

FLORIDA STATE UNIVERSITY LAW REVIEW

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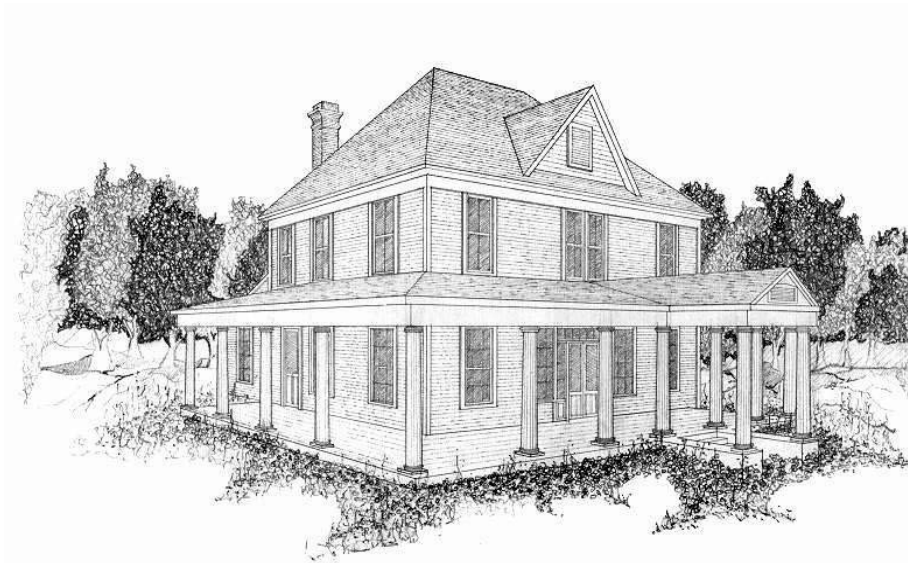
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Florida State University Law Review

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Errata: Bring errors in this volume to the attention of the Editor-in-Chief. The *Law Review* will publish corrections when necessary.

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AN ATHEIST IN THE SEMINARY^{1*}
PROFESSOR KENNETH VINSON
SCHOLAR, REALIST, AUTHOR
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LESLEY FRIEDSAM DAMISCH**

Texas is a state of mind.
John Steinbeck

An admittedly too-short biography: Kenneth's hometown, Wink, was a tiny, oil patch boondocks deep in the heart of Texas. He was an honors student and a competitive athlete.¹ For ordinary folk, growing up in Wink would have been a burden. For Kenneth, it was a blessing.

Wink's treeless, barren vastness provided an empty canvas allowing imagination to fill his senses; some of his prose reads like poetry.² Kenneth's writing artistry was the unifying thread of his published works. Reading law is often boring and narrowing. While studying Kenneth's legal writing, I found myself laughing while learning.

Kenneth's smarts got him through the University of Texas Law School (UT) and Yale; he practiced law in Andrews, Texas and became City Attorney.³

His segue into academia began years before as a UT 1L.

An innocent country boy, I came to law school believing that next to cleanliness was legalness. My Torts teacher, however, was Leon Green, who I swear on a West Publishing Company Bible is the greatest. I was

* *Faculty Profiles: Vinson*, OBITER DICTUM FLA. ST. U. COLL. OF L., Apr. 25, 1977, at 5.

** Lesley Friedsam Damisch; 1982 J.D. Florida State University College of Law (FSU); 1983 LL.M. Yale University College of Law. Kenneth was my Constitutional Law Professor. I worked as his legal research assistant as a 2L. I was an Associate Editor on *Preview*, his monthly analysis of Florida Supreme Court pending cases. We remained friends for over thirty years which informed my decision to reference him as Kenneth in this article. My Yale friend, Professor Marie Failingler suggested I write this tribute. I am especially grateful for her insights and editing suggestions.

Note from the FSU Law Review Editorial Board: Lesley Friedsam Damisch passed away in the fall of 2025 as editing was being completed. As such, we completed one final round of proofreading for errors prior to publication. All errors should be attributed to the Board. Our thanks to Mr. Damisch for his assistance as editing was completed.

1. He was the head coach of the FSU men's tennis team from 1975–1977. *Vinson Named FSU Net Coach*, THE TAMPA TRIB., Oct. 16, 1975, at 15. He also ran marathons and was ranked in the top quarter of Florida senior men's tennis. *50-Year Anniversary: 1975*, FSU L. FOCUS, Dec. 9, 2016.

2. Ken Vinson, *Trees Can Close in on a Desert Rat*, TALLAHASSEE DEMOCRAT, Aug. 24, 1981, at 4.

3. *Andrews Names City Attorney*, THE ODESSA AM., Jan. 15, 1961, at 39; *4 Civil Cases Set For Trial*, THE ODESSA AM., Apr. 18, 1960, at 2. In 1960, Kenneth represented a radiator shop owner running for county commissioner. The shop owner lost, claiming fraud. The suit was later withdrawn. *Gaines County Vote Contested*, THE ODESSA AM., May 19 1960, at 27.

blinded by Dean Green's great light on the road to the Bar, and when I recovered, I was so smart I became a law teacher.⁴

Kenneth left Andrews after three years and helped start Memphis State Law School.⁵ He went to Yale as a Sterling Fellow, earning an LL.M.⁶ Instead of returning to Memphis State, Kenneth went further South. His passion for justice and candid, blunt writing, skewering legal sacred cows, grew exponentially at Ole Miss Law.

MISSISSIPPI

1964–1969

*To understand the world, you must first
understand a place like Mississippi.*

William Faulkner

Kenneth arrived at Ole Miss Law during one of the most cataclysmic events of the Civil Rights Movement: The Ku Klux Klan murder of civil rights workers Chaney, Goodman and Schwerner. These young men came to Mississippi during the Freedom Summer to register African Americans to vote.

As one of the rebel Yalies recruited by Dean Joshua Morse, Kenneth was charged with mission impossible: help move the cloistered Old South into a New South worldview.⁷ Native Mississippian Morse seemed like a safe choice to preserve the Dixiecrat way of life.⁸ Morse was appointed by “super seg” Trustee M.M. Roberts who personified the white supremacist, states’ rights southerner.⁹

Kenneth, wrote Dean Morse, “[S]urprised everybody by putting liberal Yankee Yale graduates on the law faculty, civil rights in the curriculum, [and] black students on Ford Foundation scholarships.”¹⁰ Ole Miss Law accepted funds from the Office of Economic Opportunity (OEO) and opened a legal services clinic.¹¹ Bobby Kennedy spoke at Ole Miss to thunderous applause.¹²

4. Ken Vinson, *Torts in a Devil's Nutshell*, 21 J. OF LEGAL EDUC. 373, 430-34 (1969).

5. *Study Award Won: Kenneth Vinson Will Seek Yale Law Degree*, MEMPHIS PRESS-SCIMITAR, Dec. 18, 1962, at 19.

6. *Faculty Profiles: Vinson*, *supra* note *, at 5.

7. Jennifer Paul Anderson, *Rebel Yale: Yale Graduates and Progressive Ideals at the University of Mississippi Law School, 1946-1970* 9 (May 2015) (Ph.D. dissertation, University of Southern Mississippi) (on file with the Aquila Digital Community, University of Southern Mississippi); Kenneth Vinson, *What's Wrong with Legal Education?*, THE TORCH, Oct. 1977, at 19. Morse replaced a reformist “heretical Dean.” Ken Vinson, *Mississippi: Signs of Life: 1. The Lawyers of Ole Miss*, THE NATION, June 23, 1969, at 791.

8. Anderson, *supra* note 7, at 200.

9. *Id.* at 328. See also Ken Vinson, *Mississippi's Master Racist*, CHANGE, Sept.-Oct. 1970, at 23-24.

10. *Mississippi: Signs of Life: 1. The Lawyers of Ole Miss*, *supra* note 7, at 791.

11. Anderson, *supra* note 7, at 221.

12. *Id.*

Bob Dylan's 1964 anthem, *The Times, They Are A-Changin*, was apropos for a few years.

I don't know what Kenneth taught but I know what he wrote at Ole Miss.¹³ With words and advocacy, he jockeyed himself into John Lewis style 'Good Trouble'.¹⁴ Kenneth became President of the Ole Miss chapter of the American Association of University Professors (AAUP) and was a Director of the OEO legal clinic.¹⁵

His critique of Jim Crow apartheid was a plain language primer on racism: "THE Mississippi House of Representatives opened 1968, after considerable debate with its white conscience, by giving the first black member elected since the Bible, his seat—a separated seat."¹⁶

Kenneth was also a named plaintiff in *Mississippi State Conference of AAUP et al. v. Holmes (Chairman of the Board) et al.*¹⁷ Mississippi law required educators to annually list all organizations they had belonged to in the prior five years.¹⁸ Kenneth refused stating that the statute unconstitutionally infringed on his right of free speech and association.¹⁹ The AAUP won a permanent injunction prohibiting enforcement of the affidavit requirement.²⁰ Mississippi did not appeal.

Kenneth's additional sins included: working on the lawsuit which overturned the speaker ban; supporting the fired law professors; and initiating the American Association of University Professors investigation putting Ole Miss Law's accreditation at risk.

After the legal services clinic filed a desegregation lawsuit, the Magnolia Empire struck back. The legal services clinic was shuttered; law professors who worked there were fired; the old order enacted a speaker's ban to keep Mississippi's NAACP President from speaking on campus. Most of the Damn Yankee law professors left.

13. During his time at Ole Miss, Kenneth also wrote: Ken Vinson, *Reapportionment*, MISS. MAGAZINE, Winter 1966, at 24.

14. Kenneth's advocacy continued after Ole Miss. He instigated a faculty letter to a newspaper objecting to the Vietnam War. *7 Profs at Ole Miss Sign Anti-War Letter*, THE DELTA DEMOCRAT TIMES, February 15, 1968. He led a group of FSU Law Professors to protest President Nixon's Supreme Court nomination of Federal Judge Harold Carswell. *Tallahassee Law Professors Oppose Carswell*, TAMPA BAY TIMES, Mar. 19, 1970, at 15. John Lewis's mantra was to "Speak up, speak out, get in the way . . . Get in good trouble, necessary trouble, and help redeem the soul of America." Rashawn Ray, *Five Things John Lewis Taught Us About Getting in "Good Trouble"*, BROOKINGS (July 23, 2020), <https://www.brookings.edu/articles/five-things-john-lewis-taught-us-about-getting-in-good-trouble/>.

15. Anderson, *supra* note 7, at 260.

16. Ken Vinson, *Trustees of the Closed Society*, DESCANT, May 6, 1968, at 2.

17. WC 6625 (N.D. Miss. 1966).

18. Complaint at 5, *Miss. St. Conf. of AAUP et al. v. Holmes et al.*, WC 6625 (N.D. Miss. 1966).

19. Exhibit "A" to Complaint at 1-2, *Miss. St. Conf. of AAUP et al. v. Holmes et al.*, WC 6625 (N.D. Miss. 1966).

20. *Miss. St. Conf. of AAUP et al.*, WC 6625 at *2.

Kenneth was one of three scholars denied a raise; the University Chancellor complained that Kenneth “had ‘been behind everything that’s happened [at Ole Miss] to embarrass his efforts’.”

When a Federal Court ordered the fired professors rehired and found the speaker ban unconstitutional, Ole Miss folded. By then, Dean Morse and Kenneth had left, refuging at the Florida State University College of Law (FSU) as visiting scholars. The Ole Miss’s new Dean attempted amends by suggesting Kenneth return, offering Kenneth a raise.

Kenneth didn’t burn his bridges, he blew them up.

I thought the letter was garbage, with perhaps a half a grain of truth here and there to keep down the stink . . . Considering Ole Miss current attitude toward me reflected by your third class offer of a raise and your fourth class letter, and considering the slight chance that due process can reach the Ole Miss law school in the near-enough future, I regretfully resign.²¹

Kenneth was more reflective later: “There has been a temporary setback . . . but the Ole Miss Law School and the entire university will be better in the long run because of what happened there.”²²

Even later, Kenneth much enjoyed writing about Mississippi’s take on Prohibition, a legal fiction humdinger:

Schooling “a cocky out-of-state state freshman . . . [who] smiled and looked mean at the same time,” Kenneth wrote about taxation on the booze arriving in Mississippi’s busy ports and swank resorts.²³

“The law sometimes works its will in mysterious ways . . . When Mississippians tell ‘outsiders’ they don’t understand the Mississippi Way of Life, ‘outsiders’ best listen. It’s not easy. Consider the nine percent sales tax on articles ‘the sale of which are prohibited’ . . . each bottle bears a stamp showing the tax paid—else the sale is illegal twice.”²⁴

Kenneth’s scholarly work and his wry, witty, whimsical writing continued at FSU Law until his retirement in 2003.

21. *Id.* at 296-97.

22. John Egerton, *Shake-up at Ole Miss*, CHANGE, Winter 1972-1973, at 24, 29.

23. Kenneth Vinson, *Prohibition’s Last Stand*, THE NEW REPUBLIC, Oct. 16, 1965 at 10; see also Ken Vinson, *Prohibition as It Was in Mississippi*, TALLAHASSEE DEMOCRAT, Sept. 22, 1980, at 4.

24. *Prohibition’s Last Stand*, *supra* note 23, at 11.

SCHOLAR

The Life of the Mind
Hannah Arendt

My word budget limited my ability to explore Kenneth's immeasurable depth of fields. Instead, I focused on his torts-centric interests, specifically the bugaboo of proximate cause.²⁵ Kenneth's torts Professor, Leon Green, forbade his students from mentioning "the noxious phrase in his classroom."²⁶

Negligence law requires plaintiffs to meet the following elements: Duty, Breach of Duty, Cause-in-Fact, and Proximate Cause. Kenneth believed the hobgoblin of proximate cause is tucked into briefs and opinions because attorneys and judges make a fetish of using perplexing causation language. The result is a shell game of hide the political ball when courts mix value-neutral language (cause-in-fact) with the policy question of who should pay.²⁷

Poor, Helen Palsgraf—she won at trial and appeal, but lost at New York's highest court.²⁸ The majority ruled, as a matter of law, that Helen's tortfeasor owed her no duty because she was an unforeseeable plaintiff; her injury was too remote, bizarre, freakish, and weird.²⁹ The dissent argued that the issue was not law but fact; the jury should determine if the defendant's acts were the proximate cause of Helen's injuries.³⁰

Helen remains a loser in the negligence lottery, along with half of the other victims of traffic, medical, and other accidents. Kenneth argued that torts sweepstakes winners forfeit half of every dollar for attorneys' fees and costs.³¹

25. So apropos: the word "Tort" comes from the Latin word *tortum* which means twisted. *What is Tort Law?*, AM. MUSEUM OF TORT L., <https://www.tortmuseum.org/what-is-tort-law/> (last visited Apr. 7, 2025) Kenneth's other torts-related scholarly works include: Kenneth Vinson, *Disentangling Law and Fact: Echoes of Proximate Cause in the Workers' Compensation Coverage Formula*, 47 ALA. L. REV. 723 (1996); Kenneth Vinson, *Tort Reform the Old-Fashioned Way: By Trial and Appellate Judges*, 1987 DET. C.L. REV. 987 (1987); Kenneth Vinson, *Constitutional Stumbling Blocks to Legislative Tort Reform*, 15 FLA. ST. U. L. REV. 31 (1987); Kenneth Vinson, *Artificial World of Law and Fact*, 11 LEGAL STUD. F. 311 (1987); Kenneth Vinson, *Proximate Cause Fog Spreads*, 69 A.B.A. J. 1042, 1042 (1983).

26. Kenneth Vinson, *Proximate Cause Should Be Barred from Wandering Outside Negligence Law*, 13 FLA. ST. U. L. REV. 215 (1985) at 226, n. 31.

27. *Id.* at 215.

28. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928). Helen was injured when a heavy scale fell on her after defendant's employee pushed a passenger carrying explosives onto the train, causing the explosives to implode.

29. Ken Vinson, *Law as a Foreign Language: Understanding Law School*, 1 CUNY L. REV. 5, 99 (1996).

30. *Palsgraf*, 162 N.E. at 104-105; see also Vinson, *supra* note 29, at 94-102.

31. Vinson, *supra* note 29, at 110.

Kenneth believed causation language should be scrapped, reducing negligence claims to two questions: what happened and who should pay? He believed that using these plain language questions would eliminate causation babble.³² Kenneth maintained that the “what happened” question is usually a straight forward look into the past. The “who pays” determination is a forward-looking policy choice determining how to balance risk sharing accident losses between plaintiff and defendant.³³

Kenneth believed the benefit of collapsing negligence law into only two questions, eliminated the adjectival multipliers of reasonable, direct, active, prudent, efficient foreseeable, probable, careful, concurring, superseding, passive, indirect, substantial, material, intervening, effective, continuing, operative, and so on. Instead, causation gibberish would be replaced by plain English.³⁴

Illustrating his point, Kenneth wrote a laugh-out-loud story using the ‘what happen/who pays’ questions:

It's one kind of job . . . to empirically trace . . . the history of this planet's pollution [cause-in-fact] back to the ape who crawled down a tree, urinated in a stream, and first began to upset nature's balance. It's quite another kind of job to select, from among a jungle of contributors, which polluting apes should as a matter of public policy be liable for damages.³⁵

REALIST

There are two things wrong with almost all legal writing.

One is its style. The other is its content.

Fred Rodell

Kenneth's first law review article was written while he was a UT law student. He used passive voice chock full of legal jargon with sentences that sometimes took up almost entire paragraphs.³⁶ After studying under Rodell at Yale, Kenneth's writing changed from legal folderol to plain English.

Kenneth believed that the law writing is a foreign language; that lawyers wrote in gobbledegook, full of hocus pocus weasel words.³⁷ He

32. Vinson, *supra* note 4, at 434.

33. *Id.* at 433-434.

34. Vinson, *supra* note 29, at 107-108. Despite proximate cause's sloppy slipshod confusion and inconsistent use in negligence cases, it has metastasized into strict liability dog vases, strict products liability, worker's compensation, constitutional law, tax law, criminal law and securities law. *See generally* Vinson, *supra* note 26.

35. Vinson, *supra* note 29, at 105.

36. *See* Kenneth Vinson, *Action—Judgment—Practice and Procedure—Res Judicata—Torts—Injuries to Person and Property Resulting From Same Tortious Act Constitute But One Cause of Action—Cormier v. Highway Trucking Co.*, 312 S.W.2d 406 (Tex. Civ. App.—San Antonio 1958), 37 TEX. L. REV. 86 (1958).

37. *See generally* Vinson, *supra* note 29.

argued that lawyers' grandiosity promoted rules, codes, and black letter law as proof of decisional neutrality. Instead, Kenneth believed that the foreign language of the law hid "the law as no bearer of ultimate truth, but as politics traveling under an assumed name."³⁸

Kenneth used the analogy of gimmicky law speak to The Emperor's New Clothes; both are outwardly fancy schmancy, yet inwardly naked Oz humbuggery.³⁹

Kenneth thought political impartiality was a fig-leaf of pretense. He reasoned that if justice was blind, the only fights over Supreme Court nominees would be their scholarship, education and judicial experience, not whether their political party mirrored that of the nominating President.⁴⁰

Kenneth was a legal realist who believed that the political power Courts exercise is hidden by lawyers' fancy wordplay that something phony lurked beneath the law's obsession with unintelligible verbosity. In his view muddy, murky, messy writing is used to disguise the societal, economic, and personal experience of judges that influence their rulings.⁴¹

My research found a recent opinion piece by Ruth Marcus in the Washington Post which asked whether it mattered who appointed a particular judge. The Post article cited a recent Harvard Law School study which examined over 650,000 Circuit Court opinions investigating the judge's political bent based on the politics of who appointed them, concluding that the judge's opinions were predictable in over 90% of the cases.

To me, legalese is more than what it hides; it is a sloppy, slovenly substitute for clean, concise, cogent, and even entertaining writing. Law can be laugh-out-loud funny. Take Florida's anti-fornication statute, Section 798.01 of the *Florida Statutes*, which condemns adultery; despite the word "adultery," the statute damns both single and married sinners.

According to Kenneth, "Lovers worthy of the title live not by the rule For the most part, we each have the freedom of choice whether sex is merely to scratch an itch or, if you're lucky, feed a soul."⁴² He believed that intimacy was none of the state's R-rated business.⁴³

38. KEN VINSON, *THE CASE AGAINST THE LAW: LEGAL JARGON, LEGAL LEARNING, AND LEGAL LEGERDEMAIN* 2-3 (Sentry Press 2004).

39. Vinson, *supra* note 29, at 18, 83.

40. *Id.* at 130.

41. Ken Vinson, *Fred Rodell's Case Against the Law*, 24 FLA. ST. U. L. REV. 107-109 (1996).

42. Ken Vinson, *Matters of Love and Lust Not Proper Concerns of State*, TALLAHASSEE DEMOCRAT, Apr. 28, 1980, at 5.

43. *Id.*

A U T H O R

Dean Morse believed “Ken was a fellow that wanted to be an author terribly bad, more than he wanted to be a law professor.”⁴⁴

Writing was the gravitational pull of Kenneth’s law life.

He liked to write.

A lot.

About homosexual rights, puny pinkos, creationism, the immoral minority, and capital punishment.

Although he taught me to use five-cent words instead of five-dollar words, a mega-dollar word best describes his personal prose: Kenneth was a raconteur, a gifted, magical, entertaining, colorful, sparkling, courageous, elegant, intimate, playful, sentimental, tender storyteller.

I’m mighty partial to his water tower story.

My water tower, like most of its country cousins, proudly carries across its round bosom the name of the village over which it keeps watch. WINK. For us water-tower people, our tank-on stilts is firm proof we exist. It’s our lighthouse, our crow’s nest in a sea of sand, our church steeple, our anchor against the hard wind I can’t prove it but I suspect the trouble with this country is we long ago got too big for our water towers.

School was the pool hall.

We teenage boys in Wink, Texas divided into two gangs. One went to church twice on Sunday and to Wednesday night prayer meeting; the other communed at the pool hall Preachers are pitiful at pool and dominos Some guys, like myself ran nervously with both gangs for a while Whatever, the pool hall gang grew. [After all], Wink operated under the loose reins ‘of the law west of the Pecos,’ where men and boys are men.

Kenneth played marbles for keeps which introduced him to a life of polite crime: “Had I shunned evil and played for funnies, today I’d be doing good works instead of teaching law students how to become . . . ‘skilled in the circumvention of the law.’”

Labeled a Texas Cowboy, Kenneth was no usual cowpoke.⁴⁵ He was an oil field roustabout, a “tough, hard-living pump-jack cowboy,” toting heavy metal pipe.⁴⁶ When not wearing steel toed boots to save “toes when your buddy steps in a rabbit hole and drops his end of the pipe,” he wore boots made for stomping up a storm at the local honky-tonk,

44. Interview by Kate Medley with Dean Joshua Morse, U. Miss. L. Sch. (Sept. 29, 2007).

45. Anderson, *supra* note 7, at 206.

46. Ken Vinson, *Another Kind of Cowpoke*, TALLAHASSEE DEMOCRAT, June 1, 1981, at 4.

“feeling that being a 21-year-old pump-jack cowboy is a mighty fine thing.”⁴⁷

In high school, Kenneth won more than one for his small town Gippers. He was the clever quarterback leading his team to the 1952 state championship, earning a football scholarship to Rice University.

He didn’t much like big business college ball which attracted heretics like Virginia who only went to games to giggle at “the foolish butting of male heads” and ogle male cheerleaders. Kenneth believed in the church of football where “nobody had pads or a helmet . . . The best football was when we fourth grade guys used to meet those fifth-grade ratfinks on the field at 9 every Saturday morning.”⁴⁸

His Wink football memories lasted his lifetime:

Tomorrow at dusk, that time when on Friday nights stadium lights in 10,000 towns start to flicker on, if I happen by a field and smell newly-mowed grass, it all comes back. I’m back in the stadium, the Bermuda freshly cut, limbering up, trying to ignore the butterflies, trying instead to Think Mean. The Wink band is playing that fight song, which Notre Dame stole from us. Then I’m back to receive the kick-off. The ball floats into my arms, and I have one last chance to fulfill a life-long fantasy—to run one back all the way.⁴⁹

CONCLUSION

Kenneth talked funny, his sound bound up in Texas twang.

His office had a splendid collection of beer cans atop his law-filled bookcase.

He was an outsider on the inside, describing himself as an atheist in the seminary.

He mentored me in law, life, and plain language writing.

We were friends for over 30 years.

I remain forever grateful, honored, and indebted.

47. *Id.*

48. *Seminole Boosters Whoop It Up, Recite 50 Hail Bobbys*, TALLAHASSEE DEMOCRAT, Sept. 14, 1981, at 5.

49. *Id.*

UPHOLDING HIGHER EDUCATION'S VALUE PROPOSITION THROUGH RELATIONAL LEARNING

BY MICHAEL J. KAUFMAN* AND MARISA HAWLEY**1

ABSTRACT

The U.S. higher education system is confronted by a series of deeply rooted interrelated challenges, including affordable access, a business model dependent on declining enrollment, enterprise risk, disruptive technologies, community-building in an age of polarization, and a heavily scrutinized value proposition. These challenges can be traced to the current transactional model of education, which is based on outdated behaviorist assumptions about human nature. This model treats students as passive, isolated consumers of their education, motivated primarily by a system of external rewards and punishments.

Faced with mounting budgetary pressures, educational institutions have increasingly prioritized short-term outcomes in misguided attempts to achieve “efficiency.” As the financial burden on students and their families continues to rise, and as public skepticism about the return on investment of a postsecondary degree grows, the flaws in the system have only become more apparent. Universities have fallen short in both communicating and delivering the substantial long-term value that higher education can offer individuals and society.

The challenges confronting higher education are significant, but they do not justify efforts to target or dismantle higher education itself. Rather, as this article shows, those challenges can be overcome, and the tremendous benefits of higher education can be more fully achieved, through a simple but transformative shift in how institutions approach learning. Moving from a transactional to a relational model – supported by the latest research in the fields of neuroscience, neuropsychology, cognitive psychology, and educational psychology – will enable universities to emphasize interpersonal growth and holistic development. This shift will also empower students to be collaborative innovators who co-construct knowledge through meaningful relationships. When these principles are widely incorporated into school curricula, student services, and campus life, universities will not only improve educational outcomes, but they will also create more resilient,

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transformative learning communities, upholding the value proposition for higher education.

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INTRODUCTION

The higher education system in the United States is at a pivotal juncture as educational institutions seek to reverse a decade-long trend of declining enrollment.² However, the financial reality for many schools is precarious as universities face budget constraints, revenue shortfalls, and uncertain levels of funding. These interconnected challenges have hindered the ability of universities to offer robust academic programs, student services, and administrative support necessary to attract and retain a diverse student body.³ This leaves many in a cycle where resource limitations prevent the solutions needed to address the shrinking student population.

While these challenges are not new to the U.S. higher education system, they have only been compounded by a myriad of other present-day risks. Universities must also simultaneously prepare for and

2. *Table 303.10. Total fall enrollment in degree-granting postsecondary institutions, by attendance status, sex of student, and control of institution: Selected years, 1947 through 2031*, NAT'L CTR. FOR EDUC. STAT. (NCES) (Dec. 2022), https://nces.ed.gov/programs/digest/d22/tables/dt22_303.10.asp [<https://perma.cc/SDP8-SW99>]; see also Alan Mallach, *Higher Education on the Edge*, U.S. NEWS & WORLD REP. (Feb. 29, 2024, 11:20 AM), <https://www.usnews.com/opinion/articles/2024-02-29/higher-education-on-the-edge> [<https://perma.cc/9YWL-YUHR>]; see also Daniel Rosensweig, *US College Enrolment is Dropping, Can This Be Reversed?*, WORLD ECON. FORUM (Jan. 19, 2023), <https://www.weforum.org/stories/2023/01/us-college-enrolment-is-dropping-can-this-be-reversed-davos23/> [<https://perma.cc/B3LN-ZWJQ>].

3. See Liam Knox, *State Higher Ed Funding is Still Rising—for Now*, INSIDE HIGHER ED (May 8, 2024), <https://www.insidehighered.com/news/government/state-policy/2024/05/08/state-support-higher-ed-increased-again-2023> [<https://perma.cc/UCN2-YYW3>]; see also Lee Gardner, *Colleges Fear Cost of Doing Business Will Become Much Costlier*, THE CHRON. OF HIGHER EDUC. (Feb. 24, 2023), <https://www.chronicle.com/article/colleges-fear-cost-of-doing-business-will-become-much-costlier> [<https://perma.cc/FUV5-SS3N>]; see also Jingyun Li et al., *Impact of the Economic Recession on Student Enrollment and Faculty Composition in U.S. Higher Education: 2003-2018*, COLL. & UNIV. PRO. ASS'N FOR HUM. RES. (Feb. 2019), <https://www.cupahr.org/surveys/research-briefs/2018-impact-of-the-economic-recession/> [<https://perma.cc/2CAZ-EKAK>].

navigate cybersecurity attacks, climate change, demographic shifts, regulatory reforms, and an increasingly global workforce.⁴

At the same time, schools are grappling with growing public skepticism about higher education, particularly as an increasing share of the population questions its overall value. Twenty-three percent of Americans report to have little or no confidence in the higher education system, a sharp contrast to the ten percent who shared this view only a decade ago.⁵

The economic and social benefits of undergraduate, graduate, and post-graduate degrees remain strong. Yet educational institutions have been struggling to articulate a persuasive value proposition to prospective students, employers, and political actors. This article argues that to do so, schools must transcend the traditional transactional model and embrace a relational approach to education. A relational approach to higher education is based on the proven principle that useful knowledge, skills, and values are best co-constructed socially by all members of a learning community through their meaningful relationships.

This article asserts that higher education's key challenges derive from an outdated behaviorist system that treats students as passive, isolated consumers of information to be trained through a system of transactional rewards and punishments rather than as engaged participants in the co-construction of life-long habits of mind that will bring genuine success and well-being.⁶ Thus, universities should situate their policies and curricula within a social constructivist framework that emphasizes interpersonal relationships, community building, and shared learning experiences.

In Section II, this article identifies six major challenges which implicate the value proposition of higher education: affordability and inclusivity, professional outcomes, sense of community, disruptors, sustainability of the business model, and integration with the global community. Although these challenges appear discrete, they collectively underscore the need to espouse a vanguard approach to higher

4. See generally Vicki Phillips, *In 2024, 5 Big Issues Will Shape Education*, FORBES (Jan. 3, 2024, 11:33 AM), <https://www.forbes.com/sites/vickiphillips/2024/01/03/in-2024-5-big-issues-will-shape-education/> [<https://perma.cc/S3GB-YRSG>]; see generally Rick Seltzer, *Here Are the Top Risks College Leaders Are Worried About This Year*, HIGHER ED DIVE (Jan. 6, 2023), <https://www.highereddive.com/news/enrollment-data-hiring-top-college-risk-worries/639884/> [<https://perma.cc/T8KE-BRVQ>].

5. Jeffrey M. Jones, *U.S. Public Trust in Higher Ed Rises from Recent Low*, GALLUP (July 16, 2025), <https://news.gallup.com/poll/692519/public-trust-higher-rises-recent-low.aspx> [<https://perma.cc/3W8H-QZ58>]; see also *U.S. Confidence in Higher Education Now Closely Divided*, GALLUP (July 8, 2024), <https://news.gallup.com/poll/646880/confidence-higher-education-closely-divided.aspx> [<https://perma.cc/6S49-BRWE>]. While the share of Americans who say they have “very little” or no confidence in higher education has decreased to twenty-three percent in 2025 from thirty-two percent a year ago, less than a majority (forty-two percent) have “a great deal” or “quite a lot” of confidence in the system.

6. See generally Michael Kaufman, *Social Justice and the American Law School Today: Since We Are Made for Love*, 40 SEATTLE U. L. REV. 1187 (2017).

education. In Section III, this article argues that a relational approach comports with the latest research in the fields of neuroscience, neuropsychology, cognitive psychology, and educational psychology. Finally, Section IV proposes ways universities can respond to these six identified challenges to become transformative, relational learning communities.

I. THE HIGHER EDUCATION SYSTEM FACES SIX RELATED CHALLENGES ROOTED IN A TRANSACTIONAL APPROACH TO EDUCATION

Higher education is at a critical inflection point. An increasing percentage of Americans say they have minimal confidence in universities, fueling a broader public debate about the true value of higher education.⁷ Many feel that universities are failing to deliver a sufficient return on investment, particularly as tuition and student debt continue to rise.⁸ This has placed the value proposition of these educational institutions under heightened scrutiny. While the increasing calls for reform are warranted, abandoning higher education altogether would ignore the public good that the system provides, when it is equitable, accessible, and relational, to both advance individual opportunity and improve overall societal well-being.

In Section II, this article identifies six major threats that implicate the value proposition of higher education and to which universities must respond to restore public confidence. First, high tuition and other barriers to inclusivity raise concerns about the accessibility of higher education, particularly for students from disadvantaged backgrounds. Second, there is growing criticism about the professional outcomes of higher education and whether universities adequately provide students with the skills, knowledge, and expertise needed to succeed in a competitive job market. Third, universities face the challenge of

7. Jones, *U.S. Confidence in Higher Education*. According to this Gallup survey, forty-two percent of Americans say they are confident in higher education, with thirty-three percent reporting some confidence and twenty-three percent reporting little or no confidence in the system. Last year, respondents were nearly equally split among those who have a great deal of confidence (thirty-six percent), some confidence (thirty-two percent), or little to no confidence (thirty-two percent) in higher education. When Gallup first conducted its poll on higher education in 2015, fifty-seven percent reported having a great deal of confidence while only ten percent said they had little or no confidence.

8. See generally Ashley Mowreader, *Students, Parents and Voters Agree—Higher Ed Costs Too Much*, INSIDE HIGHER ED (May 29, 2024), <https://www.insidehighered.com/news/student-success/college-experience/2024/05/29/cost-higher-education-not-worth-it-students#> [https://perma.cc/23TC-R7JV]; Richard Fry et al., *Is College Worth It? Public Views on the Value of Education*, PEW RSCH. CTR. (May 23, 2024), <https://www.pewresearch.org/social-trends/2024/05/23/public-views-on-the-value-of-a-college-degree/> [https://perma.cc/MT8P-326T]; Douglas Belkin, *Americans Are Losing Faith in College Education, WSJ-NORC Poll Finds*, THE WALL ST. J. (Mar. 31, 2023, 5:30 AM), <https://www.wsj.com/articles/americans-are-losing-faith-in-college-education-wsj-norc-poll-finds-3a836ce1> [https://perma.cc/CB5Q-ZGHP].

fostering a sense of community and cohesion. Fourth, disruptors such as climate change, emerging technology, and an evolving regulatory landscape are testing the adaptability and resilience of universities. Fifth, the traditional university business model has proven untenable, with schools relying heavily on tuition increases and uncertain public funding while struggling to adjust to new demographic realities. Lastly, universities must better prepare students to engage in an increasingly interconnected world and to foster cross-cultural competencies.

Though these challenges are distinct, collectively they demonstrate that the current transactional approach to education is no longer serving these institutions or their students. To respond to the growing public skepticism of the value of higher education, universities must clearly demonstrate the full range of benefits—both economic and social—they provide to students and to the broader community. But first, universities must examine how they are affected by each of these threats to best devise a comprehensive strategy to undertake the necessary transformative change.

A. Cost and Access Issues Inhibit Institutions of Higher Education from Welcoming a More Diverse Student Population

Post-secondary education can be a powerful catalyst for economic and social mobility. Indeed, this potential for upward advancement has long been America's promise as a land of opportunity. The potential financial benefits of higher education are significant; an individual born into the lowest quintile who does not obtain a college degree has a forty-five percent chance of remaining in the lowest part of the income distribution, but with a college degree, they have an eighty-four percent chance of moving up the income distribution and are more likely to break into the top quintile than to remain in the lowest quintile.⁹ Those with greater educational attainment also generally have

9. Michael Greenstone et al., *Thirteen Economic Facts about Social Mobility and the Role of Education*, BROOKINGS INST. & HAMILTON PROJECT 1, 14 (June 2013), https://www.brookings.edu/wp-content/uploads/2016/06/THP_13EconFacts_FINAL.pdf [<https://perma.cc/RW4Y-4XYF>]. The original source for the data is Ron Haskins, *Education and Economic Mobility*, in *GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA* 91, 95 (Julia B. Isaacs, Isabel V. Sawhill, & Ron Haskins eds., 2008). Figure 9 indicates that without a college degree, a child born into a family in the lowest quintile has a forty-five percent chance of remaining in that quintile and only a five percent chance of moving into the highest quintile. However, with a college degree, a child born into the lowest quintile has a sixteen percent chance of remaining in the lowest quintile and a nineteen percent chance of moving into the top quintile.

higher median incomes and lifetime earnings.¹⁰ In fact, there are few investments that yield a higher rate of return than a college degree.¹¹

However, this promise has been complicated by a decades-long reduction in state funding for public education. “Between 1980 and 2015, states reduced their fiscal support for higher education [by] almost half, relative to personal income.”¹² “Overall state funding for public two- and four-year colleges in the school year ending in 2018 was over \$6.6 billion [less than] what it was in 2008 just before the . . . recession, . . . adjusting for inflation.¹³ More than thirty states are spending less on public colleges and universities now than they did in 2008, with an average decline of nearly \$1,500 per student.¹⁴ These steep cuts have contributed to significant tuition increases—the average price of college has nearly tripled from 1980 to 2021.¹⁵

The rising costs of college has made it more challenging for many families and students to consider higher education as a viable option. Although family incomes have increased by an average of thirty-seven percent between 1975 and 2011, incomes have declined for the poorest third of households.¹⁶ With a widening disparity in earnings, lower-income families have less resources to devote to postsecondary educational opportunities compared to higher-income households.¹⁷ Rates of college enrollment vary significantly based on the socioeconomic background of students’ families. Nearly ninety percent of students from high-income families attend college, compared to sixty-five percent of

10. See *Annual Earnings by Educational Attainment*, NAT’L CTR. FOR EDUC. (2024), https://nces.ed.gov/programs/coe/pdf/2024/cba_508c.pdf [<https://perma.cc/6TBG-9AYA>]; Scott A. Wolla & Jessica Sullivan, *Education, Income, and Wealth*, FED. RSRV. BANK OF ST. LOUIS (Jan. 3, 2017), <https://www.stlouisfed.org/publications/page-one-economics/2017/01/03/education-income-and-wealth> [<https://perma.cc/WKS7-65Y6>]; *Education and Lifetime Earnings*, OFF. OF RET. POL’Y, SSA (Nov. 2015), <https://www.ssa.gov/policy/docs/research-summaries/education-earnings.html> [<https://perma.cc/PK5F-KM3V>].

11. Greenstone et al., *supra* note 9, at 16. Figure 11 indicates that returns to earning associate’s, professional, and bachelor’s degrees are higher than traditional investments like stocks and 10-year treasury bonds.

12. PAUL TOUGH, *THE INEQUALITY MACHINE: HOW COLLEGE DIVIDES US* xi (preface) (2021).

13. Michael Mitchell et al., *State Higher Education Funding Cuts Have Pushed Costs to Students, Worsened Inequality*, CTR. ON BUDGET AND POL’Y PRIORITIES 1 (Oct. 24, 2019), <https://www.cbpp.org/research/state-budget-and-tax/state-higher-education-funding-cuts-have-pushed-costs-to-students> [<https://perma.cc/WEA6-LSQ4>].

14. Mary Ellen Flannery, *State Funding for Higher Education Still Lagging*, NEATODAY (Oct. 25, 2022), <https://www.nea.org/nea-today/all-news-articles/state-funding-higher-education-still-lagging> [<https://perma.cc/RQY2-ETJK>].

15. [CORRECTED] *Average undergraduate tuition, fees, room, and board rates charged for full-time students in degree-granting postsecondary institutions, by level and control of institution: Selected years, 1963-64 through 2020-21*, NAT’L CTR. FOR EDUC. STAT. (NCES), https://nces.ed.gov/programs/digest/d21/tables/dt21_330.10.asp [<https://perma.cc/3JZM-JDY3>]. According to NCES, the total cost across all institutions for the 1980-81 school year was \$9,421, while the total cost for 2020-21 was \$25,910. These numbers are measured in constant 2020-21 dollars based on the Consumer Price Index.

16. Greenstone et al., *supra* note 9, at 1, 4.

17. *Id.*

students from middle-class families and only fifty-one percent of students from low-income families.¹⁸

In addition to financial challenges, universities also face legal obstacles which impinge on their ability to meet the needs of an increasingly diverse student population. This is particularly important as first-generation students and students from disadvantaged backgrounds may face obstacles to successful degree completion that are largely different to those of earlier generations.¹⁹ Many universities recognize the importance of improving the environment and services offered by investing in hiring new personnel, building new systems of data collection, and improving safety and security of vulnerable populations on their campuses.²⁰ However, there have been attacks by all levels of government that seem designed to block universities from modifying their policies and practices to better serve their increasingly pluralistic communities.²¹

The recent United States Supreme Court decision in *Students for Fair Admissions Inc. v. University of North Carolina* and *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* makes it difficult for educational institutions to consider an applicant's complete personal identity, including their racial background, as part of the admission process.²² There is evidence that the decision already has decreased the racial diversity of student populations on campus.²³

At the state level, public universities are also confronted with obstacles in the form of legislative action seeking to restrict the ability of schools to use diversity statements in hiring and promotion,²⁴ offer tenure-track positions,²⁵ teach critical race theory and gender and

18. Sarah Reber & Ember Smith, *College Enrollment Gaps: How Academic Preparation Influences Opportunity*, BROOKINGS INST. (Jan. 23, 2023), <https://www.brookings.edu/articles/college-enrollment-gaps-how-academic-preparation-influences-opportunity/> [<https://perma.cc/798C-XETS>].

19. Johanna Kalb, *Renewing Educational Autonomy*, 76 SMU L. REV. 589, 606 (2023).

20. *Id.*

21. *Id.* at 607.

22. *Students for Fair Admissions, Inc. v. Presidents and Fellows of Harv. Coll.*, 600 U.S. 181 (2023). For an insightful analysis of the doctrinal and practical implications of the *Students for Fair Admissions* decision, please see Angela Onwuachi-Willig, *Robert's Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192 (2023).

23. See Q&A: *Undergraduate Admissions in the Wake of the 2023 Supreme Court Ruling*, MIT NEWS (Aug. 21, 2024), <https://news.mit.edu/2024/qa-undergraduate-admissions-in-wake-of-supreme-court-ruling-0821> [<https://perma.cc/ZSB3-DHRS>]; see also Anemona Hartocollis & Stephanie Saul, *At 2 Elite Colleges, Shifts in Racial Makeup After Affirmative Action Ban*, THE N.Y. TIMES (Aug. 30, 2024), <https://www.nytimes.com/2024/08/30/us/black-enrollment-affirmative-action-amherst-tufts-uva.html> [<https://perma.cc/5JTV-UCVF>].

24. Sarah Wood, *Dear Colleague Letter: DEI Bans at Colleges And What To Know*, U.S. NEWS (updated Feb. 20, 2025), <https://www.usnews.com/education/best-colleges/articles/dei-bans-at-colleges-what-students-should-know> [<https://perma.cc/NMT6-HEEB>].

25. Ryan Quinn, *The Growing Trend of Attacks on Tenure*, INSIDE HIGHER ED (Aug. 5, 2024), <https://www.insidehighered.com/news/faculty-issues/tenure/2024/08/05/growing-trend-attacks-tenure> [<https://perma.cc/C69N-9XZT>].

women's studies,²⁶ and fund diversity and inclusion initiatives and services such as Diversity, Equity, and Inclusion (DEI) offices.²⁷ As these attacks limit universities' autonomy and their ability to advance the goal of inclusive excellence, schools must continue to find new ways to ensure more affordable access for all qualified students.²⁸

B. Americans are Increasingly Skeptical about Higher Education's Mission and Outcomes

Another concern that implicates universities' value proposition is the growing skepticism of the need for postsecondary degrees. Recent public polling reveals that a significant portion of the U.S. population questions the economic value of higher education.²⁹ While previously nearly all indices agreed that higher education yields a strong return on investment, an increasing portion of the population disagrees with this premise.³⁰ The percentage of young adults who feel that a college degree is very important has fallen from seventy-four percent to forty-one.³¹ And now, nearly half of American parents would prefer their children not enroll in a four-year college even if there were no obstacles, financial or otherwise, in doing so.³²

Despite the proven long-term economic benefits of a bachelor's degree, there is a growing belief that holding a college degree does not correlate with obtaining a well-paying job. Eighty-seven percent of those holding a college degree or more report experiencing financial stability, twenty percentage points higher than groups with any other level of education.³³ College graduates are [also] half as likely to be unemployed as their peers whose highest degree is a high school

26. Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WEEK (updated July 22, 2025), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> [<https://perma.cc/D7A3-8ZSN>].

27. Char Adams & Nigel Chiwaya, *Map: See Which States Have Introduced or Passed Anti-DEI Bills*, NBC NEWS (Mar. 2, 2024, 7:00 AM), <https://www.nbcnews.com/data-graphics/anti-dei-bills-states-republican-lawmakers-map-rcna140756> [<https://perma.cc/YA7R-S2RL>].

28. Kalb, *supra* note 19, at 607.

29. Howard E. Gardner & Wendy Fischman, "Towards Quality Higher Education: Barriers and Enablers," in *FRONTIERS AND ADVANCES IN POSITIVE LEARNING IN THE AGE OF INFORMATION* (PLATO) 9, 17-18 (Olga Zlatkin-Troitschanskaia ed., 2019).

30. *Id.* at 18.

31. Paul Tough, *Americans Are Losing Faith in the Value of College. Whose Fault Is That?*, THE N.Y. TIMES (Sept. 5, 2023), <https://www.nytimes.com/2023/09/05/magazine/college-worth-price.html> [<https://perma.cc/5B96-N4T2>].

32. Jill Barshay, *Poll: Nearly Half of Parents Don't Want Their Kids to Go Straight to a Four-year College*, THE HECHINGER REP. (Apr. 7, 2021), <https://hechingerreport.org/poll-nearly-half-of-parents-dont-want-their-kids-to-go-to-a-four-year-college/> [<https://perma.cc/BL9X-YDM4>]. This article cites a Gallup survey commissioned by the Carnegie Corporation of New York.

33. *Economic Well-Being of U.S. Households*, FED. RSRV. BD. 1, 6 (May 2024), <https://www.federalreserve.gov/publications/files/2023-report-economic-well-being-us-households-202405.pdf> [<https://perma.cc/MC5U-QRV4>].

diploma.³⁴ However, forty percent of Americans say it is “not too or not at all important” to have a four-year degree to get a well-paying job in today’s economy, and about half feel it is even less important now than it was in the past.³⁵

Coupled with this skepticism about the utility of higher education are pervasive concerns about how emerging technologies, such as artificial intelligence (AI) and machine learning, will affect the job market.³⁶ Most Americans think AI will decrease the total number of jobs available over the next decade.³⁷ According to a 2023 Gallup poll, twenty-two percent of workers fear that technology will make their job obsolete, up from fifteen percent in 2021.³⁸ This increased concern is owed almost entirely to college-educated workers.³⁹ While workers without an undergraduate degree were previously much more concerned about technological replacement than college-educated workers, these groups now express similar levels of concern.⁴⁰ Universities must therefore assess how their programs equip graduates with adaptable skills, both technical and interpersonal, to develop professionally and excel in an evolving job market driven by innovation and technological change.

C. Institutions of Higher Education Struggle with Community Building and Combating Isolation in a Transactional Educational System

In addition to the economic benefits of higher education, universities must also better articulate the far-reaching social value they offer to students. Educational institutions can play a powerful role in students’ lives by creating environments that foster personal growth, development of meaningful peer relationships, and engagement with diverse perspectives. But, troublingly, there are growing concerns nationally about student well-being and connectedness within their school communities amid an “epidemic of loneliness and isolation.”⁴¹

34. *How Does a College Degree Improve Graduates’ Employment and Earnings Potential?*, ASS’N. OF PUB. & LAND-GRANT UNIVS., <https://www.aplu.org/our-work/4-policy-and-advocacy/publicvalues/employment-earnings/> [<https://perma.cc/2GXX-W3FV>].

35. Richard Fry et al., *Is College Worth it? Public Views on the Value of Education*, PEW RSCH. CTR. (May 23, 2024), <https://www.pewresearch.org/social-trends/2024/05/23/public-views-on-the-value-of-a-college-degree/> [<https://perma.cc/4FQR-SZR2>].

36. Gardner & Fischman, *supra* note 29, at 18.

37. Stephanie Marken & Tara Nicola, *Three in Four Americans Believe AI Will Reduce Jobs*, GALLUP (Sept. 13, 2023), <https://news.gallup.com/opinion/gallup/510635/three-four-americans-believe-reduce-jobs.aspx> [<https://perma.cc/2HUR-2JE4>].

38. Lydia Saad, *More U.S. Workers Fear Technology Making Their Jobs Obsolete*, GALLUP (Sept. 11, 2023), <https://news.gallup.com/poll/510551/workers-fear-technology-making-jobs-obsolete.aspx> [<https://perma.cc/ACG5-LY9P>].

39. *Id.*

40. *Id.*

41. *See Our Epidemic of Loneliness and Isolation: The U.S. Surgeon General’s Advisory on the Healing Effects of Social Connection and Community*, U.S. DEP’T OF HEALTH & HUM.

On top of the intense academic pressures students in college and post-college programs face, these individuals are also confronted with a number of complex social challenges as they navigate through their campus experiences. These difficulties can include economic uncertainty, political division, discrimination and inequalities, technology-driven stressors, and isolation.⁴² According to the American College Health Association, over three-quarters of postsecondary students experienced moderate to high levels of stress, more than half of students felt lonely, and around one in five students experienced serious psychological distress.⁴³ Loneliness and a lower sense of belonging is even more pronounced for students in historically underrepresented or marginalized groups.⁴⁴

The onset of the unprecedented global COVID-19 pandemic also led to significant disruption of college operations and added new psychosocial pressures for students. The closure of campuses due to quarantine and the abrupt shift to online learning severely curtailed the ability of students to meaningfully communicate and interact with professors, administrative staff, and their peers. However, heightened concerns about the mental health of young people in this generation have predated the onset of the pandemic, amounting to a public health crisis.⁴⁵

At a time when more than half of all students are enrolled in at least one online class,⁴⁶ universities must offer adequate mental health

SERVS. (2023) [hereinafter *Our Epidemic of Loneliness and Isolation*], <https://www.hhs.gov/sites/default/files/surgeon-general-social-connection-advisory.pdf> [https://perma.cc/WGE4-Z6F8].

42. Louis Tay, *Building Community Well-Being in Higher Education: An Introduction to the Special Issue*, 4 INT'L J. CMTY. WELLBEING 461 (2021).

43. American College Health Association-National College Health Assessment III: Reference Group Executive Summary, AM. COLL. HEALTH ASS'N 12, 14 (Fall 2023), https://www.acha.org/wp-content/uploads/2024/06/NCHA-IIIb_FALL_2023_REFERENCE_GROUP_EXECUTIVE_SUMMARY.pdf

[https://perma.cc/424Y-DCAC]. When asked “[w]ithin the last 30 days, how would you rate the overall level of stress experienced,” 49.2 percent of students said “[m]oderate” and 28.8 percent said “[h]igh.” On the UCLA Loneliness Scale, 51.5 percent of students scored positive for loneliness. Additionally, 21.3 percent of students scored in the range of serious psychological distress (between a thirteen and twenty-four) on the Kessler 6 Non-Specific Psychological Distress Score.

44. Maithreyi Gopalan & Shannon T. Brady, *College Students' Sense of Belonging: A National Perspective*, 49 AM. EDUC. RSCH. ASS'N 134 (2020). In a nationally representative sample, underrepresented racial and ethnic minority students and first-generation/low-income students reported a lower sense of belonging at four-year colleges than their peers.

45. Meghan A. Costello et al., *Facilitating Connection to Enhance College Student Well-being: Evaluation of an Experiential Group Program*, 70 AM. J. CMTY. PSYCH. 314, 315 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9666641/pdf/AJCP-70-314.pdf>

[https://perma.cc/37ND-389V]. Americans aged eighteen to twenty-four reported sixty-three percent reported increases in their levels of loneliness and depression over the last decade, before the onset of the COVID-19 pandemic; see also *Our Epidemic of Loneliness and Isolation*, supra note 41, at 13.

46. *Student Enrollment: What Is the Percent of Students Enrolled in Distance Education Courses in Postsecondary Institutions in the Fall?*, NAT'L CTR. FOR EDUC. STATS.,

services to ensure students feel connected and supported. Although online course offerings provide much-needed flexibility for many students, particularly those balancing work and family commitments, feelings of digital isolation and loneliness can undermine the academic experience. Students in virtual learning environments may encounter more barriers to engagement in team projects, less clarity around course instruction or expectations, and more limited opportunities for social interaction with their peers and faculty than in traditional in-person classroom settings.⁴⁷

And for students who attend institutions of higher education in person, feelings of disconnect may still prevail in a system where education is treated as a commodity rather than an opportunity for holistic personal development. A recent study conducted in the United Kingdom found that student expectations of their education as a commodity can prevent engagement with “independent learning,” emphasizing academic outcomes and increasing stress, distress, and desire for support.⁴⁸ Although independent learning has the potential to enable students to excel in higher education and in their lives beyond, educational institutions must also consider inclusivity efforts, structure of teaching, and students’ expectations and goal orientation to prevent negative impacts on student performance and wellbeing.⁴⁹

A transactional approach to addressing freedom of expression on campus may also contribute to division and feelings of isolation among students. When educational institutions fail to foster environments for respectful, inclusive, and constructive dialogue, students can feel marginalized and disconnected from the campus community. Under a transactional model, universities risk physical harm to students when speech causes re-traumatization that interferes with the ability to learn and may be so harmful as to shut down any competing speech or ideas.⁵⁰ It is therefore important for educational institutions to balance

<https://nces.ed.gov/ipeds/TrendGenerator/app/build-table/2/42?rid=6&cid=85>
[<https://perma.cc/TEM2-HR9G>] (last visited Feb. 11, 2025).

47. See generally Jitendra Singh et al., *Establishing Social, Cognitive, and Teaching Presence in Online Learning—A Panacea in COVID-19 Pandemic, Post Vaccine and Post Pandemic Times*, 51 J. EDUC. TECH. SYS. 28, 29 (2022).

48. Susan J. Wilbraham et al., *Inclusion or Isolation? Differential Student Experiences of Independent Learning and Wellbeing in Higher Education*, 14 EDUC. SCI. 285, 289 (2024). Here, the term “independent learning” is understood as the “process during which learners develop the values, attitudes, knowledge, and skills needed to make responsible decisions and take appropriate actions in regard to their own learning.” Constructivist educational philosophy “promote[s] independent learning over didactic passive instructional methods.” While this study was conducted in the U.K., the findings are applicable to educational institutions in the U.S. *Id.* at 286.

49. *Id.* at 289.

