data).

²⁷⁴ See, e.g., G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 19(2), *adopted and opened for signature, ratification, and accession* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) ("Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 27 ¶ 1, (Dec. 10, 1948) ("Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."); Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981, 981–83 (1996); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 388–89 (2008); Joseph Thai, *The Right to Receive Foreign Speech*, 71 OKLA. L. REV. 269, 274–75 (2018); Lea Shaver, *The Right to Science and Culture*, 2010 WIS. L. REV. 121, 123–25 (2010).

²⁷⁵ See BitGuild, *PLAT Is Migrating to Tron*, MEDIUM, (Apr. 8, 2019), <http://medium.com/the-notice-board/plat-is-migrating-to-tron-cf64909bfb3> [http://perma.cc/ZP3C-56XH]; Stéphane Blemus & Dominique Guégan, *Initial Crypto-asset Offerings (ICOs), Tokenization and Corporate Governance* 8 (Centre d'Économie de la Sorbonne, Working Paper No. arXiv:1905.03340, 2019) ("Besides, each type of crypto-asset issued during an ICO possesses its own underlying characteristics, granting rights different from the other crypto-assets (voting rights, share of capital or any particular advantage ...)."); James Grimmelmann, *All Smart Contracts are Ambiguous*, 2 J.L. & INNOVATION 1, 19 (2019) (observing that of some smart contracts, in which category author includes some digital tokens, "protocol changes, forks, 51% attacks, and other consensus breakdowns are a kind of corruption threat" that "subject smart contracts to abrogation or alteration at the whims of other blockchain users"); Wenbin Zhang et al., *A Privacy-Preserving Voting Protocol on Blockchain*, 2018 IEEE 11TH INT'L CONF. ON CLOUD COMPUTING (CLOUD) 401, 401 ("As blockchain technologies mature and ecosystems over blockchain evolve, peers on blockchain networks often face situations in which they need to conduct voting for decision-making; as happened in the case of the DAO hard fork event on Ethereum."); see also Jonathan Rohr & Aaron Wright, *Blockchain-Based Token Sales, Initial Coin Offerings, and the Democratization of Public Capital Markets*, 70 HASTINGS L. J. 463, 475 (2019); Walch, *supra* note 240, at 861–66, 876–80; Angela Walch, *Open-Source Operational Risk: Should Public Blockchains Serve as Financial Market Infrastructures?*, in 2 HANDBOOK OF BLOCKCHAIN, DIGITAL FINANCE, AND INCLUSION 243, 259–66 (David Lee Kuo Chuen & Robert Deng eds., 2018).

²⁷⁶ See, e.g., Andreessen, *supra* note 101; David Bernstein, *Blockchain Could*

transparency and control leads courts to find that some partnerships are not securities.²⁷⁷ While corporate shareholders and limited partners also have voting rights, their shares in an enterprise may be deemed a security because their real say in what goes on is heavily diluted.²⁷⁸ The same may be true of widely-subscribed crypto coins, where the number of voting rights with respect to ledger transactions may rival the shareholder count of public companies and exceed the number of limited partners in a limited liability partnership.²⁷⁹ Still, unlike a corporation, blockchain-enabled tokens may provide a way of managing the token that is more democratic than the process characterizing most shareholders' ability to participate in corporate governance, which is minimal in many cases due to officers' and directors' power.²⁸⁰ Like Bitcoin users, adopters of new crypto coins "must rely on the efforts of others on the blockchain's ecosystem to bring their investment to fruition," but that does not mean that they are like corporate shareholders.²⁸¹

Transform Securities Transfer System, INT'L FIN. L. REV. (May 29, 2018) <http://www.iflr.com/Article/3807306/IFLR-magazine/Blockchain-could-transform-securities-transfer-systems.html> [<http://perma.cc/8JCX-6D6U>]; DE FILIPPI & WRIGHT, *supra* note 48, at 19–26, 35–37, 56–57, 109–13, 119, 133–35, 196–99; FEFER, *supra* note 48; Guadamuz & Marsden, *supra* note 10; Nakamoto, *supra* note 37, at 2, 6; *compare, with supra* note 246 (citing, *inter alia*, *Matek v. Murat*, 862 F.2d 720, 730–31 (9th Cir. 1988), *abrogated by* SEC v. Schooler, 905 F.3d 1107 (9th Cir. 2018)).

²⁷⁷ See *Williamson v. Tucker*, 645 F.2d 404, 419–20 (5th Cir. 1981) (emphasizing partners' access to information and abilities to participate in enterprise's affairs); *Odom v. Slavik*, 703 F.2d 212, 214–16 (6th Cir. 1983) (holding that ability to participate in affairs of an enterprise would result in investment in enterprise as partner not being a security); *Gotham Print, Inc. v. Am. Speedy Printing Ctrs.*, 863 F. Supp. 447, 454 (E.D. Mich. 1994) (noting profits of enterprise resulting "at least in large part" from participant-investors' efforts, in addition to those of promoter, franchise-style agreement was not a security).

²⁷⁸ *Williamson*, 645 F.2d at 419–20.

²⁷⁹ Cf. Michael Abramaowicz, *Cryptocurrency-Based Law*, 58 ARIZ. L. REV. 359, 389 (2016) ("In corporations . . . voters elect board members and entrust those board members to make decisions."); *id.* at 386 ("But . . . Bitcoin cannot allow voting based on one-person, one-vote, even if that were desirable.").

²⁸⁰ See, e.g., Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 557–59 (2003); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 836–37, 843–47 (2005); Lucian Arye Bebchuk, *The Case for Shareholder Access to the Ballot*, 59 BUS. L. 43, 44–45, 47–48 (2003); Lisa M. Fairfax, *From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm*, 99 B.U. L. REV. 1301, 1304, 1307–11 (2019); *but see id.* at 1304–5 (recognizing a new era of actively voting shareholders has emerged, particularly with "SEC rule allowing shareholders to submit proxy access bylaws," although scholars continue to argue that low rate of directors being ousted means that "majority voting has no impact or . . . that shareholders are not willing to exercise their voting authority") (citing 17 C.F.R. § 240.14a-8(i)(8) (2018)); *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1146–47 (D.C. Cir. 2011); Stephen J. Choi et al., *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119, 1122, 1128 (2016); William K. Sjostrom, Jr. & Young Sang Kim, *Majority Voting for the Election of Directors*, 40 CONN. L. REV. 459, 469 (2007).

²⁸¹ Shlomit Azgad-Tromer, *Crypto Securities: On the Risks of Investments in*

Some combination of coding, mining, and automated processes may be more determinative of the coin's value than the identity of its founders or the coding enterprise's cash flow at the time of a coin's initial issuance.

Finally, like franchisees or member-managers of apartment cooperatives and the like, many coin purchasers use and improve their investments.²⁸² The SEC looks to the token purchasers' role in managing the network as an important factor, but it views crypto coins with influential or indispensable founders as more likely to be securities.²⁸³ It is true that in a case involving investors in rare (precious metal) coin portfolios designed—at the option of the buyer—with coins of the buyer's choosing or coins selected by the manager and seller, the court found a security to exist.²⁸⁴ However, that decision relied on a binding precedent regarding apartment cooperatives—finding their utility and owner-member upkeep to be irrelevant—which was later reversed by the Supreme Court.²⁸⁵ Other cases involving investments in live beavers or cosmetics for resale also predated the apartment cooperative

Blockchain-Based Assets and the Dilemmas of Securities Regulation, 68 Am. U. L. Rev. 69, 121–25 (2018). Although Bitcoin is now viewed as a “decentralized” token with an unimportant central management, see Hinman, *supra* note 155, at 3, the Bitcoin Foundation continued to shape the technological requirements of the token as late as 2017, by its own statement. See Claasen, *supra* note 240. Likewise, while the blockchain-based Aptoide app store had an existing open-source reference implementation, in 2018 the “ASF - App Store Foundation” was “created to coordinate the development of the protocol and reference implementation under an open governance model; board of directors is elected by AppCoins owners.” *AppCoins Milestones*, ICOBENCH (2019), <https://icobench.com/ico/appcoins/milestones> [<http://perma.cc/Z7KM-VWL3>].

²⁸² See, e.g., *Lino v. City Investing Co.*, 487 F.2d 689, 690–93 (regarding franchisees); *Endico v. Fonte*, 485 F. Supp. 2d 411, 415 (S.D.N.Y. 2007) (noting member-manager of apartment rehabilitation project, in which members who purchased access to the project would need to perform labor on it).

²⁸³ See No-Action Letter re: *Pocketful of Quarters, Inc.*, *supra* note 8; Hinman, *supra* note 155; Brief of SEC in Support of the United States' in Opposition to Defendant's Motion to Dismiss Indictment, *United States v. Zaslavskiy*, No. 17-CR-0647 (RJD) (E.D.N.Y. Mar. 19, 2018), at 14–15 (citing *Cont. 1 Mktg. Corp. v. SEC*, 387 F. 2d 466, 470–71 (10th Cir. 1967)); *SEC v. Aqua-Sonic Prods. Corp.*, 687 F.2d 577, 583–84 (2d Cir. 1982); *SEC v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476, 482 (9th Cir. 1973); SEC, Div. of Corp. Fin., Framework for “Investment Contract” Analysis of Digital Assets (2018), <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> [<http://perma.cc/FK4G-CB5E>]; SEC Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934, *supra* note 8, at 9–10.

²⁸⁴ *SEC v. Brigadoon Scotch Distribs., Ltd.*, 388 F. Supp. 1288, 1292–93 (S.D.N.Y. 1975).

²⁸⁵ See *id.* at 1293 (citing *Forman v. Cmty. Servs., Inc.*, 500 F.2d 1246 (2d Cir. 1974), *cert. granted*, 419 U.S. 1120 (1975), *rev'd*, 421 U.S. 837, as justifying the expansive definition of “security” applied in the case); *Wuliger v. Eberle*, 414 F. Supp. 2d 814, 821 (N.D. Ohio, 2006) (citing *Brigadoon Scotch* ruling on Federal Coin Reserve as justifying a conclusion that “viatical life settlements” were securities).

case.²⁸⁶ If such precedents do not count, “functional cryptocurrencies” or “utility tokens” may not be securities after all.²⁸⁷

Crypto coin promoters such as Ripple Labs and Telegram Group are increasingly arguing that, as a functioning currency their tokens are and should be excluded from the definition of a security.²⁸⁸ Broad definitions of “currency” as a medium of exchange that circulates regardless of official status bolster this argument.²⁸⁹ This argument might not place crypto coins on the same lightly-regulated plane as other forms of software or political information, because the coin firms making this argument often point to the CFTC as having jurisdiction over currencies as commodities.²⁹⁰ However, there is a third category

²⁸⁶ See *SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 485 (5th Cir. 1974); *Con'l Mktg. Corp. v. SEC*, 387 F.2d 466, 469–70 (10th Cir. 1967); cf. *Forman*, 421 U.S. at 851–52, 858 (emphasizing that while a share in an apartment complex may be an “investment,” it is not a security or “investment contract” because it was not marketed as generating profits or resale revenue but was capable of “personal use”). It is true that in *Forman*, the Court announced that it was not deciding whether the promotion of an asset as both personally useful and a profitable investment would be a securities transaction, but it also suggested that it would not have been an investment contract to lease land rights that were directly useful as well as being a potentially profitable source of oil drilling rights that the lessor was primarily responsible for and promoting, stating instead that the land was strictly “incidental” to the drilling rights. *Forman*, 421 U.S. at 858 nn.17–18 (citing *SEC v. CM Joiner Leasing Corp.*, 320 U.S. 344, 348 (1943)).

²⁸⁷ See, e.g., Nate Crosser, *Initial Coin Offerings as Investment Contracts: Are Blockchain Utility Tokens Securities*, 67 U. KAN. L. REV. 379, 409–11 (2018); Anthony R.G. Nolan et al., *Initial Coin Offerings: Key US Legal Considerations for ICO Investors and Sponsors*, 19 J. INV. COMPLIANCE 1 (2018), <https://www.emerald.com/insight/content/doi/10.1108/JOIC-02-2018-0016/full/html> [<http://perma.cc/A9JA-6ZYW>]; Zuluaga, *supra* note 17, at 2, 4.

²⁸⁸ Defendant’s Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment, at 20–23, *SEC v. Telegram Group Inc.*, No. 19-cv-9439 (PKC) (S.D.N.Y. Jan. 14, 2020); Notice of Motion and Motion to Dismiss Consol. Complaint for Violations of Fed. & Cal. L., at 3, *In re Ripple Labs Inc. Litig.* No. 18-cv-06753 (PJH) (N.D. Cal. brief filed 2019); Defendant’s Motion to Dismiss Indictment, at 6–10, 16–17, *U.S. v. Zaslavskiy*, No. 17-cr-0647 (RJD) (E.D.N.Y. Feb. 27, 2018); Defendant’s Reply Brief in Support of Motion to Dismiss Indictment, at 2–11, *U.S. v. Zaslavskiy*, No. 17-cr-0647 (RJD) (E.D.N.Y. Mar. 26, 2018); Defendant’s Reply Brief in Support of Motion to Dismiss, Ex. A at 3, *U.S. v. Zaslavskiy*, No. 17-cr-0647 (RJD) (E.D.N.Y. Feb. 27, 2018) (referencing *McDonnell/Coin Drop Markets*); see also Defendant’s Local Rule 56.1 Statement in Support of Their Motion for Summary Judgment, at 1, 3, 6–7, *SEC v. Telegram Group Inc.*, No. 19-cv-9439 (PKC) (S.D.N.Y. Jan. 14, 2020).

²⁸⁹ See MERRIAM-WEBSTER INC., WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 557 (Philip Babcock Gove ed. 2002) (defining “currency” as “something that is in circulation as a medium of exchange”) (emphasis added); *Currency*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/currency> [<http://perma.cc/S8MF-ENEN>] (last visited Nov. 16, 2020); see also *Emery Bird Thayer Dry Goods Co. v. Williams*, 98 F.2d 166, 172 (8th Cir. 1938) (“Our investigation indicates that any one of three meanings may be attributable to the term ‘money’: (1) Gold or silver as the monetary standard of the Nation; (2) coins and currency actually circulating as a medium of exchange; or (3) the unit of value, the dollar.”).

²⁹⁰ See Plaintiff’s Reply Memorandum of Law in Further Support of Its Motion for Summary Judgment, at 15, *SEC v. Telegram Group Inc.*, No. 19-cv-9439 (PKC) (S.D.N.Y. Jan. 27, 2020), (No. 19 Civ. 9439); Notice of Motion and Motion to Dismiss Consol.

that is probably even more apposite: vouchers or barter units. The customs laws of the United Kingdom have a category possibly suited to such virtual commodities used for barter, called “special purpose vouchers.”²⁹¹ The Monetary Authority of Singapore, Canada’s Revenue Agency, and the Australian Taxation Office have analogized Bitcoin to a barter transaction, in which a business decides to trade its goods or services for another asset that may not be a domestic or foreign currency in traditional terms.²⁹² Hong Kong and the Central Bank of the Republic of Taiwan made a similar move by calling bitcoin a “virtual commodity,” rather than traditional currency.²⁹³

The SEC has been vague in announcing that the duty to register applies to “virtually any instrument that *may* be sold as an investment.”²⁹⁴ Virtually anything may be bought and sold for

Complaint for Violations of Fed. Cal. L., at 3, In re Ripple Labs Inc. Litig., No. 18-cv-06753 (PJH) (N.D. Cal. brief filed 2019).

²⁹¹ See LIBR. OF CONG., *supra* note 12 (citing Tom Gullen, *The Challenge of Being a Bitcoin Trader*, FINANCIAL SERVICES CLUB BLOG (Nov. 13, 2013), <http://thefinanser.co.uk/fsclub/2013/11/the-challenge-of-being-a-bitcoin-trader.html> [<http://perma.cc/UG9W-AUCH>]).

²⁹² See *id.* (citing Terence Lee, *Singapore Government Decides Not to Interfere with Bitcoin*, TECHINASIA (Dec. 23, 2013), <http://www.techinasia.com/singapore-government-decides-interfere-bitcoin/> [<http://perma.cc/72WN-7NK7>]); *Bitcoins Aren't Tax Exempt, Revenue Canada Says*, CBC NEWS (Apr. 26, 2013), <http://www.cbc.ca/news/business/revenue-canada-says-bitcoins-aren-t-tax-exempt-1.1395075> [<http://perma.cc/8W6Y-EU44>]; Jasper Hamill, *Canadian Regulators Welcome US Bitcoin Refugees with Open Arms*, THE REGISTER (May 20, 2013), http://www.theregister.co.uk/2013/05/20/canada_welcomes_bitcoin_traders_fintrac_letter/ [<http://perma.cc/Q5T5-KXH2>].

²⁹³ See Oksana Panova et al., *International Models of Legal Regulation and Ethics of Cryptocurrency Use*, *Country Review*, 22 J. LEG., ETH. REGUL. ISSUES 1, 3 (2019); Yogesh Malhotra, *Future of Bitcoin & Statistical Probabilistic Quantitative Methods: Global Financial Regulation (Interview: Hong Kong Institute of CPAs)*, H.K. INST. CERTIF. PUB. ACCTS., (Jan. 20, 2014), http://finrm.org/Future_of_Bitcoin.pdf [<http://perma.cc/5ZLU-A6DY>].

²⁹⁴ Letter from Jay Clayton, SEC Chairman, to the Hon. Ted Budd, *supra* note 8, at 1 (emphasis added); see also Proskauer, *SEC Director William Hinman: “Current offers and sales of Ether are not securities transactions,”* JD SUPRA (June 18, 2018), <http://www.jdsupra.com/legalnews/sec-director-william-hinman-current-32939/> [<http://perma.cc/PGY6-288R>] (describing SEC “Chairman Jay Clayton’s position that he has not seen a single token issued through an ICO that is not a security”); *SEC to Regulate Bitcoin ICOs, Token Sales*, PYMNTS (Aug. 17, 2017), <http://www.pymnts.com/news/payment-methods/2017/sec-to-regulate-bitcoin-icos-token-sales/> [<http://perma.cc/8ARX-FEL7>] (“According to a report in Seeking Alpha, the SEC said the cryptocurrencies are subject to federal securities laws. ‘Offers and sales of digital assets by ‘virtual’ organizations are subject to the requirements of the federal securities laws,’ said SEC Chairman Jay Clayton, according to the report.”). One application of the definition of a “security” to digital asset transactions by an SEC official is slightly more precise, in requiring that the asset be purchased as an investment will be profitable due to the promoter’s “efforts,” but becomes virtually limitless again by incorporating a definition of promoter that would include eBay, franchisors, law firm partners, condominium associations, banks offering certificates of deposit, sellers of food crops or

speculative purposes by investors in the age of eBay and StubHub.²⁹⁵ The SEC has warned, in issuing no-action letters to sellers of unregistered digital tokens, that such a transaction might constitute the (criminal) unregistered sale of a security if proceeds are used “to build the . . . Platform,” if the platform is not “fully functional and operational,” if the tokens are not “immediately usable” on the platform, or if it is possible to transfer tokens to wallets.²⁹⁶ That leaves open a very narrow window in which to sell tokens without the chill and threat imposed by potential criminal prosecution or civil orders making an enterprise insolvent.²⁹⁷ Under the SEC’s view, would any form of blockchain-based art that could be exchanged for cryptocurrencies held in wallets be considered a “security?” A certain reading of its no-action letters might suggest that digital art, such as cryptokitties that sold for Ether, might be a security because it can be exchanged for other tokens.²⁹⁸

products in bulk, and anyone else who “is working actively” on a matter relevant to the “success of [an] enterprise.” See Hinman, *supra* note 155 (“Similarly, investment contracts can be made out of virtually any asset (including virtual assets), provided the investor is reasonably expecting profits from the promoter’s efforts.”); cf. *Framework for “Investment Contract” Analysis of Digital Assets*, U.S. SEC, DIV. OF CORP. FIN. (Apr. 3, 2019), <http://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> [<http://perma.cc/SW7Y-HTYC>] (similar). Commodities such as wheat, soy beans, oranges, orange juice, beer, and whiskey are not defined as securities under federal law even though farmers and cooperatives thereof invest in their production and expect a profit from their eventual sale. See *Glen-Arden Commodities, Inc. v. Costantino*, 493 F.2d 1027, 1033–34 (2d Cir. 1974) (collecting cases).

²⁹⁵ See, e.g., George Hopkin, *Kidding Around: Investing in Rare Toys*, H. K. TATLER (Dec. 28, 2015), <http://hk.asiatatler.com/life/kidding-around-investing-in-rare-toys> [<http://perma.cc/6HB3-JH7T>] (noting that some rare toys are worth tens of thousands of dollars as an investment, more than a Bitcoin and many times what Ether or other newer tokens may be worth); *Vintage Super Mario Bros. Video Game Sells for \$114,000*, ASSOCIATED PRESS (July 11, 2020), <http://apnews.com/article/99710286a6d37450f8dd87fd71faa1d3/> [<http://perma.cc/8K9H-BL7U>]; Jason M. Bailey, *Collectors Are Spending Thousands on Video Games They Will Never Play*, N.Y. TIMES (Jan. 27, 2020), <http://www.nytimes.com/2020/01/27/business/video-games-wata-heritage.html> [<http://perma.cc/5XSX-VPNH>] (noting rare Nintendo games may be sold for more than \$12,000 or even \$100,000 each); Mark Seifert, *Highest Graded Copy Of X-Men #1 Goes For Record \$492,937.50*, BLEEDING COOL (July 26, 2012), <http://bleedingcool.com/comics/highest-graded-copy-of-x-men-1-goes-for-record-492937-50/> [<http://perma.cc/T4EH-V2VV>].

²⁹⁶ No-Action Letter re: Pocketful of Quarters, Inc., *supra* note 8; cf. No-Action Letter re: Turnkey, Jet, Inc., *supra* note 8.

²⁹⁷ See Oilly Jackson, *US, UK Cryptocurrency Laws Deterring Blockchain Companies*, INT’L FIN. L. REV. (Aug. 31, 2018), <https://www.iflr.com/article/b1lp1wzy4q4wh9/us-uk-cryptocurrency-laws-deterring-blockchain-companies> [<http://perma.cc/QF68-9HKA>]; Oilly Jackson, *Initial Coin Offerings: SEC Stance Discouraging Issuances*, INT’L FIN. L. REV., Aug. 20, 2018, at 1–2, LEGAL SOURCE.

²⁹⁸ See generally Tonya M. Evans, *Cryptokitties, Cryptography, and Copyright*, 47 AIPLA Q.J. 219, 220–250 (2019) (describing how smart contracts permit digital artists to exercise more control over their productions than traditional online games or worlds such

As long as the freedom of speech is not impacted, courts have held that the broad definition of security utilized by the SEC after *Howey* may not be determined to be unconstitutionally vague or overbroad.²⁹⁹ At least one court, however, has held that “impersonal” investment publications that do not propose a purchase by a specific customer are not commercial speech, and are therefore “protected” under the First Amendment.³⁰⁰ As a result, persons desiring to publish newsletters or market chart documents could challenge a registration requirement in the U.S. Code, albeit one governing commodities investment advice.³⁰¹ Under the analysis of that court, white papers or other crypto coin promotional speech are directed to the world at large, rather than being targeted to the particular situation of any particular buyer or proposing an imminent purchase. A law censoring them should be struck down as being void for vagueness; it leaves speakers guessing as to how much speech or conduct directed at the general public it forbids or requires.³⁰²

The vagueness defect of a potential prohibition on marketing of unregistered crypto coins is compounded by the relative weakness of the scienter requirement contained in the statute cited by the SEC.³⁰³ Courts rejecting vagueness challenges in complex financial crimes often emphasize the scienter requirement of the underlying statutes, which may, for example, only criminalize falsifying certain paperwork with a “purpose of evading” the statutory paperwork mandate.³⁰⁴ Although a violation of the Exchange Act, for example, must be committed

as Minecraft or World of Warcraft); Bryan Wilson, *Blockchain and the Law of the Cat: What Cryptokitties Might Teach*, 88 UMKC L. REV. 365, 369–70 (2019) (observing that cryptokitties have been sold for tens of thousands of Ether tokens worth more than \$27 million over the two years ending March 2019).

²⁹⁹ See *Glen-Arden Commodities, Inc. v. Costantino*, 493 F.2d 1027, 1029–30 (2d Cir. 1974); *SEC v. Brigadoon Scotch Distrib. Co.*, 480 F.2d 1047, 1052 n.6 (2d Cir. 1973); *United States v. Zaslavskiy*, No. 17-CR-647, 2018 WL 4346339, at *8–9 (E.D.N.Y. Sept. 11, 2018).

³⁰⁰ See *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm’n*, 149 F.3d 679, 686 (7th Cir. 1998).

³⁰¹ See *id.* at 686–89 (citing 7 U.S.C. § 1a(5)(C)).

³⁰² See *United States v. Lanier*, 520 U.S. 259, 266 (1997).

³⁰³ See *Hinman*, *supra* note 155, at n.2 (citing 15 U.S.C. §§ 77b(a)(1) and 78c(a)(10)); Complaint at 6–35, *SEC v. ReCoin Grp. Found., LLC*, No. 17 CV 5725 (RJD), 2017 U.S. Dist. LEXIS 34225 (E.D.N.Y. Jan. 30, 2018), 2017 U.S. Dist. Ct. Pleadings LEXIS 34225, at *1 (citing 15 U.S.C. §§ 77b(a)(1), 77e(a), 77e(c), 78c(a)(10), 78u(d)(1)–(3), and 78u(d)(5)); see also *SEC v. Edwards*, 540 U.S. 389, 393 (2004) (equating the definition of “security” in the Exchange Act, 15 U.S.C. § 78c(a)(10) with the definition in the Securities Act, 15 U.S.C. § 77b(a)(1)).

³⁰⁴ See, e.g., *Skilling v. United States*, 561 U.S. 358, 412 (2010); *United States v. DeVore*, No. 90-3982, slip op. at 12 (6th Cir. May 6, 1991) (unpublished table disposition); *United States v. Drew*, 259 F.R.D. 449, 464 (C.D. Cal. 2009); *United States v. Scanio*, 705 F. Supp. 768, 773–79 (W.D.N.Y. 1988), *aff’d*, 900 F.2d 485 (2d Cir. 1990).

“willfully” in order to be a crime, courts have relaxed this requirement by holding that a willful violation does not require knowledge of the existence or meaning of the rule at issue.³⁰⁵ This state of affairs aggravates the lack of a clear meaning attached to the obligation to register “investment” offerings. Imprisonment for up to 10 years is a penalty that may be difficult to justify in cases involving ignorance of the law.³⁰⁶

Attorney speech presents a helpful analogy to token promoter speech, as both attorneys and promoters solicit new business and could be trusted by their clients or customers, raising questions of fiduciary duties and misleading advertisements. A Nevada Supreme Court rule restricting attorney speech on pending cases because it may disrupt the proceedings, or taint the result, was void for vagueness because the rule did not clarify what kinds of pretrial or mid-trial public appeals stating that a client in a criminal case is innocent, are permissible.³⁰⁷ Although attorneys perform services for pay in trials, they still have a First Amendment interest in undeterred free speech, in being clearly told what they can do, in objective standards, and in uniform enforcement procedures for their profession.³⁰⁸ Finally, the attorney speech and academic freedom cases strongly suggest that civil consequences for vague offenses may violate the First Amendment; this is relevant to such securities or commodities law remedies as being barred from certain markets or being ordered to halt an offering or to refund all proceeds.³⁰⁹

³⁰⁵ See, e.g., *United States v. Dixon*, 536 F.2d 1388, 1395 (2d Cir. 1976); *United States v. Peltz*, 433 F.2d 48, 54–55 (2d Cir. 1970). Perhaps for this reason, although seemingly glossing over the insistence by these courts that willfully represents a mens rea requirement, the SEC contends that it is a strict liability offense for a broker in cryptocurrencies or an offeror thereof to make an untrue statement or omission of material fact. See Order Instituting Administrative and Cease-And-Desist Proceedings, Crypto Asset Management, L.P., Securities Act Release No. 33-10544, Investment Company Act Release No. 33222 (Sept. 11, 2018), <http://www.sec.gov/litigation/admin/2018/33-10544.pdf> [<http://perma.cc/4YJS-F6VV>].

³⁰⁶ See 15 U.S.C. § 78ff(a) (2002); *Skilling*, 561 U.S. at 412; *Drew*, 259 F.R.D. at 464.

³⁰⁷ See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048–51 (1991).

³⁰⁸ See *id.* at 1048–52; see also *United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)). Some degree of subjective enforcement by administrative agencies or state attorneys general may be permitted. See *Prime Healthcare Servs., Inc. v. Harris*, 216 F. Supp. 3d 1096, 1125 (S.D. Cal. 2016) (upholding scheme requiring California Attorney General to approve sale of nonprofit health care provider’s assets, including by determining whether sale is in public interest, Supreme Court has upheld statutes “based upon standards such as the public interest”) (quoting *Montgomery Nat. Bank v. Clarke*, 882 F.2d 87, 89–90 (3d Cir. 1989)).

³⁰⁹ See *Gentile*, 501 U.S. at 1034–35, 1051; see also *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 254–55, 257–58 (2012) (indicating non-criminal penalties imposed by FCC violated Fifth Amendment by not placing penalized broadcaster on reasonable notice of

2. The Lanham Act of 1946

The Lanham Act provides a cause of action for false or misleading descriptions, statements of fact, or representations in interstate commerce.³¹⁰ A claim for deceptive advertising under federal law requires proof of a factual statement that is false, that will be likely to induce purchases (be material to them), and that has a tendency to deceive a “substantial” number of persons.³¹¹ Thus, “adspeak” and other claims that lack a specific, “inherent” meaning may be unregulated by laws on advertising on Internet-based services.³¹²

The First Amendment’s protection of scientific studies that boost demand for commercial products may be relevant to crypto coin white papers. It has been held that the “publication and dissemination of a scientific study that had the effect of touting a company’s product is noncommercial speech and [is] thereby immune from the false advertising provisions of the Lanham Act.”³¹³ One court has articulated an even broader principle: “Statements of opinion are not generally actionable under the Lanham Act.”³¹⁴ The FTC once adopted a similar standard in regulating deceptive acts and practices in interstate commerce.³¹⁵ Moreover, the publication of boastful

offense definition or scope); *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 970 (9th Cir. 1996) (illustrating non-criminal penalties imposed by public college); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1183–84 (6th Cir. 1995) (illustrating non-criminal penalties imposed by public university); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 579–80 (1985) (Brennan, J., joined by Marshall, J., dissenting) (assuming that civil copyright suit triggered First Amendment principles); *Burk*, *supra* note 145, at 197, 236, 238 (arguing that civil enforcement invoking the “coercive mechanisms of the state” is state action triggering First Amendment scrutiny); *Ramsey*, *supra* note 145, at 407–08 (arguing that civil enforcement of trademarks constitutes First Amendment state action); Eugene Volokh, *The Void-for-Vagueness / Fair Notice Doctrine and Civil Cases*, THE VOLOKH CONSPIRACY (June 21, 2012), <https://volokh.com/2012/06/21/the-void-for-vagueness-fair-notice-doctrine-and-civil-cases/> [<http://perma.cc/KL7L-Z3Z6>] (collecting cases, including *Fox*, *supra* note 300). *But see* *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019) (indicating holder of public monopoly right is not state actor); *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 543–47 (1987) (rejecting challenge to discriminatory enforcement of trademark-like exclusivity in term “Olympics” and/or Olympic symbol because how recipient of right enforced it was not state action).

³¹⁰ See 15 U.S.C. § 1125(b) (2012).

³¹¹ *Wells Fargo & Co. v. ABD Ins. & Fin. Servs., Inc.*, 758 F.3d 1069, 1071 (9th Cir. 2014) (citing *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997)).

³¹² See *XYZ Two Way Radio Serv. Inc. v. Uber Techs., Inc.*, 214 F. Supp. 3d 179, 185 (E.D.N.Y. 2016) (citing *Greenwich Taxi, Inc. v. Uber Techs., Inc.*, 123 F. Supp. 3d 327, 336 (D. Conn. 2015)).

³¹³ See *Greater Hous. Transp. Co. v. Uber Techs., Inc.*, 155 F. Supp. 3d 670, 690 (S.D. Tex. 2015); see also *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 498 (2d Cir. 2013).

³¹⁴ *Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 731 (9th Cir. 1999).

³¹⁵ See FTC, *Advertising in Books Enforcement Policy*, 36 Fed. Reg. 13,361, 13,414 (July 21, 1971) (distinguishing between promotion of a “product as part of a commercial scheme” other than a book, and statements in or quotations from books, as to which FTC as a “matter of policy” and in light of First Amendment “issues” will not attempt to enjoin

claims is frequently classified as noncommercial speech, because such claims are not sufficiently specific or measurable.³¹⁶ Similarly, the many projections and assertions that crypto coin ecosystems will disrupt or revolutionize some industry, are likewise general and not specific.

The trademark tort arose as an application of fraud or deceit as a cause of action at common law.³¹⁷ It was not a deceit at common law to make boastful claims upon which no reasonable person would rely.³¹⁸ As the *Restatement (Second) of Torts* put it,

or seize profits from even if opinions stated in said books are misleading or deceptive).

³¹⁶ See *Greater Hous. Transp. Co.*, 155 F. Supp. 3d at 692, 695–96 (finding Uber’s “taking the necessary steps to . . . build the safest option for consumers” was mere puffery, not a specific or measurable claim that could be false); *XYZ Two Way Radio Serv.*, 214 F. Supp. 3d 179 at 183, 185 (similar). As one court discussed:

The patchwork of district court decisions in such cases discuss, but do not create, a workable test for puffery. This Court, however, discerns several factors on which these decisions rely: (i) vagueness; (ii) subjectivity; and (iii) inability to influence the buyers’ expectations. . . . See *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 945 (3d Cir.1993) (“Puffery is distinguishable from misdescriptions or false representations of specific characteristics of a product.”); . . . General descriptions about the product—e.g., high-speed internet service as the “fastest, easiest way to get online”; a truck as the “most dependable, long-lasting”; or an insurance policy as providing that its policyholders are “in Good Hands”—can constitute puffery. See *Fink v. Time Warner Cable*, 810 F.Supp.2d 633, 643–44 (S.D.N.Y.2011); *Hubbard v. Gen. Motors Corp.*, No. 95 Civ. 4362, 1996 WL 274018, at *7 (S.D.N.Y. May 22, 1996); *Loubier v. Allstate Ins. Co.*, No. 3:09cv261, 2010 WL 1279082, at *5 (D.Conn. Mar. 30, 2010) . . . The “subjectivity” factor applies when the disputed statements may not be measured on an objective basis, such as by reference to clinical studies or comparison with the product’s competitors. See *Lipton v. Nature Co.*, 71 F.3d 464, 474 (2d Cir.1995) (“Subjective claims about products, which cannot be proven either true or false, are not actionable [for false advertising claims].” (quotations omitted)); . . . [A] statement that “you can grow thick, beautiful grass ANYWHERE” with a specific type of grass seed is “so exaggerated as to preclude reliance by consumers.” In re *Scotts EZ Seed Litig.*, No. 12 Civ. 4727, 2013 WL 2303727, at *7 n. 3 (S.D.N.Y. May 22, 2013) (quotations omitted). Likewise, “consumers know that vehicles that are ‘rock-solid’ will be dented by an impact that would not dent a rock.... A fiberglass roof may be ‘strong’ enough to withstand a hard blow, a falling tree branch, or the weight of an elephant, without being guaranteed to be indestructible.” *Jordan v. Paccar, Inc.*, 37 F.3d 1181, 1185 (6th Cir. 1994). See also *Leonard v. Abbott Labs., Inc.*, No. 10-CV-4676, 2012 WL 764199, at *22 (E.D.N.Y. Mar. 5, 2012) (Spatt, J.) (finding that a statement concerning a baby formula manufacturer’s aim to “comply[] with all applicable laws and regulations”—which, taken literally, would entail every single law in the hundreds of “countries where it operates”—embodies the sort of exaggeration that no buyers could take seriously).

Avola v. La.-Pac. Corp., 991 F. Supp. 2d 381, 392–94 (E.D.N.Y. 2013).

³¹⁷ See *Taylor v. Carpenter*, 23 F. Cas. 742 (C.C.D. Mass. 1844); Robert C. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158, 160 (1982).

³¹⁸ Cf. *Vulcan Metals Co. v. Simmons Mfg. Co.*, 248 F. 853, 856 (2d Cir. 1918) (L. Hand, J.) (“There are some kinds of talk which no sensible man takes seriously, and if he does he suffers from his credulity. If we were all scrupulously honest, it would not be so;

a seller's attempt to "exaggerate the advantages of [a] bargain" is a well-known tactic that should not deceive.³¹⁹

The First Amendment protects a great deal of nonfiction commentary and creative world-building from prior restraint or subsequent punishment under the Lanham Act and similar state laws. Thus, using the trademark of another person in a political statement or campaign may not create trademark infringement liability.³²⁰ In addition, creatively evoking a trademark in an artistic or musical work may be shielded from injunctive relief or damages by the First Amendment.³²¹ For similar reasons, crypto coin white papers that are dominated by socioeconomic or techno-political commentary deserve protection.

3. State Consumer Protection Law

Other courts have construed state law protections against false or misleading advertising to require a consideration of basic reasoning techniques available to potential consumers, which might dispel potential deception or confusion as to promotional content.³²² For example, the prohibition of false advertising under California law immunizes puffery and relatively pure statements of opinion from liability.³²³ Although advertising need

but, as it is, neither party usually believes what the seller says about his own opinions, and each knows it.”).

³¹⁹ RESTATEMENT (SECOND) OF TORTS § 539 cmt. c (AM. L. INST. 1977).

³²⁰ See *Lucasfilm Ltd. v. High Frontier*, 622 F. Supp. 931, 934–35 (D.C. 1985) (holding that public interest group's use of "star wars" to persuade the public of views about the Reagan Administration's strategic defense initiative did not infringe upon filmmaker's STAR WARS trademark because "[p]urveying points of view is not a service" and because it was a "descriptive, non-trade use"); see also *Tax Cap Comm. v. Save Our Everglades, Inc.*, 933 F. Supp. 1077, 1081 (S.D. Fla. 1996) (concluding that although not passing judgment on use of trademark to solicit contributions, its use to promote environmental group was not marketing of a service but rather "political activity").

³²¹ See, e.g., *Mil-Spec Monkey, Inc. v. Activision Blizzard, Inc.*, 74 F. Supp. 3d 1134, 1140–43 (N.D. Cal. 2014) (finding use of another's trademark for "expressive purpose" protected by First Amendment unless it is "explicitly mislead[ing]") (collecting cases); *Dillinger, LLC v. Elec. Arts Inc.*, 795 F. Supp. 2d 829, 837–38 (S.D. Ind. 2011).

³²² For example, when a few steps of reasoning from publicly available data could dispel the falsity or misleading character of the defendant's speech, it is not actionable. See *MacDonald v. Thomas M. Cooley L. Sch.*, 880 F. Supp. 2d 785, 794 (W.D. Mich. 2012) (finding no claim could be pled based on misleading employment statistic because "basic deductive reasoning[]" informs a reasonable person that the employment statistic includes all employed graduates, not just those who obtained or started full-time legal positions."); *Gomez-Jimenez v. N.Y. L. Sch.*, 956 N.Y.S.2d 54, 59 (App. Div. 2012) (finding where defendant was arguably not fully "candid and [c]omplete" in making disclosures of data plaintiffs allegedly relied on, not to be material); *Austin v. Albany L. Sch. of Union Univ.*, 957 N.Y.S.2d 833, 842–43 (Sup. Ct. 2013) (holding that "a reasonable consumer acting reasonably under the circumstances" would not be materially misled by data disclosures that claimed a certain number of law school graduates were employed without disaggregating part-time jobs).

³²³ See *Atari Corp. v. 3DO Co.*, No. C 94-20298 RMW (EAD), 1994 WL 723601, at *2–3

only be “unfair, deceptive, untrue or misleading” under California law, federal courts interpret a key provision (California Business and Professions Code § 17200) as requiring proof similar to that needed in a false advertising claim under the Lanham Act.³²⁴ Likewise, false advertising law and warranty law in other states provide a safe harbor for boastful claims that a product is great or the best.³²⁵ Similarly, the protection of products from “trade libel” does not regulate opinions or personal judgments.³²⁶

(N.D. Cal. May 16, 1994) (holding that a video game system was the “most advanced” video game system available was puffery under state law of false advertising) (citing Cal. Bus. & Prof. Code §§ 17200, 17500). *See also* Anderson v. 1399557 Ontario Ltd., No. 18-CV-1672 (PJS/LIB), slip op. at 11 (D. Minn. Nov. 4, 2019) (suggesting that claim of providing a “lifetime” warranty might be true or subjectively believed to be right even if warranty lasted a “very limited” time); Fair Isaac Corp. v. Experian Info. Sol., Inc., 645 F. Supp. 2d 734, 763 (D. Minn. 2009) (it protected as puffery under the Lanham Act to claim that a credit score service determined creditworthiness with “significantly greater precision,” is “more predictive than what’s in the market,” is “the most accurate scoring algorithm attainable,” and uses “most up-to-date information available”).

³²⁴ Zeltiq Aesthetics, Inc. v. BTL Indus., Inc., 32 F. Supp. 3d 1088, 1099 (N.D. Cal. 2014) (quoting Clearly v. News Corp., 30 F.3d 1255, 1262–63 (9th Cir. 1994)); *see also* Philip Morris USA Inc. v. Shalabi, 352 F. Supp. 2d 1067, 1072 (C.D. Cal. 2004).

³²⁵ *See, e.g.*, Hubbard v. Gen. Motors Corp., No. 95 Civ. 4362, 1996 WL 274018, at *7 (S.D.N.Y. May 22, 1996); David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1402–03, 1411 (2006).

³²⁶ *See, e.g.*, Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co., 173 F.3d 725, 730 (9th Cir. 1999) (equating commercial libel’s protection of opinions with that under Lanham Act, which requires false statement of existing fact); Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 243 (9th Cir. 1990) (stating that no cause of action would lie for disparagement or libel of a corporation by publishing an ad suggesting its fees or costs would eat customers alive, or that ad’s publisher are “low cost commercial collection experts” in comparison to it); Blatty v. N.Y. Times Co., 728 P.2d 1177, 1181, 1183 (Cal. 1985) (affirming demurrer to action for trade libel and holding: “Statements of opinion, [h]owever pernicious, are immunized by the First Amendment in order to insure that their ‘correction [depends] not on the conscience of judges and juries but on the competition of other ideas.’”) (citation omitted); Hofmann Co. v. E.I. Du Pont de Nemours & Co., 248 Cal. Rptr. 384, 388 (Ct. App. 1988) (stating trade libel plaintiff may not hold speaker liable for expressing speaker’s “view, judgment, or appraisal . . . [a] belief stronger than impression and less strong than positive knowledge.”). *Cf.* Sullivan v. Conway, 157 F.3d 1092, 1095 (7th Cir. 1998) (finding statement that lawyer is “very poor” was an “opinion that is so difficult to verify or refute that it cannot feasibly be made a subject of inquiry by a jury”); Levinsky’s Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 126–27 (1st Cir. 1997) (finding statement that store is “trashy” could not be basis of tort liability as it was merely expressing “a subjective view, an interpretation, a theory, conjecture, or surmise”); Moldea v. N.Y. Times Co., 22 F.3d 310, 312, 316 (D.C. Cir. 1994) (finding statement that journalist was “sloppy” and unprofessional could not be grounds for tort liability because “reasonable minds can and do differ” on what these terms mean); Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1093 (4th Cir. 1993) (accusing a charity of “charging hefty mark-ups on goods it ships” was a statement that was immune from tort liability as it stated an opinion); Phantom Touring, Inc. v. Affiliated Publ’ns, 953 F.2d 724, 727–28 (1st Cir. 1992) (holding statements that stage play was “fake,” “phony,” “a rip-off, a fraud, a scandal, a snake-oil job” were not tortious as admitting “of numerous interpretations”); McCabe v. Rattiner, 814 F.2d 839, 842–43 (1st Cir. 1987) (holding reference to the plaintiff’s real estate development as a “scam” to be non-actionable because of the “lack of precision”); Della Penna v. Toyota Motor Sales, Inc., 902 P.2d 740, 751 (Cal. 1995) (holding expression of opinion should not result in liability

4. Protecting “Ecosystem Speech”

Like the print press or social media, crypto coins create ecosystems. Instead of readers/browsers, writers/uploaders, editors, and advertisers, crypto coins often have four “constituencies,” in addition to their own founders and promoters: subscribers who use or pay with the coin, other subscribers who accept payment with the coin, “miners” who verify the authenticity of transactions and maintain distributed ledgers, and software developers and other creative businesses who make new uses of the coin possible.³²⁷ The creation of a forum for speech, edited by the founder or current manager, implicates First Amendment interests.³²⁸ Even the organizers of a public parade, the Supreme Court famously held, have a right to shape the message conveyed by the various floats and marchers who participate.³²⁹ Whatever the merits of the Court’s ruling, its analysis of the First Amendment problem posed by forced conformity to an ideology is pertinent to crypto coins and banking norms: the right to articulate “public viewpoints” deserves protection against “forced inclusion” in another viewpoint.³³⁰

It matters not that crypto coin white papers are lower-quality speech, for some, than the *Miami Herald* or CNN. The freedom of expression does not depend on the quality of a speaker’s viewpoint.³³¹ Promoting oneself in the marketplace of ideas and touting one’s platform on social media are important entitlements under the First Amendment doctrine.³³²

for tortious interference with prospective business relations).

³²⁷ Andreessen, *supra* note 101.

³²⁸ See *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 250, 258 (1974); see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 651 (1994).

³²⁹ See *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 559 (1995).

³³⁰ See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

³³¹ See *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972) (“The dangers and the undesirability of making [free speech] determination[s] on the basis of factors such as the size of the audience or the probity of the speaker’s ideas are obvious.”).

³³² See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (noting importance of social media for exchanges of views); see also *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 628–29 (1980) (recognizing constitutional right to distribute literature in order “to present [one’s] views on political, social or economic questions”) (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)); cf. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1934–44 (2019) (Sotomayor, J., joined by Ginsburg, J., Breyer, J., and Kagan, J., dissenting) (contending that there is a right of access to cable access television channel opened up as a public forum by legislation creating a corporation to manage a local cable network).

C. Allowing Forward-Looking Statements in and After Coin Offerings

In First Amendment cases, the narrow-tailoring or less-restrictive-means inquiry involves whether Congress or the states could have been more careful and discriminate in regulating speech.³³³ Yet, how is one to determine that a “substantial number of [a rule’s] applications are unconstitutional” so as to conclude that it is overbroad?³³⁴

An obvious less-restrictive and narrowly-tailored alternative to the obligation to preregister coin offerings is to punish false statements of fact with civil and criminal liability after harm is done. This should not be too difficult to achieve; there seems to be an enormous range of harms involving cyberthefts, insider trading of cryptocurrencies, and garden-variety frauds that could be prosecuted or enjoined under a variety of theories.³³⁵

Focusing on actual harm and factual misstatements would liberate startups to participate in the blockchain revolution. According to a senior attorney to ICO founders, the SEC has declared “war on cryptocurrencies.”³³⁶ One entrepreneur told a

³³³ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 336–37 (2010); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 466 (1997); *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 475 (1995); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

³³⁴ *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)); *Simon & Schuster*, 502 U.S. at 122 n.* (“A regulation is not ‘narrowly tailored’ . . . where, as here, ‘a substantial portion of the burden on speech does not serve to advance [Congress’s] goals.’”) (citation omitted); 16A AM. JUR. 2D *Constitutional Law* § 429 (2017).

³³⁵ See First Amended Class Action Complaint at 38, *Fabian v. LeMahieu*, 2019 U.S. Dist. LEXIS 172906 (N.D. Cal. 2019) (No. 19-cv-00054) (alleging that \$170 million worth of digital tokens were lost on Bitgrail exchange in early February 2018); Bloomberg, *The SEC Is Sending Subpoenas in Expanded ICO Crackdown*, FORTUNE (Mar. 1, 2018, 2:45 AM), <http://fortune.com/2018/03/01/sec-ico-cryptocurrency-subpoenas/> (noting that SEC “has been concerned for months that some ICOs are raising money for businesses that don’t even exist”); Jordan Pearson, *Everything You Need to Know About the Congressional Cryptocurrency Hearing*, VICE (Mar. 14, 2018, 10:05 AM), <https://www.vice.com/en/article/qveg3p/financial-services-congressional-hearing-ico-cryptocurrency-regulation> [<http://perma.cc/B6AE-QBJY>] (mentioning \$500 million taken in cybertheft affecting Japanese crypto exchange); Shane Shifflett & Coulter Jones, *Buyer Beware: Hundreds of Bitcoin Wannabes Show Hallmarks of Fraud*, WALL ST. J., (May 17, 2018, 12:05 PM), <https://www.wsj.com/articles/buyer-beware-hundreds-of-bitcoin-wannabes-show-hallmarks-of-fraud-1526573115> (“Hundreds of technology firms raising money in the fevered market for cryptocurrencies are using deceptive or even fraudulent tactics to lure investors.”); Andrea Tan & Yuji Nakamura, *Timeline: Growing List of Major Cryptocurrency Heists*, INS. J. (Feb. 1, 2018), <https://www.insurancejournal.com/news/international/2018/02/01/479206.htm> [<http://perma.cc/V5J9-8FAM>] (“[In 2016,] Bitfinex said hackers took 119,756 Bitcoin, valued at about \$65 million.”).

