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WHEN AN ALGORITHM VIOLATES THE LAW: Deconstructing a Study Supposedly Showing that an Artificial Intelligence Algorithm Makes Better Bail Decisions than Do Judges

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Abstract

A 2018 study published in *The Quarterly Journal of Economics* purported to show that an artificial intelligence (AI) algorithm made better pre-trial bail decisions than did human judges in New York City. The study has been cited over 900 times, including in the books *Noise* by Daniel Kahneman and *Talking to Strangers* by Malcolm Gladwell. Unfortunately, the algorithm violates New York law by detaining misdemeanor defendants without bail, which is illegal. Misdemeanor defendants must either be released on their own recognizance, or else must be given a dollar bail amount and then released if they post that bail—they cannot be jailed without bail. The algorithm's supposed better results versus the judges stemmed from its lawbreaking. The study made this fundamental error because it did not examine the legal constraints surrounding bail decisions. This error was compounded by the algorithm being a 'black box' type, making it difficult to detect the algorithm's illegality.

We can draw a lesson from this. If AI is to be used in the real world, its designers must appreciate the specific context in which it is applied. This includes consulting experts in the relevant field. Furthermore, black box AI must never be used to make decisions where peoples' liberty or legal rights are at stake, such as in criminal cases. Transparency in AI's operations is vital so that we can easily detect when an algorithm makes a mistake—or acts illegally.

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I. A CAUTIONARY TALE OF BLACK BOX AI

In 2018, *The Quarterly Journal of Economics* published a study purporting to show that an artificial intelligence (AI) algorithm made better pre-trial bail decisions[2] than did human judges in New York City: Kleinberg, Jon, *et al.*, "Human Decisions and Machine Predictions," *The Quarterly Journal of Economics*, 133.1 (2018): 237-293 (hereafter the "study"). The soundbite was that the algorithm could reduce 'crime'—that is, defendants failing to appear at subsequent court hearings in their cases—by up to 24.7% compared to judges' bail decisions, with no change in jailing rates. Study at 238. The study has been cited more than 900 times, including in the books *Noise* by Daniel Kahneman[3] and *Talking to Strangers* by Malcolm Gladwell.[4]

The study claimed it was a head-to-head comparison of an algorithm doing exactly what judges do: "Exactly how good judges are in making these decisions relative to an algorithm's predictions is the focus of the rest of our article." Study at 251. The algorithm won handily: "We find the algorithm dominates each judge in our data set . . . ." Study at 271. As Gladwell enthusiastically put it, "machine *destroyed* man" because the algorithm "*did a much better job at making bail decisions.*" Gladwell at 40-41.

If only it were that easy.

A. The algorithm violates New York law

Unfortunately, the algorithm's claimed success results from its violation of New York law on bail. Specifically, the algorithm detains predicted high-risk *misdemeanor* defendants without bail, which is flatly *illegal*. In New York, non-felony defendants, *i.e.*, those charged with misdemeanors or other lesser offenses, must either be released 'on their own recognizance' (OR), meaning they are free without having to post any money, or else must be allowed the opportunity to post bail. Misdemeanor defendants cannot be jailed without bail. New York Criminal Procedure

[2] 'Bail decisions' refers to selecting the three categories that accused defendants can be placed in pre-trial, when they are presumed innocent. Pre-trial defendants can either be: (a) released 'on their own recognizance' (OR); or (b) they can be given a dollar amount of bail, and if they post that amount they are released, but if they fail to post the money they remain detained; or (c) they can be 'remanded', which means they are detained in jail pending their trial, without the ability to post bail to obtain their release. New York Criminal Procedure Law (CPL) § 510.10.

[3] Kahneman, Daniel, *et al.*, *Noise: A Flaw In Human Judgment* (New York: Little, Brown Spark 2021) at 130-32 (repeating the study's conclusion that, via the algorithm, "crime rates could be reduced up to 24%, because the people behind bars would be the ones most likely to recidivate").

[4] Gladwell, Malcolm, *Talking to Strangers: What We Should Know About the People We Don't Know* (New York: Back Bay Books/Little, Brown and Company 2021) at 39-40 ("The people on the computer's list were 25 percent less likely to commit a crime while awaiting trial than the . . . people released by the judges of New York City. 25 percent!").

Law (CPL) § 530.20(1) (effective through Dec. 31, 2019)[5] ("When the defendant is charged . . . with an offense or offenses of less than felony grade only, the court must order recognizance or bail"); CPL § 170.10(7) (in a misdemeanor case, the court "must, as provided in subdivision one of section 530.20, issue a securing order either releasing the defendant on his own recognizance or fixing bail for his future appearance in the action")[6]; *Matter of LaBelle*, 79 N.Y.2d 350, 357-58 (1992) ("it is plainly the court's duty to order bail or recognizance in a nonfelony case at the time the defendant is arraigned") (holding that it is "legal error" and "sanctionable conduct" to detain a misdemeanor defendant without bail); s*ee*, *e.g.*, Phillips, Mary T., *A Decade of Bail Research in New York City* (New York: New York City Criminal Justice Agency, 2012) at 41 ("Bail may not be denied for a misdemeanor or lesser offense").[7]

How could the algorithm be designed to act illegally? The study's authors decided, for simplicity, not to require their algorithm to set money bail. Instead, they treated pretrial detention decisions as being either release OR, or remand without bail. Study at 280 (describing this "simplifying assumption").

For the algorithm to have set money bail would have involved several predictions. First, the algorithm would have to set a dollar bail amount for each misdemeanor defendant who was not released OR (while complying with legal requirements, *e.g.*, that excessive bail cannot be required and that using bail for preventive detention is prohibited[8]). Then, the algorithm would have to predict whether each defendant would have posted that bail, or not. Finally, if the misdemeanor defendant had posted bail and been released—despite the algorithm wanting that defendant detained—then the algorithm's 'failure to appear' rate versus the judges' rate would have to be adjusted. In any event, the authors removed the requirement.

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[5] New York revised its bail statutes starting in 2020. Unless otherwise stated, all references herein are to New York law as it existed in 2008-2013, the time period the study examined. Present New York law continues to prohibit detaining misdemeanor defendants without bail, and in fact mandates that most misdemeanor defendants must be released on their own recognizance. *See* current CPL § 530.20(1), (2) (effective as of May 9, 2022).

[6] In New York, misdemeanor cases are punishable by 16-364 days of incarceration. Felony cases are punishable by 365 days or more of incarceration. Cases punishable by between 1-15 days of incarceration are called violations. New York Penal Law §§ 10.00, 55.10, 70.15.

[7] The study examined cases in NYC for the five years from November 2008-November 2013. During those years, the sole exception to the rule that misdemeanor defendants may not be detained without bail was that a mentally incapacitated misdemeanor defendant could be held without bail if the court explicitly found that the defendant would not appear for a mental competency examination were they released on their own recognizance or on bail. *People v. Wilboiner*, 936 N.Y.S. 2d 873, 877 (2012) (noting this narrow exception is needed to address the misdemeanor defendant's "mental disease or incapacity" and that confinement pending the competency examination is "typically in a hospital setting"). In 2010, out of 124,896 misdemeanor defendants in New York City, only 267 were detained without bail, under this exception. Phillips at 44 table 6.

[8] New York Constitution Article I, § 5 ("Excessive bail shall not be required"); *People v. Bailey*, 462 N.Y.S. 2d 94, 98 and n.9 (1983) (setting arbitrarily high bail for "preventive detention is prohibited"; "the amount of bail must be no more than to guarantee [defendant's] presence at trial").

In the test pool, judges set bail in 35.5% of the cases, and defendants posted bail and were released in 10.4% of the total cases.[9] Study at 249. The algorithm set bail in zero cases. Instead, the algorithm chose only between releasing defendants OR, or else detaining them without bail. Consequently, the algorithm detained large numbers of misdemeanor defendants without bail—all illegally.

Indeed, had the algorithm been used to make real-world bail decisions (rather than just being an academic study), it could well have been shut down by New York's State Commission on Judicial Conduct. In *LaBelle*, the New York Court of Appeals upheld the Commission disciplining Judge Lawrence LaBelle because in several "nonfelony cases [he] committed defendants to jail, prior to trial, without setting bail in violation of CPL 530.20(1)"—the same violation the algorithm commits. *LaBelle*, 79 N.Y.2d at 356.

The study's authors, evidently oblivious to the illegality, boast that the algorithm is more effective than judges precisely because the algorithm does not make the so-called 'mistake' of releasing high-risk misdemeanor defendants. The study chides that New York's "judges are mistaken" and less effective than the algorithm because the "Judges are most likely to release high-risk people if their current charge is minor, such as a *misdemeanor*." Study at 284 (emphasis added). The authors admonish that "judges seem to be (among other things) overweighting the importance of the current charge." *Id.*

Naturally, the judges appear to be 'overweighting' the importance when the current charge is a misdemeanor, because they are following CPL §§ 530.20(1) and 170.10(7), which prohibit holding misdemeanor defendants without bail, no matter how 'high-risk' a defendant is.

Thus, an unknown amount of the algorithm's claimed 'crime reduction' is due to its unlawful conduct. Bluntly put, the algorithm's supposed better results appear to stem from its lawbreaking. Once this fundamental flaw is recognized, the study's comparison of pre-trial detention decisions between the algorithm and judges is invalidated. The study does not prove the algorithm makes better bail decisions than do human judges.

Why was this flaw not recognized by the study's authors, or by subsequent readers? There appear to be two reasons.

B. The study's authors are not lawyers

First, the study's authors apparently were unaware of New York's prohibition against detaining misdemeanor defendants without bail. That is not surprising. Even though the study's

[9] Judges released 63.2% of defendants OR, and remanded 1.3% of defendants (all on felonies). Defendants posted bail in 10.4% of the cases, and failed to post bail in 25.1% of the cases. Study at 249.

subject was bail—a quintessential legal topic—none of the five authors are lawyers. Rather, three are computer science Ph.Ds, and two are economics Ph.Ds (one of whom is director of the University of Chicago's Crime Lab). In the study's 50-plus pages there are no citations to any legal statutes or cases.

The study focused on AI's predictive ability and used bail decisions as an arena to demonstrate that ability. Thus, apparently the authors did not examine the legal constraints surrounding bail determinations. They apparently did not appreciate the *context* in which their AI was deployed. Consequently, they designed an algorithm that violated the law.

C. The study used a black box algorithm

Second, the method used to create the algorithm was a type of machine learning called "gradient boosted decision trees." Study at 239, 252. Gradient boosted decision trees are a black box form of AI. 'Black box' refers to AI algorithms that "do not explain their predictions in a way that humans can understand." Rudin, Cynthia, "Stop Explaining Black Box Machine Learning Models for High Stakes Decisions and Use Interpretable Models Instead," *Nature Machine Intelligence* 1 (2019) at 206; s*ee* Petch, Jeremy, *et al.*, "Opening the Black Box: The Promise and Limitations of Explainable Machine Learning in Cardiology," *Canadian Journal of Cardiology*, 38 (2022) at 204-05 ("the term 'black box' is shorthand for models that are sufficiently complex that they are not straightforwardly interpretable to humans") (listing "gradient boosting" as one of the forms of AI that are "rendered black boxes by the complexity and scale of their structures").

The power of black box AI is that, in large datasets, it can detect correlations that are not intuitive, and thereby make quite accurate predictions when given similar data. The downside is that the algorithm gives no understandable explanation as to how it makes a prediction in any individual instance. Rather, one is asked to accept, as an act of statistical faith, that since the overall predictions are demonstrably accurate as a group, hopefully each one is likely to be accurate.

But the lack of insight into precisely how the algorithm works—the inability to 'look under the hood'—made it difficult for subsequent readers of the study to determine how or why it might be going astray.

Section II below gives an overview of the study. Section III details how and why the algorithm violates New York law. Section IV presents concluding thoughts. But first, here is an example of how the algorithm might have acted had it been applied in reality.

D. Example of how the algorithm might have acted: Sam D.'s case

The study gives no examples of defendants whom judges had released but whom the algorithm would have detained. But we can examine how the algorithm might have acted, using the specific case of Sam D., who was charged in 2010, one of the five years the study examined. Sam D's case is discussed in Human Rights Watch's report, "The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City" (2010) (hereafter "HRW") at 42:

> Sam D., age 26, was arraigned on charges of stealing $22 of food (some sugar, a piece of chicken, and a cake) which he said he stole because he had no money and it was his girlfriend's birthday. He lives with her and their one-month old child on unemployment insurance of $140 a week. He had no prior convictions although another shoplifting case was pending. Although the prosecutor asked for $500 bail, the judge released Sam on his own recognizance.

Thus, Sam D. was accused of misdemeanor petty theft, *see* PL § 155.25, and a judge released him OR, over the prosecutor's request that $500 bail be set.

The Human Rights Watch report does not say whether Sam D. failed to appear at a subsequent court hearing. But what if the algorithm considered him to be a high risk for failure to appear? If so, then the algorithm would have illegally ordered him detained *without bail*. Sam D. would not have had the opportunity to post bail and be released. Rather, he would have remained detained with no possibility of being free pending trial—for having allegedly shoplifted $22 worth of food.

Instead, to be lawful, the algorithm first would have had to set a bail amount for Sam D., whether it be the $500 the prosecutor requested or some other amount. Then the algorithm would have had to predict whether Sam D., or someone on his behalf, would have posted that amount, thus freeing him. Finally, if Sam D. did post whatever bail the algorithm set, then his result would be the same as when the judge released him OR, regardless of whether the algorithm considered him high-risk for failure to appear.

By refusing to have the algorithm set bail, the study's authors avoided these difficulties. They also mandated that misdemeanor defendants like Sam D. would have been illegally detained without the possibility of posting bail and being released. This illegality invalidates any comparison between the algorithm and judges.

II. OVERVIEW OF THE STUDY

The study examined a dataset of 758,027 criminal cases from New York City between November 1, 2008, to November 1, 2013, in which pretrial release decisions were made.[10] The dataset included all types of misdemeanor and felony cases. Study at 247-49.

The study team used 221,876 cases to 'train' the algorithm. An imputation set of another 221,875 cases was used to fill in missing data in the training set, using statistically accepted techniques. *Id.* As noted, the algorithm was a gradient boosted decision tree type. Study at 239, 252.

The resulting algorithm was then tested on a hold-out set of 110,938 cases, and the outcomes from that testing were compared to the judges' actual decisions. Study at 249, 270. This comparison is where the 'reduces crime by up to 24.7% compared to judges' soundbite comes from. Study at 270.

The final 203,338 cases were reserved in a lock box and were not tested until just prior to final publication of the study. The study does not provide the detailed results of the lock box test, but states that the results were "very similar" to the results from testing the hold-out set. Study at 280.

There are four significant features of the study's design.

A. The study only compared failure to appear (FTA) rates

First, when the study talks about reducing 'crime' that really means whether a defendant failed to appear for a subsequent court hearing. The study uses the term 'crime' as a proxy for 'fail to appear' (FTA). In New York, by statute, bail decisions focus only on whether defendants will appear for subsequent court dates in their pending case. Perhaps surprisingly, public safety is not a bail consideration in New York. CPL § 510.30.2(a); *see* study at 246 ("New York is one of a handful of states that asks judges to only consider flight risk, not public safety risk")[11]. This contrasts with states like California, for example, where not only is public safety considered in making pre-trial detention decisions, it is the primary consideration.[12]

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[10] The study took data on "all arrests" made in New York City in those five years (apparently meaning all criminal cases filed), which totaled 1,460,462 cases. The study then excluded 272,381 desk appearance tickets, 295,314 cases disposed of at initial arraignment, 131,731 cases "adjourned in contemplation of dismissal," and eliminated some duplicate cases. This left the pool of 758,027 cases. Study at 247 and n.21.

[11] This was true for four of the five years the study examined. Starting in December 2012, New York law was amended so that public safety could be considered in certain domestic violence cases that involved violation of a restraining order or use of a firearm. CPL § 510.30(2)(vii) (effective December 2012 through December 2019).

[12] *See* California Constitution Art. 1, § 28(f)(3) (mandating that in setting bail "Public safety and the safety of the victim shall be the primary consideration"); California Penal Code § 1275(a)(1) (in setting or denying bail "public safety shall be the primary consideration").

The study acknowledges that the comparison between the algorithm and judges involved FTA rates: "since judges in NYC are asked to predict only FTA risk, this is the outcome we predict in our models . . . although for convenience we refer to our outcome generically as 'crime'" (study at 257).[13]

B. The study treated all FTAs as equal

The focus on FTAs leads to a corollary issue: all FTAs are equal to the algorithm. An FTA on the lowest level misdemeanor case is treated the same as an FTA on a murder case.

Remember that the cases used in this study occurred in New York City between 2008-2013. During those years, possession of small amounts of marijuana was a misdemeanor. For example, possession of 25 grams (less than an ounce) of marijuana, or smoking marijuana in public, were class B misdemeanors. New York Penal Law (PL) § 221.10 (effective to 8-27-2019).[14] "In fiscal year 2009, there were 43,787 arrests [in NYC] just for possession of marijuana in public view." HRW at 10, n.5 (noting also that "misdemeanor drug arrests accounted for one-quarter of all criminal arrests"). Yet subsequently, in March 2021, adult recreational marijuana use was made legal in New York.[15]

Other misdemeanors include, for example, shoplifting, jumping a subway turnstile, and driving on a suspended license. PL §§ 155.25, 155.30 (stealing property valued under $1,000 is a class A misdemeanor); PL § 165.25(3) (theft of services by subway fare evasion is a class A misdemeanor); New York Vehicle and Traffic Law § 511 (driving on a suspended license is a misdemeanor). In 2009, of the top ten charges at criminal arraignment in New York City nine were misdemeanors, led by misdemeanor possession of marijuana (1st place) and including petty larceny (4th place), theft of services (5th place), and aggravated unlicensed operation of a motor vehicle (6th place). The sole felony charge in the top ten was possession of a controlled substance in the third degree in violation of PL § 220.39, which was ninth place. Criminal Court of the City of New York, "Annual Report 2009," at 30.[16]

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[13] The study looked only at absolute FTA rates, *i.e.*, whether a defendant missed any court date, as opposed to adjusted FTA rates, which refer to a defendant failing to voluntarily reappear within 30 days of a missed court date. Most defendants who miss a court date do not abandon their case, but rather the "majority of defendants who missed a scheduled court appearance did return within 30 days." Phillips at 96. Thus, in 2005 in NYC, the absolute FTA rate was 16%, but the adjusted FTA rate was only 7%. *Id.* The study provides no information on adjusted FTA rates for the test pool.

[14] Class B misdemeanors are punishable by incarceration not to exceed 3 months. PL § 70.15(2). Class A misdemeanors are punishable by incarceration up to 364 days. PL § 70.15(1).

[15] PL §§ 221.00 to 221.55 (regarding adult marijuana possession and use) were repealed effective March 31, 2021, by New York's Marihuana Regulation and Taxation Act, L.2021.

[16] The other misdemeanors completing the top ten charges were: simple assault in the third degree, PL § 120.00 (2nd place); possession of a controlled substance in the seventh degree, PL § 220.03 (3rd place); trespass in the second

The point is that if the algorithm (a) released one defendant accused of a violent felony, who then failed to appear at a subsequent court hearing, but also (b) detained two defendants accused of smoking marijuana in public (whom judges had released on their own recognizance and who had then failed to appear), this would be treated as a net +1 success by the study. Again, to the algorithm all FTAs are equal.

C. Misdemeanors likely composed more than half of the case pool

Because the study lumps felonies and misdemeanors together, it does not give a precise breakdown of the percentage of misdemeanor cases in the dataset. We can, however, be confident that misdemeanors made up over half the cases.

For the year 2009 (one of the five years in the dataset), 85 percent of criminal arraignments in NYC were for non-felony cases and 15 percent were for felonies. Out of 375,837 total arraignments: 54,970 were for felonies (14.6%); 276,112 were for misdemeanors (73.5%); 31,853 were for violations or infractions (8.5%); and 12,902 were listed as other (3.4%). Criminal Court of the City of New York, "Annual Report 2009," at 26. This approximate 80/20 ratio of non-felony to felony cases (with misdemeanors being over 70% of the cases) holds for the five years the study looked at, 2008-2013. Criminal Court of the City of New York, "Annual Report 2013," at 25 (listing annual case breakdowns for 2007 to 2013); *see* Phillips at 107 (in 2010 in NYC felonies constituted 16% of arraigned cases). Because the study lumps misdemeanor and felony cases together, it is uncertain how closely the test dataset mirrors this 80/20 split.

However, from partial references in the study, we know that "drug misdemeanor" cases alone constituted 11.4% of the pool of cases. Study at 250, table 1. Simple assault (as contrasted to aggravated assault) is a Class-A misdemeanor in New York, *see* PL § 120, and alone constituted 21.4% of the cases. Study at 250, table 1.

D. FTA rates are higher for misdemeanor cases than for felonies

There is an additional point not mentioned in the study: the FTA rate in New York City is higher for misdemeanor cases than for felonies. There are potential explanations for why misdemeanor FTA rates are higher, the simplest one being that a higher percentage of felony defendants remain jailed while their case is pending: "14% of nonfelony and 31% of felony cases had a defendant who was detained from arraignment to disposition without ever being released." Phillips at 108. But we need not debate the reasons here, because we have the actual data from the New York City Criminal Justice Agency for the years 2009 and 2010, two of the five years the study looked at. The FTA rate on misdemeanors is 4-5% higher than on felonies.

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degree, PL § 140.15 (7th place); possession of a weapon in the fourth degree, PL § 265.01 (8th place); and consumption of alcohol on the street, New York City Administrative Code § 10-125 (10th place).

Percentage of FTAs for felonies versus misdemeanors in NYC for 2009 and 2010		
	Felonies	Misdemeanors
2009	12%	16%
2010	11%	16%
Source: Phillips at 55, Figure 15 and n.23		

Recall that misdemeanors were about 70% of criminal cases in New York City, and we can see that misdemeanor FTAs represent the majority of all FTAs.

This raises a question: if you were an algorithm unaware of the legal prohibition against detaining misdemeanor defendants without bail, and you wanted to decrease overall FTA rates regardless of whether they were felony or misdemeanor FTAs, what would be a straightforward way of achieving that? An easy answer is: detain more misdemeanor defendants without bail.

III. THE ALGORITHM VIOLATED NEW YORK LAW BY DETAINING MISDEMEANOR DEFENDANTS WITHOUT BAIL

We now turn to the path by which the algorithm violated New York law. First, the study eliminated the entire money bail category. The authors did this in order to make the risk-assessment task easier for the algorithm. With bail eliminated, the algorithm then had no option but to detain large numbers of high-risk misdemeanor defendants without bail.

A. The study first eliminated the money bail category in order to 'simplify' the algorithm

At a pre-trial detention hearing, there are three decision outcomes (CPL § 510.10; *see* study at 245):

1. Defendants can be released OR, meaning they are free pending their trial without having to post money bail. This is the most common category.
    a. In the study case pool, the judges released 63.2% of defendants OR. Study at 249.
2. Alternatively, judges can set a dollar bail amount for defendants. If the defendant posts the bail then they are free pending their trial. If they fail to post the bail amount, they generally remain in jail.[17] This is the second most common category.

[17] There is a significant exception, however, which the study fails to mention. Approximately 9% of NYC misdemeanor defendants who fail to post bail are nevertheless released OR because prosecutors fail to 'convert' a hearsay complaint to a non-hearsay information (a separate type of criminal charging document) within 5 days. HRW at 22, figure 2 and n.57; using data from 2003-04, Phillips at 108 puts the figure at 4%. New York law requires that if the misdemeanor complaint is not timely replaced by an information, then the "court must release the defendant on his own recognizance" unless special factual findings are established. CPL § 170.7(1). In other words, a significant number of misdemeanor defendants are freed pending trial due to prosecutorial inaction,

a. In the study case pool, the judges set bail in 35.5% of cases: 10.4% of the pool posted bail and were released, and 25.1% did not post bail and therefore remained in jail. *Id.*

3. Finally, in extraordinary instances, defendants can be detained in jail without bail ('remanded'). They have no ability to be freed pending their trial. This is the rarest category. In New York, only felony defendants can be remanded. CPL § 530.20.
   a. In the case pool, judges remanded only 1.3% of defendants. Essentially all of these were felonies.[18] Study at 249.

Thus, the second category, setting a dollar bail amount, represented over a third of the cases. All defendants who have a bail amount set have the potential to get out of jail pre-trial; and in the study's pool a significant number did—10.4% of the total defendants.

But presumably it was difficult to train an algorithm that would: (a) set a separate dollar bail amount for each defendant who was not either given OR or remanded; then (b) predict whether that defendant would have been able to post bail.

Therefore, to make it easier to design the algorithm, the study *eliminated* the second category: "we have made the simplifying assumption that judges simply release or jail, when in fact they set a bail amount as well." Study at 280. "Those we call 'detained by the judge' includes the two-thirds of those offered bail who cannot make bail, plus the 1.3% of defendants who are remanded (denied bail)." Study at 249. Similarly, those the study called 'released' were both the defendants released OR by judges, and also the defendants who had posted bail. *Id.*

In other words, the authors decreed that the algorithm would only have to decide between *two* categories of pre-trial release decisions: OR or remand. Study at 254 ("release decision R = 0, 1."). The study added up the number of defendants that the judges had remanded (1.3% of the pool), plus those who had failed to post bail (25.1% of the pool). Then, the algorithm detained an equal number of defendants based on risk score—all without setting bail.

B. There is no justification for the algorithm eliminating bail

The study provides no justification for this simplification. It may be the authors reasoned that the algorithm was only predicting FTA risk, and that the level of FTA risk at which bail should

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regardless of whether the defendants failed to post bail set by judges. It does not appear the study made any adjustment for this.

[18] The number of misdemeanor defendants detained without bail (due to mental competency examinations, *see* n.6) is generally less than 1%. For example, in 2010, out of 124,896 misdemeanor cases in NYC, only 267 defendants were detained without bail, which is 0.21%. In contrast, out of 52,454 felony cases, 2,201 defendants were detained without bail, which is 4.2%. Phillips at 44, table 6.

be denied was a social judgment. *See* study at 254-57. As Kahneman summarizes it, "the level of [FTA] risk *above which a defendant should be denied bail***,** requires an evaluative judgment that a model cannot make." Kahneman at 130 (emphasis added).

For felony cases that may be so. The problem is that in misdemeanor cases, under New York law there is *no* level of FTA risk at which a defendant can be denied bail. New York's legislature has already made that evaluative judgment, and courts must follow it.

Alternatively, some people believe that, in certain instances, New York judges may purposely set high bail to preventively detain misdemeanor defendants. *See*, *e.g.*, HRW at 26 (suggesting some NYC judges "set bail assuming—and sometimes intending—that pretrial detention will be the result").[19] Indeed, the study raises the possibility that "the judge actually intended to jail high-risk people but simply mispredicted what bail amount they would be able to make and assigned them bail amounts that were too low." Study at 281.

Whether some judges set too-high bail as a surreptitious means of detaining misdemeanor defendants is an important discussion to have. But we need not resolve it here, because we know that in fact 10.4% of the defendants in the study posted bail and were freed pending trial. Study at 249. Since the test pool was 758,027 cases, that is more than 78,000 people who were freed pre-trial by posting bail. Study at 247. To state the obvious, many people do post bail and are released.

If the study used cynicism regarding how judges set specific bail amounts as justification for designing an algorithm that would, as a blanket rule, detain tens of thousands of misdemeanor defendants without bail—well, that does not excuse the algorithm's illegality.

Instead, for every free misdemeanor defendant whom the algorithm would have swapped for a jailed defendant, the algorithm should have had to set a bail amount (while complying with the whole subset of laws governing how dollar bail is set[20]) and then predict how many of those defendants would have posted bail and remained free—regardless of the algorithm viewing them as high-risk. Finally, the study would have had to adjust its calculations for the misdemeanor

[19] The Human Rights Watch report notes that in 2008, out of 24,459 misdemeanor cases in which NYC judges set bail, the bail amount was $1,000 or lower in 72% of those cases (19,137 cases). HRW at 13, table 1. However, $1,000 or lower bail still is unaffordable for many people. Consequently, only 13.1% of the misdemeanor defendants given $1,000 or lower bail were able to post it and be freed pretrial. *Id.* at 21, figure 1. The report does not state the percentage of misdemeanor defendants given more than $1,000 bail who posted the bail amount.

[20] *See, e.g.,* New York Constitution Article I, § 5 ("Excessive bail shall not be required"); *People v. Bailey*, 462 N.Y.S. 2d 94, 98 and n.9 (1983) (setting arbitrarily high bail for "preventive detention is prohibited"; "the amount of bail must be no more than to guarantee [defendant's] presence at trial"); CPL § 510.30(2)(a) (effective to 12-31-2012) (listing 8 factors the court "must" consider in setting a bail amount, including evaluating "the weight of the evidence against [the defendant] in the pending criminal action and any other factor indicating probability or improbability of conviction").

defendants who would have posted bail and then FTA, despite the algorithm deeming them high-risk.

If this sounds challenging, it is. But that is what judges do, and what the algorithm did not. Remember, the study's authors claimed that "[e]xactly how good judges are in making these decisions relative to an algorithm's predictions is the focus of the rest of our article." Study at 251. That claim falls flat when the algorithm specifically avoids performing significant parts of judges' decision-making. The algorithm's failure to set bail defeats much of the value of the study.

C. The algorithm then detained misdemeanor defendant without bail

After eliminating the money bail category, it was virtually inevitable that the algorithm would act unlawfully. Once bail was eliminated, then for misdemeanor cases the only legal option left was to release all misdemeanor defendants OR. Had that been done, the algorithm's FTA rate likely would have increased past the judges' rate.

Instead, the algorithm treated misdemeanor defendants whom the algorithm did not release OR as detained without bail. The algorithm did not set a bail amount. It did not attempt to predict which misdemeanor defendants then would have posted bail. Again, remanding misdemeanor defendants without bail is illegal. CPL §§ 530.20(1), 170.10(7).

D. The algorithm detained a higher number of misdemeanor defendants

The study thus reduces to a largely beside-the-point exercise.[21] The algorithm appears to have recognized that misdemeanor defendants FTA at higher rates than felony defendants. Therefore, to minimize FTAs, it detained more misdemeanor defendants than the number of misdemeanor defendants who had not posted the bail amounts judges set; and it released more felony defendants than judges did.

We know this is so, despite the algorithm being a black box, because there is a section of the study titled "Understanding Judge Misprediction" (study at 280-84), where the authors attempt to "[shed] light on what judges are getting wrong" (study at 280). The authors recognized that the algorithm detained more misdemeanor defendants than did the judges. Unaware that the algorithm was acting illegally in doing so, they present this as a criticism of the judges' decision-making.

"Why are judges mispredicting crime risk?" they ask. Study at 281. According to the study, the answer is that judges are detaining more felony defendants than the algorithm, while the

[21] Had the study focused solely on defendants charged with felonies, then possibly it might have shown whether the algorithm could result in the release of more accused felony defendants OR, who would then show up for trial, as compared to judges' felony pre-trial detention decisions. Unfortunately, the study blended misdemeanor and felony FTAs together.

algorithm is detaining more misdemeanor defendants than the judges. The authors make this point clear:

> Judges are most likely to release high-risk people if their current charge is minor, such as a *misdemeanor*, and are more likely to detain low-risk people if their current charge is more serious. . . . Put differently judges seem to be (among other things) overweighting the importance of the current charge.

Study at 284 (emphasis added).

The response, of course, is that judges do not detain misdemeanor defendants without bail, because it is illegal to do so, no matter how high-risk the defendant is. Instead, judges set bail for misdemeanor defendants who are not released OR; many of those defendants post bail and are released; and some of those defendants then FTA.

Ultimately then, the study does prove something: if you illegally detain large numbers of misdemeanor defendants without bail, you can reduce the FTA rate.

IV. CONCLUSION

Could an AI algorithm be designed that would predict FTA risk more accurately than human judges, while (a) complying with the law, and (b) making all the determinations that judges are required to make? It may be possible. But this study was not it.

The study set out to prove the usefulness of AI in the real-world: "the bail application provides a template for when and how machine learning might be used to improve on human decisions." Study at 242. Instead, it inadvertently provides a cautionary lesson on the potential dangers of black box AI: that it can easily result in errors that may not be understood even by the designers of the algorithm, much less by outside observers.

It is striking to see how readily the study's authors designed the algorithm to detain misdemeanor defendants without bail. To be clear: the authors are highly credentialed professors. They presumably did not understand that their algorithm was acting illegally. If smart people like this can make such an error, anyone can.

The lesson is that if AI is to be applied in real-world areas that affect people's lives, the context in which it is applied must be understood. A level of humility is required. Experts who work in the specific field where the AI is to be used—be it law, medicine, or other areas—must be looped-in to the AI's design from the start. Otherwise, there will be significant unintended negative consequences.

It also has been difficult for readers who do not have legal training to detect the algorithm's illegality. The study has been cited over 900 times, apparently without questioning whether the algorithm complied with the law. In part this assumption of lawfulness has been due to the algorithm's black box nature, which obscures its actions. This gives credence to a fear articulated by Georgia Tech Professor Deven Desai:

> [T]hat the rise of large data sets combined with machine learning . . . (an area of computer science that uses the automated discovery of correlations and patterns to define decision policies) might allow those who use such techniques to wield power in ways society prohibits or should disfavor, but which society *would not be able to detect*.

Desai, Deven, *et al.*, "Trust but Verify: A Guide to Algorithms and the Law," *Harvard Journal of Law & Technology* 31.1 (2018): at 3-4 (emphasis added).

The lesson is that black box AI must never be used to make decisions where peoples' liberty or legal rights are at stake, such as in pre-trial bail hearings. People have a right to be able to know how and why a decision was made in their specific case, whether they agree or disagree with the result. Transparency in AI's operations is vital, so that people will be able to detect when an algorithm makes a mistake—or acts illegally.

Crypto-Terror on the Rise: Rethinking Regulation and Prosecution of Cryptocurrency Transactions

Miriam Elizabeth Mokhemar

Abstract

Cryptocurrency has provided the means for individuals to conduct financial transactions with each other without the need for a bank. Since the first cryptocurrency was created over a decade ago, more cryptocurrencies have been created and their popularity has soared. Cryptocurrency can be used to buy items from insurance to concert tickets. However, it can also be used to fund nefarious and illegal products, such as weapons. Regulators and prosecutors have struggled to combat illicit cryptocurrency transactions used to fund foreign terrorist organization operations and U.S. adversaries.

While there is no single entity with jurisdiction over cryptocurrency, executive agencies in the United States have the most power over cryptocurrency transactions that start and/or end in the U.S. This Note explores more effective options the Department of the Treasury and the Department of Justice can apply to regulate and prosecute cryptocurrency transactions financing foreign terrorist organizations and U.S. adversaries.

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I. Introduction

This Note argues that the regulation of cryptocurrency should be increased by the Department of the Treasury. Such regulation should include lowering the threshold for reporting suspicious cryptocurrency transactions from $10,000 to $250. This regulation would be carried out by the Office of Foreign Asset Control (OFAC) and the Financial Crimes Enforcement Network (FinCEN). Additionally, this Note argues that the Department of Justice should increase prosecution of cryptocurrency transactions that violate anti-money laundering laws and anti-terrorism laws under § 1956(h) of the Money Laundering Control Act.

First, I address different factors that warrant increased restrictions and anonymity issues with crypto-currency transactions. Second, I discuss the authority of the executive agencies and cryptocurrency case law precedent. Third, I define terrorism and provide descriptions of terrorist operations funded by cryptocurrency. Lastly, I prescribe remedies to issues identified in the first section.

II. The Basics

A. What is Cryptocurrency and Blockchain Technology?

The U.S. Department of the Treasury defines digital currency as "sovereign cryptocurrency, virtual currency (non-fiat), and a digital representation of fiat currency."[22] A fiat currency is one that governments issue, such as the U.S. dollar, Euro, British Pound, and Yen, and is controlled by a central bank.[23] OFAC clarifies that sovereign currency is focused on cryptocurrency issued by foreign governments, such as Venezuela.[24] This is an important clarification because several adversarial countries to the U.S. are developing sovereign cryptocurrencies, such as the Central Bank of Iran.[25] The Treasury Department defines virtual currency as "a digital representation of value that functions as a medium of exchange; a unit of account; and/or a store of value; and is neither issued nor guaranteed by any jurisdiction."[26] The broad definition of virtual currency most likely includes most assets of cryptocurrencies and tokens

[22] *Frequently Asked Questions*, U.S. DEP'T. OF THE TREAS., https://home.treasury.gov/policy-issues/financial sanctions/faqs (last visited Jan. 17, 2023).
[23] Inyoung Hwang, *What is Fiat Currency? How Is It Different From Crypto?*, SOFI (June 1, 2022), https://www.sofi.com/learn/content/fiat-currency/.
[24] Joseph B. Evans et al., *OFAC Reaffirms Focus on Virtual Currency with Sanctions Law Guidance*, NAT'L L. REV. (Nov. 5, 2021), https://www.natlawreview.com/article/ofac-reaffirms-focus-virtual-currency-updated-sanctions-law guidance (last visited Jan. 27, 2023).
[25] Paddy Baker, *Iranian President Calls for National Crypto Mining Strategy*, COINDESK (May 21, 2020), https://www.coindesk.com/markets/2020/05/21/iranian-president-calls-for-national-crypto-mining-strategy/ (last visited Jan. 27, 2023).
[26] S*ee Frequently Asked Questions, supra* note 22.

as they are interpreted by the courts as mediums of exchange.[27] Therefore, with broad definitions, the Treasury Department has broad authority to regulate virtual currencies and the discretion to confiscate them when they violate regulations.

Cryptocurrency exists on blockchain technology. Blockchain is a form of distributed ledger.[28] A distributed ledger is a database of digital data containing a permanent ledger of approved records spread across several locations, participants, and institutions.[29] While blockchain can be categorized as a type of distributed ledger, not every distributed ledger is classified as a blockchain.

As a decentralized database, blockchain stores "blocks" of data that are linked together on a "chain".[30] Because a distributed ledger is just a database spread across several nodes or participants in the network, it doesn't have a specific "chain" structure similar to blockchain; however, this data can be represented in numerous ways in each ledger.[31] Additionally, all the "blocks" on the blockchain are in a specific sequence whereas a distributed ledger does not need a specific data sequence.[32] If a blockchain is used in a virtual currency, such as Bitcoin or a transaction, it must have a token or a unit of value.[33] Because it is only a digital database, a distributed ledger does not need a token or currency value. Furthermore, there are more real-life implementations of blockchain networks, such as Amazon, IBM, and Oracle, while distributed ledgers are being further developed.[34]

Within blockchain technology, there is a hash algorithm, which is the transformation and generation of input data of any length into a string of a fixed size, which is performed by a specific algorithm.[35] This algorithm is a one-way cryptographic function and cannot be reversed or decrypted.[36] For example, the Bitcoin hash algorithm is SHA-256 or Secure Hashing Algorithm 256 bits.[37] Each block in the chain is assigned an original identifier and when a hash algorithm is

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[27] Evans, *supra* note 24.
[28] Inna Logunova, *Blockchain vs. DLT: What's The Difference?*, SEROKELL (Oct. 17, 2022), https://serokell.io/blog/blockchain-vs-dlt (last visited Jan. 27, 2023).
[29] *Id.*
[30] Rickie Houston, *Blockchain is a digital database used to store data for crypto transactions and other assets — here's how it works*, BUS. INSIDER (Sept. 20, 2021), businessinsider.com/what-is-blockchain (last visited Jan. 27, 2023).
[31] Logunova, *supra* note 28.
[32] *Id.*
[33] Stephanie Perez, *Does a Blockchain Need a Token?*, MEDIUM (Dec. 8, 2017), https://medium.com/swlh/does-a-blockchain-need-a-token-66c894d566fb (last visited Jan. 27, 2023).
[34] Daniel Liberto, *Amazon Set to Compete With IBM, Oracle in Blockchain Products*, INVESTOPEDIA (April 23, 2018), https://www.investopedia.com/news/amazon-set-compete-ibm-oracle-blockchain-products/.
[35] *Explained: What Is Hashing in Blockchain?*, BYBIT LEARN (Dec. 17, 2020), https://learn.bybit.com/blockchain/what-is-hashing-in-blockchain/.
[36] Toby Chitty, *The Mathematics of Bitcoin — SHA-256*, MEDIUM (Dec. 25, 2020), https://medium.com/swlh/the-mathematics-of-bitcoin-74ebf6cefbb0.
[37] *Id.*

applied to the blockchain, the data is converted into a unique string within a block.[38] This cryptographic hash function is beneficial in preventing fraudulent transactions, double spending in blockchain, and exposing stored passwords.[39] Virtual currencies use hash algorithms as a unique number that is not duplicable and can therefore verify a file's authenticity.[40] For example, two participants in a Bitcoin transaction, the buyer and the seller, will know the value of the money and if the buyer can afford to make this transaction. Both will also know who spends the money and who receives it because the Bitcoin hash function provides the digital data history of each participant on the Bitcoin network. When there's a change in a hashed file, its hash will automatically change and each subsequent hash is tied to the previous hash, thus ensuring all blocks in the chain stay uniform.[41] As the blockchain network expands, the hashing process is critical to safeguard the uniqueness and originality of each element of the system thus maintaining the integrity of the entire system.

Blockchain technology has different "layers". These layers are forms of network protocols that allow blockchains to handle more users, more transactions, and other data stored to be processed at once.[42] A digital wallet is a "software application (or other mechanism) that provides a means for holding, storing, and transferring digital currency" and allows a user to interact with the balances held on a blockchain.[43] The wallet holds the user's digital currency addresses that allows the owner to receive digital currency and private keys that allow the owner to transfer digital currency.[44] If the owner of a digital wallet loses their digital currency address, they lose control over their digital assets or money. Additionally, if the owner of a private key loses the key, they can no longer access the wallet to spend, withdraw, or transfer cryptocurrencies.

Digital wallets come in different forms. There are hardware wallets, such as Ledger, which look like a USB stick, and online wallets, such as mobile apps or other software like Coinbase Wallet, which makes using cryptocurrency as easy as shopping with a credit card online.[45] Coinbase Wallet and other wallet providers give the software to create and manage wallets to users, which they can download. A hosted wallet provider creates and stores a digital currency wallet on

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[38] *Explained: What Is Hashing in Blockchain?, supra* note 35.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *A beginner's guide to understanding the layers of blockchain technology*, COINTELEGRAPH, https://cointelegraph.com/blockchain-for-beginners/a-beginners-guide-to-understanding-the-layers-of-blockchain-technology (last visited March 16, 2022).
[43] *Frequently Asked Questions 559,* U.S. DEP'T. OF THE TREAS., https://ofac.treasury.gov/faqs/559 (last visited May 02, 2023); Brian Nibley, *What is a crypto wallet? Understanding the software that allows you to store and transfer crypto securely,* BUS. INSIDER (Oct. 28, 2021), https://www.businessinsider.com/crypto-wallet.
[44] Lucas Mearian, *What's a crypto wallet (and how does it manage digital currency)?*, COMPUTERWORLD (Apr. 17, 2019), https://www.computerworld.com/article/3389678/whats-a-crypto-wallet-and-does-it-manage-digital-currency.html.
[45] *What is a crypto wallet?*, COINBASE, (last visited March 16, 2022) https://www.coinbase.com/learn/crypto-basics/what-is-a-crypto-wallet.

behalf of a user.[46] Most hosted wallets also offer exchange and payment services to facilitate participation in a digital currency system.[47]

For converting cryptocurrency into fiat currency or cash, a crypto-user can use a cryptocurrency exchange. This process is similar to a foreign currency exchange at the airport. For example, a Bitcoin user could deposit their Bitcoin into a cryptocurrency exchange and once the exchange has received their Bitcoin, they can request a withdrawal in the currency of their choice. Similar to the foreign exchange at an airport, there is an exchange rate for Bitcoin to U.S. Dollars and other fiat currencies. The user can then request to withdraw their Bitcoin in their currency of choice and it will be paid to their bank account.[48] Cryptocurrency exchanges must comply with anti-money laundering laws, so a crypto user will need to withdraw to the same bank account that they deposited with.[49] Examples of exchanges include Bitcoin ATMs and debit cards.[50]

Another way cryptocurrencies can be converted to fiat currencies is through peer-to-peer exchanges (P2P). This method is quicker and more anonymous than using a cryptocurrency exchange because it eliminates the financial institution as an intermediary and the transaction processing done by the financial institution.[51] P2P platforms can be used for selling Bitcoin for cash.[52] When selling Bitcoins to other people, the seller can decide which payment method they want the buyers to use. This often allows for faster transactions with fewer fees.[53] In this method, the buyer and seller eliminate the need for a cryptocurrency exchange as an intermediary and the seller sets the exchange rate. Most of the time, sellers can get a better exchange rate with an individual buyer than they can with a cryptocurrency exchange.[54]

B. Challenges in Regulating Cryptocurrency

One of the major challenges to regulating cryptocurrencies is the vast number of them. As of March 2022, there are 18,000 different cryptocurrencies.[55] While the broad definition of virtual currency gives the Department of the Treasury more regulatory authority over cryptocurrencies, there are several other challenges it doesn't address.

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[46] *Hosted wallet explained*, FREEWALLET (May 30, 2018), https://freewallet.org/blog/hosted-wallet-explained/.
[47] *Id.*
[48] Frank Gogol, *How to Turn Bitcoin into Cash*, STILT (Mar. 24, 2022), https://www.stilt.com/blog/2021/03/how-to-turn-bitcoin-into-cash/#Cash-Out_Methods.
[49] *Id.*
[50] *Id.*
[51] Jake Frankenfield, *Peer-to-Peer (Virtual Currency)*, INVESTOPEDIA (Sept. 23, 2021), https://www.investopedia.com/terms/p/ptop.asp.
[52] Gogol, *supra* note 48.
[53] *Id.*
[54] *Id.*
[55] *Cryptocurrencies*, COINMARKETCAP, https://coinmarketcap.com/ (last visited Mar. 25, 2022).

i. *Anonymity*

Arguably the biggest problem in regulating cryptocurrency transactions and mitigating money laundering and counterterrorism financing is the anonymity of them. The anonymity of cryptocurrency transactions prevents them from being effectively observed.[56] This allows dubious transactions to occur outside of the regulatory regime, further permitting terrorist and criminal organizations alike to use cryptocurrencies to obtain easy access to "clean cash" going in and out of their illicit operations.[57]

While some cryptocurrencies are pseudo-anonymous, meaning it's possible to find out users' identities through complex channels and methods to help combat money laundering in the status quo, it's harder to utilize against terrorist organizations because it becomes too costly, too complex, and doesn't lead to any results.[58]

Additionally, some cryptocurrencies are entirely anonymous. Monero, another decentralized cryptocurrency, is more well-known for its complete anonymity and cybercriminals prefer to use it because of its anonymity and it is untraceable.[59] This cryptocurrency hides virtually all transaction details including the identity of the sender, the identity of the recipient, and the transaction amount itself.[60] Because of this higher level of privacy and ability to escape tracking tools, Monero is becoming more popular among ransomware hackers and cyber criminals. REvil, the ransomware group, has given discounts on ransoms paid in Monero or request payments in Monero.[61] AlphaBay, a massive underground marketplace, had various transactions paid for in Monero until the network was shut down in 2017.[62] Monero is perceived as such a threat that the Internal Revenue Service is offering a cash reward of $625,000 to anyone who can crack Monero's anonymity mechanism.[63]

A huge deterrent to using Monero is it cannot be exchanged for fiat currency as easily as other cryptocurrencies. Many regulated exchanges have chosen not to list Monero because of

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[56] Robby Houben and Alexander Snyers, *Cryptocurrencies and blockchain*, POL'Y DEP'T FOR ECON., SCI. AND QUALITY OF LIFE POLICIES. EUR. PARLIAMENT, 53 (July 2018), https://www.europarl.europa.eu/cmsdata/150761/TAX3%20Study%20on%20cryptocurrencies%20and%20blockchain.pdf.