50. Michael J. Kaufman & Jennifer R. Stukenberg, *The Future of Higher Education: Reconciling Freedom of Expression with Trauma-Informed Practices and Relationship-Building*, 33 WIDENER COMMW. L. REV. 151, 167-69 (2024).

the democracy-serving freedom of expression with the value of preventing disruptive or harmful expression.⁵¹

D. Universities Increasingly Navigate Disruptors of Technological Threats, Environmental Risk, and Regulatory Change

Each year, universities face a myriad of enterprise risks that threaten their institutional operations and continuity. Risk can be defined simply as any issue that impacts an institution's ability to meet its objectives, which may include its mission and stated outcomes.⁵² The National Association of Corporate Directors has used four broad categories to categorize risk, each posing different risks to higher education: technological, hazards and environment, governmental, and societal.⁵³

1. Technological Disruptors

The growing use of generative artificial intelligence (GAI) creates both tremendous challenges and great opportunities for higher education. As students, faculty, staff-educators, and alumni are discovering the remarkable power and efficiency of using large language models, educational institutions must rethink their policies and approaches to academic integrity, ethics, plagiarism, curriculum, pedagogy, assessment, scholarship, career development, infrastructure, and communications.

Another related technological threat to the education sector is cybersecurity risk. Institutions of higher education are unique targets because they have complex digital footprints, as they continuously collect as much data as possible on students and their performance.⁵⁴ Universities are therefore in possession of a plethora of sensitive data, from personally identifiable information such as social security numbers, emails, addresses, and demographic information, to banking information of students and staff and medical information collected by internal health centers or off-campus health providers.⁵⁵ Often times the responsibility to protect this diverse data is spread across university departments, creating challenges for cohesive data security

51. *Id.* at 154.

52. *Meeting the Challenges of Enterprise Risk Management in Higher Education*, ASS'N OF GOVERNING BODS. OF UNIVS. & COLLS. & NAT'L ASS'N OF COLL. AND UNIV. BUS. OFFICERS 3 (2007) [hereinafter *Meeting the Challenges of ERM*].

53. *Enterprise Risk Management in Higher Ed Part 1: An Overview of the Planning Process*, THE CHANGE LEADER, INC. [hereinafter *Enterprise Risk Management in Higher Ed*] (citing *Report of the NACD Blue Ribbon Commission on Adaptive Governance: Board Oversight of Disruptive Risks*, NAT'L ASS'N OF CORP. DIRS. (2018)) [hereinafter *Board Oversight of Disruptive Risk*], <https://changinghighered.com/enterprise-risk-management-in-higher-ed-part1/> [<https://perma.cc/G4J7-23SQ>] (last visited Mar. 20, 2024).

54. Noran Shafik Fouad, *Securing Higher Education Against Cyberthreats: From an Institutional Risk to a National Policy Challenge*, 6 J. CYBER POL'Y 137, 143 (2021).

55. *Id.*

management.⁵⁶ This is further compounded by the general culture of openness at universities where systems are largely designed for resource collaboration and information-sharing.⁵⁷

As educational institutions continue to adopt emerging technologies, like GAI, their everyday operations are increasingly vulnerable to cyber incidents. A large-scale personal data breach of students, staff, and alumni in which hundreds if not thousands of individuals have their personal information subject to risk raises significant privacy concerns.⁵⁸ Other risks include attacks that severely disrupt the learning process. Such disruptions may include the cancellation of final exams,⁵⁹ a delayed start of the academic term,⁶⁰ or restricted access to library systems, learning management systems, or the entire university Information Technology (IT) system.⁶¹ Ransomware attacks, in which the target's access to their data is blocked and a ransom is required to regain access or to prevent data leakage, can lead to severe financial losses.⁶² Universities may also be the victims of intellectual property theft, by state-sponsored or rogue actors.⁶³

2. Hazards and Environmental Disruptors

Environmental and health-related risks can also severely disrupt educational institutions' operations and threaten their long-term continuity. Depending on geographic location, universities may be at risk of student displacement and campus closures caused by natural disasters including hurricanes, tornados, blizzards, and wildfires.⁶⁴ "Hazards" may also encompass public health emergencies, like the unprecedented COVID-19 pandemic.⁶⁵ Indeed, the pandemic emergency exposed shortfalls in universities' risk management planning, as few had existing protocols in place to determine the course of action if the

56. *Id.* at 144.

57. *Id.*

58. *Id.* at 138; see Hailey Fuchs, *Yale Faces Lawsuit for Data Breach*, YALE DAILY NEWS (Aug. 31, 2018, 1:29 AM), <https://yaledailynews.com/blog/2018/08/31/yale-faces-lawsuit-for-data-breach/> [https://perma.cc/4XJT-8ELA].

59. Fouad, *supra* note 54, at 142; see *Northumbria University Hit by Cyber Attack*, BBC NEWS (Sept. 1, 2020), <https://www.bbc.co.uk/news/uk-england-tyne-53989404> [https://perma.cc/X9WU-NKGD].

60. Fouad, *supra* note 54, at 142; see Neil Fatkin, *University of Portsmouth Beefs up IT Security After 'Cyber Incident' as Campus Reopens*, THE NEWS (Apr. 20, 2021), <https://www.portsmouth.co.uk/education/university-of-portsmouth-beefs-up-it-security-after-cyber-incident-as-campus-reopens-3207773> [https://perma.cc/2UBU-CCLS].

61. Fouad, *supra* note 54, at 142; see *Top Irish Colleges Face the Ire of Ransomware Attacks*, CISOMAG (Apr. 8, 2021), <https://cisomag.com/ransomware-attack-on-two-irish-colleges/> [https://perma.cc/HD4N-XYVE].

62. Fouad, *supra* note 54, at 138.

63. *Id.* at 142.

64. See generally Cole Claybourn, *College Students and Natural Disasters: What to Know and Do*, U.S. NEWS (Oct. 15, 2024, 2:09 PM), <https://www.usnews.com/education/best-colleges/articles/college-students-and-natural-disasters-what-to-know-and-do> [https://perma.cc/67SM-9EYD].

65. *Enterprise Risk Management in Higher Ed*, *supra* note 53.

entire physical campus was forced to close for months at a time and academic instruction moved online for an indefinite period.

This category also includes environmental disruptors, like climate change, which will impact the entire higher education system. Educational institutions—including their operations, facilities, fiscal models and missions—are at severe and sustained risk from an increasingly destabilized climate.⁶⁶ Risks include extreme weather events that are a product of climate change, affecting the university's physical infrastructure and operations as well as the vendors and partners within its larger supply chain. There are also external pressures on university investments as many financial institutions pledge to cut or reduce emissions within their portfolios⁶⁷ and governments in the U.S. and globally scale up their decarbonization commitments.⁶⁸

Government mandates and institutional sustainability goals require universities to reflect on their role as contributors to climate change and to reduce their climate footprints. For example, the state of California has asked colleges to meet mandatory emissions reductions by 2045 while also still growing in size to accommodate more students.⁶⁹ To help achieve these climate goals, universities should prioritize investments in sustainable infrastructure and water management systems, heat-resilient building designs, clean transportation, and zero-emission technologies.

Importantly, schools must be alert to the negative long-term impacts of climate change on their students, particularly those from disaster-affected areas or who themselves or their families have been displaced by a disaster. Students whose families live in ZIP codes where a severe weather event occurred are more likely to suffer academically,

66. Mildred García & Kim Hunter Reed, *OPINION: Higher Education Must Take the Lead on Climate Change, Beginning on Our Own Campuses*, THE HECHINGER REP. (Sept. 26, 2023), <https://hechingerreport.org/opinion-higher-education-must-take-the-lead-on-climate-change-beginning-on-our-own-campuses/> [<https://perma.cc/L7DC-JQX9>].

67. See generally *About us*, GLASGOW FIN. ALL. FOR NET ZERO, <https://www.gfan-zero.com/about/> [<https://perma.cc/Y7BN-9EBQ>] (last visited Aug. 12, 2025); see generally Anderson Lee & Amanda Carter, *Banks Have Committed to Net Zero but Aren't on Track to Reach It*, WORLD RES. INST. (Aug. 14, 2024), <https://www.wri.org/insights/banks-off-track-for-net-zero-emissions> [<https://perma.cc/5TKG-68QA>].

68. See generally *The Long-Term Strategy of the United States: Pathways to Net-Zero Greenhouse Gas Emissions by 2050*, THE WHITE HOUSE (Nov. 2021), <https://biden-whitehouse.archives.gov/wp-content/uploads/2021/10/US-Long-Term-Strategy.pdf> [<https://perma.cc/9AJM-S63S>]; see generally *CAT Climate Target Update Tracker*, CLIMATE ACTION TRACKER, <https://climateactiontracker.org/> [<https://perma.cc/9BPT-HE9M>] (last visited Mar. 16, 2025).

69. Christina Chkarboul, *California Colleges Have to Slash Emissions. Here's Why Decarbonization is Complex and Costly*, CALMATTERS (Mar. 12, 2024), <https://calmatters.org/education/higher-education/college-beat/2024/03/california-colleges-decarbonization-2045#:~:text=The%20community%20college%20system's%20climate,their%20own%20plans%20by%202025> [<https://perma.cc/98GD-HSBT>].

withdraw from difficult courses, and default on their student loans after graduation.⁷⁰

3. *Governmental and Societal Disruptors*

Universities must navigate a constantly evolving regulatory landscape that directly impacts their funding models. One major concern is the persistent decline in state support for higher education. At the federal level, partisan efforts to cut funding for financial aid programs can complicate financial planning for both universities and their students and families.⁷¹ These programs are critical for ensuring that low and middle-income students continue to have access to higher education, and changes to their eligibility criteria or funding levels could have widespread implications on both future university enrollment and the ability of current students to complete their degrees. Confusion and delays in the Free Application for Federal Student Aid (FAFSA) process have created additional hurdles, deterring some students from completing their applications or receiving timely financial aid packages.⁷²

Governmental disruptors also include regulatory changes like amendments to Title IX, a federal law that safeguards students from sex discrimination and governs how institutions handle sexual misconduct cases.⁷³ Similarly, the Supreme Court's 2023 decision rejecting affirmative action in college admissions has forced universities to

70. Rebecca Hersher, *The Unexpected Links Between Climate Change, Student Debt and Lower Lifetime Earnings*, NPR (Feb. 27, 2024, 5:00 AM), <https://www.npr.org/2024/02/27/1230002959/debt-missed-classes-and-anxiety-how-climate-driven-disasters-hurt-college-studen> [https://perma.cc/BPV2-8RQU].

71. See Maria Carrasco, *House Republicans' 2025 Budget Proposal Slashes Funding for FSA Administration, Campus-Based Aid Programs*, NAT'L ASS'N OF STUDENT FIN. AID ADM'RS (June 26, 2024), https://www.nasfaa.org/news-item/34018/House_Republicans_2025_Budget_Proposal_Slashes_Funding_For_FSA_Administration_Campus-Based_Aid_Programs [https://perma.cc/GNB3-6BV6]; see also Sameer Gadkaree, *House Republicans' FY25 Education Appropriations Bill Threatens College Affordability and Accountability*, THE INST. FOR COLL. ACCESS & SUCCESS (July 10, 2024), <https://ticas.org/affordability-2/house-republicans-fy25-education-appropriations-bill-threatens-college-affordability-and-accountability/> [https://perma.cc/3PSD-M75U]; see also *Pell Grant Shortfalls Remains a Threat*, COMM. FOR A RESPONSIBLE FED. BUDGET (July 12, 2024), <https://www.crfb.org/blogs/pell-grant-shortfall-remains-threat#:~:text=Pell%20Grant%20costs%20will%20exceed%20appropriations%20over%20the%20next%20decade, reserves%20between%202027%20and%202029> [https://perma.cc/982Z-7QVJ].

72. *FAFSA Delays Cause Stress, Confusion for Students and Families*, INSIGHT INTO DIVERSITY (Apr. 9, 2024), <https://www.insightintodiversity.com/fafsa-delays-cause-stress-confusion-for-students-and-families/> [https://perma.cc/9LSU-H75J].

73. See *Enterprise Risk Management in Higher Ed*, *supra* note 53; see also *Regulations Enforced by the Office for Civil Rights*, U.S. DEP'T OF EDUC. (Apr. 19, 2024), <https://www.ed.gov/about/ed-offices/ocr/regulations-enforced-by-the-office-for-civil-rights> [https://perma.cc/6SU3-EERZ]; but see Libby Stanford, *Which States Have Sued to Stop Biden's Title IX Rule?*, EDUC. WEEK (updated Aug. 1, 2024), <https://www.edweek.org/policy-politics/which-states-have-sued-to-stop-bidens-title-ix-rule/2024/07#:~:text=Legal%20challenges%20to%20Biden's%20Title%20IX%20rule%20and%20their%20status&text=The%20lawsuits%20all%20take%20issue,to%20be%20included%20in%20regulation> [https://perma.cc/QV26-H2GN].

rethink their diversity and inclusion strategies and admissions practices.⁷⁴ Policy changes also include protectionist programs, like restrictive immigration and visa policies that harm the recruitment and retention of international students, or continued legal threats to the Deferred Action for Childhood Arrivals (DACA) program.⁷⁵

Lastly, societal disruptors play a critical role in reshaping the higher education landscape. This includes demographic shifts such as an aging workforce population, resulting in some older faculty members struggling to teach classes online or transition to digital learning platforms.⁷⁶ Another demographic shift is the “enrollment cliff,” where an anticipated reduction of the applicant pool threatens universities’ long-term financial stability.⁷⁷ Social movements also have a profound impact on university campuses.⁷⁸ Activism importantly fosters a heightened sense of awareness and engagement among students, faculty, and administrators. However, it can also spark tension and division as different groups advocate for competing visions of democracy, justice, and reform.

E. The Traditional University Business Model Predicated on Tuition Increases for a Shrinking Student Population is Untenable

The projected decline in the number of college-aged students poses a significant threat to a higher education system that is heavily reliant on tuition for revenue. Nationwide undergraduate enrollment decreased by eight percent from 2019 to 2022, even after students returned to in-person classes.⁷⁹ The reduction in college-going rates starting in 2018 is one of the steepest on record.⁸⁰ While undergraduate enrollment went up during the fall of 2023 and spring of 2024, after years of decline resulting from the COVID-19 pandemic, enrollment levels are still far below pre-pandemic levels with over 900,000 fewer undergraduates compared to spring 2020.⁸¹

Law schools have also seen a pronounced decline in enrollment within the last twenty years. After decreasing significantly from 2010

74. See generally *Students for Fair Admissions*.

75. Joe Fisher, *DACA at Heightened Risk While in Litigation Limbo*, UNITED PRESS INT'L (June 20, 2024, 5:54 AM), https://www.upi.com/Top_News/US/2024/06/20/daca-litigation-election-biden-immigration/7871718808469/ [<https://perma.cc/N9V2-2GNZ>].

76. *Enterprise Risk Management in Higher Ed*, *supra* note 53.

77. *Id.* This concept of the “enrollment cliff” is further discussed *infra* Subsection “E. The Traditional University Business Model Predicated on Tuition Increases for a Shrinking Student Population is Untenable.”

78. *Id.*

79. Collin Binkley, *Jaded with Education, More Americans are Skipping College*, AP NEWS (Mar. 9, 2023, 2:23 PM), <https://apnews.com/article/skipping-college-student-loans-trade-jobs-efc1f6d6067ab770f6e512b3f7719cc0> [<https://perma.cc/N7KW-CR6E>].

80. *Id.*

81. *Current Term Enrollment Estimates (CTEE): Spring 2024*, NAT'L STUDENT CLEARINGHOUSE RSCH. CTR. (updated May 17, 2024), <https://public.tableau.com/app/profile/researchcenter/viz/CTEESpring2024Report/CTEES24> [<https://perma.cc/U3JS-G5RD>].

to 2017, enrollment rose at law schools accredited by the American Bar Association (ABA) from 2018 to 2021.⁸² Yet enrollment was far lower in 2021 at 117,278 than it was at its height in 2010 with 147,525.⁸³ Compared with peak enrollment in 2010, overall JD enrollment was down nearly twenty-one percent in 2023.⁸⁴

This reduction has garnered concerns about the so-called “enrollment cliff” —in which changing demographics and a decline in the U.S. birthrate will lead to a smaller pool of college-aged students that is projected to reach its peak between 2025 and 2026.⁸⁵ The U.S. birth rate fell precipitously after the Great Recession, a downward trend that, though concentrated among women in the under-thirty age category, has been widespread across population groups.⁸⁶ This decline in birth rates is anticipated to result in a successively smaller college-aged population nearly every year for a decade, starting in 2026.⁸⁷ The number of traditional college-aged individuals is then expected to decrease over the next five to ten years by as much as fifteen percentage points.⁸⁸ This looming enrollment cliff reveals the vulnerabilities of a tuition-dependent, market-driven model, as well as the need for universities to rethink their financial strategies and consider alternative ways to achieve economic stability.

F. Educational Institutions Must Think Globally to Prepare Students for Success in an Increasing Interconnected World

Though many U.S. institutions of higher education have developed or intensified their internationally focused programs over the past four decades, few have made global extension of their universities central to their mission.⁸⁹ This is even more challenging in an era where

82. *Law School Enrollment Trends, 1963-2024*, LAWHUB (last visited July 4, 2025), <https://www.lawhub.org/trends/enrollment> [<https://perma.cc/6UQV-SG4N>].

83. *Id.* (showing data from the figure titled “Law School Enrollment, JD Students, Non-JD Students”).

84. *Id.*

85. Hugh T. Ferguson, *Demographic Changes and Pandemic Fallout Could Alter Higher Ed Enrollment Trends*, NAT’L ASS’N OF STUDENT FIN. AID ADM’RS (Apr. 19, 2021), https://www.nasfaa.org/news-item/25318/Demographic_Changes_and_Pandemic_Fallout_Could_Alter_Higher_Ed_Enrollment_Trends [<https://perma.cc/7F7Z-53H7>].

86. Melissa S. Kearney et al., *The Puzzle of Falling US Birth Rates Since the Great Recession*, 36 J. ECON. PERSPS. 151, 151 (2022).

87. Peace Bransberger et al., *Knocking at the College Door: Projections of High School Graduates*, W. INTERSTATE COMM’N FOR HIGHER EDUC. 1, 2 (2020), <https://www.wiche.edu/wp-content/uploads/2020/12/Knocking-pdf-for-website.pdf> [<https://perma.cc/Q523-8BAQ>].

88. Dan Bauman, *Colleges Were Already Bracing for an ‘Enrollment Cliff.’ Now There Might Be a Second One.*, THE CHRON. OF HIGHER EDUC. (Feb. 7, 2024), <https://www.chronicle.com/article/colleges-were-already-bracing-for-an-enrollment-cliff-now-there-might-be-a-second-one#:~:text=Colleges%20Were%20Already%20Bracing%20for,Might%20Be%20a%20Second%20One.&text=By%20now%2C%20you%20no%20doubt,of%20traditional%20college%20students> [<https://perma.cc/SHV9-9WV9>].

89. Mariët Westermann, *The International University in an Age of Deglobalization*, in DAEDALUS: J. AM. ACAD. OF ARTS & SCI. 36, 37 (Wendy Fischman et. al. eds., 2024).

governments seek to restrict the cross-border flow of data, intellectual property, and people.⁹⁰ While many universities offer specific international degree programs, schools may be reluctant to emphasize foreign language skills, international affairs, and other cross-cultural competencies in their broader curricula, even though these are important tools to prepare students for entering a global workforce.

Insufficient opportunities to participate in international study, internships, or global projects restrict students who are eager to broaden their horizons and gain diverse perspectives. While many universities offer study abroad programs, costs of participation running in the thousands of dollars remains a significant financial barrier, particularly for first-generation and low-income students.⁹¹ Students at private universities are also twice as likely as those attending public school to have studied abroad, revealing further discrepancies in available opportunities.⁹²

While a few U.S. educational institutions have taken on the challenge of establishing degree-granting programs abroad, there are deeply rooted challenges inhibiting many from doing so. For older, private institutions, approving these degree-granting programs requires buy-in from key constituencies who may have little incentive to take such entrepreneurial risks.⁹³ Though public universities do not have this same weight of tradition constraining them, their international partnerships often draw inimical oversight from federal or state legislatures.⁹⁴

Universities' lack of an integrated, international focus also constrains their ability to help solve complex global problems. When schools are driven by a transactional mindset focused on economic returns and narrowly defined institutional goals, they might be deterred from collaborating with universities in other countries to address major issues affecting all of humanity, such as climate change, poverty, economic inequality, disease, and human rights.

II. U.S. HIGHER EDUCATION SHOULD ADOPT A RELATIONAL APPROACH TO EDUCATION THAT EMPHASIZES THE IMPORTANCE OF HUMAN CONNECTION

These seemingly discrete challenges all result from the prevailing transactional mindset under which the higher education system currently operates. Primarily driven by a behaviorist approach that seeks to train students through transactional rewards and punishments,

90. *Id.* at 36.

91. *Making Study Abroad More Affordable*, THE FEED GEO. U. (Jan. 19, 2024), <https://feed.georgetown.edu/access-affordability/making-study-abroad-more-affordable/> [<https://perma.cc/JZC7-3FM2>].

92. *Id.*

93. Westermann, *supra* note 89, at 39.

94. *Id.*

this model treats education as a commodity, emphasizing short-term economic returns over the kind of life-long learning and well-being that derives from meaningful relationship-building.

The focus of tuition as a primary revenue source exacerbates issues of affordability and inclusivity, particularly for students from historically marginalized groups. Universities that prioritize near term revenue generation may also lack the flexibility to adapt their infrastructure and policies to disruptors like cybersecurity and regulatory change or may neglect the importance of offering globally minded academic programs and opportunities. Addressing these challenges requires a decisive shift away from a transactional model in favor of a relational approach to higher education that prioritizes collaboration, inclusivity, community, and long-term personal and social success.

A. Universities Must Shift Away from Transactional Model of Education That Reflects an Incomplete Understanding of Human Nature

The United States' education system has for generations reflected behaviorist assumptions and practices about human nature and development.⁹⁵ These behaviorist assumptions have been used to justify a regime of standardized testing.⁹⁶ Under this construct, "a person's thoughts, feelings, desires, emotions, intentions, and cognitive processes are less important than observable behavior and[, thus,] less important to learning."⁹⁷

Behaviorist pedagogies also legitimatize an authoritarian role for teachers.⁹⁸ Teachers following the behaviorist approach will rely primarily on direct instruction to transmit information to students.⁹⁹ This teacher-dominated communication to students of information, primarily done through lecture, gives students only isolated pieces of information, the acquisition of which is then measured by standardized tests.¹⁰⁰

As such, this approach supports the creation of inflexible, pre-determined lesson plans.

The principle of 'operant conditions' also suggests that teachers should deliver their external rewards and punishments immediately after the student has demonstrated the particular behavior being observed. As a consequence, teachers must present their instruction in a linear way in

95. Kaufman, *supra* note 6, at 1190.

96. *Id.* at 1191; see PHILLIP HARRIS ET AL., THE MYTH OF STANDARDIZED TESTS: WHY THEY DON'T TELL YOU WHAT YOU THINK THEY DO 73-74 (2011).

97. Kaufman, *supra* note 6, at 1191-92 (alteration in original).

98. *Id.* at 1192.

99. MICHAEL J. KAUFMAN ET AL., LEARNING TOGETHER: THE LAW, POLITICS, ECONOMICS, PEDAGOGY, AND NEUROSCIENCE OF EARLY CHILDHOOD EDUCATION 22-23 (2015).

100. *Id.*

which one particular desired behavior is observed before the next conditioning takes place.¹⁰¹

As with an unregulated approach to the economy, the behaviorist approach to education creates a false perception of efficiency.¹⁰² The “standards” movement in U.S. education is predicated on the idea that a single teacher can impart a single set of facts to a large number of students at the same time.¹⁰³ This type of education built on behaviorist principles, may appear cost-effective, but it is not by any credible measure.¹⁰⁴ As Stephen Heyneman concluded after reviewing many measures of cost-effectiveness, including overall educational expenses relative to student outputs, “The sum of this evidence would suggest that by many different measures the U.S. is less efficient than other countries and that the record of insufficiency is consistent over at least two decades.”¹⁰⁵

Rather than have universities modeled on behaviorist assumptions of education, higher education should embrace social constructivist pedagogies. Social constructivism is an educational approach that understands that true knowledge is not consumed passively or individually, but rather it is co-constructed socially through meaningful relationships.¹⁰⁶ This includes engagement between family, caregivers, teachers, peers, the environment, and the community.¹⁰⁷

Founded on the discoveries of Russian lawyer and psychologist Lev Vygotski, social constructivism recognizes that knowledge is a social construct and all of “human learning presupposes a specific social nature and a process by which children grow into the intellectual life of those around them.”¹⁰⁸

B. The Human Desire for Building Loving Relationships is Supported by Evidence from Multiple Disciplines

The notion that human beings long to build loving relationships has been validated by the recent evidence from the fields of neuroscience, neuro-psychology, cognitive psychology, educational psychology, economics, and behavioral economics.

The world’s foremost neuroscientists, relying on sophisticated research techniques such as brain imaging, have discovered the

101. *Id.* at 22.

102. Kaufman, *supra* note 6, at 1200.

103. KAUFMAN ET AL., *supra* note 99, at 11.

104. Kaufman, *supra* note 6, at 1200.

105. *Id.*; see Stephen P. Heyneman, “The International Efficiency of American Education: The Bad and the Not-so-Bad News,” in PISA, POWER AND POLICY: THE EMERGENCE OF GLOBAL EDUCATIONAL GOVERNANCE, 279, 284 (Heinz-Dieter Meyer & Aaron Benavot eds., 2013).

106. Kaufman, *supra* note 6, at 1211.

107. *Id.*

108. *Id.* at 1212 (emphasis omitted); L.S. VYGOTSKY, MIND IN SOCIETY: THE DEVELOPMENT OF HIGHER PSYCHOLOGICAL PROCESSES 88 (1978) (emphasis omitted).

existence of mirror neurons in human beings.¹⁰⁹ When a person performs an activity, these neurons fire the same way as when a person watches someone else perform that activity.¹¹⁰ These mirror neurons enable a person to first “perceive the intentional state of another, and then imitate the other’s behavior and simulate the other’s internal state.”¹¹¹

By directly influencing a person’s motor actions through imitation and shifts in their subcortical state through internal simulation, a person can feel inside their body a similar state to that of another person.¹¹² This allows individuals to “resonate” with one another and to sense others as an essential part of themselves.¹¹³ The neural connectivity between human beings is the result of human evolution; it is the foundation for our natural impulse towards empathy.¹¹⁴ Indeed, human beings are hard-wired to pursue meaningful, loving relationships rather than to consume or compete.¹¹⁵ Meaningful engagement with others is not only an innate biological desire, but it is also critical to the continued growth of cognitive functioning.¹¹⁶

Renowned child psychiatrist Dr. Bruce Perry has found compelling evidence in his path-breaking research that human beings are in fact “born for love.”¹¹⁷ Based on his brain imaging and clinical research, Dr. Perry concludes that human beings have a unique biological make-up and survival instinct which drives them to form meaningful relationships.¹¹⁸ Dr. Perry asserts that: “Humankind would not have endured and cannot continue without the capacity to form rewarding, nurturing, and enduring relationships. We survive because we can love.”¹¹⁹

Children are born with a natural desire and capacity for “attachment,” or the ability to form and maintain emotionally significant,

109 V.S. RAMACHANDRAN, *THE TELL-TALE BRAIN: A NEUROSCIENTIST’S QUEST FOR WHAT MAKES US HUMAN* 22 (2011).

110. *Id.*

111. DANIEL J. SIEGEL, *THE DEVELOPING MIND: HOW RELATIONSHIPS AND THE BRAIN INTERACT TO SHAPE WHO WE ARE* 157 (2d ed. 2020).

112. *Id.* at 308.

113. *Id.*

114. *See* RAMACHANDRAN, *supra* note 109, at 261, 265 (noting the role of mirror neurons in empathy).

115. *Id.*

116. *Cf.* CHARLES DARWIN, *THE PRINCIPAL WORKS OF CHARLES DARWIN: THE ORIGIN OF SPECIES; THE DESCENT OF MAN* 70 (1886)

When two tribes of primeval man, living in the same country, came into competition, if (other circumstances being equal) the one tribe included a great number of courageous, sympathetic and faithful members, who were always ready to warn each other of danger, to aid and defend each other, this tribe would succeed better and conquer the other.

117. *See generally* MAIA SZALAVITZ & BRUCE D. PERRY, *BORN FOR LOVE: WHY EMPATHY IS ESSENTIAL—AND ENDANGERED* (2010).

118. *See id.* at 4, 30.

119. *Id.* at 4.

reliable, and enduring bonds with other people.¹²⁰ Strong attachment bonds are based on genuine communication that supports the development of social, emotional, and cognitive functioning.¹²¹ Early attachment experiences alter one's brain chemistry, aiding the nervous system in building emotional resilience.¹²²

Loving relationships also develop the uniquely human capacity for inter-subjectivity.¹²³ This is the process by which humans understand the thoughts, feelings, and intentions of others.¹²⁴ Human beings find great joy in exercising their natural disposition towards intersubjectivity and realizing what they have in common with others.¹²⁵ In early learning environments, children who experience attachment and inter-subjectivity are more likely to exhibit higher mental functions of focus, perseverance, and control over their behavior.¹²⁶

Similarly, the natural human desire for love is vital to cognitive integration. As neuropsychiatrist Daniel Siegel has found:

We come into the world wired to make connections with one another, and the subsequent neural shaping of our brain, the very foundation of our sense of self, is built upon these intimate exchanges between the infant and her caregivers. In the early years this interpersonal regulation is essential for survival, but throughout our lives we continue to need such connections for a sense of vitality and well-being.¹²⁷

Siegel suggests that meaningful relationships stimulate the prefrontal cortex in the brain, which is crucial for integrating the cognitive processes that are essential to success and well-being.¹²⁸ In Daniel Siegel's book, *Mind: A Journey to the Heart of Being Human*, he finds that the human mind is "an embodied and relational, self-organizing emergent process that regulates the flow of energy and information both within and between."¹²⁹ He further holds that "the mind is not just within us - it is also between us."¹³⁰ Siegel therefore concludes that all human "[e]nergy and information flow happens in relationships as energy and information is shared"¹³¹

Meaningful relationships also can be developed between individuals and their environment. David Hawkins writes about the

120. Kaufman, *supra* note 6, at 1195; see DANIEL J. SIEGEL, MINDSIGHT: THE NEW SCIENCE OF PERSONAL TRANSFORMATION 214 (2010).

121. KAUFMAN ET AL., *supra* note 99, at 163.

122. *Id.*

123. *Id.* at 160.

124. *Id.*

125. Kaufman, *supra* note 6, at 1196.

126. KAUFMAN ET AL., *supra* note 99, at 215.

127. DANIEL J. SIEGEL, MINDSIGHT: THE NEW SCIENCE OF PERSONAL TRANSFORMATION 10-11 (2010).

128. *Id.* at 26.

129. DANIEL J. SIEGEL, MIND: A JOURNEY TO THE HEART OF BEING HUMAN 37 (2017).

130. *Id.* at 167.

131. *Id.* at 53.

relationship that forms between a child, a teacher, and natural materials.¹³² He notes that, when a teacher explores a natural material with a child, the teacher has made possible a “relation between the child and ‘It[.]’”¹³³

The human urge to develop loving relationships is indispensable to overall well-being. In “A Survey Method for Characterizing Daily Experience: The Day Reconstruction Method,” Nobel Prize winning psychologist and founder of behavioral economics, Daniel Kahneman, presents his transformative research regarding the determinants of happiness and well-being.¹³⁴ The evidence indicates that individuals experience the greatest degree of happiness from their social relationships.¹³⁵ As Professor Kahneman’s research confirms, the most significant determinant of happiness—whether measured as momentary feelings, reflective thoughts, or life satisfaction—is the quality of a person’s relationships.¹³⁶ “In fact, he finds that the evidence shows that ‘very happy people’ differ from unhappy or modestly happy people in the level of their ‘fulsome and satisfying interpersonal lives.’”¹³⁷

Dan Siegel’s recent research similarly explores the relationship between mindful awareness, compassion for both the self and others, and well-being.¹³⁸ Mindful awareness has been construed by some as “a way of being aware of one’s own inner life and the surrounding world with kindness, a loving awareness or loving attention that is a form of positive regard for self and others.”¹³⁹ Research demonstrates that mindful awareness can bolster “the health of the mind by increasing flexibility, concentration, and sense of well-being.”¹⁴⁰ Relationships are enhanced by improved empathy and compassion.¹⁴¹ This in turn shifts baseline activity of the brain, which is associated with approaching rather than withdrawing from challenging situations in what has been understood as a sign of “neural resilience.”¹⁴² For example, primary care physicians who are taught mindful awareness not only

132. See DAVID HAWKINS, *THE INFORMED VISION: ESSAYS ON LEARNING AND HUMAN NATURE* 56-57 (2002).

133. *Id.* at 59.

134. Daniel Kahneman et al., *A Survey Method for Characterizing Daily Life Experience: The Day Reconstruction Method*, 306 *SCIENCE* 1776, 1776-80 (2004).

135. *Id.* at 1777-78.

136. *Id.* at 1776-80.

137. SHERELYN R. KAUFMAN ET AL., *THE PRE-K HOME COMPANION: LEARNING THE IMPORTANCE OF EARLY CHILDHOOD EDUCATION AND CHOOSING THE BEST PROGRAM FOR YOUR FAMILY* 41 (2016) [hereinafter *THE PRE-K HOME COMPANION*] (citing Daniel Kahneman et al., *A Survey Method for Characterizing Daily Life Experience: The Day Reconstruction Method*, 306 *SCIENCE* 1776, 1776-80 (2004)).

138. DANIEL J. SIEGEL, *THE DEVELOPING MIND: HOW RELATIONSHIPS AND THE BRAIN INTERACT TO SHAPE WHO WE ARE* 64 (3d ed. 2020).

139. *Id.* at 65.

140. *Id.*

141. *Id.*

142. *Id.*

demonstrate enhanced empathy for their patients, but they also experience less burnout from their work.¹⁴³

The research is clear: “[t]he single most important factor in fostering happiness and well-being is the quality of a person’s relationships.”¹⁴⁴ Meaningful social relationships can be defined as close relationships characterized by a strong connectedness through reciprocal care and fulfillment of certain attributes and functions for each individual.¹⁴⁵ Human beings can fulfill critical social needs such as belonging, being accepted, feeling valued as a person, or social sharing of emotions through these relationships.¹⁴⁶ Beyond providing practical help, emotional safety, and security, drawing upon one’s meaningful relationships can “also enable[] a life full of wellbeing, satisfaction, and meaning.”¹⁴⁷ There are several different categories of meaningful relationships that have been shown to positively influence one’s life, including spouses, long-term romantic partners, and close family members.¹⁴⁸ However, relationships with friends and co-workers have also been shown to be a strong predictor of well-being.¹⁴⁹ It is therefore not just social inclusion or the pure number of relationships that is important for a person’s overall wellness, but also whether that person maintains satisfying, high-quality meaningful relationships.¹⁵⁰

People who have developed the ability to form and maintain meaningful relationships are “significantly happier and healthier than their peers who do not have such meaningful relationships. Moreover, those children who have formed meaningful relationships are even happier and healthier than their wealthier peers who have not formed those relationships.”¹⁵¹

[Q]uality of relationships also is connected to physical well-being, health, and wellness. Meaningful relationships increase immunity to

143. SIEGEL, *supra* note 138, at 65.

144. KAUFMAN ET AL., THE PRE-K HOME COMPANION, *supra* note 137, at 41.

145. Victoria J. Block et al., *Meaningful Relationships in Community and Clinical Samples: Their Importance for Mental Health*, 13 FRONTIERS IN PSYCH. 1, 1-2 (2022) (citing Jaap Van Der Meiden et al., *Strengthening Connectedness in Close Relationships: A Model for Applying Contextual Therapy*, 59 FAM. PROCESS 346, 346-60 (2020)).

146. *Id.* (citing Bernard Rimé et al., *Long-lasting Cognitive and Social Consequences of Emotion: Social Sharing and Rumination*, 3 EUR. REV. SOC. PSYCH., 225, 225-58 (1992)).

147. *Id.* (citing Julianne Holt-Lunstad et al., *Social Relationships and Mortality Risk: A Meta-analytic Review*, 7 PLOS MED (2010)).

148. *Id.* (citing Erich Kirchler, *Marital Happiness and Interaction in Everyday Surroundings: A Time-Sample Diary Approach for Couples*, 5 J. SOC. PERS. RELATIONSHIPS 375, 375-82 (1988); Nicole L. Letourneau et al., *Maternal Depression, Family Functioning and Children’s Longitudinal Development*, 28 J. PEDIATRIC NURSING 223, 223-34 (2013)).

149. *Id.* (citing Philip D. Parker et al., *Hope, Friends, and Subjective Well-Being: A Social Network Approach to Peer Group Contextual Effects*, 86 CHILD DEVELOPMENT, 642, 642-50 (2015); Jean Elizabeth Wallace & Jane Lemaire, *On Physician Well Being—You’ll Get by with a Little Help from Your Friends*, 64 SOC. SCI. MED. 2565, 2565-77 (2007)).

150. Block et. al., *supra* note 145, at 2 (citing Toni C. Antonucci et al., *Social Relations and Depressive Symptomatology in a Sample of Community-Dwelling French Older Adults*, 12 PSYCH. AGING 189-95 (1997)).

151. KAUFMAN ET AL., THE PRE-K COMPANION, *supra* note 137, at 41.

disease and infection, lower the risk of heart disease, and reduce the degree of cognitive decline through the aging process. Indeed, the absence of meaningful relationships is as deleterious to health as obesity or smoking. It is not surprising, therefore, that James Heckman, in *Giving Kids a Fair Chance (A Strategy that Works)*, presents irrefutable evidence that early childhood programs that develop in children the capacity to build meaningful relationships [not only produce robust economic returns but also] produce significant health advantages, including a reduction in obesity, blood pressure, and hypertension.¹⁵²

In the school context, a strong sense of belonging has been shown to predict positive academic outcomes and contribute to children and adolescents' mental health and overall well-being.¹⁵³ A recent study conducted by the Faculty of Psychology and Educational Sciences at the Alexandru Ioan Cuza University revealed a direct positive effect of the perceived number of school peer friends on a child's life satisfaction.¹⁵⁴ These findings support the notion that "children who perceive having more friends within their school groups, with whom they share a significant amount of time every day, are more likely to have positive interactions with their peers and to have their psychological needs for affiliation and security."¹⁵⁵

In addition, the natural human desire for meaningful relationships helps produce executive function.¹⁵⁶ The concept of executive function has been recognized as part of recent scholarship about the importance of "grit" or "growth mindset" to learning.¹⁵⁷ "These popular catch phrases capture some, but not all, of the power of executive function."¹⁵⁸ "Executive function properly understood includes three types of capacities: working memory, cognitive flexibility, and inhibitory control."¹⁵⁹ Education programs that enable students to develop meaningful, positive relationships are particularly effective in supporting the growth of executive function.¹⁶⁰ The relationship-building capacities of

152. *Id.*

153. René Gempp & Mònica González-Carrasco, *Peer Relatedness, School Satisfaction, and Life Satisfaction in Early Adolescence: A Non-recursive Model*, 12 FRONTIERS IN PSYCH. 1, 1 (2021).

154. *Id.*; see also Ana-Maria Tepordei et al., *Children's Peer Relationships, Well-Being, and Academic Achievement: The Mediating Role of Academic Competence*, 1 FRONTIERS IN PSYCH. 1, 1 (2023).

155. Ana-Maria Tepordei et al., *supra* note 154, at 6.

156. *Building the Brain's "Air Traffic Control" System: How Early Experiences Shape the Development of Executive Function*, CTR. ON THE DEVELOPING CHILD AT HARV. U. 1, 3 (2011), <https://developingchild.harvard.edu/wp-content/uploads/2024/10/How-Early-Experiences-Shape-the-Development-of-Executive-Function.pdf> [<https://perma.cc/2X64-FQTA>] [hereinafter *Building the Brain's "Air Traffic Control" System*].

157. See generally PAUL TOUGH, *HOW CHILDREN SUCCEED: GRIT, CURIOSITY, AND THE HIDDEN POWER OF CHARACTER* (2012).

158. KAUFMAN ET AL., *THE PRE-K COMPANION*, *supra* note 137, at 41.

159. *Id.* at 42.

160. See *Building the Brain's "Air Traffic Control" System*, *supra* note 156, at 10; see also W. Steven Barnett et al., *Educational Effects of the Tools of the Mind Curriculum: A Randomized Trial*, 23 EARLY CHILDHOOD RSCH. Q. 299, 299-313 (2008).

neuro-connectivity, attachment, inter-subjectivity, cognitive integration, interpersonal well-being, and executive function are uniquely human.¹⁶¹ They are vital to human nature, human survival, and human evolution.

These competencies are critical to the development of the five habits of mind, which Howard Gardner argues are indispensable for future success and well-being.¹⁶² Gardner, one of the world's most influential educational psychologists, concludes that education must be directed toward creating habits of mind that will be valuable in the future, including:

- [1] A disciplined mind—the ability to become an expert in at least one area[;]
- [2] A synthesizing mind—the ability to gather information from many sources, to organize the information in helpful ways and to communicate the information to others[;]
- [3] A creating mind—the ability of adults to keep alive in themselves the mind and sensibility of a young child, including an insatiable curiosity about other people and the environment, an openness to untested paths, a willingness to struggle, and a desire and capacity to learn from failure[;]
- [4] A respectful mind—the ability to understand the perspectives and motivations of others, particularly those who appear to be different[; and]
- [5] An ethical mind—the ability to appreciate one's social or professional role and to act in accordance with shared standards for that role[.]¹⁶³

Indeed, educational institutions can look to creative approaches like the “Compassionate Systems Framework” to help foster these imperative relationship-building competencies.¹⁶⁴ Proposed by learning organizations and systems thinking expert Peter Senge, the framework offers models of thinking and teaching that combine contemplative social and emotional learning (SEL), systems thinking, and compassion.¹⁶⁵ Through these models, Senge proposes a set of practices to help educators and students apply these skills both in and beyond the classroom.¹⁶⁶ He and his colleagues have put forward several key

161. John Barresi & Chris Moore, *The Neuroscience of Social Understanding*, in *THE SHARED MIND: PERSPS. ON INTERSUBJECTIVITY* 39, 39-41 (Jordan Zlatev et al. eds., 2008).

162. See HOWARD GARDNER, *FIVE MINDS FOR THE FUTURE* 5-9 (2008).

163. KAUFMAN ET AL., *THE PRE-K HOME COMPANION*, *supra* note 137, at 33-34 (citing GARDNER, *supra* note 162, at 3, 5-9) (alteration in original).

164. See generally Peter Senge et al., *Introduction to Compassionate Systems Framework in Schools*, ABDUL LATIF JAMEEL WORLD EDUC. LAB, MASS. INST. OF TECH., CTR. FOR SYS. AWARENESS (2019), <https://systemsawareness.org/wp-content/uploads/2019/06/Intro-CompassionateSystemsFramework-March-2019.pdf> [<https://perma.cc/F73E-FFED>].

165. *Id.* at 1.

166. *Id.* at 10.

guiding ideas for promoting a compassionate state of mind through this framework:

- 1) There exists an innate systems intelligence within us all, which begins to unfold from very early childhood on through our universal experiences in family systems and the complex relationships between parents, siblings, peers, and other relatives and caregivers.
- 2) This systems intelligence is systematically underdeveloped in mainstream education with its emphasis on reductionist ways of understanding, right versus wrong answers, and intellectual versus embodied understanding.[;]
- 3) From an education viewpoint, understanding reality through the lens of interconnectedness and change represents a powerful way to integrate diverse subjects.[;]
- 4) To cultivate this innate systems intelligence and investigate this interconnectedness between subjects requires practical tools and methods, many of which have been developed over the past 20-25 years and are now in broad use in preK-12 education, though still not widely disseminated.[;]
- 5) Those approaches that we have found to be most useful engage learners and teachers in reflecting on their ways of seeing and becoming more explicit in constructing and testing their own models of reality.[;]
- 6) Working rigorously with complexity and systems leads to enhanced conceptual skills and understanding. Students strengthen their ability to construct coherent explanations that connect different elements in a complex setting, to explain their reasoning about interconnectedness issues, and to test (disconfirm) or refine one's own understanding, such as unpacking what is missing from "my model."
- 7) Working with complexity and systems also leads to more integrated learning modalities: rational and intuitive, general and personal, conceptual and enactive/embodied, and thinking and sensing.[; and]
- 8) To take root in a school setting, adults and students alike need to be practicing systems thinking and reflection, especially since these skills are so under-developed among adults, and there is a tendency for adult educators to declare that they understand systems thinking even though they have little skill in doing it. For this reason, we have come to emphasize that school management and leadership is an essential counterpart to classroom application, showing how many of the same tools and practices can be applied in both.¹⁶⁷

By conceptualizing compassion as an essentially systemic property of mind, the "Compassionate Systems Framework" seeks to grow "compassionate integrity" to align how individuals think, feel, and act

167. *Id.* at 6-7 (alteration in original).

through an “ever-unfolding awareness of interconnectedness.”¹⁶⁸ These skills are foundational for global citizens in an increasingly interdependent world where environmental and socioeconomic challenges abound.¹⁶⁹

These habits of mind are developed through interpersonal relationships and in turn produce critical life-long relationship-building competencies.¹⁷⁰ It is these particular habits of mind—rather than just the traditionally tested abilities to consume information—that significantly increase the chance that a student will grow to experience life-long success and well-being.¹⁷¹

Accordingly, recent findings from the disparate fields of neuroscience, neuro-psychology, cognitive psychology, educational psychology, economics, and behavioral economics all support the [] recognition that human beings are ‘made for love.’¹⁷² Our educational and economic systems, which reward atomistic, competitive, and consumptive behavior, and which have produced gross inequalities and environmental degradation, cannot consequently be justified as an accurate reflection of human nature.¹⁷³ By fostering a loving, community-centric environment, our postsecondary institutions can empower students to develop key relationship-building competencies that will stay with them throughout their lives.

III. HIGHER EDUCATION'S VALUE PROPOSITION MUST REFLECT ITS ROLE IN CREATING TRANSFORMATIVE LEARNING COMMUNITIES FOR STUDENTS

To address the risks the U.S. higher education system faces, educational institutions must emphasize the economic value of a postsecondary degree. By embracing social constructivism, universities should focus on guiding students to actively engage with material, rather than simply consume and re-produce pre-packaged information. This relational approach will help universities create environments where students can develop deep knowledge bases, critical thinking skills, and transferable competencies that make the investment worth the cost. Additionally, by making degree programs more affordable and accessible, and tailoring curricula more closely to the demands of the global economy, schools can better market and communicate their tangible job and economic outcomes.

Equally important is the social value of higher education. Universities can play a foundational role by providing students with

168. *Id.* at 7.

169. Senge et. al., *supra* note 164, at 7, 9.

170. See GARDNER, *supra* note 162, at 5-9; see also KAUFMAN ET AL., THE PRE-K HOME COMPANION, *supra* note 137, at 34-36.

171. KAUFMAN ET AL., THE PRE-K COMPANION, *supra* note 137, at 35.

172. Kaufman, *supra* note 6, at 1199.

173. *Id.*

opportunities to form meaningful relationships, develop leadership skills, and cultivate a sense of political participation and civic engagement. Instead of creating a competitive academic environment where students are pitted against each other, schools can foster a sense of community and belonging that will empower students to collaborate, learn from, and share experiences with university faculty, staff, and their peers.

A. *Ensuring Access and Affordability for an Inclusive Student Body*

Ensuring that higher education is affordable is important not only to ensure a pluralistic student body, but also to reduce economic inequality nationwide. Inclusive excellence in the learning environment should be celebrated. An inclusive early learning environment produces significant educational benefits for all students including promoting cross-racial understanding; reducing prejudice, stereotyping, and implicit bias; and fostering collaborative problem-solving.¹⁷⁴ These skills are vital to a student's ultimate ability to find success and well-being in increasingly pluralistic work and social environments.

An inclusive learning environment advantages students by strengthening their cognitive abilities.¹⁷⁵ “We now know that [students] learn best in small groups.”¹⁷⁶ “And we also know that the groups that are best for learning are those that are diverse.”¹⁷⁷

Universities should pursue strategies designed to attract, retain, and celebrate a broadly diverse student body. This includes continued advocacy for inclusion, particularly for historically underrepresented groups. The Supreme Court ruled that the use of affirmative action in the admissions programs at the University of North Carolina and Harvard University—which accounted for race—was unconstitutional.¹⁷⁸ Yet the Court previously held that law schools have “a compelling interest in attaining a diverse student body.”¹⁷⁹

In light of the Supreme Court's 2023 decision rejecting the use of affirmative action, the U.S. Departments of Education and Justice have since issued joint guidance to institutions of higher education on how to seek a diverse applicant pool through “targeted outreach, recruitment, or pathway programs.”¹⁸⁰ The agencies clarify in this guidance that institutions are not required to ignore race when identifying

174. KAUFMAN ET AL., *THE PRE-K COMPANION* *supra* note 137, at 73.

175. *Id.*

176. *Id.* (alteration in original).

177. *Id.*

178. *See generally* *Students for Fair Admissions*.

179. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

180. *Questions and Answers Regarding the Supreme Court's Decision in Students for Fair Admission, Inc. v. Harvard College and University of North Carolina*, THE DEPT OF EDUC. & DEPT OF JUSTICE (Aug. 14, 2023), <https://www.politico.com/f/?id=00000189-f493-dc32-ab89-f5ff0c050000> [<https://perma.cc/W2RN-UE2D>].

students for recruitment efforts.¹⁸¹ Indeed, until recently, the American Bar Association (ABA) required “law schools to ‘demonstrate by concrete action a commitment to diversity and inclusion’ in selecting students from ‘underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.’”¹⁸²

Colleges and universities should continue to direct their outreach towards geographic regions and districts that serve predominantly first-generation students, students of color, those of limited financial means, or lower-performing schools with high dropout rates.¹⁸³ When considering applications, admissions offices can account for family income or whether the student is the first in their family to attend college or a graduate degree program. Schools can also adopt pathway programs, or “pipeline” programs focusing on increasing the pool of particular groups of college-ready applicants in high school and career and technical education programs.¹⁸⁴ This includes partnering with a particular school or a student-centered organization to increase potential applicants’ academic exposure, offering mentorship programming, or hosting summer programs to help expand the pool of applicants.¹⁸⁵ For example, some law schools offer prelaw programs to college students from underrepresented backgrounds to help them apply to and prepare for law school.¹⁸⁶

Another effective strategy that institutions of higher education “can employ to become more inclusive communities is to make visible through multiple media the presence of persons of color.”¹⁸⁷ Schools “can adorn their walls with pictures of their students, alumni, and teachers of color.”¹⁸⁸ “These pictures send a powerful message to all members of the learning community that persons of color are an integral part of the culture of the school.”¹⁸⁹

Schools can also become more inclusive by increasing their own investments in financial assistance programs and resources for underserved populations, including undocumented students. In California, universities and community colleges have opened resource centers to

181. *See id.*

182. Amy H. Soled & Barbara Hoffman, *Building Bridges: How Law Schools Can Better Prepare Students from Historically Underserved Communities to Excel in Law School*, 69 J. LEGAL EDUC. 268, 270 (2020) (citing *Standards of Rules of Procedure for Approval of Law Schools 2018-2019, Standard 206(a)*, American Bar Association: Section of Legal Edu. and Admissions to the Bar).

183. *Id.*

184. *Id.* at 278.

185. *Id.*

186. *Id.*

187. Kaufman, *supra* note 6, at 1223.

188. *Id.*

189. *Id.*

help undocumented students navigate financial aid, career advancement, and mental health services.¹⁹⁰ Importantly, some law schools have developed financial assistance programs for DACA students.¹⁹¹

This can also include offering “internal loan repayment assistance programs to students who pursue career in public service.”¹⁹² “The government also offers loan forgiveness and reduction programs for graduates who are employed in the public sector.”¹⁹³ Schools “can advocate for the expansion of these governmental programs.”¹⁹⁴ “Moreover, they can increase their own investments in this financial assistance, with the help of creative fundraising efforts like student peer support, alumni giving, and crowd-funding.”¹⁹⁵

Higher education institutions can also explore alternative methods of delivering legal education to reach a more diverse group of students and to serve a more diverse client population. For example, Santa Clara University School of Law has adopted hands-on, collaborative clinics aimed at supporting diverse and underserved client populations.¹⁹⁶ Through programs like the Northern California Innocence Project, students have the opportunity to investigate and litigate possible wrongful convictions and learn about post-conviction law and reforms to remedy the systemic problems in the criminal justice system.¹⁹⁷ Schools can also establish clinics similar to Santa Clara’s

190. Maria Molina & Vianey Valdez, *STUDENT VOICES: ‘Dreamers’ Like Us Need Our Own Resource Centers on College Campuses*, THE HECHINGER REP. (Apr. 17, 2023), <https://hechingerreport.org/student-voices-dreamers-like-us-need-our-own-resource-centers-on-college-campuses/> [<https://perma.cc/S783-AX34>].

191. See, e.g., *Welcoming Students with DACA Status*, LOYOLA U. CHI. SCH. OF L., <https://www.luc.edu/law/stories/archive/welcomingstudentswithdacastatus.shtml> [<https://perma.cc/C7GS-DZPL>]. Loyola University Chicago School of Law offers scholarship assistance to qualified admitted students with Deferred Action for Childhood Arrivals (DACA) immigration status or who are DACA-eligible. According to the website,

“These students are eligible for admission to Loyola’s School of Law and are eligible to sit for the bar exam and apply for and obtain a license to practice law in the state of Illinois As a Jesuit institution of higher learning, Loyola University Chicago firmly believes in the dignity of each person and in the promotion of social justice. The School of Law offers a welcoming and supportive environment to all students, including qualified undocumented individuals who are interested in pursuing a legal education. Moreover, it is simply in the interest of the legal profession and the people we serve to utilize the talents of qualified students of this immigration status.”

192. Kaufman, *supra* note 6, at 1226.

193. *Id.*

194. *Id.*

195. *Id.*

196. See *generally Centers and Clinics*, SANTA CLARA U. SCH. OF L., <https://law.scu.edu/centers/> [<https://perma.cc/3SLF-QJS7>].

197. *Northern California Innocence Project*, SANTA CLARA U. SCH. OF L., <https://ncip.org/> [<https://perma.cc/73EC-MNUW>].

Entrepreneurs' Law Clinic, where students can provide legal services under supervision of attorneys to entrepreneurs and nonprofits.¹⁹⁸

B. Bolstering Confidence in Higher Education Mission and Outcomes

Another way in which universities can articulate their value proposition is by bolstering overall confidence in their institution's mission. Universities should be able to clearly articulate their differentiating mission, as well as how this mission translates into meaningful career and life outcomes for their students. Educational institutions should also promote and advertise the positive professional outcomes of their alumni in a way that is both accessible and helpful to prospective and current students.

