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ARTICLES

NOTES

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On August 2023, Illinois Governor J.B. Pritzker signed a bill into law that, for the first time, allows the imposition of punitive damages in torts cases that originate in someone's death. Unfortunately, the law is flawed because it still unjustifiably bans the imposition of punitive damages in medical and legal malpractice cases. In doing so, by looking to minimize the extent of possible liability in malpractice cases, the legislature focused too much on protecting tortfeasors who act egregiously and too little on creating incentives to reduce the incidence of conduct that constitutes malpractice. As it is, the state of the law favors the wrongdoers and, more importantly, leaves the most severely injured victims without a complete means of redress. In theory, the more wrongful the tortfeasor's conduct is, the more public policy calls for the imposition of punitive damages. The current state of the law in Illinois undermines this public policy. For this reason, this Article argues that, even though we must celebrate the adoption of the new policy, we must denounce its implementation and continue to advocate for change so that it is amended to become fully inclusive and fair. The Article discusses the recently adopted new approach to punitive damages in personal injury cases and concludes that it is important that the General Assembly eliminate the ban on punitive damages in medical and legal malpractice cases so we can finally bring death actions into complete harmony with the general body of law governing other types of tortious conduct.

For many marital couples, the most valuable asset at the time of divorce is the home in which they live. If that home was brought to the marriage by one of the parties and the marital community helped pay down the mortgage, the couple may disagree about whether or how much of the value of the marital home is subject to distribution at the time of divorce. Different states have adopted different approaches to the conditions under which some of the value of the marital home is subject to distribution. The approaches are designed to achieve a variety of goals including reimbursing parties for past expenditures and distributing gains in a way that is fair both to the marital community and to the individual who brought the house to the marriage. Regrettably, many states do not take adequate account of the different implications of mortgage payments that mostly go towards interest and mortgage payments that mostly go towards the reduction of the principal owed. Marital communities may be awarded significantly more depending on when in the mortgage's life the marriage exists. Such an approach may result both in dissimilar treatment of relevantly similar cases and in great unfairness, especially in cases where marriages are relatively short. This disparity in treatment can and should be rectified.

The Federal Trade Commission (FTC) recently adopted a new regulation that prohibits non-compete clauses for employees (Non-Compete Rule). Simultaneously, the FTC allowed the inevitable disclosure doctrine to continue in existence, even though such doctrine is tantamount to a non-compete clause. Under the inevitable disclosure doctrine, an employer posits that an employee will be unable to abide by her/his confidentiality obligations, and therefore unable to resist use and disclosure of proprietary information at an alternative employer. As a result, prescient, mind-reading judges portend future conduct under the inevitable disclosure doctrine and can issue an order banning or restricting future employment, thereby creating a *de-facto* non-compete covenant. Regardless of whether the FTC Non-Compete Rule is upheld or replaced by successor legislation, the inevitable disclosure doctrine remains an ugly, unpalatable, and unfair method of competition by employers. The inevitable disclosure doctrine allows employers to bait and poison employees with purportedly irresistible information, resulting in clairvoyant judges imposing non-compete restrictions upon unwitting, innocent employees. It is time for the inevitable disclosure doctrine to mysteriously evaporate back into the same thin air from whence it first appeared.

This is a review of Wendy E. Parmet's new book, *Constitutional Contagion: COVID, the Courts, and Public Health*. The book adequately exposes the reader to criticism of modern jurisprudence involving COVID-19. However, this review focuses on three areas of critique: comparing red states versus blue states for COVID-19 response outcomes, the inability of science to make public policy pronouncements, and the alleged connection between a healthy democracy and healthy citizens. Additionally, the ends-justify-the-means theme throughout the book is critiqued as an invalid form of constitutional interpretation.

NOTES

In the last two decades, there have been several helpful and progressive reforms dedicated to changing the landscape of sexual violence. Yet, survivors of sexual assault lack a voice in the criminal justice process. The support offered by victim advocates and coordinators allows victims to be seen but not heard by the court. This Note contends that the progressive step the criminal justice system must take is an independent victim's counsel program similar to the United States military. This Note proposes model legislation establishing an Independent Victim's Counsel program in federal and state criminal justice systems. It is time for legislators to do more by enabling survivors to be heard through independent counsel.

The average flood event in the United States costs Americans $4.7 billion. Flood events have become more frequent, widespread, and of longer duration due to climate change. The United States attempts to combat the emerging threat of flooding through federal and private insurance programs. Still, as flooding risk rises, property owners are burdened by the responsibility to assess and prepare for these risks independently since standard homeowners' and renters' insurance does not cover flood damage under any circumstances in the United States. Rural communities are particularly vulnerable to the impacts of climate change due to economic foundations that are intricately linked to natural systems. These communities' importance to the country's economic and social well-being is disproportionate to its population, and it is crucial not to let them drown.
The National Flood Insurance Program (NFIP) contains several shortcomings, including outdated flood maps that fail to assess risks accurately and the program's financial instability due to an over-reliance on borrowed funds. The current flood risk is quantifiable, which allows the government to calculate and predict when and where flooding will impact the hardest. This Note recommends that the current NFIP be revitalized through direct funding to create a competitive and profitable market for flood insurance or by a broader national mandate.

TWO STEPS FORWARD, ONE STEP BACK: ILLINOIS' NEW RULE ON PUNITIVE DAMAGES IN WRONGFUL DEATH CASES

Alberto Bernabe*

INTRODUCTION

On August 11, 2023, without any fanfare, Illinois Governor J.B. Pritzker signed a bill into law that significantly altered the state's civil liability landscape.[1] For the first time, this new law allows the recovery of punitive damages in some cases under the Wrongful Death Act and the Survival Act.[2] However, the law is flawed as it shows a significant bias in favor of an important group of possible defendants while putting at a disadvantage some victims who would benefit the most from the new policy. Therefore, while we should celebrate the adoption of the new policy, we must denounce its implementation and continue to advocate for change to ensure it becomes fully inclusive and fair.

I. BACKGROUND

The history of wrongful death causes of action is well known. English Common Law, which was eventually adopted throughout the United States, did not initially recognize claims based on injuries resulting from someone's death.[3] Instead, the accepted policy held that all causes of action died with the decedent.[4] Oddly, at least in theory, this principle created a perverse incentive for tortfeasors to kill their victims since causing death would expose them to less liability than if they merely injured them.[5]

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1 *See* Public Act 103-0514, available at https://ilga.gov/legislation/publicacts/fulltext.asp?Name=103-0514.

2 *Id.*

3 Jill Wieber Lens, *Children, Wrongful Death, and Punitive Damages*, 100 B.U. L. REV. 437, 445 (2020) (citing STUART M. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1:1, at 2 (2d ed. 1975) and Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 75 (2011)).

4 *Id.*

5 *See, e.g.*, Mattyasovszky v. W. Towns Bus Co., 330 N.E.2d 509, 513 (Ill. 1975) (Goldenhersh, J., dissenting); Colin H. Dunn, *In Illinois, it's Still Cheaper to Kill than to Hurt*, CHI. DAILY L. BULL. (June 24, 2009) (explaining that in all fairness it should be stated that the incentive to kill rather than to simply hurt a victim was more "theoretical" than real because as a practical matter it was

The fact that a tortfeasor could benefit from an injured party's death, however, eventually generated interest in enacting legislation to counter the old common law rule. Scholars often point to England's "Lord Campbell's Act" of 1846 as the first wrongful death act because it granted defined family members the right to pursue a claim for compensation due to the death of a decedent.[6] Proving to be a popular policy, state legislatures in the United States soon began adopting wrongful death statutes modeled after Lord Campbell's Act.[7]

These acts specified, and significantly limited, who could bring a wrongful death claim and what damages could be recovered. Initially, recovery was usually limited to pecuniary damages, which excluded recovery for emotional distress, loss of society or companionship, and other similar types of personal damages.[8] As a practical matter, it also excluded any recovery for the death of a minor child unless the minor contributed financially to the plaintiffs' income.[9] For these reasons, as originally interpreted and applied, the wrongful death statutes in most states did not help plaintiffs obtain what many argued should constitute the full value of their injuries in many situations.[10] However, as the American Common Law began recognizing the validity of claims for emotional distress and for non-economic damages, courts and legislatures in most states expanded the limits of recovery in wrongful death claims to include at least some non-economic damages, including non-pecuniary damages suffered due to the death of a child.[11]

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minimized by the possibility of criminal prosecution. In other words, although tortfeasors might have been able to avoid possible civil liability, and therefore benefit, if their victims died, they would likely still be deterred from purposely causing a death since they could face possible criminal liability for doing so.).

6 Lens, *supra* note 3, at 445–46 (citing STUART M. SPEISER, RECOVERY FOR WRONGFUL DEATH § 1:89, at 28 (2d ed. 1975)) (explaining that the Act was officially called "An Act for Compensating the Families of Persons Killed by Accidents," and that it stated that the action would be for the benefit of the decedent's wife, husband, parent, and child).

7 *Id.* at 445.

8 *Id.* at 446.

9 *Id*.

10 John Fabian Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 L. & SOC. INQUIRY 717, 720–21 (2000) ("[T]he wrongful death statutes thus left many widowers entirely without a remedy for the wrongful death of their wives and children…. The statutes limited recovery to pecuniary damages. But because women's work was usually unpaid, husbands seeking to recover damages for the deaths of their wives faced a host of legal challenges in establishing the quantum of their losses.").

11 A 2015 survey found that at least 33 states recognized the right to recover non-economic damages or loss of companionship, or both, in their wrongful death statutes. David Schap & Andrea Thompson, *Recoverable Damages for Wrongful Death in the States: A 2015 Review of Statutory Law*, 22 J. LEGAL ECON. 143 (2016). Lens, *supra* note 3, at 447 (citing STUART M. SPEISER, RECOVERY FOR WRONGFUL DEATH, § 3:49, at 313) (finding that the modern trend is to allow damages for what has become known as loss of consortium, although not necessarily for the general mental anguish and grief that results from the death of a loved one).

Likewise, recognizing punitive damages as recoverable in wrongful death actions followed a similar trajectory. Initially, most states did not allow the recovery of punitive damages, but, over time, most jurisdictions revised their position.[12] Yet, it was not until 2023 that Illinois joined that majority.[13]

Adopting the majority view was the correct policy move. Punitive damages differ from compensatory damages, but the distinction does not justify excluding their recovery in wrongful death claims. However, as discussed below, the recently adopted amendments to recognize claims for punitive damages in death cases are significantly flawed and unfair.

A. Punitive Damages

The primary remedy in American tort law is awarding "damages," or, in other words, compensation for the value of the injuries caused by a defendant's wrongful interference with a plaintiff's right.[14] It is often said that awarding damages aims to "make the plaintiff whole" or to put the plaintiff back in the position they were in before the injury.[15] In reality, though, a monetary award often cannot fully achieve this goal, and it is better to view the monetary award as an imperfect financial substitute for the value of the loss suffered by the plaintiff.[16]

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12 *Id.* (listing 33 jurisdictions that, as of 2015, allowed recovery of punitive damages in wrongful death cases, and four that did not). *See also* Annotation, *Exemplary or punitive damages as recoverable in action for death*, 94 A.L.R. 384 (1935). This annotation collects cases holding that punitive damages are not recoverable in wrongful death actions from Colorado, Florida, Georgia, Kansas, Pennsylvania, and South Dakota. *Id.* Interestingly, the history in Alabama and California is a bit different. Alabama's approach has always been to allow the award of punitive damages in wrongful death cases. Lens, *supra* note 3, at 475–77. In contrast, California's wrongful death statute of 1862 permitted the jury to give "such damages, pecuniary and exemplary, as the jury should deem [fair] and just." Lange v. Schoettler, 47 P. 139, 139 (Cal. 1896). However, in 1874, the statute was amended to eliminate the words "pecuniary and exemplary" and the state's supreme court interpreted this amendment to mean that the legislature meant to take away the right to seek punitive damages in wrongful death cases to match statutes in other jurisdictions. *Id. See also* Smith v. Whitaker, 713 A.2d 20, 28 (N.J. Super. Ct. App. Div. 1998) (holding that a claim for punitive damages is permissible under New Jersey's survival statute); Scott v. Porter, 530 S.E.2d 389, 394 (S.C. Ct. App. 2000) (allowing punitive damages in wrongful death actions).

13 *See* Public Act 103-0514, available at https://ilga.gov/legislation/publicacts/fulltext.asp?Name=103-0514.

14 DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION 213 (3d ed. 2018); JAMES M. FISCHER, UNDERSTANDING REMEDIES 250 (4th ed. 2021).

15 ROBERTS, *supra* note 14, at 215; RUSSELL L. WEAVER & MICHAEL B. KELLY, PRINCIPLES OF REMEDIES LAW 165 (4th ed. 2022).

16 McDougald v. Garber, 536 N.E.2d 372, 374–75 (N.Y. 1989) ("recovery for noneconomic losses such as pain and suffering and loss of enjoyment of life rests on "the legal fiction that money damages can compensate for a victim's injury" . . . We accept this fiction, knowing that although money will neither ease the pain nor restore the victim's abilities, this device is as close as the law can come in its effort to right the wrong. We have no hope of evaluating what has been lost, but a monetary award may provide a measure of solace for the condition created . . . .").

However, in rare cases in which the defendant's conduct is particularly reprehensible, plaintiffs may obtain an award for punitive damages in addition to compensatory damages.[17] An award of punitive damages is an amount of money that reflects both the level of outrage of the jury given the defendant's conduct and, based on that outrage, the value of the punishment imposed on the defendant if the defendant's conduct is found to be particularly reprehensible or if the defendant's conduct reflects an evil motive or reckless indifference to the rights of others.[18]

Imposing punitive damages is justified to punish a wrongdoer and to deter future similar wrongful conduct by the same wrongdoer and others.[19] Yet, because in most cases the awarded punitive damages are paid to the plaintiff, as a practical matter, they are part of the total compensation package and thus supplement what could otherwise be an incomplete recovery.[20] The imposition of punitive damages is presumably available in all state tort actions as long as the plaintiff can convince the jury[21] that the defendant's

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17 As the Illinois Supreme Court stated in *Int'l Union of Operating Eng'rs, Loc. 150 v. Lowe Excavating Co*., 870 N.E. 2d 303, 313–14 (Ill. 2006), "punitive damages should only be awarded if the defendant's culpability . . . is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *See also* State Farm Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) ("[c]ompensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct' [while] punitive damages serve [the] broader function [of] deterrence and retribution.") (internal citations omitted). Contrary to popular belief, studies have shown that punitive damages are imposed in only a small number of cases. *See generally* Emily Gottlieb, *What You Need to Know About... Punitive Damages*, CTR. FOR JUST. & DEMOCRACY (Sept. 2011), https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://centerjd.org/system/files/PunitiveDamagesWhitePaper2011.pdf&ved=2ahUKEwi15evfic2JAxWm48kDHWf8EWAQFnoECBUQAQ&usg=AOvVaw2Hgh-OtWZ9c0OfgIkJvtEU.

18 *Id*.

19 Philip Morris USA v. Williams, 549 U.S. 346, 352 (2007) ("This Court has long made clear that '[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.'") (internal citations omitted); Mattyasovszky v. West Towns Bus Co., 330 N.E.2d 509, 511 (Ill. 1975) ("The objectives of an award of punitive damages are the same as those which motivate the criminal law – punishment and deterrence.").

20 Dunn, *supra* note 5, at 6 ("no one can deny that a punitive damage award benefits the tort victim since they collect it and the (after tax) amount can be substantial"). *See also Mattyasovszky*, 330 N.E.2d at 511–12 (explaining that punitive damages are a windfall for the plaintiff since the jurors are free to award any amount of money they see fit).

21 In some states, in order to justify an award of punitive damages, the plaintiff has to convince that punitive damages are justified by a higher standard of proof than the one used in civil litigation. When this is the case, typically courts will use the phrase "clear and convincing evidence" as the standard to meet, rather than the usual "preponderance of the evidence" or "more likely than not" standard. *See* Masaki v. General Motors Corp., 780 P.2d 566, 575 (Haw. 1989) ("[t]he plaintiff must prove by clear and convincing evidence that the defendant has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations"); Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 681 (Ariz. 1986) ("while a plaintiff may collect compensatory damages upon proof by a preponderance of the evidence of his injuries due to the tort of another, we conclude that recovery of punitive damages should be awardable only upon clear and convincing evidence of the defendant's evil mind."); Owens-Illinois, Inc. v. Zenobia,

conduct was so reprehensible that punishment is warranted in addition to financial compensation for actual damages.[22] For this reason, an award of punitive damages also serves a social function.[23]

One notable exception to this general rule, however, is that many states do not allow punitive damages in wrongful death cases.[24] This has resulted in a debate as to how jurisdictions should handle cases arising from someone's negligently caused death.[25] This is why Illinois' decision to abandon the old approach is significant and worth discussing. Yet, it is also worth pointing out that, despite being based on good intentions, the newly adopted rule still reflects a poor policy choice.

B. The Law in Illinois

To fully grasp the consequences of the newly adopted amendments that allow awards for punitive damages in wrongful death cases, it is essential to understand the law prior to 2023. Additionally, it is helpful to understand the relationship between the Wrongful Death Act, initially adopted in 1853,[26] and the Illinois Survival Act, initially adopted in 1872[27] because cases involving claims stemming from someone's death often involve claims under both acts and in many cases, courts examine claims under the Survival Act by referring to the Wrongful Death Act for clarification.

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601 A.2d 633, 657 (Md. App. Ct. 1992) ("in *any* tort case a plaintiff must establish by clear and convincing evidence the basis for an award of punitive damages.").

22 *See* Int'l Union of Operating Eng'rs, Loc. 150 v. Lowe Excavating Co., 870 N.E. 2d 303, 313–14 (Ill. 2006) ("punitive damages should only be awarded if the defendant's culpability . . . is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."); State Farm Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) ("[c]ompensatory damages 'are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct' [while] punitive damages serve [the] broader function [of] deterrence and retribution.") (internal citation omitted).

23 Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 383 (Cal. Dist. Ct. App. 1981) ("Punitive damages . . . remain as the most effective remedy for consumer protection against defectively designed mass produced articles. They provide a motive for private individuals to enforce rules of law and enable them to recoup the expenses of doing so which can be considerable and not otherwise recoverable."); Gottlieb, *supra* note 17, at 1–2 (pointing out that the imposition of punitive damages has been embraced even by conservative free market economists as essential to a fair, safe, and efficient society, that it serves as a supplement to criminal law and that the amount of money society saves as a direct result of the deterrence function of punitive damages is significant).

24 Thompson, *supra* note 11. *See also* Annotation, *supra* note 12 (citing statutes or cases from Mississippi, Virginia, Missouri, Kentucky, Massachusetts, Montana, Nevada, and South Carolina); Lens, *supra* note 3, at 475–77.

25 Lens, *supra* note 3, at 474 ("Numerous respected scholars, including Professors Cass Sunstein and Eric Posner and Professor Sean Harmon Williams, have criticized wrongful death damages—both for adults and children—by focusing on the fact that current damage measures fail to create the proper level of deterrence.") (internal footnotes omitted).

26 Illinois Wrongful Death Act, 740 ILL. COMP. STAT. ANN. 180/0.01 (LexisNexis 2024).

27 Illinois Survival Act, 755 ILL. COMP. STAT. ANN. 5/27-6 (LexisNexis 2024).

The Wrongful Death Act was enacted to recognize a cause of action on behalf of certain beneficiaries of a decedent to recover for the injuries they suffered as a result of the decedent's wrongful death.[28] In contrast, the Survival Act does not create a statutory cause of action.[29] It simply states that if a person who died as a result of wrongful conduct had the right to pursue a cause of action at the time of their death, a representative—as opposed to a beneficiary—of the estate of the decedent can pursue that claim even though the person who technically would have been the plaintiff in that action has died.[30] The statute's use of the word "survival" in its title refers to the fact that the claim survives the decedent's death, not to the possibility that a claim can be filed by someone who survives the decedent. In other words, what "survives" the decedent's death is the claim, not a person, and because the claim survives the claimant's death, the claim belongs to the decedent's estate, not the decedent's beneficiaries.[31] The estate's representative can then pursue it even though the decedent has passed away, and, if successful, the claim's proceeds go to the decedent's estate.[32]

Assume, for example, that a negligent driver strikes a pedestrian and that, under the circumstances, the pedestrian would have a right to sue in tort for compensation for their injuries. If the pedestrian then dies because of the injuries, their spouse—or any other statutorily recognized beneficiary—can pursue a cause of action for the value of the injuries suffered by the beneficiaries due to the wrongful death of the decedent. Additionally, the pedestrian's estate can file a separate cause of action under the survival statute for the value of the injuries the decedent suffered from the time of the accident until the time of his or her death.[33]

Notably, however, not all claims survive the death of a decedent. The Illinois Survival Statute specifically states that causes of action for defamation do not survive the death of the decedent, for example.[34] However,

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28 *See* Wrongful Death Act § 180/0.01.

29 *See* Survival Act § 5/27-6.

30 *See id*. *See also* Murphy v. Martin Oil Co., 308 N.E.2d 583 (Ill. 1974) (recognizing a cause of action to recover for a decedent's pain and suffering during the time between the wrongfully caused injury and their death).

31 *Id*. Given the distinctions between the Wrongful Death Act and the Survival Act, some law professors teach students to remember that "the wrongful death action is for the benefit of the survivors while the survival action is for the benefit of the dead."

32 *Id*.; *Murphy*, 308 N.E.2d at 583; Howe v. Clark Equip. Co., 432 N.E.2d 621, 625 (Ill. App. Ct. 1982).

33 *See* i*d.*; *Murphy*, 308 N.E.2d at 431 (recognizing a cause of action to recover for a decedent's pain and suffering during the time between the wrongfully caused injury and their death).

34 Survival Act § 5/27-6 ("In addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages, including punitive damages when applicable, for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property or for the detention or conversion of personal property, actions against officers for misfeasance, malfeasance, or nonfeasance of themselves or their deputies,

until 2023, the statute was silent as to whether claims for punitive damages survived. Thus, one might have assumed that a claim for punitive damages would survive if the plaintiff had the right to recover punitive damages as part of a common law action.[35] Yet, Illinois courts had consistently held that actions for punitive damages did not survive the death of the original plaintiff unless the legislature had specifically authorized such an action or unless the claimant could demonstrate that they would receive no remedy at all unless a claim for punitive damages were allowed.[36]

In other words, before the 2023 amendments, claims for punitive damages could be supported as part of a claim based on the Survival Statute only if the decedent's original claim was based on a statute that specifically allowed claims for punitive damages.[37] The fact that the common law recognized the imposition of punitive damages in tort cases was not enough for claims for punitive damages to survive a decedent's death.[38]

In fact, in 2011, the Illinois Supreme Court narrowed this limitation even further in *Vincent v. Alden-Park Strathmoor, Inc.*[39] There, the court held that a plaintiff could not recover punitive damages in a claim brought under the Survival Act even though the court had already held in previous cases

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actions for fraud or deceit, and actions provided in Section 6-21 of the Liquor Control Act of 1934.").

35 *See, e.g.*, Nat'l Bank of Bloomington v. Norfolk & W. Ry. Co., 383 N.E.2d 919, 924–26 (Ill. 1978). In this case, the court found that the plaintiff had the right to pursue a claim for punitive damages even though the claim had been brought under the Survival Act because the original claim used to support the decedent's claim was based on the Public Utilities Act which expressly allows the imposition of punitive damages. *Id.* at 924. The Court in fact held that not allowing the imposition of punitive damages in such a case would pervert the Act's intent to promote safety by public utilities. *Id. See also* Mattyasovszky v. W. Towns Bus Co., 330 N.E. 2d 509, 513 (Ill. 1975) (Goldenshersh, J., dissenting) ("Logically, it would seem that punitive damages should be allowed to the estate of the decedent under the Survival Statute.").

36 *See, e.g.,* Vincent v. Alden-Park Strathmoor, Inc., 948 N.E.2d 610, 617 (Ill. 2011) ("Under Illinois law, any right to common law punitive damages is lost once the injured party has died."); Marston v. Walgreen Co., 907 N.E.2d 851, 857 (Ill. App. Ct. 2009) ("Our supreme court has consistently held that, absent specific statutory authority or very strong equitable reasons, punitive damages are not permitted in Illinois in an action under the Survival Act . . . or as part of a common law action for wrongful death.") (internal citations omitted). *See also* Jack Casciato, *To make whole, punitive legislation needed*, CHI. DAILY L. BULL. (October 10, 2018), https://www.chicagolaw bulletin.com/punitive-damages-and-wrongful-death-claims-jack-casciato-20181010.

37 *See id.*

38 Froud v. Celotex Corp., 456 N.E.2d 131, 136 (Ill. 1983) ("We are unwilling to accept the plaintiffs' invitation to . . . add to the scope of the Survival Act by including within it common law claims for punitive damages based upon an injury to the person."). In this case, the court also pointed out that in 1975, a bill was introduced in the General Assembly to amend the Survival Act by expressly providing for the survival of "damages, actual and punitive, for an injury to the person" but the bill was defeated by the committee to which it was referred. *Id. See also Vincent,* 948 N.E.2d at 615 ("For a punitive damage claim to survive, the award of such damages must be expressly authorized by the statute on which the cause of action is predicated . . . [i]f punitive damages are not specifically permitted by the statute, any claim to those damages will be extinguished upon the injured person's death.").

39 *Vincent*, 948 N.E.2d at 610.

that the type of claim involved in the case survived the decedent's death and that it specifically allowed the imposition of punitive damages.[40] In *Vincent*, the plaintiffs brought a claim on behalf of a decedent under the Nursing Home Care Act and sought to recover punitive damages.[41] The court admitted that it had previously held that claims based on a violation of the Nursing Home Care Act may result in the imposition of punitive damages and that claims under the Nursing Home Care Act survive under the Survival Act.[42] Yet, in an opinion that defies logic, the court held:

> Although common law punitive damages are available for willful and wanton violations of the Nursing Home Care Act, and causes of action based on the Nursing Home Care Act survive the death of the nursing home resident alleged to have been injured as a result of violation of the Act, it does not necessarily follow that common law punitive damages may be recovered in a Nursing Home Care Act case where, as here, the nursing home resident is deceased. That is so because of another basic principle of Illinois law: as a general rule, the right to seek punitive damages for personal injuries does not survive the death of the injured party.[43]

Thus, in a nutshell, the court concluded that even though the Nursing Home Act permitted the imposition of punitive damages and even though claims under the Nursing Home Act survive a decedent's death, the plaintiffs could not bring a claim for punitive damages because punitive damages were traditionally not available under the Wrongful Death Act.[44]

As a result, according to the state of the law at the time, a living plaintiff could recover punitive damages under the common law of the Nursing Home Care Act, but if the plaintiff died before the case was resolved, their estate would lose the right to continue to pursue the claim for punitive damages. Thus, perhaps without realizing it, the court reinforced once again the position that it would be more advantageous for a tortfeasor to kill rather than merely injure, as it would result in less exposure to liability.

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40 *Id.* at 615–17.

41 *Id.* at 614–15.

42 *Id.* at 614.

43 *Id.* (internal citations omitted).

44 *Id.* at 615. Another reason set forth by the Illinois Supreme Court for continuing to bar punitive damages in wrongful death and survival actions is to prevent "disservice" to plaintiffs in prior death cases who were precluded from seeking punitive damages. Froud v. Celotex Corp., 456 N.E.2d 131, 137 (Ill. 1983). This makes no sense. In fact, the reasoning should be exactly the opposite. The fact that injustices were committed in the past is precisely the reason the law should be changed in order to prevent more injustices to continue to be committed in the future. *See also* Mattyasovszky v. W. Towns Bus Co., 330 N.E.2d 509, 513 (Ill. 1975) (Goldenshersh J., dissenting).

II. THE 2023 AMENDMENTS AND THEIR PROBLEMATIC EXCEPTIONS

The Supreme Court's decision in *Vincent* was controversial, but it was the result of a line of cases that delineated the state of law leading up to it.[45] As one commentator wrote in a response to one of those earlier cases, the court's interpretation

> does not appear to make sense if one employs the normal tools of statutory interpretation. If the [Survival Act] is merely a conduit to permit a common law personal injury cause of action to survive the death of the victim, there does not seem to be any basis in the statute to justify allowing a victim to seek compensatory but not punitive damages.
>
> . . . [P]unitive damages were potentially part of a common law action for an injury to a person depending on the culpability of the tortfeasor's wrongful conduct. If the act's purpose was to allow a tort victim's representative to maintain common-law actions which had already accrued to the decedent before he died, then the . . . court has changed the act from saving certain common law causes of action . . . to saving only selective aspects of those causes of action.[46]

Several cases leading to the decision in *Vincent* questioned why the death of a wronged person should reduce society's interest in punishing the wrongdoer and deterring others from committing similar acts.[47] However, it was not until the formal amendments to the Wrongful Death Act and the Survival Act were adopted in 2023 that the legislature finally addressed the issue.

As amended in 2023, both the Wrongful Death Act and the Survival Act now reflect the generally accepted policy across American jurisdictions that punitive damages should be available in cases originating from an action for damages due to someone's death.[48] The Wrongful Death Act now recognizes a right to recover any amount of compensation that a jury deems fair and just for damages suffered by the decedent's surviving spouse or next of kin, including for emotional injuries and punitive damages.[49] Likewise,

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45 Dunn, *supra* note 5.

46 *Id.*

47 *Froud*, 456 N.E. 2d at 137 (finding the plaintiff's argument that punitive damages should be recoverable "persuasive"); Ballweg v. City of Springfield, 499 N.E.2d 1373, 1377 (Ill. 1986) (acknowledging that it was "sympathetic" to the plaintiff's argument).

48 Illinois Wrongful Death Act, 740 ILL. COMP. STAT. ANN. 180/1-2 (West 2024); Illinois Survival Act, 755 ILL. COMP. STAT. ANN. 5/27-6 (West 2014).

49 *Id.*

the Survival Act now explicitly states that claims for punitive damages survive a decedent's death.[50]

This is a positive development, but it remains partial and imperfect because both statutes specify that punitive damages *cannot* be recovered if the original claim involves medical malpractice, legal malpractice, or an action against the State, a government unit, or an employee of the State or government in their official capacity.[51] In other words, even after the 2023 amendments, punitive damages are not permitted in some of the most common types of cases that result in someone's death.[52]

Evidently, therefore, even after the 2023 amendments, the statutes provide only a partial remedy for punitive damages in death cases. While it is understandable that the legislature would want the statutes to be consistent with the principles of state immunity, and it may be true that conduct that constitutes legal malpractice rarely results in someone's death, there is no good reason to create an exception. More importantly, the exception that prevents punitive damages in medical malpractice cases is indefensible and inexcusable.

At one level, the ban on punitive damages in wrongful death and survival actions is an attempt to be consistent with other statutes since, in 1985, the legislature banned the award of punitive damages in *all* medical and legal malpractice lawsuits.[53] Yet, at another level, the ban on punitive damages in medical and legal malpractice cases is merely an obvious concession to the medical and legal professions to limit possible liability for the reprehensible wrongful conduct of members of those two professions.[54] Thus, the problem is not so much in the newly adopted amendments to the wrongful death and survival statutes but in the lingering unjustified preferential treatment that the legislature has afforded doctors and lawyers for years.[55]

In sum, excluding cases involving legal and medical malpractice from the 2023 amendments allowing punitive damages under the Wrongful Death

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50 *Id.*

51 In fact, Public Act 103-0514 does not limit the ban on punitive damages to medical malpractice cases. The statute uses the term "healing art malpractice" which is broader and may include many other types of medical practices including possibly claims against hospitals, ambulance services, chiropractors, and dentists.

52 Wrongful Death Act § 180/1-2 (2024); Survival Act § 5/27-6.

53 *See* 735 ILL. COMP. STAT. ANN. 5/2-1115 (LexisNexis 2024) ("In all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages by reason of legal, medical, hospital, or other healing art malpractice, no punitive, exemplary, vindictive or aggravated damages shall be allowed.").

54 *See* Ruta K. Stropus, Bernier v. Burris: *The Constitutional Implications of Abolishing Punitive Damages in Medical Malpractice Actions*, 19 LOY. U. CHI. L.J. 1285, 1302 (1988) (explaining why legislation that bans punitive damages in medical malpractice cases does not have a rational relationship to the purposes it purports to serve).

55 *See id.*

Act and the Survival Act is not a new issue but rather the continuation of an old, discredited, and unjustified policy.[56] To understand why this policy remains problematic, it is worth examining why it was and continues to be wrong and unfair.

A. Punitive Damages in Malpractice Cases

Illinois officially banned the imposition of punitive damages in malpractice cases in 1985 with the enactment of Section 2-1115 of the Code of Civil Procedure.[57] When approved, this provision contradicted the state's established common law and undermined many plaintiffs' ability to recover full compensation in cases involving particularly reprehensible conduct. The provision was challenged almost immediately for these and other reasons, but the Illinois Supreme Court upheld its constitutional validity in 1986 in *Bernier v. Burris*.[58]

However, the most interesting aspect of the decision in *Bernier* is that the Court seemed unable to come up with a convincing explanation of the public policy upon which the statute was supposedly based. Instead, the court admitted the real motivation behind the new rule by stating that the "elimination of awards for punitive damages in actions for medical malpractice serves the legislative goals of reducing damages generally against the medical profession."[59] In other words, the goal was simply to protect the medical profession from possible liability. It was nothing more than an overt attempt to protect the medical profession from having to take full responsibility for the injuries caused by the willful, reckless, or reprehensible conduct of doctors, hospitals, and other members of the

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56 *See id.*

57 Section 2-1115 of the Code of Civil Procedure states that "[i]n all cases, whether in tort, contract or otherwise, in which the plaintiff seeks damages by reason of legal, medical, hospital, or other healing art malpractice, no punitive, exemplary, vindictive or aggravated damages shall be allowed." 735 ILL. COMP. STAT. ANN. 5/2-1115 (LexisNexis 2024). For a discussion of the policy behind this provision see, Stephen P. D'Arcy, *Legislative Reform of the Medical Malpractice Tort System in Illinois*, 53 J. RISK & INS. 538, 545 (1986).