[57] *Id.*

[58] *Id.*

[59] *The Wild World of Crypto Ransomware Payments*, FEI DAILY (Oct. 25, 2021), https://www.financialexecutives.org/FEI-Daily/October-2021/The-Wild-World-of-Crypto-Ransomware-Payments.aspx.

[60] MacKenzie Sigalos, *Why some cyber criminals are ditching bitcoin for a cryptocurrency called monero*, CNBC (June 13, 2021), https://www.cnbc.com/2021/06/13/what-is-monero-new-cryptocurrency-of-choice-for-cyber-criminals.html#:~:text=The%20identity%20of%20the%20sender,that%20the%20bitcoin%20blockchain%20offers.

[61] *Id.*

[62] *Id.*

[63] Kelly Phillips Erb, *IRS Will Pay Up To $625,000 If You Can Crack Monero, Other Privacy Coins*, FORBES (Sept. 14, 2020), https://www.forbes.com/sites/kellyphillipserb/2020/09/14/irs-will-pay-up-to-625000-if-you-can- crack-monero-other-privacy-coins/?sh=1a255c6685cc.

profits generated from illicit activities that could have repercussions for the regulated exchange if they converted the Monero coins into fiat currency, such as U.S. Dollars.[64] This is an opportunity the Department of Treasury, more specifically the Financial Crimes Enforcement Network (FinCEN), can use to regulate more anonymous cryptocurrencies, like Monero. FinCEN could tell these exchanges that if they list Monero as a currency they are willing to convert, they risk losing their license to operate as a money service business. This will be expanded on in the No Necessity of an Intermediary subsection below.

ii. Cross-border Jurisdiction

In addition to anonymity, the fundamentally cross-border nature of cryptocurrencies between crypto markets and different cryptocurrencies is a major challenge for regulators.[65] For example, if a crypto user in the U.S. trades or converts Bitcoin into Ethereum on a crypto exchange in Malta, this would cause several problems. First, crypto markets and crypto users can be located in jurisdictions that don't have effective money laundering and terrorist financing protocols implemented.[66] Secondly, the "residence country" for cryptocurrency software is difficult to determine due to the ledger's lack of a physical location.[67] Additionally, the inherent cross-border jurisdictions of cryptocurrencies and blockchain's transnational character make determining appropriate laws and identifying the proper jurisdiction for blockchain disputes exceptionally tough.[68] Lastly, cross-border jurisdictions of crypto markets and crypto users mean legal rulings applied will only be adequate when they are sufficient at the international level because multiple domestic legal frameworks will inevitably conflict with each other.[69]

While there is no entity with universal jurisdiction over cryptocurrencies, the Financial Action Task Force (FATF), the global money laundering and terrorist financing watchdog, has the most transnational jurisdiction over money financing organized crime, corruption, and terrorism.[70] This intergovernmental organization has jurisdiction over 200 countries, territories, and international organizations in setting international standards aimed at preventing illegal financial activities that support criminals that result in national legislation and regulatory reforms.[71] The FATF defines virtual currencies and virtual currency payment products and services to broaden its authority from payment schemes, such as cryptocurrency, to digital art and services obtained with

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[64] Sigalos, *supra* note 60.
[65] Dong He, *et al.*, *Virtual Currencies and Beyond: Initial Considerations*, INT'L MONETARY FUND, 25-27 (Jan. 2016), https://www.imf.org/external/pubs/ft/sdn/2016/sdn1603.pdf.
[66] *Virtual currency schemes – a further analysis*, EUR. CENT. BANK, 28 (Feb. 2015), https://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemesen.pdf (last visited Mar. 16, 2022).
[67] *Legal Issues Surrounding Cryptocurrency*, FREEMAN LAW, https://freemanlaw.com/legal-issues-surrounding-cryptocurrency/ (last visited Mar. 16, 2022).
[68] *Id.*
[69] *Id.*
[70] *Who we are*, FIN. ACTION TASK FORCE, https://www.fatf-gafi.org/en/the-fatf/who-we-are.html (last visited Mar. 25, 2022).
[71] *Id.*

virtual currencies.[72] Under FATF Recommendations, all countries and territories under FATF jurisdiction must impose anti-money laundering/counter-financial terrorism requirements (AML/CFT) on financial institutions and designated non-financial businesses and professions and ensure their compliance with those obligations.[73] The implementation of these recommendations also provides FATF members with sufficient powers to investigate and prosecute suspicious activities in financial systems, and to recover stolen assets.[74]

While U.S. cryptocurrency users may be able to circumvent U.S. regulations by accessing crypto exchanges overseas, they can still be subject to investigation and prosecution in FATF jurisdictions if they are involved in illicit activities. For any national regulator, administering laws among blockchain users and cryptocurrency transactions will be a heroic task.

iii. No Necessity of an Intermediary

Additionally, the possibility of a transaction not having an intermediary is highly challenging to the fight against money laundering and terrorist financing. Without a central intermediary, such as an issuer, which would normally be the focal point of regulation, it is harder to track questionable transactions.

As mentioned in the above subsection of anonymity, FinCEN could tell these cryptocurrency exchanges that if they list sanctioned currencies as a currency they are willing to convert, they risk losing their license to operate as a money service business. If they lose their license as a legitimate money service business (MSB), every exchange they make is a violation of MSB registration requirements and will count as an additional separate violation each day the violation continues, carrying civil and criminal penalties.[75] Furthermore, FinCEN can regulate the reporting threshold requirements for MSBs; this is expanded upon in Section IV.

C. Terrorism Definitions

For the purposes of this paper, I will focus primarily on terrorist groups and U.S. adversaries that utilize cryptocurrency to support their operations and money laundered funds. The United States Code defines "international terrorism" as:

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[72] *Guidance for a Risk-Based Approach to Virtual Currencies*, FIN. ACTION TASK FORCE, 3 (June 2015), https://www.fatf-gafi.org/en/publications/fatfgeneral/documents/guidance-rba-virtual-currencies.html (last visited Mar. 25, 2022).
[73] *Id.* at 6.
[74] *Corruption A Reference Guide and Information Note on the use of the FATF Recommendations to support the fight against Corruption*, FIN. ACTION TASK FORCE, 6 (Feb. 16, 2012), https://www.fatf-gafi.org/media/fatf/documents/reports/reference%20guide%20and%20information%20note%20on%20fight%20against%20corruption.pdf.
[75] 1 C.F.R. § 1022.380(e) (2022); 18 U.S.C. § 1960 (2022).

> activities that involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.[76]

Domestic Terrorism is defined as:

> activities that involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily within the territorial jurisdiction of the United States.[77]

Additionally, the designation of foreign terrorist organizations is defined under the Immigration and Nationality Act. An organization is designated as a foreign terrorist organization (FTO) if it is "a foreign organization; engages in terrorist activity or terrorism or retains the capability and intent to engage in terrorist activity or terrorism; and; the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States."[78]

These definitions are critical to understanding how the Office of Foreign Asset Control in the Department of the Treasury can regulate these groups and what sanctioned lists they are categorized in. Additionally, it will explain which groups FinCEN advises financial institutions to identify and report suspicious activity to the proper authorities. While regulatory mechanisms already exist, it is important to understand their authority and how they can be utilized more effectively to combat money laundering and financing for terrorism. Additionally, while prosecutorial mechanisms exist in the status quo, it is critical to understand what that authority can do and how it can provide different options for prosecuting crimes and criminals.

[76] 18 U.S.C.S. § 2331(1) (2022).
[77] 18 U.S.C.S. § 2331(5) (2022).
[78] 18 U.S.C.S. § 1189(1) (2022).

D. Authority of the Department of the Treasury

The Department of the Treasury was established under the Treasury Act of 1789 to manage government revenue. Today, it is responsible for a variety of activities, such as "advising the President on economic and financial issues, encouraging sustainable economic growth, and fostering improved governance in financial institutions."[79] The Treasury Department also enhances national security by "implementing economic sanctions against foreign threats to the U.S., identifying and targeting the financial support networks of national security threats, and improving the safeguards of our financial systems."[80]

i. The Office of Foreign Asset Control

Under the U.S. Treasury Department, the Office of Foreign Asset Control (OFAC), a financial intelligence and enforcement agency, administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to national security, foreign policy, or the economy of the United States.[81]

Entities, countries, and individuals who have assets in U.S. territories and are on the Specially Designated Nationals (SDNs) list or other sanctions lists will have their assets frozen and seized.[82] While OFAC can create sanction lists and add entities and individuals to them, the agency can also guide reporting compliance measures, record-keeping requirements, and license procedures.[83] In October 2021, OFAC released its sanction compliance guideline for virtual currencies, synonymous with digital currencies and cryptocurrencies. This outlines what OFAC expects a company's compliance program should be assessed, including management commitment, risk assessments, internal controls, testing/auditing, and training for employees.[84] These guidelines are important because the guidance acknowledges that a simple geography-based IP address screen may be insufficient by itself, and recommends companies also monitor virtual private network (VPN) addresses to prevent users from concealing their location.[85]

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[79] *Role of the Treasury*, U.S. DEP'T. OF THE TREAS., https://home.treasury.gov/about/general-information/role-of-the-treasury (last visited Mar. 16, 2022).
[80] *Id.*
[81] *Office of Foreign Assets Control - Sanctions Programs and Information*, U.S. DEP'T. OF THE TREASURY, https://home.treasury.gov/policy-issues/office-of-foreign-assets-control-sanctions-programs-and-information (last visited Mar. 16, 2022).
[82] *What are Specially Designated Nationals (SDNs)?*, DOW JONES, https://www.dowjones.com/professional/risk/glossary/sanctions/specially-designated-nationals/ (last visited March 16, 2022).
[83] Office of Foreign Asset Control, *Sanctions Compliance Guidance for the Virtual Currency Industry*, U.S. DEP'T. OF THE TREAS., 7 (Oct. 2021), https://home.treasury.gov/system/files/126/virtual_currency_guidance_brochure.pdf.
[84] *Id.* at 10.
[85] *Id.* at 14.

Additionally, OFAC recommends companies collect information about users and use such information to "conduct due diligence sufficient to mitigate potential sanctions-related risk."[86] This information can be utilized in the sanctions screening process to prevent violations and to adhere to existing anti-money laundering (AML) obligations.[87] While this may be time-consuming and tedious for companies, it can save them from future penalties for intentional or unintentional negligence and recklessness in mishandling a transaction conducted by sanctioned entities or where a third party in the agreement contracted with a sanctioned entity.

This was the case for Sojitz Hong Kong Limited (Sojitz HK). Mid-level employees at Sojitz HK acted contrary to companywide policies and purchased 64,000 tons of Iranian-origin High Density Polyethylene from a supplier in Thailand for resale to buyers in China.[88] This resulted in Sojitz HK paying $5,228,298 in OFAC violations.[89]

OFAC guidelines are critical to understanding how information pertaining to civil penalties can be mitigating or aggregating factors in a violation investigation. Furthermore, they outline how OFAC may incorporate elements of a sanctions compliance program into assessing violations, resolving investigations, and determining settlements.

i. *The Financial Crimes Enforcement Network (FinCEN)*

The Financial Crimes Enforcement Network (FinCEN) is a bureau of the U.S. Department of the Treasury and is in charge of safeguarding "the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities."[90] FinCEN exercises its regulatory functions primarily under the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) and the Bank Secrecy Act (BSA).[91]

FinCEN released an advisory in 2019 to clarify how financial institutions should identify and report suspicious activity of bad actors who exploit convertible virtual currencies (CVCs) for money laundering, sanctions evasion, and other illicit financing purposes, particularly involving darknet marketplaces, peer-to-peer (P2P) exchangers, foreign-located Money Service Businesses (MSBs), and CVC kiosks.[92] "P2P exchangers function as MSBs and, therefore, must comply with

[86] *Id.*
[87] *Id.*
[88] Office of Foreign Asset Control, *OFAC Settles with Sojitz (Hong Kong) Limited for $5,228,298 Related to Apparent Violations of the Iranian Transactions and Sanctions Regulations*, U.S. DEP'T. OF THE TREAS. (Jan. 11, 2022), https://home.treasury.gov/system/files/126/20220111_sojitz.pdf.
[89] *Id.*
[90] *What We Do*, FIN. CRIMES ENF'T NETWORK, https://www.fincen.gov/what-we-do (last visited Mar. 16, 2022).
[91] *Id.*
[92] *Advisory on Illicit Activity Involving Convertible Virtual Currency*, FIN. CRIMES ENF'T NETWORK (May 19, 2019),

all requirements for MSBs under the BSA and its implementing regulations."[93] Under the BSA, money-transmitters are a subcategory of MSBs and are subject to the same regulations as P2P exchangers.[94] In recent cases, CVC buyers and sellers involved in small-volume exchanges are increasingly used for money laundering purposes, possibly without their knowledge, such as to launder proceeds from drug trafficking.[95] This is important because smaller value exchanges tend to fly under the radar since MSBs and CVC kiosks usually look for larger illicit money transfers. With an increase in illicit smaller value exchanges comes the need to report on them, thus lowering the reporting threshold.

In its November 2021 advisory on Ransom payments, FinCEN reminded financial institutions of their regulatory obligations to complete the suspicious activity reporting (SARs) for ransomware payments, which also extends to anti-money laundering and combating the financing of terrorism (AML/CFT).[96] A financial institution is required to report a suspicious transaction if it "knows, suspects, or has reason to suspect a transaction conducted or attempted by, at, or through the financial institution involves or aggregates to $5,000" (or, with one exception, $2,000 for MSBs).[97] These apply to attempted and completed transactions, and FinCEN recommends filing a SAR even when there is no obligation to file.[98]

Financial institutions have due diligence programs and know your customer (KYC) policies for participants to combat money laundering and financing of terrorism. These programs ensure that they address correspondent accounts maintained for foreign financial institutions (FFIs), and include appropriate, specific, risk-based, and, where necessary, enhanced policies, procedures, and controls that are reasonably designed to detect and report known or suspected money laundering activity conducted through or involving any correspondent account established,

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https://www.fincen.gov/sites/default/files/advisory/2019-05-10/FinCEN%20Advisory%20CVC%20FINAL%20508.pdf.

[93] *Id.* at 4.

[94] *Money Transmitter Registration And Licensing: U.S. Cryptocurrency Entities*, SIAPARTNERS (Feb. 24, 2021), https://www.sia-partners.com/en/news-and-publications/from-our-experts/money-transmitter-registration-and-licensing-us.

[95] *Rochester Man Pleads Guilty In Case Involving Bitcoins*, U.S. DEP'T OF JUST. (Apr. 27, 2017), https://www.justice.gov/usao-wdny/pr/rochester-man-pleads-guilty-case-involving-bitcoins; *See Arizona-Based Peer-To-Peer Bitcoin Trader Convicted of Money Laundering*, U.S. DEP'T OF JUST. (Mar. 29, 2018), https://www.justice.gov/usao-az/pr/arizona-based-peer-peer-bitcoin-trader-convicted-money-laundering.

[96] *Advisory on Ransomware and the Use of the Financial System to Facilitate Ransom Payments*, FIN. CRIMES ENF'T NETWORK, 8 (Nov. 8, 2021), https://www.fincen.gov/sites/default/files/advisory/2021-11-08/FinCEN%20Ransomware%20Advisory_FINAL_508_.pdf; *Advisory on the Financial Action Task Force-Identified Jurisdictions with Anti-Money Laundering and Combating the Financing of Terrorism and Counter-Proliferation Deficiencies*, FIN. CRIMES ENF'T NETWORK, 1 (July 01, 2021), https://www.fincen.gov/news/news-releases/financial-action-task-force-identifies-jurisdictions-anti-money-laundering-and.

[97] *See* 31 CFR §§ 1020.320, 1021.320, 1022.320, 1023.320, 1024.320, 1025.320, 1026.320, 1029.320, and 1030.20 (2022), which state that the monetary threshold for filing money services businesses SARs is, with one exception, set at or above $2,000; *See also* 31 CFR § 1022.320(a)(2) (2022).

[98] He, *supra* note 65, at 27-29.

maintained, administered, or managed in the United States.[99] Additionally, MSBs have requirements with respect to foreign agents or foreign counterparties in their AML program regulation which requires them to establish adequate and appropriate policies, procedures, and controls commensurate with the risk of money laundering and the financing of terrorism posed by their relationship with foreign agents or foreign counterparties.[100]

However, just because financial institutions have these due diligence programs and KYC policies does not mean they are adequate or enforced, and remedying violations can become costly for violators. In November 2021, Mashreqbank, the oldest United Arab Emirati privately-owned bank, agreed to pay $100 million to the New York Department of Financial Services, the Federal Reserve, and the Office of Foreign Asset Control for violation of the now-repealed Sudan Sanctions Regulations published by OFAC.[101] Between 2005 and 2009, Mashreqbank's London branch intentionally concealed 1,760 payments worth over $4 billion and identifiable information, such as originating information and beneficiary bank, on behalf of Sudanese banks from U.S. banks that would have classified the payments as illegal.[102] Because of these omissions, the U.S. correspondent banks processed the transactions as legitimate and acted under the mistaken belief that the transactions did not originate from Sudan.[103] Mashreqbank processed more than $4 billion in illegal payments over the four-year period using this omission technique to conceal illegal payments.[104] To mitigate its violations, Mashreqbank spent over $122 million increasing its compliance staff, closed all U.S. dollar accounts of Sudanese banks in 2009, and implemented new procedures to ensure that all payment messages were completed with accurate bank and customer information.[105] The Emirati bank also spent an additional $40 million on employing an automated screening program for review of customer names, conducting OFAC risk assessments, and applying enhanced vendor screening tools.[106] Other financial platforms that conduct transactions with potential sanction entities, such as Airbnb, have made settlements with OFAC and remedies to their due diligence programs.[107] These instances reiterate the need for effective due diligence

[99] *See* 31 C.F.R. § 1010.610(a) (2022).
[100] *Anti-Money Laundering Program Requirements for Money Services Businesses with Respect to Foreign Agents or Foreign Counterparties*, FIN. CRIMES ENF'T NETWORK, (Dec. 14, 2004), https://www.fincen.gov/index.php/resources/statutes-regulations/guidance/guidance-interpretive-release-2004-1-anti-money-laundering.
[101] Michael Volkov, *Dubai Bank Pays $100 Million to Resolve Sanctions Violations with DFS, OFAC and Federal Reserve*, VOLKOV BLOGS, 1 (Nov. 23, 2021), https://blog.volkovlaw.com/2021/11/dubai-bank-pays-100-million-to-resolve-sanctions-violations-with-dfs-ofac-and-federal-reserve/.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] Volkov, *supra* note 101.
[107] Mengqi Sun, *Airbnb Settles With U.S. on Alleged Violations of Cuba Sanctions; The vacation rental company's payment unit has agreed to remit more than $91,000 as part of the settlement with the Treasury Department*, THE WALL STREET JOURNAL (Jan. 3, 2022), https://www.wsj.com/articles/airbnb-settles-with-u-s-on-alleged-violations-of-cuba-sanctions-11641244343.

programs and for financial institutions to report suspicious activity related to financing terrorism. More importantly, it shows the need for FinCEN guidelines and regulation of transactions.

There is a growing precedent for FinCEN to regulate cryptocurrency under existing regulations. Federal district courts have held that Bitcoin constitutes money under 18 U.S.C. § 1960 because it "can be easily purchased in exchange for ordinary currency, act[ ] as a denominator of value, and [are] used to conduct financial transactions".[108] Additionally, cryptocurrency money transmittals and money-transmitting businesses are subject to the regulations of 31 U.S.C. § 5330, the Bank Secrecy Act.[109]

The FinCEN has compliance authority and can set requirements for institutions and employees. The treasury department can make requirements for "financial institution or nonfinancial trade or business" to guard against money laundering, the financing of terrorism, or other forms of illicit finance.[110] Additionally, it can call upon an institution, trade, or business, an officer or employee of a financial institution or nonfinancial trade or business (former or current), or any person having possession, custody, or care of the reports and records to appear before the Secretary of the Treasury to supply such materials, other data, or testify under oath, as may be relevant or material to an investigation, in the jurisdiction of the U.S.[111]

E. Authority of the Department of Justice

Since 1870, the Department of Justice has handled criminal prosecutions and civil suits in which the United States had an interest.[112] The Criminal Division of the Department of Justice was established in 1919 and tasked with "all criminal matters arising under Federal laws except prosecutions under the food bill, the Antitrust Act, and violation of the war-time prohibition bill".[113]

Within the Criminal Division, the Money Laundering and Asset Recovery Section (MLARS) handles anti-money laundering enforcement forces of the Department of Justice.[114] MLARS executes various roles such as to "prosecute and coordinate complex, sensitive, multi-district, and international money laundering and asset forfeiture investigations and cases";

[108] United States v. Faiella, 39 F. Supp. 3d 544, 545 (S.D.N.Y. 2014); United States v. Murgio, 209 F. Supp. 3d 698, 707 (S.D.N.Y. 2016).
[109] United States v. Stetkiw, No. 18-20569, 2019 WL 417404, at 1 (E.D. Mich. Feb. 1, 2019).
[110] *See* 31 U.S.C.S. § 5318(a)(2) (2022), LEXIS.
[111] *See* 31 U.S.C. § 5318(a)(4) (LexisNexis 2022).
[112] *History of the Department of Justice*, U.S. DEP'T. OF JUST., https://www.justice.gov/about (last visited Mar. 16, 2022).
[113] *About the Criminal Division*, U.S. DEP'T. OF JUST., https://www.justice.gov/criminal/history (last visited Mar. 16, 2022).
[114] *Money Laundering and Asset Recovery Section*, U.S. DEP'T. OF JUST., https://www.justice.gov/criminal-mlars (last visited Mar. 16, 2022).

"provide legal and policy assistance and training to federal, state, and local prosecutors and law enforcement personnel as well as to foreign governments"; "assist Departmental and interagency policymakers by developing and reviewing legislative, regulatory, and policy initiatives"; and "manage the Department's Asset Forfeiture Program, including distributing forfeited funds and properties to appropriate domestic and foreign law enforcement agencies and to community groups within the United States, as well as adjudicating petitions for remission or mitigation of forfeited assets."[115]

Under the Money Laundering Control Act, 18 U.S.C. §§ 1956-1957, statutes, MLARS can prosecute or assist in the prosecution of the completed offense and an attempt to commit it. Including the attempt of the actual offense is important because it eliminates the need to prove each element of the underlying offense. Proving the attempt of an offense requires no more than intent to violate the underlying offense and a "substantial step" towards that end.[116] Therefore, if a criminal just had the intent to money launder assets, they can be convicted of the entire crime of money laundering without actually laundering the assets.

III. Reasons for Increased Sanctions

A. Ransomware Attacks

Increased ransomware attacks have been one of several reasons why different U.S. federal government agencies have carried out more severe anti-ransomware and anti-money laundering campaigns. Ransomware attackers have dictated ransoms to be paid in cryptocurrency because it provides anonymity for the destination address associated with the ransom demand.[117] Bitcoin is the most common cryptocurrency used because it is the most popular and accessible digital currency to date.[118] Monero, another decentralized cryptocurrency, is more well-known than Bitcoin for its anonymity, and ransomware attackers generally use it because this cryptocurrency provides anonymity and is untraceable.[119] However, Monero isn't as easy to access as Bitcoin for ransomware victims, so attackers tend to use Bitcoin as their cryptocurrency ransomware payment of choice.[120]

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[115] *Money Laundering and Asset Recovery Section, supra* note 114.
[116] United States v. Choy, 309 F.3d 602, 605 (9th Cir. 2002) (to commit promotional money laundering in violation of § 1956(a)(1)(A)(i)); United States v. Barnes, 230 F.3d 311, 314-15 (7th Cir. 2000) (to commit concealment money laundering with an undercover officer in violation of § 1956(a)(3)(B)); United States v. Nelson, 66 F.3d 1036, at 1042-44 (to commit the offense of avoiding reporting requirements with an undercover officer in violation of § 1956(a)(3)(C)).
[117] *The Wild World of Crypto Ransomware Payments*, FEI DAILY (Oct. 25, 2021), https://www.financialexecutives.org/FEI-Daily/October-2021/The-Wild-World-of-Crypto-Ransomware-Payments.aspx.
[118] *Id.*
[119] *Id.*
[120] *Id.*

The Department of Justice, Department of the Treasury, and Department of State have all taken sweeping actions against ransomware attackers.[121] Reported ransomware payments in the U.S. in the first half of 2021 reached $590 million, compared to $416 million in 2020.[122]

Specifically, OFAC has sanctioned cryptocurrency exchanges for facilitating ransomware payments to criminal groups.[123] On November 8, 2021, OFAC sanctioned Chatex, a Latvian-based cryptocurrency exchange, and Suex, a Russian-based cryptocurrency firm, and several other entities for receiving, transmitting, and providing material support for cryptocurrency transactions.[124] These transactions came from ransomware attackers, scammers, and other illicit activities over the Dark Web that amounted to $160 million.[125]

Additionally, on November 8, 2021, FinCEN released its updated advisory to companies that act as "money service businesses" (MSBs) about ransomware attackers' various sophisticated methods and red flags that may qualify MSBs engaging intentionally or unintentionally in money laundering and other illicit transactions.[126] FinCEN makes clear that it won't "hesitate to take action against entities and individuals engaged in money transmission or other MSB activities if they fail to register with FinCEN or comply with their other [Anti-Money Laundering] obligations".[127]

B. Funding Source for Terrorist Organizations

In recent years, terrorist organizations have utilized non-bank financial services to acquire monetary funds. Many have used new financial technology services as a way to "circumvent traditional financial institutions in order to obtain, transfer, and use funds to advance their missions".[128] While they might not have harnessed the most optimal methods of virtual currency,

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[121] Michael T. Borgia, *'Whole of Government' Anti-Ransomware Campaign on Full Display*, DAVIS WRIGHT TREMAINE LLP (Nov. 11, 2021), https://www.dwt.com/blogs/privacy--security-law-blog/2021/11/doj-revil-hacker-arrest. [*Hereinafter* Whole of Government' Anti-Ransomware Campaign on Full Display].
[122] Fin. Crimes Enf't Network, *Financial Trend Analysis Ransomware Trends in Bank Secrecy Act Data Between January 2021 and June 2021*, U.S. DEP'T. OF TREAS. (Nov. 8, 2021), https://www.fincen.gov/sites/default/files/2021-10/Financial%20Trend%20Analysis_Ransomware%20508%20FINAL.pdf.
[123] Borgia, *supra* note 121, at 23.
[124] *Id.*; *Chainalysis in Action: OFAC Sanctions Russian Cryptocurrency OTC Suex that Received Over $160 million from Ransomware Attackers, Scammers, and Darknet Markets*, CHAINALYSIS (Sept. 22, 2021), https://blog.chainalysis.com/reports/ofac-sanction-suex-september-2021/.
[125] *Id.*
[126] *See supra* note 96, 2-8.
[127] *Id.* at 4.
[128] Off. Deputy Att'y Gen., *Report of the Attorney General's Cyber Digital Task Force: Cryptocurrency Enforcement Framework*, U.S. DEP'T OF JUST. (Oct. 2020) at 51, www.justice.gov/archives/ag/page/file/1326061/download.

particular terrorist groups have laundered secured funds and "solicited cryptocurrency donations running into the millions of dollars via online social media campaigns".[129]

In 2016, the Ibn Taymiyya Media Center (ITMC), a designated Foreign Terrorist Organization (FTO) located in the Gaza Strip and the media wing of the Mujahideen Shura Council in the Environs of Jerusalem, launched a social media crowdfunding campaign to buy weapons for the organization through Bitcoin donations.[130] This crowdfunding page serves as the first public record of the use of Bitcoin by terrorists and still exists today.[131]

Other terrorist groups, such as Al-Qaeda; the Islamic State of Iraq and Syria (ISIS); and the al-Qassam Brigades, Hamas's military wing, have used cryptocurrency to raise funds for their operations as well.[132] In 2020, the largest seizure of terrorist organizations' monetary funds was in the form of cryptocurrency accounts from these three terrorist organizations.[133] Federal agents seized all 150 Bitcoin accounts donating to the Al-Qassam Brigades, identified and sought forfeiture of the 155 virtual currency assets tied to the Al-Qaeda campaign, and identified and sought forfeiture of ISIS's fraudulent COVID-19 equipment funding campaign doubling as a money laundering operation.[134] In June 2021, cryptocurrency donations to Hamas skyrocketed after the conflict in Israel and Gaza escalated circumventing international sanctions attempting to suppress funds for the Palestinian militant group.[135]

While substantial progress has been made in these cases, they also pose several problems for government regulation. First, terrorist groups use cryptocurrency because the anonymity of Bitcoin hides transactions between anonymous donors and the organization. Additionally, because cryptocurrency addresses and blockchain data can't be shut down like social media profiles and bank accounts, agents oftentimes can't deactivate or shut down cryptocurrency addresses. Due to the decentralized nature of the technology, it is hard for governments to know what the data on the blockchain means and how to regulate it. Lastly, even if the government knew what the data meant, sharing it with other public bodies and private entities could expose classified sensitive information that was kept secret for national security purposes. These reasons also explain why regulating ransomware payments are difficult.

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[129] *Id.* at 1.
[130] Chainalysis Team, *Terrorism Financing in Early Stages with Cryptocurrency but Advancing Quickly*, CHAINALYSIS (Jan. 17, 2020), https://blog.chainalysis.com/reports/terrorism-financing-cryptocurrency-2019/; Yaya Fanusie, *The New Frontier in Terror Fundraising: Bitcoin*, THE CIPHER BRIEF (Aug. 24, 2016), https://www.thecipherbrief.com/column_article/the-new-frontier-in-terror-fundraising-bitcoin.
[131] Chainalysis Team, *supra* note 130; Fanusie, *supra* note 130.
[132] *Global Disruption of Three Terror Finance Cyber-Enabled Campaigns*, U.S. DEP'T OF JUST. (Aug. 13, 2020), https://www.justice.gov/opa/pr/global-disruption-three-terror-finance-cyber-enabled-campaigns.
[133] *Id.*
[134] *Id.*
[135] Benoit Faucon, *Israel-Gaza Conflict Spurs Bitcoin Donations to Hamas*, THE WALL ST. J. (June 2, 2021), https://www.wsj.com/articles/israel-gaza-conflict-spurs-bitcoin-donations-to-hamas-11622633400?page=1.

Furthermore, small cryptocurrency transactions to terrorist groups fly under the radar in AML schemes. When there is more activity on a specific financial platform, it is easier to track; however, small and infrequent transactions avoid detection on AML systems and are more difficult to intercede.[136] Therefore, terrorist organizations are likely to make more illicit transactions in small cryptocurrency amounts to avoid detection.

C. Funding for U.S. Adversaries

The Democratic People's Republic of Korea (North Korea) is not only one of America's significant adversaries in cyberspace, but it also has some of the heftiest financial sanctions leveraged against it by OFAC. North Korea uses its access to international financial markets to violate arms sanctions by conducting illicit ship-to-ship transfers and the procurement of weapons of mass destruction-related items and luxury goods.[137]

To further secure illicit transactions from traditional financial institutions, North Korea utilizes cryptocurrency exchanges for transferring money.[138] This is more from these traditional financial institutions in one crypto wallet to another crypto wallet associated with the North Korean government. As discussed in Section II, these transactions are harder to trace, more anonymous between users, and subject to less government regulation than traditional banking institutions, which makes them more referable to countries and entities sanctioned from traditional financing avenues.

Additionally, North Korea has launched large-scale cyberattacks against cryptocurrency exchanges to generate this easier stream of revenue.[139] North Korean cyber actors have evaded financial sanctions by illegally forcing a money transfer from traditional financial institutions or hacking cryptocurrency exchanges for funds.[140] Out of thirty-five reported hacking incidents against financial institutions, cryptocurrency exchanges, and cryptocurrency mining activities, a significant number of them were against the Republic of Korea (South Korea), but they also targeted Bangladesh, India, Malta, Slovenia, Vietnam, Tunisia, Poland, and Liberia.[141] North Korean hackers can steal cryptocurrency either from the cryptocurrency exchange platform itself or from an individual user via their crypto wallet.[142] Cyber attackers are able to conceal their

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[136] *Survey of Terrorist Groups and Their Means of Financing: Hearing Before the Subcomm. on Terrorism and Illicit Fin. of the Comm. on Fin. Servs.*, 115 Cong. 67 (2018) (Statement of Yaya J. Fanusie), https://www.govinfo.gov/content/pkg/CHRG-115hhrg31576/html/CHRG-115hhrg31576.htm.
[137] *Report of the Panel of Experts established pursuant to resolution 1874 (2009)*, U.N. SEC. COUNCIL (Mar. 5, 2019), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/028/82/PDF/N1902882.pdf?OpenElement [hereinafter *Panel of Experts*].
[138] *Id.* at 49, 51.
[139] *Id.* at 48.
[140] *Id.* at 49.
[141] Daniel Palmer, *UN Investigating 35 North Korean Military-Funding Cyberattacks*, COINDESK (Aug. 13, 2019), https://www.coindesk.com/markets/2019/08/13/un-investigating-35-north-korean-military-funding-cyberattacks/.
[142] Patrick Howell O'Neill, *North Korean hackers steal billions in cryptocurrency. How do they turn it into real*

activities by generating thousands of transactions on a single layer of blockchain in real-time through one-time use crypto wallets.[143] This means that all the cryptocurrency transactions from the single-use crypto wallets were on the same blockchain as the hacker's cryptocurrency transaction and that the illicit cryptocurrency transaction the hacker made was able to hide in plain sight. These actors working for North Korea have stolen $2 billion worth of cryptocurrency that has been directed toward North Korea's weapons of mass destruction program.[144] In 2021 alone, North Korean crypto hackers stole $395 million worth of crypto in seven hacks into cryptocurrency exchanges and investment firms.[145] The hackers used a number of techniques to siphon funds from the victims' wallets and then moved them into North Korea-controlled crypto addresses including phishing lures, code exploits, and malware.[146]

Although the North Korean actors hacked the crypto wallets, they still had to launder the currency through crypto exchanges and/or to their crypto wallets. In 2018, to make stolen funds even more difficult to trace, North Korean hackers transferred stolen crypto coins through at least thousands of separate transactions and routed them to multiple countries before eventual conversion to fiat currency.[147] In February 2021, three North Korean computer programmers, who were part of a North Korean military intelligence agency called the Reconnaissance General Bureau, deployed cryptocurrency hacking and extortion programs that generated more than $1.3 billion in cash and cryptocurrency from financial institutions and companies.[148] Between 2016 and 2020, these programs targeted employees of the U.S. Defense Department, the U.S. State Department, U.S.-cleared defense contractors, energy firms, aerospace companies, and tech firms.[149] Additionally, Ghaleb Alaumary, a Canadian-American citizen and co-conspirator with the North Koreans, was charged by U.S. prosecutors for laundering money through different ATM cash-out schemes in several financial institutions across various countries.[150] An ATM cash-out scheme allows cyber hackers to manipulate fraud detection controls and authorizes the hackers to empty the ATM machine of cash.[151]

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cash?, MIT TECHNOLOGY REVIEW (Sept. 10, 2020), https://www.technologyreview.com/2020/09/10/1008282/north-korea-hackers-money-laundering-cryptocurrency-bitcoin/.

[143] *Id.*

[144] Michelle Nichols, *North Korea took $2 billion in cyberattacks to fund weapons program: U.N. report*, REUTERS (Aug. 5, 2019), https://www.reuters.com/article/us-northkorea-cyber-un/north-korea-took-2-billion-in-cyberattacks-to-fund-weapons-program-u-n-report-idUSKCN1UV1ZX.

[145] Andy Greenberg, *North Korean Hackers Stole Nearly $400 Million in Crypto Last Year*, WIRED (Jan. 13, 2022), https://wired.me/technology/security/north-korean-hackers-stole-nearly-400-million-in-crypto-last-year/.

[146] *North Korea hackers stole $400m of cryptocurrency in 2021, report says*, BBC NEWS (Jan. 14, 2022), https://www.bbc.com/news/business-59990477.

[147] Dan Mangan, *North Korean hackers charged in massive cryptocurrency theft scheme*, CNBC (Feb. 17, 2021), https://www.cnbc.com/2021/02/17/north-korean-hackers-charged-in-massive-cryptocurrency-theft-scheme.html.

[148] *Id.*

[149] *Id.*

[150] *Three North Korean Military Hackers Indicted in Wide-Ranging Scheme to Commit Cyberattacks and Financial Crimes Across the Globe*, U.S. DEP'T OF JUST. (Feb. 17, 2021), https://www.justice.gov/opa/pr/three-north-korean-military-hackers-indicted-wide-ranging-scheme-commit-cyberattacks-and.

[151] Mark Meissner, *PCI SSC and ATMIA share guidance and information on protecting against ATM Cash-out*, PCI

D. Easier to Money Launder Cryptocurrency

Cryptocurrency provides an easier way for money launderers to expand and complete their operations. Anonymity, lack of regulation in the crypto sphere, and the ability to layer illicit cryptocurrency transactions with legitimate transactions in a single blockchain enable money launderers to move large money payments around quickly from traditional financial institutions to a crypto wallet or from one crypto wallet to another without being identified.[152]

Many data platforms find this fear overhyped. Chainanalysis, a blockchain investigations firm, reported in 2021 that just a small group of 270 blockchain addresses have laundered around 55% of cryptocurrency associated with criminal activity.[153] However, this report also acknowledges that cyber criminals may be consolidating their efforts by relying on specialized individuals or groups that specialize in money laundering. The report identified that "we see a much greater share of illicit cryptocurrency going to addresses taking in between $1 million and $100 million worth of cryptocurrency per year".[154] For example, in February 2022, Ilya Lichtenstein and Heather Morgan of New York allegedly conspired to launder cryptocurrency stolen during the Bitfinex – a virtual currency exchange – hacking incident in 2016, currently valued at an estimated $4.5 billion.[155] Although law enforcement has seized a majority of the currency, there is close to $1 billion in cryptocurrency still unaccounted for.[156]

This recent indictment is significant for a few reasons. First, it shows that the general trend of illicit cryptocurrency transactions indicated by the Chainanalysis report is highly sophisticated and more likely to be of higher value. Second, it shows that law enforcement is still catching up to apprehending these criminals. Not only did federal officers not retrieve all the stolen crypto coins, but they also had two officers from different agencies and jurisdictions following different sets of rules.[157] Understandably, a complex, multi-jurisdictional issue such as cryptocurrency would have to involve representatives from different jurisdictions, even international ones. However, coordinating rules and procedure for this case between the Federal Bureau of Investigation, Homeland Security Investigations, the Internal Revenue Service Criminal Investigation Cyber

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(Oct. 7, 2020), https://blog.pcisecuritystandards.org/pci-ssc-and-atmia-share-guidance-and-information-on-protecting-against-atm-cash-out.

[152] Martin Cheek, *Is Cryptocurrency Making Money Laundering Easier?*, TRADERS MAGAZINE (June 18, 2021), https://www.tradersmagazine.com/am/is-cryptocurrency-making-money-laundering-easier/

[153] Catalin Cimpanu, *270 addresses are responsible for 55% of all cryptocurrency money laundering*, ZDNET (Feb. 15, 2021), https://www.zdnet.com/article/270-addresses-are-responsible-for-55-of-all-cryptocurrency-money-laundering/.

[154] *Id.*

[155] *Two Arrested for Alleged Conspiracy to Launder $4.5 Billion in Stolen Cryptocurrency*, U.S. DEP'T OF JUST. (Feb. 8, 2022) [Hereinafter *Two Arrested for Alleged Conspiracy to Launder $4.5 Billion in Stolen Cryptocurrency*], https://www.justice.gov/opa/pr/two-arrested-alleged-conspiracy-launder-45-billion-stolen-cryptocurrency; United States v. Lichtenstein et al., Case No. 1:22-mj-00022-RMM, U.S. DEP'T OF JUST. (Feb. 7, 2022), https://www.justice.gov/opa/press-release/file/1470211/download.

[156] *Id.*

[157] *Id.*

Crimes Unit, and the Ansbach Police Department in Germany can be difficult and time-consuming.[158] Especially for money laundering cryptocurrency cases, timing is essential. Third, this case signifies the elaborate methods launderers are willing to use in the crypto sphere. Here, after they automated transactions with false identities and deposited the stolen money into several different virtual currency exchanges, the alleged criminals converted the newly acquired Bitcoin into other forms of virtual currency, specifically anonymity-enhanced virtual currency, and used U.S.-based business accounts to legitimize their banking activity.[159]

IV. Reporting Thresholds and Prosecution

A. Lowering Reporting Thresholds

FinCEN should lower its reporting threshold for suspicious activity for non-bank financial institutions. Under the BSA, a MSB is obligated to report any activities of customers over $2,000 in value that it believes or knows to be suspicious.[160] Additionally, the BSA mandates that MSBs must maintain certain information for fund transfers, such as sending or receiving a payment order for a money transfer of $3,000 or more, regardless of the method of payment.[161] Specifically, for P2P exchangers, money transmitters, and CVC kiosks, the reporting threshold should be lowered to $250. This includes transactions starting or ending in the U.S.

First, it is based on the data. After collecting and analyzing data from 2,000 SARs of 1.29 million transmittals, specifically with potential terrorist financing relations filed by money transmitters, FinCEN concluded that over half of those transactions were valued below $300, yet amounted to more than $103 million.[162] Although MSBs have retained the records for the required amount of time, lowering the threshold to capture smaller money transfers and transmittals across different borders would be valuable for law enforcement and national security authorities.[163] Especially when some financial institutions may not retain records for all suspicious activities below the current threshold or recognize suspicious patterns in transactions until it's too late, these inadequacies can impede law enforcement agencies from rapidly detecting and examining terrorist and money laundering networks.[164]

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[158] *Id.*
[159] *Id.*
[160] Fin. Crimes Enf't Network, *Money Laundering Prevention A Money Services Business Guide*, U.S. Dep't of the Treas., https://www.fincen.gov/sites/default/files/shared/prevention_guide.pdf, 14 (last visited March 16, 2022).
[161] *Id.* at 6.
[162] Fin. Crimes Enf't Network, *Federal Register Notice: Threshold for the Requirement to Collect, Retain, and Transmit Information on Funds Transfers and Transmittals of Funds That Begin or End Outside the United States, and Clarification of the Requirement to Collect, Retain, and Transmit Information on Transactions Involving Convertible Virtual Currencies and Digital Assets with Legal Tender Status*, U.S. DEP'T OF THE TREAS., FINCEN-2020-0002 RIN 1506-AB41(Oct. 27, 2020), https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20201023a.pdf.
[163] *Id.*
[164] *Id.*

Second, while recent money laundering cases revolve around substantially higher valued transactions, recent prosecutions demonstrate that individual adversaries are sending and receiving funds below the current threshold. These cases involve individuals who provide material support for terrorists designed as a Foreign Terrorist Organization (FTO) and would also fit the definition of international terrorism and domestic terrorism in 18 U.S.C.S. §2331. For example, in *United States v. Harcevic*, the defendant allegedly sent $1,500 to a co-defendant's financial account within the U.S. who was collecting money to send to intermediaries in Turkey for FTO fighters in Syria, ultimately engaging in terrorist activities killing 11 people.[165] In *United States v. Hodzic*, the defendant was prosecuted for meeting with an FTO recruiter for three terrorist groups in Syria, wiring funds in the amount of $250 to an FTO, and attempting to leave the United States with the intent of joining the FTO in Libya.[166] In *United States v. Elshinawy*, a U.S. citizen of Egyptian descent received several small cash transfers from FTO affiliates of ISIS from overseas, valued at an estimated $8,700 and sent in sums of less than $3,000 through a U.S. money transmitter, with the intent to use them for an attack against the U.S.[167] All these cases prosecuted the defendant under 18 U.S.C.S. § 2339A for providing material support to terrorists.

Third, it has support from various law enforcement and executive agencies. Since 2006, MLARS has encouraged financial enforcement agencies to lower the dollar threshold for recordkeeping.[168] Different executive agency agents and prosecutors who routinely use wire transfer information in their operations and specialize in money laundering cases support lowering or eliminating altogether the reporting threshold to disrupt illegal activity and increase its cost to the perpetrators.[169] While the agency recognizes some potential challenges such as hiding illicit transactions with legitimate ones, discussed above to evade the lower threshold, it supports a lower, uniform recordkeeping threshold. FinCEN asserted that the standard should apply equally to the transfer of funds by banks and the transmission of funds by nonbank financial institutions.[170] Other agencies, such as the Federal Bureau of Investigation (FBI), the United States Drug Enforcement Administration (DEA), the Internal Revenue Service (IRS), and the United States Secret Service (USSS), have expressed encouraging a lower reporting threshold for the recordkeeping requirement.[171]

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[165] United States v. Harcevic, No. 4:15 CR 49 CDP / DNN 2015 U.S. Dist. LEXIS 5251, at 2 (E.D. Mo. Apr. 14, 2015).
[166] United States v. Hodzic, No. 4:15 CR 49 CDP / DDN, 2016 WL 11578530, at 1 (E.D. Mo. Aug. 22, 2016), *report and recommendation adopted*, 355 F. Supp. 3d 825 (E.D. Mo. 2019), *aff'd sub nom.* United States v. Harcevic, 999 F.3d 1172 (8th Cir. 2021); *see also* Off. Pub. Aff., *Missouri Man Pleads Guilty to Providing Material Support to Terrorists*, U.S. DEP'T OF JUST. (Apr. 3, 2019), https://www.justice.gov/opa/pr/missouri-man-pleads-guilty-providing-material-support-terrorists.
[167] United States v. Elshinawy, 781 F. App'x 168, 170 (4th Cir. 2019).
[168] 71 Fed. Reg. 119 (June 21, 2006), https://www.govinfo.gov/content/pkg/FR-2006-06-21/pdf/06-5567.pdf.
[169] *Id.*
[170] *Id.*
[171] *See* Fin. Crimes Enf't Network, *supra* note 162.

While there are benefits to lowering the reporting threshold requirement, time and resources dedicated to fulfilling this new rule could put a huge damper on MSBs and companies. In one of the draft proposal threshold changes by FinCEN, the change would apply to both cross-border and domestic transactions that involve virtual currencies.[172] With financial firms already sending millions of SARs to FinCEN every year, they will be overworked with sending double and even triple the number of SARs to meet this one requirement.[173] Additionally, they will be overspending on this AML scheme. These financial institutions spend billions of dollars each year on AML compliance systems which is estimated to be at least $7 million for each anti-money laundering (AML) conviction.[174] However, there have been few FinCEN cases involving criminal transactions under the $3,000 threshold, showing the evidence does not warrant that FinCEN should lower its reporting thresholds.[175] Lowering the reporting threshold substantially to $250 is likely to push many transactions to the black market and make it even harder to trace illicit activities.[176] It could also incentivize currency exchanges to offer more anonymous currencies, such as Monero, which would also make tracking crypto transactions more difficult.