In this context, Howard Gardner and Wendy Fischman propose that higher education institutions focus on three key issues which underly these institutions' value propositions: context, character, and curriculum.¹⁹⁹ First, Gardner and Fischman argue that "[e]very institution of higher education should have a stated mission" that is exemplified through daily practice.²⁰⁰ When that mission has been exemplified, positive examples should be highlighted; when the mission has not been realized, failure should be acknowledged, and subsequent action should be taken to recalibrate the institution towards that mission.²⁰¹ Second, they posit that every institution of higher education should seek to form graduates who understand and seek to embody a character of "neighborly morality" towards their peers and the broader community.²⁰² Lastly, Gardner and Fischman assert that the "central mission of every educational institutions should be the creation and presentation of high quality curriculum."²⁰³

When designing and implementing curricula, educational programs should look to approaches like Peter Senge's Compassionate Systems Framework to promote relationship-building competencies and articulate how these competencies translate into foundational professional skills.²⁰⁴ "[S]tudents both in and out of the classroom should be prompted to pursue collaborative projects in which learning grows from "compassionate care' and "dialogue with others.'" ²⁰⁵ "The best

198. Laura Norris, *Cura Personalis and the Entrepreneurs' Law Clinic: Radically Student-Centered*, SANTA CLARA U. SCH. OF L. (Dec. 10, 2020), <https://www.scu.edu/ic/media-publications/explore-journal/fall-2020-stories/cura-personalis-and-the-entrepreneurs-law-clinic-radically-student-centered.html> [<https://perma.cc/CX3J-CK54>].

199. Gardner & Fischman, *supra* note 29, at 10, 12.

200. *Id.*

201. *Id.* at 12.

202. *Id.*

203. *Id.*

204. See generally Senge et al., *supra* note 164.

205. Kaufman, *supra* note 6, at 1216 (quoting POPE FRANCIS, ENCYCLICAL LETTER, LAUDATO SI': ON CARE FOR OUR COMMON HOME para. 210 (2015)).

collaborative exercises require students to perform self-examination, dialogue, and generous encounters between persons.”²⁰⁶ “The pedagogy of perspective taking also requires that students understand and work to overcome implicit biases in themselves and others . . . [i]t fosters the development of cultural competencies.”²⁰⁷

In the law school context, graduates can provide profound value to their clients such as “discipline and perseverance, synthesis and visualization of data, creativity, ethics, and respect.”²⁰⁸ “These are the very habits of the mind that Howard Gardner argues are indispensable to the future success and well-being of students pursuing any endeavor.”²⁰⁹ “These habits or competencies are particularly vital to success and well-being in the practice of law.”²¹⁰

“In their report, *Foundations for Practice*, the Institute for the Advancement of the American Legal System and the University of Denver School of Law’s Educating Tomorrow’s Lawyers received and analyzed surveys from more than 24,000 lawyers in fifty states and found that the key to success in the practice of law is the attorney’s emotional intelligence and character.”²¹¹

“Specifically, practicing attorneys reported that law students who entered the profession achieved success if they developed professional competencies and habits such as the ability to develop relationships with clients, to listen, to communicate effectively, to respond attentively to a client’s needs, to treat others with respect, to honor commitments, to persevere, to be trustworthy, to manage stress, and to work collaboratively and as part of a team.”²¹²

Such competencies are foundational “to the effective and the ethical practice of law.”²¹³

Law schools should tout the benefits of these competencies and clearly communicate to students how they translate into positive career outcomes. These competencies can also be incorporated into school curricula through Lawyering Skills classes. Broadly, these courses focus on introducing students to skills such as communication and active listening, client service, strategic thinking, creative problem solving, ethics, and reflective lawyering. In one notable study, the grade students received in their critical Lawyering Skills class proved to be a

206. *Id.* (citing POPE FRANCIS, *supra* note 205, para. 47).

207. *Id.*

208. *Id.* at 1217.

209. *Id.* (citing GARDNER, *supra* note 162, at 6-7).

210. Kaufman, *supra* note 6, at 1217 (citing GARDNER, *supra* note 162, at 6-7).

211. *Id.* at 1217-18 (citing INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., EDUCATING TOMORROW’S LAWYERS, FOUNDATIONS FOR PRACTICE: THE WHOLE LAWYER AND THE CHARACTER QUOTIENT 5 (July 2016), https://iaals.du.edu/sites/default/files/documents/publications/foundations_for_practice_whole_lawyer_character_quotient.pdf [<https://perma.cc/5J53-2KQ5>] [hereinafter FOUNDATIONS FOR PRACTICE]).

212. *Id.* at 1218 (citing FOUNDATIONS FOR PRACTICE).

213. *Id.*

stronger predictor of law school success, as measured by class rank, than either undergraduate grade point average or Law School Admissions Test score.²¹⁴

To record learning outcomes beyond the traditional methods of formative and summative assessment, educational institutions should engage in the practice of documentation, or “making visible the process and products of individual and group learning through multiple media to multiple stakeholders.”²¹⁵ “It represents a significant advance over the traditional, individualized assessment and accountability regimes based on standardized testing.”²¹⁶ By making visible both the products and processes of learning, this practice assesses not just individual growth, but also collective growth.²¹⁷

While there is no limit to the various modalities and styles of documentation that educational institutions can use, several that are “applicable to law schools include group presentations, group capstone projects, cumulating interviews with members of the relevant community affected or represented, and demonstrations of processes learned.”²¹⁸ Such documentation practices are particularly impactful for assessing outcomes of experiential learning, including clinics and other legal skills-based courses.

To improve students’ confidence in career outcomes offered by educational institutions, schools should maintain an active and accessible career office that provides tailored professional guidance for students exploring a diversity of career paths. Universities can also showcase and celebrate examples of student success across various fields both internally and externally through websites, blog posts, and social media. Hosting alumni networking events and creating mentorship programs that connect students with graduates provide opportunities for valuable relationship building and personal connection.

C. *Creating Community in a Time of Increasing Polarization*

Making the case for postsecondary education includes clearly articulating the social value of the degree.²¹⁹ An important way for institutions of higher education to demonstrate their social value to students is by creating a campus environment that fosters compassion,

214. Leah M. Christensen, *The Power of Skills: An Empirical Study of Lawyering Skills Grades as the Strongest Predictor of Law School Success (Or in Other Words, It's Time for Legal Education To Get Serious About Integrating Skills Training Throughout the Law School Curriculum If We Care About How Our Students Learn)*, 83 ST. JOHN'S L. REV. 795, 803 (2009).

215. Kaufman, *supra* note 6, at 1223.

216. *Id.*

217. *Id.* at 1224.

218. *Id.*

219. Kaufman & Stukenberg, *supra* note 50, at 152.

empathy, and belonging. “*Sense of belonging* refers to students’ psychological sense of connection to their community.”²²⁰

Studies have found that positive campus climates, positive cross-racial relationships, perceived faculty interest in students, and more supportive residential halls are positively associated with a greater sense of belonging at universities.²²¹ In particular, culturally engaging campus environments—meaning ones which enable students to participate “in discussions about solving real social and political problems with peers from diverse backgrounds”—have been found to be salient predictors of belonging for both students of color and white students.²²² Importantly, students’ sense of belonging has been identified as a potential lever for promoting success, engagement, and overall well-being.²²³ Those who feel a sense of belonging may also engage more deeply with their studies and utilize campus resources to a greater extent.²²⁴

In an increasingly polarized political environment, universities can advance their value proposition by fostering a culturally engaging campus environment that promotes respectful dialogue among students from across backgrounds. Universities can accomplish this by developing a:

freedom of expression policy that: (1) uses reasonable time, place, and manner restrictions on expression to encourage collaboration and relationship-building among students who bring diverse experiences and viewpoints; and (2) discourages expression that is disruptive or made with conscious disregard for the likelihood that it will cause or aggravate the objectively measurable harm of trauma in others.²²⁵

Indeed, physical harm resulting from expression that causes re-traumatization interferes with the ability to learn, as well as with the reflective, free, and open exchange of ideas.²²⁶

These trauma-informed speech policies should be traceable to the institution’s educational mission.²²⁷ For example, consistent with a university’s mission “to empower learning through respect and care for

220. Samuel D. Museus et al., *How Culturally Engaging Campus Environments Influence Sense of Belonging in College: An Examination of Differences Between White Students and Students of Color*, 11 J. DIVERSITY IN HIGHER EDUC. 467, 468 (2018) (citing Sylvia Hurtado & Deborah Faye Caeter, *Effects of College Transition and Perceptions of the Campus Racial Climate on Latino Students’ Sense of Belonging*, 70 SOCIO. EDUC. 324 (1997)).

221. *Id.* at 468 (citing Dawn R. Johnson et al., *Examining Sense of Belonging Among First-Year Undergraduates from Different Racial/Ethnic Groups*, 48 J. C. STUDENT DEV. 525 (2007); Ricardo Maestas et al., *Factors Impacting Sense of Belonging at a Hispanic-Serving Institution*, 6 J. HISPANIC HIGHER EDUC. 237 (2007); Anne-Marie Nuñez, *A Critical Paradox? Predictors of Latino Students’ Sense of Belonging in College*, 2 J. DIVERSITY IN HIGHER EDUC. 46 (2009)).

222. *Id.* at 469, 479.

223. Gopalan & Brady, *supra* note 44, at 135.

224. *Id.*

225. Kaufman & Stukenberg, *supra* note 50, at 154.

226. *Id.* at 168.

227. *Id.* at 175.

the dignity of all,”²²⁸ leaders at an educational institution may seek to implement trauma-informed practices to support students who have experienced, or are experiencing, trauma. Adopting a relational approach to its speech policy will help “a university of the future, in which knowledge and well-being are constructed not through adversarial transactions, but through meaningful relationships.”²²⁹ In addition to adopting speech policies that reflect a relational approach, educational institutions should ensure that they have the personnel, resources, and services to support students from underrepresented groups. Once professors have taken the time to get to know and understand who their students are, they should employ classroom techniques that will enable their students from all backgrounds to excel and feel a sense of belonging.²³⁰

Three objectives that pertain especially to law school include professors: “(1) helping outsiders feel like insiders, (2) stimulating critical thinking with techniques other than the Socratic method, and (3) teaching students how to ask for help.”²³¹ To help students of all backgrounds feel included, professors should be mindful of their own biases and consciously create assignments and exams that account for a variety of cultures, avoid scenarios that presume wealth or privilege, and reflect issues that affect diverse communities.²³² Professors can also consider avoiding the Socratic method as a primary teaching tool, or at least supplementing this method by providing opportunities for in-class dialogue and small group discussions.²³³ Lastly, professors should inform students at the first meeting of each course that they welcome questions and offer guidance on aspects of the law school curriculum and experience beyond just the course they teach.²³⁴

For students who are enrolled online, universities should foster a sense of community by helping to connect their students who are learning virtually, whether that is through regularly scheduled small group meetings or providing spaces to engage with each other through social media or other digital platforms. Schools should also promote the resources available and accessible to these students online, including academic advising, financial aid, disability accommodations, and mental health support.

Additionally, educators can ensure that they are both accommodating and celebrating students with learning differences. As described in Steve Silberman’s book, *NeuroTribes: The Legacy of Autism and the Future of Neurodiversity*, the recognition of neurodiversity correctly reframes diagnoses such as autism or attention-deficit/hyperactivity

228. *Id.* at 177.

229. *Id.* at 154-55.

230. *See* Soled & Hoffman, *supra* note 182, at 287.

231. *Id.*

232. *Id.* at 287-88.

233. *Id.* at 291.

234. *Id.* at 292.

disorder (ADHD) as differences in learning strategies along the same natural continuum.²³⁵ It is therefore important that professors account for and build upon the strengths of these varied approaches to learning in how they structure their classroom and curricula.

D. Adopting Key Enterprise Risk Management Principles

Embracing a relational framework requires educational institutions to consider a broad range of risks and how these risks affect all aspects of their communities. The adoption of robust enterprise risk management (ERM) plans can enable institutions of higher education to better mitigate and respond to such risks. ERM is understood as:

. . . a process, effected by an entity's board of directors, management and other personnel, applied in strategy setting and across the enterprise, designed to identify potential events that may affect the entity, and manage risk to be within its risk appetite, to provide reasonable assurance regarding the achievement of entity objectives.²³⁶

While ERM has historically been confined to certain domains, such as publicly traded companies or industries like banking, universities are increasingly finding that they need the infrastructure to prioritize risk, efficiently allocate resources to address risk, make informed strategic decisions, and improve their overall resiliency.²³⁷

1. Technological Disruptors

Although GAI creates significant challenges for higher education, it also presents tremendous opportunities, particularly for those institutions willing to embrace a relational approach to learning. For all of its power, GAI cannot (yet) replicate fulsome human learning because it is cabined by a transactional, behaviorist approach to information production. The user of GAI is an atomistic consumer of outputs, rewarded by a flow of useful information responsive to the correct prompt and punished by the flow of useless information responsive to an incorrect prompt. The large language models predict which outputs consumers will find rewarding by mirroring the outputs that prior consumers have found rewarding from the same prompt. In this regard, GAI is an astoundingly rapid world-wide tool for operant conditioning. Accordingly, those educational institutions which are wedded to a transactional approach to learning will be easily replaced by GAI.

235. Kaufman, *supra* note 6, at 1219 (citing STEVE SILBERMAN, *NEUROTRIBES: THE LEGACY OF AUTISM AND THE FUTURE OF NEURODIVERSITY* (2015)).

236. *Meeting the Challenges of ERM*, *supra* note 52, at 3.

237. See generally *Enterprise Risk Management in Higher Ed*, *supra* note 53; Clifford Rossi, *Risk Matters: The Case for Enterprise Risk Management in Higher Education*, UNIV. OF MD.'S ROBERT H. SMITH SCH. OF BUS. (Dec. 17, 2024), <https://www.rhsmith.umd.edu/news/risk-matters-case-enterprise-risk-management-higher-education> [https://perma.cc/D6HR-SUCC].

But, for those institutions who recognize that human learning is relational and not transactional, GAI creates a wonderful opportunity. Under a relational approach to learning, GAI becomes a terrific tool. But it is just a tool. It is a rich and dynamic piece of material which all members of the learning community can use to help them co-construct their knowledge. In relational learning communities, educators know how to partner with students to embrace and integrate GAI with curiosity. They take advantage of its efficiency by reclaiming the time and attention needed for building the kind of meaningful relationships from which wisdom and well-being are constructed.

As trustees of a plethora of personal information, relational universities also practice good data governance and stewardship. To prevent, protect against, and respond to cyber threats, educational institutions should develop a cyber incident response plan that involves inventorying hardware, software and storage locations of sensitive data, assessing vulnerabilities and potential damage in event of an attack, and detailing plans for responding to an attack.²³⁸ Schools can also implement technologies like multifactor authentication to require more than a simple password before allowing individuals to access an online account.²³⁹ And, cybersecurity trainings should be offered to all university personnel, as well as to students, so individuals understand how to protect their data and to recognize and report suspicious activity.²⁴⁰

2. Hazards and Environmental Disruptors

To meet environmental goals and reduce their carbon footprint, universities can commit to reaching certain emissions targets and shifting to renewable energy sources. These climate efforts can be included in the educational institution's mission statement, or it can be framed as a high-level goal that aligns with the institution's mission of pursuing responsible and sustainable environmental practices.

Campuses can install onsite solar projects and shift their vehicle fleets to electric, while also refraining from investing in natural gas infrastructure. Educational institutions can also take steps to reduce energy consumption by taking on lower-risk, higher-return projects like installing LED lighting. Schools should also foster a culture of sustainability on campus by making it easy for students to recycle, compost, and donate, offering free bicycle rental programs, and installing ample water stations around campus.

For students who are directly affected by climate-driven disasters, universities should provide timely financial assistance and adjust

238. *Cybersecurity Preparedness for K-12 Schools and Institutions of Higher Education*, READINESS AND EMERGENCY MGMT. FOR SCH.'S TECH. ASSISTANCE CTR., DEP'T OF EDUC. (updated May 21, 2025), <https://rems.ed.gov/Cyber> [<https://perma.cc/L9GZ-6T59>].

239. *Id.*

240. *Id.*

curricula so students can continue to build credits for graduation.²⁴¹ Schools can also ensure that emergency funds are immediately available to students to purchase necessary supplies.²⁴² In addition to academic support, universities should offer trauma-informed mental health counseling services for these students to get the support they need to care for themselves and continue their education.

Universities should also take a more comprehensive approach to climate change by incorporating environmental issues into their curricula. This includes offering courses on topics such as sustainability, water conservation, and environmental justice to not only prepare students to enter a workforce affected by environmental degradation, but also to inspire action to reverse these trends.

3. Governmental and Societal Disruptors

To stay apprised of government actions that affect the operation of their institution and ensure adherence with any applicable laws or regulations, universities may consider setting up compliance offices. Schools can also form regulatory task forces that are comprised of members from different departments within the university or join task forces made up of representatives across multiple universities, to assess and respond to potential legislative and regulatory changes. Additionally, schools can build relationships with local, state, and national policymakers to better advocate for the interests of their students, faculty, staff, and academic programs.

Universities should also be proactive in promoting lifelong learning and providing continuous professional development opportunities for both faculty and staff to learn new education technologies. To be responsive to social movements, educational institutions should stay closely engaged with students and faculty, establish mechanisms for dialogue and feedback, and remain open to making tangible changes based on legitimate concerns from university constituents. Fostering an inclusive campus culture, including through a trauma-informed speech policy, will help ensure the university remains a constructive place of learning and growth for all individuals. Additionally, schools can build strong ties with the local community and interest groups to better understand how they are affected by societal issues and events.

E. Preparing for Demographic Shifts Through Meaningful Recruitment Efforts and Strategic Initiatives Aligned with the University Mission

Facing a smaller applicant pool, institutions of higher education will have to be proactive in managing student enrollment while fostering a supportive learning environment. Universities should devise a

241. See Hersher, *supra* note 70.

242. *Id.*

recruitment strategy that will keep enrollment levels steady while also bringing an invaluable range of perspectives, backgrounds, and ideological viewpoints to the institution. This can include meaningful outreach to first-generation students who had not previously considered a postsecondary degree as an option available to them. Universities can also recruit more non-traditional students, such as adult learners, while ensuring that their needs are accommodated through the school's curriculum.

Offering flexible course schedules at night and on the weekends outside of traditional working hours will provide students with employment and familial obligations the opportunity to complete and succeed in undergraduate and graduate degree programs. Law schools can look to programs like Santa Clara University School of Law's Flex J.D., offering a hybrid part-time structure that enables students to attend classes in-person for one week at the start of the semester combined with three long weekends once per month.²⁴³ Between these on-campus sessions, students complete asynchronous online classes, which allows them to balance the law school course load with their other commitments in a way that works with their schedule.²⁴⁴

Universities should also ensure their campuses are open and welcoming to international students, whose enrollment in U.S. undergraduate and graduate programs has surged after the pandemic.²⁴⁵ These institutions should build meaningful relationships with alumni globally to help increase their visibility among international students, including through organizing local alumni chapters and recruiting events and showcasing positive testimonials on the school's website. It is also important for schools to help ease the transition of international students into U.S. campus life "to promote retention and an overall positive learning experience."²⁴⁶ This may be accomplished in part through the internationalization of academic curricula and a demonstrated commitment to teaching disciplines in a global context.²⁴⁷

243. See, e.g., *Flex JD: Silicon Valley's Hybrid, Part-Time Law Degree*, SANTA CLARA UNIV. SCH. OF L., <https://law.scu.edu/flexjd/> [<https://perma.cc/5CXX-AQLZ>]. According to the website:

"Students attend classes in-person for one week at the beginning of the semester combined with three long weekends (Friday through Sunday) once per month. Between on-campus sessions, students complete asynchronous online classes at the times and locations that work best for their schedule. The program is designed for completion in four years."

244. *Id.*

245. Liam Knox, *A 'Near-Record' International Student Surge*, INSIDE HIGHER ED (Nov. 13, 2023), <https://www.insidehighered.com/news/global/international-students-us/2023/11/13/international-enrollment-rockets-past-pre-pandemic> [<https://perma.cc/5QLN-ASHY>].

246. Niall Hegarty, *Where We Are Now –The Presence and Importance of International Students in the United States*, 4 J. INT'L STUDENTS 223, 228 (2014).

247. *Id.*

As a longer-term financial strategy, institutions of higher education can consider leveraging public-private partnerships to finance large capital projects and transfer risk to trusted private sector partners. These partnerships can be used to fund a range of critical university infrastructure, from student housing and dining services to large-scale renewable energy projects.²⁴⁸ Educational institutions may also explore other revenue streams by promoting their research and development capabilities or service offerings to work with start-up incubators, research parks, and technology transfer centers.

F. Fostering Global Citizenship through an International Educational Outlook

Many of our most pressing societal challenges are global. Schools should thus strive to prepare their students to be global citizens, equipped with the tools to excel as part of an interconnected, international workforce. Institutions of higher education can recruit more individuals from outside the U.S. to broaden their pool of potential students. In addition to mitigating the consequences of the domestic demographic shift, these students offer important global perspectives both in the classroom and as valuable members of the university community. Educators should take steps to help make these students feel included. For example, if a class is held online, professors should be mindful of any challenges for non-native English speakers who may have trouble understanding content or social cues when academic instruction is delivered onscreen.²⁴⁹

In addition to recruiting students from other countries, educational institutions could provide opportunities for students to participate in summer exchange programs with a foreign university or to work at an internship in a non-U.S. city during the summer or a full semester. Schools can offer scholarships and stipends for students who are interested in international study but cannot afford the additional cost. Outside of the classroom, universities can also promote and support funding for different speaker series, panels, and other campus events that include and showcase global voices and perspectives.

Educational institutions should also consider ways to make their schools' experience more globally focused through the curriculum, special programs, or institutional support for certain extracurricular organizations. At law schools, course offerings may include classes or seminars focused on international topics, such as International Law,

248. See *Three-Quarters of Universities See Growth of Public-Private Partnerships on Campus*, HIGHER ED DIVE (July 31, 2024), <https://www.highereddive.com/press-release/20240731-three-quarters-of-universities-see-growth-of-public-private-partnerships-on/> [https://perma.cc/LS22-GY97].

249. Amoneta Beckstein, *How Are International Students Coping with the COVID-19 Pandemic?*, TIMES HIGHER EDUC. (July 24, 2020), <https://www.timeshighereducation.com/student/blogs/how-are-international-students-coping-covid-19-pandemic> [https://perma.cc/J6UJ-PTGZ].

International Business Transactions, or International Human Rights. Schools might even decide to require that students take a certain number of credits of international-focused classes or enroll in foreign language classes to graduate.

CONCLUSION

While the higher education system today faces legitimate criticisms, attempts to dismantle it are shortsighted as to the significant potential it has when reenvisioned as a human-centric institution. The future of higher education depends on a fundamental shift away from the transactional model that has defined universities' operations for decades. Adopting a relational approach to education offers a solution that fosters strong connections between students, faculty, and the broader community. This model focuses on long-term skills development and meaningful interpersonal engagement, preparing students not only for the modern workforce but also for active participation in an increasingly global and interconnected society. By integrating concepts rooted in a more complete understanding of human nature, universities can create more adaptive, responsive, and inclusive campuses that reflect the needs of both their students and the world.

Moving forward, this shift toward a relational approach will require schools to rethink their strategies for enrollment and retention, academic course offerings, hiring, student services, and campus engagement. It will also involve reimagining how universities define, communicate, and deliver their value, ensuring that students graduate not only with the requisite technical skills but also social, emotional, and cross-cultural competencies to succeed and thrive. In doing so, higher education can secure its role as a cornerstone of democracy and societal progress. As the landscape of higher education continues to evolve, embracing a relational approach will be essential to ensuring its continued success.

LEARNING FROM MISTAKES:
A QUANTITATIVE COMPARATIVE STUDY OF COURT
DECISIONS INVOLVING THE EXCUSE OF CONTRACTUAL
MISTAKE

BRIAN M. MCCALL*

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INTRODUCTION

In almost two decades of teaching Contracts law to first-year law students, I have found one of the hardest doctrines to teach to be the excuse of mistake, both mutual and unilateral.¹ Students typically

* Orpha and Maurice Merrill Chair in Law, University of Oklahoma. I would like to thank Jacob Black, Research & Instructional Services Librarian of the OU Law Library, for his incredible assistance in organizing and completing the coding project. I also wish to acknowledge the incredible work of law students Tiffany Barker, Michaya Collier, Melanie McGruder, and Ashton Sears. This article was greatly improved by the generosity of Professors Carolina Arlota, Kara Bruce and Larry DiMatteo, who read and commented upon an earlier draft.

1. There is a variation of approaches to categorizing the doctrine of contractual mistake. Some textbooks and treatises consider the doctrine of mistake to be a formation defense. See, e.g., “MAKING OF CONTRACT—MISTAKE,” DEFENSE AGAINST A PRIMA FACIE

express the frustration that they cannot articulate a clear standard to determine when a party's claim of an excusing mistake will succeed or fail. In my own textbook that I use to teach the course, I include a larger number of cases compared to other chapters. Often the impression the students express is that the cases appear to be random results that are impossible to reconcile. Sometimes I think students would wholeheartedly agree with this practically useless summation of the law of contractual mistake by Professor James Gordley: "sometimes a party who has made a mistake will obtain relief, and sometimes he will not."² This frustration with the doctrine seems to be thousands of years old. On the issue of contracts formed on the basis of a mistake in Roman law sources dating back two thousand years, Professor Bruce Frier comments thus: "mistake is undoubtedly the commonest and most difficult, and what survives of the juristic discussion is in any case a good deal less than satisfactory."³ My students would also likely agree with a Note in the Harvard Law Review from 1965: "'To formulate an accurate and practically applicable definition of the mistake of fact which will warrant rescission of a contract, has been apparently well nigh the despair of law writers.' If text writers and courts are

CASE § 2:24 (rev. ed.) ("The doctrine of 'mutual mistake' of fact serves as a defense to the formation of a contract and occurs when the parties to the contract have an erroneous belief as to a basic assumption of the contract at the time of formation which will have a material effect on the agreed exchange as to either party."). Others label the doctrine of mistake an excuse for non-performance. *See, e.g.*, TRACEY E. GEORGE & RUSSELL KOROBKIN, K: A COMMON LAW APPROACH TO CONTRACTS 431-32 (Wolters Kluwer, 2d ed. 2017) ("[T]he distinction between the two varieties of conditions [precedent or subsequent] sheds light on a trio of doctrines—mistake, impracticability, and frustration of purpose—that operate to excuse parties from the obligation to perform contractual duties. By their terms, these doctrines become effective only when the risks of unanticipated developments are not explicitly or implicitly allocated by the parties' agreement. . . . Each of these doctrines can be understood to impose on contracts a constructive condition subsequent, even though the contracts include no such condition, either expressly or impliedly. Consequently, these doctrines should be understood as creating default conditions that the parties are free to contract around. When these doctrines are successfully invoked, the harmed party is usually entitled to rescission of the contract, excusing both parties from further performance obligations and entitling them to restitution of benefits previously conferred. In some circumstances, however, the complaining party might be entitled only to temporarily suspend the performance of a duty."). Some sources use both the language of a defense and excuse. *See, e.g.*, MIRIAM A. CHERRY, CONTRACTS: A REAL WORLD CASEBOOK 347 (West Academic Publishing, 2d ed. 2021) (including the topic of mistake in a chapter entitled "Excuse and Termination" but then describing mistake as a "defense."). In teaching the doctrine, I choose to describe it as an excuse and not a formation defense. In my mind, a mistake does not prevent formation of an enforceable contract in the way that the statute of frauds or public policy does. There was offer, acceptance, and consideration, and no prohibition of the subject matter or an unconscionable term. The mistake gives an excuse to a party to avoid performance of a contract or obligation. I admit that this terminological distinction may be mere semantics since the result is to avoid liability on a contractual promise. Thus, broadly speaking, mistake is a defense to liability, but I find it helpful to distinguish it from doctrines such as the statute of frauds or unconscionability and thus refer to it as an excuse in this article.

2. James Gordley, *Mistake in Contract Formation*, 52 AM. J. COMP. L. 433, 433 (2004).

3. BRUCE W. FRIER, A CASEBOOK ON THE ROMAN LAW OF CONTRACTS 204 (Oxford University Press, 2021).

unable to agree even on what a mistake is, such confusion and uncertainty as to its legal consequences are to be expected.”⁴

After years of struggling to teach this topic, I resolved to dig deeper into the case law to see if any trends could be observed that would help dispel some of the uncertainty, or at least confirm that uncertainty and unpredictability in the law. Before selecting cases to study, I surveyed the secondary literature on contractual excuses based on mistakes of fact. What I learned is that commentary on the doctrine seems to have changed significantly over the past 125 years. The wording of the Restatement of the Law of Contracts §§500-511 (completed in 1932)⁵ (“First Restatement”) and the Restatement (Second) of the Law of Contracts §§151-158 (completed in 1979)⁶ (the “Second Restatement”) on this doctrine changed dramatically. This led me to conclude it would be helpful not only to empirically study a set of opinions but also to compare two distinct time periods of cases, separated by a half century (roughly the time elapsed between the First and Second Restatements) and spanning the transition from the First to the Second Restatement. Thus, cases from two three-year periods were selected for coding so that aspects of the cases can be compared. The first set of opinions were dated within the last three-year period before the completion of the Second Restatement, i.e. 1977 to 1979 (the “Older Cases”) and the second set of opinions were dated in the three years 2017 through 2019 (the “Newer Cases” and collectively referred to with the Older Cases as the “Data Set.”).

The First Part of this Article surveys selected secondary literature concerning the contractual excuse of mistake of fact that existed before the Older Cases were published and changes in that literature that occurred between the dates of the Older Cases and the Newer Cases. Part II of the Article reports the results of the case coding project by first explaining the methodology and then reporting the findings. Part III reports the results of several logistic regressions (and decision tree) analyses that were performed on parts of the Data Set. Part IV offers some tentative conclusions.

I. SCHOLARSHIP ON THE DOCTRINE OF MISTAKE

In attempting to formulate the questions for the empirical research project, I surveyed secondary literature attempting to describe the doctrine of mistake. I focused on identifying and comparing secondary sources that would have been in circulation before the adoption of the

4. *Note, Rescission of A Contract for A Mutual Mistake of Fact*, 35 HARV. L. REV. 757, 757-58 (1922) (quoting *Kowalke v. Milwaukee Electric Lt. & Ry. Co.*, 103 Wis. 472, 473, 79 N. W. 762, 763 (1899)).

5. See Hugh E. Willis, *Restatement of the Law of Contracts by the American Law Institute*, 8 IND. L.J. 402 (1933)

6. See CONTRACT LAW: CASEBOOKS FOR THE COMMON LAW OF EUROPE (Hugh Beale et al. eds., Hart Publishing, 2002).

Second Restatement, as well as sources published after the Second Restatement. This part summarizes the state of juristic thinking on mistakes of fact excusing contracts.

A. Texts written prior to the dates of the Older Cases

I searched for articles with a title including mistake and contract that were published before the Older Cases were decided. I found no law review or law journal articles published in the 1970s with a primary focus on the contractual excuse of mistake. I did find a Columbia Law Review published summary of the doctrine of mistake dating from 1965, about ten years before the Older Cases. It described the doctrine thus:

The equitable doctrine of mistake has been developed to alleviate the harshness of rigid adherence to literal contract terms. The doctrine offers relief to parties who have entered into binding agreements on erroneous assumptions of fact or who have failed to conform a contract to their actual understanding. Application of the doctrine, however, has been confined to narrow fact patterns. The mistake, which allegedly occurred in negotiating and formulating the agreement, must be mutual and must substantially undermine the basis of the contract. It must arise either from belief in a non-existing fact or from ignorance of an existing fact. Doubting belief or conscious ignorance, however, will not support the defense of mistake because there is in fact no mistake but simply an erroneous judgment, an unsuccessful gamble.⁷

The same article claimed that “Courts have consistently refused to reform unilateral mistakes . . . unless so obvious that it would be inequitable to allow the other party to profit from them. . . .”⁸ Notwithstanding the Columbia Law Review’s assertion that a claim of mistake must be mutual (except when inequitable, whatever that means), the Yale Law Journal stated as far back as 1928 that there could be relief granted for unilateral mistake, although possibly limited by negligence.⁹

B. Corbin’s Treatise

Corbin’s Treatise on Contracts, as it existed in the 1970s (published in 1960) and in the 2000s (published in 2002), provides insight as to the meaning of mistake over time. The third edition of Corbin’s Treatise on Contracts published in 1960 includes a very lengthy chapter on

7. *Government Contracts: Fixed-Price Agreements and Mutual Mistake of Fact*, 65 COLUM. L. REV. 542, 545 (1965) (internal citations omitted).

8. *Id.* at 545 n.9.

9. *Note, Contracts-Unilateral Mistake-Negligence-Rescission*, 37 YALE L.J. 1152, 1152 (1928) (“It is usually held that a substantial unilateral mistake will not excuse performance and be ground for rescission if the mistake is negligent.”).

the doctrine of mistake. Early in the chapter, he states the following about the law of mistakes in contract formation:

Cases involving mistake are difficult of classification because of the number and variety of factors to be considered. These factors are found in many combinations. The citation of authorities for a rule stated in general terms is made perilous by this fact. It is equally perilous, and it may be positively harmful, to construct a rule of law, unless it is so limited as to be applicable to a particular combination of many factors. If this exact combination does not recur, what we really have is merely one precedent, and not a rule.¹⁰

In other words, there is no rule governing claims of excusing mistakes, but only a variety of highly specific case precedents. Corbin lists 13 questions which he suggests can aid the analysis of the claim of mistake.¹¹ Two important questions or factors that will seem familiar to those who have read the Second Restatement are whether the mistake involves something of “substantial importance” and whether either party assumed the risk of such a mistake by agreement or custom.¹²

When Joseph M. Perillo revised Corbin’s treatise in 2002, he retained the same 13 questions as well as the above paragraph from Corbin’s original (with some minor linguistic revisions that do not change the substance), but he added the following statement: “The Restatement (Second) of Contracts formulates, in § 152, a rule for mutual mistake that is quite flexible and is a useful guide.”¹³ This added statement is quite startling. After stating that it is perilous to formulate a rule, he then quotes a rule in the Restatement. Corbin’s 1960 edition did not quote or reference the First Restatement of Contracts §502 in its discussion.

The differences between the 1960 and 2002 editions of Corbin’s treatise are even more striking in the sections discussing unilateral

10. ARTHUR LINTON CORBIN, A COMPREHENSIVE TREATISE ON THE RULES OF CONTRACT LAW 583 (West Publishing Company, vol. 3, 1960).

11. *Id.* at 582-83. The 13 questions are: “1. Did both parties, or only one, have a mistaken thought? 2. Did the mistake induce mutual expressions of agreement; or did it merely induce action by one person toward another? E.g. a payment of money. 3. If mutual expressions were induced, were they expressions that agreed in meaning, as interpreted by the parties themselves or by third parties? 4. What was the fact to which a mistaken thought existed? The possibilities are myriad. 5. Was the fact of substantial importance? 6. Did one party know of the other’s mistake, or have reason to know it? 7. Did one party cause the other’s mistake, purposely or innocently? 8. Was the mistaken party negligent? 9. How soon was the mistake discovered and notice given? 10. Has either party, or a third party, changed his position, so that restoration of the former position is impossible? 11. Was the risk of such error assumed by one of the parties, by agreement or by custom? 12. What remedies are available? Among these are Damages, Restitution, Specific Performance, Rescission, Cancellation, Reformation. 13. Were there differences between Common Law and Equity, and do they still exist?”

12. *See id.*

13. JOSEPH M. PERILLO, CORBIN ON CONTRACTS: AVOIDANCE AND REFORMATION 112 (LexisNexis., vol. 7 rev. ed., 2002).

mistake. Corbin opens the section in the 1960 edition by stating that the commonly expressed opinion (by courts and treatise writers) is that “relief will not be given on the ground of mistake unless the mistake is ‘mutual.’”¹⁴ This statement is in agreement with the summary of the Columbia Law Review quoted *supra*.¹⁵ Corbin does go on at great length to explain that this generalization is subject to exceptions.¹⁶ Yet, the overall impression throughout the lengthy section is that exceptions to this rule, although existing, are not common and that mutual mistake is more typically the successful claim. In addition to distinguishing situations that sound like unilateral mistake but are really not properly categorized,¹⁷ Corbin does claim that a rule that relief cannot be granted for only a unilateral mistake is too absolute.¹⁸ Yet, Corbin does not formulate any general rules or principles to determine under what circumstances an accurately categorized unilateral mistake claim will be grounds for relief. Instead, he states that a rule on unilateral mistake “must take into account a variety of factors.”¹⁹ Yet, the 1960 edition of Corbin states no general rule including any number of factors that can predict which unilateral mistakes are likely to give rise to relief.

In Perillo’s 2002 edition of the treatise, the section on unilateral mistake had changed significantly in this respect from the 1960 version. It begins by rejecting prior formulations of the general rule (mistakes must be mutual) and notes that “an increasing number of cases have permitted avoidance where only one party was mistaken.”²⁰ It states that unilateral mistake is recognized when: “two conditions concur: (1) enforcement of the contract against the mistaken party would be oppressive, or at least, result in an unconscionably unequal exchange of values; and (2) avoidance would impose no substantial hardship on the other.”²¹ It also notes that independently of this two-pronged rule, relief can also be granted for “unilateral palpable mistake.”²²

C. *The Two Restatements*

The First Restatement was adopted in 1932 and was not superseded by the Second Restatement until 1981.²³ Thus, the Older Cases

14. CORBIN, *supra* note 10, at 669.

15. *See supra* note 7, at 545.

16. CORBIN, *supra* note 10, at 669-78.

17. *See id.* at 669-74.

18. *Id.* at 674.

19. *Id.*

20. PERILLO, *supra* note 13, at 224.

21. *Id.*

22. *Id.*

23. Although the work on the Second Restatement was completed by 1979. *See generally supra* note 6.

analyzed for this article were decided when the First Restatement was in effect and the Newer Cases were decided under the Second Restatement.

The equivalent sections are dramatically different in their wording. The First Restatement reads:

[W]here parties on entering into a transaction that affects their contractual relations are both under a mistake regarding a fact assumed by them as the basis on which they entered into the transaction, it is voidable by either party if enforcement of it would be materially more onerous to him than it would have been had the fact been as the parties believed it to be, except

(a) where the welfare of innocent third persons will be unfairly affected, or

(b) where the party seeking to avoid the transaction can obtain reformation or performance of the bargain according to the actual intent of the parties when the transaction was entered into, or

(c) where it is possible by compensation to the party injured by the mistake to put him in as good a position as if the transaction had been what he supposed it to be, and such compensation is given.²⁴

The heart of this section requires merely that a mutual mistake be made with respect to a fact which served as “the basis on which they entered into the transaction.” If this element is found to be present, a party can avoid the contract if it has become “materially more onerous” than if the mistaken fact had been true. Interestingly, the First Restatement establishes the principle that a proven mutual mistake (as long as the facts of the mistake are proven by “clear and convincing evidence and not by a mere preponderance”²⁵) gives rise to a right of avoidance and then simply lists three narrow exceptions in which it would be inequitable to do so (innocent third parties are harmed, reformation or performance can adequately ameliorate the onerous effect, or compensation can be paid). In a certain sense, the latter two exceptions are not really exceptions. The contract as written by the parties is altered to either change the nature of performance or provide compensation. In these two cases, the mistake does relieve a party of the strict duty to perform as contracted.

The Second Restatement lowers the requirements for avoidance in three ways but also adds a new required element. It states:

When Mistake of Both Parties Makes a Contract Voidable (1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the

24. CONTRACTS: RESTATEMENT OF THE LAW 961-62 (American Law Institute Publishers, vol. II, 1932).

25. CONTRACTS: RESTATEMENT OF THE LAW 981 (American Law Institute Publishers, vol. II, 1932).

adversely affected party unless he bears the risk of the mistake under the rule stated in §154. (2) In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution, or otherwise.²⁶

The Second Restatement eliminates the requirement that proof be by “clear and convincing evidence.” Next, it lowers the requirement that the mistake be “*the basis* on which they entered into the transaction” to merely “*a basic assumption* on which the contract was made.” (emphasis added). Finally, the effect of the mistake under the Second Restatement needs only be “material,” whereas under the First Restatement it had to make performance “materially more onerous.” The Second Restatement then adds the element that the party seeking avoidance not “bear the risk” of the mistake.²⁷ The final sentence appears to encapsulate the second and third exceptions listed in the First Restatement but illuminates the exception for innocent third parties. Based on these changes, most of which lower the standard for a required element, one would expect more parties to prevail on a claim for an excusing mistake following the adoption of the Second Restatement.

As to unilateral mistake, the First Restatement avoids stating a clear rule. It merely states that “A mistake of only one party that forms the basis on which he enters into a transaction does not of itself render the transaction voidable.”²⁸ Yet, the First Restatement does not describe what beyond the mistake being the basis on which the party entered into the transaction is required for avoidance for unilateral mistake. The Second Restatement clarifies that all the elements of mutual mistake are necessary for avoidance of a unilateral mistake plus one of the following factors must be present: “(a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake.”²⁹ As with mutual mistake, the general trend seems to be towards a greater likelihood of granting relief.

26. CONTRACTS: RESTATEMENT OF THE LAW (SECOND) 385 (American Law Institute Publishers, vol. I, 1981).

27. *Id.* at 402-03. The Second Restatement of Contracts §154 sets forth rules for determining when the party bears the risk of the mistake. It reads: “When a Party Bears the Risk of a Mistake A party bears the risk of a mistake when (a) the risk is allocated to him by agreement of the parties, or (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.”

28. CONTRACTS: RESTATEMENT OF THE LAW 966 (American Law Institute Publishers, vol. II, 1932).

29. CONTRACTS: RESTATEMENT OF THE LAW (SECOND) 394 (American Law Institute Publishers, vol. I, 1981).

D. Scholarship Published After the Dates of the Older Cases but Before or During the Newer Cases

In the third edition of his treatise on Contracts published in 1999, E. Allen Farnsworth explained that “the cases in which the adversely affected party has been allowed to avoid the contract on this ground [mutual mistake] are not marked by their consistency in either reasoning or result.”³⁰ He goes on to observe that “courts have had great difficulty in formulating rules for mutual mistake cases.”³¹ As a result, Farnsworth merely recites the three requirements included in the Second Restatement. As to unilateral mistake, Farnsworth explains that traditionally courts have been “reluctant” to grant relief for a unilateral mistake,³² but notes that “many courts, however, have abandoned this strict view and recognized a limited right of avoidance for unilateral mistake,”³³ in support of which claim he only cites the Second Restatement § 153. Farnsworth then claims that “most of the cases” in which such relief was granted involved calculation errors in bids.³⁴ Contracts casebooks appear to convey the same impression that unilateral mistakes claims mostly involve unilateral calculation errors (and in particular in contractor bids).³⁵

In addition to the requirements for mutual mistake, Farnsworth states that to obtain this exception for relief for a unilateral mistake, the affected party must show that the mistake creates an unconscionable hardship and the other party had not detrimentally relied on the contract to be avoided before the mistake was discovered.³⁶ Farnsworth’s additional requirements for unilateral mistake, although

30. E. ALLAN FARNSWORTH, *CONTRACTS* 623 (Aspen Publishers Inc., 3d. ed.1999).

31. *Id.*

32. *Id.* at 631.

33. *Id.*

34. *Id.*

35. *See, e.g.*, E. ALLAN FARNSWORTH, ET AL., *CONTRACTS: CASES AND MATERIALS* 1081 (Foundation Press, 10th ed. 2023) (including one unilateral mistake case, *Sumerel v. Good-year Tire & Rubber Co.*, that involves a calculation error in a litigation settlement offer); IAN AYRES & GREGORY KLASS, *STUDIES IN CONTRACT LAW NINTH EDITION* 485 (Foundation Press, 9th ed. 2017) (including one case, *Boise Junior College District v. Mattefs Construction Co.*, that involved a calculation error in a contractor bid); TRACEY E. GEORGE & RUSSELL KOROBNIN, *K: A COMMON LAW APPROACH TO CONTRACTS* 444 (Wolters Kluwer, 2d. ed. 2017) (including one unilateral mistake case *Donovan v. RRL Corp.*, involving a newspaper advertisement for a used car that included an incorrect price); BEN TEMPLIN, *CONTRACTS: A MODERN COURSEBOOK* 414-15 (Wolters Kluwer 2017) (including two unilateral mistake cases—one, *Info Int’l Associates Inc. v. United States*, that involved a calculation error on a contractor’s bid, and the other, *Donovan v. RRL Corporation*, involving a newspaper advertisement for a used car that included an incorrect price); THOMAS D. CRANDALL & DOUGLAS J. WHALEY, *CASES, PROBLEMS, AND MATERIALS ON CONTRACTS* 539 (Aspen Publishers, Inc., 3d. ed. 1999) (including only one unilateral mistake case *First Baptist Church of Moultrie v. Barber Construction Co.*, that involved a calculation case in a contractor’s bid); CHARLES L. KNAPP, ET AL., *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 674 (Wolters Kluwer, 6th ed. 2007) (including one unilateral mistake case, *Wil-Fred’s Inc. v. Metropolitan Sanitary District*, that involved a calculation error in a contractor bid).

36. E. ALLEN FARNSWORTH, *CONTRACTS* 633 (Aspen Publishers, Inc., 3d ed. 1999).

similar to the Second Restatement, differ in requiring detrimental reliance by the other party and by not including the possibility that the other party caused the mistake.³⁷

In 2004, Professor James Gordley provides a thorough summary and critique of the various concepts that have been offered throughout legal history to explain which mistakes can lead to a party being relieved of performance.³⁸ First, he considers the requirement that the mistake be of the “substance” or essence of the contract.³⁹ This legal standard is thousands of years old.⁴⁰ Exemplified by the famous case of *Sherwood v. Walker*,⁴¹ the problem with the substance test, as Gordley explains, is “that many distinctions are drawn among objects by ordinary people or in commercial dealings, but people do not usually spend time deciding which of these distinctions amounts to a difference in ‘essence.’”⁴² Secondly, Gordley says some jurists argue that there must be a mistake related to the determining motive of the parties—the mistake must make the contracted performance unsuited to the motive that led to the formation of the contract.⁴³ Gordley points out that the problem with this standard is that whenever “a party wants to escape from a contract, he has made some mistake absent which he would not have contracted.”⁴⁴ In addition, Gordley notes, as did the early twentieth century treatises and the First Restatement, that some jurists claim that the distinguishing feature must be that the mistake is mutual, i.e. not merely unilateral.⁴⁵ Yet, by the time Gordley writes, it is clear that at least some unilateral mistakes have been the basis of relief when other factors are present.

The fourth theory, which Gordley identifies with the approach of Oliver Wendell Holmes, essentially limits mistake cases to instances in which there is a mistake in the process of contract formation, or in other words, “only if the parties contradicted themselves outwardly” in

37. Compare *id.*, at 631 to Restatement (Second) of Contracts § 153 (1981).

38. James Gordley, *Mistake in Contract Formation*, 52 AM. J. COMP. L. 433 (2004).

39. *Id.* at 434.

40. See, e.g., JUSTINIAN, DIG. §1.9.2 (Ulpian, 18) (Ulpian considers the effect of a mistake in substance).

41. See generally *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887). In this famous case, the parties agreed on the sale of Rose 2d of Aberlone whom both parties believe to be barren. After contracting but before delivery, the defendants discovered that the cow as in fact not barren but a breeding cow. The defendants argued that the mutual mistake about Rose entitled them to avoid performance. The Michigan Supreme Court held that the jury should have been instructed that if they found that both parties were so mistaken that such mistake touched the substance of the contract and would excuse the defendant from performing the promise to sell. In other words, a barren cow is in substance something different from a calf bearing cow and thus a mistake about this substantial fact would excuse performance.

42. Gordley, *supra* note 38, at 435.

43. *Id.*

44. *Id.*

45. *Id.* at 436.

attempting to form a contract.⁴⁶ Yet, Gordley realizes that this approach does not explain many cases throughout legal history when relief is granted but there is no outward mistake in the contract formation process; rather there is a mistake not in what was said but in how surrounding facts were understood.⁴⁷

The fifth theory is that a mistake must involve a basic assumption on which the contract was made. After noting that this concept is found in both the First and Second Restatement, Gordley points out that “[t]he difficulty with this approach is to explain what is meant by a basic or a tacit assumption” and then notes that this concept becomes indistinguishable from the “motive test.”⁴⁸ Finally, Gordley explains the approach to mistake cases that attempts “to formulate general principles that describe how the law allocates risks to the parties to a contract.”⁴⁹ Gordley then explains that there is no general agreement on how to determine which party should bear a risk.⁵⁰ Although in general Gordley believes the approach of Law and Economics scholarship to risk allocation, an approach that allocates risk to the party in the best position to bear the risk, makes general sense, he is concerned that it is not easy to see how to apply it to the problem of mistake.⁵¹ It is one thing to say that if a party consents to a contract, the risks incident to the transaction should fall upon him if he can bear them most easily. It is another to assign risks to someone who can best bear a risk but who, because he was mistaken, may never have consented to do so.⁵²

Gordley attempts to synthesize these various schools of thought into a theory of mistake cases, but the merits of his proposal are not relevant to this inquiry. I took his thorough summary of thousands of years of contract jurisprudence relating to mistake as a basis for searching which of these concepts might be relevant to courts in the twentieth and twenty-first centuries. Abstracting from Gordley’s summary, I identified the following questions that may be employed by courts: (1) is the mistake of the substance or essence of the contract; (2) did the mistake relate to a motive for entering into the contract; (3) did the mistake involve a basic assumption on which the contract was made; and (5) did one party bear the risk. I have excluded from this list two concepts considered by Gordley. One is the idea that mistakes are limited to errors in the manifestation of assent.⁵³ I agree with Gordley that this is an unhelpful distinction because courts routinely

46. *Id.* at 437.

47. Gordley, *supra* note 38, at 437.

48. *Id.* at 439.

49. *Id.* at 440.

50. *Id.* at 440-41.

51. *Id.* at 441-42.

52. Gordley, *supra* note 38, at 441-42.

53. *Id.* at 437-39.

consider the doctrine of mistake outside the concept of mistakes in formation. I believe that this concept is a wholly separate doctrine that relates to the necessities for contract formation (offer and acceptance) and not excuse of performance for mistake. Finally, it seems clear (from the number of cases alone) that courts no longer, if they ever did, limit excuse of performance to mutual mistakes alone. I did however code the Data Set for the variable of whether or not the mistake was mutual or unilateral. In the next part, I explain the methodology of the coding project and report the results.

II. THE CODING PROJECT

The present survey examines the consistency and evolution of case law when courts apply the doctrine of contractual mistake. As noted above, two sets of cases are analyzed to determine trends and correlations in the case law. A cursory overview of the history of the doctrine shows its evolution over the past 120 years. To measure this evolution, the two sets of opinions allow for a comparison of cases from different time periods. I chose the last three years of the 1970s as a time just before the Second Restatement proposed major changes to the formulation of the standards governing an alleged mistake. The second set of cases is drawn from the last three years of the twenty teens. The goal was to compare cases that date before and after the Second Restatement as well as to consider cases separated by a significant period of time. Fifty years was chosen as the interval. This decision was taken before running any searches or knowing how many or what type of cases would be discovered. In this way, the decision of which cases to include would not reflect any bias or reaction since the periods were chosen without knowing the results of the searches.

Although the methodology attempted to limit the effects of bias on case selection (once the time periods were chosen) since every case contained in Westlaw's system was included, this methodology is still subject to some limitations. First, the project could only code cases included in Westlaw's database. Although all reported cases in the applicable time periods are included, only those unreported cases that Westlaw chose to add to their database could be found by the searches. Any unreported cases not chosen by Westlaw were outside the scope of the searches. There seems no practical way around this limitation as there is no efficient method for searching for unreported cases in all state and federal courts. Further, the searches do not include cases in which parties filed claims or defenses including claims of contractual mistake, but which were settled or otherwise dismissed before the court could issue any opinion or decision. As noted below, the collected datasets are of court opinions or decisions, not of filed cases more broadly. Again, there seems no efficient method for considering filed but settled or withdrawn cases. Finally, the assembled data does not consider cases that were arbitrated and not litigated in court. Many

commentators have noted the dramatic rise of disputes being resolved by mandatory arbitration.⁵⁴ As with unreported cases, there is no efficient, systematic way to gather all arbitral awards and decisions. The methodology is thus restricted to reported and unreported opinions, selected by Westlaw to include in their tap base, issued by federal and state courts.

The searches described in the next section uncovered reported decisions and unreported decisions that Westlaw collected. In this project and throughout this article, the word “case” is used to identify a unique judicial decision or opinion. It does not refer to a totality of litigation history. Thus, if in the course of litigation multiple courts issue a separate opinion, each is considered as a single case. I did not attempt to aggregate decisions that were issued in the same course of a litigated case. I treated each decision as a stand-alone data point for my data analysis. In other words, the dataset is one of court decisions, not cases. The goal was not to study particular litigation history, but to look at the individual decisions, or opinions, that were issued by a specific court.

A. Methodology

The following two searches were run in Westlaw all state and all federal databases:

advanced: (ATLEAST5(contract) and ATLEAST7(mistake) and (mutual or unilateral /5 mistake)) & DA(aft 12-31-1977 & bef 01-01-1980) (“Older Search”)

advanced: (ATLEAST5(contract) and ATLEAST7(mistake) and (mutual or unilateral /5 mistake)) & DA(aft 12-31-2017 & bef 01-01-2020) (“Recent Search”)

The Older Search produced 110 results. Of these, thirteen were false positives because they did not involve any issues of mistake in contract formation. That left ninety-seven cases in the dataset from the years 1977 through 1979. The Recent Search produced 280 results. Upon review, forty-five of these were categorized as false positives that did not involve issues of contractual mistake. That left 235 cases in this second dataset.

One reason for searching in two different time periods was to see if any observable changes occurred over a fifty-year interval. The goal

54. See for example, Alexander J.S. Colvin, *The growing use of mandatory arbitration: Access to the courts is now barred for more than 60 million American workers*, ECON. POL'Y INST. (April 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/> [<https://perma.cc/PH7Y-CYW8>]; Judge Craig Smith & Judge Eric V. Moyé, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 TEX. TECH L. REV. 281, 282 (2012); *The State of the Judiciary in Texas: Presented to the 80th Legislature by Chief Justice Wallace B. Jefferson February 20, 2007*, 70 TEX. B.J. 314, 314 (2007).

was to see if changes in results occurred but also if changes in the terminology or concepts used by courts in analyzing the excuse of mistake are discernible. The periods were chosen without doing any searching so that no bias would be introduced in choosing the particular years.

Each case was then coded for a list of twenty-eight variables. These variables attempted to capture basic information about the case, such as the court issuing the opinion and the year of decision, as well as the nature of the parties. Cases were coded according to whether a mutual or unilateral mistake was alleged. A third category was created for a small number of cases in which both a unilateral and mutual mistake were claimed. The cases were coded accordingly if the court used certain terminology or legal concepts in its discussion of the issue (e.g., was the mistake of the substance or essence, was it a basic assumption, etc.). Each case was also coded to track whether the court cited or quoted the Restatement (Second) of Contracts in its analysis. Finally, each case was coded for the result (did claim of mistake succeed) and remedy granted (reformation or excuse of performance). The full set of coded variables is listed in Appendix 1 “Variables and Coding Instructions.”