³³⁶ Jeff John Roberts, *SEC Guidance Sparks Fear and Loathing in Crypto Industry*, FORTUNE (Apr. 5, 2019, 7:16 AM), <https://fortune.com/2019/04/05/sec-crypto-rules/>.

researcher: “If you’re just starting up, you’re almost forced to break the [criminal] law and hope that you can get away with it long enough to produce some traction’ to secure investors’ money, after which you can try to meet regulatory requirements.”³³⁷ As another entrepreneur stated: “We’re all forced to break the law until someone calls us out.”³³⁸ If a crypto coin is a security, simply discussing the value of owning it via impersonal online publications might be enjoined, or even criminal, if such an act is widely known to be illegal.³³⁹

Pursuing the true perpetrators of investor harm while leaving other coins alone would ameliorate this problem. A well-known and workable framework for such a regulation results from application of the “bespeaks caution” doctrine and “safe harbor” for “forward-looking statements” as well as the falsity and materiality requirements of securities fraud law.³⁴⁰ This would shield good-faith statements that have a basis when made or that are so “rosy” that no one would reasonably rely on them. Such a framework properly distinguishes between false statements of existing fact or fraudulent promises or projections on the one hand and genuine but controversial aspirations communicated publicly to potential share purchasers or business partners.³⁴¹ Participants in high-technology

³³⁷ BRIAN PATRICK EHA, *HOW MONEY GOT FREE: BITCOIN AND THE FIGHT FOR THE FUTURE OF FINANCE* (2017).

³³⁸ *Id.*

³³⁹ *See* 15 U.S.C.A. § 80(b)-2(a)(11) (West) (regulating recommendations involving securities); 15 U.S.C.A. § 77x (West) (criminalizing willful violation of provisions of Securities Act or regulations thereunder involving securities); 15 U.S.C.A. § 78ff(a) (West) (criminalizing willful violation of provisions of Securities Act or regulations thereunder); *Lowe v. SEC.*, 472 U.S. 181, 216–19 (1985) (White, J., concurring); *SEC v. Suter*, 732 F.2d 1294, 1298–1302 (7th Cir. 1984) (holding SEC could enjoin newsletters with investment recommendations about whether or when to buy or sell particular securities); *United States v. Peltz*, 433 F.2d 48, 54–55 (2d Cir. 1970) (holding “willfully” means realizing illegality of act); S. REP. NO. 76-1775, at 22–23 (1940).

³⁴⁰ *Slayton v. Am. Express Co.*, 604 F.3d 758, 768–70 & n.5 (2d Cir. 2010). The safe harbor for forward-looking statements is statutory, being modeled on the “bespeaks caution” doctrine and added to the Exchange Act. *Id.* at 770 & n.5 (citing, inter alia, 15 U.S.C.A. § 78u-5(c)(1)(A)(i) (West)).

³⁴¹ *See, e.g., Tongue v. Sanofi*, 816 F.3d 199, 214 (2d Cir. 2016) (holding that “no reasonable investor would have been misled by Defendants’ optimistic statements regarding the approval and launch” of their new drug); *Shaw v. Digit. Equip. Corp.*, 82 F.3d 1194, 1217 (1st Cir. 1996) (holding no securities liability for “rosy affirmation[s] commonly heard from corporate managers and numbingly familiar to the marketplace—loosely optimistic statements that are so vague . . . that no reasonable investor could find them important in the total mix of information available”); *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 926 (9th Cir. 1996) (distinguishing statement that turns out not to be true from one untrue at outset); *Kline v. First W. Gov’t Sec., Inc.*, 24 F.3d 480, 486 (3d Cir. 1994) (holding forward-looking projections actionable as securities fraud only if “[they are] issued without reasonable genuine belief [in their accuracy or truth] or if [they] ha[ve] no basis”); *Gregory v. ProNAi Therapeutics Inc.*, 297 F. Supp. 3d 372, 398–417 (S.D.N.Y. 2018) (distinguishing “sincerely held views” from “historical statement” that is not “correct”) (quoting *In re Int’l Bus. Machines Corp. Sec. Litig.*,

markets are familiar with this framework as courts have routinely applied it to them.³⁴² Although a special-purpose law on fraud involving crypto coin offerings might need to modify aspects of the framework, its fundamental distinction or premise would be helpful.³⁴³

Regarding regulatory and jurisdictional competition, other countries will move forward aggressively with their token-based businesses whether or not the United States falls behind. Several European countries are establishing legal frameworks that facilitate crypto-coin inventions and platforms.³⁴⁴ China is taking numerous moves, including creating state-owned crypto coins, to become the world leader in virtual currency and blockchain technology.³⁴⁵ As of late 2019, Japan had not clearly defined ICOs as securities. Europe and the United Kingdom may not regulate payment mechanisms on blockchain platforms as investments.³⁴⁶

163 F.3d 102, 109–10 (2d Cir. 1998)); *Nursing Home Pension Fund v. Oracle Corp.*, 242 F. Supp. 2d 671, 678 (N.D. Cal. 2002) (distinguishing “statements of present fact” from “future projections”) (internal citation omitted); *In re MobileMedia Sec. Litig.*, 28 F. Supp. 2d 901, 936–40 (D.N.J. 1998) (similar to *Kline and Shaw*); *In re Bell Atl. Corp. Sec. Litig.*, No. 91-0514, 1997 WL 205709, at *23 (E.D. Pa. 1997) (cited in *MobileMedia*).

³⁴² See *Slayton*, 604 F.3d at 770, 772 (distinguishing “historical fact” from “future projections, estimates or opinions”) (citations and internal quotation marks omitted).

³⁴³ In particular, the safe harbor for forward-looking statements appears to require a warning list of factors that could cause projections or intentions not to materialize such as one might find in a registration statement or prospectus, which typically has a different and much more formal organization and tone than a white paper about a token. See *Slayton*, 604 F.3d at 770–72 (indicating cautionary statements should be “substantive” about such “important factors”) (citing 15 U.S.C. § 78u-5(c)(1)(A)(i); H.R. Conf. Rep. 104-369, at 42 (1995), as reprinted in 1995 U.S.C.C.A.N. 730, 742); *Inst. Invs. Grp. v. Avaya, Inc.*, 564 F.3d 242, 256 (3d Cir. 2009) (discussing specificity of statements in prospectus); *Gregory*, 297 F. Supp. 3d at 405 (indicating cautionary statements must have “specificity” about risks).

³⁴⁴ See J.D. Alois, *Will Paris Become the Capital of ICOs? French National Assembly Approves Key Framework for Initial Coin Offerings*, CROWD FUND INSIDER (Sept. 13, 2018, 5:30 pm), <https://www.crowdfundinsider.com/2018/09/139003-will-paris-become-the-capital-of-icos-french-national-assembly-approves-key-framework-for-initial-coin-offerings/> [<http://perma.cc/L6MQ-SV9K>] (discussing France, Malta, and Switzerland).

³⁴⁵ See Arjun Kharpal, *With Xi’s Backing, China Looks to Become a World Leader in Blockchain as US Policy Is Absent*, CNBC (Dec. 15, 2019, 6:30 PM), <https://www.cnbc.com/2019/12/16/china-looks-to-become-blockchain-world-leader-with-xi-jinping-backing.html> [<http://perma.cc/223L-C9K7>] (“Since March, over 500 blockchain projects have been registered with the Cyber Administration of China. Some of China’s largest internet companies from Tencent to Huawei have registered projects.”); *id.* (stating a partner at “Blockchain Valley Ventures” claimed “that China’s blockchain push could put other countries behind, to the point where the world’s second-largest economy could dominate the technology and the way it’s developed.”); Coie, *supra* note 35 (warning blockchain technology could cluster abroad).

³⁴⁶ See Cooke, Denisenko & Cohen, *supra* note 229.

D. Increasing Remedies for Factual Fraud

The Securities Act and/or Exchange Act could be amended to award treble damages, punitive damages, and/or statutory damages in cases of willful misstatements of existing fact in connection with the purchase or sale of a security.³⁴⁷ The breadth of a law is not the only measure of its effectiveness; its deterrent and remedial strength may also be relevant.³⁴⁸ Investment law would be more forceful if it offered the relief available under other federal laws, such as those governing counterfeiting (\$2 million per willful offense type), copyright infringement (\$150,000 per willful offense type), false advertising (treble damages), or competition law violations (treble damages).³⁴⁹ As one court has observed: “Undeniably, punitive damages would deter violations of the Act and punish those who did commit violations.”³⁵⁰

Amendments to the securities laws would not help the purchasers of utility tokens and appcoins under the approach advocated in this article. To aid such purchasers and anyone else who buys a good or service, the Lanham Act could be amended with a few simple words that would create a federal remedy for interstate commerce fraud.³⁵¹ This amendment would significantly impact

³⁴⁷ See 15 U.S.C.A. § 78bb(a) (West) (limiting plaintiffs’ recovery to “actual damages”); *Globus v. Law Rsch Serv., Inc.*, 418 F.2d 1276, 1282–86 (2d Cir. 1969); *Green v. Wolf Corp.*, 406 F.2d 291, 302–04 (2d Cir. 1968).

³⁴⁸ See *Carlson v. Green*, 446 U.S. 14, 21–22 (1980) (noting that cause of action promising punitive damages may have greater deterrent effect); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (stating that punitive damages punish and deter). Statutory damages may also deter; indeed, one law increasing statutory damages ranges in copyright was called the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106–160, 113 Stat. 1774 (1999). See Jeremy Wilson et al., *Product Counterfeiting Legislation in the United States: A Review and Assessment of Characteristics, Remedies, and Penalties*, 106 J. CRIM. L. & CRIMINOLOGY 521, 533–34 (2016); Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 461–62 (2009).

³⁴⁹ See 15 U.S.C.S. § 15 (LexisNexis) (treble damages); 15 U.S.C. § 1117 (West) (\$2 million); 17 U.S.C.A. § 504(d) (West) (\$150,000 per work). By contrast, the Supreme Court has rejected a theory that would allow securities fraud plaintiffs who cannot plead conventional investment damages to be able to recover for an inflated purchase price at the time of a transaction; absent actual damages, the Court apparently intends that securities plaintiffs receive nothing under federal law, in stark contrast to copyright or trademark plaintiffs. See *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346–47 (2005).

³⁵⁰ *Globus*, 418 F.2d at 1284.

³⁵¹ The amendment to 15 U.S.C. § 1125(a) would have to state that the standing to sue for false advertising and the like under federal law extends to those “likely to be damaged by such act, regardless of the presence or absence of the person’s direct competition with the plaintiff or the person’s economic or reputational injury from such act.” This proposed amendment is based on language in 15 U.S.C. § 1125(c), which creates a federal injunctive remedy for dilution (and, which 15 U.S.C. § 1117 creates a damages remedy). For extensive arguments in favor of such an amendment, see Jeremy Rovinsky,

remedies in false advertising by granting consumers a private right of action for false descriptions of fact in connection with goods or services marketed in interstate commerce.³⁵² In its discretion, the court could increase the damages award to three times those actually inflicted on the plaintiff.³⁵³ Similarly, consumers could obtain a private right of action for unfair or deceptive methods of competition under the FTC Act.³⁵⁴ Many consumers have such a cause of action under state law already, but the elements and remedies could be harmonized.³⁵⁵ Arbitration clauses that make class actions or punitive damages unavailable in fraud or false-advertising cases could be declared incompatible with federal law, or at least it could be made permissible under federal law for the states to prohibit or restrict such clauses.³⁵⁶ Frauds that inflict many minor economic losses are not economical to litigate individually.³⁵⁷

E. Reducing the Burden Associated with Disclosure Requirements

In the House of Representatives, legislation has been introduced to exclude from the definition of a “security,” in the Securities Act and the Exchange Act, certain digital tokens based on a mathematical digital ledger or data structure that are not controlled as to their supply by any single person or group of

Troubleshooting Legal Malfunction: Lexmark and Consumer Standing Under the Lanham Act, 48 JOHN MARSHALL L. REV. 453 (2015).

³⁵² See *Lexmark Intern., Inc. v. Static Control*, 572 U.S. 118, 132 (2014) (“A consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-fact cognizable under Article III, but he cannot invoke the protection of the Lanham Act—a conclusion reached by every Circuit to consider the question.”); *Halicki v. United Artists Commc’ns, Inc.*, 812 F.2d 1213, 1214 (9th Cir. 1987) (holding that to bring suit for false advertising, plaintiff must be a competitor injured in business that directly competes with false advertiser).

³⁵³ See 15 U.S.C.A. § 1117 (West).

³⁵⁴ See 15 U.S.C.A. § 45 (West).

³⁵⁵ See CAROLYN CARTER, NATIONAL CONSUMER LAW CENTER, CONSUMER PROTECTION IN THE STATES 42 (2018), <https://www.nclc.org/images/pdf/udap/udap-report.pdf>. Among other divergences that could be harmonized, some states do not extend private standing to consumers, cap treble damages, impose procedural hurdles, or require proof of individualized reliance. See *id.* at 42–45.

³⁵⁶ Cf. *American Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 252–53 (2013) (Kagan, J., joined by Breyer, J., and Ginsburg, J., dissenting) (urging that class action waivers in arbitration clauses be declared incompatible with or at least unprotected by federal arbitration law when they threaten to deprive plaintiffs of “any effective opportunity” of challenging a violation of substantive federal law, due to cost of hundreds of thousands dollars in proving a claim worth tens of thousands); Br. of Am. Antitrust Inst. as Amicus Curiae in Support of Respondents at 16, *American Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013) (No. 12-133) (urging similar result when class action waivers undermine a role of a “private damages remedy” such as treble damages in antitrust law to “serve[] its intended function of deterring antitrust violations and compensating victims”).

³⁵⁷ Cf., e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

persons “under common control.”³⁵⁸ The *Howey* test is outdated and has generated tremendous uncertainty even as applied to traditional business enterprises.³⁵⁹ Its roots lie in a state supreme court decision from 1920, purportedly viewed by Congress as a helpful addition to the word “security” to cover “booster agent” contracts involving the sale of goods, i.e., “investment contracts.”³⁶⁰ While there are some similarities between cosmetics salespersons and crypto coin users, the dissimilarities are arguably more significant.

The cost of registering securities with the SEC has been called “tremendous” and disproportionate in the case of startups.³⁶¹ According to two researchers at Tallinn Law School, smart contracts supported by crypto coins could replace modes of e-commerce or financial or insurance transactions that are “restrictive, antagonistic, contentious, competitive, divisive and costly, [with new modes that are] participative, responsible, responsive and collaborative.”³⁶² For example, they could slash the transaction fees on micropayments, international remittances, and wire transfers, and reduce financial-industry collusion.³⁶³ New

³⁵⁸ H.R. 7356, 115th Cong. §§1–3 (2018); *see also* H.R. 2144, 116th Cong. (2019); H.R. 1628, 117th Cong. (2021).

³⁵⁹ *See, e.g.*, Maura Monaghan, *An Uncommon State of Confusion: The Common Enterprise Element of Investment Contract Analysis*, 63 *FORDHAM L. REV.* 2135, 2171 (1994); Ronald J. Coffey, *The Economic Realities of a “Security”: Is There a More Meaningful Formula?*, 18 *W. RES. L. REV.* 367, 377 (1967); James D. Gordon III, *Defining a Common Enterprise in Investments Contracts*, 72 *OHIO ST. L.J.* 59, 73–74 (2011).

³⁶⁰ *See SEC v. Koscot Interplanetary*, 497 F.2d 473, 480 (5th Cir. 1974).

³⁶¹ *See* Carol Goforth, *Why Limited Liability Company Membership Interests Should Not Be Treated As Securities and Possible Steps to Encourage This Result*, 45 *HASTINGS L.J.* 1223, 1285 (1993) (collecting sources).

³⁶² María Claudia Solarte-Vásquez & Katrin Nyman-Metcalf, *Smart Contracting: A Multidisciplinary and Proactive Approach for the EU Digital Single Market*, 7 *BALTIC J. EUR. STUD.* 208, 233 (2017).

³⁶³ *See* Andreessen, *supra* note 101; *see also* BPP Illinois, LLC v. Royal Bank of Scotland Grp. PLC, 859 F.3d 188 (2d Cir. 2017) (alleging potential rigging of benchmark interest rate); *Contant v. Bank of Am. Corp.*, 385 F. Supp. 3d 284 (S.D.N.Y. 2019) (alleging potential rigging of currency exchange rates); *In re Commodity Exch., Inc., Gold Futures & Options Trading Litig.*, 328 F. Supp. 3d 217 (S.D.N.Y. 2018) (alleging potential rigging of precious metals prices, specifically gold); *Levy v. BASF Metals Ltd.*, 917 F.3d 106 (2d Cir. 2019) (alleging manipulation of precious metals prices, specifically platinum); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430 (S.D.N.Y. 2018) (alleging similar fraud as preceding case); *In re London Silver Fixing, Ltd., Antitrust Litig.*, 213 F. Supp. 3d 530 (S.D.N.Y. 2016) (alleging potential rigging of precious metals prices, specifically silver); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581 (S.D.N.Y. 2015) (alleging similar rigging as *Contant*); *In re Moody’s Corp. Sec. Litig.*, 599 F. Supp. 2d 493 (S.D.N.Y. 2009) (alleging potential misrepresentations involving rating of collateralized debt and mortgage-backed securities as investment-grade securities); *In re Stock Exchanges Options Trading Antitrust Litig.*, No. 99 CIV. 0962 (RCC) (S.D.N.Y. Dec. 4, 2006) (involving collusion in marketing of stock exchange options in settlement of suit); DEAN BAKER, *RIGGED: HOW GLOBALIZATION AND THE RULES OF THE MODERN ECONOMY WERE STRUCTURED TO MAKE THE RICH RICHER* (2016); Janith Aranze, *Visa and MasterCard Interchange Fees Restricted Competition, English Court Rules*,

ecosystems would arise, with new pro-democratic possibilities for promoting economic and environmental sustainability.³⁶⁴ Socially responsible investing objectives or automatic divestment upon specified breaches of corporate social responsibility principles could be encoded.³⁶⁵ In contrast to traditional forms such as private equity and the like, open-source smart contract investments could be examined by consumers, investors, and regulators to gauge compliance with various ethical or political norms.³⁶⁶ Unlike traditional financial firms and social media giants, crypto coins enable privacy preservation through emerging anonymous trading systems and applications.³⁶⁷

There is reason to be hopeful about disruption when it comes to loans, interest on deposits, business capital, remittances, and even insurance, selling creative works, and renting out cars, devices, and houses. The fintech firm, SoFi, has saved borrowers about two billion dollars in what would have been excessive interest charges.³⁶⁸ The use of the Ripple token for remittances could save the poor and the middle class billions of dollars in

SCOTT+SCOTT: GLOBAL COMPETITION REVIEW (July 4, 2018), <http://scott-scott.com/visa-and-mastercard-interchange-fees-restricted-competition-english-court-rules/> [<http://perma.cc/9RN5-7WG7>] (describing anti-competitive cross-border payment card fees in Europe); Richard Jones et al., *MasterCard in £19bn UK Interchange Fees Class Action*, LEXOLOGY (July 26, 2014), <http://www.lexology.com/library/detail.aspx?g=c58d7828-e845-4d43-9222-02eebcec57fc> [<http://perma.cc/5XX4-RXAL>] (describing similar anti-competitive interchange fees as Janith Aranze); *Antitrust: Commission Welcomes Court Judgment Confirming that MasterCard's Payment Card Interchange Fees are Anti-Competitive*, EUROPEAN COMMISSION (Sept. 11, 2014), http://europa.eu/rapid/press-release_MEMO-14-528_en.htm [<http://perma.cc/BSQ4-5PHW>].

³⁶⁴ See Merlinda Andoni et al., *Blockchain Technology in the Energy Sector: A Systematic Review of Challenges and Opportunities*, 100 RENEWABLE & SUSTAINABLE ENERGY REVS. 143, 158–60 (2019) (describing potential for tokenized clean energy trading); Ryan Browne, *Sustainable Energy: IBM Joins Forces with a Start-up to Combine Crypto with Environmental Credit Trading*, CNBC (May 15, 2018, 8:00 AM), <http://www.cnbc.com/2018/05/15/ibm-veridium-team-up-on-blockchain-enabled-carbon-credit-trading.html> [<http://perma.cc/2QF3-BSP6>] (describing potential for carbon-trading tokens to trade with less friction than traditional carbon/energy credits); Miriam Denis Le Sève et al., *Delivering Blockchain's Potential for Environmental Sustainability*, ODI BRIEFING NOTE 3, 5–6 (Oct. 2018), <http://www.odi.org/sites/odi.org.uk/files/resource-documents/12439.pdf> [<http://perma.cc/28U2-7FX8>] (describing how the Sun Exchange token use could, at least partially, enable financing conversion of buildings to solar power).

³⁶⁵ See Massimo Lomuscio, *Smart Social Contracts, Unstoppable Promises on the Blockchain*, MEDIUM (Feb. 4, 2018), <http://medium.com/reason/what-are-smart-social-contracts-the-new-business-model-for-the-blockchain-d3a27025fc4b> [<http://perma.cc/6A3F-5QJR>].

³⁶⁶ See *id.* But cf. Alfred C. Aman Jr. & Landyn W. Rookard, *Private Government and the Transparency Deficit*, 71 ADMIN. L. REV. 437, 472, 484 (2019) (noting that opacity as to practices of private equity firms is expected by the public, and actually results).

³⁶⁷ See Azgad-Tromer, *supra* note 272.

³⁶⁸ SoFi saved borrowers \$1.45 billion by mid-2017, and has grown tremendously since then, more than doubling the total loan volume since the end of 2016. See Michael Bartlett, *Digital or Doomed? What Credit Unions Need to Be Top of Wallet*, AMERICAN BANKER (July 26, 2017, 8:00 AM), <http://www.americanbanker.com/creditunions/news/digital-or-doomed-what-credit-unions-need-to-be-top-of-wallet> [<http://perma.cc/6K8R-FDS2>].

excessive fees for international transfers of their own money to family members or others in need.³⁶⁹ The average interest rate on U.S. savings accounts was about a quarter of a percentage point at a time when a crypto account could offer a fixed rate of seven percent or more, and when investments in tokens such as Bitcoin earned well in excess of 100% a year.³⁷⁰ The average U.S. equity fund investor earns less than a five percent return per annum over 10 to 20 years, but the average crypto investor through mid-2018 earned double-digit returns in a matter of days or months.³⁷¹ Based on a mid-2020 technical analysis, a \$1,000 investment in Bitcoin in late 2016 might be worth \$20,000 four years later, or a 210% annual return.³⁷²

Blockchain-based asset trading systems could democratize value exchanges by disrupting the financial system's models for extracting value from disempowered "users."³⁷³ The Lightning Network and Hyperledger are examples of sustained, high-level collaboration among sophisticated players to achieve efficient and fairly reliable mechanisms of commerce over blockchains.³⁷⁴ In blockchain-based content monetization systems, artists or other creators designate rights information, which eMusic encodes into "smart contracts" so

³⁶⁹ See Andreessen, *supra* note 101 (referring to Bitcoin); *In Latin America, Ripple Makes Remittance Waves*, PYMNTS (Aug. 22, 2019), <http://www.pymnts.com/news/b2b-payments/2019/in-latin-america-ripple-makes-remittance-waves/> [<http://perma.cc/723Y-UDQE>]; *Santander Becomes First U.K. Bank to Use Ripple for Real-time Cross-border Payments*, RIPPLE (2019), http://ripple.com/files/case_study_santander.pdf [<http://perma.cc/4ACP-H2JH>] (predicting billions of dollars in savings, at first for financial institutions in their cross-border payments); Billy Bambrough, *Former Hedge Fund Billionaire Makes the Case for \$20,000 Bitcoin Price by the End of 2020*, FORBES (July 28, 2020, 7:10 PM), <http://www.forbes.com/sites/billybambrough/2020/07/28/former-hedge-fund-billionaire-makes-the-case-for-20000-bitcoin-price-by-the-end-of-2020/#2d1072842f76> [<http://perma.cc/ND46-L5T7>].

³⁷⁰ See *Mohammed v. Central Driving Mini Storage, Inc.*, 128 F. Supp. 3d 932, 956 (E.D. Va. 2015) (estimating an average interest rate of less than two-tenths of a percentage point between January 2011 and November 2014); Valerie Ashton, *See Interest Rates Over the Last 100 Years*, GOBANKINGRATES (July 14, 2017), <http://www.gobankingrates.com/banking/interest-rates/see-interest-rates-last-100-years/> [<http://perma.cc/PVK4-KVTS>] (showing the rate has steadily declined to less than one-tenth of a percent); *A New Way to Borrow and Lend Money* <http://nebeus.com>, COMMUNICATIONS TEAM@NEBEUS (Apr. 25, 2016), <http://medium.com/@Nebeus/a-new-way-to-borrow-and-lend-money-874a10754e97> [<http://perma.cc/8P42-M44E>] (claiming that peer to peer lenders could set their own interest rates, and borrowers could save with lower rates, with the platform taking a 10% cut).

³⁷¹ See Thane Stenner, *Why the Average Investor Is So Bad at It*, THE GLOBE AND MAIL (July 1, 2016), <http://www.theglobeandmail.com/globe-investor/globe-wealth/why-the-average-investor-is-so-bad-at-it/article30728320/> [<http://perma.cc/Z2QN-R69H>]; Hugo Benedetti & Leonard Kostovetsky, *Digital Tulips? Returns to Investors in Initial Coin Offerings*, BOSTON COLLEGE 1, 35–36 (May 20, 2018), <http://www.ssrn.com/abstract=3182169> [<http://perma.cc/D2C-Z5LY>].

³⁷² See Thane, *supra* note 362; see also Benedetti & Kostovetsky, *supra* note 362.

³⁷³ TAPSCOTT & TAPSCOTT, *supra* note 31, at loc 61.

³⁷⁴ See *id.* at loc 69.

that streams or sales result in faster, more open and “autonomous” payments of both the streaming or download provider, the performers, the songwriters, and the label(s).³⁷⁵ The operation of such systems is rich with informative speech:

Rather than erecting walls and aiming to create artificial scarcity, we view decentralization as a means to break walls down and enable more open re-use that aligns with the way information propagates on the internet. Leveraging content identification technology we can make information about the work—who made it, where it was published, and what people are saying about it—discoverable anywhere media is found. This is a prerequisite to enabling value to flow. It starts with attention (attribution), gratitude, analytics, and can lead to financial exchange, directly through media itself.³⁷⁶

Thus, content monetization systems express an idea about democratization, and implement that idea by attempting to multiply and propagate truthful information about the underlying speech. Another way of saying this is that such systems express opposition to intermediary interference in speech flows, and that they do so by conveying more information to the benefit of participants and by structuring that information in more efficient and transparent ways.³⁷⁷

V. CONCLUSION

Blockchain-fueled software and Internet innovation have rekindled debate about how crypto coins are regulated. The global Internet lends itself to a combination of proprietary and multistakeholder governance strategies, with the corporate tech giants coexisting with a variety of foundations, consortia, and open source software and digital content projects such as the Linux Foundation, the Wikimedia Foundation, and Creative Commons. Cryptocurrencies incentivize Internet users to contribute processing power and applications to new economic and social networks. The laws governing the registration of investments, primarily securities investments but also commodities futures and other investments, could erect giant

³⁷⁵ eMusic, *Press Release, eMusic Building a Blockchain Platform to Fix a Broken Music Industry*, CISION PR NEWSWIRE (July 31, 2018: 3:00 PM), <https://www.prnewswire.com/news-releases/emusic-building-a-blockchain-platform-to-fix-a-broken-music-industry-300688788.html> [<http://perma.cc/M8XR-WN8U>]; George Howard, *Mediachain Facilitates Automatic Attribution Using Blockchain and Machine Learning*, FORBES (July 29, 2016), <https://www.forbes.com/sites/georgehoward/2016/07/29/mediachain-facilitates-automatic-attribution-using-blockchain-and-machine-learning> [<http://perma.cc/8KXD-6D8V>].

³⁷⁶ Howard, *supra* note 375.

³⁷⁷ See eMusic, *Press Release, eMusic Building a Blockchain Platform to Fix a Broken Music Industry*, *supra* note 375.

hurdles to these incentive structures. By requiring the registration of crypto coin white papers and sales, they deter truly decentralized economic and cultural cooperation.

This Article has argued that the freedom of expression protects crypto coin software and related economic and technical speech from being treated like a simple offering of stock in a bank or an oil company. Crypto coin white papers are not strictly commercial speech, and blockchain networks are not traditional corporations or limited partnerships with passive investors in need of transparency and active managers who control the enterprise and dictate its future. Instead, crypto coins and their white papers promote information sharing, open source software, insights in computer science and peer-to-peer networking technologies, and new socio-economic and political models of decentralized collaboration. They promise alternatives to the often slow, costly, and unequal schemes by which corporations organize exchanges of value, whether on or off the Internet. Unless they are marketed using false statements of existing fact, crypto coins deserve to be exempt from civil liability and especially from preregistration requirements. By statute and under the Constitution, crypto coin promotion is a human right.

Actions Speak Louder Than Words: When *Should* Courts Find that Institutions have a Duty to Protect Minor Children from Sexual Abuse?

Emily C. Hoskins*

INTRODUCTION

*“Our greatest responsibility as members of a civilized society is our common goal of safeguarding our children, our chief legacy, so they may grow to their full potential and can, in time, take our places in the community at large.”*¹

It is hard to disagree with this statement, and rightfully so. Minor children are one of the most vulnerable classes of people, yet when it comes to ensuring their safety against sexual abuse, the courts, the legislature, and society as a whole, have utterly failed them. Nearly sixty years ago, the court acknowledged sexual molestation and assault by third parties was a foreseeable crime for which children involved in youth programs should be protected.² Yet here we are as a society, decades later, still dealing with continuous allegations of sexual abuse, like those lodged against USA Gymnastics doctor, Larry Nassar. The stories of abuse are horrifying, and the lifelong effects on the young children who suffered the abuse are even worse. Instead of working to solve the problem on an institutional level, these youth programs are spending countless hours and millions of dollars attempting to dodge all responsibility. They argue as institutions—designed to improve and benefit the lives of young children—they owe no duty to protect those young children involved in their programs. What is even more disheartening than the fact that institutions are still making these arguments, is the fact that they are getting away with it.

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¹ *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 33 (Ct. App. 2000) (emphasis added).

² *See Wallace v. Der-Ohanian*, 18 Cal. Rptr. 892, 896 (Ct. App. 1962).

There is no shortage of literature on the drastic and lifelong impacts sexual abuse has on a minor child.³ The impacts of childhood sexual abuse are also felt by the legal field, as the effects of childhood sexual abuse have served as the basis of many legal and policy driven pieces.⁴ For example, many academics have written advocating for the importance of an extended statute of limitations when it comes to cases of childhood sexual abuse.⁵ Additionally, many papers have explored the types of claims survivors of childhood sexual abuse can bring against the institutions that played a role in their abuse.⁶ One theory of liability, based on the existence of a special relationship, has been explored in the context of school districts, psychotherapists, and police officers.⁷ This Article will also focus on the issue of special relationships, but under the lens of youth sports and recreation organizations. Many articles have recently been published regarding the liability of sports organizations for abuse of their athletes, in part due to the very public scandals within the United States Olympic Committee (“USOC”) and its National Governing Bodies (“NGB”).⁸ However, these articles

³ See, e.g., Damyan Edwards, *Childhood Sexual Abuse and Brain Development: A Discussion of Associated Structural Changes and Negative Psychological Outcomes*, 27 CHILD ABUSE REV. 198 (2018); Abdul Wohab & Sanzida Akhter, *The Effects of Childhood Sexual Abuse on Children’s Psychology and Employment*, 5 PROCEDIA – SOC. & BEHAV. SCIS. 144 (2010); Gaon et al., *Dissociative Symptoms as a Consequence of Traumatic Experiences: The Long-Term Effects of Childhood Sexual Abuse*, 50(1) ISR. J. OF PSYCHIATRY & RELATED SCIS. 17 (2013); Buzi et al., *The Relationship Between Adolescent Depression and a History of Sexual Abuse*, 42(168) ADOLESCENCE 679 (2007).

⁴ See, e.g., Elizabeth A. Wilson, *Suing for Lost Childhood: Child Sexual Abuse, the Delayed Discovery Rule, and the Problem of Finding Justice for Adult-Survivors of Child Abuse*, 12 UCLA WOMEN’S L.J. 145 (2003); Lois A. Weithorn, *A Constitutional Jurisprudence of Children’s Vulnerability*, 69 HASTINGS L.J. 179 (2017).

⁵ See, e.g., Gregory G. Gordon, *Adult Survivors of Childhood Sexual Abuse and Statute of Limitations: The Need for Consistent Application of the Delayed Discovery Rule*, 20 PEPP. L. REV. 1359 (1993); Erin Khorrarn, *Crossing the Limit Line: Sexual Abuse and Whether Retroactive Application of Civil Statutes of Limitation are Legal*, 16 U.C. DAVIS J. JUV. L. & POL’Y 391 (2012).

⁶ See, e.g., Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133 (2003); Joseph B. Conder, Annotation, *Liability of Church or Religious Society for Sexual Misconduct of Clergy*, 5 A.L.R. 5th 530 (1992); Catherine Blumenfeld, *C.A. v. William S. Hart Union School District: California’s Shift in Vicarious Liability Leaves School Districts with No Protection*, comment, 47 LOY. L.A. L. REV. 883 (2014).

⁷ See, e.g., Anita Binayifaal, *Reexamining School Liability and the Viability of a Special Relationship Claim in the Aftermath of Deshaney v. Winnebago County Department of Social Services*, 87 ST. JOHN’S L. REV. 1071 (2013); Calista Menzhuber, *In the Absence of Parents: Expanding Liability for Caretaker’s Failure to Protect Minors from Third-Party Harm – Bjerke v. Johnson*, 35 WM. MITCHELL L. REV. 714 (2009); Susanna M. Kim, *Section 1983 Liability in the Public Schools After Deshaney: The “Special Relationship” Between School and Student*, 41 UCLA L. REV. 1101 (1994).

⁸ See, e.g., Alexandria Murphy, *Better Late Than Never: Why the USOC Took So Long to Fix a Failing System for Protecting Olympic Athletes from Abuse*, 26 JEFFREY S. MOORAD SPORTS L.J. 157 (2019); Maureen A. Weston, *Tackling Abuse in Sport Through Dispute System Design*, 13 U. ST. THOMAS L.J. 434 (2017); Daniel Fiorenza, *Blacklisted:*

mainly focus on actions taken outside of the courtroom to fix problems of sexual abuse within organizations. This Article fills the gap in the literature by analyzing the law of negligence, specifically the duty arising from a special relationship and other policy considerations, and using it to simplify and enunciate a test which should be used to determine when a duty exists.

In 2019, a case was certified for appeal to the Supreme Court of California involving minor athletes who were sexually abused by their coach while participating in a youth sports program sanctioned by USOC and one of its NGBs.⁹ In that case, the court is tasked with answering the question of when an institution has a duty to protect a minor child participating in its program from sexual abuse by a third party.¹⁰ In previous cases involving sexual abuse within institutions, the courts analyzed one set of factors indicating the existence of a special relationship and analyzed a separate set of factors as policy considerations. After reviewing negligence law and the cases interpreting it in California, to determine whether or not to impose a duty, the court should analyze only the factors of (1) the dependence of the child on the institution for protection, (2) the control the institution has over the means of protection, and (3) the burden on the institution and consequences to the community of imposing a duty, with the rest of the policy factors automatically weighing in favor of imposing a duty. This test will be easier for courts to apply, thereby improving judicial efficiency. Additionally, it will lead to more consistent and predictable results.

The outcome of the *Brown v. USA Taekwondo* case and the standard used to impose, or not impose a duty, will have profound effects not only on survivors of sexual abuse bringing lawsuits, but also on how institutions behave and structure themselves. In recognizing the higher likelihood that a duty will be imposed under this test, the institutions will do everything they can to act reasonably instead of everything they can to avoid liability. For years institutions have been able to escape liability by turning a blind eye to the sexual abuse committed by their members and happening within their programs. Hundreds of brave survivors of sexual abuse have come forward to share their stories and to hold those who are responsible accountable. If nothing else, this paper

Safe Sport's Disciplinary Policy Restrains a Coach's Livelihood, 27 MARQ. SPORTS L. REV. 113 (2016); Haley O. Morton, *License to Abuse: Confronting Coach-Inflicted Sexual Assault in American Olympic Sports*, 23 WM. & MARY J. WOMEN & L. 142 (2016).

⁹ See *Brown v. USA Taekwondo*, 253 Cal. Rptr. 3d 708, 715 (Ct. App. 2019).

¹⁰ While this article was in the editing process, the California Supreme Court released its decision. See *Brown v. USA Taekwondo*, 11 Cal. 5th 204 (2021). The implications of the Court's decision are discussed below in Part IV.

serves as a call to action. As a society, we cannot continue to just talk about how much we care about protecting vulnerable children, we must show them with our actions. The Supreme Court of California had the opportunity to do precisely that.

Part I of this Article describes the rampant childhood sexual abuse¹¹ that is occurring in American institutions. It also discusses recent legislative attempts to improve the safety of children within these institutions and the legal actions survivors of childhood sexual abuse have taken. Last, Part I discusses the brief history of the *Brown* case, including the courts' decisions at both the trial and appellate level.

Part II begins with the question posed to the Supreme Court of California in the *Brown* case. Part II then examines the law of negligence in California state courts, specifically focusing on the exception to the general rule that the existence of a special relationship can create an affirmative duty to act.

Part III discusses the cases leading up to *Brown*, concentrating solely on the special relationship argument presented in those cases. This section highlights the inconsistencies in the court's analysis and the need for a simplified and standardized test. Part III will also assess the special relationship argument presented in *Brown*, reviewing the court's findings against USA Taekwondo ("USAT") and USOC.

Part IV details and analyzes the decision of the Supreme Court of California in *Brown* issued on April 1, 2021, including a critique of its decision to not proceed to the policy factors if a special relationship is not first established.

Part V describes a synthesized and simplified test a minor plaintiff must satisfy to establish a defendant owed a duty to protect the plaintiff from sexual abuse by a third party. This section will also explain how prior court decisions align and are consistent with the proposed test, suggesting the court was already using the proposed factors as the vital considerations in its decisions. Last, Part V will discuss the implications and benefits of the suggested test.

¹¹ For purposes of this Article, "childhood sexual abuse" also refers to "childhood sexual assault" as defined in *California Code of Civil Procedure* section 340.1. See CAL. CODE CIV. PRO. § 340.1 (Deering, LEXIS through ch. 3 of the 2020 Reg. Sess.). The 2020 amendment to the statute changed the wording from childhood sexual abuse to childhood sexual assault to expand the definition of conduct that would be included. See Nelson & Schwabke, *New California Law Allowing Childhood Sexual Assault Victims More Time to Report Draws Widespread Praise*, ORANGE CNTY. REG. (Oct. 14, 2019), <https://www.ocregister.com/2019/10/14/new-california-law-allowing-childhood-sexual-assault-victims-more-time-to-report-draws-widespread-praise/> [http://perma.cc/8GJT-M8CR]. For ease of understanding and consistency, and due to the use of the term "childhood sexual abuse" in prior case law, "childhood sexual abuse" will be used throughout this paper.

I. BACKGROUND

“The ripple effect of our actions—or inactions—can be enormous, spanning generations. Perhaps the greatest tragedy of this nightmare is that it could have been avoided. Predators thrive in silence.”¹² These words were spoken as Aly Raisman, Sarah Klein, and Tiffany Thomas Lopez, along with over 100 survivors of Larry Nassar’s decades of sexual abuse, filled the ESPY’s stage to accept the Arthur Ashe Courage Award.¹³ These “sister survivors”¹⁴ took a stand to bring awareness to the issue of sexual abuse within sports organizations and call out the institutions that silenced their allegations of abuse for years.¹⁵ But their story is just one of many. There have been complaints of sexual misconduct against members and/or coaches in USA Basketball, USA Boxing, USA Diving, US Equestrian Federation, US Figure Skating, USA Gymnastics, USA Hockey, USA Rugby, US Soccer, USA Swimming, USA Taekwondo, US Tennis Association, USA Track and Field, USA Wrestling, and USA Volleyball, to name a few.¹⁶ With more than 290 coaches and officials in the United States facing accusations of sexual misconduct and counting,¹⁷ it is clear these institutions are “plac[ing] money and medals above the safety of child athletes.”¹⁸

However, sports institutions are not alone. Instances of childhood sexual abuse and assault are occurring at alarming rates, the actual magnitude of which may never be fully known.¹⁹

¹² Aly Raisman, Address Accepting at the Excellence in Sports Performance Yearly Awards (July 18, 2018) (accepting the Arthur Ashe Courage Award alongside dozens of fellow athletes and sexual abuse survivors for bravery that transcends sports) (transcript available at *Cosmopolitan* website).

¹³ Michelle R. Martinelli, *Aly Raisman and 140 Abuse Survivors Unite for Powerful ESPYS Moment, FOR THE WIN* (July 19, 2018, 8:48 AM), <https://ftw.usatoday.com/2018/07/aly-raisman-espys-arthur-ashe-courage-award-abuse-nassar-survivors-powerful-video> [<http://perma.cc/LHX5-EKDW>].

¹⁴ Sarah Klein, Address Accepting at the Excellence in Sports Performance Yearly Awards (July 18, 2018) (referring to the hundreds of women who survived years of sexual abuse by Larry Nassar) (transcript available at *Cosmopolitan* website).

¹⁵ Martinelli, *supra* note 13.

¹⁶ See *Centralized Disciplinary Database*, U.S. CTR. FOR SAFESPORT, <https://uscenterforsafesport.org/response-and-resolution/disciplinary-database/> [<http://perma.cc/V6PK-LJF5>] (last visited Apr. 29, 2020). This list is not exhaustive and does not include instances of sexual misconduct where the survivor has yet to come forward. See *id.*

¹⁷ See Murphy, *supra* note 8, at 158.

¹⁸ Klein, *supra* note 14.

¹⁹ See *Child Abuse Statistics*, CTR. FOR FAM. JUST., <https://centerforfamilyjustice.org/community-education/statistics/> [<http://perma.cc/D2PM-YMMZ>] (last visited Apr. 29, 2020) (explaining that roughly “1 in 3 girls and 1 in 7 boys will be sexually assaulted by the time they reach 18,” according to the Department of Justice); *Child Sexual Abuse Statistics: The Magnitude of the Problem*, DARKNESS TO LIGHT (Dec. 22, 2015), http://www.d2l.org/wp-content/uploads/2017/01/Statistics_1_Magnitude.pdf [<http://perma.cc/QJc9-3D7J>] (finding the magnitude of the problem of childhood sexual abuse is largely unknown due to the fact that only about 38% of child victims disclose their sexual abuse).

Over the past few decades, many trusted institutions have become the center of allegations involving rampant and uninhibited sexual abuse of vulnerable children.²⁰ Sexual abuse within religious institutions is a worldwide problem.²¹ Most notably, this centuries-old problem characterized by cover-ups and lack of accountability has placed the Catholic Church under international scrutiny.²² Additionally, sexual abuse is repeatedly occurring in schools and other children's recreation programs, leaving countless children to cope with the lifelong effects of abuse.²³ As an illustration, an investigation in the 1990s revealed the Boy Scouts of America have reported, "on average, more than one incident of sexual abuse per week for the past two decades" not including the number of unreported cases.²⁴

Childhood sexual abuse is not simply a problem of abusive individuals but a problem of systematic failures within institutions²⁵—institutions that failed to take action to adequately protect the children they were entrusted to care for.²⁶

²⁰ Chamallas, *supra* note 6, at 133.

²¹ See *Child Sexual Abuse in the Catholic Church*, CHILD RTS. INT'L NETWORK, <https://home.crin.org/issues/sexual-violence/child-sexual-abuse-catholic-church> [<http://perma.cc/5D6W-FP3V>] (last visited Apr. 29, 2020).

²² *Id.*

²³ See, e.g., *LAUSD Agrees to Multimillion-Dollar Settlement of Child Sex Abuse Claims Against Ex-Teachers*, ABC 7 EYEWITNESS NEWS (Jan. 16, 2020), <https://abc7.com/child-sex-abuse-sexual-misconduct-laugd-los-angeles-unified-school-district/5855667/> [<http://perma.cc/24W9-X82E>] (questioning the Los Angeles Board of Education's steps "to reform a culture which places the reputation of the district and its employees above the safety of children in its care" after paying out more than \$300 million in settlement of sexual abuse cases); Joe Nelson, *Redlands Unified Slapped with Sex Abuse Lawsuit Under New State Law*, REDLANDS DAILY FACTS (Jan. 23, 2020, 3:01 PM), <https://www.redlandsdailyfacts.com/2020/01/21/redlands-unified-slapped-with-sex-abuse-lawsuit-under-new-state-law/> [<http://perma.cc/4WMP-JUCK>] (exposing 20 years of covering up sexual abuse by teachers in the district); Cara Kelly, *Boy Scouts Face 'Flood of Litigation' Over Child Sexual Abuse*, USA TODAY (Jan. 7, 2020, 1:17 PM), <https://www.usatoday.com/story/news/investigations/2020/01/06/boy-scouts-hit-more-lawsuits-claiming-child-sex-abuse/2806124001/> [<http://perma.cc/9VFD-MFF9>] ("Boy Scouts of America faces mounting legal liability as lawsuits alleging sexual abuse by leaders and volunteers continue to roll in."); Carter Sherman, *Hundreds of Kids Across the Country Were Abused at Boys & Girls Clubs of America, Report Reveals*, VICE (Aug. 15, 2019, 9:57 AM), https://www.vice.com/en_ca/article/mbma98/hundreds-of-kids-across-the-country-were-abused-at-boys-and-girls-clubs-of-america-report-reveals [<http://perma.cc/8HS3-SE2F>] ("More than 200 people across 30 states say that they were sexually abused as children by people with ties to the Boys & Girls Clubs of America, which serves more than 4 million children as the nation's largest youth development nonprofit.").

²⁴ See Mark C. Lear, *Just Perfect for Pedophiles? Charitable Organizations that Work with Children and Their Duty to Screen Volunteers*, 76 TEX. L. REV. 143, 144 n.8 (1997); Patrick Boyle, *Scout's Honor: Scouting's Sex Abuse Trail Leads to 50 States*, WASH. TIMES, May 20, 1991, at A1 (finding sex abuse by scout leaders more common than the amount of accidental deaths and serious injuries to youth scouts combined).

²⁵ See Chamallas, *supra* note 6, at 133.

²⁶ Jennifer Shore, *Institutional Sex Abuse of Children: Part 1: The Scope of the Problem*, FOCUS FOR HEALTH (Feb. 14, 2019), <https://www.focusforhealth.org/institutional->

Sex abuse rises to the level of institutional abuse when the organization and institutional structure these individuals are affiliated with does not respond appropriately to allegations when they come forward. . . . In all these cases, the actions of the predator were either ignored or accepted by the institution, and the focus of the system shifted to covering up the allegation to avoid scandal and preserve the institution itself instead of protecting children. The collective inaction of the institution allowed the abuse to continue and more children became victimized. When abuse occurs to children in the very settings that are designed to enhance their lives and to protect them, it is especially egregious and difficult to understand. We no longer have one sexual deviant to blame for the exploitation of a child, but an entire system that has allowed for the abuse to continue, and in the process, enabled more children to be victimized.²⁷

The destructive impacts of childhood sexual abuse on children are undeniable.²⁸ Children who are sexually abused suffer immediate impacts as well as long term consequences.²⁹ Some immediate impacts of childhood sexual abuse include lower self-esteem, depression, anxiety, guilt, shame, anger, sleep disturbances, lack of trust, and withdrawn behavior.³⁰ Unfortunately, these problems do not simply disappear when the abuse stops. Victims of childhood sexual abuse are more likely to develop substance abuse problems, develop mental health problems including anxiety, depression, post-traumatic stress disorder and eating disorders, encounter problems with authority including law enforcement, and have problems with intimacy and sexual relationships.³¹

Action must be taken to prevent institutions from continually failing to protect defenseless and vulnerable children. Allegations must be taken seriously, and children must be believed. It is not enough to address issues of childhood sexual abuse after they have already occurred. But how do we compel institutions to take allegations of sexual abuse seriously? What proactive and preemptive measures can be taken to safeguard children before the abuse ever occurs? Should this problem be left up to the legislators to decide? At both a federal and state level,

sex-abuse-of-children-part-1-scope-of-the-problem/ [http://perma.cc/JC52-98T2].

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *Effects*, NAT'L CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/what-is-child-trauma/trauma-types/sexual-abuse/effects> [http://perma.cc/PRH8-K9XB] (last visited May 1, 2020).

³⁰ See *id.*; *Immediate and Lasting Effects*, RACE AGAINST ABUSE OF CHILD. EVERYWHERE, [raace.org/immediate-lasting-effects](https://www.raace.org/immediate-lasting-effects) [http://perma.cc/79L9-6T57] (last visited May 1, 2020).

³¹ See *Effects*, *supra* note 29; *Long Term Consequences of Child Sexual Abuse*, DARKNESS TO LIGHT (Jan. 2017), <https://www.d2l.org/wp-content/uploads/2017/01/Long-Term-Consequences-4.11.14.pdf> [http://perma.cc/7YKD-KJ5U].

the United States is recognizing the need to take action to protect children from sexual abuse. For example, in 2018, the Safe Sport Authorization Act was enacted to improve protection for young athletes, including the creation of the United States Center for SafeSport as an independent entity that investigates reports of abuse in Olympic programs.³² In addition, multiple states have recently extended their statute of limitations³³ and made necessary updates to the laws governing childhood sexual abuse claims, in recognition of delays in reporting and other hurdles attributed to the nature of this type of abuse.³⁴ Specifically, California's Assembly Bill 218 extended the time to bring a claim of childhood sexual assault to twenty-two years after the adult survivor reaches the age of majority.³⁵ Moreover, it revived previously time barred claims that had not been litigated to finality for a period of three years.³⁶ Time and again, the state of California has recognized its compelling interest in protecting citizens, particularly those most vulnerable, like minor children, from the devastation of such atrocious crimes as sexual assault and molestation.³⁷

While the changes in law represent a step in the right direction, these changes will be meaningless unless they impact and alter the behavior of the institutions that are continuing to allow childhood sexual abuse to take place. Since these institutions have repeatedly prioritized money and reputation over children's safety, it appears that impacting an institution's reputation and finances may be the precise motivation needed to improve child safety measures and precautions within the institutions. Survivors of childhood sexual abuse have instituted civil actions against their perpetrators and the institutions that

³² Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017, Pub. L. No. 115–126, 132 Stat. 318 (2018).