58 Bernier v. Burris, 497 N.E.2d 763, 769 (Ill. 1986). In this case, the plaintiff challenged several changes to the rules of procedure in medical malpractice actions which were made under the pretense of addressing a medical malpractice crisis. *Id.* at 766–67. The lower court found that there had been no crisis and that, therefore, enactment of the Act had been unnecessary. *Id.* at 768. On appeal, the Supreme Court held that if there was evidence before the legislature reasonably supporting the allegation of a crisis, litigants could not seek to invalidate the legislation merely by showing that the legislature had been mistaken, and that, since whether a malpractice crisis existed at the time was a debatable question, the court was "limited to determining whether the legislation in question [was] constitutional, not whether it [was] wise as well." *Id.* at 769. For a comment on this case, see Stropus, *supra* note 54.

59 *Bernier*, 497 N.E.2d at 776.

medical community. By extension, the same principles would apply in cases of legal malpractice.[60]

Other arguments have been advanced to support banning punitive damages in medical malpractice cases, but none of them are convincing. For example, proponents have claimed that this type of so-called "tort reform" is necessary to improve patient safety, lower insurance costs, limit frivolous lawsuits, preserve healthcare services in rural areas, and prevent physicians from leaving the state.[61] Yet, available data consistently refutes these claims. The data instead reveals that medical errors that cause injury remain a significant problem,[62] that tort reform measures restricting medical malpractice lawsuits do not improve safety, and that most people injured by malpractice do not file claims to hold the wrongdoers accountable.[63]

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60 *See, e.g.*, Noonan v. Harrington, No. 09-3191, 2010 WL 1797648 (C.D. Ill. May 5, 2010) (disregarding the distinction between a cause of action for breach of fiduciary duty and a cause of action for legal malpractice in order to deny access to punitive damages); David M. Schultz & Justin M. Penn, *Statutes Affecting Lawyer Liability*, *in* ATTORNEYS' LEGAL LIABILITY §§ 12.1–12.9 (IICLE 2022).

61 *See* Editorial Board, *State needs caps on medical malpractice awards*, DAILY HERALD, Apr. 5, 2004.

62 A study by the Institute of Medicine published in 2000 concluded that preventable medical errors resulted in up to 98,000 deaths in hospitals annually. Geoff Boehm, *Debunking Medical Malpractice Myths: Unraveling the False Premises Behind "Tort Reform,"* 5 YALE J. HEALTH POL'Y, LAW & ETHICS 357, 357 (2013) (citing Institute of Medicine, TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM (2000), http://www.nap.edu/openbook/0309068371/html/.). Five years later, the number had risen to more than 195,000 and considering the fact that that number did not include obstetrics patients, the numbers are likely much higher. A study published in 2016 by *The BMJ*, a peer-reviewed medical journal, concluded that medical errors were the third leading cause of death in the United States. For more information on this report, including access to the document, a podcast discussing it and multiple responses to it, go to https://www.bmj.com/content/353/bmj.i2139 and to the Johns Hopkins Medicine website, at https://tinyl.io/ATic. *See also* Boehm, *supra* note 62, at 357 (citing HEALTHGRADES QUALITY STUDY: PATIENT SAFETY IN AMERICAN HOSPITALS 6 (2004)) ("[E]xcluding obstetric patients, we calculated that ... 575,000 preventable deaths occurred, as a direct result of the 2.5 million patient safety incidents that occurred in U.S. hospitals from 2000 through 2002."). *See also* HEALTHGRADES SIXTH ANNUAL PATIENT SAFETY IN AMERICAN HOSPITALS STUDY (2009), available at https://tinyurl.com/27d3fg8a, which is a study of patient safety among Medicare patients that found that, "[w]hile hospitals have made progress, medical mistakes still occur at an alarming rate. The [Institute for Healthcare Improvement] estimates 40,000 instances of medical harm occur in the healthcare delivery system daily." The seventh annual version of the study reported essentially the same findings. *See* HEALTHGRADES SEVENTH ANNUAL PATIENT SAFETY IN AMERICAN HOSPITALS STUDY (2010), available at https://tinyurl.com/2yvaxnkj.

63 For a great collection of data and statistical analysis about issues related to tort reform in the medical malpractice area, see EMILY GOTTLIEB & JOANNE DOROSHOW, MEDICAL MALPRACTICE: BY THE NUMBERS (Ctr. for Just. & Democracy 2024), which provides support for the following important conclusions, among others: (1) few injured patients file claims or lawsuits, (2) almost no cases filed are frivolous; (3) medical malpractice cases are not clogging the courts because few cases go to trial; (4) payouts are low and high verdicts are almost always reduced by the courts; (5) the contingency fee system helps screen frivolous lawsuits; and (6) "tort reform" measures do not improve access to care, prevent physician shortages, or lower insurance premiums for doctors. *See also* Gottlieb, *supra* note 17; TOM BAKER, THE MEDICAL MALPRACTICE MYTH 1–14 (Univ. of Chi. 2005), available at: https://press.uchicago.edu/Misc/Chicago/036480.html; Boehm, *supra* note 62,

Furthermore, the likelihood of filing a frivolous claim is low because claimants are often required to provide expert support certifying that their claims are not frivolous[64] and because lawyers representing the claimants are subject to sanctions for filing frivolous lawsuits.[65] Likewise, studies show that the argument that limits or other types of reforms to possible malpractice liability are needed to prevent an exodus of doctors is false or misleading.[66] In the end, as has been proven repeatedly, the cause of finance and insurance-related problems in the healthcare industry has little to do with the legal system and more to do with insurance companies' financial interests as affected by their response to broader economic cycles.[67]

In sum, while the increasing cost of healthcare and high medical malpractice insurance premiums are legitimate concerns,[68] the data does not support adopting solutions that prevent deserving victims from recovering punitive damages in cases involving particularly reprehensible conduct. In

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at 360 ("In addition to mischaracterizing the quantity and quality of medical malpractice suits, supporters of tort reform make unsupported assertions about the impact of medical malpractice litigation on the quality and availability of health care."); *see generally* Patrick Salvi, *Why Medical Malpractice Caps are Wrong*, 26 N.I.U. L. REV. 553 (May 2005), available at: https://huskiecommons.lib.niu.edu/niulr/vol26/iss3/8/ ("Supporters of damage caps argue that they will lower insurance premiums. But the evidence strongly demonstrates that this isn't true.").

64 *See* 735 ILL. COMP. STAT. ANN. 5/2-622 (West 2024) (requiring a certificate of merit for medical malpractice cases). For a survey of statutes in all states, see Heather Morton, *Medical Liability/Malpractice Merit Affidavits and Expert Witnesses*, NAT'L CONF. STATE LEGISLATURES, https://www.ncsl.org/financial-services/medical-liability-malpractice-merit-affidavits-and-expert-witnesses (last visited Nov. 8, 2024). Unlike in the medical malpractice area, however, Illinois law does not require a certificate from an expert attorney attesting to the meritorious nature of the claim as part of a legal malpractice complaint. Thomas P. McGarry & Robert A. Chapman, *Litigating the Legal Malpractice Case*, *in* ATTORNEYS' LEGAL LIABILITY § 6.7 (IICLE 2022).

65 ILL. SUP. CT. R. PRO. CONDUCT r. 3.1 states that lawyers "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . ." Lawyers who are found to have violated this rule are subject to professional discipline. *See also* ILL. SUP. CT. R. 137 (providing for sanctions for filing frivolous lawsuits). *Compare id. with* FED. R. CIV. P. 11.

66 *See* Boehm, *supra* note 62, at 361 (it is a fiction to tie the lack of access to medical services in rural areas to malpractice litigation or jury awards).

67 *Id.*; BAKER, *supra* note 63, at 1–14 (describing the correlation between financial crises in the 1970s, 1980s and the early 2000s with nationwide concerted efforts to "reform" the tort civil liability system by making it more difficult for victims of medical malpractice to have access to compensation based on arguments of increasing insurance premiums, frivolous litigation, and "runaway juries" and concluding, however, that the real costs of medical malpractice have little to do with litigation and more to do with financial cycles); Brad A. Elward, *The 1985 Illinois Medical Malpractice Reform Act: An Overview and Analysis*, 14 S. ILL. U. L.J. 27 (1989) ("[i]t is questionable whether the Act has achieved its goals."). *See also* AMERICANS FOR INSURANCE REFORM, *MEDICAL MALPRACTICE INSURANCE: STABLE LOSSES/UNSTABLE RATES IN ILLINOIS* (Feb. 2003), https://www.insurance-reform.org/studies/StableLosses2007.pdf (concluding that Illinois medical malpractice claims have been stable for 30 years, but premiums gyrate in sync with economy and investment income.); Salvi, *supra* note 63.

68 D'Arcy, *supra* note 57, at 539 (discussing that the concern over the cost of malpractice insurance is nothing new. Physicians have been expressing dissatisfaction with this issue from as early as the 1920s, and in 1938 it was such a problem that some insurers withdrew from some markets).

fact, such policies do not really address those concerns while at the same time they diminish the deterrent impact of civil liability on wrongful conduct.

Even if one could argue that allowing punitive damages in malpractice cases would affect healthcare availability or costs, the effect would be minimal. This is so because most victims of medical (and legal) malpractice do not pursue litigation, and of those who do, only a minimal number are entitled to punitive damages. The ban on punitive damages only favors those who cause injury by preventing victims in the most extreme cases—including those involving death—from accessing full recovery for their injuries. For all these reasons, the ban on punitive damages in malpractice cases is a counterproductive, unjustified, and unfair policy. It should be abolished in all cases[69] or, at the very least, in cases brought under the Wrongful Death Act and the Survival Act.[70]

CONCLUSION

Awarding punitive damages in appropriate cases is a settled principle of the common law in Illinois and the rest of the United States to punish wrongdoers and to deter future similar conduct.[71] Yet, it was not until late in 2023 that Illinois recognized the possibility of imposing punitive damages in torts cases that originate in someone's death either under the Wrongful Death Act or the Survival Act.[72] However, even after the 2023 amendments to those acts, Illinois still does not recognize the use of punitive damages in medical or legal malpractice cases.[73] This state of the law must change.

In 1975, Illinois Supreme Court Justice Joseph Goldenhersh argued that the court should abandon the rule banning punitive damages in death cases.[74]

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69 Interestingly, in the legal malpractice area, there are a few reported cases in which the courts tried to avoid applying the ban on punitive damages by categorizing the claims as something other than legal malpractice claims. *See, e.g.*, Safeway Ins. Co. v. Spinak, 641 N.E.2d 834, 837 (Ill. App. Ct. 1994) (discussing that although it appears that §2–1115 is broad enough to cover any acts arising out of the provision of legal services, the court will look to the nature of the behavior alleged in the plaintiff's complaint to determine whether the activities fall within the terms of the malpractice); Cripe v. Leiter, 683 N.E.2d 516, 518 (Ill. App. Ct. 1997) (declining to follow precedent cases that applied ban on punitive damages and holding that 735 ILL. COMP. STAT. ANN. 5/2-1115 (West 1985) did not prohibit a claim for punitive damages when the plaintiff's claim states a cause of action for common-law fraud); Stiles v. Whalen, 13 C 3516, 2013 WL 6730797 at *7 (N.D. Ill. 2013) (punitive damages allowed in a claim against a lawyer for breach of fiduciary duty as a trustee); *see* Weidner v. Karlin, 932 N.E.2d 602, 606 (Ill. App. Ct. 2010) (dismissing the plaintiff's claim but intimating that an award of punitive damages may be appropriate when fraud is pleaded properly).

70 Illinois Wrongful Death Act, 740 ILL. COMP. STAT. ANN. 180/1-2 (West 2024); Illinois Survival Act, 755 ILL. COMP. STAT. ANN. 5/27-6 (West 2014).

71 *See* RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (AM. L. INST. 1979).

72 *See* Public Act 103-0514; Wrongful Death Act § 180/1-2; Survival Act § 5/27-6.

73 *See* 735 ILL. COMP. STAT. ANN. 5/2-1115 (LexisNexis 2024).

74 Mattyasovszky v. W. Towns Bus Co., 330 N.E. 2d 509, 513 (Ill. 1975) (Goldenhersh, J., dissenting).

Now is the time to fully embrace his suggestion. The Illinois General Assembly should eliminate the ban on punitive damages in both general medical and legal malpractice cases and in instances of death so that, as Justice Goldenhersh stated in 1975, we can finally "bring death actions into complete harmony with the general body of law governing other types of tortious conduct."[75]

Following the economic crisis of the 1970s, physicians' organizations and insurers became very efficient at lobbying state legislatures to enact statutory reforms to ease the burden of possible malpractice.[76] Every state except West Virginia enacted reform proposals.[77] As explained by one author:

> The insurance industry, the U.S. Chamber of Commerce, and corporate front groups such as the American Tort Reform Association have spent many tens of millions of dollars in pursuit of immunity or limitations on liability from wrongdoing . . . Moreover, federal and state lawmakers, regulators, doctors, and the general public are being told by medical and insurance lobbyists that doctors' insurance rates are rising due to increasing claims by patients, rising jury verdicts, and exploding tort system costs in general, despite clear evidence to the contrary.[78]

Not surprisingly, organizations advocating for the interests of those whose conduct puts others at risk, along with their insurers, opposed the 2023 proposal to allow punitive damages in death cases. Lacking sound policy arguments, the American Tort Reform Foundation, for example, denounced the proposal as a "calamity," "a recipe for disaster," and a "shameless attack on businesses," while labeling Illinois as a "judicial hellhole."[79] As explained above, these characterizations are not supported by the available evidence. Yet, the Foundation did make a valid point: The proposal's exception for medical and legal malpractice cases, eventually included in the bill that became law, is both unfair and unjustified.[80]

However, the Foundation's proposed solution is flawed. The solution to the fact that the law now has an unfair exception is not to reject the new law entirely, thus depriving possible plaintiffs of access to full recovery, but rather to eliminate the exception and, thus, provide access to justice to those

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75 *Id*.

76 *See generally* D'Arcy, *supra* note 57, at 539; BAKER, *supra* note 63, at 1–14.

77 D'Arcy, *supra* note 57, at 539.

78 Boehm, *supra* note 62, at 363.

79 ATR Foundation, *Illinois' Punitive Damage Pandemonium: A Shameless Attack on Businesses*, JUD. HELLHOLES BLOG (May 6, 2023), https://tinyl.io/AVe7.

80 *See id.*

who deserve it. After all, punitive damages are awarded in only a small fraction of cases anyway.[81]

By focusing on minimizing potential liability for doctors and lawyers in malpractice cases, the legislature has prioritized protecting egregious tortfeasors over creating incentives to reduce the incidence of malpractice. This is particularly problematic because, as previously discussed, the issue with malpractice is not excessive litigation but the prevalence of wrongful and harmful conduct.[82]

The bottom line is that the ban on punitive damages in malpractice cases resulting in death targets "the most egregious cases of malpractice and the most severely injured [plaintiffs]."[83] This flawed public policy was adopted without proper justification to protect a politically influential class of defendants. As one author has explained, when organizations like the American Medical Association speak about a malpractice "crisis," they are not referring to the people injured or killed by medical errors or the widespread failure to discipline negligent doctors but rather to doctors' concerns about liability for those errors.[84]

Eliminating the ban on punitive damages in cases involving someone's death, whether under the Wrongful Death Act or the Survival Act, represents a positive leap forward in the right direction. However, by maintaining the ban on punitive damages in malpractice cases, the state simultaneously took a step back. The current legal framework favors wrongdoers over the wronged and removes the fundamental power of juries to determine adequate compensation and to use that power to deter reprehensible conduct resulting in death.[85] More importantly, it leaves the most severely injured victims without a complete remedy.

In theory, the more egregious the tortfeasor's conduct is, the more public policy should support the imposition of punitive damages. Yet, the current state of the law in Illinois undermines this public policy. To correct this mistake, the Illinois General Assembly must eliminate the ban on punitive damages in medical and legal malpractice cases in general and in death cases in particular.

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81 Gottlieb, *supra* note 17, at 9; *Punitive Damages*, CORNELL L. SCH. LEGAL INFO. INST., WEX (Jan. 2024), https://www.law.cornell.edu/wex/punitive_damages ("Statistics show that about 5% of all verdicts result in the awarding of punitive damages.").

82 See *supra* notes 62-67, and their accompanying text.

83 Boehm, *supra* note 62, at 360.

84 *Id.*

85 For multiple recommendations on how to address the flaws of the current legal framework, see *id.* at 368.

DIVIDING UP THE MARITAL HOME

Mark Strasser*

I. INTRODUCTION

For many marital couples, the most valuable asset at the time of divorce is the home in which they live.[1] The couple may have bought the home during the marriage with marital funds,[2] which, as a general matter, would make the home a marital asset.[3] However, sometimes, the home is brought to the marriage by one of the parties, and the couple may disagree about whether or how much of the value of the marital home is subject to distribution at the time of divorce.[4]

States have adopted differing approaches to the extent to which the value of the marital home is subject to distribution.[5] The approaches are designed to achieve various goals, including reimbursing parties for past expenditures and distributing gains in a way that is fair to the marital estate and the individual who brought the house to the marriage. Regrettably, many states do not consider the different implications of mortgage payments that mostly go towards interest and those that mostly go towards reducing the principal owed. That failure may result in dissimilar treatment of relevant cases and significant unfairness.

This Article discusses some of the differing state approaches concerning the distribution of some of the value of a home brought to a marriage, where the marital couple either pays down the mortgage or uses marital funds to improve the home. The Article explores some of the ways that the current approaches seem unfair, both concerning the value distributed to the separate owner rather than the marital estate and the relative distributions when comparing couples who marry earlier versus later in the

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1 *See* Harper v. Harper, 448 A.2d 916, 920 (Md. 1982) (noting that "the marital residence is ordinarily the major asset of a marriage").

2 *See* A. Mechele Dickerson, *Millennials, Affordable Housing, and the Future of Homeownership*, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 435, 461 (2016) (discussing "the profile of the typical first-time homebuyer . . . [who] were a married couple with young children who wanted to buy a single-family detached home.").

3 *See* Nakkina v. Mahanthi, 496 P.3d 1173, 1180 (Utah Ct. App. 2021) ("The property was acquired during the marriage, with marital funds, and as such was presumptively marital.").

4 *See, e.g.*, McKown v. McKown, 108 S.W.3d 180 (Mo. Ct. App. 2003) (husband and wife dispute whether the marital estate has an interest in the home that husband brought to the marriage where the mortgage was paid down using marital funds).

5 *See* FLA. STAT. ANN. § 61.075(6)(a)(1)(c)(II) (West 2024) and text following *infra* note 167 and text preceding *infra* note 187 (offering charts of how different states would distribute the passive appreciation in the marital home under a particular set of facts).

life of the mortgage. While it is unsurprising that different states might have differing priorities with respect to distribution, it is surprising that the current system in many states fails to capture the respective state's values regarding what constitutes a just distribution. States must reexamine and modify their approaches to value distribution in these kinds of cases.

II. DISTRIBUTING THE EQUITY IN THE MARITAL HOME

States vary in whether or how they distribute the value of the marital home.[6] Those differences cover various matters, including how much of the home's value is subject to distribution and the criteria for determining who should receive what.[7] Regrettably, the current approach used in many states may result in distributions that seem quite unfair.

A. Is It Marital?

In many states, a court tasked with distributing property upon divorce must first decide which property is separate and which is marital.[8] Then, the court must distribute the assets or the value thereof.[9] While some states

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6 *See* text following *infra* note 167 and text preceding *infra* note 187.

7 *Id.*

8 Thompson v. Thompson, 208 P.3d 539, 541 (Utah Ct. App. 2009) ("When dividing assets between divorcing spouses, a trial court must first categorize the parties' assets into marital and separate property.") (citing Elman v. Elman, 45 P.3d 176, 180 (Utah Ct. App. 2002)); Carpenter v. Carpenter, 781 S.E.2d 828, 837 (N.C. Ct. App. 2016) ("When making an equitable distribution of a marital estate, a trial court must first classify all property owned by the parties as marital, separate, or divisible.") (citing N.C. Gen. Stat. § 50-20(a) (West 2013)); Schmitz v. Schmitz, 88 P.3d 1116, 1124 (Alaska 2004) ("The first step in equitable division of marital property requires the trial court to determine what property is available for distribution; to accomplish this, the trial court must characterize assets as separate or marital property."); Davis v. Davis, No. 03A01-9708-CH-00381, 1999 WL 83948, at *2 (Tenn. Ct. App. Feb. 19, 1999) ("[A]s a first order of business, it is incumbent on the trial court to classify the property, to give each party their separate property, and then to divide the marital property equitably."); Reeves v. Reeves, 575 N.W.2d 1, 3 (Mich. Ct. App. 1997) ("[T]he trial court's first consideration when dividing property in divorce proceedings is the determination of marital and separate assets.") (citing Byington v. Byington, 568 N.W.2d 141, 146 n.4 (Mich. Ct. App. 1997)); Murphy v. Murphy, No. 1211-22-2, 2023 WL 8587791, at *3 (Va. Ct. App. Dec. 12, 2023) ("First, the trial court 'must classify the property as either separate or marital.'") (citing Marion v. Marion, 401 S.E.2d 432, 436 (Va. Ct. App.1991)); Bobie v. Bobie, 2023-Ohio-3293, ¶ 9 (Ohio Ct. App.) ("The trial court must first determine 'what constitutes marital property and what constitutes separate property.'") (citing Ohio Rev. Code Ann. § 3105.171(B)); Waldon v. Waldon, 114 S.W.3d 428, 431 (Mo. Ct. App. 2003) ("It is a necessary requirement that the trial court make specific findings on whether assets are marital or separate property prior to a subsequent just division of marital property.") (citing Pruitt v. Pruitt, 94 S.W.3d 429, 433 (Mo. Ct. App. 2003)).

9 Hansen v. Hansen, 119 P.3d 1005, 1009 (Alaska 2005) ("First, the trial court must determine what property is available for distribution, characterizing the property as either separate or marital . . . . Second, the trial court must place a value on the property. . . . Third, the trial court must equitably allocate the property."); Conway v. Conway, 508 S.E.2d 812, 816 (N.C. Ct. App. 1998) ("In distributing marital assets, the trial court is required by G.S. § 50-20 (1995) to (1) classify property

permit courts to distribute marital and separate assets,[10] many states only permit marital assets to be distributed,[11] perhaps creating a special exception for cases involving dissipation or waste.[12] The characterization of a particular asset as marital or separate thus may have important implications for whether or how much of the asset will be subject to distribution upon divorce.[13]

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as marital, separate, or mixed, (2) determine the net value (fair market value less encumbrances) of the property, and (3) distribute the property equally, unless equity requires an unequal distribution.") (citing Smith v. Smith, 433 S.E.2d 196 (N.C. Ct. App. 1993), *rev'd*, 444 S.E.2d 420 (1994); McIver v. McIver, 374 S.E.2d 144 (N.C. Ct. App. 1988)); Weaver v. Weaver, 247 So. 3d 374, 376 (Miss. Ct. App. 2018) ("The first step in the court's analysis of assets in a divorce action is to determine which assets are separate property and which assets are marital property and thus subject to distribution between the parties . . . . After valuing the marital property, the court distributes it using the factors laid out in Ferguson v. Ferguson, 639 So. 2d 921, 928 (Miss. 1994)."); Goldberg v. Goldberg, 531 N.Y.S.2d 318, 319 (N.Y. App. Div. 1988) ("The court's obligation under the Equitable Distribution Law (Domestic Relations Law § 236[B]) is not to determine who holds title to property, but to determine whether it is marital or separate property and if the former, to provide for its equitable distribution between the parties.") (citing Price v. Price, 503 N.E.2d 684 (N.Y. 1986)). Sometimes, the court may defer the distribution of the asset, e.g., until after the children have attained majority. *See, e.g.*, Garcia v. Hernandez, 947 So. 2d 657, 661 (Fla. Dist. Ct. App. 2007) (granting "the wife exclusive use and possession of the marital home until the minor child reaches the age of majority."); *In re* Marriage of Florke, 270 N.W.2d 643, 645 (Iowa 1978) ("[T]he sale of the home and division of the proceeds of that sale should occur upon the youngest surviving child attaining his or her majority, or graduating from high school, whichever occurs last."); *In re* Marriage of Zirngibl, 606 N.E.2d 1, 7 (Ill. App. Ct. 1991) ("[A] provision should be made for the continued use of the marital residence by Richard and the children until Mary's 18th birthday. Upon Mary's 18th birthday the house should be sold and the proceeds divided in accordance with the trial court's decision.").

10 Kannianen v. White, 788 N.W.2d 340, 343 (N.D. 2010) ("The marital estate subject to equitable distribution includes all property of the parties, regardless of source or title"); Clifford v. Koester, No. FST-FA21-6053448S, 2024 WL 339776, at *6 (Conn. Super. Ct. Jan. 22, 2024) ("Under General Statutes § 46b-81 (a), the court may assign to either party all or any part of the estate of the other party at the time of entering a decree dissolving a marriage."). *See also* Liisa R. Speaker, *Analyzing Whether a Property Distribution Is Equitable and Moving Toward Equity in Property Division*, 34 J. AM. ACAD. MATRIM. LAW. 493, 495 (2022) ("In all-property states, the court will consider and divide any property owned between the parties, regardless of whether the property was acquired during the marriage or before.").

11 Liisa R. Speaker, *Analyzing Whether a Property Distribution Is Equitable and Moving Toward Equity in Property Division*, 34 J. AM. ACAD. MATRIM. LAW. 493, 496 (2022) ("Dual-classification property distribution is the majority standard in the United States. Unlike all property distribution, dual-classification implements a system where the court divides assets as either separate property or marital property, and only considers marital property in the distribution."); Craig W. Dallon, *The Likely Impact of the ALI Principles of the Law of Family Dissolution on Property Division*, 2001 BYU L. REV. 891, 894–95 (2001) ("[T]he majority of jurisdictions in divorce actions classify all property of the spouses as either marital property or separate property and typically divide only the marital property.").

12 PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.11 (1) (AM. L. INST. 2002) (October 2023 Update) ("In every dissolution of marriage, all separate property should be assigned to its owner, except that when there is insufficient marital property to permit the reimbursement that would otherwise be required under § 4.10"). § 4.10 discusses financial misconduct, where the court may reassign the spouses' separate property in order to achieve the equivalent result.

13 *See* J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 FAM. L.Q. 219, 220 (1989) ("[I]t is quite important to establish at the time of divorce which items owned by the spouses are

Many states permit an asset to be characterized as separate, marital, or partly separate and partly marital.[14] A home acquired separately by one party brought into a marriage may become partly marital if marital assets are used to increase the value of or equity in the home.[15] Marital assets might be used to pay down a mortgage[16] or to increase the home's value by making some improvements, such as adding a room or building a pool.[17] Sometimes, the marital contribution is in the form of sweat equity—the individual spouse adds value to the home through his or her labor.[18] At the time of divorce, courts must decide how to distribute the marital interest in the family home.

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divisible 'marital' property and which items are nondivisible property (normally referred to in various states as 'individual,' 'separate,' or 'nonmarital'). Indeed, even kitchen sink states seem increasingly inclined to award 'separate' property to the owning spouse.").

[14] Harrower v. Harrower, 71 P.3d 854, 858 (Alaska 2003) ("recogniz[ing] that a separate asset can become partly marital"); Davenport v. Davenport, 2003 WL 22119565, 2003-Ohio-4877, ¶ 38 (Ohio Ct. App) ("[T]he trial court had an evidentiary basis for awarding Appellee $5,000 in equity in the marital residence, even though the residence was partly Appellant's separate property."); *see* Warme v. Warme, No. 0413-20-4, 2020 WL 6733492, at *2 (Va. Ct. App. Nov. 17, 2020) (marital home partly separate and partly marital); Morgan v. Morgan, 322 So. 3d 531, 547 (Ala. Civ. App. 2020) (Moore, J., concurring in part and dissenting in part) ("[N]othing in the language of § 30-2-51(a) prohibits a trial court from determining that the marital home shares a dual status as partly separate property and partly marital property."); Brett R. Turner, *Unlikely Partners: The Marital Home and the Concept of Separate Property*, 20 J. AM. ACAD. MATRIM. LAW. 69, 104 (2006) ("Under modern law, it is essentially settled that marital and separate interests can exist in the same asset.").

[15] *See* Adkins v. Adkins, 650 So. 2d 61, 66 (Fla. Dist. Ct. App. 1994) ("By statute, however, a '[m]arital asset[ ] include[s] . . . [t]he enhancement in value and appreciation of [a] non-marital asset[ ] resulting either [1] from the efforts of either party during the marriage or [2] from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both.' § 61.075(5)(a)(2), Fla. Stat. (1991)"); Collis v. Collis, 745 S.E.2d 250, 255 (2013) ("According to W. Va. Code § 48–1–233, 'Marital property' means: (2) The amount of any increase in value in the separate property of either of the parties to a marriage, which increase results from: (A) an expenditure of funds which are marital property, including an expenditure of such funds which reduces indebtedness against separate property, extinguishes liens, or otherwise increases the net value of separate property; or (B) work performed by either or both of the parties during the marriage.").

[16] Crowder v. Crowder, 642 S.E.2d 97, 99 (Ga. 2007) ("Where, as here, a spouse brings an encumbered home to the marriage and it is undisputed that the marital unit reduced the outstanding balance of the encumbrance, a portion of the interest in the home is marital property subject to equitable division.") (citing Snowden v. Alexander–Snowden, 587 S.E.2d 54, 55 (Ga. 2003)).

[17] *Cf*. Blay v. Blay, 857 N.Y.S.2d 784, 787 (App. Div. 2008) ("[T]he marital residence was improved during the marriage through the addition of a basement bedroom and laundry room, new flooring and remodeling in the kitchen, installation of a hot tub and erection of an outdoor deck, presumably with marital funds."); Decato v. Decato, No. 2017-244, 2018 WL 722456, at *1 (Vt. Feb. 2, 2018) ("During the marriage, the parties made several improvements to the marital property, including adding landscaping, repairing the foundation, building a twelve-foot-by-twenty-four-foot addition to the residence, and remodeling the living room.").

[18] Barger v. Barger, No. 263070, 2006 WL 3298365, at *4 (Mich. Ct. App. Nov. 14, 2006) ("When plaintiff lived with defendant at 1010 Sycamore, improvements were made to the patio, shed, landscaping, kitchen, and other areas. The evidence also showed that plaintiff contributed to the addition of an extra room in the house and an outside pool.").

Various courts have offered guidance with respect to how much of the home's value is marital property subject to distribution. A separate question involves *how* the court will distribute the marital property, e.g., divided equally[19] versus equitably.[20] However, the prior question involves whether any of the home's value is appropriately considered marital.

B. Partly Marital Homes

In *Brandenburg v. Brandenburg*,[21] a Kentucky appellate court issued an influential opinion that has been subsequently followed by various states.[22] It implements a formula, originally posited by the Kentucky Supreme Court,[23] that explains how to distribute the value of the marital interest in a home originally characterized as separate property.[24]

The *Brandenburg* court explained:

> [T]here is to be established a relationship between the nonmarital contribution and the total contribution, and between the marital contribution and the total contribution. These relationships, reduced to percentages, shall be multiplied by the equity in the property at the time of distribution to establish the value of the nonmarital and marital properties.[25]

Thus, when determining how much of the equity in the home is marital and subject to distribution, the court suggests that dividing the marital contribution by the total contribution of funds increasing equity in the home will yield a percentage.[26] That percentage, when multiplied by the equity in

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19 ARK. CODE ANN. § 9-12-315 (a)(1)(A) (West 2020) ("All marital property shall be distributed one-half (½) to each party unless the court finds such a division to be inequitable."). *See also* WIS. STAT. ANN. § 767.61 (3) (2020) (discussing the presumption of equal division).

20 Boschetto v. Boschetto, 224 A.3d 824, 832 (R.I. 2020) ("Marital assets are to be divided equitably, though not necessarily equally.") (quoting Bober v. Bober, 92 A.3d 152, 162 (R.I. 2014)); Bader v. Bader, 448 N.W.2d 187, 189 (N.D. 1989) ("In dividing marital property, the trial court is to make an equitable distribution of the assets. [citing Wastvedt v. Wastvedt, 371 N.W.2d 142 (N.D.1985)] There is no requirement that property be divided equally in order to be divided equitably.").

21 Brandenburg v. Brandenburg, 617 S.W.2d 871 (Ky. Ct. App. 1981).

22 Steven J. Willis, *How a Spouse Can Profit by Paying Partner's Principal*, 49 N.M. L. REV. 283, 290 (2019) ("The Kentucky formula arose in 1980, but was well-articulated in the 1981 *Brandenburg* decision. Many states use this formula, including Virginia, North Carolina, Missouri, Maryland, Georgia, and Delaware.").

23 *Brandenburg*, 617 S.W.2d at 872 ("The guidelines for apportionment between marital and nonmarital property were issued in *Newman v. Newman*, Ky., 597 S.W.2d 137 (1980).").

24 *Id.*

25 *Id.*

26 However, when discussing the amount expended, the court has a particular understanding of which funds count for these purposes, namely, those funds resulting in the reduction of principal owed. *See infra* notes 49-50 and accompanying text.

the home, will yield the value of the home subject to distribution at the time of divorce.[27]

To use this formula, one must know what counts as a marital rather than a nonmarital contribution. The *Brandenburg* court defined the nonmarital contribution "as the equity in the property at the time of marriage, plus any amount expended after marriage by either spouse from traceable nonmarital funds in the reduction of mortgage principal, and/or the value of improvements made to the property from such nonmarital funds."[28] In contrast, the marital contribution is "the amount expended after marriage from other than nonmarital funds in the reduction of mortgage principal, plus the value of all improvements made to the property after marriage from other than nonmarital funds."[29] The total contribution is simply the "sum of nonmarital and marital contributions."[30]

Facially, this approach treats nonmarital and marital contributions similarly. The nonmarital contribution involves a few different elements:

(1) Equity in the home prior to the marriage, plus
(2) The amount expended from nonmarital funds to reduce the principal owed on the mortgage, plus
(3) The value of post-marriage improvements made to the property which are traceable to the use of nonmarital funds.[31]

The marital contribution involves:

(1) The amount expended from marital funds to reduce the principal owed on the mortgage, plus
(2) The value of post-marriage improvements made to the property which are traceable to the use of marital funds.[32]

An essential aspect of this approach is that the extent of the marital or non-marital contribution depends upon how much the equity increases rather than the total amount of money spent.[33] If a couple spends $30,000 of marital funds to add a room to the house, thereby increasing the home's value by $15,000, the marital contribution is $15,000 (the value added) rather than $30,000 (the amount spent).