B. Overall Results

The first noticeable result is that the number of cases increased dramatically between the two time periods. I found almost two and a half times more opinions in the Recent Search (235 results) compared to the Older Search (ninety-seven results). This explosion of cases could mean that litigators observed a greater likelihood of success on this issue in the more recent time period, and therefore, more mistake claims were brought. On the other hand, this increase does not necessarily mean that this doctrine has grown in importance in fifty years, but could merely be a result of the growth of litigation generally. Jürgen O. Skoppek reported in 1989 on the explosion of civil litigation since 1970. He found that the number of civil case filings in federal court has absolutely mushroomed. He reports: “The number of civil cases filed in U.S. District Courts in 1970 was 87,321. By 1980, this number had grown to 168,789. In 1986, the number had grown to 254,828 (a staggering 192% increase in case filings compared to 1970).”⁵⁵ As to state courts in the 1970s and 1980s, he reported: “According to a 1986 *Time* report, the number of civil lawsuits in state courts grew four times as fast as the American population from 1977 to 1981. In 1984, there was one private lawsuit for every fifteen Americans, with 16.6 million private civil suits filed in state courts.”⁵⁶ Even

55. Jürgen O. Skoppek, *Litigation and the Market: Restoring the Balance Between Individual and Employer Rights*, MACKINAC CTR. FOR PUB. POL’Y, (July 1, 1989) <https://www.mackinac.org/6263> [<https://perma.cc/5XBP-NTYV>].

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

if the general increase in litigation is a factor, it is still possible that changes in the doctrine also produced more opinions involving the doctrine of mistake. The number of cases in the dataset increased by 250%, whereas the increase in federal cases from 1970 to 1986 is only 192%.

The starting hypothesis for the research, based on the survey of secondary literature, was that claims for mistake would be more successful in the Newer Cases than in the Older Cases. This hypothesis was built on the observation that the literature and the Restatements seem to be lowering the standard for finding of an excusing mistake over time. Of the ninety-seven Older Cases, ninety-one cases made a determination of the issue of the alleged mistake. Out of these cases in which a decision was made regarding the excuse of mistake, the party alleging a contractual mistake prevailed thirty-four times (or in 37.4% of the cases in which the issue was resolved). Of the 235 Newer Cases, 199 cases reached a decision on the claimed contractual mistake. Of these cases, the party claiming a mistake in contracting prevailed only thirty-three times, resulting in only a 16.6% success rate, which is less than half of the success rate in the 1970s. Thus, the initial hypothesis appears to have been disproven, as the overall success rate was reduced by more than half. Such a dramatic drop in success begs the question: why this decrease over fifty years? This Part will first look to see if any coded factors experienced significant changes, and then will break the results down between alleged mutual and unilateral mistakes to see if an explanation lies in that distinction.

C. State Courts v. Federal

Of the ninety-seven Older Cases decided in the 1970s, the vast majority of opinions were issued by state, as opposed to federal, courts (seventy-five cases or 77.3%). The seventy-five cases were divided among thirty-three states with Texas representing the state with the most cases (twelve cases or 16% of all cases in state court). Of the twenty-two federal cases, eight applied federal common law and the other cases applied the law of ten different states. New York law was applied by federal courts most often, having been used in three cases. Appendix 2 lists the state courts in which cases appeared and the law of which states were applied by federal courts.

In addition, the vast majority of opinions were issued by appellate courts (eighty-one or 83.5%). Of the eighty-one appellate decisions, were issued by the highest court in the applicable jurisdiction (representing 29.6% of all appellate decisions in this set of cases and 24.7% of all cases in the Older Cases dataset). Those numbers suggest a significant number of cases involving mistake are appealed and reach the highest court. Over a quarter of all appeals went to the highest possible court. Such a large percentage may indicate the unsettled nature

of the doctrine, since the litigants are willing to continue appeals to the highest court.

In the Newer Cases, a smaller percentage (than in the Older Cases) of the 235 cases were decided by state, as opposed to federal, courts (123 or 52.3%). Although state courts still represent a majority of the decisions, the percentage decided by state courts dropped by over twenty percentage points. The 123 cases were distributed among 35 states and the US Virgin Islands. The states with the most decisions were Connecticut and Ohio (ten), California (nine), and Texas (seven). Connecticut and Ohio saw the greatest increase in number of cases compared with the Older Cases. Although Texas still saw a significant number of cases, they fell from twelve to seven. Federal courts most often applied California (seventeen) and New York Law (ten) in the Newer Cases dataset. Thus, California law appears most often in the Newer Cases, regardless of whether a federal or state court is applying its law, with twenty-six cases (or 11% of the Newer Cases). New York law was applied in fifteen opinions in total in the Newer Cases, and Ohio law and Texas law appear in twelve and eleven opinions, respectively. There was a significant decrease in cases identified as applying federal common law in the Newer Cases, a decrease from eight to one.

In addition, trial court opinions accounted for a much greater percentage of the decisions in the Newer Cases. Of the 235 cases, only 111 were issued by appellate courts (47.2%). In addition, a significantly lower percentage of cases reached the highest court in a jurisdiction. Only twenty-four opinions (21.6% of all appellate level cases in the Newer Cases and only 10.2% of all decisions in the Newer Cases) were issued by the highest court. Thus, a higher percentage of cases appeared in federal courts, and more trial decisions were found in the more recent set of cases relative to appellate decisions. There may be a connection between these factors, since it is more likely that federal district courts publish opinions than state trial courts do. Since there is a greater number of federal courts in the Newer Cases, it is therefore expected that there would be a higher number of trial court opinions. Despite this influence on the newer cases, it is likely that there has been an absolute decrease in the number of cases being appealed all the way to the highest court of a jurisdiction. Such an increase might be explained by the law becoming more settled.

D. Case Characteristics

In this section, the results of the coding for the type of party, and the type of claims made by the parties, are reported. The type of parties involved did not change significantly over time. In the Older Cases, forty-seven out of ninety-seven of the opinions (48.5%) were coded to identify that at least one of the parties was a natural person. In the Newer Cases, 107 (45.5%) of the decisions were coded to indicate

at least one of the parties was a natural person. Thus, in both time periods, slightly less than half of the cases involved natural persons, with the majority involving only legal entities as parties.

In addition to coding for the type of party, the cases were coded to see if parallel claims excusing performance were also alleged by a party. A claim of misrepresentation can be considered similar to a claim of mistake, because a party thought something was true when in fact it was not. The same fact could give rise to a claim of misrepresentation, if the other party caused the mistake by misrepresenting facts. In addition, the doctrine of changed circumstances (impossibility or frustration of purpose) could address situations similar to a mistake. An expectation of the parties about the context in which the contract would be performed is a similar error to a mistake of fact. Therefore, the cases were coded to see if there were correlations between these claims for excuse of performance and mistake. Comparing the two periods, it seems that in the later period more cases involved an allegation of fraud or misrepresentation along with the claimed mistake of fact. In Older Cases, 22 of 97 (22.7%) involved an allegation of fraud or misrepresentation in addition to a claimed mistake of fact, but in the Newer Cases, 111 of 235 (47.2%) cases involved such an allegation in addition to that of mistake. In both time periods, the cases rarely involved an accompanying claim of changed circumstances (impracticability or frustration of purpose). In the Older Cases only eight (8.2%) and in the Newer Cases thirteen (5.5%) involved such a claim. Thus, it appears that in both periods, the same factual scenarios in a significant number of cases, between 22% and 47% of the time, involve a parallel claim of misrepresentation. There appears to be little correlation between the doctrine of change circumstances and mistake. This finding confirms the way I have always explained these concepts to my students: mistakes and misrepresentations relate to facts at the time of contracting, whereas changed circumstances relate to changes in facts after contracting.

In both time periods, the mistake alleged most often was alleged to be a mutual mistake. In the Older Cases, seventy-five cases involved an alleged mutual mistake (77.3%), sixteen cases involved an alleged unilateral mistake (16.5%), and six cases (6.2%) involved a claim of both types of mistake. In the Newer Cases, 149 opinions (63.4%) involved an allegation of mutual mistake, eighty-seven cases (37.0%) involved only an alleged unilateral mistake, and thirty-nine cases (16.6%) involved an allegation of both. Thus, although mutual mistake cases dominated both time periods, the data did show a small but significant increase in the percentage of cases involving only a unilateral mistake and cases in which both types of mistake were alleged. A later section of this article will compare the data involving mutual and unilateral mistake. For now, it appears that the data supports a conclusion that courts have been more willing to entertain claims of

unilateral mistake, and therefore parties have more often brought those claims.

E. Language of Legal Analysis

The cases were coded to identify if the court considered a variety of legal standards in analyzing the claimed mistake. Based on the survey of secondary literature, a variety of legal concepts and language were sought in the opinions and the cases coded if they were found to be present.

The most prevalent legal test found in the Data Set was the assumption of risk of the mistake. Each case was coded to identify if the court attempted to determine which party bore the risk of the alleged mistake. In the combined Data Set of 332 opinions, this consideration appeared in 56 opinions (15.7%). In the Older Cases, that inquiry appeared in twenty-five cases (25.8%). Surprisingly, the presence of this inquiry declined in the Newer Cases. Although twenty-six of the Newer Cases involved an inquiry into risk assumption, since there were more than double the number of decisions in the Newer Cases, that number represented only 11.1% of the Newer Cases. This finding was rather surprising since inquiry into assumption of risk is a central element in the Second Restatement. It seems that several decades after the Second Restatement added this provision, only a little more than 10% of the opinions coded utilized this inquiry.

The cases were also coded to identify if the court sought to determine if the mistake related to the “substance” or “essence” of the contractual exchange. In the Older Cases, only seven cases (7.2%) were coded as including this inquiry. Within the Newer Cases, only twenty-six (11.1%) of the opinions included this inquiry. Combing the two time periods, this means that this approach was found in only 33 of the 332 decisions in the entire Data Set examined, which equates to only 9.9% of all cases under review. Thus, this traditional language associated with the doctrine of mistake seems to have little influence in the cases in the Dataset (appearing in just under 10% of the cases). Its influence did increase slightly from the Older to the Newer Cases, a surprising finding since the Second Restatement does not use this concept.

The cases were also coded for the inquiry that appeared in some Older Cases and secondary literature—did the court consider the mistake as relating to the “motive” for entering into the contract? This concept rarely appeared in the Dataset. In the combined Dataset of 332 cases, it appears only five times (1.5%). In the Older Cases, this term appeared only three times (3.1%). In the dataset of Newer Cases, it appeared even less frequently, with only two opinions (0.9%) including this concept. Thus, Professor Gordley’s dismissal of this test appears justified, as even the courts in these two time periods do not consider it a relevant inquiry.

Surprisingly, courts rarely discussed if the mistake constituted a “basic assumption” on which the contract was made. Within the combined Data Set, only thirty-three cases (9.9%) could be identified as including a discussion of this concept. The Older Cases included only three opinions (3.1%) that discussed this term. The Newer Cases did show some increased attention to this concept with thirty (12.8%) cases identified as such; however, this is still a small minority of opinions. This finding is surprising given the Second Restatement’s use of this term and it being highlighted in first year casebooks.⁵⁷ Although its prevalence did increase in the Newer Cases, it only appears in fewer than 15% of cases in that dataset. Thus, the Second Restatement’s addition of this concept seems to have had little effect on the opinions that were decided after its adoption.

Even more surprising is that very few of the cases in the Dataset involved the court analyzing a contractual *force majeure* clause or other provision that explicitly allocated risk of the particular mistake. Only 4 of the 332 cases (1.2%) included discussion of an express contractual provision (3 of which are from the Older Cases and 1 is from the Newer Cases). Although this might suggest that lawyers are not including such clauses in contracts to allocate risks, other explanations may exist for this absence. It is possible that the presence of a clear *force majeure* clause in a contract reduces the likelihood that mistake claims are made in litigation, because there is an explicit allocation of risk. There is no reasonable method for testing this hypothesis, because there is no reliable collection of all contracts formed but which are not litigated against which the findings in litigation could be compared. It is possible that clear contractual allocation of risk may channel such contracts away from litigation alleging a mistake due to the explicit allocation of risk, but not having data on the prevalence of such clauses in all contracts, this is only speculation. Another possibility is that contracts containing explicit *force majeure* clauses also include mandatory arbitration clauses and thus channel those disputes away from the court system. It is possible that a higher percentage of cases in arbitration involve contracts with specific risk allocation. A fact that would suggest this explanation may not be accurate is that even in the Older Dataset there were few cases involving such clauses (only 3). Since arbitration was less prevalent in the 1970s, and a statistically significant decline in the presence of *force majeure* clauses in the Newer Dataset is not observed, it may not be that arbitration is playing a role in channeling such disputes away from courts. These speculations could only be confirmed by a systematic study of arbitrated disputes. Only a more modest conclusion can be drawn from the data on

57. See, e.g., FARNSWORTH ET. AL., *supra* note 35, at 1022; AYERS AND KLASS, *supra* note 35, at 480; CHERRY, *supra* note 1, at 347; GEORGE AND KOROBKIN, *supra* note 35, at 432; TEMPLIN, *supra* note 35, at 400.

this issue: that *force majeure clauses* are not frequently included in contracts with respect to which mistake litigation occurs.

Given the infrequent reference to concepts contained in the Restatement of Contracts, it is not surprising that the cases included few express citations to the Restatement. Within the total Dataset of 332 cases only 30 (9%) cited the Restatement. The Older Cases included only one case that cited the First Restatement. Although more opinions in the Newer Cases cited the Second Restatement (29 cases) this only represents 12.3% of those 235 cases. Clearly, the Restatement of Contracts does not play a direct role in courts' analysis of claimed mistakes. Likewise, cases to which the Uniform Commercial Code applies rarely appeared in the Dataset. Of the 332 cases in the combined Dataset, only 9 cases (2.7%) involved the Uniform Commercial Code. Of the Older Cases, only two cases were identified as being subject to the UCC. One involved Article 2 (Sale of Goods) and the other Article 3 (Negotiable Instruments). Only seven cases in the Newer Cases involved the UCC (5 involved Article 2 and 2 involved Article 9 (Secured Transactions)). It is not clear why cases governed by the UCC were so underrepresented. The code contains no provisions that would make such claims less likely to succeed.

F. Cases of Mutual Mistake

Of the combined Dataset, a large majority of cases involved an allegation of a mutual mistake—224 of the total of 332 cases (67.5%). Of this total 224 cases in which a party claimed a mutual mistake, 75 cases were in the Older Cases dataset (representing 77.3% of all Older Cases) and 149 opinions were in the Newer Cases dataset (representing 63.4% of all Newer Cases). In the combined Dataset, 103 cases involved an allegation of unilateral mistake (31.0%). Of the total 103 cases, 16 cases (representing 16.5% of the Older Cases) involved allegations of unilateral mistake, and 87 cases (representing 37.0% of the Newer Cases) involved an allegation of unilateral mistake. Of all 332 cases, 45 cases (13.6%) contained an allegation of both a mutual and unilateral mistake. Of these forty-five cases, only six were in the Older Cases (representing only 6.2% of the Older Cases), and the remaining thirty-nine cases were from the Newer Cases (representing 16.6%). Thus, although allegations of a mutual mistake still comprised the majority of cases in the Newer Cases dataset, a greater percentage of cases in that dataset involved a unilateral mistake allegation. The percentage of cases involving unilateral mistakes more than doubled between the two data sets, increasing from 16.5% to 37% of the respective datasets. Thus, comparing the periods, mutual mistake cases still make up the majority of opinions, but the number of claims of only a unilateral mistake rose significantly. The other noticeable change is the increase in the number of cases involving allegations of both types

of mistakes. Allegations of both mutual and unilateral mistake rose from 6.2% of the Older Cases to 16.6% of the Newer Cases.

In the seventy-five Older Cases involving only a claim of mutual mistake, sixty-nine opinions included a determination of the availability of the excuse of mutual mistake. Of these sixty-nine cases, twenty-four decisions (34.8%) were decided in favor of the party alleging a mutual mistake. Of the sixty-nine results, sixteen cases (23.2%) involved a claim of misrepresentation along with the mistake claim, but only six (8.7%) involved a parallel claim of changed circumstances. In only seven cases (10.1%) did the court use the standard of evaluating if the alleged mistake was of the substance or essence of the bargain. A higher percentage of cases saw the court inquiring into who bore the risk of the mistake, seventeen cases (24.6%). In only three cases did the court discuss a *force majeure* clause. Likewise, only three cases (4.3%) involved an inquiry into whether the mistake was a basic assumption on which the contract was made. The court only cited the Restatement once, and no cases involved any articles of the Uniform Commercial Code.

Within the New Cases dataset of the 149 cases alleging a mutual mistake, the opinion resolved the question of an alleged mutual mistake in 128 instances. Of these 128 cases, the party alleging only a mutual mistake prevailed on that claim 27 times (21.1%), which represents a significant decrease (almost 14 percentage points) in the rate of success on such claims compared to older cases, alleging mutual mistake. A parallel claim of misrepresentation or fraud was found to accompany the mistake claim significantly more often than in the Older Cases (eighty-three cases or 64.8%). A claim of changed circumstances was, as in the Older Cases, less common than a parallel misrepresentation claim. Such claims only appeared in 7 of the 128 opinions in which a decision was made on the claim (5.5%). The use of a legal standard asking if the mistake was one of the essence or substance of the contract remained about the same in the Newer Cases. Only fifteen cases used such a legal standard (11.7%). Interestingly, a lower percentage of the decided cases involved inquiring into which party bore the risk of the mistake. Only 13 of the 128 cases used such an inquiry (10.2%), which is approximately half the rate that this inquiry appeared in the Older Cases). As with the Older Cases, *force majeure* clauses played no significant role with only one case referencing such a clause. A larger number of cases inquired into whether the mistake was related to a basic assumption on which the contract was made (fourteen cases or 10.9%). Although a greater percentage of cases involved this inquiry, it is still a surprisingly low percentage given the prominence this element holds in the Second Restatement's formulation of the doctrine. The question of a mistake of motive is certainly not prominent in the New Cases with only one case using this framework. The Restatement of Contracts was quoted more often in the New

Cases (14 cases), yet even with this absolute increase, it was quoted in only 10.9% of the 128 cases. Cases involving the UCC were also rare. Only one case noted Article 2 of the UCC applied, and two cases noted other articles of the UCC.

Although cases involving a mutual mistake appeared to follow the overall trends for the Dataset, the decrease in the percentage of cases finding in favor of the party alleging a mutual mistake, was less than the decrease in the overall rate of success in the combined Dataset. Thus, the decline in the overall rate of success across the Dataset does not seem to be driven primarily by mutual mistake cases.

G. Unilateral Mistake Cases

Of the cases alleging only a unilateral mistake within the Older Cases, sixteen opinions resulted in a ruling about the alleged mistake. Of these sixteen cases, in seven decisions the party claiming a mistake prevailed (43.8% of these cases).⁵⁸ This rate of success is higher than the overall success rate for all types of mistake cases in the dataset of Older Cases, which was 37.4%. Such a result appears contrary to the claims of secondary literature prior to the adoption of the second restatement that cases for unilateral mistake were less likely to succeed. Thus, the cases in the data set did not produce expected results with respect to unilateral mistake. This surprising result may suggest that commentators overstated the rarity of success on unilateral mistake claims.

Only three of these sixteen cases (18.8%) involved a parallel claim of fraud or misrepresentation. No opinions considered the question of whether the mistake was of the substance or essence of the contract. Of the sixteen opinions, the court in six decisions (37.5%) asked who bore the risk of a mistake. This finding is noticeably different from the mutual mistake cases in the Older Cases. It appears that in the Newer Cases, the court inquired into risk assumption, approximately thirteen percentage points more than in the mutual mistake cases. No cases involved a *force majeure* clause, the question of the mistake was a basic assumption on which the contract was made or if the mistake involved a motive for entering into the contract. No cases cited the Restatement and only one case involved a sale of goods under Article 2 of the UCC.

As discussed in part I, *supra*, once a remedy for unilateral mistake became accepted, courts and commentators attempted to list additional tests or factors that would be taken into account in determining if relief should be granted for a unilateral mistake. Interestingly, of the special factors that courts say that they consider in unilateral

58. In one of the seven cases, the court found the mistake to be mutual even though the party alleged unilateral mistake. The decision was made to keep this case coded as a successful unilateral case since the party argued such and still prevailed, even though the court, characterized the mistake as mutual.

mistake cases, twelve opinions (75% of Older Cases in which a determination was rendered) considered if the effect of the mistake was to render the exchange unconscionable. Five opinions (31.3% of Older Cases in which a determination of the mistake claim was made) reach the conclusion that the unilateral mistake would render performance of the contract unconscionable. All sixteen opinions included an inquiry into whether the mistaken party was at fault for the mistake, but the court found the other party to be at fault in some way for the mistake in only one instance. In this one case in which the other party was found to bear some responsibility for the mistake, the court granted relief for the unilateral mistake.⁵⁹ Thus, it does seem that in the Older Cases courts regularly looked at both of these factors.

The common wisdom has been that calculation errors in bids are the typical type of case in which relief is granted.⁶⁰ Of the unilateral mistake cases in the Older Cases, seven decisions involved a mistake characterized as a unilateral calculation error, and seven cases (not overlapping with the calculation error total) involved a contractor bid. Of the entire seventeen total cases involving a unilateral mistake claim in the Older Cases dataset (including the one case in which no decision was made on the issue), seven involved some sort of error in a bid (41.2% of all cases and 43.8% of those in which a decision on the issue was rendered). The party claiming a calculation mistake in a bid prevailed in the majority (four) of those seven cases (57.1%). Thus, calculation errors and contract bids do seem to represent a significant number of cases in the Older Cases.

In the Newer Cases dataset, forty-two of the forty-seven cases alleging only unilateral mistake resolved the question of mistake in the opinion. Of these forty-two cases, only three cases found the mistake to excuse performance (7.1% of the cases in which a decision on the issue was rendered). Although the overall success rate on claims of all types of mistakes did decline between the two periods (from 37.4% to 16.6%), the decline in success rates for unilateral mistake cases between the two periods was much more dramatic (the success rate fell from 43.8% to 7.1%). Thus, one of the most interesting findings is that although the literature seems to suggest a greater openness by courts to claims for relief due to unilateral mistake, the results over the forty-year period of 1977-2017 demonstrate a dramatic decline in the success rate for such claims. In addition, the percentage of cases involving a calculation error or a contractor's bid declined dramatically between the two periods. Of the forty-seven cases in this dataset, only two cases involved construction bids (only 4.3% of all these Newer Cases). The most common type of alleged unilateral mistake involved a mistake relating to a settlement agreement. Of the forty-seven cases, eleven

59. *See generally* Bromley Contracting Co., Inc. v. U.S., 596 F.2d 448 (Ct. Cl. 1979).

60. *See supra* note 35.

(23.4%) involved an alleged unilateral mistake involving some form of settlement agreement. Thus, claims of unilateral mistake are being brought in more factual contexts than calculation errors but with much more limited success.

In contrast to the Older Cases dataset, the Newer Cases dataset contained a higher percentage of cases involving claims of fraud or misrepresentation along with the mistake claim (19 of the 47 cases or 40.4%). In only four cases (8.5%), the court asked if the mistake involved the substance or essence of the contract, confirming that this concept has not been significant in either period. The question of which party bore the risk of mistake decreased in the opinions of the Newer Cases, with only six cases (12.8%) asking that question. As in the Older Cases dataset, no cases discussed a *force majeure* clause. As with the Older Cases, asking whether the mistake was one of motive played little role in this dataset, with only one case being coded as such. Only seven cases cited the Restatement, and only four involved a sale of goods under Article 2 of the UCC.

With respect to the considerations unique to a unilateral mistake, forty-one out of the forty-two opinions in which the court resolve the claim of mistake (97.6%), the court inquired as to whether the other party bore responsibility for the mistake and fifteen opinions (35.7% of those in which a decision on the claim was made) considered whether the effect of the mistake would be unconscionable. Of the fifteen cases in which an inquiry into the mistake being unconscionable was made, only one case found the result to be unconscionable. Of the forty-one cases in which a court inquired into the fault of the other party, only two cases found the other party to be at fault for the mistake.⁶¹ Seven cases involved a calculation error, and only two cases involved a contractor's bid. Thus, although approximately the same percentage of opinions considered the fault of the other party, a significantly fewer number of courts considered the question of performance being unconscionable in the Newer Cases (35.7%), compared to the Older Cases (75%).

H. Both Types of Mistake Alleged

One noticeable difference between the Older and Newer Cases is an increase in the number of cases in which both a mutual and a unilateral mistake were claimed. In the Older Cases, only six cases involved such a claim. In the Newer Cases, the number had risen to thirty-nine opinions. This represents a five and a half times increase in opinions between the two periods., whereas the total number of all decisions in the Newer Cases is only two and a half times the number of opinions

61. In both cases, the party alleging unilateral mistake prevailed. *See generally* Zaniewski v. R.V. World Co., Inc., 2018 WL 4134691 (W. Dist. Tenn. 2018); *see generally* Johnson v. USA Underwriters, 328 Mich. App. 223 (Mich. Ct. App. 2019).

in the Older Cases. Therefore, it seems that parties are increasingly attempting to argue both types of mistakes in the same transaction. Of the six opinions in the Older Cases, that decided the claims of both a mutual and unilateral mistake, an excusing mistake was found in three cases (50%). Of the three successful Older Cases, one decision granted relief for mutual mistake and the other for the claimed unilateral mistake. Among the twenty-nine Newer Cases involving both types of claims, the party seeking relief was much less successful. Only two of the twenty-nine opinions in which a decision was made (6.9%) resulted in the finding of an excusing mistake, one of which was found to be mutual and one unilateral. Thus, although parties increasingly attempted to claim both unilateral and mutual mistakes as excuse, this strategy did not result in greater success on the request for an excuse.

Thus, this data analysis seems to confirm that cases involving contractual mistake are difficult to categorize and there are no simple generalizations that can be applied. Comparing cases over a forty-year period revealed more cases involving this contractual defense have arisen, but this growth is consistent with the growth of litigation generally. Claims of mistake more often fail than succeed, and in fact the odds of prevailing on the claim declined in the later time period. Success on claims of unilateral mistake declined even more dramatically between the time periods. Mutual mistake cases are more predominant in both time periods, although an increase in unilateral mistake claims and, more significantly, claims of either type in the alternative, grew significantly between the time periods. Consistent with the older secondary treatises, there appears to be no clearly articulated legal standards that are applied by courts. Many of the highlighted concepts in treatises and casebooks appear irregularly, and the Restatement of Contract is quoted infrequently. It seems that the older treatises characterization of this issue as highly factually specific has remained true. It does seem that across the time considered in this study, courts consistently inquire into the fault of the other party in unilateral mistake cases. Surprisingly, courts seem to ask if the unilateral mistake would make performance unconscionable more frequently in the Older Cases than in the Newer Cases. To further test these observations, I also ran several logistic regressions to determine if any other relationships or correlations could be found in the coded data. The next part reports on the results of these regressions.

III. LOGISTIC REGRESSIONS

This section reports the findings of three logistic regressions performed on aspects of the Dataset. The section starts with the general design of the research analysis and explains the three datasets built out of the Dataset for this investigation. It also describes the different hypotheses as well as the general premises of the regressions and

related specificities of the models chosen. The second part discusses the results of Regressions One and contextualizes such results in light of the previous literature reviewed in the initial part of this article and the analysis of the coding project contained in Section II. The next part discusses the results of Regressions Two and Three.

A. *Regressions Premises and Hypothesis*

The open software RStudio, version 2023.03.0+386 was used for the logistic regressions (also known as logit model). To ensure reliability and replicability, all tests (and related information) obtained from the regressions are reported.⁶² The logit model was chosen because all independent variables used in the regressions are binary, namely, zero or one, and there are no additional assumptions about the behavior of these variables.⁶³ The model was at its most powerful and this power was tested by running several tests for interactions, as described below.⁶⁴ Technically, the datasets do not have sampling, as they analyzed all decisions in the chosen years that appeared in the original Westlaw search results.⁶⁵ The years were chosen, as discussed *supra*, to investigate possible changes in case trends over a half century. This approach demonstrates the research methodology is well-crafted and systematic, as it minimizes (to the extent possible) selective application and/or selective research design (selective bias, for instance) that can occur when sampling is not properly designed.⁶⁶

Regression One was performed on all cases in which the court decided the question of an alleged mistake in formation. It combines all such opinions from the Older Cases and the Newer Cases into a single dataset. The dependent variable was whether or not the court determined that a mistake should excuse performance in some way (coded as 1). The independent variables identified in the reported results were selected to determine to what extent, if any, the coded factors influenced the outcome. The hypotheses that were tested in this regression were:

- Claims of an excusing mistake are unlikely to succeed.
- Courts have become less likely over time to find an excusing mistake.

62. ROBERT M. LAWLESS, ET AL., *EMPIRICAL METHODS IN LAW* 26 (Wolters Kluwer, 2010) (emphasizing the paramount importance of replicability in empirical legal research specifically).

63. BARBARA G. TABACHNICK & LINDA S. FIDELL, *USING MULTIVARIATE STATISTICS* 439-41 (Pearson, 6th ed. 2013) (explaining the general purpose and overall descriptions of the logit model).

64. *Id.* at 442 (highlighting how interactions may complicate a model without significantly contributing to the improvement of its predictions).

65. *See supra*, Part II.

66. *See, e.g.*, LAWLESS ET AL., *supra* note 62, at 139-53.

- Inquiring into the bearing of risk may decrease the likelihood of success on a mistake claim.
- Alleging fraud or misrepresentation may bolster a mistake claim

Regression Two and Three were designed to determine if there were differences between cases involving only an alleged mutual or unilateral mistake. Regression Two and Three were performed on the subset of cases alleging unilateral mistake and mutual mistake, respectively. The cases in which both unilateral and mutual mistake were alleged were not placed into either category because there was no rational method to determine in which category they belong. The hypothesis for the unilateral cases were the following:

- Courts have become more likely to find an excusing unilateral mistake over time.
- Cases involving contractor bids or mathematical error are more likely to succeed in a court finding an excusing condition.

Regression Three proposed as a hypothesis that looking only at mutual mistake cases there would be no significant change from the findings of the regression run on the complete dataset.

The next two sections present my analysis of the results of the regressions that are statistically significant.⁶⁷

B. Regression One Results

Table 1 shows the statistics (and related significance tests) for Regression One, as per common practice.⁶⁸

Table 1 Regression One Model Fit⁶⁹

	<i>Min</i>	<i>1Q</i>	<i>Median</i>	<i>3Q</i>	<i>Max</i>
<i>Deviance</i>	-1.30467	-0.67712	-0.51786	-0.07503	2.27693
<i>Residuals</i>					

67. Usually, only statistically significant coefficients are interpreted. TABACHNICK & FIDELL, *supra* note 63, at 464.

68. SUSAN E. MORGAN, ET AL., FROM NUMBERS TO WORDS: REPORTING STATISTICAL RESULTS FOR THE SOCIAL SCIENCES 7-26 (Allyn and Bacon, 2002).

69. The formula used was “glm(formula = `Did the party claiming mistake prevail` ~ Year + `State or federal court` + `Trial or appellate court` + `Party claiming mistake a natural person` + `Also allege fraud or misrepresentation` + `Also argue changed circumstances` + `Court ask of the substance of the bargain` + `Court ask which party bore risk of mistake` + `Contract contain express allocation of the risk` + `Court ask basic assumption of contract` + `Court ask mistake motive` + `Court cite Restatement`, family = binomial(link = "logit"), data = Mistakes).” Dispersion parameter for binomial family taken to be 1. Null deviance: 315.89 on 289 degrees of freedom; Residual deviance: 271.78 on 277 degrees of freedom; AIC: 297.78; Number of Fisher Scoring iterations: 15.

I converted the year of decision to the binomial form of 0 for the Older Cases and 1 for the Newer Cases. To avoid potential multicollinearity issues,⁷⁰ I opted to limit the number of independent variables. To this end, I eliminated the following independent variables since there were so few instances of being coded a 1: Whether the appellate court was the highest court in the jurisdiction, and whether an article of the Uniform Commercial Code governed the contract. This dataset also did not include the characteristics unique to a claim of unilateral mistake (which were tested in Regression Two). Table 2 reports the summary results of Regression One. Table 3 reports the calculation of the Odds Ratios for Regression One.

Table 2 Results of Regression One⁷¹

<i>Names</i>	<i>Estimate</i>	<i>Std. Error</i>	<i>z value</i>	<i>Pr(> z)</i>
Intercept	-0.14716	0.40668	-0.362	0.717468
Year	-1.20899	0.33852	-3.571	0.000355 ***
`State or federal court`	-0.05585	0.48222	-0.116	0.907799
<i>Names</i>	<i>Estimate</i>	<i>Std. Error</i>	<i>z value</i>	<i>Pr(> z)</i>
`Trial or appellate court`	0.49729	0.50615	0.983	0.325853
`Party claiming mistake a natural person`	-0.52947	0.31712	-1.670	0.094993.
`Also allege fraud or misrepresentation`	-1.07024	0.42596	-2.513	0.011987 *
`Also argue changed circumstances`	-2.04906	1.21645	-1.684	0.092093.
`Court ask of the substance of the bargain`	1.05548	0.51481	2.050	0.040344 *

70. See TABACHNICK & FIDELL, *supra* note 63, at 441-46.

71. Significance codes: 0 '***' 0.001 '**' 0.01 '*' 0.05 '.' 0.1 ' ' 1.

`Court ask which party bore risk of mistake`	-1.12373	0.50479	-2.226	0.026005 *
`Contract contain express allocation of the risk`	-15.28160	1096.34420	-0.014	0.988879
`Court ask basic assumption of contract`	0.18169	0.62454	0.291	0.771113
`Court ask mistake motive`	1.42559	1.13874	1.252	0.210604
`Court cite Restatement`	-0.23246	0.67255	-0.346	0.729611

Table 3 Regression One Odds Ratios

<i>Names</i>	<i>Odds Ratio</i>	<i>2.5%</i>	<i>97.5%</i>
Intercept	8.631594e-01	0.385066224	1.912091e+00
Year	2.985000e-01	0.152301123	5.764380e-01

<i>Names</i>	<i>Odds Ratio</i>	<i>2.5%</i>	<i>97.5%</i>
`State or federal court`	9.456831e-01	0.362728508	2.435902e+00
`Party claiming mistake a natural person`	5.889146e-01	0.313262521	1.089995e+00
`Also allege fraud or misrepresentation`	3.429264e-01	0.140038430	7.562372e-01
`Also argue changed circumstances`	1.288554e-01	0.005441624	9.055514e-01

`Court ask of the substance of the bargain`	2.873347e+00	1.022526999	7.882213e+00
`Court ask which party bore risk of mistake`	3.250646e-01	0.112534761	8.329348e-01
`Contract contain express allocation of the risk`	2.308271e-07	NA	1.737197e+44
`Court ask basic assumption of contract`	1.199244e+00	0.321733107	3.872409e+00
`Court ask mistake motive`	4.160331e+00	0.397269719	4.478377e+01
`Court cite Restatement`	7.925804e-01	0.187194321	2.743968e+00

The Estimate (Coefficient) for the intercept having a negative value confirms that courts are more likely than not to find no excusing condition, thus supporting hypothesis 1.⁷² The variables that appear to have statistical significance are (1) if the party alleged fraud or misrepresentation, (2) if the court asked if the mistake was of the substance of the bargain, (3) if the court asked which party bore the risk of the mistake, and (4) the year of decision. The first three were significant at ten percent, and the last at one percent.

The year of decision (having a negative coefficient) supports Hypothesis 2 that courts have become less likely to find an excusing mistake in the Newer Cases compared to the Older Cases. The Odds Ratio for the year of decision indicates that cases brought in the late twenty teens were approximately 70% less likely to succeed than in the late 1970s. The coefficient for year of decision being a negative number further reinforces the conclusion that claims of mistake have been meeting with less success recently compared to fifty years ago.

With respect to the various legal tests that courts are believed to use to resolve this question, only the question of the mistake involving

72. *Interpret Logistic Regression Coefficients [For Beginners]*, QUANTIFYING HEALTH, <https://quantifyinghealth.com/interpret-logistic-regression-coefficients/> [https://perma.cc/2ENE-PDEQ] (last visited June 6, 2023) (noting that a negative coefficient indicates a decreased likelihood that the independent variable is positive).

the substance of the transaction and an inquiry into risk bearing appeared to be statistically significant in Regression One. When the court inquired into whether the mistake was of the substance of the transaction the likelihood of success increased. This variable had a positive coefficient and the Odds Ratio for this variable indicates an approximately 187% increase in success when the court made this inquiry. Although the presence of this inquiry significantly increased the likelihood of success, this finding must be considered in light of the fact that approximately only 10% of the opinions employed this test. Thus, courts are less likely to conduct this inquiry, but when they do, it appears to have a positive impact upon success. Conversely, when the court looks into risk allocation the likelihood of success decreases as evidenced by a negative coefficient. The Odds Ratio for this variable indicates an approximate 68% decrease in likelihood of success when this inquiry is found in the opinion. Once again, the fact that this inquiry appears infrequently needs to be noted. Although more prevalent than the inquiry into the substance of the transaction, courts analyzed risk assessment, approximately only 17% of the opinions. Overall, the results of Regression One support hypothesis 3 and indicate a factor of importance not articulated in the hypotheses.

My interpretation of the Odds ratio⁷³ indicates that when a party is also alleging fraud or misrepresentation their likelihood of success on the claim of mistake decreases by 66% (a fact which is consistent with the Coefficient for this variable being negative). These observations suggest that hypothesis 4 is not correct and that there is no proven advantage to alleging fraud along with mistake.

To further test the statistical significance of the model results of Regression One, I ran an Analysis of Variance Test (Type 2) (“ANOVA”) on the model which produced the results listed in Table 3.

Table 3: Analysis of Deviance Table (Type II tests)⁷⁴

<i>Names</i>	<i>LR Chisq</i>	<i>Df</i>	<i>Pr(>Chisq)</i>
Year	13.0227	1	0.0003077 ***
`State or federal court`	0.0134	1	0.9077681
`Trial or appellate court`	0.9844	1	0.3211037

73. *FAQ: How Do I Interpret Odds Ratios in Logistic Regression?*, UCLA ADVANCED RSCH. COMPUTING; STAT. METHODS & DATA ANALYTICS, <https://stats.oarc.ucla.edu/other/mult-pkg/faq/general/faq-how-do-i-interpret-odds-ratios-in-logistic-regression/> [https://perma.cc/BT2P-AXQ4] (last visited June 6, 2023) (explaining how to convert and interpret logit model results and related odds ratio).

74. Signif. codes: 0 ‘***’ 0.001 ‘**’ 0.01 ‘*’ 0.05 ‘.’ 0.1 ‘.’ 1.

`Party claiming mistake a natural person`	2.8357	1	0.0921906
`Also allege fraud or misrepresentation`	7.2726	1	0.0070015 **
`Also argue changed circumstances`	4.3231	1	0.0375984 *
`Court ask of the substance of the bargain`	4.0033	1	0.0454121 *
`Court ask which party bore risk of mistake`	5.5685	1	0.0182863 *
`Contract contain express allocation of the risk`	1.9985	1	0.1574532
`Court ask basic assumption of contract`	0.0832	1	0.7730515
`Court ask mistake motive`	1.5109	1	0.2190092
`Court cite Restatement`	0.1226	1	0.7262708

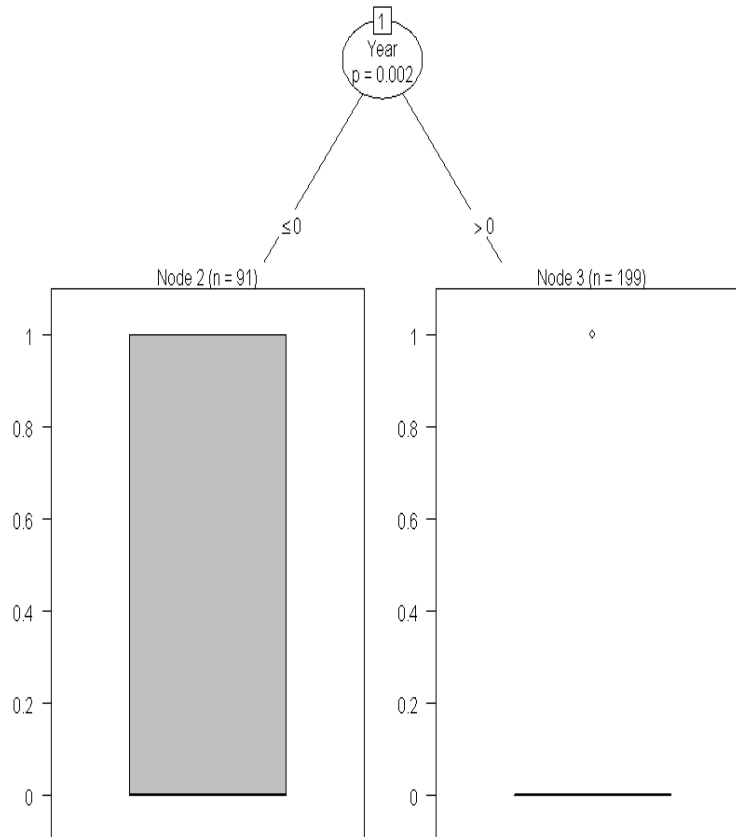
The ANOVA test confirmed the statistical significance of the independent variables: year, the presence of a misrepresentation or fraud claim, the court asking if the mistake involved the substance of the exchange, and the inquiry into risk allocation. In addition, the ANOVA indicated that a claim of changed circumstances might be statistically significant (at 5%), which was not evident from the model results itself. If statistically significant, the presence of a parallel claim of changed circumstance seems to decrease success on the mistake claim (as that variable has a negative coefficient).

I tested the data for likely interactions between year of decision (the most statistically significant variable) and several other factors considered by the court, including, “Court ask of the substance of the bargain,” “Court ask which party bore risk of mistake,” “Court ask mistake motive,” and “Also allege fraud or misrepresentation.” I also tested for an interaction between “Court ask of the substance of the bargain” and “Court ask which party bore risk of mistake.” The interactions did not quantitatively and qualitatively modify the results. Based on the p values, none of these interactions were statistically significant.⁷⁵

In addition to Regression One, I also performed a decision tree analysis (ctree function in RStudio) on the data. According to Kendal Wong, a decision tree “is a tool that builds regression models in the shape of a tree structure. Decision trees take the shape of a graph that

75. The interaction that reported a p value closest to statistical significance was Year: Court ask of the substance of the bargain` which had a value of 0.25981.

illustrates possible outcomes of different decisions based on a variety of parameters. Decision trees break the data down into smaller and smaller subsets. . . .⁷⁶ This test identified only a signal node of significance, year of decision. The figure below is the plotted diagram of the analysis:



This analysis confirms the conclusion drawn from the regression. That year of decision is the most important factor, and that Newer Cases were less likely to succeed.

C. Regression Two and Three Results

A regression was performed on two subsets of data. Regression Two was performed on all cases coded as involving only an alleged unilateral mistake. Regression Three was performed on cases in which a party alleged only a mutual mistake. Due to the difficulty of categorizing the subset of cases in which both types of mistake were alleged, these cases were not included in either subset of data. Finally, due to

76. Kendal Wong, *Chapter 24: Decision Trees*, U. OF ILL. CHI., <https://ademos.people.uic.edu/Chapter24.html> (last visited June 6, 2023).

the small number of cases in which both types of mistake were alleged, there seem to be insufficient data on which to run a regression for these cases.

Regression Two sought to test the hypothesis that certain types of unilateral mistake cases were more likely to be met with success. Treatment of unilateral mistakes (particularly in first year law classes) often highlights cases involving mathematical or computational errors in contractor bids. Thus, the hypothesis tested in Regression Two is that these types of cases are more successful. The only independent variables tested therefore were variables related solely to characteristics of unilateral mistakes in addition to the year of decision variable. The model run on the following variables produced the following results:

Table 4: Regression Two Results⁷⁷

	<i>Min</i>	<i>1Q</i>	<i>Median</i>	<i>3Q</i>	<i>Max</i>
<i>Deviance Residuals</i>	-9.981e-06	-2.779e-06	-2.110e-08	4.622e-07	8.129e-06

<i>Names</i>	<i>Estimate</i>	<i>Std. Error</i>	<i>z value</i>	<i>Pr(> z)</i>
Intercept	-0.3200	0.8371	-0.382	0.702
Year	-19.2396	2982.4835	-0.006	0.995
`If unilateral other party found at fault`	39.6364	11159.9284	0.004	0.997
`If unilateral consequences of the mistake unconscionable`	-0.5108	1.1092	-0.461	0.645

77. The formula for this model was "model2unilateral <- glm('Did the party claiming mistake prevail' ~ Year + 'State or federal court' + 'Trial or appellate court' + 'Party claiming mistake a natural person' + 'Also allege fraud or misrepresentation' + 'Also argue changed circumstances' + 'Court ask of the substance of the bargain' + 'Court ask which party bore risk of mistake' + 'Contract contain express allocation of the risk' + 'Court ask basic assumption of contract' + 'Court ask mistake motive' + 'Court cite Restatement' + 'If unilateral other party found at fault' + 'If unilateral consequences of the mistake unconscionable' + 'If unilateral involve calculation error' + 'If unilateral contractor bid', data = Unilateral, family = binomial(link = "logit")). Dispersion parameter for binomial family taken to be 1); Null deviance: 30.903 on 26 degrees of freedom. Residual deviance: 17.046 on 21 degrees of freedom; (31 observations deleted due to missingness); AIC: 29.046; Number of Fisher Scoring iterations: 18.

`If unilateral involve calculation error`	1.2079	1.4876	0.812	0.417
`If unilateral contractor bid`	-0.0864	1.4517	-0.060	0.953

As is evident from Table 4, none of the variables appear even close to being statistically significant. Thus, it is not possible from the regression to affirm the hypothesis that cases involving calculation errors or contractors bids correlate to a successful ultimate outcome of a mistake claim. Likewise, it is not possible from the regression to affirm the hypothesis that the inquiry into the unconscionability of the mistake or the fault of the mistaken party by the court correlate to success on the unilateral mistake claim. Given the inconclusive results, it seemed unnecessary to determine and report Odds Ratios for Regression Two. The lack of statistical significance was surprising given the prevalence of the use of an unconscionability or fault of the other party inquiry in the data. It is possible that these variables were not statistically significant because of a small number of data points, but that they are still significant in the actual cases.

Regression Three performed a regression on all cases involving an alleged mutual mistake only. Given the inconclusiveness of the results from Regression Two, it was hypothesized that the inclusion of cases involving unilateral mistake may have skewed the results of Regression One. Thus, the model was run solely on cases involving mutual mistake only. Table 5 reports the results of Regression Three.

Table 5 Regression Three Results

	<i>Min</i>	<i>1Q</i>	<i>Median</i>	<i>3Q</i>	<i>Max</i>
<i>Deviance Residuals</i>	-1.3995	-0.7843	-0.6037	1.1659	2.0739

Table 5 Regression Three Results⁷⁸

<i>Names</i>	<i>Estimate</i>	<i>Std. Error</i>	<i>z value</i>	<i>Pr(> z)</i>
Intercept	-0.60880	0.49961	-1.219	0.2230
Year	-0.75091	0.38829	-1.934	0.0531.

78. The same formula as for Regression One was run on the subset of mutual mistake cases. Dispersion parameter for binomial family taken to be 1); Null deviance: 227.40 on 196 degrees of freedom; Residual deviance: 204.01 on 184 degrees of freedom AIC: 230.01; Number of Fisher Scoring iterations: 15. Signif. codes: 0 '***' 0.001 '**' 0.01 '*' 0.05 '.' 0.1 ' ' 1.

`State or federal court`	0.25336	0.56680	0.447	0.6549
`Trial or appellate court`	0.33833	0.60597	0.558	0.5766

<i>Names</i>	<i>Estimate</i>	<i>Std. Error</i>	<i>z value</i>	<i>Pr(> z)</i>
`Party claiming mistake a natural person`	-0.41200	0.35909	-1.147	0.2512
`Also allege fraud or misrepresentation`	-0.84685	0.49359	-1.716	0.0862.
`Also argue changed circumstances`	-2.28252	1.42752	-1.599	0.1098
`Court ask of the substance of the bargain`	1.13361	0.58601	1.934	0.0531.
`Court ask which party bore risk of mistake`	-0.90848	0.61624	-1.474	0.1404
`Contract contain express allocation of the risk`	-15.17824	1076.52788	-0.014	0.9888
`Court ask basic assumption of contract`	0.47829	0.76864	0.622	0.5338
`Court ask mistake motive`	1.68845	1.34820	1.252	0.2104
`Court cite Restatement`	-0.08445	0.79215	-0.107	0.9151

As is evident from Table 5, removing the cases of unilateral mistakes reduces the statistical significance of the independent variables. Both the variable of Year of decision and whether the court discussed if the mistake were of the substance of the bargain were reduced just below the typical cutoff of .05 (by only .003). The variable considering whether or not the party also alleged fraud or misrepresentation was also close to being statistically significant (missing the cutoff by .0362).

This seems to suggest that these three variables are significant, but their significance decreases on the reduced data set when the types of cases are separated.

Overall, the logistic regressions reinforced the conclusions that claims of contractual mistake are unlikely to succeed and have become less likely to succeed over the 50-year timeframe. Only when the entire data is tested, do certain factors emerge as statistically significant. Inquiring into whether the mistake touches the substance of the transaction, and the allocation of risk, appear to influence results. But, as discussed in Section II, most courts do not employ these legal concepts. Regression Two suggests that the common wisdom, that calculation or bid errors are more likely to have succeeded in a claim from a mistake, may not be accurate. The same regression also suggests the listed special factors for unilateral mistake may not be as significant as the analysis in Section II suggested.

CONCLUSIONS

In certain respects, this coding project confirmed my instincts after teaching contracts for 17 years. It is a difficult topic to explain, and there is no clear legal standard that can be used to predict results. The strongest claim that I can make is that claims of mistake in formation are unlikely to succeed. Although our comparison of treatises from the two time periods suggests that courts have become more open to granting relief for mistake, the data analysis in this project indicates the opposite to be true. Although more claims for mistake were brought in the recent set of cases, the likelihood that those claims would succeed fell dramatically. Courts seem less likely to grant relief for such claims. The inquiry into the motive for contracting that some have claimed is or was a significant factor for courts seems to play no significant role in the outcome of cases. An inquiry into the substance of the bargain, and into the bearing of risk, appear to be the most significant legal factors considered by courts in both time periods. Likewise, although claims for mistake are often coupled with claims either of fraud or changed circumstances, the presence of these other legal theories appeared to reduce the statistical likelihood of success on the mistake claim. Contrary to secondary literature claims that courts have been gradually becoming more open to claims of unilateral mistake, this project's results do not support such a conclusion. The classic first year course that emphasizes calculation errors and contractor bids may not accurately reflect the profile of cases brought recently or of successful unilateral mistake cases. Perhaps the cases chosen in first year casebooks on this subject should be varied from this typical approach to include cases involving settlement agreements.

Most surprising, the Restatement of Contracts seems to have had very little influence over this area of contract doctrine. Based on the

paucity of citations to either the First or Second Restatement, together with the limited reference in the opinions to legal concepts promoted by the Restatement, it seems that courts have not widely adopted the approach of the Restatement to this topic.

Thus, it may not be possible to learn much from a detailed study of our mistake cases. At the end of the day, the conclusion of Professor Corbin in 1960 may be the most I can say about this difficult area of contract law: "It is equally perilous, and it may be positively harmful, to construct a rule of law, unless it is so limited as to be applicable to a particular combination of many factors."⁷⁹

79. ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE RULES OF CONTRACT LAW 583 (West Publishing Company, vol. 3, 1960).

Appendix 1

Variables and Coding Instructions

Case Name	List the full name of the case.
Citation	Citation hyperlinked to the case in Westlaw.
Year	Year the decision or opinion was issued.
State or Federal Court	Place 1 if the court is a state court and 0 if a federal court.
State's law applied if a federal court	
State of decision if a state court	If a 1 placed in the prior column, list the two letter postal abbreviation for the state in which the court is located. If a federal court, leave blank.
Trial or appellate court	If an appellate court, place a 1; if a trial court decision, place a 0.
Highest Appellate Court	If the prior column is a 1, put a 1 in this column if the court is the highest level court in the system (i.e. US Supreme Court or highest appellate state court). If only an intermediate court (i.e. US Circuit Court of Appeals), put a 0. If prior column was a 0 leave blank.
Name of court	List the full name of the court as it appears in the opinion (i.e. Court of Appeals for the 3rd Circuit or Supreme Court of Oklahoma). List circuits of federal courts of appeals with numbers (8th) not spelled out.

<p>Was the Party claiming mistake a natural person?</p>	<p>If the party alleging there was a mistake that excuses or relieves performance was a natural person (a human being), place a 1. If that party is anything else (ie.e corporation, trust, partnership, government, etc.), place a 0. If both parties are alleging a mistake excuses, then place 2 in the cell and explain in notes if one or both are natural persons.</p>
<p>Was a Unilateral or mutual claimed?</p>	<p>If a unilateral mistake was claimed, place a 1. If a mutual mistake was claimed, place a 0. If both a mutual and unilateral mistake are claimed, place a 2. If you cannot answer this question, the case may be a false positive.</p>
<p>Did party arguing a mistake also allege fraud or misrepresentation or non disclosure by the other party?</p>	<p>Place a 1 if a party that is arguing that a mistake occurred (either mutual or unilateral) also claimed fraud or misrepresentation or non-disclosure by the other party. If such an allegation is not mentioned in the opinion, place a 0. I am trying to capture how many times a party alleges both the doctrine of mistake and fraud/misrepresentation together on the same facts.</p>
<p>Did the party claiming mistake also argue impracticability, impossibility or frustration of purpose?</p>	<p>Place a 1 if a party that is arguing that a mistake occurred (either mutual or unilateral) also claimed any (not necessarily all) of the doctrines of changed circumstances (impossibility, impracticability, or frustration of purpose). If no such allegation is referenced, place a 0. I am trying to capture however both mistake and changed circumstances are alleged on the same facts.</p>

<p>Did court ask or consider if the mistake was of the substance or essence of the bargained for performance?</p>	<p>If the court in analyzing the claim of mistake asks or considers whether the mistake was one relating to the "substance" or "essence" (or any similar word expressing the same concept but if a different word or phrase explain what phraseology the court used in the notes) of the promised performance, put a 1. If the court does not, place a 0.</p>
<p>Did court ask which party bore risk of mistake?</p>	<p>If the court asked or considered which party bore or assumed the risk of such a mistake, place a 1. If the court does not consider or ask this question, place a 0.</p>
<p>Did the contract contain a force majeure clause or other express provision that the court analyzed to determine if the contract expressly allocated the risk of the mistake?</p>	<p>If the court found a force majeure clause or any clause alleged to expressly allocate the risk of such a mistake, place a 1. If there is no mention of any such express clause in the contract, place a 0.</p>
<p>Did court ask or consider if mistake involved basic assumption of contract?</p>	<p>If the court asked or considered whether the mistake involved a basic assumption on which the contract was made, place a 1. If the court did not ask or consider this issue, place a 0.</p>
<p>Did court ask if it was a mistake in motive for party in entering contract?</p>	<p>If the court asked or considered whether the mistake was solely a mistake relating to the motive of the party in entering into the contract, place a 1. If not, place a 0. Motive often involves not how valuable the promised performance is in itself but how much unique value it would be to the particular party.</p>

<p>If unilateral mistake did the court find the other party to be at fault for the mistake?</p>	<p>If the mistake is a unilateral mistake and if the court found the other party was at fault for the mistake occurring in some way, place a 1. If a unilateral mistake and the court found the other party was not at fault for the mistake occurring, put a 0. If the case involved only a mutual mistake or if a unilateral mistake was involved but the court did not consider whether or not the other party was at fault for the mistake, put NA.</p>
<p>If unilateral mistake did the court find the consequences of the mistake would be unconscionable if contract terms enforced?</p>	<p>If the case involved a unilateral mistake if the court found that enforcement of the contract in light of the mistake would be unconscionable, put a 1. If the case involved a unilateral mistake and the court found enforcement of the contract would not be unconscionable, put a 0. If the case involves a mutual mistake only or if it involves a unilateral mistake but the court did not ask or consider if enforcement would be unconscionable, put NA.</p>
<p>If unilateral mistake did the mistake involve calculation error?</p>	<p>If the case involved a unilateral mistake and the mistake was characterized as a mathematical, computational, or calculation error, put a 1. If the case involved a unilateral mistake but it was not characterized as a mathematical, computational, or calculation error, put a 0. If the case involved only a mutual mistake, put NA.</p>
<p>If unilateral mistake did the contract involve a contractor bid in a construction project?</p>	<p>If the case involved a unilateral mistake and the mistake involved a bid, place a 1. If the case involved a unilateral mistake but it was not in the context of a bid in, put 0. If the case only involved a mutual mistake, put NA.</p>

Did court cite Restatement 2nd of Contracts?	If the opinion cites or references or quotes any of the Restatement of Contracts (Second) sections 151, 152, 153, or 154, place a 1. If the opinion does not, place a 0.
Was this contract governed by Article 2 of the UCC?	If Article 2 of the Uniform Commercial Code was applicable to the dispute, place a 1. If this article of the UCC was not applicable, put a 0. If the court does not address the question of the UCC or does not state one way or the other or does not decide if the Code is applicable, put NA.
Was this contract governed by any other article than 2 of the UCC?	If any other Article of the Uniform Commercial Code (other than Article 2) was applicable to the dispute, place a 1. If the court finds no article of the UCC was applicable, put a 0. If the court does not address the question of any article of the UCC or does not state one way or the other or does not decide if an article of the Code is applicable, put NA. If the prior column is coded 1, put ART2 in this column.
If answer to prior column is yes, which article?	If you put a 1 in the prior column, place the number of the Article of the UCC found to apply (i.e. 8). If the coding to the prior column was 0 or NA or ART2, put NA.