B. Prosecution Under the Money Laundering Control Act

MLARS-DOJ should utilize 18 U.S.C. § 1956(h) to increase prosecution of money launderers linked to terrorist organizations. The Money Laundering Control Act empowers MLARS to prosecute or assist in the prosecution of the completed offense and an attempt to commit it. Including the attempt of the actual offense is important because it eliminates the need to prove each of element of the underlying offense.

MLARS should aim for charges under this provision because the burden of proof is easier to meet. Proving the attempt of a financial transaction involving the proceeds of specified unlawful activity requires no more than intent to violate the underlying offense and a "substantial step" towards that end.[177] 18 U.S.C. §1956(h) creates a separate crime by stating that "[a]ny person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same

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[172] Fin. Crimes Enf't Network, *31 CFR Parts 1010 and 1020 Action: Joint notice of proposed rulemaking*., DEP'T OF THE TREA. Docket No. FINCEN–2020–0002; RIN 1506– AB41, (Oct. 27, 2020), https://www.govinfo.gov/content/pkg/FR-2020-10-27/pdf/2020-23756.pdf.

[173] Weiner Brodsky Kider PC, *FinCEN's Data Shows Continued Increase in SAR Filings*, JDSUPRA (Oct. 13, 2020), https://www.jdsupra.com/legalnews/fincen-s-data-shows-continued-increase-58306/.

[174] Norbert Michel, *FINCEN Should Not Lower Money Transmission Thresholds*, FORBES (Nov. 17, 2020), https://www.forbes.com/sites/norbertmichel/2020/11/17/fincen-should-not-lower-money-transmission-thresholds/?sh=2fc28f706c59.

[175] *Id*.

[176] *Id*.

[177] United States v. Choy, 309 F.3d 602, 605 (Cal. 9th Dist. Ct. App. Oct. 28, 2002) (attempt to commit promotional money laundering in violation of section 1956(a)(1)(A)(i)); United States v. Barnes, 230 F.3d 311, 314-15 (7th Cir. 2000) (attempt to commit concealment money laundering with an undercover officer in violation of section 1956(a)(3)(B)); United States v. Nelson, 66 F.3d 1036, at 1042-44 (Cal. 9th Dist. Ct. App. Dec. 2, 1997) ((attempt to commit the offense of avoiding reporting requirements with an undercover officer in violation of section 1956(a)(3)(C)).

penalties as those prescribed for the offense the commission of which was the object of the conspiracy".[178] A conviction for conspiracy to violate this section requires the government to prove: "there was an agreement between two or more persons to commit money laundering" and "that the defendant joined the agreement knowing its purpose and with the intent to further the illegal purpose".[179] It is well-settled that a conspiracy may be proved by circumstantial evidence, and "the agreement need not be formal or spoken" for a court to determine there was sufficient evidence to satisfy the government's burden of proof.[180]

Additionally, a conviction of conspiracy carries the same penalties as a conviction with the intent to commit money laundering under §1957.[181] Similarly, civil fines and forfeitures are equal.[182] Potentially, a violation of §1956 could carry harsher penalties. Any violation of §1956 is punishable by imprisonment for not more than 20 years while a violation of §1957 and conspiracy to violate §1957 are each punishable by imprisonment for not more than 10 years.[183] Moreover, anyone who commands, counsels, or aids and abets the commission of money laundering or conspiracy to money launder by another is equally culpable and equally punishable as the one who intended to commit the federal crime.[184] "In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associated himself with the venture, that he participated in it as in something that he wishes to bring about, that he seek by his action to make it succeed".[185]

Furthermore, §1956 provides a mechanism for criminal confiscation of property by the government and proceeds from unlawful activities in two very distinctive ways. First, the proceeds of any §1956 established offense and any property traceable to such proceeds are subject to confiscation without the necessity of any actual violation of §1956.[186] This allows the government to confiscate property derived from crimes that might form the basis for a money laundering offense without having to prove that a money laundering offense occurred.[187] Second, property "involved" in a §1956 money laundering offense or property traceable to such involved property

[178] United States v. Turner, 400 F.3d 491, 496 (7th Cir. 2005); United States v. Greenidge, 495 F.3d 85, 100 (3d Cir. 2007). *Cf.* United States v. Rice, 776 F.3d 1021, 1026 (9th Cir. 2015) (When the defendant joins an existing conspiracy, he cannot be held criminally liable for offense committed in the name of the scheme before it joined it which is a caveat for rule 18 U.S.C. §1956(h)).
[179] United States v. Vinson, 852 F.3d 333, 356 (4th Cir. 2017); United States v. Wittig, 575 F3d 1085, 1103 (10th Cir. 2009).
[180] United States v. Tencer, 107 F.3d 1120, 1132 (5th Cir. 1997).
[181] 18 U.S.C. §§1957(h) (2015).
[182] *Id.*
[183] 18 U.S.C. §§ 1956(a) (2015), 18 U.S.C. §§ 1957(b)(1) (2015).
[184] 18 U.S.C. § 2(a)–(b) (2015).
[185] Nye & Nissen v. United States, 336 U.S. 613, 619 (1949); *see* United States v. Seng Tan, 674 F.3d 103, 110 (1st Cir. 2012); *see* United States v. Blair, 661 F.3d 755, 765 (4th Cir. 2011).
[186] 18 U.S.C. § 981(a)(1)(C).
[187] United States v. Newman, 659 F.3d 1235, 1239-240 (9th Cir. 2011); *see* United States v. Hernandez, 803 F.3d 1341, 1342-43 (11th Cir. 2015); *see* United States v. Khan, 771 F.3d 367, 379 (7th Cir. 2014); *see* United States v. Gregoire, 638 F.3d 962, 971 (8th Cir. 2011); *see also* United States v. Bodouva, 853 F.3d 76, 77-8 (2d Cir. 2017).

may be confiscated.[188] Involved property includes more than the proceeds of the established offense since the proceeds are separately forfeitable already. "Property eligible for forfeiture under 18 U.S.C. §982(a)(1) includes that money or property which was actually laundered ..., along with any commissions or fees paid to the launderer and any property used to facilitate the laundering offense".[189] Property acquired in exchange for the proceeds, or proceeds combined with other involved property, is forfeitable as traceable property.[190] However, the government may confiscate the property on either side of the transaction, but not the property on both sides.[191]

Because conspiracy is its own separate crime under §1956, it can be difficult to differentiate where the conspiracy to money launder ended, and where the crime of committing money laundering started presenting a unique problem for prosecutors. Conspiracy is a crime that begins with a scheme and may continue on until its objective is accomplished or abandoned.[192] Any overt act which supports the plan to continue a crime is considered a part of the conspiracy, including apportioning benefits of the conspiracy.[193] However, acts of concealment do not extend the conspiracy beyond the time of the accomplishment of its main objectives unless concealment is one of the main objectives of the conspiracy.[194] The whole objective of money laundering is to conceal the identity, source, and destination of illicitly acquired currency.[195] This creates a clash between an element of committing the crime of money laundering and the separate crime of conspiracy to commit money laundering. This burden to discern the different crimes will fall on the prosecutor. However, instead of discerning between the two crimes, the prosecutor can charge the individual(s) with both crimes if they can prove the element of concealment of money laundering. This should not be difficult since concealment is inherent in the crime of money laundering.

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[188] 18 U.S.C. § 981(a)(1)(A) (2015); *see also* 18 U.S.C. § 982(a)(1) (2015).
[189] United States v. Seher, 562 F.3d 1344, 1368 (11th Cir. 2009).
[190] Charles Doyle, *Money Laundering: An Overview of 18 U.S.C. § 1956 and Related Federal Criminal Law*, CONGRESSIONAL RESEARCH SERVICE (Nov. 30, 2017), https://sgp.fas.org/crs/misc/RL33315.pdf , 20.
[191] Stefan D. Cassella, *The Forfeiture of Property Involved in Money Laundering Offenses*, 7 BUFF. CRIM. L. REV. 583,627 (2004) (citing United States v. Hawley, 148 F.3d 920, 928 (8th Cir. 1998)).
[192] United States v. Wilbur, 674 F.3d 1160, 1176 (9th Cir. 2012) ("[C]onspiracy continues until there is affirmative evidence of abandonment, withdrawal, disavowal or defeat of the object of the conspiracy."); *See* United States v. Fishman, 645 F.3d 1175, 1195 (10th Cir. 2011); *See* United States v. Payne, 591 F.3d 46, 69 (2d Cir. 2010) ("Conspiracy is a continuing offense ... one that involves a prolonged course of conduct; its commission is not complete until the conduct has run its course").
[193] United States v. Morgan, 748 F.3d 1024, 1036-37 (10th Cir. 2014); *See* United States v. Rutigliano, 790 F.3d 389, 400 (2d Cir. 2015) ("We [have] held that interest payments made ... over an indefinite and prolonged period eventually ceased to be overt acts in furtherance of a conspiracy. [We] thus recognize[] an exception to the ordinary rule ... that a conspirator's receipt of anticipated benefits within the statute of limitations period can, by itself, constitute an overt act in furtherance of an ongoing conspiracy").
[194] United States v. Bornman, 559 F.3d 150, 153 (3d Cir. 2009) (citing Grunewald v. United States, 353 U.S. 391, 413 (1957)); United States v. Turner, 548 F.3d 1094, 1097 (D.C. Cir. 2008), United States v. Upton, 559 F.3d 3, 10 (1st Cir. 2009); United States v. Weaver, 507 F.3d 178, 185-86 (3d Cir. 2007).
[195] *Money Laundering*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/money_laundering (last visited March 25, 2022); 18 U.S.C. §1956(a)(1)(B)(i).

Under §1956, federal district courts are permitting the government to seize cryptocurrency as property. In *United States v. 113 Virtual Currency Accounts*, a federal district court held that the government could confiscate cryptocurrency as property from crypto addresses identified that were linked to a designated terrorist organization and U.S. adversaries.[196] In this case, the 113 crypto addresses were suspected of laundering proceeds in cryptocurrency to mix illicit and legitimate profits together and return them to North Korea.[197] Under this section and other statutes, the government can seek the forfeiture of property foreign and domestic, which may have never touched the U.S. territory, to reach all property of terrorist organizations.[198] Additionally, if the government discovers the identities of the individuals who own the crypto addresses, the government may seek criminal prosecution against them.[199]

There is precedent to establish this proposed prosecution. In *United States v. Elashi*, the government utilized §1956(h) to charge and convict defendants of conspiracy to money launder with a sanctioned individual of a sanctioned terrorist organization.[200] In this case, defendants wire transferred money from their company, which they owned all the stock in, to a leader of Hamas.[201] Hamas is a designated terrorist entity sanctioned by OFAC, and Marzook was a sanctioned individual because of his terrorism connection.[202] Defendants allegedly entered into a money laundering scheme when they made a money transfer of approximately $250,000 appear as if it was being invested by their cousin for false business services when it was actually Marzook and the money would be sent back to them.[203] The government was able to use circumstantial evidence and the unique confiscation methods provided by §1956 to seize the laundered funds and obtain a conviction of twenty years for each defendant who knowingly laundered funds to the known Hamas leader.[204]

In the context of the crypto sphere and cryptocurrency transactions, there is precedent for this proposed prosecution. In the case of *United States v. Lichtenstein et al.*, the government used § 1956(h) to charge defendants with money laundering stolen cryptocurrency after a cyberattack on a VCE.[205] While this case is still ongoing, the government has used the unique confiscation mechanism of §1956 by seizing the crypto coins as proceeds or property of the illicit crypto transactions without the prerequisite of proving the money laundering offense occurred.[206] Additionally, the government is seeking the harsher penalty of twenty years in prison for

[196] United States v. 113 Virtual Currency Accounts, Civil Action No. 20-606, 2020 U.S. Dist. LEXIS 142015, 2 (D.D.C. 2020).
[197] *Id.* at 3.
[198] *United States v. One Gold Ring with Carved Gemstone*, 2019 WL 5853493, 1 (D.D.C. 2019).
[199] *113 Virtual Currency Accounts*, Civil Action No. 20-606 at 5.
[200] United States v. Elashi, 440 F. Supp. 2d 536, 542-43 (N.D. Tex. 2006).
[201] *Id.* at 542.
[202] *Id.* at 543.
[203] *Id.* at 542.
[204] *Id.* at 543-44.
[205] *See United States v. Lichtenstein et al., supra* note 155 at 2.
[206] *Id.*

conspiracy to money launder instead of the intent of committing money laundering with the penalty of ten years in prison under §1957.[207] In this case, the government does have substantial evidence to prove the conspiracy to money launder the crypto coins, including a list of 2,000 virtual currency addresses with corresponding private keys that are linked to the VCE hack.[208] Even if it just had circumstantial evidence tying transactions made to defendants or proceeds defendants acquired that could be traced back to the hack itself or the cryptocurrency laundered from the hack, the government can still seize defendants' proceeds and obtain convictions under §1957.[209]

Lastly, recent events indicate the government has shifted its focus towards prosecution of cryptocurrency transactions. In October 2021, the DOJ announced the creation of the National Cryptocurrency Enforcement Team (NCET) to handle complex investigations and prosecutions of criminal uses of cryptocurrency.[210] NCET will focus on crimes committed by virtual currency exchanges and money laundering infrastructure actors, including human traffickers and narcotics traffickers.[211] This new division will employ the expertise of MLARS, Computer Crime and Intellectual Property Section (CCIPS), and other subdivisions of the DOJ Criminal Division.[212] NCET will also assist in "tracing and recovery of assets lost to fraud and extortion", such as cryptocurrency payments to ransomware groups and hackers.[213] While this new team has been founded, it is in the process of gathering resources, appointing officers, and creating its own framework. Additionally, NCET will handle its own cases and assist existing and future criminal cases.[214] This means MLARS will still be the division of the DOJ primarily responsible for investigating and prosecuting money laundering cases, but now it will have some reinforcements.

V. Conclusion

There are several concerns with blockchain technology and cryptocurrency transactions. From anonymity to lack of universal jurisdiction, regulators struggle to craft laws that prevent illicit cryptocurrency transactions. Additionally, federal prosecutors grapple with prosecuting illicit cryptocurrency transactions. These illicit transactions are used to fund foreign terrorist organizations, U.S. adversaries, and ransomware attackers, whether they are direct transactions or transferred through different cryptocurrency exchanges. These unlawful transactions can be concealed in plain sight with layering.

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[207] *See supra* note 188.
[208] *See United States v. Lichtenstein et al., supra* note 155 at 2.
[209] *See Final report of the Panel of Experts on Libya established pursuant to Security Council resolution 1973, supra* note 116; *See* Greenberg, *supra* note 145.
[210] *Deputy Attorney General Lisa O. Monaco Announces National Cryptocurrency Enforcement Team*, U.S DEP'T OF JUST., https://www.justice.gov/opa/pr/deputy-attorney-general-lisa-o-monaco-announces-national-cryptocurrency-enforcement-team (Oct. 6, 2021).
[211] *Id.*
[212] *Id.*
[213] *Id.*
[214] *Id.*

While the National Cryptocurrency Enforcement Team was created with the intent to prosecute complex cryptocurrency cases, current statutes and executive agency powers can be utilized more efficiently to prevent these illegal transactions. The Money Laundering and Asset Recovery Section should utilize § 1956(h) of the Money Laundering Control Act to prosecute money launderers linked to foreign terror organizations and the Financial Crimes Enforcement Network should lower its reporting threshold for suspicious activity for non-bank financial institutions to $250, despite higher compliance costs on companies. Without lowering required reporting thresholds and opting for less burdensome criminal charges with equal penalties, money laundering in the crypto sphere and financial support for terrorism will become more common. These methods are not an endpoint but rather a decent starting point to combat cryptocurrency money laundering for terrorism.

Death is Unavoidable: Strategies for Offering a Final Gift to the Living

Chloe A. Shortz[215]

Abstract

This Note topic was born through the dynamic and ever-changing medical field. The medical field is fueled off innovation and the ability to treat, build, and diagnose an individual's ailments. While this field is constantly expanding and changing, one consistent aspect is utilizing medical cadavers for teaching.

For centuries, the use of cadavers has been essential for medical research and advancement. Furthermore, the process of donating a body to science to pursue medical research can be difficult. It is important to ensure the anatomical donation is being carried out in accordance with the donator's wishes. This Note will also explore the rights of the dead and follow what happens to a body when anatomical wishes are not followed. There are several reasons, such as rejection by medical doctors, ambiguous language about final wishes, and family disputes. These legal issues will then be analyzed through the lens of the body as quasi-property, ideas surrounding the consent of a deceased individual, and through the exploration of the legal laws that exist to prevent necrophilia. Finally, this Note will conclude with recommendations to encourage and bring awareness to the necessity of body donations.

[215] Syracuse University College of Law, Juris Doctor 2023. I would like to thank Professor Ghosh for his encouragement and help throughout the development of this Note.

Table of Contents

I. Introduction

This Note began with the concept of aborted fetal cell lines, which are cells developed from a single cell and are uniform in nature.[216] However, this topic has been addressed and several notes have focused on the topic of human remains on a cellular level. Therefore, through careful research, the topic of human remains donated to medical research has been born. There has been a shift in societal values towards donating the body to science; this concept will be explored in the context of utilizing the body for medical research.[217] Through analysis of the use of cadavers in the medical field and the process individuals go through in order to have their advance directives respected, several legal issues arise.[218] These legal issues consist of the rights of human cadavers within the medical field, topics of corpse rights, advance directives, quasi-property, and consent.[219] These legal issues will be explored in the context of cadavers used in medical research. Further, this paper seeks to explore the legal tools utilized to make recommendations to ensure legal and ethical whole-body donations.

II. Cadaver Use

A. History of Cadaver Use

The use of cadavers to further educate individuals about the human body was first recorded in the third century.[220] In Alexandria, Herophilus of Chalcedon and Erasistratus of Ceos were the first physicians to begin dissecting human bodies for educational purposes; this dissection was socially accepted.[221] Thus, for about 1,700 years, human dissection was not pursued until the 11th century when human dissection was again accepted by society.[222] The rise of universities in medieval Europe helped to reintroduce the study of cadavers into medical education.[223]

In the United States, in 1832, the Anatomy Act mandated that unclaimed bodies would be dissected.[224] However, patterns emerged that showed unethical practices to transfer a body from grave to dissection table; examples include grave robbing, body snatching, or simply using

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[216] Meredith Wadman, *Abortion opponents protest COVID-19 vaccine of fetal cells*, SCIENCE (Jun. 5, 2020), https://www.science.org/content/article/abortion-opponents-protest-covid-19-vaccines-use-fetal-cells (last visited Feb. 28, 2023).
[217] Kate Kershner, *Donating Your Body to Science Becoming More Popular in U.S.*, HOW STUFF WORKS, https://science.howstuffworks.com/life/biology-fields/donating-your-body-science-becoming-more-popular-us.htm (last visited Feb.28, 2023).
[218] *See id.*
[219] *See id.*
[220] *A Deep Dive into The History of Cadaver Use and Whole-Body Donation*. RSCH. FOR LIFE, https://www.researchforlife.org/blog/a-deep-dive-into-the-history-of-cadaver-use-and-whole-body-donation/ (last visited Feb.28, 2023).
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] *Id.*

unclaimed bodies.[225] In 1968, the Uniform Anatomical Gift Act was passed which promised protection to the interest of the whole-body donors and their families.[226] Different parts of the world began to promote whole-body donation.[227] The successful promotion of the Uniform Anatomical Gift Act led to the stabilization of body donors in the latter part of the 20th century.[228] This movement thus satisfied the demands of medical schools across the United States and fueled social change regarding whole-body donation in reference to the medical profession.[229] The thought of a whole-body donation became a more acceptable option for individuals because of the large amounts of medical knowledge that was gained by medical students utilizing cadavers.[230] The benefits accrued through cadaver research include but are not limited to allowing surgeons to perfect their craft, the development of medical devices, understanding drug delivery systems, and improving drug delivery systems.[231]

B. Advance Directives

The rights of autonomy and self-determination, meaning that an individual maintains the capacity to make decisions for oneself, are important for the purpose of maintaining individualistic societal values held in the United States.[232]

In general, the progress of refusal-withdrawal is incongruous.[233] The right was recognized for decades in cases concerning competent patients who sought to refuse medical treatment.[234] Most cases denied a competent person's attempt to refuse treatment; it was when the question of withholding or withdrawing treatment was raised on behalf of all patients that courts then began to recognize this right for patients.[235] The United States Supreme Court addressed competent persons when hearing a case involving end-of-life decision-making for an incompetent patient in a persistent vegetative state.[236] The Court assumed that a competent adult has the autonomy to make such decisions, and absent clear and convincing evidence, an incompetent adult is unable to make decisions regarding end-of-life care.[237]

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[225] *A Deep Dive into The History of Cadaver Use and Whole-Body Donation, supra* note 220.
[226] *Id.*
[227] *Id.*
[228] *Id.*
[229] *Id.*
[230] *A Deep Dive into The History of Cadaver Use and Whole-Body Donation, supra* note 220.
[231] *Id.*
[232] Ava Rosenbaum, *Personal Space and American Individualism*, BROWN POL. REV. (Oct. 31, 2018). https://brownpoliticalreview.org/2018/10/personal-space-american-individualism/.
[233] Raphael J. Leo, *Competency and Capacity to Make Treatment Decisions: A Primer for Primary Care Physicians*, 1(5) THE PRIMARY CARE COMPANION TO THE J. OF CLINICAL PSYCHIATRY 131 (1999).
[234] *Id.*
[235] *Id.*
[236] Cruzan v. Director Missouri Department of Health, 497 U.S. 261 (1990).
[237] *Id.*

There are a variety of documents that set forth individual's wishes about incompetence and end-of-life decision-making.[238] These documents include living wills, durable powers of attorney, and health care proxies.[239] The focus of these advance directives is to ensure the patient has the right to refuse medical treatment or to designate an individual to refuse treatment on their behalf.[240] The living will allows individuals to take control of their end-of-life choices; in this directive, an individual is able to communicate their choices regarding preferences for medical decisions when the individual is no longer able to advocate for themselves.[241] Living wills address a variety of medical decisions such as cardiopulmonary resuscitation, mechanical ventilation, tube feeding, dialysis, antibiotics, palliative care, organ, and tissue donation.[242]

There is also a document called a Power of Attorney which is a type of advance directive that allows an individual to designate someone to make decisions on their behalf when they are unable to make decisions.[243] Family members may seem to be the most logical choice to act as a surrogate decisionmaker; this is because family members presumably have the decisionmaker's best interest in mind.[244] Furthermore, in the case of an incompetent decisionmaker, there are three different options regarding who will act as the ultimate decisionmaker: physician, ethics committee, and guardianship.[245]

First, the Physician Approach allows the physician to be the ultimate decisionmaker for an unrepresented patient.[246] Second, an Ethics Committee Approach is when a hospital ethics committee aids in making decisions for unrepresented patients by meeting and deliberating and then offering a final recommendation.[247] Third, a guardian may be a financially and emotionally disinterested non-family member[248] The court-appointed guardian acts as a surrogate decisionmaker, and there have been issues regarding guardianships.[249]

These issues arise when families demand treatment or actions to be taken to prolong an individual's life or, when the individual has died, to take actions that are inconsistent with the individual's wishes regarding the disposition of their remains.[250] In the case *Regents of the*

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[238] *Id.*
[239] *Living wills and Advance directives for medical decisions*, MAYO CLINIC (Aug.02, 2022), https://www.mayoclinic.org/healthy-lifestyle/consumer-health/in-depth/living-wills/art-20046303.
[240] *Id.*
[241] *Id*.
[242] *Id.*
[243] *Id*.
[244] *Living wills and Advance directives for medical decisions, supra* note 239.
[245] Scott J. Schweikart, *Who Makes Decisions for Incapacitated Patients Who Have No Surrogate or Advance Directive*? 21 AMA J. OF ETHICS, 587, 588 (2019).
[246] *Id.*
[247] *Id*.
[248] *Id.* at 589.
[249] *See* Burke & Casserly, P.C., *Advance Directives & Guardianships* (Nov. 6, 2018), https://www.burkecasserly.com/docs/advancedirectivesguardianship.pdf.
[250] *See* The Regents of the Univ. of Cal. V. Super. Ct. of L.A. Cnty., 107 Cal. Rptr.3d 637 (Cal. Ct. App. 2010)

University of California v. The Superior Court of Los Angeles County, the plaintiff's children enrolled her body in the UCLA Willed Body Program in 1970 and subsequently donated her body upon her death in 2001.[251] The court found that the document executed by Ruth Waters gave UCLA the right to use her body for teaching purposes, scientific research, or other purposes as UCLA maintains sole discretion of the body's use.[252] The court reasoned that upon the donor's death, the donee becomes the right holder and has the exclusive right to control the disposition of the decedent donor's remains.[253] In addition to the Uniform Anatomical Gift Act, the donee's rights created by an anatomical gift are superior to the rights of others, including family members; those who do not have the right to alter the terms of the written donation agreement executed by the donor.[254] Because Ruth Water's donation was "irrevocable", the plaintiffs were unable to enter into an agreement with UCLA regarding Ruth Water's body and UCLA did not owe a duty to the plaintiffs.[255]

C. The Donation Process

National statistics from agencies are unreliable in determining the number of cadavers in the United States; there are around 20,000 body donations annually, which is less than 1% of the 2 million Americans who die annually.[256]

D. Organ Donation v. Donation to Science

Donating the body to science is not the same as being an organ donor, an action an individual can opt into on their license.[257] An individual is put into the national system for organ transplants once they register as an organ donor through their local Department of Motor Vehicles.[258] This national system manages all transplants and indicates when an organ is available.[259] Whole-body donation is different because in order to become a body donor, an individual must follow their state's unique guidelines and protocols.[260] Whole-body donation is difficult because there is no single organization utilized to match donors with specific programs.[261] The steps implemented to promote the whole-body donation depend on where the individual is

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[251] *Id.* at 639.
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] Regents of Univ. of Cal., 107 Cal. Rptr. 3d at 639.
[256] Emily Petsko, *Everything You've Ever Wanted to Know About Donating Your Body to Science*, MENTAL FLOSS (May 31, 2019).
[257] *FAQ: How Are Organ Donation and Body Donation Different*, MEDCURE (Jun. 25. 2019), https://medcure.org/faq-how-are-organ-donation-and-body-donation-different/.
[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] *FAQ: How Are Organ Donation and Body Donation Different*, *supra* note 257.

located.[262] For example, Florida, Texas, and Maryland have state anatomical boards that individuals can contact to become a donor.[263] In other states, if the individual is interested in donating, they must reach out directly to the institution (i.e., a medical school) to determine if they are eligible for a whole-body donation.[264]

Furthermore, there are more than 120 million registered organ donors in the United States, with an average of about 79 transplant surgeries occurring each day.[265] While the declaration of oneself as an organ donor on a license is often met with pride, an entire body donation is often stigmatized by scandals and frightening stories present in the media.[266]

If an individual wishes to be an organ donor or donate their body to science, there is the opportunity to save up to eight individuals.[267] For example, individuals can donate their heart, liver, lungs, kidneys, pancreas, intestines, tissue, bones, skin, heart valves, and corneas.[268] Individuals can register as an organ donor through the Department of Motor Vehicles or can donate their body by registering with a specific program.[269] Under the Uniform Anatomical Gift Act, body donation is possible with the specific purpose of donating the body to hospitals, medical schools, storage facilities, and therapy or transplantation.[270] The Uniform Anatomical Gift Act states that if the decedent is alive, they can consent to the donation and if the decedent has died, then the decedent's next of kin has control over the donation process. [271]

E. The Ideal Candidate

Most health conditions do not prevent organ donation, and age is not a factor in organ donation.[272] However, there are a few risk factors that need to be evaluated prior to donation that would indicate why an individual may be denied the ability to donate their body.[273] A few potential

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[262] *Id.*
[263] *Donate Your Body to Science*, PHYSICIANS COMM. FOR RESPONSIBLE MED (last visited Dec. 28, 2022), https://www.pcrm.org/ethical-science/animal-testing-and-alternatives/donate-your-body-to-science.
[264] *Id.*
[265] Vivian McCall, *The Secret Lives of Cadavers*, NAT'L GEOGRAPHIC (Jul. 29, 2016), https://www.nationalgeographic.com/science/article/body-donation-cadavers-anatomy-medical-education.
[266] *Id.*
[267] *What it means to have "organ donor" on your driver's license,* GEISINGER (May 26. 2021), https://www.geisinger.org/health-and-wellness/wellness-articles/2017/03/22/14/48/what-it-means-to-have-organ-donor-on-your-drivers-license
[268] *Id.*
[269] *FAQ: How Are Organ Donation and Body Donation Different*, MEDCURE (Jun. 25. 2019), https://medcure.org/faq-how-are-organ-donation-and-body-donation-different/
[270] Britta Martinez, *Uniform Anatomical Gift Act* (1968), https://embryo.asu.edu/pages/uniform-anatomical-gift-act-1968
[271] *Id.*
[272] *Would Certain Conditions or Diseases Make You Ineligible to Donate?* LIFESOURCE ORGAN, EYE, AND TISSUE DONATION (Dec. 11 2022), https://www.life-source.org/latest/would-certain-conditions-or-diseases-make-you-ineligible-to-donate/.
[273] *Id.*

reasons include an infectious or contagious disease such as viral meningitis, active tuberculosis, and Creutzfeldt-Jakob disease.[274] At the time of death, doctors will determine whether the body is medically suitable for donation and will evaluate each organ to determine if the organ is suitable for donation.[275] Due to the safeguards that have been established to protect the wishes of the deceased through the Uniform Anatomical Gift Act, there can be greater communication between medical institutions and estate planning lawyers to facilitate conversations and make individuals aware of the body donating option.[276]

II. Laws Protecting the Dead

A. Rights of the Dead

The disposition of the human body after death usually follows the desires of the deceased as expressed while living to be carried out by friends and relatives.[277] In defining and determining who can be a legal right-holder there is a history of different philosophies about a dead body's "rights."[278] To begin, corpses are legally protected but do not retain legal rights such as the right to marry, divorce, or vote.[279] Further, the executor of an estate cannot sue for libel or slander of a deceased person.[280] Also, the right to medical privacy disappears after death, and family members are able to obtain information about a decedent's medical conditions.[281] There are two different theories that have evolved to contemplate and analyze the rights of the dead.[282]

First, the Will Theory states that legal rights exist only when the individual making these decisions has the autonomy to make these choices.[283] By this theory, an individual who is comatose, senile, or dead should have the benefit of legal protections but does not maintain legal rights.[284] In contrast, an alternative train of thought comes from the Interest Theory of legal rights.[285] This theory is that an individual who is unable to make a choice for any reason can be a legal right holder because that individual still has interests even if they are unable to express their interests to others.[286]

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[274] *Id.*
[275] *Id.*
[276] Clinton Jones, *Cadaveric Confusion: Conflicts Between Whole Body Donation and Family Wishes*, 11 EST. PLAN. & COMMUNITY PROP. L.J. 387 (2019).
[277] W.F.B., *Dead Bodies--Nature of The Rights in a Dead Body*, 27 W. VA L.REV. 199 (1921).
[278] Kristen Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV., 763,765-66 (2009).
[279] *Id.* at 763.
[280] *Id.*
[281] *Id.*
[282] *Id.* at 768-69.
[283] Smolensky, *supra* note 278, at 768.
[284] *Id.* at 768-69.
[285] *Id.*
[286] *Id.*

The law has defined death as a single moment in time because death changes a person's legal status.[287] For example, death ends a marriage, initiates the transfer of property, and ends some contractual and parental obligations.[288] Therefore, the granting of some posthumous rights and not others suggest that the law is full of conflicts when it comes to the rights of the dead.[289] There are several legal rules in place favoring the legal rights of the dead.[290] The use of "rights" language in the creation of these rules suggests a series of social norms to guide courts in honoring and respecting the dead.[291] Finally, these societal expectations are in place to cause minimal harm to the living.[292]

Rights and duties exist regarding the burial and disposal of a deceased body.[293] The surviving spouse of the deceased holds the strongest interest in the custody of the deceased person.[294] Typically, courts will honor the decedent's wishes, even if there is a contest by the surviving spouse and any surviving kin.[295] If the decedent has not specified their wishes, then the wishes of the kin will be analyzed.[296] If unanimous consent from the next of kin is not achieved, then the court will decide how the corpse is to be disposed of.[297] After the body has been buried or disposed of in accordance with the decedent's wishes, it becomes the custody of the law.[298] There may be recovery based on a negligence claim or intentional infliction of emotional distress may be cause for unlawful action toward a dead body.[299] Actions that would be described as unlawful include secret disinterment or displacement of a dead body.[300] The damages resulting from the disinterment or destruction of the body of the deceased are actionable for monetary damages.[301]

For example, in the case *Larson v. Chase*, there was a tort action for damages due to the unlawful mutilation and dissection of the body of the plaintiff's deceased husband.[302] The complainant alleged that she was charged with the burial of the body and thus entitled to the charge

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[287] *Id.* at 774.
[288] Smolensky, *supra* note 278, at 768-69.
[289] *Id.* at 774.
[290] *Id.* at 763.
[291] *Id* at 764.
[292] *Id.*
[293] *Rights and Obligations as To Human Remains and Burial*, LAW OFF'S. OF STIMMEL, STIMMEL & ROESER, https://www.stimmel-law.com/en/articles/rights-and-obligations-human-remains-and-burial.
[294] *Id.*
[295] *Id.*
[296] *Id.*
[297] *Id.*
[298] *Rights and Obligations as To Human Remains and Burial*, *supra* note 293.
[299] Christopher Ogolla, *Emotional Recovery for Mishandling of Human Remains: A Fifty State Survey,* DREXEL L.REV. 316 (Apr. 18, 2022).
[300] *Id.*
[301] *Id.*
[302] Larson v. Chase, 50 N.W. 238, 239-40 (Minn. 1891).

and control of the body.[303] The court granted damages for the tort action of mental anguish for the widow because of the dismemberment of the body.[304]

Another example is provided in the case *Christensen v. Superior Court of Los Angeles*. Many friends and relatives of the decedent brought an action against mortuaries, crematoriums, and a biological supply company alleging that the defendants had negligently mishandled the decedent's remains.[305] The court agreed there was a class of persons who may recover damages on the basis of emotional distress.[306]

Finally, courts have generally agreed the dead do not retain constitutional rights.[307] The reasoning is, "[a]fter death, one is no longer a person within our constitutional and statutory framework and has no rights of which he may be deprived."[308]

B. Rights and Obligations to Human Remains

Courts often face the conflict between the living and the non-living.[309] There are two ways in which postmortem interests can be justified: through living people who have an interest in certain events that occur after death or construction of the dead having a limited set of ongoing interests.[310]

Respecting an individual's wishes beyond death is important because the claim of the living person's legal right to posthumous bodily integrity is grounded in the benefit of knowing individual wishes will be respected.[311] While an individual is still alive and competent, they will likely have the power to create an advance directive.[312]

In most circumstances, the individual who is enforcing the decedent's rights is the selected executor of the decedent's estate. Executors are selected by the decedents because they are deemed as trustworthy.[313] If someone does not elect an agent, then the wishes of the decedent will likely be aligned with those of their spouse and next of kin.[314]

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[303] *Id.*
[304] *Id.*
[305] Christensen v. The Superior Ct., 820 P.2d 181, 182 (Cal. 1991).
[306] *Id.* at 184.
[307] Fred O. Smith Jr., *The Constitution After Death,* 120 COLUM. L. Rev. 1471, 1473 (2020).
[308] *Id.* at 1473-74.
[309] Hilary Young, *The Right to Posthumous Bodily Integrity and Implications of Whose Right It I*s, 14 MARQ. BENEFITS & SOC. WELFARE L.R. 197, 210-12 (2013).
[310] *Id.* at 211-14.
[311] *Id.* at 214.
[312] *Advance Care Planning: Health Care Directives*, NAT'L INST. ON AGING, (last visited Feb. 8, 2022) https://www.nia.nih.gov/health/advance-care-planning-health-care-directives.
[313] Smolensky, *supra* note 278, at 800.
[314] *Id.*

There are a few concerns regarding the obligations that an agent may have; there may be potential conflicts of interest and room for ambiguity.[315] Furthermore, if the decedent dies intestate, then it is difficult to regard their final wishes and there is even more ambiguity.[316]

This information illustrates the importance of advanced planning, especially regarding advance directives and ensuring individuals take the steps to ensure the setting up of advance directives.[317]

Regarding the use of cadavers within medical schools, there has been a considerable focus on imparting components of professionalism among medical students, especially within the dissection room.[318] A personal reflection from a medical student recalls the process of practicing cutting on a cadaver in Human Anatomy.[319] The student stated that she did do harm to the body but she did not hurt anyone because the cadaver's intent was to donate her body to science, and ultimately her autonomy was preserved.[320] The medical student recounted that life was acknowledged and the cadaver will never reap the benefits of the donation, but the creation and advancements and utmost respect from the cadaver carry on to every patient.[321] Medical schools uphold strict professionalism for the treatment of these cadavers, but even more, the personal reflections from medical students regarding the use of cadavers and respect towards their remains and gift to society demonstrate the sheer importance of body donation.[322]

III. Legal Issues

A. Property

Quasi-property is an American common law concept that has similar functions to property but does not completely qualify as property.[323] The concept of quasi-property arose as an invention by United States courts.[324] It is considered a legal fiction because it has no relationship to property in the legal sense.[325] The idea embodies the next-of-kin's sepulchral rights, which are not based on a property right but rather are based on the right to possess the corpse.[326] These rights are

[315] *Id.* at 801.
[316] *Id.*
[317] *Advance Care Planning: Health Care Directives*, *supra* note 312.
[318] Helena Winston, *A Medical Student-Cadaver Relationship,*14 AM. MED. ASS'N J. OF ETHICS, 419 (2012).
[319] *Id.*
[320] *Id.*
[321] *Id.*
[322] *Id.*
[323] Alix Rogers, *Unearthing the Origins of Quasi-Property Status*, 72 HASTINGS L. J. 291, 291 (2020).
[324] *Id.*
[325] *Id.*
[326] Remigius N. Nwabueze, *Biotechnology and the New Property Regime in Human Bodies and Body Parts*, 24 LOY. L.A. INT'L & COMP. L. REV. 19, 34 (2002).

recognized when there is a property-like entitlement, which is distinguishable from something that is fully proprietary in nature.[327]

The Health and Safety Code refers to dead bodies as "human remains" or "remains" which are defined as the body of a deceased person, regardless of its stage of decomposition.[328] The concept of quasi-property is a legal fiction because it has no relationship to property in the legal sense.[329] Common law has recognized a duty for certain individuals such as the executors, administrators, occupiers, and next of kin to bury a deceased individual.[330] The next of kin do not have a property right in the bodies of their decedents.[331]

However, it has been recognized that human remains have significant commercial value, and therefore, these perceptions of the human body have shifted.[332] Judge Cowen of the U.S. Court of Appeals observed, "human remains can have a significant commercial value, even though they are not typically bought and sold like other goods. Although remains that are used for these medical and scientific purposes are usually donated, rather than bought and sold, this does not negate their potential commercial value."[333] Selling body parts of the dead is becoming a largely commercialized business; an individual who sells these human body parts is known as a "body broker".[334] Many funeral homes participate in the business of selling human remains to body brokers in order to increase their profits.[335] The business of selling human remains is inherently predatory because it affects low-income families; often the employees of funeral homes will offer families the option to have a portion of their family member cremated for free, but in turn, the rest of the body will be sold to body brokers.[336]

No U.S. federal laws and very few state laws forbid or even address the buying or selling of human remains.[337] Selling body parts of the deceased on the black market has become even easier with the internet.[338] A hidden part of the internet accessible only through the "TOR" browser is often used to facilitate sales, even allowing body brokers to sell human remains to buyers overseas.[339] Many of these organs, tissues, ligaments, and various body parts sold on the black

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[327] *Id.*
[328] Cal. Health & Safety Code § 7001 (West 2016).
[329] Remigius N. Nwabueze, *Biotechnology and the New Property Regime in Human Bodies and Body Parts*, 24 LOY. L.A. INT'L & COMP. L. REV.19, 31 (2002).
[330] *Id* at 22-23.
[331] *Id.* at 23.
[332] *Id.*
[333] *Id.*
[334] *Selling Body Parts from the Dead is Becoming a Big Business*, DEATH INVESTIGATION TRAINING ACADEMY, https://ditacademy.org/selling-body-parts-from-the-dead-is-becoming-a-big-business/(last visited 04/22/2023).
[335] *Id.*
[336] *Id.*
[337] *Id.*
[338] *Id.*
[339] *Selling Body parts from the Dead is Becoming a Big Business, supra* note 334 at 123.

market are used for illegal transplants.[340] However, for low income individuals and their families who are desperate for a potentially life-saving transplant, they are willing to take the risk and there are many doctors who are willing to provide an illegal procedure.[341]

There is a tension that exists in the biomedical technology that gives corpses and body parts the utility that has not been historically present.[342] There are no federal laws in the United States that forbid or even regulate the buying and selling of human remains for dissection, and there are few states that regulate the buying and selling of human remains for dissection.[343] Medical advancements are born from the bodies which have been donated to science.[344] Therefore, as more cutting-edge science fueled by body donation impacts the research of nurses, paramedics, and even dentists, nothing can better prepare medical professionals for the emotional response of working with patients other than working on once living human beings.[345]

According to various United States insurance companies and hospitals, selling various organs can provide a high revenue; with this high revenue and few regulations in the United States, it appears this unsettling practice will not stop anytime soon.[346] Furthermore, in the case *Shelley v. County of San Joaquin*, family members filed an action alleging that the county exhumed missing body remains, which caused the skeletal remains to be co-mingled with other victims.[347] The court held that there is no property interest in the remains.[348]

In contrast, there is a unique disposition and understanding of property of human remains when discussed in the context of cultural property rights.[349] For example, most states have unique laws that regulate the care of the dead in cemeteries; in California, there are no health or safety laws afforded to unmarked Native American burial grounds, and in states where protection was afforded, the Native American burial penalties were minor and were ultimately insufficient to deter looting or vandalism to these graves.[350] In contrast, there are two main pieces of federal legislation that pertain to burial places more than 50 years old.[351] It is now a class five felony to intentionally disturb human remains or other objects.[352] Furthermore, the Archaeological Resources Protection Act of 1979 is a law that provides the federal government with a flexible tool to preserve and

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[340] *Id.*
[341] *Id.*
[342] *Id.*
[343] *Selling Body parts from the Dead Is Becoming a Big Business, supra* note 334 at 123.
[344] *Id.*
[345] *Id.*
[346] *Id.*
[347] Shelley v. Cnty of San Joaquin, 996 F. Supp. 2d 921, 923 (E.D. Cal. 2014).
[348] *Id.* at 928.
[349] Sherry Hutt, *Native American Cultural Property Law*, 34, ARIZ. ATT'Y, 18-19 (Jan. 1998), https://www.myazbar.org/AZAttorney/Archives/Jan98/1-98a3.htm.
[350] *Id.* at 19.
[351] *Id.* at 22.
[352] *Id.*

protect irreplaceable archeological resources; in short, this law affords protection to ancient Native American burials and cultural property.[353] The Archaeological Resources Protection Act of 1979 is insulting to many Native Americans because it treats sensitive objects and human remains as scientific resources.[354] As a response, the Native American Graves Protection and Repatriation Act was drafted to overcome the Archaeological Resources Protection Act of 1979 and to institutionalize the consideration of Native American property rights regarding human remains.[355] The Native American Graves Protection and Repatriation Act assigns ownership over the remains and objects discovered on tribal land.[356]

Furthermore, litigation that has utilized the Native American Graves Protection and Repatriation Act has confirmed that the Act has no application to human remains and cultural items that are not found on either federal or tribal land.[357] This connection is utilized to illustrate that human remains with a cultural significance have a different application and heightened status than human remains that do not share a similar cultural distinction.[358]

B. Consent

Under professional and fiduciary responsibilities, a healthcare provider must obtain a significant amount of information prior to suggesting a treatment.[359] The healthcare provider also has a duty to inform the patient about any potential hazards that may apply to routine procedures and surgeries.[360] In order to obtain consent, a patient must have the capacity to understand the information presented.[361]

First, researchers should obtain informed consent to the collection of the biomaterials allowing the participant to decide the type of biomaterials they feel comfortable donating.[362] Second, researchers should obtain consent to use the biomaterials for research purposes which would include information about utilizing the donated materials to begin a particular research project.[363]

There is tension within the scientific community by those who consider it unnecessary to obtain informed consent to perform procedures on the newly dead because they want to focus on the

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[353] *Id.*
[354] Hutt, *supra* note 349, at 2.
[355] *Id.*
[356] *Id.*
[357] Francis McManamon, *The Native American Graves Protection and Repatriation Act (NAGPRA)*, NAT'L PARK SERVICE U.S. DEP'T OF THE INTERIOR (2000), https://www.nps.gov/archeology/tools/laws/nagpra.htm.
[358] *Id.*
[359] Bryan Murray, *Informed Consent: What Must a Physician Disclose to a Patient*, AMA J. OF ETHICS (Jul. 2012), https://journalofethics.ama-assn.org/article/informed-consent-what-must-physician-disclose-patient/2012-07.
[360] *Id.*
[361] *Id.*
[362] *See id.*
[363] *Id.*

benefit gained for the newly trained physicians.[364] The belief stems from the idea that alternative models such as utilizing mannequins, animals, or instructional videos are not life-like enough as a means of teaching medical students.[365] This argument flows from the value of performing procedures on newly deceased patients because then living patients receive the benefit of having a well-trained medical provider.[366] In contrast, there is a strict requirement to obtain consent from an individual patient before undertaking any medical procedures which focuses on the respect for patient autonomy.[367] This perspective prohibits the use of individuals in a dehumanizing manner that creates apathy for autonomy.[368]

Some individuals have offered the concept of presumed consent which often occurs in the Emergency Department when a patient arrives unconscious and a lifesaving treatment is offered.[369] It is assumed that the patient consents to the lifesaving treatments, however, there are policy concerns if the patient does not consent to life saving measures.[370] The issue of consent arises with autonomy interests that survive death and whether the family has an interest in controlling what happens to the body.[371] Courts have recognized that family members of a deceased patient have a legally recognized interest in how the remains of the body are to be treated.[372]

C. Necrophilia

The occurrence that comes to issue most frequently when discussing informed consent and human remains is the issue of necrophilia, which is an abnormal fascination with death and the dead; or more particularly an erotic attraction to corpses.[373] Necrophilia is a psychosexual disorder and is categorized with the group of disorders that comprises the paraphilias for full sexual excitement.[374] Several courts have held that intercourse with a dead body does not constitute the crime of rape, while other courts are split on the issue.[375]

The newly deceased are used for training procedures, and there are ethical parameters used to ensure that the interests of all parties are respected.[376] Use of the newly deceased for training should be limited to those procedures that are best learned using anatomic structures; in the absence

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[364] Herbert Rakatansky et al., *Performing Procedures on the Newly Deceased*, 77 J. OF THE ASS'N OF AM. MED. COLLS., 1212, 1212-16 (2002).
[365] *Id.*
[366] *Id.*
[367] *Id.*
[368] *Id.*
[369] Rakatansky, *supra* note 364.
[370] *Id.*
[371] *Id.*
[372] *Id.*
[373] Tyler Trent Ochoa, *Defiling the Dead: Necrophilia and the Law*, 18 WHITTIER L. REV. 539, 540 (1997).
[374] *Id.*
[375] *Id.* at 546.
[376] Herbert Rakatansky et al., *Performing Procedures on the Newly Deceased*, 77 ACAD. MED. 1212, 1214 (2002).

of expressed preferences, families should be consulted, as is the norm for organ donations and autopsies.[377] When supervisors are unable to obtain consent in a reasonable time frame, training supervisors must forego the training opportunity.[378] Performing procedures on the newly deceased without an attempt to gain consent from the family or relying on presumed consent in this context "runs counter to an evolving norm of our society that threatens to erode further the trust of the community in the medical profession."[379] The benefits of neglecting consent in these cases do not outweigh the importance of patient autonomy and ultimately do not warrant the risk of damaging trust in the medical profession and accruing potential legal liabilities.[380]

Furthermore, there are examples of students abusing cadavers. In the case, *Tatro v. Minnesota*, a student in the Mortuary Science Program at the University of Minnesota posted statements on Facebook describing her interactions with the human cadavers.[381] A formal complaint was placed against the student by the instructor who indicated that the Facebook posts violated the anatomy lab rules and policies of the Anatomy Bequest Program.[382] The academic program rules requiring the respectful treatment of human cadavers are consistent with the statutory professional conduct standard requiring mortuary science professionals to treat the deceased with dignity and respect.[383] The court held that the academic program rules imposed on Tatro as a condition of her access to human cadavers are directly related to the establishment of respect for an individual's bodily autonomy.[384]

IV. Conclusion

A. Recommendations

This Note analyzes the importance of supplying medical cadavers for the scientific community to ensure that cutting-edge science is being utilized to further life changing advancements in the healthcare community. As such, there are steps that attorneys can take to ethically ensure that whole-body donation increases while fighting the stigma associated with these donations.