Another feature of the *Brandenburg* approach is that its classification of the equity added after marriage as either separate or marital only takes into

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27 *Brandenburg*, 617 S.W.2d at 872.
28 *Id.*
29 *Id.*
30 *Id.*
31 *Cf. id.* at 873.
32 *Brandenburg*, 617 S.W.2d at 872.
33 *Id.* at 873.

account the reduction of principal owed on the mortgage and any added value from home improvements.[34] This part of the analysis does not focus on the passive appreciation of the house[35] due to general market forces.[36] The *Brandenburg* approach seeks to determine how much of the equity in the home is attributable to marital versus nonmarital sources.[37]

This approach's apparent simplicity and straightforwardness are misleading, as becomes clear when the approach is applied. Consider the Georgia Supreme Court's application of the "'source of the funds' rule to the equitable division of a home . . . [a spouse] brought to a marriage. . . ."[38] The court explained that "the trial court must determine the contribution of the spouse who brought the home to the marriage, and weigh it against the total nonmarital and marital investment in the property."[39]

The description that focuses on what the spouse brought to the marriage is often misunderstood. The court is not suggesting that the separate property is limited to the value of (the equity in) the home at the time someone brought the house to the marriage. Instead, the separate property includes the value of the equity in the home at the time of the marriage plus any additional equity acquired through the use of separate funds. For example, if a party paid down the mortgage using inherited monies or monies earned before the marriage, that increased equity would also be included in the separate property column.[40] A "spouse contributing nonmarital property is entitled to an interest in the property in the ratio of the nonmarital investment to the total nonmarital and marital investment in the property."[41] Once the separate

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34 *Id.* at 872.

35 OHIO REV. CODE ANN. § 3105.171 (A) (West) ("'Passive income' means income acquired other than as a result of the labor, monetary, or in-kind contribution of either spouse.").

36 Jerry Reiss & Michael R. Walsh, *Mathematics for Imputing Income*, 80 FLA. BAR J. 84, 65 (2006) ("If the value of a home increases due to passive appreciation, that increase is solely the result of market forces on the home over time."). *See also* Suzanne Reynolds, *Increases in Separate Property and the Evolving Marital Partnership*, 24 WAKE FOREST L. REV. 239, 246 (1989) ("If the property increased by what the court determines to be natural causes, then the court classifies the increase as separate property. If, on the other hand, the court finds that either the funds or labor of the marriage caused the increase, then the court classifies the increase as community or marital property.").

37 *Brandenburg*, 617 S.W.2d at 873.

38 Horsley v. Horsley, 490 S.E.2d 392, 393 (Ga. 1997) (explaining that many jurisdictions use this approach); *see* Lisa Milot, *Accounting for Time: A Relative-Interest Approach to the Division of Equity in Hybrid-Property Homes Upon Divorce*, 100 KY. L.J. 585, 592 (2012) ("To classify the equity in hybrid property on divorce, most jurisdictions focus on the 'source of funds' used to acquire the property.").

39 *Horsley*, 490 S.E.2d at 393 (emphasis added).

40 *See, e.g.*, Fell v. Fell, 473 S.W.3d 578, 580 (Ark. Ct. App. 2015) (agreeing with the husband that the trial court had erred when classifying the home as marital when the husband had "used his separate nonmarital funds to make the down payment; the home was titled and mortgaged in his name; he paid all the mortgage payments from his separate bank account; and Camme never contributed any funds to the mortgage.").

41 *Horsley*, 490 S.E.2d at 393 (citing Thomas v. Thomas, 377 S.E.2d 666, 669 (Ga. 1989)).

property in the house is determined, the "remaining property is characterized as marital property and its value is subject to equitable distribution."[42]

One issue involves determining the proportion of a house that a court should consider separate and the proportion that should be considered marital and subject to distribution. A different issue involves whether this approach is fair and equitable. Unfortunately, the court's description of the implications of this approach was somewhat misleading. The court suggested that "the spouse who contributed nonmarital funds, and the marital unit that contributed marital funds each receive a proportionate and fair return on their investment."[43] However, several factors must be assessed before one can establish that each receives a "proportionate and fair return" on the investment.[44] For example, one might consider the length of time that the money was invested in the house. The individual who brought the house to the marriage might have invested the funds years before the marital funds were invested in the home and might reasonably deserve some sort of premium for having made that earlier investment.[45]

Suppose that an individual invests in a home several years before her marriage. Suppose further that the house substantially appreciates before the marriage. It might seem unfair for the marital estate to benefit from the appreciation that occurred before the marriage, and some states limit the marital interest in the passive appreciation of the home's value to that which occurs during the marriage.[46]

An additional reason that investment timing might affect whether the spouse bringing the house to the marriage and the marital unit each receive a fair and proportionate return on the investment is that the source of funds rule not only considers who is spending the money but also the degree to which

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42 *Id.*

43 *Id.* (quoting Harper v. Harper, 448 A.2d 916, 922 (Md. Ct. Spec. App. 1982) (explaining that while it seems accurate to suggest that this method is fairer than the title approach which the Maryland court was criticizing, "courts in a majority of community property states employing the inception of title theory have held that improvements made on the separate real property of a spouse during marriage are the separate property of that spouse, even though the improvements were provided by the expenditure of community funds or efforts.").

44 *See* Harold Leventhal, *Vitality of the Comparable Earnings Standard for Regulation of Utilities in a Growth Economy*, 74 YALE L.J. 989, 997 n.26 (1965) ("Many factors enter into the determination of what constitutes a fair rate of return.").

45 *See* Lisa Milot, *Accounting for Time: A Relative-Interest Approach to the Division of Equity in Hybrid-Property Homes Upon Divorce*, KY. L.J. 585, 597 (2012) ("[A] fair return on the earlier separate contribution to the home should be higher than the return on the later marital contributions even after the marriage date."); *see also id.* at 604 (discussing "a 'relative-interest' approach for dividing the equity in a hybrid-property home between the separate and marital estates.").

46 *See* Weiss v. Weiss, 543 A.2d 1062, 1064 (N.J. Super. Ct. App. Div. 1988); Cooper v. Cooper, 260 So. 2d 272, 274 (Fla. Dist. Ct. App. 1972); Lerch v. Lerch, 608 S.E.2d 223, 223 (Ga. 2005); Curry v. Curry, 741 S.E.2d 558, 563 (S.C. Ct. App. 2013); Saba v. Khoury, 516 P.3d 891, 896 (Ariz. 2022).

the funds spent result in increased equity.[47] When someone is paying down a mortgage, a high percentage of the early payments goes towards interest, and a relatively low percentage goes towards reducing the principal owed.[48] When a party brings a recently acquired house to a marriage and marital funds are used to pay down the mortgage, a high percentage of the marital investment in those early years will not reduce the principal owed, and the monies going towards the payment of interest will not be counted when allocating equity in the home.[49]

Suppose Wanda purchases a house worth $100,000, makes a down payment of $20,000 and secures a mortgage for $80,000. She then has a whirlwind romance, meeting and marrying the spouse of her dreams. They make monthly mortgage payments, eventually paying off the mortgage. When the couple divorces, the house is worth $200,000.

Many states will view the home as partly separate property and partly marital property. Wanda contributed $20,000 of separate property to the purchase of the home, whereas the marital couple retired the mortgage, paying off the $80,000 that they owed. One-fifth (20,000/100,000) of the house's value will be treated as Wanda's separate property, whereas four-fifths (80,000/100,000) of the home's value will be marital and subject to distribution.[50]

Suppose that Wanda and her spouse divorce after paying off the mortgage. If the home (worth $200,000) is sold, then Wanda will receive $40,000 (1/5 of $200,000) as her separate property, whereas the marital estate will receive $160,000 (4/5 of $200.000).[51] That $160,000 will be split equitably,[52] so Wanda might receive $120,000, whereas Wanda's former spouse would receive $80,000.

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47 *Saba*, 516 P.3d at 896.

48 *See* Tania Davenport, Note, *An American Nightmare: Predatory Lending in the Subprime Home Mortgage Industry*, 36 SUFFOLK U. L. REV. 531, 542 n.69 (2003) (noting that in early payments on a mortgage most of the payment goes to interest rather than the reduction of the principal owed).

49 *See* Brett Turner, *Allocation Location Formulas, Interest on Mortgages, and Joint Loans: A Critique of* Keeling v. Keeling, 18 No. 3 DIVORCE LITIG. 37 (March 2006) (criticizing a decision "because it ignored most of the marital expenditures, on grounds that they were payments of interest on the mortgage rather than payments toward principal").

50 *Cf.* Michael D. Lyon, *The Source of Funds Rule - Equitably Classifying Separate and Marital Property*, 11 UTAH BAR J. 45, 46–47 (1998) ("Wife owns a house with a fair market value of $100,000 at the time of the marriage and at that time the house carries an $80,000 mortgage. The house remains in her separate name and the parties use marital funds to pay down the mortgage. At the time of the divorce, the fair market value is still $100,000 but the mortgage is now $60,000. A trial court using the source of funds approach would classify $20,000 of the $40,000 of acquired value in the home as separate property and the remaining $20,000 as marital property.").

51 *Cf. id.*

52 *See, e.g.*, Stava v. Stava, 6 N.W.3d 567, 575 (Neb. Ct. App. 2024) ("The district court assigned the $84,620 marital paydown of the mortgage loan as a marital asset awarded to Larry; this effectively gave Carine credit for one-half of that mortgage reduction."); Porter v. Porter, 2023-Ohio-403, ¶ 8 (Ohio Ct. App. 2023) ("Debra would be entitled to one-half of the increase in equity resulting from the mortgage payments . . . .").

Perhaps a $120,000/$80,000 split does not seem particularly unfair. Yet, Wanda received almost all the value of her contribution of $20,000,[53] whereas much of the money spent by the marital couple went to interest, which is not recouped. For example, if this had been a thirty-year mortgage at 7%, the marital estate would have paid out $191,607 over those thirty years.[54]

A Virginia appellate court illustrated the potential difficulty in the *Brandenberg* formula. In *Keeling v. Keeling*, the court offered a hypothetical "case in which one spouse contributes the down payment from separate funds and, to cover the balance of the purchase price, the parties obtain a loan that requires payment of interest only for the marital portion of the loan term."[55] The court explained that "any increase in equity in the property is wholly separate property, despite the fact that marital funds were used to hold the property for the period during which it appreciated . . . ."[56] That is "because the principal loan balance has not been reduced."[57] Such an approach "would result in a windfall to the party whose separate funds were used for the down payment and would place no value whatever on the fact that . . . the interest-only loan allowed the parties to retain the asset for a period during which the appreciation occurred."[58]

The *Keeling* example is extreme because the marital estate does not reduce the principal owed at all and only pays interest on the loan. Nonetheless, an analogous criticism might be made where the marital estate payments are almost entirely going towards interest, namely, that the marital estate is not getting sufficient credit for the payments.

Consider instead a different approach that accounts for all the funds expended on mortgage payments rather than focusing exclusively on the increased equity in the home. If the interest paid is also included in the relevant calculation, then the individual making the initial down payment will still have a share of the home as her separate property at the time of divorce, although that share will be smaller than it would have been using the *Brandenburg* approach.

Suppose that Smith makes a $40,000 down payment on a $200,000 home with a thirty-year mortgage at 6%.[59] Smith marries, and the marital

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53 *See* Weatherman v. Gary-Wheaton Bank of Fox Valley, N.A., 713 N.E.2d 543, 545 (Ill. 1999) (discussing some fees).

54 *See* BANKRATE, https://www.Bankrate.com (last visited Sept. 7, 2024).

55 Keeling v. Keeling, 624 S.E.2d 687, 690 (Va. Ct. App. 2006). In a different case in a different jurisdiction the Husband had asserted that he had made interest-only payments on a mortgage. *See* Avera v. Avera, 485 S.E.2d 731, 733 (Ga. 1997) ("Husband asserted he had made 'interest only' payments on the personal mortgage he had obtained while the house was the property of the trust.").

56 *Keeling*, 624 S.E.2d at 690.

57 *Id.*

58 *Id.*

59 Rachel D. Godsil & David V. Simunovich, *Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of Homeownership*, 77 FORDHAM L. REV. 949, 962 (2008) ("Consider again

couple spends $345,341 to pay down the mortgage.[60] If the relative shares of the home are determined in light of the money spent, then Smith will have roughly a 10% interest in the home, leaving the marital estate with roughly a 90% interest.[61] In the *Brandenburg* approach, Smith will have a 20% interest in the home, while the marital estate will have an 80% share.[62] If the couple divorces after paying down the mortgage and the home is now worth $440,000, then the all-monies-spent-to-pay-down-the-mortgage approach would distribute roughly $396,000 to the marital estate and $44,000 to Smith.[63] In contrast, the *Brandenburg* approach would distribute $352,000 to the marital estate and $88,000 to Smith.[64] It is unclear why the *Brandenburg* approach is more equitable and fairer to all concerned parties than an approach focusing on the monies spent. However, the *Brandenburg* approach might be adopted for reasons that do not particularly focus on fairness.[65]

Some states do not focus on the increase in equity to determine the marital interest in the home produced by paying down the mortgage.[66] Instead, they focus on the total expenditure, including monies spent on taxes and fees.[67] Texas and Louisiana have statutes authorizing crediting the community with the funds spent to pay down the mortgage on a separately

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the Johnsons and the Robertsons. The Johnsons paid 20% down ($40,000) on their $200,000 home and obtained a $160,000 mortgage for the remainder of the purchase price. Assume that the Johnsons obtained a thirty-year mortgage in which the payments remain constant throughout the terms of the loan (thirty-year fixed). At an interest rate of 6%, the Johnsons would pay roughly $960 per month. After one year, the Johnsons have reduced the principal loan amount by roughly $2000; after three years, the principal is reduced by $7000. This total cost is significantly lower than either of the alternatives below, and demonstrates the benefits of a conventional loan combined with a large down payment. After thirty years, the total cost of owning their home (that is, the cost of the thirty-year fixed mortgage and the $40,000 down payment) would be $385,341.").

60 *Id.*

61 $40,000/$385,541=0.103; $345,341/$385,341=0.896

62 $40,000/$200,000 = 0.20; $160,000/$200,000 = 0.80. *See* Brandenburg v. Brandenburg, 617 S.W.2d 871 (Ky. Ct. App. 1981).

63 $440,000 x 0.10 = $44,000; 0.90 x $440,000 = $396,000. *See Keeling*, 624 S.E.2d 687.

64 $440,000 x 0.2 = $88,000; $440,000 x 0.8 = $352,000. *See Brandenburg*, 617 S.W.2d 871.

65 *See, e.g.*, *In re* Marriage of Moore, 618 P.2d 208, 210–11 (Cal. 1980) ("Appellant argues, however, that interest and taxes should be included in the computation because they often represent a substantial part of current home purchase payments. We do not agree. Since such expenditures do not increase the equity value of the property, they should not be considered in its division upon dissolution of marriage. The value of real property is generally represented by the owners' equity in it, and the equity value does not include finance charges or other expenses incurred to maintain the investment. Amounts paid for interest, taxes and insurance do not contribute to the capital investment and are not considered part of it.").

66 *See* Hardy v. Hardy, 273 So. 3d 448 (La. Ct. App. 2019).

67 *See id.* at 452.

owned home.[68] This is a reimbursement approach,[69] which creates no interest in the home. Instead, the court will give the non-owner party one-half of the community's reimbursement for the funds expended.[70] However, notwithstanding the explicit language of the statute, some courts interpreting the reimbursement statute have not reimbursed the entire amount but only the reduction in principal.[71]

A separate issue is whether the value-added approach should be used in other contexts, such as improvements to the home,[72] because the cost of improving a home often exceeds the amount by which the improvement increases the home's value.[73] If an improvement costing $20,000 adds $8,000 to a home's value,[74] it will matter whether the relevant approach focuses on the value added or the cost. If the court attributes the improvement cost to the community, the $20,000 will be distributed to the parties at the time of divorce. If only the value of the improvement is attributed to the community,

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68 *Id.* at 457 ("Our review of the record shows that Mrs. Hardy presented evidence that she paid $ 82,989.61 on the loan balance. The mortgage payments on the former community home were clearly a community debt, and Mrs. Hardy is entitled to reimbursement for one-half, or $ 41,494.81, of the separate property that was used to satisfy this community obligation. Mrs. Hardy also asked to be reimbursed for the property taxes and insurance payments she made on the Wakefield property after the termination of the community. We find that Mrs. Hardy has sufficiently shown that she paid $ 3,829.38 in taxes and insurance from her separate property for the former community home after the community terminated and should be reimbursed for one-half of that amount, or $ 1,914.69.") (internal citations omitted).

69 *See In re* Estate of Baker, 627 S.W.3d 523, 526 (Tex. App. 2021) (discussing reimbursement to community of funds used to enhance separate property); Ponson v. Ponson, 241 So. 3d 1213 (La. Ct. App. 2018) (discussing whether there was sufficient evidence to support community reimbursement for community funds allegedly made to make mortgage payments on separately owned home).

70 McGee v. McGee, 905 So. 2d 300, 302 (La. Ct. App. 2005) ("Mr. McGee must reimburse Ms. McGee for the community funds used to build the house on his separate property. The proper measure of the reimbursement is 'one-half of the amount or value that the community assets had at the time they were used,' not the sums applied to the mortgage over the years.") (internal citations omitted).

71 Loyacono v. Loyacono, 618 So. 2d 896, 899 (La. Ct. App. 1993) (finding that the plaintiff was entitled to reimbursement to the extent that the mortgage payments reduced the principal balance on the mortgage note).

72 *See* TEX. FAM. CODE ANN. § 3.402(d)(2) (West 2023) ("[I]f the benefit resulted from the use of the conferring estate's property to make improvements on the benefited estate's real property, then the value of the benefit conferred is measured by the enhancement in the value of the benefited estate's real property that resulted from the improvements."); LA. CIV. CODE ANN. art. 2366 (2009) ("If community property has been used during the existence of the community property regime or former community property has been used thereafter for the acquisition, use, improvement, or benefit of the separate property of a spouse, the other spouse is entitled to reimbursement for one-half of the amount or value that the community property had at the time it was used.").

73 Mark S. Scarberry, *A Critique of Congressional Proposals to Permit Modification of Home Mortgages in Chapter 13 Bankruptcy*, 37 PEPP. L. REV. 635, 704–05 (2010) ("Quite often improvements add much less to the value of a home than the cost of the improvements.").

74 *Id.* at 705.

then only the $8,000 will be distributed at the time of divorce insofar as the funds associated with the improvement are to be distributed.[75]

Suppose that a jurisdiction considers the cost of the improvement rather than the value added when determining the marital estate's interest in the home. An additional issue exists if a party borrows monies to improve the home, namely, whether the reimbursement should include both the interest and the principal for the funds borrowed to make the improvements or, instead, only the principal. A jurisdiction might focus on the cost of the improvement but refuse to include within the calculation the interest paid on the loan to fund the improvement.[76]

C. When Is Equity Increased?

An approach that focuses on the increased equity in the home resulting from (a) paying down the principal owed on the mortgage or (b) improving the home, e.g., by adding a room, seems straightforward but rather limited concerning the kinds of contributions that will yield an interest in the home. This approach focuses on active steps[77] taken by the marital estate to increase the equity in the home beyond what it was when brought to the marriage.[78] This approach becomes more complicated and less straightforward, depending on how the couple manages their finances.

Consider *Hubby v. Hubby*,[79] which involved the following fact scenario:

> The purchase price of the home was $145,500, of which Husband contributed $80,500 and the remaining $65,000 was financed. . . . [M]arital funds in the amount of $1,983 were used to pay down the original mortgage

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75 An additional issue dividing jurisdictions is whether the marital estate acquires an interest in the home by virtue of maintaining and repairing the home or only if improving the home. *See, e.g.*, Martin v. Martin, 501 S.E.2d 450, 455 (Va. Ct. App. 1998) ("The term 'contribution of marital property' within the meaning of the statute contemplates an improvement, renovation, addition, or other contribution which, by its nature, imparts intrinsic value to the property and materially changes the character thereof . . . . [A]lthough the customary care, maintenance, and upkeep of a residential home may preserve the value of the property, it generally does not add value to the home or alter its character."); Moran v. Moran, 512 S.E.2d 834, 836 (Va. Ct. App. 1999) ("[T]he Morans spent $30,000 of marital funds to renovate the Berkshire house. However, the evidence failed to prove the extent to which the 'contributions' of marital funds to the renovations caused any of the home's appreciation in value. Absent evidence that the renovations contributed to a specific increase in value, the husband failed to satisfy his initial burden of proof . . . and to that extent the appreciation cannot be classified as marital property.").

76 *See* Sims v. Sims, 677 So. 2d 663, 667 (La. Ct. App. 1996) ("[R]eimbursement is due for only one-half the *principal* payments made on the debt.") Here, the court was distinguishing between interest and principal payments. *Id.*

77 The active steps are to be contrasted with passive appreciation of the home.

78 *See* Hubby v. Hubby, 556 S.E.2d 127, 128 (Ga. 2001).

79 *Id.*

> to $63,017. The home was then refinanced and a new indebtedness of $68,500 incurred. Thereafter, $2,585 in marital funds were used to reduced [sic] the balance on the new mortgage to $65,915. The home is now worth $183,000, of which $117,085 is net equity comprised of Husband's initial down payment, subsequent mortgage pay-down from marital funds and market appreciation.[80]

An initial point should be made before explaining the disagreement between the trial court and the state supreme court. When the court notes that parties used marital funds to pay down both mortgages,[81] it should not be thought that the funds expressly mentioned reflect the total amount spent by the marital estate. On the contrary, because mortgage payments go partly towards the reduction in the principal owed and partly towards the interest payment,[82] the marital estate would have been paid more than the amounts mentioned. Nonetheless, the *Hubby* court focused only on how much the couple's principal owed on the respective mortgages had been reduced.[83]

The disagreement between the trial court and the state supreme court was not about whether the marital estate should have been credited with some portion of the mortgage payments that had been spent on paying interest, but about whether the marital estate had acquired any interest at all in the house.[84] The trial court concluded that there was no marital interest in the home at the time of divorce because the mortgage was for $65,000 when the married couple started making mortgage payments and the principal owed on the mortgage at the time of divorce was over $65,000.[85] The Georgia Supreme Court reversed, holding that the trial court had misapplied the source of funds rule.[86] The Georgia Supreme Court concluded that the "[h]usband's initial down payment of $80,500 represents 94.6% of the net equity in the marital home"[87] and that the "remaining 5.4% represents the portion of the net equity attributed to marital funds."[88] The court justified its position by noting that marital funds were used to reduce both mortgages.[89]

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80 *Id.*

81 *Id.* ("[M]arital funds in the amount of $1,983 were used to pay down the original mortgage to $63,017 . . . . Thereafter, $2,585 in marital funds were used to reduced [sic] the balance on the new mortgage to $65,915.").

82 *See* Weiss v. Weiss, 543 A.2d 1062, 1064 (N.J. Super. Ct. App. Div. 1988); Cooper v. Cooper, 260 So. 2d 272, 274 (Fla. Dist. Ct. App. 1972); Lerch v. Lerch, 608 S.E.2d 223, 223 (Ga. 2005); Curry v. Curry, 741 S.E.2d 558, 563 (S.C. Ct. App. 2013); Saba v. Khoury, 516 P.3d 891, 896 (Ariz. 2022).

83 *See Hubby*, 556 S.E.2d at 128.

84 *Id.*

85 *See id.*

86 *Id.* ("We hold that the trial court misapplied the rule . . . .").

87 *Id.*

88 *Id.*

89 *Id.*

While the Georgia high court did not expressly state how it arrived at these percentages, it presumably did the following: First, it added together the mortgage reductions achieved using marital funds ($1,983 + $2,585 = $4,568). The court then added $4,568 to the amount represented by the down payment ($80,500), which equals $85,068. The down payment is roughly 94.6% of the $85,068. At the time of the divorce, the house was worth about $183,000[90] with an outstanding mortgage of $65,915, making the net equity a little over $117,000.[91] The court held that 94.6% of the $117,085 was separate property, with a little over $6,322 being marital and subject to distribution.[92]

Here, the *Hubby* court applies *Brandenburg* by crediting the marital estate with "the amount expended after marriage from other than nonmarital funds in the reduction of mortgage principal."[93] However, a straightforward application of the rule adopted by the Georgia Supreme Court can have results that are, at best, counterintuitive.

In the actual case, when the couple refinanced, they borrowed $68,500. They paid off the original mortgage of $63,017,[94] leaving a balance of $5,483,[95] which they presumably used for other purposes, such as paying off a car repair bill.[96]

One need only consider a modified scenario to see why a straightforward application of the reduction-of-principal-owed rule can have surprising implications. Suppose there is no penalty for reducing the

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90 *Id.*

91 *Id.*

92 *Id.*

93 Brandenburg v. Brandenburg, 617 S.W.2d 871, 872 (Ky. Ct. App. 2001).

94 *Hubby*, 556 S.E.2d at 129.

95 *Id.*

96 *Cf.* Brett R. Turner, *Unlikely Partners: The Marital Home and the Concept of Separate Property*, 20 J. AM. ACAD. MATRIM. LAW. 69, 115–17 (2006) ("[I]t is not uncommon to see the parties borrowing more money than they need to retire the balance due on the previous mortgage, and using the excess to pay off other debt or to acquire additional property . . . . Second, refinancing is a situation in which the limitations of total apportionment are especially easy to see. Assume that the parties contribute $10,000 in marital funds to reduce the balance due on the mortgage on a separate property home. The marital interest rises in value to $15,000 due to market forces. The home is then refinanced, with $15,000 in equity withdrawn to pay for marital credit card debt incurred by both spouses. After the refinancing, the home then doubles in value. In this situation, the appreciated value of the marital contribution was really used to repay the credit card debt, so that the only marital interest would be the appreciated value of marital funds used to reduce the balance due on the second mortgage. If the apportionment formula is applied only once for the entire marriage, however, the effect is to give the original $10,000 marital contribution a share of the post-refinancing appreciation—appreciation which occurred after that contribution had been used for another purpose."). When a couple refinances and uses some of that money to pay off other marital debts, a separate issue is whether the marital estate should be viewed as having spent the marital equity that it had previously earned by paying off the mortgage. Then, when the *Hubby* court credited the marital estate with equity when paying down the principal owed on each of the mortgages, the court was not treating the marital estate as having spent any of its earned equity. *See Hubby*, 556 S.E.2d at 129.

mortgage early, and the couple borrows $88,500 when refinancing. They pay off the initial mortgage of $63,017, use $5,483 to pay off the car repair bill, and then use that extra $20,000 to reduce the principal owed on the new mortgage. Using the *Hubby* court's reasoning, the marital estate in the modified case would end up being credited with $24,568 in mortgage reduction ($1,983 + $2,585 + $20,000 = $24,568), even though the principal owed at the time of divorce still would have been $65,915.

To make the result even more surprising, one might suppose that the marital estate refinances again, borrowing an extra $20,000 and repaying it immediately. The principal owed on the mortgage would still be $65,915, but the marital estate would now be credited with $44,568 ($1,983 + $2,585 + $20,000 + $20,000). But for the various costs associated with refinancing multiple times,[97] the marital estate might instead benefit by increasing its share of the equity in the home even though this method does not add to equity (by reducing the principal owed, which remains $65,915) or by adding to the home's value (by adding a room).

A single individual could use this same strategy (refinancing and using some or all of the borrowed funds to reduce the indebtedness incurred) rather than the marital estate to increase their share of the equity in the home,[98] so the point is not to suggest that this method of borrowing and then quickly repaying is a way for the marital estate, in particular, to benefit unfairly. Nor is the point that this strategy should be adopted (especially because of the costs associated with refinancing). Instead, the point is that simply looking at who contributed funds to reduce the principal owed has potential problems.

Consider a different scenario. Rather than refinance the home, a couple takes out a loan to pay off some expenses, using the home as collateral. They pay the expenses and eventually pay off the loan using marital funds. The marital estate does not acquire any interest in the home where the home has been used as collateral for the second loan because the payments used to retire the second loan did not reduce any of the principal owed on the home mortgage.[99] The former method of obtaining funds to pay off other expenses results in marital equity in the home, whereas the latter does not.

The approach recommended by the *Hubby* trial court, namely, not crediting any payments that did not reduce the principal owed on the mortgage below what it was at the beginning of the marriage, is also

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97 Todd Zywicki, *The Behavioral Law and Economics of Fixed-Rate Mortgages (and Other Just-So Stories)*, 21 SUP. CT. ECON. REV. 157, 170 (2013) (discussing prepayment penalties and the costs of refinancing). *Cf.* Schoenbachler v. Minyard, 110 S.W.3d 776, 786 (Ky. 2003) ("[A] portion of the funds Appellant contributed at refinancing ($2,283.00 of the $8,577.61) paid for closing costs and thus were not used to acquire additional interest in the property.").

98 *See generally* Willis, *supra* note 22, at 283.

99 *See* Bullock v. Bullock, 218 So. 3d 265, 270 (Miss. Ct. App. 2017) (holding that the use of separate property as collateral does not, without more, convert that property into marital property).

problematic.[100] Suppose that at the time of the marriage, the house is owned separately by the husband, who has made a $40,000 down payment and has secured a $160,000 mortgage. However, the couple falls behind on the mortgage payments because of some unanticipated expenses. Pursuant to the original agreement, the principal owed on the mortgage increases because of the past due mortgage payments.[101] The marital estate begins making mortgage payments. At the time of divorce, the principal on the mortgage is slightly more than at the beginning of the marriage.[102] Using the trial court's approach, the marital estate will not acquire any interest in the home, notwithstanding having made mortgage payments to reduce the principal owed on the mortgage.

Even worse, suppose that one of the parties, e.g., the husband, forgot to make payments for several months. In that event, the marital couple might not have benefitted in some other way, e.g., having used the non-expended funds to pay other expenses,[103] but would not have been credited with any equity when later making the payments.

In many cases, the possibilities mentioned above would not occur, for example, because the principal owed on the mortgage steadily decreased during the marriage as the couple diligently made monthly payments. Nonetheless, a literal application of the reduction-in-principal-owed rule can result in unfairness, whether or not one uses the initial amount of principal owed at the start of the marriage as the trigger point at which the marital estate begins to acquire an interest in the separately owned home.[104]

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100 *See Hubby*, 556 S.E.2d at 128 ("[T]he trial court concluded that, 'under the facts of this case, marital assets played no role [in] increasing the equity in the house for the equity, in fact, decreased . . . Hence, there is no appreciation in the house subject to equitable division as a marital asset.'").

101 *Cf.* Mulvey v. U.S. Bank N.A., 570 S.W.3d 355, 357 (Tex. App. 2018) ("The . . . agreement also capitalized $9,983.47 of interest into the loan, making the new principal balance $132,413.36.").

102 *Cf.* Horton v. Horton, 785 S.E.2d 891, 895 (Ga. 2016) ("[T]here is testimony indicating that the balance due on the mortgage may have actually increased during the marriage.").

103 If they had simply left the funds in a checking account, they might not have earned any interest on those funds. Even if they put the funds in a savings account, they would get much less in interest than they would be paying compared to a personal loan or a home loan. *Compare* Lauren Perez, *What Is the Average Interest Rate for Savings Accounts*?, SMARTASSET (Aug. 26, 2024), https://smartasset.com/checking-account/average-savings-account-interest ("According to the FDIC, the national average interest rate on savings accounts stands at 0.45% APY (as of June 17, 2024).") *with* Denny Celzyk, *What is the average personal loan interest rate*, BANKRATE (Sept. 4, 2024), https://www.bankrate.com/loans/personal-loans/average-personal-loan-rates/ ("The current average personal loan interest rate is 12.35%.") *and* Jeff Ostrowski, *Compare 30-year mortgage rates today*, BANKRATE (June 27, 2024), https://web.archive.org/web/20240627145404/https://www.bankrate.com/mortgages/30-year-mortgage-rates/ ("On Thursday, June 27, 2024, the current average interest rate for the benchmark 30-year fixed mortgage is 7.00%, rising 4 basis points over the last week.").

104 *Cf. Horton*, 785 S.E.2d at 895 (noting that "the record does not show the amount applied to pay down the principal, and instead there is testimony indicating that the balance due on the mortgage may have actually increased during the marriage").

D. Alternatives to the *Brandenburg* Approach

Other states use different approaches, which also characterize the house as partly marital (or community[105]) property and partly separate property. However, these approaches differ in how or whether to attribute to the marital estate an interest in the house's passive appreciation.

The California approach to determining the marital interest in a separately owned house considers how much the community has added to the home's value[106] or reduced the principal owed on the mortgage.[107] Added to that is a percentage of the passive appreciation of the house.[108] That percentage involves a fraction—the numerator is the amount by which the marital community has reduced the principal owed on the mortgage and the denominator is the original purchase price of the house.[109]

The California and *Brandenburg* approaches differ in the method of calculating the marital interest in the passive appreciation of the home.[110] While the numerator is the same in both approaches, the denominator in the California approach is not the sum of the community and separate contributions but the home's original purchase price.[111]

The differing approaches will in some cases yield the same result. If a party brings a house to the marriage and the marital community makes all the remaining mortgage payments to retire the mortgage, then the marital interest in the passive appreciation of the home will be the same whether one uses the *Brandenburg* or the California approach.[112] Under *Brandenburg*, the marital interest will involve a fraction, with the numerator being how much the marital estate reduced the principal owed on the mortgage (the marital contribution) and the denominator being the sum of the separate (the down payment plus the amount that either party reduced the principal owed during the marriage with separate funds) and marital contributions combined.[113] Under the California approach, the community interest will also involve a

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105 George M. Strander, *Surviving Spouse Property Protection*, 102 MICH. BAR J. 24, 27 n.28 (2023) ("The 10 community property states are Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin.").

106 *See* Bono v. Clark, 128 Cal. Rptr. 2d 31, 44 (Cal. App. 2002). In this case, the community's financial investment in the property took the form of improvements, rather than acquisition or debt reduction expenditures. *See id.* For that reason, care must be taken to include only capital improvements, and then only to the extent that those capital improvements enhance the property's value. *See id.*

107 *See In re* Marriage of Moore, 618 P.2d 208, 209 (Cal. 1980); *Bono*, 128 Cal. Rptr. 2d at 39.

108 *Bono*, 128 Cal. Rptr. 2d at 42–44.

109 *See In re Moore*, 618 P.2d at 211 ("The community property share would be $16,911.29, which represents the amount of capital appreciation attributable to community funds (10.57 percent of $103,359.43) added to the amount of equity paid by community funds ($5,986.20).").