<p>Did this specific case resolve the question of whether or not the alleged mistake should relieve one or both parties of duties under the contract?</p>	<p>If this opinion or case rendered a decision on the question of a mistake relieving or excusing a party, place a 1. If this court considered or analyzed the issue but did not resolve or determine whether the mistake occurred or excused performance, put a 0. Explain in the notes column what the court did if it did not decide the issue. Note an appellate court affirming or reversing a lower court on the issue of a mistake or whether a mistake relieves or excuses performance is an example of a court deciding the issue.</p>
<p>If answer to the prior column is yes, did the party claiming mistake should excuse performance prevail?</p>	<p>If the prior column has a 1, put a 1 in this column if the party alleging a mistake should excuse or relieve performance prevailed (won on that issue). If such a party lost on that issue, put a 0. Note if the prior column has a 1, this column must have a 1 or 0. If you cannot put a 1 or 0 here, that suggests the prior column is miscoded. If the prior column is a 0, this column should be coded NA.</p>
<p>Did the court determine there was a mutual (1) or unilateral (2) mistake?</p>	
<p>Did party seek performance (1) or reformation (2)?</p>	
<p>Briefly describe the nature of the alleged mistake.</p>	<p>Briefly describe the nature of the alleged mistake.</p>
<p>Name of student</p>	<p>List your name.</p>
<p>Notes</p>	<p>Include any notes required by the instructions or which you think relevant to explain any decisions you made in coding or any anomalies you detected.</p>

Appendix 2

Frequency of Appearance in State Courts and State Law Applied by
Federal Courts

Older Data Set

<u>State Court</u>	<u>Number of Cases</u>
AK	2
AL	3
AR	1
AZ	3
CO	1
DE	1
FL	1
GA	2
IA	1
ID	2
IL	5
IN	2
KS	2
KY	1
MA	2
MD	1
MI	4
MO	5
MS	1
NE	2
NH	1
NJ	1
NY	1
OH	2
OK	1
OR	1
PA	1
SC	1
TN	4
TX	12
UT	1
WA	4
WI	3

<u>State Law Applied by Federal Court</u>	<u>Number of Cases</u>
Federal common law	8
CA	1
DC	1
FL	1
IL	2
OH	1
MN	1
MO	1
MS	2
NY	3
SC	1

Newer Data Set

AR	1
AZ	2
CA	9
CT	10
DE	7
FL	3
GA	1
IA	4
IL	5
IN	1
KS	2
KY	1
MA	3
MD	2
MI	8
MN	2
MO	1
MS	4
MT	1
NC	3
ND	3
NJ	2
NY	5
OH	10

OR	3
PA	1
RI	2
SC	1
TN	6
TX	7
UT	4
VA	1
Virgin Islands	1
WA	4
WI	1
WY	2

State Law Applied by Federal Courts

AL	2
AZ	1
CA	17
CO	4
DC	2
DE	3
FL	3
GA	6
IA	1
IL	7
IN	1
KY	3
LA	1
MA	2
MD	1
MI	7
MO	4
ND	3
NJ	2
NM	3
NY	10
OH	2
OK	3
PA	5
SC	2
TX	4

TN	4
UT	3
VT	1
WA	3
WI	1
Federal	1

THE COSTS OF THE VEXATIOUS LAWYER: WHO BEARS RESPONSIBILITY?

JAYANTH K. KRISHNAN*

ABSTRACT

This Article investigates how the law should respond to a lawyer who engages in unprofessional, tormenting, or what is often referred to as “vexatious” conduct during litigation. At present, a federal law—28 U.S.C. § 1927—allows courts to issue sanctions upon a vexatious lawyer.

When such a lawyer works for a law firm, a deep split has emerged among the circuits. Some courts have ruled that law firms may also be liable for their lawyers’ actions under the statute. Other circuits, though, have concluded that law firms are free from this type of vicarious liability.

Unfortunately, the problem with this debate is that by only focusing on law firm liability, a universe of entities—nongovernmental organizations, corporations, nonprofits, law school clinics, and the like—are omitted from the dialogue. Moreover, even when examining law firms alone, there is often an assumed homogeneity in how they are treated. As a result, other key considerations have not been thoughtfully addressed to date.

Therefore, as this Article argues, once there has been careful reflection, several reasons arise for why the law ought to refrain from assigning financial responsibility to an organization that employs a vexatious lawyer. First, holding an organization liable may not align with the principle of proportionality and can lead to lesser-resourced entities scaling back or even shuttering operations, which could have devastating ramifications for clients seeking representation.

Second, the imposition of collective punishment could also discourage whistleblowing and greater transparency, with unethical behavior potentially going unchecked. Third, vicarious liability could cause financial and reputational damage to innocent parties for actions undertaken beyond their control. Finally, holding an entire organization

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liable for the conduct of one lawyer undermines a foundational tenet of the bar's professional responsibility rules—namely, personal accountability—and thereby dilutes the consequences that the individual wrongdoer deserves to face.

Ultimately, an irony exists here: those supporting organizational liability often do so out of a noble desire for attaining a utilitarian form of justice. However, this advocacy can actually have detrimental implications both for clients and causes that are all too frequently marginalized in today's political environment.

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INTRODUCTION

How should the law—and for that matter, society more broadly—respond to a lawyer who engages in unprofessional, exasperating, and tormenting conduct during litigation? Such “vexatious” behavior has been of concern to Congress, incredibly, dating back to 1813 when it first began contemplating this problem.¹ Today, there is a statute in place, 28 U.S.C. § 1927, which specifically allows courts to impose “costs, expenses, and attorneys’ fees”² upon a lawyer who behaves “unreasonably and vexatiously”³ during the course of litigation.⁴

In the case of a lawyer who works as a solo practitioner, § 1927 is relatively easy to apply when the statute is violated. However, where a lawyer works for a law firm, a debate has emerged that has engulfed many federal courts of appeals and has resulted in a deep split among

1. See Joseph T. Janochoski, Note, *Punishing the Pettifogger’s Practice: Applying the Sanction Power of 28 U.S.C. § 1927 to Law Firms*, 102 MINN. L. REV. 1733, 1738-39 (2018).

2. 28 U.S.C. § 1927.

3. *Id.*

4. *Id.* (noting, specifically, that such conduct includes one who “multiplies the proceedings in any case”).

the circuits.⁵ On the one hand, there are appellate courts that have held that law firms may also be liable for the vexatious actions of the lawyers who work for them.⁶ By contrast, several other circuits have concluded that law firms are free from such sanctions.⁷

The question of whether a law firm should be liable for the vexatious actions of one of its lawyers raises complex issues of justice, accountability, and organizational responsibility. Vexatious behavior that intimidates, harasses, and looks to subdue the opposing side can have serious implications for the legal system by draining judicial resources and inflicting enormous burdens on the parties involved.⁸ It may be, for that reason, as will be discussed in the following sections, why it may appear reasonable to hold law firms concurrently responsible for the conduct of their lawyers.

At the same time, it is important to note that the organizational entity of focus throughout the § 1927 conversation has been exclusively on the *law firm*.⁹ To a certain extent, this singular focus on the firm is understandable; § 1927 is frequently analyzed and adjudicated alongside the well-known Federal Rules of Civil Procedure—namely, Rule 11.¹⁰ Under Rule 11, a court has the power to sanction “an attorney, *law firm*, or party”¹¹ that has behaved in a harassing, delay-ridden, or frivolous manner during litigation.¹² So, when courts

5. See Douglas R. Richmond, *Appellate Sanctions Against Lawyers*, 73 BAYLOR L. REV. 562, 572-73 (2021). For an examination of the notice and hearing requirements required for due process when a lawyer faces potential litigation sanctions, see generally Douglas R. Richmond, *Litigation Sanctions Against Lawyers and Due Process*, 48 FLA. ST. U. L. REV. 945 (2021).

6. See, e.g., *Avirgan v. Hull*, 932 F.2d 1572, 1582 (11th Cir. 1991); *LaPrade v. Kidder Peabody & Co.*, 146 F.3d 899, 906 (D.C. Cir. 1998); *Baker Indus., Inc. v. Cerberus Ltd.*, 764 F.2d 204, 206, 211-12 (3d Cir. 1985). These cases are cited and discussed in Glenn J. Waldman, *Federal Court Sanctions Against Attorneys Under 28 U.S.C. § 1927*, 81 FLA. BAR J. 16 (2007).

7. See, e.g., *Vaughan v. Lewisville Indep. Sch. Dist.*, 62 F.4th 199, 208 (5th Cir. 2023); *Claiborne v. Wisdom*, 414 F.3d 715, 723-24 (7th Cir. 2005); *Kaass Law v. Wells Fargo Bank, N.A.*, 799 F.3d 1290, 1295 (9th Cir. 2015). The Fourth Circuit appeared to arrive at the same conclusion but was less definitive. See *Blue v. U.S. Dep’t of the Army*, 914 F.2d 525, 549 (4th Cir. 1990) (setting aside the district court’s sanction of the law firm without addressing the legal question, but expressing “doubt[]” about “sanctions against an entire firm rather than against the individual lawyers who acted improperly”). For a discussion of the circuit split, see Brett D. Fallon & Brenna A. Dolphin, *Let’s Ask for Sanctions! (But What Kind?)*, AM. BANKR. INST. J., June 2018, at 36, 36.

8. Richard M. Zielinski, *Vexatious Litigation: A Vexing Problem*, 56 BOS. BAR J., (2012); Samantha Rust, *The Vexatious Litigant Problem*, 62 HOUS. L. REV. 453, 454-56 (2024).

9. See *supra* notes 6-7.

10. See FED. R. CIV. P. 11.

11. *Id.* at 11(c)(1) (emphasis added).

12. *Id.* at 11(b) (noting also that the lawyer must not “needlessly increase the cost of litigation,” must make “claims, defenses, and other legal contentions [that] are warranted by existing law,” must assert “factual contentions [that] have evidentiary support,” and,

are deciding whether to sanction lawyers for their transgressions, the rule and the statute are often paired together.¹³ The visible distinction between the two is that Rule 11 explicitly mentions the words “law firm” whereas § 1927 does not.¹⁴

Perhaps not surprisingly then, for those circuits that refuse to bind the firm to the lawyer’s vexatious behavior, it becomes primarily a matter of statutory interpretation that dictates the § 1927 analysis. Since the statute makes no mention of the firm, as the argument goes, congressional intent clearly indicates a desire to insulate it from liability.¹⁵ The counterargument though, raised by other circuits, is that it is not so easy to separate the firm from the lawyer; the two are often inextricably intertwined, thereby making the firm effectively a *respondeat superior* that is vicariously responsible for the conduct of its agents.¹⁶

The problem with the current discourse, however, is that by only focusing on whether or not there is law firm liability, an entire universe of entities—nongovernmental organizations (NGO), corporations, nonprofits, law schools and their clinics, and the like—are omitted from the dialogue.¹⁷ Moreover, even when examining law firms alone, there is often an assumed homogeneity in how they are treated.¹⁸ As a result, a range of other important considerations has not been properly or thoughtfully addressed to date.¹⁹

Accordingly, this Article argues that in order to best assess the wisdom of extending liability beyond the individual practitioner, such a decision must also involve studying the constellation of other organizational entities that exist.²⁰ Once this calculation is done, it becomes evident that holding the hiring organization liable can have serious, negative consequences.²¹ In fact, by drawing upon two overlapping literatures—one from the field on the legal profession and the other from the broader law and society scholarship—this

when denying factual contentions, the denials must be “warranted on the evidence or, if specifically so identified, [be] reasonably based on belief or a lack of information”).

13. See generally Vincent J. Margiotta, *Affirming Firm Sanctions: The Authority to Sanction Law Firms Under 28 U.S.C. § 1927*, 86 FORDHAM L. REV. 265 (2017); see generally David E. Shipley, *Discouraging Frivolous Copyright Infringement Claims: Fee Shifting Under Rule 11 or 28 U.S.C. § 1927 as an Alternative to Awarding Attorney’s Fees Under Section 505 of the Copyright Act*, 24 J. INTELL. PROP. L. 33 (2016); see generally Ardiola Sinaj, Note, *Attorneys’ Ability to Pay Sanctions Under 28 U.S.C. § 1927*, 15 J.L. SOC’Y 335 (2014).

14 Compare FED. R. CIV. P. 11, with 28 U.S.C. § 1927.

15 See, e.g., Kevin C. Kifer, Note, *Law Firms Are People, Too? Law Firm Sanctions Under 28 U.S.C. § 1927 and the Strained Reading of “Person”*, 61 ST. LOUIS U. L.J. 547, 568-69 (2017).

16. See *supra* note 7 and accompanying text.

17. See discussion *infra* Section IV.

18. See discussion *infra* Section IV.

19. See discussion *infra* Section IV.

20. See discussion *infra* Section IV.

21. See *infra* Section IV.

Article sets forth a framework outlining why caution is warranted before an organization is vicariously assigned financial responsibility for the vexatious actions of its lawyer.

To begin, holding an entire organization accountable may not always align with the principle of proportionality.²² For example, the organization may well have taken measures to prevent such bad behavior, yet under the pro-liability position, it could still face severe penalties. Furthermore, in the case of an organization that does not have the financial wherewithal to sustain the imposed costs, the result could be a scaling back or even shuttering of operations, which could have devastating ramifications for current and potential clients needing legal representation.²³

In addition, one could easily imagine that in a jurisdiction allowing for organizational liability, there would be disincentives associated with reporting the unethical behavior of colleagues. The fear of collective punishment could discourage whistleblowing and transparency, thereby leading to unethical behavior going unchecked.²⁴ Also, imposing liability on the whole organization for the actions of one lawyer may simply be unfair, especially if the other organizational members had no knowledge of or involvement in the vexatious conduct.²⁵ There could be ensuing financial and reputational damage to innocent parties for actions beyond their control.²⁶

Finally, there is an individual accountability component to consider. The field of law is, after all, a profession that emphasizes personal responsibility. As students learn in law school, and as practitioners are obliged to follow, lawyers are bound by ethical rules and professional standards.²⁷ Holding an entire organization liable for the actions of one lawyer could undermine such personal responsibility and dilute the consequences that the individual wrongdoer deserves to face.²⁸

22. See *infra* Section IV.A

23. Here, such clients may be seeking representation from nonprofits or other public interest organizations.

24. See DEBORAH L. RHODE ET AL., LEGAL ETHICS 643-50 (8th ed. 2020). For an important discussion of whistleblowing and the dilemmas tied to what should be done in such situations, see *id.* at 73-74, 643-50, 682-91.

25. *Id.* at 92-93 (citing Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1991)).

26. See *infra* Section IV.A.

27. See, e.g., MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2023).

28. See RHODE ET AL., *supra* note 24, at 92-93 (quoting Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 11 (1991)); Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal*, 16 GEO. J. LEGAL ETHICS 1, 77-78 (2002); Helen Gunnarsson, *Should Discipline Rules Be Extended to Entities?*, BLOOMBERG L. (Feb. 5, 2019, 8:45 AM), <https://news.bloomberglaw.com/legal-ethics/should-discipline-rules-be-extended-to-entities-2> [<https://perma.cc/RW4L-FJVW>].

This framework thus will be used to counter the position that the organizational employer should have a financial obligation for the vexatious conduct of the offending, affiliated lawyer.²⁹ In terms of structure, this Article will proceed as follows. Section II will provide an overview of the circuit split that has given rise to the current debate. Section III then lays out the ethical and social policy reasons offered by those who strongly support organizational liability.

Section IV subsequently rebuts these points by expanding upon the framework outlined above. Finally, Section V, the conclusion, anticipates and then answers the possible critiques that may emerge relating to this Article's central thesis. For reasons that will be explained, there is an irony here: those who support imposing *respondeat superior* liability often do so out of a noble desire for attaining a utilitarian form of justice. However, the sad reality is that this advocacy can actually have detrimental implications both for clients and causes that are often marginalized in today's political environment.

I. THE JUDICIAL DEBATE OVER VICARIOUS ORGANIZATIONAL LIABILITY

In 2023, the Fifth Circuit issued an important § 1927 ruling in the case of *Vaughan v. Lewisville Independent School District* ("LISD").³⁰ The petitioner, Frank Vaughan, argued that the manner in which school board members were elected within the LISD violated Section 2 of the Voting Rights Act.³¹ The district court ruled against Vaughan, stating that he lacked standing because he was not part of a racial class that the statute was written to protect.³² (Vaughan was white.³³) From there, the district court granted the LISD's motion requesting that Vaughan pay the costs of the litigation, attorney's fees, and "punitive sanctions" under § 1927.³⁴

The Fifth Circuit then heard the case only as it pertained to the LISD receiving attorney's fees.³⁵ With respect to the § 1927 issue, the appellate court's findings were layered.³⁶ It held that during the deposition portion of the litigation process, the district court reasonably

29. See *infra* Section IV.A.

30. 62 F.4th 199 (5th Cir. 2023).

31. *Id.* at 201-02. For an important treatment of this statute, see generally Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Super-statute*, 100 IOWA L. REV. 1389 (2015).

32. *Vaughan*, 62 F.4th at 202-03.

33. *Id.* at 202.

34. *Id.* at 203 (imposing sanctions under both 52 U.S.C. § 10310(e) and 28 U.S.C. § 1927).

35. *Id.* at 206-07 (noting that simply because the district court disagreed with Vaughan's standing position did not necessarily trigger the lawyer fee-shifting provisions under the Voting Rights Act).

36. *Id.* at 207-08.

could have found Vaughan's lawyers acted in a vexatious manner.³⁷ However, when these lawyers filed the lawsuit, that action alone, according to the Fifth Circuit, did not rise to the level of vexatiousness.³⁸

Thereafter, the court tackled the thornier question of whether the law firm that employed Vaughan's lawyers could be held vicariously liable for violating § 1927.³⁹ In a resounding fashion, the court said no.⁴⁰ Citing the rationale from a 2005 decision from the Seventh Circuit as persuasive authority, the court pointed to the language of the statute as its guidance.⁴¹ It found that § 1927 allowed for sanctions to be levied only upon "[a]ny attorney or other person admitted to conduct cases in any court of the United States."⁴² As it bluntly stated, "[c]ourts do not admit law firms to conduct cases, but instead admit individual attorneys."⁴³

As part of its analysis, the Fifth Circuit also focused on whether Rule 11 sanctions could reach a lawyer's law firm.⁴⁴ In doing so, the court, while not citing it, analyzed this issue similarly to how the Supreme Court approached the subject in *Pavelic & LeFlore v. Marvel Entertainment Group*.⁴⁵ In *Pavelic*, the Court was confronted with an older version of the rule that did not include the specific term "law firm."⁴⁶ In its judgment, the Court stated that the plain meaning of the then-existing rule precluded inclusion of the organization for liability purposes.⁴⁷ (In 1993, the rule was revised to explicitly include law firms as sanctionable entities.⁴⁸) For the Fifth Circuit, financial responsibility for vexatious conduct could not extend beyond the lawyer, since § 1927 was silent on law firm liability.⁴⁹

37. Vaughan, 62 F.4th at 207-08.

38. *Id.* ("As Vaughan's lawsuit was not frivolous and relied on an 'unsettled legal theory,' his attorneys cannot be sanctioned under § 1927 simply for filing the action." (quoting *Procter & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 531-32 (5th Cir. 2002))).

39. *Id.* at 208.

40. *Id.*

41. *Id.* (citing *Claiborne v. Wisdom*, 414 F.3d 715, 722-24 (7th Cir. 2005)).

42. Vaughan, 62 F.4th at 208 (alteration in original) (quoting 28 U.S.C § 1927).

43. *Id.*

44. *Id.* at 208-209.

45. 493 U.S. 120 (1989).

46. *Id.* at 123 (quoting FED. R. CIV. P. 11 (1987) (amended 1993)). For an analysis of this case, see Waldman, *supra* note 6, at 21.

47. See *Pavelic*, 493 U.S. at 123-26.

48. See FED. R. CIV. P. 11(e)(1)(1993) (amended 2007); see also FED. R. CIV. P. 11 advisory committee's note to 1993 amendments ("[I]t is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency.").

49. See Vaughan, 62 F.4th at 208.

The Fifth Circuit's *Vaughan* decision is one of the more recent that insulates law firms.⁵⁰ Other circuits, as stated, have ruled similarly, using parallel reasoning to arrive at the same conclusion.⁵¹ There is another side to the ledger, though. As Brett Fall and Brenna Dolphin have noted, "[t]he First, Second, Third, Eighth, Eleventh and District of Columbia Circuits [all] authorize the imposition of sanctions against a law firm."⁵²

For these courts, the rationale for permitting law firm liability falls into one of three (sometimes overlapping) camps. Some appellate courts have opted simply to defer to their respective lower courts' judgments when it imposes pecuniary responsibility onto the employer-firm.⁵³ The idea here has been not to "upset a relatively long-standing practice among district courts,"⁵⁴ which allows them to make empirical, context-laden calls based on the facts in front of them. Other courts have opted to implicitly read into § 1927 the presence of the law firm entity.⁵⁵ The argument here has been that it is not a stretch to tie the firm to the activities of the lawyer;⁵⁶ the interconnections are clear and obvious, so if the district judge finds that link to impliedly exist when interpreting the statute, that decision should be supported by the appellate court.⁵⁷

Then there is what might be referred to as the *Brignoli* approach. Here, Southern District of New York Judge Robert Sweet, in a well-known case entitled *Brignoli v. Balch Hardy & Scheinman, Inc.*, affirmatively (rather than impliedly) argued that the law firm indeed was a core and natural part of § 1927.⁵⁸ Unlike the Fifth and Seventh Circuits' determination that only individual attorneys could "conduct cases" in court, according to Judge Sweet, where the actions have met

50. *Id.*

51. *See* Claiborne v. Wisdom, 414 F.3d 715, 723-24 (7th Cir. 2005); Lockary v. Kayfetz, 974 F.2d 1166, 1169-70 (9th Cir. 1992), *superseded on other grounds* by Fed. R. Civ. P. 11(c)(1), *as recognized in* Margolis v. Ryan, 140 F.3d 850, 854-55 (9th Cir. 1998) (limiting application of § 1927 to individual attorneys); Kaass Law v. Wells Fargo Bank, N.A., 799 F.3d 1290, 1295 (9th Cir. 2015). *See also* Fallon & Dolphin, *supra* note 7, at 36 (surveying the circuit split). For a classic treatise that discusses 28 U.S.C. § 1927, see 20 CHARLES ALAN WRIGHT & MARY KAY KANE, FED. PRAC. & PROC. DESKBOOK § 74 (2d ed.), Westlaw (database updated Apr. 2023).

52. Fallon & Dolphin, *supra* note 7, at 36 (footnotes omitted); *see also* Janochoski, *supra* note 1, at 1737.

53. *See, e.g.*, Enmon v. Prospect Capital Corp., 675 F.3d 138, 147-48 (2d Cir. 2012); Lee v. First Lenders Ins. Servs., Inc., 236 F.3d 443, 445 (8th Cir. 2001); LaPrade v. Kidder Peabody & Co., 146 F.3d 899, 906-07 (D.C. Cir. 1998); Baker Indus., Inc. v. Cerberus Ltd., 764 F.2d 204, 210-12 (3d Cir. 1985).

54. *Enmon*, 675 F.3d at 147.

55. *See, e.g.*, Smith v. Grand Bank & Tr. of Fla., 193 F. App'x 833, 838 (11th Cir. 2006); Apex Oil Co. v. Belcher Co. of N.Y., 855 F.2d 1009, 1020 (2d Cir. 1988).

56. *See* cases cited *supra* note 55.

57. *E.g.*, *Apex Oil*, 855 F.2d at 1020.

58. *Brignoli v. Balch Hardy & Scheinman, Inc.*, 735 F. Supp. 100, 102 (S.D.N.Y. 1990).

the “‘bad faith’ standard . . . a law firm as much as an individual attorney can [be found to have] conduct[ed] litigation” under § 1927.⁵⁹ *Brignoli* remains good law to this day, and thus its rationale has been one to which the highly influential Second Circuit has effectively given its imprimatur.

At present, the Supreme Court has not addressed this circuit split. Over the years, however, it has issued judgments on other sanction-related issues. For example, from the early 1960s to 1980, the Court, on three separate occasions, allowed district court judges to impose sanctions on lawyers through their inherent authority.⁶⁰ In 1991, the Court reaffirmed this position, despite a dissent from Justice Anthony Kennedy who argued that an “extension of inherent authority to sanction a party’s prelitigation conduct subverts the American Rule[.]”⁶¹ But more recently, in the 2017 case of *Goodyear Tire & Rubber Company v. Haeger*, the Court unanimously held that when a judge issues inherent power sanctions, the financial penalty must be “limited to the fees the innocent party incurred solely because of the misconduct—or put another way, to the fees that party would not have incurred but for the bad faith” of the wrongdoing lawyer.⁶²

If the *Goodyear* decision is any indication of what the Court may do as it relates to law firm liability under § 1927, then perhaps going forward sanctions will be limited to just the lawyer.⁶³ Still, it is difficult to know for certain.⁶⁴ Furthermore, beyond looking at this issue through a statutory interpretation lens, supporters of vicarious liability cite numerous policy reasons for why this principle should be valid. We turn to that discussion next.

59. *Id.* (citation omitted) (first quoting 28 U.S.C. § 1927; then quoting *Apex Oil*, 855 F.2d at 1020).

60. See *Link v. Wabash R.R. Co.*, 370 U.S. 626, 632 (1962); *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 258-59 (1975); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980). For a discussion of these cases, see Kevin J. Henderson, Note, *When Is an Attorney Unreasonable and Vexatious*, 45 WASH & LEE L. REV. 249, 249 n.1 (1988).

61. *Chambers v. Nasco*, 501 U.S. 32, 61 (1991) (Kennedy, J., dissenting); see also Phil Goldberg & Kathryn Constance, Appellate Practice, IADC Committee Newsletter, Sept. 2017, at 2-3 (discussing *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991)). https://www.iadclaw.org/assets/1/19/Appellate_Practice_September_2017.pdf [<https://perma.cc/9JFJ4WTB>].

62. *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 104 (2017).

63. For a related discussion, see Jayanth K. Krishnan, *Lawyers for the Undocumented: Addressing a Split Circuit Dilemma for Asylum-Seekers*, 82 OHIO ST. L.J. 163, 191-95 (2021).

64. *Id.*

II. THE POLICY RATIONALE FOR *RESPONDEAT SUPERIOR* LIABILITY

A. *Organizational Responsibility*

In the United States today, a law firm is able to take on one of several different forms when it decides to establish itself.⁶⁵ For example, a firm can be a limited liability partnership (LLP), a general partnership (GP), a professional corporation (PC), a limited liability corporation (LLC), “or another type of entity” altogether.⁶⁶ In fact, the author and his research assistant studied the top 400 law firms in the U.S, as measured by the number of lawyers employed, with Table 1 revealing a set of interesting data.⁶⁷

Table 1
Business Form of Top 400 Law Firms in the U.S.

Type	Percentage	Raw Number
APLC	0.50%	2
GP	0.50%	2
LLC	3.50%	14
LLP	64.5%	258
LPA	0.50%	2
Ltd	0.50%	2
PA	7.00%	28
PC	15%	60
PLC	1.25%	5
PLL	0.25%	1
PLLC	5.00%	20
PLLP	0.50%	2
SC	0.75%	3

65. For a complete illustrative discussion, see Appendix A.

66. See Mark Wilson, *Which Corporate Form Is Best for Your Law Firm?*, FIND L. (Mar. 21, 2019), <https://www.findlaw.com/legalblogs/strategist/which-corporate-form-is-best-for-my-law-firm/> [<https://perma.cc/7JPF-F98L>] (noting that there are LLLPs, or limited liability limited partnerships, and even PLLCs, or professional limited liabilities companies).

67. For the top 400 firms by headcount, see Sam Bell & Pamela Wilkinson, *The Law360 400: Tracking the Largest U.S. Law Firms*, LAW360 (May 21, 2024, 2:04 PM), https://www.kiernantrebach.com/wp-content/uploads/2024/06/2024_Law360_Tracking-the-400-Largest-Law-Firms.pdf [<https://perma.cc/2HSA-SF54>]. From there, this Article’s author relied on a database listing many of the firms’ corporate form. See *America’s 350 Largest Law Firms*, PUB. LEGAL, <https://www.ilrg.com/nlj250/> [<https://perma.cc/WS2C-WVN9>] (last updated July 2019). For those firms that did not have their corporate form listed, the author’s research assistant, Zenas Shi, did web searches to find the structure of those firms, as well as for fifty additional firms listed in the Bell and Wilkinson article.

Swiss Verein	0.25%	1
Grand Total	100.00%	400

Appendix A lists each of the 400 firms and the corporate forms that they respectively embody.⁶⁸ As the summary table above indicates, there are a total of 14 types of business structures that law firms can assume.⁶⁹ LLPs make up 65% of the grand total, and interestingly, five corporate forms (including LLPs) make up 95% of all the firms in the table. The others include the above-mentioned LLCs and PCs, professional limited liability companies (PLLCs), and professional associations (PAs).⁷⁰

Why are nearly two-thirds of the firms LLPs? There are several reasons. To begin, this corporate structure insulates partners—personally—from the debts and obligations incurred by the partnership.⁷¹ Otherwise put, personal assets are generally not in jeopardy of being attached by creditors where the LLP encounters fiduciary or financial penalties or legal judgments against it.⁷² Additionally, partners in an LLP are generally not deemed to be financially responsible for the negligent conduct or malpractice of an affiliated, offending lawyer.⁷³

68. See *supra* note 67 (discussing the methodology used for Appendix A).

69. Of those not mentioned thus far in the text, they include A Professional Law Corporation (APLC), Limited Partnership Agreement (LPA), Limited Corporation (LTD), Professional Association (PA), Public Limited Company (PLC), Partnership of Limited Liability (PLL), Professional Limited Liability Company (PLLC), Professional Limited Liability Partnership (PLLP), Service Corporation (SC), and the Swiss Verein model. For a useful article on the choice of organizational entities and the need for rationalization of the process, see Eric H. Franklin, *A Rational Approach to Business Entity Choice*, 64 U. KAN. L. REV. 573 (2016). See also, John H. Matheson & Brent A. Olson, *A Call for a Unified Business Organization Law*, 65 GEO. WASH. L. REV. 1 (1996).

70. See Table 1 (noting the percentages for each of these respective corporate forms).

71. For a well-known, long-standing book on LLPs that remains extremely relevant, see CHRISTINE HURT, D. GORDON SMITH, ALAN R. BROMBERG & LARRY E. RIBSTEIN, *BROMBERG AND RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS, THE REVISED UNIFORM PARTNERSHIP ACT, AND THE UNIFORM LIMITED PARTNERSHIP ACT* (2001) § 1.01 (2d ed. 2023). For a sample of other scholarship in this area, see generally Symposium, *Check-the-Box and Beyond: The Future of Limited Liability Entities*, 52 BUS. LAW. 605, 608 (1997), and Larry E. Ribstein, *Making Sense of Entity Rationalization*, 58 BUS. LAW. 1023 (2003).

72. For a well-known analysis (and critical discussion) of this point, see Larry E. Ribstein, *Fiduciary Duties and Limited Partnership Agreements*, 37 SUFFOLK U. L. REV. 927, 930-32 (2004). For an important overview of the LLP along with other entity forms, see generally Robert R. Keatinge, *Are Professional Partnerships Really Partnerships? LLPs, LLCs, and PCs—Vicarious Liability Protection and Limitations*, 60 CONSUMER FIN. L.Q. REP. 518 (2006).

73. See *supra* note 72.

Furthermore, it is relatively simple, both logistically and administratively, to establish an LLP.⁷⁴ Costs can be lower, compliance with state law requirements and bureaucratic paperwork is easier, and LLPs are viewed by regulators, consumers, and other professionals as a reputable way of collectively organizing as a business.⁷⁵ And there are tax benefits as well.⁷⁶

That said, as Table 1 illustrates, the LLP is not the only model to which law firms adhere, and there are justifications for why these other forms are used.⁷⁷ Having a general understanding of the organizational structure of law firms is important because only then can we best determine whether collective responsibility should be levied upon

74. See, e.g., Jane Haskins & Leeron Hoory, *LLC vs. LLP: Key Differences Between the Two Business Structures*, FORBES, <https://www.forbes.com/advisor/business/llp-vs-llc/> [https://perma.cc/4NFR-M9T3] (last updated May 30, 2024, 8:33 PM).

75. Relatedly, for partners in an LLP, this business structure is also seen as an efficient way to run the firm—managerially. Responsibilities and commitments between partners can be established via contractual agreements, and supervisory duties over non-partner employees similarly can be established fairly easily (also through contractual agreements) in an LLP. For a discussion of this point, see *id.* See also Mathew Aitken, *The Pros and Cons of Operating as an LLP*, 1STFORMATIONS (May 17, 2024), <https://www.1stformations.co.uk/blog/llp-pros-and-cons/> [https://perma.cc/D66L-Y227]. For academic treatments of this subject, see BRADLEY T. BORDEN & ROBERT J. RHEE, *LIMITED LIABILITY ENTITIES: STATE-BY-STATE GUIDE TO LLCs, LPS AND LLPs* (2012).

76. Specifically, there is the ability to avoid what is referred to as a “double taxation,” where any financial gains that LLPs make “pass-through” directly to the partners rather than through the partners and the organization structure of the firm as well. See BORDEN & RHEE, *supra* note 76, § 2.1[c]; Haskins & Hoory, *supra* note 74. For an interesting case study of what occurred in the state of Kentucky when the legislature sought to curtail these benefits, see Thomas E. Rutledge & Allan W. Vestal, *Making the Obvious Choice Malpractice: LLPs and the Lawyer Liability Time Bomb in Kentucky’s 2005 Tax Modernization*, 94 KY. L.J. 17 (2005).

77. For example, a firm may wish to form as an LLC because some state jurisdictions simply do not offer the LLP as an option. See Haskins & Hoory, *supra* note 74. Furthermore, LLCs have similar types of advantages of an LLP (in terms of limited liability protection, tax benefits, and the flexibility in how profits are distributed), and there can be certain additional benefits as well. These include insulating the personal liability of managers from the business debts of others within the corporation, and with LLCs, meeting state-based regulatory measures tend not to be as onerous as LLPs. See, e.g., Haskins & Hoory, *supra* note 74; BORDEN & RHEE, *supra* note 76, § 1.3; see also Ginny Cascio Bonifacino, *Beyond the Bottom Line: Law Firms as B Corps*, MD. B.J., Dec. 2022, at 14, 14-15; Edward W. Feldman, *Essential Elements of an Operating Agreement for a Law Firm Organized as an LLC*, CBA REC., Apr. 2002, at 30, 30-32. Firms that organize as a professional corporation generally see the pluses taking the form of professional and personal liability insulation, certain tax benefits, and the ability of the PC to continue even after the demise or departure of the individual(s) who established the entity. Additionally, management responsibilities can be more easily centralized and transferred within a PC, and there is thought to be a reputational boost as well to being organized in this manner. For further research on PCs, along with PLLCs and other entities, see generally William D. Elliott & Elizabeth S. Miller, *Structuring Law Firm Organizations and Related Ethics Issues*, TEX. CLE CHOICE, GOVERNANCE, & ACQUISITION ENTITIES, May 19, 2017, at 1, 9; Robert R. Keatinge, *LLP, LLCs and PCs—Vicarious Liability Protection and Limitations* (ALI-ABA Video Law Review, Mar. 17, 2005), WL VMF0317 ALI-ABA 55, 63-64; Jennifer J. Johnson, *Limited Liability for Lawyers: General Partners Need Not Apply*, 51 BUS. LAW. 85 (1995); Allison Martin-Rhodes, Robert W. Hillman & Peter Tran, *Law Firms’ Entity Choices Reflect Appeal of Newer Business Forms*, 4 BUS. ENTITIES 16 (2014).

those in charge. For our purposes, the relevant and specific question is whether the way the entity is formed offers protection for the partners, managers, and the firm itself from the conduct of a vexatious lawyer.

For advocates who believe in *respondeat superior* liability, this protection is not necessarily absolute.⁷⁸ For LLPs, for instance, it is not unheard of for a partner to agree contractually—or through some other type of guarantee—to cover the entity’s outside financial obligations.⁷⁹ Under these circumstances, a creditor may have the ability to come after the organization in order to recover beyond what the individual offending lawyer pays.⁸⁰

In addition, in certain situations, when the vexatious lawyer’s actions are criminal in nature, the leaders of an entity may be held civilly accountable.⁸¹ Also, if the vexatious lawyer is an organizational leader who a) misuses the entity, b) violates other existing statutes, or c) acts in an unauthorized manner, courts can “pierce the veil” and hold the entity liable.⁸² And, even where the vexatious perpetrator is not a principal, but rather, say, an associate, the entity itself may still be held to account because of fiduciary duties that are owed.⁸³

So, there are *legal* justifications that advocates of *respondeat superior* put forward for why the organization ought to be liable in a vexatious lawyer situation. There are a number of other arguments offered as well, which tend to be more policy-based, ethical, and even cultural in scope. These points appear to be equally, if not more powerful in nature.

78. See generally Kenneth Silver, *When Should the Master Answer? Respondeat Superior and the Criminal Law?*, 18 CRIM. L. & PHIL. 89 (2024) (noting that when it comes to corporate criminal liability, “we cannot infer from the presence of a principal/agent relation that the principle is answerable for the conduct of the agent.”).

79. Alan L. Feld, *The Control Test for Limited Partnerships*, 82 HARV. L. REV. 1471, 1474 (1969).

80. *Id.*

81. See generally CAROL A. POINDEXTER, CRIMINAL AND CIVIL LIABILITY FOR CORPORATIONS, OFFICERS, AND DIRECTORS 8 (2016); JODI AVERGUN ET AL., CORPORATIONS, DIRECTORS, AND OFFICERS: POTENTIAL CRIMINAL AND CIVIL LIABILITY 1 (2018).

82. See sources cited *supra* note 81. See also generally Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAW. 143, 144-145 (2002) (discussing how officers, including lawyers, have a fiduciary duty to ensure that the employer entities abide by laws, regulations, and legal ethics principles); George W. Overton, *Supervisory Responsibility: A New Ball Game for Law Firms and Lawyers*, 78 ILL. BAR J. 434, 435-36 (1990); Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271, 277-81 (2008); Jeannie Nelson, Comment, *New Corporate Responsibility Law Increases Liabilities for Directors, Officers, and Attorneys, but Does it Increase Protections for Investors?*, 34 TEX. TECH. L. REV. 1165, 1167-68 (2003).

83. See sources cited *supra* note 82; see also Sarah Theresa Eibling, Note, *Duties and Responsibilities of Lawyers in Light of In re Myers: Are You Aware?*, 55 S.C. L. REV. 599 (2004).

B. Additional Considerations

Under the American Bar Association's legal ethics code, there are specific provisions that obligate those in supervisory positions to ensure that subordinates adhere to standards of integrity.⁸⁴ Take Rule 5.1, titled "Responsibilities of Partners, Managers, and Supervisory Lawyers."⁸⁵ Within this section, there are sub-provisions that outline the duties imposed on supervisors.⁸⁶

For example, partners with managerial authority are required to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct."⁸⁷ For those who hold direct supervisory roles, they are also responsible for ensuring that subordinates who report to them follow the Rules.⁸⁸ And perhaps most crucially, where the supervisor signs off on the "conduct [or] ratifies the conduct involved[] or . . . knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action," responsibility is deemed to fall onto the supervisor.⁸⁹

The question begged here is what type of responsibility should be imposed. Not surprisingly, there is variation as to how closely states comport to the ABA's Model Rules, even though most have adopted them in principle.⁹⁰ Generally speaking, though, regardless of jurisdiction, violations of 5.1 can result in disciplinary sanctions ranging from reprimands and fines to suspensions and disbarment.⁹¹ Additionally, state disciplinary committees can and do cite the vexatious conduct of

84. See MODEL RULES OF PRO. CONDUCT r. 5.1 (AM. BAR ASS'N 2023).

85. *Id.*

86. See *id.*

87. *Id.* r. 5.1(a).

88. See *id.* r. 5.1(b) ("A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.").

89. *Id.* r. 5.1(c).

90. See *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS'N (Mar. 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ [<https://perma.cc/NBZ9-KCSW>] (listing forty-nine of the fifty states and their adoption dates, as well as the District of Columbia, Guam, and Northern Mariana Islands jurisdictions). Also see <https://libguides.law.ucla.edu/ethics#:~:text=Historically%2C%20the%20California%20Rules%20were,by%20the%20California%20Constitution%20> [<https://perma.cc/QY6TT84Q>] (noting that "historically, the California Rules were independent of the ABA Model Rules but, in 2018, the California State Bar dramatically revised the California Rules to make them more consistent with the ABA Model Rules.").

91. For just one example, see what the state of Michigan did in adopting the standards set forth by the ABA: STATE OF MICH. ATT'Y DISCIPLINE BD., ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (2000).

a lawyer as justification for finding against a supervisor and the employer-entity.⁹²

In fact, there is another section of the Model Rules that deals with a need for all lawyers to promote and “[m]aintain[] the [i]ntegrity of the [p]rofession.”⁹³ Rule 8.3(a) mandates that a lawyer report another lawyer whose “honesty, trustworthiness[,] or fitness”⁹⁴ comes into “substantial question.”⁹⁵ For a lawyer who acts in a vexatious manner, other lawyers within the employing organization would thus be obligated to comply with this compulsory provision.⁹⁶ Furthermore, Rule 8.4 is even more sweeping in that it defines lawyer misconduct to include any behavior that is deemed to be “prejudicial to the administration of justice.”⁹⁷ Read together with 8.3(a), this latter provision would seemingly impute even greater responsibility upon an entity (and those in supervisory positions) whose affiliated lawyer acts vexatiously and outside the boundaries of professionalism.⁹⁸

One could also imagine how deterrence theory could be used to support the doctrine of why *respondeat superior*. Years back, Alan Sykes wrote a pivotal article discussing how when an entity’s superiors know that they could be responsible for the vexatious conduct of a colleague, there could be an incentive to find ways to deter such offending behavior.⁹⁹ Relatedly, one could then suppose that having such a doctrine in place can result in the organizational leadership being encouraged to engage in more vigilant oversight and greater accountability. Practically speaking, as a way of proactively staving off inappropriate conduct by their lawyers, an organization may place resources into

92. See Douglas R. Richmond, *Subordinate Lawyers and Insubordinate Duties*, 105 W. VA. L. REV. 449, 451-61 (2003).

93. See MODEL RULES OF PRO. CONDUCT r. 8.1-8.5 (AM. BAR ASS’N 2023).

94. *Id.* r. 8.3(a)

95. *Id.*

96. Note that Model Rule 8.3(c) has an exception, which states: “This Rule does not require disclosure of information otherwise protected by Rule 1.6 [i.e., information protected under the rules of confidentiality] or information gained by a lawyer or judge while participating in an approved lawyers assistance program.” *Id.* r. 8.3(c); see also *id.* r. 1.6.

97. *Id.* r. 8.4(d).

98. See *id.* r. 8.3-8.4.

99. Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 588 (1988); c.f. Jennifer Arlen & Lewis A. Kornhauser, *Battle for Our Souls: A Psychological Justification for Corporate and Individual Liability for Organizational Misconduct*, 2023 U. ILL. L. REV. 673, 724-27 (2023) (arguing that imposing liability on organizations alone may be insufficient to deter misconduct unless individual actors also face consequences, due to psychological tendencies that limit managerial control over employee behavior)

training or educational programs to convey to their staff the financial consequences for violating the vexatious behavior statute.¹⁰⁰

Finally, if the public knows that there are serious ramifications for lawyers *and their employers* when the former behaves badly, the reputation of the profession will likely improve as a result.¹⁰¹ Consider a case where those injured by vexatious lawyering are able to receive compensation because the organizational entity is also financially on the hook. In that situation, one could craft a type of argument that would run as follows: greater trust in the profession will ensue because the public will see the employer actually being held to account, which will likely result in higher confidence of all who are working within the system.

Combining, therefore, the rules-based arguments with the above social policy points—and the judicial rationale from those more sympathetic circuits¹⁰²—leads to a rather persuasive conclusion: namely, that the doctrine of *respondet superior*, in these circumstances, is indeed fair and equitable.

As we will discuss below, however, the problem is that not all entities are, in fact, law firms. Thus, having such a blanket principle in place has the potential for leading to consequences that these advocates frequently ignore as part of their analysis.

III. A COUNTER-FRAMEWORK OF CAUTION TO CONSIDER

A. *Principle of Proportionality*

Often, when sanctions and penalties are discussed by legal observers, they are done so in the context of criminal law. The U.S. Constitution's Eighth Amendment has its roots in ensuring that punishment, for example, is not disproportionately meted out against someone who commits a crime.¹⁰³ In the famous Supreme Court case of *Coker v.*

100. Another practical consequence is that employers will be more likely to secure proper insurance coverage if they know they are obliged to be financially responsible for the conduct of their lawyers. For an important book on the role of lawyer misconduct and how frequently lawyers actually have malpractice insurance, see HERBERT M. KRITZER & NEIL VIDMAR, *WHEN LAWYERS SCREW UP: IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS* 4 (2018).

101. *See generally* Richmond, *supra* note 92, at 451-61 (discussing courts that have impliedly employed this rationale).

102. *See* Fallon & Dolphin, *supra* note 7, at 36; Janochoski, *supra* note 1, at 1737.

103. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); *see also* Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 *YALE L. J.* 3094, 3096 (2015) (noting that this principle of proportionality "now flows across national lines, a seemingly common methodology for evaluating many constitutional and human rights claims. The United States is often viewed as an outlier in this transnational embrace of proportionality in

Georgia, Justice Byron White, in his plurality opinion, stated that a sanction or punishment will be considered invalid where it “(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering[,] or (2) is grossly out of proportion to the severity of the crime.”¹⁰⁴

Yet, this principle that there needs to be proportionality when sanctions are issued has long-standing Aristotelian roots and has also been noted and expanded upon by numerous philosophers and legal scholars over time.¹⁰⁵ In essence, the idea is that in order to ensure that there is fairness, equity, and justice, penalties need to be calibrated to fit the offensive conduct accordingly.¹⁰⁶ This rationale has underpinned many legal spaces.

For example, several international law scholars have long written about “just war theory,” which holds that in times of military conflict, there must be proportionality between the force that is deployed and the threat that is faced by combatting parties.¹⁰⁷ In the administrative law context, Max Weber and Hans Kelsen each described the importance of adhering to proportionality as, according to scholars Moshe Cohen-Eliya and Iddo Porat, being “a crucial means for ensuring a more effective governmental system and . . . an important tool for maximizing individual freedom.”¹⁰⁸ Within the European Court of Human Rights, proportionality is a frequently cited notion found in judgments

constitutional law. Yet some areas of U.S. constitutional law embrace proportionality as a principle, as in Eighth Amendment case law, or contain other elements of the structured ‘proportionality review’ widely used in foreign constitutional jurisprudence, including the inquiry into ‘narrow tailoring’ or ‘less restrictive alternatives’ found in U.S. strict scrutiny.” (footnotes omitted).

104. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977).*Id.* at 592.

105. See, e.g., Andrew von Hirsch, *Proportionality in the Philosophy of Punishment: From “Why Punish?” to “How Much?”*, 25 ISR. L. REV. 549 (1991) (arguing for a defense of proportionality as both morally and practically justified); Michael Tonry, *Is Proportionality in Punishment Possible, and Achievable?*, in OF ONE-EYED AND TOOTHLESS MISCREANTS: MAKING THE PUNISHMENT FIT THE CRIME? 1, 1-9 (Michael Tonry ed., 2019); Nicola Lacey, *Getting Proportionality in Perspective: Philosophy, History, and Institutions*, 50 CRIME & JUST. 77, 80-83, 87-89 (2021); Thaddeus Metz & Mika’il Metz, *How Much Punishment Is Deserved? Two Alternatives to Proportionality*, PHILOSOPHIES, Mar. 2022, at 1, 1-2; Mitchell N. Berman, *Proportionality, Constraint, and Culpability*, 15 CRIM. L. & PHIL. 373 (2021).

106. Andrew von Hirsch, *Proportionality in the Philosophy of Punishment: From “Why Punish?” to “How Much?”*, 25 ISR. L. REV. 549, 572-573 (1991).

107. See, e.g., Patrick Tomlin, *Proportionality in War: Revising Revisionism*, 131 ETHICS 34, 34-36 (2020); Gary D. Brown, *Proportionality and Just War*, 2 J. MIL. ETHICS 171, 172-73 (2011); Jeff McMahan, *Proportionality and Necessity in Jus in Bello*, in THE OXFORD HANDBOOK OF ETHICS OF WAR 418, 418 (Seth Lazar & Helen Frowe eds., 2018); Thomas Hurka, *Kamm on Intention and Proportionality in War*, 11 J. MORAL PHIL. 411, 414-15 (2014).

108. Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The historical origins*, 8 INT’L. J. CONST. L. 263, 274 (2010); see also Max Weber, *On Legal*

that this body delivers.¹⁰⁹ And many observers have described how different countries' legislatures and courts have, respectively, codified this principle into rights-based statutes and within the judicial review process.¹¹⁰

Given that proportionality has been present and of focus within these various areas of law, it should not be surprising that in the civil context, this principle also carries considerable weight.¹¹¹ For researchers, determining the fairness and reasonableness of how penalties and remedies are delivered is a central priority.¹¹² In private law disputes, for instance, compensatory damages are thought to be calculated in accordance with the actual, proportional loss suffered by the injured party.¹¹³ Punitive damages can also sometimes be awarded, of course, but even here a plaintiff's recovery still needs to be proportionally

Theory and Sociology, in WEIMAR: A JURISPRUDENCE OF CRISIS 50, 53 (Arthur J. Jacobson & Bernhard Schlink eds., Belinda Cooper trans., 2000) (viewing “formal justice,” or formal rationality, as almost the “twin sister of liberty,” since it prevents the government from taking arbitrary action).

109. See EIRIK BJORGE, DOMESTIC APPLICATION OF THE ECHR: COURTS AS FAITHFUL TRUSTEES 155-57 (2015); Jeremy Letwin, *Proportionality, Stringency and Utility in the Jurisprudence of the European Court of Human Rights*, HUM. RTS. L. REV., Sept. 2023, at 1, 6-16, 22-23 (examining decisions to argue that indirect utilitarianism is “a descriptive account of the Court’s proportionality jurisprudence”).

110. See, e.g., BJORGE, *supra* note 109, at 157-73, 177 (reviewing proportionality doctrine in France, Germany, and the United Kingdom and concluding that the three nations “have adopted the ECHR proportionality test in rights cases”); Emil Sliwiński, *Principle of Proportionality as a Threat to Criminal-Law-Related Fundamental Rights*, 14 NEW J. EUR. CRIM. L. 327 (2023) (outlining the traditional rationale and then critiquing statutes and court decisions that have employed proportionality); Charter of Fundamental Rights of the European Union, art. 49, 2000 O.J. (C 364) 1, 20 (incorporating the principle of proportionality as a fundamental right); BENEDIKT PIRKER, PROPORTIONALITY ANALYSIS AND MODELS OF JUDICIAL REVIEW 3, 6-9 (2013) (discussing the idea of pre-balancing, which entails courts “weighing the arguments taken from the context of judicial review to ascertain how proportionality analysis ought to be used”).

111. See, e.g., CIV. JUST. IMPROVEMENTS COMM., APPENDIX F: THE ROLE OF PROPORTIONALITY IN REDUCING THE COST OF CIVIL LITIGATION 2 (2016), https://www.ncsc.org/_data/assets/pdf_file/0025/25675/ncsc-cji-appendices-f.pdf [<https://perma.cc/8Q49-GPT9>] (discussing the importance of proportionality in civil justice), appended to CIV. JUST. IMPROVEMENTS COMM., CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL (2016); Lesley J. Bryant & Lovita Tandy, *Litigating Proportionality Under Federal Rule of Civil Procedure 26(b)(1)*, AM. BAR ASS’N (Feb. 6, 2023), <https://www.americanbar.org/groups/litigation/resources/newsletters/minority-trial/litigating-proportionality-under-federal-rule-civil-procedure-26b1/> [<https://perma.cc/82MY-BWLC>] (discussing proportionality in discovery disputes); Joseph V. Schaeffer, *Proportionality Has Some Bite*, AM. BAR ASS’N (Mar. 1, 2019), <https://www.americanbar.org/groups/litigation/resources/newsletters/pretrial-practice-discovery/proportionality-has-some-bite/> [<https://perma.cc/QD94-4PM5>] (same).