First, attorneys practicing in wills and trusts law can work together with medical professionals to have an accurate portrayal of donating the body to science and the options an individual must

[377] *Id.*
[378] *Id.* at 1214.
[379] *Id.*
[380] *Id.* at 1212-15.
[381] Tatro v. Univ. of Minnesota, 816 N.W.2d 511 (Minn. 2012).
[382] *Id.* at 513.
[383] *Id.* at 522.
[384] *Id.* at 516.

set out in their specific directives regarding their corpse.[385] Together, attorneys and medical professionals can use knowledge to break the stigma of whole-body donation.[386]

Second, medical schools can work with attorneys to create an educational presentation regarding the use of corpses. Individuals tend to be afraid of what they do not understand, and therefore the use of these open houses will lessen the fear individuals have regarding death. Others have recommended offering monetary incentives to families of the deceased.[387] This approach is problematic because it is predatory on individuals who are in a lower socioeconomic class and may need the money and thus their bodily autonomy is hindered due to the monetary incentive. Furthermore, rather than providing monetary incentives for individuals to donate their bodies to science, there can be social incentives and prestige associated with the act of donation to science. This prestige can be achieved through seminars from medical school students recounting their experiences regarding the use of medical cadavers.

Finally, there needs to be better advertising regarding the donation of the body to science. For example, billboards from local medical schools and brochures in law and medical offices could lead to greater exposure and societal understanding that body donation is an option for all individuals from all walks of life. This could, in turn, bring awareness and hopefully break barriers by providing insights, thereby inspiring individuals to consider whole-body donation as part of their end-of-life decision-making.

[385] Clinton Jones, *Cadaveric Confusion: Conflicts Between Whole Body Donation and Family Wishes*, 11 EST. PLAN. & COMMUNITY PROP. L.J. 387, 406 (2019).
[386] *Id*. at 402.
[387] *Id.*

Confusing Copyrights: How the Decision in *Google v. Oracle* May Effect the Already Tumultuous World of Copyright Infringement and How the Confusion Can Be Clarified

Zebedayo Masongo[388]

Abstract

In 2021, the Supreme Court of the United States ruled in *Google v. Oracle* that Google's use of Oracles API was fair use, and therefore not a copyright infringement. This decision was a landmark decision for big tech companies and businesses in general. The internet is a relatively new thing, and the law is still working its way around how to handle it. Since the framing of the Constitution, the framers highlighted in the Intellectual Property Clause the importance of advancing the useful arts. This decision's repercussions may be bigger than anticipated. The effects that it may have on music copyright cases if this same rationale is applied may be problematic for some. In *Gaye v. Williams*, Pharrell Williams and others lost a case concerning the hit song "Blurred Lines". Sometime before this, "Pretty Woman" by 2 Live Crew was deemed to not be copyright infringement because it was considered a parody. Fast forward to 2021. Olivia Rodrigo forfeited millions because some fans heard some similarities in her music, so she retroactively added writing credits. The whole copyright infringement world in music is a mess. This Note will examine the *Google v. Oracle* ruling before taking a wider look at its potential effect on music copyright cases. After looking at its potential effect on copyright cases and the general confusion around the possible standards, this Note will offer a possible solution that may help musicians and other creatives understand how to properly move and create in peace.

[388] Syracuse University College of Law, Juris Doctor expected 2023. I would like to thank Mandy M. Li for all her feedback. It was greatly appreciated. I would also like to thank Professor Ghosh for helping me with my topic and the continued support.

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Introduction

This year, *Google v. Oracle* was a case that many saw as an important case for the future of intellectual property as it pertained specifically to coding and copyright protection in music.[389] It was a 6-2 decision that was an important moment for the future of companies and consumers.[390] Oracle sued Google for copyright infringement because Google without permission used some of Oracle's code as the building blocks for a platform it was building.

The Court ruled in essentially a landslide decision that the use of the code was fair use and permission wasn't required.[391] Fair use permits limited use in certain situations and does not require any permission from the original owner.[392]

There are also similarities between music and software. Music's basic building blocks are several sheets of music filled with notes and chords. Software's basic building blocks are several lines of code. In copyright protection for music, it appears that the focus is on the building block. In copyright protection for software code, it appears the focus is on the final product. This line may be based on the distinction that was drawn between what the user can and cannot see. This will be addressed through the course of this analysis.

Music over the years has seen several cases involving copyright infringement. Some cases involve using a word here and there or full-on "sampling" which is the reuse of a portion of a sound recording in another recording.[393] The standard that is used in several of these cases is not fair use, and the original owners of the songs usually win. The standard is usually an extrinsic and intrinsic standard for copyright infringement in music. It is important to note that music and code are uniquely different. Music is recorded and the intention is that people will hear it.[394] The computer user is not supposed to see the computer code.[395] It plays a purely functional role. This key difference may be one of the reasons for the separations in standards.

The problem with the *Google v. Oracle* decision is that if the fair use standard was used in copyright infringement, then music would essentially be taken on a regular basis and copyrights in music would be nothing more than a legal fiction. Google sampled Oracle's code, and if it was

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[389] Google LLC v. Oracle Am., Inc., 141 U.S. 1183 (2021).
[390] *Id.* at 1190.
[391] *Id.*
[392] Office of the General Counsel, *Copyright and Fair Use,* HARVARD UNIVERSITY (Feb. 16, 2023), https://ogc.harvard.edu/pages/copyright-and-fair use#:~:text=Fair%20use%20is%20the%20right,law%20is%20designed%20to%20foster (last visited Mar. 1, 2023).
[393] Jane McGrath, *How Music Sampling Works*, HOWSTUFFWORKS (2011), https://entertainment.howstuffworks.com/music-sampling.htm (last visited Dec. 16, 2021).
[394] *Music, Movies and Computer Software copyrights, Foundations of Law*, LAW SHELF EDUC. MEDIA, https://lawshelf.com/coursewarecontentview/music-movies-and-computer-software-copyrights (last visited Dec. 17, 2021).
[395] *Id.*

a music case, Google would have been held liable. This paper will explore some of the implications of the various standards used in copyright cases and how the decision in *Google v. Oracle* may affect similar situations in music copyright.

I. *Google v. Oracle*

The *Google v. Oracle* case decided on the copyrightability of API's in favor of Google.[396] The decision was 6-2, which was admittedly a landslide decision that was a significant moment for programmers, companies, and consumers. But let's start at the beginning. What is an API? Why does this case matter? What's the impact this has on small companies? How does this affect us as consumers?

An API is an Application Program Interface.[397] An API's main function is to allow different software to communicate with each other.[398] APIs connect the dots. In reality, most websites and applications we use at this point utilize some sort of API. They've become an essential part of how we utilize the internet, which is why any case surrounding them receives significant attention. Justice Breyer who wrote the opinion for the Court described it as follows: "Imagine that you can, via certain keystrokes, instruct a robot to move to a particular file cabinet, to open a certain drawer, and to pick out a specific recipe.[399] With the proper recipe in hand, the robot then moves to your kitchen and gives it to a cook to prepare the dish. This example mirrors the API's task-related organizational system."[400]

Oracle sued Google for copyright infringement because Google used some of Java's (owned by Oracle) API to incorporate into its Android OS (Operating System).[401] The API was used as the initial building blocks for the OS, and considering how competitive the market for mobile devices is, Oracle sued because they knew as we all know, there is a lot of money in the mobile device market.[402]

The Supreme Court decided in favor of Google and that the use of the APIs was fair use.[403] The impact this may have on smaller companies should be taken into account. Now, a small company can develop an API and a bigger company like Google can essentially use that same code

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[396] *Google*, 141 U.S. at 1190.
[397] *Id.* at 1191.
[398] *Id.* at 1192.
[399] *Id.* at 1193.
[400] *Id.*
[401] *Google*, 141 U.S. at 1193.
[402] *Analysis of the smartphone market in North America, 2017-2027 featuring profiles of Apple, HTC, Huawei, Lenovo, Motorola, Nokia, realme, Samsung, Sony, vivo, Xiaomi, and more*, GLOBENEWSWIRE NEWS ROOM (2021), https://www.globenewswire.com/news-release/2021/12/16/2353881/0/en/Analysis-of-the-Smartphone-Market-in-North-America-2017-2027-Featuring-Profiles-of-Apple-HTC-Huawei-Lenovo-Motorola-Nokia-Realme-Samsung-Sony-Vivo-Xiaomi-and-More.html (last visited Dec 17, 2021).
[403] *Google*, 141 U.S. at 1209.

to build as it chooses. Although this may seem like a disastrous turn of events for small companies, for us as consumers this means that there is a level of innovation that will be unencumbered by the red tape of certain intellectual property rules. It's more than likely Oracle and the minority of the Court agree with the former, and Google along with the majority agrees with the latter.

Justice Thomas notes in his dissent that what Google did was unfair.[404] He wrote that "Oracle spent years developing a programming library that successfully attracted software developers, thus enhancing the value of Oracle's products. Google sought a license to use the library in Android, the operating system it was developing for mobile phones. But when the companies could not agree on terms, Google simply copied verbatim 11,500 lines of code from the library."[405] This angle of fairness wasn't addressed in full by the majority.

There are many factors to take into consideration when looking at an issue like this and this is undoubtedly the first of many cases. As the internet grows, so will libraries of software consisting of thousands of lines of code. The future of innovators and consumers will depend on some of these decisions.

II. Constitutional and Statutory Authority

The Copyright Clause of the Constitution says that the goal is to promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to the exclusive Rights to their respective Writings and Discoveries.[406]

For the sake of this paper, I will be critical of the Court's decision and its adherence to the idea of "promoting the progress of science and useful arts".[407] The standards we use to determine if something is a copyright infringement in music are often too strict and can lead to people not wanting to create in certain aspects. As mentioned before, music chords and notes are limited. If we take the ruling in *Google v. Oracle* to be precedent, switching to a fair use standard for music copyright would make the most sense.

The fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.[408]

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[404] *Id.* at 1211.
[405] *Id.* at 1212.
[406] U.S. CONST. art. I, § 8, cl. 8.
[407] *Id.*
[408] 17 U.S.C. § 107.

In determining whether something is fair use, we examine the purpose and character of the use (commercial nature or nonprofit educational), the nature of the copyrighted work, the amount used in relation to the copyrighted work as a whole, and the effect of the use on the value of the copyrighted work.[409]

For the sake of this paper, I will look at elements 3 and 4 of the fair use doctrine. In many situations, when it comes to music, the issue is the substantiality and the effect of the use. In some situations, the copyright being infringed over is barely recognizable, or it's a few bars. Throughout the paper, I will describe examples of when this was at issue and the case didn't go in the direction that it probably should have due to the standard that was used. It's also noted, especially in hip-hop samples, that streams to the original song usually increase if the new recording is popular enough. In recent situations, we saw Drake and Future sample Right Said Fred's song "I'm Too Sexy" in their hit song "Way 2 Sexy". This led to increased interest, sales, and even the song recharting on Billboard.[410]

The U.S. Copyright Act says that copyright protection exists in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.[411] Works of authorship include literary works, musical works (including any accompanying words), dramatic works (including accompanying music), pantomimes and choreographic works, pictorial works (including graphic and sculptural works), motion pictures (and other audiovisual works), sound recordings, and architectural works.[412] Copyright protection for an original work of authorship does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.[413] This paper will focus on musical works. Some of the cases will involve words and some music.

At first glance, since software code is functional and not seen in the same creative light as some of the other aspects of copyright law, it would appear that software falls in the last section of the Act which clarifies that processes, systems, and methods of operations are not covered under copyright law.[414] This is not the case, fortunately or unfortunately. Fortunately, because the world of copyright law is already confusing enough. Unfortunately, because these groups are so close to software that some of the decisions may overlap in logic and rationale.

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[409] *Id.*
[410] *Why is there so much 'sexy' on the charts?*, ROLLING STONE (2021), https://rollingstoneindia.com/why-is-there-so-much-sexy-on-the-charts/ (last visited Dec 17, 2021).
[411] 17 U.S.C. § 102.
[412] *Id.*
[413] *Id.*
[414] *Id.*

The question then must be where software code falls in all of this. Every other form of creation seems to fit neatly into one of the categories. Congress has defined a computer program as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result".[415]

A line of code looks something like this: <h1>. This is a sample of how a heading may be coded using Hypertext Markup Language (HTML)</h1>.[416] It ends up being essentially a group of numbers and letters. This is why code is protected under the "literary works" of copyright law. Since literary works are groups of organized letters and possibly numbers conveying a cohesive thought, and software code is groups of letters and numbers directing a cohesive action, this category makes sense. One could argue that software should be treated differently from literary works because of the accessibility to software code and the limited number of people who even understand software code. Literary works are "works, other than audiovisual works, expressed in words, numbers, or other verbal or numeric symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied."[417]

III. *Williams v. Gaye*

One case where fair use was not used was between Williams (Pharrell Williams, Robin Thicke, Clifford Harris, Jr.) and Gaye (Frankie Christian Gaye, Nona Marvisa Gaye, Marvin Gaye III).[418] Marvin Gaye's estate sued over the song "Blurred Lines" which was the world's best-selling single in 2013.[419] The Gayes sued because of comparisons to Marvin Gaye's song "Got To Give It Up".[420] The court used a two-part test that involved an extrinsic test and an intrinsic test.[421] The court didn't mention why fair use did not apply. For a jury to find any substantial similarities between the allegedly infringed song and the infringing song, there must be evidence under both the extrinsic and intrinsic prongs of the test.[422] The extrinsic test is objective and looks at objective external criteria in order to determine the similarities.[423] The intrinsic test is subjective and involves looking at if a reasonable person would find the song to be substantially similar.[424]

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[415] 17 U.S.C. § 101.
[416] *HTML TUTORIAL*, W3SCHOOLS, https://www.w3schools.com/html/ (last visited Dec 17, 2021).
[417] 17 U.S.C. § 101.
[418] Williams v. Gaye, 895 F.3d 1106, 1119 (9th Cir. 2018).
[419] *Robin Thicke's Blurred Lines is 2013's best-selling song*, BBC NEWS (2013), https://www.bbc.com/news/newsbeat-25298366 (last visited Dec 17, 2021).
[420] *Williams*, 895 F.3d at. 1116.
[421] *Id.* at 1119.
[422] *Id.*
[423] *Id.*
[424] *Id.*

During the trial, the jury never actually heard the commercial sound recording of the song the Gaye family was suing over.[425] They heard clips that were edited to capture the parts that were allegedly copied.[426] Also, the jury was played a mash-up version of the songs superimposed onto each other.[427] The intrinsic prong of the test looks to see if an ordinary, reasonable person would find the total concept and feel of the works to be completely similar.[428] If this is standard, why would the jury not hear both original songs? Why would they compare "Blurred Lines" to a version of the song that was not the version that was being argued over?

The issue with this sort of procedure is that anyone can go online and find mashups of songs that are different. The precedent that is set for how we review copyright cases is confusing.
Also, if the process in *Google v. Oracle* is also taken as precedent, this may be fair use. The closest similarity between the two songs is the drums. Everything else is different. This is similar to Google taking Oracle's code without permission and using it as a building block for a larger system. If anything, Google's level of infringement is miles ahead of whatever Williams is alleged to have done since it was literally copy and paste.

Music and software are inextricably linked because of their alignment. The decision in *Google v. Oracle* may have far-reaching effects that will serve music in the long run. A good question to ask is maybe it's possible that courts believe software code is more limited than music. If this is the belief, then using one's software code for your own purpose and having it fall under fair use would be beneficial to us all. Justice Story in *Emerson v. Davies* said "[i]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout."[429] Lord Ellenborough also commented in *Carey v. Kearsley* that "while I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles upon science."[430] This "there's nothing new under the sun" sentiment is thrown around constantly, but when it comes to music copyright laws, it seems that the courts and society expect there to always be something new. This dissonance when it comes to music has made for a peculiar music copyright landscape.

IV. Parody and Fair Use

A 1994 case involved rap group 2 Live Crew (Luther R. Campbell, Christopher Wongwon, Mark Ross, David Hobbs) and Roy Orbison and William Dees (rights of song assigned to Acuff-Rose Music, Inc.).[431] The songs at issue were "Pretty Woman" by 2 Live Crew and "Oh, Pretty

[425] *Williams,* 895 F.3d. at 1117.
[426] *Id.*
[427] *Id.*
[428] *Id.* at 1119.
[429] Emerson v. Davies, 8 F. Cas. 615 (Mass. Cir. Ct. 1845).
[430] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575 (1994).
[431] *Id*. at 569.

Woman" by Roy Orbison.[432] The issue before the Supreme Court was whether the use of the song was fair use.[433] The Court decided that the use of the song "Pretty Woman" would fall under fair use since it was a parody of "Oh, Pretty Woman". [434] The Court looked at the lyrics and context of 2 Live Crew's song, amongst other things, while reaching its decision.[435] It is possible that the substantiality test used in *Williams v. Gaye* was not widely used at this time or was implemented after this, but it is not clear why that was not used.

The Court used several definitions of "parody" in its opinion.[436] First, it identified that the root of parody lies in the Greek "parodeia" which means "a song sung alongside another".[437] Then it used modern dictionaries that defined the word parody as a literary or artistic work that imitates the characteristic style of an author or a work for comic or ridicule.[438] It can also be a composition in prose or verse so that the author or class of authors appear ridiculous.[439]

The definition of parody, being as broad as it is, is interesting in that it is not used more often in music copyright cases. It could be used as a way to implement fair use without having to name fair use explicitly.

V. Hip-Hop and Copyright

What 2 Live Crew did sounds very much like sampling. It sounds like the very thing that has record executives scrambling to avoid during lawsuits when a new act uses a piece or interpolation of someone else's song. Merriam-Webster defines a sample as "an excerpt from a recording that is used in a musical composition, recording, or performance."[440] Since the early days of hip-hop, this technique has been used to take older songs and make new songs. The practice is common, and based on the extent of how much the original is recognized, this practice has caused a copyright disaster for musicians, record labels, lawyers, and most likely law students alike. Are courts to blame for the general confusion? Is it possible, as mentioned before, that the standards set are both confusing and arbitrary and musicians don't know the lines between copyright infringement, fair use, and parody?

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[432] *Id.* at 572.
[433] *Id.* at 571.
[434] *Id.* at 572.
[435] *Campbell,* 510 at 573.
[436] *Id.* at 580.
[437] *Id.*
[438] *Id.*
[439] *Id.*
[440] *Sample*, Merriam-Webster (2021), https://www.merriam-webster.com/dictionary/sample#:~:text=3%20%3A%20an%20excerpt%20from%20a,use%20a%20Michael%20Jackson%20sample%20%E2%80%A6%E2%80%94 (last visited February 16, 2022).

Courts have bounced around on this issue and in many ways have caused a mess of a situation with samples and copyright infringement. As discussed in the *Williams v. Gaye* case, sometimes the courts use an extrinsic test and an intrinsic test as part of a two-part test.[441] The Court has used fair use to get around copyright infringement.[442] Now we'll turn to a third method that courts have implemented to deal with several copyright infringement cases.

Courts have also used a de minimis analysis to rule on copyright infringement cases. De minimis in the context of copyright law is examined in *Ringgold v. Black Entertainment TV, Inc*.[443] De minimis non curat lex is sometimes read as "the law does not concern itself with trifles".[444] De minimis insulates those who cause insignificant violations of the rights of others from any liability.[445] The court in Ringgold broke down the significance of de minimis in the context of copyright law into three distinct factors.

The first factor is that de minimis means that the technical violation is so trivial that there will be no legal consequences.[446] The second factor is that the copying that is in question is trivial because it falls below a quantitative threshold of substantial similarity to be even considered copying.[447] The third factor is that de minimis might be considered relevant to the defense of fair use.[448] This is examined when looking at the substantiality of the portion used in relation to the copyrighted work as a whole.[449]

The leading question needs to be why this standard is not used across the board for copyright cases. What appears to be happening with copyright cases is that courts are picking and choosing when to apply what standard, and when they do apply certain standards, there's a certain level of inconsistency as to the enforcement of it. In *Bridgeport Music, Inc. v. Dimension Films*, the court rejected the de minimis argument and found that there was a copyright infringement.[450] In *VMG Salsoul, LLC v. Ciccone*, the court found that the violation was de minimis and there was no copyright infringement.[451] Looking at the difference in rationales for each, maybe some insight might be gleaned as to the differing arguments.

Bridgeport Music, Inc. v. Dimension Films was a case revolving around the rap song "100 Miles and Runnin'" that appeared in the soundtrack for the movie "I Got the Hook Up".[452] The

[441] *Williams*, 895 F.3d at 11167.
[442] *Google*, 141 U.S. at 1209.
[443] Ringgold v. Black Entertainment TV, Inc., 126 F.3d 70 (2d Cir. 1997).
[444] *Ringgold*, 126 F.3d at 74.
[445] *Id.*
[446] *Id.*
[447] *Id.*
[448] *Id.* at 75.
[449] *Ringgold*, 126 F.3d at 75.
[450] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005).
[451] VMG Salsoul, LLC v. Ciccone, 824 F.3d 871, 887 (9th Cir. 2016).
[452] *Bridgeport*, 410 F.3d at 795.

film was released by Dimension Films and Miramax; the soundtrack was through Priority Records and No Limit Records.[453] The copyrighted song that was alleged to have been taken without permission was "Get Off Your Ass and Jam" by George Clinton Jr. and the Funkadelics.[454] The copyright was owned by Bridgeport Music. One of the plaintiff's experts testified that the song copied a loop of a two-second guitar solo.[455] Not only was it two seconds but the piece was pitched lower as well.[456] The district court decided that the sample did not rise to the level of legally cognizable appropriation. So, the district court applied the de minimis standard.[457] The district court also mentioned that a reasonable juror, even one familiar with the works of George Clinton, would not recognize the sample.[458] This is reminiscent of the intrinsic test mentioned in the *Williams v. Gaye* case that looks at whether a reasonable person "would find the total concept and feel of the works to be substantially similar."[459] In Bridgeport, the court essentially concluded that the song in question and the piece in question did not do enough to be considered an infringement and granted summary judgment to Dimension and No Limit. Upon appeal, this was rejected.

On appeal, the court of appeals rejected the de minimis argument that the district court resolved the case under.[460] The court said that even when a small part of a recording is taken, the part taken is something of value.[461] They also noted that the sounds are taken from a fixed medium. The court considered this to be a fixed taking rather than an intellectual one.[462] The court of appeals also did not give much credence to the district court's notes about there being a limited number of notes and chords available to composers.[463] The district court mentioned that they focused on the aural effect produced by the way the notes are played.[464] For the court of appeals to reject all of these concepts, it puts creatives between a rock and a hard place.

If the Court in *Google v. Oracle* used the argument of the court of appeals and said that the code was a physical taking and not an intellectual one, then Oracle would have won the case. Of course, the Supreme Court does not have to use a court of appeals decision as precedent and can create a new precedent. Thus, this situation does not help practitioners of the law or creatives. The API that was taken in *Google v. Oracle* in relation to the music that is at issue here in *Bridgeport Music, Inc. v. Dimension Films* would be considered something of value. If the Supreme Court used the analysis that the court of appeals in *Bridgeport Music, Inc. v. Dimension Films* used, then it would have found Google liable for copyright infringement.

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[453] *Id.*
[454] *Id.*
[455] *Id.*
[456] *Id.*
[457] *Bridgeport*, 410 F.3d at 795.
[458] *Id.*
[459] *Williams*, 895 F.3d at 1119.
[460] *Bridgeport*, 410 F.3d at 801.
[461] *Id.* at 802.
[462] *Id.*
[463] *Id.* at 797.
[464] *Id.*

The court of appeals in *VMG Salsoul, LLC v. Ciccone* came to a different conclusion than the court in *Bridgeport Music, Inc. v. Dimension Films*.[465] This case arises out of the song "Vogue" which was sung and performed by Madonna (real name Madonna Louise Ciccone) but produced by Shep Pettibone.[466] The plaintiffs alleged that a 0.23-second segment of horns from a song called "Love Break" was taken and used for the production of "Vogue".[467] In this case, the court of appeals agreed with the district court that the general audience would not recognize the brief snippet in "Vogue" to have originated from "Love Break".[468] The court of appeals found Bridgeport's reasoning unpersuasive.[469] They continued to comment that the de minimis analysis applies to infringement actions concerning copyrighted sound recordings as well as other copyright infringement actions.[470]

The court of appeals cited the *Newton v. Diamond* case's definition of how to use the de minimis analysis.[471] The court said that a use is de minimis only if the average audience would not recognize the appropriation.[472] Once again, remnants of a subjective reasonable person test is showing itself in the reasoning of a copyright infringement case. Why did they reject the argument in Bridgeport? Why was this argument not used in *Williams v. Gaye*? It is interesting that the goalpost for copyright infringement for music is moved so often. How can creators or lawyers know what the legal framework is if judges do not seem to know what the framework is? And if they do know, they are inconsistent with whatever the standard is for holding someone liable for copyright infringement based on the preceding information.

If the de minimis standard from *VMG Salsoul, LLC v. Ciccone* had been used in *Google v. Oracle*, then the results would have been about the same. The Court would have said something along the lines of "it is not enough", as opposed to the building blocks and fair use argument that was proposed and accepted. This is the problem. So far for copyright infringement, we have seen too many ways of arguing for or against it and there has not been a consistent analysis, factor test, or rule that everyone is using. It would be okay if the Court in *Google v. Oracle* explicitly stated that their ruling was specific only to code and not to anything else, but since it did not, one must wonder about the future implications and why it could not set a hard standard for copyright liability. It is also entirely possible that copyright infringement for software code should have its own set of laws completely separate from copyright infringement in music. Because of the pervasive use of APIs and different types of software code, it may be time that the legislature or the court be more specific about copyright rules and separate them as they pertain to works of art and lines of software code.

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[465] *VMG Salsoul*, 824 F.3d at 887.
[466] *Id.* at 874.
[467] *Id.*
[468] *Id.*
[469] *Id.*
[470] *VMG Salsoul*, 824 F.3d at 887.
[471] Newton v. Diamond, 388 F.3d 1189, 1190 (9th Cir. 2004).
[472] *Id.* at 1193.

VI. Now Playing: 1 step forward, 3 steps back by Olivia Rodrigo

It seems as though anytime there is a case that shows some steps forward in the future of copyright liability, another case happens that seems to take it a few steps back. This cycle of give and take by courts around the country, including the Supreme Court, as has been mentioned before, has put fans and creators in a tough position. Fans are also in a rough place because, with no set standard, anything they hear that is even remotely similar, they think is stealing or copyright infringement.

In 2021, Olivia Rodrigo released her debut album "SOUR". The album was released after her record-breaking single "drivers license", and it was met with positive reviews: receiving four out of five stars from Rolling Stone Magazine.[473] Unfortunately for Olivia Rodrigo, she had to give up millions of dollars in royalty money to Taylor Swift, Hayley Williams, and a few other songwriters and producers.[474] The album was released and then Olivia and her team gave Taylor Swift, Hayley Williams, and some others retroactive writing credits.[475] This happened after fans claimed that Olivia's track "1 step forward, 3 steps back" was a copy of Taylor Swift's "New Year's Day" which was written by Taylor Swift and Jack Antonoff.[476] The song features a piano melody which some saw as similar to Olivia Rodrigo's song. Olivia Rodrigo admitted that she was inspired by the chords in the Taylor Swift song.[477] Olivia Rodrigo and her team, fearing the legal ramifications, gave them writing credits and made sure they were paid.

This was not the only song on the album that put Olivia in a tough position. Fans noticed some similarities between Olivia Rodrigo's "good 4 u" and Paramore's "Misery Business".[478] Fans proceeded to create mashups and propel the theory that the song was taken.[479] After the uproar, Hailey Williams and Joshua Farro were retroactively added to the writing credits of the song on the album.[480]

Olivia Rodrigo also had to add Taylor Swift, Jack Antonoff, and Annie Clark to the writing credits for "deja vu".[481] "deja vu" was one of the hits off her album and was seen as similar to

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[473] Angie Martoccio, *Olivia Rodrigo Is a Revelatory New Pop Voice on 'Sour.' Deal With It*, ROLLING STONE (May 21, 2021, 8:39 AM), https://www.rollingstone.com/music/music-album-reviews/olivia-rodrigo-sour-review-1170714/.
[474] Ben Henry, *Olivia Rodrigo Has Reportedly Given up Millions of Dollars in Royalties to Taylor Swift and Hayley Williams After Being Accused of Copying Their Song*, BUZZFEED NEWS (Sep. 2, 2021, 8:46 AM), https://www.buzzfeednews.com/article/benhenry/olivia-rodrigo-paramore-good-4-u-taylor-swift-deja-vu.
[475] *Id.*
[476] *Id.*
[477] *Id.*
[478] *Id.*
[479] Henry, *supra* note 474.
[480] *Id.*
[481] *Id.*

Taylor Swift's song "Cruel Summer".[482] Hayley Williams and Joshua Farro are estimated to be able to make around $1.2 million because of the success of "good 4 u".[483] What is interesting about this situation is that there were no cases for any of these songs. No one sued anyone. All of the actions taken were because of the appearance of an infringement. This appearance may largely be due to the confusing nature that these music copyright issues are decided. It is important to note that if the same logic from *Google v. Oracle* was applied to situations such as these, Olivia Rodrigo would not have had to retroactively add anyone. It could have just been counted as fair use since it would be considered building blocks and not taking the song and just copying it.

Musicians have also expressed their frustrations with the gray area that has been created as it pertains to music copyright laws. Maroon 5's lead singer Adam Levine commented that the situations are tricky.[484] He also commented that anyone who has ever written a song knows that you may inadvertently rip something off then it makes a tap, and all of a sudden there's a lawsuit.[485] He acknowledged that sometimes it is not warranted that legal action should be taken and the whole situation has created a gray area.[486]

Of course, this all happened after the *Williams v. Gaye* case. Seeing a song that was as big as "Blurred Lines", with artists as big and established as Pharrell Williams, T.I., and Robin Thicke, go through that level of scrutiny put the whole music industry on notice. It continued to perpetuate an environment where creatives have to look through their records with a fine-toothed comb in order to be completely above anything that even remotely resembles a copyright infringement issue. The copyright landscape has now been put in a position where creatives are walking around scared based on single riff similarities or interpolations in different keys. The concerning connection between this and the *Google v. Oracle* case is that this may not be the same for technology companies.

The precedent that *Google v. Oracle* set is essentially that technology companies can take software code from one another, and it might be okay based on the fair use doctrine. The threshold for liability seems to be much higher for software code than for music copyright. It may be time that these two kinds of copyright liability are bifurcated. They may need to be considered entirely different things.

The reasoning for the disparity could be for a number of reasons. Maybe it is because music money is older money and the music industry may simply have more skin in the game than the technology sector. With the rapid growth and rise in technology companies, although a lot of money is involved, the players are all new. The courts and the world at large are not as familiar

[482] *Id.*
[483] *Id.*
[484] Henry, *supra* note 474.
[485] *Id.*
[486] *Id.*

with the technology companies as they are with the music industry companies that are going after these copyright infringement suits.

As it pertains to the old money against new money argument, we can simply look at when the companies were founded to illustrate and further analyze the theory. The big five tech companies are Google, Apple, Facebook, Amazon, and Microsoft.[487] Google was founded in September of 1998.[488] Apple was founded in April of 1976.[489] Facebook was founded in February of 2004.[490] Amazon was founded in July of 1994. Microsoft was founded in April of 1975.[491] The big three music companies are Universal Music Group, Sony Music, and Warner Music Group.[492] Universal Music Group was founded in 1934.[493] Sony Music was founded in 1929.[494] Warner Music Group was founded in 1958.[495] The disparity between the oldest music company and the oldest tech company is almost forty years.

The new money and old money argument is an opinion that is pertinent to note, but the level of confusion is a fact. If musicians themselves are confused, fans are confused, and judges seem to be confused, what can be the possible solution? Hopefully, by the end of this Note, an arrival point can be a potential solution.

VII. Public Policy Considerations

The consequences of adopting the standard set in *Google v. Oracle* to the music industry could have polarizing responses. This paper has looked at what could have changed as far as some cases are confirmed, but the situation could be much more severe than a few simple cases. In a world that is constantly preaching creativity and entrepreneurship, a broad reading of the fair use standard could likely put creatives and business people in a very challenging position. This section will attempt to illustrate some of those public policy concerns. Hopefully, this will demonstrate that overregulation will be just as problematic as underregulating.

How do we as a society encourage people to start small businesses? How do we motivate the smaller firms and companies to continue to innovate, create, employ, and produce at a high level? The incentive is clearly monetary and backed by the protection of the various laws across the land.

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[487] Nicolas Lekkas, *GAFAM: The Big Five Tech Companies Facts (FAAMG)*, GROWTHROCKS (Aug. 18, 2021), https://growthrocks.com/blog/big-five-tech-companies-acquisitions/.
[488] *Id.*
[489] *Id.*
[490] *Id.*
[491] *Id.*
[492] Hugh McIntyre, *The 3 Major Record Labels & Their Role in the Music Industry*, CAREERS IN MUSIC (June 30, 2021), https://www.careersinmusic.com/major-record-labels/ (June 30, 2021).
[493] *Id.*
[494] *Id.*
[495] *Id.*

The knowledge of knowing that they are protected is something that cannot be taken for granted. Today, the party is Oracle, which is a big business. Tomorrow, it is a mom-and-pop startup that is being put into a compromising position. With the backdrop of a pandemic, the issues with small businesses only become more dismal.

In 2020, the number of small businesses dropped 29% and revenue dropped 31.9% in that same time frame.[496] During that same time, big businesses thrived.[497] The S&P 500 was up 16% in 2020.[498] Amazon shares went up 73%, Walmart shares increased by 22%, and McDonalds' were up 7%.[499] The connection between this and the *Google v. Oracle* decision is a matter of incentive. Why should small businesses compete if a big business can come along, use the tech, and have it be counted as fair use? How can the everyday creator be encouraged to compete? For society, this could be a disaster, since as recently as 2019, small businesses accounted for about 44% of U.S. economic activity.[500]

How does this connect to music? Why does this matter? If this is analogized to music, then smaller creatives will be less inclined to produce since a bigger artist can simply take their content and it can be counted as fair use. The cascade of events that the *Google v. Oracle* decision could cause may be disastrous for the music industry if smaller courts start to adopt this ruling in music copyright cases. Let us take a closer look at the numbers.

Spotify held an event in February of 2021 where it confirmed that 60,000 new tracks are uploaded on its platform every single day.[501] That is about one song every 1.4 seconds.[502] In 2020, Soundcloud had 200 million tracks.[503] That is a 100% increase from 2015.[504] As of 2021, Apple Music has over 70 million tracks on its platform.[505]

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[496] Kate Taylor, *In 2020, big businesses got bigger and small businesses died. The vicious cycle won't stop until we take action*, INSIDER (Jan 3, 2021, 8:31 AM), https://www.businessinsider.com/in-2020-big-businesses-got-bigger-small-businesses-died-2020-12.
[497] *Id.*
[498] *Id.*
[499] *Id.*
[500] Office of Advocacy, Small Businesses Generate 44 Percent of U.S. Economic Activity (Jan. 30, 2019), https://advocacy.sba.gov/2019/01/30/small-businesses-generate-44-percent-of-u-s-economic-activity/.
[501] Tim Ingham, *Over 60,000 Tracks Are Now Uploaded To Spotify Every Day. That's Nearly One Per Second,* MUSIC BUSINESS WORLDWIDE (Feb. 24, 2021), https://www.musicbusinessworldwide.com/over-60000-tracks-are-now-uploaded-to-spotify-daily-thats-nearly-one-per-second/.
[502] *Id.*
[503] Sehaj Dhillon, *SoundCloud Revenue and Usage Statistics*, BUSINESS OF APPS (Jan. 11, 2022), https://www.businessofapps.com/data/soundcloud-statistics/.
[504] *Id.*
[505] Lexy Savvides & Vanessa Hand Orellana, *Apple Music vs. Spotify: Comparing the top music streaming services*. CNET (Sept. 25, 2021, 3 AM), https://www.cnet.com/tech/services-and-software/apple-music-vs-spotify-comparing-the-music-streaming-giants-best-2021/.

Based on these numbers, it is apparent that creatives are uploading music online at an unprecedented rate. There is no fear about the threat of their music being taken because for years the creatives have believed that they are protected by the law. They believe that their intellectual property cannot be taken because that is not how things are done here.

Looking at the *Google v. Oracle* decision, if courts use that standard for music, creatives will be essentially left unprotected from bigger, more well-funded creatives. There will be nothing stopping artists at the major labels from sourcing Soundcloud, Spotify, Apple Music, Tidal, or any of the other digital streaming platforms for artists with smaller followings. They can essentially take aspects of songs that they like and use the fair use standard as set forth in *Google v. Oracle* in order to validate their use and not be held liable for copyright infringement.

Is the public policy dilemma clear? Is the quagmire of epic proportions something that can be solved? If the courts overregulate and nitpick at every song that comes out, then creatives will be less inclined to create. If the courts underregulate, then smaller creatives will be left vulnerable to being in compromising positions by larger, more heavily funded creatives. The solution cannot be one side or the other. The heavy-handed nature of the two-part test can be constricting and often vague. The random and often unquantifiable nature of fair use is sometimes arbitrary. Parody is too specific to specific kinds of songs. Is it possible that a balancing test of some sort is needed in order to resolve the copyright dilemma in music? Should a balancing test have been introduced to resolve the *Google v. Oracle* case?

VIII. Possible Solution To The Problem

If we did introduce a balancing test, where would we start? Is there anywhere in case law we can go to see a balancing test that can be used as a template for the next steps in order to solve the issue that has been presented here? *Mathews v. Eldridge* may be able to take us some of the way there.[506]

The Mathews case is an administrative law case about social security benefits.[507] It is not in the realm of big business or music, but there is a lesson to be learned here. A core procedural piece of information that may be used to solve our current problem. The Supreme Court was trying to decide if Mathews should have been afforded an opportunity for an evidentiary hearing before the termination of his social security benefits.[508] The Court eventually decided that he did not.[509] This is outside the scope of what we are interested in for the sake of this paper. Where the focus will be is on how it landed on the no. The Court used a balancing test involving three factors to solve this.

[506] Mathews v. Eldridge, 424 U.S. 319 (1976).
[507] *Id.* at 323.
[508] *Id.*
[509] *Id.* at 349.

The first factor it considered was the private interest that would be affected by the action.[510] The second factor it considered was the risk of erroneous deprivation of that interest through the action.[511] The third factor it considered was the government's interest in the situation.[512] For the landing of this legal diatribe, there need not be an explanation about these factors and their relationships in administrative law. It did create a good framework through which copyright cases may be decided. The Supreme Court here laid out a brilliant foundation that has not been utilized in other fields of the law as much as it maybe could be.

In these copyright cases, three factors could also be used. The first factor could be the interest of the individual that is bringing the action. This can be examined by looking at the notoriety of the artist or business. Is it a big business that is suing a small business for infringement? Is it a big artist or a small artist that is suing? What is their position in the pecking order of their respective field? This information is important because we can gauge if they are in a position of power and simply wielding the idea of copyright infringement like a sword or using it like a shield.

The second factor could be the interest of the individual that whom the action is being brought. This factor could have a reasonableness test intrinsic to it. How many resources does this individual have? Could a reasonable person have recognized this infringement? Is it a few lines of code? A few words or chords from a song? If there are similarities, are they a big enough business or artist that it even matters?

The third factor could be the government's interest in the matter. In this factor, a court could weigh the pros and cons of if they decided it was an infringement or if it was not an infringement. This is the factor where public policy is considered the most. In this factor, the court can look at what kind of precedent is set if they allow for this specific action to be considered infringement. This factor is also where the courts will look at the looming copyright clause and the idea of promoting the progress of science and useful arts.

IX. Conclusion

It's understood that this whole situation may be a bit confusing but if these factors are used as somewhat of a balancing test, maybe there can be a little more parity in the world of copyright infringement. Courts would be forced to think hard before calling certain things copyright infringement or deciding that certain things are not copyright infringement. Since this would be the case, creatives may be more at ease because they understand the court's ability to do more. If artists and other creatives knew that courts had to go through such a detailed factor test and explain

[510] *Id.* at 335.
[511] *Matthews,* 424 U.S. at 323.
[512] *Id.*

every step of the way, maybe the world of copyright infringement would not have so many blurred lines.

This system may not be imperfect, but there is no point in presenting a problem without also presenting a solution to solve the problem. If the problem is the only thing being presented, then that is just complaining. And if there is one thing people do not like, it's a complainer.

What's in a Juul? Are the Youth Lacking in Knowledge Due to a Lack of Corporate Transparency?

Sam Schimel

Abstract

Vaping has become a huge issue in modern America. Tobacco companies target kids, teens, and young adults with unique flavorings. There are numerous side effects that may impact the health of younger people. Lung damage, nicotine addiction resulting in decreased brain development, and other side effects are still being discovered by scientists. However, cases exist now that reveal irreversible damage done by Juuls to younger people. There was even a short-lived ban on certain Juul products under the Trump Administration as well as the passage of a law that limits the purchasing age of vaping products to 21. However, the statistics have shown that limiting the age has not limited the consumption for kids, teens, and young adults to a satisfactory level. However, the consumption may perhaps be better influenced by specific ingredient labels that include exact amounts of each ingredient on the products. This Note explains that specific labeling on vaping products should be accurate. Companies should be forced to make their products comply with the required labeling. Lastly, developing litigation can change the tide of the influence of tobacco companies if labeling on Juuls is enforced and enforced accurately, focusing mainly on the success of statewide regulation, and why nationwide litigation is probably not viable. This Note will predominantly focus on the trend of 'Juuling' for kids, teens, and young adults across the United States because Juuls are found to be overwhelmingly popular amongst those groups. While Juul is no longer the most used e-cigarette brand, it is the most well-known. The other brands, however, will be periodically mentioned as well, though they will not be the focus.

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Introduction

Tobacco companies have used deceptive advertising to persuade younger people to buy their products for many years. Vaping has become an epidemic for the younger generation with likely the most popular vaping product being Juul.[513] Tobacco companies target the younger generation with interesting flavors such as fruit, mint, and dessert flavors.[514] This type of marketing is very problematic because younger people are less likely to do heavy research on the products they are consuming.[515] To remedy this issue, future lawsuits against tobacco companies should stress the need for specific ingredient labels on Juul packages that list the exact amounts of each ingredient. If specific and particularized labels are placed on the packaging of Juuls, a consumer will have the requisite knowledge of what they are consuming in order to understand the consequences of using said product. The argument that younger people do not read labels is not persuasive enough because it puts forth the responsibility onto younger people to do outside research if they are mindful of their physical health. Outside research costs time, and the side effects of the chemicals existing in vaping products are still being researched by professionals. Because Juuls are causing health issues primarily in younger people and they are the demographic that use this product the most, specific ingredient lists on the packaging are necessary.[516] Additionally, in order for families to take proactive measures to help protect their loved ones, class action lawsuits should occur because it is likely the only way to mandate that tobacco companies like Juul Labs implement specific ingredient labels on their products. Through statistics about current usage among younger people, it is proven that the restrictions that are currently in place are just not enough to curb the vaping epidemic.[517] So, the likely solution is for states to pursue statewide regulation rather than national regulation.

The first part of this Note will be on the background of vaping and some statistics on the harmful effects associated with its ingredients. The second part will be about the Trump Administration's ban on certain vaping products, which led to the Tobacco 21 Act, a major law that restricted the legal age for purchasing vaping products, and how mandating specific ingredient labels be implemented by tobacco companies could go a step further in solving the epidemic. The third part will discuss the wrongful death cases against tobacco companies and how litigation could veer toward more state regulation. The fourth part again will focus on where litigation might go by comparing vaping cases to past cigarette cases and what they have accomplished. The fifth part

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513 *See* Jamie Ducharme, *Trump Administration Announces Stripped-Down Regulations on Flavored Vaping Products,* TIME (Jan. 2, 2020, 6:28 PM), https://time.com/5758004/flavored-vape-ban/.

514 Jamie Ducharme, *Trump Administration Announces Stripped-Down Regulations on Flavored Vaping Products,* TIME (Jan. 2, 2020, 6:28 PM), https://time.com/5758004/flavored-vape-ban/.

515 *See id.*

516 *Id.*

517 *See* Allison Hunt, *Almost 85 Percent of the More Than 2 Million U.S. Middle and High School Students Who Used E-Cigarettes Used Flavored E-Cigarettes in 2021*, CDC (Sept. 30, 2021), https://www.cdc.gov/media/releases/2021/p0930-e-cigarette.html.

will use Canada as a model for how to treat ingredient labels in the United States and show that there could be improvements by mandating specified ingredient labels through statewide legislation. The sixth part will focus on the potential for class action lawsuits in order to push the envelope and have a greater chance of obtaining legislation requiring specific ingredient labels. The seventh part will discuss the counterargument of lack of knowledge of ingredients which will lead to apathy about them if they are listed on vaping products. And finally, there will be the conclusion.