110 *See generally* Brandenburg v. Brandenburg, 617 S.W.2d 871 (Ky. Ct. App. 1981); *In re Moore*, 618 P.2d at 211.

111 *See Brandenburg*, 617 S.W.2d at 872; *In re Moore*, 618 P.2d at 211.

112 *See generally Brandenburg*, 617 S.W.2d 871; *In re Moore*, 618 P.2d 208.

113 *See generally Brandenburg*, 617 S.W.2d 871.

fraction, with the numerator being how much the marital estate reduced the principal owed on the mortgage and the denominator being the original purchase price.[114] However, the sum of the down payment and the repayment of the principal owed will in many cases equal the original purchase price.[115] The marital interest in the passive appreciation would then be the same whether one used the *Brandenburg* or the California approach.

Yet, as the California Supreme Court has noted, a different result might occur if the mortgage has not been retired.[116] If an individual buys a home, makes a few mortgage payments, and then marries, and the community makes mortgage payments for several years, the community might not have reduced the principal owed very much, and so its share (where the numerator is the reduction in principal owed and the denominator is the original purchase price) might not amount to much. Under *Brandenburg*, the marital interest would be higher.[117] Under *Brandenburg*, the denominator is the down payment plus the possibly small amount by which the separate parties had reduced the principal owed, plus the potentially small amount that the marital estate had reduced the principal owed.[118] However, the sum of those numbers might be much smaller than the original purchase price, meaning that the marital estate would have a relatively larger share in the house under *Brandenburg*.[119] The example below illustrates how the *Brandenburg* and California approaches work (1) when the marital estate retires the mortgage and (2) when the couple divorces after making payments for several years where there is still an outstanding balance on the mortgage.

Suppose Wanda purchases a house worth $100,000, makes a down payment of $20,000 and secures a mortgage for $80,000 at 5% for thirty years. Wanda marries, and the couple pays off the mortgage. The couple divorces, at which time the house is worth $200,000, even though the couple made no improvements to it.

The passive appreciation is $100,000 ($200,000 - $100,000) because the home is now worth $200,000, was worth $100,000 when purchased, and the couple made no improvements. The marital interest in the passive appreciation is 4/5 ($80,000 / ($80,000 + $20,000)) (marital contribution/marital and separate contribution). Under *Brandenburg*, the marital interest in the home is $80,000 (reduction in principal owed) + $80,000 (marital interest in passive appreciation) = $160,000.

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114 *See In re Moore*, 618 P.2d at 211.

115 *See, e.g.*, Simunovich, *supra* note 59, at 962 ("The Johnsons paid 20% down ($40,000) on their $200,000 home and obtained a $160,000 mortgage for the remainder of the purchase price." However, "the Robertsons only paid 1% down ($2,000) on their $200,000 home, and obtained a $198,000 mortgage for the remainder of the purchase price.").

116 *See In re Moore*, 618 P.2d at 212.

117 *See generally Brandenburg*, 617 S.W.2d 871.

118 *See generally Brandenburg*, 617 S.W.2d 871.

119 *Id.*; *In re Moore*, 618 P.2d at 211.

Using the California approach, the community interest in the passive appreciation of the home is 4/5 ($80,000 / $100,000) (community contribution[120]/original purchase price), and the community interest in the home is $80,000 (reduction in principal owed) + $80,000 (community interest in passive appreciation) = $160,000. In this case, the marital/community interest in the home at the time of divorce is the same whether one uses the *Brandenburg* or the California approach.

Suppose instead that Wanda and her spouse divorce after ten years. If they were paying $532 per month, they would have reduced the principal owed by about $11,220.[121] Under the *Brandenburg* approach, the marital interest in the passive appreciation would be $11,220 / $31,220 = 0.359. Under the California approach, the community interest in the passive appreciation would be $11,220 / $100,000 = 0.112. If the passive appreciation of the house had been $33,000, the marital interest in the passive appreciation would have been about $11,847 under *Brandenburg*, whereas it would have been about $3,696 under the California approach.

In the case where Wanda and her spouse divorced after ten years, they would have paid $63,840 (120 monthly payments of $532), where $52,620 would have gone to interest and would not have yielded any marital interest in the house. While it is clear that the California and *Brandenburg* approaches differ in how courts distribute passive appreciation, the California approach is less preferable—the marital (community) estate does not receive adequate credit for its contribution.[122]

Some states follow the California approach.[123] In *Saba v. Khoury*,[124] the Arizona Supreme Court explained how to determine the marital community's interest in a separately owned home:

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120 Because California is a community property state, this would be a community contribution. Strander, *supra* note 105, at 27 n.28.

121 *See Amortization Calculator*, BANKRATE, https://www.bankrate.com/mortgages/amortization-calculator/ (adjust loan amount to $80,000 on a 30-year term with a 5% interest rate and an additional monthly payment of $103).

122 *Compare Brandenburg*, 617 S.W.2d at 871 *with* Bono v. Clark, 128 Cal. Rptr. 2d 31, 40–41 (Cal. Ct. App. 2002). While the *Brandenburg* approach allocates more to the marital estate than does the California approach, a separate issue is whether even the *Brandenburg* approach gives adequate credit to the marital estate. *See generally* Robin Graine, *The "Wild West" of Divorce Law Concerning Real Estate in Virginia*, GRAINE MEDIATION (Apr. 22, 2014), https://www.grainemediation.com/2014/04/the-wild-west-of-divorce-law-concerning-real-estate-in-virginia/.

123 *See* Dorbin v. Dorbin, 731 P.2d 959, 961 (N.M. Ct. App. 1985) (suggesting that it would be permissible to award to the marital community the amount that community funds were used to pay down the principal plus a percentage of the equity. That percentage involves a fraction where the numerator is the amount that the community reduced the mortgage, and the denominator is the original purchase price.); *see also* Antone v. Antone, 645 N.W.2d 96, 102 (Minn. 2002) (describing how separately owned property is partly marital and partly separate where the marital unit paid down the mortgage).

124 Saba v. Khoury, 516 P.3d 891 (Ariz. 2022).

> The community property equitable lien interest is determined by adding the principal balance paid by the community to the product of the community property principal payments divided by the purchase price[125] times the appreciation in value.[126]

This approach mirrors the California approach in that it adds the amount that the community reduced the principal owed on the mortgage to the community's share of passive appreciation. The community's share of passive appreciation is determined by (1) creating a fraction where the numerator is the reduction in the mortgage principal attributable to the community and the denominator is the home's purchase price. That fraction is multiplied by the home's passive appreciation[127] (i.e., the appreciation not due to any improvements in the home).

The *Saba* court explained that "a fair return on the amount paid to reduce the principal balance of the mortgage would be the rate of return that money would have otherwise earned for the community."[128] Yet, the court's comparison to the rate of return that the money would otherwise have earned is misleading because the principal reduction will be a possibly small fraction of the amount spent by the community. Using the numbers in the example involving Wanda and her spouse who divorced after ten years, the marital community would have received $14,916 ($11,220 + $3,696) after having spent $63,840, which hardly replicates what the couple would have earned on that money had the community invested those funds elsewhere.

The *Saba* court made clear that trial courts are permitted—but not required—to employ the approach described in the opinion[129] and that trial courts have much discretion.[130] However, the *Saba* opinion likely causes some confusion in the lower courts because the approach it endorsed, the

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125 The express formulation offered by the Arizona Supreme Court follows the California approach. However, the court is less clear than might be desired about which approach the court is actually endorsing. *See Saba*, 516 P.3d at 895.

126 *Id.*

127 The *Saba* court clarified that only the passive appreciation occurring during the marriage should be used when making this calculation. See *Saba*, 516 P.3d at 895, for illustrations of the cost implications of only using the appreciation of the home during the marriage.

128 *Id.* at 896 (discussing the interest of the "community" because Arizona is a community property state).

129 The court also made clear that it was not mandating the use of this formula. *See id.* ("To be clear, by approving the use of the *Drahos/Barnett* formula we are not mandating that courts apply it in every case, nor must courts strictly adhere to the formula and ignore additional factors unique to each case.").

130 *Id.* ("[O]ur caselaw is clear that trial courts are 'not bound by any one method, but may select whichever will achieve substantial justice between the parties.'") (citing Cockrill v. Cockrill, 601 P.2d 1334, 1338 (Ariz. 1979)).

Drahos/Barnett approach,[131] did not mirror the one described in the opinion.[132]

The *Drahos/Barnett* approach offers the following as the way to determine the community interest in the separately owned home, where the community reduced the principal owed on the mortgage:

> Where "A" = appreciation of the property during the marriage . . .
>
> Where "B" = the appraised value of the property as of the date of the marriage . . .
>
> Where "C" = the community's contributions to principal, the value of the community's lien is:
>
> C + [C/B X A][133]

This approach is similar to the approach described in *Saba* in that the community interest in the separately owned home involves a sum of the amount that the community reduced the principal owed on the mortgage and a percentage of the passive appreciation that occurred during the marriage.[134] However, the *Barnett* approach is that the fraction (determining the community interest in the passive appreciation) involves the reduction in principal owed over the appraised value at the time of the marriage. In contrast, the *Saba* approach involves the reduction of the principal owed over the purchase price.[135] Those respective denominators need not be different if, for example, the separate property is acquired during the marriage.[136] However, in a case in which the property is acquired before the marriage, the difference may be important.

In *Bonam v. Bonam*, the husband claimed that the trial court erred when determining the community interest in his separately owned home because the trial court used the purchase value of the home rather than its fair market value at the time of the marriage.[137] The appellate court did not address the merits of the claim because the husband failed to provide the court with an

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131 *Saba*, 516 P.3d at 896 ("We now hold that the *Drahos/Barnett* formula is an appropriate starting point for courts to calculate a marital community's equitable lien on a spouse's separate property.").

132 *Compare Saba*, 516 P.3d at 896 *with* Barnett v. Jedvnak, 200 P.3d 1047, 1052 (Ariz. Ct. App. 2009).

133 *Barnett*, 200 P.3d at 1052.

134 *See Saba*, 516 P.3d at 895 (endorsing the view that "the formula . . . [should] account for only the post-marriage appreciation").

135 The express formulation offered by the Arizona Supreme Court follows the California approach. However, the court is less clear than might be desired about which approach the court is actually endorsing. *See id.*

136 In *Saba*, the separate properties were acquired the year following the marriage. 516 P.3d at 893.

137 Bonam v. Bonam, No. 1 CA-CV 23-0277 FC, 2024 WL 850417 (Ariz. Ct. App. Feb. 29, 2024).

appraised value of the house at the time of the marriage.[138] Instead, the appellate court held that he was precluded from challenging the trial court's failure to use that value when determining the marital interest in the home.[139]

The issue here is that the *Bonam* court cited the *Drahos* formula,[140] *Barnett*,[141] and *Saba*,[142] all for the proposition that the home's purchase price is the relevant denominator. However, *Barnett* modified *Drahos* to make the fair market value at the time of the marriage the relevant denominator, and *Saba* had expressly noted and approved the *Barnett* modification.[143] While trial courts have discretion and are not required to use the *Drahos/Barnett* formula,[144] confusion is likely to continue in Arizona courts when making the relevant calculation.

The *Saba* court offered a general analysis of the community interest in separately owned property where the community pays down the mortgage or improves the property.[145] Neither of the properties at issue had been used as the marital domicile,[146] so the calculation could not include any potential benefits from using the property as a home.[147] But if that is so, then the court could not have implicitly included within the calculation of the return on investment the money saved by not having been forced to rent living accommodations.[148] The question at hand is why the court believed that the

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138 *Id.* at *3–4.

139 *Id.* at *2 ("Husband failed to provide the figures required to account for any prenuptial appreciation. He has thus waived the right to claim it was error not to consider it.").

140 *Id.* at *3.

141 *Bonam*, 2024 WL 850417, at *3.

142 *Id.*

143 *See* Saba v. Khoury, 516 P.3d 891, 895–96 (Ariz. 2022).

144 The court also made clear that it was not mandating the use of this formula. *See id.* at 896.

145 *Id.* ("When a marital community contributes its money or labor to a spouse's separate property, it 'is entitled to share in the enhanced value of [that] property.'") (citing Honnas v. Honnas, 648 P.2d 1045, 1046 (Ariz. 1982)).

146 *Saba*, 516 P.3d at 893 ("Hani Saba ('Husband') and Sawsan Khoury ('Wife') married in 2009. In 2010, the couple purchased two Phoenix houses in addition to their existing marital residence. [. . .] These properties were treated as Wife's separate property because she had title, she was the borrower, and because Husband, who had poor credit, had disclaimed any interest in the properties.").

147 Hurta v. Hurta, 260 So. 2d 324, 327 (La. Ct. App. 1972) ("By providing his separate house as the family home, the husband dedicates its actual 'profits', although not reduced to a dollar-revenue, to the community, and that dedication produces an actual, in-pocket, dollar saving to the community in the form of the rent for another house which the community consequently does not have to expend."); Roque v. Tate, 631 So. 2d 1385, 1389 (La. Ct. App. 1994) (Cannella, J., dissenting) ("This is precisely the kind of unjust result that the Legislature sought to remedy in enacting La. R.S. 9:374(C). Its purpose is to enable the courts to allow an offset as rental for the use and occupancy of the family home, when, as here, the circumstances warrant it and it has not been previously precluded by earlier agreement or judgment."); Roque v. Tate, 637 So. 2d 457 (La. 1994) (writ not considered); *cf.* John G. Steinkamp, *A Case for Federal Transfer Taxation*, 55 ARK. L. REV. 1, 38 (2002) ("The economic return in the case of an investment in owner-occupied housing is not realized in cash, but rather through the owner's rent-free personal occupancy.").

148 *Id.*

articulated approach determining the community interest created by virtue of having reduced the principal owed on the mortgages constituted a "fair return."[149] At the very least, one would expect that a net loss would not be viewed as a fair return on investment,[150] and it "blinkers reality"[151] to ignore the substantial community sums spent on interest when assessing whether there is a fair return on investment.[152]

In a different case in which the court focused on separate property used as a marital domicile, the court might decide to include more than the attributed value of the equity in the home at the time of divorce when determining whether there had been a fair return on investment. For example, a court might consider that the couple had lived in the home for the relevant period, which meant that the couple did not need to pay rent during that period.[153] Suppose that the couple would either have lived in the house or, instead, would have rented an apartment for that period where the rent would have averaged $1,200/month. In that case, the avoided rental costs would have been $144,000 ($1,200 x 12 x 10). Perhaps avoiding those rental costs should also be included when assessing whether there has been a fair return on investment.[154]

If the assessment of the marital community's return on investment includes the benefit of not having to pay rent elsewhere, then there would be an analogous way to treat separate rental properties where the community helps pay down the mortgage. If the rents from those properties belong to the marital estate,[155] those funds could also be considered when determining the

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149 *Saba*, 516 P.3d at 896.

150 *Cf.* Popowsky v. Pennsylvania Pub. Util. Comm'n, 910 A.2d 38, 45–46 (Pa. 2006) ("[T]he PUC had determined that it was reasonable to require customer contribution to a main extension 'if necessary to prevent the utility from a negative return on investment, *i.e.*, the utility must realize at least a 'break even' return on mandated extensions.") (citing Popowsky v. Pennsylvania Pub. Util. Comm'n, 853 A.2d 1097, 1104 (Pa. Commw. Ct. 2004), *aff'd*, 910 A.2d 38 (2006)).

151 *In re* Elec. Books Antitrust Litig., No. 11 CIV. 5576 DLC, 2012 WL 2478462, at *4 (S.D.N.Y. June 27, 2012).

152 *See generally* Turner, *supra* note 49, at 37 (suggesting that the failure to consider interest has counterintuitive results).

153 Hurta v. Hurta, 260 So. 2d 324, 327 (La. Ct. App. 1972); Roque v. Tate, 631 So. 2d 1385, 1389 (La. Ct. App. 1994); *cf.* John G. Steinkamp, *A Case for Federal Transfer Taxation*, 55 ARK. L. REV. 1, 38 (2002).

154 To compare the amounts spent, one would want to include additional expenses for utilities, maintenance, etcetera.

155 *See Hurta*, 260 So. 2d at 327 ("If he rents his separate house, all its non-capital expenses are deductible in determining its profits, which alone fall to the community.") (internal quotation marks omitted).

return on investment. Yet, in several states[156] including Arizona, [157] the rent from a separately owned property remains separate.

The marital community might indirectly benefit from the separately owned rental property. In many states, the marital community would have an interest in that home after having reduced the principal owed on the mortgage, yielding a percentage of the passive appreciation in the house. The house's potential as a rent producer might contribute to its market value, and the marital estate might benefit from the increased market value resulting from its rental potential.[158] Yet, it is unlikely that this share of the house's fair market value would have made the properties a good investment for the marital community. In *Saba*, the two separately owned properties[159] were purchased a year into the marriage.[160] Six years later, the husband filed for divorce.[161] A substantial part of each mortgage payment would have gone to interest rather than a reduction in principal,[162] so it is unlikely that the marital community's share in the passive appreciation would make up for all the interest paid.

Even if the rent goes to the separate owner when the marital community is paying down the mortgage on the rental property, the non-owner spouse might benefit in a different way at the time of divorce. The court would consider the rental income on the separate property as income to the separate owner when figuring out whether or how much spousal support should be ordered.[163] The non-owner spouse might benefit in that support might be increased for that spouse or support might be decreased for the other spouse considering the additional income that the other spouse was receiving. That said, the marital community still would not have received a fair return on

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156 Brett R. Turner, *Separate Property: Income from Separate Property—General Rules*, 1 EQUIT. DISTRIB. OF PROPERTY, 4th § 5:50 (Jan. 2024 update) ("A number of states . . . classify[] all income from separate property as separate property.").

157 Rueschenberg v. Rueschenberg, 196 P.3d 852, 855 (Ariz. Ct. App. 2008) ("Arizona's statutory community property scheme provides that the increase, rents, issues and profits' of a spouse's real and personal property that is owned by that spouse before marriage is the separate property of that spouse.") (citing A.R.S. § 25–213(A) (2007)) (internal quotation marks omitted).

158 *See* Pace v. Pace, 134 N.Y.S.3d 540, 544 (N.Y. App. Div. 2020) (upholding trial court's upward assessment of the passive appreciation of a separately owned house because that house had temporarily been approved as a rental for an increased number of occupants, thereby increasing the amount of passive appreciation that was marital and subject to distribution).

159 Saba v. Khoury, 516 P.3d 891, 893 (Ariz. 2022).

160 *Id.*

161 *Id.*

162 Davenport, *supra* note 48, at 542 n.69 (noting that in early payments on a mortgage most of the payment goes to interest rather than the reduction of the principal owed).

163 *See, e.g.*, Headwell v. Headwell, 156 N.Y.S.3d 491, 494–95 (N.Y. App. Div. 2021) (attributing rental income to husband when deciding whether the spousal support he was ordered to pay was reasonable); Gorman v. Gorman, 134 N.Y.S.3d 330, 333 (N.Y. App. Div. 2020) (upholding attribution to wife of rental income when determining how much she should receive in spousal support).

investment, especially if the couple paid down the mortgage early in its life and did not remain married very long.[164]

E. How Much of the Passive Appreciation Must Be Considered?

One issue involves the percentage of the passive appreciation that should go to the separate homeowner versus the marital community. A different but related issue dividing states is whether the passive appreciation subject to distribution is limited to the appreciation that occurs during the marriage or, instead, also includes the appreciation that occurs before the marriage.[165]

In many of the cases considered here, the marital estate has only partially reduced the principal owed on the mortgage and only receives a portion of the passive appreciation. Perhaps some of the reduction occurred before the marriage[166] or some of the principal had yet to be repaid at the time of divorce.[167] Even if the marital estate had paid down all the remaining mortgage, the separate homeowner had presumably made a down payment, so some of the equity in the house would not be attributable to action by the marital unit.[168]

In these cases, the separate homeowner and the marital estate each receive a percentage of the passive appreciation. A different question is which passive appreciation will be subject to distribution—should all passive appreciation be considered or only that appreciation occurring during the

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164 *See* Davenport, *supra* note 48, at 542 n.69; Turner, *supra* note 49, at 37 ("The formula reached an unreasonable result because it ignored most of the marital expenditures, on grounds that they were payments of interest on the mortgage rather than payments toward principal.").

165 McGowan v. McGowan, 344 So. 3d 607, 612 (Fla. Dist. Ct. App. 2022) (The trial court went on to misclassify as exclusively nonmarital Former Husband's home in Fayetteville, Georgia. It did so while acknowledging that Former Husband used marital funds to pay the mortgage on the Fayetteville home. The trial court should also have considered the passive appreciation of the Fayetteville home that accrued); *see also* FLA. STAT. ANN. § 61.075(6)(a) (West 2024).

166 *See, e.g.*, Weiss v. Weiss, 543 A.2d 1062, 1064 (N.J. Super. Ct. App. Div. 1988) ("Because mortgage payments are made monthly and each payment reduces the principal owed a least a little bit, one would expect that at least some of the principal owed would have been paid down unless the home had been acquired immediately before the marriage in anticipation of that marriage. A home acquired in anticipation of the marriage might itself be treated as subject to distribution.").

167 *See, e.g.*, Cooper v. Cooper, 260 So. 2d 272, 274 (Fla. Dist. Ct. App. 1972) (discussing the respective obligations of the parties with respect to paying the remaining mortgage payments).

168 This statement must be qualified in that, for example, an individual who gifts his/her interest to the marital community will not have a separate interest in the home. *See, e.g.*, Lerch v. Lerch, 608 S.E.2d 223, 223–24 (Ga. 2005) ("In this case, the Husband deeded the home to both his wife and himself, to be held as 'tenants in common' with right of survivorship. In so doing, Husband manifested an intent to transform his own separate property into marital property."); Curry v. Curry, 741 S.E.2d 558, 563 (S.C. Ct. App. 2013) ("The evidence reflects that when Husband received title to Lot 34 from his mother in 1993, the lot was appraised at $200,000. Within one month, Husband contributed Lot 34 to the marital estate by transferring half of his ownership interest to Wife.").

marriage? Some states limit the passive appreciation subject to distribution to that which occurred while the couple was married.[169]

Suppose, for example, that Charlotte owns her own home. She pays down the mortgage on her $200,000 home for several years and then marries. At the time of her marriage, the home's fair market value is $248,000. Charlotte and her spouse continue to pay down the mortgage using marital funds. After ten years, Charlotte and her spouse divorce. At the time of divorce, the home's fair market value is $350,000.

Assume that Charlotte made a down payment of $40,000 and secured a mortgage for $160,000. Before her marriage, she reduced the principal owed on the mortgage by about $15,444. During the marriage, Charlotte and her spouse reduced the principal owed by $39,492, having paid $106,320 (120 payments of $886).[170]

In a state using the *Brandenburg* approach, the marital estate's interest in the passive appreciation would be roughly $62,398 ($39,492/$94,936 x $150,000). In a state using the California approach, the marital estate's interest in the passive appreciation would be roughly $29,619 ($39,492/$200,000 x $150,000). In a state like Georgia that limits the passive appreciation to that which occurs during the marriage,[171] the marital interest in the passive appreciation would be roughly $20,141 ($39,492/$200,000 x $102,000).

Florida also considers only the passive appreciation that occurs during the marriage.[172] However, Florida alters the fraction that determines the marital interest in the passive appreciation of the house. While the numerator is the marital estate's reduction in the principal owed, the denominator is not the original purchase price but the home's fair market value at the time of the marriage.[173] In the example involving Charlotte and her spouse,[174] marital

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169 *See, e.g.*, FLA. STAT. ANN. § 61.075(6)(a)(1)(c)(I) (West 2024) ("The passive appreciation is determined by subtracting the value of the property on the date of the marriage or the date of acquisition of the property, whichever is later, from the value of the property on the valuation date in the dissolution action, less any active appreciation of the property during the marriage as described in sub-subparagraph b., and less any additional encumbrances secured by the property during the marriage in excess of the first note and mortgage on which principal is paid from marital funds.").

170 The numbers here roughly reflect a 30-year mortgage of $160,000 at 5.27%. *See Amortization Calculator*, *supra* note 121.

171 *See, e.g.*, Horton v. Horton, 785 S.E.2d 891, 894 (2016) (noting that allocation of the respective interests in passive appreciation requires evidence of how much the house appreciated during the marriage).

172 *See* FLA. STAT. ANN. § 61.075(6)(a)(1)(c)(I) (West 2024).

173 *See* FLA. STAT. ANN. § 61.075(6)(a)(1)(c)(II) (West 2024).

174 *See* FLA. STAT. ANN. § 61.075(6)(a)(1)(c)(I) (West 2024) ("The passive appreciation is determined by subtracting the value of the property on the date of the marriage or the date of acquisition of the property, whichever is later, from the value of the property on the valuation date in the dissolution action, less any active appreciation of the property during the marriage as described in sub-

interest in the passive appreciation would be roughly $16,243 ($39,492/$248,000 x $102,000).

Some states, like Ohio, treat the passive appreciation of the separately owned home as separate,[175] even if the marital estate had made payments to reduce the principal owed on the mortgage.[176] The marital estate would be credited with its reduction in the principal owed on the mortgage[177] but would not be credited with some of the passive appreciation of the separately owned home. A separate issue involves the degree to which the marital estate acquires an interest in the house when improvements are made.[178]

The marital community's interest in the home would differ depending upon the state in which Charlotte and her spouse had lived. In each case, the reduction in principal owed is $39,492, so the chart lists passive appreciation (PA) and the total marital interest (TOT):

Kentucky (*Brandenburg*)	PA $62,398	TOT $101,890
California	PA $29,619	TOT $69,111
Georgia	PA $20,141	TOT $59,633
Florida	PA $16,243	TOT $55,735

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subparagraph b., and less any additional encumbrances secured by the property during the marriage in excess of the first note and mortgage on which principal is paid from marital funds.").

175 A different analysis is appropriate if the marital estate contributed funds to improve the home. *See* Porter v. Porter, 2023-Ohio-403, ¶ 8 (Ohio Ct. App. 2023) ("Debra would be entitled to one-half of the increase in equity resulting from . . . any improvements made during the marriage as that would have arisen from the use of marital funds.").

176 *See, e.g.*, Bozhenov v. Pivovarova, 220 N.E.3d 1283, 1288 (Ohio Ct. App. 2023) ("[T]here is no evidence in the record to suggest that the value of the Loveland house was anything but passive income and appreciation acquired from separate property by Husband during the marriage. As of the date of the marriage, the mortgage balance was $139,225. During the marriage, the mortgage was paid down to $101,995.17 by marital effort, thus limiting the parties' marital equity in the real estate to $37,229.83."); *Porter*, 2023-Ohio-403, at ¶ 8 ("Debra would be entitled to one-half of the increase in equity resulting from the mortgage payments . . . ."); Stava v. Stava, 6 N.W.3d 567, 572–75 (Neb. Ct. App. 2024) ("The appreciation or income of a nonmarital asset during the marriage is marital insofar as it was caused by the efforts of either spouse or both spouses . . . The district court assigned the $84,620 marital paydown of the mortgage loan as a marital asset awarded to Larry; this effectively gave Carine credit for one-half of that mortgage reduction. We find no abuse of discretion in that regard."). Some states like Pennsylvania make *all* the home's passive appreciation during the marriage marital and subject to distribution. *See* 23 PA. STAT. AND CONS. STAT. ANN. § 3501(a) (West 2005) (stating that increase in value during the marriage is marital); COLO. REV. STAT. ANN. § 14-10-113(1)(d) (West 2004) (stating that increase in value during the marriage is marital).

177 *Porter*, 2023-Ohio-403, at ¶ 8 ("Debra would be entitled to one-half of the increase in equity resulting from the mortgage payments . . . ."); Gilleo v. Gilleo, 2010-Ohio-5191, at ¶ 25 (discussing marital interests resulting from paying down the mortgage).

178 *Id.*

Ohio	PA $0	TOT $39,492

In this case, the marital community paid $106,320.[179] The *Brandenburg* approach comes closest to returning the amount spent. That does not mean that this is a fair return on investment—the marital community received about 96% of its money back, although that calculation does not include the benefit of not having to pay rent.[180] That said, the separate owner also did not have to pay rent, so it is not as if the marital community was receiving a special benefit that the separate owner did not receive.

The California approach accords less to the marital community than the *Brandenburg* approach because the denominator in the fraction determining the share of passive appreciation is based on the purchase price rather than on the increase in equity attributable to the combined contributions of the separate owner and the marital community.[181] The Georgia approach accords less to the marital community than the California approach because the former only considers passive appreciation during the marriage.[182] The Florida approach accords less to the marital community than does the Georgia approach because Florida only considers appreciation during the marriage, and Florida uses the home's fair market value at the time of the marriage rather than the original purchase price as the denominator to determine the share of the passive appreciation.[183] Ohio accords the least to the marital community among these states because the marital community does not earn a share of the passive appreciation by virtue of helping to pay down the mortgage.[184]

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179 *See Amortization Calculator*, *supra* note 121.

180 *See* Hurta v. Hurta, 260 So. 2d 324, 327 (La. Ct. App. 1972) ("By providing his separate house as the family home, the husband dedicates its actual 'profits', although not reduced to a dollar-revenue, to the community, and that dedication produces an actual, in-pocket, dollar saving to the community in the form of the rent for another house which the community consequently does not have to expend."); Roque v. Tate, 631 So. 2d 1385, 1389 (La. Ct. App. 1994) (Cannella, J., dissenting) (discussing a statute whose "purpose is to enable the courts to allow an offset as rental for the use and occupancy of the family home, when, as here, the circumstances warrant it and it has not been previously precluded by earlier agreement or judgment."). *Cf.* John G. Steinkamp, *A Case for Federal Transfer Taxation*, 55 ARK. L. REV. 1, 38 (2002) ("The economic return in the case of an investment in owner-occupied housing is not realized in cash, but rather through the owner's rent-free personal occupancy."). To compare the amounts spent, one would want to include additional expenses for utilities, maintenance, etcetera.

181 *See In re* Marriage of Moore, 618 P.2d 208, 210–11 (Cal. 1980) ("The community property share would be $16,911.29, which represents the amount of capital appreciation attributable to community funds (10.57 percent of $103,359.43) added to the amount of equity paid by community funds ($5,986.20).").

182 *See* Horton v. Horton, 785 S.E.2d 891, 894 (Ga. 2016) (noting that allocation of the respective interests in passive appreciation requires evidence of how much the house appreciated during the marriage).

183 *See* FLA. STAT. ANN. § 61.075(6)(a)(1)(c)(I-II) (West 2024).

184 *See* Porter v. Porter, 2023-Ohio-403, ¶ 8 (Ohio Ct. App. 2023); Bozhenov v. Pivovarova, 220 N.E.3d 1283, 1288 (Ohio Ct. App. 2023); Stava v. Stava, 6 N.W.3d 567, 572–75 (Neb. Ct. App.

The listing above only represents the marital community's share of the passive appreciation plus its reduction of the principal owed on the mortgage. It does not reflect the share from improvements to the home.[185] Further, the listing does not speak to what a party must prove for the marital community to be credited with a share of the passive appreciation. For example, where the state distributes some portion of the passive appreciation during the marriage, it will be necessary to compare the value of the house when the marriage began to the value of the house at the time of divorce.[186] Suppose a party cannot show what the value of the house was at the time of the marriage. In that case, the court may be unable to establish how much passive appreciation is marital and subject to distribution.[187]

The listing above illustrates how different states determine the marital community's interest in the home when the couple has made no improvements to the home. One of the features of the hypothetical offered is that the separate owner had paid down some of the mortgage prior to the marriage.[188] Suppose the separate owner had paid down a substantial portion of the principal owed on the mortgage before marrying. In that case, the marital community would receive a comparatively larger share of the value of the house.[189]

F. Passive Appreciation in Marriages Late in the Life of the Mortgage

One of the points emphasized above is that the marital community does not get a fair return on investment when paying the mortgage payments early

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2024). Some states like Pennsylvania make *all* the home's passive appreciation during the marriage marital and subject to distribution. *See* 23 PA. STAT. AND CONS. STAT. ANN. § 3501(a) (West 2005); COLO. REV. STAT. ANN. § 14-10-113(1)(d) (West 2004).

185 *See Porter*, 2023-Ohio-403, at ¶ 8 ("Debra would be entitled to one-half of the increase in equity resulting from . . . any improvements made during the marriage as that would have arisen from the use of marital funds.").

186 Jones-Shaw v. Shaw, 728 S.E.2d 646, 648 (Ga. 2012) ("[I]n order for a trial court to determine that an asset appreciated in value during a marriage, there must be evidence of the value of the asset at the time of the marriage and its value at the time of the divorce.").

187 *Horton*, 785 S.E.2d at 895 ("Wife did not present the evidence necessary to apply the source-of-funds rule to determine the value of any such marital property. There is no evidence of the fair market value of the House at the time of the marriage, at the time of Wife's payments, or at the time of the divorce . . . .").

Some commentators propose a solution to this problem. *See* Lisa Milot, *Accounting for Time: A Relative-Interest Approach to the Division of Equity in Hybrid-Property Homes Upon Divorce*, 100 KY. L.J. 585, 605 (2012) ("Instead, an appraisal as of the date of marriage can be obtained, or, if no improvements were made to the home, an index-that is, a specialized real estate database that calculates the change in value of the typical home in a given geographic area over a defined time period-can be used to measure the value of the home, including premarital appreciation.").

188 *See* text following *supra* note 169.

189 *See Porter*, 2023-Ohio-403, at ¶ 8; *Jones-Shaw*, 728 S.E.2d at 648; *Horton*, 785 S.E.2d at 895; Lisa Milot, *Accounting for Time: A Relative-Interest Approach to the Division of Equity in Hybrid-Property Homes Upon Divorce*, 100 KY. L.J. 585, 605 (2012).

in the life of the mortgage, especially if the marriage does not last very long.[190] The marital community does much better comparatively when paying down the mortgage late in the life of the mortgage, especially when the marriage is of relatively short duration. The comparison below illustrates the point.

Suppose Amanda purchases a $250,000 house with a down payment of $50,000, obtaining a $200,000, thirty-year mortgage at 5% interest. She makes mortgage payments every month. She marries twenty years later, and the married couple pays off the mortgage with marital funds. The marital community will have paid down over $101,225 of the principal owed because, in the last ten years, a larger percentage of each mortgage payment goes to reducing the principal owed than was true for the mortgage payments made during the first twenty years.[191] If Amanda and her spouse were to divorce after having paid off the mortgage, the marital community's contribution towards equity would have been $101,225 of the $250,000 total. If the state uses the *Brandenburg* approach, the marital community would be entitled to 40% ($101,225 / $250,000) of the home's fair market value.