112. See, e.g., CIV. JUST. IMPROVEMENTS COMM., *supra* note 111, at 2-3.

113. See *A Guide to Compensatory Damages*, BLOOMBERG L. (Feb. 13, 2013), <https://pro.bloomberglaw.com/insights/litigation/a-guide-to-compensatory-damages/> [<https://perma.cc/PSU7-S3G9>]; Michael Pressman, *Calculating Compensation Sums for Private Law Wrongs: Underlying Imprecisions, Necessary Questions, and Toward a Plausible Account of Damages for Lost Years of Life*, 53 U. MICH. J.L. REFORM 597, 600 (2020).

based on the defendant's bad behavior together with the societal concern for deterring such ill conduct in the future.¹¹⁴

This conversation about civil penalties and proportionality is relevant to our vexatious lawyer discussion. Recall that the judicial debate among the different circuits has been on whether it is reasonable to assign liability and issue penalties against those entities—i.e., namely law firms—that employ the vexatious lawyer.¹¹⁵ For those that support extending such liability, there is often an unstated assumption: law firms that are required to incur a penalty will nevertheless be able to continue operations going forward.¹¹⁶

However, two important literatures tell us that the ramifications are more nuanced and potentially more problematic for other employer-entities.¹¹⁷ Law and society scholars who have studied social movements have documented how grassroots, bottom-up organizations often function under uncertain, shifting, and sometimes precarious financial realities.¹¹⁸ As far back as 1970, Stephen Wexler critically wrote about the way that lawyers and organizations engaged in “[p]ractic[ing] [l]aw for [p]oor [p]eople.”¹¹⁹ Although much of Wexler’s ire was directed towards the lawyers’ tactics and their inability to be strategic in how they litigated,¹²⁰ he also pointed out that there was frequently little organizational infrastructure to help support a sustained and effective movement on behalf of the poor.¹²¹

Others, as well, have observed that entities such as public interest groups, nonprofits, and other types of movements can struggle for

114. As a side note, it should also be recognized that scholars have discussed the principle of proportionality in the civil context through the lens of weighing whether the time, expense, and energy involved in litigating a matter are reasonable (and, frankly, “worth it”) when balanced against the results that are likely to be enjoyed. On proportionality vis-à-vis punitive awards, see Leo M. Romero, *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 CONN. L. REV. 109, 113 (2008). And for a key Supreme Court case discussing due process review for punitive damage awards, see *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

115. See *supra* Section II.

116. See *supra* Section III.B.

117. The two literatures of focus—the fields of law and society and the legal profession—overlap considerably and should not be seen as completely distinct from one another.

118. See, e.g., GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* 2-3 (1992); JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* 33 (1978); JACK KATZ, *POOR PEOPLE’S LAWYERS IN TRANSITION* (1982); Cary Coglianese, *Social Movements, Law, and Society: The Institutionalization of the Environmental Movement*, 150 U. PA. L. REV. 85, 87-99 (2001) (detailing environmentalism as a social movement).

119. See Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1049 (1970).

120. *Id.* For a parallel criticism, see Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 502-507 (1976).

121. See Wexler, *supra* note 119, at 1051.

resources.¹²² Because it is not uncommon for these organizations to be financially disadvantaged, they often depend upon strategic alliances with more well-endowed associations—especially when the opposition is a wealthier firm or the government.¹²³ Susan Bibler Coutin’s work has shown that immigrant-rights NGOs, which engage in an array of advocacy tactics, depend on other ideologically similar partners (who are richer) in order to accomplish their objectives.¹²⁴

Scholarship by Joel Handler,¹²⁵ Michael McCann,¹²⁶ Stuart Scheingold,¹²⁷ and Charles Epp,¹²⁸ among others, have each discussed how legal activism by grassroots groups can be dependent upon the funding available to these entities, which routinely comes in the form of soft money that can easily evaporate.¹²⁹ For these reasons, if a lawyer is employed within one of these financially strapped environments, and then is found to act vexatiously, the ramifications of holding the employer-organization liable can be significantly consequential.

A second body of scholarship involves a subfield of the legal professions research: cause lawyering literature.¹³⁰ Academics in this field have pointed out that, while still zealously fulfilling their obligations, cause lawyers affirmatively act contrary to the Weberian ideal of remaining professionally distant, sober, and emotionally detached and instead see little daylight between themselves and their clients’ agendas.¹³¹ Cause lawyers embody the model of passionate representatives who serve as the vehicle for obtaining the goals and objectives of those they represent—through not just legal but also political, economic, and grassroots advocacy tactics.¹³² While there is a need to act within the

122. See, e.g., CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 90-110 (1998); Jayanth K. Krishnan, *Lawyerling for a Cause and Experiences from Abroad*, 94 CALIF. L. REV. 575, 586, 588 (2006); STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 23-51 (2004).

123. See sources cited *supra* note 122.

124. See Susan Bibler Coutin, *Falling Outside: Excavating the History of Central American Asylum Seekers*, 36 L. & SOC. INQUIRY 569, 579 (2011).

125. See HANDLER, *supra* note 118.

126. See MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 173, 298 (1994).

127. See STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 198 (2ded. 2004).

128. See EPP, *supra* note 122, at 1-25.

129. See *supra* notes 122-127.

130. See SCHEINGOLD & SARAT, *supra* note 122 at 33-37; Krishnan, *supra* note 122, at 576-77, 585-87.

131. See SCHEINGOLD & SARAT, *supra* note 122, at 1-50; Krishnan, *supra* note 122, at 581-82.

132. See generally SCHEINGOLD & SARAT, *supra* note 122, at 1-50; Krishnan, *supra* note 122, at 582. For others who have spent considerable time on this subject, see generally Susan Sterett, *Caring About Individual Cases: Immigration Lawyering in Britain*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 293 (Austin

law and rules of professional responsibility, effectively there is a no holds barred mentality.¹³³

As this literature describes, cause lawyers can work in different settings: public interest firms, NGOs, certain government bodies, and occasionally in private practice.¹³⁴ In order to sustain themselves financially, these lawyers (and their employers) often rely on statutes that allow them to recover attorney's fees from those whom they prevail against.¹³⁵ The obvious reason is that the economic model under which lawyers work does not afford them the luxury of having a wealthy reservoir of resources.¹³⁶ Given these tenuous financial circumstances, even a single adverse judgment against an entity-employer could impair operations and thereby harm the clients who need representation.¹³⁷

Thus, thinking about the principle of proportionality is crucial when determining whether it makes sense to extend vicarious liability to the organizational entity. It is easy for the answer to this question to be "yes," where there is little chance that the organization will fold, and where the organization can afford such a penalty. However, in those cases where the organization is *not* a wealthy law firm, then the considerations become more complicated.

B. *The Impact on Reporting, Whistleblowing, and Transparency*

Might there be an argument to be made that an entity deemed responsible for the actions of its lawyers could see fewer instances of whistleblowing reports? After all, would not such an entity presumably

Sarat & Stuart Scheingold eds., 1998); Susan Bibler Coutin, *Cause Lawyering and Political Advocacy: Moving Law on Behalf of Central American Refugees*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 101 (Austin Sarat & Stuart A. Scheingold eds., 2006); Susan Bibler Coutin, *Cause Lawyering in the Shadow of the State: A U.S. Immigration Example*, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 117 (Austin Sarat & Stuart Scheingold eds., 2001).

133. See generally SCHEINGOLD & SARAT, *supra* note 132 .

134. See generally SCHEINGOLD & SARAT, *supra* note 122, chapters 1-2.; Krishnan, *supra* note 122 , at 602.

135. See generally SCHEINGOLD & SARAT, *supra* note 122, chapters 1 and 4.

136. See generally SCHEINGOLD & SARAT, *supra* note 122 .

137. On this point, there is also another scenario regarding proportionality to consider. Imagine we are examining a public interest group that is primarily interested in gaining an injunction—rather than monetary damages. If the lawyer for the group acts vexatiously and unreasonably drives up costs for the other side, and a judge thereafter levies a huge financial sanction, the question to ask is whether it is proportional and fair to have the organization bear the brunt of the fine, especially when doing could so disproportionately harm the group. Not surprisingly, as this Article argues, the answer should be no. Note, the contrast is with the for-profit lawyer who will generally tend to balance the costs of acting vexatiously against the amount of money being litigated over. The presumption is that such a lawyer is more likely to consider acting vexatiously, if the case is worth more, and they are from a firm that is well-resourced, so that even if that lawyer and the firm are sanctioned, they will be more able to absorb such a cost.

take greater care to instill the ethic of professionalism and promote a culture of respect among its employees—including its lawyers? Moreover, should it not be that transparency would also be a prioritized value, leading to higher levels of trust within the organization? Therefore, the need to whistleblow would logically seem to be low.

However, consider an alternative possibility. If an entity knows that it could be held monetarily responsible, the leadership might preemptively enact a set of excessively cautious, hyper-defensive, and intrusive policies in an effort to reduce potential exposure.¹³⁸ Leaders following this playbook would likely prefer to handle complaints in a more discrete and internal manner, but in the process, this would create a more mistrustful and overly suspicious environment.¹³⁹ For potential whistleblowers wishing to report wrongdoing, they might reasonably fear retaliation for taking their concerns to these leaders who are doing everything in their power to minimize the risks of bad publicity and financial exposure.

Furthermore, if the organizational leaders know that they could face financial repercussions because of their lawyers' conduct, there is the real possibility of entities acting less transparently vis-à-vis: (a) a judicial body during litigation, (b) opposing parties in the discovery process, or (c) a government agency that is conducting an investigation.¹⁴⁰ Under these circumstances, it is conceivable that entities would resort to highly defensive tactics, such as engaging in prolonged delay, to try and shield themselves.¹⁴¹ Also, in this vein, organizations might likely privilege opaqueness and act in furtive ways to protect themselves from financial vulnerability.¹⁴²

138. See, e.g., Richard A. Posner, *A Theory of Negligence*, 1 J. LEG. STUD. 29, 48 (1972); Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CAL. L. REV. 1345, 1350 (1982);

139. See Shelley Smith, *Lack of Trust Can Make Workplaces Sick and Dysfunctional*, FORBES (Oct. 24, 2019, 7:00 AM), <https://www.forbes.com/councils/forbescoachescouncil/2019/10/24/lack-of-trust-can-make-workplaces-sick-and-dysfunctional/> [<https://perma.cc/52L7-WYRB>].

140. For work entity-delay during litigation, see Sherrie R. Savett, *The Merits Matter Most and Observations on a Changing Landscape Under the Private Securities Litigation Reform Act of 1995*, 39 ARIZ. L. REV. 525, 531 (1997). For work on delays by corporations during discovery, see Érica Gorga & Michael Halberstam, *Litigation Discovery and Corporate Governance: The Missing Story About the “Genius of American Corporate Law”*, 63 EMORY L.J. 1383, 1409 (2014)^{“”}; Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1111 (2012). For a well-publicized case of a firm using delay tactics during a government agency investigation, see Cassell Bryan-Low, *KPMG is Accused of Delay Tactics*, WALL ST. J. (Dec. 11, 2003, 12:01 AM), <https://www.wsj.com/articles/SB107109457388263800> [<https://perma.cc/8LQW-9D44>].

141. See sources cited *supra* note 140. For example, there may be enhanced “red tape” or bureaucratic measures put in place as a way to frustrate the efforts by opposing parties to gain access to information from the entity.

142. For example, consider an insightful article on non-disclosure agreements (NDAs) by Stephen M. Kohn, *Understanding Your NDA (and When It Can Be Broken)*, HARV. BUS. REV.

The bottom line is that this defensive behavior has costs. Fears of being found liable for their lawyers' bad acts can result in organizational leaders allocating scarce resources towards the preemptive measures outlined above—instead of on affirmatively seeking to ensure that lawyers not act in a vexatious manner. Such investments might include paying for continuing legal education sessions,¹⁴³ up-to-date ethics training,¹⁴⁴ and programming that focuses on how to avoid engaging in sanctionable behavior altogether.¹⁴⁵ However, so long as entities are concentrating their time and energy on staving off liability, the chances of fostering a culture of trust and integrity will likely remain a low priority.

C. *The “Just-Ness” of Organizational Liability and the Need for Individual Responsibility*

Notions of equity and fairness were implicit in our discussion of proportionality above.¹⁴⁶ Yet, the primary considerations there were on the practical impact of issuing sanctions against the employer-entity.¹⁴⁷ In this section, we dig deeper into the more theoretical and justice-related aspects of why vicarious organizational liability has problems. To begin, a simple question first needs to be asked: how fair is it to saddle with liability those members of the organization who were not involved or who were unaware of the vexatious conduct committed by the offending lawyer?

Let us imagine three different scenarios, which help to shed light on this query. As part of this exercise, we can draw upon the famous law and society book written by Marc Galanter and Thomas Palay entitled *Tournament of Lawyers*.¹⁴⁸ In that landmark work, the authors show that, over the last several decades, law firms have experienced a change in the way that they operate.¹⁴⁹ Today, for example, it is not uncommon for larger law firms to adopt a tournament model, whereby

ONLINE (May 15, 2024), <https://hbr.org/2024/05/understanding-your-nda-and-when-it-can-be-broken> [<https://perma.cc/6XRY-F3L2>]. For a recent Federal Trade Commission rule on this subject, see *FTC Announces Rule Banning Noncompetes*, FED. TRADE COMM'N (April 23, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes> [<https://perma.cc/66ZP-SMY2>].

143 The American Bar Association has a valuable website that provides a universe of information on the availability of these types of continuing legal education and up-to-date legal ethics trainings for which organizations can have their lawyers participate. See *Welcome to the ABA Learning Center*, AM. BAR ASS', <https://www.americanbar.org/cle-marketplace/> [<https://perma.cc/7WY9-7TFP>] (last visited Apr. 2, 2025).

144. *Id.*

145. *Id.*

146. See discussion *supra* Sections IV.A-B.

147. *Id.*

148. See generally MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991).

149. See *id.* at 1-3.

there is intense competition among associates to move up the promotion ladder—with the final reward being named a partner, which is available to only a small, select number.¹⁵⁰

Relying on the Galanter-Palay framework, consider the case of Senior Associate Z who uses the pronouns “they/them/theirs.” Z joined the large law firm of ABC straight out of law school eight years ago. Z still has a considerable amount of student loans to pay back, and they worry constantly about finances, even though they are receiving a generous remuneration package.¹⁵¹ Z’s work ethic, work product, and billable hours are all universally praised by the firm’s leadership. While many of the associates with whom Z started have since left Z is considered a lock for partnership because of how stellar their performance has been throughout their time at ABC.¹⁵²

One day, Z learns that a partner in the firm has been found liable for violating 28 U.S.C. § 1927’s vexatious lawyering statute.¹⁵³ ABC is located within a circuit that imposes organizational liability, and in addition to financially penalizing the partner, the district court has held that the firm is liable as well and levies a significant fine.¹⁵⁴ The following week, ABC’s leadership informs Z that Z will be named equity partner within the next month.¹⁵⁵ However, because of the fine that the firm will have to pay, Z’s “buy-in” to the partnership will be larger than Z had anticipated. Furthermore, Z is told that the annual “draw” that partners are typically paid out by the firm will be much lower than in previous years.¹⁵⁶

150. See *id.* at 100-02.

151. See Jane Nam, *Average Law School Debt: 9 Statistics Students Should Know*, BESTCOLLEGES (June 5, 2023), <https://www.bestcolleges.com/research/average-law-school-debt-statistics/> [https://perma.cc/MK67-S4HG] (noting that “the median cumulative student loan debt—including law school and undergraduate debt—was \$160,000”); see also Debra Cassens Weiss, *Law Student Debt Averages about \$165K at Graduation, Creating Stress and Restricting Choices*, SURVEY SAYS, ABA J. (Oct. 27, 2020, 12:19 PM), <https://www.abajournal.com/news/article/law-student-debt-averages-165k-at-graduation-creating-stress-and-restricting-choices-survey-says> [https://perma.cc/Z6ZL-RCWR] (describing how young lawyers make life and career decisions based on their debt). For a report on the average salary of an eighth-year associate at Big Law, see Paul Caron, *BigLaw Associate Compensation Soars to \$240k for 1st Years, \$550k for 8th Years*, TAXPROF BLOG (Dec. 1, 2023), https://taxprof.typepad.com/taxprof_blog/2023/12/biglaw-associate-compensation-soars-to-240k-for-1st-years-550k-for-8th-years-.html [https://perma.cc/9WKU-VBBY].

152. For landmark study that has tracked careers within law firms and the legal profession, see generally ROBERT L. NELSON ET AL., *THE MAKING OF LAWYERS’ CAREERS: INEQUALITY AND OPPORTUNITY IN THE AMERICAN LEGAL PROFESSION* (2023).

153. For this hypothetical, we will assume that the vexatious behavior relates to the types of actions discussed in Part II.

154. See *supra* Section II for those circuits in which this firm could be located.

155. See Caron, *supra* note 151 (indicating that the partner track in Big Law firms is roughly eight years).

156. For background on what the buy-in structure looks like, see Jeffrey Liebster, *Equity Partnership Isn’t What It Used to Be*, MAJOR, LINDSEY & AFRICA (Mar. 29, 2018).

Z was stunned. Z did not know this vexatious partner, never worked with this individual, and had no knowledge of any of the work done by that person. How in the world was this fair and just for Z to suffer adverse consequences as a result of this other lawyer's conduct?¹⁵⁷

Relatedly, next consider a second scenario within this same firm involving a different partner—P. P also did not have any dealings with the sanctioned lawyer but now is financially impacted by the district court's decision as well. Specifically, P is the chair of the firm's hiring committee. The competition for hiring lawyers is a constant source of preoccupation for P, and as much as entry level and lateral lawyers are keen to come to ABC, the firm equally has to sell itself as a warm, inviting, and hospitable place to work.¹⁵⁸

One of the key attractions of ABC is that it offers its lawyers the opportunity to think about the practice of law in more than just billable hours.¹⁵⁹ Lawyers at the firm have their continuing legal education credits financially covered.¹⁶⁰ The firm also hosts events such as legal academic symposiums and lecture series, where prominent members of the bench and bar are invited to give diverse perspectives on key topics of the day.¹⁶¹ Then, there are other perks, benefits, and

<https://www.mlaglobal.com/en/insights/articles/equity-partnership-isnt-what-it-used-to-be?byconsultantauthor=jeffrey-liebster> [<https://perma.cc/HE94-HWP2>] (“While the norm is for equity partners to pay in capital equaling between 25 and 35 percent of the current year's compensation, some firms require as much as 65 percent, and most partnership agreements contain provisions that give the firm up to several years to repay the partner should she or he leave. For new partners, it's much more sensible to have an interim period with guaranteed compensation, eligibility for bonuses and no requirement of a major investment of capital—particularly for a lateral in the process of integrating into a new platform and culture.”).

157. For a recent study examining this issue, especially in the post-COVID era where organizations are now seeing employees work remotely and less within “bounded” entity structures, see Erin Frey et al., *What We (Do Not) Know About Punishment Across Organizational Boundaries*, 49 J. MANAGEMENT 196, 196 (2023).

158. For the latest data on the entry and lateral level markets for law firms, see *Entry-level and Lateral Hiring*, NAT'L ASS'N FOR L. PLACEMENT, <https://www.nalp.org/entry-lateral> (last visited Apr. 5, 2025) (describing hiring patterns going back over a decade). See also *Lateral Hiring Market Continued to Soften in 2023*, NAT'L ASS'N FOR L. PLACEMENT (Apr. 2024), <https://www.nalp.org/0424research> [<https://perma.cc/N9RY-LS47>] (describing how after a year where “lateral hiring increased by an unprecedented 111%,” the “market [has] showed continued signs of a course correction” recently).

159. See NAT'L ASS'N FOR L. PLACEMENT, LATERAL HIRING BEST PRACTICES GUIDE (2007), https://www.nalp.org/assets/769_07lateralhiringbestpracti.pdf [<https://perma.cc/ASPT-U7SL>] (discussing lateral hiring best practices, including strategies that go beyond billable hours).

160. For a discussion of this point on Big Law, see Jordan Rothman, *Not All Law Firms Are Created Equal: Some Provide Fewer Benefits Which Can Hurt Your Ability to Pay Off Student Loans*, ABOVE THE L. (Oct. 25, 2017), <https://abovethelaw.com/2017/10/not-all-law-firms-are-created-equal-some-provide-fewer-benefits-which-can-hurt-your-ability-to-pay-off-student-loans/> [<https://perma.cc/U7X8-SQAY>].

161. See Julia DiPrete, *BigLaw Offers Big Employee Benefits These Days: That's a Big Deal*, VAULT (Jan. 12, 2023), <https://vault.com/blogs/vaults-law-blog-legal-careers-and->

opportunities, including the ability to take extended family leave, receive excellent health care, and engage in pro bono legal services.¹⁶²

However, for P, the worry is that with organizational liability being attached, resources that the firm previously devoted to the above programs now might need to be reallocated.¹⁶³ For one thing, the firm may be required to pay the costs of the penalty immediately to the outlet ordered by the court.¹⁶⁴ As a result, the firm may simply have less money.¹⁶⁵ From P's perspective, the consequence here could mean greater difficulty recruiting and retaining the caliber of lawyers that the firm desires. In turn, clients whom the firm wishes to represent may look elsewhere because the quality of the lawyers working at ABC is perceived to no longer be what it once was.¹⁶⁶

This situation then leads to thinking about scenario three: how vicariously holding the organization liable for the conduct of one bad actor could lead to some employees facing cuts in their hours or even to being laid off. To be sure, an organization like ABC might be able to absorb an externality like a § 1927 sanction. However, there is evidence that, especially since the 2008-2009 global recession, several Big Law firms have not hesitated to look for ways to save on costs,

industry-news/biglaw-offers-big-employee-benefits-these-days-and-that-s-a-big-deal [https://perma.cc/V6P2-5MMS].

162. *Id.*; see also Jayanth K. Krishnan et al., *Big Law's Immigration Advocates*, 2024 U. ILL. L. REV. 447, 466-67 (2024) (describing how lawyers in various practice settings—especially in Big Law firms—often seek these types of benefits when considering where to work).

163. See discussion *supra* Section IV.B.

164. Where and to whom the penalty is paid really depends on the order issued by the court. For example, the firm may have to pay the court directly for costs associated with the vexatious behavior. Alternatively, the court may order that the firm pay the opposing party or contribute to a charitable organization or that the fine go towards a government agency, the state bar association, or the state's disciplinary committee on professional conduct. On where Rule 11 sanction-fees can go, see FED. R. CIV. P. 11 (c)(2)-(4). Note, 28 U.S.C. § 1927 is silent on the destination of such fees.

165. There is also the issue of whether the firm's malpractice and liability insurance rates may increase, which would, of course, mean that existing resources directed toward the initiatives and programs mentioned above might be adversely affected. On lawyer malpractice, see generally KRITZER & VIDMAR, *supra* note 100 (discussing the general hurdles that exist for lawyers in different practices spaces who struggle to find and pay for malpractice insurance).

166. The word "perceived" is intentionally used here because it is possible that the alternative lawyers whom the firm ends up hiring could be just as talented—even though they may not have the same types of credentials and historic markers compared to the lawyers ABC is used to employing. Also, it should be acknowledged that some clients in this situation may actually wish to seek out extraordinarily aggressive, vexatious-leaning firms when looking for representation. And there are certainly firms out there that pride themselves on acting this way. For lawyers like these, *and their firms*, even if they occasionally receive vexatious conduct penalties, they may view it as a necessary and acceptable cost that is far outweighed by the otherwise enormous benefits (in terms of profits and reputation-boosts) they receive. This Article acknowledges that lawyers and firms like this obviously exist in the marketplace, but the assumption is that they are outliers, although further empirical research is needed as to how willing they are to absorb the costs of being sanctioned for vexatious conduct.

including participating in staff and lawyer layoffs.¹⁶⁷ If a large enough vexatious lawyer penalty is levied, the firm may contemplate these reductions. And predictably, the employees most at risk of losing their jobs would be those with less power, standing, and financial security. For smaller, more modest organizations, this reality becomes even further pronounced.

Underscoring this entire discussion is a tension that is inherently present. Sections II and III outlined why advocates of organizational liability believe their position is superior.¹⁶⁸ However, it is crucial to remember that the bulk of the bar's professional responsibility rules centers around the *individual behavior* of lawyers.¹⁶⁹ Certainly, as discussed above, the rules do assign obligations organizational supervisors are to have over their subordinates.¹⁷⁰

Yet, it must be stressed that the eight different sections of the ABA's Model Code primarily deal with how lawyers are supposed to behave vis-à-vis *themselves*.¹⁷¹ For example, consider provision 8.4. Recall that this rule explicitly deals with "misconduct."¹⁷² The seven sub-provisions of 8.4 define misconduct in multiple ways, including an omnibus prohibition on activities that disrupt the administration of justice through "dishonesty, fraud, deceit or misrepresentation."¹⁷³

But, from the start, the opening sentence of 8.4 emphasizes that "[i]t is professional misconduct for *a lawyer*"¹⁷⁴—not an organization, entity, law firm, corporation, or nonprofit—to engage in the proscribed behavior.¹⁷⁵ In fact, the ABA's official comment on 8.4 delves into how the individual "lawyer is personally answerable to the entire criminal

167. See, e.g., Patrick Austin, *Big Law Firm Layoffs Are an Opportunity for Midsize and Small Firms*, NAT'L BUS. INST., <https://nbi-sems.com/blogs/news/big-law-firm-layoffs-are-an-opportunity-for-midsize-and-small-firms> [<https://perma.cc/HN3J-YMPY>] (last visited Feb. 13, 2025); Sara Merken, *Law Firm Layoffs Spread as Cooling Economy Keeps Clients Wary*, REUTERS (Apr. 5, 2023, 2:02 PM), <https://www.reuters.com/legal/legalindustry/law-firm-layoffs-spread-cooling-economy-keeps-clients-wary-2023-04-05/> [<https://perma.cc/5PVQ-8EHZ>]; Meghan Tribe, *Law Firm Hiring Plummets 35% Amid Layoffs, Slow Demand*, BLOOMBERG L. (Mar. 27, 2024, 9:13 PM), <https://news.bloomberglaw.com/business-and-practice/law-firm-hiring-plummets-35-amid-layoffs-slow-corporate-demand> [<https://perma.cc/6UTB-VGCQ>]; Justin Wise, *By the Numbers: The Big Law Stories That Mattered Most*, BLOOMBERG L. (Dec. 27, 2023, 5:30 AM), <https://news.bloomberglaw.com/business-and-practice/by-the-numbers-the-big-law-stories-that-mattered-most> [<https://perma.cc/93Q5-G63E>]; Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 751 (2010); Eli Wald, *The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051, 2051 (2010).

168. See discussion *supra* Sections II, III.

169. See generally MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2023).

170. See *id.* r. 5.1.

171. See generally MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2023).

172. *Id.* At r. 8.4.

173. *Id.* r. 8.4(c).

174. *Id.* r. 8.4 (emphasis added).

175. *Id.*

law [and] . . . for [civil] offenses that indicate [a] lack of those characteristics relevant to law practice.¹⁷⁶ Again, though, nowhere is it mentioned about extending liability of such misconduct to the employer-organization.

There is similar silence in the accompanying rule of 8.5, which focuses on what jurisdiction should be the disciplinary authority when a lawyer with contacts in multiple jurisdictions engages in misconduct.¹⁷⁷ Neither the rule nor 8.5's commentary discusses sanctions beyond the individual lawyer.¹⁷⁸

This absence of specific language in the rules parallels a similar omission we discussed previously relating to § 1927 itself.¹⁷⁹ For supporters of organizational liability, they have to overcome this linguistic reality in order to make their case.¹⁸⁰ This task, frankly speaking, is difficult to achieve. They then also have to overlook the fact that it is not only rich employers who will have to assume a financial hit, but if lawyer sanctions are indeed extended, entities that fight for more public interest or social justice causes would potentially be affected in an adverse manner as well.¹⁸¹

The counter-framework that this Article has just presented will surely face scrutiny and potential criticism from different corners. The concluding section anticipates and responds to some of the more serious challenges that could emerge.

CONCLUSION

In addition to a lack of statutory and Model Rules support, there have been several policy arguments offered here for why circuits ought to carefully weigh issuing penalties on entities that employ vexatiously sanctioned lawyers.¹⁸² Too often, principles of proportionality, the impact on reporting, whistleblowing, transparency, and considerations of equity and lawyer-responsibility are overlooked in favor of imposing collective punishment.¹⁸³ As such, there needs to be a reset in how courts and researchers deliberate on this subject.

Defenders of vicarious organizational liability may understandably raise objections to the framework provided in this Article.¹⁸⁴ One immediate critique is that for well over a century, the Supreme Court has held that corporate criminal liability can be imposed on an

176. MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 2 (AM. BAR ASS'N 2023).

177. *See id.* r. 8.5.

178. *See id.*; *id.* r. 8.5 cmt.

179. *See supra* Sections II, IV.

180. *See* doctrinal discussion *supra* Section II.

181. *See supra* Section IV.

182. *See supra* Section IV.

183. *See supra* Section IV.

184. *See* discussion *supra* Sections III-IV.

organization where one of its agents acts in an illegal manner.¹⁸⁵ The landmark 1909 case of *New York Central & Hudson River Railroad Co. v. United States* established that where an employee unlawfully acts under the auspices of an employer, both the individual and organization can be criminally charged by the government.¹⁸⁶ In subsequent years, different circuit courts have cited this case as the basis for reaffirming the doctrine, and researchers have analyzed this principle in their scholarship as well.¹⁸⁷

Based on this precedent, the critique of this Article's framework can be summarized simply: if the law allows for sanctions that can hold an entity liable on more serious, criminal grounds, then surely there should be nothing wrong with saying that the entity can be civilly penalized when one of its lawyers acts vexatiously.¹⁸⁸ In the latter context, no one is at risk of losing their liberty. All that is being assessed is a monetary fine, which, while potentially significant, does not amount to imprisonment or criminal sanctions of the entity's leadership. Moreover, it would seem backwards to allow for harsher consequences to be meted out against an organization, but then not to allow for civil remedies to be pursued as well. Victims of crimes often file civil proceedings against defendants as part of what might be seen as a comprehensive recovery process.¹⁸⁹

Although seemingly persuasive, it should be noted that there is a serious deficiency to this criticism. When a corporation has policies that are inadequate, nonexistent, or not being enforced, it is justifiable to both criminally and civilly extend liability beyond just the agent who is acting unlawfully.¹⁹⁰ In these circumstances, the corporation

185. See *N.Y. Cent. & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 494-97 (1909).

186. *Id.* at 496-97.

187. See, e.g., *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 971 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004-07 (9th Cir. 1972); Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1570-73 (1990); Brent Fisse, *Restructuring Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1185-86 (1983).

188. This argument would likely draw on sources identified in the previous footnote. See *supra* note 187.

189. Of course, "just compensation" is most frequently cited in the context of takings and the U.S. Constitution's Fifth Amendment. See U.S. CONST. amend. V. For pedagogical material on this subject, see JESSE DUKEMINIER ET AL., PROPERTY (10th ed. 2022).

190. Although it is important to note that this type of corporate criminal liability is not limited to just inadequate or unenforced policies. In theory, the corporate entity could still be reasonably vigilant and yet legally liable—criminally—if the criminal actions of the employee fall under the scope of employment. So, in that case, it would make sense to allow for the victim to pursue both criminal and civil actions against the corporation. (The reasonable vigilance by the corporation could make a difference in terms of sentencing or a prosecutor's

ought to be doing better at monitoring the actions of its employees. A failure to do so is a shirking of the basic supervisory responsibilities that corporate managers have over their workers.

In a litigation context, however, the situation is different. Whether it is a law firm, law school with legal clinics, nonprofit, or another type of organization, the ability of supervisors to monitor is much more difficult. Having a blanket rule that creates an expectation that higher-ups in an organization actually have a duty to keep a close eye on the litigation actions of their lawyers is more illusion than reality.

Nevertheless, for those who remain wedded to the vicarious liability position, they may, in turn, respond by arguing next for a more means-tested approach. Entities with resources and the ability to closely oversee their lawyers would be subject to organizational sanctions. Those with less means would be exempt.

Yet, the problem with this position is that it gets messy to try and figure out which organizations would qualify for the exemption, and which ones would not. Who would make such a decision—a court? If so, how would a judge determine the amount to be reached? Does an amendment to the Federal Rules of Civil Procedure need to be made, and how might one be crafted that would be acceptable to the various stakeholders? Would legislation or alterations to 28 U.S.C. § 1927 be required and if so, how likely is that to happen?

Given these challenges and the low probability that meaningful change on any of these fronts is in the offing, the question that naturally arises is: what is the best approach to pursue? As future researchers continue to contemplate this matter, it is important to remember that there are at least two competing issues that exist. One is how best to hold a vexatious lawyer responsible for misdeeds so that such behavior is deterred from occurring again. Another is if the circuit split is eventually resolved in favor of placing vicarious responsibility upon the entity, that such liability needs to be (a) proportional and (b) considerate of innocent parties—whether they be those actually injured by the vexatious conduct or those within the organization who are uninvolved.

Indeed, one could imagine a formula that imposes a penalty that is high enough to ensure that the punishment is significantly felt, while not being so excessive that the organization has to cease operations.¹⁹¹

decision on whether or not to charge, but it would not serve as a legal defense.) See Benjamin Thompson & Andrew Yong, *Corporate Criminal Liability*, 49 AM. CRIM. L. REV. 489, 492 (2012) (noting that “a corporation [is] vicariously liable for the acts of its employee if: (i) the individual acted within the scope and nature of his [or her] employment; (ii) the individual acted, at least in part, to benefit the corporation; and (iii) the act and intent of the individual can be imputed to the corporation” (footnotes omitted)).

191. For a reflection on this point, in the torts context, see RESTATEMENT (SECOND) OF TORTS § 826 (AM. L. INST. 1979), which provides a formula that may be applicable here for

To be sure, the nuts and bolts of this calculation would have to be determined, and this Article urges future researchers to contemplate the necessary logistics.¹⁹² For now, though, the hope is that observers who instinctively advocate for organizational liability will pause and reflect on the implications that such a rule might have on entities that have thus far been ignored in the current conversation.

determining when “(a) the gravity of the harm outweighs the utility of the actor’s conduct, or (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.” This type of calculus could be relevant to the point made in the above text.

192. *See generally id.* (providing the possible test). Also, it is important to remember that it may be the client who is ordering the lawyer to behave in a vexatious manner rather than the entity-employer. If this is the case, then that aspect needs to be incorporated within the discussion.

Appendix A**Business Structure of the Top 400 Law Firms by Attorney Headcount in the United States¹⁹³**

	<u>Firm</u>	<u>Business Structure</u>
1	Kirkland & Ellis	LLP
2	Latham & Watkins	LLP
3	Greenberg Traurig	LLP
4	Holland & Knight	LLP
5	Sidley Austin	LLP
6	DLA Piper	LLP
7	Morgan Lewis	LLP
8	Jones Day	GP
9	Gibson Dunn	LLP
10	Goodwin Procter	LLP
11	Lewis Brisbois	LLP
12	Ropes & Gray	LLP
13	Dentons	Swiss Verein
14	Gordon Rees	LLP
15	Skadden	LLP
16	K&L Gates	LLP
17	Little Mendelson	PC
18	Perkins Coie	LLP
19	Simpson Thacher	LLP
20	Cooley	LLP
21	Mayer Brown	LLP
22	Covington & Burling	LLP
23	King & Spalding	LLP
24	Troutman Pepper	LLP
25	McDermott Will & Emery	LLP
26	Foley & Lardner	LLP
27	Wilson Elser	LLP
28	Hogan Lovells	LLP
29	WilmerHale	LLP
30	Reed Smith	LLP

193. For the methodology of how this ranking was derived, see *supra* note 67. The headcount list is updated as of December 31, 2023. See Bell & Wilkinson, *supra* note 67.

31	Wilson Sonsini	PC
32	Faegre Drinker	LLP
33	Baker & Hostetler	LLP
34	Morgan & Morgan	PA
35	Husch Blackwell	LLP
36	Jackson Lewis	PC
37	Fox Rothschild	LLP
38	Arnold & Porter	LLP
39	Sheppard Mullin	LLP
40	Polsinelli	PC ¹⁹⁴
41	Ogletree	PC
42	Davis Polk	LLP
43	Paul, Weiss	LLP
44	Nelson Mullins	LLP
45	Quinn Emanuel	LLP
46	White & Case	LLP
47	McGuireWoods	LLP
48	Winston & Strawn	LLP
49	Debevoise & Plimpton	LLP
50	Alston & Bird	LLP
51	Weil	LLP
52	Seyfarth Shaw	LLP
53	Taft Stettinius & Hollister	LLP
54	Willkie Farr & Gallagher	LLP
55	Paul Hastings	LLP
56	Cozen O'Connor	PC
57	Venable	LLP
58	Hunton Andrews Kurth	LLP
59	Morrison & Foerster	LLP
60	Duane Morris	LLP
61	Orrick	LLP
62	Norton Rose Fulbright	LLP
63	Barnes & Thornburg	LLP
64	Sullivan & Cromwell	LLP

194. This firm is registered as an LLP in California but as a PC everywhere else.

65	Akin Gump	LLP
66	Akerman	LLP
67	Clark Hill	PLC
68	Dinsmore & Shohl	LLP
69	Dechert	LLP
70	Proskauer Rose	LLP
71	Vinson & Elkins	LLP
72	O'Melveny & Myers	LLP
73	Blank Rome	LLP
74	Fried Frank	LLP
75	Baker Donelson	PC
76	Bradley Arant Boult Cummings	LLP
77	Milbank	LLP
78	Haynes Boone	LLP
79	Baker McKenzie	LLP
80	Pillsbury	LLP
81	Squire Patton Boggs	LLP
82	Ballard Spahr	LLP
83	Katten Muchin Rosenman	LLP
84	ArentFox Schiff	LLP
85	Davis Wright Tremaine	LLP
86	Womble Bond Dickinson	LLP
87	Nixon Peabody	LLP
88	Frost Brown Todd	LLP
89	Kilpatrick Townsend & Stockton	LLP
90	Cole, Scott & Kissane	PA
91	Crowell & Moring	LLP
92	Mintz	PC
93	Fisher & Phillips	LLP
94	Baker Botts	LLP
95	Cleary Gottlieb	LLP
96	Bryan Cave Leighton Paisner	LLP
97	Kutak Rock	LLP
98	Fragomen	LLP
99	Maynard Nexsen	PC
100	Locke Lord	LLP

101	Shook, Hardy & Bacon	LLP
102	Dorsey & Whitney	LLP
103	Quarles & Brady	LLP
104	Jackson Walker	LLP
105	Jenner & Block	LLP
106	Marshall Dennehey	PC
107	Snell & Wilmer	LLP
108	Fenwick & West	LLP
109	Cravath, Swaine & Moore	LLP
110	Spencer Fane	LLP
111	Hinshaw & Culbertson	LLP
112	Holland & Hart	LLP
113	Buchalter	PC
114	Quintairos Prieto	PA
115	Stinson Leonard Street	LLP
116	Wood Smith Henning & Ber- man	LLP
117	Williams & Connolly	LLP
118	Dickinson Wright	PLLC
119	Goldberg Segalla	LLP
120	Thompson Coburn	LLP
121	Saul Ewing	LLP
122	Eversheds Sutherland	LLP
123	Buchanan Ingersoll & Rooney	PC
124	Loeb & Loeb	LLP
125	Butler Snow	LLP
126	Benesch	LLP
127	Thompson Hine	LLP
128	McCarter & English	LLP
129	Fredrikson & Byron	PA
130	Gunderson Dettmer	LLP
131	Moore & Van Allen	PLLC
132	Dykema Gossett	PLLC
133	Freeman Mathis & Gary	LLP
134	Phelps Dunbar	LLP
135	Bass, Berry & Sims	PLC

136	Ice Miller	LLP
137	Lowenstein Sandler Cadwalader, Wickersham &	LLP
138	Taft	LLP
139	Fish & Richardson	PC
140	Vorys	LLP
141	Hall Booth Smith	PC
142	Burr & Forman	LLP
143	Step toe	LLP
144	Epstein Becker & Green	PC
145	Carlton Fields	PA
146	Kramer Levin	LLP
147	Jones Walker	LLP
148	Michael Best & Friedrich	LLP
149	Schulte Roth & Zabel	LLP
150	Step toe & Johnson	PLLC
151	Stoel Rives	LLP
152	Armstrong Teasdale	LLP
153	Honigman	LLP
154	Foley Hoag	LLP
155	Smith, Gambrell & Russell	LLP
156	Day Pitney	LLP
157	Eckert Seamans	LLC
158	Bond, Schoeneck & King	PLLC
159	Lathrop GPM	LLP
160	Bracewell	LLP
161	Vedder Price	PC
162	Knobbe Martens	LLP
163	O'Hagan Meyer	PLLC
164	Cahill Gordon & Reindel	LLP
165	Shearman	LLP
166	Gunster	PA
167	Adams & Reese	LLP
168	FisherBroyles	LLP
169	Manatt, Phelps & Phillips	LLP
170	McAngus Goudelock & Courie	LLC
171	Kelley Drye & Warren	LLP

172	Brownstein Hyatt	LLP
173	Shumaker, Loop & Kendrick	LLP
174	Parker Poe Adams & Bernstein	LLP
175	Offit Kurman	PA
176	Shutts & Bowen	LLP
177	Wicker Smith	PA
178	Barclay Damon	LLP
179	Fennemore Craig	PC
180	Finnegan	LLP
181	Robinson & Cole	LLP
182	Chapman and Cutler	LLP
183	Wachtell, Lipton, Rosen & Katz	GP
184	Thompson Coe	LLP
185	Wiley Rein	LLP
186	Goulston & Storrs	PC
187	Cordell & Cordell	PC
188	Litchfield Cavo	LLP
189	Kasowitz Benson Torres	LLP
190	Williams Mullen	PC
191	Winstead	PC
192	GrayRobinson	PA
193	Kubicki Draper	PA
194	Warner Norcross & Judd	LLP
195	Rivkin Radler	LLP
196	Atkinson Andelson	PC
197	Chartwell Law Offices	LLP
198	Amundsen Davis	LLC
199	Lewis Roca	LLP
200	Best Best & Krieger	LLP
201	Tucker Ellis	LLP
202	Susman Godfrey	LLP
203	Pryor Cashman	LLP
204	Allen Matkins	LLP
205	Constangy	LLP
206	Morrison Mahoney	LLP
207	Greenspoon Marder	LLP

208	Balch & Bingham	LLP
209	Hanson Bridgett	LLP
210	Stradley Ronon	LLP
211	Tyson & Mendes	LLP
212	Kaufman Dolowich	LLP
213	Miller Canfield	PLC
214	Choate	LLP
215	Kean Miller	LLP
216	Whiteford	LLP
217	Reinhart Boerner Van Deuren	SC
218	Kelley Kronenberg	PA
219	Harris Beach	PLLC
220	Brown Rudnick	LLP
221	Munger Tolles	LLP
222	Hodgson Russ	LLP
223	Varnum	LLP
224	White and Williams	LLP
225	Parsons Behle & Latimer	PC
226	Morris Manning	LLP
227	Berry Appleman	LLP
228	Bricker Graydon	LLP
229	Hughes Hubbard	LLP
230	Stevens & Lee	PC
231	Procopio Cory	LLP
232	Rimon	PC
233	Godfrey & Kahn	SC
234	Arnall Golden	LLP
235	Patterson Belknap	LLP
236	Dickie McCamey	PC
237	Robins Kaplan	LLP
238	Stites & Harbison	PLLC
239	Chiesa Shahinian	PC
240	Cole Schotz	PC
241	Luks Santaniello	LLC
242	Swift Currie	LLP
243	Lippes Mathias	LLP

244	Cullen & Dykman	LLP
245	Richards Layton	PA
246	Kirton McConkie	PC
247	Miles & Stockbridge	PC
248	McAfee & Taft	PC
249	Archer & Greiner	PC
250	Sandberg Phoenix	PC
251	Winthrop & Weinstine	PA
252	Robbins Geller	LLP
253	McDonald Hopkins	LLC
254	Chamberlain Hrdlicka	PC
255	Robinson Bradshaw	PA
256	Bowman and Brooke	LLP
257	Roetzel & Andress	LPA
258	Windels Marx	LLP
259	Munsch Hardt	PC
260	Bodman	PLC
261	Hinckley Allen	LLP
262	MG+M The Law Firm	LLP
263	Lane Powell	PC
264	McGlinchey Stafford	PLLC
265	Burns White	LLC
266	von Briesen	SC
267	Burke Williams	LLP
268	Sterne Kessler	PLLC
269	Phillips Lytle	LLP
270	Porter Wright	LLP
271	Connell Foley	LLP
272	Wiggin and Dana	LLP
273	Crowley Fleck	PLLP
274	McElroy Deutsch	LLP
275	Stoll Keenon	PLLC
276	Verrill Dana	LLP
277	Hall Render	PC
278	McNees Wallace	LLC
279	Gibbons	PC

280	Schwabe Williamson	PC
281	Resnick & Louis	PC
282	Cipriani & Werner	PC
283	Stearns Weaver	PA
284	Taylor English	LLP
285	Hawkins Parnell	LLP
286	Boies Schiller	LLP
287	Pierce Atwood	LLP
288	Smith Anderson	LLP
289	Bremer Whyte	LLP
290	Butler Weihmuller	LLP
291	Post & Schell	PC
292	Reminger	LPA
293	Miller Nash	LLP
294	Jackson Kelly	PLLC
295	Carr Allison	PC
296	Rutan & Tucker	LLP
297	Kelly Hart	LLP
298	Sullivan & Worcester	LLP
299	Sherman & Howard	LLC
300	Banker Lopez	PA
301	Nutter	LLP
302	Davis Graham	LLP
303	FordHarrison	LLP
304	Manning Kass	LLP
305	Shipman & Goodwin	LLP
306	Liskow & Lewis	APLC
307	Miller Johnson	PLC
308	Foster Garvey	PC
309	Davis+Gilbert	LLP
310	Greensfelder Hemker	PC
311	Cox Castle	LLP
312	Hahn Loeser	LLP
313	Calfee Halter	LLP
314	Lewis Rice	LLC
315	Gray Reed	LLP

316	Ulmer & Berne	LLP
317	Howard & Howard	PLLC
318	Swanson, Martin & Bell	LLP
319	Hall Estill	PC
320	Potomac Law Group	PLLC
321	Nossaman	LLP
322	Vernis & Bowling	PA
323	SBSB Eastham	PLLC
324	Messner Reeves	LLP
325	Herrick Feinstein	LLP
326	Norris McLaughlin	PA
327	McCalla Raymer	LLC
328	Seward & Kissel	LLP
329	Sills Cummis	PC
330	Barley Snyder	LLP
331	Kaufman Borgeest	LLP
332	Keating Muething	PLL
333	DeWitt	LLP
334	Conroy Simberg	PA
335	Bernstein Shur	PA
336	Spilman Thomas	PLLC
337	Riker Danzig	LLP
338	Neal Gerber	LLP
339	Butzel Long	PC
340	Beveridge & Diamond	PC
341	Galloway Johnson	APLC
342	Plunkett Cooney	PC
343	Brock & Scott	PLLC
344	Hanna Brophy	LLP
345	Keker Van Nest	LLP
346	Becker & Poliakoff	PC
347	Burns & Levinson	LLP
348	Morrison Cohen	LLP
349	Hall & Evans	LLC
350	Abrams Fensterman	LLP
351	Farella Braun	LLP

352	Miller & Martin	PLLC
353	Porter Hedges	LLP
354	McKool Smith	PC
355	Dilworth Paxson	LLP
356	Lydecker LLP	LLP
357	Lieff Cabraser	LLP
358	Segal McCambridge	Ltd
359	Ward and Smith	PA
360	Leech Tishman	LLC
361	Weber Gallagher	LLP
362	Foley & Mansfield	PLLP
363	Albert & Mackenzie	LLP
364	Milber Makris	LLP
365	Hill Ward	PA
366	Obermayer Rebmann	LLP
367	Barack Ferrazzano	LLP
368	Thomas J. Henry Injury Attorneys	PLLC
369	Lozano Smith	PC
370	Bressler Amery	PC
371	Wolf Greenfield	PC
372	Crowe & Dunlevy	PC
373	Young Conaway	LLP
374	Wheeler Trigg	LLP
375	Motley Rice	LLC
376	Linebarger Goggan	LLP
377	Farah & Farah	PA
378	Kiernan Trebach	LLP
379	Banner Witcoff	Ltd
380	Wyrick Robbins	LLP
381	Harter Secrest	LLP
382	Wyatt Tarrant	LLP
383	McLane Middleton	PA
384	Tarter Krinsky	LLP
385	Brooks Pierce	LLP
386	Haynsworth Sinkler Boyd	PA
387	Kellogg Hansen	PLLC

388	Kopka Pinkus Dolin	PC
389	Mitchell Silberberg & Knupp	LLP
390	Lewis Thomason	PC
391	Mullen Coughlin	LLC
392	Hedrick Gardner	LLP
393	Pillinger Miller	LLP
394	Shulman Rogers	PA
395	Mandelbaum Barrett	PC
396	Drummond Woodsum	PA
397	Schwegman Lundberg	PA
398	Jeffer Mangels	LLP
399	Babst Calland	PC
400	Hamilton, Miller & Birthisel	LLP

THE RELATIONSHIP AMONG LANGUAGE, MORALITY, AND LAW: THE CHICKEN AND THE EGG

ALAN M. DERSHOWITZ*

Which came first: language, morality, or law? The relationship among these three components of civilization is complex and ever-changing, with each influencing the other in subtle ways.

Law is based on language. Law's commands—its prohibitions, duties, punishments, and rewards—are all expressed in words. Often, these words are inadequate to reflect the nuances of the moral underpinnings of the legal rules.

As Justice Oliver Wendell Holmes Jr. put it: “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.”¹ Because of the inherent inadequacy of language to capture the complexity of human thought and action, the law is often a blunderbuss, rather than a scalpel. Where morality suggests a continuum, the law demands arbitrary lines—on-off switches rather than dimmers. The result is often retail injustice at the edges in order to bring about wholesale justice at the core.²

As Aristotle cautioned:

[The] law is always a general statement, yet there are cases which it is not possible to cover in a general statement. In matters therefore where, while it is necessary to speak in general terms, it is not possible to do so correctly, the law takes into consideration the majority of cases, although it is not unaware of the error this involves. And this does not make it a wrong law; for the error is not in the law nor in the lawgiver, but in the nature of the case: the material of conduct is essentially irregular.³

There are those who argue that human beings are naturally endowed not only with a grammar of language, but also with a universal grammar of morality.⁴ If this were true, it would also suggest a universal language of law, since morality and law are so closely

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1. *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (quoting *Lamar v. United States*, 240 U.S. 60, 65 (1916)).

2. *See, e.g.*, ARISTOTLE, *NICOMACHEAN ETHICS* bk V (G.P. Goold ed., H. Rackham trans., Harvard Univ. Press rev. ed. 1934) (c. 384 B.C.E.).

3. *Id.* at 5.10.4.

4. *See* MARC D. HAUSER, *MORAL MINDS* (2006). *See also*, NOAM CHOMSKY, *LANGUAGE AND POLITICS* 210 (C. P. Otero ed., 2d ed. 2004) (“[W]e should conclude that in the case of the development of moral systems, there’s a biological endowment which in effect requires us to develop a system of moral judgment and a theory of justice. . .”).

connected. Indeed, some degrees and types of morality may well have preceded language.

Evidence suggests some degree of universality in the language employed by morality and law—at least at the most abstract level. Concepts such as fairness, due process, equality, property, evidence, guilt, justification, and excuse seem pervasive, though in varying degrees, in nearly all systems of law and morality. But this commonality of language often masks real differences in the law and morality in action. The Constitution of the Soviet Union was a model of rights and liberties!

The American Declaration of Independence spoke of equality—“all men are created equal”—at a time when slavery was central to the economies not only of the South but also of parts of the North, and Black “men” were considered “property” that their white owners had a “right” to possess, exploit and sell.⁵

Yet the language of equality played an important role in the formation of our nation. The same can be said about many other nations, including Israel, whose founding documents employed the language of equality, but some of whose actions—perhaps born of necessity—often were at variance with that language.⁶

Language often reflects aspirations, rather than reality. It forces citizens to acknowledge the hypocrisy represented by the disparity between words and deeds. If hypocrisy is the “homage vice pays to virtue” as Rochefoucauld once observed, then it is important to maintain the language of aspiration as we engage in the never-ending struggle to move ignoble deeds closer to noble words.⁷

The “chicken-egg” question inevitably arises in considering the relationship among language, law, and morality. Which comes first? John tells us that “in the beginning was the word”, but anthropology teaches that the deed preceded the word—that there was killing before

5. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). *See, e.g.* SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 132, 149 (1965). Some pre-Civil War state constitutions declared the “right” to own slaves as “before and higher than any constitutional sanction.” *See* ALAN M. DERSHOWITZ, RIGHTS FROM WRONGS 138 (2005). Nor were non-slaves equal before the law: Jews could not hold office in several states, *see, e.g.*, ALEXANDER DECONDE, ETHNICITY, RACE, AND AMERICAN FOREIGN POLICY 52 (1992); Catholics were officially discriminated against, *see, e.g.* SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 590-91 (1965); and citizens who could not afford to pay a poll tax were denied the right to vote. *See, e.g.*, FREDERIC D. OGDEN, THE POLL TAX IN THE SOUTH 4 (1958). It was not until the ratification of the Twenty-fourth Amendment in 1964 that both Congress and state legislatures were prohibited from conditioning the right to vote in federal elections on the ability to pay a poll tax. The Supreme Court extended this prohibition on the state level in *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966).

6. THE ISRAELI DECLARATION OF INDEPENDENCE (May 14, 1948). (“[The State of Israel] will uphold the full social and political equality of all its citizens, without distinction of race.”)

7. FRANCOIS DE LA ROUCHEFOUCAULD, COLLECTED MAXIMS AND OTHER REFLECTIONS 63 (E. H. & A. M. Blackmore, & Francine Giguère trans., Oxford World’s Classics 2008).

there was a prohibition against killing, as the biblical story of Cain exemplifies.⁸ Only after his murder of Abel, did the Bible ordain that he “whoso sheddeth man’s blood, by man shall his blood be shed.”⁹ Freud also placed the deed before the word when he quipped that when the first man who “flung a word of abuse at his enemy instead of a spear was the founder of civilization.”¹⁰

Does the language of a particular culture influence its morality and law? Or does the morality and law of a particular culture influence its language? Both are obviously true to some degree. The word “right,” for example, is not common in early, religious-based cultures.¹¹ It becomes more common as cultures move toward democracy and recognize that individuals are entitled to have certain expectations in relationship to the government.¹²

8. The prohibition against killing first appeared in God’s covenant with Noah. *Genesis* 9:6 (English Standard Version). “Whoever sheds the blood of man, by man shall his blood be shed, for God made man in his own image,” which appears many chapters after the murder of Abel. *Genesis* 9:6, 4:10-4:11 (English Standard Version).

9. *Genesis* 9:6 (King James). For an analysis of the Cain and Abel story, see ALAN DERSHOWITZ, *THE GENESIS OF JUSTICE: TEN STORIES OF BIBLICAL INJUSTICE THAT LED TO THE TEN COMMANDMENTS AND MODERN MORALITY AND LAW*, Ch. 2 (Warner Books, 2000).