Background & Statistics

Traditionally, electronic cigarettes (e-cigarettes) have been used to help former cigarette addicts with nicotine withdrawal by simulating the act of smoking a cigarette.[518] Vaping products, another term for e-cigarettes, operate by using electricity to heat water which contains nicotine and other substances, then turning the water into vapor allowing it to be inhaled.[519] Nicotine, by itself, is harmful for the brain development of teenagers and can result in premature births and low birthweight babies if consumed in a tobacco product during pregnancy.[520] Other than nicotine, e-cigarettes and e-cigarette vapor ordinarily contain propylene glycol and/or vegetable glycerin.[521] These substances are often used to produce stage or theatrical fog and they have been discovered to increase lung and airway irritation after intensive exposure.[522] Other harmful chemicals included in e-cigarettes are volatile organic compounds (VOCs), flavored chemicals, and formaldehyde.[523] At specified levels, VOCs can result in eye, nose, and throat irritation, headaches and nausea, and can damage the liver, kidneys, and overall nervous system.[524] Some flavorings are found by scientists to be more toxic than others and contain different levels of a chemical called diacetyl that can result in a lung disease known as bronchiolitis obliterans.[525] Additionally, formaldehyde is a cancer-causing substance that has the possibility of forming if e-liquid overheats or not enough liquid ends up reaching the heating element.[526] This is also known as a "dry puff".[527] Other chemicals that are present in Juul are neomenthol and benzyl alcohol which are both respiratory

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[518] *See* Benjamin Caleb Williams, *Are Vaping and Juuling the Same thing?,* THE RECOVERY VILLAGE (Nov. 10, 2021), https://www.therecoveryvillage.com/teen-addiction/faq/are-vaping-and-Juuling-the-same/.
[519] *Id.*
[520] *What Do We Know About E-cigarettes?*, AMERICAN CANCER SOCIETY (June 23, 2022), https://www.cancer.org/healthy/stay-away-from-tobacco/e-cigarettes-vaping/what-do-we-know-about-e-cigarettes.html.
[521] *Id.*
[522] *Id.*
[523] *Id.*
[524] *Id.*
[525] *What Do We Know About E-Cigarettes?*, *supra* note 520.
[526] *Id.*
[527] *Id.*

irritants.[528] This long list of toxic ingredients is currently not disclosed to the general public on the packaging of a vaping product produced in the U.S. in specific quantities.

"Juuling" refers to the usage of one of the most popular brands of e-cigarettes, Juuls.[529] Juuls contain nicotine and usually come in small, compatible, easy-to-hide devices which can also be hidden well from parents.[530] These devices give off a very small vapor smell so they are hard to smell and they can be charged by a computer.[531] Kids and teenagers use them in school restrooms and can even get away with using them in classrooms.[532]

Currently, the warning present on Juul packaging labels is that the product contains nicotine and that the product contains chemicals known to California to cause cancer, birth defects, and reproductive harm as required by Proposition 65.[533] Proposition 65 is a California law that mandates all products that are to be sold in California have a warning label that the product contains chemicals that can cause cancer, birth defects, and reproductive harm, but its flaw occurs in the lack of specified quantities being required.[534] The same label is required for any product containing any amount of any substance that is found on a list of over 900 toxins and carcinogens. The same warning label appears on potato chips (acrylamide), chemotherapy (uracil mustard), lumber (wood dust), or toxic runoff (arsenic).[535] Knowing the presence of these chemicals is helpful for a consumer, but the chemicals just being listed on the products does not necessarily mean they are harmful.[536] While this law is resulting in many companies placing the label on their products due to an increase in recent lawsuits, it becomes a problem when so many products have this label.[537] When so many products use the label, the average consumer will become apathetic when they start seeing it everywhere.[538] Juul Labs likely has opted to place the label on every product to avoid any potential lawsuit, but the force behind the label would be much stronger if the ingredients listed specified quantities so that a regular consumer would be more apprehensive about the actual amount of these chemicals being included in the product.

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[528] Rui Zhang, *JUUL e-liquid exposure elicits cytoplasmic Ca2+ responses and leads to cytotoxicity in cultured airway epithelial cells,* 337, TOXICOLOGY LETTERS, 46, 54-55 (2021) (study completed to show the effect of aerosols on lung epithelial cells).

[529] Williams*, supra* note 518.

[530] *What Do We Know About E-Cigarettes*, *supra* note 520.

[531] *See* Williams*, supra* note 518.

[532] Jia Tolentino, *The Promise of Vaping and the Rise of Juul*, NEW YORKER (May 14, 2018), https://www.newyorker.com/magazine/2018/05/14/the-promise-of-vaping-and-the-rise-of-Juul.

[533] *Health Effects*, JUUL LABS, https://www.Juullabs.com/about/health-effects/ (last visited Jan 2, 2021, 8:18 PM).

[534] Ganda Suthivarkom, *What is Prop 65? And Why Is There a Warning Label on This Thing I Bought?*, THE NEW YORK TIMES: WIRECUTTER (March 10, 2020), https://www.nytimes.com/wirecutter/blog/what-is-prop-65/.

[535] *Id.*

[536] *Id.*

[537] Brett D. Heinrich & Dana B. Mehlman, *The Long Reach of Proposition 65,* 12 NAT'L L. REV., 67 (2022) (discussing the recent lawsuits against companies whose products aren't compliant with Proposition 65).

[538] Suthivarkom, *supra* note 534.

In a study that used A549 and Calu-3 cultured cells (two types of epithelial cells from distinct regions of the human lung), it was shown that exposure of the cells to e-liquids resulted in induced cytotoxicity (toxicity from chemical therapeutic agents on cells) and eventually led to pro-inflammatory responses (cytokine response to infection) and apoptosis (cell death).[539] Shockingly, 3% of mint-flavored e-liquid exposure for 0.5 hours led to an almost complete disappearance of all cell viability.[540] While this study has the weakness of only utilizing unchanged, base e-liquids and does not replicate real-world vaping exactly, it does show that cell viability is almost immediately affected when introduced to Juul e-liquids.[541] Flavored e-liquids are also shown to cause more harm than menthol ones as supported by the existence of respiratory irritants like neomenthol and benzyl alcohol being included at much higher amounts in the epithelial cells that were subjected to the mint-flavored e-liquid rather than the menthol flavor.[542] The exact differences are 0.25 mg compared to barely detectable levels of neomenthol in the epithelial cells and 1.0 mg compared to barely detectable levels of benzyl alcohol.[543] These respiratory irritants likely contributed to the cytotoxicity and apoptosis.[544] In a similar study, it was additionally found that mice exposed to e-cigarettes over only a two-week period showed significant increases in pulmonary oxidative stress, which damages cell repair and increases aging, and moderate macrophage-mediate inflammation, which can lead to cell death, compared to the control group which did not receive the vaping test.[545] Other researchers found that 22.5% of mice exposed to e-cigarette smoke developed adenocarcinomas (lung tumors).[546] Mice are known to be biologically quite similar to humans.[547] These studies reveal the true risk that the ingredients found in e-cigarettes pose to human health, especially given that flavored e-cigarettes are the most popular. This reveals a need for more public transparency regarding the existence of these ingredients in e-cigarettes in specified quantities.

The criticisms against vaping products were previously way worse because in 2019 and going into 2020, vitamin E acetate had been found in many vaping products tested by the Food and Drug Administration (FDA) which had led to an outbreak of lung injuries in mostly younger people.[548] According to the Centers for Disease Control (CDC), a total of 2,807 hospitalized cases or deaths have been reported from all 50 states, the District of Columbia, Puerto Rico, and the U.S.

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[539] Zhang, *supra* note 528, at 54-55.
[540] *Id.*
[541] *Id.*
[542] *Id.*
[543] *Id.*
[544] Zhang, *supra* note 528, at 54-55.
[545] Alexandra Bellisario, *et al.*, *An Observational Study of Vaping Knowledge and Perceptions in a Sample of U.S. Adults*, 12 CUREUS 1-14, (2020) (an observational study of public perception about e-cigarettes).
[546] *Id.*
[547] *Why are mice considered excellent models for hums.?*, THE JACKSON LAB'Y, https://www.jax.org/why-the-mouse/excellent-models (last visited March 8, 2022).
[548] *Outbreak of Lung Injury Associated with E-Cigarette Use, or Vaping*, CDC (Feb. 25, 2020, 1:00 PM), https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html.

Virgin Islands.[549] In samples of 51 lung-related cases associated with e-cigarettes from 16 states, vitamin E acetate was identified in the bronchoalveolar lavage fluid (BAL) samples in 48 of the 51 patients but not in the BAL samples of the 99 healthy comparison individuals.[550] These cases led to the heightened awareness of the harm vitamin E acetate can cause and the later removal of it from most vaping products.[551] While this instance did not involve Juul Labs, it shifted the public perception to the possible health implications and the possibility of even death after prolonged usage of e-cigarettes, including Juuls.

The need for specific ingredient labels is due to the popularity of Juul products among kids, teens, and young adults. Based on recent 2021 data from the National Youth Tobacco Survey, an estimated 11.3% (1.72 million) of high school students and an estimated 2.8% (320,000) of middle school students reported current e-cigarette use.[552] Among those surveyed, 84.7% prefer flavored e-cigarettes.[553] Additionally, one in four high school students and one in twelve middle school students used e-cigarettes daily.[554] When surveying high school students who currently used e-cigarettes, 26.1% revealed that their usual brand was Puff Bar, followed by Vuse (10.8%), SMOK (9.6%), Juul (5.7%), and Suorin (2.3%).[555] For middle school students who currently used e-cigarettes, 30.3% revealed that their usual brand was Puff Bar, and 12.5% reported Juul.[556] Interestingly, 15.6% of high school users and 19.3% of middle school users revealed that they did not know the e-cigarette brand they usually used, suggesting that someone else was regularly supplying the product to them.[557]

Juuling is also favored among younger adults in addition to kids and teens, although not nearly to the same degree and not for their intended purpose. When asked if respondents vaped in the past week in a recent 2022 Gallup poll, 13% of adults aged 18-49 said yes.[558] Only 1% of adults over 50 said yes.[559] These numbers are interesting because according to a recently published survey by the CDC, seven of every 100 adults aged 18-24 years (7.4%) have smoked, about 14 of every 100 adults aged 25-44 years (14.1%) have smoked, and nearly 15 of every 100 adults aged 45-64

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549 *Id.*
550 *Id.*
551 *Id.*
552 Press Release, Youth E-Cigarette Use Remains Serious Pub. Health Concern Amid COVID-19 Pandemic, FDA (Sept. 20, 2021) (on file with Allison Hunt).
553 *Id.*
554 *Id.*
555 *Id.*
556 *Id.*
557 Hunt, *supra* note 552.
558 Justin McCarthy, *What Percentage of Americans Vape,* GALLUP (Aug. 17, 2022), https://news.gallup.com/poll/267413/percentage-americans-vape.aspx.
559 *Id.*

years (14.9 %) have smoked.[560] This means that e-cigarettes are quite simply not used for their intended purpose, to help cigarette smokers quit as much anymore, as they are being used more prominently by younger adults who have never smoked. This revelation is quite astonishing because based on their intended use, kids, teens, and young adults who have never smoked should have no practical use for vaping at all.

Studies have shown that public perception among younger adults is not that negative when it comes to vaping. A study about public perception was conducted at Wagner College in Staten Island about the harmful effects of vaping.[561] 413 young adults participated in the study which found that the majority who were inclined to vape did so because they believed it reduced stress, drinking alcohol makes people more inclined to vape, ingredients in a vape are relatively safe to consumers, and believed that smoking cigarettes is more dangerous than vaping.[562] Based on the questionnaires that were sent to the participants, the researchers concluded that if the dangers of vaping were discussed with them by their healthcare providers, they would be more inclined to quit vaping.[563] The researchers also concluded that those same respondents would be inclined to vape less frequently.[564] Thus, public knowledge about vaping's harmful health effects is still very minimal even among university students. Ingredient labels could help to rectify the issue of a knowledge gap about these products or at least give them the proper chance for concern when viewing the ingredient list with quantities of each and coupled with the Proposition 65 warning. The warning coupled with the specific ingredient labels could discourage young people from using the products.

Trump Administration Ban and Tobacco 21 Act

Flavored vaping did have a brief ban in 2020 in which President Trump announced he would be removing some, but not all, flavored e-cigarettes from the U.S. market.[565] Under the proposed regulation, mint, fruit, and dessert-flavored cartridge-based e-cigarettes, like the ones made by Juul Labs, would be taken off the market entirely.[566] The ban occurred after recent statistics were released from the Centers for Disease Control and Prevention which estimated 5.4 million middle and high school students used e-cigarettes in 2019.[567] Additionally, a newly signed law, the Tobacco 21 Act, had raised the legal purchasing age for tobacco and vaping products to

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[560] *Current Cigarette Smoking Among Adults in the United* States, CDC (Mar. 17, 2022), https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm.
[561] Bellisario, *supra* note 545.
[562] *Id.*
[563] *Id.*
[564] *See id.*
[565] Jamie Ducharme, *Trump Administration Announces Stripped-Down Regulations on Flavored Vaping Products,* TIME (Jan. 2, 2020, 6:28 PM), https://time.com/5758004/flavored-vape-ban/.
[566] *Id.*
[567] *Id.*

21.[568] The law is still in effect, but the Trump ban was rescinded after battleground state polling revealed that the ban was costing him support during the 2020 election.[569] The ban certainly did pave the way for the Act, so it did accomplish that much. However, the issue with the Tobacco 21 Act is that while the percentages of kids and high schools have decreased since the law went into effect, it has only decreased by thirty-three percent.[570] Additionally, teenagers can be supplied vaping products by an adult as evidenced by the fact that 15.6% of high school users and 19.3% of middle school users did not know what vaping product they used when asked in a National Youth Tobacco Survey.[571] The raising of the legal age necessary to purchase tobacco products is a step in the right direction but the issue of a lack of requisite public knowledge about the products remains.

Wrongful Death Suits and Other Lawsuits

The harm of Juul

Ingredients in Juul have caused numerous health complications and deaths of younger individuals which is likely not helped by a lack of ingredient labels on packages. One of the current wrongful death cases is that of *Vail v. Juul Labs*.[572] In this case, 18-year-old David Wakefield died in his sleep in August of 2019 due to smoking Juul e-cigarettes for several years.[573] Wakefield's family alleges that Juul Labs took advantage of minimal regulations for e-cigarettes in order to develop a market targeting mostly teenagers.[574] According to his family, Wakefield was admitted to Saint Joseph's North Children's Hospital for three days due to breathing and lung complications prior to his death.[575] This case was not part of the class action *In Re Juul Labs, Inc., Mktg., Sales Practices, & Prods. Liab. Litig* which was a consolidation of several cases against Juul Labs, but the lawsuit began during the same month.[576] In a suit conducted by Lisa Marie Vail, Wakefield's mother, she states that her son was roped into smoking Juuls at around age 15 and was attracted to the candy-like flavors and sleek design, and was persuaded by advertisements that it was a healthier alternative to combustible cigarettes.[577] Wakefield attempted to ease plaintiff's concerns about the

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[568] *Id.*

[569] Annie Karnie, *Trump Retreats from Flavor Ban for E-Cigarettes*, NY TIMES (Nov. 17, 2019), https://www.nytimes.com/2019/11/17/health/trump-vaping-ban.html.

[570] Hunt, *supra* note 552.

[571] *Id*.

[572] Emily Field, *Juul Hit With First-Ever Vaping Lawsuit*, LAW 360 (Oct. 15, 2019, 2:52 PM), https://www.law360.com/articles/1209609.

[573] *Id.*

[574] *Id.*

[575] *Id.*

[576] *See id; see also In re Juul Labs, Inc. Mktg. Sales Pracs. & Prods. Liab. Litig.*, No. 19-md-02913-WHO, 2022 U.S. Dist. LEXIS 93386 (N.D. Cal. Apr. 29, 2022).

[577] Field, *supra* note 573.

potentially negative effects of vaping by arguing that it was a healthier alternative to cigarettes.[578] Interestingly, THC devices were thought to have been the cause of these widespread deaths in 2019 due to their inclusion of vitamin E acetate.[579] However, plaintiff still believes the marketing design is the main issue because her son would have never started vaping if the design of the products intentionally appealed to adult workers over the age of 26 who smoked conventional cigarettes, which is the population that in theory would benefit the most from vaping to help them quit cigarettes.[580] The case is still pending litigation likely because of the COVID-19 pandemic, but that does not mean certain conclusions cannot be drawn from this pending case. The most obvious one being the design of the product itself targeting younger people regardless of any other outside influence. Even if wrongful deaths have gone down after the removal of vitamin E acetate, kids, teens, and young adults will be predominantly addicted to this product if they are not given the opportunity to educate themselves about its ingredients listed in specified quantities.

In another case against Juul Labs, in 2019, plaintiff Connor Patrick Evans sued Juul Labs after he was admitted to the hospital with his lungs being filled up to 80% of its capacity with fluid.[581] Evans was completely healthy before the incident and was the former captain of his school's ice hockey team.[582] He started vaping when he was 19 and had continued on since the incident at 21 and he never used any other tobacco products.[583] Evans started a lawsuit against the company and claimed that Juul failed to "properly assess and warn about the harm of using the product and knew or should have known that their products were potentially dangerous."[584] Evans also claimed that the products deliberately attempted to attract minors and young adults, including those who have never even been regular tobacco smokers.[585] This case would be entirely avoided if the specific ingredients were listed on the Juul pods.

Non-Juul Factors

Certain non-Juul-related factors have been linked to outbreaks of lung and other health-related issues of e-cigarette usage beginning in 2019.[586] For example, of the 1500 hospitalized cases, underlying asthma was found in 30% of cases, which is very high considering the 8% to

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[578] *Id.*

[579] *Outbreak of Lung Injury Associated with E-Cigarette Use, or Vaping Products, supra* note 548.

[580] Field, *supra* note 573.

[581] Angeline Jane Bernabe & Jerry Wagschal, *Former Juul user, 21, sues company after being hospitalized, placed in coma for 8 days*, ABC NEWS (Oct. 22, 2019, 7:14 AM), https://abcnews.go.com/GMA/News/Juul-user-21-sues-company-hospitalized-coma-days/story?id=66431800.

[582] *Id.*

[583] *Id.*

[584] *Id.*

[585] *Id.*

[586] Phillip Clapp, *et al.*, E-*cigarettes, vaping-related pulmonary illnesses, and asthma: A perspective from inhalation toxicologists*, J. ALLERGY CLINICAL IMMUNOLOGY, Jan. 2020, at 97, 145 (potential non-Juul factors for respiratory illnesses).

10% of individuals with asthma present in the overall population. Vaping is indeed common among teenagers with asthma. But arguably, this fact encourages the need for labeling even further for individuals who have pre-existing conditions like asthma so that they're knowledgeable about the product's detriment to their health.[587]

Past Cigarette Cases and Mandated Cigarette Onserts

The public can learn from past cigarette cases how to properly conduct a lawsuit against Juul Labs and other vaping/tobacco companies. In the 2006 *U.S. v. Morris* case, the United States led a huge lawsuit against nine cigarette manufacturing companies and two tobacco-related trade organizations.[588] The government argued that defendants had violated the Racketeer Influenced and Corrupt Organizations (RICO) Act.[589] They did so by engaging in a conspiracy to deceive the immediate public about the health effects of smoking and the addictiveness level of nicotine, lying about the supposed "health benefits" of low-tar cigarettes and the changes implemented in the structure and design of cigarettes to allow for more nicotine.[590] According to general counsel for Phillip Morris, Denise Keane, the company had never before explained its position on the level of addiction present from cigarettes.[591] Ms. Keane also admitted that when Philip Morris purchased three Liggett brands in 1999, L&M, Lark, and Chesterfield, it removed the pre-existing package labels stating that smoking is addictive.[592] Even though Philip Morris replaced the pre-existing package labels with "onserts" (a communication attached to but separate from an individual cigarette pack and/or carton purchased at retail by consumers, such as a miniature brochure located underneath the outer cellophane wrapping or glued to the outside of the cigarette packaging), these onserts did not put a statement on the packaging stating that smoking is addictive, even though Philip Morris had publicly stated this view in 2000.[593] This removal of labels coincided with the claims against defendants that they concealed and suppressed research data and other evidence that proved that nicotine was addictive since it had not specified to the public that the reason cigarettes were addictive was due to nicotine concentrations.[594] Additionally, ample scientific evidence proves that low-tar cigarettes are not "healthy".[595] The court ended up ordering defendants to cease using brand descriptors that either implicitly or explicitly conveyed to the consumer that low tar cigarettes were less hazardous.[596] The court also ordered the companies to provide public statements in major newspapers, television networks, on cigarette onserts, and in

[587] *Id.*
[588] United States v. Philip Morris USA, Inc., 566 F.3d 1095 (D.C. Cir. 2009).
[589] *Id.*
[590] *Id.*
[591] *Id.*
[592] *Id.*
[593] *Phillip Morris USA*, 566 F.3d at 1095.
[594] *Id.*
[595] *Id.*
[596] *Id.*

retail displays regarding the negative health effects of smoking; the addictiveness of nicotine; a lack of any kind of supposed health benefits from smoking low-tar cigarettes; the changes made to the original designs of cigarettes to allow for optimum delivery; and the negative health effects involving the exposure to secondhand smoke.[597] While there is no current law requiring specific ingredient labels on cigarette packs, "onserts" are better than not having any labeling at all. Vaping cartridges do not have any kind of onserts, most likely due to the packaging of vaping products, including Juul pods, being restrictive in the sense that the products don't come in cartons.[598] However, the products do come in cylindrical packaging that does provide room for ingredients on the outside.[599] Juul Labs could implement these specific ingredient labels in a similar vein to the tobacco companies' implementation of onserts in order to clear up public misunderstandings about the harmfulness of vaping.

How to Proceed With Litigation Based On Past Tobacco Regulation

Future litigation could be further based on these past cigarette cases. The Family Smoking and Tobacco Control Act was signed into law in 2009 and gave the FDA the authority to regulate, manufacture, distribute, and market tobacco products.[600] Under the Act's "deeming rule", vaping products are deemed to fall under the umbrella of tobacco products.[601] It put in place specific restrictions on marketing tobacco products to children and gave the FDA further authority to take action to protect the overall public health as it sees fit.[602] This law further banned sales to minors; vending machine sales; the sale of packages of fewer than 20 cigarettes; tobacco-brand sponsorships of sports and entertainment events or other social or cultural events; and free giveaways of sample cigarettes and brand-name non-tobacco promotional items except in adult-only facilities.[603] Many of these changes have already taken place for Juul products, such as the age restriction courtesy of the Tobacco 21 Act. Advertising also does not really take place for vaping because, in 2019, most television stations made the decision to pull out of advertising for Juul because of the growing concern over youth safety.[604] However, the law left open the potential need for further regulation as public health concerns arise. Under the Act, a modified risk tobacco product can be commercially viable only if the Secretary determines that the manufacturer has demonstrated that the particular product is actually used by consumers, and meets two

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[597] *Id.*

[598] Williams, *supra* note 518.

[599] *Shop*, Juul, https://www.Juul.com/shop (last visited Jan 2, 2021, 8:18 PM).

[600] *Family Smoking Prevention and Tobacco Control Act - An Overview,* FDA (Jun. 3, 2020), https://www.fda.gov/tobacco-products/rules-regulations-and-guidance/family-smoking-prevention-and-tobacco-control-act-overview.

[601] Jooce v. FDA, 981 F.3d 26, 28 (D.C. Cir. 2020).

[602] *Family Smoking Prevention and Tobacco Control Act*, FDA (Jun. 3, 2020), https://www.fda.gov/tobacco-products/rules-regulations-and-guidance/family-smoking-prevention-and-tobacco-control-act-overview.

[603] *Id.*

[604] Brakkton Booker, *TV Broadcasters to Stop Taking E-Cigarette Ads*, NPR (Sept. 19, 2019, 7:22 PM), https://www.npr.org/sections/health-shots/2019/09/19/762410165/tv-broadcasters-to-stop-taking-e-cigarette-ads.

conditions.[605] First, the product must be proven to "significantly reduce harm and the risk of tobacco-related disease to tobacco users."[606] Second, it will "benefit the health of the population as a whole taking into account both users of tobacco products and persons who also do not directly use tobacco products."[607] When recognizing that Juul products are not passing either of these requirements due to the increased harm to both former cigarette users and other users of the products, it is important to draw upon these standards to not weaken the Act's presence because commercial viability is necessary for tobacco companies to safeguard their products. By appealing to this law, a possible future lawsuit against Juul Labs could go well because of this previous need to safeguard public health.

In 2021, a California Southern District Court adopted one such measure using the Tobacco Control Act.[608] Neighborhood Market Association and Vapin' the 619s sued the County of San Diego over their recently implemented ordinance which banned flavored electronic smoking devices.[609] Under the Tobacco Control Act, the FDA is granted the authority to regulate the sale, issuance, marketing, promotion, and utilization of tobacco products, but the banning of an entire class of nicotine products such as all cigarettes, or reducing the nicotine level to zero was prohibited.[610] The broad authority allocated to state and local governments is restricted only to the extent that a local law breaches one of the specific prohibitions enumerated in the Preemption Clause of the Tobacco Control Act.[611] The Preemption Clause expressly preempts: any requirement that is different from, or in addition to, any requirement under the provisions relating to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards, or modified risk tobacco products.[612] However, state and local laws that would potentially fall within the Preemption Clause are exempt if they fall within the Savings Clause, which explains that the Preemption Clause does not apply to requirements relating to the sale, distribution, possession, information reporting to the state, exposure to, access to, the advertising and promotion of, or use of, tobacco products by individuals of any age, or connected to fire safety standards for tobacco products.[613] The defendant's motion to dismiss ended up being granted because the ordinance was not preempted since the products being banned were related to the sale.[614] The holding of this case could apply to any law involving a labeling restriction that could otherwise be preempted by the Preemption Clause of the Tobacco Control Act by instead

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[605] *Id.*
[606] *Id.*
[607] *Id.*
[608] *Neighborhood Mkt. Ass'n v. County of San Diego,* 529 F. Supp. 3d 1123, 1130 (9th Cir.2021).
[609] *Id.* at 1128.
[610] *Id.* at 1130.
[611] *Id.* at 1131.
[612] *Id.*
[613] *Neighborhood Mkt. Ass'n v. County of San Diego,* 529 F. Supp. 3d 1123, 1131 (9th Cir. 2021).
[614] *Id.* at 1132.

raising the defense of the Savings Clause since ingredient labels relate to sales and distribution.[615] Thus, further statewide laws could be passed introducing a labeling regulation for Juul products if a nationwide labeling restriction fails, which likely will happen.

The major reason why a nationwide ban on flavored vaping would not be beneficial to pursue is because it just is not practical given the age restrictions already in place and the failed Trump Administration ban which has not set a useful precedent. Despite the success of introducing onserts onto cigarette products, cigarette smoke is well known to cause long-lasting side effects which are backed up by decades of empirical research and the more recent trend of vaping does not have the decades-long research to back up these claims. Additionally, one major argument tobacco companies have used against a ban on certain flavored vaping products is that it would cause the overall market for vaping products to plummet because flavored vaping products are overwhelmingly the most popular products.[616] The court in *Neighborhood Market Association* struggled to reconcile this conflict between a ban and the overall market's viability. Thus, if every municipality in the United States adopted a similar ordinance to the one used in San Diego, that would result in a nationwide ban on vaping products containing certain ingredients because it would become impossible for manufacturers to sell a product that also contained those ingredients with the potential for mass public fear.[617] While this sort of phenomenon did not happen exactly with cigarettes, it is not outside of the realm of possibility with the recent wrongful death cases in mind. A nationwide ban is far greater in scope than what the statistics lend to, so it is more reasonable to advocate for safer precautions in how the products are advertised to younger people since they statistically have a significant predisposition to take up vaping.

Canada Setting the Trend

Canada recently implemented a mandate for warning labels on all Juul products through two laws: the Tobacco and Vaping Products Act and the Canada Consumer Product Safety Act.[618] The Tobacco and Vaping Products Act is the more important law for the purposes of analyzing what still needs to be added to U.S. vaping regulations. In addition to the prior requirements in the U.S. and Canada, the law required ingredient lists and health warning labels.[619] The health warning placement requirements, as well as the ingredient labels, are interestingly very specific. The health warning is required to be displayed on the main display panel or on a tag where the product is displayed for purchase.[620] If a kit is sold that is intended for refilling another vaping product, it

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[615] *See id.*
[616] *See id.* at 1129.
[617] *See id.*
[618] *Vaping Products Labelling and Packaging Regulations: SOR 2019-353*, CANADA GAZETTE (Dec. 19, 2019), https://gazette.gc.ca/rp-pr/p2/2019/2019-12-25/html/sor-dors353-eng.html.
[619] *Id.*
[620] *Id.*

also must have a health warning on its display panel or tag.[621] For a packaged vaping device, the health warning must be displayed on the display panel of the exterior package.[622] There is an exception if the package is too small, but even in that circumstance, the warning must be displayed on the exterior package or on a leaflet.[623] Although it may seem like a simple health warning, it is important to public perception as evidenced by the requirement for obvious placement.

Additionally, for the aforementioned nicotine concentration, it must be displayed on the display panel or tag.[624] The rationale behind the regulation is to prevent the harm done to youths and non-users of tobacco products; however, these regulations also have financial implications for the vaping industry experienced in both the United States and Canada.[625] Although it has a relatively minor impact on the companies, Health Canada estimated it would cost tobacco companies $610,500 per year, on average, to implement these regulations.[626] Health Canada published a consultation paper on potential regulatory measures gathering input from the general public on these proposed measures.[627] These four regulations were: the nicotine concentration displays, the products requiring displays if they contain 0.1 mg/mL of nicotine or higher, nicotine warnings on packaging, and most importantly, that a complete list of ingredients be listed by weight.[628] Over 100 comments were sent from academics, the public, representatives from the tobacco industry, retailers (including vape shops), and other levels of the government.[629] Concerns were responded to accordingly and accounted for in the Tobacco and Vaping Products Act.[630] One such concern was limited label space on vaping products.[631] This concern was met with the response that the regulatory requirements do not need to be changed based on the necessary size of the health warning to be prominent and the available space for all required information.[632] Another concern was the requirement that all flavoring ingredients be identified in the list of ingredients would be difficult for the industry since consumers would be less likely to buy the products with flavoring ingredients known.[633] Instead, it was suggested that just the use of the term "flavor" in the list of ingredients would make it easier for industry officials to still sell their products.[634] That change was implemented, and as a result, companies must indicate that a specific

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621 *Id.*
622 *Id.*
623 *Vaping Products Labelling and Packaging Regulations: SOR 2019-353*, *supra* note 618.
624 *Id.*
625 *Id.*
626 *Id.*
627 *Id.*
628 *Vaping Products Labelling and Packaging Regulations: SOR 2019-353*, *supra* note 618.
629 *Id.*
630 *Id.*
631 *Id.*
632 *Id.*
633 *Vaping Products Labelling and Packaging Regulations: SOR 2019-353*, *supra* note 618.
634 *Id.*

flavor is included in their product, but need not list the exact name of the flavoring compound.[635] Concerns were also raised about the methodology for detecting nicotine at a concentration of 0.1 mg/mL and how accurate that regulation would be.[636] Industry officials suggested that a minimum of 0.5 mg/mL should be considered for the amount of nicotine to require the health warnings and that the amount of nicotine should be displayed either in percent or "mg/mL".[637] In contrast, some public health groups and municipal/provincial/territorial governments submitted comments saying that a vaping product should be considered to contain nicotine based on any detectable level, as opposed to the proposed 0.1 mg/mL.[638] While concentrations of nicotine between 10 mg/mL and less than 66 mg/mL would be captured by the Consumer Chemicals and Container Regulations Act (CCCR) (2001), a risk assessment of the toxicity of nicotine was done in response to the worry about the proposed 0.1 mg/mL requirement.[639] This amount, when ingested, provides empirical support for the position that vaping substances containing between 0.1 mg/mL and less than 10 mg/mL of nicotine that lack suitable toxicity labeling and child-resistant containers may create a danger to human health or safety for the purposes of sections 7 and 8 of the CCPSA (Canadian Consumer Public Safety Act). In addition, in response to concerns raised about the availability of laboratory methods to determine the amount of nicotine at or below 0.1 mg/mL, a test method, Method C57.1: Determination of Nicotine at Low Concentration in Liquids used in Electronic Nicotine Devices by GC-MSD/FID, has been developed by Health Canada to determine nicotine at low concentrations.[640] All of these proposed solutions were done in response to these comments submitted by parties that would have a stake in these labeling regulations as well as the public, so a similar public comment period could be instituted if labels on vaping products were to be introduced in the United States.

In Canada, if there are non-compliant vaping products, appropriate measures will be taken including warning letters issued, negotiated compliance, seizures, and possible prosecution.[641] Some of the proposed disciplinary actions that could be taken as a result of infringement on regulation under the CCPSA may include a voluntary commitment to product correction by the industry, negotiation with industry officials for the voluntary removal of non-compliant products from the market completely, seizure, orders for recall, administrative monetary penalties, and potential lawsuits.[642] These penalties could likewise be instituted by the states under a similar statute to the CCPSA.

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635 *Id.*
636 *Id.*
637 *Id.*
638 *Vaping Products Labelling and Packaging Regulations: SOR 2019-353*, *supra* note 618.
639 *Id.*
640 *Id.*
641 *Id.*
642 *Id.*

The most important requirement that was instituted by the Canadian Tobacco and Vaping Products Act is of course the list of ingredients. A list of ingredients is required for all vaping products and each ingredient must be listed without abbreviation to minimize confusion.[643] The list of ingredients has to be displayed on the display surface of the immediate container of the vaping product as well as on the display surface of the exterior package.[644] Further, if the product container is a vaping device or part and is not packaged, the list of ingredients must be easily identifiable from a tag attached to the vaping device or part that is displayed for sale.[645] It's the same outcome if the label is too small to fit on the exterior package.[646] In that case, it also needs a tag and it must also be displayed on the display surface.[647] The law outlines that ingredients present in concentrations of 1% or more be set out according to their proportions on the ingredient label.[648] If the ingredients make up less than 1% of the concentration, there is no order restriction and it must be set out on the label after the ingredients that make up more than 1% of the concentration.[649] These regulations and consequences for breaking the regulations could certainly be implemented in the U.S. Also, with the intense amount of public input completed over in Canada, a law requiring specified ingredient labels by quantity could easily be modeled after the Tobacco and Vaping Products Act. While a specified quantity should still be required in the U.S., the weight of the ingredients provided in order does show a brief estimate of the quantity and if there is no weighted list, the ingredient is likely too miniscule to be harmful.

Potential Class Action

There are many cases pursued by school districts on behalf of concerned parents over wrongful death, second-hand exposure, and concern over the nicotine levels in e-cigarettes.[650] One of the most well-known cases, *In Re Juul Labs, Inc., Mktg., Sales Practices, & Prods. Liab. Litig.*, indirectly argued in favor of specific ingredient labels.[651] It included 350 additional cases to the originally filed case, *Bradley Colgate v. Juul Labs*.[652] The defendants argued that the numerous claims in all three operative complaints found that Juul Labs did not warn about the potential risks of nicotine addiction and possible physical harm and that Juul Labs' products were instead advertised as reasonable replacements for cigarettes when they were in fact not.[653] There is a

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643 *Vaping Products Labelling and Packaging Regulations: SOR 2019-353*, *supra* note 618.
644 *Id.*
645 *Id.*
646 *Id.*
647 *Id.*
648 *Vaping Products Labelling and Packaging Regulations: SOR 2019-353*, *supra* note 618.
649 *Id.*
650 Gregory Bailey, *Reshaping the Cigarette with Less Regulations and More Nicotine: How Juul Reversed a Generation of Work Following the Cigarette Industry*, 24, QUINNIPIAC HEALTH L. J., 185, 189-92 (2021) (discussing the case currently pending litigation regarding wrongful death and nicotine).
651 *Id.*
652 *Id.*
653 In re Juul Labs, Inc., Mktg., Sales Practices, & Prods. Liab. Litig., F. Supp. 3d, 552, 587 (N.D. Cal. 2020).

minimum nicotine requirement for advertisements, but defendants contended that any other additions for ingredients in Juul should not be considered misbranding.[654] However, the nicotine warning only requires that the tobacco product state that it includes nicotine, an "addictive chemical", and nothing more.[655] That is the only claim of misbranding that is preempted, so the arguments of failure to disclose these harmful ingredients aside from nicotine are not preempted and allowed in litigation.[656] The *In Re Juul Labs* case is one of these cases that are likely pending due to the inundated court system amidst the COVID-19 pandemic. Thus, we won't be able to witness the outcome of this litigation soon, but the "misbranding" issue is not a salient one since Juul Labs is not required by law to put the ingredients on a Juul package.[657] Likewise, the labeling issue is frivolous too because there is no labeling on Juul packaging to begin with.[658] A different avenue for litigation should be taken by a push for a direct and mandated disclosure of Juul packaging to hold Juul Labs accountable using this loophole of non-preemption.

In another case in October 2019, the Los Angeles Unified School District had a class action lawsuit against Juul Labs.[659] The plaintiffs are claiming that Juul has interrupted the educational environment and is restricting the learning environment in schools throughout the district.[660] Likewise, a class action lawsuit could also be taken in favor of placing labels on Juul packaging because it would decrease the usage of Juuls in schools to promote the learning environment.

Counterpoint: The General Public Will Not Understand the Harmfulness of These Ingredients

An obvious counterpoint to this proposed regulation is that the general public will not understand the potential harmfulness of these ingredients in e-cigarettes, even if they were listed with specific quantities and accompanied the warning that the ingredients could cause cancer, birth defects, and pregnancy issues. These ingredients are so nebulous in name and characteristics after all. As a result, a passing glance at an ingredient label would possibly result in no significant change in individual consumption. However, in a study that researched how individuals feel about additives in cigarette smoke, a sample of 300 cigarette smokers and non-smokers was taken through the website Amazon Mechanical Turk.[661] The study showed positive results including that

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654 *Id.*

655 21 C.F.R. §1143.3 (LexisNexis 2016).

656 In re Juul Labs, *supra* note 653, at 591.

657 *Id.* at 589.

658 *Id.* at 588.

659 Corrado Rizzi, *Los Angeles Unified School District Hits Juul Labs with Class Action Over Time, Resources Spent Battling Youth Vaping*, CLASSACTION.ORG (Oct. 30, 2019), https://www.classaction.org/news/los-angeles-unified-school-district-hits-Juul-labs-with-class-action-over-time-resources-spent-battling-youth-vaping.

660 *Id.*

661 Marissa G. Hall, *et al.*, *Smokers' and Nonsmokers' Beliefs About Harmful Tobacco Constituents: Implications for FDA Communication Efforts*, OXFORD JOURNALS NICOTINE & TOBACCO RESEARCH (March 2014), 343-50 (study showing public perception of cigarette ingredients).

most participants had heard of ammonia (99%), arsenic (97%), benzene (75%), cadmium (66%), carbon monoxide (100%), formaldehyde (94%), and nicotine (100%) being in cigarettes.[662] It was revealed that the chemicals that companies add to cigarette tobacco made participants more anxious about the harms of smoking than chemicals naturally occurring.[663] In addition, cigarette tobacco additives caused more dejection from wanting to smoke.[664] This study shows that ingredient onserts for cigarettes have maintained a lasting space in the public consciousness and just the existence of additives themselves can be enough to discourage the use of tobacco products. Even though people may not know what exactly the health effects are from such ingredients in e-cigarettes, other than the warning that they may cause cancer, birth defects, and other harms while pregnant, if the specified ingredient quantities are posted on the e-cigarette packages at the same time that wrongful death suits and class action suits are commenced, the ingredients will overall be given a negative connotation in the public conscious like the ingredients in cigarettes are.

Another study that recruited 325 smokers and non-smokers ages 18-30 through community distribution lists in North Carolina in a national survey showed similar positive results.[665] Out of the 36 graphic warning labels the FDA proposed in 2010, each participant viewed 27 labels with graphic images and text warnings.[666] Each label was rated on understandability and the level at which it triggered fear-related reactions.[667] The participants found the majority of the labels easy to understand.[668] Overall, 22 of the 36 graphic images intimidated participants from smoking cigarettes.[669] While the graphic labels (depicting diseased body parts and suffering or dead people) resulted in greater reactions against smoking, they aren't necessary to elicit a negative reaction as shown through the study.[670] The findings add new information that the warning label effects expand to non-smokers and even have stronger effects on fear-related responses and persuade both non-smokers and smokers against smoking long-term.[671] The findings of the studies also were thought to have an influence on immediate smoking motivations.[672] Similarly, ingredient concentrations accompanying the Proposition 65 warning label would likely garner volatile reactions from consumers.

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[662] *Id.*
[663] *Id.*
[664] *Id.*
[665] Linda D. Cameron, Jessica K. Pepper, & Noel T. Brewer, *Responses of young adults to graphic warning labels for cigarette packages*, HHS PUBLIC MANUSCRIPTS (2013) (study showing how participants feel about ingredient labels on cigarette packages).
[666] *Id.*
[667] *Id.*
[668] *Id.*
[669] *Id.*
[670] *See* Cameron, *supra* note 665.
[671] *Id.*
[672] *Id.*

Conclusion

People who purchase Juul pods may or may not read the labels just like people may not take the time out of their day to educate themselves about the potential harm that comes from Juuls. However, giving the consumer the possibility to educate themselves about a product before buying is conducive to the free-market mentality that is prevalent in the United States. While this issue has the potential to reach the Supreme Court in a similar vein to *U.S. v. Morris* and with the Canadian Tobacco and Vaping Products Act as a successful example of nationwide regulation, this is more likely to succeed by state ordinances that have been paved by successful cases like that of *Neighborhood Market Association v. City of San Diego.*

Running the Risk of Violating Elderly Persons' Due Process Rights by Limiting Court Access to Virtual and Hybrid Settings Without Supplemental Assistance Programs

Allison Wick

INTRODUCTION

Technology is used today in the United States courts more than ever before in history. While this creates convenience in accessing the courts for the general population, especially considering the ongoing COVID-19 pandemic, this format is not an accessible alternative for impoverished persons or people with special needs. In the past two years, life with COVID-19 has pushed many Americans to accept virtual platforms as a mode to access vital resources. However, aging adults, specifically those who face elder abuse, are one demographic that is suffering from the implementation of virtual court resources.

The Fifth and Fourteenth Amendments of the Federal Constitution grant individuals the right to procedural due process, which includes access to state and federal courts.[673] This right may become limited when a person has trouble accessing justice through the court system. There are many situations that result in the heightened risk of inequitable access to the justice system, including low socioeconomic status and persons who have disabilities.

People who experience elder abuse are simultaneously more likely to have mental or physical disabilities and may also be impoverished.[674] The demographic subject to elder abuse consists of aging persons, federally recognized as those who are 60 years of age or older.[675] Aging populations may enter the courts to seek legal remedies as a result of "elder abuse" (a unique set of crimes affecting aging populations, commonly financial abuse from caretakers, family, and friends).

Due to poverty or disabilities, seniors experiencing elder abuse will inevitably face exponential challenges when attempting to exercise their right to access judicial remedies for elder abuse crimes. These challenges result in the inability to access the courts in online or virtual

[673] U.S. Const. amend. V; XIV, § 1.
[674] *See* Jeffrey E. Hall, Debra L. Karch, & Alex Crosby, *Elder Abuse Surveillance: Uniform Definitions and Recommended Core Data Elements*, CDC (2016), https://www.cdc.gov/violenceprevention/pdf/EA_Book_Revised_2016.pdf (last visited Feb. 28, 2023); *Poverty Among the Population Aged 65 and Older*, CONG. RSCH. SERV. (Dec. 6, 2022), https://sgp.fas.org/crs/misc/R45791.pdf (last visited Feb. 28, 2023), [hereinafter *Poverty*].
[675] *Elder Abuse and Elder Fin. Exploitation Statutes*, U.S. DEP'T OF JUST., https://www.justice.gov/elderjustice/prosecutors/statutes?field_statute_state=IL&field_statute_category=All (last visited Feb. 25, 2022).

settings due to lack of technology, inadequate technological training, or the lack of user-friendly technology.[676] While persons with disabilities are a protected class and granted the right to court accommodations in-person, the transition online has proved difficult to provide adequate accommodations for those with disabilities.[677]

The recent shift to implement technology in court proceedings and legal practice can, at times, adversely affect impoverished and disabled populations due to limited access to technology. Further, amid the COVID-19 pandemic, most courts only offered virtual or hybrid judicial proceedings to access the courts and pursue judicial remedies.[678] As a result, these populations, specifically those experiencing elder abuse, demonstrate that the push for virtual court proceedings cannot accommodate the needs of everyone.

Moving forward, it is unclear whether the courts will revert to flexibility with regard to the mode of court hearings to accommodate individual situations where persons may benefit greatly from in-person court procedures. With the courts in their remote or hybrid settings during COVID-19, there has been an increase in initiatives from private non-profit organizations and state initiatives to assist aging adults in accessing the courts.[679] However, many of these initiatives are limited in their funding, lack adequate resources, or have narrow parameters of assistance. As a result, with some court proceedings fully virtual or in the hybrid setting, there is an ongoing risk of aging adults being denied access to the courts, which violates their procedural due process rights guaranteed in the federal Constitution.

One promising solution to the raised due process violations is for these non-profit and state initiatives to follow a recent 2021 framework created by the Justice in Aging called Advancing Equity.[680] The goal of the Advancing Equity initiative is to assist aging persons who experience systemic inequities and to improve their access to legal remedies.[681] By following the Justice in Aging roadmap, both non-profit and state agencies attempting to eliminate obstacles for aging persons with overlapping systemic discrimination can lead to improved access to the courts.

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[676] *Virtual Meetings: Accessibility Checklist & Best Practices*, AM. BAR ASS'N (July 1, 2021), https://www.americanbar.org/groups/diversity/disabilityrights/resources/covid-resources/virtual-meetings-checklist/.
[677] *See Remote Court Operations Incorporating A2J Principles: A Pandemic Resource from NCSC*, NCSC (Mar. 27, 2020), https://www.ncsc.org/__data/assets/pdf_file/0016/14470/remote-court.pdf [hereinafter *Remote Court Operations*].
[678] Jane Wester, *Appellate Dep'ts Schedule Return to In-Person Arguments After Remote Jan.*, N.Y. LAW JOURNAL (Jan. 27, 2022), https://www.law.com/newyorklawjournal/2022/01/27/appellate-departments-schedule-return-to-in-person-arguments-after-remote-january/.
[679] *See* Aimee Adler Cooke, *Coast to Coast Legal Aid of South Florida Launches Mobile Justice Squad*, COAST TO COAST LEGAL AID S. FLA. (October 15, 2020), https://www.coasttocoastlegalaid.org/coast-to-coast-launches-mobile-justice-squad/.
[680] Denny Chan, *Strategic Initiative: Advancing Equity*, JUST. IN AGING, https://justiceinaging.org/wp-content/uploads/2021/03/Advancing-Equity-Framework.pdf (last visited Feb. 28, 2023).
[681] *Id.*

DEFINITIONS, UNIQUE LEGAL ISSUES, AND DISTINCTIVE CIRCUMSTANCES AFFECTING AGING POPULATIONS

There are many unique legal issues that affect the elderly. One issue is elder abuse, which takes many forms and affects every victim differently. One of the most common forms of elder abuse is financial exploitation.[682] Those experiencing elder abuse often simultaneously have age-related physical and mental impairments.[683] Furthermore, many of those affected by elder abuse are socioeconomically disadvantaged. Because the sixty-plus population who experiences abuse is often also negatively impacted by disabilities and poverty, they face even greater challenges trying to access the courts. As the courts move toward virtual hearings, there is an increased risk of deprivation of life, liberty, or property without procedural due process for the elderly.