Suppose further that the home's fair market value increased by about $10,000/year on average. If the home's fair market value at the time of divorce is $550,000, the marital community will be entitled to $221,225 ($120,000[192] + 101,225) after paying $128,880 ($12,888 annually for ten years).

Consider Zelda, who also purchases a $250,000 house with a down payment of $50,000 and obtains a $200,000 thirty-year mortgage at 5% interest. Zelda marries shortly after purchasing the house, and she and her spouse make mortgage payments for the next ten years. They then divorce in a state using the *Brandenburg* approach. At that point, the principal owed on the mortgage would be about $162,684. The marital interest in the equity in the home would be about 43% ($37,316 / $87,316). If the home's fair market value were $350,000 (increasing about $10,000/year on average) and the principal owed on the mortgage was $162,684, the equity in the home would be about $187,316. The marital interest would be about $117,862 ($37,316 + $80,546) after having paid $128,880 in monthly mortgage payments.

Suppose the facts above, except that Amanda and Zelda live in a state employing the California approach. Amanda and her spouse would have reduced the mortgage by about $101,225, and the marital community would

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190 *See* Davenport, *supra* note 48, at 542 n.69 (noting that in early payments on a mortgage most of the payment goes to interest rather than the reduction of the principal owed); Turner, *supra* note 49, at 37 (criticizing a decision "because it ignored most of the marital expenditures, on grounds that they were payments of interest on the mortgage rather than payments toward principal.").

191 *See Amortization Calculator*, *supra* note 121 (using the amortization table using the values listed in the hypothetical).

192 0.40 x $300,000 = $120,000.

be entitled to 40% ($101,225 / $250,000) of the home's fair market value. As had been true in a state using the *Brandenburg* approach, the marital community will be entitled to $221,225 ($120,000 + $101,225) after having paid $128,880 ($12,888 annually for ten years).

Zelda, however, will do better in a state using the California approach. The marital community's interest in the equity in the home would be about 15% ($37,316 / $250,000), which means that the marital community in Zelda's case would be entitled to about $65,413 ($37,316 + $28,097).[193]

In a state like Georgia that limits the marital community's share of the passive appreciation to that which occurred during the marriage,[194] the passive appreciation would be $100,000. In Amanda's case, the marital community's share of the passive appreciation would be $40,000 (40% of $100,000) + $101,225 (reduction in principal owed) = $141,225. In Zelda's case, the marital community's share of the passive appreciation would be $15,000 (15% of $100,000) + $37,316 (reduction in principal owed) = $52,316.

In a state like Florida that limits the marital community's share of the passive appreciation to that which occurred during the marriage and which determines the percentage of the interest in the passive appreciation by using the fair market value of the house at the time of the marriage,[195] the passive appreciation would be $100,000. In Amanda's case, the marital community's share of the passive appreciation would be about $22,000 (22% of $100,000)[196] + $101,225 (reduction in principal owed) = $123,225. In Zelda's case, the marital community's share of the passive appreciation would be $15,000 (15% of $100,000)[197] + $37,316 (reduction in principal owed) = $52,316.

In a state like Ohio, the marital community's interest in the house is limited to the amount the principal owed was reduced. In Amanda's case, the marital community's share of the house would be $101,225 (reduction in principal owed), and in Zelda's case, the marital community's share of the house would be $37,316.

Below is a listing of the marital community's interest in the home after having paid $128,880 over ten years of marriage in these different states, comparing the couple who married early in the life of the mortgage (E) with the couple who married late in the life of the mortgage (L), and the difference

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193 $187,316 x 0.15 = $28,097.

194 Because mortgage payments are made monthly and each payment reduces the principal owed a least a little bit, one would expect that at least some of the principal owed would have been paid down unless the home had been acquired immediately before the marriage in anticipation of that marriage. A home acquired in anticipation of the marriage might itself be treated as subject to distribution. *See, e.g.*, Weiss v. Weiss, 543 A.2d 1062 (N.J. App. Div. 1988).

195 *See* text following *supra* note 169.

196 $101,225 / $450,000 = 0.22.

197 $37,316 / $250,000 = 0.15.

between the two (D). RE is the loss for the marital community where the marriage was celebrated early in the life of the mortgage, and RL is the profit or loss for the marital community where the marriage was celebrated later in the life of the mortgage.

CA	E $65,413 RL $92,345	L $221,225	D $155,812	RE	-$63,467
KY	E $117,862 RL $92,345	L $221,225	D $103,363	RE	-$11,018
GA	E $52,316 RL $12,345	L $141,225	D $88,909	RE	-$76,564
FL	E $52,316 RL -$5,655	L $123,225	D $70,909	RE	-$76,564
OH	E $37,316 RL -$27,655	L $101,225	D $63,909	RE	-$91,564

Ohio generally accords the marital community less on its investment in the separately owned home because Ohio does not award any interest in the passive appreciation of the house. Among the states according the marital community some interest in the passive appreciation, Florida generally[198] accords comparatively less to the marital community celebrating a marriage late in the life of the mortgage because passive appreciation is limited to what occurs during the marriage and also because the percentage of the passive appreciation is based on the value of the house at the time of the marriage rather than on the house's purchase price.[199] Georgia accords the late-marrying marital community less than those following the California or *Brandenburg* approach because Georgia limits the passive appreciation to that which occurred during the marriage.[200] States using the California or *Brandenburg* approaches will award the later-marrying couple the same amount of passive appreciation, assuming that the couple simply pays down the mortgage until it has been retired. However, if the marital community does not retire the mortgage but, instead, only pays down some of it, then the *Brandenburg* approach will yield the couple a larger percentage because *Brandenburg* states focus on the amount that the mortgage was reduced

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198 However, if the house depreciates in value between the time of purchase and the time of the marriage, Florida might accord *more* to the marital couple because the denominator of the fraction determining the marital community's interest would be smaller than it would have been had the purchase price been the relevant number. *See* FLA. STAT. ANN. § 61.075(6)(a)(1)(c)(I) (West 2024).

199 *See, e.g.*, FLA. STAT. ANN. § 61.075(6)(a)(1)(c)(I) (West 2024).

200 *See* Horton v. Horton, 785 S.E.2d 891, 895 (Ga. 2016).

rather than on the original purchase price,[201] assuming that the couple is paying down the original mortgage and has not refinanced.[202]

The return on investment for the separate owner and the marital community varies depending upon the number of years the marriage was intact, the number of years the marital community paid down the mortgage, the interest rate for the loan, etcetera. Further, houses may appreciate at different rates in different states. Nonetheless, conclusions can be drawn. The current approaches in many states treat the marital community paying down the mortgage early in its life more unfavorably than the marital community paying down the mortgage late in its life. It is unclear whether this differential treatment is understood, much less intended. States vary in whether the court distributes the value of passive appreciation, and if so, whether that divisible passive appreciation should be limited to that which occurs during the marriage.[203] Without more discussion of the goals particular policies are designed to serve, it is difficult to assess which policies are justifiable as a matter of fairness or sound public policy. However, it seems clear that it is unlikely that the same policy justifying the distribution approach in late marriages is also served by the distribution approach in early marriages. It is also unlikely that the same policies justifying the approach when long-term marriages are involved are served when the marriages at issue are short-term, whether early or late in the life of the mortgage. In short, many states must modify their approaches to distributing the value of the marital home if they wish to promote fairness and other policy objectives.

III. CONCLUSION

Various states have adopted differing approaches to calculating the marital community's interest in a separately owned home where the marital community helps pay down the mortgage. Very few states consider that a

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201 *Cf.* Simunovich, *supra* note 59, at 962 ("Consider again the Johnsons and the Robertsons. The Johnsons paid 20% down ($40,000) on their $200,000 home and obtained a $160,000 mortgage for the remainder of the purchase price. Assume that the Johnsons obtained a thirty-year mortgage in which the payments remain constant throughout the terms of the loan (thirty-year fixed). At an interest rate of 6%, the Johnsons would pay roughly $960 per month. After one year, the Johnsons have reduced the principal loan amount by roughly $2000; after three years, the principal is reduced by $7000. This total cost is significantly lower than either of the alternatives below, and demonstrates the benefits of a conventional loan combined with a large down payment. After thirty years, the total cost of owning their home (that is, the cost of the thirty-year fixed mortgage and the $40,000 down payment) would be $385,341.").

202 *Cf.* Hubby v. Hubby, 556 S.E.2d 127, 129 (Ga. 2001) ("[A] refinancing of the mortgage during the marriage does not prevent an equitable division. Even though a refinancing may increase the debt and reduce the equity, the net effect is to convert the then-existing equity in the marital home into cash.").

203 *See* text preceding *supra* note 201 (comparing states *inter alia* that only distribute the passive appreciation occurring during the marriage with states that distribute all the passive appreciation that had occurred).

large percentage of mortgage payments early in the life of the mortgage goes toward interest. The failure to take that into account has surprising and unfair implications, whether comparing the interests of different marital communities or the interests of the marital community versus those of the separate owner. The marital community making payments early in the life of a mortgage does not receive a fair return on the investment, claims to the contrary notwithstanding, which means that the separate owner may be getting a windfall. However, the marital community making payments late in the life of the mortgage will get a comparatively better return on investment, possibly at the expense of the separate owner or, perhaps, at the expense of an earlier marital community that did not get its fair share.

States may have assumed that the benefits to the separate owner early in the life of the marriage are balanced out by the benefits to the marital community late in the life of the mortgage. That presumes that the couple will remain together for a substantial period, which does not reflect the experience of many married couples.[204]

One issue involves how to distribute the equity between the separate owner and the marital community that helped pay down the mortgage. As the *Keeling* court pointed out, the separate owner may reap a windfall when the marital community is doing the heavy lifting by paying the interest on the mortgage.[205] A different issue involves comparing marital couples making mortgage payments early versus late in the life of the mortgage. The states can reduce disparity in the respective shares of the home's equity by altering their approaches and considering the amount expended rather than the reduction in the principal owed. For example, in the hypothetical involving Zelda and Amanda,[206] both marital couples made payments totaling $128,880 over ten years, but Amanda and her spouse had a much greater interest in the house than Zelda and her spouse.[207] It is difficult to understand why the same outlays should yield such different results.

One difficulty pointed to here is that simply as a matter of honesty one cannot describe the current system as affording a fair return on investment for all the parties, especially when the percentage of payments going to interest is ignored. Nor do the inequities in treatment balance themselves out, given that so many marriages are relatively short.

Marital communities paying down the mortgage early in its life are under-compensated for their contribution, especially when the marriage is

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204 *See* Donald R. Collins, *A Legal Doctrine for the Starter Marriage*, 33 OKLA. CITY U. L. REV. 793, 805 (2008) ("Today, roughly half all marriages will end in divorce."). "[I]t appears that the average marriage that ends in divorce lasts between six and eight years." *Id.*

205 *See* Keeling v. Keeling, 624 S.E.2d 687, 690 (Ga. 2006); BANKRATE, *supra* note 54; Avera v. Avera, 485 S.E.2d 731, 733 (Ga. 1997) ("Husband asserted he had made 'interest only' payments on the personal mortgage he had obtained while the house was the property of the trust.").

206 *See* text following *supra* note 193 through text preceding *supra* note 200.

207 *Id.*

relatively short. Marital communities that pay down the mortgage late in its life are better compensated. However, deciding whether they are over-compensated or simply not as badly under-compensated will depend both upon state law and some notion of how much of a return would be appropriate.

Another issue is whether marital couples paying down the mortgage in the house in which they live should be treated differently than marital couples paying down the mortgage on other properties. Those living in the house may receive a special benefit (because they are not paying rent to someone) that is not received when the marital couple is paying down the mortgage on a different property and the separate owner is receiving the rent.

Marriage is not a business venture, and there is no requirement that those ending their marriage should be treated as if they had been in business together.[208] Nonetheless, a more precise articulation of the goals behind distributing the equity in the home and a more thoughtful analysis of how to achieve those goals would promote fairness and sound public policy.

States are understandably tempted to employ a single approach to allocating value when the marital community pays down the mortgage on a separately owned property. Ignoring when the marriage occurs in the life of the mortgage is simpler because courts will not have to decide which approach is appropriate in a particular case based on the life of the mortgage, which might be especially cumbersome when there is more than one mortgage. Yet, given the significant impact of how mortgages are structured with most of the payments going towards interest early in the life of the mortgage, states should modify their current approaches. If only one approach is used, states should focus on the amount spent rather than on how much the principal owed was reduced.[209] Alternatively, states could offer guidelines so that courts can distinguish between long-term and short-term marriages and between marriages early versus late in the life of the mortgage.

The implications of the current approaches in many states are clearly not appreciated. If states seek to promote fairness, they should not simply ignore how much of a mortgage payment goes to interest. If states evaluating whether there has been a fair return on investment are implicitly considering that couples paying down a mortgage are receiving a benefit because they do not, in addition, have to pay rent, then states should also consider that the separate owner may also benefit from not having to pay rent elsewhere. If states try to be fair to both the separate owner and the marital community,

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208 Martinez v. Martinez, 818 P.2d 538, 540 (Utah 1991) ("[A] marriage is certainly not comparable to a commercial partnership.").

209 *See* Brett R. Turner, *Unlikely Partners: The Marital Home and the Concept of Separate Property*, 20 J. AM. ACAD. MATRIM. LAW. 69, 112 (2006) (suggesting that interest also be included when determining the contribution amount).

the saved-rent consideration applies to both and thus is a little more complicated than might first appear.

Additionally, a marital couple paying down the mortgage on an investment property does not thereby achieve rental savings. If the rents from the investment property are treated as separate rather than marital earnings, then the state has reason to distinguish between the methods used to calculate the marital community's interest in the family home as opposed to other properties.[210]

States vary in how they calculate the marital community's interest in separately owned property where the marital community helps pay down the mortgage. What seems clear is that the states do not use a sufficiently fine-grained approach, which means that possibly defensible approaches in some circumstances are quite unfair in other circumstances. Further, the difficulty posed by using a one-size-fits-all approach does not disappear merely because judges have discretion, especially if judges are unaware of the differing implications of the respective approaches. States can and should do better.

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[210] Even once the interests are allocated, a separate issue involves who will be awarded the marital home. *See, e.g.*, Conley v. Conley, 508 A.2d 676 (R.I. 1986) (upholding trial court's award of husband's interest in the marital home to wife); King v. King, 364 N.E.2d 1218 (Mass. 1977) (upholding lower court's assignment of husband's interest in the home to wife in lieu of spousal support).

NON-COMPETE CLAUSES MYSTERIOUSLY APPEARING OUT OF THIN AIR: THE CATASTROPHIC FLAWS OF INEVITABLE DISCLOSURE DOCTRINE IN THE NEW FTC NON-COMPETE RULE AND BEYOND

Bradford P. Anderson*

INTRODUCTION

The new Federal Trade Commission (FTC) non-compete clause rule[1] (hereafter, Non-Compete Rule) purportedly exists to protect employees[2]

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1 Federal Trade Commission Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (codified at 16 C.F.R. pts. 910, 912).

2 *Id.* (The FTC Non-Compete Clause Rule uses the term "Worker" instead of employee, but the practical application from a lexical perspective is the same. ("*Worker* means a natural person who works or who previously worked, whether paid or unpaid, without regard to the worker's title or the worker's status under any other State or Federal laws, including, but not limited to, whether the worker is an employee, independent contractor, extern, intern, volunteer, apprentice, or a sole proprietor who provides a service to a person. The term worker includes a natural person who works for a franchisee or franchisor, but does not include a franchisee in the context of a franchisee-franchisor relationship.") at 38502); *See also* FTC Non-Compete Clause Rule, 89 Fed. Reg. 38344 (May 7, 2024) (codified at 16 C.F.R. pts. 910, 912) ("use of non-competes tended to impede rivals' access to the restricted employees' labor, harming workers, consumers, and competitive conditions"); FTC Non-Compete Clause Rule, 89 Fed. Reg. 38392 (May 7, 2024) (codified at 16 C.F.R. pts. 910, 912) ("prohibiting non-competes will empower small businesses by providing them with new access to critical talent and will drive small business creation as entrepreneurial employees will be free to compete against their former employers. Many small businesses also argued that non-competes can hinder small business formation and can keep small businesses from growing once they are formed"); FTC Non-Compete Clause Rule, 89 Fed. Reg. 38420, 38421 (May 7, 2024) (codified at 16 C.F.R. pts. 910, 912) ("Numerous commenters urged the Commission not to ban non-competes for workers who have access to trade secrets and confidential information, often noting this justification is commonly used for highly paid and highly skilled workers, including senior executives. One comment expressly stated that this exception should apply regardless of earnings, though many others did not mention compensation thresholds. One business suggested a bright-line rule for the types of confidential business information that can be protected by a non-compete based on existing State statutes, to increase certainty about what is allowed. Commenters suggested exceptions based on a variety of job types they viewed as more likely to be exposed to trade secrets and confidential information, including all highly skilled workers; key scientific, technical, R&D, or sales workers; or workers with highly

from the harm of non-compete restrictions.[3] A non-compete clause is a provision that restricts an employee (or former employee)[4] from engaging in employment with a competing business or starting a competing business for a designated time period.[5]

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detailed knowledge of business and marketing plans"), and FTC Non-Compete Clause Rule, 89 Fed. Reg. 38424 (May 7, 2024) (codified at 16 C.F.R. pts. 910, 912) ("The experiences of certain States in banning non-competes bolster this conclusion. Non-competes have been void in California, North Dakota, and Oklahoma since the 1800s. In these three States, employers generally cannot enforce non-competes, so they must protect their investments using one or more less restrictive alternatives. There is no evidence that employers in these States have been unable to protect their investments (whether in human capital, physical capital, intangible assets, or otherwise) or have been disincentivized from making them to any discernible degree. Rather, in each of these States, industries that depend on highly trained workers and trade secrets and other confidential information have flourished. California, for example, is home to four of the world's ten largest companies by market capitalization, and it also maintains a vibrant startup culture. Technology firms are highly dependent on highly-trained and skilled workers as well as protecting trade secrets and other confidential information—and, since the 1980s, California has become the epicenter of the global technology sector, even though employers cannot enforce non- competes. Indeed, researchers have posited that high-tech clusters in California may have been aided by increased labor mobility due to the unenforceability of non-competes.") (footnotes omitted).

[3] FTC Non-Compete Clause Rule, 89 Fed. Reg. 38343 (May 7, 2024) (codified at 16 C.F.R. pts. 910, 912) ("use of non-competes by employers tends to negatively affect competition in labor markets, suppressing earnings for workers across the labor force— including even workers not subject to non-competes."), and FTC Non-Compete Clause Rule, 89 Fed. Reg. 38472 (May 7, 2024) (codified at 16 C.F.R. pts. 910, 912) ("The final rule provides that, with respect to a worker other than a senior executive, it is an unfair method of competition—and thus a violation of section 5 of the FTC Act—for a person to enter into or attempt to enter into a non-compete; enforce or attempt to enforce a non-compete; or represent that the worker is subject to a non-compete. The final rule also provides that, with respect to senior executives, it is an unfair method of competition—and thus a violation of section 5 of the FTC Act—for a person to enter into or attempt to enter into a non-compete; enforce or attempt to enforce a non-compete entered into after the effective date; or represent that the worker is subject to a non-compete, where the non-compete was entered into after the effective date.").

[4] FTC Non-Compete Clause Rule, 89 Fed. Reg. 38502 (May 7, 2024) (codified at 16 C.F.R. pts. 910, 912) ("*Non-compete clause* means: (1) A term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from: (i) Seeking or accepting work in the United States with a different person *where such work would begin after the conclusion of the employment* that includes the term or condition; or (ii) Operating a business in the United States *after the conclusion of the employment* that includes the term or condition.") (emphasis added).

[5] FTC Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (codified at 16 C.F.R. pts. 910, 912); *see also* Orly Lobel, *Gentlemen Prefer Bonds: How Employers Fix the Talent Market*, 59 SANTA CLARA L. REV. 663, 667 (2020) ("The scholarly literature and policy have focused on clauses that are worded as formal non-competes. A formal non-compete clause prohibits an employee's ability to engage (1) in competitive work, (2) in a geographic area, and (3) for a period of time following his or her departure from a current employer.").

The FTC's Non-Compete Rule[6] is already under challenge.[7] The courts will determine the ultimate survival of the Non-Compete Rule.[8] Regardless of whether or not the Non-Compete Rule is upheld[9] or whether new

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[6] *See* FTC Non-Compete Clause Rule, 89 Fed. Reg. at 38343 ("The final rule further provides that, for purposes of the final rule, 'term or condition of employment' includes, but is not limited to, a contractual term or workplace policy, whether written or oral. The final rule further defines 'employment' as 'work for a person.' The final rule defines 'worker' as 'a natural person who works or who previously worked, whether paid or unpaid, without regard to the worker's title or the worker's status under any other State or Federal laws, including, but not limited to, whether the worker is an employee, independent contractor, extern, intern, volunteer, apprentice, or a sole proprietor who provides a service to a person.' The definition further states that the term 'worker' includes a natural person who works for a franchisee or franchisor, but does not include a franchisee in the context of a franchisee-franchisor relationship. The final rule does not apply to non-competes entered into by a person pursuant to a bona fide sale of a business entity. In addition, the final rule does not apply where a cause of action related to a non-compete accrued prior to the effective date. The final rule further provides that it is not an unfair method of competition to enforce or attempt to enforce a non-compete or to make representations about a non-compete where a person has a good-faith basis to believe that the final rule is inapplicable. The final rule does not limit or affect enforcement of State laws that restrict non-competes where the State laws do not conflict with the final rule, but it preempts State laws that conflict with the final rule. Furthermore, the final rule includes a severability clause clarifying the Commission's intent that, if a reviewing court were to hold any part of any provision or application of the final rule invalid or unenforceable—including, for example, an aspect of the terms or conditions defined as non-competes, one or more of the particular restrictions on non-competes, or the standards for or application to one or more category of workers—the remainder of the final rule shall remain in effect. The final rule has an effective date of September 4, 2024."); *see also* J Mark Gidley et al., *White and Case Global Non-Compete Resource Center*, WHITE CASE (July 5, 2024), https://www.whitecase.com/insight-tool/white-case-global-non-compete-resource-center-ncrc#article-content (last visited July 5, 2024.).

[7] *See* Ryan, LLC v. FTC, No. 3:24-cv-00986, Doc. 211 (N.D. Tex. Aug. 20, 2024) (Federal District Court set aside the Non-Compete Clause Rule as unenforceable, determining that the FTC exceeded its authority in issuing the Non-Compete Clause Rule and that the rule is arbitrary and capricious, thereby violating the Administrative Procedure Act), *appeal docketed* 0:24-usc-10951 (5th Cir. Oct. 24, 2024) (The appellant FTC seeks to reinstate the Non-Compete Clause Rule and have the District Court decision reversed); *see also,* Chamber of Commerce of the United States of America v. Federal Trade Commission, U.S. District Court for the Eastern District of Texas, No. 6:24-cv-00148.

[8] *See* Ryan, LLC v. FTC, *appeal docketed* 0:24-usc-10951 (5th Cir. Oct. 24, 2024) (The appellant FTC seeks to reinstate the Non-Compete Clause Rule and have the District Court decision reversed).

[9] *See* Scott R. McLaughlin, Christine Bestor Townsend, and Tobias E. Schlueter, *FTC's Ban on Non-Compete Agreements: Definitions, Prohibitions, Requirements, and Employer Considerations*, OGLETREE DEAKINS (May 24, 2024), https://ogletree.com/insights-resources/blog-posts/ftcs-ban-on-non-compete-agreements-definitions-prohibitions-requirements-and-employer-considerations/#:~:text=On%20May%207%2C%202024%2C%20the,most%20existing%20non%2Dcompete%20agreements ("Although the Constitution grants the Congress the authority to regulate matters that affect interstate commerce, it does not grant such authority to the executive branch, of which the FTC is a part. Whether the FTC has the power to decide a 'major question' that arguably is within congressional authority, rather than executive branch authority, is a question that will not be resolved quickly."); *see also* Ryan, LLC v. FTC, No. 3:24-cv-00986, Doc. 211 (N.D. Tex. Aug. 20, 2024) (ruling that the FTC exceeded its authority in issuing the Non-Compete Clause Rule and that the rule is arbitrary and capricious, thereby violating the Administrative Procedure Act), *appeal docketed* 0:24-usc-10951 (5th Cir. Oct. 24, 2024).

legislation on the topic is incited by the Non-Compete Rule,[10] a catastrophic flaw still exists in the underlying philosophy of the Non-Compete Rule.[11] This flaw is that the Non-Compete Rule[12] did not supplant the inevitable disclosure doctrine.[13] The FTC even received comments that the inevitable

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[10] There is a possibility that the Non-Compete Clause Rule, even if ultimately determined to be outside of the FTC's scope of authority, may serve as fuel for state or federal legislation protecting employees against non-compete clauses. *See generally* Hannah J. Wiseman, *Negotiated Rulemaking and New Risks: A Rail Safety Case Study*, 7 WAKE FOREST J.L. & POL'Y 207, 261 (2017) (describing benefit of regulatory negotiation) ("A final potential benefit of reg-neg is that through the process of forming working groups and proposing rules, parties involved in the process become more coordinated, and they might potentially further align their positions beyond alliances that existed prior to reg-neg. This might spur quicker congressional action in addition to, or in lieu of, agency rules because these parties might more effectively and quickly influence policy. For example, although Congress did not rapidly enact legislation addressing crude and ethanol rail risks from the perspective of risk prevention and mitigation, the issuance of an act that partially addressed rail safety several years after the growing risks became apparent is somewhat impressive in today's gridlocked, partisan context. This is not necessarily evidence that reg-neg affected the policymaking process; Congress might have acted regardless of pressures from various interest groups due to the heightened public attention to rail safety after several high-profile disasters. But it is a potential benefit that merits further empirical investigation.") (footnote omitted); Jonathan R. Siegel, *The Reins Act and the Struggle to Control Agency Rulemaking*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 131, 142 (2013) ("Congress always had the power to overturn any agency rule by passing a new statute, and the CRA process by which Congress can overturn an agency rule is the process of passing a new statute . . . ."), and Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 650 (1984) ("The Constitution and the structural judgments it embodies require, at a minimum, that Congress observe a rule of parity in providing for political oversight of any government agency it creates. Congress cannot favor itself in providing for political oversight of an agency that administers, as well as assists in the formulation of, its laws. A rule that presidents may not, but members of Congress may, seek to bring political influence to bear on the policymaking of any agency directly affronts the framers' purposes, and serves no apparent function beyond aggrandizement of congressional power at the expense of the President's. Members of Congress are as capable as presidents of making excessive telephone calls or passing on private views under the guise of policy guidance, and often have done so; congressional hearings, for example, are used at sensitive stages of policymaking as instruments of coercion as well as of inquiry. Yet Congress's constitutional raison d'etre is not to oversee the execution of laws; it is to enact new laws as required.") (footnotes omitted).

[11] Scott Dinner & Seth Horvath, *Protecting Proprietary Information After FTC Non-Compete Ban*, NIXON PEABODY (May 20, 2024), https://www.nixonpeabody.com/insights/alerts/2024/05/20/protecting-proprietary-information-after-ftc-non-compete-ban.

[12] Federal Trade Commission Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (codified at 16 C.F.R. pts. 910, 912).

[13] *See FTC Issues Final Rule Banning Most Non-Compete Agreements*, CROWELL (April 24, 2024), https://www.crowell.com/en/insights/client-alerts/ftc-issues-final-rule-banning-most-non-compete-agreements ("Finally, companies seeking the return of misappropriated trade secrets through litigation should consider whether they can fill the gap left by the FTC's ban on non-compete agreements through the "inevitable disclosure" doctrine. In jurisdictions that recognize the doctrine, courts can enjoin an employee from taking on particular job responsibilities at the competitor's company where it is "inevitable" that they will disclose trade secrets in performing those job duties. However, there is a split in authority on whether the "inevitable disclosure" doctrine can support the issuance of an injunction. The doctrine is currently only recognized in about half of the states, and a portion of those impose a high evidentiary burden before granting such relief. And although the Defend Trade Secrets Act (DTSA) provides that an injunction may issue to prevent actual *and "threatened"* misappropriation, it does not expressly refer to "inevitable

disclosure doctrine may be more harmful to workers than non-competes and also that the Non-Compete Rule may trigger an increase in the offensive use of the inevitable disclosure doctrine against former employees.[14] It is critical that the FTC Non-Compete Rule, or successor legislation, cast a fatal blow to the vicious monster known as the inevitable disclosure doctrine.[15]

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disclosure." Thus, although the FTC points to the DTSA as providing adequate protections against trade secret misappropriation, and the DTSA's protections against "threatened" misappropriation may justify injunctions under the inevitable disclosure doctrine in some states, it remains to be seen whether and to what extent the doctrine will survive in the remaining jurisdictions should the FTC's ban on non-competes take effect."), and Horvath, *supra* note 11 ("In passing the rule, the FTC indicated that it also does not prevent employers from invoking the "inevitable-disclosure doctrine," which allows a court to enjoin a former worker from working at a competitor where there is a substantial risk that the worker will use or disclose the employer's trade secrets in the worker's new position. Courts in roughly one-third of the states currently recognize the inevitable-disclosure doctrine."). *See also* Federal Trade Commission Non-Compete Clause Rule, 89 Fed. Reg. 38472 (May 7, 2024) (codified at 16 C.F.R. pts. 910, 912) (addressing comments on the efficacy and enforceability of NDAs and non-competes in trade secret law), and *id.* at 38472 n. 801 ("In some States, under the "inevitable disclosure doctrine," courts may enjoin a worker from working for a competitor of the worker's employer where it is "inevitable" the worker will disclose trade secrets in the performance of the worker's job duties; *See, e.g., PepsiCo, Inc.* v. *Redmond*, 54 F.3d 1262, 1269, 1272 (7th Cir. 1995). The inevitable disclosure doctrine is controversial. Several States have declined to adopt it altogether, citing the doctrine's harsh effects on worker mobility. *See Bayer Corp.* v. *Roche Molecular Sys., Inc.*, 72 F. Supp. 2d 1111, 1120 (N.D. Cal. 1999); *LeJeune* v. *Coin Acceptors, Inc.*, 849 A.2d 451, 470-71 (Md. 2004). Other States have required employers to meet high evidentiary burdens related to inevitability, irreparable harm, and bad faith before issuing an injunction pursuant to the doctrine. *See generally* Eleanore R. Godfrey, *Inevitable Disclosure of Trade Secrets: Employee Mobility* v. *Employer Rights*, 3. J. HIGH TECH. L. 161 (2004)."). *See also* Wei-Lin Wang, *Inevitable Disclosure Theory in the US Legal System and Its Influence on Other Jurisdictions*, 98 J. PAT. & TRADEMARK OFF. SOC'Y. 74, 76 (2016) (describing the inevitable disclosure theory), and Joseph J. Mahady, *Burying the Inevitable Disclosure Doctrine in the Nooks and Crannies: The Third Circuit's Liberal Standard for Trade Secret Misappropriation in Bimbo Bakeries USA, Inc. v. Botticella*, 56 VILL. L. REV. 699, 707 (2012) (explaining the history of the inevitable disclosure doctrine). See Michael J. Garrison, Dawn R. Swink, & John T. Wendt, *A Proposed Framework For a Federal Inevitable Disclosure Doctrine Under The Defend Trade Secrets Act*, 72 BUFF. L. REV. 271, 377 (2024), for a recent summary of the status of the inevitable disclosure doctrine in the various state jurisdictions. *See also* Randall E. Kahnke, Kerry L. Bundy, & Kenneth A Liebman, *Doctrine of Inevitable Disclosure*, FAEGRE & BENSON LLP (Sept. 2008), https://www.faegredrinker.com/webfiles/inevitable%20disclosure.pdf.

[14] *See* FTC Non-Compete Clause Rule, 89 Fed. Reg. 38427 (May 7, 2024) (codified at 16 C.F.R. pts. 910, 912) ("Other commenters argued the inevitable disclosure doctrine may be worse for workers, and one commenter argued that the final rule would increase the use of the inevitable disclosure doctrine and thus reduce worker mobility."); *see also* Brandon H. Elledge, *Don't Fret (Yet): Trade Secrets, NDAs and Non-Solicits After the FTC Non-Compete Rule*, HOLLAND & KNIGHT (April 29, 2024), https://www.hklaw.com/en/insights/publications/2024/04/dont-fret-yet-trade-secrets-ndas-and-non-solicits ("the FTC's rule may invite more "inevitable disclosure" trade secret claims in those jurisdictions where permitted or test the doctrine in those states where it is not.").

[15] *See* Gretchen L. Jankowski, *The Inevitable Disclosure Doctrine-- Inability of Former Employees to Perform Without Disclosing Confidential Information*, 75 PA. B. ASS'N. Q. 34, 35–36 (2004) (explaining the inevitable disclosure doctrine).

The inevitable disclosure doctrine avows that a former employee will find it impossible to resist disclosure[16] and will use proprietary information,[17] even if such a person is subject to the terms of a confidentiality agreement,[18]

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16 *See id.* (explaining that Pennsylvania courts determined that an employee will not be capable of performing duties for a company competing with his former employment without using confidential information gained from former employment).

17 *See* Mahady, *supra* note 13, at 723 ("the Third Circuit's opinion has been equally as popular, with practitioners focusing more on the extremely low threshold required to enjoin employment in a trade secret misappropriation case."); Vendavo, Inc. v. Long, 397 F. Supp. 3d 1115, 1140 (N.D. Ill. 2019) ("[C]ourts in this district have employed a three-factor analysis to evaluate whether a defendant ***will inevitably*** disclose trade secrets in her new position.") (emphasis added).