10. Quoted in JOSE BRUNNER, *FREUD AND THE POLITICS OF PSYCHOANALYSIS* (Taylor & Francis, 2018) Freud quotes the English writer Hughlings Jackson here but the quotation is often attributed to Freud.

11. “Right” has multiple meaning in current usage. In addition to legal entitlement, it also means “correct,” as in “right and wrong,” as well as “conservative,” as in “right-wing.” See “Law” in 8 OXFORD ENGLISH DICTIONARY (J.A. Simpson & E. S. C. Weiner, eds.) (2d. ed., 1989). There is no precise Biblical or ancient Hebrew word for rights (as we use the term today) because in most ancient legal cultures group obligations preceded individualistic notions of rights by many centuries. The Hebrew word for rights, *zchut*, derives from the ancient word for property or assets. See George P. Fletcher, *In Honour of Ius et Lex: Some Thoughts on Speaking about Law*, Lecture in Honor of Leon Petrazycki, Inauguration of IUS ET LEX LEGAL MAGAZINE, June 1, 2001, available at <http://www.iusetlex.pl/pdf/fletcher.pdf>. The concept of “rights” also does not exist in traditional Islam. As one scholar explained this absence:

Islam is first and foremost the religion of submission (the literal meaning of *islām* is ‘submission’), and the slave-master relationship is an important symbol of the believer’s relationship with God. Rights in the sense of self-assertion (‘I’ve got a right to do x’) or in the sense of pressing a claim against God (or against a fellow human being) thus seem to run counter to the spirit of Islam. . . . From an Islamic perspective, personal and moral autonomy (whether based on theories of rights or on Kantian individualism) is a kind of nonsense, for two reasons: first, it involves usurping God’s own position as the judge of good and evil; and second, it cuts the individual off from the community of faith.

J. Marc Halstead, *Islamic Values: A Distinctive Framework for Moral Education?*, 36 J. MORAL EDUC. 283, 289 (No. 3, September 2007).

12. If merely understood as “entitlement,” one could claim that “rights” had always existed. As anthropologists point out, even the most primitive societies are governed by some kinds of social norms—certain rules specifying which individuals have special permission to do certain things and are entitled to tell others what they must do. Such rules ascribe “rights.” Leif Wenar, “Rights” in: *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2011). Understood in the broader sense, many contemporary scholars date it back to the 11th or 12th century. ANNABEL S. BRETT, *LIBERTY, RIGHT AND NATURE* (1997); BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS* (1997).

Words matter. Language is a weapon of advocacy. As President John Kennedy said of Churchill: “[H]e mobilized the English language and sent it into battle.”¹³ Evil leaders such as Hitler have also mobilized their languages of hate. Many years ago, when I was a law clerk for Justice Arthur Goldberg who had been America’s most prominent labor lawyer, he gave me an example of the power of language. Organized labor was fighting for a provision that would require all workers in particular industries to join the union. Management was opposed to this provision.

The controversy was hot and heavy until management came up with a phrase describing their position as “the right to work.” They sought “right to work laws.” Goldberg told me that as soon as they came up with that phrase, the fight was over, since all Americans support the right to work.¹⁴ Similarly when anti-abortionists came up with the phrase “right to life,” they strengthened their position enormously, since the right to life trumped the right to choose in the minds of many undecided voters.¹⁵ Moreover, describing the fetus as a “baby” also substituted a powerful emotional word for an antiseptic scientific one. Other phrases—such as “the right to bear arms” and “victims’ rights”—have also resonated with the public. Words really do matter.

In a rights-oriented society, bestowing the imprimatur of “right hood” on a preference or a power changes the nature of the debate.¹⁶ This has been true as far back as when kings claimed the “divine right” of monarchs, even though the word “right” had no real meaning in the context of such a claim, since rights, properly understood, are claims against the power of the government. Likewise, the emotive phrase “victims’ rights” makes little rational sense, especially in the context of the criminal justice system, since the government is on the side of the victims. Thus, the term “victims’ rights” has been used, essentially, to deny criminal defendants *their* constitutional rights to which they are entitled when prosecuted by the government.

There are other ways as well in which language influences law and morality. Consider the word “law” itself. In the English language, the word “law” has several distinctive meanings: it means the ever-

13. John F. Kennedy, President, Proclamation Conferring Honorary U.S. Citizenship on Sir Winston Churchill (April 9, 1963).

14. For a history of how the so-called “right to work” laws were a slogan designed to undermine union power, see GILBERT J. GALL, *Thoughts on Defeating Right-to-Work: Reflections on Two Referendum Campaigns in ORGANIZED LABOR AND AMERICAN POLITICS, 1894-1994* 195, 197 (Kevin Boyle, ed., 1998).

15. This was complicated by the fact that many of the most vocal supporters of a woman’s right to choose abortion were stridently opposed to a man’s right to choose to view pornography or other sexist material. I’ve described my own encounter, both as a lawyer and academic, with those “feminist censors” in several of my books, see, e.g., ALAN M. DERSHOWITZ, *THE BEST DEFENSE* 155-192 (1983), ALAN M. DERSHOWITZ, *SHOUTING FIRE* 163-175 (2002).

16. See MARY ANN GLENDON, *RIGHTS TALK* (1991).

changing human-made law, such as the Internal Revenue Code, the Penal Code and the Constitution; but it also means the immutable laws of nature, such as Newton's laws of gravity, the laws of physics, and

Einstein's laws of relativity; and for some it means the "natural law" of God (or some other objective or external source) that trumps positive, man-made law.¹⁷ In other languages, there are distinct words for these very different types of "law" (as in some cold cultures there are numerous words for different kinds of snow). This trichotomy of American usage regarding the loaded word "law" sometimes confuses students and may incline some toward an unthinking acceptance of the concept of "natural law," that is prescriptive rules of conduct that are as immutable and external as the "laws" of physics.

Most languages have two terms for law—one refers to law that derives its authority from the power of the legislature; the other refers to a broader sense of law, encompassing not only statutory law but eternal principles of justice.¹⁸ The fact that the English language does not make this distinction between *ius* and *lex* (in Latin) or *Recht* and *Gesetz* (in German) causes not only confusion but may have wide-ranging implications. For instance, the legal philosopher H.L.A. Hart argued that that having two notions allows courts to deal with crimes which were committed in perfectly legal form under an earlier regime. So, German courts in the 1950s could rebut the Eichmann defense—that one was just following orders—by declaring, "This may have been the *Gesetz* but it certainly was not *Recht*."¹⁹

Some scholars also argue that the lack of systematic ambiguity in the English language when using the word "law" results in an imprecision when the concept of "the rule of law" is invoked: does an English

17. In the sciences, the word "law" is also used in describing "a theoretical principle deduced from particular facts...and expressible by the statement that a particular phenomenon always occurs if certain conditions be present." The word "law" in this scientific sense was first used in the 17th century by Johannes Kepler in his *NEW ASTRONOMY* (1609). It was later also used by Galilei, Descartes, Leibniz and Newton. In the physical sciences, those laws are also sometimes called "law of nature" and "natural law" because they were viewed "as commands imposed by the Deity upon matter." Even writers who did not accept this view, like Spinoza, often spoke of them as "obeyed" by the phenomena, or as "agents by which the phenomena are produced." See *OXFORD ENGLISH DICTIONARY*, *supra* note 11, at 714. Other languages, too, use their word for "law" in the scientific context. In German, for instance, a *Naturgesetz* can describe physical laws, such as Newton's law. But *Naturgesetz* can also mean *natural law* in the jurisprudential sense, as in "the natural law theory of Aquinas." In other words, it can have a descriptive and normative meaning. *Naturgesetz*, *UTB HANDWOERTERBUCH DER PHILOSOPHIE*, <https://www.utb.de/doi/book/10.36198/9783838586915> (last visited Apr. 26, 2025). The same is true for the French word *loi naturelle*. *Loi naturelle*, *LINTERNAUTE ENCYCLOPEDIE*, <http://www.linternaute.com/dictionnaire/fr/definition/loi-naturelle> (last visited Apr. 26, 2025).

18. For example, *lex/ius* in Latin, *Gesetz/Recht* in German, *loi/droit* in French, *ley/derecho* in Spanish, *legge/diritto* in Italian.

19. H.L.A. HART, *THE CONCEPT OF LAW* 208 (Peter Cane et al. eds., 2d. ed. 1997).

speaker mean a *Gesetzesstaat*—a state based on laws laid down—or *Rechtsstaat*—a state committed to higher principles of justice?²⁰

Language has power that can cut both ways. Consider the word “rape.” In its original meaning, rape conveyed a sense of force, violence, and physical brutality. The image of the rapist was the stranger who physically assaulted his victim in a dark alley either by grabbing her from behind and forcing himself on her, or by threatening to kill her with a gun or knife. Over time, the meaning of rape has been expanded to include date rape that involved a lack of consent without force or threat of violence, and even rape by “fraud” or “trickery.”²¹ This may be a positive development, but it has diluted the power of the word “rape,” so that today the image of the “rapist” includes the drunken college freshman who doesn’t believe that “no”—or the absence of “yes”—now means “no,” both as a matter of law and morality.

It is fair to ask whether it would have been better, all things considered, to maintain the original connotation of the word “rape” and to employ different words—such as “unconsented to sex,” or “sex by fraud”—to define new crimes representing the emerging approach to sexual autonomy and the requirement of affirmative and knowing consent. Reasonable people can and do disagree about this. The important point is that there are consequences—some positive, some negative—to expanding (and diluting) the meaning of a powerful word such as “rape.”

The same is true of terms like racism, antisemitism, homophobia, sexism, and Islamophobia. These once powerful words of conscription have been softened in their impact by their political weaponization and promiscuous invocation. Language influences law and morality in myriad ways. Consider, for example, the way in which the literary narrative influences the way we look at crime. The classic literary narrative, like the Biblical narrative, is logical, coherent, and purposive. Chekhov put it aptly when he advised a young playwright that “[i]f in the first chapter you say that a gun hung on the wall, in the second, or third chapter it must without fail be discharged.”²² In literature, as in the Bible, there is no coincidence, randomness, or superfluous in the use of language. Every word or act has a *raison d’être*—a role in the narrative, a purpose. In real life, to the contrary, most words and acts are purposeless, random, and without meaning.²³ Many literary, biblical, and even constitutional scholars live by a rule of teleology that has little resonance in real life—namely, that every event, character, and

20. Fletcher, *see supra* note 11, at 5-6.

21. In addition, the word “rape” is used to describe factually “consensual” sex with an underage person who is deemed by law to be incapable of legal consent.

22. H. PORTER ABBOTT, *THE CAMBRIDGE INTRODUCTION TO NARRATIVE* 60 (2d ed. 2008).

23. *See* Alan M. Dershowitz, *Life Is Not A Dramatic Narrative*, in *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 99 (Peter Brooks & Paul Gewirtz eds., 1996).

word has a purpose. “To every *thing there is* a season, and a time to every purpose under heaven,” says Ecclesiastes.²⁴ God does not engage in redundancy, say the Talmudists.²⁵ Freud, whose forebears came from that tradition, similarly believed that all words, even those dreamed or spoken in error, have meaning.²⁶ Some lawyers who view our Constitution in near biblical terms—and who seek to discern the true meaning of those near deities who wrote it—fall into the same teleo-/theological trap: every word of that secularly sacred text must have a purpose, a meaning, and if we only had the wisdom of the framers, we could discern it.

But life does not imitate art. Life is not a purposive narrative that follows Chekhov’s canon. Words and events are often simply meaningless, irrelevant to what comes next; in real life, our words and actions can be out of sequence, random, purely accidental, without purpose. If our universe and its inhabitants are governed by rules of chaos, randomness, and purposelessness, then many of the stories—if they can even be called stories—will often lack meaning. Human beings always try to impose order and meaning on random chaos, both to understand and to control the forces that determine their destiny. This desperate attempt to derive purpose from purposelessness will often distort reality, as, indeed, Chekhov’s canon surely does.

In Chekhovian drama, chest pains are followed by heart attacks, coughs by consumption, life insurance policies by murders, telephone rings by dramatic messages. In real life, most chest pains are indigestion, coughs are colds, insurance policies are followed by years of premium payments, and telephone calls are from marketing services.

To be sure, after the fact, we may be able to offer a plausible retrospective account, a story, or a narrative. As Sartre put it: “When you tell about life. . . [y]ou seem to start at the beginning. . . And in reality you have started at the end.”²⁷ Narrative often starts at the end. But rarely can we employ such retrospective accounts to predict their reoccurrence. Nor is the lack of prophetic ability merely a function of our relative ignorance. Often it is simply in the nature of things.

24. *Ecclesiastes* 3:1 (King James).

25. During the 15th and 16th centuries, a new intensive form of Talmud study arose. Complicated logical arguments were used to explain minor points of contradiction within the Talmud. The term *pilpul* was applied to this type of study. Usage of *pilpul* in this sense (that of “sharp analysis”) harks back to the Talmudic era and refers to the intellectual sharpness this method demanded.

Pilpul practitioners posited that the Talmud could contain no redundancy or contradiction whatsoever. New categories and distinctions (*hillukim*) were therefore created, resolving seeming contradictions within the Talmud by novel logical means. Mavro, *Talmud: The Hebrew Oral Teachings*, ABRAHAMIC STUDY HALL (July 29, 2017), <https://www.abrahamicstudyhall.org/2017/07/29/talmud-the-hebrew-oral-teachings/>.

26. See, e.g., SIGMUND FREUD, *THE PSYCHOPATHOLOGY OF EVERYDAY LIFE* (1914).

27. JEAN-PAUL SARTRE, *NAUSEA* 57 (Lloyd Alexander trans., New Directions Playbook ed. 2007) (1938).

Quantum physics corroborates on the micro level what paleontology teaches on the macro level. The most important rule in the game of life is that generally there are no knowable rules.

Perhaps it is the often-unspoken recognition of this nihilistic reality that drives us so powerfully toward perspective human laws by which we can exercise some control over our mostly random destiny and toward purposive narratives by which we seek to impose an order on the largely disordered words and deeds of life.

This critical dichotomy between teleological rules of drama, on the one hand, and the mostly random rules of real life, on the other, has profoundly important implications for our legal system. When we import the narrative form of storytelling into our legal system—when we rearrange words to create a coherent narrative—we confuse fiction with fact and endanger the truth-finding function of the adjudicative process. Fact finders are familiar with the dramatic form—not only from Chekhov but also from pulp novels, mysteries, movies, and television shows. They expect a beginning, a middle, and an end to each story. In drama, life unfolds in acts or chapters or between commercials. There is an internal logic to the structure. Defense attorneys now use this expectation to try to persuade jurors that there must be a reasonable doubt, if there are any loose ends to the prosecutor's narration. This is called the "law and order" tactic, named after the popular TV show. Life, as actually lived, is filled with randomness.

I once used this insight to win an appeal involving a businessman who had taken out a life insurance policy on his partner ten days before the partner was gunned down by a professional hit man. The District Attorney persuaded the jury that the timing could not possibly be coincidental and the businessman was convicted. I argued that the appellate court should not look at the case as if it were a made-for-TV-movie, but rather as a slice of real life, full of irrelevant actions and coincidences. I asked the judges how many of them had taken out life insurance on a loved one and what their neighbors would have thought if that loved one had died shortly thereafter. The court agreed and reversed the conviction.²⁸

Among the most pervasive narratives in the human experience have been the stories of justice. In these stories virtue is rewarded, vice punished, and justice achieved. The Psalmist reports, "I have been young, and now am old; yet have I not seen the righteous forsaken, nor his seed begging bread."²⁹ This is a narrative of justice. But it is a perversely false narrative. It is false because the history of humankind is replete with the abandonment of the righteous and their children. It is perverse because it implies that those who are

28. I discuss this case in my novel, ALAN M. DERSHOWITZ, *THE ADVOCATE'S DEVIL* 25-27 (1994).

29. *Psalms* 37:25 (King James).

abandoned must necessarily have been unrighteous.³⁰ In the early days of the motion picture industry, the Hays Commission required all films to follow this false heuristic, so as to persuade viewers that we live in a just world that does not require change.³¹ A Jewish commentator once used the absence of justice here on earth as an argument for a heaven in which early injustices are remedied.

The great Israeli novelist Amos Oz contrasted the Shakespearean and Chekhovian dramatic narratives in the context of the Middle-East conflict:

At the end of a Shakespeare tragedy, the stage is strewn with dead bodies, and maybe there's some justice hovering high above. A Chekhov tragedy, on the other hand, ends with everybody disillusioned, embittered, heartbroken, disappointed, absolutely shattered, but still alive. And I want a Chekhovian resolution, not a Shakespearean one, for the Israeli-Palestinian tragedy.³²

In real life, as distinguished from dramatic narrative, the resolution, if there ever is one, is likelier to be even messier than in Chekhov's plays.

To paraphrase Holmes, the life of the law should not be teleo-logic or theo-logic (neither of which is logic at all); it should be human experience.³³ And human experience cannot be cabined into the structure of narrative, language, or words. Let the language of literature continue to borrow from law and life (though it would borrow more accurately if it looked less to Chekhov for its canons of structure and more to Proust, Kerouac and Mamet). But let law develop its own rules of language, grammar structure, and editing—of evidence, relevance, and prejudice—by looking to the vagaries of real human experience.³⁴ And let fact finders be warned that life is not a Shakespearean or Chekhovian narrative.

Language, even in the hands and pens of its greatest practitioners, will never be capable of probing all the nuances of the human condition. Even Shakespeare and Dostoyevsky, whose insights into the inner workings of the human psyche and soul are unparalleled,

30. See ALAN M. DERSHOWITZ, *THE GENESIS OF JUSTICE* 236 (2000).

31. MOTION PICTURE ASSOCIATION OF AMERICA, INC., *THE MOTION PICTURE PRODUCTION CODE OF 1930* (1930). I discuss the Production Code in my essay, Alan M.B. Dershwotiz, *The Danger of Seeing Movies Through a Censor's Eye*, *THE CHRON. OF HIGHER EDUC.*, (Jul. 30, 1999), <https://www.proquest.com/docview/214711008?sourcetype=Trade%20Journals>.

32. Johann Hari, *A Life in Focus: Amos Oz, Israeli Literary Colossus and Lifelong Advocate of a Two-State Solution*, *THE INDEPENDENT* (Dec. 31, 2018 2:22 PM), <https://www.the-independent.com/news/obituaries/amos-oz-dead-israeli-writer-novelist-palistine-israel-tale-of-love-and-darkness-a8705681.html> (quoting Amos Oz).

33. OLIVER WENDELL HOLMES, JR., *The Common Law* in LECTURE I: EARLY FORMS OF LIABILITY 1 (1881).

34. Of course, human experience is itself distorted by one's interpretation of past events, which, in turn, is driven by men's need to create a narrative around random, independent events. See, e.g., DANIEL KAHNEMAN, *THINKING, FAST AND SLOW*, Ch. 19 (2011).

recognized that the language of the law, in its feeble efforts to reflect the human condition, is an inadequate mirror of life. But language is all we have to communicate experience from generation to generation, and without this capacity to transmit the knowledge acquired by one generation to another, humans would remain static, subject to only long-term evolution, as are all other animals, whose experiences gained over their lifetime die with them. Despite its limitations, language is what separates us from other species, and it is what makes law possible.

RETHINKING RESTRICTIONS:
HOW FLORIDA’S ONLINE PROTECTION FOR MINORS ACT
MAY PROVIDE A CONSTITUTIONAL FRAMEWORK FOR
SAFEGUARDING YOUTH FROM SOCIAL MEDIA

JACOB PHELPS*

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INTRODUCTION

In today’s digital age, our youth are facing an unprecedented “mental health crisis,” and a culprit can be traced back to a powerful force: social media.¹ Screens dominate children’s lives. “Up to 95% of youth ages 13-17 report using a social media platform, with more than a third saying they use social media ‘almost constantly.’”² Teens spend on average almost 5 hours a day on social media, more than double the amount of time they spend on homework.³ This has been associated with rising rates of depression and anxiety,⁴ normalization of self-harm acts,⁵ perpetuation of body dissatisfaction and disordered eating

1. See, e.g., Kenta Minamitani, *Social Media Addiction and Mental Health: The Growing Concern for Youth Well-Being*, SLS BLOGS (May 20, 2024), <https://law.stanford.edu/2024/05/20/social-media-addiction-and-mental-health-the-growing-concern-for-youth-well-being/> [https://perma.cc/T8SH-REPC]. It is noteworthy that, although research is ongoing, social media has not been definitively identified as the only factor involved; however, it is at least among the primary contributors. See, e.g., Nidhi Subbaraman, *More Children Are Depressed and Anxious. Is Social Media Really Behind It?*, WALL ST. J. (Oct. 15, 2024), <https://www.wsj.com/health/wellness/mental-health-children-social-media-d04190b3> [https://perma.cc/9AQP-KHB9].

2. U.S. DEP’T. OF HEALTH AND HUMAN SERVS., *Surgeon General’s Advisory on Social Media and Youth Mental Health* 4 (2023), <https://www.hhs.gov/sites/default/files/sg-youth-mental-health-social-media-advisory.pdf> [https://perma.cc/N35C-XM55] [hereinafter ADVISORY]; *Teens and Social Media Fact Sheet*, PEW RSCH. CTR. (Jan. 5, 2024), <https://www.pewresearch.org/internet/fact-sheet/teens-and-social-media-fact-sheet/?tabItem=26288fdf-8b5e-4076-97e4-84f6ce9ecbf7> [https://perma.cc/9RGH-7N8J] (“Many teens are on social media daily – if not constantly. . .”).

3. Jonathan Rothwell, *Teens Spend Average of 4.8 Hours on Social Media Per Day*, GALLUP (Oct. 13, 2023), <https://news.gallup.com/poll/512576/teens-spend-average-hours-social-media-per-day.aspx> [https://perma.cc/DA2E-LPHY]; *39 Homework Statistics To Know*, SCOTTMAX, <https://scottmax.com/homework-statistics/> [https://perma.cc/24G2-8CHZ] (last visited June 16, 2025) (noting that teenagers spend more than 2 hours per night on homework).

4. Kathy Katella, *How Social Media Affects Your Teen’s Mental Health: A Parent’s Guide*, YALE MED. (June 17, 2024), <https://www.yalemedicine.org/news/social-media-teen-mental-health-a-parents-guide>. [https://perma.cc/Q8SJ-BGMH]

5. ADVISORY, *supra* note 2, at 8.

behaviors,⁶ cyberbullying, and access to sexually explicit or violent content.⁷

These findings are not mere speculation. They are real. A teenage girl reported to the New York Times that social media “greatly affects [her] body image,” resulting in her questioning whether “a little over-exercising or a little starvation could pay off.”⁸ A ten-year-old in Pennsylvania died attempting a dangerous “Blackout Challenge” she saw on her TikTok’s For You Page.⁹ Despite states like Ohio, Arkansas, and Utah taking notice and enacting legislation to try and combat these harms,¹⁰ these states have been met with criticism as critics argue that their legislation infringes on First Amendment principles because it focuses on the content platforms host,¹¹ signaling an application of “the most demanding test known to constitutional law”: strict scrutiny.¹² Florida’s recent enactment of the Online Protections for Minors Act (“Minors Act”),¹³ however, may signify a shift in lawmakers’ approach to regulating social media usage.

In 2024, one issue stood out among the Florida Legislature’s top priorities: the unwavering commitment to safeguarding children.¹⁴

6. Helen Thai et al., *Reducing Social Media Use Improves Appearance and Weight Esteem in Youth With Emotional Distress*, AM. PSYCH. ASS’N (2023), available at <https://www.apa.org/pubs/journals/releases/ppm-ppm0000460.pdf> [<https://perma.cc/5GAX-Z2RX>].

7. Rebecca Maddrell, *Social Media Safety for Kids and Teens*, LOY. MED. (Dec. 7, 2021), <https://www.loyolamedicine.org/newsroom/blog-articles/social-media-safety-kids-teens> [<https://perma.cc/V77H-EHRN>].

8. The Learning Network, *What Students Are Saying About How Social Media Affects Their Body Image*, N.Y. TIMES (Mar. 31, 2022), <https://www.nytimes.com/2022/03/31/learning/what-students-are-saying-about-how-social-media-affects-their-body-image.html> [<https://perma.cc/5RA2-H7BV>].

9. *Lawsuit Against TikTok Over Pennsylvania Girl’s “Blackout Challenge” Death Reversed by US Appeals Court*, CBS NEWS (Aug. 28, 2024), <https://www.cbsnews.com/philadelphia/news/tiktok-blackout-challenge-lawsuit-nylah-anderson-death/> [<https://perma.cc/DEW8-UU7Q>].

10. *Social Media and Children 2024 Legislation*, NCSL (June 14, 2024) <https://www.ncsl.org/technology-and-communication/social-media-and-children-2024-legislation> [<https://perma.cc/EQ8M-74TL>] (summarizing the legislation from 30 states who have pending litigation surrounding social media and the youth). Ohio, Arkansas, and Utah are some of many states that have enacted legislation. Federal district courts have enjoined bills from Ohio, Arkansas, and Utah on First Amendment grounds and will be discussed *infra*. See *infra* Part II.

11. See *NetChoice, LLC v. Griffin*, No. 5:23-CV-05105, 2023 WL 5660155 (W.D. Ark. Aug. 31, 2023); *NetChoice, LLC v. Yost*, 716 F. Supp. 3d 539 (S.D. Ohio 2024); *NetChoice, LLC v. Reyes*, 748 F. Supp. 3d 1105 (D. Utah 2024), *appeal docketed*, No. 24-4100 (10th Cir. Oct. 11, 2024).

12. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (discussing the challenges of strict scrutiny).

13. Fla. CS/CS/HB 3 (2024); Fla. Stat. § 501.1736 (2024).

14. NEWS RELEASE, FLA. H.R. SPEAKER PAUL RENNER, *Speaker Renner Kicks Off 2024 Legislative Session 1* (Jan. 9, 2024), <https://www.myfloridahouse.gov/api/document/house?listName=Press%20Releases&itemId=888> [<https://perma.cc/A8KX-5KA3>] [hereinafter “NEWS RELEASE”].

From the start, Speaker Paul Renner and other representatives focused on how “addictive”¹⁵ social media has caused “unprecedented damage to children’s mental health.”¹⁶ He went on to say at a bill-signing ceremony held in Jacksonville that “[a] child in their brain development doesn’t have the ability to know that they’re being sucked into these addictive technologies and to see the harm and step away from it, and because of that we have to step in for them.”¹⁷ Governor DeSantis added, “[b]eing buried in those devices all day is not the best way to grow up—it’s not the best way to get a good education.”¹⁸ The result of Florida’s priority was the Minors Act, which may provide a framework for states to regulate their youth’s social media usage and withstand constitutional scrutiny by emphasizing the addictive features of the platforms rather than the content itself.

Part I examines Florida’s Minors Act, focusing on its purpose, legislative history, and wording. Part II discusses the First Amendment issue of scrutinizing the Minors Act will encounter¹⁹ and the void for vagueness doctrine under the Fourteenth Amendment,²⁰ concluding that the Minors Act passes intermediate scrutiny and is not void for vagueness. Part III proposes alternative considerations to the Minors Act, such as finding ways around Section 230’s legal shield or directly regulating smartphone developers.

I. FLORIDA’S ONLINE PROTECTION FOR MINORS ACT

Florida joined a list of seventeen other states²¹ that have enacted legislation to protect minors from the adverse health effects social media is having on minors with the passage of the Minors Act. The Minors Act is divided into two main topics: (1) protecting the youth from social

15. Tristan Wood, *Florida’s Social Media Ban for Kids May Survive After an Agreement With DeSantis*, HEALTH NEWS FLA. (Mar. 1, 2024), <https://health.wusf.usf.edu/health-news-florida/2024-03-01/kids-social-media-ban-is-still-being-debated-by-desantis-and-state-leaders> [https://perma.cc/XBC4-G2VG].

16. NEWS RELEASE, *supra* note 14, at 3.

17. Brendan Farrington, *Florida’s DeSantis Signs One of the Country’s Most Restrictive Social Media Bans for Minors*, AP NEWS (Mar. 25, 2024), <https://apnews.com/article/florida-social-media-ban-desantis-fd07f61e167bd9109a83cd7355b5f164> [https://perma.cc/BM6Q-ZSUK].

18. Ginger Adams Otis & Victoria Albert, *Florida Law Bans Social Media for Minors Under 14*, WALL ST. J. (Mar. 26, 2024), <https://www.wsj.com/us-news/law/florida-passes-law-banning-social-media-for-minors-under-14-abae4ce3> [https://perma.cc/65JG-TK9Z].

19. See Complaint at Count I, *NetChoice v. Moody*, Case 4:24-cv-00438-MW-MAF (N.D. Fla. filed Oct. 28, 2024) (arguing the Minors Act runs afoul of the First Amendment).

20. See *id.* at Count II (arguing the Minors Act runs afoul of the void for vagueness doctrine).

21. Lindsey Tonsager et al., *State and Federal Developments in Minors’ Privacy in 2024*, COVINGTON (Aug. 9, 2024), <https://www.insideprivacy.com/childrens-privacy/state-and-federal-developments-in-minors-privacy-in-2024/> [https://perma.cc/QLA2-VN4W].

media²² and (2) protecting the youth from pornographic material.²³ This Note addresses the first topic, Florida's aim to protect the youth from the harmful effects of addictive social media. Florida accomplishes this through three main avenues: (i) prohibiting minors younger than 14 from entering into a contract with a social media platform to become an account holder;²⁴ (ii) requiring social media platform to terminate any account held by an account holder younger than 14 years of age;²⁵ and (iii) permitting account holders of 14–15 years of age with parental consent.²⁶ This Note specifically addresses prohibiting social media access to minors under 14 because it represents a pioneering legislative measure. No other state has effectively prohibited a specific age group from using social media. This Part explores the purpose, history, and text of Florida's Minors Act to highlight the underpinnings that may permit the Minors Act to pass constitutional attacks.

A. *The Purpose of Florida's Minors Act was to Address the Growing Mental Health Epidemic Caused by Social Media*

Florida's strategy with the Minors Act centered on the harmful effects of social media platforms' addictive features rather than the damaging content they may host. The floor debates in the Florida House illustrate the Legislature's focus on the addictive features of social media platforms. Co-sponsor Representative Tyler Sirois stated that what the "legislation is drawing attention to is that these features being deployed are addictive in nature, . . . to keep [our kids] hooked and to keep them coming back for more—and manipulating their behaviors."²⁷ Co-sponsor Representative Fiona McFarland added that "[t]hese dopamine hits [from social media] are so addictive, it's like a digital fentanyl."²⁸ It's clear that Florida's Legislature was strategic in focusing on the features, not the content.²⁹

Despite the plethora of research on youth mental health and its association with social media, some still question whether social media

22. See Fla. Stat. § 501.1736 (2024).

23. See Fla. Stat. § 501.1738 (2024).

24. Fla. Stat. § 501.1736(2)(a) (2024).

25. Fla. Stat. § 501.1736(2)(b)(1) (2024).

26. Fla. Stat. § 501.1736(3)(a) (2024).

27. Andrew Atterbury, *Florida's GOP-controlled House passes strict social media restrictions for minors*, POLITICO (Jan. 25, 2024), <https://www.politico.com/news/2024/01/24/florida-social-media-restrictions-00137670> [<https://perma.cc/E6PE-BZM7>].

28. *Id.* (second alteration in original).

29. The reason is that other states like Arkansas and Ohio passed comparable bills to the Minors Act but failed because they were content-based. Focusing on features might permit a court to determine the Minors Act is content-neutral. See *infra* Section II.A.

is actually detrimental to our youth.³⁰ Additionally, one might consider whether Florida's stance is substantiated or merely a political maneuver to target social media companies once more.³¹ However, Florida is not alone in its sentiment about the detrimental effects of social media, as both the United States and the global community recognize that social media is driving this "youth mental health crisis."³² The following acknowledges the benefits of youth access to social media but notes that the overwhelming amount of studies indicate that the harmful effects outweigh the benefits.

1. The Positive Impact of Social Media on Social Engagement and Learning

Although most of the focus of the association between youth and social media discusses the harmful effects, U.S. Surgeon General Vivek noted in his 2023 General Advisory on Social Media and Youth Mental Health that there is "broad agreement among the scientific community that social media has the potential to both benefit and harm children and adolescents."³³ Social media platforms provide adolescents with opportunities for self-exploration and facilitate healthy social interactions, particularly when experiencing social isolation or stress.³⁴ The online social support for peers that provides this buffering effect against stress is vital for youth who are marginalized by race, ethnicity, and sexual and gender minorities.³⁵

A study conducted by the Pew Research Center with 1,316 teens between the ages of 13-17 found that social media helps teenagers feel more accepted (58%), like they have people who can support them

30. See Emma Roth, *Mark Zuckerberg Says There's No 'Causal Connection' Between Social Media and Teen Mental Health*, THE VERGE (Sep. 25, 2024), <https://www.theverge.com/2024/9/25/24254044/mark-zuckerberg-meta-social-media-teen-mental-health> [<https://perma.cc/WKQ2-HDAW>].

31. In 2021, Florida passed SB 7072 which sought to prevent the deplatforming of Florida political candidates and require social media companies to be transparent about their content moderation. Kylie Mason, *Attorney General Moody in SCOTUS Today Fighting to Protect Floridians from Big Tech Censorship*, OFF. OF THE ATTY GEN. STATE OF FLA. (Feb. 26, 2024), <https://www.myfloridalegal.com/newsrelease/attorney-general-moody-scotus-today-fighting-protect-floridians-big-tech-censorship#:~:text=In%20addition%20to%20preventing%20the,sue%20platforms%20when%20treated%20unfairly> [<https://perma.cc/5AJ7-C2F5>]. Florida's attempt was ultimately unsuccessful.

32. ADVISORY, *supra* note 2, at 13; see also Caden DeLisa, *Florida Joins Call for Surgeon General Warning on Social Media Risks*, THE CAPITOLIST (Sep. 11, 2024), <https://thecapitolist.com/florida-joins-call-for-surgeon-general-warning-on-social-media-risks/> [<https://perma.cc/QV4M-QNRZ>] (noting that a coalition of 42 state attorneys general called on Congress to requires U.S. Surgeon General warning on social media platforms utilizing algorithms).

33. ADVISORY, *supra* note 2, at 5 (citation omitted).

34. Kirsten Weir, *Social Media Brings Benefits and Risks to Teens. Psychology Can Help Identify a Path Forward*, AM. PSYCH. ASS'N (Sept. 1, 2023), <https://www.apa.org/monitor/2023/09/protecting-teens-on-social-media> [<https://perma.cc/ZW76-MAF7>].

35. ADVISORY, *supra* note 2, at 6.

through tough times (67%), that they have a place to show their creative side (71%), and that they are more connected to what's going on in their friends' lives (80%).³⁶ Similar to the advantages of social media for the population generally, social media also offers young people numerous opportunities to explore new ideas, stay informed about current events, engage with important issues, and share their voices with a broader audience.³⁷

2. *The Negative Impacts of Social Media on Youth Mental and Physical Health*

The vast majority of scientific studies on the relationship between adolescent social media usage and their mental health have shown that there are “*ample* indicators that social media can also have a profound risk of harm to the mental health and well-being of children and adolescents.”³⁸ The science behind these risks derives from the dopamine spikes the youth receive from social media activity because of the close tie to the ventral striatum, where dopamine and oxytocin rush.³⁹ The lack of prefrontal cortex development in youth⁴⁰ creates an addiction to the dopamine it receives from screen time and social media that is “*intoxicating*.”⁴¹ These biological predispositions to addictions are the root of the profound risks associated with social media usage.

For example, a recent research study focusing on American adolescents aged 12 to 15 revealed that individuals who engage with social media for more than three hours daily exhibit a twofold increase in the likelihood of experiencing symptoms associated with depression and anxiety.⁴² This depression can also coincide with a feeling of loneliness that is rooted in social media usage.⁴³ Another study, focusing on approximately 11,000 14-year-olds, found that greater social media use predicted poor sleep, online harassment, poor body image, low self-esteem, and higher depressive symptom scores with a more significant

36. Emily A. Vogels & Risa Gelles-Watnick, *Teens and Social Media: Key Findings from Pew Research Center Surveys*, PEW RSCH. CTR. (Apr. 24, 2023), <https://www.pewresearch.org/short-reads/2023/04/24/teens-and-social-media-key-findings-from-pew-research-center-surveys/> [<https://perma.cc/9RGH-7N8J>].

37. Weir, *supra* note 34.

38. ADVISORY, *supra* note 2, at 4 (emphasis added).

39. Zara Abrams, *Why Young Brains Are Especially Vulnerable to Social Media*, AM. PSYCH. ASS'N. (Aug. 3, 2023), <https://www.apa.org/news/apa/2022/social-media-children-teens> [<https://perma.cc/5NSJ-AP4W>].

40. *Id.*

41. Michaeleen Doucleff, ‘*Anti-Dopamine Parenting*’ Can Curb a Kid’s Craving for Screens or Sweets, NPR (June 12, 2023, 5:00 AM), <https://www.npr.org/sections/health-shots/2023/06/12/1180867083/tips-to-outsmart-dopamine-unhook-kids-from-screens-sweets> [<https://perma.cc/68WW-3UER>].

42. Katella, *supra* note 4.

43. Brian X. Chen, *How Tech Created a ‘Recipe for Loneliness’*, N.Y. TIMES (Nov. 10, 2024), <https://www.nytimes.com/2024/11/10/technology/personaltech/technology-loneliness.html> [<https://perma.cc/KEK4-KZF5>].

association for girls than boys.⁴⁴ Adolescent girls are also more likely to perpetuate body dissatisfaction and disordered eating behaviors because of social media.⁴⁵

Additionally, access to extreme, inappropriate, and harmful content remains readily available to children and adolescents, facilitated by direct pushes, unsolicited content exchanges, and algorithmic designs.⁴⁶ Although social media can foster a sense of community for specific individuals, a systematic review encompassing over two dozen studies has identified that specific social media platforms often display real-time representations of self-harming behaviors, such as partial asphyxiation—which can result in seizures—and cutting, which may lead to substantial bleeding.⁴⁷ These studies found that accessing this content can normalize such behaviors, leading to suicide pacts and the posting of self-harm models for others to follow.⁴⁸

Social media also gives predators access to kids.⁴⁹ In 2023, journalists Jeff Horwitz and Katherine Blunt of the Wall Street Journal published a series of investigative articles, which won the Gerald Loeb Award for Distinguished Business & Financial Journalism, that examined how Instagram and Facebook facilitated networks of pedophiles and disseminated disturbing content.⁵⁰ The authors discuss how Meta's algorithms promote a vast network of accounts devoted to the commission and purchase of underage sex content by connecting pedophiles to sellers.⁵¹ They found that algorithms would promote risqué footage of children and overtly sexual adult videos to users, which often included large numbers of adult men as followers of these accounts.⁵² While platforms are trying to rid pedophiles from its systems,

44. Yvonne Kelly et al., *Social Media Use and Adolescent Mental Health: Findings from the UK Millennium Cohort Study*, 6 *ECLINICALMEDICINE* 59-68, available at [https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370\(18\)30060-9/fulltext](https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370(18)30060-9/fulltext) [<https://perma.cc/9N5G-FVJS>].

45. Thai et al., *supra* note 6.

46. ADVISORY, *supra* note 2, at 8.

47. Michele P. Dyson et al., *A Systematic Review of Social Media Use to Discuss and View Deliberate Self-Harm Acts*, *PLOS ONE*, May 18, 2016, at 7, available at <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0155813> [<https://perma.cc/Z2FJ-HQUR>].

48. ADVISORY, *supra* note 2, at 8.

49. Maddrell, *supra* note 7.

50. *The Dark Side of Meta's Algorithms*, *WALL ST. J.* (Oct. 11, 2024), <https://www.wsj.com/tech/the-dark-side-of-metas-algorithms-37135e61> [<https://perma.cc/D6UH-6QNJ>].

51. Jeff Horwitz & Katherine Blunt, *Instagram Connects Vast Pedophile Network*, *WALL ST. J.* (June 7, 2023), https://www.wsj.com/articles/instagram-vast-pedophile-network-4ab7189?mod=article_inline [<https://perma.cc/7UFC-YCHY>].

52. Jeff Horwitz & Katherine Blunt, *Instagram's Algorithm Delivers Toxic Video Mix to Adults Who Follow Children*, *WALL ST. J.* (Nov. 27, 2023), https://www.wsj.com/tech/meta-instagram-video-algorithm-children-adult-sexual-content-72874155?mod=article_inline [<https://perma.cc/5ZXR-P8A7>].

they are struggling to prevent its systems from enabling and promoting pedophilic accounts.⁵³

B. History of Florida's Minors Act

The two main points of attack for the Florida Legislature to address its priority of protecting children were social media and pornography. The Legislature planned to address social media companies in HB 1⁵⁴ and pornography in HB 3.⁵⁵ However, plans changed along the way.

Florida's Minors Act had a tumultuous journey to its final product that was eventually codified into Florida Statutes. HB 1's final product, after being amended and passing both houses, required social media platforms that use certain addictive features to prohibit and terminate minors younger than 16 from being account holders and to offer an anonymous or standard age verification method to verify every user's age.⁵⁶

Governor DeSantis initially vetoed the bill on constitutional grounds, citing the First Amendment.⁵⁷ This was applauded by NetChoice, a trade association that advocates for free expression and enterprise on the Internet⁵⁸ and represents many prominent Internet companies like Google, Meta, Snap Inc., and others⁵⁹ due to constitutional issues.⁶⁰ However, Governor DeSantis prodded the Legislature to craft a "different, superior bill" that more effectively balanced protecting children from the dangers of social media, respected parental rights, and preserved adults' ability to engage in anonymous speech.⁶¹ Governor DeSantis also raised concerns about

53. Jeff Horwitz & Katherine Blunt, *Meta Is Struggling to Boot Pedophiles Off Facebook and Instagram*, WALL ST. J. (Dec. 1, 2023), https://www.wsj.com/tech/meta-facebook-instagram-pedophiles-enforcement-struggles-dceb3548?mod=article_inline [<https://perma.cc/RP9Y-LCY7>].

54. H.B. 1, 126th Gen. Assemb., Reg. Sess. (Fla. 2024).

55. H.B. 3, 126th Gen. Assemb., Reg. Sess. (Fla. 2024).

56. Fla. H.R. Comm. on Judiciary, CS/HB 1 (2024) Final Bill Staff Analysis 1 (Mar. 13, 2024), <https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0001z.RRS.DOCX&DocumentType=Analysis&BillNumber=1&Session=2024> [<https://perma.cc/3MJQ-JUQ5>].

57. Veto of Fla. CS/HB 1 (2024) (letter from Gov. DeSantis to Speaker of the H.R. Paul Renner Mar. 1, 2024), <https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=Veto%20Message.pdf&DocumentType=VetoMessageDocuments&Session=2024&BillNumber=1> [<https://perma.cc/FB6R-FDZD>].

58. *Our Mission*, NETCHOICE, <https://netchoice.org/about/#our-mission> [<https://perma.cc/WJ7A-BGKP>] (last visited Feb. 14, 2025).

59. *Reyes*, 748 F. Supp. 3d at 1111.

60. Krista Chavez, *NetChoice Applauds Gov. DeSantis Vetoing HB 1, Standing Up for Floridians & Families*, NETCHOICE (Mar. 1, 2024), <https://netchoice.org/netchoice-applauds-gov-desantis-vetoing-hb-1-standing-up-for-floridians-families/#> [<https://perma.cc/LY8S-RTQR>].

61. Veto of Fla. CS/HB 1, *supra* note 57, at 1.

constitutionality, specifically First Amendment Issues, which will be discussed in Part II.⁶² The Legislature responded to the Governor's concerns and combined HB 1 and HB 3 to form the Online Protection for Minors Act that the Governor signed on March 25, 2024.⁶³

C. *The Text of Florida's Minors Act*

This Section outlines the text of Florida's Minors Act as it pertains to youth and social media, specifically on the language regarding the banning of minors under the age of 14. The following Part addresses the Constitutional concerns associated with banning social media use for minors under the age of 14. It leaves out the Minors Act's requirements for harmful material since it is not the substance of the Note.

A significant distinction between HB 1 and the provisions established in Section 501.1736 of the Florida Statutes lies in categorizing age groups. Before its veto, HB 1 prohibited minors under 16 from contracting with social media platforms for an account.⁶⁴ However, the compromise negotiated between Governor DeSantis and the Legislature prohibited minors under 14 from entering into a contract with a social media platform to become an account holder⁶⁵ and permitted account holders of 14-15 years of age with parental consent.⁶⁶ Should a court enjoin the enforcement of the bill due to the parental consent provision, then § 501.1736(4), which prohibits a minor who is 14 to 15 years of age from entering into a contract with a social media company, becomes effective.⁶⁷

The Minors Act characterization of a "social media platform" outlines its purpose to regulate the addictive features of social media companies by defining it as an online forum, website, or application that must meet all four elements⁶⁸: (1) allows users to upload or view content or activity of other users; (2) ten percent or more of the daily active

62. *What is Florida's HB 3 Act: Online Protection for Minors?*, PRIVO (Mar. 28, 2024), <https://www.privo.com/blog/what-is-floridas-hb-3-act-online-protection-for-minors> [<https://perma.cc/ZN4W-9TZC>].

63. *See infra* Section I.C (discussing the Legislature's alterations after the Governor's veto).

64. Fla. H.R. Comm. on Judiciary, *supra* note 56, at 1.

65. Fla. Stat. § 501.1736(2)(a) (2024).

66. Fla. Stat. § 501.1736(3)(a) (2024). Adding the parental consent provision was likely to appease Governor DeSantis' concerns. *See* Veto of CS/HB 1, *supra* note 61 and accompanying text.

67. Fla. Stat. § 501.1736(4)(a) (2024). The likely rationale behind this subsection of the bill is due to the constitutional challenges parental consent provisions have faced in the courts. *See, e.g.*, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011) (finding a California law that banned violent video games without parental consent unconstitutional); *see also, e.g.*, *Griffin*, 2023 WL 5660155 (finding Arkansas's Act that limits minors' social media access without parental consent unconstitutional); *see also, e.g.*, *Yost*, 2024 WL 555904 (finding Ohio's law that required social media companies to obtain parental consent before allowing any child under 16 to register and create a platform unconstitutional).

68. Fla. Stat. § 501.1736(1)(e)(1)-(4) (2024).

users who are younger than 16 years of age spend on average 2 hours per day on the platform; (3) employs algorithms that analyze user data or information on users to select content for users; and (4) contains at least one of five listed addictive features.⁶⁹ Elements (2) through (4) specifically address the addictive nature of social media. The Minors Act provides an exception for an “online service, website, or application where the *exclusive function* is e-mail or direct messaging consisting of text, photographs, pictures, images, or videos shared only between the sender and the recipients, without displaying or posting publicly or to other users not specifically identified as the recipients by the sender.”⁷⁰ These definitions will be crucial to a court’s analysis of the First Amendment and void for vagueness challenges the Minors Act faces.⁷¹

II. OVERCOMING CONSTITUTIONAL CONCERNS IN THE COURTS

After passing Florida’s Minors Act, Governor DeSantis remarked, “[w]e not only satisfied me, but we also satisfied, I think, a fair application of the law and constitution.”⁷² What were these constitutional concerns that Florida was so aware of? For one, Arkansas, Ohio, and Utah courts found comparable bills to Florida’s Minors Act unconstitutional.⁷³ In each case, NetChoice challenged them on First Amendment grounds, arguing that the respective Acts’ age-verification requirements target speech on social media websites and platforms based on content, speaker, and viewpoint, making them subject to strict scrutiny.⁷⁴ NetChoice stayed true to what has worked for them as they argue that the Minors Act should also be analyzed under strict scrutiny.⁷⁵ Additionally, NetChoice argues that Florida’s definition of “social media platform” is void for vagueness.⁷⁶

While NetChoice is currently batting 1.000 on these constitutional challenges, this Part argues that NetChoice’s success may have run out. Ultimately, this Part will show that the lesser standard of

69. The addictive features include infinite scrolling, push notifications or alerts, displaying personal interactive metrics, auto-play video, and live-streaming. Fla. Stat. § 501.1736(1)(e)(4)(a)-(e) (2024).

70. Fla. Stat. § 501.1736(1)(e)(4) (2024) (emphasis added).

71. See Complaint at 26, 40, *NetChoice v. Moody*, No. 4:24-cv-00438-MW-MAF (N.D. Fla. filed Oct. 28, 2024) (arguing that the Minors Act runs afoul of the First Amendment and its definition of a social media company is void for vagueness).

72. *Ron DeSantis Signs Florida Social Media Ban for Children Into Law*, THE GUARDIAN (Mar. 26, 2024), <https://www.theguardian.com/us-news/2024/mar/26/ron-desantis-florida-social-media-ban-children> [<https://perma.cc/M6EK-YP5J>].

73. *Griffin*, 2023 WL 5660155; *Reyes*, 748 F. Supp. 3d at 1111.

74. See *Griffin*, 2023 WL 5660155, at *15; *Yost*, 716 F. Supp. at 553; *Reyes*, 748 F. Supp. 3d at 1123.

75. Complaint at 30, *NetChoice v. Moody*, No. 4:24-cv-00438-MW-MAF (N.D. Fla. filed Oct. 28, 2024) (“Indeed, the sweeping nature of its restrictions demands strict scrutiny.”).

76. *Id.* at 40 (“HB3 fails to speak with the requisite specificity.”).

intermediate scrutiny is applicable given the Minors Act's focus on features, not content, but first explores strict scrutiny. This Part also explores the potential void for vagueness concern over Florida's exception when defining a social media platform, but it argues that the exception is clear and direct.

A. *Strict Versus Intermediate Scrutiny*

A challenge to the Minors Act will likely center on whether it imposes content and speaker-based restrictions on social media platforms and prevents minors from accessing certain protected content, thereby implicating the First Amendment. The First Amendment bars the government from dictating what “we see or read or speak or hear”⁷⁷ and protects “the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach.”⁷⁸ States do not have a “free-floating power to restrict the ideas to which children may be exposed” despite their legitimate power to protect children from harm.⁷⁹ Determining whether Florida's Minors Act is content-based or content-neutral is crucial because it not only determines whether a court must apply strict or intermediate scrutiny, but whether the Minors Act survives.

Strict scrutiny is the most “demanding test known to constitutional law”⁸⁰ and requires the government to show that the “restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’”⁸¹ Conversely, intermediate scrutiny is a “less rigorous”⁸² standard that only requires a government to show that the regulation “advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.”⁸³ The following discussion first addresses whether the Minors Act is content-based versus content-neutral, and then applies the resulting test dependent on the analysis.

1. *Features Over Content – How Features Make the Minors Act Content Neutral*

Whether a statute targets “features” versus where an act targets “content” essentially determines the fate of the statute's

77. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002).

78. *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (citation omitted).

79. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794 (2011).

80. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

81. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

82. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 622 (1994).

83. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 26-27 (2010) (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997)).

constitutionality.⁸⁴ According to the Supreme Court's seminal opinion in *Ward v. Rock Against Racism*:

The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.⁸⁵

Thus, the content determination hinges on whether Florida's Minors Act disfavors the *messages* social media platforms publish or the *manner* in which the messages are transmitted.⁸⁶

The strongest argument that the Minors Act is content-based would focus on "bullying" speech, such as those that Speaker Renner made in his opening remarks of the 2024 legislative session, stating that "[c]hildren have always faced mean girls and boys" and social media has only enhanced this.⁸⁷ Another argument would be that supporters of the Minors Act contended that the content on social media platforms makes children vulnerable to predators.⁸⁸ Further, Florida's bill analyses indicate that social media usage includes damaging content like depictions and discussions of violence or self-harming, inappropriate sexual content, or speech targeting an individual's body image.⁸⁹ These provided the basis for the court's decision in *NetChoice, LLC v. Griffin* that the Arkansas Act was content-based and should be subject to strict scrutiny.⁹⁰

However, the Minors Act should be considered content-neutral because it regulates the function⁹¹ or manner⁹² in which these social media platforms operate. Though the bill analyses mention the damaging content described above, it specifies that these are the "effects stemming from social media overuse."⁹³ The Legislative findings indicate that the harmful effects of social media are, therefore, incidental to the addictive nature of the social media platforms.

84. VALERIE C. BRANNON, CONG. RSCH. SERV., R45650, FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT 19 (2019).

85. 491 U.S. 781, 791 (1989) (citation omitted).

86. *Turner*, 512 U.S. at 645, 658 (1994).

87. EWS RELEASE, *supra* note 14, at 2.

88. Otis & Albert, *supra* note 18.

89. See Fla. H.R. Comm. on Commerce, CS for CS for HB 3 (2024) Staff Analysis 4 (Mar. 28, 2024), <https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0003z1.RRS.DOCX&DocumentType=Analysis&BillNumber=3&Session=2024> [<https://perma.cc/Q3F5-QELV>].

90. No. 5:23-CV-05105, 2023 WL 5660155, at *15-16 (W.D. Ark. Aug. 31, 2023).

91. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 451 (2d Cir. 2001).

92. *Turner*, 512 U.S. at 645.

93. Fla. H.R. Comm. on Commerce, *supra* note 89, at 4 (emphasis added).

Further, Florida Representative Tyler Sirois said the Minors Act “focused on features.”⁹⁴ Unlike *NetChoice, LLC v. Yost*, where the court said that addictive features are not hallmarks of the social media platforms as defined by the Ohio Act,⁹⁵ the Minors Act requires a regulated social media platform to have addictive features.⁹⁶ Florida also contrasts with Arkansas’ Act 689’s definition of social media, which centered around uploading and interacting with content or users.⁹⁷ While the first element of the Minors Act’s social media platform definition requires a regulated social media platform to allow users to post and view other content,⁹⁸ this is only one out of the four elements. The other three requirements concern the features and time spent on platforms, such as whether the company employs data collection algorithms or has addictive features.⁹⁹ For example, an application or platform could allow users to upload content, have more than ten percent of its users use the platform for extended periods, and employ algorithms to collect user data. However, any minor could use the platform if it doesn’t contain any identified addictive features.

Ultimately, Florida must emphasize that the platforms’ features, not the content, were what they sought to regulate to be considered content-neutral.¹⁰⁰ The Minors Act will undoubtedly limit what minors “see or read or speak or hear”¹⁰¹ because many platforms meet the four listed criteria. Yet, this is “incidental” to the legislation’s primary purpose,¹⁰² which is to protect minors from the harmful features of social media platforms. Therefore, the Minors Act is content-neutral and should be examined under intermediate scrutiny because it regulates the manner in which social media companies display their content—that is, the features—not the content itself.¹⁰³

94. C.A. Bridges & Brandon Girod, *Florida House Passes Bill to Keep Minors Off Social Media. But What Social Media Do They Mean?*, TALLAHASSEE DEMOCRAT (Feb. 23, 2024, 9:10 AM), <https://www.tallahassee.com/story/news/politics/2024/01/25/florida-ban-minors-bill-law-what-is-social-media/72355797007/> [https://perma.cc/VK7R-2246].

95. 716 F. Supp. 3d at 557.