³³ *Statute of Limitations*, CAL. CTS.: THE JUD. BRANCH OF CAL., <https://www.courts.ca.gov/9618.htm?rdeLocaleAttr=en> [<http://perma.cc/JM8H-SVJB>] (last visited Apr. 30, 2020) (“A statute of limitations is the deadline for filing a lawsuit. Most lawsuits MUST be filed within a certain amount of time. In general, once the statute of limitations on a case ‘runs out,’ the legal claim is not valid any longer. The period of time during which you can file a lawsuit varies depending on the type of legal claim.”).

³⁴ See S.B. 2440, 242nd Ann. Legis. Sess., Ch. 11 (N.Y. 2019) (allowing childhood sexual abuse victims to seek civil action against their abusers and institutions that enabled them until they turn age 55); S.B. 477, P.L. 2019, Ch. 120 (N.J. 2019) (extending the statute of limitations in civil actions for childhood sexual abuse and creating a two-year window for civil lawsuits that would otherwise be time barred even under the new statute of limitations); Assemb. B. 218, 2019-2020 Ch. 861 (Cal. 2019) (expanding the definition of childhood sexual assault, extending the statute of limitations, broadening notice requirements, and reviving previously time barred claims).

³⁵ Assemb. B. 218 (resulting in any person under the age of forty (40), age of majority (18) plus twenty-two (22) years, able to bring a claim of childhood sexual assault).

³⁶ *Id.*

³⁷ *Burt v. County of Orange*, 15 Cal. Rptr. 3d 373, 382 (Ct. App. 2004).

were supposed to be protecting them in the hopes that significant monetary and reputational losses will inspire better childcare procedures and safeguards.

Under the recently updated *California Code of Civil Procedure* section 340.1, a person can bring a civil action for the recovery of damages suffered as a result of sexual abuse for the following:

- (1) An action against any person for committing an act of childhood sexual assault.
- (2) An action for liability against any person or entity who owed a duty of care to the plaintiff, if a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual assault that resulted in the injury to the plaintiff.
- (3) An action for liability against any person or entity if an intentional act by that person or entity was a legal cause of the childhood sexual assault that resulted in the injury to the plaintiff.³⁸

While many theories of liability have been advanced in California state courts against institutions, this paper will focus on a theory of negligence based on an affirmative duty created by the special relationship between the institution and the child who was the victim of sexual abuse, or the special relationship between the institution and the perpetrator of the sexual abuse.³⁹

³⁸ CAL. CODE CIV. PRO. § 340.1 (Deering, LEXIS through ch. 3 of the 2020 Reg. Sess.).

³⁹ There are many other theories of liability survivors of sexual assaults use in civil lawsuits including, but not limited to: vicarious liability, direct liability through negligence, intentional torts, agency, and premises liability. California courts have held institutions vicariously liable for sexual misconduct committed by their employees in some situations, but not in others. See *John R. v. Oakland Unified Sch. Dist.*, 769 P.2d 948, 956–57 (Cal. 1989) (finding the school district was not vicariously liable for its teacher’s act of sexually assaulting a student while the student was participating in a district sanctioned extracurricular activity at the teacher’s home); *White v. County of Orange*, 212 Cal. Rptr. 493, 496 (Ct. App. 1985) (finding a police officer who sexually assaults a member of the community while on duty carries with them the authority of the law, and when the wrongful acts flow from that exercise of authority, the employer (the government) must be held responsible). Additionally, California courts have held institutions directly liable for their employee’s negligence. See *C.A. v. William S. Hart Union High Sch. Dist.*, 270 P.3d 699, 702 (Cal. 2012) (finding the employer liable for the negligence of supervisory and/or administrative employees who knew or should have known of the sexually abusive employee’s propensities and nevertheless hired, retained, or inadequately supervised that employee). Survivors of sexual abuse have attempted to bring claims of premises liability, intentional torts, and claims based on agency, but have not always been successful. See *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 17 (Ct. App. 2000) (affirming summary judgement for the defendants on an action for premises liability); *Boy Scouts of Am. Nat’l Found. v. Superior Ct.*, 141 Cal. Rptr. 3d 819, 833–34 (Ct. App. 2012) (finding a claim for intentional infliction of emotional distress was time barred under the applicable statute of limitations); *Doe v. Roman Cath. Archbishop of L.A.*, 202 Cal. Rptr. 3d 414, 426 (Ct. App. 2016) (asserting “a principal may be liable for the wrongful conduct of its agent, even if that conduct is criminal, in one of three ways”).

In the 2019 *Brown* case, three young women sued their coach for sexually abusing them while they were minor children.⁴⁰ They also sued USAT and USOC for their inaction and negligence in failing to protect the minor girls from the coach's sexual abuse.⁴¹ The trial court dismissed the minor plaintiffs' claims against USAT and USOC.⁴² On review, the Court of Appeal of California found USAT was in a special relationship with the coach that sexually abused the plaintiffs, thus USAT owed the plaintiffs a duty to act affirmatively to protect them.⁴³ In contrast, the court found USOC did not owe the plaintiffs a duty because it did not have a special relationship with the sexually abusive coach or with the plaintiffs.⁴⁴ The plaintiffs petitioned for review which the Supreme Court of California granted.⁴⁵

II. THE SPECIAL RELATIONSHIP EXCEPTION IN CALIFORNIA NEGLIGENCE LAW

The issue in the *Brown* case presents a question of duty: when do institutions have a duty to protect minor children from sexual abuse by third parties?⁴⁶ In order to answer that question, a discussion of negligence, specifically focusing on the element of duty is necessary.

The elements of a cause of action for negligence are: (1) the existence of a duty on the part of the actor toward another to take action to protect against risk; (2) the failure on the part of the actor to conform to a required standard of conduct in light of the duty imposed; (3) a reasonably close connection between the conduct and the resulting injury, commonly called "proximate cause"; and (4) actual loss or damage resulting from such injury.⁴⁷

A. Duty as a Necessary Element of Negligence

A duty is a legally recognized obligation requiring an actor to follow a standard of conduct for the safety of others against

⁴⁰ *Brown v. USA Taekwondo*, 253 Cal. Rptr. 3d 708, 715 (Ct. App. 2019).

⁴¹ *Id.* at 715–16.

⁴² *Id.* at 716.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Summary of Cases Accepted and Related Actions During Week of December 30, 2019*, CAL. CTS. at 1 (Jan. 3, 2020), <https://www.courts.ca.gov/documents/ws123019.pdf> [<http://perma.cc/7G69-FA69>] (press release).

⁴⁶ *Pending Issues Summary*, CAL. CTS. at 2, <https://www.courts.ca.gov/documents/MAY0820civpend.pdf> [<http://perma.cc/HHX4-C7X2>] (last updated May 8, 2020).

⁴⁷ See *Koepke v. Loo*, 23 Cal. Rptr. 2d 34, 36 (Ct. App. 1993) (citing W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS*, §30 at 164–65 (5th ed. 1984)); SHERYL L. HECKMANN & HOWARD C. ANAWALT, 1 CALIFORNIA TORTS §1.01, Westlaw (database updated 2020).

unreasonable risks.⁴⁸ “A duty to do something for another person or entity often creates a right in the other that the duty be performed, and a breach of such a duty gives rise to a cause of action for violation of the right.”⁴⁹ The existence of a duty is generally a question of law to be determined by the court.⁵⁰ The existence of a duty is not a “discoverable fact[] of nature, but merely [a] conclusory expression[] that, in cases of a particular type, liability *should* be imposed for damage done.”⁵¹ In many cases, a duty may be obvious.⁵² But the issue of duty in a legal context may arise when a defendant insists that he or she was under no legal obligation to act carefully.⁵³ As will be discussed *infra*, a duty is a judicial determination that a person is liable to another person who was injured, based on a variety of policy considerations.⁵⁴

In California, there is a general duty to exercise reasonable care under the circumstances.⁵⁵ California has codified its general duty in California Civil Code Section 1714(a), which states:

Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.⁵⁶

This is a very broad rule requiring every person to exercise reasonable care to avoid causing injury to every other person.⁵⁷ However, a person will not be held liable for a failure to act to protect or aid another who is imperiled by the circumstances, by that person’s own actions, or by the actions of a third party.⁵⁸

⁴⁸ HECKMANN & ANAWALT, *supra* note 47, §1.02; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, §30 at 164 (5th ed. 1984); *see* Peter W. v. S.F. Unified Sch. Dist., 131 Cal. Rptr. 854, 859 (Ct. App. 1976).

⁴⁹ *Duty*, BOUVIER LAW DICTIONARY (2012) (desk edition).

⁵⁰ *See* HECKMANN & ANAWALT, *supra* note 47, § 1.02; *Peter W.*, 131 Cal. Rptr. at 859; *Raymond v. Paradise Unified Sch. Dist.*, 31 Cal. Rptr. 847, 851 (Ct. App. 1963); *Cabral v. Ralphs Grocery Co.*, 248 P.3d 1170, 1175 (Cal. 2011) (stating the determination of a duty owed is for the court to make, but the determination of whether the defendant breached that duty is for the jury in a jury trial to make).

⁵¹ *Thompson v. County of Alameda*, 614 P.2d 728, 732 (Cal. 1980) (emphasis added) (citing *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976)).

⁵² *See* HECKMANN & ANAWALT, *supra* note 47, § 1.02 (indicating no judge would welcome lengthy argument regarding automobile drivers owing a duty to other drivers and pedestrians on the road, since the duty owed is very clear).

⁵³ *Id.*; CHARLES O. GREGORY & HARRY KALVEN, JR., CASES AND MATERIALS ON TORTS 260 (2d ed. 1969).

⁵⁴ HECKMANN & ANAWALT, *supra* note 47, § 1.02.

⁵⁵ *Id.*

⁵⁶ CAL. CIV. CODE § 1714(a) (Deering 2020); HECKMANN & ANAWALT, *supra* note 47, § 1.02.

⁵⁷ HECKMANN & ANAWALT, *supra* note 47, § 1.02.

⁵⁸ *Id.* § 1.10 (“Generally, one was not held liable for his or her ‘mere’ nonfeasance.

A person is not required to take affirmative action that benefits another person unless there was some preexisting legal duty obligating them to do so.⁵⁹ Without a legal duty, any injury suffered is said to be “damnum absque injuria” or an injury without a wrong.⁶⁰ This failure to act affirmatively where an action is required is referred to as nonfeasance, and courts are more reluctant to impose liability for nonfeasance as opposed to malfeasance, or an affirmative act that causes injury.⁶¹ Despite this reluctance, the courts have carved out exceptions to this general rule.⁶² However, the Supreme Court of California has declared that no exception should be made to this fundamental principle, except if it is clearly supported by public policy.⁶³

B. Factors for Determining if an Exception is Supported by Public Policy

The Supreme Court of California recognized a duty as an “expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.”⁶⁴ The court makes this determination on a case by

Nonfeasance generally refers to a person’s failure to act to protect or assist others who are imperiled by the circumstances, by their own actions, or by the actions of a third party.”). See *Stout v. City of Porterville*, 196 Cal. Rptr. 301, 304 (1983) (“As a rule, one has no duty to come to the aid of another. A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to such a duty.”); RESTATEMENT (SECOND) OF TORTS § 314 (AM. L. INST. 1965) (“The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”).

⁵⁹ HECKMANN & ANAWALT, *supra* note 47, § 1.10.

⁶⁰ *E.g.*, *Nally v. Grace Cmty. Church*, 763 P.2d 948, 956 (Cal. 1988).

⁶¹ See *Conti v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, 186 Cal. Rptr. 3d 26, 37 (2015); *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 343 n.5 (Cal. 1976), *superseded by statute*, Cal. Civ. Code § 43.92 (Deering 2020) (attributing the reluctance to practical difficulties in setting a workable rule for situations of nonfeasance).

⁶² *Stout*, 196 Cal. Rptr. at 304 (including exceptions when a person voluntarily undertakes aiding another, where a special relationship exists, and when a person has created a foreseeable peril). See, *e.g.*, HECKMANN & ANAWALT, *supra* note 47, § 1.11 (stating that one who voluntarily renders aid or protection to another is under a duty to exercise reasonable care); *Tarasoff*, 551 P.2d at 343 (finding that the relationship between a patient and his psychotherapist may result in affirmative duties for the benefits of third persons); *Johnson v. State*, 447 P.2d 352, 355 (Cal. 1968) (imposing a “duty upon those who create a foreseeable peril, not readily discoverable by endangered persons, to warn them of such potential peril”).

⁶³ See HECKMANN & ANAWALT, *supra* note 47, § 1.02; *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968), *superseded by statute*, Cal. Civ. Code § 847 (West 2020), *as recognized in* *Calvillo-Silva v. Home Grocery*, 968 P.2d 65 (Cal. 1998), (“Although it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy.”).

⁶⁴ See HECKMANN & ANAWALT, *supra* note 47, § 1.02; *Weirum v. RKO Gen., Inc.*, 539

case analysis.⁶⁵ In the landmark Supreme Court of California case *Rowland v. Christian*, the plaintiff sued the defendant for a severe injury to his hand sustained when the knob of the faucet on the bathroom basin broke.⁶⁶ The plaintiff argued that the defendant knew of the dangerous condition presented by the defective knob and owed him a duty to warn him of that danger.⁶⁷ The court moved away from the rigid common law duties a landowner owes to a trespasser, licensee, or invitee.⁶⁸ Instead, in determining the existence of a duty in that case, the court observed there was no “statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code.”⁶⁹ Consequently, an exception could only exist if it was supported by public policy, which is determined by an analysis of factors.⁷⁰

To make this determination, the court balanced a number of considerations including:

[T]he foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.⁷¹

The factors generally fall into two categories, and the courts often analyze the factors according to those groups.⁷² The first group of factors involve foreseeability.⁷³ This group includes the foreseeability of harm to the plaintiff, and the similar concepts of certainty of injury and connection between the plaintiff’s injury and the defendant.⁷⁴ The second group of factors is concerned

P.2d 36, 39 (Cal. 1975) (quoting WILLIAM L. PROSSER, *THE LAW OF TORTS* 325–26 (4th ed. 1971)); *Dillon v. Legg*, 441 P.2d 912, 916 (Cal. 1968).

⁶⁵ HECKMANN & ANAWALT, *supra* note 47, § 1.02.

⁶⁶ *Rowland*, 443 P.2d at 562. A separate analysis is discussed in this case involving whether the injured person was classified as a trespasser, licensee, or invitee. *Id.* at 565. However, this case’s relevance for the purpose of this paper only relates to the factors considered to determine whether an exception to the general duty to exercise ordinary care should be made.

⁶⁷ *Id.* at 562.

⁶⁸ *Id.* at 561.

⁶⁹ *Id.* at 564.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See *Kesner v. Superior Ct.*, 384 P.3d 283, 291 (2016); *Regents of Univ. of Cal. v. Superior Ct.*, 413 P.3d 656, 670 (Cal. 2018); *Univ. of S. Cal. v. Superior Ct.*, 241 Cal. Rptr. 3d 616, 633 (Ct. App. 2018).

⁷³ See *Kesner*, 384 P.3d at 291; *Regents*, 413 P.3d at 670; *Univ. of S. Cal.*, 241 Cal. Rptr. 3d at 633.

⁷⁴ See *Kesner*, 384 P.3d at 291; *Regents*, 413 P.3d at 670; *Univ. of S. Cal.*, 241 Cal.

with public policy.⁷⁵ This group includes concerns of moral blame,⁷⁶ preventing future harm, burden, and insurance availability.⁷⁷ This policy analysis looks at whether certain kinds of plaintiffs or certain kinds of injuries should be excluded from relief.⁷⁸

The foreseeability of the injury is the most important factor “in determining whether to create an exception to the general duty to exercise ordinary care.”⁷⁹

In examining foreseeability, “the court’s task . . . ‘is not to decide whether a particular plaintiff’s injury was reasonably foreseeable in light of a particular defendant’s conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed’”⁸⁰

Importantly, all factors are evaluated at a broad level of generality—that is, “whether carving out an entire category of cases from that general duty rule is justified by clear considerations of policy.”⁸¹ No factor by itself is determinative, so the courts must analyze each factor and weigh them against the other factors to determine when a duty exists.⁸²

Rptr. 3d at 633; *cf.* *Bryant v. Glastetter*, 38 Cal. Rptr. 2d 291, 296–97 (Ct. App. 1995) (The court found there was “no logical cause and effect relationship between the negligence and the harm suffered by decedent except for the fact that it placed decedent in a position to be acted upon by the negligent third party.” Thus, the connection between the plaintiff’s injury and the defendant’s conduct weighed against finding the injury foreseeable, and therefore, against the existence of a duty.)

⁷⁵ See *Kesner*, 384 P.3d at 291; *Regents*, 413 P.3d at 670; *Univ. of S. Cal.*, 241 Cal. Rptr. 3d at 633.

⁷⁶ Moral blame usually refers to “evidence that a defendant knew or reasonably should have known there was any danger or potential danger associated with that defendant’s act or failure to act.” See *Butcher v. Gay*, 34 Cal. Rptr. 2d 771, 780 (Ct. App. 1994) (imposing liability without some degree of moral blame on the defendant is like imposing liability without fault). Moreover, any moral blame that is ordinarily associated with negligence in general is not enough to tip the balance. See *Adams v. City of Fremont*, 80 Cal. Rptr. 2d 196, 212 (Ct. App. 1998) (requiring a higher degree of moral blame such as intent or planning the harm, actual or constructive knowledge of the danger, reckless indifference to consequences of one’s actions, or inherently harmful acts).

⁷⁷ See *Kesner*, 384 P.3d at 291; *Regents*, 413 P.3d at 670; *Univ. of S. Cal.*, 241 Cal. Rptr. 3d at 633.

⁷⁸ See *Kesner*, 384 P.3d at 291; *Regents*, 413 P.3d at 670; *Univ. of S. Cal.*, 241 Cal. Rptr. 3d at 633.

⁷⁹ *Regents*, 413 P.3d at 670–71 (quoting *Kesner*, 384 P.3d at 291); see *Tarasoff v. Regents of Univ. of Cal.* 551 P.2d 334, 342 (Cal. 1976). *But cf.* *Parsons v. Crown Disposal Co.*, 936 P.2d 70, 82 (Cal. 1997) (noting that the mere presence of foreseeability standing alone is not sufficient to impose a duty and that public policy may dictate nonliability despite how foreseeable the risk is); *Adams*, 80 Cal. Rptr. 2d at 211 (remarking that almost any result is foreseeable with the benefit of hindsight, so the low bar of foreseeability alone is insufficient to create a duty).

⁸⁰ *Regents*, 413 P.3d at 670 (emphasis in original omitted).

⁸¹ *Cabral v. Ralphs Grocery Co.*, 248 P.3d 1170, 1175 (Cal. 2011).

⁸² See, e.g., *Parsons*, 936 P.2d at 82 (holding that the factors of social utility of the

C. The Special Relationship Exception to the General No Duty to Protect Rule

One such exception to the general rule of liability that has been developed through the common law is the special relationship exception.⁸³ This exception is stated in *Restatement (Second) of Torts* section 315:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.⁸⁴

The existence of a special relationship may result in the imposition of an affirmative duty to protect an individual against harm or injury by a third person.⁸⁵ This affirmative duty can include a duty to warn, a duty to control, or both.⁸⁶ Specifically, a duty to control can result if a defendant is in a "special relationship with the foreseeably dangerous person," and the defendant has an ability to control that person's conduct.⁸⁷ Similarly, a duty to warn or protect exists if "the defendant has a special relationship with the potential victim that gives the victim a right to expect protection."⁸⁸ Deeming a relationship a special relationship has no independent significance, it merely signals that the court is recognizing an affirmative duty where no duty to act would generally exist.⁸⁹

conduct and the burden and consequences to the community outweighed the foreseeability factor in that case); *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 33–34 (Ct. App. 2000) (resulting in a duty owed, despite the absence of any moral blame weighing strongly as a factor against finding a duty).

⁸³ HECKMANN & ANAWALT, *supra* note 47, § 1.10 ("[A] person may in some instances be obligated to take certain affirmative steps to protect or aid another if that person stands in some 'special relationship' to either the person endangered or the person whose conduct may injure the person endangered."); *id.* at §1.12 ("California courts have recognized that 'special relationships' may create special duties, including the duty to protect against the harmful acts of third persons."); *see, e.g., Tarasoff*, 551 P.2d at 343 (finding a special relationship between a patient and a psychotherapist); *Marois v. Royal Investigation & Patrol, Inc.*, 208 Cal. Rptr. 384, 388 (Ct. App. 1984) (finding a special relationship between a business and its customers).

⁸⁴ RESTATEMENT (SECOND) OF TORTS § 315 (AM. L. INST. 1965).

⁸⁵ *See* HECKMANN & ANAWALT, *supra* note 47, § 1.12.

⁸⁶ *Id.*; *see Tarasoff*, 551 P.2d at 346; *Marois*, 208 Cal. Rptr. at 387–88.

⁸⁷ *Regents of Univ. of Cal. v. Superior Ct.*, 413 P.3d 656, 664 (Cal. 2018); *see* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 41 (AM. L. INST. 2012).

⁸⁸ *Regents*, 413 P.3d at 664; *see Zelig v. County of Los Angeles*, 45 P.3d 1171, 1182–83 (Cal. 2002).

⁸⁹ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 40 cmt. h (AM. L. INST. 2012).

The *Restatement (Third) of Torts* has recognized several special relationships that may support the imposition of a duty.⁹⁰ Under section 40, special relationships giving rise to a duty can include (1) common carriers with passengers, (2) innkeepers with guests, (3) business with those who are lawfully on the premises, (4) employers with employees under certain circumstances, (5) schools with students, (5) landlords with tenants, and (6) custodians with those in its custody under certain conditions.⁹¹ Section 41 covers special relationships resulting in the imposition of a duty to a third person.⁹² Special relationships, whether explicitly stated in the *Restatement (Third) of Torts* or otherwise, include common features.⁹³ These common features include dependency, defined boundaries, and benefit to the party charged with care.⁹⁴

1. Dependency

Special relationships generally include some aspect of dependency.⁹⁵ Indeed, “the law appears to be heading toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence.”⁹⁶ A relationship of dependency refers to one party relying to some degree on the other party for protection.⁹⁷ On the other side of dependency in a special relationship is control.⁹⁸ When one party is dependent on the other party, that other party has control over the mechanisms of protection.⁹⁹

A classic dependency situation resulting in a special relationship exists between a jailer and a prisoner.¹⁰⁰ A special relationship has also been recognized between a common carrier and its passengers as passengers are confined in the moving

⁹⁰ *Regents*, 413 P.3d 656, 664; see RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM §§ 40, 41 (AM. L. INST. 2012).

⁹¹ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 40 (AM. L. INST. 2012).

⁹² *Id.* § 41 (including “(1) a parent with dependent children, (2) a custodian with those in its custody, (3) an employer with employees when the employment facilitates the employee’s causing harm to third parties, and (4) a mental-health professional with patients.”).

⁹³ *Regents*, 413 P.3d at 664.

⁹⁴ *Id.* at 664–65.

⁹⁵ *Id.* at 664; see *Baldwin v. Zoradi*, 176 Cal. Rptr. 809, 814 (Cal Ct. App. 1981), *overruled on other grounds by Regents*, 413 P.3d 656 (Cal. 2018).

⁹⁶ *Regents*, 413 P.3d at 664–65 (observing this shift began over fifty years ago); *Mann v. State*, 139 Cal. Rptr. 82, 86 (Ct. App. 1977); RESTATEMENT (SECOND) OF TORTS § 314A cmt. b (AM. L. INST. 1965).

⁹⁷ *Regents*, 413 P.3d at 664.

⁹⁸ *Id.* at 665.

⁹⁹ *Id.*; *Brown v. USA Taekwondo*, 253 Cal. Rptr. 3d 708, 723 (Ct. App. 2019).

¹⁰⁰ *Giraldo v. Cal. Dept. of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371, 386 (Ct. App. 2008).

vehicle and the driver has exclusive control over the entrances and exits of the vehicle.¹⁰¹ The Supreme Court of California has recognized dependency and control relationships between business proprietors and their tenants or patrons, between innkeepers and their guests, and between mental health professionals and their patients.¹⁰² Significantly, the cases point out a typical setting for a special relationship is where “the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff’s welfare.”¹⁰³

2. Defined Boundaries

Special relationships are also defined by specific boundaries creating a duty of care “owed to a limited community, not the public at large.”¹⁰⁴ A special relationship may impose a duty owed to a specific person, or a specific group of persons.¹⁰⁵ The scope of the duty owed applies to dangers that are within the confines of the relationship.¹⁰⁶ It does not extend to risks or dangers that are not within the confines of the relationship.¹⁰⁷ As such, the scope of the duty is generally confined by geography and time.¹⁰⁸ Imposing any sort of affirmative duty on a party necessarily imposes a burden.¹⁰⁹ Nevertheless, the clearly defined boundaries of the special relationship lower the burden and incursion on the party’s autonomy, thus justifying the imposition of an affirmative duty.¹¹⁰

¹⁰¹ *Lopez v. S. Cal. Rapid Transit Dist.*, 710 P.2d 907, 912 (Cal. 1985) (reasoning passengers have no say or control over who can enter the vehicle and are entirely dependent upon the driver to provide help or escape when danger occurs).

¹⁰² *Giraldo*, 85 Cal. Rptr. 3d at 382; *Delgado v. Trax Bar & Grill*, 113 P.3d 1159, 1165 (Cal. 2005).

¹⁰³ *Regents*, 413 P.3d at 665 (quoting *Giraldo*, 85 Cal. Rptr. 3d at 382); *Brown*, 253 Cal. Rptr. 3d at 723.

¹⁰⁴ *Regents*, 413 P.3d at 665.

¹⁰⁵ *See id.* at 667 (finding a special relationship “with students while they are engaged in activities that are part of the school’s curriculum or closely related to its delivery of educational services.”); *Buford v. State*, 164 Cal. Rptr. 264, 272 (Ct. App. 1980) (concluding a special relationship existed between the state and prisoner such that the state owed a duty to warn a foreseeable victim of the prisoner’s release), *overruled on other grounds by Quigley v. Garden Valley Fire Protection Dist.*, 444 P.3d 688 (Cal. 2019).

¹⁰⁶ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM §40 cmt. f (AM. L. INST. 2012).

¹⁰⁷ *Id.* §40 cmt. f.

¹⁰⁸ *Id.*

¹⁰⁹ *See Regents*, 413 P.3d at 673 (recognizing measures to protect or warn may be burdensome, expensive, and impractical to implement); *Kesner v. Superior Ct.*, 384 P.3d 283, 296 (Cal. 2016) (highlighting the correct burden is cost to defendants in upholding the duty, not the cost to defendants of violating the duty).

¹¹⁰ *Regents*, 413 P.3d 656, 665; RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM §40 cmt. f (AM. L. INST. 2012).

Courts in California have consistently found schools are in a special relationship with students; even a college is in a special relationship with its students but only in the confines of school sponsored activities that the college has some control over.¹¹¹ However, the courts are mindful that it is unreasonable in some situations for students to rely on their school for protection, particularly with regard to college students partaking in off campus festivities.¹¹² The differing results reached in these situations demonstrates the court's detailed attention to the boundaries of the particular special relationship.

3. Benefit to the Party Charged with Care

Special relationships are usually characterized by the party charged with care experiencing a benefit or an advantage because of the relationship.¹¹³ Even where both parties in the relationship experience a benefit, a special relationship can still be found.¹¹⁴ A special relationship has been imposed between a college and its student-athletes in part because of the importance and benefits athletic competitions bring to the school.¹¹⁵ In addition, retail stores and hotels may be deemed in a special relationship with their customers and guests, pointing to the advantage and even necessity of the customers and guests to the business's successful operation.¹¹⁶ Many court opinions do not explicitly address this factor in their special relationship analyses.¹¹⁷ However, the courts implicitly endorse the receipt of the benefit by the party charged with a duty as a justification for

¹¹¹ See, e.g., *Regents*, 413 P.3d at 674 (holding the college owed a duty of reasonable care to protect students during curricular activities like attending class); *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 392–93 (Cal. 2006) (finding the college owed a duty of reasonable care during school-supervised athletic events); *Patterson v. Sacramento City Unified Sch. Dist.*, 66 Cal. Rptr. 3d 337, 344 (Ct. App. 2007) (concluding the school owed a duty of reasonable care during a school sponsored community service project).

¹¹² See *Univ. of S. Cal. v. Superior Ct.*, 241 Cal. Rptr. 3d 616, 629 (Ct. App. 2018); *Barenborg v. Sigma Alpha Epsilon Fraternity*, 244 Cal. Rptr. 3d 680, 691 (Ct. App. 2019).

¹¹³ *Regents*, 413 P.3d at 665; RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM §40 cmt. h (AM. L. INST. 2012).

¹¹⁴ *Regents*, 413 P.3d at 665; *Brown v. USA Taekwondo*, 253 Cal. Rptr. 3d 708, 723 (Ct. App. 2019).

¹¹⁵ See *Avila*, 131 P.3d at 392; James J. Hefferan, Jr., *Taking One for the Team: Davidson v. University of North Carolina and the Duty of Care Owed by Universities to Their Student-Athletes*, 37 WAKE FOREST L. REV. 589, 589–90, 605–06 (2002) (including enhanced recruitment of athletes, enhanced recruitment of other students, increased donations from alumni, and revenue).

¹¹⁶ See *Regents*, 413 P.3d at 665; *Brown v. USA Taekwondo*, 253 Cal. Rptr. 3d 708, 723 (Ct. App. 2019); RESTATEMENT (THIRD) OF THE LAW, TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 40 cmt. j (AM. L. INST. 2012).

¹¹⁷ See e.g., *Conti v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 186 Cal. Rptr. 3d 26, 41 (Ct. App. 2015) (assuming a religious institution receives a huge benefit from having its members perform field service and go out in to the world to spread its doctrines, even though the court never expressly states this).

the imposition of the burden of the affirmative duty on that party.¹¹⁸

III. DIFFERENCES IN APPLICATION OF THE SPECIAL RELATIONSHIP FACTORS AND *ROWLAND* POLICY FACTORS

In the context of childhood sexual abuse cases, a plaintiff who is sexually abused as a minor child by a third party often will argue that while the defendant institution did not act affirmatively to cause the harm, the rule of nonliability should still be set aside due to the nature of the specific circumstances.¹¹⁹ Specifically, the plaintiff will allege the specific circumstances created a special relationship, resulting in the defendant institution owing the minor child plaintiff a duty of care.¹²⁰ In response, the defendant institution will argue no special relationship existed between the institution and the minor child or between the institution and the third-party abuser.¹²¹ Thus, the defendant institution maintains it owed no duty to plaintiff to control the conduct of a third-party sexual abuser, nor did it owe the plaintiff a duty to warn of the danger posed by the third-party sexual abuser.¹²²

In these cases, the relevant inquiry is not simply whether there exists some special relationship; the inquiry also comprehends deliberation of the same policy considerations discussed in *Rowland*.¹²³ However, courts have not always been consistent in their interpretation of the special relationship factors and *Rowland* policy factors.¹²⁴ In some cases, courts analyzed the factors to determine the existence of a special relationship, and then analyzed the relevant policy considerations from *Rowland* to determine the existence of a duty.¹²⁵ In some cases, when the courts found a special relationship did not exist, they denied the existence of a duty before even considering the *Rowland* factors.¹²⁶ Yet in another

¹¹⁸ See *id.* at 43.

¹¹⁹ See, e.g., *Brown*, 253 Cal. Rptr. 3d at 720.

¹²⁰ See, e.g., *id.*

¹²¹ See, e.g., *id.* at 721.

¹²² See, e.g., *id.* 720–21.

¹²³ See *Hansra v. Superior Ct. of Yuba Cnty.*, 9 Cal. Rptr. 2d 216, 226 (Ct. App. 1992); *Adams v. City of Fremont*, 80 Cal. Rptr. 2d 196, 222 (Ct. App. 1998) (“[R]esolution of the question whether a special relationship gives rise to a duty of protection requires consideration of the same *Rowland* factors underlying any duty of care analysis.”).

¹²⁴ See *Brown*, 253 Cal. Rptr. 3d at 723; *Regents of Univ. of Cal. v. Superior Ct. of L.A. Cnty.*, 413 P.3d 656, 669–70 (Cal. 2018); *Barenborg v. Sigma Alpha Epsilon Fraternity*, 244 Cal. Rptr. 3d 680, 686–87 (Ct. App. 2019); *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 36 (Ct. App. 2000).

¹²⁵ See *Brown*, 253 Cal. Rptr. 3d at 723; *Regents*, 413 P.3d at 669–70.

¹²⁶ See *Brown*, 253 Cal. Rptr. 3d at 733; *Barenborg*, 244 Cal. Rptr. 3d at 686–87.

case, the court found the *Rowland* factors were sufficient to impose a duty, though had it analyzed the special relationship factors, its decision would not have changed.¹²⁷ Clearly, the courts have been inconsistent and unpredictable in their application of these tests to determine the existence of an affirmative duty to act. Moreover, “the interrelationship between the traditional duty analysis and the ‘special relationship’ doctrine has never been clearly defined.”¹²⁸

Notwithstanding this confusion, the recent trends indicate plaintiffs alleging a defendant institution had a duty to protect them must establish (1) that the special relationship exception to the general no duty to protect rule applies and (2) the balancing of the *Rowland* factors support the imposition of the duty.¹²⁹ The existence of the special relationship itself does not create the duty, rather the special relationship adds to the factors favoring imposition of a duty of care in particular circumstances, thereby outweighing the countervailing factors.¹³⁰ This incorporation of the *Rowland* policy factors into the question of duty resulting from a special relationship follows the trend of an overwhelming majority of American jurisdictions, and in particular, aligns with the key Supreme Court of California decisions on point.¹³¹

A. Key Supreme Court of California Decisions Demonstrating Varying Applications of the Two Tests

In its pending issues summary describing the question posed in *Brown*, the summary referenced several significant cases that have played a role in the development of the law.¹³² While the list in the summary is not exhaustive and many cases have helped shape the current state of negligence law, this list provides a comprehensive starting point in order to accurately understand and predict the direction of negligence law in California.

¹²⁷ See *Juarez*, 97 Cal. Rptr. 2d at 36.

¹²⁸ *Adams*, 80 Cal. Rptr. 2d at 210.

¹²⁹ See *id.* at 209; cf. *Conti v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 186 Cal. Rptr. 3d 26, 38 (Ct. App. 2015) (stating a number of cases find the absence of a special relationship dispositive and balancing the *Rowland* factors is not necessary).

¹³⁰ See *Hansra v. Superior Ct. of Yuba Cnty.*, 9 Cal. Rptr. 2d 216, 226 (Ct. App. 1992) (explaining that one factor weighing against the imposition of a duty is that the harm was caused by a third person, thus the connection between the plaintiff's injury and the defendant's conduct is attenuated—but the existence of a special relationship between the defendant and the plaintiff, or the defendant and the third party that caused the injury, counterbalances the weight of this factor.)

¹³¹ See *Adams*, 80 Cal. Rptr. 2d at 223; Peter F. Lake, *Common Law Duty in Negligence Law: The Recent Consolidation of a Consensus on the Expansion of the Analysis of Duty and the New Conservative Liability Limiting Use of Policy Considerations*, 34 SAN DIEGO L. REV. 1503, 1505 (1997).

¹³² See *Pending Issues Summary*, supra note 46.

1. *Nally v. Grace Community Church* (1988)

In *Nally*, Kenneth Nally (“Nally”), a twenty-four year old man committed suicide and his parents sued Grace Community Church of the Valley (“Church”) for the wrongful death of their son.¹³³ The Church offered a pastoral counseling service that had approximately thirty non-therapist counselors who served a congregation of approximately 10,000 people.¹³⁴ Nally began forming relationships with and receiving counseling from some of the pastors and non-therapist counselors at the Church.¹³⁵ In its review, the Supreme Court of California agreed with the trial court’s grant of summary judgment.¹³⁶ The court found that no evidence presented, nor principles of tort law supported the imposition of a duty to refer in this case.¹³⁷

Here, the court analyzed both the special relationship and *Rowland* factors to make its determination. The court first sought to determine if a duty existed under the special relationship exception.¹³⁸ The court relied on the non-therapist counselor’s lack of control over Nally to negate the finding of a special relationship resulting in a duty.¹³⁹ Next, the court examined the *Rowland* factors to determine if a duty may nonetheless be imposed.¹⁴⁰ While the court admitted it is foreseeable a suicidal individual who is not referred to a professional may commit suicide, the imposition of a duty to refer could “stifle all gratuitous or religious counseling.”¹⁴¹ As to the closeness of the connection between the Church’s conduct and Nally’s suicide, the court found the connection was extremely tenuous.¹⁴² Further, the imposition of a duty on non-therapist counselors could have a huge deterrent effect on encouraging private assistance efforts, which the legislature has sought to encourage.¹⁴³ In recognition of the lack of factors indicating the existence of a special relationship, the foreseeability and policy considerations involved, and the difficulty in precisely

¹³³ See *Nally v. Grace Cmty. Church*, 763 P.2d 948, 949 (Cal. 1988).

¹³⁴ *Id.* at 950.

¹³⁵ See *id.*

¹³⁶ See *id.* at 955.

¹³⁷ See *id.*

¹³⁸ See *id.* at 956.

¹³⁹ See *id.* at 958.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 959.

¹⁴² See *id.* at 958–59 (finding Nally was examined by five physicians and a psychiatrist during the weeks before his suicide and Nally refused psychiatric commitment).

¹⁴³ See *id.* at 959.

determining whom the duty should apply to, the court found the Church did not have a duty to prevent Nally's suicide.¹⁴⁴

2. *Juarez v. Boy Scouts of America* (2000)

In *Juarez*, the plaintiff sued the Boy Scouts of America ("Boy Scouts") asserting the Boy Scouts breached their duty of care to take reasonable protective measures to protect the plaintiff from the risk of sexual abuse by adult volunteers involved in the program.¹⁴⁵ In the 1980s, the Boy Scouts identified child sexual abuse as socially unacceptable and committed many of its resources to protect children from it.¹⁴⁶ The Boy Scouts developed a program to educate all participants in the program in detection and prevention of sexual molestation.¹⁴⁷ The Boy Scouts had developed a comprehensive video as an educational tool, however it was never shown to plaintiff's troop.¹⁴⁸ Despite the Boy Scout's purported efforts at prevention, the plaintiff was repeatedly sexually abused by his scoutmaster during officially sanctioned scouting events.¹⁴⁹

The court held that the Boy Scouts owed a legal duty to the plaintiff to take reasonable measures to protect him from sexual abuse by one of the program's volunteers.¹⁵⁰ Here, the court solely analyzed the *Rowland* foreseeability and policy factors.¹⁵¹ The court noted that foreseeability is a flexible concept:

In cases where the burden of preventing future harm is great, a high degree of foreseeability may be required. On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required.¹⁵²

Since the Boy Scouts admitted that: (1) there was a possibility that pedophiles would be drawn to their programs (as the programs provided access to young boys), and (2) that they received, on average, more than one report of sexual abuse per week, it was "likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct."¹⁵³ The court took it a step further, concluding

¹⁴⁴ *Id.* at 960.

¹⁴⁵ *See Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 17 (Ct. App. 2000).

¹⁴⁶ *Id.* at 26.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 27.

¹⁴⁹ *Id.* at 17.

¹⁵⁰ *See id.*

¹⁵¹ *See id.* at 29–30.

¹⁵² *Id.* at 30. (quoting *Issacs v. Huntington Mem'l Hosp.*, 695 P.2d 653, 658 (Cal. 1985)) (citations omitted).

¹⁵³ *Id.*

that even sexual abuse by a person with “no documented history of such proclivities” was reasonably foreseeable to the Boy Scouts.¹⁵⁴

The court also examined the closeness of the connection between the suffered injury and the defendant’s conduct and found that, in touting the effectiveness of its youth program, the Boy Scouts admitted education was an effective tool to prevent sexual abuse.¹⁵⁵ By not providing these educational materials to plaintiff’s troop, the court found that there was a sufficient causal link between the Boy Scouts negligent acts and the harm suffered by the plaintiff.¹⁵⁶ As to policy considerations, the court found that society and the state overwhelmingly recognize an interest in protecting the welfare of children.¹⁵⁷ Moreover, the burden of imposing a duty on the Boy Scouts was minimal.¹⁵⁸ The Boy Scouts already had an effective system in place to ensure its program and educational materials were provided to the volunteers, parents, and children in its programs, notwithstanding the fact that it failed to provide these materials to plaintiff’s troop.¹⁵⁹ Significantly, the court pointed to the Boy Scout’s widespread organization, which is chartered under an act of Congress, and its purpose of developing a specific set of values in young boys; because of this, it was imperative that the organization understand the risks of sexual abuse, and work to combat it.¹⁶⁰ The court ultimately found that the benefits to the community in recognizing a duty would far outweigh any minimal burden imposed on the Boy Scouts.¹⁶¹

Interestingly, the court was reluctant to also conduct a special relationship analysis, as it found that balancing the *Rowland* factors was sufficient to impose a duty.¹⁶² Despite its reluctance, the court noted it would have found that a special relationship existed between the Boy Scouts and the plaintiff, thereby giving rise to a duty to protect for a number of reasons:

The mission of youth organizations to educate children, the naivete of children, and the insidious tactics employed by child molesters dictate that the law recognize a special relationship between youth organizations and the members such that the youth organizations are

¹⁵⁴ *Id.* at 31.

¹⁵⁵ *See id.* at 32.

¹⁵⁶ *See id.* at 33.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 34.

¹⁵⁹ *Id.*

¹⁶⁰ *See id.*

¹⁶¹ *Id.*

¹⁶² *See id.* at 36.

required to exercise reasonable care to protect their members from the foreseeable conduct of third persons.¹⁶³

3. *Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015)

The court in *Conti* had to determine whether a religious institution owed a duty to one of its members who had been sexually abused by another member.¹⁶⁴ The plaintiff was molested by another member of the congregation, Johnathan Kendrick (“Kendrick”), from the time she was nine years old until she was around ten or eleven years old.¹⁶⁵ Kendrick had been accused of inappropriately touching his stepdaughter, also a member of the congregation, just four months earlier.¹⁶⁶ Despite this allegation, Kendrick was allowed to continue participating in field service.¹⁶⁷ Much of the sexual abuse of the plaintiff occurred while Kendrick and plaintiff were supposed to be performing field service, thus affording Kendrick unsupervised access to the minor plaintiff.¹⁶⁸ The plaintiff sued the religious institution alleging that they had a duty to warn her and a duty to supervise her participation in church activities.¹⁶⁹ The court held that, while defendant had no duty to warn, there was a duty to limit and supervise a church sponsored activity like field service.¹⁷⁰

In this instance, the court analyzed both the special relationship and *Rowland* factors. The court found the religious institution was in a special relationship with the plaintiff and Kendrick when they were performing field service because the religious institution exercised control over the service.¹⁷¹ The institution’s policy is what allowed child molesters to continue performing field service, and the institution controlled when, where, and with whom field service would be conducted.¹⁷² Significantly, the court noted that the abuse happened *during* field service, a church-sponsored activity, since the abuse occurred while they were

¹⁶³ *Id.* (quoting *Evans v. Ohio State Univ.*, 680 N.E.2d 161, 181 (Ohio Ct. App. 1996) (Lazarus, J., dissenting)).

¹⁶⁴ *Conti v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, 186 Cal. Rptr. 3d 26, 30 (Ct. App. 2015).

¹⁶⁵ *Id.* at 30–31.

¹⁶⁶ *Id.* at 31.

¹⁶⁷ *Id.* at 30 (defining field service as “small groups, usually consisting of two or three people, go[ing] door to door in neighborhoods to spread the church’s spiritual teachings”). Moreover, an official of the religious institution testified that policy “allowed a known child molester to continue to perform field service, but not alone or with a child.” *Id.* at 31.

¹⁶⁸ *See id.* at 34 (occurring at the member’s home where he drove the plaintiff during field service).

¹⁶⁹ *See id.* at 30.

¹⁷⁰ *See id.*

¹⁷¹ *Id.* at 43.

¹⁷² *Id.*

supposed to be performing field service.¹⁷³ The court also found that the *Rowland* factors supported the imposition of a duty because “it is foreseeable that a child molester will reoffend, and the risk is heightened when the molester is put in a position . . . to be alone with a child[.] . . . imposition of this duty would [not] be unduly burdensome . . . [and it] furthers the policy of preventing future harm without affecting the confidentiality of penitential communications.”¹⁷⁴

4. *Doe v. United States Youth Soccer Ass’n, Inc.* (2017)

In *United States Youth Soccer Ass’n*, the plaintiff was sexually abused by her former soccer coach when she was only twelve years old.¹⁷⁵ “In 1994, US Youth acknowledged that pedophiles were drawn to its youth soccer program to gain access to children, and its program presented an unacceptable risk of harm to children unless appropriate preventative measures were taken.”¹⁷⁶ In recognition of this problem, US Youth developed a KidSafe program designed to educate on the risks and exclude persons who have been convicted of violence or crimes against another person.¹⁷⁷ US Youth possessed pamphlets and other educational tools which could be used to educate youth, parents, volunteers, and coaches about warning signs of abuse.¹⁷⁸ Despite this, no one involved in the affiliated league that the plaintiff participated in was educated or trained in the KidSafe program, no one was given any educational materials, and no discussions or meetings were held regarding the KidSafe program.¹⁷⁹ US Youth also required affiliate leagues to screen criminal conviction information from coaches, which could be accomplished through a criminal background check by an independent third party or a voluntary disclosure form.¹⁸⁰ The coach who sexually abused the plaintiff lied on his disclosure form, covering up a conviction for battery against his spouse.¹⁸¹ No criminal background check for verification was ever conducted on the coach.¹⁸²

The plaintiff sued US Youth alleging an action for negligence.¹⁸³ Again, the court analyzed both the special

¹⁷³ *Id.* (finding it irrelevant that the abuse occurred at the member’s home and not out in the field).

¹⁷⁴ *Id.* at 44.

¹⁷⁵ *Doe v. U.S. Youth Soccer Ass’n, Inc.*, 214 Cal. Rptr. 3d 552, 559 (Ct. App. 2017).

¹⁷⁶ *Id.* at 560.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 561–562.

¹⁸¹ *Id.* at 562.

¹⁸² *Id.*

¹⁸³ *Id.* at 559.

relationship factors and the *Rowland* factors separately. In concluding that a special relationship existed between US Youth and the plaintiff, the court recognized that “a greater degree of care is owed to children because of their lack of capacity to appreciate risks and avoid danger.”¹⁸⁴ US Youth argued that parents were present at games and practices, but the court still found that—in this setting—US Youth was acting as a “quasi-parent” by assuming responsibility for the safety of the children in its program when their parents were not present.¹⁸⁵ Further, the court rejected the argument that the voluntary nature of participation precluded the finding of a special relationship.¹⁸⁶ Last, the court concluded that US Youth exercised physical custody and control over the plaintiff by establishing hiring standards for coaches, which in turn, determined who had custody and supervision of the children in US Youth’s programs.¹⁸⁷

In examining the foreseeability of the conduct, the court took a “sliding-scale balancing formula” approach where “imposition of a high burden requires heightened foreseeability, but a minimal burden may be imposed upon a showing of a lesser degree of foreseeability.”¹⁸⁸ While US Youth was not specifically aware of the coach previously sexually abusing anyone or having a propensity to do so, US Youth was aware of incidents of sexual abuse by its coaches averaging between two and five instances per year.¹⁸⁹ More importantly, US Youth had developed its own program, thereby acknowledging and recognizing the risk of sexual abuse in its program.¹⁹⁰ Additionally, the burden on US Youth to conduct background checks was minimal as US Youth had already demonstrated an administrative ability to ensure compliance with performing background checks.¹⁹¹ The only factor weighing in favor of US Youth was moral blame because, although their procedure of using voluntary disclosure forms proved ineffective, they made an attempt to identify potential

¹⁸⁴ *Id.* at 564 (quoting *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 35 (Ct. App. 2000)).

¹⁸⁵ *See id.* at 564.

¹⁸⁶ *Id.* at 565 (reasoning that even though participation was voluntary, “parents entrusted their children to defendants with the expectation that they would be kept physically safe and protected from sexual predators while they participated in soccer activities”).

¹⁸⁷ *Id.* at 566.

¹⁸⁸ *Id.* (quoting *Delgado v. Trax Bar & Grill*, 113 P.3d 1159, 1172 (Cal. 2005)) (noting the requirement of heightened foreseeability can be met by showing “evidence of prior similar criminal incidents or ‘other indications of a reasonably foreseeable risk of violent criminal assaults’”).

¹⁸⁹ *Id.* at 567.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 569.

predators.¹⁹² “[B]alancing the degree of foreseeability of harm to children in [US Youth’s] soccer programs against their minimal burden, [the court] conclude[d] that [US Youth] had a duty to require and conduct criminal background checks of [their] employees and volunteers who had contact with children in their programs.”¹⁹³

5. *Regents of University of California v. Superior Court* (2018)

In *Regents*, a student enrolled at the University of California, Los Angeles (“UCLA”) began experiencing auditory hallucinations.¹⁹⁴ The student believed other students at UCLA were criticizing him and mistreating him.¹⁹⁵ Eventually the student met with a psychologist at an outpatient treatment center.¹⁹⁶ The student’s mental health continued to decline, and eventually the student stabbed a fellow classmate in the chest and neck with a knife.¹⁹⁷ The classmate sued the Regents of University of California (“Regents”) alleging they had a special relationship with her as an enrolled student and thus had a duty to take reasonable protective measures to ensure her safety, to warn her of reasonably foreseeable dangerous conduct on the campus, and to control the reasonably foreseeable acts of other students.¹⁹⁸

The court first analyzed the ever-evolving college environment under the special relationship exception.¹⁹⁹ Importantly, the court recognized this as a situation not involving alcohol-related injuries, and thus a broader view of duties owed should be applied.²⁰⁰ In analyzing the relationship, the court found students are very dependent on their college

¹⁹² *Id.* at 570.

¹⁹³ *Id.* at 571. However, the court refused to impose a duty to educate about the risks of sexual abuse because there are no uniform standards for effective education, and many parents would consider education about risks of sexual abuse the responsibility of the parent and not the sports organization. *Id.* at 572.

¹⁹⁴ *Regents of Univ. of Cal. v. Superior Ct. of L.A. Cnty.*, 413 P.3d 656, 659 (Cal. 2018).