The U.S. Department of Justice (DOJ) has defined elder abuse to include "causing… physical, mental, or sexual injury to an eligible adult, including exploitation of… financial resources…" in varying civil and criminal actions.[684] The DOJ has defined an "eligible adult" in elder-related crimes and civil actions to be "…a person aged 60 or older who resides in a domestic living situation and is… abused, neglected, or financially exploited by another individual or who neglects himself or herself."[685] There are many crimes and civil actions identified by the DOJ to further protect aging Americans and their property interests including financial exploitation; aggravated assault or battery; and adult endangerment, which can include harm or threat of harm as a result of neglect or battery.[686]

Risk factors for elder abuse include mental illness, abuse of drugs or alcohol, physical health problems, a history of disruptive behavior, traumatic event exposure, high stress, undertrained or untrained caregivers, exposure to abuse, and social isolation.[687] There is a higher risk of elder abuse within relationships that involve financial and emotional dependence on vulnerable seniors, family conflict, the inability to have positive relationships, and lack of social support.[688] In care facilities, risk factors include staffing problems, burnout, and stressful working conditions.[689] Social support, emotional intelligence, and a strong connection to the community are ways that elder abuse can be mitigated.[690]

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[682] *See* Hall, *supra* note 674.
[683] *Id.*
[684] *Elder Abuse and Elder Financial Exploitation Statutes*, *supra* note 675.
[685] *Id.*
[686] *Id.*
[687] *Violence Prevention: Risk and Protective Factors*, CTR. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/violenceprevention/elderabuse/riskprotectivefactors.html (last visited Feb. 25, 2022).
[688] *Id.*
[689] *Id.*
[690] *Id.*

Older adults are subject to more financial abuse, neglect, exploitation, and healthcare fraud because of their age-related impairments and general isolation.[691] Caregivers and loved ones have been reported for stealing financial information; misusing, mismanaging, or exploiting the property and assets of another without consent or under false pretenses; and overcharging, billing twice for the same service, falsifying medical claims, or charging for care that was not provided.[692]

While the government has attempted to create remedies for those experiencing elder abuse, there are many systemic issues that interfere with the aging population's ability to these access remedies. One large issue that older individuals face is the inability to access the courts due to poverty and mental or physical impairments. The legal remedies created specifically to protect the elderly are of little use when these persons are unable to access the courts due to inequities.

ISSUES RELATING TO VIRTUAL HEARINGS

Resulting Issues of Implementing Virtual Hearings in Cases of Elder Abuse

Persons facing elder abuse are adversely affected by the courts transitioning to virtual hearings due to, in part, the intersectional issues of poverty and disability. Elder abuse disproportionately affects those who experience physical and cognitive impairments.[693] The same impairments that make one more susceptible to elder abuse also prevent these vulnerable older adults from accessing the courts to recover their losses. When experiencing cognitive decline or physical limitations, seniors may be unable to navigate a website or appear for a virtual hearing. Court accommodations for those with disabilities have been limited primarily to virtual assistance guides or programs.[694] Ultimately, the limited reach of court facilitation of the transition from in-person proceedings to online proceedings may entirely prevent aging adults with impairments from accessing the courts in a virtual setting.

Further, financial exploitation and abuse may isolate older adults in a way that prevents them from accessing the court in a virtual setting. When a caretaker is financially taking advantage of an elderly person, the person can easily be prevented from accessing the courts in a virtual setting. Abusers often work to isolate their victims to maximize their control.[695] In some situations, an older adult does not have access to the internet, telephone, or even their own finances, thus their ability to access the court is limited to in-person formats. Aging populations may be

[691] *Id.*
[692] Hall, *supra* note 674.
[693] *Id.*
[694] Stephanie Francis Ward, *Mary Juetten Hopes Legal Software can Help Improve Access-to-Justice Problems*, AM. BAR ASS'N (Feb. 14, 2018), https://www.americanbar.org/groups/journal/podcast/20180214-mary-juetten-hopes-legal-software-can-help-improve-access-to-justice-problems/.
[695] Hall, *supra* note 674.

entirely excluded from recovering from their abusers and denied procedural due process as the courts move to virtual hearings.

Aging populations experience conditions that are linked to advanced age that may cause cognitive and physical impairments that prevent their ability to access technology.[696] The human brain is complex and vulnerable to interference or decay that may be affected over time or by illness or injury.[697] Because of nature and age, those who are sixty years of age and older are more susceptible to cognitive impairments due to increased risk of illness and injury.[698] These people who are limited in their ability to generally access technology will be adversely affected by this transition to virtual court proceedings.

Aging Populations Face Limitations in Accessing the Courts Virtually

Aging adults are facing particular legal issues at different times of their lives depending on their health and financial statuses.[699] Many seniors go without reporting elder abuse.[700] In reality, up to five million men and women aged 60 or older are abused annually and the estimated loss from victims of financial abuse is at least $36.5 billion.[701] Mental impairment and social isolation are noted factors that contribute to seniors being particularly vulnerable to abuse.[702] Shockingly, nearly half of adults experiencing dementia also experience abuse or neglect.[703] Additionally, aging adults with disabilities disproportionately experience interpersonal violence than other aging adults.[704] Abused elders face a 300% higher risk of death when compared to aging adults who are not mistreated. Elder financial abuse and fraud are estimated to cost aging Americans from $2.6 billion to $36.5 billion annually.[705] Financial abuse in aging populations is underreported; however, elder abuse related to emotional, physical, and sexual abuse or neglect is underreported at a much higher rate.[706] States across the country have adopted criminal sanctions and trained officers and service providers to spot situations of elder abuse; however, in New York, there is no mandatory reporting.[707]

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[696] *Elderly Capacity & the Neuroscience of Aging*, MASSACHUSETTS GEN. HOSP., https://clbb.mgh.harvard.edu/elders/ (last visited Feb. 22, 2022).
[697] Hall, *supra* note 674.
[698] *Id.*
[699] *Get the Facts on Elder Abuse*, NAT'L COUNCIL ON AGING (Feb. 23, 2021), https://www.ncoa.org/article/get-the-facts-on-elder-abuse.
[700] *Id.*
[701] *Id.*
[702] *Id.*
[703] *Id.*
[704] *Get the Facts on Elder Abuse*, *supra* note 699.
[705] *Id.*
[706] *See id.*
[707] *See State of New York*, ELDER ABUSE GUIDE FOR LAW ENF'T (EAGLE), https://eagle.usc.edu/state-specific-laws/ny/ (last visited Feb. 25, 2022); *See also Just. Gap Initiatives: The Legal Services Corporation's national initiative that measures the gap between the need for civil legal assistance among low-income Americans and the resources available to meet that need*, LEGAL SERVICES CORPORATION, https://www.lsc.gov/initiatives/justice-gap-

Poverty in Elder Abuse Cases Limits Access to Virtual Court Proceedings

People who experience elder abuse also include populations that are impoverished, which creates further obstacles in accessing the courts.[708] Many low-income households frequently face civil legal issues that affect their basic needs to survive, including their health care, safety, income, and housing.[709] However, these populations often cannot resolve these legal issues due to inadequate legal support and difficulty in accessing the courts.[710] In conjunction with the court access issues faced by aging people experiencing elder abuse, it can be nearly impossible to access the courts. Now with more court proceedings online than ever before, low-income, elderly Americans could also experience increased court access issues.

A 2017 national survey and report including low-income households revealed a larger justice gap than ever reported by these communities.[711] The report reflected that 86% of civil legal problems reported by low-income Americans received inadequate or no legal help.[712] The study also showed that 71% of low-income households experienced at least one legal problem in the past year.[713] Additionally, one in four of these households experienced six or more civil legal problems.[714] This demographic included 67% of households with survivors of domestic violence or sexual abuse.[715] These problems also "included the vital issues of veterans' benefits, domestic violence, disability access, poor housing conditions, debt issues, and health."[716]

Low-income Americans are facing legal issues without remedy, and possibly without any assistance to identify that they even have a legal issue. Without legal education, awareness, or access to the courts, many of these people will continue to live without intervention or remedy. These households inevitably include individuals who are elderly. While these individuals are victims and re-victimized, there has not been an effective national effort to assist them in changing their circumstances through legal remedies. The statistics show that many low-income Americans have vital legal issues and inadequate legal assistance, including the inability to access the courts for any judicial remedy.

The commentary on the report noted that the concept rooted in the phrase "with liberty and justice for all" includes everyone having access to legal remedies.[717] However, as evidenced by

initiatives (last visited Oct. 14, 2022) [hereinafter *Just. Gap Initiatives*].
[708] *Poverty, supra* note 674.
[709] *Just. Gap Initiatives, supra* note 707.
[710] *Id.*
[711] *Id.*
[712] *Id.*
[713] *Just. Gap Initiatives, supra* note 707.
[714] *Id.*
[715] *Id.*
[716] *Id.*
[717] *Id.*

this study focused on low-income Americans, the civil courts are tailored to address legal issues of those who can afford professional legal representation whose job it is to understand how to access the courts – whether they are remote or more traditional.[718] Self-represented litigants rarely understand the complexities and formalities included in legal processes.[719] Since litigants in the civil system do not have a constitutional right to representation, low-income Americans disproportionately do not receive legal help.[720] Without legal assistance, many elder persons do not have the ability or skills to access digital filings and proceedings for civil courts, which are now commonplace.[721]

Procedural Due Process Afforded to Aging Americans in Poverty

Virtual filings and procedures are not an equitable, or adequate remedy to afford procedural due process to underserved Americans. While digitalization of the courts has increased public access to the courts, that access is limited to individuals who have the financial means to access computers. Another issue that prevents people from accessing the virtual platforms of the court is education barriers on how to adequately use websites, search engines, and computers generally. With these combined issues, access to the courts in a digital setting leaves only those who were taught to use computers and who have access to a computer to access the court.

The court's move to digitalize civil filings and procedures was expedited by COVID-19.[722] During the COVID-19 pandemic, virtual hearings were the only mode to access the courts, as the federal and state governments were not permitting in-person procedure.[723] With the push for the courts to involve more remote services, many Americans have been left behind in this process.[724] As noted by the National Center for State Courts, legal information is crucial to empower litigants (especially those self-represented) to take action in their cases.[725] In the case of aging, low-income, and disabled Americans, the legal information may need to evolve into legal assistance to guarantee that these populations are able to access the courts in the same manner as anyone else.[726] It is noted that when it comes to solutions, "[o]ne size does not fit all," meaning that some individuals may need more assistance than what the courts can offer for their needs.[727] Local and state affordable social services and legal aid services may supplement the court's digitalized

[718] *See Just. Gap Initiatives, supra* note 707.
[719] *Id.*
[720] *Id.*
[721] *Id.*
[722] *Remote Hearings and Access to Just.: During Covid-19 and Beyond*, NATIONAL CENTER FOR STATE COURTS, https://www.ncsc.org/__data/assets/pdf_file/0018/40365/RRT-Technology-ATJ-Remote-Hearings-Guide.pdf (last visited Feb. 25, 2022).
[723] *Id.*
[724] *Id.*
[725] *Id.*
[726] *Id.*
[727] *Remote Hearings and Access to Just., supra* note 722.

processes by offering education and information on how to effectively use these civil and criminal remedies.[728]

The impact of virtual court procedure on the elderly is a prominent issue that has attracted recent initiatives to assist these populations in court access. Those who experience elder abuse often have the intersectional issues of poverty or have disabilities. [729] By assisting the victims of elder abuse, and more generally those aged sixty years and older, this will also assist in protecting individuals with disabilities and poverty.

CONSTITUTIONAL RIGHTS OF DUE PROCESS

The United States Constitution Guarantees Individuals the Right to Due Process in All Proceedings that Risk the Deprivation of Life, Liberty, or Property

The "Due Process Clause" is found in the text of the Fifth and Fourteenth Amendments of the Constitution.[730] While the Fifth Amendment applies to federal actions, the Fourteenth Amendment applies to state action. The Fifth Amendment states, "No person shall be… deprived of life, liberty, or property, without due process of law."[731] Similarly, the Fourteenth Amendment § 1 states, "No State shall… deprive any person of life, liberty, or property without due process of law."[732]

Facially, the Constitution affords each person with the right of due process before the federal or state judiciary that makes determinations that may deprive the individual of life, liberty, or property.[733] Due process has been divided into two categories: substantive due process and procedural due process.[734] In *United States v. Salerno*, the U.S. Supreme Court distinguished the concept of substantive due process from procedural due process by stating that once a government action depriving a person of life, liberty, or property survives substantive due process scrutiny, the government action must still be implemented in a fair manner.[735] First, the right of substantive due process prevents the government from engaging in conduct that "shocks the conscience or interferes with rights implicit in the concept of ordered liberty."[736] Once an action is found to satisfy substantive due process, the issue of procedural due process remains. Procedural due

[728] *Id.*
[729] Hall, *supra* note 674; *Poverty*, *supra* note 674.
[730] U.S. CONST. amends. V, XIV.
[731] U.S. CONST. amend. V.
[732] U.S. CONST. amend. XIV, § 1.
[733] U.S. CONST. amends. V, XIV, § 1.
[734] United States v. Salerno, 481 U.S. 739, 746 (1987).
[735] *Id.*
[736] *See id.* at 746.

process affords individuals the right to be on notice, the opportunity to be heard, and the right to a decision by a neutral decision-maker when their life, liberty, or property interests are at stake.[737]

Defining Procedural Due Process

Procedural due process requires the court to apply evenhanded legal procedures to protect individuals from arbitrary exercise of government power. In the civil context, the court applies a balancing test to evaluate whether the government's procedure was appropriate in relation to the affected private interest; the risk of erroneous deprivation of the interest under the government's procedure; and the government's interest at stake.[738] When applying the Matthews test, the court must balance the individual interests in a fair and impartial trial against the government's interests at stake.

Procedural due process is distinct from substantive due process in that substantive is a broad guarantee that the government will not act abusively toward its citizens. Dissenting Justice Stephen J. Field in the Slaughter-House Cases defined substantive due process as a protection of the individual against state legislation that infringes upon their federal constitutional "Privileges and Immunities."[739] Further, in *Lochner v. New York*, the Supreme Court found that a New York law regulating bakers' working hours was unconstitutional under the substantive due process doctrine.[740] The court ruled that the law's public benefit did not justify the substantive due process right of the bakers to work under their own terms.[741] Substantive due process is not a dead doctrine; however, procedural due process is generally the doctrine at issue when considering issues related to access to the courts.

Procedural due process is flexible; the procedure must be "appropriate to the nature of the case."[742] The purpose of the right to procedural due process is to "protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."[743] Persons must be allowed to "minimize substantively unfair or mistaken deprivations" of their protected interests by contesting the state's proposed basis for deprivation.[744] As a result, the three elements of procedural due process are notice, a hearing, and being heard before an impartial tribunal.[745]

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[737] U.S. CONST. amends. V, XIV, § 1.
[738] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
[739] Slaughter-House Cases, 83 U.S. 36, 84-111 (1873).
[740] Lochner v. New York, 198 U.S. 45, 63-65 (1905).
[741] *Id.*
[742] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).
[743] Carey v. Piphus, 435 U.S. 247, 259 (1978).
[744] Fuentes v. Shevin, 407 U.S. 67, 81 (1972).
[745] *Mathews*, 424 U.S. at 336.

The U.S. Supreme Court ruled in *Mathews v. Eldridge* that procedural due process imposes constraints on governmental decisions that deprive individuals of liberty or property interests, but must be balanced.[746] In this case, the Court found the administrative procedures provided to recipients who desired to contest the termination of their Social Security disability benefits were adequate because the administration gave the recipients sufficient notice of the case against them and the opportunity to meet it.[747] To reach its conclusion, the Court applied three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[748]

In weighing these factors, the Court reasoned that the existing administrative procedure offered to Social Security recipients to contest benefit termination was sufficient under procedural due process. To support its rationale, the Court stated that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands."[749] Here, the Court considered the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner" if an individual is to be deprived of a liberty or property interest.[750] However, the Court ultimately found that the administrative burden was too costly to impose new evidentiary hearing procedures in cases of Social Security disability benefit termination.[751]

More recently, the Court in *Turner v. Rogers* held that a father was denied due process when the court denied him state-provided counsel because he was an indigent parent facing incarceration pursuant to a support order.[752] In the case, this kind of civil action related to parent support orders would not ordinarily invoke a due process right to counsel.[753] However, because the father was at risk of loss of his bodily freedom if the judge were to order his incarceration, the Court found that he was entitled to counsel.[754] Therefore, since the trial judge had denied defendant's right to counsel, his constitutional due process rights were violated.[755]

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[746] *Id.* at 332.
[747] *Id*. at 348 (citing Joint Anti-Fascist Comm v. McGrath, 341 U.S., 123, 171-72 (1951)).
[748] *Id.* at 335.
[749] *Mathews*, 424 U.S. at 334 (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).
[750] *Id.* at 333 (citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).
[751] *Id.* at 347.
[752] Turner v. Rogers, 564 U.S. 431, 444-47 (2011).
[753] *Id.*
[754] *Id.*
[755] *Id.* at 434.

Therefore, procedural due process is a right to persons who are at risk of losing life, liberty, or property. Procedural due process requires that an individual be on notice that there is a state action against them that may affect their rights to liberty or property, a right to be heard at a meaningful time and in a meaningful manner, and a decision by a neutral decision-maker.[756] In the hearing, the neutral decision-maker must extend the flexibility of due process to include procedures that accommodate the subject individual and their situational demands.[757]

The Court's Current Procedural Posture

Courts are granted broad discretion in determining the mode of procedures.[758] In light of the COVID-19 pandemic, many courts have used their discretion to postpone hearings and modify the mode of hearings from in-person to virtual.[759] While the court's preference to protect public health is understandable for the duration of the pandemic, many individuals have faced uncontrollable hardships in accessing the courts for timely and meaningful hearings.[760]

In *Matter of S.N. v. J.A.*, the New York Family Law Court found in a case of a mother seeking modifications to child custody orders, that "[t]rial courts have wide latitude and discretion" in determining trial procedures, especially during the COVID-19 pandemic.[761] Here, both parties complained of unfairness, prejudice, and denial of due process because the court directed the parties' witnesses to submit direct testimony via affidavit and placed time limitations on cross-examination.[762] In its defense, the court noted that the pandemic devastated court resources, creating an accumulation of cases for the courts to hear. For example, there were very few virtual courtrooms and few court reporters.[763] The court expressed that ordinarily applicable rules could not be imposed in "exceptional circumstances," such as a pandemic.[764] Under its broad discretion and powers, the court determined that it was permitted to conduct virtual proceedings, require affidavit testimony, and limit cross-examination.[765]

The courts have a lot of discretion in determining how judicial proceedings are conducted. The circumstances of the recent pandemic have by default shifted a lot of proceedings to virtual platforms because of the health risks of in-person proceedings against potential due process violations. In many cases where due process has been a concern during the COVID-19 pandemic, the court has steered on the side of caution by favoring virtual hearings to prevent the spread of

[756] *Id.* at 447.
[757] *Mathews*, 424 U.S. at 319 (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).
[758] Matter of S.N. v. J.A., 142 N.Y.S.3d 925, 925 (N.Y. Fam. Ct. 2021).
[759] *See* People v. Stanley, 123 N.Y.S.3d 455, 461 (City Ct. 2020).
[760] *See, e.g.*, *Mathews*, 424 U.S. at 319.
[761] *S.N.*, 142 N.Y.S.3d at 925.
[762] *Id.* at 3.
[763] *See id*.
[764] *Id.*
[765] *Id.*

illness.[766] The courts have interpreted the right of procedural due process quite differently due to the COVID-19 pandemic with the quick retreat to virtual hearings. In Albany, New York criminal cases, for example, the acceptable timelines for hearings were extended due, in part, to limited city resources.[767]

For example, in *People v. Stanley*, the City Court of Albany found that criminal defendants were not deprived of access to the courts when the court granted a motion to adjourn defendants' preliminary hearings because it was considered "non-essential judicial activity."[768] In the case, defendants argued that the courts have sufficient technology and the ability to conduct evidentiary hearings remotely because other Albany Courts allow remote evidentiary hearings.[769] The court agreed with the defendants' claim that virtual hearings were being used for some hearings that were deemed to be essential in relation to these non-essential preliminary hearings.[770] However, the court determined that "essential" court hearings should fill the virtual court's judicial calendar prior to any preliminary hearings.[771] To reach this conclusion, the court weighed the defendants' interest in freedom from imprisonment against the state's interest in restricting court access to prevent the spread of COVID-19.[772] When balancing the considerations, the court noted that no regulation must have a perfect fit between its means and ends; further, all rules have the "inherent nature" of granting a privilege to some and denying it to others.[773] Ultimately, the court found that "essential" virtual hearings took priority over "non-essential" preliminary virtual hearings in criminal proceedings because the financial, material, and intellectual resources of the state were being allocated to other state interests at the time.[774]

New York State courts view access to the courts via virtual hearings, when the in-person option is available, as a privilege rather than a right.[775] However, in the future, the delay of hearings may become intolerable, and virtual proceedings would need to be implemented and prioritized to hasten proceedings. The effect of implementing virtual hearings amid the COVID-19 pandemic has compromised individuals' due process rights by limiting access to the courts for when it is convenient for the government. It is not too early to be critical of these barriers erected by the courts to access judicial proceedings, as the ultimate impact could be a myriad of procedural due process violations.

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[766] *S.N.*, 142 N.Y.S.3d at 925.
[767] *Stanley*, 123 N.Y.S.3d at 461.
[768] *Id.* at 460-61.
[769] *Id.*
[770] *Id.* at 460.
[771] *Id.* at 459-60.
[772] *Stanley*, 123 N.Y.S.3d at 459-61.
[773] *Id.* at 460.
[774] *Id.* at 460-61.
[775] *Id.*

Court Discretion to Require Virtual Proceedings Due to Health Concerns and Emergency

The court has discretion as to trial procedures within the limits of the Constitution.[776] The COVID-19 global pandemic has created a unique situation for the courts where the top priority is not flexibility for the individual whose life, liberty, or property rights are at stake, but for public health and larger policy issues.[777] However, as the world moves closer to "normal" and farther from the public health crisis, one must wonder if the court will swing back to flexibility favoring procedure that accommodates the individual needs of litigants.

In *People ex rel. Arogyaswamy v. Brann*, the New York Queens County Supreme Court held that the court had a valid state interest in the emergency of the COVID-19 pandemic to limit arraignment hearings to virtual settings and holding defendants in custody for more than the statutory maximum 144-hour limit.[778] The court noted that the petitioner's liberty interests were not negotiated, but because of the global health crisis, his liberty interests were "temporarily suspended."[779] In the setting of a pandemic, the court stated that there were adequate procedures adopted and implemented to prevent any defendant's procedural due process right from being violated entirely.[780] The court's procedure included a system of requesting virtual hearings, a scheduling system, and a platform for the virtual hearings.[781] Similar to *Stanley*, the court here noted the limited ability of the criminal court system to conduct virtual hearings due to the limited availability of technology and coordination issues.[782]

In *Perez v. 1857 Walton Realty Corp.*, the Bronx County City Court found that in a harassment and damages case, a petitioner's underlying health concerns were a sufficient basis to deny the respondent's request for an in-person trial.[783] In the case, the respondent requested an in-person trial arguing that a virtual trial was prejudicial by denying them the opportunity to present visual evidence, documentation, and in-person testimony.[784] However, the petitioner had underlying health concerns and argued that an in-person trial created a significant health risk.[785] New York Judicial Law § 2-b (3) allows a court to create new processes and forms of proceedings necessary to carry into effect its possessed powers and jurisdiction.[786] Although this procedure prejudiced one of the parties, the court ultimately held that the virtual hearing was appropriate in light of the COVID-19 public emergency.[787]

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[776] U.S. CONST. amends. V, XIV, § 1.
[777] People *ex rel.* Arogyaswamy v. Brann, 126 N.Y.S.3d 341, 343 (N.Y. App. Div., 2020).
[778] *Id.* at 342.
[779] *Id.* at 343.
[780] *Id.* at 343-44.
[781] *Id.* at 345.
[782] *Arogyaswamy*, 126 N.Y.S.3d at 346.
[783] Perez v. 1857 Walton Realty Corp., 142 N.Y.S.3d 789, 789 (N.Y. Civ. Ct. 2021).
[784] *Id.*
[785] *Id.*
[786] *Id.*
[787] *Id.*

The court's procedural discretion over the past two years has strongly favored state interests, such as public health.[788] Due to the pandemic, the liberty, life, and property interests of individuals were "temporarily suspended" in the face of COVID-19.[789] While preventing the spread of illness and considering health risks is an important public policy, finding "good enough" remedies could be a slippery slope for procedural due process rights. The court is trusted with discretion to adopt procedures to provide individuals with the right to timely and meaningful hearings that accommodate each person's situation. Moving forward, it is unclear whether the courts will continue to respect individual situations and the person's right to procedural due process or conduct hearings in the mode most convenient for the court generally.

A FRAMEWORK FOR "ADVANCING EQUITY" IN ELDER ABUSE CASES

Many organizations across the United States have recognized a discrepancy in access to the courts for aging populations in comparison to younger generations. One effort is the 2021 strategic initiative of advancing equity for aging populations to access justice and the courts.[790] This initiative's primary motive is to "pursu[e] systemic change in law and policy to improve the lives of low-income older adults who experience inequities."[791] Six elements are used to achieve these goals: leadership and staffing; partnership and outreach; research and analysis; planning and evaluation; communications; and education, advocacy, and litigation.[792] Through these six focus areas, this initiative has provided better access to courts as a means of achieving the ultimate goal of limiting systemic discrimination faced by older people throughout their lives.[793]

The Justice for Aging's framework is a model that could aid non-profit and state agencies, like a checklist, to ensure that they are covering all their bases to effectively eliminate obstacles for aging persons with overlapping systemic discrimination. The initiative provides a comprehensive approach to assisting aging persons to access the courts.

ATTEMPTS TO IMPLEMENT SOLUTIONS

Proposed Solutions for the Issue of Access to the Courts

There are many proposed, and some implemented, solutions to the issue of aging populations being denied access to the courts due to their limited access to online court information and processes. These solutions include online public information, educational meetings, social service interventions, in-person assistance with virtual court proceedings, modified disability

[788] *Arogyaswamy*, 126 N.Y.S.3d at 342.
[789] *Id.* at 343.
[790] Chan, *supra* note 680.
[791] *Id.*
[792] *Id.*
[793] *Id.*

accommodations, hotlines and meet-ups, and dedicated court senior centers.[794] However, national initiatives to afford senior citizens access to the courts have been few and limited in their reach.

A common solution to court access issues for aging adults is to provide online information.[795] It is counterproductive to provide individuals who cannot access computers and technology on a regular basis. When someone is unable to access a computer at all, online information does not assist in accessing virtual proceedings. Online information also limits judicial access where an aging person would need prerequisite knowledge of how to adequately use the court's technology. When one is struggling with the online platform of the courts, online information will be of limited assistance because it is the virtual aspect of the court that is at issue. Therefore, the online judicial services offered during COVID-19 inadvertently limited access to court services at a disproportionate rate for those who are not technologically literate.[796]

The argument that technology and elder law work together, provided by few sources, has little supportive research suggesting that technological advancement is the solution to the difficulties that aging populations face in accessing virtual legal proceedings.[797] Elder law as a whole, which includes attorneys who have advanced degrees, may prosper by adapting to virtual settings and using technology to supplement its practice.[798] However, many older persons who experience elder abuse and poverty, or who have disabilities, struggle with computer access; when they can access a computer, they are not in private settings and they are limited by inadequate technology training and skills.[799] Although Elder Law generally needs technological advancements, implementing technology is a key solution for litigants experiencing elder abuse, poverty, and, or, who have disabilities.

In accessing the new wave of legal services and court proceedings that occur online, there have been helpful guides created and provided to people with disabilities who may experience hardship or be adversely affected by the online setting.[800] When engaging with these online

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[794] *Pennsylvania Supreme Court's Advisory Counsel on Elder Just. Highlights Need to Protect Incapacitated Persons*, PENNSYLVANIA LEGAL AID NETWORK (April 21, 2020), https://palegalaid.net/news/pennsylvania-supreme-courts-advisory-council-elder-justice-highlights-need-protect [hereinafter *Advisory Counsel*]; Hon. Patricia Banks, *Legal Access for Elders: A Workable Court Model in Cook County, Illinois*, AM. BAR ASS'N (June 1, 2016), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol_37/issue_5_june2016/legal-access-for-elders/; Cooke, *supra* note 679; Amanda Robert, A*mid the Covid-19 Pandemic, Legal Services Providers find Creative Ways to Serve Older Adults*, AM. BAR ASS'N (Jan. 4, 2021), https://www.americanbar.org/groups/journal/articles/2021/amid-the-covid-19-pandemic--legal-services-providers-find-creati/.

[795] Ward, *supra* note 694.

[796] *Remote Court Operations*, *supra* note 677.

[797] *Id.*

[798] Ward, *supra* note 694.

[799] *Hall*, *supra* note 674; *Just. Gap Initiatives*, *supra* note 707.

[800] Sonja Waters, *Using Technology to Track, Manage Guardians in PA*, AM. BAR ASS'N (Mar. 18, 2020), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-41/bifocal-vol-41-issue-4/using-technology-to-track--manage-guardians-in-pa/.

platforms, there are accessibility needs including hearing and visual impairments; blindness; and intellectual, developmental, or mobility disabilities.[801] Platforms have made initiatives to make their websites accessible to people with all kinds of disabilities and impairments including shortcuts, screen readers, and interpreters.[802] However, others do not provide such services.[803] When working with an aging population, considering these impairments is crucial when implementing any online service that is expected to serve their legal needs.[804]

The guides offered online are provided to and for those who can access a computer and who are educated in how to operate a computer and the internet. However, those who are aged and impoverished may have limited access to resources such as computers.[805] Further, aging people with disabilities may be unable to access these legal resources that would assist in access to the courts due to cognitive decline or physical limitations.[806] Therefore, these court resources are limited in their useful application to this population already struggling to access online resources.

Initiatives to Extend Access to the Courts, but Not Including the Elderly

There have been countless initiatives across the U.S. to stretch access to the courts for the public. In 2012, the Harvard Journal of Law & Technology wrote about the U.S.'s efforts to provide impoverished communities and persons with disabilities with legal services including rural resident internet connection, legal information programs, and screen readers for those with disabilities.[807] Over the past twenty years, the United States has increased its efforts to incorporate technology into legal proceedings as a means to utilize the devices available to expedite procedures.[808] Such as in Family Court, marriage dissolutions mostly occur in remote settings and are likely to utilize videoconferencing for hearings moving forward.[809] With the courts expanding their use of technology, there is a risk of this new procedure preventing access to populations of those with disabilities and impoverished communities.[810]

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[801] *Virtual Meetings: Accessibility Checklist & Best Practices*, *supra* note 676.
[802] *Id.*
[803] *See id.*
[804] *See id.*
[805] *See* Hall, *supra* note 674.
[806] *See id.*
[807] Bonnie Rose Hugh, *Using Technology to Enhance Access to Just. Let's Not Make It Worse: Issues to Consider in Adopting New Technology*, 26 HARV. J. LAW & TECH. 241, 261-262 (2012).
[808] *Remote Hearings and Access to Just.*, *supra* note 722.
[809] Stephanie Zimmermann, *Divorce laws. say tech. changes may outlive the Covid-19 pandemic,* ABA JOURNAL (June 11, 2020, 8:00 AM), https://www.abajournal.com/web/article/divorce-in-the-time-of-coronavirus-attorneys-say-tech-changes-may-outlive-the-pandemic.
[810] *Id.*

In general, the use of technology has successfully connected a large population to the courts.[811] For the elderly, the use of technology has tended to isolate and prevent access to legal remedies or assistance.[812] Elder abuse is a unique issue that has led to the creation of an entire body of law. Due to the difference in the individuals from the public, and peculiar legal issues faced by these people, there has been a shift to recognize these issues and people as distinct from other areas of the law.

STATE MODELS FOR FACILITATING THE TRANSITION TO VIRTUAL COURT PLATFORMS IN ELDER LAW

With the rise in the aging population, courts in the United States have been looking for ways to supplement the underlying court systems to promote equitable access for seniors. One model implemented was a Pennsylvania Elder Law Task Force with the purpose of assessing the current state of the Pennsylvania courts and creating recommendations on how to proceed in a way that provides seniors with better access to the courts.[813] Another model in Illinois created The Elder Law and Miscellaneous Remedies Division of a county court to provide aging persons with legal information, education on legal issues affecting the elderly, and age-conscious legal support to assist in the access to the courts.[814] Both models provided the courts with insight into the legal issues affecting the elderly and ways to make the courts more inclusive for aging persons.

The Pennsylvania Model

In Pennsylvania, the Supreme Court took the initiative to establish an Elder Law Task Force to study, identify, and make recommendations regarding the ability of senior citizens to gain meaningful access to the courts in cases of incapacity.[815] This initiative was in part created because the state identified that it had a growing population of residents over the age of sixty-five.[816] The Task Force found that educating the general public and court officials about elder abuse while giving the elderly a voice was "critically important" when the aging person may be unable to advocate for themselves in legal proceedings due to incapacity.[817] The Task Force then developed elder abuse training and presentations for judges, attorneys, court staff, guardians, and others who interact frequently with aging populations to promote collaboration amongst these groups and to accumulate resources for elderly people.[818] The Pennsylvania courts have been able to partner

[811] *Id.*
[812] Hall, *supra* note 674.
[813] *Advisory Counsel*, *supra* note 794.
[814] Hon. Banks, *supra* note 794.
[815] *Advisory Counsel*, *supra* note 794.
[816] *Id.*
[817] *Id.*
[818] *Id.*

with other elder justice partners to offer education to the public and spread awareness as to the difficulties that aging persons face when trying to access the courts.[819]

The Illinois Model

In 2016, Honorable Patricia Banks wrote about a workable pro-bono court model in Illinois that catered to the specific socio-legal needs of seniors.[820] The Elder Law and Miscellaneous Remedies Division (ELMRD) included access to legal resources, civil remedies, and criminal actions in cases of abuse, neglect, and financial exploitation of seniors.[821] ELMRD offered aging persons a team of 35 specialized service providers to cater to the unique legal needs of aging populations.[822] This team was specifically formed to supplement the underlying court structure by providing older adults with services that would promote equitable access to the courts.[823] When ELMRD's ability to provide legal services to aging adults was compromised by budget cuts, the court focused on community education using their own elder abuse education materials, offering senior enrichment seminars, and resources to social services agencies.[824] This court's initiative provided user-friendly, elder-focused legal services to the general public, court officials, and aging populations to promote elder's access to the justice system and court remedies.[825]

Analysis of the State Models

The focused task force and the dedicated court division have worked relatively well in Pennsylvania and Illinois, respectively. By providing education and outreach on the state and local levels, aging populations were able to achieve court access, even in remote settings, by using these programs.[826] This was no small mission, as the states had to include guardians, social workers, and other agencies to accomplish the goal of being more inclusive to aging persons. For the courts to function in a way that best served the aging class, the courts could not rely upon a "one-size-fits-all" model. Allowing input and accepting help from outside organizations better served older populations. The flexibility of Pennsylvania and Illinois reflects the spirit of the constitutional due process clause provisions: that each person should be afforded procedural due process that allows for a timely and meaningful hearing before the court when their life, liberty, or property interests are at risk.

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[819] *Pa. Advisory Council on Elder Just. in the Courts, Elder Just. Partners Host Virtual Town Hall on Understanding and Preventing Elder Abuse*, THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA (June 16, 2021), https://www.pacourts.us/judicial-administration/court-programs/office-of-elder-justice-in-the-courts.
[820] Hon. Banks, *supra* note 794.
[821] *Id.*
[822] *Id.*
[823] *Id.*
[824] *Id.*
[825] Hon. Banks, *supra* note 794.
[826] *Id.*

NON-PROFIT MODELS FOR FACILITATING THE TRANSITION TO VIRTUAL COURT PLATFORMS IN ELDER LAW

Non-profits across the United States have used the pandemic as an opportunity to find inventive ways to connect with aging litigants. Florida and Louisiana offer two models of community outreach that are in-person and offer legal services to elders who need legal assistance.[827] Both initiatives have made genuine attempts to continue assisting their litigants in-person when necessary, despite their limits in funding and ability to conduct large-scale, in-person legal training sessions with COVID-19 restrictions.

The Florida Non-Profit Model

During the COVID-19 pandemic in Florida, the courts had to find new ways of serving the legal needs of residents who were sixty years or older.[828] A local agency that provides legal services to older adults, Coast to Coast Legal Aid of South Florida (CCLA), purchased a van for its legal aides to be driven to isolated older adults who needed legal assistance.[829] With their van, this organization set up free and contactless legal services for community members in parking lots where groups of older adults would already be gathering for food banks or social services.[830] This alternative is helpful to demographics who may experience difficulty accessing online court services or legal services.[831] If the court continues to rely on online methods of providing services due to convenience, large groups of people will be unable to access services except with extreme difficulty and by waiting long periods of time.[832]

The Louisiana Non-Profit Model

The Southeast Louisiana Legal Services (SLLS) has used a mixture of new and "old-timey" approaches for aging litigant outreach and to provide legal information on how to access the courts amid the pandemic.[833] The service provider offered a legal aid hotline to answer legal inquiries and created a series of Facebook Live videos to educate their community.[834] This is another initiative using technology to educate community members, which does not offer aging persons with disabilities or who are impoverished access to this information.[835] In other attempts to reach the public with these new modes of service, they advertised their services at in-person events that

[827] Cooke, *supra* note 679; Robert, *supra* note 794.
[828] Cooke, *supra* note 679.
[829] *See id.*
[830] *See id.*
[831] *See id.*
[832] *See id.*
[833] Robert, *supra* note 794.
[834] *Id.*
[835] *Id.*

are more likely to include low-income or disabled aging persons, such as Catholic Charities events like food distributions for seniors and families.[836]

Analysis of the Non-Profit Models

Non-profits were a large help in facilitating aging populations' access to the courts as they bridged the gaps left by the courts going virtual during the COVID-19 pandemic.[837] Services like CCLA and SLLS directly communicated with older populations to assist them in fulfilling their legal needs.[838] While these were creative and unique services offered by agencies and many others during the pandemic, the courts only extended similar assistance in exceptional cases.[839] The pandemic has been ongoing for two years at this point and there has only recently been an option for in-person proceedings.[840] However, even in-person proceedings now are hybrid, meaning that they are partly virtual and partly in-person.[841] With the changes in judicial procedure, non-profits are not equipped and should not be responsible for assisting individuals in understanding newly implemented and ever-changing court processes. Rather, the state is in the best place financially, knowledgably, and skillfully, to provide procedural due process to aging populations. In fact, it is the responsibility of the State to afford procedural due process to each person who risks losing life, liberty, or property.

Synthesis of the State and the Two Non-Profit Models

The efforts of non-profits demonstrate, like the state initiatives, the ability to overcome hardship and global health issues to serve the procedural due process rights of all persons, including aging populations. The differences between the non-profits and the state initiatives are the source of the assistance, the duration of the projects, and the means related to the ends. While these differences do not facially seem to be pertinent, the impact of these elements is crucial to further action to support the procedural due process rights of aging populations.

In the state initiatives, the states created the task force and court division in recognition of the vital procedural due process rights that all people have, whereas the non-profits came from a private recognition removed from the government. While these are both noble efforts, the states' initiatives demonstrate a direct acknowledgment of the individual rights at stake and direct advocacy on behalf of the people. For the due process rights of aging populations to be a front-line issue of the government, the government itself must act to invest in these interests.

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[836] *Id.*
[837] *See id.*
[838] Robert, *supra* note 794.
[839] *See* Wester, *supra* note 678.
[840] *See id.*
[841] *Id.*

Investments in aging populations' procedural due process rights include accommodating the class as-is and pulling together resources to assist them in accessing the courts.

The duration of the projects is reliant on the means related to the end. The means of the state projects are achieving procedural due process for aging populations for the time being and creating a lasting project that promotes these goals. The means for the non-profits are to assist aging populations in navigating virtual court proceedings during the COVID-19 pandemic. While the in-the-moment assistance is vital to aging persons' ability to access the courts in a virtual setting, the courts are retaining some virtual aspects of proceedings. Further, a trend of the courts over the past twenty years has been to advance their online presence. Since this is the trend, a lasting program that assists aging persons in accessing the courts online is crucial to preserving the procedural due process rights of these people. In this aspect, the state-led initiatives have more resources and suggest methods that may stand against time and change.

CONCLUSION

The recent COVID-19 pandemic has highlighted the procedural due process issues faced by many classes. Within these classes, aging populations are one of many demographics that are suffering from loss of property due to inadequate access to the courts. Within the sixty-year-old and older population, many are impoverished and have cognitive or physical disabilities. These are two overlapping classes that are disproportionately affected by the court's transition to virtual platforms. The hybrid court procedures, or worse yet, the fully remote court procedures, can ultimately prevent older Americans with disabilities or who are impoverished from accessing the courts.

Aging persons face unique legal issues that include addressing and preventing elder abuse. A common form of elder abuse is financial exploitation.[842] Further, the most common perpetrator of elder abuse is a caregiver of the aging person.[843] Many older individuals facing elder abuse are isolated, have impairments, and are in dire financial situations. It can be very difficult for these older adults to access the courts. The lack of state support in accessing the courts and the ever-evolving court procedures compound the problems of those facing elder abuse.

Access to the courts is a federal and state constitutionally protected right. In the federal Constitution, the Fifth and Fourteenth Amendments afford Americans the right to due process, which includes the right to access the courts. Interpreted into the right of due process, Americans have the right to access the courts. The vital interests of life, liberty, or property are at stake when someone cannot access the courts for a judicial decision.

[842] Hall, *supra* note 674.
[843] *Id.*

Of proposed and implemented solutions, the strongest in place currently are state initiatives to supplement judicial information and services. The Illinois and Pennsylvania models compiled social services and community resources to provide comprehensive support programs to assist senior citizens through litigation. As a result of these programs, aging populations have gained access to the courts, which furthers the constitutional right to procedural due process.

Since the state is prohibited from depriving a person of life, liberty, or property without due process, it is its obligation to provide flexible means that accommodate the needs of litigants to obtain meaningful and timely hearings. As the courts inevitably include more virtual proceedings, the state should carry the burden of providing supplemental programs to assist all persons in gaining access to the courts. With the assistance of the state and adaptation of the Justice for Aging's Advancing Equity model, senior citizens will successfully be able to access the courts and ultimately work toward minimizing elder abuse.

A New Means for Healthcare? How the United States Could Learn from Costa Rica

Autumn Burgin

Abstract

Healthcare in the United States has been a longstanding battle for many years between a private and public system. Today, the United States offers a mixed model approach with components of both public and private sectors. While the U.S. has attempted to make improvements to healthcare, racial health inequality remains rampant, especially for Black Americans. In 2022, the health demographics for Black Americans are startling and need to be put at the forefront of healthcare. The U.S. spends more money on healthcare than any other high-income country, yet it has some of the worst statistics.

On the other side, Costa Rica is a country that has seen significant growth and improvement in its healthcare system within the last 40 years. By taking a more community-oriented approach to its structure, it has been able to grant access to over three-quarters of its citizens while spending far less than the United States and most other countries. Today, Costa Rica's health demographics are very similar to the United States, and it even maintains a higher life expectancy.

This Note offers a look into the racial health inequities facing Black/African Americans and Costa Rica's healthcare system. It then proposes the United States learn from the success of Costa Rica and strive to implement specific tactics to offer a more community-oriented approach to healthcare. In doing so, the U.S. could help to reduce racial health inequities for Black Americans and produce better health outcomes.