96. Fla. Stat. § 501.1736(1)(e)(4) (2024).

97. ARK. CODE ANN. § 4-88-1101(7)(A) (2023).

98. Fla. Stat. § 501.1736(1)(e)(1) (2024).

99. Fla. Stat. § 501.1736(1)(e)(2)-(4) (2024).

100. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 451, 454 (2d Cir. 2001). (finding that regulations targeting the nonspeech component of the prohibited actions by focusing on the functional aspects of computer code that operate without human involvement were content-neutral).

101. *Ashcroft*, 535 U.S. at 245.

102. *Rock Against Racism*, 491 U.S. at 791-92.

103. *Turner*, 512 U.S. at 645, 658-59.

2. *The Minors Act Fails Strict Scrutiny*

A court would likely strike the Minors Act under strict scrutiny upon concluding it is content-based. Content-based laws pass the “demanding standard” of strict scrutiny when the Government (1) proves the restriction furthers a compelling interest and (2) is narrowly tailored to achieve that interest.¹⁰⁴ A court would likely find that the Minors Act fails both prongs or at least find that the Minors Act is not narrowly tailored despite serving a compelling interest.

(a) *The Minors Act Likely Serves a Compelling Governmental Interest in Protecting the Well-Being of Minors.*

Florida’s legislative history and purpose behind the Minors Act is clear: protect minors from the harmful effects of social media’s addictive features.¹⁰⁵ The Supreme Court has a long history of stating that protecting minors, precisely what Florida is seeking to do, serves a compelling state interest.¹⁰⁶ For example, the Court in *Sable Communications of California* stated that “there is a compelling interest in protecting the physical *and psychological* well-being of minors.”¹⁰⁷ However, under strict scrutiny, the Government has a heightened burden and must show a “direct causal link” between the object it wishes to regulate and the harm.¹⁰⁸ Thus, Florida would have to show evidence of a direct causal link between the addictive features of social media and the harmful effects on today’s minors.

Despite a substantial body of research indicating the detrimental impacts associated with the addictive features of social media,¹⁰⁹ a significant number of individuals maintain the belief that these harmful effects are not causally linked. One individual in particular, Meta CEO Mark Zuckerberg, testified in front of Congress in January of 2024 that “the majority of the high-quality research out there suggests that there’s no causal connection at a broad scale between these things.”¹¹⁰

104. *Ent. Merchs. Ass’n*, 564 U.S. at 799; *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (quoting *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011)).

105. *See supra* Sections I.A-C.

106. *See, e.g., Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC* 518 U.S. 727, 743 (1996) (identifying “the need to protect children from exposure to patently offensive sex-related material” as an interest “this Court has often found compelling”); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (citing *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 607 (1982)); *Ginsberg v. New York*, 390 U.S. 629, 639-41 (1968).

107. 492 U.S. at 126 (emphasis added).

108. *Brown*, 564 U.S. at 799.

109. *See supra* Section I.A.

110. Roth, *supra* note 30.

Interestingly,¹¹¹ Utah's federal district court seemed to endorse Meta CEO Mark Zuckerberg's stance on the issue, striking down Utah's Minor Protection in Social Media Act,¹¹² straying from many years of precedence, and ultimately finding that the government "ha[s] not provided evidence establishing a clear, causal relationship between minors' social media use and negative mental health impacts."¹¹³

Though Utah did not find a causal relationship, a court should defer to Florida's legislative findings and not make its own scientific judgment. Florida's bill analyses cite numerous studies showing a causal relationship between social media use and decreases in a minor's well-being.¹¹⁴ The scientific analysis of whether social media "causes" the detrimental effects or is only "correlated" adds to the hurdles Florida must overcome under strict scrutiny. Should it pass prong one, it will almost surely fail the narrowly tailored prong.

(b) *Florida's Minors Act is Likely Not Narrowly Tailored Under Strict Scrutiny*

The second prong, whether a restriction relying upon a compelling governmental interest is narrowly tailored, is ironically not narrowly defined.¹¹⁵ This Note operates under the view that First Amendment speech cases demand the Government's chosen means to be the "least restrictive alternative" that would achieve its goals.¹¹⁶ This is a "nearly impossible standard"¹¹⁷ because it is generally always feasible to conceive a narrower speech restriction than any specific restriction the government might impose.¹¹⁸

111. Both Arkansas and Ohio found that protecting children from harm was a compelling government interest, but the respective Acts needed to be narrowly tailored toward that purpose. See *Griffin*, 2023 WL 5660155, at *17-18; *Yost*, 716 F. Supp. 3d at 559.

112. UTAH CODE ANN. §§ 13-71-101 to -401 (2024).

113. *NetChoice, LLC v. Reyes*, 748 F. Supp. 3d at 1125.

114. See Fla. H.R. Comm. on Commerce, *supra* note 89, at 4-6.

115. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1326 (2007) (citing a three, or sometimes four, elemental test for narrow tailoring); John Inazu, *First Amendment Scrutiny: Realigning First Amendment Doctrine Around Government Interests*, 89 BROOK. L. REV. 37 (2023) ("Supreme Court has been inconsistent in specifying whether strict scrutiny requires narrow tailoring or the least restrictive means").

116. *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 666 (2004); see also *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, (2021) ("Under strict scrutiny, the government must adopt 'the least restrictive means of achieving a compelling state interest.'") (quoting *McCullen v. Coakley*, 573 U.S. 464, 478 (2014)). One case suggests that the Court operates under the view that narrow tailoring itself means the least restrictive means. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) ("The term 'narrowly tailored,' so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used.").

117. Inazu, *supra* note 115, at 3.

118. See *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 841 (2000) (Breyer, J., dissenting).

In the case of the Minors Act, the most feasible, less restrictive alternative is that instead of having a blanket ban on social media for those under fourteen, Florida could have allowed these younger age groups to access social media with parental consent. This would force Florida to argue that existing parental controls are an inadequate alternative to the Minors Act in its quest to protect children from social media harms to overcome this challenge.¹¹⁹ Florida's stance would not be entirely meritless.¹²⁰ For example, several studies indicate that using parental controls undermines teen autonomy and negatively impacts the parent-child relationship.¹²¹ While social media companies like Meta indicate that its parental controls allegedly protect kids, former director of Meta's responsible innovation team, Zvika Krieger, noted that "the vast majority of parents don't use them."¹²² Therefore, while studies show that kids whose parents monitor their screen time spend significantly less time on social media than parents who do not,¹²³ it is meaningless because an Act that gives all control to the parents would not effectively help minors whose parents don't use parental controls.

However, social media companies are pushing to improve their platforms and give more power to parents. For example, Meta, which owns Instagram, WhatsApp, Facebook, and Messenger, has introduced more than thirty different tools and features to help parents and teens in the last year.¹²⁴ Thus, NetChoice could argue that Florida could pass legislation "encourag[ing] the use of filters . . . by parents"¹²⁵ to protect

119. *Ashcroft*, 542 U.S. at 666 (upholding a district court's decision to issue a preliminary injunction enjoining enforcement of a federal law restricting minors' access to certain internet content when the government did not demonstrate that the plaintiffs' alternative—blocking and filtering software—was a less effective solution).

120. Julie Jargon, *Keeping Teens Safe Online Has to Go Beyond Parental Controls. Here's What to Do.*, WALL ST. J. (Feb. 10, 2024), <https://www.wsj.com/tech/personal-tech/parental-controls-on-apps-dont-work-heres-a-better-way-cc4d49bc> [<https://perma.cc/MDV9-6X4Q>] (noting the ineffectiveness of parental controls).

121. Karla Badillo-Urquiola et.al., *Beyond Parental Control: Designing Adolescent Online Safety Apps Using Value Sensitive Design*, 35(1) J. ADOLESCENT RSCH. 147 (2020), <https://journals.sagepub.com/doi/full/10.1177/0743558419884692> [<https://perma.cc/CQ93-F894>].

122. Naomi Nix, *Meta Says Its Parental Controls Protect Kids. But Hardly Anyone Uses Them.*, WASH. POST (Jan. 30, 2024), <https://www.washingtonpost.com/technology/2024/01/30/parental-controls-tiktok-instagram-use/> [<https://perma.cc/M5XY-BUYL>].

123. See JONATHAN ROTHWELL, INST. FOR FAM. STUD., HOW PARENTING AND SELF-CONTROL MEDIATE THE LINK BETWEEN SOCIAL MEDIA USE AND MENTAL HEALTH 13 (2023), <https://ifstudies.org/ifs-admin/resources/briefs/ifs-gallup-parentingsocialmediascreentime-october2023-1.pdf> [<https://perma.cc/FUA6-CPCN>].

124. *Our Work to Help Provide Young People with Safe, Positive Experiences*, META (Jan. 31, 2024), <https://about.fb.com/news/2024/01/our-work-to-help-provide-young-people-with-safe-positive-experiences/#:~:text=We've%20built%20more%20than,under%2018%20to%20over%2018> [<https://perma.cc/LRF9-GRKH>].

125. *Ashcroft v. Am. C.L. Union*, 542 U.S. 656, 669 (2004).

minors instead of the blanket ban.¹²⁶ This would be less restrictive and, if effective, could help the psychological damage social media is causing the youth.

Given the “demanding” requirements of strict scrutiny, the odds are not in Florida’s favor should the courts construe the Minors Act as content-based. Not only would Florida have to show a direct causal relationship between social media and youth mental health, which Florida would likely overcome, but it would have to show that no narrower alternative, like providing parental controls, would be feasible. Ultimately, applying strict scrutiny “merely announces an inevitable [negative] result” in this case.¹²⁷

3. *A Light at the End of the Tunnel – An Intermediate Scrutiny Application Substantially Increases the Minors Act’s Success*

Should a court find that the Minors Act is content-neutral and focused on the features—rather than the content—of social media platforms, as this Note argues *supra*, then a court would apply the lesser intermediate scrutiny standard.¹²⁸ The test for intermediate scrutiny versus strict scrutiny is more “nuanced” or even more “incoherent.”¹²⁹ Based on an analysis of eight different kinds of free speech cases in which intermediate scrutiny was applied in the First Amendment context,¹³⁰ Professor Ashutosh Bhagwat concludes that the Supreme Court’s test for intermediate scrutiny is that: “laws will be upheld so long as they serve some sort of a significant/substantial/important governmental interest and are reasonably well tailored to that purpose.”¹³¹ Thus, the Minors Act will pass intermediate scrutiny if Florida can establish (1) an important governmental interest and (2) that the Minors Act effectively achieves that interest. This Section argues that Speaker Renner’s belief that Florida will “do something about” social media’s detrimental effects on the youth might be realized under intermediate scrutiny because Florida need not show a causal connection and can establish that the Minors Act efficiently tackles the problems associated with minors and social media.

126. See *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 815 (2000) (noting that voluntary, “targeted blocking” of content by viewers is “less restrictive than banning” the same content).

127. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188 (1979) (Blackmun, J., concurring).

128. See *supra* Section II.A.1.

129. Utkarsh Srivastava, *Gotta Catch ‘Em All: Legislative Overreach in Florida and Texas Anti-Moderation Laws*, 38 *BERKELEY TECH. L.J.* 1437, 1453 (2023).

130. Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 *U. ILL. L. REV.* 783, 788-800 (2007).

131. *Id.* at 801.

(a) *The Minors Act Serves an Important Governmental Interest*

Given that Florida's compelling government interest nearly satisfies the stringent standard under strict scrutiny, it suggests that it is very likely to meet the more lenient requirements of intermediate scrutiny. The crucial component differentiating strict versus intermediate scrutiny is the fact that Florida need not show a "direct causal link."¹³² The Court in *Brown v. Entertainment Merchants Ass'n*, a case involving a California bill that prohibited the sale or rental of violent video games to minors and was challenged on First Amendment grounds,¹³³ implied that a State need not show a direct causal link under intermediate scrutiny so long as the Legislature can make a predictive judgment that a link exists, based on competing psychological studies.¹³⁴ This aligns with Court precedent stating that "courts must accord substantial deference to the predictive judgments of Congress"¹³⁵ since Congress is far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon a complex and dynamic issue.¹³⁶

For any challenge to the Minors Act, Florida can substantiate its position by referencing the extensive research highlighting the detrimental effects of adolescent social media use that was the backbone of this legislation.¹³⁷ The volume of research almost certainly establishes at least a "predictive link" to pass the first prong of intermediate scrutiny. It also aligns with consistent Supreme Court precedent that the more intensive compelling governmental interest standard is met when the interest is protecting the psychological well-being of minors.¹³⁸

132. *Brown*, 564 U.S. at 799.

133. *See id.* at 788-89. This case is analogous to social media usage because interactive violent video game usage showed correlated harmful effects that the State deemed harmful just like the harmful effects seen in minors today from social media usage. *Compare id.* at 800, *with supra*, Section I.A.

134. *Brown*, 564 U.S. at 799 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661-62 (1994)).

135. *Turner*, 512 U.S. at 665 (1994) (citing *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973)).

136. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985).

137. *See supra* Section I.A. (discussing the harmful effects of social media and citing only a small sample of tons of studies on the topic).

138. *Reno v. ACLU*, 521 U.S. 844, 869 (1997); *Sable Commc'ns of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996) (identifying "the need to protect children from exposure to patently offensive sex-related material" as an interest "this Court has often found compelling"); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982); *Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968).

(b) *Protecting Minors from the Detrimental Effects of Social Media Would Be Achieved Less Effectively Without the Minors Act*

The second “narrow” or “reasonable” tailoring prong is where Florida may find the most considerable advantage for successfully arguing that the Minors Act is content-neutral. What exactly the “reasonably tailoring” prong requires is unclear. According to the Supreme Court in *Ward v. Rock Against Racism*, this second prong does not require the Government to show that its regulation is the least restrictive or least intrusive means; instead, “the requirement of narrow tailoring is satisfied ‘so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’”¹³⁹ The Court also provided that it cannot “burden *substantially* more speech than is necessary to further the government’s legitimate interests.”¹⁴⁰

A tailoring analysis is inherently a balancing test, something the Supreme Court has provided little to no guidance on.¹⁴¹ “[T]he tests inevitably invite courts to *compare*—i.e., to balance—the strength of the asserted policy against the constitutional interests on the other side.”¹⁴² The Supreme Court has made it clear that “[e]ven where the protection of children is the object, the constitutional limits on governmental action apply.”¹⁴³

Justice Alito’s concurring opinion in *Packingham v. North Carolina*, a case involving a North Carolina statute that made it a felony for a registered sex offender to gain access to social media websites which was successfully challenged on First Amendment grounds,¹⁴⁴ suggested that an analysis of whether an Act “burden[s] substantially more speech than is necessary to further the government’s legitimate interests” in a content-neutral context concerns whether it would result in prohibiting the access of an “enormous number of websites.”¹⁴⁵ Justice Alito analyzed every factor within North Carolina’s definition of a “commercial social networking Web site” to conclude it was too broad a sweep.¹⁴⁶ Doing the same for the Minors Act would not result

139. 491 U.S. at 798-99 (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

140. *Id.* at 799 (emphasis added).

141. Bhagwat, *supra* note 130, at 819-20.

142. *Id.* at 820.

143. *Brown*, 564 U.S. at 804-05. *See also* *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-14 (1975) (“[M]inors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them . . . Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.”).

144. 582 U.S. 98, 101 (2017).

145. *See id.* at 113-14 (2017) (Alito, J., concurring in the judgment) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989)) (internal quotations omitted).

146. *Id.* at 113-15.

in too broad of a sweep. While “[allowing] users to upload content or view the content or activity of other users”¹⁴⁷ essentially encompasses everything on the web, defining social media platforms as those that have “ten percent or more of the daily active users who are younger than 16 years of age spend[ing] on average 2 hours per day . . . on the days when using the online forum . . . during the previous 12 months”¹⁴⁸ or containing one of the listed “addictive features”¹⁴⁹ seriously limits the scope. Presumably, these definitions would only apply to major platforms such as Instagram, YouTube, TikTok, and X.¹⁵⁰ Minors would still be able to engage with content on the web and learn things since Florida’s Minors Act was not concerned about the content but about the features.¹⁵¹

Further tipping the scale towards finding that the Minors Act is reasonably tailored towards its interest, Professor Ashutosh Bhagwat stated that “[t]he commonality appears to be that the Court will uphold regulations of speech so long as, in its view, the regulation keeps open for that speaker ample alternative, and effective, channels of communication.”¹⁵² The Minors Act does just this since it focuses on the features of platforms that the platforms can adjust to comply with the Act. Platforms are already doing this. For instance, Messenger Kids, a feature allowing children to message and video chat with friends and family and is controlled and monitored by the child’s parents, would meet Florida’s exception because the app is designed exclusively for kids to communicate with family and close friends.¹⁵³ Instagram has implemented a new “Teen Accounts” feature aimed at users aged 16 and under.¹⁵⁴ This initiative includes automatic time limit reminders, encouraging teens to step away after 60 minutes of use. Moreover, the platform restricts access between 10 PM and 7 AM. Consequently, less than 10 percent of daily active users may spend less than two hours on the app daily, meaning Florida’s Minors Act would not encompass it.¹⁵⁵

147. Fla. Stat. § 501.1736(1)(e)(1) (2024).

148. Fla. Stat. § 501.1736(1)(e)(2) (2024).

149. Fla. Stat. § 501.1736(1)(e)(4) (2024).

150. No sources online indicate where the Florida Legislature received the 10% number from.

151. Bridges & Girod, *supra* note 94.

152. Bhagwat, *supra* note 130, at 790 (emphasis omitted).

153. *Messenger Kids*, META: HELP CENTER https://www.facebook.com/help/messenger-app/213724335832452?helpref=hc_fnav [<https://perma.cc/4RA7-CZYA>] (last visited June 16, 2025).

154. *Introducing Instagram Teen Accounts: Built-In Protections for Teens, Peace of Mind for Parents*, INSTAGRAM (Sept. 17, 2024), <https://about.instagram.com/blog/announcements/instagram-teen-accounts> [<https://perma.cc/84NJ-NTLZ>].

155. Fla. Stat. § 501.1736(1)(e)(2) (2024).

Lastly, an argument that parental controls would be more “effective”¹⁵⁶ at solving the harmful effects associated with addictive social media platforms than an outright ban would be unfruitful. As noted previously, while parents are aware of parental controls, they often don’t utilize them, or children find a way to circumvent them.¹⁵⁷ While parental controls may be effective for a subset of children, they may not be the most effective way to reduce the harmful effects addictive social media platforms have on the mass majority of minors under the age of 14. Thus, the Minors Act would likely pass an intermediate scrutiny analysis.

4. Concluding Remarks on Scrutiny

Ultimately, Florida’s Legislature did not focus on what platforms were being banned or the content hosted on platform¹⁵⁸ but rather on the harmful addictive features and mass amounts of time spent on platforms to minors.¹⁵⁹ Thus, the Minors Act narrows the scope enough so it does not burden substantially more speech than is necessary. It also permits platforms to regulate their features so that they can come in compliance with the Act and protect minors from the harms of addictive features. By focusing on features, this method may provide the blueprint for other states wishing to protect their children from social media.

B. Is the Minors Act’s Exception Vague?

Both Arkansas’ and Ohio’s laws were ruled unconstitutional on void for vagueness grounds.¹⁶⁰ The main issue the respective courts found with each statute was how it defined the social media platforms the states sought to regulate.¹⁶¹ For example, Judge Brooks of Arkansas took issue with Arkansas’ Social Media Safety Act’s (“Act 689”) definition of a social media company as an online forum that permits users for the “*primary purpose* of interacting socially with other profiles and accounts” and uploading or viewing content.¹⁶² The statute failed to define or provide guidelines on a platform’s primary purpose, “leaving companies to choose between risking unpredictable and arbitrary

156. *Rock Against Racism*, 491 U.S. at 799.

157. *See supra* notes 121-23 and accompanying text.

158. Bridges & Girod, *supra* note 151.

159. Compare with *Griffin*, 2023 WL 5660155, at *20 (“[R]esearch suggests that it is *the amount of time that a minor spends unsupervised online* and the content that he or she encounters there that matters. However, Act 689 does not address time spent on social media; it only deals with account creation.”).

160. *Id.* at *12-15; *Yost*, 716 F. Supp. 3d at 560-61.

161. *Griffin*, 2023 WL 5660155, at *13; *Yost*, 716 F. Supp. 3d at 560; This is the same contention NetChoice has with Florida’s Minors Act. *See* Complaint at 85, *NetChoice v. Moody*, Case 4:24-cv-00438-MW-MAF (N.D. Fla. filed Oct. 28, 2024).

162. *Griffin*, 2023 WL 5660155, at *13 (quoting Act 689 at ARK CODE ANN. § 4-88-1101(7)(A) (2023)).

enforcement.¹⁶³ Thus, the Court found the statute vague.¹⁶⁴ It also found the statute’s phrase “social media platform” vague because the statute defined it “as an ‘internet-based service or application . . . [o]n which a *substantial function* of the service or application is to connect users in order to allow users to interact socially with each other’ ” but excluded services in which “ ‘the *predominant or exclusive function* is’ ‘[d]irect messaging consisting of messages, photos, or videos.’ ”¹⁶⁵ The statute failed to define “substantial function” or “predominant function,” presenting the same contention that a platform’s “predominant function” was malleable and, therefore, vague.¹⁶⁶

Judge Marbley of Ohio also took issue with Ohio’s Parental Notification by Social Media Operators Act’s (“Ohio Act”)¹⁶⁷ definition of what entities or online services would be regulated. The Ohio Act’s definition includes entities whose “product targets children” or “is reasonably anticipated to be accessed by children”¹⁶⁸ and provides an eleven-factor list to help define these entities.¹⁶⁹ The court found that an entity whose “product targets children” or “is reasonably anticipated to be accessed by children” was impermissibly vague because it would leave many operators unsure whether it applies to their platform or service.¹⁷⁰ The listed considerations did not assist either because they were undefined.¹⁷¹ Further, similar to Arkansas, the court found the exception for “established” and “widely recognized” media outlets whose “primary purpose” is to “report news and current events” in § 1349.09(O)(2) was vague because the Act provides no guardrails for which media outlets are “established” and “widely recognized,” and invites arbitrary application of the law.¹⁷²

Florida’s definition of a “social media platform”¹⁷³ appears to be more favorable than the definitions employed by Arkansas and Ohio. A social media platform would be able to effectively evaluate its adherence to the four essential criteria outlined in § 501.1736(1)(e), *Florida*

163. *Id.*

164. *Id.*

165. *Id.* at *14 (Quoting Act 689 at ARK CODE ANN. § 4-88-1101(8)(A)-(B) (2023)) (alterations in original).

166. *Id.*

167. *Yost*, 716 F. Supp. 3d at 560.

168. OHIO REV. CODE ANN § 1349.09(B) (2024).

169. OHIO REV. CODE ANN. § 1349.09(C)(1)-(11) (2024). These factors are: (1) Subject matter; (2) Language; (3) Design elements; (4) Visual content; (5) Use of animated characters or child-oriented activities and incentives; (6) Music or other audio content; (7) Age of models; (8) Presence of child celebrities or celebrities who appeal to children; (9) Advertisements; (10) Empirical evidence regarding audience composition; and (11) Evidence regarding the intended audience.

170. *Yost*, 716 F. Supp. 3d at 560.

171. *Id.*

172. *Id.*

173. *See supra* Section I.C.

Statutes, rather than determining its “primary purpose” or whether it is “established.” Briefly going through the four factors, all entities that we consider “social media platforms” would meet the first element of uploading and viewing content, including some that we would not commonly think of, like news outlets.¹⁷⁴ Furthermore, a platform can readily analyze its user metrics to determine compliance with the second criterion, whether ten percent or more of the daily active users younger than 16 years of age spend an average of 2 hours per day on the platform.¹⁷⁵ Regarding the third and fourth elements, utilizing algorithms that analyze user data to select content for users and containing addictive features, major companies like X, Facebook, Instagram, Google, and TikTok satisfy the third criterion by employing algorithms.¹⁷⁶ Additionally, these companies can easily assess the presence of addictive features, as the statute distinctly outlines these characteristics. Such evaluations are factual determinations that a court or jury could make and thus do not render the definition vague.¹⁷⁷

However, the Minors Act’s exception does pose a concern. In its entirety, it does not encompass:

[A]n online service, website, or application where the *exclusive function* is e-mail or direct messaging consisting of text, photographs, pictures, images, or videos shared only between the sender and the recipients, without displaying or posting publicly or to other users not specifically identified as the recipients by the sender.¹⁷⁸

This concern stems from the Arkansas court’s ruling, which noted that the lack of definitions for “predominant” or “substantial” function in a similar exception created unpredictability in determining a company’s compliance with Act 689.¹⁷⁹ A close analysis of the court’s argument, however, may provide a loophole when assessing the Minors Act. Act 689 excluded services in which “the predominant *or* exclusive function is” direct messaging.¹⁸⁰ The court only took issue with the “predominant function” language and explicitly omitted “exclusive” in its

174. *Social Media Fact Sheet*, PEW RESEARCH CTR. (Nov. 13, 2024), <https://www.pewresearch.org/internet/fact-sheet/social-media/> [<https://perma.cc/3GHK-5Q7W>].

175. *Social Media Privacy*, ELEC. PRIVACY INFO. CTR., <https://epic.org/issues/consumer-privacy/social-media-privacy/> [<https://perma.cc/ZRD9-A7D2>] (“Data collection is at the core of many social media platforms’ business models.”).

176. Arvind Narayanan, *Understanding Social Media Recommendation Algorithms* 10-11 (Knights First Amend. Inst., Mar. 23, 2023), <https://knightcolumbia.org/content/understanding-social-media-recommendation-algorithms> [<https://perma.cc/6PGU-6MYJ>].

177. See *United States v. Williams*, 553 U.S. 285, 306 (2008) (upholding a law that limited the distribution of child pornography because the requirements were a factual determination that could be made by a court or jury).

178. Fla. Stat. § 501.1736(1)(e)(4)(e) (2024) (emphasis added).

179. *Griffin*, 2023 WL 5660155, at *14.

180. Social Media Safety Act, No. 689, 2023 Ark. Acts, at § 1101(8)(B) (emphasis added).

analysis.¹⁸¹ This is likely because “exclusive” is not malleable nor subject to interpretation.

Black’s Law Dictionary defines “exclusive” as “[l]imited to a particular person, group, entity, or thing.”¹⁸² Applying the definition to the Minors Act’s exception means that only a company whose function is limited to e-mail or direct messaging between sender and recipients will not be regulated.¹⁸³ Using “exclusive” rids any balancing a court would have to do when determining a “predominant” or “substantial function.” Exclusive is clear and direct, providing fair notice to any platforms subject to regulation, leaving no room for ambiguity. Thus, the Minors Act should not be found to violate the void for vagueness doctrine.

III. ALTERNATIVE CONSIDERATIONS TO THE MINORS ACT

Suppose a court examines the Minors Act under strict scrutiny, effectively signifying the act’s doom and keeping NetChoice’s batting average at 1.000. Can states or Congress solve the problems associated with youth mental health and social media? This Part examines two possible alternatives. One addresses Section 230 of the Communications Decency Act (CDA)¹⁸⁴ and the current dissatisfactions within the legislative and judicial branches concerning its broad protections. Repealing or finding an exception to Section 230 would remove social media companies’ liability shield and allow children who suffer damages from using social media to present a more viable cause of action against platforms. However, this may result in a substantial chilling of free speech due to over-content moderation. Second, this Part addresses attacking smartphone manufacturers like Apple, Google, and Samsung rather than social media platforms.

A. *Putting Section 230 on the Hot Seat is not a Good Idea*

Section 230, also known as the “twenty-six words that created the internet,”¹⁸⁵ is on the hot seat. Section 230 provides two principal functions centered on providing immunity for Internet Service Providers

181. *Griffin*, 2023 WL 5660155, at *14.

182. *Exclusive*, BLACK’S LAW DICTIONARY (12th ed. 2024).

183. This likely means that apps like Messenger for Kids or KiK would be allowable. It is also arguable that Snapchat would be allowed. Andrew Hutchinson, *Florida Moves Ahead With Laws To Restrict Teen Use of Social Media*, SOCIALMEDIATODAY (Mar. 25, 2024), <https://www.socialmediatoday.com/news/florida-moves-ahead-laws-restrict-teen-use-of-social-media-apps/711324/> [https://perma.cc/NG3Q-WGSS]. However, given Snapchat’s “Discover” function, it would be hard to argue that Snapchat’s “exclusive” function is direct messaging.

184. 47 U.S.C. § 230.

185. See JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* (2019) (providing a historical analysis of Section 230).

(“ISP”)¹⁸⁶: immunizing ISPs from informational content providers¹⁸⁷ and immunizing ISPs from content moderation. Put simply, you cannot sue Meta or TikTok for content on their platform,¹⁸⁸ and you cannot sue them for removing or blocking content in good faith.¹⁸⁹ In practice, should an ISP get sued for content on their platform, Section 230 operates as an affirmative defense to liability,¹⁹⁰ resulting in motions to dismiss that provide ISPs “legal certainty at a relatively low cost.”¹⁹¹

Since its enactment in 1996, Section 230 has been “one of the most important guarantors of free expression on the Internet” in the United States,¹⁹² creating immunity for ISPs even where the First Amendment might not.¹⁹³ Congress granted this broad statutory immunity in response to recognizing the threat that tort-based lawsuits, like defamation, pose to freedom of speech in the budding Internet medium.¹⁹⁴ Section 230 effectively allows the free flow of ideas on the internet because ISPs are not afraid of being held liable for what is said or posted on their platform, and it allows them the flexibility to remove content that does not adhere to community guidelines.¹⁹⁵ However, as the old adage goes, “when something is too good to be true, it usually is.”

Section 230 is a double-edged sword. It frees platforms to publish current events *and* gives them a license to encourage abuse; it allows platforms to host civil liberties protestors *and* sexual predators; it allows companies to enhance the visibility of user-generated art *and* deepfake sex videos.¹⁹⁶ It allows U.S.-based revenge-porn sites to

186. The Act broadly defines “interactive computer service” to mean “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.” 47 U.S.C. § 230(f)(2).

187. An information content provider is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” *Id.* § 230(f)(3). This means third parties who post content on their platforms.

188. *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc) (footnote omitted) (stating that Section 230 “immunizes providers of interactive computer services against liability arising from content created by third parties.”).

189. *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1176-77 (9th Cir. 2009).

190. *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

191. Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 42 (2019).

192. Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 433 (2009).

193. VALERIE C. BRANNON, CONG. RSCH. SERV., R45650, FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT 22 (2019).

194. *Zeran*, 129 F.3d at 330.

195. Danielle Keats Citron, *How to Fix Section 230*, 103 B.U. L. REV. 713, 717 (2023).

196. *Id.* at 717-18, (“Section 230 is why the internet is filled with war footage *and* death threats, encyclopedia entries *and* rape videos, restaurant reviews *and* nonconsensual pornography.”).

operate with immunity.¹⁹⁷ Companies reap all the benefits without bearing any responsibility for the harmful content posted on their platforms.

This is why Congress and the courts might be fed up with Section 230's legal shield. Politicians believe that Section 230 "as it exists today isn't working. The status quo just simply isn't viable."¹⁹⁸ This view extends across the ideological political spectrum as Democrats and Republicans desire to address Section 230 and the leeway provided to platforms under the legislation.¹⁹⁹ Bills have even been proposed to repeal Section 230,²⁰⁰ arguing that Section 230 curbs free speech rather than enhances it.²⁰¹

The dissatisfaction with Section 230 is not limited to the legislative branch, as the judiciary has also voiced concerns. Justice Thomas succinctly captures the issue by characterizing Section 230 as granting social media platforms a "get-out-of-jail free card."²⁰² The broad construction of the law has conferred "sweeping immunity" to major companies like Meta and X.²⁰³ Courts have criticized Section 230 for shielding corporations from claims loosely related to third-party content, effectively insulating platforms from the consequences of their actions and allowing them to neglect the standard duty imposed on most

197. *Id.* at 718, 728-29; see also Margaret Talbot, *The Attorney Fighting Revenge Porn*, THE NEW YORKER (Nov. 27, 2016), <https://www.newyorker.com/magazine/2016/12/05/the-attorney-fighting-revenge-porn> [<https://perma.cc/HJJ9-6LDT>] (discussing an attorney who was a victim of a revenge-porn site).

198. *Legislative Proposal to Sunset Section 230 of the Communications Decency Act: Hearing Before the Committee On Energy and Commerce*, 118th Cong. (2024) (statement of Doris Matsui, Ranking Member of Subcommittee on Communication and Technology) available at https://democrats-energycommerce.house.gov/sites/evo-sites/democrats-energycommerce.house.gov/files/evo-media-document/Matsui_Opening%20Statement_CAT.2024.05.22.pdf [<https://perma.cc/6UQR-S3GT>].

199. Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 46-47 (2020). Democrats advocate for increased liability of tech companies in addressing extremist content, hate speech, and misinformation, while Republicans are concerned about the platforms' potential bias in censoring conservative viewpoints. Rebecca Kern, *White House renews call to 'remove' Section 230 liability shield*, POLITICO (Sep. 9, 2022), <https://www.politico.com/news/2022/09/08/white-house-renews-call-to-remove-section-230-liability-shield-00055771> [<https://perma.cc/ZC5J-GAUP>]. The Republican point of view is evident in Florida's passing of S.B. 7072 in 2021, and Texas' passing of H.B. 20 in the same year, which both sought to hold platforms liable for moderating conservative viewpoints. *Moody v. NetChoice, LLC*, 603 U.S. 707, 713-19 (2024). The Court ultimately ruled that these two State bills were unconstitutional. *Id.* at 2394.

200. S. 2972, 117th Cong. (2021).

201. Compare John Spisak, Note, *A Strange-Love or: How I Learned to Stop Worrying and Love Section 230*, 61 WASHBURN L.J. 395, 417-18 (2022) (stating contentions that Section 230 curbs Free Speech), with Balkin, *supra* note 192, at 433 (noting how crucial Section 230 has been to Free Speech).

202. *Doe Through Roe v. Snap, Inc.*, 144 S. Ct. 2493, 2494 (2024) (Thomas, J., dissenting from denial of certiorari).

203. *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020) (statement of Thomas, J., respecting denial of certiorari).

businesses to take reasonable measures to prevent causing significant harm.²⁰⁴

The following Subsections discuss how Congress and the courts may get what they want if the Supreme Court affirms the Third Circuit's decision and reasoning in *Anderson v. TikTok, Inc.*²⁰⁵ First, it discusses how the Supreme Court's recent decision in *Moody v. NetChoice, LLC*²⁰⁶ may have paved the way for providing a loophole around Section 230's liability shield. Then, it addresses how the Third Circuit capitalized on the Court's determination in *Moody* of recommendation algorithms as "expressive activity" and a platform's first-party speech. It concludes by noting that while private causes of action would protect children from social media harms, the chilling effect on free speech would not be worth it.

1. Recommendation Algorithms as First-Party Speech?

The last case in the Court's 2023-2024 term, *Moody v. NetChoice, LLC*, is poised to significantly impact ISPs' content moderation protocols and the judicial interpretations of how these companies' platforms operate. While this Note's primary concern is not content moderation policies, the Court's discussion of social media platforms and their algorithms is instructive to how the Third Circuit decided in *Anderson*.²⁰⁷

Moody involved the constitutionality of Florida and Texas laws that sought to limit social media platforms' ability to moderate content freely.²⁰⁸ NetChoice filed lawsuits alleging that the two state laws facially violated the First Amendment.²⁰⁹ The Supreme Court considered whether these laws "restrict[ed] the ability of social-media platforms to control whether and how third-party posts are presented to other users" and run afoul of the First Amendment.²¹⁰ Although the Court decided the case on the facial nature of the challenges and not on First Amendment grounds, it still set out "the relevant constitutional principles" and analysis for managing recommendation algorithms in light of the First Amendment.²¹¹

The Court depicted the algorithms platforms use to curate feeds and deliver content to users as ones that "cull and organize uploaded posts in a variety of ways."²¹² The "key to the scheme is [the]

204. *Anderson v. TikTok, Inc.*, 116 F.4th 180, 191 (3d Cir. 2024) (Matey, J., concurring in the judgment in part and dissenting in part) (citing *Gonzalez v. Google LLC*, 598 U.S. 617 (2023)); *Force v. Facebook, Inc.*, 934 F.3d 53, 65-71 (2d Cir. 2019).

205. 116 F.4th 180 (3d Cir. 2024).

206. 603 U.S. 707 (2024).

207. *Anderson*, 116 F.4th at 183-84 n.10.

208. *Moody*, 603 U.S. at 717.

209. *Id.*

210. *Id.*

211. *Id.* at 718.

212. *Id.* at 719.

prioritization of content,” achieved through the usage of these algorithms, which the platforms write.²¹³ Although “[t]he selection and ranking is most often based on a user’s expressed interests and past activities,” the Court noted that “it may also be based on more general features of the communication or its creator.”²¹⁴ The Court explained that, by engaging in such activity, the platforms “shape other parties’ expression into their own curated speech products.”²¹⁵ Thus, the platforms engage in protected first-party speech under the First Amendment when these algorithms “present[] a curated and ‘edited compilation of [third party] speech.”²¹⁶ Basically, “*expressive activity* includes presenting a curated compilation of speech originally created by others.”²¹⁷ This means that every time you open up Instagram or TikTok and see something on your “For You Page” (FYP), that’s Instagram or TikTok directly talking to you, not the user who posted the picture or video.

2. *Anderson v. TikTok, Inc. – Providing a Loophole in Section 230*

Online challenges are rampant across users’ FYPs, representing a potent communicative tool among the young community but carrying the potential for self-inflicted harm among participants, with the associated risks varying from minor to fatal.²¹⁸ One of these challenges, the “Blackout Challenge,” tragically claimed the life of ten-year-old Nylah Anderson after she attempted the challenge once it popped up

213. *Moody*, 603 U.S. at 734.

214. *Id.* at 734-35.

215. *Id.* at 717.

216. *Id.* at 744 (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 570 (1995)) (second alteration in original).

217. *Id.* at 728 (emphasis added). Holding that recommendation algorithms are “expressive activity” significantly contrasts with how the Court viewed them in its previous term. *Compare Moody*, 603 U.S. at 728, with *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 499 (2023) (finding that recommendation algorithms that recommended terrorist content to potential terrorists were “agnostic”). By defining them as agnostic in its last term, the Court seemed to imply that the platforms are not really tied to their algorithms—almost serving as two separate distinct bodies just under one body. The “agnostic” algorithms simply operate without being tied to any particular stances. On the contrary, “expressive” implies that the Court in *Moody* believed that what an ISP’s algorithm produced was a convention of the ISP’s intent.

218. See Suely Ferreira Deslandres et al., *Online Challenges Among Children and Adolescents: Self-Inflicted Harm and Social Media Challenges*, SALUD COLECTIVA, 23 Dec. 2020, at 1, 1, <https://revistas.unla.edu.ar/saludcolectiva/article/view/3264/1703> [<https://perma.cc/JEJ8-MXH8>] (analyzing 122 social challenge videos and the harms associated amongst them). Positive challenges include the ALS Ice Bucket which has raised over \$220 million worldwide to support ALS research and care for people living with the disease. *ALS Ice Bucket Challenge*, ALS THERAPY DEV. INST., <https://www.als.net/ice-bucket-challenge/> [<https://perma.cc/F87A-Q6RT>] (last visited Apr. 26, 2025). On the other hand, challenges like the “Benadryl Challenge” or the “sleepy chicken” challenge has taken the lives of our children. *Why Social media Challenges Can Be a Recipe for Disaster – When They’re Real*, CLEVELANDCLINIC (Feb. 1, 2023), <https://health.clevelandclinic.org/dangers-of-social-media-challenges> [<https://perma.cc/Y285-LG4C>].

on her TikTok's FYP.²¹⁹ It also might have opened the door for private causes of action against social media platforms whose algorithms recommend content to its users, removing any Section 230 protection.

In *Anderson v. TikTok, Inc.*, Nylah Anderson's mother asserted a strict product liability and negligence claim against TikTok because its recommendation algorithm suggested a Blackout Challenge video to ten-year-old Nylah Anderson on her FYP, ultimately ending in her death after she tried to replicate the video.²²⁰ The Third Circuit supported the view that TikTok's recommendation algorithm integrates third-party videos and produces an expressive product for its users.²²¹ The Court concluded that TikTok's algorithm, "which recommended the Blackout Challenge to Nylah on her FYP, was TikTok's own 'expressive activity' " because of the Supreme Court's analysis in *Moody*.²²² TikTok's algorithm was considered an "expressive activity" due to its role in determining the inclusion or exclusion of third-party speech in a compilation and its presentation on a user's FYP, effectively transforming third-party speech into first-party speech.²²³

Why does it matter that a platform's recommendation algorithm, i.e., its FYP, is first-party speech? Section 230 would no longer be a liability shield for content produced by platforms' algorithms on users' main feeds. Section 230 did not protect TikTok in *Anderson*,²²⁴ and entities employing recommendation algorithms (meaning pretty much all ISPs and social media platforms) that facilitate harmful behavior resulting in self-inflicted harm may be subject to liability. Although the Supreme Court did not mention Section 230 in its *Moody* opinion, defining some algorithms as expressive activity may have opened the door for Plaintiffs to pursue legal action against ISPs without facing inevitable dismissal based on a Section 230 defense.²²⁵ Thus, if

219. The Blackout Challenge encourages people to record themselves engaging in self-asphyxiation. Nylah Anderson tried it and accidentally hanged herself. See *Anderson*, 116 F.4th at 182 (3d Cir. 2024) (the Court drew these facts from the complaint).

220. *Id.*

221. *Id.* at 183.

222. *Id.* at 184 (citing *Moody v. NetChoice, LLC*, 603 U.S. 707, 731 (2024)).

223. *Id.*

224. *Anderson*, 116 F.4th at 182.

225. See *Communications Decency Act of 1996—Jurisprudence—Judicial Minimalism—Twitter, Inc. v. Taamneh*, 137 HARV. L. REV. 402, 406 (2023) (discussing how the primary objective of Section 230 was to immunize platforms from the threat of civil liability and to prevent chilling free speech). The Third Circuit's perspective is not unique. For example, Chief Judge Katzman of the Second Circuit illustrated a similar opinion in his dissent to the majority in *Force v. Facebook, Inc.*, finding that Facebook's friend-and-content-suggestion algorithm did not make Facebook the publisher of *third-party content* for two reasons: (1) Facebook's algorithm creates and communicates its own message—that a user would like the specific content it is recommending (i.e., recommendation algorithm); and (2) Facebook's suggestions create real-world social networks that go far beyond traditional editorial functions. 934 F.3d 53, 81-82 (2d Cir. 2019) (Katzman, J., concurring in part and dissenting in part). Ultimately, he believed Facebook's algorithm "allegedly provide[s] the user with a message from Facebook." *Id.* at 82.

Florida's Minors Act fails, it and other states could wait and see if this reasoning is upheld because it would likely cause platforms to become more restrictive out of fear of potential liability.²²⁶

3. *The Potential Chilling Effects of Repealing Section 230 or Following Anderson*

Removing Section 230's liability shield and creating private causes of action may empower children to hold social media companies accountable for their harmful content through legal action. This would incentivize these companies to provide safer standards. However, the potential chilling effects on free speech would be significant.

The Internet and Social Media are not all bad. "Cyberspace" is "one of the most important places to exchange views."²²⁷ The Court has repeatedly emphasized that the Internet and Social Media Platforms are a marketplace of ideas, transforming communication, business, and information dissemination of millions of Americans.²²⁸ Social media is also crucial for political discourse since it plays a vital role in how young people absorb the news.²²⁹ Social media platforms enable a more democratic political process by facilitating easier access for candidates to a broader audience, irrespective of their political allegiance or financial capabilities.²³⁰ This, in turn, allows for direct communication between candidates and potential voters. Nothing screams how crucial social media is to political discourse than the politicians who wish to dispel America of TikTok's influence but still maintain accounts for their political campaigns.²³¹

The main concern about repealing Section 230, or upholding the *Anderson* opinion, is the chilling effect on speech as platforms will favor removing challenging content over keeping it.²³² During the latter half of 2020 alone, a staggering six billion posts were eliminated

226. See *infra* Section III.A.3.

227. *Packingham v. North Carolina*, 582 U.S. 98, 98 (2017).

228. *Moody*, 603 U.S. 707, 767 (Alito, J., concurring in the judgment); see also *Reno v. Am. C. L. Union*, 521 U.S. 844, 849-52 (1997); *Counterman v. Colorado*, 600 U.S. 66, 87 (2023) (Sotomayor, J., concurring in part and concurring in the judgment).

229. *Social Media and News Platform Fact Sheet*, PEW RSCH. CTR. (Sep. 17, 2024), <https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet> [<https://perma.cc/57XS-ZWGU>].

230. Stephen Despin, *The Role of Social Media in US Politics: Pros and Cons of Digital Democracy*, LIBERTARIAN ASS'N OF MASS. (July 20, 2023), https://www.lpmass.org/the_role_of_social_media_in_us_politics_pros_and_cons_of_digital_democracy [<https://perma.cc/X3W5-3VR9>].

231. See, e.g., Monica Alba, Sahil Kapur & Scott Wong, *Biden Campaign Plans to Keep Using TikTok Through the Election*, NBC NEWS (Apr. 24, 2024), <https://perma.cc/QPQ5-RVAD>; Tom Norton, *These US Lawmakers Voted for TikTok Ban But Use It Themselves*, NEWSWEEK (Apr. 17, 2024), <https://perma.cc/AQ5F-N8XQ>.

232. Derek E. Bambauer, *How Section 230 Reform Endangers Internet Free Speech*, BROOKINGS (July 1, 2020), <https://perma.cc/PC9R-Q7UL>.

despite the stabilized protection afforded by Section 230.²³³ Now imagine what that number may reach in 2025 and beyond if *Anderson* is upheld and companies fear potential liability.

Just because Section 230 would no longer provide protection doesn't mean these companies would automatically be liable. What is concerning is the *potential* liability, which could be "astronomical."²³⁴ As distinguished Section 230 scholar Jeff Kosseff noted, "a rational platform would err on the side of taking down user content that might be defamatory or otherwise lead to potential liability."²³⁵ This is especially true for smaller platforms with limited legal resources.²³⁶ Thus, while social media platforms' content moderation decisions would have a stark First Amendment defense,²³⁷ a company's moderation will only exacerbate to cover their tails against any potential litigation. This is because platforms would be faced with two choices: censor or face endless lawsuits.²³⁸

How would that moderation look today? The total number of daily users and content on the platform would make moderation almost impossible,²³⁹ most likely resulting in robust algorithms that remove mass amounts of content. These same algorithms that the Court in *Moody* stated were "expressive activity" and therefore afforded First Amendment protection.²⁴⁰ Thus, Section 230 is indispensable for

233. Malena Dailey, *By The Numbers: What Content Social Media Removes and Why*, NETCHOICE, <https://netchoice.org/wp-content/uploads/2021/11/Content-Moderation-By-The-Numbers-v5.pdf> [https://perma.cc/H9B8-CA84].

234. David Post, *A Bit of Internet History, or How Two Members of Congress Helped Create a Trillion or so Dollars of Value*, WASH. POST (Aug. 27, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/27/a-bit-of-Internet-history-or-how-two-members-of-congress-helped-create-a-trillion-or-so-dollars-of-value/> [https://perma.cc/D294-FAZA].

235. Jeff Kosseff, *A User's Guide to Section 230, and a Legislator's Guide to Amending It (or Not)*, 37 BERKELEY TECH. L.J. 757, 792 (2022).

236. *Id.*

237. Jeffrey Westling, *Moody v. NetChoice: Implications for Speech Regulation*, AM. ACTION F. (July 1, 2024), <https://www.americanactionforum.org/insight/moody-v-netchoice-implications-for-speech-regulation/> [https://perma.cc/LNN8-KFUJ].

238. *Infographic: Why CDA 230 is So Important*, ELEC. FRONTIER FOUND., <https://perma.cc/8FDS-L6Y7> (last visited Oct. 1, 2024).

239. Meta's daily users in June 2024 was 3.27 billion people on average. META INV. RELATIONS, *Meta Reports Second Quarter 2024 Results*, META (July 31, 2024), <https://investor.fb.com/investor-news/press-release-details/2024/Meta-Reports-Second-Quarter-2024-Results/default.aspx> [https://perma.cc/5HE9-6BML]. X's number of daily active users in the second quarter of 2024 was 251 million. Jess Weatherbed, *X is Stuck at 250 Million Daily Users*, THE VERGE (July 9, 2024), <https://www.theverge.com/2024/7/9/24194765/x-is-stuck-at-250-million-daily-users> [https://perma.cc/9JZJ-ASGM]. YouTube reached 2.7 billion active users in 2023. Mansoor Iqbal, *YouTube Revenue and Usage Statistics (2025)*, BUS. OF APPS (Feb. 3, 2025), <https://www.businessofapps.com/data/youtube-statistics/> [https://perma.cc/CC6F-NM5W]. The Court in *Moody* discusses how Facebook users share more than 100 billion messages every day and YouTube sees more than 500 hours of video uploaded every minute. *Moody*, 603 U.S. at 719.

240. *Moody*, 603 U.S. at 738-40.

fostering an unrestricted marketplace of ideas²⁴¹ and serves as a crucial impetus for platforms to uphold freedom of expression on the Internet.²⁴² This is why repealing or finding a loophole in Section 230 is not a viable alternative to keeping young people safe from the harms of social media.

B. Regulate Smartphone Developers Directly

Should the Minors Act be ruled unconstitutional, Congress or other state legislatures could look to regulating the source: the phones themselves. To date, state legislators have focused solely on social media companies and their platforms to resolve issues associated with youth mental health and social media.²⁴³ Behind these different pieces of legislation is the issue of child age verification and how platforms should do it. But why don't legislatures look to regulate Apple, Google, and Samsung directly? Meta CEO Mark Zuckerberg said this would be the easiest way to do it because child-age verification is already embedded in phones.²⁴⁴ But, these phone developers "don't want to take responsibility."²⁴⁵

Further, these phone developers can control the ability to receive push notifications,²⁴⁶ screen time,²⁴⁷ and infinite scrolling,²⁴⁸ which are

241. See generally Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035 (2018) (detailing how foreign government laws holding platforms liable for content have led to broad intermediary restrictions on speech abroad).

242. John Spisak, *A Strange-Love or: How I Learned to Stop Worrying and Love Section 230*, 61 WASHBURN L.J. 395, 423 (2022).

243. NCSL, *supra* note 10 (summarizing the legislation from 30 states who have pending litigation surrounding social media and the youth).

244. Nilay Patel & Alex Heath, *Why Mark Zuckerberg Thinks AR Glasses Will Replace Your Phone*, THE VERGE (Sep. 25, 2024), <https://www.theverge.com/24253481/meta-ceo-mark-zuckerberg-ar-glasses-orion-ray-bans-ai-decoder-interview> [https://perma.cc/7SZH-6XT9].

245. *Id.* One idea behind why Apple has been able to stay out of legislator's spotlight is their lobbying efforts. Apple's federal lobbying efforts from 2020 to 2023 have increased almost \$26 million from the previous four year window. Thomas Barrabi, *Apple Execs and Lobbyists – Including CEO Tim Cook – Visited WH 87 Times Since Biden Took Office as Antitrust Crackdown Loom*, N.Y. POST (Mar. 11, 2024), <https://nypost.com/2024/03/11/business/apple-ceo-tim-cook-dramatically-ramps-up-lobbying-in-washington-as-antitrust-crackdown-looms/> [https://perma.cc/ZEE8-WR7K].

246. APPLE, *Use Notifications on Your iPhone or iPad*, <https://support.apple.com/en-us/108781#:~:text=0,alerts%20from%20the%20Notification%20Center> [https://perma.cc/WP3D-U6D9] (last visited Nov. 16, 2024).

247. David Nield, *How to Give Yourself a Break from Your Android Phone*, THE VERGE (Nov. 7, 2023), <https://www.theverge.com/23948646/android-phone-digital-wellbeing-focus-sleep-how-to> [https://perma.cc/DG97-82DH]; APPLE, *Use Screen Time on Your iPhone or iPad*, <https://support.apple.com/en-us/108806#:~:text=Manage%20Screen%20Time%20settings,to%20set%20limits%20and%20restrictions> [https://perma.cc/A95C-B7KH] (last visited Nov. 16, 2024).

248. Denis Z., *Infinite Scrolling: Yes or No?*, MEDIUM (June 24, 2019), <https://medium.com/@denisz.design/infinite-scrolling-yes-or-no-a90282648aea#:~:text=>

the addictive features the Minors Act seeks to regulate. Regulating phone companies rather than platforms would eliminate the debate regarding whether legislation is content-based or content-neutral because phone companies do not make content but can control the manner in which the youth and general public receive information.²⁴⁹ A piece of legislation like this would, therefore, fall under intermediate scrutiny and further alleviate problems imposed by the First Amendment.

If a State attempted to issue this legislation, it would likely encounter challenges under the dormant commerce clause and be subject to the balancing test under *Pike v. Bruce Church, Inc.*²⁵⁰ However, Apple, Google, and Samsung may be able to tailor to the individual state to circumvent the dormant commerce clause just like Meta tailored to Texas in light of their recently passed SCOPE Act.²⁵¹

CONCLUSION

States face a pressing challenge: social media addiction is deeply affecting today's youth. Despite attempts by state legislatures to regulate social media companies and safeguard young users, the constraints of the First Amendment have hindered meaningful action. Florida's Minors Act may have found the proper way to protect its youth from social media—focusing on the platforms' addictive features. This Note suggested that the Minors Act's focus on addictive features rendered it content-neutral, thereby invoking the less stringent intermediate scrutiny standard, which the Act should pass. It also argues that the Minors Act's exception is not vague because it uses the word "exclusive" and platforms can readily ascertain whether the Minors Act's definition applies to them.

This Note also explored two alternatives. One concerned the implications of repealing Section 230 or affirming a holding like *TikTok, Inc. v. Anderson*. While removing the liability shield of Section 230 would allow minors to initiate legal attacks against social media companies for the harm they are experiencing, the potential chilling effects of free speech would be too severe. Second, it raised the idea of regulating the

Mobile%20vs.&text=Depending%20on%20the%20device%20type,badly%20adjustable%20to%20mobile%20demands [https://perma.cc/MW9Z-Y9AP] ("all devices can control infinite scrolling to some extent by control bars and filters").

249. See *supra* Section II.A.1.

250. 397 U.S. 137, 142 (1970).

251. Pooja Salhorta, *Texas Parents Gain New Tools to Control Their Teen's Social Media Use*, THE TEX. TRIB. (Sep. 10, 2024), <https://abc13.com/post/texas-parents-control-teens-social-media-use-after-meta-rolls-new-tools-comply-house-bill-18/15286859/> [https://perma.cc/VN8J-HL9P]. The SCOPE Act, or HB 18, requires social media companies to receive consent from a minor's parent or guardian before they'd be allowed to create their own accounts. Makena Kelly, *Texas Bans Kids from Social Media Without Parental Consent*, THE VERGE (June 14, 2023), <https://www.theverge.com/2023/6/14/23760975/texas-ban-social-media-kids-louisiana-utah> [https://perma.cc/QSJ6-PDTE].

phone manufacturers themselves since they possess the capability to create devices devoid of addictive features. This issue has not yet been a focal point for legislators; however, it merits consideration as it offers a more direct approach to mitigating the detrimental effects associated with the addictive features inherent in smartphones.