¹⁹⁵ *See id.* at 660.

¹⁹⁶ *Id.* at 661.

¹⁹⁷ *Id.* at 662. The student who was stabbed, Katherine Rosen, was frequently referred to by the student as one of his harassers, suggesting the student had identified a foreseeable victim. *See id.* at 661–62.

¹⁹⁸ *Id.* at 662.

¹⁹⁹ *See id.* at 665.

²⁰⁰ *Id.* at 666. *See* *Crow v. State*, 271 Cal. Rptr. 349, 359–60 (Ct. App. 1990) (finding no special relationship when a college student voluntarily participates and is injured at a dorm keg party); *Tanja H. v. Regents of Univ. of Cal.*, 278 Cal. Rptr. 918, 921 (Ct. App. 1991) (stressing the duty to prevent alcohol related crimes would require colleges to “impose onerous conditions on the freedom and privacy of resident students,” contrary to the modern view that adult students are generally responsible for their own welfare”).

community.²⁰¹ Colleges have the correlating control over the ability and means used to protect students on its campus.²⁰² Further, the special relationship is limited by a person's enrollment as a student at the school and by the person's involvement in a school sponsored activity.²⁰³ The court concluded postsecondary schools do have a special relationship with students, but only "while they are engaged in activities that are part of the school's curriculum or closely related to its delivery of educational services."²⁰⁴

Finding a special relationship, the court then turned to analysis of the *Rowland* factors.²⁰⁵ Looking at foreseeability generally, the court found even though they are rare, violent classroom attacks are foreseeable occurrences.²⁰⁶ The court reasoned colleges were alert to the possibility of violent third party attacks on students after the focused national attention on the Virginia Tech shootings.²⁰⁷ Significantly, the court stated that case-specific foreseeability questions, such as any prior acts of violence by the person who committed the harm, "do not . . . inform our threshold determination that a duty exists."²⁰⁸ In addition, the fact that harm was caused by an intervening act does not necessarily attenuate the defendant's negligent conduct.²⁰⁹ These factors relating to foreseeability all support the imposition of a duty.²¹⁰

Focusing on the policy implications, while moral blame has been assigned in situations where the plaintiffs are "particularly powerless or unsophisticated compared to the defendants," college students are not so powerless and unsophisticated.²¹¹ However, the greater access to information regarding potential threats possessed by the university creates a disparity in knowledge that favors the imposition of a duty.²¹² Additionally, while imposition of a duty and

²⁰¹ *Regents of Univ. of Cal. v. Superior Ct. of L.A. Cnty.*, 413 P.3d 656, 668 (Cal. 2018) (providing students with structure, guidance, and a safe learning environment).

²⁰² *Id.* (imposing rules and restriction, employing advisers, counselors, and campus police, and monitoring student discipline). Case law from other jurisdictions also recognizes that schools are in the best position to implement safety measures. *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 667.

²⁰⁵ *See id.* at 669–70.

²⁰⁶ *See id.* at 671. The court pointed out that in the wake of the Virginia Tech shooting, "[c]olleges across the country, including the public universities of California, created threat assessment protocols and multidisciplinary teams to identify and prevent campus violence." *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 672. "Although a criminal act is always shocking to some degree, it is not completely unpredictable if a defendant is aware of the risk." *Id.* *See also* *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 589 (Cal. 1997).

²¹⁰ *Regents of Univ. of Cal. v. Superior Ct. of L.A. Cnty.*, 413 P.3d 656, 672 (Cal. 2018).

²¹¹ *Id.*

²¹² *Id.*

thus liability may discourage colleges from offering certain mental health and crisis services— and may incentivize colleges to simply expel anyone who poses a threat—these concerns are negated because colleges are restricted from arbitrary decisions on admission and expulsions by certain laws and are regulated by market forces.²¹³ Last, the court examined the burden recognizing a duty would impose on Regents and found Regents had already developed strategies for handling potential threats.²¹⁴ The court, however, took its analysis of the burden one step further. Recognizing that Regents, specifically UCLA, marketed itself as “one of the safest campuses in the country” and that the University of California system raised its registration fee, the court reasoned the imposition of a burden would not be unmanageable since the university had the available funds.²¹⁵ Recognizing that a college is in a special relationship with its students and that both the foreseeability factors and policy factors support the imposition of a duty, the court held “colleges have a duty to use reasonable care to protect their students from foreseeable violence during curricular activities.”²¹⁶

B. *Brown v. USA Taekwondo* (2019)

In *Brown*, plaintiffs were minor athletes coached by Marc Gitelman (“Gitelman”) and were participating in USAT’s youth programs.²¹⁷ USAT is one of forty-nine NGB’s that were certified by USOC.²¹⁸ USAT requires athletes to be USAT members, requires athletes to train under USAT registered coaches, and requires members comply with USAT rules and policies.²¹⁹ The plaintiffs and Gitelman were members of USAT and would attend and participate at taekwondo competitions sanctioned and sponsored by USAT and USOC.²²⁰ Since the 1980s, USOC has had actual knowledge, via direct reports and complaints, that numerous female athletes suffered sexual abuse at its facilities.²²¹ Additionally, a USOC employee was specifically aware of at least one occurrence: the rape of a young female

²¹³ See *id.* at 673 (restricting a college’s decision to expel a student under the Americans with Disabilities Act and regulating services offered by colleges through competitive market forces favoring schools that adopt sophisticated violence prevention practices).

²¹⁴ See *id.* (countering the argument that implementation of a duty would be expensive and impractical).

²¹⁵ See *id.*

²¹⁶ *Id.* at 674.

²¹⁷ *Brown v. USA Taekwondo*, 253 Cal. Rptr. 3d 708, 715–17 (Ct. App. 2019).

²¹⁸ *Id.* at 717.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

taekwondo athlete at a USOC training center.²²² Moreover, by the early 2000s, the prevalence of allegations of sexual misconduct in institutions was a widely known risk.²²³ Despite general recognition of this risk and reports by athletes of inappropriate sexual behavior, USAT and USOC did little to protect athletes from the abuse.²²⁴

Gitelman sexually abused and molested the plaintiffs while attending USOC and USAT sanctioned events.²²⁵ He also sexually abused plaintiffs at USOC's Olympic training center.²²⁶ Gitelman did not hide his relationships and inappropriate behavior with the plaintiffs, and the relationships were common knowledge throughout the taekwondo community.²²⁷ Finally, in 2013, Gitelman's abuse allegations were brought before the USAT ethics committee, who recommended his termination.²²⁸ Despite this recommendation, USAT did not fire Gitelman.²²⁹ USOC's director of ethics and safe sport and USAT's chief executive officer and USAT's ethics committee chair, were aware of the hearing and recommended termination, but allowed Gitelman to continue as a member in good standing at USAT and continue to attend USAT and USOC sanctioned events.²³⁰ Eventually, Gitelman was convicted of felonies for his sexual misconduct with the plaintiffs.²³¹ The plaintiffs sued USAT and USOC, alleging USAT and USOC owed a duty to protect plaintiffs from Gitelman's sexual abuse.²³² The trial court dismissed plaintiff's claims, and the plaintiff's appealed.²³³

Regarding the USAT, the appellate court found USAT had a special relationship with Gitelman.²³⁴ USAT required Gitelman to be a USAT member and comply with USAT policies and procedures. Eventually, USAT terminated Gitelman for his noncompliance.²³⁵ Therefore, USAT was "in the best position to protect against the risk of harm and meaningfully reduce the risk of harm that actually occurred."²³⁶ The court distinguished the

²²² *Id.*

²²³ *Id.*

²²⁴ *See id.*

²²⁵ *Id.* at 718.

²²⁶ *Id.*

²²⁷ *Id.* at 719.

²²⁸ *Id.*

²²⁹ *See id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 715.

²³³ *Id.*

²³⁴ *Id.* at 725.

²³⁵ *Id.* (reasoning "USAT can, and did, enforce its policies and procedures by temporarily suspending Gitelman pending the ethics committee hearing").

²³⁶ *Id.*

facts from *Barenborg v. Sigma Alpha Epsilon Fraternity*, where the fraternity could only implement control, after the fact.²³⁷ The *Rowland* factors also supported the imposition of a duty against USAT.²³⁸ Based on the widespread allegations across NGB's and within USAT, it was foreseeable a coach could sexually abuse a minor athlete attending a competition.²³⁹ Actual knowledge of Gitelman's dangerous propensities was not required to determine a duty.²⁴⁰ In addition, USAT's failure to take preventative steps to prevent sexual assault was closely connected to plaintiff's injuries.²⁴¹ This same failure to take preventative measures constituted moral blame on USAT.²⁴² Furthermore, the policy of preventing future harm weighed in favor of imposing a duty because society has a common goal of safeguarding children.²⁴³ Last, the court concluded the burden from imposing a duty would not be substantial because USAT had already enacted a code of ethics, had disciplinary procedures, and could ban any sexually abusive person from coaching.²⁴⁴

Regarding USOC, the court found USOC was not in a special relationship with either the plaintiffs or Gitelman.²⁴⁵ The court found USOC could regulate USAT's conduct, but not Gitelman's.²⁴⁶ They also found USOC was not in the best position to protect plaintiffs from their coach's sexual abuse.²⁴⁷ USOC's control over Gitelman was too remote, meaning USOC could not control Gitelman directly, nor was USOC able to prevent him from coaching at competitions.²⁴⁸ Since the court found USOC had no special relationship with either Gitelman or the plaintiffs, the court did not analyze the *Rowland* factors.²⁴⁹ The plaintiffs appealed to the Supreme Court of California based on the finding that USOC had no special relationship with the plaintiffs and therefore did not owe a duty of care.

²³⁷ *See id.* at 725–26; *Barenborg v. Sigma Phi Epsilon Fraternity*, 244 Cal. Rptr. 3d 680, 688 (Ct. App. 2019).

²³⁸ *Brown*, 253 Cal. Rptr. 3d at 726.

²³⁹ *Id.* at 728.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 729.

²⁴² *Id.* at 730.

²⁴³ *Id.*

²⁴⁴ *See id.* at 731.

²⁴⁵ *See id.*

²⁴⁶ *See id.* at 732.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 733. The courts in *Barenborg* and *University of Southern California* also refused to perform the analysis of the *Rowland* factors once they concluded the institution was not in a special relationship with the plaintiff or the third-party perpetrator. *See Barenborg v. Sigma Phi Epsilon Fraternity*, 244 Cal. Rptr. 3d 680, 687 (Ct. App. 2019); *Univ. of S. Cal. v. Superior Ct. of L.A. Cnty.*, 241 Cal. Rptr. 3d 616, 629 (Ct. App. 2018).

IV. CRITIQUE OF THE SUPREME COURT OF CALIFORNIA'S DECISION IN BROWN

In its decision, the Supreme Court of California determined whether to recognize a duty to protect minor children in institutions is a two-step inquiry.²⁵⁰ First, the court must determine if a special relationship existed.²⁵¹ Second, and only if a special relationship existed, the court must analyze the policy factors established in *Rowland* to determine if the duty should be limited.²⁵²

In its discussion, the court articulates that “[t]he multifactor test set forth in *Rowland* was not designed as a freestanding means of establishing a duty, but instead as a means for deciding whether to limit a duty derived from other sources.”²⁵³ Thus, the *Rowland* factors alone cannot create the duty. The court cites much precedent for its inability and unwillingness to use the *Rowland* factors as a stand alone test for creation of a new duty, while seemingly discounting others.²⁵⁴ But the court still sees a role for the *Rowland* factors.²⁵⁵ It acknowledged the overlap between the special relationship factors and the *Rowland* factors, but distinguished them based on how the factors operate.²⁵⁶ The special relationship factors apply to the particular facts of that case, whereas the *Rowland* factors consider the policy of imposing a duty at a relatively broad level.²⁵⁷

But this interpretation is too simple. Both the particular facts of the case and the broad policy considerations should play a role in deciding to impose a duty. It is clear that sexual abuse within institutions that care for children is happening far too often with very few consequences on the institutions. Shouldn't this foreseeability (one of the *Rowland* factors) play a role in deciding to impose a duty, even when the level of dependence or control appear more attenuated? This highlights the importance of using both the special relationship and *Rowland* factors, especially when the outcome of this determination affects the willingness of an institution to protect the minor children in its care. When the court is more likely to impose a duty, the institutions will conform their behavior in anticipation of that

²⁵⁰ *Brown v. USA Taekwondo*, 11 Cal. 5th 204,209 (2021).

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at 217.

²⁵⁴ *See id.* at 217–19 (minimizing the weight and discussions in *Nally* and *Adams*).

²⁵⁵ *Id.* at 221.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

duty, taking greater steps to supervise, monitor, and protect the children within their care.

As is discussed more fully *infra*, the special relationship factors and *Rowland* factors should be analyzed together to fully contemplate both the specific factual circumstances and the broad level considerations of childhood sexual abuse within institutions, before deciding whether or not a duty should be imposed.

V. WHEN THE COURT *SHOULD* FIND A DUTY AND THE POTENTIAL IMPACTS OF A SIMPLIFIED TEST FOR IMPOSITION OF A DUTY

A. Proposed Test Based on California's Case Law

As can be seen in the cases previously described, the analysis for a special relationship's existence and the foreseeability and policy analyses of the *Rowland* factors are intertwined. Both analyses seek to answer the same question: when do the circumstances justify imposing a duty? While the tests themselves appear to analyze different factors,²⁵⁸ I propose they do no such thing. In fact, the analyses in all of the cases described above rely on the same policy considerations and factual situations to reach a conclusion. More importantly, California courts have already recognized how the existence of a special relationship plays into the *Rowland* analysis. The existence of the special relationship itself does not create the duty, but tips the scales of the factor test in favor of imposing a duty.²⁵⁹ In its most basic sense, the court stated that the existence of a special relationship is another factor to weigh in determining if a duty should exist.

As such, the appropriate test to determine when an institution owes a duty to protect a child from sexual abuse by a

²⁵⁸ The special relationship analysis looks at dependence, boundaries, and benefit on the party charged with a duty. *See Regents of Univ. of Cal. v. Superior Ct. of L.A. Cnty.*, 413 P.3d 656, 664 (Cal. 2018). The *Rowland* analysis considers "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." *See Rowland, Jr. v. Christian*, 443 P.2d 561, 564 (Cal. 1968).

²⁵⁹ *See Hansra v. Superior Ct. of Yuba Cnty.*, 9 Cal. Rptr. 2d 216, 226 (Ct. App. 1992) (arguing that one factor weighing against the imposition of a duty is that the harm was caused by a third person, thus the connection between the plaintiff's injury and the defendant's conduct is attenuated—but the existence of a special relationship between the defendant and the plaintiff, or the defendant and the third party that caused the injury, counterbalances the weight of this factor).

third party should be a combination of the special relationship factors and *Rowland* factors. Based on the case law in California, I propose the courts should analyze only the factors of (1) the dependence of the child on the institution for protection, (2) the control the institution has over the means of protection, (3) and the burden on the institution and consequences to the community of imposing a duty, with the rest of the factors automatically weighing in favor of imposing a duty. This test encompasses the remaining factors originally detailed in the special relationship analysis and the *Rowland* factors analysis, and a court can automatically deem that the remaining factors weigh in favor of the imposition of a duty. In its most basic sense, this test would act as a presumption of a duty that can be rebutted by the institution. This proposed test simplifies the number of factors the court must consider in making a determination to impose a duty, while also ensuring the court considers all relevant details and facts.

1. Factors Automatically Weighing in Favor of Imposing a Duty, Thereby Creating a Strong Presumption that a Duty Exists

Due to the policy considerations surrounding childhood sexual abuse, a court can automatically deem certain factors to weigh in favor of imposing a duty, because those factors will only ever point to one result.

First, and most important to the determination of the existence of a duty, is foreseeability.²⁶⁰ For the analysis on whether or not to impose a duty, acts of sexual abuse perpetrated on a child within institutions who design programs for children can be deemed generally foreseeable. The Supreme Court of California has stated that case-specific foreseeability questions, such as any prior acts of violence by the person who committed the harm, “do not . . . inform our threshold determination that a duty exists.”²⁶¹ Thus a court need not consider actual knowledge on the part of an institution to impose a duty, but instead whether an act of sexual abuse was generally foreseeable.²⁶² The court in *Juarez* found foreseeability could be met if the abuse was “likely enough in the setting of modern life that a reasonably thoughtful person would take account of it in guiding practical

²⁶⁰ See *Regents*, 413 P.3d at 670–71 (quoting *Kesner v. Superior Ct. of Alameda Cnty.*, 384 P.3d 283, 291 (Cal. 2016)); *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976).

²⁶¹ *Regents*, 413 P.3d at 671.

²⁶² Actual knowledge, however, may be informative for the analysis of breach of a duty.

conduct.”²⁶³ The risk of sexual abuse to a child in an institution’s care is foreseeable due to the number of cases brought to the institutions attention through both the media and their own inter-disciplinary processes. Any reasonably thoughtful person in society would take account of that risk in guiding practical conduct. Thus, the general foreseeability of incidents of sexual abuse in institutions weighs heavily in favor of imposing a duty.

Additionally, the certainty that the plaintiff suffered injury will always weigh in favor of the imposition of a duty. There is no rational argument that children do not suffer harm when they are sexually abused at a young age. Moreover, as previously discussed, the child’s harm is drastic and can result in damaging lifelong effects.²⁶⁴

Next, the policy of preventing future harm can also be deemed as favoring the imposition of a duty. The court has held protecting children from sexual abuse, in order to safeguard the physical and psychological well-being of its minor children, is a compelling state interest.²⁶⁵ Moreover, the legislature through its recent enactments, has so clearly announced there is a huge importance and need to safeguard children against acts of sexual abuse.²⁶⁶ “Public policy against the victimization of children is most evident in our criminal laws, which exact a heavy toll from those who endanger our most precious asset. So, too, it must be in our civil law.”²⁶⁷ Last, society as a whole has indicated its awareness and desire to combat instances of sexual abuse and sexual violence, especially with regard to children.²⁶⁸ Thus, this factor will always weigh in favor of imposing a duty.

Another factor that weighs in favor of imposing a duty is the availability and cost of insurance. While insurance costs may at first seem prohibitive, especially to poorly funded child-centered institutions, the availability of insurance for incidents of sexual abuse is more prevalent than ever, and institutions have many options when it comes to deciding what insurance to use.²⁶⁹

²⁶³ *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 30 (Ct. App. 2000).

²⁶⁴ *See supra* notes 28–31 and accompanying text.

²⁶⁵ *See Burt v. County of Orange*, 15 Cal. Rptr. 3d 373, 382 (Ct. App. 2004).

²⁶⁶ *See supra* notes 32–37 and accompanying text.

²⁶⁷ *Juarez*, 97 Cal. Rptr. 2d at 33 (citations omitted).

²⁶⁸ *See, e.g., Statistics: Age, ME TOO*, <http://metoomvmt.org/learn-more/statistics/> [<http://perma.cc/Y5E5-BMWN>] (last visited Oct. 7, 2020) (detailing statistics of sexual abuse by age from a multitude of studies); *Safety Support for Parents*, RAINN, <http://www.rainn.org/safety-parents> [<http://perma.cc/RB7H-HHCF>] (last visited Oct. 7, 2020) (providing information to parents for discussing sexual abuse with children).

²⁶⁹ *See Marshall Gilinsky, Standard Insurance Policy Coverage for Sexual Abuse, Harassment, and Assault Claims*, RISK MANAGEMENT (Sept. 12, 2019), <http://www.rmmagazine.com/2019/09/12/standard-insurance-policy-coverage-for-sexual-abuse-harassment-and-assault-claims/> [<http://perma.cc/9K63-G3YM>].

Moreover, compared to the costs and time spent defending claims of sexual abuse, the cost of insurance coverage for claims of sexual abuse is relatively low.²⁷⁰ Due to the low cost of insurance compared to the alternative of litigation, and the availability and prevalence of insurance, the *Rowland* factor will always weigh in favor of imposing a duty in today's society.

Finally, the factor of moral blame will always weigh in favor of imposing a duty. Moral blame usually refers to "evidence that a defendant knew or reasonably should have known there was any danger or potential danger associated with that defendant's act or failure to act."²⁷¹ Moral blame has been assigned in situations where the plaintiffs are "particularly powerless or unsophisticated compared to the defendants."²⁷² In this context, the minors in childcare institutions will constantly be powerless or unsophisticated compared to the defendants. Moreover, the institution has more knowledge regarding the danger posed to the minor plaintiff.²⁷³ Furthermore, even in cases in which the court found moral blame to be placed on the institution, a duty was still imposed on the institution.²⁷⁴ Thus the existence of moral blame on the institution's behavior weigh in favor of imposing a duty, while the absence of moral blame does not weigh against imposing a duty.

2. Encompassed Factors in the Test Which Further Supports Use of a Simplified Test

In considering the *Rowland* factor of effects of the burden to the defendant and consequences to the community of imposing a duty, the boundaries of the special relationship are also necessarily considered. The burden on the institution will be too large if the scope of the duty cannot be limited in a meaningful way, and the scope of the duty is determined by the boundaries of the special relationship. These concepts are clearly interrelated and would require an analysis of the same underlying facts to make a determination. Additionally, the facts considered for whether the person charged with a duty benefits from the special

²⁷⁰ See *Abuse and Molestation Insurance Coverage*, WEST BEND, <http://cultureofsafety.thesilverlining.com/childcare/insurance/abuse-and-molestation-coverage/> [<http://perma.cc/2PSD-J5X4>] (last visited June 19, 2020) (acknowledging the annual cost for a one million dollar abuse policy costs between five to ten dollars per child).

²⁷¹ *Butcher v. Gay*, 34 Cal. Rptr. 2d 771, 780 (Ct. App. 1994).

²⁷² See *Regents of Univ. of Cal. v. Superior Ct. of L.A. Cnty.*, 413 P.3d 656, 672 (Cal. 2018) (quoting *Kesner v. Superior Ct.*, 384 P.3d 283, 295 (Cal. 2016)).

²⁷³ See *id.*

²⁷⁴ See *Doe v. U.S. Youth Soccer Ass'n, Inc.*, 214 Cal. Rptr. 3d 552, 570–71 (Ct. App. 2017); *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 33 (Ct. App. 2000).

relationship also plays into the *Rowland* burden analysis. If the person charged with a duty is receiving significant benefits as a result of the relationship, it may outweigh any burden placed on them by the imposition of that duty. Therefore, analysis of the burden to the defendant and consequences to the community will necessarily encompass consideration of the boundaries of the special relationship and any benefits to the party charged with the duty.

Further, the analysis of the dependence of the child on the institution and the control the institution has over the means of the protection necessarily encompasses the *Rowland* factor of closeness in the connection between the defendant's conduct and the injury suffered. An institution's failure to protect a child will be most clear when the child was dependent on the institution for protection, and the institution had a clear means of protection. Thus, there is a direct relationship between the dependence and control factors and the closeness of the connection factor. As the child's dependence on the institution for protection and the institution's control over the means of protection increases, the closeness of the connection between the defendant's conduct and the injury suffered also increases. Conversely, as dependence and control decrease, so does the closeness of connection. Accordingly, the consideration of dependence and control will encompass the *Rowland* factor closeness of connection between the defendant's conduct and injury suffered.

3. Remaining Factors that Must be Weighed to Determine if the Institution has Overcome the Presumption that a Duty Exists

After identifying the encompassed factors and those factors that will always weigh in favor of imposing a duty, the court is left to test and weigh the factors of (1) the dependence of the child on the institution for protection, (2) the control the institution has over the means of protection, (3) and the burden on the institution and consequences to the community of imposing a duty.

When analyzing the factor of the dependence of the child on the institution for protection, the court should consider the degree of reliance of the minor children on the institution for protection, the vulnerability and sophistication of the children in the program, the purpose of the institution, and whether the institution presents itself as safe for children involved in its programs. In *United States Youth Soccer Ass'n, Inc.*, this factor played a key role in the imposition of a duty on the institution. In that case, the court found that the defendant institution assumed

a “quasi-parent” responsibility for the safety of the players when the parents were not present.²⁷⁵ As children greatly depend on their parents for safety, the children involved in the institution’s activities also greatly depend on the institution for safety. The court extended this concept even further in *Regents*, where it found college students are sufficiently dependent on their college communities to support an imposition of a duty.²⁷⁶

In the closed environment of a school campus where students pay tuition and other fees in exchange for using the facilities, where they spend a significant portion of their time and may in fact live, they can reasonably expect that the premises will be free from physical defects and that school authorities will also exercise reasonable care to keep the campus free from conditions which increase the risk of crime.²⁷⁷

To analyze the factor of control that an institution has over the means of protection, the court should consider the institution’s ability to control both directly and indirectly the child’s or third party’s behavior, the connection between the institutions control and the injury suffered, and the disparity in knowledge between the child and the institution regarding the risks involved. This factor of control was vital to the decision in *Nally* not to impose a duty. There, the court relied heavily on the fact that non-therapist counselors from the church had no control over the environment of the injured person.²⁷⁸ Conversely, in *Conti*, the court found the institution exercised considerable control over the means of protection since the institution determined who remained eligible to perform field service, determined when, where, and with whom field service would be conducted, and determined the perpetrator’s access to children while performing field service.²⁷⁹ While the control in *Conti* appeared to be direct control over the means of protection, the court has also recognized methods of indirect control. The court found that a disparity in knowledge can also weigh in favor of imposing a duty because the party with more knowledge of the potential danger is in a better position and has more control to prevent or warn of the danger.²⁸⁰

²⁷⁵ *United States Youth Soccer Ass’n, Inc.*, 214 Cal. Rptr. 3d at 565.

²⁷⁶ *Regents*, 413 P.3d at 668 (finding dependence on “structure, guidance, and a safe learning environment”).

²⁷⁷ *Id.* (quoting *Peterson v. S.F. Cmty. Coll. Dist.*, 685 P.2d 1193, 1201 (Cal. 1984).

²⁷⁸ *Nally v. Grace Cmty. Church*, 763 P.2d 948, 956–57 (Cal. 1988).

²⁷⁹ *Conti v. Watchtower Bible & Tract Soc’y of N.Y., Inc.*, 186 Cal. Rptr. 3d 26, 42–43 (Ct. App. 2015).

²⁸⁰ *Regents*, 413 P.3d at 672. The court also found, more generally, that the institution had “the power to influence [students’] values, their consciousness, their relationships, and their behaviors.” *Id.* at 668.

Lastly, to analyze the burden on the institution and consequences to the community of imposing a duty, the court should consider the connection between the institution's protective measures (or lack thereof) and the injury suffered by the child, the scope or boundaries of the duty being imposed, the existence of policies and practices already in place within the institution, and the benefits received by the institution from its involvement in the program. A recurring fact in cases where a duty was imposed is the existence of a program or educational materials designed to combat childhood sexual abuse within the organization. In *Juarez*, the court found the burden on the institution was minimal since it already had an effective system in place to ensure its program and educational materials were provided to the volunteers, parents, and children in its programs.²⁸¹ Similarly, in *United States Youth Soccer Ass'n, Inc.*, the burden on the institution was minimal because it developed its own child safety educational program and already demonstrated an administrative ability to ensure compliance with performing background checks.²⁸² Likewise, when an institution touts its educational materials and uses its safety to advertise and encourage minor children to join its programs, any burden imposed on the institution is minimal and can be justified.²⁸³

As was demonstrated in the discussion *supra*, the simplified three-factor test with the strong presumption of imposing a duty can account for and reconcile with prior decisions by the court. Many, if not all of the decisions, can be explained using these three factors.²⁸⁴ Importantly, duties are not immutable facts of nature.²⁸⁵ Any time the court imposes a duty, they are simply responding to a policy determination that a person should have a duty to warn or protect in that scenario. “[L]egal duties are . . . merely conclusory expressions that [sic], in cases of a particular type, liability should be imposed for damage done.”²⁸⁶ Duty is a “shorthand statement of a conclusion . . . [and] an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to [legal] protection.”²⁸⁷

281 See *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 34 (Ct. App. 2000).

282 See *Doe v. U.S. Youth Soccer Ass'n, Inc.*, 214 Cal. Rptr. 3d 552, 567 (Ct. App. 2017).

283 See *Juarez*, 97 Cal. Rptr. 2d at 32 (finding the institution was essentially admitting education was an effective safety tool in its possession); *Regents*, 413 P.3d at 673–74 (marketing itself as one of the safest campuses raised revenue which lowered the burden as these funds could be used to ensure a safe environment).

284 See *supra* notes 275–283 and accompanying text.

285 See *Adams v. City of Fremont*, 80 Cal. Rptr. 2d 196, 210 (Ct. App. 1998).

286 *Tarasoff v. Regents of Univ. of Cal.*, 561 P.2d 334, 342 (Cal. 1976).

287 *Dillon v. Legg*, 441 P.2d 912, 916 (Cal. 1968).

B. Justification for the Proposed Test and Impact on the Future

This three-factor test presents a logical combination of policy considerations and factual considerations that the courts are already considering in their analyses. The test simplifies the court's analysis by removing discretion from factors that can only be rationally decided in one way. Additionally, this test is easier to apply than the prior separate analyses for the existence of a special relationship and *Rowland* factors. The cases demonstrate that the court will sometimes apply both tests,²⁸⁸ or will stop analyzing if one test was not met,²⁸⁹ and at other times, will decide one test was sufficient even when had the court applied both tests, its decision would not have changed.²⁹⁰ Having a single test to use in these situations will lead to greater judicial efficiency. This test will also allow for clear and straight forward analysis, allowing for equal application, greater consistency, and predictability in the courts. Consistency and predictability in judgments, as well as uniformity, is essential to our judicial system founded on precedent.

Another justification for this test is that the imposition of a duty does not guarantee that an institution will be found liable for its actions or inactions. While this test at first appears to overtly expose institutions to liability, it is important to remember that this is just the first step in determining liability.²⁹¹ Even with the imposition of a duty, an institution must be found to have breached that duty, which is a question for the jury to examine and determine.²⁹² Thus, imposing a lower standard to find a duty that exists in childhood sexual abuse cases within institutions is justified. More importantly, the application of this test will help proactively shape the behavior of institutions. In recognizing the presumption that a duty will be imposed under this test, the institutions will do everything they can to act reasonably instead of doing everything they can to avoid liability. In this way, the test itself helps safeguard children in institutions before the abuse has even occurred.

Additionally, as organizations begin to implement better policies, practices, and procedures that demonstrate limited

²⁸⁸ See *Brown v. USA Taekwondo*, 253 Cal. Rptr. 3d 708 (Ct. App. 2019); *Regents*, 413 P.3d 656.

²⁸⁹ See *Brown*, 253 Cal. Rptr. 3d 708; *Barenborg v. Sigma Alpha Epsilon Fraternity*, 244 Cal. Rptr. 3d 680 (Ct. App. 2019).

²⁹⁰ See *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12 (Ct. App. 2000).

²⁹¹ See *Adams v. City of Fremont*, 80 Cal. Rptr. 2d 196, 208 (Ct. App. 1998) (“Examining whether a legal duty exists and whether a particular defendant was negligent are not coterminous exercises.”).

²⁹² See *Cabral v. Ralphs Grocery Co.*, 248 P.3d 1170, 1175 (Cal. 2011).

exposure to claims of sexual abuse, the result will be favorable insurance premiums. With clear standards and more predictable liability, the costs of insurance will likely decrease for these institutions. This also benefits the families and the children involved in these institutions. With less money spent on insurance and defending claims of sexual abuse, more funds will be available for institutions to spend on materials, items, and opportunities that further their ultimate mission and purpose. With more resources, care, and education for children, these funds will lead to better opportunities for children and further enrich their lives.

Finally, this test provides the message that we, as a society, desire our judicial system to effectively and consistently communicate to our children: that children are valued and deserve protection. By using tests that make it easier for institutions to escape liability, we essentially communicate to our children that we want them to participate in institutions meant to help them grow and develop—but accept the risk that they may be sexually abused. Even worse, we are setting an example for children that those who commit evil will not have to suffer the consequences of their actions. This proposed test will change that narrative. It will demonstrate to children that we, as a society, care for our children and recognize their importance in the future. It will demonstrate accountability and a willingness to hold people responsible for their actions. Changing this narrative is imperative for us to ensure that our children grow into their full potential and can, in time, take our places in society.

CONCLUSION

“The general feeling of the public that this problem does exist in a threatening way lead[s] to the conclusion that people charged with the care of children should guard against it[.]”²⁹³ The court in *Brown* was tasked with answering an incredibly significant question. The Supreme Court of California’s decision will have lasting impacts on both survivors of sexual abuse and the institutions that have consistently failed the children they were supposed to be protecting. Recent legislative and judicial decisions demonstrate a recognition of the magnitude of the problem and a willingness to take steps to correct it. Based on the law of negligence and the cases interpreting it in California, to determine whether or not to impose a duty, the court *should* analyze only the factors of (1) the dependence of the child on the institution for protection, (2) the control the institution has over

²⁹³ *Juarez*, 97 Cal. Rptr. 2d at 31.

the means of protection, and (3) the burden on the institution and consequences to the community of imposing a duty, with the rest of the policy factors automatically weighing in favor of imposing a duty.

This test is easier for courts to apply, thereby improving judicial efficiency and more predictable results. Most importantly, the application of this test will shape the behavior of institutions. In recognizing the higher likelihood that a duty will be imposed under this test, the institutions will do everything they can to act reasonably instead of everything they can to avoid liability. In this way, the test itself helps safeguard children in institutions. Time and again, our lawmakers, and society as a whole, have stated the importance of safeguarding children from abuse. This test recognizes the importance of giving both meaning and real action to those words. The court's decision in *Brown* to stop the analysis when the special relationship factors are not met, without taking into account the *Rowland* policy considerations, is a major setback to the goal of protecting children within institutions. Instead of fully considering all the policy reasons why institutions should be responsible for the children they invite to participate and benefit from, the court refuses to impose a duty based on a limited and incomplete set of factors. As has happened too often, the court's words were rendered meaningless by its actions.

“Some Days It’s Tough Just Gettin’ Up”: How the Current Civil and Criminal Legal Remedies Fail to Protect Mass Shooting Victims

*Ariel J. Romero**

I. INTRODUCTION

On October 1, 2017 at 10:01 pm, the sound of gunfire rang out. Thousands of concertgoers at the Route 91 Harvest Festival in Las Vegas initially mistook these sounds of gunfire for fireworks popping off in the distance. One of those people was me. By the time my mind realized what the sounds *were not*, it was too late. I had been shot in the face with a hollow point bullet from an AR-15. It entered my right cheek, exploded inside my jaw, and exited the back of my neck. A choice to sing and dance near the front of the concert stage that night was one that gave rise to ten excruciating minutes of gruesome sights and horrific sounds that will never leave me.

At the time of the attack, I was a twenty-three-year-old woman, unknowledgeable about guns, uninformed of their history, ignorantly indifferent to the gun debate in our society, uneducated about the rights of victims of gun violence, and completely unaware of what gunfire sounded like. Now, gunfire is a sound I cannot and will not forget. It plays on a continual loop in my head almost every single day, blasting against the backdrop of the lyrics playing when a loved one and I were shot: “Some days it’s tough just gettin’ up.” Those Jason Aldean lyrics became the soundtrack to a new reality for me: I now live in a world where I survived, and she did not. Witnessing the carnage of mass murder, fighting for a renewed will to live, and continuing to survive through trauma inspired this Article.

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This Article proposes amending United States laws dealing with rights and remedies for victims who survive mass shootings.¹ Mass shootings are at the forefront of news and political platforms. Each new occurrence triggers renewed pleas for prayers and reform. Time and time again, humanity exhibits its goodness by providing consolation and comfort to the victims in their initial time of need. Our nation's politicians, however, have failed to enact meaningful reform to ameliorate the crisis. Victims of mass shootings face complex, outdated, and ineffective laws that do little to redress the trauma victim's experience in the days, months, and years after the shooting. Victims lack the resources and legal knowledge to effectively advocate for solutions. Victims are expected to make decisions with serious legal ramifications immediately following the shootings, or shortly thereafter. Most of the time victims make these decisions without being adequately informed of the civil and criminal justice mechanisms designed for victims of gun violence. This is largely because the necessary information to make informed legal decisions is scattered throughout many different agencies, civil statutes, criminal statutes, and other data sources. There is no uniform, reliable platform containing all this information, making it extremely complicated for victims to navigate. This Article is intended to be a single source outlining both the civil and criminal remedies available to victims in an effort to provide greater transparency and cohesiveness to the literature. It will also aid victims and scholars alike in analyzing mass shooting victims' redresses through my first-hand account and perspective, specifically utilizing the Route 91 Harvest Festival mass shooting to recount personal experiences. Further, this Article proposes concepts that, if implemented, would prevent further victimization of mass shooting victims. In the civil context, it includes offering various non-monetary remedies to victims. In the criminal context, it includes implementing measures for sufficient follow-through with victims in addition to creating a domestic terrorism federal cause of action for more accountability and equity. When civil and criminal remedies overlap, this Article recommends streamlining the civil and criminal procedures for victims to manageably navigate.

¹ It is important to note that this Article is not meant to undermine other gun violence victims. There are countless victims of gun violence attributed to suicide, homicide, domestic violence, hate crimes, unintentional shootings, and other gun incidents. This Article is meant to specifically shed a light on the inadequacy of current victims' remedies for mass shooting victims.

Part II of this Article provides a short history of mass shootings and the relevant law pertaining to victims’ civil and criminal remedies. Part III and IV separately discuss the deficiencies in civil and criminal remedies, including their failure to address the psychological and emotional injuries suffered by mass shooting victims, and briefly proposes various non-monetary solutions for victims. In the civil context, this Article recommends: allowing victims the opportunity for catharsis, advocacy, and reputational harm, forbidding non-disclosure clauses in settlement agreements with victims of mass shootings, and tolling statutes of limitation for mass shooting victims. In the criminal context, this Article recommends: enacting private victim compensation funds specifically for victims of mass shootings and stronger enforcement of codified victims’ rights. Part V highlights the civil and criminal remedies’ overlap and its legal implications, and proposes a stronger interdisciplinary approach to victims’ rights by recognizing all mass shootings as acts of domestic terrorism, thereby creating a federal domestic terrorism cause of action. Part VI concludes.

II. BACKGROUND

A. History of Mass Shootings

There is no universally accepted definition of a public mass shooting.² Some experts classify a mass shooting as a shooting killing four or more people.³ Using this narrow definition, “mass” shooters have killed 1,300 people between August 1, 1966 and April 12, 2021.⁴ While some might view that figure as surprisingly high and others might view it as shockingly low, the sentiment remains the same: the victims and their families should receive the remedies afforded victims in other tort contexts. And let us not forget the thousands of victim-survivors who have suffered catastrophic injuries, broken families, and psychological damage.⁵

Mass shootings have occurred in the United States as early as 1891.⁶ That year, a man fired his doubled barreled shotgun

² See Bonnie Berkowitz, Chris Alcantara, & Denise Lu, *The Terrible Numbers that Grow with Each Mass Shooting*, WASH. POST (Apr. 12, 2021), <http://www.washingtonpost.com/graphics/2018/national/mass-shootings-in-america/> [<http://perma.cc/RMM6-LHV7>] (noting that most of these shootings are carried out by a “lone shooter”).

³ See *id.* (excluding shootings tied to robberies or domestic shootings in private homes).

⁴ See *id.*

⁵ See *id.*

⁶ See Maria Esther Hammack, *A Brief History of Mass Shootings*, BEHIND THE TOWER, <http://behindthetower.org/a-brief-history-of-mass-shootings> [<http://perma.cc/ARU7-V8A3>] (last visited Mar. 20, 2021).

into a crowd of students and faculty attending a school exhibition in Mississippi, severely injuring over fourteen people—mostly children.⁷ The next month, a man went inside a school in New York and shot several children playing on the playground.⁸ While none of the victims were killed as a result of these first mass shootings, these shootings mirror the scenes and traumas of modern-day mass shootings.

In the twentieth century, mass shootings started as early as 1903. However, it was not until the University of Texas at Austin shooting on August 1, 1966 when the number of people killed and injured in mass shootings began to rise.⁹ That shooting lasted ninety-six minutes, killed seventeen people, and injured more than thirty.¹⁰ Mass shootings that followed were equally harrowing, which included but are not limited to: the McDonald's mass shooting in California in 1984 that killed twenty-one and injured nineteen;¹¹ the Post Office shooting in Oklahoma in 1986 that killed fourteen and injured six;¹² the Cleveland Elementary School shooting in California in 1989 that killed five children and wounded thirty-two others;¹³ the General Motor shooting in Florida in 1990 that killed eight and injured five;¹⁴ the Luby's Cafeteria shooting in Texas in 1991 that killed twenty-two and injured more than twenty others;¹⁵ the Jonesboro Middle School shooting in Arkansas in 1998 that killed five and injured ten;¹⁶ and one of the last mass shootings of the century being the Columbine High School shooting in Colorado in 1999 that killed thirteen and wounded more than twenty others.¹⁷

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Twenty-one people are shot to death at McDonald's*, HIST., <http://www.history.com/this-day-in-history/twenty-one-people-are-shot-to-death-at-mcdonalds> [<http://perma.cc/5Z4D-GGNP>] (last updated July 20, 2020).

¹² Dianna Everett, *Edmond Post Office Massacre*, OKLA. HIST. SOC'Y, <http://www.okhistory.org/publications/enc/entry.php?entry=ED003> [<http://perma.cc/3TBY-XXKD>] (last visited Mar. 20, 2021).

¹³ *Five Children Killed as Gunman Attacks a California School*, N.Y. TIMES (Jan. 18, 1989), <http://www.nytimes.com/1989/01/18/us/five-children-killed-as-gunman-attacks-a-california-school.html> [<http://perma.cc/G3AJ-J7VD>].

¹⁴ *A Look Back: GMAC Mass Shooting*, FLA. TIMES-UNION (Apr. 10, 2019), <http://www.jacksonville.com/photogallery/LK/20190410/NEWS/409009969/PH/1> [<http://perma.cc/U9N8-68J4>].

¹⁵ Thomas C. Hayes, *Gunman Kills 22 and Himself in Texas Cafeteria*, N.Y. TIMES (Oct. 17, 1991), <http://www.nytimes.com/1991/10/17/us/gunman-kills-22-and-himself-in-texas-cafeteria.html> [<http://perma.cc/CHR4-JFFZ>].

¹⁶ Jonathan Ford, *Westside School Shooting*, ENCYCLOPEDIA OF ARK., <http://encyclopediaofarkansas.net/entries/westside-school-shooting-3717/> [<http://perma.cc/8Z4B-U6RV>] (last updated July 29, 2019).

¹⁷ *Columbine Shooting*, HIST., <http://www.history.com/topics/1990s/columbine-high-school-shootings> [<http://perma.cc/62FN-KTM6>] (last updated Mar. 4, 2021).

The twenty-first century has witnessed some of the most disturbing mass shootings to date: the Virginia Tech shooting in Virginia in 2007 that killed thirty-two people and injured seventeen;¹⁸ the Fort Hood Shooting in Texas in 2009 that killed thirteen and injured thirty-two;¹⁹ the Sandy Hook shooting in Connecticut in 2012 that killed twenty-seven and injured two others;²⁰ the Pulse nightclub shooting in Florida in 2016 that killed forty-nine and wounded fifty-three others;²¹ the Sutherland Springs Texas church shooting in 2017 that killed twenty-six and injured nineteen others;²² the Marjory Stoneman Douglas High School shooting in Parkland, Florida in 2018 that killed seventeen and wounded fourteen others;²³ the Tree of Life synagogue shooting in Pittsburgh in 2018 that killed eleven and wounded six others;²⁴ the Saugus High School shooting in California in 2019 that left two dead and three wounded;²⁵ the shooting in Dayton, Ohio in 2019 that killed nine and injured twenty-seven others;²⁶ the shooting at Walmart in Texas in 2019

¹⁸ Kalhan Rosenblatt, *Las Vegas Shooting is Deadliest in Modern U.S. History*, NBCNEWS (Aug. 20, 2018, 3:56 PM), <http://www.nbcnews.com/storyline/las-vegas-shooting/las-vegas-shooting-deadliest-modern-u-s-history-n806486> [<http://perma.cc/JSF7-7U2C>].

¹⁹ Kyle Rempfer, *The Mass Shooting at Fort Hood Was 10 Years Ago, on Nov. 5, 2009*, ARMY TIMES (Nov. 5, 2019), <http://www.armytimes.com/news/your-army/2019/11/05/the-mass-shooting-at-fort-hood-was-10-years-ago-on-nov-5-2009/> [<http://perma.cc/VJ78-HQF5>].

²⁰ Michael Ray, *Sandy Hook Elementary School Shooting*, BRITANNICA, <http://www.britannica.com/event/Newtown-shootings-of-2012> [<http://perma.cc/24U9-YBX7>] (last visited Mar. 20, 2021).

²¹ Haley Tsukayama et al., *Gunman Who Killed 49 in Orlando Nightclub Had Pledged Allegiance to ISIS*, WASH. POST (June 13, 2016, 6:28 AM), <http://www.washingtonpost.com/news/post-nation/wp/2016/06/12/orlando-nightclub-shooting-about-20-dead-in-domestic-terror-incident-at-gay-club/> [<http://perma.cc/46FG-H9N5>]; Lizette Alvarez & Richard Pérez Peña, *Orlando Gunman Attacks Gay Nightclub, Leaving 50 Dead*, N.Y. TIMES (June 12, 2016), <http://www.nytimes.com/2016/06/13/us/orlando-nightclub-shooting.html> [<http://perma.cc/AB4G-KHQJ>].

²² *Texas Church Killings: What We Know and Don't Know*, N.Y. TIMES (Nov. 5, 2017), <http://www.nytimes.com/2017/11/05/us/texas-church-killings-what-we-know.html> [<http://perma.cc/ZU2R-F268>].

²³ Elizabeth Chuck et al., *17 Killed in Mass Shooting at High School in Parkland, Florida*, NBCNEWS (Feb. 15, 2018, 7:20 AM), <http://www.nbcnews.com/news/us-news/police-respond-shooting-parkland-florida-high-school-n848101> [<http://perma.cc/8ECC-ZHQJ>].

²⁴ Kellie B. Gormly et al., *Suspect in Pittsburg Synagogue Shooting Charged with 29 Counts in Deaths of 11 People*, WASH. POST (Oct. 27, 2018, 7:50 PM), <http://www.washingtonpost.com/nation/2018/10/27/pittsburgh-police-responding-active-shooting-squirrel-hill-area/> [<http://perma.cc/Q4PA-CJ7V>].

²⁵ Jason Silverstein, *There Were More Mass Shootings than Days in 2019*, CBSNEWS, <http://www.cbsnews.com/news/mass-shootings-2019-more-than-days-365/> [<http://perma.cc/C5FT-PZUL>] (last updated Jan. 2, 2020, 11:45 AM).

²⁶ James Doubek & Vanessa Romo, *Police Identify Suspected Dayton, Ohio, Shooter: 9 Dead, 27 Injured*, NPR (Aug. 4, 2019, 4:33 AM), <http://www.npr.org/2019/08/04/747989695/9-killed-at-least-16-injured-in-shooting-in-dayton-ohio> [<http://perma.cc/5RJB-4CNV>].

that killed twenty-three and injured twenty-six;²⁷ the shooting in Virginia Beach in 2019 that killed twelve and wounded four;²⁸ the Molson Coors campus shooting in Milwaukee, Wisconsin in 2020 that killed five;²⁹ the spa shootings in Atlanta, Georgia in 2021 that killed eight and injured one other;³⁰ and also witnessed the “deadliest” mass shooting with the highest number of victims in modern history at the Route 91 Harvest Festival mass shooting in Las Vegas in 2017 that killed fifty-eight and wounded over five hundred others.³¹

A total of 196 shooters perpetuated mass killings between 1966 and 2021. 104 of them died either at the scene of the shooting or nearby,³² and most of them killed themselves.³³ The killings occurred in forty-two states and the District of Columbia.³⁴ California has been the state home to most of these mass shootings—thirty-two have taken place in the state.³⁵

The paucity of public health research on gun violence, resulting in part from a federal law enacted in 1996 that restricts federal funding for firearms research, makes it difficult to solve these problems.³⁶ The 1996 law eliminated \$2.6 million worth of federal funding to the agency that was used for research related to gun violence.³⁷ A provision, known as the Dickey Amendment, stated

²⁷ Peter Martinez, *El Paso Walmart Shooting Victim Dies, Raising Death Toll to 23*, CBS NEWS (Apr. 27, 2020, 12:10 PM), <http://www.cbsnews.com/news/el-paso-walmart-shooting-guillermo-garcia-dies/> [<http://perma.cc/98QZ-CCUE>]; Vanessa Romo, *El Paso Walmart Shooting Suspect Pleads Not Guilty*, NPR (Oct. 10, 2019, 4:31 PM), <http://www.npr.org/2019/10/10/769013051/el-paso-walmart-shooting-suspect-pleads-not-guilty> [<http://perma.cc/4BGL-CM5Y>].

²⁸ Michael James & Doug Stanglin, *‘War Zone’: 12 Killed in Virginia Beach Shooting at Municipal Center; Gunman Dead After Long Gun Battle*, USA TODAY (June 3, 2019, 12:16 PM), <http://www.usatoday.com/story/news/nation/2019/05/31/police-shooter-opens-fire-virginia-beach-courthouse/1305277001/> [<http://perma.cc/Q7YE-3YJN>].

²⁹ WPR Staff, *Police: 5 People, Gunman Dead After Shooting at Molson Coors Campus in Milwaukee*, WIS. PUB. RADIO (Feb. 27, 2020, 6:10 AM), <http://www.wpr.org/police-5-people-gunman-dead-after-shooting-molson-coors-campus-milwaukee> [<http://perma.cc/SJ9Y-DFM9>].

³⁰ Elinor Aspegren, Ryan W. Miller, & Christal Hayes, *Atlanta Spa Shooting Updates: All Victims Identified; Suspect Disowned by Church; Biden in Georgia Says ‘Silence is Complicity’*, USA TODAY (Mar. 20, 2021, 9:03 AM), <http://www.usatoday.com/story/news/nation/2021/03/19/atlanta-shooting-updates-biden-harris-asian-american-hate-crime/4752589001/> [<http://perma.cc/5AUA-BYZF>].