Table of Contents

I. INTRODUCTION

a. Addressing Racial Health Inequities

Racial and ethnic disparities in the United States have been a continuing problem for numerous years. Despite the progress that has been made in reducing health inequities, racial health gaps continue to persist today, especially among the Black/African American population of the United States. In the last seventeen years, the mortality rate for African Americans has declined by about 25%.[844] However, recent analysis has shown that they are dying or living with health conditions that usually show up in older White Americans starting as early as their twenties.[845] These diseases include high blood pressure, diabetes, and stroke.[846] Furthermore, while mortality rates have declined, some of the leading causes of death amongst Black people are still stroke, cancer, and heart disease.[847]

b. Health Inequities Amongst Black Americans

In 2018, African Americans were thirty percent more likely to die from heart disease than White Americans.[848] They are also forty percent more likely to have high blood pressure than White Americans, and they are less likely to have it under control.[849] African Americans are fifty percent more likely to have a stroke or cerebrovascular disease than White Americans.[850] More specifically, Black men are seventy percent more likely to die from a stroke than White Americans in general. So not only are young Black Americans living with diseases that are common at older ages, but overall, they are dying from those diseases at a higher rate. However, this is just a surface-level look into just how radically different the health of Black Americans is to their White counterparts. Black Americans also struggle in the areas of maternal health, and unsurprisingly, their life expectancy rate.[851] In 2019, the maternal mortality rate for Black women was 44 deaths per 100,000 births.[852] This leaves them 2.5 times higher than the rate of White women, which was 17.9 deaths per 100,000 births.[853] On top of this, in 2018, Black women were twice as likely to

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[844] *Vital Signs—African American Health,* CDC, https://www.cdc.gov/vitalsigns/aahealth/index.html (last reviewed Jul. 3, 2017).
[845] *Id.*
[846] *Id.*
[847] *Id.*
[848] *Heart Disease and African Americans*, U.S. DEP'T OF HEALTH AND HUM. SERV. OFF. OF MINORITY HEALTH, https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=19 (last modified Jan. 31, 2022).
[849] *Id.*
[850] *Stroke and African Americans*, U.S. DEP'T OF HEALTH AND HUM. SERV. OFF. OF MINORITY HEALTH, https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=28 (last modified Feb. 11, 2021).
[851] *See* Donna L. Hoyert, *Maternal Mortality Rates in the United States--2019*, CDC, https://www.cdc.gov/nchs/data/hestat/maternal-mortality-2021/maternal-mortality-2021.htm (last reviewed Mar. 23, 2021); *See also Profile: Black/African Americans*, U.S. DEP'T OF HEALTH AND HUM. SERV. OFF. OF MINORITY HEALTH, https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=61 (last modified Oct. 12, 2021).
[852] Hoyert, *supra* note 851.
[853] *Id.*

receive late or no prenatal care as compared to White women.[854] With regards to life expectancy, the most recent data from the 2020 census indicated that the life expectancy for Black Americans is 77 years old.[855] More specifically, women are projected to live to 79.8 years and men at 74 years.[856] White Americans in comparison are projected to live on average to 80.6 years. Women are expected to live until about 82.7 years and 78.4 years for men.[857] These statistics show a deeply concerning difference in the health of Black Americans versus White Americans. When COVID-19 is added to the equation, these health disparities worsened.

i. How COVID-19 Exacerbated Inequities Amongst Black Americans

It has become well-documented that COVID-19 disproportionally and negatively affects minorities, especially in Black and Brown neighborhoods.[858] In the surge of COVID-19, Black Americans contracted and died from COVID-19 at a disproportionally higher rate than White Americans.[859] In "hotspot areas" such as New York City, Milwaukee, Louisiana, and Chicago, Black populations were decimated because of over-exposure to several structural risk factors for COVID-19.[860] In 2021, Black patients were 1.4 times more likely to die from COVID-19 than White patients.[861] For example, between May 1 and August 31, 2020, across the entire United States, 114,000 deaths were reported.[862] Within these deaths, 78.2% of decedents were under the age of 65, 53.3% were male, 51.3% were non-Hispanic White, 24.2% were Hispanic or Latino, and 18.7% were non-Hispanic Black.[863]

c. Addressing the Problem and a Possible Solution

There are multiple social and economic factors that contribute to the disparities seen today such as discrimination, occupation, education, income, and housing.[864] However, a major factor that plays a role not only in the lives of Black Americans, but everyone in the United States, is a lack of healthcare access.[865] For example, Black Americans are more likely to report that they cannot even see a doctor because of the cost.[866] Prior to the passing of the Affordable Care Act

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[854] *Infant Mortality and African Americans*, U.S. DEP'T OF HEALTH AND HUM. SERV. OFF. OF MINORITY HEALTH, https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=23 (last modified Jul. 8, 2021).
[855] Hoyert, *supra* note 851.
[856] *Id.*
[857] *Id.*
[858] Abdur Rahman Amin, *Redefining Healthcare to Address Racial Health Disparities & Inequities*, 42 MITCHELL HAMLINE L. J. OF PUB. POL'Y & PRAC., 2021, at 1, 3.
[859] Dayna Bowen Matthew, *Structural Inequality: The Real COVID-19 Threat to America's Health and How Strengthening the Affordable Care Act Can Help*, 108 GEO. L. J. 1679, 1684 (2020).
[860] *Id.*
[861] Amin, *supra* note 858, at 4.
[862] *Id.*
[863] *Id.*
[864] *Vital Signs—African American Health*, *supra* note 844.
[865] *Id.*
[866] *Id.*

(ACA), Black people were twice as likely to not have access to health care or insurance as compared to White people.[867] Even though the ACA extended coverage and access to more Americans in general, there is still a lack of providers to give out some form of health care.[868]

While it should be a major goal to address and correct *all* factors that contribute towards racial health inequities and the upsetting statistics surrounding the health of Black Americans, access to healthcare is a highly significant factor when it comes to determining a person's health outcome.[869] The factor of access to healthcare can be investigated on both an individual and collective level.[870] It also provides policymakers and leaders a chance to bring changes to communities.[871] In this case, changes to Black communities. This is not to say that the United States has not tried to assist in access to healthcare. For example, the United States Department of Health and Human Services has focused on addressing health disparities, and part of that goal is improving healthcare access.[872]

However, as the statistics above show, the United States is nowhere near where it should be regarding health equality among Americans. The health concerns of Black Americans need to be put on the forefront and more solutions need to be explored. This paper proposes that the United States should look to Costa Rica and its community-oriented healthcare system. Costa Rica's system offers an example of an efficient healthcare system centered around using community-oriented primary healthcare.[873] In putting focus on the needs of communities, the health concerns of many underserved communities, especially Black communities, could be addressed properly.

II. UNITED STATES HEALTH CARE

a. General Overview of the United States

Before examining Costa Rica's healthcare system, the United States and the approaches they have taken must be examined first. The healthcare system of the U.S. could be considered a "mixed model" where some parts are public and others private (e.g., Medicare/Medicaid versus private insurance).[874] The United States actually spends more on healthcare than any other high-income country but has one of the lowest life expectancies.[875] Furthermore, many people do not have

[867] Ruqaiijah Yearby & Seema Mohapatra, S*ystemic Racism, the Government's Pandemic Response, and Racial Inequities in COVID-19*, 70 EMORY L. J. 1421, 1468 (2021).
[868] *Id.*
[869] Amin, *supra* note 858, at 7.
[870] *Id.*
[871] *Id.*
[872] *Id.* at 10.
[873] *What Does Community-Oriented Primary Health Care Look Like? Lessons From Costa Rica*, THE COMMONWEALTH FUND, (Mar. 16, 2021), https://www.commonwealthfund.org/publications/case-study/2021/mar/community-oriented-primary-care-lessons-costa-rica.
[874] Amin, *supra* note 858, at 11.
[875] *Id.*

proper access to healthcare. In general, about one in every ten Americans do not have health insurance.[876] This is even after the Affordable Care Act was implemented.

b. A Major Change in Healthcare Coverage: The Affordable Care Act

One of the biggest changes to the healthcare system America has seen was through the Affordable Care Act (ACA).[877] The ACA represented the largest impact of the expansion of public funding for healthcare delivery.[878] In 2010, Congress enacted the ACA in order to provide more equal access to healthcare.[879] The ACA also contained provisions to introduce some flexibility so as to equalize access to social determinants.[880] Some key features of the ACA include: requiring most Americans to obtain health insurance, extending coverage to young adults under twenty-six if they are dependents, "creating" a healthcare marketplace for people to choose the insurance plan they want, and expanding Medicaid eligibility and funding options for states that did opt into the program.[881]

When the ACA was passed, around twenty million more people gained healthcare coverage.[882] The uninsured rate among adults ages 19-24 went from 20% to 12% in 2018.[883] Between 2013 and 2016, the coverage gap between Black and White Americans declined by 4.1%.[884] The Medicaid expansion under the ACA greatly improved access and affordability to care through insurance which had a positive effect on health outcomes.[885] In short, the ACA did indeed reduce *some* health insurance coverage disparities/health disparities between Black and White people.[886] However, there are still more shortcomings that need to be addressed.

i. Remaining Issues with the ACA

Nearly three million of the twenty million insured people under the ACA were Black Americans. Black people comprise about 13% of the total population.[887] In 2018, the uninsured rate of Black people was 9.7% while for White people it was 5.4%. The financial burden on Black people was almost double that of the rest of the population.[888] Furthermore, the primary force of

[876] *Id*. at 9.
[877] *Id.* at 11.
[878] *Id.*
[879] Matthew, *supra* note 859, at 1708.
[880] *Id.*
[881] Amin, *supra* note 858, at 12.
[882] *Id.*
[883] *Id.*
[884] Matthew, *supra* note 859, at 1709.
[885] Amin, *supra* note 858, at 13.
[886] *Id*.
[887] *Id*.
[888] *Id*.

the ACA was not to improve *access* for minorities.[889] While the ACA made some improvements, the bill is not popular amongst certain groups and contains a lot of loopholes.[890] For example, insurance agencies cannot set premiums based on preexisting conditions, so some would likely deny people healthcare rather than offer it at a lower rate.[891] Since its passing, there have been approximately seventy-one attempts to repeal it.[892] The ACA does not come without controversy and room for improvement. Black Americans are the ones who become burdened by these issues, and it is for these reasons that some other reform needs to be considered. That reform involves looking to Costa Rica's healthcare system.

III. COSTA RICAN HEALTHCARE SYSTEM

a. General Overview: *Caja Costarricense de Seguro Social* (*CCSS*)

In just the last 40 years, Costa Rica has improved its healthcare system immensely.[893] Throughout these years, Costa Rica has been able to sustain and implement a form of universal healthcare through a community-oriented primary healthcare (PHC) approach.[894] Costa Rica is one of the very few countries in Latin America that offers almost a complete universal healthcare system, as it offers both public and private sector coverage options.[895] Currently, the government holds a monopoly over private health insurance plans and decides premiums based on the income of each applicant.[896] While much of Costa Rica utilizes the public sector, approximately 30% of the population still has private insurance plans.[897] The public and private sectors, for the most part, coincide together.[898] Oftentimes, it is common for physicians to work for the public in the morning and then go to their private practice later on in the day.[899] Looking to the public sector, specifically the community-oriented PHC, this approach is built on five main pillars: 1) integration of public health with primary health care, 2) multidisciplinary teams integrated within the community, 3) geographic empanelment, 4) measurement and quality improvement at all levels, and 5) integration of digital technologies at all levels.[900]

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[889] *Id*.
[890] Riley Baker & Vincent S. Gallicchio, *How United States Healthcare Can Learn from Costa Rica: A Literature Review*, 12 J. OF PUB. HEALTH AND EPIDEMIOLOGY, 106, 108 (2020).
[891] *Id.*
[892] Matthew, *supra* note 859, at 1708.
[893] *See* Baker & Gallicchio, *supra* note 890, at 109; *See also Lessons from Costa Rica*, *supra* note 873.
[894] *See Costa Rica: Summary*, COLUM. UNIV. MAILMAN SCH. OF PUB. HEALTH, https://www.publichealth.columbia.edu/research/comparative-health-policy-library/costa-rica-summary (last updated Mar. 11, 2022).
[895] *Id*.
[896] *Id*.
[897] *Id*.
[898] *See id*.
[899] *Id.*
[900] *Lessons from Costa Rica*, *supra* note 873.

To meet the first pillar, Costa Rica implemented its first major legislation towards healthcare coverage called the *Caja Costarricense de Seguro Social* (*CCSS*).[901] This legislation was a social security insurance system for wage workers and was meant to provide pension and health benefits.[902] This system set up the foundation from which Costa Rica's current healthcare system would stem.[903] The system was expanded to include dependents of workers in 1961.[904] Up until 1975, the *CCSS* extended coverage to people in rural areas, low-income populations, and certain vulnerable populations for primary care, outpatient care, and inpatient services.[905] Eventually, coverage began to include farmers and independent contract workers.[906] As time went on, the *CCSS* expanded and more Costa Ricans became eligible, and by 2003, insurance coverage reached 89%.[907] The Costa Rican government, by 2010, made it mandatory for residency applicants to become members of the *CCSS*.[908] While healthcare is not an explicit right in Costa Rica, this process facilitated access to healthcare as one.[909]

Prior to 1995, the Ministry of Health in Costa Rica was responsible for keeping up with primary care and prevention services for the general population.[910] However, by 1995, primary care became a nationwide priority, leading to a lesser concentration on administrative responsibility.[911] Primary care and prevention became the responsibility of the *CCSS*.[912] The *CCSS* became an autonomous institution, separate from the Ministry of Health, and it is now in charge of financing, purchasing, and delivering most of the personal health services in Costa Rica.[913] This public sector of Costa Rica's healthcare system consists of around 30 hospitals and 250 clinics.[914] The *CCSS* currently manages three different regimes including the illness and maternity insurance regime, the disability, old-age, and death regime, as well as the non-contributive regime.[915] As far as the Ministry of Health is concerned, it is in charge of strategic planning, sanitary regulation, research, and technology development for Costa Rica's system.[916] With this significant shift in its responsibility, the *CCSS* decided to establish Primary Health Care Teams, or *EBAIS*.[917] This is where pillars three through five come in.[918]

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[901] *Id*.
[902] Baker & Gallicchio, *supra* note 890, at 109.
[903] *Id*.
[904] *Costa Rica: Summary*, *supra* note 894.
[905] *Id*.
[906] *Id*.
[907] *Id*.
[908] *Id*.
[909] *Costa Rica: Summary*, *supra* note 894.
[910] *Id*.
[911] *Id.*
[912] *Id*.
[913] *Id*.
[914] *Costa Rica: Summary*, *supra* note 894.
[915] *Id*.
[916] *Id.*
[917] *Id*.
[918] *See id*.

i. Community Oriented Primary Healthcare and *Equipo Básico de Atención Integral de Salud* (*EBAIS*) and *Asistente Técnico en Atención Primaria* (ATAP)

Pillar two focuses on the establishment of the *EBAIS* teams.[919] *EBAIS* stands for *equipo básico de atención integral de salud*, and these teams are responsible for providing and increasing access to care at a community level.[920] By 2001, 80% of Costa Ricans had access to these teams and almost everyone had access by 2006.[921] These teams offer a community-oriented primary healthcare (PHC) approach.[922] These teams usually comprise a doctor, a nurse assistant, a medical clerk, and an assistant technician, or *asistente técnico en atención primaria* (ATAP). ATAPs are comparable to advanced community health workers, and they fulfill the fourth and fifth pillars.[923] They try to visit each household annually, using a "risk stratification" scheme to prioritize their visits. The scheme breaks down various homes based on "priority".[924] "Priority 1" homes are inhabited by elderly people living alone, individuals with chronic diseases, high-risk pregnancies, or other issues that may put an individual at high risk.[925] These homes will receive visits three times a year.[926] "Priority 2" homes consist of those with more moderate risks, and these individuals receive visits twice a year.[927] "Priority 3" homes consist of those with low risk, and they receive visits just once a year.[928]

In order to gather data about each residency, ATAPs use *ficha familiar*, or "family file", that geocodes each house. This is where the fifth pillar is established.[929] Using a tablet to do the geocoding, these tablets can keep track of patient history.[930] These tablets also enable post-hospital discharge visits as well as tracking for community determinants of health. Additionally, cell phone chips are put in each tablet so as to upload information, and a graphic dashboard allows the ATAPs to see each patient's house on a map.[931] All information collected is confidential and highly secured. ATAPs are very well trained and crucial to the success of the *EBAIS* teams.[932] Additional support is given to *EBAIS* teams through nutritionists, psychiatrists, and pharmacists. As of 2019, there were 1,053 *EBAIS* teams and 106 support teams (for behavioral and social services) within Costa Rica. This averages out at about one team per 4,660 citizens.[933]

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[919] *Lessons from Costa Rica*, *supra* note 873.
[920] *Id.*
[921] *Costa Rica: Summary*, *supra* note 894.
[922] *See Lessons from Costa Rica*, *supra* note 873.
[923] *Id*.
[924] *Id*.
[925] *Id.*
[926] *Id.*
[927] *See Lessons from Costa Rica*, *supra* note 873.
[928] *Id.*
[929] *Id.*
[930] *Id.*
[931] *Id.*
[932] *Lessons from Costa Rica*, *supra* note 873.
[933] *Id.*

The impact of community-oriented PHC and *EBAIS* teams has certainly made significant impacts on the citizens of Costa Rica.[934] As stated earlier, these teams have provided almost all of Costa Rica with the ability to access healthcare. Between 1960 and 1980, Costa Rica experienced major health improvements which placed it as the second best country in Latin America for health indicators such as population coverage, infant mortality, life expectancy, and health services.[935] Today, Costa Rica is not far behind the United States in health demographics and Costa Rica's life expectancy even exceeds the United States'.[936] While Costa Rica was able to make such large strides in a short number of years, its new system is not without its limitations/challenges.[937]

b. Limitations on the Primary Healthcare System

One of those limitations is that the system relies heavily on the success of its economy.[938] A large source of funding comes from large businesses, employers, and government institutions.[939] The efficiency of Costa Rica's system fluctuates with its economic performance.[940] In the 1980s, Costa Rica went into a recession that halted and even reversed some of the progress it was able to make. With internal governmental issues and an increasing population, financially maintaining the system became increasingly difficult.[941] This crisis showed that in order for the system to stay successful, Costa Rica must stay in strong economic standing.[942]

Another limitation Costa Rica has seen is that it has not implemented enough *EBAIS* teams to match its population size.[943] As of 2019, the country was aiming for approximately 300 clinics to reach a target ratio of one team per 4,000 citizens.[944] Lastly, Costa Rica has started seeing an increase in noncommunicable diseases such as cardiovascular illness and cancer.[945] While the country's system has strong primary care, it struggles with demands for specialized treatment of these diseases.[946] The *CCSS* is aware that it must strengthen its PHC to better combat specific diseases. Executive President of the *CCSS*, Dr. Román Macaya, stated that primary and secondary care levels must increase their ability to resolve these increasing issues before reaching hospitals.[947] However, whether Costa Rica will start to strengthen their system is another

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[934] *See Lessons from Costa Rica*, *supra* note 873; *See also Costa Rica: Summary*, *supra* note 894.
[935] *Costa Rica: Summary*, *supra* note 894.
[936] *Mortality in the United States*, CDC, https://www.cdc.gov/nchs/products/databriefs/db427.htm (last reviewed Dec. 21, 2021); *Costa Rica: Summary*, *supra* note 894.
[937] *See Costa Rica: Summary*, *supra* note 894; *See* Baker & Gallicchio, *supra* note 890; *See also Lessons from Costa Rica*, *supra* note 873.
[938] Baker & Gallicchio, *supra* note 890, at 110.
[939] *Id.*
[940] *Id.*
[941] *Id.*
[942] *Id.*
[943] *Lessons from Costa Rica*, *supra* note 873.
[944] *Id.*
[945] *Costa Rica: Summary*, *supra* note 894.
[946] *Id.*
[947] *Lessons from Costa Rica*, *supra* note 873.

conversation. In understanding the ins and outs of Costa Rica's healthcare system, a comparison between it and the United States must be drawn.

IV. COSTA RICA AND THE UNITED STATES: A COMPARISON

When comparing the two healthcare systems Costa Rica and the United States have, the countries are not that far apart when it comes to demographics surrounding healthcare. For example, as of 2020, the life expectancy of the general population of the United States was 77 years old.[948] Costa Rica has a higher life expectancy of about 80 years old.[949] When it comes to infant mortality, the rate in the United States was about 5.4 deaths per 1,000 live births.[950] Costa Rica has a slightly higher infant mortality rate of 6.3 deaths per 1,000 live births.[951] When it comes to maternal mortality in the U.S., for every 100,000 live births, 20.1 women die.[952] Costa Rica's maternal mortality rate is a little higher with 27 deaths per 100,000 live births.[953] These statistics show that Costa Rica is not far behind the U.S. when it comes to healthcare, and Costa Rica accomplished these things in just 40 years. The main question that remains is: can the U.S. implement a system that is similar to Costa Rica's? In answering this question, the differences between the two systems must be addressed.

There is no question that there are some major differences between the United States and Costa Rica. One of the leading differences in the healthcare systems between these two countries is that the United States had more time to develop as a country when healthcare was implemented.[954] On the other hand, Costa Rica implemented its system at a time when it was suffering from low sanitation outreach, poor water availability, high rates of infant mortality, and low life expectancy.[955] It made sense for Costa Rica to reach out to as many as possible in a small amount of time, whereas the U.S. did not "necessarily" need to implement a universal system.[956] Another difference between the two countries is differences in population.[957] To put that into perspective, Costa Rica is comparable to South Carolina or Kentucky in both size and population.[958] Currently,

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[948] *Mortality in the United States*, *supra* note 936.
[949] *Costa Rica: Summary*, *supra* note 894.
[950] *Infant Mortality*, CDC, https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm (last reviewed Sept. 8, 2021).
[951] *Costa Rica: Summary*, *supra* note 894.
[952] Hoyert, *supra* note 851.
[953] *Costa Rica: Summary*, *supra* note 894.
[954] Baker & Gallicchio, *supra* note 890, at 111.
[955] *Id*.
[956] *Id*.
[957] *See U.S. Population Estimated at 332,403,650 on Jan. 1, 2022,* U.S. DEP'T OF DOM. (Jan. 6, 2022) https://www.commerce.gov/news/blog/2022/01/us-population-estimated-332403650-jan-1-2022; *See also Costa Rica: Summary*, *supra* note 894.
[958] Luis Rosero-Bixby & William H. Dow, *Exploring Why Costa Rica Outperforms the United States in Life Expectancy: A Tale of Two Inequality Gradients*, PNAS (Jan. 4, 2016), https://www.pnas.org/doi/10.1073/pnas.1521917112.

Costa Rica's population is a little over 5 million people.[959] The United States, on the other hand, has a population of approximately 332,000,000 people.[960] On a smaller population, it is likely universal healthcare would be easier to achieve as a smaller base of citizens would need coverage.[961]

With these differences in mind, there are a few things worth noting. This paper is not calling for the United States to implement a universal healthcare system. One, while Costa Rica is close to a universal system, they still have private healthcare. Two, this paper is also not asking for the U.S. to upheave its system for Costa Rica's. This paper is simply proposing that the United States learn from Costa Rica and implement parts of its system into its own. Three, despite how different Costa Rica and the U.S. are, they actually have much in common.[962] The United States already has community health workers (CHWs) who hold some similarities to Costa Rica's *EBAIS* teams.[963] Both also share the common challenge of increasing burdens of noncommunicable diseases that both have to start addressing.[964] Furthermore, many of the solutions that Costa Rica has implemented over the years, specifically using CHWs to support its primary healthcare services, could have relevance in the U.S.'s own primary healthcare system, empanelment, advanced electronic health records, and data use.[965] Learning from Costa Rica could help facilitate the delivery of comprehensive care to patients, even in rural settings.[966] Also, Costa Rica's own efforts show ongoing improvements are necessary to support complex process changes, including improving the U.S.'s own primary healthcare system.[967] Knowing all of this, the current status of the U.S.'s own community healthcare workers will now be addressed to determine if the U.S. can take the steps to reflect Costa Rica's *EBAIS* teams and reduce the health inequalities facing Black Americans.

V. PUSHING ONE STEP FURTHER

a. The United States and CHWs

The term "community healthcare worker" encompasses an assortment of community health aides who are selected, trained, and work in communities in which they are from.[968] Community health workers (CHWs) are part of what are usually called community-based integrated health

[959] Baker & Gallicchio, *supra* note 890, at 110.
[960] *U.S. Population*, *supra* note 957.
[961] Baker & Gallicchio, *supra* note 890, at 110.
[962] *Lessons from Costa Rica*, *supra* note 873.
[963] *See id*.
[964] *Id.*
[965] *Id.*
[966] *Id.*
[967] *Lessons from Costa Rica*, *supra* note 873.
[968] Uta Lehmann & David Sanders, *Community Health Workers: What Do We Know About Them? The State of the Evidence on Programmes, Activities, Costs and Impact on Health Outcomes of Using Community Health Workers*, WORLD HEALTH ORG. (July 31, 2013), https://www.who.int/hrh/documents/community_health_workers.pdf.

teams (CIHTs). CHWs as well as CIHTs can play an important role in improving the quality and value of healthcare.[969] Their main role is to help serve underserved communities.

CIHTs in the U.S. may include clinicians, behavioral health specialists, social workers, and other related health professionals.[970] CIHTs can provide health coaching to patients to help manage medical conditions as well as address problems facing disadvantaged populations.[971] Because CIHTs include those who have expertise in addressing patient health, they are able to quickly and efficiently respond to challenges that face disadvantaged populations.[972] They are also able to extend outreach to vulnerable patients for a number of needs. Most importantly, CIHTs can use data to identify high-risk individuals, educate individuals about public health risks, identify preventative steps, and connect them with healthcare providers.[973] CIHTs were actually very important in the U.S. when it came to COVID-19.[974] CIHTs can be incredibly useful in that they have extensive data from various data platforms on the populations they serve.[975] They also have the capacity to develop predictive models of patient health risks using data mining, machine learning, and statistics.[976] CIHTs gain a lot of knowledge through serving underserved communities so they can know how best to treat them as well as share with community leaders what they observe.[977] Research has shown that CIHTs can be *incredibly* useful when it comes to improving the health and well-being of disadvantaged groups.[978]

The key to the success within CIHTs are CHWs. CHWs are a part of CIHTs as they work within them.[979] The community health worker model is designed to amend the problem of limited resources and inadequate service providers by building productive relationships.[980] They serve as a bridge between patients and medical health, as well as behavioral health and social services by aiding patients in navigating different forms of healthcare.[981] Furthermore, they attend to relationships between them and members of clinical teams assigned to provide health care to those patients and other service providers.[982] As stated above, the term CHW is an all-encompassing term, as they are made up of multiple individuals who share characteristics with the patients they

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[969] Adrienne Lapidos et al., *Realizing the Value of Community Health Workers: New Opportunities for Sustainable Financing, New England Journal of Medicine*, 380 NEW ENG. J. OF MED. 1990, 1990 (2019).
[970] Jessica Mantel, *Leveraging Community Based-Integrated Health Teams to Meet the Needs of Vulnerable Populations in Times of Crisis*, 30 ANNALS OF HEALTH L. AND LIFE SCI. 133, 135 (2021).
[971] *Id.*
[972] *Id.*
[973] *Id.*
[974] *See id.* at 138-41.
[975] *Id.* at 137.
[976] *Id*.
[977] *Id*. at 148.
[978] *Id*. at 143.
[979] *Id*. at 134-35.
[980] Richard C. Boldt & Eleanor T. Chung, *Community Health Workers and Behavioral Health Care*, 23 J. OF HEALTH CARE L. AND POL., May 4, 2020, at 1, 1.
[981] Mantel, *supra* note 970, at 134-35.
[982] Boldt & Chung, *supra* note 980, at 2.

serve.[983] They are sometimes called "patient navigators" or "peer support workers".[984] CHWs have been around since the middle of the twentieth century and there are well over 120,000 in the U.S.[985] For the most part, CHWs provide peer relationships rather than clinical expertise.[986] They are mostly there to build relationships between patients and professionals and teach patients about preventative care; however, some do provide primary care and other healthcare interventions.[987] Nonetheless, when used effectively, they can be essential to providing better healthcare outcomes.[988]

When looking at CHWs and CIHTs, the U.S. seems to have more in common with Costa Rica than one realizes. One of the main differences, however, is that Costa Rica's own CHWs are integral to the success of their system.[989] CHWs are not at the forefront in the U.S., even though they have tons of potential. This is often a problem for CHWs across the globe.[990] Costa Rica's *EBAIS* teams can be classified as advanced CHWs.[991] The U.S., like Costa Rica, should be pushing for this potential. The ability of CIHTs to data mine, create patient models, etc., already shows the potential to become similar to Costa Rica's ATAPs. Yet, like anything in this world, CHWs/CIHTs have limitations and the U.S. remains elusive to the success of CHWs because of these limits.

There are a couple of limitations for CHWs including: 1) funding and 2) lack of training. However, these are not mutually exclusive of each other. If one problem is solved, then the rest could follow. As has already been established, CIHTs are well trained whereas the CHWs who often work within these teams are not. Key to Costa Rica's success is that their *EBAIS* teams are very well trained.[992] CHWs within the U.S. often are not implemented the way they should be. One reason for that is that CHWs do not have proper training or guidelines for what their job is.[993] A CHW's training will revolve around local and state legislation, so they will be subject to whatever funding, training, and certification schemes there are available.[994] Some CHWs will receive training that keeps them at a community level and unable to integrate into clinical care teams.[995] CHWs often perform tasks they are not suited for or they lack adequate supervision for the tasks they are assigned to do.[996] Many CHW initiatives experience high levels of turnover and burnout very quickly because of this.[997] Additionally, this can lead to costly operating issues and

[983] *Id*.
[984] *Id*.
[985] *Id*. at 3.
[986] *Id*.
[987] *Id*. at 4.
[988] *See* Boldt & Chung, *supra* note 980; *See also* Lapidos, *supra* note 969.
[989] *See Lessons from Costa Rica*, *supra* note 873.
[990] Lehmann & Sanders, *supra* note 968, at v.
[991] *Lessons from Costa Rica*, *supra* note 873.
[992] *Id.*
[993] Boldt & Chung, *supra* note 980, at 12.
[994] *Id.* at 14.
[995] *Id.* at 10.
[996] *Id.* at 11.
[997] Boldt & Chung, *supra* note 980, at 12.

the need for more funding.[998] Another problem with training is that many CHWs are not even exposed to healthcare professionals/providers.[999] In Costa Rica, healthcare providers are a part of the *EBAIS* teams, but in the U.S., oftentimes healthcare professionals will not even meet with CHWs, so they then refuse to work with them because of this lack of exposure.[1000] Therefore, they do not see the value in them, and that ends up leading to them being less willing to fund training programs that CHWs need.[1001] In order for CHWs to succeed, training is absolutely necessary.

The biggest issue for CHWs is a lack of funding.[1002] In order for CHWs to have a long-standing impact, proper funding is required.[1003] Right now, many CHW models rely on grant funding which is often sparse and unreliable.[1004] The widespread adoption of CHWs and CIHTs remains ambiguous because organizations do not see their value, they require upfront costs, and organizations do not know what long-term stable financing will look like for CHWs.[1005] Establishing training programs for CHWs requires time and money, but some organizations find a lack of evidence for their effectiveness and cost-effectiveness (even though there *is* evidence).[1006] Because of this, organizations do not find it feasible to invest in these initiatives or to find out how effective they could be.[1007] When comparing the populations of Costa Rica versus the United States, it is understandable that establishing community-oriented healthcare in almost three-quarters of the country is more feasible there than in the United States. However, the U.S. is a developed country with a healthcare system that has seen many changes, so funding is not impossible.

The key to implementing improved CHW programs is to solve funding issues. In doing this, the challenge of proper training could also be addressed. One of the most impressive aspects of Costa Rica's system is that they were able to implement it using a small amount of their GDP.[1008] Costa Rica puts approximately $61.8 billion USD towards healthcare, accounting for just 7.56% of their gross domestic product (GDP).[1009] As stated earlier, the U.S. spends more on healthcare than any other high-income country in the world, yet has some of the worst health outcomes.[1010] As of 2020, U.S. healthcare spending actually grew 9.7% reaching $4.1 trillion dollars.[1011] This

[998] *Id.*
[999] *Id.* at 11.
[1000] *Id.*
[1001] *Id.*
[1002] Boldt & Chung, *supra* note 980, at 12; Lapidos, *supra* note 969, at 1991.
[1003] Boldt & Chung, *supra* note 980, at 12.
[1004] *Id.*
[1005] Mantel, *supra* note 970, at 151.
[1006] Lapidos, *supra* note 969, at 1991.
[1007] *Id.*
[1008] *See Costa Rica: Summary*, *supra* note 894.
[1009] *Id.*
[1010] Amin, *supra* note 858, at 9.
[1011] *National Health and Expenditure Data: Historical*, CMS, https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical (last modified Dec. 15, 2021).

spending accounts for 19.7% of the nation's GDP.[1012] While the U.S. does have a much larger population than Costa Rica, it spends far more money on healthcare than anyone in the country, yet Costa Rica's health demographics are very close to the U.S.'s, and its life expectancy is also higher.

Costa Rica was able to completely change its system using far less money than the U.S. uses already. This alludes to the reasoning that it is not that the U.S. cannot fund CHWs, but rather they have not been given the chance to test their effectiveness. However, funding may no longer be an excuse as of recent years.[1013] There has been a move in the U.S. towards payment structures that feature risk sharing, value-based purchasing, and models such as accountable care organizations that would be able to finance CHW programs and determine their effectiveness.[1014] With these new payment structures and stable funding, CHW programs could improve care while accelerating research to determine their most effective use.[1015] CHWs could then receive proper training and certification to build successful community healthcare teams.

As can be seen, the U.S. already has the tools to create a subset of healthcare that reflects that of Costa Rica. Like Costa Rica, it needs to utilize its CHWs, train them, set up a model, and place them in disadvantaged communities to better combat health concerns.

b. Can We Use CHWs to Improve the Health of Black Americans?

The short answer that this paper proposes is yes. Yes, CHWs could very well improve the health inequalities of Black Americans if the U.S. not only follows what Costa Rica has done but also creates proper funding for them. In laying out the details of Costa Rica's system, the U.S.'s system, what CHWs can do, as well as their limitations, a new model for CHWs could be created. One possible solution could be where they become an integral part like in Costa Rica rather than just an "option". There are a few implementations the U.S. could make, as seen in Costa Rica, that could be very beneficial to Black Americans.

One would be to create a set group of CHWs/CIHTs and who would be put on each team. Costa Rica's *EBAIS* teams consist of a doctor, nurse assistant, medical clerk, and assistant technician.[1016] The U.S. does not need to adopt this structure specifically, but creating teams with a variety of medical knowledge may be the most efficient strategy to make effective health outcomes. It has already been established that CIHTs have various medical professionals within them, but a

[1012] *Id.*
[1013] Lapidos, *supra* note 969, at 1991.
[1014] *Id.*
[1015] *Id.*
[1016] *Lessons from Costa Rica*, *supra* note 873.

standard could be set for a baseline of who is needed within each team. It seems that a balance of health professionals and community understanding creates a successful and effective balance.[1017]

Another beneficial implementation would be to establish a priority system here in the United States. Costa Rica does not send its *EBAIS* teams to every house every day. It has a system where those who have higher priority get more visits. The statistics that have been provided in this paper show that Black Americans have far more health concerns than their counterparts of other races. Black Americans are dying of diseases that are completely preventable when given access to proper care. They are also dying at a concerning rate. Putting them as a number one priority and affording them more visits a year could provide them with access that could make a significant difference. CHWs and CIHTs are here to help prevent diseases and treat disadvantaged communities. By prioritizing those who need attention most, CHWs could help teach Black communities how to prevent certain diseases while building relationships with healthcare providers.

In improving the funding and training for CHWs here in the United States while implementing some of the tactics that have been shown successful in Costa Rica, the U.S. healthcare system could become increasingly successful. Some of those tactics include setting up strategic teams of healthcare professionals and clinicians, creating priority systems, AND increasing communication in rural areas. Specifically, these tactics could improve the health outcomes of Black Americans.

VI. CONCLUSION

Overall, the United States could learn a lesson from Costa Rica's community-oriented healthcare system. While Costa Rica has its own limitations, it is a country that has, nonetheless, seen tremendous improvements to the health outcomes of its citizens in a short amount of time. Not only does it spend far less of its GDP on healthcare than the U.S. and its health demographics are also not far behind that of the United States, but it has a higher life expectancy. As this paper has shown, the health of Black Americans remains a considerable concern that has to be addressed. Black people are living and dying from diseases that are completely preventable, yet they cannot acquire the access they need. The health system of the U.S., specifically CHWs, should take steps towards proper funding, training, and testing of CHWs. Furthermore, steps should be taken to have CHWs here in the U.S. reflect what has been successful in Costa Rica with its *EBAIS* teams. In helping underserved communities gain access to healthcare on the community level, we could see an improvement in the health outcomes of Black Americans.

[1017] *See* Boldt & Chung, *supra* note 980; *See* Mantel, *supra* note 970.

Federal Right to be Forgotten for Social Media Posts Made While a Person Was a Minor

Shannon Brophy

ABSTRACT

Social media is becoming an increasingly large part of people's lives. Most people are active on at least one social media platform and each day an increasing number of people are joining them, particularly children. An emerging issue in today's society is people's past social media posts coming back to haunt them. The transition between childhood and adulthood is a time of significant transformation. Most people would probably agree that they would not want something that they posted when they were a minor to come back and be a representation of who they are as an adult.

Perhaps the best way to deal with the emerging issue of people's past social media posts potentially coming back to haunt them is to enact a right to be forgotten for social media posts made specifically when someone was a minor. This way, social media posts that a person made when he/she was a minor could be erased and, as the name suggests, forgotten. The European Union ("EU") has attempted to tackle issues like that through its General Data Protection Regulation, which deals with a right of erasure (aka right to be forgotten), but it does not specifically cover regulation of social media posts made while a person was a minor. In the United States, California has taken limited steps to address the issue by enacting an Online Eraser law, but the United States has yet to do so on a national level.

There is an argument that people should be held accountable for their actions or social media posts and creating such a law might let them off the hook. However, it seems overly harsh to judge the type of person someone is as an adult based on the social media posts he/she made when he/she was a minor. With the proposed law, minors would be able to post more freely and/or would not have to worry about their posts potentially affecting their lives further down the road when they are adults. Thus, although there may be some costs with creating a federal right to be forgotten for social media posts made while a person was a minor, there would be some enormous benefits that could have positive effects on society and can be seen as a necessity in today's increasingly social media centric-world.

INTRODUCTION

While we have many laws in the United States, we have relatively few when it comes to privacy on the Internet and social media. As social media continues to become an increasingly large presence in people's lives, there is a growing concern over what, if anything, should be protected and/or how such protections can and should be provided. When specifically talking about minors, there are some laws such as the Children's Online Privacy Protection Act ("COPPA") that deal with companies not being able to collect their personal information, but none specifically address social media posts made when someone was a minor.[1018]

Suppose a young girl made social media posts when she was thirteen about how much she hates males and that she considers them an inferior gender all because she had a fight with her brother. Years later when she was in her thirties and was running for political office, the opposition dug up those past posts made while she was a minor and used them against her to argue that she was sexist. It seems a bit unfair that those posts made during her unwise teenage years should be able to come back and haunt her. Creating a national right to be forgotten in the United States for social media posts made when someone was a minor can help address concerns like that.

The European Union is a step ahead of the United States and has already recognized a right to be forgotten. It recognized such a right when it implemented Directive 95/49/EC back in 1995 and then it broadened the scope of the right to be forgotten and made it a fundamental right when its General Data Protection Regulation took effect in May 2018.[1019] However, as referenced earlier, the United States has not recognized a right to be forgotten on a national level. It has attempted to protect children by creating COPPA, but that Act is about trying to prevent children under the age of thirteen from giving their personally identifiable information to commercial websites and not about online safety for minors.[1020] The closest the United States has come to having a right to be forgotten is when California created and enacted its own Online Eraser law in 2015.[1021]

There are some concerns over whether instituting a federal right to be forgotten in the United States can and/or should be done. Some critics feel that a federal right to be forgotten would directly conflict with the First Amendment.[1022] Other people argue that such a law would allow

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[1018] Larry Magid, *FTC Clarifies Children's Online Privacy Law (COPPA)*, FORBES (Apr. 25, 2013), https://www.forbes.com/sites/larrymagid/2013/04/25/ftc-clarifies-childrens-online-privacy-law-coppa/#7e4c18bf4771.

[1019] *The Right to Erasure or Right to Be Forgotten Under the GDPR Explained and Visualized*, I-SCOOP, https://www.i-scoop.eu/gdpr/right-erasure-right-forgotten-gdpr/ [hereinafter *Explained and Visualized*].

[1020] Magid, *supra* note 1018.

[1021] Shaudee Dehghan, *How Does California's Erasure Law Stack Up Against the EU's Right to Be Forgotten*, INT'L ASS'N OF PRIVACY PROFS. (Apr. 17, 2018), https://iapp.org/news/a/how-does-californias-erasure-law-stack-up-against-the-eus-right-to-be-forgotten/.

[1022] Chelsea E. Carbone, *To Be or Not to Be Forgotten: Balancing the Right to Know with the Right to Privacy in the Digital Age*, 22 VA. J. SOC. POL'Y & L. 525, 557 (2015).

people to create a distorted view of themselves. However, the proposed law would not be as detrimental and dangerous as First Amendment proponents fear because it would be limited in scope. Also, people already create a distorted image of themselves by choosing what they share on social media in the first place.[1023]

Having a federal right to be forgotten in the United States for social media posts made while someone was a minor offers a lot of benefits. It would provide protection to individuals so that their old social media posts made while they were minors could not come back to haunt them, thereby giving them a chance at rehabilitation. It would create uniformity in terms of enforceability, which individuals and businesses/websites would benefit from. Moreover, a right to be forgotten already exists in the United States in other areas of law, so creating one for social media posts made while someone was a minor is not too outlandish.

As social media is becoming an increasingly large presence in people's lives, especially children, there are some particularly concerning issues that are emerging and those will be addressed in Part I of this article. Part II of this article discusses existing laws that deal with the right to be forgotten. While there are specific laws in Europe that deal with that right, the United States has been more apprehensive about embracing and adopting the concept of a right to be forgotten. Part III of this article will address some concerns that have been raised about creating a federal right to be forgotten in the United States but also why, despite those concerns, a federal right to be forgotten for social media posts made while someone was a minor should still be created. Part IV will talk about the benefits of having such a law in the United States and why one should be implemented.

I. BACKGROUND: EMERGING ISSUES

Social media in its current form did not exist when the Framers wrote the Constitution. However, they did consider communications between people and/or the spreading of ideas as evidenced by the creation of the First and Fourth Amendments. The First Amendment deals with freedom of speech and the Fourth Amendment deals with the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.[1024] Social media platforms are really just a newer, more technological way to facilitate the communication of ideas. People use social media today for many different reasons. Some of the uses include to connecting with friends and/or family, getting the news, expressing views about certain issues, or just having fun. Today most people, especially children, are active on at least one social media platform whether it be Facebook, Instagram, Twitter, Snapchat, or a different one. With social media's increasing presence in our lives and society as a whole, we need to take a hard look at what, if anything, needs to be done to protect ourselves and children in particular.

[1023] *Id.* at 558.
[1024] U.S. CONST. amends. I, IV.

A. Growth of Social Media

Communication between people is nothing new and has been a vital element of every society. Yet, the forms of communication have changed and evolved over the years. The Internet and social media are recent extensions of that evolution. On a global level, an estimated 42.3% of people use the Internet.[1025] There are a lot of positive aspects of the Internet. For example, it has enabled people to be able to connect with others from around the world in a way that was not possible before. It has also allowed people to be exposed to cultures and/or ideas that they may not have been exposed to if it were not for the Internet.

However, not every aspect of the Internet can be considered positive. One of the factors to consider is that once a person puts something on the Internet, it tends to be out there forever. That is especially dangerous because what a person posts on the Internet, particularity on social media platforms, can have significant effects on a person in his/her personal life and/or professional life.[1026] For example, recall the scenario at the beginning of the paper about the girl who made anti-male posts when she was thirteen and then those posts were used against her when she ran for political office in her thirties.

In the 1990s, the Internet really started to gain widespread use. As it became more user-friendly and more accessible, it started to become a staple in a lot of households in the United States. In 2013, fifty-seven percent of children between the ages of three and seventeen used the Internet at home, whereas back in 1997, only eleven percent did.[1027] In 1984, fifteen percent of children had a computer at home, but by 2013, seventy-nine percent did.[1028] With the growth of the Internet came the emergence and growth of social media. As of January 2018, about seventy-three percent of people use more than one type of social media platform, the average American uses three, and, as you may expect, younger people tend to use even more social media platforms.[1029] The development of smartphones has also helped to increase the use of social media by enabling even more people to be on social media, and on a more constant basis. As of 2018, ninety-five percent of children between the ages of thirteen and seventeen report they have a smartphone or access to one, and forty-five percent of them say that they are online on a near-constant basis.[1030] As the amount of people, especially children, on social media continues to grow and the amount of time that they spend on those platforms keeps increasing, society is likely to encounter new effects, positive and negative, that it's never had to deal with before. For example,

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[1025] Carbone, *supra* note 1022, at 530.
[1026] *Id.* at 531.
[1027] *Home Computer Access and Internet Use*, CHILD TRENDS DATABANK, (2015), https://www.childtrends.org/?indicators=home-computer-access.
[1028] *Id.*
[1029] Aaron Smith & Monica Anderson, *Social Media Use in 2018*, PEW RES. CTR. (Mar. 1, 2018), http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/.
[1030] Monica Anderson & Jingjing Jiang, *Teens, Social Media & Technology 2018*, PEW RES. CTR. (May 31, 2018), http://www.pewinternet.org/2018/05/31/teens-social-media-technology-2018/.

people's past posts coming back to haunt them was not something that was a consideration back in the 1980s, let alone a possibility. Social media didn't even exist back then. Creating some laws to deal with potential issues that may, and most likely will, arise is becoming an increasingly important and urgent matter, especially for the people who may be affected.

B. Uncharted Territory – New Considerations in the Age of Social Media

A major concern when it comes to social media nowadays is the amount of information that people share on social media platforms. The frequency of how often people post has increased and the age at which people start sharing on social media keeps becoming younger and younger.[1031] Those two factors, when put together, make a dangerous combination. For example, minors do not have the intellectual ability to assess the potential long-term effects or consequences of what they post, which can lead to some idiotic postings in hindsight and can be pretty numerous given the rate at which people are posting on social media.

There are critics who say that this is not that big of a concern because if everyone is oversharing on social media, then it is a level playing field and therefore there is not much harm. However, that is incorrect for a few reasons. First, minors cannot be held to the same level as adults when it comes to social media posts because their brains are not at the same level of development.[1032] Also, even though minors are mostly at the same level developmentally as each other, society should strive to protect children from themselves, especially because they are not capable of being fully aware of what they are doing. Lastly, even if everyone is on the same level when it comes to oversharing or embarrassing themselves on social media, that does not mean that that is the level that society wants to be on. Society may want to hold itself to a higher level than that. For example, consider how society's view on smoking has changed over the years. The idea used to be that smoking could not be that bad for you because everyone was doing it. However, as time went on society decided that it wanted and/or needed to address the issue and now there are laws in effect that ban smoking in a lot of places. There are also smoking laws specifically aimed at minors making it illegal for them to smoke cigarettes and there is even a growing trend of states moving the legal age up from eighteen or nineteen to twenty-one.[1033] The argument that making embarrassing posts on social media is not that big of an issue because it happens to everyone, especially when they are young, is a cop-out.

[1031] Smith & Anderson, *supra* note 1029.
[1032] Sara B. Johnson, Robert W. Blum & Jay N. Giedd, *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. OF ADOLESCENT HEALTH 216, 216 (Sept. 2009), https://www.jahonline.org/article/S1054-139X(09)00251-1/fulltext.
[1033] Jenni Bergal*, Local Governments Aren't Waiting for States to Raise Smoking Age*, PEW (Aug. 29, 2018), https://www.pewtrusts.org/research-and-analysis/blogs/stateline/2018/08/29/local-governments-arent-waiting-for-states-to-raise-smoking-age.

The people who are now becoming adults are the ones who grew up with social media, which is something that society has not really experienced before. More or less people's entire lives have been documented on social media and someone is able to go back years and see what a person posted on social media. The ability to do that is creating issues that have never had to be dealt with before and it is making life even more complicated than it was before. An emerging reality in today's world is that old social media posts can threaten and/or impact things that societies typically value and strive to protect, such as rehabilitation, reputation, and identity.[1034] For example, during the 2018 Major League Baseball All-Star Game some old social media posts that player Josh Hader made back in 2011 and 2012, when he was seventeen years old, surfaced, and in them he used homophobic and racial language.[1035] Hader stated that he made those posts when he was a child and they do not reflect who he is or what he believes today.[1036] The point is that Hader suffered damage, at least to his reputation, because the social media posts he made when he was a minor were still on a social media platform.

For people who grew up with social media, posting on at least one social media platform is the norm and sometimes they do not think of the potential consequences of what they post. For example, as this new generation (who grew up having social media) starts having children, they are often documenting everything about their pregnancy and new child on social media platforms. In the present moment, that might seem okay and as a fun and easy way to connect with people and share experiences, but what happens when that child grows up? The parents probably did not think that far down the road when they were posting pictures of the child's birth or thoughts about how terrible the child was acting.