18 *See generally* Lobel, *supra* note 5, at 681 ("Nondisclosure agreements (NDAs) have become standard in employment contracts. NDAs regularly include information beyond traditionally defined secrets under trade secrecy laws -typically a formula or process that is not generally known and that the company derives value from its secrecy. More expansive inclusions of information as proprietary in NDA, beyond the traditional categories of trade secrets, include general know-how, client lists, and salary information.") (footnote omitted); Byron F. Egan, *Confidentiality Agreements: How to Draft Them and What They Restrict*, 33 CORP. COUNS. REV. 35 (2014); John F. Hilson & Stephen L. Sepinuck, *A Lesson on Drafting Overly Broad Nondisclosure Agreements*, 10 TRANSACTIONAL LAW. 1 (2020); Alec Hillbo, *Fifty Years of Restrictive Covenants in Arizona Law*, 4 PHX. L. REV. 725 (2011). *See also Confidentiality Agreement*, CAL. REST. ASS'N, https://www.calrest.org/sites/main/files/file-attachments/confidentialityagreement.pdf (last visited Nov. 1, 2024); *Duke Confidentiality Agreement*, DUKE HEALTH, https://hr.duke.edu/sites/default/files/atoms/files/Confidentiality%20Agreement.pdf (last visited Nov. 1, 2024); *New York City Bar Association Model Form of Non-Disclosure Agreement*, N.Y.C. Bar (Feb. 2025), https://www.nycbar.org/pdf/report/New_York_City_Bar_Association_Model_Form_of_Non-Disclosure_Agreement_2015.pdf [hereinafter *N.Y.C. Non-Disclosure Agreement*]; *Nondisclosure Agreement*, CORNELL UNIV., https://researchservices.cornell.edu/sites/default/files/2019-06/Cornell%20Standard%20Bilateral%20NDA%202019%20-%20fillable%20form_0.pdf (last visited Nov. 1, 2024) [hereinafter *Cornell Nondisclosure Agreement*].

risks of injunction[19] and damages,[20] and potential risk of criminal liability.[21] Invocation of the inevitable disclosure doctrine occurs when an employer

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[19] *See* UNIF. TRADE SECRETS ACT § 2 (UNIF. L. COMM'N 1985) [hereinafter *Uniform Trade Secrets Act*] ("(a) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.").
See also CAL. CIV. CODE § 3426.2:
(a) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.
See also Defend Trade Secrets Act, 18 U.S.C.A. § 1836(b) (West) [hereinafter *Defend Trade Secrets Act*]:

> (3) **Remedies.**--In a civil action brought under this subsection with respect to the misappropriation of a trade secret, a court may--
> (A) grant an injunction--
> (i) to prevent any actual or threatened misappropriation described in paragraph (1) on such terms as the court deems reasonable, *provided the order does not*--
> *(I) prevent a person from entering into an employment relationship, and that conditions placed on such employment shall be based on evidence of threatened misappropriation and not merely on the information the person knows*; or
> (II) otherwise conflict with an applicable State law prohibiting restraints on the practice of a lawful profession, trade, or business;
> (ii) if determined appropriate by the court, requiring affirmative actions to be taken to protect the trade secret; and
> (iii) in exceptional circumstances that render an injunction inequitable, that conditions future use of the trade secret upon payment of a reasonable royalty for no longer than the period of time for which such use could have been prohibited; (emphasis added).

[20] *See* UNIF. TRADE SECRETS ACT § 3 ("(a) Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret. (b) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subsection (a).")
See also CAL. CIV. CODE § 3426.3:

> (a) A complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.
> (b) If neither damages nor unjust enrichment caused by misappropriation are provable, the court may order payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.
> (c) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subdivision (a) or (b).

See also Defend Trade Secrets Act, 18 U.S.C.A. § 1836(b) (West):

provides an employee with proprietary information to perform her/his job and then alleges that this individual cannot avoid using the proprietary

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(3) **Remedies.**--In a civil action brought under this subsection with respect to the misappropriation of a trade secret, a court may . . .
(B) award--
(i)(I) damages for actual loss caused by the misappropriation of the trade secret; and
(II) damages for any unjust enrichment caused by the misappropriation of the trade secret that is not addressed in computing damages for actual loss; or
(ii) in lieu of damages measured by any other methods, the damages caused by the misappropriation measured by imposition of liability for a reasonable royalty for the misappropriator's unauthorized disclosure or use of the trade secret;
(C) if the trade secret is willfully and maliciously misappropriated, award exemplary damages in an amount not more than 2 times the amount of the damages awarded under subparagraph (B);

[21] *See* Economic Espionage Act of 1996, 18 U.S.C. §§ 1831-1839 [hereinafter *Economic Espionage Act*], at § 1832:

(a) Whoever, with intent to convert a trade secret, that is related to a product or service used in or intended for use in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offense will, injure any owner of that trade secret, knowingly--
(1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains such information;
(2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys such information;
(3) receives, buys, or possesses such information, knowing the same to have been stolen or appropriated, obtained, or converted without authorization;
(4) attempts to commit any offense described in paragraphs (1) through (3); or
(5) conspires with one or more other persons to commit any offense described in paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy, shall, except as provided in subsection (b), be fined under this title or imprisoned not more than 10 years, or both.
(b) Any organization that commits any offense described in subsection (a) shall be fined not more than the greater of $5,000,000 or 3 times the value of the stolen trade secret to the organization, including expenses for research and design and other costs of reproducing the trade secret that the organization has thereby avoided.

See also CAL. PENAL CODE § 499c (2023):

(b) Every person is guilty of theft who, with intent to deprive or withhold the control of a trade secret from its owner, or with an intent to appropriate a trade secret to his or her own use or to the use of another, does any of the following:
(1) Steals, takes, carries away, or uses without authorization, a trade secret.
(2) Fraudulently appropriates any article representing a trade secret entrusted to him or her. (3) Having unlawfully obtained access to the article, without authority makes or causes to be made a copy of any article representing a trade secret. (4) Having obtained access to the article through a relationship of trust and confidence, without authority and in breach of the obligations created by that relationship, makes or causes to be made, directly from and in the presence of the article, a copy of any article representing a trade secret.

information in some future job, thereby justifying restraints and restrictions upon future employment with alternative employers.[22]

The inevitable disclosure doctrine is akin to the message sender (employer) shooting the recipient of a message (employee) merely because the sender (employer) fears that the recipient (employee) might one day seek to work for an alternative employer.[23] Indeed, inevitable disclosure embodies demented, flawed, disjointed logic, particularly where existing protections and remedies already exist, such as an injunction against use,[24] damages in

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[22] *See, e.g.*, PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1267 (7th Cir. 1995) ("On December 15, 1994, the district court issued an order enjoining Redmond from assuming his position at Quaker through May, 1995 . . . . "); Strata Mktg., Inc. v. Murphy, 740 N.E.2d 1166, 1178 (Ill. App. Ct. 2000) ("We believe *PepsiCo* correctly interprets Illinois law and agree that inevitable disclosure is a theory upon which a plaintiff in Illinois can proceed under the Act."); Barilla Am., Inc. v. Wright, No. 4-02-CV-90267, 2002 WL 31165069, at *12 (S.D. Iowa July 5, 2002) ("The Court therefore concludes that Barilla is entitled to a remedy. Barilla requests that the Court enjoin Wright from being employed by a competitor, including AIPC, and AIPC from employing Wright for at least one year."); DoubleClick Inc. v. Henderson, No. 116914/97, 1997 WL 731413, at *8 (N.Y. Sup. Ct. Nov. 7, 1997) ("Defendants are enjoined, for a period of six months from the date of this opinion, from launching any company, or taking employment with any company, which competes with DoubleClick, where defendants' job description(s) or functions at said company or companies include providing any advice or information concerning any aspect of advertising on the Internet. A company shall be presumed to compete with DoubleClick if it provides advertising software, advertising services, or a mix of advertising software and advertising services, to any entity seeking to advertise on the Internet, or to any web site seeking advertisers. Nothing herein shall be construed to prevent defendants from working for any employer that competes with DoubleClick, so long as defendants' job description(s) or functions with such employer do not include providing advice or information concerning any aspect of advertising on the Internet. Defendants are also enjoined, for a period of six months from the date of this opinion, from providing any advice or information concerning any aspect of advertising on the Internet to any third parties who 1) work for defendants' employer(s), or 2) provide or promise to provide any of the defendants with valuable consideration for the advice or information, or 3) share or promise to share any financial interest with any of the defendants.").

[23] *See* Jankowski, *supra* note 15, at 35–36 (explaining that Pennsylvania courts determined that an employee will not be capable of performing duties for a company competing with his former employment without using confidential information gained from former employment); *PepsiCo, Inc.*, 54 F.3d at 1267 ("On December 15, 1994, the district court issued an order enjoining Redmond from assuming his position at Quaker through May, 1995 . . . . ").

[24] *See* UNIF. TRADE SECRETS ACT § 2 (UNIF. L. COMM'N 1985) ("(a) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation."); *see also* CAL. CIV. CODE § 3426.2; Defend Trade Secrets Act, 18 U.S.C.A. § 1836 (West).

excess of the amount actually incurred,[25] and criminal prosecution.[26] Despite the risk of losing money (damages) and freedom (incarceration) with existing remedies, the inevitable disclosure doctrine asserts that former employees lack the willpower to comply with such obligations.[27] Invocation of the inevitable disclosure doctrine enables the former employer with the power to obtain a court order restricting or prohibiting the former employee from working for a competitor because the former employee will purportedly lack the self-control to comply with the confidentiality agreement or other trade secret restraint.[28]

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[25] *See* UNIF. TRADE SECRETS ACT § 3 ("(a) Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret. (b) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subsection (a)."); *see also* CAL. CIV. CODE § 3426.3; Defend Trade Secrets Act, 18 U.S.C.A. § 1836 (West).

[26] *See* Economic Espionage Act of 1996, 18 U.S.C. §§ 1831-1839; *see also* Defend Trade Secrets Act, 18 U.S.C.A. § 1832 (West); CAL. PENAL CODE § 499c (2023).

[27] *See generally* Ryan M. Wiesner, Comment, *A State-by-State Analysis of Inevitable Disclosure: A Need for Uniformity and A Workable Standard*, 16 MARQ. INTELL. PROP. L. REV. 211, 214 (2012) ("In general, the inevitable disclosure doctrine allows courts to enjoin an employee from working for his employer's competitors because of the threat of misappropriation. The employer must show that its employee had access to its trade secrets 'and the former employee has such similar responsibilities with the new employer as to make it inevitable that he will use or disclose those trade secrets in the performance of his job duties for the new employer.' The idea is that an employee who wants to succeed at his new position will rely on skills and information learned from his former employer, including trade secrets. If an employer shows that its former employee will inevitably disclose its trade secrets to a competitor, the court can grant a preliminary injunction or, in rare circumstances, a permanent injunction against that employee from working for the competitor or from participating in certain kinds of work for the competitor. There is a fundamental tension between competing interests when applying the doctrine: the need to protect an employer's confidential, valuable information and the need to support an employee's freedom of mobility.") (footnotes omitted).

[28] *See* PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1267 (7th Cir. 1995) ("On December 15, 1994, the district court issued an order enjoining Redmond from assuming his position at Quaker through May, 1995 . . . . "); Jankowski, *supra* note 15, at 35–36 (explaining that Pennsylvania courts determined that an employee will not be capable of performing duties for a company competing with his former employment without using confidential information gained from former employment).

This Article elaborates on why the inevitable disclosure doctrine is an unfair method of competition,[29] and provides legislative and policy guidance in remedying this unjust dogma.[30]

I. "I JUST CAN'T RESIST!" THE FLAWED PREMISE OF THE INEVITABLE DISCLOSURE DOCTRINE

At the heart of the inevitable disclosure doctrine is a judicially imposed implicit attribution that a former employee lacks self-control and will use the

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[29] *See* Federal Trade Commission Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (codified at 16 C.F.R. pts. 910 and 912). *See also,* 15 U.S.C.A. § 45 (West) ("(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."); Federal Trade Commission Non-Compete Clause Rule, 89 Fed. Reg. 38346 (May 7, 2024) ("[T]he inquiry as to whether conduct is an unfair method of competition under section 5 focuses on the nature and tendency of the conduct, not whether or to what degree the conduct caused actual harm."); Maurice E. Stucke, *Addressing Personal Data Collection As Unfair Methods of Competition*, 38 BERKELEY TECH. L.J. 715, 723–24 (2023) ("In creating the FTC in 1914, Congress wanted the new agency to define and curb all 'unfair methods of competition . . . . ' The unique term 'unfair methods of competition,' as employed in the Act, was meant to have a broader meaning than the common law of 'unfair competition.' Congress purposely did not define this novel term. Why? Because any definition would be self-defeating. Congress recognized the futility of attempting to define the many iterations of unfair methods of competition: It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be at once necessary to begin over again. As Congress observed, '[i]t is the illusive character of the trade practice that makes it though condemned today appear in some other form tomorrow.' Thus, Congress intended the term *unfair methods of competition* to be both far-reaching and evolving. Rather than proposing a closed universe of forbidden practices, Congress left it open-ended 'so that it might include all devices which would tend to deceive or take unfair advantage of the public and so that it might not be confined within the narrow limits of existing law.' The term encompasses, as we'll see, conduct that violates the federal antitrust laws (e.g., the Sherman and Clayton Acts) as well as conduct that constituted unfair competition under the common law. Congress, dissatisfied with the Supreme Court's rule of reason legal standard announced in *Standard Oil*, created the FTC to continually identify and deter unfair methods of competition.").

[30] Mahady, *supra* note 13, at 701–03 (critiquing the inevitable disclosure doctrine); Helen Norton, *Employers' Duties of Honesty and Accuracy*, 21 EMP. RTS. & EMP. POL'Y J. 575, 575 (2017) ("Employers speak to workers about a wide range of job-related topics that include the terms and conditions of employment, business projections, and applicable workplace legal protections. Employers' communications on these subjects can, and often do, valuably inform workers' decisions about jobs and other weighty issues. But employers' speech - in particular their lies and misrepresentations - about these matters can also inflict substantial harm by distorting workers' decisions of great life importance. That employers enjoy advantages of information and power further enhances their ability to manipulate or coerce workers' choices through lies and misrepresentations. Efforts to articulate employers' legal duties of honesty and accuracy should thus be informed by a functional, rather than formalist, understanding of the information and power dynamics within this relationship."); U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.").

former employer's trade secrets.[31] A California Appellate Court, in *Whyte v. Schlage Lock Co.*,[32] provided an excellent summary of the inevitable disclosure doctrine:

> The doctrine of inevitable disclosure permits a trade secret owner to prevent a former employee from working for a competitor despite the owner's

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[31] *See* Gregory Porter and Joseph Beauchamp, *The Inevitable Disclosure Doctrine and Its Effect on Employee Mobility*, 44 HOUS. LAW. 36, 37 (Nov./Dec. 2006) ("An engineer working in the oil field services industry figures her decision to accept employment with a prospective competitor of a prior employer is a harmless one, as millions of Americans change jobs in the post-dot-com economy. The engineer, who never signed a non-competition agreement with her prior employer, reasons that there is no prohibition against her working for a competitor, certainly not in the U.S., which values labor mobility. The engineer fails to realize that her prior employer may use the law of inevitable disclosure (perhaps in conjunction with a confidentiality agreement signed years earlier) in an effort to prevent the engineer from working for a competitor. In a resulting lawsuit, the prior employer argues that the engineer could not use her job experience for a competitor, as her knowledge is allegedly tainted with an assortment of its confidential information and trade secrets, which she *inevitably* would use while working for a competitor. The prior employer thus argues that such employment should be enjoined by a court. The engineer contends that the research and development she had performed years earlier relates to technology that is generally available and, in any event, that she cannot recall any information specific enough to use. She reasons that any employee should be allowed to change jobs and use her basic skills and knowledge. Of course this situation also affects the engineer's prospective employer, which feels that it has the right to hire the engineer and is not attempting to misappropriate trade secrets. However, the prospective employer also has to weigh whether retaining the engineer is worth the price of being embroiled in a lawsuit. The foregoing situation is not unique to engineers, nor is it unique to a particular state. Instead, in a tightening skilled-labor market, it is becoming more common throughout the country as employers seek to retain at-will employees who have not signed a covenant not to compete. Accordingly, any company with a research and development, manufacturing or sales facility should be aware of and actively address the issue of trade secrets with respect to prospective and departing employees. While the aforementioned issues often arise in a non-compete agreement case, application of the inevitable disclosure doctrine may effectively create a non-competition obligation where no such agreement was negotiated."); Rebecca J. Berkun, *The Dangers of the Doctrine of Inevitable Disclosure in Pennsylvania*, 6 U. PA. J. LAB. & EMP. L. 157, 157 (2003) ("[The] doctrine of inevitable disclosure restricts an employee's future employment if that employee will inevitably use a former employer's trade secrets in the course of the future employment. This principle is not new, but the number of courts applying it has risen in recent years. The Seventh Circuit case PepsiCo, Inc. v. Redmond has led to the doctrine's increased popularity in trade secrets cases in several states. Since this 1995 case, the doctrine has been expressly adopted by many states, including Pennsylvania, and thus has become a new factor with which employers and employees must contend. Inevitable disclosure has serious ramifications for the employment and intellectual property worlds. On one hand, a strong policy exists in many states for freedom of employment and employee mobility, thus favoring the rights of employees over employers. Intellectual property rights, however, rival these policies as employer trade secrets deserve protection under intellectual property laws. As a result, there is a tension between freedom of employment and protection of trade secrets. Inevitable disclosure favors the latter of the two policies and thus shifts the balance of power toward employers. The doctrine can act as a covenant not to compete or in place of a non-disclosure agreement. In this way, the doctrine is effectively a fallback provision for employers who neglected other means of trade secret protection. Employers who were careless during their hiring process or contractual negotiations are now equipped with the inevitable disclosure safety net. This gives an incentive to employers to be more cavalier in not protecting their trade secrets ahead of time and seriously hinders employee mobility and freedom of contract.") (footnotes omitted).

[32] Whyte v. Schlage Lock Co., 101 Cal. App. 4th 1443 (Cal. Ct. App. 2002).

> failure to prove the employee has taken or threatens to use trade secrets. Under that doctrine, the employee may be enjoined by demonstrating the employee's new job duties will inevitably cause the employee to rely upon knowledge of the former employer's trade secrets.[33]

A notorious example of the flaws in the inevitable disclosure doctrine and its dirty deeds in action is *PepsiCo, Inc. v. Redmond*.[34] In *PepsiCo, Inc. v. Redmond*,[35] a former executive (Redmond)[36] of a beverage company (PepsiCo)[37] left to join a competitor (Quaker Oats).[38] His former employer (PepsiCo) sued for an injunction to prevent the former employee (Redmond) from performing duties related to his expertise at the competitor (Quaker Oats).[39] The former employer (PepsiCo) alleged that the former executive (Redmond) could not contain himself from using trade secrets protected by a confidentiality agreement.[40] Without evidence of any wrongdoing[41] and without even an allegation that the new competitor employer stole any trade secrets,[42] the Seventh Circuit Court of Appeals invoked its unique mind-reading and behavior-predicting skills in determining that the former executive must be subjected to a judicially imposed non-compete covenant, by being forbidden from performing duties related to his expertise.[43] The justification from the telepathic district court, affirmed by the psychic court of appeals, was that the former executive lacked "an uncanny ability to

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33 *Id*. at 1446.

34 *See* PepsiCo, Inc. v. Redmond, 54 F.3d 1262 (7th Cir. 1995).

35 *See id.*

36 *Id*. at 1264.

37 *Id*. at 1263.

38 *Id*. at 1264.

39 *Id*. at 1265.

40 *Id*. at 1269 ("PepsiCo presented substantial evidence at the preliminary injunction hearing that Redmond possessed extensive and intimate knowledge about PCNA's strategic goals for 1995 in sports drinks and new age drinks. The district court concluded on the basis of that presentation that unless Redmond possessed an uncanny ability to compartmentalize information, he would necessarily be making decisions about Gatorade and Snapple by relying on his knowledge of PCNA trade secrets.").

41 *Id*. at 1270 ("PepsiCo has not contended that Quaker has stolen the All Sport formula or its list of distributors. Rather PepsiCo has asserted that Redmond cannot help but rely on PCNA trade secrets as he helps plot Gatorade and Snapple's new course, and that these secrets will enable Quaker to achieve a substantial advantage by knowing exactly how PCNA will price, distribute, and market its sports drinks and new age drinks and being able to respond strategically.").

42 *Id.* ("Admittedly, PepsiCo has not brought a traditional trade secret case, in which a former employee has knowledge of a special manufacturing process or customer list and can give a competitor an unfair advantage by transferring the technology or customers to that competitor.").

43 *Id*. at 1272 ("For the foregoing reasons, we affirm the district court's order enjoining Redmond from assuming his responsibilities at Quaker through May, 1995, and preventing him forever from disclosing PCNA trade secrets and confidential information.").

compartmentalize information"[44] and therefore *would* [45] rely upon the trade secrets of his former employer.[46]

How impressive and unique that these judges have prescient visions, can read individuals' minds, and also predict behavior![47] *PepsiCo v. Redmond* and the inevitable disclosure doctrine create a mental bridge connecting the courts with the carnival by allowing court judges and carnival psychics to invoke their skills in portending the future conduct of individuals.[48] Even if judges possess such predictive skills, the correct remedy is an injunction against using the proprietary information,[49] as well as damages[50] and criminal prosecution[51]—not the judicial imposition of a non-compete covenant.[52]

Under the Uniform Trade Secrets Act (hereinafter UTSA),[53] a trade secret is information that "[d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons"[54] and which is subject to reasonable efforts to maintain its secrecy.[55] Such efforts to maintain secrecy typically involve a confidentiality or non-disclosure agreement between the employer and employee.[56] In the event of violation of such an agreement, the UTSA allows the trade secret owner to recover monetary damages,[57] as well as injunctions for actual or threatened misappropriation of the trade secret[58] against the party violating such

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44 *Id.* at 1269.

45 *Id.* ("The district court concluded on the basis of that presentation that unless Redmond possessed an uncanny ability to compartmentalize information, he would necessarily be making decisions about Gatorade and Snapple by relying on his knowledge of PCNA trade secrets.") (emphasis added).

46 *Id.*

47 *See id.* at 1269–70.

48 *See id.*

49 *See* statutes cited *supra* note 19.

50 *See* statutes cited *supra* note 20.

51 *See* statutes cited *supra* note 21.

52 *See also* Wang, *supra* note 13, at 76 (describing the inevitable disclosure theory), and Mahady, *supra* note 13, at 707 (explaining the history of the inevitable disclosure doctrine) For a recent summary of the status of the inevitable disclosure doctrine in the various state jurisdictions, see Wendt, *supra* note 13, at 377. *See also* Liebman, *supra* note 13.

53 *See* UNIF. TRADE SECRETS ACT (UNIF. L. COMM'N 1985).

54 *See id.* at § 1(4). *See also* CAL. CIV. CODE § 3426.1(d).

55 *See id.*

56 *See generally* Egan, *supra* note 18, at 35; Sepinuck, *supra* note 18, at 1; Hillbo, *supra* note 18, at 726. *See also DLA Piper Startup Pack Nondisclosure Agreement*, DLA PIPER, https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.dlapiper.com/~/media/files/other/2021/start-up-pack/dla-piper-start-up-pack-2021-nda-two-way.doc&ved=2ahUKEwiMso2S7ruJAxXgm4kEHXUHKfgQFnoECBEQAQ&usg=AOvVaw3H1paRmDN1-pXP9IYDIFP3 (last visited Nov. 1, 2024); *N.Y.C. Non-Disclosure Agreement*, *supra* note 18; *Cornell Nondisclosure Agreement*, *supra* note 18.

57 *See* statutes cited *supra* note 20.

58 *See* statutes cited *supra* note 19.

obligation.[59] Moreover, such repercussions of damages and injunctions also apply to new (or prospective) employers.[60] Actual or threatened misappropriation[61] means acquiring, disclosing, or using the underlying trade secret.[62] Nowhere in the UTSA is there any provision or commentary to indicate that working for an alternative employer constitutes a threat,[63] nor is there any language that even vaguely has a scent of supporting the imposition of a non-compete clause.[64] Indeed, the federal Defend Trade Secrets Act

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[59] *See* UNIF. TRADE SECRETS ACT § 2 (UNIF. L. COMM'N 1985).

[60] *See id. See also* CAL. CIV. CODE § 3426.1(b):

> (b) "Misappropriation" means:
> (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
> (2) Disclosure or use of a trade secret of another without express or implied consent by a person who:
> (A) Used improper means to acquire knowledge of the trade secret; or
> (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:
> (i) Derived from or through a person who had utilized improper means to acquire it;
> (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
> (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
> (C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

[61] *See* UNIF. TRADE SECRETS ACT § 1; *see also* CAL. CIV. CODE § 3426.2(a).

[62] *See* UNIF. TRADE SECRETS ACT § 1; *see also* CAL. CIV. CODE § 3426.1(b):

> (b) "Misappropriation" means:
> (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
> (2) Disclosure or use of a trade secret of another without express or implied consent by a person who:
> (A) Used improper means to acquire knowledge of the trade secret; or
> (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:
> (i) Derived from or through a person who had utilized improper means to acquire it;
> (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
> (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
> (C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

[63] *See* UNIF. TRADE SECRETS ACT.

[64] An exhaustive list of remedies is supplied within the language of the UTSA, and does not include any reference to restricting past, present, or future employment. *See id.* at § 2–3. Nowhere does the UTSA contain any reference to restricting or preventing past, present, or future employment. Indeed, the only mention of employers, employees, and employment within the UTSA and the Uniform Law Commission comments is: (A) in requiring reasonable efforts to maintain secrecy of the trade secret ("(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy") (UNIFORM TRADE SECRETS ACT § 1(4)(ii)), where the comment to the section states "Finally, reasonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on 'need to know basis', and controlling plant access. On the other hand, public disclosure of information through display, trade

(which closely models the UTSA)[65] specifically rejects an injunction that prevents a person from entering into an employment relationship.[66] Despite this, courts following the inevitable disclosure doctrine have cobbled together a flawed mixture of logic that somehow synthesized a mixture of its predictive skills along with "threatened misappropriation" to result in a recipe for an *ex post facto* non-compete agreement.[67]

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journal publications, advertising, or other carelessness can preclude protection. The efforts required to maintain secrecy are those 'reasonable under the circumstances.' The courts do not require that extreme and unduly expensive procedures be taken to protect trade secrets against flagrant industrial espionage. (citation omitted). It follows that reasonable use of a trade secret including controlled disclosure to employees and licensees is consistent with the requirement of relative secrecy"; and (B) in the comments to Section 3, where the Uniform Law Commission noted that "Monetary relief can be appropriate whether or not injunctive relief is granted under Section 2. If a person charged with misappropriation has materially and prejudicially changed position in reliance upon knowledge of a trade secret acquired in good faith and without reason to know of its misappropriation by another, however, the same considerations that can justify denial of all injunctive relief also can justify denial of all monetary relief. See Conmar Products Corp. v. Universal Slide Fastener Co., 172 F.2d 150 (CA2, 1949) (no relief against new employer of employee subject to contractual obligation not to disclose former employer's trade secrets where new employer innocently had committed $40,000 to develop the trade secrets prior to notice of misappropriation)."

65 *See generally* Steven D. Gordon, *The Impact of the New Federal Trade Secrets Act on Trade Secret Litigation,* HOLLAND & KNIGHT (July 30, 2018), https://www.hklaw.com/en/insights/publications/2018/07/the-impact-of-the-new-federal-trade-secrets-act-on ("The DTSA was modeled upon the UTSA. Its definition of a trade secret is very similar to the UTSA. Likewise, it defines "misappropriation" in the same way as the UTSA, to include (1) acquisition of a trade secret by a person who knows or has reason to know that the trade secret was acquired by improper means or (2) disclosure or use of a trade secret without consent by a person who used improper means to acquire the trade secret or knows or had reason to know that the trade secret was acquired by improper means."); Seth J. Welner & John Michael Marra, *Defend Trade Secrets Act vs. Uniform Trade Secrets Act: Reasonable Security Measures as Objective or Subjective?,* HOLLAND & KNIGHT (Aug. 6, 2018), https://www.hklaw.com/en/insights/publications/2018/08/defend-trade-secrets-act-vs-uniform-trade-secrets; and Danielle A. Duszczyszyn &Daniel F. Roland, *Three Years Later: How the Defend Trade Secrets Act Complicated the Law Instead of Making it More Uniform*, FINNEGAN (July/Aug. 2019), https://www.finnegan.com/en/insights/articles/three-years-later-how-the-defend-trade-secrets-act-complicated-the-law-instead-of-making-it-more-uniform.html ("Given this legislative backdrop and the substantive similarities between the UTSA and DTSA, it is unsurprising that courts have often analyzed state and DTSA claims together.").

66 *See* Defend Trade Secrets Act, 18 U.S.C § 1836(b) (West):

> (3) **Remedies.**--In a civil action brought under this subsection with respect to the misappropriation of a trade secret, a court may--
> (A) grant an injunction--
> (i) to prevent any actual or threatened misappropriation described in paragraph (1) on such terms as the court deems reasonable, ***provided the order does not--***
> *(I) prevent a person from entering into an employment relationship, and that conditions placed on such employment shall be based on evidence of threatened misappropriation and not merely on the information the person knows*; or
> (II) otherwise conflict with an applicable State law prohibiting restraints on the practice of a lawful profession, trade, or business;
> (emphasis added).

67 PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1269 (7th Cir. 1995) ("a plaintiff may prove a claim of trade secret misappropriation by demonstrating that defendant's new employment will inevitably lead him to rely on the plaintiff's trade secrets").

The inevitable disclosure doctrine must be eschewed and renounced due to its utter, complete, total failure to apply, and understand, the UTSA.[68] The UTSA only allows for an injunction against the "threatened misappropriation"[69] of a trade secret.[70] Nowhere in the UTSA is there any provision or implication for an injunction against employment.[71] Instead, the plain language of the UTSA only provides for an injunction to halt threatened misappropriation[72]—not an injunction to restrict employment.[73] A suitable injunction under the UTSA for threatened misappropriation would be an order not to use the trade secrets,[74] under risk of contempt and damages for failure to comply.[75]

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68 *See* UNIF. TRADE SECRETS ACT (UNIF. L. COMM'N 1985).

69 *Id.* at § 2(a) ("Actual or threatened misappropriation may be enjoined."). *See also* CAL. CIV. CODE § 3426.2(a) (West 1984) ("Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.").

70 UNIF. TRADE SECRETS ACT § 2(a) ("Actual or threatened misappropriation may be enjoined."). *See also* CAL. CIV. CODE § 3426.2(a) ("Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.").

71 An exhaustive list of remedies is supplied within the language of the UTSA, and does not include any reference to restricting past, present, or future employment. *See* UNIF. TRADE SECRETS ACT § 2–3. Nowhere does the UTSA contain any reference to restricting or preventing past, present, or future employment. Indeed, the only mention of employers, employees, and employment within the UTSA and the Uniform Law Commission comments is: (A) in requiring reasonable efforts to maintain secrecy of the trade secret ("(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy") (UNIFORM TRADE SECRETS ACT § 1(4)(ii)), where the comment to the section states "Finally, reasonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on 'need to know basis', and controlling plant access. On the other hand, public disclosure of information through display, trade journal publications, advertising, or other carelessness can preclude protection. The efforts required to maintain secrecy are those 'reasonable under the circumstances.' The courts do not require that extreme and unduly expensive procedures be taken to protect trade secrets against flagrant industrial espionage. (citation omitted). It follows that reasonable use of a trade secret including controlled disclosure to employees and licensees is consistent with the requirement of relative secrecy"; and (B) in the comments to Section 3, where the Uniform Law Commission noted that "If a person charged with misappropriation has materially and prejudicially changed position in reliance upon knowledge of a trade secret acquired in good faith and without reason to know of its misappropriation by another, however, the same considerations that can justify denial of all injunctive relief also can justify denial of all monetary relief. See Conmar Products Corp. v. Universal Slide Fastener Co., 172 F.2d 150 (CA2, 1949) (no relief against new employer of employee subject to contractual obligation not to disclose former employer's trade secrets where new employer innocently had committed $40,000 to develop the trade secrets prior to notice of misappropriation)."

72 *See* UNIF. TRADE SECRETS ACT § 2.

73 *See id.* at § 2–3.

74 *See id.* at § 2.

75 *See id.*; CAL. CIV. CODE § 3426.2(a).

Additionally, the UTSA requires either an actual misappropriation[76] or a threat of misappropriation.[77] The inevitable disclosure doctrine incorrectly and inappropriately stretches the concept of a threat under the UTSA[78] to mean any alternative employment; this result is beyond the elasticity of any material known on this planet,[79] resulting in what is equivalent to a non-compete clause.[80]

Under the inevitable disclosure doctrine, if an employee has access to confidential information and then announces that she has accepted a new job elsewhere, she is improperly deemed to constitute a threat.[81] Saying, "Hi

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[76] *See* UNIF. TRADE SECRETS ACT § 2.

[77] *See id.*

[78] Statutory interpretation requires that additional exceptions (e.g., inevitable disclosure) not be created by the courts, unless the statute contains such exceptions. *See generally* Edwards v. Arthur Andersen LLP, 142 Cal. App. 4th 603, 621 (Cal. Ct. App. 2006), *aff'd in part, rev'd in part*, 189 P.3d 285 (Cal. 2008) ("[T]he presence of express exceptions ordinarily implies that additional exceptions are not contemplated. '[W]here exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed' unless a contrary legislative intent is evident.'" (quoting People v. Standish, 38 Cal. 4th 858, 870 (2006))).

[79] *See generally* Jennifer L. Saulino, *Locating Inevitable Disclosure's Place in Trade Secret Analysis*, 100 MICH. L. REV. 1184, 1192 (2002) ("The need to define the doctrinal framework of inevitable disclosure arises from its possible confusion with threatened misappropriation. Cases of threatened misappropriation already are provided for by statute and common law. As Section A discussed, threatened misappropriation is unlawful and is easily analyzed under regular trade secrets analysis: 1) decide whether a trade secret exists; 2) decide whether someone threatens disclosure; and 3) craft the appropriate remedy. Several courts, however, including the *PepsiCo* court, have conflated threatened misappropriation and inevitable disclosure in order to grant an injunction. The two are distinct and courts should recognize the distinction.") (footnotes omitted).