³¹ Doug Criss, *The Las Vegas Attack is the Deadliest Mass Shooting in Modern US History*, CNN, <http://www.cnn.com/2017/10/02/us/las-vegas-attack-deadliest-us-mass-shooting-trnd/index.html> [<http://perma.cc/DX59-LJ3G>] (last updated Oct. 2, 2017).

³² See Berkowitz et al., *supra* note 2.

³³ See *id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ See *How the NRA Suppressed Gun Violence Research*, UNION OF CONCERNED SCIENTISTS (Oct. 12, 2017) http://www.ucsusa.org/resources/how-nra-suppressed-gun-violence-research#.W_gg5JNKh-U [<http://perma.cc/X58D-ZLZ8>].

³⁷ See *id.*

that none of the funds made available for injury prevention and control at the Centers for Disease Control and Prevention (“CDC”) may be used to advocate or promote gun control.³⁸ Arkansas Representative Jay Dickey introduced this provision into the federal spending bill.³⁹ Before he passed away, Dickey wrote an essay urging research into the causes of gun violence. He co-authored the essay with a former official of the CDC, whom he previously interrogated on the accuracies of a study on gun violence during a Congressional hearing in 1996. In 2015, he told the Huffington Post that he wished he kept the research going all this time, admitting that he had “regrets” implementing the amendment.⁴⁰

For the first time in twenty years, the 2020 Labor, Health and Human Services, Education and Related Agencies (LHHS) funding bill (H.R. 2740) provides funding to ensure the CDC can conduct scientific research to reduce injuries and save lives from gun violence.⁴¹ It passed the House of Representatives in June 2019,⁴² and it had its third cloture motion in the Senate on October 31, 2019.⁴³ The bill specifically provides for firearm injury research, the findings of which will directly impact the approach to victims’ road to recovery in both civil and criminal processes.

B. Overview of Remedies and Victim Rights in the Civil and Criminal Context

Under current law, victims of mass shootings have limited access to remedies that foster healing for their injuries. Victims

³⁸ *See id.*

³⁹ *Id.*

⁴⁰ See Matt Schudel, *Jay Dickey, Arkansas Congressman Who Blocked Research on Gun Safety, Dies at 77*, WASH. POST (Apr. 22, 2017), http://www.washingtonpost.com/national/jay-dickey-arkansas-congressman-who-blocked-research-on-gun-safety-dies-at-77/2017/04/22/39e363a0-26bb-11e7-a1b3-faff0034e2de_story.html [http://perma.cc/TF2H-Y64U].

⁴¹ See *Appropriations Committee Releases Fiscal Year 2020 Labor-HHS-Education Funding Bill*, HOUSE COMM. ON APPROPRIATIONS (Apr. 29, 2019), <http://appropriations.house.gov/news/press-releases/appropriations-committee-releases-fiscal-year-2020-labor-hhs-education-funding> [http://perma.cc/F3CX-MCXW] (“The bill includes a total of \$8.3 billion for CDC—\$921 million above the 2019 enacted level and \$1.7 billion above the President’s budget request. This includes \$854 million in transfers from the Prevention and Public Health Fund and \$225 million in transfers from the HHS Nonrecurring Expenses Fund for a new research support building and campus infrastructure improvements. For the first time in more than 20 years, the bill includes funding—\$25 million—to specifically support firearm injury and mortality prevention research.”).

⁴² *H.R.2740—Labor, Health and Human Services, Education, Defense, State, Foreign Operations, and Energy and Water Development Appropriations Act, 2020*, CONGRESS.GOV, <http://www.congress.gov/bill/116th-congress/house-bill/2740/all-actions?r=111&overview=closed&s=3#tabs> [http://perma.cc/M4N3-7PUZ] (last visited Mar. 20, 2021).

⁴³ *Id.*

may choose to utilize tort law in the form of civil litigation and settlement, but they also face steep procedural and emotional barriers that make it extremely difficult to litigate. Victims may also have the option to employ criminal law with the prosecution and filing of criminal charges against the offender, but there is rarely a living offender to prosecute. Concurrently with the civil and criminal systems, victims may also connect with administrative agencies that investigate the shooting, assist in relaying the requisite information for counseling, and informing victims of other compensation funds. However, their assistance is often introductory and limited in both personalization and duration.

1. Civil Context

Tort law has two primary goals: making wronged victims whole again and providing compensation to these victims to deter wrongdoers from continuing to engage in unreasonable conduct that causes harm to others.⁴⁴ In this area, scholars tend to take a law and economics approach, articulating the main goal as reducing the societal costs accompanying accidents in our society.⁴⁵ Businesses and other organizations take this approach when they implement precautionary measures, because otherwise they would be liable if an accident happened—and these payouts are more costly than implementing safety precautions in the first place.⁴⁶

But tort law remedies only work when the victim can secure and collect on a fair judgment.⁴⁷ In reality, victims face countless barriers when attempting to establish that certain elements exist for liability purposes.⁴⁸ Further, liable parties are typically unable to compensate victims for the fully entitled amount.⁴⁹

⁴⁴ See Kathleen A. Zink, *Note: Should Neither Wind Nor Rain Nor Hurricane Keep Victims from Recovery? Examining the Tort and Insurance Systems' Ability to Compensate Hurricane Victims*, FORDHAM L. REV. 1621, 1652–53, 1654 (2014) (“[C]ompensation is seen as ‘repairing plaintiff’s injury or of making him whole as nearly [as possible] by an award of money. . . . Another primary goal of tort law is deterrence or the reduction of accidents.’”); see also Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1570 (1997) (explaining that making victims whole is a traditional tort law goal); cf. Michael I. Krauss & Jeremy Kidd, *Collateral Source and Tort’s Soul*, 48 U. LOUISVILLE L. REV. 1, 26–28 (2009) (noting that tort law is “not concerned with making the victim whole but rather with righting wrongs”).

⁴⁵ See David W. Barnes & Rosemary McCool, *Reasonable Care in Tort Law: The Duty to Take Corrective Precautions*, 36 ARIZ. L. REV. 357, 364 (1994).

⁴⁶ See *id.* at 365.

⁴⁷ See Carl L. Buck, *Expansion of Bankruptcy Court Jurisdiction as a Means to Provide More Adequate Remedies to Victims of Mass Torts*, 15 W. NEW ENG. L. REV. 257, 257–58. (1993).

⁴⁸ For example, mass shootings are frequently criminal acts committed in a public place. Thus, in most jurisdictions, when suing an establishment where the mass shooting

Civil litigation through tort actions is a common remedial approach in the mass shooting context. Mass tort litigation, specifically, usually consists of numerous severely injured victims as potential plaintiffs—all of whom have a common set of injuries that were sustained in either the same or similar circumstances—in actions involving one or more defendants.⁵⁰ These mass tort actions began in the 1960s and evolved in the 1980s.⁵¹ Federal courts became flooded with filings as people began to sue corporations for losses, injuries, or diseases from “catastrophic events, pharmaceutical products, medical devices, or toxic substances.”⁵² The typical “mass” tort injury usually results from corporate activities like the manufacturing and distribution of defective products, or from a catastrophic event that occurred as a result of the corporation’s misconduct, rather than from the acts of individuals acting in their personal capacity.⁵³

The victims typically include laypersons, distinguishable from other mass tort or class action contexts like securities or antitrust actions where the plaintiffs are typically shareholders or entities with larger financial resources.⁵⁴ This classification of plaintiffs in mass tort actions can also be imputed to the makeup of victims of public mass shootings, as this class of victims is more likely to consist of everyday people with little to no encounters with, or desire to engage with the legal system.⁵⁵ Indeed, a solicitation letter I received regarding the massive litigation against MGM for liability in the Route 91 Harvest Festival shooting described Route 91 mass shooting victims as some of the most litigation averse individuals the attorney had encountered.⁵⁶

occurred, a victim must prove the criminal act was foreseeable. See Michael Steinlage, *Liability for Mass Shootings: Are We at a Turning Point?*, ABA (Feb. 7, 2020), http://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2019-20/winter/liability-mass-shootings-are-we-a-turning-point/ [http://perma.cc/K42V-N82U].

⁴⁹ See *id.*

⁵⁰ See Leonard J. Long, *Bankruptcy Lesson of Future Mass Tort Claims*, 16 QUINNIPIAC L. REV. 357, 380 (1997); John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1355–56 (1995).

⁵¹ See Coffee, *supra* note 50, at 1356; see also JOHN G. FLEMING, *The American Tort Process* 1, 3–4 (1991).

⁵² Coffee, *supra* note 50, at 1355.

⁵³ See Long, *supra* note 50, at 363.

⁵⁴ See Coffee, *supra* note 50, at 1355; Noah Smith-Drelich, *Article: Curing the Mass Tort Settlement Malaise*, 48 LOY. L.A. L. REV. 1, 5 (2014).

⁵⁵ See Amy Novotney, *What Happens to the Survivors*, AM. PSYCH. ASS’N (Sept. 2018), <http://www.apa.org/monitor/2018/09/survivors> [http://perma.cc/8WQM-2K9F].

⁵⁶ See Letter from Catherine R. Lombardo, Attorney, Lombardo L. Firm, to Ariel Romero (Mar. 29, 2019) (on file with author).

Development in mass litigation has created a trend for tort reform against traditional private litigation.⁵⁷ States have implemented tort reforms that have effectively curtailed proceedings in courts, caused procedural barriers to victims, and imposed caps on statutory remedies.⁵⁸ Powerful companies are the primary catalysts for such reforms.⁵⁹ Opponents of private mass actions argue that private mass actions are subject to abuse in several ways—higher transaction costs for both victims and society, and the threat of private injury lawyers neglecting their duty to advocate on behalf of their client for the greater good of society.⁶⁰ The alternative to a private mass action may be a class action, which are also criticized for their murky settlement agreements that “provide a mechanism for defendants to resolve mass liability exposure without the risk of a class trial.”⁶¹ These settlements have emerged in recent decades and revealed new strategies for defendants—create an uneven power dynamic between parties, take advantage of absent class members, and settle cheap before any damaging information gets out.⁶²

Despite the power struggle between victims and powerful defendants in the tort system, it is still seen as a viable avenue for victims: it provides flexibility with several forms of relief, its underlying goal promotes deterrence of bad acts for public safety, and it is more sensitive to a victim’s needs than certain governmental and administrative agencies.⁶³ This is because a return to a more traditional approach of individual case litigation is inefficient and more costly than the mass tort litigation alternative.⁶⁴ Ultimately, mass tort class actions do work to deliver monetary compensation to victims of mass shootings despite the likelihood that attorneys can self-deal and solidify settlements subject to criticism.⁶⁵

2. Criminal Context

Shooting incidents, for the most part, are considered homicides or attempted homicides—which is how these shootings enter into the criminal justice realm of law. In fact, this may be

⁵⁷ Jack B. Weinstein, *Compensation for Mass Private Delicts*, U. ILL. L. REV. 947, 967 (2001).

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ *See id.*

⁶¹ *See* Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. U. L. REV. 951 (2014).

⁶² *See generally id.*

⁶³ *See* Weinstein, *supra* note 57, at 969–71.

⁶⁴ *See* Coffee, *supra* note 50, at 1346.

⁶⁵ *See id.* at 1349.

the first time that these gun violence victims are introduced to the criminal justice court system.⁶⁶ Involvement in the criminal justice system can be extremely confusing and frustrating for victim-survivors because in most cases, the shooter either has not been found, has been killed, or cannot be arrested because of lack of evidence.⁶⁷

Many programs were created to help victims of crime during the 1970s and 1980s victims’ rights movement.⁶⁸ Laws were enacted at all levels—local, state, and federal—to encapsulate victims’ rights.⁶⁹ While state and local authorities investigate crimes where a state law violation has occurred, the Federal Bureau of Investigation (“FBI”) investigates crimes where U.S. Federal Criminal Code violations have occurred.⁷⁰ The victims of these federal crimes have different rights and assistance enacted under federal law.⁷¹ There is a caveat as these rights and services are not inherent—most of these rights provided for in federal law apply only after charges have been filed by a U.S. Attorney.⁷² However, whether or not charges are filed, the FBI is responsible for assisting victims continuously until their own investigation is closed *or* until the case is turned over to the U.S. Attorney’s Office to begin the prosecution process.⁷³

The past thirty years proved beneficial for victims’ rights as every state, the District of Columbia, and other territories have provided for basic rights and protections for victims of crime in their respective statutory codes.⁷⁴ These rights include: the right to attend and be present at criminal justice proceedings, the right to be heard in the criminal justice process, the right to restitution from the offender, the right to apply for crime victim compensation, and the right to enforcement of these rights and access to other available remedies.⁷⁵ The right to restitution is another victims’ right that is more commonly known among the public. The term “restitution” refers to the payment of damages

⁶⁶ See *Navigating the Criminal Justice System*, EVERYTOWN FOR GUN SAFETY, <http://everytown.org/survivors/resources/navigating-the-criminal-justice-system/> [<http://perma.cc/AZG3-XS53>] (last visited Mar. 21, 2021).

⁶⁷ See *id.*

⁶⁸ See *Rights of Federal Crime Victims*, FBI, <http://www.fbi.gov/resources/victim-services/rights-of-federal-crime-victims> [<http://perma.cc/4EVQ-MV34>] (last visited Mar. 21, 2021).

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See *About Victims’ Rights*, OFF. OF JUST. PROGRAMS, <http://victimlaw.org/victimlaw/pages/victimsRight.jsp> [<http://perma.cc/GJ2Z-7UQD>] (last visited Mar. 21, 2021).

⁷⁵ 18 U.S.C. § 3771.

by the defendant for the harm which he or she caused.⁷⁶ Almost two-thirds of states have constitutions that provide for guaranteed rights to victims of crime.⁷⁷

The Justice for All Act of 2004, commonly known as the Crime Victims' Rights Act ("CVRA"),⁷⁸ establishes crime victims' rights in federal criminal justice cases, provides "mechanisms for victims to enforce those rights, and gives victims and prosecutors standing to assert victims' rights."⁷⁹ These enumerated rights compensate for the gap in the Constitution that fails to provide for victims' rights.⁸⁰ The CVRA was inspired and passed due to the stories of various victims whose families were either not notified of, or excluded from, certain criminal proceedings against those who killed their loved ones.⁸¹ Laws like the CVRA usually do not apply to victims of mass shootings since the perpetrators are often dead, and therefore cannot be criminally prosecuted.

Victim compensation is an important tool for victims as their injuries result in an immediate monetary need. The Victims of Crime Act was enacted to help victims with the costs associated with surviving terrorism or mass violence, which includes but is not limited to, medical bills, counseling sessions, and lost wages.⁸² This Act, passed in 1984, created the Crime Victim's Fund.⁸³ This Fund is administered by the Office for Victims of Crime, which "provides financial assistance to victims of crime through state-based compensation programs, as well as indirectly through state grants that help finance state victim service organizations."⁸⁴ These funds come from various sources: they may come from criminal law mechanisms like the "U.S. Attorneys' Offices, federal courts, or the Federal Bureau of Prison, which collect criminal fines, forfeited bail bonds, penalties, and special assessments, and are subsequently deposited into the Crime Victims Fund."⁸⁵ This Office for Victims

⁷⁶ See *About Victims' Rights*, *supra* note 74.

⁷⁷ See *id.*

⁷⁸ 18 U.S.C. § 3771.

⁷⁹ *Id.*

⁸⁰ See Jon Kyl et al., *On the Wings of Their Angels: The Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act*, LEWIS & CLARK L. REV. 581, 591 (2005) ("During Crime Victims' Week in April 2004, victims' advocates . . . suspended their effort to amend the U.S. Constitution and turned instead toward enacting a comprehensive federal statute."); see also H.R. REP. NO. 108-711 (2003) (explaining the bill being prompted because "[v]ictims of crime have long complained that they are the forgotten voice in the criminal justice system").

⁸¹ See Kyl, *supra* note 80, at 582-83.

⁸² See 34 U.S.C. §§ 20101-44.

⁸³ See *Victims of Crime Act*, RAINN, <http://www.rainn.org/articles/victims-crime-act> [<http://perma.cc/ZN35-UMWX>] (last visited Mar. 21, 2021).

⁸⁴ *Id.*

⁸⁵ *Victims of Crime Act: Rebuilding Lives through Assistance and Compensation*,

of Crime is headed by a director (“Director”) who is appointed by the President of the United States.⁸⁶ This Director is allowed to make supplemental grants to:

States for certain eligible crime victim compensation and assistance programs, and to victim service organizations, public agencies (including Federal, State, or local governments) and nongovernmental organizations that provide assistance to victims of crime, which shall be used to provide emergency relief, including crisis response efforts, assistance, compensation, training and technical assistance, and ongoing assistance, including during any investigation or prosecution, to victims of terrorist acts or mass violence occurring within the United States.⁸⁷

The Act allows for victims to submit invoices for the reimbursement of certain out-of-pocket costs incurred.⁸⁸ However, a victim must first submit an application and receive a claim number from the program before submitting their costs for reimbursement.⁸⁹

Every state has its own designated crime victim compensation program and the eligibility for each program is determined through an application process, which varies across states.⁹⁰ A common process involves the following: the application is sent in, and either accepted or rejected by a board. That same board decides what costs will and will not be reimbursed for each individual victim.⁹¹ Determining which costs fall under the reimbursement or non-reimbursement category differs by state.⁹² Of note, these programs are reimbursement-based. This means that victims are expected to pay for all expenses out-of-pocket, and then fully or partially reimbursed for *approved* expenses (usually medical, dental, counseling, funeral, burial, and lost wages associated with a crime).⁹³

Victims have more options for recovery under the state crime system since state courts are not limited by subject matter jurisdictional constraints the way federal courts are.⁹⁴ There are

OFF. FOR VICTIMS OF CRIME, http://www.ovc.gov/pdf/txt/VOCA_Chart_hr.pdf [<http://perma.cc/E66K-Z3PJ>] (last visited Mar. 21, 2021).

⁸⁶ 34 U.S.C. § 20111(b).

⁸⁷ 34 U.S.C. § 20105(b).

⁸⁸ See *Victims of Crime Act*, *supra* note 83.

⁸⁹ See *id.*

⁹⁰ See *Crime Victim Compensation: Financial Assistance After a Crime*, EVERYTOWN FOR GUN SAFETY, <http://www.everytown.org/survivors/resources/crime-victim-compensation/> [<http://perma.cc/LKK6-9C2S>] (last visited Mar. 21, 2021).

⁹¹ See *id.*

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See Jeffrey A. Parness, Laura Lee, & Edmund Laube, *Monetary Recoveries for State Crime Victims*, 58 CLEV. ST. L. REV. 819, 820 (2010) (“State trial court jurisdictional

many recovery claims of both federal and state crimes which lay outside of federal court authority.⁹⁵ Thus, victims often use the state crime system for recovery even when a federal law crime occurred.⁹⁶

3. Recent Developments: Classifications of Mass Shootings as Acts of Domestic Terrorism

The western world has had an indisputable and disturbing white nationalist domestic terrorist problem⁹⁷—even if these mass shootings are not referred to as such.⁹⁸ Clearer cases of this type of domestic terrorism in the context of mass shootings have occurred, such as the shooting in El Paso, Texas that left twenty-three people dead.⁹⁹ The U.S. Department of Homeland Security has now formally recognized the increased number of mass shootings in America as domestic terrorism.¹⁰⁰ Homeland Security even went as far as stating: “[T]he Nation also faces a growing threat from domestic actors inspired by violent extremist ideologies, as well as from those whose attacks are *not* ideologically driven.”¹⁰¹ For the first time, government agencies are starting to pay attention to “conspiratorial” and “hateful” communities that originate online as domestic terrorist threats.¹⁰² Future designations of mass shootings as acts of domestic terrorism have enormous potential legal implications, as discussed later in this Article.¹⁰³

If mass shootings of this nature are classified as domestic terrorist attacks, victims may be afforded additional remedies.

authority typically is unlimited.”).

⁹⁵ See U.S. CONST. art. III; see also Parness, Lee, & Laube, *supra* note 94.

⁹⁶ See Parness, Lee, & Laube, *supra* note 94.

⁹⁷ See Robert O’Harrow et al., *The Rise of Domestic Extremism in America*, WASH. POST (Apr. 12, 2021), <https://www.washingtonpost.com/investigations/interactive/2021/domestic-terrorism-data/> [http://perma.cc/5UFV-DP79].

⁹⁸ See Editorial Board, *We Have a White Nationalist Terrorist Problem*, N.Y. TIMES, (Aug. 4, 2019), <http://www.nytimes.com/2019/08/04/opinion/mass-shootings-domestic-terrorism.html> [http://perma.cc/54AJ-ABVT].

⁹⁹ See *id.*; see also Julio-Cesar Chavez, *Death Toll Reaches 23 from Last Year’s Mass Shooting in El Paso, Texas*, THOMSON REUTERS (Apr. 26, 2020), <http://www.reuters.com/article/us-texas-shooting/death-toll-reaches-23-from-last-years-mass-shooting-in-el-paso-texas-idUSKCN22901V> [http://perma.cc/6A2R-WG9J].

¹⁰⁰ See *Department of Homeland Security Strategic Framework for Countering Terrorism and Targeted Violence*, U.S. DEPT. OF HOMELAND SEC. (2019), http://www.dhs.gov/sites/default/files/publications/19_0920_ply_strategic-framework-countering-terrorism-targeted-violence.pdf [http://perma.cc/UFZ3-2R3S] (“[W]e face a growing threat from domestic terrorism and other threats originating at home, including the mass attacks that have too frequently struck our houses of worship, our schools, our workplaces, our festivals, and our shopping spaces.”).

¹⁰¹ *Id.* (emphasis added).

¹⁰² See Jana Winter, *Exclusive: FBI Document Warns Conspiracy Theories Are a New Domestic Terrorism Threat*, YAHOO! NEWS (Aug. 1, 2019), <http://news.yahoo.com/fbi-documents-conspiracy-theories-terrorism-160000507.html> [http://perma.cc/7S4F-NMN8].

¹⁰³ See discussion *infra* Part V.A.2.

Through the Victims of Crime Act, the Office of Victims of Crime established the Antiterrorism Emergency Reserve, which uses funds from the Crime Victims Fund.¹⁰⁴ The Director may use these Emergency Reserve funds for the Antiterrorism and Emergency Assistance Program (“AEAP”), which is meant to support victims who have lived through “incidents of terrorism or mass violence”¹⁰⁵ by responding to their immediate and ongoing needs after these incidents occur.¹⁰⁶ There are five funding “streams” offered to “qualified applicants,” which include state victim assistance and compensation programs, public agencies, federally recognized Indian tribal governments, U.S. Attorneys’ Offices, public institutions of higher education, and nongovernmental and victim service organizations. However, it is important to note that a disclaimer remains on its webpage: “Limited funding may be available to cover administrative costs necessary and essential to the delivery of services and assistance to victims.”¹⁰⁷

III. MASS SHOOTING VICTIMS’ AVAILABLE REMEDIES: CIVIL CONTEXT

A. Ineffective Existing Remedies

Mass shooting victims are inadequately served through the current civil mechanisms available to them. Existing laws and the current state of litigation misses the mark for this specific subset of victims for numerous reasons, but especially because tort laws are outdated and ineffective in achieving justice for mass shooting victims.

1. Weaknesses of Class Actions for Mass Torts

There are plausible arguments against the effectiveness of class actions for mass torts in helping compensate victims both monetarily and emotionally. In these actions, individual plaintiffs have little to no control over attorneys. This results in both plaintiffs’ and defense lawyers being extremely susceptible to collusion, and ultimately reaching suspicious settlements because they agree on such settlements in early stages of litigation before significant evidence is discovered. This quickly

¹⁰⁴ Office for Victims of Crime, *Antiterrorism and Emergency Assistance Program (AEAP): OVC Supports Communities Responding to Terrorist Attacks and Mass Violence*, U.S. DEPT. OF JUST., <http://www.ovc.gov/AEAP/pg2.html#eligibility> [http://perma.cc/P4AV-AWWD] (last visited Mar. 20, 2021).

¹⁰⁵ *Id.*

¹⁰⁶ See Office for Victims of Crime, *Antiterrorism and Emergency Assistance Program (AEAP): AEAP FAQs*, U.S. DEPT. OF JUST., <http://www.ovc.gov/AEAP/faqs.html> [http://perma.cc/WG53-8MQV] (last visited Mar. 20, 2021).

¹⁰⁷ *Id.*

and cheaply gets rid of the action without paying much attention to the interests of the plaintiffs.¹⁰⁸

Lack of control is frequently an issue for victims in class actions because only the “representative parties have the power to make important decisions regarding the lawsuit.”¹⁰⁹ This means that unless a person is one of the *named* representatives in the class action, there is basically no incentive to consider that person’s thoughts or opinions on the case. Additionally, since causation, liability, and damages are often difficult and costly to prove in a mass tort context, these victims rarely instigate individual lawsuits.¹¹⁰

However, victims of mass shootings are in a different position than plaintiffs in other mass tort actions, such as products liability or toxic torts. The emotional scars left by bullet wounds and the long-term emotional distress are not as readily evident as other mass tort harms like a toxic oil leak that visibly contaminates sea water. Thus, the legal elements like causation, liability, and damages are much harder to prove.¹¹¹ There is also longer durational awareness surrounding other torts. For example, the countless attorney commercials soliciting people with potential product liability claims of mesothelioma caused by asbestos or auto accidents¹¹² play on television frequently and have aired for decades. Mass shootings receive headlines on news outlets for a few days following the tragedies, yet the headlines quickly change, and the victims’ plight is not heard or discussed again.

Class actions are vulnerable to abuse and exploitation by defense counsel.¹¹³ One scholar highlights the lack of consideration toward victims under intense pressure or severe physical and psychological distress, and whether they have received “sufficient neutral, dispassionate” information to make

¹⁰⁸ See Coffee, *supra* note 50, at 1346–49.

¹⁰⁹ *The Pros and Cons of Class Action Lawsuit*, MARGARIAN L. (Oct. 30, 2018), <http://margarianlaw.com/class-action-lawsuit-pros-cons/> [<http://perma.cc/7AFZ-XPG4>].

¹¹⁰ See Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal-Analysis*, 59 BROOK. L. REV. 961, 968 (1991) (noting that “no claim in a mass tort litigation will have value until plaintiffs are able to establish causation, liability and damages”).

¹¹¹ See John P. Rafferty, *9 of the Biggest Oil Spills in History*, BRITANNICA, <http://www.britannica.com/list/9-of-the-biggest-oil-spills-in-history> [<http://perma.cc/LBV5-H9YF>] (last visited Mar. 28, 2021).

¹¹² See injurylawassociates, *Mesothelioma*, YOUTUBE (Aug. 29, 2008), <http://www.youtube.com/watch?v=zIJErvIVOY8> [<http://perma.cc/6JCK-GVZS>]; see also Larry H. Parker, *Larry H. Parker TV Commercial—Accident Attorney Through the Years*, YOUTUBE (Jul. 1, 2009), <http://www.youtube.com/watch?v=5QnITZm9nFo> [<http://perma.cc/H3DU-PS9A>].

¹¹³ See Coffee, *supra* note 50, at 1349.

informed decisions about their case.¹¹⁴ Defense counsels sometimes use this leverage against victims in mass tort class actions to manipulate them into settling for “cheap.”¹¹⁵ In fact, defendants actually prefer to resolve these claims by urging plaintiffs’ counsel to bring class actions in hopes of reaching a settlement.¹¹⁶ A criticism that relates to all class actions is that attorneys representing members of a class action are “rarely” responsive to clients and retain clients who are supposed to be representative of the class, but are usually hand-selected by the attorneys themselves, rendering the other class members powerless since they are technically not parties to the action.¹¹⁷ Thus, an inherent conflict of interest exists in these class actions since the attorneys’ interests are primarily in their attorney fees, while class member interests primarily lie in the award to the entire class.¹¹⁸ A U.S. Court of Appeals for the Seventh Circuit scathingly remarked that the incentive of class counsel is complicit with defendant’s counsel, which is “to sell out the class by agreeing with the defendant to recommend that the judges approve a settlement involving a meager recovery for the class but generous compensation for the lawyers—the deal that promotes the self-interest of both class counsel and the defendant and is therefore optimal from the standpoint of their private interests.”¹¹⁹

The modern class action is becoming a *shield* for defendants.¹²⁰ News of class action settlements with these entity defendants carries less “force” or assurance of “merit” as opposed to holding an entity and/or its agents criminally or civilly liable.¹²¹ While class members of a mass tort litigation case may sometimes uncover and obtain information that only litigation can unearth, the “private mass-dispute resolution systems” they use to obtain it are often not public, and the lack of transparency

¹¹⁴ See Linda S. Mullenix, *Mass Tort Funds and the Election of Remedies: The Need for Informed Consent*, 31 REV. LITIG. 833, 837–38 (2012).

¹¹⁵ See Coffee, *supra* note 50, at 1350.

¹¹⁶ See *id.*

¹¹⁷ *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (“Class counsel rarely have clients to whom they are responsive. The named plaintiffs in a class action, though supposed to be the representatives of the class, are typically chosen by class counsel; the other class members are not parties and have no control over class counsel.”).

¹¹⁸ See *id.* (“The result is an acute conflict of interest between class counsel, whose pecuniary interest is in their fees, and class members, whose pecuniary interest is in the award to the class.”).

¹¹⁹ *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (quoting *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 918 (7th Cir. 2011)).

¹²⁰ Coffee, *supra* note 50, at 1350 (“Once a sword for plaintiffs, the modern class action is in some contexts increasingly becoming a shield for defendants.”).

¹²¹ Russell M. Gold, *Compensation’s Role in Deterrence*, 91 NOTRE DAME L. REV 1997, 2001 (2016).

throughout the process leaves many scholars troubled.¹²² Additionally, corporations stand to face irreparable harm from incriminating information coming out during the discovery process or trial.¹²³ The most effective reputational harm to a corporation occurs in the stage after a complaint is filed but before the announcement of a settlement.¹²⁴ If a settlement is not reached quickly, reputational harm may emerge from media attention of certain actions in the case (like motion filings or any negative information revealed in discovery).¹²⁵

This occurred in the litigation that stemmed from the Route 91 Harvest Festival in Las Vegas, when MGM filed lawsuits against the victims as a response to victims filing suit against the corporation.¹²⁶ In response, the corporation received backlash from victims and non-victims alike.¹²⁷ However, MGM escaped accountability and admitting liability altogether because the case never saw the courtroom. In fact, because little to no reputational harm attached to MGM, MGM Resorts International was able to close a deal in February 2020 for approximately \$4.6 billion, resulting in the sale of MGM Grand and Mandalay Bay resorts and casinos to a joint venture with MGM Growth and Blackstone Real Estate Trust, Inc.¹²⁸ That same joint venture purchased the Bellagio casino in 2019 for \$4.25 billion.¹²⁹ That same year, MGM

¹²² *Id.* at 2045–46.

¹²³ *See id.* at 2019 (“Discovery can provide proof of the underlying wrong, and trial may reveal that proof publicly.”).

¹²⁴ *See id.* at 2015–16.

¹²⁵ *See id.*

¹²⁶ *See, e.g.,* Camila Domonoske, *MGM Files Lawsuits Denying Liability over Las Vegas Shooting*, NPR (July 17, 2018), <http://www.npr.org/2018/07/17/629740001/mgm-files-lawsuits-denying-liability-over-las-vegas-shooting> [<http://perma.cc/RU52-LTEV>]; Gillian Brassil, *MGM Sues More Than 1,000 Victims of Las Vegas Shooting, Denying Liability for the Massacre*, CNBC (Jul 17, 2018, 12:21 PM), <http://www.cnbc.com/2018/07/17/mgm-resorts-files-suit-against-more-than-1000-route-91-victims.html> [<http://perma.cc/A3A4-KLR7>]; Joshua Barajas, *MGM's Lawsuit Against Las Vegas Shooting Victims, Explained*, PBS (July 18, 2018, 9:20 PM), <http://www.pbs.org/newshour/nation/mgms-lawsuit-against-las-vegas-shooting-victims-explained> [<http://perma.cc/NT8C-HY45>].

¹²⁷ *See, e.g.,* Mili Mitra, *MGM Files Awful Lawsuit Against Las Vegas Shooting Survivors*, WASH. POST (July 19, 2018), <http://www.washingtonpost.com/blogs/post-partisan/wp/2018/07/19/mgm-files-awful-lawsuit-against-las-vegas-shooting-survivors/> [<http://perma.cc/6D5P-TF3Z>]; Amanda Woods, *MGM Already Facing Backlash After Suing Las Vegas Shooting Victims*, N.Y. POST (July 18, 2018, 12:40 PM), <http://nypost.com/2018/07/18/mgm-already-facing-backlash-after-suing-las-vegas-shooting-victims/> [<http://perma.cc/FP8N-PYDR>].

¹²⁸ *See* Dow Jones Newswires, *MGM Makes a Deal to Sell MGM Grand, Mandalay Bay to Joint Venture*, BARRON'S (Jan. 14, 2020 3:58 PM), <http://www.barrons.com/articles/mgm-resorts-makes-a-deal-to-sell-mgm-grand-mandalay-bay-to-joint-venture-51579035517> [<http://perma.cc/2VPA-2PN3>]; Bailey Schulz, *MGM Resorts' Landlord Says Company Meeting Rent Obligations*, LAS VEGAS REV. J. (May 5, 2020, 2:21 PM), <http://www.reviewjournal.com/business/casinos-gaming/mgm-resorts-landlord-says-company-meeting-rent-obligations-2021716/> [<http://perma.cc/QJ62-VAE2>].

¹²⁹ *See id.*

sold the Circus Circus casino and 37 acres of nearby land for \$825 million.¹³⁰

Class actions may appear to be an advantageous course of litigation for mass tort victims, but they are far from ideal. While the development of mass tort litigation has developed to better serve victims and their interests, monetarily compensating victims is only one aspect that helps their healing and recovery from their injuries.¹³¹ Arguably, monetary victim compensation is not as important in the attempt to make victims whole. It is only a small piece of the puzzle to make victims of mass shootings whole because adequate monetary compensation is often unavailable, difficult, or meager for this class of victims. This is precisely why measures must be taken to help victims’ healing through non-monetary mechanisms.

The current remedies available for mass torts are far from adequate, for both victims and society.¹³² More adequate remedies (other than compensation) for mass shooting victims may include a variety of distinctive but effective measures. It may simply consist of an entity defendant formally or informally making a statement to admit liability. Lawsuits resulting from mass shootings are becoming a typical mass tort scenario and thus, corporations should have a stake in the game and be liable for these acts in order to help prevent and deter them in the future. Thus, another remedy may focus on including language in either a settlement agreement or court order from an entity defendant that creates a binding commitment to implement stronger safety procedures and policies that will better protect the patrons they serve. Another measure, which offers an opportunity for catharsis, is allowing victims to speak out on the record to voice their grievances against an entity defendant during litigation. Alternatively, the elimination of any confidentiality, non-disclosure, or non-disparagement clause in order to prevent the silencing of victims wanting to speak out about an entity defendant’s wrongdoing.¹³³

¹³⁰ See *id.*; *MGM Resorts, Seeking Cash, Sells Stakes in MGM Grand and Mandalay Bay Casinos for \$4.6B*, CBS NEWS, (Jan. 14, 2020, 3:09 PM), <http://www.cbsnews.com/news/mgm-resorts-selling-mandalay-bay-and-mgm-grand-casinos/> [<http://perma.cc/8NQC-M5SX>].

¹³¹ See Coffee, *supra* note 50, at 1356.

¹³² See Buck, *supra* note 47, at 262.

¹³³ See Katie Wilcox & Bianca Buono, *One Mediator in Las Vegas Shooting Settlement is Daughter to Former MGM Security Vice President*, 12 NEWS (June 9, 2020, 6:28 PM), <http://www.12news.com/article/news/investigations/some-survivors-question-las-vegas-shooting-settlement/75-a30fe101-b4da-4858-8c44-f5b682722821> [<http://perma.cc/QGU3-CS2B>] (highlighting 1 October Las Vegas mass shooting victims afraid to speak out due to a non-disclosure clause in their settlement agreement, despite discovery that the mediator assigned to their case is the daughter of MGM’s former Vice President of

2. Inability to Sue the Proper Parties

What about the victims of public mass shootings, which are so frequently characterized as “mass accidents”?¹³⁴ Mass shooters kill themselves more than half the time, which eliminates a victim’s ability to pursue criminal prosecution for accountability purposes.¹³⁵ Gun manufacturers are protected by product liability law, and the establishments where the massacres are carried out are also protected from liability.¹³⁶ These laws include the Protection of Lawful Commerce in Arms Act in 2005,¹³⁷ which exempts the gun industry from tort lawsuits when criminals use their guns.¹³⁸ Victims and victims’ families from the Sandy Hook shooting still attempted to take this avenue by suing the gun manufacturers.¹³⁹ They ultimately failed.¹⁴⁰ Heidi Li Feldman, a Georgetown Law professor, states this problem is attributed to Congress’ “specific intent to make it difficult.”¹⁴¹

Because the perpetrators are often deceased and the gun manufacturers are shielded from suit, victims sometimes attempt

Security, Surveillance, and Safety at Mandalay Bay Resort and Casino at the time of the shooting).

¹³⁴ See, e.g., Long, *supra* note 50, at 357 (explaining that one class of tort litigation may be classified as “mass accidents” when a catastrophic event occurs and as a result, masses of people are injured); see also Sherrill P. Hondorf, *A Mandate for the Procedural Management of Mass Exposure Litigation*, 16 N. KY. L. REV. 541, 546–48 (1989) (noting the difference between “mass accident” cases and “mass exposure” cases); R. Joseph Barton, *Note: Utilizing Statistics and Bellwether Trials in Mass Torts: What Do the Constitution and Federal Rules of Civil Procedure Permit?*, 8 WM. & MARY BILL OF RTS. J. 199, 201 (1999) (“Whereas those injured in a mass accident suffer injuries as a result of one uniform cause, plaintiffs in a mass tort suffer a variety of injuries over a long period of time and the causation of such injuries must be evaluated in light of individual aspects of the person.”).

¹³⁵ See Berkowitz, Alcantara, & Lu, *supra* note 2.

¹³⁶ Some courts have held that liability was not proven in a products liability cause of action brought by victims of shootings by third-party criminals against the manufacturer or sellers of the guns used in the attacks. See *Coulson v. DeAngelo*, 493 So. 2d 98, 99 (Fla. Dist. Ct. App. 1986) (holding that the manufacturer of a gun used in a criminal act in which the plaintiff was injured cannot be held strictly liable based on the tory that the gun was a defective product); *Hilberg v. F.W. Woolworth Co.*, 761 P.2d 236, 240 (Colo. App. 1988) (holding that the plaintiff’s products liability theory failed since the product was not proven to have a defect) *overruled on other grounds by* *Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992). Additional courts have held that no negligence occurred on the part of an establishment for third-party criminal acts. See *Lopez v. McDonald’s Corp.*, 193 Cal. App. 3d 495, 509–10 (Cal. Ct. App. 1987) (holding that a mass shooting occurring in a fast-food restaurant was unforeseeable as a matter of law); *McKown v. Simon Prop. Grp., Inc.*, 344 P.3d 661, 669 (Wash. 2015) (holding that the third-party criminal act is unforeseeable as a matter of law if the “criminal act that injures the plaintiff is not sufficiently similar in nature and location to prior act(s) of violence”).

¹³⁷ 15 U.S.C. §§ 7901–03.

¹³⁸ See Kirk Siegler, *Why It Will Be Tough to Hold Hotel Legally Responsible for the Vegas Shooting*, NPR, (Oct. 13, 2017, 5:07 AM), <http://www.npr.org/2017/10/13/557520555/lawsuits-begin-after-las-vegas-massacre> [<http://perma.cc/VR5J-MDQQ>].

¹³⁹ See *id.*

¹⁴⁰ See *id.*

¹⁴¹ *Id.*

to sue third parties to hold them accountable for harmful acts they failed to prevent.¹⁴² This is exemplified from the first negligence lawsuit filed against MGM Grand as a result of the Route 91 Harvest Festival mass shooting. The lawsuit was filed on behalf of Paige Gasper, who suffered a bullet wound that lacerated her liver and broke her ribs.¹⁴³ She was twenty-one at the time of the shooting.¹⁴⁴ According to a personal injury lawyer and law professor at the University of Denver, proving negligence in cases suing venues is a tough feat.¹⁴⁵ That statement has been subsequently proven, as Gasper’s case (along with many other Route 91 victims’ cases), was dismissed a few months after filing.¹⁴⁶ Other victims who attempted to sue bigger venues where mass shootings took place have also lost. Victims of the Aurora movie theater massacre of 2012 tried to sue the Century 16 theater chain and lost.¹⁴⁷ The Aurora mass shooting victims had to come to terms not only with the additional trauma of losing the lawsuit, but also being ordered to pay the company’s legal fees stemming from the lawsuit.¹⁴⁸

In regard to the aforementioned Sandy Hook, Aurora, MGM cases, and other cases that deal with mass shootings that occurred in public venues with corporate defendants, the venues are sometimes labeled as “victims” themselves since they claim injury due to “lost business” and “other harm.”¹⁴⁹ One line of reasoning behind this sentiment from MGM, as a corporate defendant, is that hotels cannot be blamed for failure to predict that the gunman would go up to the thirty-second floor with an arsenal of guns, break the windows, and start to fire at people below.¹⁵⁰ Labeling these venues as “victims” is a backward attempt to avoid and shift liability, which ultimately does more harm to the actual victims who were physically, mentally, emotionally, and financially injured as a result of the shootings.

This fear of businesses being subject to unnecessary ruin was a huge factor after the September 11th attack—it is what

¹⁴² See Mary Anne Franks, *Our Collective Responsibility for Mass Shootings*, N.Y. TIMES (Oct. 9, 2019), <http://www.nytimes.com/2019/10/09/opinion/mass-shooting-responsibility.html> [<http://perma.cc/E9CN-4QTC>].

¹⁴³ Siegler, *supra* note 138.

¹⁴⁴ *Id.*

¹⁴⁵ *See id.*

¹⁴⁶ *See Paige Gasper et al. v. MGM Resorts International et al.*, TRELIS, <http://trellis.law/case/BC684143/PAIGE-GASPER-ET-AL-VS-MGM-RESORTS-INTERNATIONAL-ET-AL> [<http://perma.cc/X2YQ-93RM>] (last visited Mar. 28, 2021).

¹⁴⁷ Siegler, *supra* note 138.

¹⁴⁸ *See id.*

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*

prompted legislation known as The SAFETY Act,¹⁵¹ which changed long standing product liability laws.¹⁵²

Congress passed the Homeland Security Act of 2002.¹⁵³ The Act consolidated twenty-two agencies and bureaus and effectuated the Department of Homeland Security (“DHS”) in an effort to work together and “protect the homeland from the myriad threats” confronting the country.¹⁵⁴ The Homeland Security Act has many subsections—the SAFETY Act being one of them.¹⁵⁵ This part of the Act designated the Secretary of the DHS as responsible for administration of the Act and determining which anti-terrorism technologies qualify for protection under the Act.¹⁵⁶ Most importantly, the position is also responsible for determining whether a particular act qualifies as a terrorist attack.¹⁵⁷ This part of the Act creates a federal cause of action for “claims arising out of, relating to, or resulting from an act of terrorism when qualified anti-terrorism technologies have been deployed in defense against or response or recovery from such act and such claims result or may result in loss to the seller” of such qualified anti-terrorism technologies.¹⁵⁸ Mass shootings have become almost commonplace and pervasive enough in our culture to classify them as acts of domestic terrorism. However, these potential designations of mass shootings as domestic terrorist attacks are exactly what venues and entities want.¹⁵⁹ This creates an irreparable conflict for victims who widely recognize these acts as domestic terrorism and would benefit emotionally from its classification as such, yet in that

¹⁵¹ Support Anti-terrorism by Fostering Effective Technologies Act of 2002, or SAFETY Act of 2002, 6 U.S.C. §§441–44, 442(a)(1) (2002).

¹⁵² See Karen Shichman Crawford & Jeffrey Axelrad, *Article: Legislative Modifications to Tort Liability: The Unintended Consequence of Public Health and Bioterrorism Threats*, 45 CREIGHTON L. REV. 337, 349 (2012).

¹⁵³ *Homeland Security*, U.S. SENATE COMM. ON HOMELAND SEC. & GOVERNMENTAL AFFS., <http://www.hsgac.senate.gov/issues/homeland-security> [<http://permacc/S8L7-3V6U>] (last visited May 9, 2020).

¹⁵⁴ *Id.*

¹⁵⁵ Homeland Security Act of 2002, 6 U.S.C.A §§ 441–44 (2002).

¹⁵⁶ See *id.* § 442(a)(1) (2002).

¹⁵⁷ See *id.*

¹⁵⁸ *Id.*

¹⁵⁹ This is because once these entities file a lawsuit under the SAFETY Act, there is a rebuttable presumption that this government contractor’s defense applies, in which the liability is passed on the person or company that sold the qualified anti-terrorist technology, ensuring protection of the company that complied with a federal government contract that otherwise would be subject to liability without this defense. See Brian Coleman & Jennifer Moore, *Government Contractor Defense: Military and Non-Military Applications*, AM. BAR ASS’N (Sept. 12, 2016), <http://www.americanbar.org/groups/litigation/committees/products-liability/practice/2016/gvt-contractor-defense-military-non-military-applications/> [<http://perma.cc/ZLN2-KWHC>].

same breath, would be precluded from establishing liability against an entity due to the classification because terrorist attacks are protected under the SAFETY Act.¹⁶⁰

For example, MGM filed declaratory judgment actions against almost 2,000 victims, seeking a declaration that any state-law claims arising against MGM from the Route 91 Harvest Festival mass shooting are barred by the SAFETY Act of 2002, thereby eliminating MGM’s liability.¹⁶¹ Had the SAFETY Act applied to this case as a result of Homeland Security designating the mass shooting as a terrorist attack, victims would have been forced to litigate the case in the federal court system of MGM’s choosing, limiting the entities from which victims could seek liability.¹⁶² This takes advantage of Congress’ intent in enacting this law, which arose from the adverse impact that future acts of this type of terrorism would have in the country.¹⁶³ Thus, Congress’ goal was to “stimulate private industry to create products and services by providing companies with legislative protections to limit liability exposure.”¹⁶⁴ Congress did not intend to bar liability for incidents in these mass shooting contexts.¹⁶⁵

These enacted laws fail to address the ever-evolving problem with mass shootings: victims are foreclosed from suing the proper parties because the mass shooter is dead and cannot be brought to justice by trial, the mass shooter’s estate is not sizeable enough to compensate the victims for their injuries from the

¹⁶⁰ See *id.*; see also *In re Route 91 Harvest Festival Shootings in Las Vegas, Nev.*, on October 1, 2017, 347 F. Supp. 3d 1355, 1357 (J.P.M.L. 2018).

¹⁶¹ See 347 F. Supp. 3d at 1357.

¹⁶² Victims would most likely only be able to sue CSC, the entity that provided the security services for the Route 91 Harvest Festival. See Mary Jo Smart, *The Route 91 Harvest Festival Shooting: How MGM is Attempting to Escape Liability*, 51 U. PAC. L. REV. 179, 187 (2019) (“[I]f the SAFETY Act were to apply in this case and the Secretary determines Paddock’s attack was a terrorist attack, the victims would be forced to litigate in the federal court MGM chose and face limited options in who they could seek redress from, likely only CSC.”).

¹⁶³ See Crawford & Axelrad, *supra* note 152.

¹⁶⁴ *Id.*

¹⁶⁵ The SAFETY Act was enacted by Congress when our nation was facing an epidemic of *foreign* terrorism. Compare *SAFETY Act: About Us*, U.S. DEPT. OF HOMELAND SEC., <http://www.safetyact.gov/lit/hfhtml/AboutUs> [<http://perma.cc/4ENU-NWSQ>] (last visited Mar. 29, 2021) (“As we approach the 20th anniversary of the 9/11 attacks it is important to re-affirm the *foundational principles* of the SAFETY Act and its role in providing critical incentives for the development and deployment of effective anti-terrorism offerings.”) (emphasis added) with *Department of Homeland Security Strategic Framework for Countering Terrorism and Targeted Violence*, *supra* note 100 (introducing a new initiative titled *Strategic Framework for Countering Terrorism and Targeted Violence*, which was the first time the Department of Homeland Security recognized mass shootings as an act of domestic terrorism: “[T]he country confronts an evolving challenge of terrorism . . . [W]e face a growing threat from domestic terrorism and other threats originating at home, including mass attacks that have too frequently struck our houses of worship, our schools, our workplaces, our festivals, and our shopping spaces.”).

shooting, and both the gun manufacturer and third-party entity defendant are shielded from liability.

3. Inadequate Statute of Limitations

The California Code of Civil Procedure states the following: “An action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another” may be filed within two years of the victim’s injury.¹⁶⁶ This means that the victim has two years to file a lawsuit for their personal injury claim, and once that time period passes, the ability to file that legal claim disappears.¹⁶⁷ In the aftermath of a mass shooting, victims are coming to grips with their new realities: dealing with trauma, grief, depression, PTSD, anxiety, sleep issues, somatic complaints, cognitive issues, suicidal ideation, survivor’s guilt, and tending to their physical injuries.¹⁶⁸

Following mass violence, victim-survivors experience their trauma in three phases: the acute phase, the intermediate phase, and the long-term phase.¹⁶⁹ The acute phase includes denial, shock, and disbelief.¹⁷⁰ The intermediate phase includes “fear, anger, anxiety, panic, retaliatory attacks, difficulty paying attention at work or school, depressed feelings, and disturbed sleep.”¹⁷¹ The long-term phase includes alternative periods of adjustment and relapse, where behavioral health could possibly develop into illnesses that require specialized mental health and disorder-related services.¹⁷²

Though the literature on the effects of gun violence is sparse,¹⁷³ research suggests that these victims may be at greater

¹⁶⁶ CAL. CIV. PROC. CODE § 335.1 (West 2020).

¹⁶⁷ See *Statute of Limitations*, CAL. CTS.: THE JUD. BRANCH OF CAL., <http://www.courts.ca.gov/9618.htm?rdeLocaleAttr=en> [<http://permacc/KE6D-6BBL>] (last visited May 16, 2020).