Thanks to their parents' actions, children who are being born nowadays have a social media presence before they can even consent to having one. For example, back in 2015, Facebook introduced a feature called Scrapbook that lets parents tag their child in pictures even though the child does not personally have a Facebook account.[1037] By allowing parents to tag their children in photos on Facebook, it essentially links a child to all of the photos posted of him/her while he/she was growing up and instantly gives the child an extensive social media presence.[1038] Because of that, the child will have had a large social media presence before he/she was even able to post anything for himself/herself. While it is currently possible to delete social media posts, the process can be cumbersome because many social media platforms do not allow you to delete posts

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[1034] Meg Leta Ambrose, *It's About Time: Privacy, Information Life Cycles, and the Right to Be Forgotten*, 16 STAN. TECH. L. REV. 101, 106 (2013), http://stlr.stanford.edu/pdf/mostlitigatedpatents.pdf.
[1035] Adam Kilgore, *Ugly Tweets from Brewers' Josh Hader Surface During MLB All-Star Game*, WASH. POST (July 18, 2018), https://www.washingtonpost.com/sports/ugly-tweets-from-brewers-josh-hader-surface-during-mlb-all-star-game/2018/07/18/7de58772-8a42-11e8-a345-a1bf7847b375_story.html?noredirect=on&utm_term=.3cf089ee1dcc.
[1036] *Id.*
[1037] Josh Constine, *Facebook's New Photo "Scrapbook" Lets Parents Give Kids an Official Presence*, TECH CRUNCH (Mar. 31, 2015), https://techcrunch.com/2015/03/31/step-1-identify-baby-photo-step-2-hide-baby-photos/.
[1038] *Id.*

in bulk and require you to delete them one by one.[1039] For instance, if you have a social media presence that spans five years and you post once a day, that means you will have 1,825 posts to comb through if you want to try and clean up your social media account, which will probably take a long time. There are some applications that exist to help you delete old posts in bulk, however, they tend to cost money and involve giving a third party access to information, which seems counterintuitive since the whole idea behind deleting old posts is to limit the audience of who can see them.[1040]

Moreover, parents who are currently posting about their children are likely not thinking about whether their child would approve of what they post and/or if the child would want that on social media for people to see. Issues will start to arise when that child grows up and some of those prior posts from his/her parents start affecting his/her life. For example, a teenager probably would not want pictures from his/her first bath or any other pictures that he/she would deem embarrassing on social media. But yet, even though the child himself/herself may not have a social media account, stuff like that would be still out there on the World Wide Web for people to see, thanks to his/her parents. Parents may be doing things that will have severe consequences for their children later on in life and could potentially also cause psychological issues for their children. For example, posts that parents make could lead to or cause a child to be bullied in school, or worse. In today's world where it is already hard enough to grow up and navigate the teen years, parents should not make life harder for their child, even if it is inadvertently done. Therefore, it seems logical to give people a right to have social media posts from when they were minors taken down, erased, and essentially forgotten.

There is also an emerging issue concerning what minors themselves are actually posting on their social media accounts. Scientific evidence shows that "adolescence is a period of continued brain growth and change" and that the frontal lobes of the brain, which control things such as impulse control and planning, are among the last areas of the brain to mature.[1041] With that in mind, when minors make social media posts, they certainly are not fully capable of realizing how a post can and may impact their lives in the future. Biologically, they are predisposed not to be able to. Typically, minors are only capable of focusing on the present moment in time and are unable to think of the big picture. Therefore, it is best to draw a distinction between social media posts made when someone was a minor as opposed to social media posts when the person was an adult. The law this paper will propose, like most laws in the United States, would recognize a minor as someone who is younger than eighteen years old. There needs to be a line drawn somewhere and since eighteen is the recognized age of majority in most states, that is what it would be for a right to be forgotten in the United States too.[1042]

[1039] Whitson Gordon, *How to Erase Your Embarrassing Old Facebook and Twitter Posts in One Fell Swoop*, POPULAR SCI. (July 26, 2018), https://www.popsci.com/erase-facebook-twitter-posts#page-3.
[1040] *Id.*
[1041] Johnson et al., *supra* note 1032.
[1042] *Determining the Legal Age to Consent to Research. It's Not Always 18!*, WASH. UNIV. IN ST. LOUIS (July 26,

It is possible for a person's brain to develop faster than normal. However, even when minors' brains are developing and their cognitive capacities become close to that of adults, their judgments and actual decisions will likely be different than those of adults because of minors' psychosocial immaturity.[1043] Cognitive capacities are what shape the process of decision-making whereas psychosocial immaturity affects decision-making outcomes, such as what values and preferences minors consider when they are making choices.[1044] Some of the psychosocial factors that are most relevant when trying to understand differences in judgment and decision-making between adults and minors are (a) susceptibility to peer influence, (b) attitudes towards and perceptions of risk, (c) future orientation, and (d) the capacity for self-management.[1045]

Also, peer pressure and peer influence are very important factors to consider when discussing social media. As a society, we often act in ways that we think our peers would approve of or in ways that will help us fit in or avoid being rejected.[1046] Social media has taken that concept to a heightened level. People, especially minors, often make social media posts with the intention of getting as many likes, views, shares, etc. as possible. Minors often act in ways or make posts that they think their peers will approve of, even if that goes against how they personally might feel.[1047] As was previously discussed, minors' brains are not fully developed and their desire for peer approval and the fear of rejection or fear of being ostracized greatly affects their choices in life, including and especially what they post on social media.[1048] Since minors may not be posting based on how they actually think or feel and instead may just be posting to get their peers' acceptance and/or approval, we should not forever hold people accountable for the posts that they made when they were in those formative, minor years. Instead, there should be a law that could grant them a right to have those social media posts that were made while they were minors be forgotten.

Additionally, studies have shown that adults and minors tend to think very differently when it comes to the consequences of their posts and/or actions. Minors tend to think more about what the short-term consequences of certain actions and/or posts would be and think very little about what the long-term consequences could be.[1049] On the other hand, adults tend to give more weight to long-term risks and benefits than short-term ones.[1050] Overall, scientific studies have found that,

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2012), https://hrpo.wustl.edu/wp-content/uploads/2015/01/5-Determining-Legal-Age-to-Consent.pdf.
[1043] Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003), http://dx.doi.org/10.1037/0003-066X.58.12.1009.
[1044] *Id.*
[1045] *Id.*
[1046] *Id.*
[1047] *Id.* at 1013.
[1048] *Id.* at 1012.
[1049] *Id.* at 1013.
[1050] *Id.* at 1012.

biologically, minors are predisposed to have greater difficulty regulating their moods, impulses, and behaviors than adults do.[1051] Those factors contribute to the conclusion that minors have a diminished decision-making capability because they are more susceptible to influence, less future-oriented, and less able to manage their impulses and behavior.[1052] Since minors are so much less capable of making well-informed decisions when it comes to what they post on social media, it makes sense to give them a level of protection and enact a federal right to be forgotten for social media posts made while a person was a minor.

II. EXISTING LAW DEALING WITH A RIGHT TO BE FORGOTTEN/PRIVACY LAWS

As technology becomes an increasingly present and central part of society, new issues emerge, and how to address those issues in regard to privacy, data protection, etc. becomes increasingly important. Europe has typically been more aggressive and proactive than the United States when it comes to protecting the privacy of its citizens online. The right to be forgotten, which is more or less a right for an individual to have his/her personal data removed from the Internet, is a reflection of that. The European Union believes that a person should have a right to erase certain aspects of his/her past or to have them be forgotten. Thereby indicating that a person should not be held accountable, forever, for everything that he/she has ever done or for everything that he/she has posted online.

The right to be forgotten is a concept that exists over in Europe but is still a somewhat foreign concept in the United States, especially in the social media context. The right was first articulated in the case of *Google Spain SL v. Agencia Española de Protección de Datos*, ("*Google Spain*"), in which a Spanish daily newspaper ran two announcements that publicized a real-estate auction and its attachment proceedings to recover social security debt from Mario Costeja González.[1053] Mr. Costeja González asked the newspaper to remove the announcements because they inaccurately reflected his current situation, but it refused.[1054] As a result, he filed a complaint against the newspaper, Google Spain SL, and Google, Inc. stating that the two announcements should be removed because he had settled his debt and thus, the announcements did not give an accurate impression of his current financial status.[1055] The Court of Justice of the European Union ("CJEU") determined that once a person makes a request for information to be taken down because it is either "inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in light of the time that has elapsed", the links related to the person must be removed from

[1051] *Id.* at 1013.
[1052] *Id.*
[1053] Case C-131/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 E.C.R. 317, http://eurlex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0131 [hereinafter *Google Spain*].
[1054] *Id.* ¶ 14.
[1055] *Id.* ¶ 15.

search results.[1056] Thus, the CJEU ordered Google to remove the search results that referenced Mr. Costeja González from its search engine.

The holding in *Google Spain* states that the right to be forgotten is dependent upon whether a person "has a right that the information relating to him personally should, at this point in time, no longer be linked to his name by a list of results displaying following a search made on the basis of his name", as opposed to a finding that the results are prejudicial against the person.[1057] The CJEU also noted that the right to be forgotten for an individual is more important than the general public's interest in being able to find the information on search results and also more important than the search engine operator's economic interest.[1058] Given those holdings, Mr. Costeja González had a right to be forgotten with regard to the announcements because many years had passed since their publication, they were about his private life, and there did not seem to be a public interest in keeping the information accessible.[1059] *Google Spain* set the groundwork for situations that involved a right to be forgotten that followed.

A. In Europe

Historically, Europe has been more concerned with data privacy than the United States. Back in the 1980s, the Organization for Economic Cooperation and Development recommended seven principles to the Council Concerning Guidelines Governing the Protection of Privacy and Trans-Border Flows of Personal Data.[1060] Those principles were notice, purpose, consent, security, disclosure, access, and accountability.[1061] However, the European Commission noticed that data privacy laws varied depending on where in Europe someone was, so it adopted those seven guidelines into the Data Protection Directive, or Directive 95/46/EC, ("the Directive"), thereby creating a binding set of data protection requirements for all Member States of the European Union.[1062] The European Parliament and the Council of the European Union adopted the Directive in October 1995.[1063] The Directive provided a unified framework for the regulation of data protection within all of the European Union's twenty-eight Member States.[1064] It set guidelines for the use and collection of personal data and required all twenty-eight Member States to adopt national provisions pursuant to the Directive.[1065] The Directive was intended to protect the personal

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[1056] *Id.* ¶ 94.
[1057] *Id.* ¶ 96.
[1058] *Id.* ¶ 97.
[1059] *Id.* ¶ 99.
[1060] Nate Lord, *Data Protection 101 – What is the Data Protection Directive? The Predecessor to the GDPR*, DIGITALGUARDIAN.COM (Sept. 12, 2018), https://digitalguardian.com/blog/what-data-protection-directive-predecessor-gdpr.
[1061] *Id.*
[1062] *Id.*
[1063] Carbone, *supra* note 1022, at 532.
[1064] *Id.*
[1065] *Id.*

data of users within the European Union regardless of whether the company and/or website was based in the European Union or just operated within the European Union.[1066]

After the *Google Spain* ruling in 2014, privacy regulators from the EU's twenty-eight Member States met to determine guidelines that data protection authorities in each country had to adopt in order to implement that right to be forgotten.[1067] They sought to build on the Directive that was already in place at the time and they set thirteen factors that search engine operators are required to take into account when analyzing requests for material to be taken down.[1068] Some of those factors include the context in which the information was published, whether the data is relevant, excessive, accurate, or puts the subject at risk, and, importantly, whether the individual is a minor.[1069] By acknowledging being a minor as a factor, the European Union recognizes that when it comes to materials on the Internet, there is a distinction and special consideration given for minors as opposed to adults.

Very recently, the European Union has taken additional steps concerning data privacy in the form of its General Data Protection Regulation, ("GDPR"), which went into effect in May 2018. The GDPR was designed from parts of the Directive and the outcome of *Google Spain*. The GDPR broadened the scope of the right to be forgotten, made it a fundamental right, and required data controllers to allow EU citizens to exercise the right.[1070] It also created more specific data requirements and harder non-compliance and enforcement penalties.[1071] In short, it gave EU citizens greater control over their personal data and also gave them greater recourse if their personal data was misused.[1072]

In Europe, the right to be forgotten acknowledges and gives EU citizens a privacy interest in their own personal information, even in situations where the particular individual is the one who is solely responsible for exposing the information to the Internet.[1073] It is also worth noting that the GDPR refers to the right to be forgotten as the right of erasure in some cases, which contributes to the idea that certain personal data can be erased. Most interestingly, there is a part of the GDPR that specifically states the right to erasure applies "where the data subject has given his or her

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[1066] Lord, *supra* note 1060.
[1067] Patrick Van Eecke, *EU: Update on Google's Right to Be Forgotten*, TECH.'S LEGAL EDGE (June 15, 2014), http://www.technologyslegaledge.com/2014/06/15/eu-update-on-googles-right-to-be-forgotten/.
[1068] Carbone, *supra* note 1022, at 540.
[1069] Carbone, *supra* note 1022, at 540 (citing Art. 29 Working Party, *Guidelines on the Implementation of the Court of Justice of the EU Judgment on "Google Spain and Inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González" C-131/121, 12-20, 14/EN WP 225* (Nov. 26, 2014), http://ec.europa.eu/justice/dataprotection/article-29/documentation/opinion-recommendation/files/20 I 4/wp 225_en.pdf).
[1070] *Explained and Visualized*, *supra* note 1019.
[1071] Lord, *supra* note 1060.
[1072] *Id.*
[1073] Dawinder Sidhu, *Privacy Doesn't Exist in a Vacuum*, U.S. NEWS & WORLD REP. (Dec. 8, 2014), http://www.usnews.com/debate-club/should-there-be-a-right-to-be-forgotten-on-the-internet/privacydoesnt-exist-in-a-vaccum.

consent as a child and is not fully aware of the risks involved by the processing, and later wants to remove such personal data, especially on the internet."[1074] That is likely because, as previously discussed, minors' brains are not fully developed, especially not in the frontal lobes which are in charge of "executive functions" such as planning, judgement, and decision-making.[1075] As a result, minors are likely not thinking about the risks and potential long-term implications of what they post on social media when they do so. That appears to reflect and translate into the idea that Europe acknowledges a right to be forgotten for social media posts made while a person was a minor.

B. In the United States

At first it was thought that the Directive and the *Google Spain* ruling gave citizens of the United States some protection because neither the Directive nor the *Google Spain* ruling expressly stated that the right to be forgotten applied only to EU citizens.[1076] However, when implementation guidelines were established, people started to question whether they indeed granted U.S. citizens some protection and the overall conclusion is that the ruling in *Google Spain* does not extend to and afford protection to U.S. citizens.[1077]

In the United States, there is not a national right to be forgotten (or for erasure) like there is in Europe. The United States does have COPPA, but COPPA is focused more on what website operators and parents can/cannot do as opposed to what minors can/cannot do. According to the Federal Trade Commission, COPPA's main goal is to put parents in control of what information is collected online from their children who are under thirteen.[1078] For example, under COPPA an operator of a commercial website or an online service must "provide direct notice to parents and obtain verifiable parental consent...before collecting personal information online from children."[1079] That appears to imply that parents need to be in control of such decisions because children have limited cognitive abilities and shouldn't be in charge of certain decisions. While COPPA does provide some protections for children in some respects, it does not provide a right of erasure and in fact, back when COPPA was enacted in 1999, Facebook, Twitter, and even MySpace were not yet created.

The closest that the United States has come to creating a law similar to the ones in Europe is in California, which has routinely been the state that has been the most active in protecting the rights and privacy of its residents. In 2015, California enacted its Online Eraser law, which allows minors who are younger than eighteen years old to erase their online content.[1080] In order to comply

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[1074] *Explained and Visualized*, *supra* note 1019.
[1075] Johnson et al., *supra* note 1032.
[1076] Carbone, *supra* note 1022, at 546.
[1077] *Id.*
[1078] Magid, *supra* note 1018.
[1079] *Id.*
[1080] Dehghan, *supra* note 1021.

with the law, the operator of a website, online service, or application must either allow a minor who is a registered user of the platform to remove information that the minor posted or allow that minor to request and obtain removal of that content.[1081] That sounds pretty much like a right to be forgotten, however, that law is only applicable to California residents. Although there is not really any data published yet on the effect of California's Online Eraser law since it is still relatively new, its guidelines are in line with what a federal right to be forgotten for social media posts made while someone was a minor would aim for. Thus, enacting the proposed law with guidelines similar to the ones in California's Online Eraser law would be a good starting point.

III. CONCERNS OVER INSTITUTING A FEDERAL RIGHT TO BE FORGOTTEN

There are quite a few concerns over whether instituting a federal right to be forgotten in general is the right action to take in the United States, let alone instituting one for social media posts made when someone was a minor. There is an argument that such a law is not possible in America because it would go against what the Framers wanted when they wrote the Constitution. Proponents of that argument state that creating a federal law to be forgotten would directly conflict with freedom of speech, which is exactly what the First Amendment aims to protect. Another concern about creating a national right to be forgotten in the United States is that having one will allow people to create a distorted version of reality. The argument is that if a person is allowed to erase things that he/she did or said on social media platforms, then the individual is not showing an accurate portrayal of who he/she is as a person. Is it fair that individuals get to pick and choose what people see about them on the Internet? Some people would probably say no. However, their opinions might change if you tailored the law to specifically address social media posts made when an individual was a minor. The argument for being able to forget and/or essentially forgive social media posts made when an individual was a minor tends to be an easier one to win than if a person did and/or said those same things on social media as an adult.

A. First Amendment

One of the major arguments against granting a federal right to be forgotten in the United States, particularly when it comes to social media, references the First Amendment to the Constitution. People who are against creating such a federal right point to the fact that the First Amendment states that "Congress shall make no law...abridging the freedom of speech, or of the press...."[1082] They feel that a right to be forgotten and freedom of speech cannot coexist. They argue that the First Amendment's protection of free speech does not allow a widespread removal of information and that that is exactly what a federal law granting a right to be forgotten for social media posts made while a person was a minor would do.[1083] They also argue that the First

[1081] Rahul Kapoor, W. Reece Hirsch & Shokoh H. Yaghoubi, *Get to Know California's 'Online Eraser' Law*, NAT'L L. REV. (July 12, 2016), https://www.natlawreview.com/article/get-to-know-california-s-online-eraser-law.
[1082] U.S. CONST. amend. I.
[1083] Carbone, *supra* note 1022, at 556 (citing Moira Paterson, Sur*veillance in Public Places: The Regulatory*

Amendment stands for a right to know information and allowing people to remove posts made while they were minors would negate that.[1084] It is important to recognize that the proposed law would not be as detrimental and dangerous as First Amendment proponents fear because it would be limited in scope to the time when a person is a minor and not capable of recognizing and/or assessing all of the potential ways that a social media post could impact his/her life later on. It would be more of a focused removal than a widespread one, and the removal of posts would only occur if a person chose to enact the law. Additionally, consider this, there are statutes in the United States that allow someone's criminal record to be expunged for various reasons. If the First Amendment's protection of free speech did not allow a widespread removal of information, then those statutes would be held unconstitutional, but they clearly are not, and the expungement of records is a widespread practice across the country. Therefore, the First Amendment does not completely bar the removal of information.

Tied into those First Amendment arguments is also the idea that once information is lawfully in the public domain, the government cannot restrict access to it.[1085] However, the Supreme Court does not necessarily share that same view. The Supreme Court has rejected the idea that the Constitution protects the public domain and makes it untouchable by Congress.[1086] If Congress wanted to, it could create a law that has an impact on the public domain. The Supreme Court also tries to avoid viewing First Amendment issues in terms of a right to access the public domain or public records and it has held that there is not a constitutional right to obtain all information, like all of the information provided by the Freedom of Information Act.[1087] It has held that there are certain things that the general public does not have a right to access and therefore not everything needs to be publicly accessible. Thus, creating a federal right to be forgotten for social media posts made while a person was a minor is not barred by the First Amendment.

Overall, the First Amendment may potentially conflict with a right to be forgotten, but it does not completely bar the proposed law. The risks and benefits of each should be considered, weighed against each other, and/or balanced. It is worth noting that freedom of speech is a constitutional right whereas a federal law granting a right to be forgotten for social media posts made while a person was a minor would be a statutory right, and a constitutional right does outrank a statutory right. However, in today's increasingly digital, social media-centric world, creating a

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Dilemma, in EMERGING CHALLENGES IN PRIVACY LAW: COMP. PERSP. 201, 212-17 (Normann Witzleb et al. eds., 2014)).

[1084] Carbone, *supra* note 1022, at 557.

[1085] Edward Lee, *The Right to be Forgotten v. Free Speech*, 12 I/S: A J. OF L. & POL'Y FOR THE INFO. SOC'Y 85, 93 (2015), https://kb.osu.edu/bitstream/handle/1811/80043/ISJLP_V12N1_085.pdf.

[1086] *Golan v. Holder*, 565 U.S. 302 (2012) (The Supreme Court held that Congress was allowed to act the way it did when it granted restored copyrights to foreign works that had been in the public domain).

[1087] *McBurney v. Young*, 569 U.S. 221 (2013) (The Supreme Court held that the Virginia Freedom of Information Act, which granted only Virginia citizens access to all public records, did not violate either the Privileges and Immunities Clause of Article IV of the Constitution or the Commerce Clause, and also held that there was no constitutional right to obtain all the information provided by FOIA laws).

federal statute for a right to be forgotten is of very high importance and that should carry some weight.

B. Creating a Distorted View

Some people argue that you should not be able to pick and choose what you want people to know about your past, like when you were a minor, because it does not portray an accurate view of who you are as a human being. They say that creating this distorted view of who someone is can be detrimental to society because you are only getting to see the side of a person that he/she wants you to see.[1088] Judge Richard Posner, (who was a judge on the United States Court of Appeals for the Seventh Circuit until 2017), is one of those people. Although he was not specifically talking about a right to be forgotten, he did state that he believed a right to privacy is better characterized as a right to misrepresent one's self.[1089] Judge Posner analogized privacy to the world of commerce. He said that sellers of goods are not allowed to misrepresent the goods that they are selling and since people sell themselves on a regular basis by deciding what they want society to see and/or know about, misrepresentations that people make about themselves should also not be allowed.[1090] Thus, even though the Restatement (Second) of Torts acknowledges that individuals have some right to privacy in their past and that everyone has some part of his/her life that he/she would not want the public to know about, Judge Posner does not think that people should be able to pick and choose what parts the public can see.[1091]

However, there is a counterargument to Judge Posner's position. The argument is that by posting on social media in the first place, people are already shaping the image of themselves that they want the public to see. When a person posts on social media, he/she is not posting literally everything that he/she is thinking or saying. A person is just posting what he/she wants society to see. It follows that since a person is already creating a distorted image of himself/herself on social media based on what he/she posts, then there is no harm in allowing him/her to remove prior posts that were made when he/she was a minor. Removing posts may alter an image of who someone is to the general public, but since the image was originally not an accurate one, it is just an alteration of an already distorted image. Either way you slice it, if you do or do not allow people to remove social media posts made when they were minors, you are still left with a distorted image of who someone is. Therefore, enacting a federal right to be forgotten for social media posts made while someone was a minor is not what creates a distorted image of who someone is on social media.

Additionally, *The Right to Privacy* by Samuel Warren and eventual Supreme Court Justice Louis Brandeis tends to push back on Justice Posner's argument as well. They state that a person has the right to decide how his/her thoughts are communicated to others and that even if he/she has chosen to express them, he/she still has the power to change how much publicity they should

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[1088] Carbone, *supra* note 1022, at 558.
[1089] Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 395 (1977).
[1090] *Id.* at 399.
[1091] RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977).

get.[1092] Thus, even if a person made a social media post, he/she still has the right to remove it because that person retains the right to determine how much publicity he/she wants the post to receive. Warren and Brandeis felt that an individual has a personal right to privacy which includes expressing his/her thoughts and emotions and controlling the audience of those thoughts and emotions.[1093] It is worth noting that *The Right to Privacy* is considered to be part of the foundation of privacy law in the United States and the ideas mentioned in it are still widely revered today. Therefore, the concerns about people creating a distorted image of themselves on social media are likely not large enough or strong enough to deny the creation of a federal right to be forgotten for social media posts made while someone was a minor, especially considering the standpoint of Warren and Brandeis.

C. Automatically Allows People to be Forgiven

Another argument to consider is that granting a right to be forgotten is actually granting a right to be forgiven for past actions and/or posts, and not everyone agrees that that is a good thing.[1094] For example, if someone made racist or very offensive posts about someone or something when he/she was a minor, but then was able to erase those posts, is that a good thing or should society have a right to see those posts? It is essentially a judgement call and that is where situations can get a little tricky.

When decisions start being made about specific content or types of social media posts, we enter this grey area where it can get difficult to compare and/or distinguish between posts; we start to enter the realm of a standard versus a rule. Standards are often used when the goal is flexibility or individualization in decision-making and rules are often used when the goal is certainty or uniformity in decision-making.[1095] It is hard to determine what type of posts and/or actions someone can be forgiven for and what type of posts and/or actions someone should not be forgiven for, as well as who should be the one to make those decisions. That is precisely why there should be a federal law that grants an individual a right to be forgotten (or forgiven) for social media posts made while he/she was a minor. Since the proposed law would apply equally to everyone, there would not be discrimination based on posts that people consider to be more offensive than others. Having a bright-line rule on the books makes the decision-making process less subjective and easier overall. Thus, the value of having an objective rule instead of making subjective decisions on a case-by-case basis outweighs any concern over the proposed law granting a right to be forgiven.

[1092] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890).
[1093] *Id.*
[1094] Carbone, *supra* note 1022, at 553.
[1095] Pierre Schlag, Rules and Standards, 33 UCLA L. REV. 379, 400 (1985), https://scholar.law.colorado.edu/articles/1034.

Also, while a federal right to be forgotten for social media posts made when someone was a minor would essentially allow people to be forgiven for past posts, the person would need to choose to enact the law for his/her posts. It is important to realize that the demographic covered under the proposed law are minors and that society tends to be more forgiving of minors for their indiscretions, than adults, because of their age. Therefore, although there may be concerns over potentially creating a right to be forgiven, the benefits of creating a federal right to be forgotten for social media posts made while someone was a minor will outweigh the concerns.

IV. A FEDERAL LAW IN THE UNITED STATES WOULD BE IDEAL

While there are concerns about implementing a federal law for a right to be forgotten in the United States, there are also a lot of reasons for why one should be granted, especially when it comes to social media posts made when someone was a minor. I think everyone would agree that when you are a child you tend to do and/or say certain things that you hope people forget either because it was embarrassing, or you are ashamed of what you did and/or said. People are usually afforded that luxury because humans do not have photographic memories and as time goes on, humans tend to forget certain things. However, if what you did and/or said as a child was posted on social media then it is on the Internet for all of eternity and you are not afforded that same luxury. Is that a situation that as a society we want to create? The majority of Americans would probably say no because people tend to evolve from who they were as a child to who they are as an adult. There are many positives from creating a federal right to be forgotten for social media posts made while someone was a minor and they shall be discussed in the following sections.

A. A Federal Right to be Forgotten Would Create Uniformity

Having a right to be forgotten is important to promoting democracy. As more and more people are becoming active on at least one social media platform, the amount of people that would be afforded protection under a federal right to be forgotten is constantly growing. In a study from 2014, sixty-one percent of Americans believe that some version of the right to be forgotten is necessary, although they do not all agree on whom it should apply.[1096] Whether we like it or not, the increasingly digital age that we live in is going to force us to examine the laws that the United States currently has and possibly add to and/or amend them to be more applicable to today's world.[1097]

As was discussed earlier in terms of having a standard versus a rule, creating a federal law would provide uniformity in terms of enforceability. With one law, people all across the country would know what their rights are and/or what protections they are afforded. That would make things very user-friendly and easy to understand. However, the way things are going now, with

[1096] H.O. Maycotte, *America's 'Right to Be Forgotten' Fight Heats Up*, FORBES (Sept. 30, 2014), https://www.forbes.com/sites/homaycotte/2014/09/30/americas-right-to-be-forgotten-fight-heats-up/#ac0aef9198fa.
[1097] *Id.*

California becoming the first state to implement a right to be forgotten for minors, individual states may start to create their own laws about a right to be forgotten for minors and they may all end up being different. Having different specifications for a right to be forgotten depending on which state a person is a resident of would create a headache not only for individuals, but also for businesses/websites and law enforcement. If laws are different depending on which state a person is a resident of, businesses/websites will have to be able to determine and distinguish between residents of one state and residents of another state.[1098] That would add another level of complexity to their operations and would increase their costs. Bigger companies like Google and Facebook would be better able to deal with those issues than smaller companies would. However, as time goes on and factors change, the bigger companies may face difficulties as well. Those burdens are avoidable if there is a uniform right to be forgotten across the country as opposed to on an individualized state level.

Another potential problem if there is not a federal law for a right to be forgotten for social media posts made while an individual was a minor is that each state could create its own law and they each may choose to set different age limits for who can be deemed a minor. That would make a whole different set of issues when it comes to enforcement. Being able to identify the state in which the minor user is located would become vital and studies have shown that determining the city or state of a user is very difficult.[1099] Even Facebook has admitted that there is a possibility of obtaining inaccurate geographic information, which would add additional complications to an already difficult process.[1100] One of the main reasons why the European Commission proposed the Directive back in the day was because it recognized that the data protection rules that existed at the time varied greatly between the Member States and that was a problem because the protections that people had and/or the laws that they had to abide by were different depending on which Member State they were in.[1101] For example, Germany, France, and the United Kingdom all had pretty strong privacy protection laws whereas Greece did not have a data protection law at all.[1102] If a federal law is not created in the United States, then there is a risk of that same lack of uniformity happening in America.

Also, among the laws concerning children, there is not one uniform age that they all use or recognize as the age that constitutes a minor. For example, COPPA applies to children under the

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[1098] James Lee, *SB 568: Does California's Online Eraser Button Protect the Privacy of Minors?*, 48 U.C. DAVIS L. REV. 1173, 1203 (2015), https://lawreview.law.ucdavis.edu/issues/48/3/Note/48-3_Lee.pdf (citing *Nat'l Fed'n of the Blind v. Target Corp.*, 452 F. Supp. 2d 946, 961 (N.D. Cal. 2006)).

[1099] Lee, *supra* note 1098, at 1195 (citing Yuval Shavitt & Noa Zilberman, *A Study of Geolocation Databases* 3 (July 1, 2010) (unpublished manuscript), http://arxiv.org/pdf/1005.5674v3.pdf; *How Accurate Is IP GeoLocation?*, WHATISMYIPADDRESS.COM, http://whatismyipaddress.com/geolocation-accuracy).

[1100] Lee, *supra* note 1090, at 1195 (citing *What Does It Mean if I Don't Recognize a Location in Where You're Logged in Section of My Account?*, FACEBOOK, https://www.facebook.com/help/224047177607864).

[1101] Michael L. Rustad & Sanna Kulevska, *Reconceptualizing the Right to Be Forgotten to Enable Transatlantic Data Flow*, 28 HARV. J.L. & TECH. 349, 359 (2015).

[1102] Rustad & Kulevska, *supra* note 1101, at 359 (citing Ronald J. Mann & Jane K. Winn, ELEC. COMMERCE 187 (1st ed. 2002)).

age of thirteen, European laws typically apply to children aged sixteen and younger, and California's Online Eraser law applies to residents of California who are under the age of eighteen. When talking about a minor in the United States, most laws and people consider a minor to be someone who is younger than eighteen. In the United States, when a person turns eighteen years old he/she is allowed to do many activities that he/she was not able to do before turning that age, such as volunteer for military service, vote, stand trial as an adult, and be considered independent from his/her parents without any intervention of the state.[1103] While it is true that the age to be able to do certain activities, such as getting married, is different among states, every state except Nebraska recognizes the age of majority and the ability to get married without parental consent as eighteen.[1104]

Since the United States appears to recognize eighteen as a big, transformative age, it makes sense to deem a person who is under eighteen years old a minor for purposes of creating a federal right to be forgotten for social media posts made when someone was a minor. It is worth noting that there is a potential for over and/or under-inclusiveness, but that is kind of inevitable. Not every minor would need the protection that a federal right to be forgotten would provide and/or not every person eighteen years old or older has developed enough to have better mental capacity when it comes to decision-making than they did when they were a minor. A person who is technically an adult could still have the mental capacity of a minor. However, the line needs to be drawn somewhere, and limiting the scope to social media posts made when someone was a minor is the best way to do that. Being able to distinguish between posts made when someone was a minor as opposed to an adult outweighs the concerns about potential over and/or underinclusiveness.

Having one set age for who would be deemed a minor in the context of granting a right to be forgotten for social media posts made while the person was a minor would make everyone's lives easier because enforceability and/or protections would not change based on what state a person was a resident of at the time the post was made. Thus, in terms of creating a federal right to be forgotten in the United States for social media posts made when someone was a minor, a person who is younger than eighteen is the limitation that should be used, and that will make enforcement easier and the law more effective.

B. Holding Someone Accountable for Every Single Post that Person Ever Made Can Have Detrimental Effects

Is it really fair to hold someone accountable for everything that the person did and/or said throughout the entire course of his/her life, especially when he/she was a minor and not able to

[1103] Jake Linford, The Kidney Donor Scholarship Act: How College Scholarships Can Provide Financial Incentives for Kidney Donation While Preserving Altruistic Meaning**,** 2 ST. LOUIS U.J. HEALTH L. & POL'Y 265, 318 (2009), https://ir.law.fsu.edu/articles/54.
[1104] Sheri Stritof, *State-By-State Legal Age Marriage Laws*, THE SPRUCE (Oct. 24, 2018), https://www.thespruce.com/legal-age-marriage-laws-by-state-2300971.

fully grasp the potential consequences of his/her actions? People are divided on that question, but California did not seem to think so when it passed its Online Eraser law with the support of both political parties in both houses of the California legislature.[1105] Recall that California's Online Eraser law requires websites to provide people who are eighteen and younger with a process for deleting posted content. Minors must be able to remove or request and obtain removal of content or information that they post on a website and they must receive notice and clear instructions on how to do so.[1106] The proposed law would likely contain a lot of the same guidelines that are in the California law because California's Online Eraser law is pretty straightforward and appears to cover what the proposed law aims for. However, the proposed law would likely not have individuals be responsible or in charge of removing/deleting their own social media posts because, as was mentioned earlier with individuals deleting their own posts, the process could be cumbersome. Having websites or social media platforms do it themselves would be the proposed law's preferred method because they probably have better resources to do so more efficiently. One of the reasons why California enacted its Online Eraser law was because it recognized that college admission offices and future employers often look at applicants' social media pages and tend to profile applicants based on their social media posts.[1107] California did not think it was fair for the past social media posts of its residents to be able to impact their potential future life plans.

As it is becoming increasingly common for people's past social media posts to come back to haunt them, another potential effect of not having a federal right to be forgotten is that a chilling effect might happen. For the subset of minors who are forward-thinking, they may be less likely to post on social media at all if they are concerned that what they post could come back to affect them later in life. While that might at first not seem like too big of a deal, recall that the First Amendment was enacted to protect freedom of speech and to prevent a chilling effect. The subset of minors who are forward-thinking, as opposed to typical short-sighted minors, might have valuable or insightful things to say and/or share, and society would be deprived of hearing or seeing those things if a chilling effect stopped those minors from posting on social media. Enacting a federal law for a right to be forgotten for social media posts made when someone was a minor will combat that potential chilling effect and will do for social media what the First Amendment did for speech. It will provide protection to people so that they can express themselves freely on a social media platform when they are minors without having to worry about negative consequences later on when they are adults.

[1105] Erika Aguilar, *Update: Gov. Jerry Brown Signs Bill Increasing Online Privacy for Minors in California*, 89.3 KPCC (Sept. 23, 2013), https://www.scpr.org/news/2013/09/23/39426/california-teenagers-could-get-an-online-eraser-bu/.
[1106] Kapoor et al., *supra* note 1081.
[1107] Andrea Peterson, *Author of California Online Eraser Law: It's Not Always Easy to Find the Delete Button*, WASH. POST (Sept. 25, 2013), https://www.washingtonpost.com/news/the-switch/wp/2013/09/25/author-of-california-online-eraser-law-its-not-always-easy-to-find-the-delete-button/.

Another question to consider is what if people want to change or if a person should be afforded an opportunity to change his/her past bad behavior and evolve. The right to be forgotten itself grew out of a desire to give someone an opportunity to move beyond his/her past, especially when that past can be easily accessible by other people online.[1108] If we hold a person accountable for all of his/her past actions or posts and never provide him/her with an opportunity to evolve, then we are just condemning that person to forever be who he/she was at that one particular point in time. People need to examine if that is the type of society that they want to live in. Most people probably would not want to be forever known as the type of person that they were when they were a teenager. The European Union seems to recognize that a person can evolve and appears to believe that a person should be able to move on from their past actions. In the European Union, the right to be forgotten can traced back to French law, which recognizes "le droit à l'oubli," which means the "right of oblivion" and is a right that allows a convicted criminal who has served his/her time and has been rehabilitated to object to the publication of the facts of his/her conviction and incarceration.[1109]

Under that same token, consider the following example. Suppose a twenty-seven-year-old woman is a productive member of society, volunteers at a soup kitchen on the weekends, is married, and has a family of her own, but made some stupid and outlandish posts on social media when she was fourteen years old. When she applied for a job, her prospective employer did some research, found those past social media posts, and did not hire her as a result. If that twenty-seven-year-old woman is a completely different person from who she was when she was an adolescent teenager, going through puberty, with nowhere near fully developed frontal lobes, is it right that she was judged and denied a job based on social media posts she made when she was fourteen? That is a serious question that society is going to have to start addressing because situations like that are becoming more and more prevalent as people who grew up having social media accounts are entering the workforce. It seems unfair to judge her by her past social media posts if in the time since the posts were made and the present, the woman has not done anything to demonstrate that she still feels the same way as indicated in the posts. She has changed from who she was when she made those posts at age fourteen and has evolved into a respectable member of society. The right to be forgotten is essentially a right to have one's past wiped away for whatever reason, and if society believes that people can change and/or evolve then the proposed law should be enacted.

Next, the United States clearly believes in rehabilitation and acknowledges that there is a difference in the actions of minors versus adults or else there would not be an option in the justice system to charge someone either as a juvenile or as an adult. The juvenile justice system is based on the idea that rehabilitation is possible, and the goal of the juvenile justice system is to help the

[1108] Ambrose, *supra* note 1034, at 118.
[1109] Jeffrey Rosen, *The Right to be Forgotten*, 64 STAN. L. REV. 88, 88 (2012), https://review.law.stanford.edu/wp-content/uploads/sites/3/2012/02/64-SLRO-88.pdf.

offender instead of solely punishing the offender.[1110] In the juvenile justice system, young offenders are seen as children in need of help instead of criminals.[1111] The fundamental assumptions of the juvenile justice system are "that juvenile offenders will become adult criminals unless they are treated and that young offenders are particularly amenable to rehabilitative treatment."[1112]

Those ideas can be carried over into why the United States should grant a federal right to be forgotten for social media posts made when someone was a minor. A person needs to be given a chance at rehabilitation if they made offensive social media posts as a minor, just as a person would in the criminal justice system if he/she committed a crime. That is especially true if a person has taken actions to clearly demonstrate that he/she is indeed a different person or if a person has not done anything to demonstrate that he/she is still the same person that he/she was when the posts were made.

Additionally, while there may be a consideration about whether a certain amount of time needs to pass before a person can request that his/her social media posts be taken down, the proposed law should not include such a restriction because it would create a lot of issues. For example, suppose the proposed law said that a person would not be able to enact a right to be forgotten for a social media post that he/she made until five years have passed since he/she initially made the post. The reasoning for that would be that those five years would go towards showing that the individual has evolved or matured as a person.

However, while that may seem like a good idea on the surface, as stated earlier, it would create a lot of problems. First, there is an issue of determining exactly how much time should be deemed enough time before someone can make a request to be forgotten when it comes to his/her social media posts. Doing so would take us into a case-by-case, subjective determination area that, as was discussed earlier, it is best to stay out of and avoid if possible. Next, if you have a time requirement like that, then posts made closer to the age of eighteen could have longer lasting effects and be more impactful on a person's future. For example, if a person made a stupid post when he/she was twelve and the time requirement was five years, then that person could have that post be forgotten when he/she is seventeen. However, if that person made the post when he/she was seventeen, that post would be out there until the person was at least twenty-two which would likely be after he/she completed college and when the person was trying to get a job. Therefore, a time requirement would raise a bunch of fairness issues. People could see having a time requirement as being slightly discriminatory, especially since the potential consequences of social media posts would, in a way, increase as a minor became closer to adulthood. It is also worth noting that a time requirement could increase the burden on social media platforms and/or enforcers of the proposed

[1110] Anna Louise Simpson, *Rehabilitation as the Justification of a Separate Juvenile Justice System*, 64 CAL. L. REV. 984, 984 (1976), http://scholarship.law.berkeley.edu/californialawreview/vol64/iss4/5.
[1111] *Id.*
[1112] *Id.* at 1003.

law because they would need to do additional work to make sure that the specified time period had indeed passed since the person made the initial post. All in all, having a time requirement in a federal right to be forgotten for social media posts made when someone was a minor may sound like a good idea at first, but it would ultimately create a lot of issues, make the proposed law too subjective, and overall be detrimental. Also, since the United States clearly recognizes that a person is capable of rehabilitation and that being a minor versus an adult is an important distinction, having a federal right to be forgotten when it comes to social media posts made when someone was a minor seems to be in line with the ideals that the United States holds.

C. A Right to be Forgotten Already Somewhat Exists in the United States

Creating a federal right to be forgotten for social media posts made while an individual was a minor is not that outlandish of a concept because versions of a right to be forgotten already exist in the United States in a few different contexts. In several states, there are specific statutes that deal with a right to be forgotten or erased, although they are not specifically called that, when dealing with children and their criminal histories and/or records. For example, in Montana, there is a statute that orders the physical sealing of juvenile criminal records when the individual turns eighteen years old and it also considers completely destroying all youth court records.[1113] In North Dakota, there is a statute that requires photographs and fingerprint records of an arrested child to be destroyed and after those actions have been done, per the statute, the government is required to act as if the record never existed in the first place.[1114] Furthermore, in Minnesota, state officials are not allowed to release juvenile offender records or acknowledge that they exist; the juvenile records must be destroyed at some point; photographs of children must be destroyed when the child turns nineteen years old; and if a school receives a disposition order from law enforcement then any data about the incident must be deleted and the information must be destroyed when the child graduates.[1115] All of those laws exist because, as was stated earlier, the juvenile justice system is based on the idea that rehabilitation is possible. Those laws are all means to a certain end, which is letting a person move on from his/her past indiscretions; essentially being forgiven for them and allowing them to be forgotten.

There is also something resembling a right to be forgotten when it comes to adoptions in the United States. In many states, including Alabama, when a child is adopted the original birth certificate is sealed and a brand-new birth certificate is issued that has the names of the adoptive parents.[1116] Kentucky takes further steps when it comes to adoptions. In Kentucky, when a new birth certificate is issued as a result of an adoption that new birth certificate is not allowed to

[1113] MONT. CODE ANN. §§ 41-5-216(1), 41-5-216(3) (2017).
[1114] N.D. CENT. CODE §§ 27-20-53(4), 27-20-54(2) (2017).
[1115] MINN. STAT. §§ 299C.095(1)(b), 299C.095(2)(b)–299C.095(2)(e), 260B.171(1)(c), 121A.75(2)(e), 121A.75(3)(e) (2017).
[1116] ALA. CODE § 26-10A-32 (2017).

indicate the location of the hospital or any attending medical professionals.[1117] Also, people who have access to those adoption files may not disclose any of the adoption information.[1118] The reason for those types of laws is that society is protective of children's past lives. Those statutes exist so that society can ensure that certain individuals are forgotten.[1119]

In addition, some state statutes specifically deal with the right to be forgotten concerning adults and some of the statutes even call for a complete destruction of information, which would definitely count as a right to erasure or to be forgotten. For example, in South Carolina, all photographs, videos, electronic files, and/or other evidence at issue in an eavesdropping or voyeurism case are required to be destroyed in order to protect the victim's privacy.[1120] There are even some specific state statutes when it comes to a person's adult criminal past. In Connecticut, there is a statute that addresses when criminal records can be erased and states that a person in control of the criminal records cannot disclose any information or even acknowledge their existence.[1121] A Massachusetts statute requires that after five years, material involving a police warrant must be destroyed.[1122] In South Carolina, once a criminal record is expunged, the individual's arrest records, bench warrants, mug shots, and fingerprints must all be destroyed.[1123] Clearly, there are rights to be forgotten in the United States when it comes to a lot of different areas, which interestingly includes actions that adults have taken. The decision-making frontal lobes of adult brains are much more fully developed than minors' and if a right to be forgotten can be granted to adults for things that they did and/or said, then there is definitely a worthwhile argument that a right to be forgotten should be extended to social media posts made while a person was a minor.

More significantly, Americans have a right to be forgotten when it comes to bankruptcy credit reporting. According to the U.S. Code, bankruptcy cannot appear on a person's credit report after ten years have passed.[1124] Although it can be argued that someone's entire past credit history can be very important to know, especially in certain situations, the U.S. Code requires a credit agency to forget that someone had filed for bankruptcy at some point in his/her life if it was over ten years ago. That federal statute is essentially granting people a chance to be forgiven for their past actions and/or giving them a chance at rehabilitation. The federal statute gives someone a new shot at life by allowing a bankruptcy to be deleted if it was ten years ago or longer, and that is essentially the same idea that the court in *Google Spain* followed when it ruled that Google had to erase Mr. Costeja González's ten-year-old debt from its search results. Both actions grant an

[1117] KY. REV. STAT. ANN. § 199.570 (West 2018).
[1118] *Id.*
[1119] Amy Gajda, *Press, Privacy, and the Right to be Forgotten in the United States*, 93 WASH. L. REV. 201, 250 (2018), https://ssrn.com/abstract=3144077.
[1120] S.C. CODE ANN. § 16-17-470(f) (2017).
[1121] CONN. GEN. STAT. § 54-142(a) (2017).
[1122] MASS. GEN. LAWS ANN. ch. 272, § 99(N)(3) (West 2017).
[1123] S.C. CODE ANN. § 17-1-40(b)(1) (2017).
[1124] 15 U.S.C. § 1681c(a)(1) (2012).

individual a right to be forgotten. Therefore, the United States has already recognized a federal right to be forgotten in many different contexts and at least one of those contexts happens to be closely related to how the European Union's right to be forgotten was first articulated in *Google Spain*.

Furthermore, the fact that California has implemented its Online Eraser law shows that Americans are at least starting to want and/or acknowledge that the European Union's right to be forgotten has a place in the culture of the United States. California has typically been one of the most progressive states in the nation and it also has the largest population of any state in the United States, with an estimated 39,536,653 people as of 2017.[1125] As was stated earlier, with California enacting its Online Eraser law back in 2015, it appears that individual states may be starting to get on board with creating their own versions of laws addressing a right to be forgotten. Therefore, it would not be too farfetched to create and implement a federal law recognizing a right to be forgotten, particularly for social media posts made while a person was a minor.

CONCLUSION

Although there are some concerns about enacting a federal right to be forgotten in the United States for social media posts made while someone was a minor, there are many other factors to consider including reasons for why there should be one. On a global level, social media is continuing to have an increasingly widespread reach and impact. It is something that children nowadays are raised with and it is becoming part of the norm for people to have at least one social media account. As a result, more issues are emerging that the United States has never really had to deal with before. Europe has been leading the charge when it comes to data protection for its citizens, including creating a right to be forgotten, and the United States should follow suit. Certain states have already started to address data protection and/or privacy issues and the United States, as a whole, should attempt to get ahead of the issue, or else it risks falling behind. Protecting individuals by enacting a right to be forgotten for social media posts made while they were minors would be a great place to start.

[1125] *U.S. and World Population Clock*, U.S. CENSUS BUREAU (2018), https://www.census.gov/popclock/.