[80] *See* Cypress Semiconductor Corp. v. Maxim Integrated Prod., Inc., 186 Cal. Rptr. 3d 486, 505 (Cal. Ct. App. 2015) ("The inevitable disclosure doctrine would contravene this policy by 'permit[ting] an employer to enjoin the former employee without proof of the employee's actual or threatened use of trade secrets based upon an inference (based in turn upon circumstantial evidence) that the employee inevitably will use his or her knowledge of those trade secrets in the new employment. The result is not merely an injunction against the use of trade secrets, but an injunction restricting employment.'" (citations omitted); Whyte v. Schlage Lock Co., 101 Cal. App. 4th 1443, 1462 (2002) ("The result [of the inevitable disclosure doctrine] is not merely an injunction against the use of trade secrets, but an injunction restricting employment."); and Hooked Media Grp., Inc. v. Apple Inc., 269 Cal. Rptr. 3d 406, 413 (Cal. Ct. App. 2020), *rev'd, cause transferred* 472 P.3d 1064 (Cal. 2020) ("Allowing an action for trade secret misappropriation against a former employee for using his or her own knowledge to benefit a new employer is impermissible because it would be equivalent to *retroactively* imposing on the employee a covenant not to compete." (citations omitted)). *See also* Saulino, *supra* note 79, at 1193–94 ("Obviously, employers prefer an injunction against employment no matter the type of case because a court order may not deter a threatening employee. The implications for the affected employee, however, necessitate that the law not allow employers such a cushion. With inevitable disclosure, evidence of bad faith or ill-intent is not a part of the analysis. If bad faith is present--if disclosure is actually threatened--then threatened misappropriation has occurred and the court should fashion an injunction against disclosure.").

[81] *See* Wang, *supra* note 13, at 76 (describing the inevitable disclosure theory); Mahady, *supra* note 13, at 707 (explaining the history of the inevitable disclosure doctrine); Wiesner, *supra* note 27, at 214 (describing the tension between competing interests under inevitable disclosure doctrine as it impairs an employee's freedom of mobility); and Jankowski, *supra* note 15, at 35. *See, e.g.*, PepsiCo, Inc. v. Redmond, 54 F.3d 1262 (7th Cir. 1995), and DoubleClick Inc. v. Henderson, No. 116914/97, 1997 WL 731413, at 8 (N.Y. Sup. Ct. Nov. 7, 1997).

Boss, I enjoyed working here but found a new job elsewhere" is a threat.[82] Just sending a resume and looking for a new job could be a threat.[83] These examples demonstrate the perverse and faulty logic behind the inevitable disclosure doctrine.[84]

For an employer facing an imminent threat of misappropriation of a trade secret, the UTSA allows for an injunction to halt the use of the trade secret,[85] but there is no indication that a restriction or ban to alternative employment was intended in the UTSA.[86] Had the drafters of the UTSA intended or desired to create a ban on alternative employment versus a ban on the use of the former employer's trade secret, they could have easily drafted the language of the UTSA to provide as much.[87] They did not, and therefore, the plain meaning of the UTSA is that no ban or restriction of employment is intended or authorized by the UTSA.[88] This assertion is supported by the fact that the UTSA was adopted when some states already

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82 *See* Wang, *supra* note 13, at 76 (describing the inevitable disclosure theory); Mahady, *supra* note 13, at 707 (explaining the history of the inevitable disclosure doctrine); and Jankowski, *supra* note 15, at 35. *See*, *e.g.* PepsiCo, Inc. v. Redmond, 54 F.3d 1262 (7th Cir. 1995), and DoubleClick Inc. v. Henderson, No. 116914/97, 1997 WL 731413, at 8 (N.Y. Sup. Ct. Nov. 7, 1997).

83 *See id.*

84 *See* Saulino, *supra* note 79, at 1193 ("Obviously, employers prefer an injunction against employment no matter the type of case because a court order may not deter a threatening employee.").

85 *See* UNIF. TRADE SECRETS ACT § 2 (UNIF. L. COMM'N 1985).

86 *See* UNIF. TRADE SECRETS ACT. Indeed, the only mention of employers, employees, and employment within the UTSA and the Uniform Law Commission comments is: (A) in requiring reasonable efforts to maintain secrecy of the trade secret ("(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy") (UNIFORM TRADE SECRETS ACT § 1(4)(ii)), where the comment to the section states "Finally, reasonable efforts to maintain secrecy have been held to include advising employees of the existence of a trade secret, limiting access to a trade secret on 'need to know basis', and controlling plant access. On the other hand, public disclosure of information through display, trade journal publications, advertising, or other carelessness can preclude protection. The efforts required to maintain secrecy are those 'reasonable under the circumstances.' The courts do not require that extreme and unduly expensive procedures be taken to protect trade secrets against flagrant industrial espionage. (citation omitted). It follows that reasonable use of a trade secret including controlled disclosure to employees and licensees is consistent with the requirement of relative secrecy"; and (B) in the comments to Section 3, where the Uniform Law Commission noted that "If a person charged with misappropriation has materially and prejudicially changed position in reliance upon knowledge of a trade secret acquired in good faith and without reason to know of its misappropriation by another, however, the same considerations that can justify denial of all injunctive relief also can justify denial of all monetary relief. See Conmar Products Corp. v. Universal Slide Fastener Co., 172 F.2d 150 (CA2, 1949) (no relief against new employer of employee subject to contractual obligation not to disclose former employer's trade secrets where new employer innocently had committed $40,000 to develop the trade secrets prior to notice of misappropriation)."

87 *See id.* at § 2.

88 Magney v. Truc Pham, 466 P.3d 1077, 1082 (Wash. 2020) ("Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature.").

had laws against non-compete clauses.[89] Therefore, any implication that the UTSA allows a ban on alternative employment (vis-à-vis inevitable disclosure) is wholly contrary to the concept of a uniform act because such an interpretation (allowing a ban on alternative employment under the auspices of threatened disclosure) would immediately be contrary to such bans of non-compete clauses,[90] thereby vitiating the very purpose of a uniform act.[91]

In *PepsiCo v. Redmond*, there was never any threat enunciated by Redmond or his new employer.[92] On the contrary, both Redmond and his new employer acknowledged Redmond's obligation not to use PepsiCo's trade secrets.[93] Even if Redmond or Quaker Oats (his new employer) threatened to use trade secrets, the remedies under the UTSA are an injunction not to use such trade secrets and monetary damages.[94]

The inevitable disclosure doctrine results in an injunction not just against using trade secrets but also against pursuing alternative employment[95]

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89 *See* CAL. BUS. & PROF. CODE § 16600. *See also* Edwards v. Arthur Andersen LLP, 189 P.3d 285, 291 (Cal. 2008) ("The law protects Californians and ensures 'that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice.' (citation omitted). It protects 'the important legal right of persons to engage in businesses and occupations of their choosing.'"). *See generally* Bradford P. Anderson, *Complete Harmony or Mere Detente? Shielding California Employees from Non-Competition Covenants,* 8 U.C. DAVIS BUS. L.J. 8, 20 (2007).

90 Maine v. Thiboutot, 448 U.S. 1, 13–14 (1980) ("But the 'plain meaning' rule is not as inflexible as the Court imagines. Although plain meaning is always the starting point…this Court rarely ignores available aids to statutory construction. (citations omitted). We have recognized consistently that statutes are to be interpreted 'not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed.'") (citations omitted).

91 Adam D. Fuller & Florence M. Johnson, *What You Need to Know About the Uniform Restrictive Employment Act,* A.B.A. (Oct. 19, 2022), https://www.americanbar.org/groups/tort_trial_insurance_practice/publications/tortsource/2022/fall/what-you-need-know-about-uniform-restrictive-employment-act/ (suggesting the purpose of uniform acts are to strengthen existing laws and implying that diverting from this would create a lack of uniformity and would undermine the overall effectiveness and purpose of the act).

92 PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1269 (7th Cir. 1995) ("[T]he mere fact that a person assumed a similar position at a competitor does not, without more, make it 'inevitable that he will use or disclose . . . trade secret information.'").

93 *Id.* at 1266 ("The defendants also pointed out that Redmond had signed a confidentiality agreement with Quaker preventing him from disclosing 'any confidential information belonging to others,' as well as the Quaker Code of Ethics, which prohibits employees from engaging in 'illegal or improper acts to acquire a competitor's trade secrets.' Redmond additionally promised at the hearing that should he be faced with a situation at Quaker that might involve the use or disclosure of PCNA information, he would seek advice from Quaker's in-house counsel and would refrain from making the decision.").

94 *See* UNIF. TRADE SECRETS ACT §§ 2–3 (UNIF. L. COMM'N 1985)

95 Wang, *supra* note 13, at 76 ("If an employer can prove that a former employee will inevitably disclose its trade secrets during the course of his or her subsequent employment, it is possible to enjoin the former employee from taking on a role that would inevitably result in the use of trade secrets.").

and is, therefore, the equivalent of a non-compete clause.[96] As a result, the inevitable disclosure doctrine is the polar opposite of a non-compete ban and flies in the face of the very purpose of the FTC Non-Compete Rule[97] as well as any state laws protecting against non-compete clauses.[98] The purported justification of the inevitable disclosure doctrine is that the employee ***will*** (the word "will" indicating predictive future tense of an event that has not yet occurred)[99] consciously or subconsciously rely upon knowledge of the former employer's trade secrets in performing his or her new job duties.[100] Therefore, the inevitable disclosure doctrine is a *per se* anti-competition clause because it restricts the scope and freedom of a former employee to pursue any alternative employment of her/his choice.[101] As aptly stated by a California Appellate Court:

> The inevitable disclosure doctrine permits an employer to enjoin the former employee *without proof of the employee's actual or threatened use of trade secrets based upon an inference* (based in turn upon circumstantial evidence) that the employee inevitably will use his or her knowledge of those trade secrets in the new employment. *The result is not merely an injunction against the use of trade secrets, but an injunction restricting employment.*[102]

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96 Stacey Dogan & Felicity Slater, *The Long Shadow of Inevitable Disclosure*, 30 GEO. MASON L. REV. 655, 660 (2023) ("[N]on-compete agreements involve duties with respect to employment relationships, trade secret non-disclosure agreements involve duties with respect to information. The [Inevitable Disclosure Doctrine] conflates these two types of duties and imposes a restriction on employment without even the fiction of a consideration-based contract to that effect.").

97 Federal Trade Commission Non-Compete Clause Rule, 89 Fed. Reg. 38343 (May 7, 2024) (codified at 16 C.F.R. pts. 910 and 912) ("The purpose of this rulemaking is to address conduct that harms fair competition.").

98 Slater, *supra* note 96, at 684 ("[A]s more states abandon or severely limit the availability of non-compete agreements based on concerns about their impact on individuals and the economy, those same considerations counsel a skeptical approach to other, non-consensual restraints like the [Inevitable Disclosure Doctrine].").

99 *See generally Simple Future Tense: Definition, Use Cases with Examples*, GRAMMARLY, https://www.grammarly.com/blog/simple-future/?msockid=10cf36ba4d9065ac3710256 34cee6483 (last visited Aug, 30, 2024); Language Tool, *Simple Future Tense: Difference Between "Will" and "Going To,"* INSIGHTS, https://languagetool.org/insights/post/will-vs-going-to/#:~:text=Simple%20future%20tense%20helps%20indicate,I%20will%20eat%20at%20Fud druckers (last visited Aug. 30, 2024).

100 Whyte v. Schlage Lock Co., 101 Cal.App.4th 1443, 1458–59 (2002) ("The doctrine's justification is that unless the employee has 'an uncanny ability to compartmentalize information the employee will necessarily rely--consciously or subconsciously--upon knowledge of the former employer's trade secrets in performing his or her new job duties.") (citation omitted).

101 *See* PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1269 (7th Cir. 1995); UNIF. TRADE SECRETS ACT §2 (UNIF. L. COMM'N 1985).

102 *Whyte*, 101 Cal. App. 4th 1443, 1461–62 (Cal. Ct. App. 2002) (emphasis added).

As a result, "a court should not allow a plaintiff to use inevitable disclosure as an after-the-fact noncompete agreement to enjoin an employee from working for the employer of his or her choice."[103]

II. "DON'T SHOOT THE RECIPIENT OF THE MESSAGE!"

A. The Baiting and Poisoning of Employees with Irresistible Information

1. The Outrageous Proposition of Inevitable Disclosure

By definition, the inevitable disclosure doctrine is, *a priori*, an unfair method of competition by employers.[104] The employer and employee enter into a confidentiality obligation, whether through a non-disclosure agreement or other workplace policy, which does not bar future employment opportunities of the employee.[105] Such obligation prohibits the employee from using the employer's trade secrets and other confidential information.[106] This employee obligation is coupled with the risk of civil damages,[107] criminal penalties,[108] and injunction.[109] However, this deceptive and illusive representation by the employer of such a confidentiality obligation occurs while the employer secretly, surreptitiously, and simultaneously believes that it will be impossible for the employee to perform that obligation due to the overwhelming temptations of the proprietary information,[110] thereby enabling the employer to assert inevitable disclosure which is tantamount to a non-compete.[111] This process allows an employer to bait an employee with

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103 *Id.* at 1463. *See also* Bradford P. Anderson, *A Little Dictum is a Dangerous Thing: The Post Pandemic Need to Bust the Myth of a So-Called "Trade Secret" Exception to California's Statutory Ban on Non-Competition Agreements*, 62 SANTA CLARA L. REV. 245, 268–69 (2022).

104 *See* Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (codified at 16 C.F.R. pts. 910 and 912). See Jankowski, *supra* note 15, at 35, for the impact of inevitable disclosure.

105 *See PepsiCo, Inc.*, 54 F.3d at 1264 (noting that the employee signed a confidentiality agreement but not a non-compete agreement).

106 *See* Jankowski, *supra* note 15, at 35; Mahady, *supra* note 13, at 699–700; Vendavo, Inc. v. Long, 397 F. Supp. 3d 1115, 1140 (N.D. Ill. 2019) ("[C]ourts in this district have employed a three-factor analysis to evaluate whether a defendant *will inevitably* disclose trade secrets in her new position.") (emphasis added).

107 *See Trade secret litigation 101*, THOMSONREUTERS (Nov. 23, 2022), https://legal.thomsonreuters.com/blog/trade-secret-litigation-101/. *See also* UNIF. TRADE SECRETS ACT § 3 (UNIF. L. COMM'N 1985); CAL. CIV. CODE § 3426.3; Defend Trade Secrets Act, 18 U.S.C.A. § 1836 (West).

108 *See Trade secret litigation 101*, *supra* note 107. *See also* Economic Espionage Act of 1996, 18 U.S.C. §§ 1831-1839; Defend Trade Secrets Act, 18 U.S.C.A. § 1832; and CAL. PENAL CODE § 499(c) (2023).

109 *See* UNIF. TRADE SECRETS ACT § 2; CAL. CIV. CODE § 3426.2; and Defend Trade Secrets Act, 18 U.S.C.A. § 1836.

110 *See PepsiCo, Inc.*, 54 F.3d at 1265-66, 1269–70.

111 *See* Cypress Semiconductor Corp. v. Maxim Integrated Prod., Inc., 186 Cal. Rptr. 3d 486, 504–05 (Cal. Ct. App. 2015) ("Nothing in the complaint, and nothing submitted by Cypress since filing the complaint, lends any color to the naked assertion that Maxim was pursuing Cypress employees with

a confidentiality agreement and then poison the employee into a non-compete (vis-à-vis inevitable disclosure).[112] When the employer and employee part ways, the employer invokes the inevitable disclosure doctrine to either restrict the scope of employment or prevent the employee from working for a competitor, declaring that the proprietary information contaminated the employee so extensively that the employee could never abide by the confidentiality agreement.[113] This is the very essence of deceptive conduct and an unfair method of competition by the employer: requiring an employee to sign an agreement as a pre-condition to employment, poisoning the employee with information, and then saying that the information was so poisonous that the employee could never perform the original confidentiality obligations and must face restrictions in future employment.[114]

Under the inevitable disclosure doctrine, when the employee leaves and seeks to work for an alternative employer, the original employer alleges that the information provided to the former employee was so tempting, tantalizing, and irresistible that the former employee will find it impossible

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the object of extracting trade secrets from them. In the trial court Maxim suggested that Cypress's claims in this regard implicitly rested on the doctrine of inevitable disclosure, under which some jurisdictions will permit a plaintiff to substantiate a trade secret claim against a departing employee 'by demonstrating that [the] defendant's new employment will inevitably lead him to rely on the plaintiff's trade secrets.' (citation omitted). This doctrine, as Maxim pointed out, has been flatly rejected in this state as incompatible with the strong public policy in favor of employee mobility. The inevitable disclosure doctrine would contravene this policy by 'permit[ting] an employer to enjoin the former employee without proof of the employee's actual or threatened use of trade secrets based upon an inference (based in turn upon circumstantial evidence) that the employee inevitably will use his or her knowledge of those trade secrets in the new employment. The result is not merely an injunction against the use of trade secrets, but an injunction restricting employment.'" (citations omitted)); and Hooked Media Grp., Inc. v. Apple Inc., 269 Cal. Rptr. 3d 406, 413 (Cal. Ct. App. 2020), *review granted and cause transferred sub nom*. Hooked Media Grp. v. Apple, 472 P.3d 1064 (Cal. 2020) ("Hooked relies on circumstantial evidence that in its view generates an inference of trade secret use sufficient to create a triable issue of fact as to that element: its former employees were assigned to tasks at Apple similar to the work they did at Hooked and within weeks one of them produced a detailed plan for a recommendations system much like Hooked's version. Further, an expert opined that the source code for Apple's recommendations system was similar to the source code for Hooked's. That evidence does suggest the engineers drew on knowledge and skills they gained from Hooked to develop a product for their new employer—but California's policy favoring free mobility for employees specifically allows that. Allowing an action for trade secret misappropriation against a former employee for using his or her own knowledge to benefit a new employer is impermissible because it would be equivalent to *retroactively* imposing on the employee a covenant not to compete." (citations omitted)). *See also* Saulino, *supra* note 79, at 1193–94 ("Obviously, employers prefer an injunction against employment no matter the type of case because a court order may not deter a threatening employee. The implications for the affected employee, however, necessitate that the law not allow employers such a cushion. With inevitable disclosure, evidence of bad faith or ill-intent is not a part of the analysis. If bad faith is present—if disclosure is actually threatened—then threatened misappropriation has occurred and the court should fashion an injunction against disclosure.").

112 *See* Beauchamp, *supra* note 31, at 37; and Berkun, *supra* note 31, at 157.

113 *See* Beauchamp, *supra* note 31, at 37; Berkun, *supra* note 31, at 157; and *PepsiCo, Inc.*, 54 F.3d at 1265–66, 1269–70.

114 *See* Wiesner, *supra* note 27, at 214; *PepsiCo, Inc.*, 54 F.3d at 1265–66, 1269–70.

to comply with the contractual obligation in the confidentiality agreement.[115] The FTC Non-Compete Rule, or any subsequent legislation initiated in response to it, must be revised to expressly eschew the inevitable disclosure doctrine.[116] The inevitable disclosure doctrine is tantamount to a non-compete provision.[117]

2. Extending the Absurd Proposition of Inevitable Disclosure

Extending the concept of inevitable disclosure to other areas of the law illustrates how ridiculous the doctrine is. Inevitable disclosure is tantamount to a mortgage lender foreclosing on a property before the borrower has defaulted, simply because the borrower might be tempted to default at some future date by virtue of spending the mortgage payment on other things. The borrower does not need to threaten wrongdoing or have committed any wrongdoing; the mere temptation of default would be sufficient. It does not matter that the lender has determined that the borrower is creditworthy and that the lender has security for payment compliance by virtue of the mortgage interest (akin to monetary[118] and injunctive relief for trade secrets).[119]

If a lender went into a court seeking foreclosure in such a situation, proffering such absurd statements, the competent opposing counsel would seek costs imposed against the lender in addition to dismissing the cause of action. The borrower has committed no wrongdoing, is not in default, is compliant with her/his obligations, and the lender has bargained for the remedy of foreclosure only in the event of the borrower's default.[120] The absurd proposition of inevitable disclosure parallels the analogy above, yet it is palatable in some jurisdictions[121] and not yet determined to be an unfair trade practice by the FTC.[122]

Beyond the fact that the inevitable disclosure doctrine should be eviscerated within the context of the FTC Non-Compete Rule (and any

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115 *See generally PepsiCo, Inc*, 54 F.3d at 1264–65, 1269.

116 Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (codified at 16 C.F.R. pts. 910 and 912) (the current version of the Non-Compete Clause Rule preserves the inevitable disclosure doctrine).

117 *See* Cypress Semiconductor Corp. v. Maxim Integrated Prod., Inc., 186 Cal. Rptr. 3d 486, 504–05 (Cal. Ct. App. 2015); and Hooked Media Grp., Inc. v. Apple Inc., 269 Cal. Rptr. 3d 406, 413–14 (Cal. Ct. App. 2020), *review granted and cause transferred sub nom*. Hooked Media Grp. v. Apple, 472 P.3d 1064 (Cal. 2020). *See also* Russel Beck et al., *The Inevitable Disclosure Doctrine in Employment Litigation: Two Perspectives*, 66 BOS. BAR J. 7, 7 (2022).

118 *See* statutes cited *supra* note 20.

119 *See* statutes cited *supra* note 19.

120 *See generally* Bradford P. Anderson, *Robbing Peter to Pay for Paul's Residential Real Estate Speculation: The Injustice of Not Taxing Forgiven Mortgage Debt*, 36 SETON HALL LEGIS. J. 1, 6 (2011).

121 *See* Wendt, *supra* note 13, at 377; *see also* Liebman, *supra* note 13, at 18–26.

122 Horvath, *supra* note 11 (explaining that the FTC still allows employers to use the inevitable disclosure doctrine to enjoin previous employees from working for their competition).

successor legislation), the inevitable disclosure doctrine raises severe issues about potential liability for any employer who attempts to invoke it against a former employee.

Employers who assert inevitable disclosure should not only be denied any injunctive or other relief for the above reasons but should also be subjected to counterclaims for the underlying practice. Assume that an employer who asserts inevitable disclosure previously asked an employee to enter into a non-disclosure agreement, which the employer now alleges is impossible for the employee to honor per the inevitable disclosure doctrine.[123] This situation means that the employer required, as a condition of employment, the employee to sign a non-disclosure agreement, which the employer now argues will be impossible for the employee to perform.[124] All of this came about as a result of exposure to information that purportedly is so intoxicating and powerful that the employee will be unable to abide by the confidentiality agreement and will have to surrender to her/his carnal desires in relentlessly disclosing the information to others.[125]

3. Is the Assertion of Inevitable Disclosure an Indication of Fraudulent or Negligent Misrepresentation by Employers?

An employer who invokes the inevitable disclosure doctrine has baited and fed an employee with confidential information, purportedly knowing that it would contaminate the employee and make them unsuitable for work with any competitor.[126] Therefore, an employer using a non-disclosure agreement or other approach to maintain confidentiality would have done so with knowledge that it would be impossible for the employee to perform those obligations.[127] Is this not the very definition of fraudulent misrepresentation?[128]

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123 Mahady, *supra* note 13, at 702 ("The doctrine…undermines the employee's fundamental right to move freely and pursue his or her livelihood.").

124 Liebman, *supra* note 13, at 12 ("[A]t least one court has found the existence of a nondisclosure agreement to be a factor against inevitable disclosure . . .").

125 *See generally* PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1264–65, 1269–70 (7th Cir. 1995).

126 *See* Wiesner, *supra* note 27, at 214; *PepsiCo, Inc.*, 54 F.3d at 1265–66, 1269–70.

127 Norton, *supra* note 30, at 577–78 ("The workplace relationship similarly involves information imbalances that justify enforceable expectations of employers' honesty or accuracy in their speech to workers about jobs and related matters of great life importance. Indeed, the employment relationship is riddled with information differentials: employers know considerably more than workers about the terms and conditions of employment, about economic projections and business prospects, and often (as repeat players with comparatively greater resources) about workplace legal protections.").

128 *See* William D. Le Moult, *The Duty of Residential Real Estate Brokers and Salespersons to Disclose Property Condition to Buyers*, 70 CONN. BAR J. 435, 453 (1996) ("Liability for fraudulent misrepresentation (deceit) is dealt with in the Second Restatement of Torts, at Section 525: One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other

An analysis of the elements of fraudulent misrepresentation[129] in the context of an employer who subsequently alleges inevitable disclosure would proceed as follows:

> 1. Representation:[130] A representation was made to the employee regarding an enforceable contract (non-disclosure agreement) or workplace policy wherein the employee has an obligation to maintain confidentiality of information as part of a bilateral agreement in exchange for employment;[131]
> 2. Falsity:[132] The representation was false because, under inevitable disclosure, the employer is arguing that the former employee cannot perform the obligation described above;[133]
> 3. Knowledge:[134] When requiring the employee to enter into the obligation above, the employer knew that it might subject the employee to irresistible information that the employee purportedly will not be able to maintain as confidential and, therefore, invoke a claim of inevitable disclosure, resulting in an order restricting or banning alternative employment.[135] Therefore, the employer knew that the representation of an enforceable confidentiality obligation was false, instead relying upon a restriction or ban on future alternative employment, and ***not*** merely a confidentiality obligation;[136]

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in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation. Reliance upon a fraudulent misrepresentation is not justifiable unless the matter represented is material. A matter is material if (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.") (footnotes omitted).

129 *See* Legal Info. Inst., *Fraudulent Misrepresentation*, CORNELL L. SCH., https://www.law.cornell.edu/wex/fraudulent_misrepresentation#:~:text=fraudulent%20misrepresentation%20%7C%20Wex%20%7C%20US%20Law,The%20representation%20was%20false (last visited Aug. 28, 2024) ("Fraudulent misrepresentation is a tort claim, typically arising in the field of contract law, that occurs when a defendant makes a intentional or reckless misrepresentation of fact or opinion with the intention to coerce a party into action or inaction on the basis of that misrepresentation. To determine whether fraudulent misrepresentation occurred, the court will look for six factors: 1. A representation was made; 2. The representation was false; 3. That when made, the defendant knew that the representation was false or that the defendant made the statement recklessly without knowledge of its truth; 4. That the fraudulent misrepresentation was made with the intention that the plaintiff rely on it; 5. That the plaintiff did rely on the fraudulent misrepresentation; 6. That the plaintiff suffered harm as a result of the fraudulent misrepresentation.").

130 *See id.*

131 *See* Norton, *supra* note 30, at 579–81. *See generally* Egan, *supra* note 18; Sepinuck, *supra* note 18; Hillbo, *supra* note 18.

132 *See* Legal Info. Inst., *supra* note 129.

133 *See generally* Norton, *supra* note 30.

134 *See* Legal Info. Inst., *supra* note 129.

135 *See* Jankowski, *supra* note 15, at 35; Mahady, *supra* note 13, at 699–700; and PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1265–66, 1269–70 (7th Cir. 1995).

136 *See* Cypress Semiconductor Corp. v. Maxim Integrated Prod., Inc., 186 Cal. Rptr. 3d 486, 504–05 (Cal. Ct. App. 2015); and Hooked Media Grp., Inc. v. Apple Inc., 269 Cal. Rptr. 3d 406, 413–14

> 4. Reliance by Employee:[137] The employee believed that he or she was only agreeing to maintain confidentiality of information and was not agreeing to a non-compete;[138] and
> 5. Damages:[139] The employee is harmed by a restriction or ban on alternative employment (e.g., non-compete) instead of the mere confidentiality obligation that was represented by the employer.[140]

By offering a non-disclosure contract or other confidentiality obligation, the employer represents a simple obligation for the employee to maintain confidentiality in exchange for employment.[141] However, under inevitable disclosure, the employer later asserts that it will be impossible for the employee to perform this agreement.[142] The employer, therefore, intentionally misleads the employee[143] (non-disclosure contract) with the

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(Cal. Ct. App. 2020), *review granted and cause transferred sub nom*. Hooked Media Grp. v. Apple, 472 P.3d 1064 (Cal. 2020).

137 *See* Legal Info. Inst., *supra* note 129.

138 *See* Norton, *supra* note 30, at 579–81.

139 *See* Legal Info. Inst., *supra* note 129.

140 *See* Norton, *supra* note 30, at 579–81; Beauchamp, *supra* note 31, at 37; and Berkun, *supra* note 31, at 157.

141 *See* Egan, *supra* note 18; Sepinuck, *supra* note 18; Hillbo, *supra* note 18.

142 *See* Wiesner, *supra* note 27, at 214; PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1265–66, 1269–70 (7th Cir. 1995).

143 *See* Norton, *supra* note 30, 579–81 ("III. The *Restatement*'s Approach to Employers' Honesty and Accuracy. The reality that employers enjoy significant informational and power advantages over their workers should inform any articulation of their legal duties of honesty and accuracy when speaking to workers. As discussed in more detail below, the *Restatement* and its commentary are inconsistently attentive to these functional realities by failing to recognize the breadth of situations in which employers enjoy structurally unequal and thus special knowledge of key information and by discounting the ways in which these asymmetries can lead workers to rely to their detriment on employers' misrepresentations. *A. Section 6.05 on Fraudulent Misrepresentations: Articulating Employers' Duty of Honesty* Section 6.05 provides for employer liability for certain knowingly false statements (those of 'fact, current intent, opinion, or law') accompanied by a certain motivation ('intentionally inducing a current or prospective employee') that is successful in achieving certain results ('to enter, maintain, or leave an employment relationship' or 'to refrain from entering into or maintaining an employment relationship with another employer'). Here section 6.05 draws from the *Restatement (Second) of Torts* in taking an appropriately broad view of the scope of employers' misrepresentations that would breach this duty of honesty to include those of 'fact, current intent, opinion, or law.' More specifically: Knowingly False Statements of Fact: Employer misrepresentations about a wide range of factual matters related to the terms and conditions of employment - such as pay, benefits, hours, hazards, job security and opportunities for advancement - can and do inflict substantial harm. Indeed, employers' lies and misrepresentations about the factual terms and conditions of employment can distort and sometimes even coerce workers' important life decisions - for example, decisions about whether to take, decline, keep, or leave a job. Knowingly False Statements of Current Intent: As the commentary to the *Restatement (Second) of Torts* (from which section 6.05 often draws) observes, '[t]he state of a man's mind is as much a fact as the state of his digestion.' Examples of fraudulent misrepresentations of intent include an employer's knowingly false claims to workers that it had no plans to move or shut down, or its false claims that it planned to expand a position's job responsibilities and pay. Knowingly False Statements of Opinion: As comment b to section 6.05 explains, '[a]n employer's intentional misrepresentation of opinion about the future of its business may be intended to induce acceptance of employment,' observing that '[t]his is true particularly when the maker is understood to have

purpose of deceiving the employee, (intending to declare that the employee cannot perform the non-disclosure contract) to the detriment of the employee, resulting in damage. [144]

Even if the employer's behavior was not intended to mislead the employee into signing a non-disclosure agreement or other confidentiality obligation, such behavior may readily constitute a careless, and therefore

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special knowledge of facts unknown to the recipient.' The commentary does not offer an illustration of an employer's misrepresentation of opinion, but examples include knowingly false statements of opinion that the employer is complying with employment law protections, or opinions about the safety or other quality of working conditions. Knowingly False Statements of Law: Finally, employers' lies or misrepresentations about workers' legal rights can frustrate key workplace protections by skewing workers' decisions about whether to engage in a wider range of protected activity - such as decisions about whether to unionize, report illegal workplace conditions, take family or medical leave, or advocate for different terms and conditions of employment. Here too the commentary does not offer an illustration of an employer's misrepresentation of law, but examples abound. Consider one recent instance, where an employer's employee handbook denied the existence of federal and state laws that require overtime pay: 'There is no overtime pay as there is no shortage for qualified labor. Any hours worked beyond 40 are paid straight-time and it is understood by the employee that the extra hours are a privilege.' Other examples might include an employer's knowingly false assertions to its workers that its compulsory noncompetition agreements complied with applicable law.") (footnotes omitted).

144 *Id.* ("Employers speak to workers about a wide range of job-related topics that include the terms and conditions of employment, business projections, and applicable workplace legal protections. Employers' communications on these subjects can, and often do, valuably inform workers' decisions about jobs and other weighty issues. But employers' speech – in particular their lies and misrepresentations – about these matters can also inflict substantial harm by distorting workers' decisions of great life importance. That employers enjoy advantages of information and power further enhances their ability to manipulate or coerce workers' choices through lies and misrepresentations. Efforts to articulate employers' legal duties of honesty and accuracy should thus be informed by a functional, rather than formalist, understanding of the information and power dynamics within this relationship."). *See also* Frank J. Cavico, *Fraudulent, Negligent, and Innocent Misrepresentation in the Employment Context: The Deceitful, Careless, and Thoughtless Employer*, 20 CAMPBELL L. REV. 1, 4–5 (1997) ("When defendant employers have made false representations, and employees have pursued misrepresentation lawsuits therefor, it is very interesting to examine the various types of employment misrepresentations allegedly committed by employers as well as to discern the degree of success by employees in bringing legal actions therefor. The kinds of employer misrepresentations scrutinized herein can be classified into seven general categories, as follows: (1) when the employer makes misrepresentations, regarding the terms and conditions of employment or the fact of employment itself, to an applicant during the hiring, interviewing, and recruitment process, presumably for the purpose of persuading the applicant to accept employment with the employer . . . (6) employer's false statements regarding the legality, propriety, or fairness of employment practices and procedures or the employee's status or conduct, or the safety and security of the workplace . . . .") (footnotes omitted); Richard P. Perna, *Deceitful Employers: Intentional Misrepresentation in Hiring and the Employment-at-Will Doctrine*, 54 U. KAN. L. REV. 587 (2006) ("When an employer lies about an existing or past fact with the intent to induce a prospective employee to accept employment, that employee may seek redress by pursuing a common law action for fraudulent misrepresentation."); *In re Aman*, 498 B.R. 592, 601–02 (Bankr. N.D.W. Va. 2013) ("Relying on the *Restatement of Torts* and the Supreme Court's survey of the dominant consensus of common-law jurisdictions in 1978, the Court of Appeals for the Fourth Circuit found that a plaintiff must prove four elements to satisfy § 523(a)(2)(A): '(1) a fraudulent misrepresentation; (2) that induces another to act or refrain from acting; (3) causing harm to the plaintiff; and (4) the plaintiff's justifiable reliance on the misrepresentation.'").

negligent, misrepresentation by the employer,[145] when the employer subsequently argues for an inevitable disclosure restriction or ban on alternative employment.[146]

4. Is Inevitable Disclosure an Impairment of Contract Rights?

The United States Constitution provides that: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."[147] Although the doctrine of inevitable disclosure is a matter of judicial interpretation[148] and not legislation,[149] the doctrine is purportedly based upon the concept of

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145 *See* Stephanie R. Hoffer, *Misrepresentation: The Restatement's Second Mistake*, 2014 U. ILL. L. REV. 115, 167 (2014) (distinguishing fraud from nonfraudulent misrepresentation); Norton, *supra* note 30, at 584–85; Sneve v. Mut. Of Omaha Ins. Co., No. 13-CV-252-ABJ, 2015 WL 12866983, at 1, 7 (D. Wyo. Apr. 23, 2015) ("The distinguishing elements of fraudulent misrepresentation and negligent misrepresentation are the state of mind of the person who supplied the information and the standard of proof that must be met by the plaintiff.").