¹⁶⁸ See Rebecca G. Cowan et al., *Supporting Survivors of Public Mass Shootings*, 14 J. SOC., BEHAV., & HEALTH SCIENCES 169, 171 (2020).

¹⁶⁹ See *Disaster Technical Assistance Center Supplemental Research Bulletin, Mass Violence and Behavioral Health*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (September 2017), <http://www.samhsa.gov/sites/default/files/dtac/srb-mass-violence-behavioral-health.pdf> [<http://perma.cc/2DJU-GFFH>].

¹⁷⁰ See *id.*

¹⁷¹ *Id.*

¹⁷² See *id.*; see also Amy Novotney, *What Happens to the Survivors*, AM. PSYCH. ASS’N: MONITOR ON PSYCH. (2018), <http://www.apa.org/monitor/2018/09/survivors> [<http://perma.cc/XH8E-PU6J>].

¹⁷³ See *supra* Part II.A and discussion *infra* Part III.B.3; see also William Wan, *Shooting Victims Have Increased Risk of Mental Harm Long After Physical Injuries Have Healed, Study Finds*, WASH. POST (Nov. 20, 2019, 8:28 AM), <http://www.washingtonpost.com/health/2019/11/20/shootings-victims-have-increased-risk-mental-harm-long-after-physical-injuries-have-healed-study-finds/> [<http://perma.cc/47PJ-7GFA>] (mentioning a report published in 2019 as part of a “new wave of gun research that has grown after a decades-long drought of funding, data, and political support”).

risk of mental health issues than other victims. For example, one study published in *Behavior Therapy* found that the percentage of the mass shooting victim-survivors from the Northern Illinois University shootings in 2008 experienced persistent PTSD that was higher than the average experienced “among trauma survivors as a whole.”¹⁷⁴ Other studies approximate between 40% and 95% of victims develop PTSD after mass shootings.¹⁷⁵ Further, victims who were directly exposed to a mass shooting with physical injuries, victims who witnessed others get shot, or victims that lost a friend or loved one and also perceived their life to be in danger are at a much higher risk for long-term PTSD and other mental health complications.¹⁷⁶ Another recent study has discussed the need for gun injury treatment to change. The evidence suggests “gunshot trauma [is harder] to recover from than other types of injuries.”¹⁷⁷

However, victims are pressured to swap these concerns with economic ones and are inadvertently forced to begin consultations with lawyers to secure representation and avoid missing statutory deadlines. This is purportedly unfair when trauma surgeons and researchers like Mark Seamon know that the trauma of these victims is different, yet cannot fully articulate why:

We also just don’t know enough about gun violence and what makes it so different than other injuries I see it in my work as a trauma surgeon. Patients who can’t sleep, who say they can get it out of their heads. Other traumas may cause greater physical injury, but the mental toll from gun shots is deeper for some reason.¹⁷⁸

Until extensive and cohesive data is compiled to understand the disparate injuries mass shooting and other gun violence victims face in contrast to other tort victims, victims of mass shootings should be afforded a tolling of the statute of limitations to file a legal claim to prevent the re-victimization of those who were not in a proper mental or physical state to file a claim

¹⁷⁴ See generally Lynsey R. Miron et al., *Differential Predictors of Transient Stress Versus Posttraumatic Stress Disorder: Evaluating Risk Following Targeted Mass Violence*, 45 BEHAV. THERAPY 791 (2014).

¹⁷⁵ See Cowan, *supra* note 168.

¹⁷⁶ See generally Laura C. Wilson, *Mass Shootings: A Meta-Analysis of the Dose-Response Relationship*, 27 J. TRAUMATIC STRESS 631, 631–38 (2014).

¹⁷⁷ See Wan, *supra* note 173 (citing Michael A. Vella et al., *Long-term Functional, Psychological, Emotional, and Social Outcomes in Survivors of Firearm Injuries*, 155 JAMA SURGERY 51, 51–59 (2020)).

¹⁷⁸ Wan, *supra* note 173; Cowan, *supra* note 168, at 177 (“More literature is also needed specifically concerning effective treatment and intervention with survivors of mass shootings This research could further explore how survivors of mass shootings navigate the post-event phase structure put forth by the U.S. Department of Veteran Affairs’ (2018) National Center for PTSD and SAMHSA (2017)”).

within two years of the injury—a time period victims claim still feels excruciatingly close to the dates of their attack.¹⁷⁹

B. Meaningful and Fulfilling Remedial Alternatives: Civil Context

Victims of mass shootings will never get back what was lost—loved ones, innocence, feelings of safety, a sense of normalcy, and so much more. This does not mean the legal system cannot someday provide innovative solutions to make victims feel adequately protected or fully redressed. The following discussion encompasses non-monetary remedies that legislative committees should also consider in the larger conversation surrounding gun violence and mass shootings.

1. Opportunity for Catharsis and Advocacy Notwithstanding Settlement Agreements

When litigating a matter involving violence and trauma, the opportunity for “catharsis” has a significant effect on victims.¹⁸⁰ Catharsis may manifest in many different ways. It may involve victims meeting with company executives or perpetrators held liable for their actions (or inactions) or victims sharing details of the harm inflicted upon them and the loss they suffered as a result of their tragedy.¹⁸¹ This is proven to have strong psychological effects on victims in their future well-being—especially considering that settlements with responsible parties act as a placeholder for a victim’s “day in court.”¹⁸² When victims are not afforded the opportunity to tell their stories and be heard, it becomes a failure to address victims’ psychological needs. This can reduce victim participation rates in settlements to such an extent that it actually weakens a settlement’s effectiveness and legality.¹⁸³

As mentioned throughout this Article, monetary compensation does not make a victim feel “whole.”¹⁸⁴ When victims are severely harmed by a traumatic experience, they also find solace and fulfillment in advocacy—usually fighting for other

¹⁷⁹ To date, it has been over three years since the 1 October Route 91 Harvest Festival shooting in Las Vegas. I frequently tell my family and close friends how it feels as if the shooting happened “like yesterday,” largely in part to the recurring nightmares and other constant interferences in my everyday life. I am also still monitoring my physical injury as it requires additional surgeries. All of these factors contribute to the shooting’s continued proximity to both my mind and heart.

¹⁸⁰ See Dodge, *supra* note 61, at 385.

¹⁸¹ See *id.*

¹⁸² See *id.*

¹⁸³ See *id.*

¹⁸⁴ See Steven P. Croley & Jon D. Hanson, *Article: The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1785, 1913 (1995) (“[M]oney cannot possibly make the victim whole . . .”).

victims who share similar experiences.¹⁸⁵ Victim advocates typically focus on implementing solutions that prevent the same tragedies from occurring over and over again.¹⁸⁶ As an advocate, victims can generate support for legislative reform and use their journeys as a coping mechanism.¹⁸⁷ Nevertheless, a path of advocacy is not without its own trials and tribulations.¹⁸⁸ Victim advocates face collateral damage in the form of organizational backlash, public denials of corporate responsibility, and other countless efforts to silence victims.¹⁸⁹

2. Achieving Reputational Harm by Forbidding Non-Disclosure and Non-Disparagement Clauses in Settlement Agreements

Providing victims with opportunities to seek reputational harm against an entity denying liability for a mass shooting as a form of behavior deterrence is valuable, despite being widely unrecognized by scholars.

Russell M. Gold has written on this topic.¹⁹⁰ Gold recognized most scholars focus on legal damages in a way that virtually advertises damages as the sole remedy to deter wrongdoers.¹⁹¹ While litigation is most certainly one way to deter future wrongdoings, it is not the only way to effectively deter behavior and inflict reputational harm upon entities. Non-legal avenues exist as well.¹⁹² From the corporate standpoint, any media coverage or publicity that stems from a corporate wrongdoing affects company morale, company reputation, the corporate image, corporate relationships with customers, suppliers, and the

¹⁸⁵ See, e.g., Brad Brooks & Sharon Bernstein, ‘Still a mess’: Trauma Haunts U.S. Mass Shooting Survivors Due to Gaps in Mental Healthcare, REUTERS (Mar. 25, 2021, 1:03 PM), <http://www.reuters.com/article/us-colorado-shooting-trauma/still-a-mess-trauma-haunts-u-s-mass-shooting-survivors-due-to-gaps-in-mental-healthcare-idUSKBN2BH35R> [<http://perma.cc/NYR2-JEP8>]; see also Dodge, *supra* note 61, at 385.

¹⁸⁶ See Brooks & Bernstein, *supra* note 185.

¹⁸⁷ See *id.*

¹⁸⁸ See Emily Wax-Thibodeaux et al., *Gun-control Activists Gird for Tough National Fight in Wake of Deadly Rampages: ‘We’re playing the long game’*, WASH. POST (Mar. 27, 2021), http://www.washingtonpost.com/national/gun-control-movement-boulder/2021/03/27/17a36a46-8e50-11eb-9423-04079921c915_story.html [<http://perma.cc/F8YM-T9S4>].

¹⁸⁹ See *id.*; see also Jeffrey Kasky, *Opinion: Parkland Father Prepares Boulder Shooting Survivors for Inevitable Backlash* (Mar. 31, 2021, 3:37 PM), <http://www.denverpost.com/2021/03/31/boulder-shooting-parkland-gun-control/> [<http://perma.cc/FLV6-CU3P>]. Cf. Heidi Schlumpf, *Catholic #MeToo Victims and Advocates Face Backlash* (July 17, 2018), <http://www.ncronline.org/news/accountability/catholic-metoo-victims-and-advocates-face-backlash> [<http://perma.cc/48HZ-UX3S>] (highlighting adversity other trauma victim advocates face).

¹⁹⁰ See, e.g., Gold, *supra* note 121.

¹⁹¹ See *id.* at 1997.

¹⁹² See *id.*

government, future business relationships with other corporate entities, and share market prices.¹⁹³

Reputational harm garners crucial benefits for victims. It disseminates information about an entity's wrongdoing to the community, exposing details of the harm to the general public and aiding in deterrence efforts to prevent future harm. This type of harm also allows direct competitors to take advantage of the wrongdoing entity's failures, resulting in direct financial loss to wrongdoers. Further, reputational harm provides impetus for wrongdoing entities to implement stronger safety policies and procedures to avoid costly legal ramifications.¹⁹⁴

Reputational harm does not reach its full potential or provide any redress to victims when entities utilize victims' weaker bargaining position and their need for compensation by incorporating non-disclosure and non-disparagement clauses into settlements. Civil and class action settlements should not be seen as a mechanism for powerful defendants to "buy-out" and silence victims who may have simultaneous criminal or administrative proceedings.¹⁹⁵ Thus, forbidding non-disclosure and non-disparagement clauses in settlement agreements with mass shooting victims would provide assurance for individual victims to hold leverage against powerful corporate defendants by maintaining their ability to speak out regarding their personal injustices, which is vital to their psychological healing and may not be possible if such clauses are valid.

3. Tolling the Statute of Limitations for Mass Shooting Tort Actions

Civil litigation can only be filed within certain time periods prescribed by laws.¹⁹⁶ There is generally a two-year statute of limitations to file suits for personal injury, including wrongful death.¹⁹⁷ Causes of action "accrue," or begin to toll, once the

¹⁹³ See *id.* at 2010.

¹⁹⁴ See *id.* at 2022.

¹⁹⁵ Weinstein, *supra* note 57, at 982.

¹⁹⁶ See ZERNE P. HANING ET AL., CALIFORNIA PRACTICE GUIDE: PERSONAL INJURY ¶ 5:104 (2019); CAL. CIV. PROC. CODE § 312 (West 2020).

¹⁹⁷ See generally ALA. CODE § 6-2-38 (2020); ALASKA STAT. § 9.10.070 (2020); ARIZ. REV. STAT. ANN. § 12-542 (2020); CAL. CIV. PROC. CODE § 340 (2020); COLO. REV. STAT. § 13-80-102 (2020); CONN. GEN. STAT. § 52-584 (2020); DEL. CODE ANN. tit. 10, § 8119 (2020); GA. CODE ANN. § 9-3-33 (2020); HAW. REV. STAT. § 657.7 (2020); IDAHO CODE § 5-219 (2020); ILL. COMP. STAT. §13-202 (2020); IND. CODE § 34-11-2-4 (2020); IOWA CODE § 614.1 (2020); KAN. STAT. ANN. § 60-513 (2020); MINN. STAT. §§ 541.05, 541.07 (2020); NEV. REV. STAT. § 11.190 (2020); N.J. STAT. ANN. § 2A:14-2 (2020); OHIO REV. CODE ANN. § 2305.10 (2020); OKLA. STAT. tit. 12, § 95 (2020); OR. REV. STAT. § 12.110 (2020); 42 PA. CONS. STAT. § 5524 (2020); TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (2020); VA. CODE ANN. § 8.01-243 (2020); W. VA. CODE § 55-2-12 (2020). *But cf.* ME. STAT. tit. 14, § 752

wrongful act is committed or once liability arises.¹⁹⁸ Some causes of action may delay the tolling until a plaintiff *discovers* facts constituting the cause of action, or *should have been put on notice* that his or her injury was caused by the wrongdoing.¹⁹⁹ It postpones accrual of the cause of action until the plaintiff suspects or reasonably should suspect (1) that he or she has been injured; (2) the cause of the injury; and (3) the tortious nature of the conduct causing the injury.²⁰⁰

Under a newly enacted statute in California’s Code of Civil Procedure, victims of childhood sexual abuse may bring an action “within 22 years of the date the plaintiff attains the age of majority or within five years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual assault, whichever period expires later. . . .”²⁰¹ While victims of mass shootings and victims of childhood sexual abuse live through different traumatic events, both sets of victims experience similar lifelong, chronic health detriments.²⁰²

Both victims experience neurobiological impacts with various degrees of PTSD, re-victimization, mental illness, anxiety, nightmares, avoidance of stimuli that triggers trauma, hyper-alertness, hypervigilance, feelings of detachment, irritability, and many other symptoms that last for years after the wrongful act or acts have taken place.²⁰³ Without conflating the two traumas, mass shooting victims similarly feel guilt and shame in asking for help, such that many survivors wait many years before making the decision to come forward and get treatment.²⁰⁴

Additionally, monetary recovery is generally a complicated issue for victims and takes years for them to sort through.²⁰⁵ An

(2020) (six-year statute of limitation for personal injury claim).

¹⁹⁸ HANING ET AL., *supra* note 196, ¶ 5:106.

¹⁹⁹ *Id.* ¶ 5:107–08.1.

²⁰⁰ *Id.* ¶ 5:108.1.

²⁰¹ CAL. CIV. PROC. CODE, § 340.1(a) (West 2020).

²⁰² See Harvard Women’s Health Watch, *Past Trauma May Haunt Your Future Health*, HARV. HEALTH PUBL’G (Feb. 12, 2021), <http://www.health.harvard.edu/diseases-and-conditions/past-trauma-may-haunt-your-future-health> [<http://perma.cc/G57S-BQTA>].

²⁰³ See, e.g., *The Mental Impact of Mass Shootings*, BRADY UNITED AGAINST GUN VIOLENCE 8–9, <http://brady-static.s3.amazonaws.com/Report/MentalHealthImpactOfMassShootings.pdf> [<http://perma.cc/4DW7-GMJN>]; Brooks & Bernstein, *supra* note 185 (quoting Columbine survivor, Heather Martin: “We learned that 13 years later we were still struggling—that there was a whole group of us who were still a mess[.]”); Lori Haskell & Melanie Randall, *The Impact of Trauma on Adult Sexual Assault Victims*, DEP’T. OF JUST. CAN. (2019), http://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf [<http://perma.cc/6NKG-NQP4>].

²⁰⁴ See *The Mental Impact of Mass Shootings*, *supra* note 203, at 9.

²⁰⁵ See Michelle Maiese, *Compensation and Reparations*, BEYOND INTRACTABILITY, <http://www.beyondintractability.org/essay/compensation> [<http://perma.cc/REJ5-NGKX>] (2003).

[B]ecause many survivors suffer from impoverishment, receiving any money

internal struggle exists since victims may feel litigation only provides a fraction of the necessary monetary compensation for the trauma inflicted upon them, yet they recognize the absolute necessity of the money to begin paying back current and future medical costs²⁰⁶ (which may not be fully accounted for at the outset of the attack). Experts may not accurately predict a victim's lifelong medical costs because research suggests serious gaps exist in the counseling literature, and there is scarce written guidance on both how to treat mass shooting victims and the psychological consequences of public mass shootings.²⁰⁷

Further, some victims have a moral affliction and psychological aversion to accepting money from wrongdoing entities or offenders and would rather receive compensation through different avenues.²⁰⁸ I classify my experience in this vein. I did not participate in the \$800 million settlement with MGM for the Route 91 Harvest Festival mass shooting because I personally felt both plaintiff and defense counsels in the case were not interested in truth and justice.²⁰⁹ After years of feeling

will help them to meet their immediate needs. As a result they are often compelled to prioritize their immediate need for short-term payment over the prospect of any long-term or symbolic reparations. While many survivors will initially be satisfied with monetary compensation, they may grow increasingly dissatisfied as time passes. If victims do not feel that justice has been served, they will find it difficult to put the past behind them.

Id.

²⁰⁶ *See id.*

²⁰⁷ *See Cowan, supra* note 168, at 170.

However, there are significant gaps in the counseling literature. For instance, a content analysis of three influential counseling journals (*The Journal of Counseling and Development*, *The Journal of Mental Health Counseling*, and *Counselor Education and Supervision*) conducted by Webber et al. (2017) found only 10 articles (0.004%) published between 1994 and 2014 on mass trauma (disaster, n = 1; terrorism, n = 7; war, n = 2), none of which provided guidance on how to support survivors of mass shootings. Since the conclusion of the Webber et al. (2017) study, a review of the literature identified just two additional articles on mass trauma (Day et al., 2017; Tarvydas et al., 2017) published in *The Journal of Counseling and Development* and no articles in *The Journal of Mental Health Counseling* or *Counselor Education and Supervision*. Therefore, the purpose of the present article was to examine what is currently known in the limited scholarly literature on the psychological consequences of public mass shootings and to offer treatment alternatives.

Id.

²⁰⁸ There is limited research on this issue in the mass shooting context. However, studies of sexual assault survivors revealed that some victims perceived financial awards from civil suits against their offenders as “dirty money,” “hush money” or “blood money,” and took other avenues for compensation (i.e., state compensation). *See Bruce Feldthusen et al., Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse*, 12 CAN. J. WOMEN & L. 66, 98 (2000).

²⁰⁹ One solicitation letter I received from a Las Vegas-based attorney representing victims wrote the following: “Las Vegas is an extremely tight knit legal community and I have personal relationships with most of the judges and defense lawyers in Las Vegas” For a victim that personally felt like corruption played a huge role in the tragedy, this was not a sentiment I

conflicted and sometimes regretful for my decision not to participate, my intuition proved me right when Robert Eglet, plaintiffs’ counsel for approximately 4,400 victims of the shooting, eventually praised MGM for its “outstanding corporate citizenship” and deemed MGM as a “shining example” of corporate America at the settlement press conference.²¹⁰ Not to mention, the mediator assigned to that case, Jennifer Togliatti, is the daughter of George Togliatti, MGM’s former Vice President of Security, Surveillance, and Safety at Mandalay Bay Resort and Casino at the time of the shooting.²¹¹ Thankfully, my heightened apprehensions due to my law school experience and faith (both of which have been a constant in my recovery and healing) prevented me from making a decision I would fully regret.²¹² Other victims of this shooting may have also elected alternative avenues for monetary compensation had they been allowed more

cared to read. See Letter from Brian D. Nettles, Attorney, Nettles Morris, to Ariel Romero (undated) (on file with author). For discussion of importance of truth and transparency for victims, see also Maiese, *supra* note 205.

Passively accepting reparations can be experienced by the survivor as a disrespectful act that betrays the loss they have endured or the memory of those killed. It is only the ongoing combination of truth, justice, and survivor-support that may one day be sufficient to make some survivors feel at ease with accepting reparations as a symbolic replacement for what has been lost.

Id. (quoting Brandon Hamber, *Repairing the Irreparable: Dealing with Double-Binds of Making Reparations For Crimes of the Past*, INCORE 12–13 (1998)).

²¹⁰ See Dana Gentry, *Once a Fierce Critic, Attorney for LV Shooting Victims Praises MGM Following Settlement*, NEV. CURRENT (Oct. 3, 2019), <http://www.nevadacurrent.com/2019/10/03/once-a-fierce-critic-attorney-for-lv-shooting-victims-praises-mgm-following-settlement/> [<http://perma.cc/CGE9-QHCW>]. Robert Eglet’s comments and handling of the case make me wonder whether he represented victims or was in MGM’s pocket: “They’ve made me the most loyal customer they’ll ever have,” Eglet said during his press conference. “If I have family and friends in town I’ll put them up at an MGM property every time. They have to me shown the most outstanding corporate citizenship I’ve ever witnessed.” Eglet also said the following about MGM: “What MGM has done here through this process, and through this mediation, represents the highest standard of corporate citizenship I have ever seen in my career,” he said. “They are, quite frankly, a shining example of what corporations can do in America, in that they can both do well for their shareholders as well as do well for the community. And MGM proved that in this case.” Amanda Bronstad, *Robert Eglet: MGM Agrees to Pay Up to \$800M to Settle Las Vegas Shooting Lawsuits*, THE INNER CIRCLE OF ADVOCS. (Oct. 3, 2019), [http://www.innercircle.org/News/1329352/MGM-Agrees-to-Pay-Up-to-\\$800M-to-Settle-Las-Vegas-Shooting-Lawsuits](http://www.innercircle.org/News/1329352/MGM-Agrees-to-Pay-Up-to-$800M-to-Settle-Las-Vegas-Shooting-Lawsuits) [<http://perma.cc/R4Y7-KDBG>].

²¹¹ See Wilcox & Buono, *supra* note 133.

²¹² While I did not receive compensation from the civil settlement with MGM, the California Victim Compensation Board partially reimbursed medical costs during the first year of my recovery. Emmy Dean, a Kappa Alpha Theta sorority sister, kickstarted a GoFundMe campaign that paid for the medical costs from my two-week ICU hospitalization in Las Vegas. I also received grants from the Kappa Alpha Theta foundation and California ChangeLawyers (formerly California Bar Foundation). Lastly, my parents, insurance, and medical professionals provided for additional medical costs—all of which helped alleviate immense mental and physical stress during a painful time in my life.

time to process their feelings and address these civil litigation issues and concerns.

Thus, mass shootings victims should be entitled to delayed or tolled statutes of limitations—similar to those enacted for victims of childhood sexual abuse. Those who have not experienced similar traumas have a hard time acknowledging how long it takes victims to come to terms with their experiences.²¹³ Once victims have worked through the initial shock or grief that comes with being subjected to sexual abuse or gun violence, it may be too late.

IV. MASS SHOOTING VICTIMS' AVAILABLE REMEDIES: CRIMINAL CONTEXT

A. Ineffective Existing Remedies

Criminal statutes have effectuated honor to victims by codifying victims' rights,²¹⁴ but miss the mark in carrying out their intended effects for mass shooting victims. State Victim Compensation Funds ("VCF") enacted for the protection of victims often cause more psychological harm and stress because of the state VCF's inability to adequately compensate victims for medical bills or failure to timely notify victims of decisions against reimbursement for certain medical expenses.²¹⁵ However, no mechanism currently exists to enforce or rectify non-notification to victims. Thus, victims are yet again unable to hold responsible parties accountable.

1. Victim Compensation Funds: Caps, Deadlines, and Oversight

Victims have caps on how much compensation they may recover and a time limit as to how long they have the opportunity to collect it.²¹⁶ Because VCF deadlines widely vary across states, it is pertinent for victims to know exactly how much time they have to apply.²¹⁷ "A victim in Kentucky has five years after the

²¹³ See *Counseling Center: Trauma*, NC STATE U., <http://counseling.dasa.ncsu.edu/trauma/> [<http://perma.cc/8WZX-F37P>] ("People react to the extreme stress of traumatic experiences in different ways. Some people respond immediately, while others have delayed reactions which sometimes occur months or even years after trauma.") (last visited Apr. 10, 2021); see also *Treatment Improvement Protocol (TIP): Trauma-Informed Care in Behavior Health Sciences*, CTR. FOR SUBSTANCE ABUSE TREATMENT, http://www.ncbi.nlm.nih.gov/books/NBK207191/table/part1_ch3.t1/ [<http://perma.cc/7NFG-T9PR>] (referencing Exhibit 1.3-1, which is a graph entitled "Immediate and Delayed Reactions to Trauma") (last updated 2014).

²¹⁴ See discussion *supra* Part II.B.2.

²¹⁵ This statement is supported by my own records and correspondence with the California Victim Compensation Board, or CalVCB (on file with author).

²¹⁶ See Parness, Lee, & Laube, *supra* note 94, at 845–46.

²¹⁷ See *Crime Victim Compensation: Financial Assistance after a Crime*, *supra* note 90.

commission of a crime while a victim in Indiana only has 180 days to apply to file claims to the compensation fund.”²¹⁸ Victims also have fixed time periods to collect compensation that differs considerably among states, which creates complications and confusion.²¹⁹

Each state VCF has a cap on the total amount of money authorized for payment to any individual victim.²²⁰ There are also statutory caps on how much money may be paid out for each category of expense (lost wages or loss of support, medical expenses, or mental health counseling).²²¹ The National Association of Crime Victim Compensation Boards claims that the maximum benefits paid out from state VCFs average around \$25,000 per victim, with some states having lower limits and some states having the ability to offer more.²²² Funeral costs, burial costs, mental health counseling, and lost wages often have the lowest caps.²²³

Governmental agencies have attempted to aid states’ lack of funding and infrastructure to help victims in various national tragedies, including the Route 91 Harvest Festival shooting.²²⁴ Most recently in the effort to assist victims, the Department of Justice granted \$2.3 billion in grants to victims across the nation through the Crime Victims Fund.²²⁵ Out of that \$2.3 billion, approximately \$136 million will be given to state victim compensation programs.²²⁶ While this is a generous lump sum, splitting it amongst participating states leaves each state with an extremely diluted award to provide for the enormous financial strains resulting from medical fees, lost wages, funeral expenses, etc.²²⁷

²¹⁸ Parness, Lee, & Laube, *supra* note 94, at 847.

²¹⁹ See Parness, Lee, & Laube, *supra* note 94, at 875.

²²⁰ See *Crime Victim Compensation*, RAINN, <http://www.rainn.org/articles/crime-victim-compensation> [<http://perma.cc/V8NA-VJQX>] (last visited Mar. 29, 2021).

²²¹ See *id.*

²²² *Crime Victim Compensation: An Overview*, NAT’L ASS’N OF CRIME VICTIM COMP. BDS., <http://www.nacvcb.org/index.asp?bid=14> [<http://perma.cc/955F-T8GL>] (last visited Mar. 29, 2021).

²²³ See *id.*

²²⁴ See *Justice Department Awards More than \$8.3 Million to Support California Victims of the Las Vegas Mass Shooting*, U.S. DEPT. OF JUST. (Feb. 7, 2019), <http://www.justice.gov/opa/pr/justice-department-awards-more-83-million-support-california-victims-las-vegas-mass-shooting> [<http://perma.cc/H8RX-8BHD>].

²²⁵ See *Department of Justice Awards over \$2.3 Billion in Grants to Assist Victims Nationwide*, U.S. DEPT. OF JUST. (Oct. 29, 2019), <http://www.justice.gov/opa/pr/department-justice-awards-over-23-billion-grants-assist-victims-nationwide> [<http://perma.cc/Y78J-KTX6>].

²²⁶ See *id.*

²²⁷ See Nicole Raz, *Victims of Crime Receives 4k Claims in Las Vegas Shooting*, LAS VEGAS REV. J. (Dec. 12, 2017), <http://www.reviewjournal.com/crime/shootings/victims-of-crime-receives-4k-claims-in-las-vegas-shooting/> [<http://perma.cc/2MRD-HZ9F>] (highlighting

Unfortunately, inability to finance the monetary plight of victims ultimately hurts the individual victim again. I have previously submitted invoices for reimbursement of medical treatments (which I've paid out-of-pocket) that take over a year to compensate.²²⁸ And more often than not, certain invoices go ignored without any indication of repayment.²²⁹ No explanation. Just ignored. This phenomenon is hard to reconcile, considering the Route 91 Harvest Festival mass shooting involved many state compensation funds that were actively encouraging victims to apply to and receive funds from before the deadline.²³⁰ It begs the question: if funds are not being completely disbursed and victims making claims are not receiving full reimbursement, then where does the money go? Questions of handling and budgeting oversight lead to more questions as to how victims can address these concerns.

2. No Enforcement of Rights or Remedies

Victim rights and remedy provisions enacted in state constitutions and in federal statutes relating to victim notification and recoveries are not typically enforceable.²³¹ In *People v. Superior Court of L.A. County*, the court found that no procedures existed to enforce the duty of notification to victims, nor were there any remedies for victims when a failure to notify occurred.²³² Governmental failures to secure and enforce recoveries benefiting crime victims do not prompt separate claims against the government. In California, the state

Nevada's Victims of Crime program receiving 4,013 claims and its program accepting applications from anyone attributing claims to the event despite where they live, and mentioning its fund having about \$12 million to disburse as of mid-October).

²²⁸ This statement is supported by my own personal records and correspondence with CalVCB (on file with author).

²²⁹ See *id.*

²³⁰ See, e.g., *Route 91 Harvest Festival Victims of Crime Program Oct. 1 Application Deadline Quickly Approaching*, MICHIGAN.GOV (Aug. 2, 2018), <http://www.michigan.gov/som/0,4669,7-192-29942-474370--,00.html> [<http://perma.cc/2SZV-S425>] (stating only 21% of people who purchased tickets to the Route 91 Harvest Festival in Las Vegas have applied for any kind of state fund compensation, and only seventeen applications have been received by Michigan residents when sixty Michigan residents purchased tickets); Rebekah L. Sanders, *Deadline Nears for Arizona Victims of Las Vegas Shooting to Apply for Assistance Funds*, AZ CENTRAL (Sept. 1, 2018), <http://www.azcentral.com/story/money/business/consumers/2018/09/01/deadline-soon-apply-las-vegas-shooting-funds-arizona-route-91-harvest-festival/1057982002/> [<http://perma.cc/QXG8-959K>] (noting that hundreds of Arizonans attended the Route 91 Harvest Festival, yet only 89 Arizona residents applied to the Nevada State Victims of Crime Program: "An estimated 500 to 600 Arizonans who attended the Route 91 Harvest festival haven't applied for benefits . . .").

²³¹ See Parness, Lee, & Laube, *supra* note 94 at 826, 860.

²³² *People v. Superior Court of L.A. Cnty.*, 154 Cal. App. 3d 319, 322 (Cal. Ct. App. 1984) (denying the victim's petition that a probation order should be set aside since he was not notified of a sentencing hearing since it concluded there was "no authority to afford any relief").

constitution has a section that enumerates a victim’s rights.²³³ It states that criminal activity has a “serious impact” on the citizens of California.²³⁴ The state constitution further states that the rights of victims of crime and their families in “criminal prosecutions are a subject of grave statewide concern.”²³⁵ It begs the question of whether the phrase “criminal prosecutions” should be eliminated from the state constitution, as there is a growing number of victims of crime left without the ability to criminally prosecute anyone even though they deal with the same traumatic and crippling experiences of those who have the ability to go through that process.

“As in many states, crime victims in the federal courts do not have claims when a United States officer fails to honor victims’ rights.”²³⁶ The federal statute dealing with victim compensation and assistance outlines the services it provides for victims.²³⁷ It specifically provides that a “responsible official shall provide a victim the earliest possible notice of the status of an investigation of a crime during the investigation, to the extent it is appropriate to inform the victim and to the extent that it will not interfere with the investigation.”²³⁸ On its face, the statute is self-explanatory and favorable to victims. However, a subsection of this statute lays out that no “cause of action or defense in favor of any person arising out of the failure of a responsible person to provide information as required by [the earlier subsections].”²³⁹

This makes sense, as the government would like to balance protecting victims’ rights with the limiting interference of government officials’ ability to do their jobs, which may result in findings that a victim may not agree with. As a middle ground, the government has allowed victims to file a complaint for certain violations (i.e., the right to be protected from the accused, the right to notice of any public court proceeding, the right to be treated with fairness and respect for the victim’s dignity and privacy, etc.).²⁴⁰

Nonetheless, the complaint procedure is not an easy process, nor is it generally well-known to any victims. First, the complaints must be submitted in writing to the point of contact (“POC”) of the relevant office or offices of the Department of

²³³ See CAL. CONST. art. I, § 28.

²³⁴ *Id.* § 28(a)(1).

²³⁵ *Id.*

²³⁶ Parness, Lee, & Laube, *supra* note 94, at 860.

²³⁷ See 42 U.S.C. § 10607.

²³⁸ *Id.* § 10607(c)(3)(A).

²³⁹ *Id.* § 10607(d).

²⁴⁰ See 28 C.F.R. § 45.10 (outlining the complaint process for violations of 18 U.S.C. § 3771).

Justice.²⁴¹ If that complaint creates a conflict of interest for the POC to investigate (which undoubtedly would occur most of the time since the complaint would likely be against the POC), then it is forwarded to the Department of Justice Victims' Rights Ombudsman ("VRO").²⁴² The caveat to this process is that complaints *must* be submitted to the POC within sixty days of the "victim's knowledge of a violation, but not more than one year after the actual violation."²⁴³ Additionally, the VRO has the final say on what action is taken on the complaint and this decision cannot be challenged.²⁴⁴ Thus, the threshold to submit a complaint is a high barrier as victims must somehow be *aware* of these rights, and then form a formal and timely written complaint before the decision is ultimately decided by a "neutral" ombudsman who works within the organization that the victim is formally complaining about. This complaint process hardly seems fair to victims since it gives government entities *carte blanche* in investigative procedures and essentially authorizes the potential mishandlings of investigations, which undermines a victim's basic right to an adequate and informative investigation.

B. Meaningful and Fulfilling Remedial Alternatives: Criminal Context

The criminal statutes and governmental agencies working for victims in the criminal context have a solid foundation to build upon when crafting newer solutions for this unfortunate growth of mass shooting victims. While victims' rights have been codified in our nation's statutes, victims need stronger mechanisms to ensure compensation and enforce their existing rights.

1. Regularize Private Victim Compensation Funds

Scholars suggest state legislatures should help create additional compensation funds in which private individuals are allowed to contribute.²⁴⁵ These compensation funds would supplement a completely separate fund—one that is distinct from the established state compensation funds already in place in states.²⁴⁶ Private citizens would have the option to contribute to

²⁴¹ See *id.* § 45.10(c).

²⁴² See *id.*

²⁴³ *Id.* § 45.10(e)(3).

²⁴⁴ See *id.* § 45.10(c)(7)–(8).

²⁴⁵ See Michelle Findley, *Statutory Tort Caps: What States Should Do when Available Funds Seem Inadequate*, 46 IND. L. REV. 849, 868 (2013) (suggesting solutions when states face catastrophic events when the available funds do not amount to enough compensation for victims).

²⁴⁶ See *id.*

these funds, as was the case of citizens who donated to the 9/11 victim compensation fund because they felt a sense of “patriotism” and “collective unity” in doing so.²⁴⁷ This solution addresses the problem with disbursement of funds exceeding statutory cap levels and also aligns with policy goals to keep statutory caps, all the while providing greater compensation to victims.²⁴⁸

The World Trade Center Compensation Fund was the first “large-scale use of a no-fault, non-litigation fund” used in attempt to resolve mass torts claims in the United States.²⁴⁹ The fund instituted helpful mechanisms for victims to take advantage of, like providing *pro se* counsel for victims.²⁵⁰ With that being said, no research has solidified whether or not victims that opted out of the fund and pursued litigation fared financially better than the victims who opted in.²⁵¹

2. Enforce Rights and Remedies

When victims feel slighted by procedural failures through the government process as a victim of crime, there is no relief afforded to them. While creating a cause of action against any government agent that fails to properly adhere to the enumerated victims’ rights in state constitutions or federal statutes seems extreme, the current mechanisms fall on the other end of the spectrum—miserably inferior. At a minimum, the complaint process for violations should be reworked to undo the government insulation, and instead outsource review of complaints to neutral magistrates. Further, complaint procedures should be mandatorily communicated to any and all victims involved in a criminal investigation.

V. CIVIL AND CRIMINAL REMEDY OVERLAP

A. Inability to Navigate Civil and Criminal Contexts Simultaneously and Cohesively

Immediately following a mass shooting, victims struggle to identify and navigate the uniquely separate civil and criminal remedies afforded to them. The applicable laws are outdated and

²⁴⁷ *Id.* at 868–69 (citing Janet Cooper Alexander, *Procedural Design and Terror Victim Compensation*, 53 DEPAUL L. REV. 627, 678 (2003)).

²⁴⁸ *See id.* at 869.

²⁴⁹ Mullenix, *supra* note 114, at 833 (citing Robert L. Rabin, *The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?*, 53 DEPAUL L. REV. 769, 793–96 (2003)).

²⁵⁰ *See id.* at 842.

²⁵¹ *See id.* at 863.

complex, and are typically communicated to victims in a disjointed manner that muddies the interplay between the civil and criminal contexts—or worse, not communicated to victims at all.

1. Ineffective Interdisciplinary Approach to Victims

The civil and criminal legal systems should operate cohesively to allow victims the opportunity to utilize “criminal and administrative controls and sanctions while [also] compensating individuals for their losses in a coordinated proceeding.”²⁵² However, problems naturally arise when criminal and administrative functions require crossover and fusion into spaces that are typically occupied and resolved in civil contexts. These various agencies lack integration. This lack of integration creates a bottleneck in communication between agencies and victims, which ultimately affects a victim’s ability to be adequately informed and receive their entitled compensation.²⁵³ Thus, the current interplay between civil, criminal, and administrative agencies that were all designed to help victims just serves as another source of frustration due to the agencies’ inability to convey a legal roadmap to victims. The agencies’ inability to consolidate and amalgamate such information for victims explains how overwhelming it currently is for victims to navigate and decipher the available information regarding their rights and entitled compensation.

Victims need an abundance of information, transparency, and advice when assessing their legal options.²⁵⁴ It also matters *how* this sensitive information is communicated. For the victims of the Route 91 Harvest Festival mass shooting, the administrative agency in charge, the FBI, concluded its investigation with no significant findings.²⁵⁵ On the state criminal side of the investigation, the Las Vegas police department closed their investigation in August of 2019 without finding a motive.²⁵⁶

²⁵² Weinstein, *supra* note 57, at 960.

²⁵³ *See id.*

²⁵⁴ Mullenix, *supra* note 114, at 841. Victims need information that includes:

- (1) the deadline for electing remedies, as well as relevant statutes of limitations impelling imminent decision;
- (2) the scope of the release or waiver,
- (3) potential claims, defendants, and applicable law,
- (4) eligibility for, evaluation of, and amount of the potential awards,
- (5) the jurisdiction and venue for potential litigation,
- (6) a risk assessment of potential litigation, and
- (7) the status of future claims.

Id.

²⁵⁵ *See* FBI, *Key Findings of the Behavioral Analysis Unit’s Las Vegas Review Panel (LVRP)*, U.S. DEPT. OF JUST. (Jan. 29, 2019), <http://www.hsdl.org/?view&did=820782> [<http://perma.cc/M3MS-GA5Q>].

²⁵⁶ *See id.*

As a victim, I learned of both these investigative findings after they became public. I learned from others that the public investigative reports contained triggering information, including but not limited to, the locations of where identified victims’ bodies were found, and pictures of the shooter’s arsenal. I did not receive updates regarding either investigation while they were ongoing, nor did I know what kind of information was going to be released in these reports. Victims do not deserve to be revictimized and retraumatized when agencies neglect to inform them of sensitive details pertaining to investigations surrounding the worst day in their lives—and I certainly deserved to know what type of bullet hit me before the general public did.

Criminal and administrative agency overlap also tends to alienate victims because other important details, collateral to legal issues, slip through the cracks.²⁵⁷ For example, most victims would be surprised to know that every year, National Crime Victims’ Rights Week (“NCVRW”) takes place.²⁵⁸ This year is NCVRW’s fortieth anniversary.²⁵⁹ During this week, “victim advocacy organizations, community groups and state, local and tribal agencies traditionally host rallies, candlelight vigils, and other events to raise awareness of victims’ rights and services.”²⁶⁰ Notification of information like this is crucial for victims because these are the events and communities that may be necessary to utilize once all of their legal avenues and options have been exhausted.

Victims are disparaged by the various agencies and legal mechanisms created to aid their ongoing medical issues. Camille Biros worked on mediating settlement agreements for 9/11 victims and their relatives, the Boston Marathon bombing, and the Pulse nightclub shooting.²⁶¹ She stated that, “[a]t the end of the day, these individuals don’t get anywhere near the amount of

²⁵⁷ See Weinstein, *supra* note 57, at 975.

²⁵⁸ See *Department of Justice Commemorates National Crime Victims’ Rights Week*, U.S. DEP’T. OF JUST. (Apr. 20, 2020), <http://www.justice.gov/opa/pr/departement-justice-commemorates-national-crime-victims-rights-week> [<http://perma.cc/6KH5-EJ6N>].

²⁵⁹ Office for Victims of Crime, *National Crime Victims’ Rights Week*, U.S. DEP’T. OF JUST. (May 18, 2020), <http://ovc.ojp.gov/program/national-crime-victims-rights-week/overview> [<http://perma.cc/9RE3-5W6U>].

²⁶⁰ *Department of Justice Commemorates National Crime Victims’ Rights Week*, *supra* note 258. I discovered this information in conducting research for this Article by searching the Department of Justice’s press release page rather than from any personal connection to any particular victim compensation program or governmental agency, despite both organizations having my personal contact information and the ability to send this information to victims.

²⁶¹ See David Gambacorta & Helen Ubiñas, *Shot and Forgotten*, PHILA. INQUIRER (Nov. 28, 2018, 5:00 AM), <http://www.inquirer.com/news/gun-violence-philadelphia-shooting-victims-columbine-wheelchair-jalil-frazier-ralph-brooks-20181127.html> [<http://perma.cc/Q494-E8LP>].

money they need to cover their medical expenses throughout the rest of their lives.”²⁶² Victims of mass shootings find out hospital bills are only a small fraction of the financial burden that stems from being shot.²⁶³ Despite needing a wheelchair since April 20, 1999, when he was shot eight times at Columbine High School,²⁶⁴ Richard Castaldo was denied quality of life equipment, which included a \$1,500 wheelchair cushion.²⁶⁵ The wheelchair cushion was necessary because Richard developed an ulcer on his backside.²⁶⁶ His mother and grandmother later paid for the cushion themselves.²⁶⁷

Joshua Nowlan was forced to accept money from a GoFundMe that his friends created to cover the medical expenses of his leg amputation.²⁶⁸ Nowlan was shot in the leg when he used his body to shield another woman during the Aurora, Colorado mass shooting in 2012.²⁶⁹ His leg required amputation years after the attack as a result of bullet damage complications.²⁷⁰ Some victim-survivors of mass shootings initially receive media attention and charitable donations from the public that provides for “immediate medical debt,” but most victims discover they must continue to fight for years to receive resources, guidance, and compensation for their long-term healing.

Part of a victim’s inability to not only financially, but emotionally support themselves stems from a lack of information given to victims at the outset. Because victims are initially unaware of the magnitude and implications that come with becoming a mass shooting victim-survivor, it is harder to come to terms with a reality they could not have possibly anticipated—simply because they were not instructed on how to navigate and acclimate into their new lives. Jami Amo, another Columbine victim, posed the question: “Why isn’t there a national clearinghouse that gun-violence survivors could consult to find all of the resources—state, local, and federal—that they could be entitled to, with a clear explanation of how to navigate the application processes?”²⁷¹ Even worse, when victims *are* able to navigate the web of local, state, and federal assistance programs, they discover these programs have steep backlogs and smaller caps on monetary assistance.²⁷²

²⁶² *Id.*

²⁶³ *See id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *See id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* (“Many struggle to navigate a confusing web of local, state, and federal assistance programs, which are plagued by *steep backlogs* and in some cases can award as

2. Inconsistent Terrorist Attack Designations and Its Impact in Civil and Criminal Litigation

Certain mass shootings are designated as terrorist attacks while others are not.²⁷³ These designations have different legal ramifications and implications for victims of the attack.²⁷⁴ As touched upon earlier when discussing MGM’s attempt to utilize the SAFETY Act as a bar to tort liability for the Route 91 Harvest Festival mass shooting, Homeland Security’s potential classification of the attack as an act of domestic terrorism would essentially render MGM liability free.²⁷⁵ As of the writing of this Article, Homeland Security has not classified the Route 91 Harvest Festival mass shooting as an act of domestic terrorism. While technically this is a favorable outcome for this specific set of victims in their battle for compensation, its non-classification undermines the significance of the attack and also deflects from addressing domestic terrorism’s growth in recent years.

Unfortunately, there are many conflicting and competing definitions of terrorism.²⁷⁶ A state law definition of terrorism may encompass acts by a mass shooter while the federal definition may not. For example, Nevada’s state law defines an act of terrorism as involving:

[T]he use or attempted use of sabotage, coercion or violence which is intended to: (a) cause great bodily harm or death to the general population; or (b) cause substantial destruction, contamination, or impairment of: (1) any building or infrastructure, communications, transportation, utilities or services; or (2) any natural resource of the environment.²⁷⁷

Under the Federal Criminal Code, terrorism is defined as

[Activities that involve violent . . . or life-threatening acts . . . that are a violation of the criminal laws of the United States or of any State and . . . appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation

little as \$1,500 to victims whose injuries require expensive lifelong care.”) (emphasis added).

²⁷³ See JEFFREY CONNOR & CAROL ROLLIE FLYNN, REPORT: LONE WOLF TERRORISM, GEO. U. SEC. STUDIES PROGRAM: NAT’L SEC. CRITICAL ISSUE TASK FORCE 9 (2015).

²⁷⁴ See *id.* Mass killings involving white non-Muslim and Muslim culprits have revealed a pattern: white non-Muslim culprits are designated as killers whereas Muslim culprits are designated as terrorists, which creates a legal distinction in which *killers* are prosecuted criminally outside of the counterterror process, but *terrorists* are prosecuted on both grounds. *Id.*

²⁷⁵ See *supra* Part III.A.2.

²⁷⁶ See Khaled A. Beydoun, *Lone Wolf Terrorism: Types, Stripes and Double Standards*, 112 NW. U. L. REV. 187, 193 (2018) (“This is due in part to the competing and conflicting definitions of terrorism, defined broadly by U.S. law enforcement and military, and theorized even more broadly by scholars.”).

²⁷⁷ NEV. REV. STAT. § 202.4415 (2003).

or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and . . . (C) occur primarily within the territorial jurisdiction of the United States²⁷⁸

Under the SAFETY Act, a terrorist act is a term of art that includes any unlawful act “designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.”²⁷⁹ Some scholars have defined terrorism as “terrorist attacks carried out by persons who (a) operate individually, (b) do not belong to an organized terrorist group or network, and (c) whose *modi operandi* are conceived and directed by the individual without any direct outside command or hierarchy.”²⁸⁰ However, these various state and federal definitions of “terrorism” merely describe what would constitute a “terrorist attack.” But in reality, federal law supersedes a state’s jurisdiction over these acts,²⁸¹ and federal officials cannot charge a perpetrator with a terrorism charge *unless* that person acts on behalf of the approximately sixty groups that the State Department designated as foreign terrorist organizations.²⁸² A separate terrorism charge for domestic terrorism simply does not exist.

In the United States, the law provides for charges of international terrorism.²⁸³ If an attack is classified as an international terrorist attack, the law allows for “broader surveillance, wider criminal charges, and more punitive treatment for crimes labeled as international terrorism.”²⁸⁴ Thus, the harsher penalties tend to be applied to attacks perpetrated by U.S. Muslims and designated as international attacks while attacks from white nationalists are not elevated to the same level of wrongdoing.²⁸⁵

²⁷⁸ 18 U.S.C. § 2331.

²⁷⁹ 6 C.F.R. § 25.2.

²⁸⁰ Ramón Spaaij, *The Enigma of Lone Wolf Terrorism: An Assessment*, 33 *STUD. CONFLICT & TERRORISM* 854, 856 (2010).

²⁸¹ Mike Valerio, *Las Vegas Shooting: Why Isn't it Domestic Terror?*, WUSA9 (Oct. 3, 2017), <http://www.wusa9.com/article/news/national/las-vegas-shooting-why-isnt-it-domestic-terror/65-480495186> [<http://perma.cc/5WSY-W2GX>] (“In reality, a state does not have jurisdiction over a deemed act of terrorism—the federal law supersedes all,” said Dr. Scott J. White, a former intelligence officer . . .”).

²⁸² See Greg Myre, *What Is, and Isn't, Considered Domestic Terrorism*, NPR (Oct. 2, 2017), <http://www.npr.org/2017/10/02/555170250/what-is-and-isnt-considered-domestic-terrorism> [<http://perma.cc/P8HR-X7FL>] (“A person who carries out a mass attack and survives can face a range of charges, but unless the person is linked to one of the banned groups, a federal terrorism charge won't be one of them.”).

²⁸³ See Shirin Sinnar, *Article: Separate and Unequal: The Law of “Domestic” and “International” Terrorism*, 117 *MICH. L. REV.* 1333, 1334 (2019).

²⁸⁴ *Id.*

²⁸⁵ See *id.*

To a significant degree, law enforcement polices, prosecutes, and punishes terrorism differently according to whether it is considered international or domestic in nature, even with respect to conduct by U.S. citizens and residents within the United States. The law treats international terrorism more harshly

Confusion regarding the laws of terrorism stems from the non-existence of any single federal crime called “terrorism.” Instead, the U.S. criminal code lists certain offenses that are classified as being related to terrorism, and also includes a “wider variety of offenses” as federal crimes of terrorism.²⁸⁶ Federal officials hesitate to classify white nationalist cases as terrorism “because federal terrorism charges are less available in domestic cases.”²⁸⁷ These legal divides cause inequities for the people who fall victim to these attacks.

To further illustrate the disparate treatment between international and domestic terrorism, it is important to note that federal prosecutors handle most international terrorism cases while local prosecutors are technically supposed to handle domestic terrorism cases under applicable state laws.²⁸⁸ Unfortunately, while many states have enacted terrorism laws, state prosecutions rarely use these laws.²⁸⁹ This contributes to the disconnect of the “differential conceptualization of the threat and differential enforcement” of terrorism.²⁹⁰

While the public may think that the international terrorist threat is statistically greater than those threats of domestic terrorism, that sentiment does not justify a different set of remedies for victims merely because they were attacked by a terrorist that does not fit under the international terrorist criteria. Victims are still affected the same way whether or not the classification changes. In fact, current numbers suggest that certain agencies, like the FBI, should devote more resources to fight cases of domestic

than domestic terrorism and requires less oversight of law enforcement and intelligence activities investigating it.

Id.

²⁸⁶ *Id.* at 1352.

These crimes fall into three general categories. The first category covers offenses committed with particular weapons—such as chemical, biological, and nuclear weapons or more common explosives—and tactics historically associated with terrorism, such as taking hostages or hijacking aircraft. As a result of this category of offenses, federal jurisdiction sometimes turns on the choice of weapon. In particular, an assailant who used a bomb would fall within various federal terrorism statutes, while a suspect using a gun might not.

Id. (footnotes omitted).

²⁸⁷ See *id.* at 1337; see also Ryan J. Reilly, *There’s a Good Reason Feds Don’t Call White Guys Terrorists, Says DOJ Domestic Terror Chief*, HUFFINGTON POST (Jan. 11, 2018, 9:32 AM), http://www.huffingtonpost.com/entry/white-terrorists-domestic-extremists_us_5a550158e4b003133ecceb74 [<http://perma.cc/ZYS8-TCKD>] (noting that Justice Department domestic terrorism counsel stated that federal prosecutors do not describe cases as domestic terrorism where they do not deploy terrorism charges).

²⁸⁸ See Sinnar, *supra* note 283, at 1338–39.

²⁸⁹ See Lisa Daniels, *Prosecuting Terrorism in State Court*, LAWFARE (Oct. 26, 2016, 11:33 AM), <http://www.lawfareblog.com/prosecuting-terrorism-state-court> [<http://perma.cc/VC47-XAVZ>].

²⁹⁰ Sinnar, *supra* note 283.

terrorism, and that the current structure allocating 80% of its agents to stopping threats of international terrorism is extremely lopsided.²⁹¹ More Americans have been killed in domestic terrorist attacks than “Islamic terror attacks” since September 11, 2001.²⁹²

The federal criminal code has made it difficult for government agents to bring charges against domestic terror suspects.²⁹³ As aforementioned, this is because domestic terrorism is not a federal crime.²⁹⁴ Attacks like the 2015 Emanuel AME Church shooting in Charleston, South Carolina that killed nine people and traumatized five others, or the 2018 Tree of Life Synagogue shooting in Pennsylvania that killed eleven people and left six others wounded, involve prosecutions of only criminal “hate crime” charges since no domestic terrorism statute nor charge exists.²⁹⁵

B. Solutions for Civil and Criminal Streamlining

1. Stronger Interdisciplinary Approach to Victim Remedies Incorporating Psychology

Victims are often confused about their recovery options.²⁹⁶ Victims should be able to access and visualize all their applicable recovery options in a manageable way, with the ability to instantly cross-reference between civil and criminal databases. In addition to creating websites that publicize and outline “recovery avenues,” one scholar suggested creating a handbook on crime victim rights that outlines “recovery avenues” that is *always* distributed to victims of a significant crime.²⁹⁷ The streamlined information system would significantly reduce the “threat of duplicative litigation,” while providing judges with both a “more complete picture of victims’ needs” and an opportunity to create more effective remedies for victims.²⁹⁸

An initiative attempting to solve this problem is currently making its way through our government’s legislative system.

²⁹¹ See Alexander Mallin, *Democrats Grill FBI, DHS Officials on White Supremacy Threat*, ABC NEWS (June 4, 2019), <http://abcnews.go.com/Politics/lawmakers-grill-trump-administration-officials-white-supremacy-threat/story?id=63478001> [<http://perma.cc/94UZ-BQVW>]. From 2009–2018, “far-right extremism was responsible for 73% of extremist murders, while international terrorism was responsible for 23% of terrorism deaths.” *Id.*

²⁹² *Id.*

²⁹³ See *id.*

²⁹⁴ See *id.*

²⁹⁵ See *id.*

²⁹⁶ See Parness, Lee, & Laube, *supra* note 94, at 875 (“Too often, recoveries are difficult to secure and judgments are difficult to enforce. Crime victims can also be confused about their recovery options.”).

²⁹⁷ *Id.*

²⁹⁸ Weinstein, *supra* note 57, at 977.

United States Senator Bob Casey and United States Representative Dwight Evans introduced the Resources for Victims of Gun Violence Act of 2019²⁹⁹ to address the challenges that victim-survivors, their friends, and families face in the aftermath of their tragedies, and to support them in managing their long-term needs.³⁰⁰ The Act would establish an “interagency Advisory Council to gather and disseminate information about the resources, programs and benefits that can help victims of gun violence.”³⁰¹ This interagency Advisory Council would consist of federal representatives from various agencies, in addition to victims of gun violence, and victim assistance professionals like medical professionals and social workers.³⁰²

This council would also be responsible for evaluating the medical, legal, financial, educational, workplace, housing, transportation, assistive technology, and accessibility needs of victims of gun violence, and thereafter disseminating the information about “resources, programs and benefits.”³⁰³ Their responsibility would not stop there. After the council disseminates the requisite information to victims, it would be required to submit a report about its findings to Congress—the report would have to identify “any gaps in policy that the government could address.”³⁰⁴

It is clear that the effects of gun violence are not known due to the lack of evidence-based research, which only contributes to government, medical, and legal agencies lacking requisite knowledge to aid victims.³⁰⁵ While current literature and evidence-based research suggests laws revolving around the gun violence issue would be extremely “low-yield”, “ineffective”, and “wasteful of scarce resources”,³⁰⁶ the growing community of victim-survivors

²⁹⁹ Resources for Victims of Gun Violence Act of 2019, S. 1352, 116th Cong. (2019).

³⁰⁰ See Casey, Evans Push to Support Victims of Gun Violence, U.S. CONGRESSMAN DWIGHT EVANS <http://evans.house.gov/media-center/press-releases/casey-evans-push-support-victims-gun-violence> [<http://perma.cc/DQW9-3PFQ>] (last visited Apr. 10, 2021).

³⁰¹ *Id.*

³⁰² See *id.* (“The interagency Advisory Council would be composed of federal representatives from the [Department of Health and Human Services, the Department of Justice], the Department of Education, [the Department of Housing and Urban Development, the Department of Veterans Affairs], the Social Security Administration . . .”).

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ See *The Mental Health Impact of Mass Shootings*, *supra* note 203.

³⁰⁶ James L. Knoll & George D. Annas, *Mass Shootings and Mental Illness*, AM. PSYCH. ASS’N 81, 81–82 (2016). Cf. Katie Young & Contessa Brewer, *Rise in Mass Shootings Leads to ‘rapid growth’ in Active Shooter Insurance*, CNBC (Jan. 10, 2020), <http://www.cnbc.com/2020/01/10/rise-in-mass-shootings-boosts-active-shooter-insurance.html> [<http://perma.cc/3CYV-ELDB>] (exemplifying the very real impact these shootings have, not only on a personal and emotional level, but in business and economics as insurance companies have seen an increase in underwriting for deadly weapons coverage: “[We] saw the number of policies grow by 235% in 2018 and by 270% in 2019.”).

would beg to differ and are tired of being forgotten. Government-funded research, encompassed in the Gun Violence Act, is a necessary step forward in its commitment to address the interagency problems that currently work against victims.

2. Classifying Mass Shootings as Acts of Domestic Terrorism and Codifying as a Federal Crime

Domestic terrorism should be treated the same under state and federal law to protect victims. Federal terrorism charges should be made available for domestic terrorism victims, and there should be a civil cause of action for domestic terrorist acts. The treatment of domestic terrorism on the federal level could help victims by providing greater resources than the state level may provide, enable a centralized approach to aiding victims, and also compensate in ways that a state remedy may be inadequate.³⁰⁷ Acts of lone wolf terrorism should not be an exemption from terrorism classifications. Additionally, classification of domestic terrorist attacks should not preclude an entity's liability and their ability to be sued. The argument that the percentage of mass shootings being miniscule in relation to gun violence as a whole cannot be used as a sword and shield. If this premise is true, then the legal system would not falter by expanding the available remedies to victims, allowing certain mass shootings to be designated as domestic terrorist attacks, and thereafter, creating a civil cause of action for the victims of these attacks. FBI Assistant Director for Counterterrorism, Michael McGarrity, has said he would personally "welcome Congress passing a law that makes domestic terrorism a federal crime."³⁰⁸

VI. CONCLUSION

Once the front-page headlines detailing the latest mass shooting disappear, the plight and suffering of victims does not end—it is only just beginning. These victims of trauma are long overdue for meaningful and innovative reform in both the civil and criminal legal contexts to better address the pain and suffering they undeservingly endure for the rest of their lives.

Please do not wait to act. Do not wait until it happens to yourself or a loved one, or until you feel the debilitating grief and hopelessness that mass shootings bestow upon everyone they touch. Do not wait until every new day is "tough just gettin' up."

³⁰⁷ See Sinnar, *supra* note 283, at 1338–39.

³⁰⁸ Mallin, *supra* note 291.

Risk Assessments are the Diagnosis not the Cure: How Using Algorithms as Diagnostic Tools Can Prevent the Bait-And-Switch of Unconstitutional Pretrial Practices

Yara M. Wahba*

INTRODUCTION

“In our society, liberty is the norm and detention prior to trial or without trial is the carefully limited exception.”¹

While the Supreme Court has emphasized the exceptional nature of infringements on any individual’s liberty, the reality of our criminal justice system contradicts this sentiment. Marginalized people,² whether because of race or socioeconomic status, disproportionately find themselves as the exception to this rule—the exception to laws that are intended to protect all Americans equally.³ Where liberty is the norm, it is not the norm for people of color.⁴ Where pretrial detention is the carefully limited exception, it is not the carefully limited exception for people of color.⁵ Where the presumption of innocence is a tenet to be fiercely protected, it is not fiercely protected for people of color.⁶

* J.D. Candidate, Expected May 2021, Chapman University Dale E. Fowler School of Law. To my Dad, Mom, and Ramy: no words can adequately express how grateful I am for you. You have always pushed me to pursue my dreams and encouraged me every step of the way. A special thank you to the Honorable Serena Murillo for her invaluable guidance, instruction, and support. To Jenny Carey, Professor of Law at Chapman University Dale E. Fowler School of Law, your passion for equality inspired me to tackle this challenging topic, and your faith in me was a driving force in this process. Finally, thank you to all the policy makers, legislators, and activists who work tirelessly to eradicate inequitable and unjust practices within our criminal justice system. May we be relentless in our pursuit of justice.

¹ United States v. Salerno, 481 U.S. 739, 755 (1987).

² Throughout this Article, marginalization refers to racial identification and socioeconomic status—often times race and socioeconomic status interplay. This Article is not generalizing that all people of color are of low socioeconomic status or that all people of low socioeconomic status are people of color. However, U.S. history and the laws set in place because of that history make it difficult to address one without the other.

³ See *S.B. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018)*, 132 HARV. L. REV. 2098, 2107 (2019).

⁴ *Id.*

⁵ *Id.*

⁶ These sentiments describe overall trends in the criminal justice system, with the understanding that there will always be outliers. See *S.B. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018)*, *supra* note 3 at 2098; see also Bryce Covert, *A Bail Reform Tool Intended to*

In *United States v. Salerno*, quoted above, the Supreme Court held that in certain situations, the Government's regulatory interest in community safety outweighs an individual's interest in liberty.⁷ For this reason, the Court found the Bail Reform Act of 1984⁸ facially valid and not a violation of a defendant's constitutional rights.⁹ It did not infringe upon the carefully limited exception the Court delineated in *Salerno*.¹⁰ But while this Act and others like it are not facially invalid and are—in theory—designed to protect all people equally, in practice these laws do not perform as they are intended.¹¹ As for the reality of the cash bail system, indigent individuals' liberties are not protected at all costs and detention is not the carefully limited exception. In fact, the opposite is true: detention is the norm, and liberty is the carefully limited exception.

In an effort to remedy this harsh reality and even the playing field regarding enforcement of these laws, bail reform has increasingly shifted toward pretrial risk assessments—the tool designed to “replace judicial instincts with validated algorithms and . . . reserve detention for high-risk defendants.”¹² Modern criminal justice reform literature discusses at length the propriety and impropriety of risk assessments, but there is a gap in the literature as to a solution that combines the ideas and concerns of both critics and advocates.¹³

Part I of this Article surveys the history of bail, which dates back to Anglo-Saxon England with the use of “bots” to pay

Curb Mass Incarceration has only Replicated Biases in the Criminal Justice System, INTERCEPT (July 12, 2020, 5:00 AM), <http://theintercept.com/2020/07/12/risk-assessment-tools-bail-reform/> [<http://perma.cc/RQ4Q-52VE>].

⁷ *United States v. Salerno*, 481 U.S. 739, 751–52 (1987).

⁸ The Bail Reform Act of 1984 mandated “pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court . . . unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.” The Act further provides that if, after a hearing, “the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person (as required) and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.” The Act creates a rebuttable presumption toward confinement when the person has committed certain delineated offenses, such as crimes of violence or serious drug crimes. TIMOTHY R. SCHNACKE ET AL., PRETRIAL JUSTICE INSTITUTE, *THE HISTORY OF BAIL AND PRETRIAL RELEASE 17–18* (Sept. 24, 2010), http://b.3cdn.net/crjustice/2b990da76de40361b6_rzm6ii4zp.pdf [<http://perma.cc/K3B2-7AKJ>].

⁹ *Salerno*, 481 U.S. at 755.

¹⁰ *Id.*

¹¹ See *S.B. 10, 2017–2018 Leg., Reg. Sess. (Cal. 2018)*, *supra* note 3 at 2098; see also Covert, *supra* note 6.

¹² Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1125 (2018).

¹³ Critics of risk assessments propose complete abandonment of the tool, while advocates support its use. The literature is underdeveloped with solutions that meaningfully combine the efforts and concerns of both sides.

reparations to victims.¹⁴ With the Norman Conquest of England, the system shifted its focus away from victims toward pretrial detention and punishment for the offender.¹⁵ To prevent the unchecked discretion sheriffs and judges exercised over pretrial decisions, the British wrote a prohibition against excessive bail into the English Bill of Rights.¹⁶ Colonial American States then penned this same language into their state constitutions.¹⁷ However, with the emergence of bail bondsmen, bail in the U.S. morphed into an industry that functions more as a corporate machine than a public service.¹⁸

Part II of this Article addresses the problems caused by cash bail, including the large number of individuals—more than 550,000 at last count—in jail awaiting trial or sentencing, notwithstanding the presumption of ‘innocent until proven guilty’.¹⁹ Many defendants who cannot post bond face only minor charges and spend more time behind bars during the pretrial phase, where they “enjoy” the presumption of innocence, than they ever would if convicted.²⁰

Part III discusses modern efforts at bail reform, specifically SB 10—California’s recent proposal. SB 10 was a product of the Chief Justice of California’s charge for reevaluation of California’s current bail system.²¹ Chief Justice Cantil-Sakauye tasked a working group of diverse judges with researching and reporting on the current cash bail system.²² This bill acts as a model of how risk assessments can be used to release all low-risk offenders who do not present a threat to public safety and detain high risk offenders who do. Risk assessments are a tool used to enhance judicial discretion, not replace it.²³

Due to the difficulty in implementing reform that resolves problems and the lack of a workable solution, Part IV of this Article evaluates the two main schools of thought on bail reform: advocates and critics of risk assessments. Those who advocate for risk assessments urge it is prudent to replace human subjectivity with a

¹⁴ See *infra* Part I.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLY INITIATIVE (Mar. 24, 2020), <http://www.prisonpolicy.org/reports/pie2020.html> [<http://perma.cc/EZ6G-U6KU>].

²⁰ Cynthia E. Jones, “Give Us Free”: Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919, 935–36 (2013).

²¹ Bail Reform Act of 2018, S.B. 10, 2019-2020 Reg. Sess. (Cal. 2018) (codified as law in Chapter 244 on August 28, 2018); *State of the Judiciary March 2016*, CAL. COURTS (Mar. 8, 2016, 4:00 PM), <http://www.courts.ca.gov/34477.htm> [<http://perma.cc/BDE4-6LN6>].

²² *State of the Judiciary March 2016*, *supra* note 21.

²³ *Id.*

consistent algorithm,²⁴ while those who criticize these assessments argue that by using racially entrenched data, risk assessments further perpetuate racially discriminatory practices.²⁵ Champions of risk assessments have valid concerns about the efficacy and constitutionality of the cash bail system, while critics of risk assessments have valid concerns about the efficacy and constitutionality of these proposed algorithms.

Often with reform, the lack of a perfect solution inhibits change. Part V of this Article proposes a comprehensive solution by taking the best arguments from both sides of the risk assessment aisle and compiles them into a three-fold working solution that recognizes the value of risk assessments while discouraging its potential for discriminatory effects.²⁶ This three-part solution is to be implemented as one cohesive operation—each component depends on the other functioning properly.

First, risk assessments should be used diagnostically prior to arraignment to direct a defendant's next step in the pretrial release process, ultimately releasing defendants charged with misdemeanors assessed as "low risk" within a matter of hours after their arrest. Second, the agency that administers the risk assessments should be a Pretrial Assessment Services Agency that is a separate, independent branch under the umbrella of the court, not the probation department. Finally, to encourage risk assessments as an enhancement rather than a replacement to judicial discretion, judges must be trained on how to recognize bias both in the courtroom and in the data.²⁷ Judges should be required to make tentative rulings on the record given all the information about a defendant on paper, before ever confronting the defendant. A judge wishing to change the tentative ruling must state her reasons for doing so on the record at the bail hearing. Additionally, there must be an effort to diversify the bench itself. If judges are to retain their discretion, it is imperative they recognize how their decisions may be disparately impacting people of color and perpetuating marginalization.

²⁴ See Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 317 (2018).

²⁵ Vienna Thompkins, *What Are Risk Assessments—and How Do They Advance Criminal Justice Reform?*, BRENNAN CTR. FOR JUST. (Aug. 23, 2018), <http://www.brennancenter.org/our-work/analysis-opinion/what-are-risk-assessments-and-how-do-they-advance-criminal-justice-reform> [<http://perma.cc/GYY2-PYDF>].

²⁶ See *infra* Part V.

²⁷ Biased data refers to data that may not be probative of a person's flight risk, either because they are part of a demographic more likely to be accused of crimes, and in turn more likely to be arrested, and thus, more likely to receive an inflated assessment of risk.

I. HISTORY OF BAIL

“Bail emerged to solve a problem we still grapple with today—balancing the general right of defendants to pre-trial freedom with the need of society to protect against flight and ensure punishment.”²⁸ The concept of bail has its origins in Anglo-Saxon England. Criminal wrongs were settled through “bots,” which were amends or reparations paid to the victim or person wronged.²⁹ Crimes were private affairs and were not prosecuted in the name of the state as they are today.³⁰ Wrongs were righted with money, not imprisonment.³¹ However, in a select number of cases, persons considered dangerous or a threat to the public were mutilated or executed.³²

Anglo-Saxons had two primary motivations: securing public safety and ensuring the accused did not escape the consequences of their actions.³³ “Thus, a system was created in which the defendant was required to find a surety who would provide a pledge to guarantee both the appearance of the accused in court and payment of the bot upon conviction.”³⁴ That pledge was quantified to equal the amount of the penalty.³⁵ This was called “bail.”³⁶

This bail system ensured that if the “accused were to flee, the responsible surety would pay the entire amount to the private accuser, and the matter was done.”³⁷

Since the amount of the pledge and the possible penalty were identical, the effect of a successful escape would have been a default judgment for the amount of the bot. To the extent the accused left behind sufficient property to pay the bot, he would have had no incentive for flight. To the extent the surety bore the financial responsibility for the payment, he had every incentive to ensure the appearance of the accused.³⁸

Perhaps “[t]he Anglo-Saxon bail process was . . . the last entirely rational application of bail.”³⁹

²⁸ JOHN-MICHAEL SEIBLER & JASON SNEAD, THE HISTORY OF CASH BAIL, HERITAGE FOUNDATION 6, 8 (2017).

²⁹ SCHNACKE ET AL., *supra* note 8, at 1.

³⁰ *Id.*

³¹ *See id.*

³² *Id.* at 1–2.

³³ *See id.* at 2.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ June Carbone, *Seeing Through the Emperor’s New Clothes: Rediscovery of Basic Principles in the Administration of Bail*, 34 SYRACUSE L. REV. 517, 520 (1983).

³⁹ *Id.*

Beginning in 1066 with the Norman Conquest of England, the bail system shifted away from reparations and toward confinement and corporal punishment.⁴⁰ Executions and mutilations were phased out, but corporal punishment escalated.⁴¹ The possibility of corporal punishment heightened the criminal's desire to flee.⁴² With the formation of juries,⁴³ wrongs became less of a private affair and more of a criminal process that involved more than just the oppressed and their oppressor.⁴⁴ Criminals were held in confinement by the shire's reeve, equivalent to a county sheriff, and magistrates travelled from shire to shire making determinations about who would be confined and who would be released.⁴⁵ Sheriffs were unchecked in their pretrial detention decisions and judges unchecked in their bail determinations.⁴⁶ Abuse and corruption were rampant.⁴⁷

In response to this widespread abuse, Parliament passed the Statute of Westminster, which took a different approach to bail than the Anglo-Saxons but still rearticulated the underlying notion "that the bail process must mirror the outcome of the trial."⁴⁸ The Statute established three criteria that governed a bail decision: (1) the nature of the offense; (2) the probability of conviction; and (3) the criminal history of the accused.⁴⁹ "[T]his standard governed English bail bond determinations for the next five centuries," but not without continued abuse.⁵⁰ Judges set bail extremely high to place additional obstacles in the way of a defendant's release.⁵¹ This abuse eventually led to the prohibition against "excessive bail" in the English Bill of Rights of 1689—"a phrase similar to that found in the Eighth Amendment to the U.S. Constitution."⁵²

In 1791, the Framers translated this principle into the Eighth Amendment of the U.S. Constitution, which guaranteed a right to

⁴⁰ See SCHNACKE ET AL., *supra* note 8, at 2.

⁴¹ *Id.*

⁴² *Id.*

⁴³ "The exact time of the introduction of the jury trial into England is a question much discussed by historians, some of them contending it was developed from laws brought over by William the Conqueror, while others point to . . . its existence . . . among the Anglo-Saxons prior to the Norman Conquest." Robert von Moschzisker, *Historic Origin of Trial by Jury*, 70 U. PA. L. REV. & AM. L. REG. 1, 2 (1921).

⁴⁴ See *id.* at 4.

⁴⁵ SCHNACKE ET AL., *supra* note 8, at 3.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 4.

⁵² *Id.*

be free of excessive bail, not a right to bail itself.⁵³ But language from the Northwest Ordinance of 1787 guaranteeing a right to bail itself made its way into most state constitutions by the mid-19th century. Section 14, Article 2 stated, “All persons shall . . . be bailable by sufficient sureties, except for capital offenses, where proof is evident, or presumption great.”⁵⁴ State constitutions interpreted this language as making “risk of flight the only legitimate factor . . . in denying bail in non-capital cases.”⁵⁵ Thus, any sort of “infringement on the presumption of innocence was justified on the grounds” that the accused was a flight risk.⁵⁶

The Supreme Court affirmed this practice in *Stack v. Boyle*.⁵⁷ The Court proclaimed that “[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”⁵⁸ In the same vein, “[s]ince the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant” at trial.⁵⁹

Laws regarding bail seek to accommodate two primary concerns: the presumption of innocence and the risk of flight. The former must be protected, and the latter must be protected against. However, a shift occurred in the 20th century. “As the nation grew and urbanized,” the bail bond system morphed into a political and lucrative for-profit industry.⁶⁰ The U.S. is only one of two countries that allows for-profit bail bonding (the Philippines is the other).⁶¹ Beginning in the mid-20th century, independent commercial bail companies and bail bond

⁵³ While some argue that the right to bail is inherent in the Eighth Amendment’s protection against non-excessive bail, the Supreme Court has never explicitly held that the Constitution affords a right to bail itself. See Donald P. Lay & Jill De La Hunt, *The Bail Reform Act of 1984: A Discussion*, 11 WM. MITCHELL L. REV. 929, 945 (1985). In fact, in *United States v. Salerno*, the Court held that the Eighth Amendment does not create a right to bail. 481 U.S. 739, 755 (1987). See also *Thirty-Third Annual Review of Criminal Procedure, Bail*, 33 GEO. L.J. ANN. REV. CRIM. PROC. 291, 291 (2004).

⁵⁴ *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio*, OUR DOCUMENTS, http://www.ourdocuments.gov/document_data/document_transcripts/document_008_transcript.html [<http://perma.cc/M5QX-9AVS>]; Kurt X. Metzmeier, *Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations*, 8 PACE INT’L L. REV. 399, 405 (1996).

⁵⁵ Metzmeier, *supra* note 54, at 406.

⁵⁶ See *id.*

⁵⁷ *Stack v. Boyle*, 342 U.S. 1, 8 (1951).

⁵⁸ *Id.* at 4.

⁵⁹ *Id.* at 5.

⁶⁰ Metzmeier, *supra* note 54, at 406.

⁶¹ Louis Jacobson, *Are U.S., Philippines the Only Two Countries with Money Bail?*, POLITIFACT (Oct. 9, 2018), <http://www.politifact.com/factchecks/2018/oct/09/gavin-newsom/are-us-philippines-only-two-countries-money-bail/> [<http://perma.cc/T84F-BMJV>]; see also PRETRIAL DETENTION REFORM WORKGROUP, PRETRIAL DETENTION REFORM: RECOMMENDATIONS TO THE CHIEF JUSTICE 33 (2017).

associations began to industrialize and institutionalize the bail system.⁶² Bail bondsmen, unencumbered by any legal restriction, “stalked the corridors of city police courts and county houses” to arbitrarily set bail on a defendant-by-defendant basis.⁶³ In many states, particularly in the South, this practice detrimentally affected African Americans because of their lower socio-economic status, and became just one building block of their systemic disenfranchisement.⁶⁴ Having no true understanding of “risk,” bail bondsman relied on personal judgment and prejudice to make these determinations.⁶⁵ “[W]ealthy and politically connected defendants were released, while the poor” were not.⁶⁶ Those who fell prey to the commercializing tactics of the industry often spent as much time in jail awaiting trial as the time they would likely have served if actually convicted.⁶⁷

The presumption of innocence that was once so highly valued increasingly became overshadowed by the corporate machine that is the American cash bail system. Currently, about seventy-four percent of American inmates have not been convicted of a crime.⁶⁸ Many of these detainees present no flight risk or risk to public safety if released.⁶⁹ So why are these defendants still locked up? As has been true for decades, their financial and socioeconomic conditions do not afford them an ability to pay the money necessary to post bond.⁷⁰ “If they could pay their bail or bail bondsman’s fee, they could walk out the front door and go home.”⁷¹

II. PROBLEMS WITH THE CASH BAIL SYSTEM

Pretrial detention interrupts a defendant’s life in ways that have drastic, lasting impacts. For defendants who pose a risk to the safety of their community, this interruption can be justified. But for defendants who are shackled to a jail cell because of an inability to pay, and not because they present a risk to the community, this interruption cannot be justified. Ability to post

⁶² PRETRIAL DETENTION REFORM WORKGROUP, *supra* note 61.

⁶³ Metzmeier, *supra* note 54, at 407.

⁶⁴ *Id.* at 406–07.

⁶⁵ *Id.* at 407.

⁶⁶ *Id.* at 406.

⁶⁷ *Id.*

⁶⁸ Wendy Sawyer & Peter Wagner, *supra* note 19.

⁶⁹ See PRETRIAL DETENTION REFORM: RECOMMENDATIONS TO THE CHIEF JUSTICE, *supra* note 61, at 69.

⁷⁰ See, e.g., SUPERIOR CT. OF CAL. CNTY. OF ORANGE, 2020 UNIFORM BAIL SCHEDULE (FELONY AND MISDEMEANOR), at 1 (2020); SUPERIOR CT. OF CAL. CNTY. OF L.A., 2020 BAIL SCHEDULE FOR INFRACTIONS AND MISDEMEANORS, at 1 (2020).

⁷¹ *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, *supra* note 12, at 1127.

bond is a socioeconomic issue that directly correlates with race.⁷² Bail determinations are not color-blind.⁷³ The current cash bail system uses a defendant's financial situation, rather than risk of flight, to determine appropriateness of detention.⁷⁴

Uprooting a person from their daily routine can destroy their employment and housing stability, leave children parentless, and instigate and perpetuate idleness.⁷⁵ Seventy-five percent of pretrial detainees have been charged with minor, non-violent crimes such as drug offenses,⁷⁶ yet the impact of pretrial detention is anything but minor. Just as punishment should be proportional to the harm committed, so should detention prior to trial. But what our current cash bail system does is anything but proportional.⁷⁷

Not only does pretrial detention disrupt the flow of a defendant's life, but prolonged periods of pretrial detention actually increase the defendant's likelihood of committing another crime.⁷⁸ Even if a defendant is low-risk, when held two to three days in detention, that person is almost forty percent more likely to commit new crimes than a similarly situated defendant who was held no longer than twenty-four hours.⁷⁹ As the number of days in detention increases, so does the likelihood of the defendant committing a new crime.⁸⁰

Pretrial detention can also affect the outcome of a defendant's case.⁸¹ Extended periods of detention effectively force defendants into pleading guilty at an early stage in the

⁷² See Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST. 8 (May 2018), <http://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [<http://perma.cc/B7XQ-55AF>] ("A 2013 review of 50 years of studies on racial disparities in bail practices found that black people are subject to pretrial detention more frequently, and have bail set at higher amounts, than white people who have similar criminal histories and are facing similar charges. Studies documented this disparity in state and federal cases as well as juvenile justice proceedings, and in all regions of the country.")

⁷³ See Jones, *supra* note 20, at 938–42.

⁷⁴ See *id.* at 921.

⁷⁵ See PRETRIAL DETENTION REFORM: RECOMMENDATIONS TO THE CHIEF JUSTICE, *supra* note 61, at 13.

⁷⁶ Jones, *supra* note 20, at 935.

⁷⁷ See, e.g., SUPERIOR CT. OF CAL. CNTY. OF ORANGE, 2020 UNIFORM BAIL SCHEDULE (FELONY AND MISDEMEANOR), *supra* note 70, at 1; SUPERIOR CT. OF CAL. CNTY. OF L.A., 2020 BAIL SCHEDULE FOR INFRACTIONS AND MISDEMEANORS, *supra* note 70, at 1.

⁷⁸ Christopher T. Lowenkamp et al., *The Hidden Costs of Pretrial Detention*, LJAF 3 (Nov. 2013), http://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf [<http://perma.cc/J6JV-ZK2U>].

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, VERA INST. OF JUST. 2–3 (April 2019), <http://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf> [<http://perma.cc/D2BF-RC8Y>].

proceedings when they otherwise may not have in order to “secure their release from custody.”⁸² Many of these defendants, especially first-time offenders, will do whatever it takes to get out of jail while awaiting trial.⁸³

Bail is not only problematic on a micro level, but also on a macro level, revealing a larger broken criminal justice system. The multitude of people subject to pretrial confinement exacerbates the national crisis of jail overcrowding.⁸⁴ Six out of ten people in jail are awaiting trial.⁸⁵ As such, if we wish to remedy the problem of mass incarceration, reforming the bail system is a necessary predicate. Our cash bail system is not only disrupting individuals’ personal lives—it is perpetuating a larger system of injustice.

III. SB 10 AS A SPRINGBOARD FOR BAIL REFORM

As evidenced by its history, the American bail system is riddled with injustices which persist to this day. Legislators and community activists continue to seek reform. “In 2016, state lawmakers in 44 states and the District of Columbia enacted 118 new laws regarding pretrial detention and release.”⁸⁶ In an effort to decrease the historical disparities endemic in the pretrial process, California advanced SB 10, a bill aiming to address bail reform. This bill would have effectively eliminated cash bail and relied instead on risk assessments for pretrial determinations. SB 10 models a bail system that reflects the principle that cash bail is inherently flawed, that risk assessments are beneficial when utilized in a limited fashion, and that judges cannot be completely removed from the process.

A. History of SB 10

During her State of the Judiciary address in 2016, Chief Justice Tani Cantil-Sakauye called for a review of California’s current cash bail system:⁸⁷

I think it’s time for us to really ask the question whether or not bail effectively serves its purpose, or does it in fact penalize the poor. Bail—does it really ensure public safety? Does it in fact assure

⁸² PRETRIAL DETENTION REFORM: RECOMMENDATIONS TO THE CHIEF JUSTICE, *supra* note 61, at 14.

⁸³ *See id.*

⁸⁴ SCHNACKE ET AL., *supra* note 8, at 10.

⁸⁵ *Why are People in Jail Before Trial?*, PRETRIAL JUST. INST., <https://www.pretrial.org/get-involved/learn-more/why-we-need-pretrial-reform/> (last visited Nov. 27, 2020) [<http://perma.cc/7877-SMEX>].

⁸⁶ PRETRIAL DETENTION REFORM WORKGROUP, *supra* note 61, at 18.

⁸⁷ *State of the Judiciary March 2016*, *supra* note 21.

people's appearance in court, or would a more effective risk assessment tool be as effective for some cases?⁸⁸

Motivated by these concerns, Chief Justice Cantil-Sakauye established a Pretrial Detention Reform Workgroup in October of 2016.⁸⁹ This Reform Workgroup consisted of a diverse task force⁹⁰ of nine judges and one court executive officer from across the state who “studied the bail system, listened to all interested stakeholders, discussed the issues and unanimously reached these recommendations in the report.”⁹¹ After the task force spent a year critically studying these issues, “it became clear that the current system of money bail fails to adequately address public safety and the profound negative impacts on those individuals who should not be detained before trial.”⁹² The recommendations of this task force eventually became part of SB 10, introduced by Senator Robert Hertzberg on December 05, 2016.⁹³

After several amendments on the floor of the Assembly and the Senate, SB 10 was signed into law by Governor Brown on August 28, 2018.⁹⁴ This law was to take effect on October 01, 2019.⁹⁵ However, the day after it was signed, Thomas W. Hiltachk, backed by the Californians Against the Reckless Bail Scheme, introduced and filed veto referendum 1856 to overturn this law.⁹⁶ The bail bond industry was able to garner opposition

⁸⁸ *Id.*

⁸⁹ PRETRIAL DETENTION REFORM WORKGROUP, *supra* note 61, at 1.

⁹⁰ This group is diverse in many senses of the word, including their education, background, and ethnicity.

⁹¹ Merrill Balassone, Jud. Council Pub. Affs., *Chief Justice Workgroup: Money Bail is “Unsafe and Unfair,”* CAL. CTS. NEWSROOM (Oct. 24, 2017), <https://newsroom.courts.ca.gov/news/chief-justice-workgroup-money-bail-is-unsafe-and-unfair> [<http://perma.cc/HS3B-U2B6>].

⁹² *Id.*

⁹³ The Pretrial Detention Reform Workgroup's ten recommendations were: (1) implement a robust risk-based pretrial assessment and supervision system to replace the current money bail system, (2) expand the use of risk-based preventive detention, (3) establish pretrial services in every county, (4) use a validated pretrial risk assessment, (5) make early release and detention decisions, (6) integrate victim rights into the system, (7) apply pretrial procedures to violations of community supervision, (8) provide adequate funding and resources, (9) deliver consistent and comprehensive education, and (10) adopt a new framework of legislation and rules of court to implement these recommendations. *Id.*

⁹⁴ *Governor Signs SB 10, Eliminating Money Bail in California*, SENATE MAJORITY LEADER SENATOR ROBERT HERTZBERG (Aug. 28, 2018), <https://sd18.senate.ca.gov/news/8282018-governor-signs-sb-10-eliminating-money-bail-california> [<http://perma.cc/5V6L-TBJX>].

⁹⁵ See Michael McGough, *The Fate of California's Cash Bail Industry will Now Be Decided on the 2020 Ballot*, SACRAMENTO BEE (Jan. 17, 2019, 1:04 PM), <https://www.sacbee.com/news/california/article224682595.html> [<http://perma.cc/5DK4-3VMQ>].

⁹⁶ See *id.*; see also *California Proposition 25, Replace Cash Bail with Risk Assessments Referendum (2020)*, BALLOTEDIA https://ballotpedia.org/California_Proposition_25_Replace_Cash_Bail_with_Risk_Assess

to this bill by labeling its proposed reforms as a system that would jeopardize the safety of the community and implement a discriminatory risk assessment system—concerns that are widely held by critics of risk assessments in general.⁹⁷ Claiming that SB 10 would single-handedly decimate a \$2-billion nationwide industry by abolishing cash bail in California, the bail industry did everything it could to halt its implementation.⁹⁸ For SB 10's opponents to successfully take it out of the hands of the legislature, they needed to collect five percent of the total votes cast for Governor Brown in the 2014 general election, which totaled 365,880 signatures.⁹⁹ The coalition succeeded, gathering far more signatures than necessary.¹⁰⁰ By November 20, 2018, the coalition had collected more than 575,000 signatures.¹⁰¹ After the signatures were verified, the Secretary of State certified the initiative on January 16, 2019.¹⁰² In less than three months, SB 10's opponents had snatched it from the hands of the legislature that had toiled over it for years, and placed it instead into the hands of voters for the 2020 general election in the form of Proposition 25.¹⁰³

Just as private interest groups were able to fund a veto referendum to secure Proposition 25 a spot on the November ballot, they further employed their wealth and influence to ensure Proposition 25 did not pass, an effort aided by divisions among pro-reform advocates.¹⁰⁴ A “yes” vote on Proposition 25 would have upheld the contested legislation and effectively abolished cash bail. A “no” vote would repeal the legislation and

ments_Referendum_(2020) [http://perma.cc/27E6-C9DC] (last visited Feb. 14, 2021).

⁹⁷ See e.g., *California Proposition 25, Replace Cash Bail with Risk Assessments Referendum (2020)*, *supra* note 96; BlackLivesMatter–LA (@BLMLA) Twitter, (Aug. 18, 2018, 4:37 PM), <https://twitter.com/blmla/status/1030961861234122752?lang=en> [http://perma.cc/8CSS-78BA].

⁹⁸ 2020 California Ballot Propositions, CAL. RENTAL ASS'N <https://www.naylornetwork.com/ria-nwl/articles/index-v3.asp?aid=570461&issueID=65741> [http://perma.cc/NGB2-NW5J] (noting there are over 3,000 registered bail agents in California alone).

⁹⁹ McGough, *supra* note 96.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *California Proposition 25, Replace Cash Bail with Risk Assessments Referendum (2020)*, *supra* note 96.

¹⁰³ See *id.*

¹⁰⁴ See Matt Brannon, *Props 20 and 25 Failed. What Does That Tell Us About Criminal Justice Reform in California?*, RECORD SEARCHLIGHT (Nov. 5, 2020, 3:36 PM), <https://www.redding.com/story/news/local/2020/11/05/california-prop-20-25-criminal-justice-reform-shasta-county-jail/6180378002/> [http://perma.cc/ZHA5-ST88]; Patrick McGreevy, *Prop. 25, Which Would Have Abolished California's Cash Bail System, is Rejected by Voters*, L.A. TIMES (Nov. 3, 2020, 8:49 PM), <https://www.latimes.com/california/story/2020-11-03/2020-california-election-prop-25-results> [http://perma.cc/Y7TX-J4TP].

maintain the current cash bail system.¹⁰⁵ On November 3rd, 2020, during one of the most contentious election years, California voters voted to repeal SB 10.¹⁰⁶ Although 43.59% of voters voted to uphold SB 10, 56.41% voted to strike it down.¹⁰⁷

There are two main reasons the proposition did not pass: opposition by bail coalition groups¹⁰⁸ and opposition by progressive activist groups.¹⁰⁹ Unsurprisingly, bail coalitions did not want their industry and livelihood to collapse. Perhaps more surprisingly, progressive activist groups were fragmented in their support of SB 10, with some believing the proposed alternative to cash bail would actually further racial discrimination within the criminal justice system.¹¹⁰ Because Proposition 25 failed, California finds itself back at square one in regard to bail reform. Now, more than ever, a meaningful solution is required, one that anticipates the criticisms and opposition the Proposition encountered that ultimately led to its demise.

B. What the Bill Proposed

SB 10 sought to condition a defendant's eligibility for release on their *risk* rather than their *charge*.¹¹¹ The goal was to achieve a "just and fair pretrial release and detention system [that] provides due process, recognizes the presumption of innocence, and advances the government's fundamental role in protecting public safety."¹¹² The current bail system does not treat pretrial detention as a "carefully limited exception" to the presumption of innocence across all racial groups alike. SB 10 aimed for counties to impose the least-restrictive nonmonetary condition (or combination of conditions) that would have reasonably assured public safety and the suspect's return to court.¹¹³

¹⁰⁵ *California Proposition 25, Replace Cash Bail with Risk Assessments Referendum (2020)*, *supra* note 96.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See 2020 California Ballot Propositions, CAL. RENTAL ASS'N, <https://www.naylornetwork.com/ria-nwl/articles/index-v3.asp?aid=570461&issueID=65741> [<http://perma.cc/GH4R-FXSR>] (last visited Jan. 2, 2021).

¹⁰⁹ Marisa Lagos, *Proposition 25 Would End Cash Bail. So Why Are Some Progressive Groups Against It?*, KQED (Oct. 7, 2020), <https://www.kqed.org/news/11841209/proposition-25-would-end-cash-bail-so-why-are-some-progressive-groups-against-it> [<http://perma.cc/X7RV-32TS>] (last visited Jan. 2, 2021).

¹¹⁰ See Anabel Munoz, *California Prop. 25 Explained: Voters to Decide Whether to End State's Cash-Bail System*, ABC (Oct. 30, 2020), <https://abc7.com/prop-25-cash-bail-proposition-california/7482465/> [<http://perma.cc/M4UY-8CYG>] (last visited Jan. 2, 2021).

¹¹¹ See S.B. 10, 2019–2020 Reg. Sess. (Cal. 2018) (codified as law in Chapter 244 on August 28, 2018).

¹¹² PRETRIAL DETENTION REFORM WORKGROUP, *supra* note 52.

¹¹³ See S.B. 10, 2019–2020 Reg. Sess. (Cal. 2018) (codified as law in Chapter 244 on August 28, 2018).

The law contemplates bail through four pretrial stages: (1) book and release, (2) pre-arraignment review, (3) arraignment hearing, and (4) preventive detention hearing.¹¹⁴

1. Book and Release

The law attempted to effectuate its purpose of safely releasing as many defendants as possible in part by providing the opportunity for most misdemeanants to be released within twelve hours of booking.¹¹⁵ A person arrested or detained for a misdemeanor would be released by the booking agency within twelve hours of booking, unless any of the ten enumerated exceptions applied.¹¹⁶ If one of these exceptions applied, then the law deemed the suspect ineligible for immediate¹¹⁷ book and release and mandated that he or she be held until pre-arraignment review.¹¹⁸ At this stage of detention, risk assessments were not implemented. Instead, arrestees were separated based upon set criteria—the ten exceptions. If an arrestee was charged with a misdemeanor and one of the ten exceptions did not apply, they would be released. If charged with a felony, the arrestee was ineligible for immediate release and had to undergo pre-arraignment review.

2. Pre-Arraignment Review

The next stage was pre-arraignment review, which applied to any rollover misdemeanants from *book and release* who were ineligible for immediate release, and to most people charged with felonies.¹¹⁹ These two categories of people were to be assessed by Pretrial Assessment Services (“PAS”) within twenty-four hours of booking.¹²⁰ As defined by the bill:

¹¹⁴ *See id.*

¹¹⁵ *See id.*

¹¹⁶ *See id.* The statute carves out the following exceptions from the automatic release provisions: (1) Any offense found in Cal. Penal Code section 290; (2) the suspect is charged with a domestic violence crime such as 273.4, 243(e)(1), and certain violations of domestic violence restraining order like 273.5 or stalking; (3) the suspect is charged with their third DUI at a BAC of .20 or higher; (4) the suspect has been arrested for a restraining order violation within the last five years; (5) the suspect has three or more prior warrants for “failure to appear” within the past 12 months; (6) the suspect is pending trial or sentencing on a misdemeanor or a felony; (7) the suspect is on formal probation or post-conviction supervision; (8) the suspect has intimidated, dissuaded, or threatened retaliation against a witness or victim of the current crime; (9) the suspect has violated a condition of pretrial release within the past five years; or (10) the person has a serious or violent felony prior within the last five years. *Id.*

¹¹⁷ *See* S.B. 10, 2019–2020 Reg. Sess. (Cal. 2018) (codified as law in Chapter 244 on August 28, 2018) (the term “immediate” in this context means within 12 hours).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

“Pretrial Assessment Services” means an entity, division, or program that is assigned the responsibility . . . to assess the risk level of persons charged with the commission of a crime, report the results of the risk determination to the court, and make recommendations for conditions of release of individuals pending adjudication of their criminal case, and as directed under statute or rule of court, implement risk-based determinations regarding release and detention.¹²¹

PAS would then use the suspect’s information to conduct a risk assessment based on a validated tool¹²² which would assign the suspect a score, and that would categorize them as low risk, medium risk, or high risk based on that score.¹²³ It is at this stage of review that the risk assessment tool would be used “diagnostically.” PAS would input the arrestee’s data into the tool, and the algorithm will then “diagnose” the arrestee’s risk and *direct* the next step.¹²⁴

For suspects deemed “high risk,” their next step would be to await arraignment, where a judge could review their detention status because they could not, by law, be released by Pretrial Services.¹²⁵ For suspects whom the algorithm deemed low risk,¹²⁶ their next step would be release on their own recognizance (“OR”) by PAS.¹²⁷ Finally, for suspects whom the algorithm deemed “medium risk”,¹²⁸ their next step was further review either by

¹²¹ *Id.*

¹²² S.B.10, 2019-2020 Reg. Sess. (Cal. 2018) (codified as law in Chapter 244 on August 28, 2018).

‘Validated risk assessment tool’ means a risk assessment instrument, selected and approved by the court, in consultation with Pretrial Assessment Services or another entity providing pretrial risk assessments, from the list of approved pretrial risk assessment tools maintained by the Judicial Council. The assessment tools shall be demonstrated by scientific research to be accurate and reliable in assessing the risk of a person failing to appear in court as required or the risk to public safety due to the commission of a new criminal offense if the person is released before adjudication of his or her current criminal offense and minimize bias.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *See id.*

¹²⁶ *Id.*

‘Low risk’ means that an arrested person, after determination of the person’s risk following an investigation by Pretrial Assessment Services, including the use of a validated risk assessment tool, was categorized as having a minimal level of risk of failure to appear in court as required or risk to public safety due to the commission of a new criminal offense while released on the current criminal offense.

¹²⁷ This did not apply if the individual meets one of the ten exceptions discussed above. *Id.*

¹²⁸ *Id.*

‘Medium risk’ means that an arrested person, after determination of the person’s risk following an investigation by Pretrial Assessment Services, including the use of a validated risk assessment tool, was categorized as

PAS or by the courts. If PAS conducted the review, it would gather more information and then determine whether the suspect be released on their own recognizance or, alternatively, under supervised own recognizance (“SOR”).¹²⁹ If the courts conducted the pre-arraignment review,¹³⁰ either a judge on-call or a judicial officer would further analyze and determine whether the suspect would be released OR or SOR, or else be detained until arraignment.¹³¹

3. Arraignment Hearing

All suspects still in custody and not released through the previous two stages were entitled to a release or detention determination at arraignment.¹³² At this stage, victims were notified and given an opportunity to be heard.¹³³ The court had the discretion to modify the conditions of release upon request by either party.¹³⁴ It is also at this stage that the District Attorney was able to file a motion for preventive detention, which would allow the court to detain the defendant pending a hearing.¹³⁵ There were only certain enumerated circumstances, usually involving heightened danger of the suspect, that allowed a prosecutor to seek preventive detention.¹³⁶ Once this motion was

having a moderate level of risk of failure to appear in court as required or risk to public safety due to the commission of a new criminal offense while released on the current criminal offense.

¹²⁹ If reviewed by PAS, the suspect was required to be detained if they met one of the ten criteria discussed in footnote 116, *supra*. If not, then the suspect had to be released either on their own recognizance or supervised own recognizance, “with the least restrictive nonmonetary condition or combination of conditions that [would] reasonably assure public safety and the person’s return to court.” *Id.*

¹³⁰ “Medium risk” suspects and those that fell within the 10 criteria had to be either detained by PAS until arraignment or reviewed by the court, and the court had to use the pretrial assessment services information and consider their options for release. *Id.*

¹³¹ For a medium risk defendant who is further reviewed by the court prior to arraignment, a judge could decide to detain the defendant until arraignment only if there is a substantial likelihood that no condition will reasonably assure public safety or the defendant’s return to court. *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Note that the court cannot initiate a preventive detention hearing on its own motion. *See id.*

¹³⁶ (1) The crime for which the person was arrested was committed with violence against a person, threatened violence, or the likelihood of serious bodily injury, or was one in which the person was personally armed with or personally used a deadly weapon or firearm in the commission of the crime, or was one in which he or she personally inflicted great bodily injury in the commission of the crime.

(2) At the time of arrest, the defendant was on any form of postconviction supervision other than informal probation or court supervision.

(3) At the time of arrest, the defendant was subject to a pending trial or sentencing on a felony matter.

(4) The defendant intimidated or threatened retaliation against a witness or victim of the current crime.

filed, the court had to determine whether to release the defendant or else detain him pending the preventive detention hearing. If the court determined there was a “substantial likelihood that no nonmonetary condition or combination of conditions of pretrial supervision” could reasonably assure either the appearance of the defendant at the preventive detention hearing or reasonably assure public safety prior to the preventive detention hearing, the court could detain the defendant pending this hearing, but it had to state its reasons for doing so on the record.¹³⁷

4. Preventive Detention Hearing

A suspect found to need preventive detention was either violent or high-risk as defined by the statute.¹³⁸ They were entitled to a hearing within three days of arraignment.¹³⁹ At this stage, there was a rebuttable presumption that the defendant needed to be detained.¹⁴⁰ For the court to find it necessary for a suspect to be preventively detained, the court had to make two findings: (1) there was probable cause to believe the defendant committed the charged crime where there was no indictment and the defendant challenged the sufficiency of the evidence, and (2) there was clear and convincing evidence that no condition or combination of conditions could reasonably assure the protection of the public or the appearance of the defendant in court.¹⁴¹ The court had to then state the reasons for its determination on the record.¹⁴² This assured that the court was recognizing and working to protect both the suspect’s presumption of innocence (by finding that there is probable cause) while also protecting the community against danger and assuring the defendant’s return to court.¹⁴³

(5) There is substantial reason to believe that no nonmonetary condition or combination of conditions of pretrial supervision will reasonably assure protection of the public or a victim, or the appearance of the defendant in court as required. *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

‘High risk’ means that an arrested person, after determination of the person’s risk following an investigation by Pretrial Assessment Services, including the use of a validated risk assessment tool, is categorized as having a significant level of risk of failure to appear in court as required or risk to public safety due to the commission of a new criminal offense while released on the current criminal offense.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *See id.*

A court could consider many of the same factors they would consider under California Penal Code section 1275 when deciding whether to release a suspect on bail:¹⁴⁴ the nature and circumstances of the crime charged as well as the risk to the community posed by the defendant's release, the weight of evidence against the defendant, the defendant's past conduct, family and community ties, criminal history, and record for court appearances.¹⁴⁵ The court could also consider if the defendant was on probation, parole, or some other type of supervised release pending trial, sentencing or appeal. Additionally, the court could look to the recommendation of Pretrial Assessment Services obtained using a validated risk assessment instrument.¹⁴⁶ The court could then evaluate the "impact of detention on the defendant's family responsibilities and community ties, employment, and participation in education."¹⁴⁷ In this way, SB 10 would have allowed considerations that have never been statutorily recognized.¹⁴⁸

SB 10 proposed that the Judicial Council should maintain a list of validated risk assessments from which each county could choose.¹⁴⁹ It also proposed that these pretrial assessment services be performed by either court employees or a third party qualified local public agency.¹⁵⁰

Although this bill may not perfect—as few pieces of legislation ever are—it is evident that the Task Force thoughtfully considered the multiple levels and layers to bail and the consequences of reforming our current system. At best, SB 10 protects the presumption of innocence by generously limiting pretrial detention, while combining algorithmic tools with modified judicial discretion. At worst, SB 10 provides a solid platform from which other states can build, as it clearly takes

¹⁴⁴ See CAL. PENAL CODE § 1275 (2020).

¹⁴⁵ *Id.*

¹⁴⁶ S.B.10, 2017-2018 Reg. Sess. (Cal. 2018) (codified as law in Chapter 244 on August 28, 2018).

¹⁴⁷ *Id.*

¹⁴⁸ While California Penal Code section 1272.1 gives judges the ability to evaluate the defendant's ties to the community and his/her family "attachments," the word "responsibilities" is never mentioned in the statute. The word "responsibilities" indicates to the judge that other people, not just the defendant, will be impacted by pretrial detention. For example, it is possible that the defendant is the sole caregiver for young children or elderly parents, and SB 10 would have allowed the judge to account for such responsibilities when making his/her decision. Additionally, the present statutes do not currently permit judges to consider participation in education when determining pretrial release. CAL. PENAL CODE § 1272.1 (2020).

¹⁴⁹ S.B.10, 2017-2018 Reg. Sess. (Cal. 2018) (codified as law in Chapter 244 on August 28, 2018).

¹⁵⁰ *Id.*

into consideration the multitude of problems our current cash bail system presents.

IV. THE MULTIPLE GOALS OF BAIL REFORM

Bail reform is a complex and arduous process in large part because it does not have one singular goal.¹⁵¹ As an illustration, consider a sports team that continually loses games. The team would be foolish not to adapt its strategy in response to failure, because ultimately, its goal is to win. Of course, achieving that ultimate goal requires first achieving several smaller goals such as greater teamwork, tightening up the team's defense, and better anticipating the other team's plays. There is one ultimate goal, and all sub-goals work toward it. The same cannot be said about bail reform.

Not only does the fight to reform the bail system contain multiple goals, but some of these goals clash with each other. Accomplishing one goal may come at the expense of another.¹⁵² Bail reform seeks to accomplish a myriad of objectives, ranging from "preserving the presumption of innocence for people charged with crimes, imposing the least restrictive conditions on release, protecting the public from people charged with crimes, ensuring that people return to court, imposing detention in a racially and economically fair way, and reducing America's astounding pretrial incarceration rate."¹⁵³ The presence of multiple, competing goals naturally generates intense debate regarding what bail reform ought to look like.

Given this division, it is unsurprising that politicians and activists cannot reach a consensus.¹⁵⁴ Danny Montes, the Alliances Director for Californians for Safety and Justice tweeted in support of SB 10, "Why Californians Need #BailReform 'If someone can afford their bail even though they are a threat to public safety, they're free to go.'" Taking an opposing view, New York Legal Aid's Decarceration Project responded: "Sorry, you have it backwards. Our bail system should prioritize release and decarceration above all else."¹⁵⁵ This exchange is just one example of how reform-minded, anticipated allies can spiral into stalemate based upon which bail reform goals matter most to them.

¹⁵¹ *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, *supra* note 12, at 1144.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *See id.*

¹⁵⁵ *Id.*; *see also* DecarcerationProject (@DecarcerateNYC), TWITTER (Aug. 17, 2017, 2:07 PM), <https://twitter.com/DecarcerateNYC/status/898290148550389760> [<http://perma.cc/A7YN-M3M5>].

V. RISK ASSESSMENT ADVOCATES

The arguments in favor of implementing risk assessments for pretrial decisions are intuitive. One well-supported argument for adopting risk assessments is that replacing human judgment with algorithms produces more consistent results.¹⁵⁶ To this point, one author noted, “[F]ormal, actuarial, and algorithmic methods of prediction perform better than the intuitive methods used by judges or other experts.”¹⁵⁷ By replacing human discretion with formulaic algorithms, pretrial detention decisions can be standardized and streamlined.¹⁵⁸ The idea that actuarial tools perform better than human intuition at predicting crime comes from 1950s–1980s psychology research.¹⁵⁹ A meta-analysis of the literature in this area¹⁶⁰ shows that algorithms are ten percent more accurate than human clinical predictions.¹⁶¹

However, not all these advocates of risk assessments believe they are a perfect tool. “Santa Barbara Probation Chief Tanja Heitman, whose county has been experimenting with alternatives to money bail, said she believes risk assessments can actually help reduce racial disparities.”¹⁶² Although youth of color are 2.6 times more likely to get arrested than their white counterparts in Santa Barbara County, their release rates are identical.¹⁶³ Heitman has seen the risk assessment tool erase certain racial biases in the juvenile criminal justice system in her county.¹⁶⁴ Notwithstanding the tool’s lack of perfection, risk assessment advocates still support the tool’s ability to weed out racial biases present within determination decisions.

The second argument in favor of risk assessments is that pretrial detention decisions should be conditioned upon true risk, not ability to pay. These advocates have a particular problem with the cash aspect of the current bail system. Supporters of the Detention decisions should be made based on true risk of flight and likelihood of committing another crime while out on bail, not on ability to pay an arbitrary sum of money.¹⁶⁵ “Conversely,

¹⁵⁶ See Stevenson, *supra* note 24, at 317–22.

¹⁵⁷ *Id.* at 321.

¹⁵⁸ See CHARLES SUMMERS & TIM WILLIS, BUREAU OF JUST. ASSISTANCE U.S. DEP’T OF JUST., RESEARCH SUMMARY: PRETRIAL RISK ASSESSMENT 1 (2010).

¹⁵⁹ Stevenson, *supra* note 24, at 322.

¹⁶⁰ This meta-analysis consolidates the data from ten papers that compare algorithms to human prediction. *Id.*

¹⁶¹ *Id.*; William M. Grove et al., *Clinical Versus Mechanical Prediction: A Meta-Analysis*, 12 PSYCH. ASSESSMENT 19, 19 (2000).

¹⁶² Lagos, *supra* note 109.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Stevenson, *supra* note 24, at 317.

wealthy defendants who pose a high risk of serious crime should not be released simply because they can afford bail.”¹⁶⁶ They argue that “conditioning release on money results in racial and wealth-based disparities in detention, a waste of taxpayer money, and harm to public safety.”¹⁶⁷

VI. RISK ASSESSMENT CRITICS

Unlike risk assessment advocates who find value in replacing human judgement with a consistent algorithm, risk assessment critics believe the algorithm is just as damning as the data it utilizes and is skewed by discriminatory practices. Robin Steinberg, The Bail Project’s Chief Executive Officer, argues that “these algorithmic assessments are only as good as the data they use.”¹⁶⁸ This data will inevitably reflect the “deeply imbedded racism and economic inequity that has driven mass incarceration in the first place.”¹⁶⁹ While the risk assessment may seem to eliminate the evil of cash bail, it simply repackages the type of inequity presented. “Whereas defendants were condemned to pre-trial detention prior to the bill’s passage due to their poverty and inability to make bail, they will now be in pre-trial detention due to their risk assessment—which will inevitably be based on their poverty, plus their race.”¹⁷⁰

A. Racism Entrenched in the American Criminal Justice System

To understand the staunch opposition to risk assessments, it is necessary to understand just how engrained with racism the American criminal justice system is, dating back to the 1800s. From Jim Crow laws which “codified discrimination and second-class status for African Americans”¹⁷¹ to the fight for African American suffrage,¹⁷² “[r]acial disparities in the criminal justice system have deep roots in American history and penal policy.”¹⁷³ The War on Drugs illustrates a law or policy that appears neutral on its face but systemically disenfranchised people of color in its effect. Under the administration of President Nixon and subsequently of President

¹⁶⁶ *Id.* at 318.

¹⁶⁷ *Id.* at 317–18.

¹⁶⁸ Arvind Dilawar, *What Should Replace Cash Bail?*, PAC. STANDARD (Apr. 9, 2019) <https://psmag.com/social-justice/what-should-replace-cash-bail> [<http://perma.cc/CZL5-XNFBV>].

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 163, 166 (2010).

¹⁷² Sarah Pruitt, *When Did African Americans Actually Get the Right to Vote?*, HIST. (Jan. 29, 2020), <https://www.history.com/news/african-american-voting-right-15th-amendment> [<http://perma.cc/E9YL-2JUT>].

¹⁷³ Hinton et al., *supra* note 72, at 2.

Reagan, the War on Drugs was declared an effort to eradicate “public enemy number one”: drugs.¹⁷⁴ Notwithstanding the genuine objectives underlying the War on Drugs, the delivery and enforcement of these laws proved disproportionately detrimental to people of color because of drug-free zone laws.¹⁷⁵ Residential segregation had pushed low-income African Americans to high density areas of the city, which often included schools, playgrounds, and public housing projects.¹⁷⁶ The influx of low-income African Americans caused the exodus of white people from those areas and into the less densely populated suburbs.¹⁷⁷ Drug-free zone laws prohibited the use or sale of drugs in proximity to certain “zones” which were protected areas such as schools, playgrounds, and public housing projects.¹⁷⁸ This necessarily meant that the majority of people affected by these laws were African-Americans since they were the ones living in those zones.

The punishment for using or selling drugs in one of these zones could earn someone a punitive sentence, including mandatory minimums and sentencing enhancements.¹⁷⁹ In certain states, defendants convicted of drug-free zone offenses faced a fixed mandatory minimum penalty enhancement, which was added to any sentence imposed upon them for the underlying drug offense.¹⁸⁰ While in other states, defendants faced enhancements to their presumptive sentencing guidelines range.¹⁸¹ Yet, in some states, convictions of offenses within drug-free zones raised the felony class of the underlying offense which exposed the defendant to a more severe penalty.¹⁸² Lastly, drug-free zone offenses elevated youth from being prosecuted as juveniles to being prosecuted as adults.¹⁸³

The War on Drugs is just one example of a law that is neutral on its face but racist in its impact. Our history is laden with laws that are facially neutral, like the Bail Reform Act evaluated in *United States v. Salerno*, but racially discriminatory

¹⁷⁴ *War on Drugs*, HIST. (Dec. 17, 2019), <https://www.history.com/topics/crime/the-war-on-drugs> [<http://perma.cc/VST8-SWCG>]; Chris Barber, *Public Enemy Number One: A Pragmatic Approach to America's Drug Problem*, RICHARD NIXON FOUND. (June 29, 2016), <https://www.nixonfoundation.org/2016/06/26404/> [<http://perma.cc/E3YG-LX36>].

¹⁷⁵ Hinton et al., *supra* note 72, at 3.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Punishments for offenses within the drug-free zones were double the punishment for the same offenses committed outside these zones. JUDITH GREENE, KEVIN PRANIS, & JASON ZIEDENBERG, *DISPARITY BY DESIGN: HOW DRUG-FREE ZONE LAWS IMPACT RACIAL DISPARITY—AND FAIL TO PROTECT YOUTH* 5 (Just. Pol'y Inst. eds., 2006).

¹⁸⁰ *Id.* at 7.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

in effect.¹⁸⁴ Cash bail and the myriad of pretrial detention laws that come with it are no exception.

Such laws have scarred our criminal justice system. People of color, particularly African Americans, are disproportionately overrepresented in the criminal justice system.¹⁸⁵ “Black people are incarcerated in state prisons at a rate 5.1 times greater than that of white people.”¹⁸⁶ For African American men, the incarceration rate is more than 3,000 per 100,000 citizens.¹⁸⁷ This is approximately four times the national average and approximately six times the rate among white men.¹⁸⁸ Where an African American male has a thirty-two percent chance of serving time in prison at some point in his life, a white male born at the same time would only have a six percent chance of being sent to prison.¹⁸⁹ The same rings true for African American women. Forty-four percent of incarcerated women are black even though only about thirteen percent of the female population is black.¹⁹⁰

“[T]hese racial disparities are no accident, but rather are rooted in a history of oppression and discriminatory decision making that have deliberately targeted black people and helped create an inaccurate picture of crime that deceptively links them with criminality.”¹⁹¹ While some argue that these disparate numbers are a result of disparate crime rate because men and women of color simply commit more crimes than White men and women,¹⁹² such claims have no factual or statistical basis.

¹⁸⁴ See S. 1070, 49 Leg., 2d Sess. (Ariz. 2010) (allowing officers who possess “reasonable suspicion” that an individual is unlawfully present in the United States to make reasonable attempts to determine the immigration status of that person under the Support our Law Enforcement and Safe Neighborhoods Act); see also *McClesky v. Kemp*, 481 U.S. 279, 286–87, 320 (1987) (explaining a study that showed the death penalty was more often imposed in Georgia on black defendants and killers of white victims than on white defendants and killers of black victims); *City of Memphis v. Greene*, 451 U.S. 100, 126–28 (1981) (showing that the road closure had a racially discriminatory effect because the only drivers who were inconvenienced by the action were black); *Hunter v. Underwood*, 471 U.S. 222, 227 (1985) (finding that section 182 of the Alabama Constitution, which provided for the disenfranchisement of persons convicted of crimes involving moral turpitude, violated equal protection because even though it was racially neutral on its face, the original enactment was motivated by a desire to discriminate against blacks on account of race, and the provision had a racially discriminatory impact since its adoption).

¹⁸⁵ See John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL’Y REV. 377, 378 (2013).

¹⁸⁶ Hinton et al., *supra* note 72, at 2.

¹⁸⁷ Conyers, *supra* note 185, at 378.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Hinton et al., *supra* note 72, at 2.

¹⁹¹ *Id.*

¹⁹² Conyers, *supra* note 185, at 378.

Despite society's recent progress on social justice issues, racism remains entrenched in our criminal justice system. Just last year, the San Francisco District Attorney's Office began a process of "blind charging."¹⁹³ The office removed all demographic and racial information from incident reports before they reached the hands of prosecutors in an effort to correct the overcharging of African Americans and the undercharging of similarly situated white people.¹⁹⁴ This was the office's effort to "directly confront [] ingrained racial bias" that leads some prosecutors to charge African Americans for low-level drug offenses more frequently than their similarly situated white counterparts, "even though studies show that white people use illicit drugs at higher rates."¹⁹⁵

B. The Unintended Racist Consequences of Risk Assessments

If, as critics argue, algorithms are entrenched with racially biased data, then the assessments they produce will inevitably be discriminatory as well. Can an egg be separated from a cake that has already been baked? Of course not. This is exactly how critics of the pre-trial risk assessments view the efficacy of these tools—these algorithms "bake in" longstanding practices of bias that cannot be extracted.¹⁹⁶ Matt Watkins, senior writer for the Center for Court Innovation, explains "[t]here's no way to square the circle there, taking the bias out of the system by using data generated by a system shot through with racial bias" is simply impossible.¹⁹⁷

Critics explain the push for risk assessments as "entrenching racial disparities and hiding them behind the rhetoric of science"¹⁹⁸ If the data used in the risk assessment algorithms is heavily engrained with systemic and institutional racism, then the output of that algorithm is not going to be a neutral evaluation or an accurate representation of the person's risk.¹⁹⁹

¹⁹³ Timothy Williams, *Black People Are Charged at a Higher Rate Than Whites. What if Prosecutors Didn't Know Their Race?*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/us/prosecutor-race-blind-charging.html> [<http://perma.cc/WE2K-GNVU>].

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Thompkins, *supra* note 25.

¹⁹⁷ Beth Schwartzapfel, *Can Racist Algorithms be Fixed?*, MARSHALL PROJECT (July 1, 2019, 6:00 AM), <http://www.themarshallproject.org/2019/07/01/can-racist-algorithms-be-fixed> [<http://perma.cc/LU53-VVA5>].

¹⁹⁸ Robin Steinberg, *Cash Bail Must be Eliminated, but 'Risk Assessments' Aren't the Tool to do it*, USA TODAY (Sept. 1, 2018, 12:26 AM), <http://www.usatoday.com/story/opinion/policing/2018/08/30/california-law-risk-assessments-bail-justice-system-policing-usa/1043956002/> [<http://perma.cc/3GM2-RECF>].

¹⁹⁹ See generally CTR. ON RACE, INEQ., + THE L. & ACLU, WHAT DOES FAIRNESS LOOK LIKE? CONVERSATIONS ON RACE, RISK ASSESSMENT TOOLS, AND PRETRIAL JUSTICE (2018) <http://www.law.nyu.edu/sites/default/files/Final%20Report--ACLU->

This issue was examined by ProPublica, a non-profit news group whose mission is to “expose abuses of power and betrayals of the public trust by government, business, and other institutions, using the moral force of investigative journalism.”²⁰⁰ In May of 2016, ProPublica published a study called *Machine Bias*, which criticized risk assessments for their inability to accurately predict future risk for defendants detained pre-trial.²⁰¹ Specifically, this inaccuracy is skewed toward black defendants. ProPublica found the COMPAS risk assessment tool²⁰² produced great error in misclassifying black defendants as high risk when it did not similarly misclassify white defendants.²⁰³

Bernard Parker, an African American man, and Dylan Fugett, a White man, both arrested on drug charges, received massively different risk assessment scores. Dylan was rated as a three (low risk) and Bernard was rated as a ten (high risk).²⁰⁴ Looking at these numbers, one would not know that Fugett had a prior attempted burglary conviction whereas Parker only had a non-violent resisting arrest conviction.²⁰⁵ After release, Fugett re-offended three times with possession of drugs while Bernard did not reoffend even once.²⁰⁶ This further confirmed the notion that White people do not commit less crimes than their African American counterparts, and drugs are not a “black problem.”²⁰⁷

The following example will, to a certain extent, explain why these misclassifications occur.²⁰⁸ If racial group A is arrested at a higher rate than racial group B, then a tool that uses arrest rate as a factor for future re-arrest will undoubtedly find anyone in

NYU%20CRIL%20Convening%20on%20Race%20Risk%20Assessment%20%20Fairness.pdf [http://perma.cc/7BKF-73W5].

²⁰⁰ *About Us*, PROPUBLICA, <http://www.propublica.org/about/> [http://perma.cc/W9YC-RRBP] (last visited May 10, 2020).

²⁰¹ Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <http://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> [http://perma.cc/33BE-NK3W].

²⁰² COMPAS, which stands for Correctional Offender Management Profiling for Alternative Sanctions, is a risk and needs assessment instrument that was first developed in 1998 and has evolved several times to reach its most current model—the fourth generation. NORTHPOINTE, PRACTITIONER’S GUIDE TO COMPAS CORE 1 (2019) <http://www.equivant.com/wp-content/uploads/Practitioners-Guide-to-COMPAS-Core-040419.pdf> [http://perma.cc/TD6K-WGP9].

²⁰³ See Angwin et al., *supra* note 201; SARAH PICARD ET AL., CTR. FOR CT. INNOVATION, BEYOND THE ALGORITHM 4 (2019) <http://www.courtinnovation.org/publications/beyond-algorithm> [http://perma.cc/FD5U-TSM6].

²⁰⁴ Angwin et al., *supra* note 201.

²⁰⁵ *Id.*

²⁰⁶ See *id.*

²⁰⁷ *Id.*

²⁰⁸ This example is not used to undermine the importance of individuality in risk assessments. It is used solely to show how the data plugged into risk assessments can be biased from the get-go.

group A as higher risk.²⁰⁹ Group A represents African Americans and group B represents Caucasians. Caucasians escape high risk determinations because the criminal justice system does not target them like it targets African Americans. Certain communities, specifically communities of color, have greater contact with the criminal justice system simply because of the heightened policing that occurs in those communities.²¹⁰ The statistics that result from those interactions do not indicate the dangerousness of people of color; if anything, they indicate just how targeted police behavior can be.²¹¹ Consequently, although risk assessments themselves are not biased tools since they are merely math equations, these equations are applied to infected data. Just as what goes up must come down, what goes in must come out. If racially biased data goes in, racially biased results must come out.

VII. A LOOK TO THE FUTURE: A 3-IN-1 SOLUTION

One might argue that risk assessments should be removed entirely from the bail reform discussion, given their potential to over-detain and to make false predictions. Risk assessments may exacerbate rather than alleviate the issues inherent in the cash bail system.²¹² But eliminating them from the picture is not the proper solution. These algorithms can be used as a force to even the playing field and not as a math equation that disproportionately hurts defendants of color, provided they are not used in a vacuum.²¹³ Risk assessments are exactly what their name suggests: tools. They are not a magical device that will single-handedly solve our country's discriminatory pre-trial detention system. While these tools have the potential to further racism and inequality, if used correctly, they could alleviate these problems. Consequently, the question is—*how* do we use them correctly?

The following solution is three-fold. First, these tools must be used diagnostically. Second, there must be a system of pretrial services dedicated solely to implementing these risk assessments and offering pretrial services that will stand in place of detention. Third, judges must undergo training that works to undo the implicit bias that often permeates pretrial decisions.

²⁰⁹ CTR. ON RACE, INEQ., + THE L. & ACLU, *supra* note 199, at 12.

²¹⁰ *Id.*

²¹¹ *Id.* at 13.

²¹² Steinberg, *supra* note 198.

²¹³ CTR. ON RACE, INEQ., + THE L. & ACLU, *supra* note 189, at 12.

A. Solution 1: Using Risk Assessments Diagnostically

Risk assessments are simply algorithms, but as discussed above, they can produce impartial results. To use this double-edged sword for good, risk assessments must be used only as diagnostic tools to direct either release, further review, or holding until arraignment. Risk assessments should not be used as the sole determining factor for pretrial detention. Using the tool diagnostically means the algorithm is used to *diagnose and direct* the defendant's next step in the pretrial detention decision process, rather than *conclusively determine* their confinement. Because the data used in these algorithms is not always probative of a defendant's flight risk or danger to the community, courts should not rely *solely* on these algorithms to make their pretrial decision or use them as a replacement for judicial discretion.²¹⁴ Using risk assessments conclusively without regard for human discretion or without implementing various layers of review will inevitably lead to skewed results and could very well further entrench the process in discriminatory results.

The Center for Court Innovation conducted an analysis that explained what happens when risk assessment tools are used diagnostically and what happens when they are used conclusively.²¹⁵ The Center for Court Innovation's study used real data from a sample of New York City defendants from 2015.²¹⁶ They tested the data through three models and found that the hybrid model, which used the risk assessment diagnostically—as explained above—yet still gave judges discretion, produced the most racially equivalent results.²¹⁷

The study focused on assessing what *types* of errors the risk assessment tool makes.²¹⁸ After interpreting the findings, the Center for Court Innovation concluded not that we should eliminate risk assessments, but that we should restrict pretrial detention only to defendants charged with violent crimes and scored as high-risk.²¹⁹ This method actually reduces overall incarceration and also alleviates racial disparities. Jurisdictions need not be confined to their risk assessment tools, but rather should utilize them as powerful tools for bail reform; hence, *Beyond the Algorithm*.²²⁰

²¹⁴ Steinberg *supra* note 188.

²¹⁵ PICARD et al., *supra* note 203, at 3.

²¹⁶ The data used in this study was not actually used to inform pretrial decisions; it was simply used for research purposes. *See id.* at 5.

²¹⁷ *Id.* at 12–13.

²¹⁸ *Id.* at 3–4.

²¹⁹ *Id.* at 12.

²²⁰ *Id.* at 13–14.

The Center for Court Innovation's findings demonstrate why it is important to look beyond the math equation within risk assessments and use them to diagnose, not determine. This study involved an empirical test of racial bias in risk assessment tools and evaluated "whether there are policy-level solutions that could conserve the benefits of risk assessment, while also addressing valid concerns over racial fairness."²²¹ The study evaluated a risk assessment tool that employs an algorithm that combines a defendant's prior convictions, jail or prison sentences, FTAs,²²² probation status, charge type, charge severity, concurrent open cases, as well as age and gender to generate a risk score.²²³ These categories are weighted and combined to generate a numerical score which then translates into one of five risk categories: minimal, low, moderate, moderate-high, and high-risk categories.²²⁴

This study collected a sample of all arrests made in New York City in 2015.²²⁵ This included more than 175,000 defendants: 49% Black, 36% Hispanic, and 14% white.²²⁶ While the tool does not explicitly include race as a category because of the constitutional problems that would present, the study is conscious of the fact that race is embedded into each one of these categories.²²⁷ Additionally, while it may seem strange that gender is included as a category, its inclusion "mitigates the tendency of the tool to over-classify female defendants as high-risk."²²⁸

Ultimately, the study showed that the tool was accurate in its predictions of re-arrest regardless of race or ethnicity. Defendants classified as high-risk were rearrested at rates of 72% for Blacks, 71% for Hispanics, and 70% for Whites.²²⁹ Similarly, defendants categorized at "minimal risk" were only re-arrested at rates of 11%, 9%, and 10% respectively for those three groups.²³⁰ However, there were substantial racial differences in re-arrest in the low and moderate risk categories.²³¹ The data was then placed into three different models of decision-making and the results were calculated and analyzed.²³²

²²¹ *Id.* at 3.

²²² FTA stands for failure to appear. *See id.* at 15.

²²³ *See id.*

²²⁴ *See id.* at 6.

²²⁵ *Id.* at 5.

²²⁶ *Id.*

²²⁷ *See id.* at 4.

²²⁸ *Id.* at 5.

²²⁹ *Id.* at 6.

²³⁰ *Id.*

²³¹ *Id.*

²³² *See id.* at 10.

1. Scenario 1: Business as Usual

The first scenario “*Business as Usual*” involves a system where judges maintain their subjective judicial discretion, and risk assessments are merely present as suggestions, no matter what risk category the defendant is placed in.²³³ In this scenario, real-world differences that exist in pre-trial detention based on the person’s race persisted.²³⁴ For example, in New York in 2015, defendants who were held in detention were 31% Black, 25% Hispanic, and 22% White.²³⁵ A total of 27% of defendants were detained.²³⁶ False positives, representing the individuals who were classified as high-risk but were not in fact re-arrested on a new charge, were found to be rather high. They averaged at 19%, with the rate for Blacks 6% higher than the rate for Whites.²³⁷

2. Scenario 2: Risk-Based Approach with an Adjusted High-Risk Threshold

In the second scenario, “*Risk-Based Approach with an Adjusted High-Risk Threshold*,” pretrial detention is based solely on the risk-assessment tool and not on judicial discretion.²³⁸ Only defendants in the highest risk category would be detained, thereby reducing the proportion of defendants who would be exposed to pretrial detention.²³⁹ In this scenario, overall detention decreased by 9% for a total detention rate of 18%.²⁴⁰ Additionally, the false positive rate decreased to 8%.²⁴¹ However, even though false positives decreased overall, there still existed a disparity of 7% in the false positives between Black defendants and White defendants.²⁴²

3. Scenario 3: Hybrid Charge and Risk Based Approach

In the final scenario, “*Hybrid Charge and Risk Based Approach*,” pretrial detention was reserved exclusively for defendants who fell into the highest two risk categories and were charged with a violent felony or domestic violence.²⁴³ This assumes that “most misdemeanor and non-violent defendants are not appropriate candidates for bail or detention consideration,

²³³ *See id.*

²³⁴ *See id.* at 11.

²³⁵ *Id.*

²³⁶ *Id.* at 12.

²³⁷ False positives for black defendants was 21%, 17% for Hispanic defendants, and 15% for white defendants. *Id.* at 11, 13.

²³⁸ *See id.* at 11.

²³⁹ *See id.*

²⁴⁰ *Id.* at 11–12.

²⁴¹ *Id.* 13.

²⁴² *Id.* at 11–13.

²⁴³ *Id.* at 11. Also, note the similarity of this approach to the one suggested by SB 10.

regardless of risk level.”²⁴⁴ Controversially so, this hybrid approach recognized that “charge alone is not a good proxy for risk, and that some individuals with violent charges can be safely supervised in the community.”²⁴⁵

For example, in 1999, Tom May, a 75-year old man, faced a murder charge for the “mercy killing” of his terminally ill wife.²⁴⁶ May and his wife shared 50 years of a loving, happy marriage, but May’s wife begged to be put out of her misery once her condition began to deteriorate due to Lou Gehrig’s disease.²⁴⁷ One day, May gave his wife an overdose of her medication and then carried her into the car in the garage and started the engine.²⁴⁸ He sat beside his dying wife for hours hoping to also die with her, but he lived.²⁴⁹ He was arrested and freed on \$100,000 bail.²⁵⁰ The seventy-six-year-old retired Navy officer later committed suicide.²⁵¹ May’s situation is a prime example of a defendant facing a serious charge that presents virtually no risk to the community whatsoever.²⁵² This is why the individual’s circumstances, rather than just their ability to post bond based on their charge, matter.

This hybrid approach suggests a reduction in overall pretrial detention rates by 51% when compared to the other two scenarios.²⁵³ In contrast to the 27% overall detention rate presented by the “business as usual” model, only 13% would be detained under this “hybrid” model.²⁵⁴ Additionally, this model greatly alleviates racial prejudice in false positives: 16% for Blacks and Hispanics alike, and 14% for Whites.²⁵⁵ While the overall false positive rate is not as low as the “risk-based approach” model, the disproportionate detention by race is greatly decreased, and that is of utmost importance.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ See Tony Perry, *Man, 75, May Face Charges in Mercy Killing of Wife*, L.A. TIMES (Oct. 13, 1999), <https://www.latimes.com/archives/la-xpm-1999-oct-13-mn-21770-story.html> [http://perma.cc/G58K-ETGX].

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ Tony Perry, *Man Facing ‘Mercy Killing’ Trial Commits Suicide*, L.A. TIMES (Feb. 29, 2000), <https://www.latimes.com/archives/la-xpm-2000-feb-29-mn-3718-story.html> [http://perma.cc/8RBP-K9VV].

²⁵¹ *Id.*

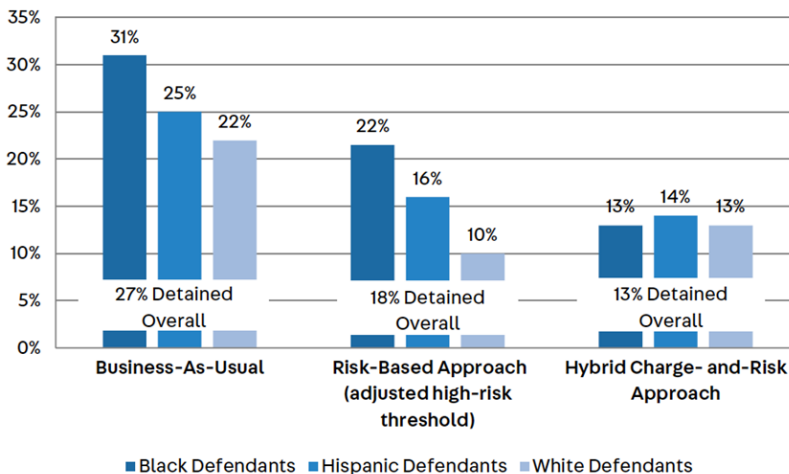
²⁵² See *id.*

²⁵³ PICARD et al., *supra* note 203, at 12.

²⁵⁴ *Id.*

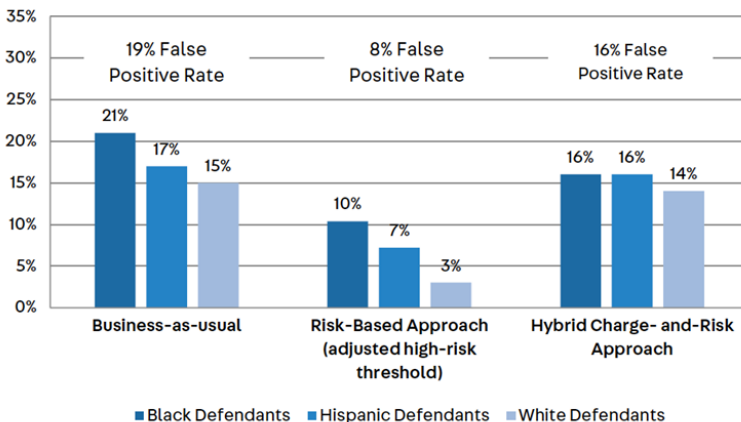
²⁵⁵ *Id.* at 13.

Exhibit 5. Pretrial Detention by Race Under Three Decision-Making Scenarios
 New York City Defendants, 2015



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Exhibit 6. False Positive Rates by Race Under Three Decision-Making Scenarios
 New York City Defendants, 2015



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256 *Id.*
 257 *Id.*

Not only does this show that operating on a “business as usual” basis will continue to perpetuate racial inequalities present within the bail system, but it also proves that risk assessments can be used to even the playing field when used diagnostically.²⁵⁸ It is true that risk assessments used in isolation and without proper understanding of how destructive they can be can actually perpetuate these racial biases, especially in “jurisdictions where [B]lack, Hispanic, or other racial or ethnic groups have disproportionate contact with the justice system.”²⁵⁹ However, this study substantiates that the argument ‘*risk assessments perpetuate racial inequalities, and thus should be abandoned*’ cannot actually withstand the statistics that prove the power of risk assessments when used correctly.

“For more than two centuries, the key decisions in the legal process, from pretrial release to sentencing to parole, have been in the hands of human beings guided by their instincts and personal biases.”²⁶⁰ The Center for Court Innovation said it best:

“Too often the debate over risk assessments portrays them as either a technological panacea, or as evidence of the false promise of machine learning. The reality is they are neither. Risk assessments are tools with the potential to improve pretrial decision-making and enhance fairness. To realize this potential, the onus is on practitioners to consider a deliberate and modest approach to risk assessment, vigilantly gauging the technology’s effects on both racial fairness and incarceration along the way.”²⁶¹

Diagnostic risk assessments do just that. This approach realizes that risk assessments can be a helpful tool when used modestly. They aim to release suspects early and often as long as it is safe for the community, and as long as pretrial services can assure the suspect will return to court. Gone are the days of pre-arraignment situations where defendants must frantically call their family members to help them post bond. Using the risk assessments diagnostically protects a defendant’s presumption of innocence if they are unlikely to harm others or evade court proceedings.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Angwin, *supra* note 201.

²⁶¹ PICARD et al., *supra* note 203, at 14.

B. Solution 2: Form Pretrial Services as an Independent Branch

1. Pretrial Services Should Not Be Under the Probation Department

For the risk assessment tool to perform properly as a diagnostic, there must be a system of pretrial services in place. Ideally, these services would be provided by a stand-alone agency under the auspices of the court, *separate from* probation. Probation officers are not the best equipped to uphold one of the most significant pillars of our criminal justice system: innocent until proven guilty. Although probation was originally created with the intent to rehabilitate offenders, over the years, probation officers have increasingly taken on the tasks of law enforcement.²⁶² Probation officers deal with defendants who have already been convicted of a crime and now must be monitored in lieu of serving time in prison.²⁶³ A probation officer's primary role is to "ensure that the offender does not engage in illegal or prohibited behavior."²⁶⁴ While true that probation officers also help defendants find employment, stay out of trouble, and re-integrate into society, a probation officer's relationship with their client exists *because* their client committed a crime; their presumption of innocence has already been rebutted. It would be a disservice to defendants to task probation officers with unlearning all their probationary skills to administer risk assessments and pretrial services to defendants at an entirely different stage in the criminal justice process.²⁶⁵ This would require a huge mental jump on the part of the probation officer and could lessen the efficacy and purpose of pretrial services.

The same is true with peace officers. Peace officers are trained to detect crime.²⁶⁶ When a person gets arrested, is booked, and then seen by pretrial services, a peace officer will likely not presume innocence by default. Because of these reasons, it is of utmost importance that pretrial services are an

²⁶² Marcus Purkiss et al., *Probation Officer Functions - A Statutory Analysis*, 67 FED. PROBATION 12, 12 (2003).

²⁶³ See *Probation and Pretrial Officers and Officer Assistants*, U.S. CTS., <https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-officers-and-officer> [<http://perma.cc/T6CU-W75M>] (last visited Jan. 3, 2021).

²⁶⁴ *Probation Officer Career*, PROBATION OFFICER EDU, <https://www.probationofficeredu.org/probation-officer/> [<http://perma.cc/R5E3-6N7H>] (last visited Jan. 9, 2021).

²⁶⁵ See COLLIN DOYLE, CHIRAAG BRAINS & BROOK HOPKINS, *BAIL REFORM: A GUIDE FOR STATE AND LOCAL POLICYMAKERS* 25 (2019).

²⁶⁶ See *Peace Officer Basic Training*, POST COMM'N ON PEACE OFFICER STANDARDS AND TRAINING, <https://post.ca.gov/peace-officer-basic-training> [<http://perma.cc/6GXT-XAGW>] (last visited May 20, 2020).

independent agency under the auspices of the court, not the probation department.

2. What Services Should a Pretrial Service Agency Offer?

It is vital for a pretrial service agent to have a background in social work. The goal of using risk assessment diagnostically as an enhancement, not a replacement, for judicial discretion is to put the “human” back into the process. Therefore, understanding the complexities of a person’s life is crucial.

Additionally, it is important for pretrial services to operate independently, so it has the capacity not only to perform risk assessments, but to supervise defendants upon release. Additionally, the agency can offer mental health services run by professionals trained specifically in criminality, and it can oversee defendants released on Supervised Own Recognizance in a way that encourages the defendant to return to court. Further, the agency can offer phone call or text message reminders for low-level offenders, transportation services, and counseling.

Following through with defendants is inevitably more work than handing them a paper stating their next hearing date and ordering them to appear in court. Probation and police agencies are already bombarded with other tasks and will not have the ability to carry out pretrial services to their full potential as a designated, stand-alone Pretrial Service Agency would. As such, the task must be entrusted to an agency equipped to handle it.

C. Solution 3: Educate Judges

1. Recognition of Bias

Because risk assessments are only to be used diagnostically, judges will still retain their discretion if they find the defendant high-risk, or in some situations, medium-risk. Most, if not all judges will openly agree that racism is wrong. However, race may unintentionally factor into a judge’s decision. The concept that all individuals hold certain stereotypes and attitudes without conscious awareness is called implicit bias.²⁶⁷ Even judges who have taken an oath to be impartial protectors of the law struggle with implicit bias.²⁶⁸

In a study performed on bail-setting in Connecticut, researchers found that judges set bail for African American

²⁶⁷ See Rachel D. Godsil & James S. Freeman, *Race, Ethnicity, and Place Identity: Implicit Bias and Competing Belief Systems*, 37 U. HAW. L. REV. 313, 314 (2015).

²⁶⁸ See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1223 (2009).

suspects at an amount 25% higher than similarly situated white defendants.²⁶⁹ Killers of whites are more likely to receive longer sentences than killers of blacks.²⁷⁰ Federal judges impose sentences 12% longer on black defendants than on similarly situated white defendants.²⁷¹ Judges cannot dismiss that implicit racial bias infects the entire criminal justice system. Even if judges do not actively make racially charged decisions, their subconscious biases still contribute to these racial disparities. Consequently, the question is not “*if* a judge holds implicit bias,” but “*how* do we unfold and unravel these biases.” The first step in undoing bias is simply recognizing that it exists.

The good news is that the effects of these implicit biases can be remedied by making judges aware of their existence and prevalence.²⁷² In a study where judges sensed their implicit bias was being tested, white judges consciously attempted to manipulate their determinations to cognitively correct any appearance of bias.²⁷³ This study shows that merely identifying the existence of implicit bias can have a positive impact, through self-correction.

2. Implicit Bias Trainings

Although it is proven that racial prejudice permeates judicial decisions, training must focus more on helping judges correct their *bias* rather than their *racism*. Judges want to protect their reputation and defend their morals. A judge who is supposed to act as a neutral magistrate does not want to admit they hold racist beliefs. Although implicit biases often manifest in racially biased actions, a judge will be more likely to participate in trainings that address bias than racism—a more politically charged concept. Simply calling these trainings “implicit bias trainings” might encourage judges to genuinely participate and learn, rather than make them defensive and unwilling to attend.

3. Tentative Rulings on the Record

Aside from acknowledging bias and dealing with it through training, further concrete actions must be taken when a person's liberty is on the line *before* they have been adjudged guilty. If a suspect is not released prior to arraignment, or is held for a preventive detention hearing, the judge should first be required to make a tentative determination about release or detention on

²⁶⁹ *Id.* at 1196.

²⁷⁰ *See id.*

²⁷¹ *Id.*

²⁷² *See id.* at 1203.

²⁷³ *See id.* at 1223.

the record *before* the suspect ever steps into the courtroom. Judges will base this tentative ruling on the risk assessment, recommendation from Pretrial Services, and all case facts that exist at the time and presented to them.

When a judge faces a defendant, his or her appearance, including their race, automatically signals to the judge their perceived likelihood of committing crime and their risk to the community. To illustrate, judges tend to view black men as “aggressive, criminal, dangerous, irresponsible, and intimately connected to drug use and trade.”²⁷⁴ Drug use and distribution are portrayed as “ghetto pathologies” that have invaded “White space[s],” instead of being an issue that both Black people and White people deal with.²⁷⁵ This makes it imperative for judges to be given all the case facts, incident reports, and any other necessary documents, with the defendant’s name and racial identification removed, and be asked to make a determination from the facts they have received from Pretrial Services without ever laying eyes on the defendant.²⁷⁶ Based on the information on paper, they must make a tentative ruling. Once the defendant is brought into the courtroom, and if the judge decides to change their tentative ruling, they must then state their reasoning on the record.

This process does three things. First, it strips the suspect’s file of any explicit pieces of information that indicate their race.²⁷⁷ This eliminates the possibility of race being used as a factor for the judge to use when making his or her decision.²⁷⁸ In the absence of this information first presented on paper, the pure fact that the defendant is standing before the judge presupposes their criminality in a way that is more readily apparent, and thus, makes the judge more likely to err on the side of detention.²⁷⁹ Second, this method forces the judge to indicate *real reasons* apart from an amorphous and abstract sense of “danger”

²⁷⁴ Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170, 172 (2005).

²⁷⁵ *Id.*

²⁷⁶ As previously mentioned, this is why it is imperative for the solution to be a mesh of three solutions combined, the second one being a solid system of pretrial services. Ideally, pretrial services would be so well equipped that judges should not need to deviate from pretrial recommendations except in special circumstances. In New York City, once risk assessments were implemented, judges became more likely to follow pretrial recommendations and “when they did, subsequent court appearance rates improved significantly.” N.Y.C. CRIM. JUST. AGENCY, ANNUAL REPORT 2016, 1 (2016).

²⁷⁷ Of course, this statement is made with the understanding that certain pieces of data can be racially entrenched even if they do not facially indicate this discrimination. See Schlesinger, *supra* note 274, at 171–72.

²⁷⁸ See *id.* at 172.

²⁷⁹ See *id.*

that emanates from the defendant's physical appearance.²⁸⁰ It forces them to look at the situation objectively. Third, this tentative ruling will make judges more aware of the effects their racially biased decisions can have. If a judge is unable to state a legitimate reason on the record for changing his or her ruling, the judge risks being overturned on appeal. Fourth, it will help judges further recognize his or her implicit bias. What many judges tend to do now is overestimate risk and overincarcerate pre-trial.²⁸¹ If a defendant appears to be a good candidate for release on paper, but the judge feels the urge to detain them once the defendant steps into the courtroom, this is certainly telling of implicit bias. A tentative ruling on the record will require judges to introspectively examine their decisions.

4. Diversity on the Bench

Finally, to use risk assessments to enhance judicial discretion, there must be more diversity on the bench—diversity of gender, race, color, and thought. *In the entirety of American history*, only two of 113 Supreme Court Justices have been African-American men.²⁸² *In the entirety of American history*, only five of the 114 Supreme Court Justices have been women.²⁸³ Neither have ever been appointed Chief Justice.²⁸⁴ However, throughout American history, 107 of the 114 Supreme Court Justices have been White males.²⁸⁵ Thus, when our country portrays judicial authority, women and minorities are not in that picture, and are simply referred to as the “other.”²⁸⁶ If one of the

²⁸⁰ See *id.*

²⁸¹ Ted Gest, *Are Pretrial Risk Assessments Biased? The Debate Sharpens*, CRIME REPORT (Feb. 18, 2020), <http://thecrimereport.org/2020/02/18/are-pretrial-risk-assessments-biased-the-debate-sharpens/> [<http://perma.cc/CU8G-ZQRY>].

²⁸² The two men of color to serve on our Supreme Court are Thurgood Marshall (1967–1991) and Clarence Thomas (1991–present). See Jessica Campisi & Brandon Griggs, *Of the 113 Supreme Court Justices in US History, All But 6 Have Been White Men*, CNN POLITICS (Sept. 5, 2018), <http://www.cnn.com/2018/07/09/politics/supreme-court-justice-minorities-trnd/index.html> [<http://perma.cc/UV67-82BB>].

²⁸³ The five female Supreme Court Justices: Sandra Day O'Connor (1981–2005), Ruth Bader Ginsburg (1993–2020), Sonia Sotomayor (2009–present), Elena Kagan (2010–present), and Amy Coney Barrett (2020–present). See *Women's Underrepresentation in the Judiciary*, REPRESENT WOMEN (Nov. 21, 2017), http://www.representwomen.org/women_s_underrepresentation_in_the_judiciary [<http://perma.cc/W3LF-CXMS>]; *Senate Confirms Amy Coney Barrett for Supreme Court*, LAW & JUSTICE (Oct. 26, 2020), <http://www.whitehouse.gov/articles/senate-confirms-amy-coney-barrett-supreme-court/> [<http://perma.cc/9QJ-H5EF>]. Note that this Article was written prior to Barrett's confirmation.

²⁸⁴ *Meet the Four Women Who Preceded Amy Coney Barrett on the Supreme Court*, USA TODAY (Oct. 27, 2020), <https://www.usatoday.com/in-depth/life/women-of-the-century/2020/10/26/four-women-preceded-amy-coney-barrett-us-supreme-court-sonia-sotomayor-ruth-bader-ginsburg/3710518001/> [<http://perma.cc/7R98-4HEB>].

²⁸⁵ See *id.*; Campisi, *supra* note 282.

²⁸⁶ See Kathleen Mahoney, *Judicial Bias: The Ongoing Challenge*, 2015 J. DISP.

goals of bail reform is to put the human component back into the process, then it is vital to fill the bench with individuals who span various walks of life. At the end of the day, judges carry their life experiences, thought processes, and identities into the courtroom—which inevitably spill over into pretrial decisions.

VIII. CONCLUSION

“You are where you came from. There are no disembodied selves. There are only humans embedded in practices, places, and cultures.”²⁸⁷

It seems our cash bail system has lost sight of the fact that the humans filtered through the criminal justice system come from communities that raised them, families waiting at home for their return, and jobs that cannot wait until they are released. Our cash bail system assumes that a blanket monetary amount based on the crime charged is the fairest way to determine pretrial release. It fails to realize that these “practices, places, and cultures,” have contributed to the factors a judge weighs when determining risk. Because our cash bail system neglects this, we must ensure that any system we implement as part of bail reform does not. We cannot employ risk assessments at face value and neglect judicial discretion that allows for a holistic view of the facts. We must use these tools diagnostically to release as many as is safely possible. To prevent risk assessments from reducing the complexities of the human experience to group data, we must perfect the human element involved in the process.²⁸⁸

Our current system does not presume a defendant innocent. It presumes them indigent, whether because of their race or not.²⁸⁹ If bail reform has any true hope of eradicating these racial inequalities, we must use risk assessments to guarantee that liberty is the norm *for all*, that pretrial detention is the carefully limited exception *for all*, and that the presumption of innocence is fiercely protected *for all*.

RESOL. 43, 64 (2015).

²⁸⁷ Godsil, *supra* note 267, at 313.

²⁸⁸ See Steinberg, *supra* note 198.

²⁸⁹ David J. Reimel III, *Algorithms & Instruments: The Effective Elimination of New Jersey's Cash Bail System and Its Replacement*, 124 PENN ST. L. REV. 193, 216 (2019).