146 *See* Cavico, *supra* note 144, at 40–42. *See also* Jankowski, *supra* note 15, at 35; Mahady, *supra* note 13, at 699–700; and *PepsiCo, Inc.*, 54 F.3d at 1265–66, 1269–70.

147 U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.").

148 *See* Barton H. Thompson, Jr., *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373, 1456–57 (1992) ("In sum, there is little to encourage the Court to review state judicial impairments, and much to say from the Court's perspective for avoiding the issue. Two additional facts further discourage active Supreme Court policing against judicial impairments. First, the doctrinal road to such policing has far more obstacles than it had a century ago: Seventy years of precedent now clearly state that the Contract Clause does not apply to judicial decisions, and post-*Erie* diversity jurisdiction does not give federal courts the flexibility they had a century ago to ignore state court interpretations of local laws. Second, Congress and state legislatures can provide at least some relief against judicial impairments. This does not mean there is no need for constitutional protection. But where Congress has expressed no concern over state and local judicial impairments, the Court is entitled to be at least suspicious whether significant federal interests are actually at stake.").

149 *See generally* Christopher R. Green, *Justice Gorsuch and Moral Reality*, 70 ALA. L. REV. 635, 652 (2019) ("One area in which the Court has taken a morally infused reading of the Constitution, but where Justice Gorsuch has rejected it, is the Contracts Clause: 'No State shall ... pass any ... Law impairing the Obligation of Contracts ....' Dissenting alone in *Sveen v. Melin*, he criticized the Court's 1983 holding in *Energy Reserves Group* that the facially exceptionless Contracts Clause implicitly allowed 'reasonable' impairment of contract rights if in pursuit of a 'significant and legitimate public purpose.' In addition to being 'hard to square with the Constitution's original public meaning,' such a morally infused balancing test posed several difficulties in Justice Gorsuch's view: Under a balancing approach ... how are the people to know today whether their lawful contracts will be enforced tomorrow, or instead undone by a legislative majority with different sympathies? Should we worry that a balancing test risks investing judges with discretion to choose which contracts to enforce--a discretion that might be exercised with an eye to the identity (and popularity) of the parties or contracts at hand? How are judges supposed to balance the often radically incommensurate goods found in contracts and legislation? Justice Gorsuch is thus hostile to a morally infused reading of the Contracts Clause; 'obligation' refers to the legally binding nature of a contract, not obligation with a moral tinge."); Henry N. Butler and Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 BROOK. L. REV. 767, 793 (1989) ("But even if there is a

protecting against a threat of misappropriation of a trade secret which is directly founded in legislation.[150] The UTSA states: "Actual or threatened misappropriation may be enjoined."[151] Indeed, opinions evaluating inevitable disclosure have quoted that exact legislative language as a foundational enabling component of the doctrine.[152] Therefore, there is a solid, firmly rooted contention that the inevitable disclosure doctrine's reliance upon such legislation as its empowering basis thereby creates an unlawful impairment of the employee's contract rights.[153] The employee who signs a confidentiality agreement or agrees to non-disclosure obligations through a

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state-private distinction, it does not justify applying a lower scrutiny level to impairment of private contracts. When the state impairs its own contract, it takes a property right for which the state has a constitutional obligation to compensate. In effect, such compensation amounts to paying damages for breach of contract. Therefore, the issue is not one of scrutiny level. Rather, there is simply no justification for state impairment of contract rights. Even if the state could impair private contracts more readily than its own, an argument can be made that the state is, in a sense, a party to the corporate contract. When a firm incorporates in a state and agrees to pay franchise fees, the state agrees on its part to the quid pro quo of enforcing its corporation law. A retroactive change in the corporation law violates this contract. Since damages are not a feasible remedy, the state's contract should be specifically enforced by application of the contract clause. In summary, the contract clause not only limits state infringements of the corporate contract through changes in state law, but such impairments are precisely the type the contract clause was designed to prevent. Moreover, the reserved power provisions found in virtually all state corporation codes do not provide states with a license to impair private corporate contracts."); *see also* Joshua I. Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64 GEO. WASH. L. REV. 633, 669 (1996) ("One way of implementing a deliberative ideal of legislative politics, however, would be to hold that the shield of the sovereign acts doctrine is unavailable unless the Congress or its delegate recognized the impairment of contract rights being effected and articulated a credible public interest that plausibly outweighed the disappointment of expectation interests resulting from its action. The government might thus be required to show that the breach reflected a reasoned governmental decision and that it was made at an appropriate level of governmental authority. This might embody a kind of 'due process of contract impairment' approach to application of the sovereign acts doctrine that is analogous to 'due process of lawmaking' analysis. Due process of contract impairment would assure that a decision that impairs private rights under a government contract on the strength of a public interest justification is in fact made either by Congress itself, or by an agency with delegated authority to consider the relevant policy considerations.") (footnotes omitted).

150 *See* UNIF. TRADE SECRETS ACT (UNIF. L. COMM'N 1985).

151 *See id.* at § 2 ("(a) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.").

152 *See* PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1267 (7th Cir. 1995) (referencing Illinois Trade Secrets Act and "threatened misappropriation.").

153 *See* Christopher T. Wonnell, *Market Causes of Constitutional Values*, 45 CASE W. RSRV. L. REV. 399, 422–23 (1995) ("While takings of property and impairments of contract rights theoretically could take the form of broad and general legislative language, the courts have shown special solicitude when the statutes appeared to have a targeted focus against one individual or narrow group. Distrust of state actions against individuals is also manifest in the protections accorded the criminal accused, many of which are designed to ensure that objective evidence supports the state administrator's assertion of criminal guilt. Similar values appear to be behind procedural due process rights such as the right to a hearing before important interests are administratively terminated.") (footnotes omitted).

workplace policy is entitled to those specific contract rights and not the imposition of restrictions or bans on alternative employment.[154] Such restrictions or bans on alternative employment impair the employee's contract rights.[155]

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154 *See* Lobel, *supra* note 5, at 681 ("Nondisclosure agreements (NDAs) have become standard in employment contracts. NDAs regularly include information beyond traditionally defined secrets under trade secrecy laws -typically a formula or process that is not generally known and that the company derives value from its secrecy. More expansive inclusions of information as proprietary in NDA, beyond the traditional categories of trade secrets, include general know-how, client lists, and salary information.") (footnote omitted); Egan, *supra* note 18; and Sepinuck, *supra* note 18. *See also* Cypress Semiconductor Corp. v. Maxim Integrated Prod., Inc., 186 Cal. Rptr. 3d 486, 504–05 (Cal. Ct. App. 2015) ("The inevitable disclosure doctrine would contravene this policy by 'permit[ting] an employer to enjoin the former employee without proof of the employee's actual or threatened use of trade secrets based upon an inference (based in turn upon circumstantial evidence) that the employee inevitably will use his or her knowledge of those trade secrets in the new employment. The result is not merely an injunction against the use of trade secrets, but an injunction restricting employment.'" (citations omitted); Whyte v. Schlage Lock Co., 101 Cal. App. 4th 1443, 1461–62 (2002) ("The result [of the inevitable disclosure doctrine] is not merely an injunction against the use of trade secrets, but an injunction restricting employment."); and Hooked Media Grp., Inc. v. Apple Inc., 269 Cal. Rptr. 3d 406, 413–14 (Cal. Ct. App. 2020), *rev'd cause transferred* 472 P.3d 1064 (Cal. 2020) ("Allowing an action for trade secret misappropriation against a former employee for using his or her own knowledge to benefit a new employer is impermissible because it would be equivalent to *retroactively* imposing on the employee a covenant not to compete." (citations omitted)).

155 *See* David Bohrer, *Threatened Misappropriation of Trade Secrets: Making A Federal (DTSA) Case Out of It*, 33 SANTA CLARA HIGH TECH. L.J. 506, 526 (2017) ("California's rejection of inevitable disclosure is often described as the minority position. It is difficult to discern with any degree of precision the jurisdictions that are in the majority or minority on this question due to the treatment of inevitable disclosure in some jurisdictions as one form of threatened misappropriation, while others, such as California, view threatened misappropriation as a separate alternative to actual or threatened misappropriation.") (footnotes omitted).

5. Fortune Telling Judges: Is Inevitable Disclosure a Denial of Due Process?

Procedural due process, under the U.S. Constitution,[156] requires a meaningful opportunity to be heard.[157] This includes a fair-minded and impartial decision-maker,[158] as:

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[156] U.S. CONST. amend. XIV **§1** ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[157] Boddie v. Connecticut, 401 U.S. 371, 377–80 (1971) ("Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that '(w)herever one is assailed in his person or his property, there he may defend.'") (citing Windsor v. McVeigh, 93 U.S. 274, 277 (1876); *See* Baldwin v. Hale, 68 U.S. 223 (1864); Hovey v. Elliott, 167 U.S. 409 (1897). The theme that 'due process of law signifies a right to be heard in one's defense,' Hovey v. Elliott, 167 U.S. 409, 417 (1897), has continually recurred in the years since Baldwin, Windsor, and Hovey. Although "'(m)any controversies have raged about the cryptic and abstract words of the Due Process Clause,'" as Mr. Justice Jackson wrote for the Court in Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306 (1950), 'there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950). Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, see Windsor v. McVeigh, 93 U.S. 274, 278 (1876), or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication, Hammond Packing Co. v. Arkansas, 212 U.S. 322, 351 (1909). What the Constitution does require is 'an opportunity . . . granted at a meaningful time and in a meaningful manner,' Armstrong v. Manzo, 380 U.S. 545, 552 (1965), 'for (a) hearing appropriate to the nature of the case,' Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313 (1950). The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. In short, 'within the limits of practicability,' Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 318 (1950), a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause. Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question. Thus, in cases involving religious freedom, free speech or assembly, this Court has often held that a valid statute was unconstitutionally applied in particular circumstances because it interfered with an individual's exercise of those rights. No less than these rights, the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals.").

[158] *See generally* Vanelli v. Reynolds Sch. Dist. No. 7, 667 F.2d 773, 779–80 (9th Cir. 1982) ("The key component of due process, when a decisionmaker is acquainted with the facts, is the assurance of a central fairness at the hearing. … Essential fairness is a flexible notion, but at a minimum one must be given notice and an opportunity to be heard 'at a meaningful time and in a meaningful manner.'"); Stewart v. Bailey, 556 F.2d 281, 285 (5th Cir. 1977), *on reh'g* 561 F.2d 1195 (5th Cir.

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations, and the promotion of participation and dialogue by affected individuals in the decision-making process. (citation omitted). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken *on the basis of an erroneous or distorted conception of the facts* or the law.[159]

Invocation of the inevitable disclosure doctrine, resulting in a restriction or ban on alternative employment, raises the question of whether the employee has a meaningful opportunity to be heard.[160] A finding of inevitable disclosure necessarily means that a judge has engaged in predicting that an individual will not abide by a confidentiality obligation and will disclose proprietary information.[161] How meaningful is the opportunity to be heard when civil courts, populated by prescient, mind-reading, psychic judges, make *a predictive determination about the future conduct* of an individual, resulting in a restriction or ban on employment and the right of such individual to earn a wage and support herself/himself and family?[162] How

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1977) ("That hearing should be before a tribunal that . . . has an apparent impartiality toward the charges."); Mary Judge Ryan, *The Public Lawyer As Employer*, ARIZ. ATT'Y, October 1995, at 32, 33–34 ("Due process requires a meaningful opportunity to be heard before a person can be deprived of a constitutionally protected interest. The following factors are required for a valid due process hearing:

> 1. Adequate written notice of the specific grounds for termination, 2. Disclosure of the evidence supporting termination, including the names and nature of the testimony of adverse witnesses; 3. The opportunity to confront and cross-examine available adverse witnesses; 4. The opportunity to be heard in person and present evidence; 5. The opportunity to be represented by counsel; 6. A fair-minded and impartial decision maker; 7. A written statement by the fact-finders as to the evidence relied upon and the reasons for the determination made.") (footnotes omitted); Brief of Petitioner-Appellant at 34, Jacobson v. Blaise, 2020 WL 3472566 (N.Y. App. Div. 2020) ("The law is well established that a fundamental tenet of due process is a fair and impartial tribunal, *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). The Due Process guarantees of the United States Constitution assures every litigant, civil or criminal, of a trial by an impartial court, free of bias or the appearance of bias. *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).").

159 Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (emphasis added).

160 *See generally* cases cited *supra* notes 157–158.

161 *See generally* PepsiCo, Inc. v. Redmond, 54 F.3d 1262 (7th Cir. 1995).

162 *See generally* Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967, 989 (1999) ("One of the most common arguments for employment subsidies is a moral claim. The basic idea is that hard work is morally required, and people who display this kind of virtue should be guaranteed a job at a decent wage. Put another way, *full-time work is both necessary and sufficient as a condition for a decent level of subsistence.* This argument seems to make a clear case for employment subsidies and to call into question the wisdom of unconditional cash grants. Once one accepts this moral premise, work is an appropriate precondition for assistance.") (emphasis added).

can such prescient fortune-telling be anything other than a "distorted conception of the facts or the law"?[163]

A judicial hearing is likely involved in an inevitable disclosure dispute, however: "The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due."[164]

Employers might argue that a judicial hearing in which the inevitable disclosure doctrine is invoked (banning or restricting alternative employment of the victim or employee) constitutes a meaningful opportunity to be heard.[165] Such a position appears to be nothing other than a heavy-handed, sacrificial tilting of the scale of rights[166] at the expense of the employee.[167] Additionally, the exploration of conspiratorial behavior by employers in limiting the freedom of employees may well have merit.[168]

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163 Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

164 Boddie v. Connecticut, 401 U.S. 371, 380 (1971).

165 *See generally* Beck et al., *supra* note 117, at 7–9.

166 *See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 1004–05 (1987) (discussing approaches to judicial balancing in constitutional law).

167 *See generally* Beck et al., *supra* note 117, at 10–12.

168 *See* Lobel, *supra* note 5, at 684–85 ("Whether restrictions on job mobility are formed horizontally, in agreements between employers, or vertically, in employment contracts themselves, these clauses are designed for the same purpose and to similar effects: decreasing labor market competition, locking employees into a single employer, and reducing outside opportunities. In 2017, Princeton Economist Alan Krueger wrote: 'New practices have emerged to facilitate employer collusion, such as noncompete clauses and no-raid pacts, but the basic insights are the same: employers often implicitly, and sometimes explicitly, act to prevent the forces of competition from enabling workers to earn what a competitive market would dictate, and from working where they would prefer to work.' All of the clauses described above contribute to the concentration of labor markets and the suppression of wages. In recent years, productivity and profit have gone up; yet wages have stagnated, consistent with these insights suggesting that the structure of the labor market benefits dominant employers and harms workers. Researchers and policymakers should focus their attention toward these restrictions, vertical and horizontal, and their effects on mobility, competition, and wages.") (footnote omitted); Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance*, 106 MINN. L. REV. 877, 914–16 (2021) ("The trend towards widespread inclusion of noncompete agreements, even in contracts for low-skilled workers, demonstrates that parties include noncompetes for illegitimate reasons. When the inclusion of noncompetes becomes standard across an industry, even if done without explicit agreement between employers, the effect can be to suppress the industry as a whole--decreasing wages and employee mobility and preventing competitors from entering. Thus, an antitrust analysis is better suited to address the problem of noncompetes than a single contract analysis. However, antitrust doctrine, as it has developed in practice, creates major impediments to litigating individual boilerplate contracts and exposing contract thickets. The challenges of antitrust litigation have meant that despite the consensus in the economic literature--established both through theory and in empirical findings--less mobility between employers reduces wages . . . . Recently, collusions between companies agreeing not to hire each other's employees have resulted in successful antitrust litigation, including class actions with settlements of hundreds of millions of dollars. In Silicon Valley, a class of 64,000 engineers brought action against major tech companies including Google and Apple for such horizontal no-poach agreements, resulting in a $415 million settlement. Calling these practices 'blatant and egregious,' the Department of Justice concluded that these agreements were per se violations of

III. GUILTY UNTIL PROVEN GUILTY, OR LIABLE UNTIL PROVEN LIABLE; IT IS TIME TO EVISCERATE THE INEVITABLE DISCLOSURE DOCTRINE

The inevitable disclosure doctrine involves a judicial finding of prospective future wrongdoing without any act of wrongdoing, other than alternative employment, by the former employee.[169] This is equivalent to being "guilty until proven guilty"[170] or liable until liable in the civil context.[171]

The FTC's goal in the Non-Compete Rule was to prevent the use of non-compete clauses for employees.[172] The inevitable disclosure doctrine is another form of a non-compete provision imposed through the magic of judicial prescience about individuals' future behavior.[173] The hocus-pocus magic of the inevitable disclosure doctrine must disappear through an amendment to the FTC Non-Compete Rule.[174] Even if the Non-Compete Rule is ultimately deemed invalid, the rationale behind it indicates that successor legislation, federal or state, is likely to gain momentum.[175] The

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American antitrust law. In 2018, the DOJ similarly brought action against two rail equipment manufacturers for agreeing not to hire each other's workers In June 2020, a class action was brought by the faculties of Duke University and the University of North Carolina against the universities for similar agreements not to compete over each other's employees. The federal Antitrust Division has recognized that these practices stifle opportunities for employees, are bad for the wage market, and are bad for innovation. At the same time, vertical noncompetes that seek to accomplish the exact same goal of preventing an employee from moving from one competitor to another have yet to receive the same rigorous treatment from antitrust law . . . . A more fundamental reform would be to reject the vertical/horizontal distinction altogether and adopt a per se illegal view of noncompetes.") (footnotes omitted); *See generally* Naomi Price and Jason Jarvis, *Conspiracy Jurisdiction,* 76 STAN. L. REV. 403 (2024); Thomas J. Leach, *Civil Conspiracy: What's the Use?,* 54 UNIV. OF MIAMI L. REV. 1 (1999).

169 *See* Jankowski, *supra* note 15, at 35; Mahady, *supra* note 13, at 699–700; and PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1265–66, 1269–70 (7th Cir. 1995).

170 THE BOOMTOWN RATS, *The Elephants Graveyard, on* MONDO BONGO (CBS Records 1981) ("they were guilty 'til proven guilty, isn't that the law?").

171 *See* Elizabeth A. Rowe, *When Trade Secrets Become Shackles: Fairness and the Inevitable Disclosure Doctrine*, 7 TUL. J. TECH. & INTELL. PROP. 167 (2005); *see generally* David Lincicum, Note, *Inevitable Conflict?: California's Policy of Worker Mobility and the Doctrine of "Inevitable Disclosure,"* 75 S. CAL. L. REV 1257 (2002).

172 *See* Federal Trade Commission Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (codified at 16 C.F.R. pts. 910, 912).

173 *See generally* Beck et al., *supra* note 117.

174 FTC Non-Compete Clause Rule, 89 Fed. Reg. at 38342. *See generally* M. Claire Flowers, *Facing the Inevitable: The Inevitable Disclosure Doctrine and the Defend Trade Secrets Act of 2016*, 75 WASH. & LEE L. REV. 2207, 2263 (2019).

175 There is a possibility that the Non-Compete Clause Rule, even if ultimately determined to be outside of the FTC's scope of authority, may serve as fuel for state or federal legislation protecting employees against non-compete clauses. *See generally* Wiseman, *supra* note 10, at 261 (describing benefit of regulatory negotiation); Siegel, *supra* note 10, at 142 ("Congress always had the power to overturn any agency rule by passing a new statute, and the CRA process by which Congress can overturn an agency rule is the process of passing a new statute . . . ."), and Strauss, *supra* note 10,

Non-Compete Rule and any successor legislation must be modified to decimate the inevitable disclosure doctrine.

Employers have suitable protection under trade secret law without restricting alternative employment.[176] Moreover, a non-compete could force the former employee to turn to public assistance due to the inability to obtain alternative employment.[177]

Fear that an employee will be unable to compartmentalize information with a result of inevitable disclosure[178] does not satisfy the legal requirements

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at 650 ("The Constitution and the structural judgments it embodies require, at a minimum, that Congress observe a rule of parity in providing for political oversight of any government agency it creates. Congress cannot favor itself in providing for political oversight of an agency that administers, as well as assists in the formulation of, its laws. A rule that presidents may not, but members of Congress may, seek to bring political influence to bear on the policymaking of any agency directly affronts the framers' purposes, and serves no apparent function beyond aggrandizement of congressional power at the expense of the President's. Members of Congress are as capable as presidents of making excessive telephone calls or passing on private views under the guise of policy guidance, and often have done so; congressional hearings, for example, are used at sensitive stages of policymaking as instruments of coercion as well as of inquiry. Yet Congress's constitutional raison d'etre is not to oversee the execution of laws; it is to enact new laws as required.") (footnotes omitted). *See* Ryan, LLC v. FTC, No. 3:24-cv-00986, Doc. 211 (N.D. Tex. Aug. 20, 2024) (Federal District Court set aside the Non-Compete Clause Rule as unenforceable, determining that the FTC exceeded its authority in issuing the Non-Compete Clause Rule and that the rule is arbitrary and capricious, thereby violating the Administrative Procedure Act), *appeal docketed* 0:24-usc-10951 (5th Cir. Oct. 24, 2024) (The appellant FTC seeks to reinstate the Non-Compete Clause Rule and have the District Court decision reversed).

176 *See generally* Lobel, *supra* note 5, at 681 ("Nondisclosure agreements (NDAs) have become standard in employment contracts. NDAs regularly include information beyond traditionally defined secrets under trade secrecy laws -typically a formula or process that is not generally known and that the company derives value from its secrecy. More expansive inclusions of information as proprietary in NDA, beyond the traditional categories of trade secrets, include general know-how, client lists, and salary information.") (footnote omitted); Egan, *supra* note 18; Sepinuck, *supra* note 18; Hillbo, *supra* note 18. *See also* UNIF. TRADE SECRETS ACT (UNIF. L. COMM'N 1985); Defend Trade Secrets Act, 18 U.S.C.A. § 1836 (West); and Economic Espionage Act of 1996, 18 U.S.C. §§ 1831-1839.

177 *See* Alstott, *supra* note 162, at 989 ("One of the most common arguments for employment subsidies is a moral claim. The basic idea is that hard work is morally required, and people who display this kind of virtue should be guaranteed a job at a decent wage. Put another way, *full-time work is both necessary and sufficient as a condition for a decent level of subsistence.* This argument seems to make a clear case for employment subsidies and to call into question the wisdom of unconditional cash grants. Once one accepts this moral premise, work is an appropriate precondition for assistance.") (emphasis added). *See generally* Beauchamp, *supra* note 31.

178 The author has previously characterized inevitable disclosure as "guilty until proven guilty" (or "liable until proven liable" in the civil law context). Anderson, *supra* note 103, at 268–69; Anderson, *supra* note 89, at 32; *see also* Rowe, *supra* note 171; Lincicum, *supra* note 171.

to justify an injunction under the UTSA,[179] and any such injunction is *per se*, a non-compete clause.[180]

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[179] Anderson, *supra* note 103, at 268–69; *see generally* The Retirement Group v. Galante, 98 Cal. Rptr. 3d 585, 593 (Cal. Ct. App. 2009) ("We distill from the foregoing cases that [§] 16600 bars a court from specifically enforcing (by way of injunctive relief) a contractual clause purporting to ban a former employee from soliciting former customers to transfer their business away from the former employer to the employee's new business, but a court may enjoin tortious conduct (as violative of either the Uniform Trade Secrets Act and/or the Unfair Competition Law) by banning the former employee from using trade secret information to identify existing customers, to facilitate the solicitation of such customers . . . . Viewed in this light, therefore, the conduct is enjoinable not because it falls within a judicially-created [trade secret] "exception" to section 16600's ban on contractual nonsolicitation clauses, but is instead enjoinable because it is wrongful independent of [the contractual undertaking of confidentiality related to the trade secret] . . . ."); Dowell v. Biosense Webster, Inc., 102 Cal. Rptr. 3d 1, 10-11 (Cal. Ct. App. 2009) ("In reconciling the 'tension' between section 16600 and trade secrets, the Galante court stated: 'We distill from the foregoing cases that section 16600 bars a court from specifically enforcing (by way of injunctive relief) a contractual clause purporting to ban a former employee from soliciting former customers to transfer their business away from the former employer to the employee's new business, but a court may enjoin tortious conduct (as violative of either the Uniform Trade Secrets Act (Civ.Code, § 3426 et seq.) and/or the unfair competition law) by banning the former employee from using trade secret information to identify existing customers, to facilitate the solicitation of such customers, or to otherwise unfairly compete with the former employer. Viewed in this light, therefore, the conduct is enjoinable not because it falls within a judicially created 'exception' to section 16600's ban on contractual nonsolicitation clauses, but is instead enjoinable because it is wrongful independent of any contractual undertaking.'").

[180] *See* Whyte v. Schlage Lock Co., 101 Cal. App. 4th 1443, 1446–47 (Cal. Ct. App. 2002) ("The doctrine of inevitable disclosure permits a trade secret owner to prevent a former employee from working for a competitor despite the owner's failure to prove the employee has taken or threatens to use trade secrets. Under that doctrine, the employee may be enjoined by demonstrating the employee's new job duties will inevitably cause the employee to rely upon knowledge of the former employer's trade secrets. No published California decision has accepted or rejected the inevitable disclosure doctrine. In this opinion, we reject the inevitable disclosure doctrine. We hold this doctrine is contrary to California law and policy because it creates an after-the-fact covenant not to compete restricting employee mobility."); Cypress Semiconductor Corp. v. Maxim Integrated Prod., Inc., 236 Cal. App. 4th 243, 264–65, 186 Cal. Rptr. 3d 486, 504–05 (Cal. Ct. App. 2015) ("Nothing in the complaint, and nothing submitted by Cypress since filing the complaint, lends any color to the naked assertion that Maxim was pursuing Cypress employees with the object of extracting trade secrets from them. In the trial court Maxim suggested that Cypress's claims in this regard implicitly rested on the doctrine of inevitable disclosure, under which some jurisdictions will permit a plaintiff to substantiate a trade secret claim against a departing employee 'by demonstrating that [the] defendant's new employment will inevitably lead him to rely on the plaintiff's trade secrets.' (citations omitted). This doctrine, as Maxim pointed out, has been flatly rejected in this state as incompatible with the strong public policy in favor of employee mobility. The inevitable disclosure doctrine would contravene this policy by 'permit[ting] an employer to enjoin the former employee without proof of the employee's actual or threatened use of trade secrets based upon an inference (based in turn upon circumstantial evidence) that the employee inevitably will use his or her knowledge of those trade secrets in the new employment. The result is not merely an injunction against the use of trade secrets, but an injunction restricting employment.' Cypress expressly disclaimed any reliance on the doctrine of inevitable disclosure, but in the absence of that doctrine we can detect no basis for its allegation of threatened misappropriation. . . . Given the complete absence of any coherent factual allegations suggesting a threatened misappropriation, Cypress's second theory of relief was an inevitable disclosure claim, or it was no claim at all--and in either case, it did not state grounds for relief under California law."); Hooked Media Grp., Inc. v. Apple Inc., 55 Cal. App. 5th 323, 332–33, 269 Cal. Rptr. 3d 406, 413–14, *reh'g denied* (June 19, 2020),

There is a carefully delineated and limited right under the UTSA to *only* prevent a former employee from using trade secrets.[181] It does not empower the imposition of a non-compete provision by courts invoking the inevitable disclosure doctrine.[182]

CONCLUSION

The inevitable disclosure doctrine is rotten through to its core.[183] The doctrine relies upon the judiciary as fortune tellers, predicting how innocent persons will behave in the future, ascribing unto such unwitting innocent persons that they cannot resist temptation while simultaneously imputing wrongdoing without any foundation for doing so, other than a perceived "threat."[184] The doctrine is based upon an employer poisoning an employee with allegedly irresistible information that the employee will not be able to resist using in a future, alternative job.[185] This is the same as the employer-messenger shooting the employee-recipient of the message.[186] It is time for

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publication ordered (Sept. 30, 2020), *review denied* (Dec. 30, 2020), *review granted and cause transferred sub nom.* Hooked Media Grp. v. Apple, 472 P.3d 1064 (Cal. 2020) ("Hooked relies on circumstantial evidence that in its view generates an inference of trade secret use sufficient to create a triable issue of fact as to that element: its former employees were assigned to tasks at Apple similar to the work they did at Hooked and within weeks one of them produced a detailed plan for a recommendations system much like Hooked's version. Further, an expert opined that the source code for Apple's recommendations system was similar to the source code for Hooked's. That evidence does suggest the engineers drew on knowledge and skills they gained from Hooked to develop a product for their new employer—but California's policy favoring free mobility for employees specifically allows that. . . . Allowing an action for trade secret misappropriation against a former employee for using his or her own knowledge to benefit a new employer is impermissible because it would be equivalent to retroactively imposing on the employee a covenant not to compete. . . . For that reason, evidence that Apple hired engineers with knowledge of Hooked's trade secrets and that the engineers inevitably would have relied on that knowledge in their work for Apple does not support a claim for improper acquisition of a trade secret. Hooked did not meet its burden to show a triable issue of material fact.").

181 *See* Mahady, *supra* note 13, at 723; Vendavo, Inc. v. Long, 397 F. Supp. 3d 1115, 1140 (N.D. Ill. 2019) ("[C]ourts in this district have employed a three-factor analysis to evaluate whether a defendant ***will inevitably*** disclose trade secrets in her new position.") (emphasis added). *See generally* Lobel, *supra* note 5, at 681 ("Nondisclosure agreements (NDAs) have become standard in employment contracts. NDAs regularly include information beyond traditionally defined secrets under trade secrecy laws -typically a formula or process that is not generally known and that the company derives value from its secrecy. More expansive inclusions of information as proprietary in NDA, beyond the traditional categories of trade secrets, include general know-how, client lists, and salary information.") (footnote omitted); Egan, *supra* note 18; Sepinuck, *supra* note 18; Hillbo, *supra* note 18; *see also Confidentiality agreement*, *supra* note 18; *Duke Confidentiality Agreement*, *supra* note 18; *N.Y.C. Non-Disclosure Agreement*, *supra* note 18; *Cornell Nondisclosure Agreement*, *supra* note 18.

182 *See id.*

183 *See id.*

184 *See id.*

185 *See id.*

186 *See id.*

the inevitable disclosure doctrine to mysteriously evaporate back into the same thin air from whence it first appeared.

IS MODERN CONSTITUTIONAL LAW MAKING US UNHEALTHY?

Michael Conklin*

INTRODUCTION

This is a review of Wendy E. Parmet's new book, *Constitutional Contagion: COVID, the Courts, and Public Health*.[1] The book adequately exposes the reader to criticism of modern jurisprudence involving COVID-19. However, this review focuses on three areas of critique: comparing red states versus blue states for COVID-19 response outcomes, the inability of science to make public policy pronouncements, and the alleged connection between a healthy democracy and healthy citizens.

I. RED STATES VS. BLUE STATES

Parmet attempts to compare the state results from disparate COVID-19 policies to support the idea that the more restrictive policies in blue states are superior to the more laissez-faire policies in red states.[2] Parmet accurately notes that "many red states were barring vaccine mandates even as blue states imposed them."[3] Parmet praises New York Governor Andrew Cuomo, who became a "rock star."[4] However, the notion that blue states' policies were superior to that of red states is far from clear.

In Florida, Governor Ron DeSantis stated, "We refused to let our state descend into some type of 'Faucian' dystopia, where people's rights were curtailed and their livelihoods were destroyed."[5] Parmet alleges that these policies "proved fatal."[6] However, Florida has an age-adjusted COVID-19 mortality rate that is better than California's,[7] and mortality is only one metric

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1 WENDY E. PARMET, CONSTITUTIONAL CONTAGION: COVID, THE COURTS, AND PUBLIC HEALTH (2023).

2 *Id*.

3 *Id.* at 114.

4 *Id.* at 11.

5 Rong-Gong Lin II et al., *California vs. Florida: The Surprising Answer to Which Handled COVID Better*, L.A. TIMES (Nov. 27, 2023, 11:48 AM), https://www.latimes.com/california/story/2023-11-27/california-vs-florida-which-state-handled-covid-pandemic-better.

6 PARMET, *supra* note 1, at 51.

7 Rong-Gong Lin II et al., *California vs. Florida: The Surprising Answer to Which Handled COVID Better*, L.A. TIMES (Nov. 27, 2023, 11:48 AM), https://www.latimes.com/california/story/2023-11-27/california-vs-florida-which-state-handled-covid-pandemic-better.

through which to evaluate COVID-19 policy.[8] New York's COVID-19 policies resulted in significantly more job losses than in Florida.[9] The press has described the COVID-19 school closures as potentially "the most damaging disruption in the history of American education."[10] Additionally, there is the psychological cost of being unable to attend social events, including religious worship services.[11] Finally, some proposed blue state policies, such as those in Minnesota and New York, are likely unconstitutionally discriminatory and incur numerous harms, such as perpetuating racial stereotypes, the breeding of racial resentment, lack of trust in future governmental medical pronouncements, and creating medical ethics conflicts for doctors.[12]

II. THE SCIENCE SAYS . . .

Parmet mistakenly attributes the ability to make public policy pronouncements to science.[13] She refers to "restrictions on liberty that are supported by the science . . . "[14] and references how some courts have "little concern for what the science shows."[15] This fallacy is similar to Dr. Anthony Fauci's statements that attacks against his policy preferences are "attacks on science."[16] However, science itself cannot state which policies should be implemented. People can interpret the science to estimate the likely outcomes of different policies, but that differs from stating which policies should be implemented. Public policy considerations inevitably involve tradeoffs, such as those involving subsidizing vaccine creation, social distancing guidelines,

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8 Alyssa M. Bilinski et al., *Adaptive Metrics for an Evolving Pandemic: A Dynamic Approach to Area-level COVID-19 Risk Designations*, PNAS (Aug. 1, 2023), https://www.pnas.org/doi/epub/10.1073/pnas.2302528120.

9 Samantha Putterman, *Chart Comparing New York and Florida on COVID-19 Is Flawed. Here's Why*, POLITIFACT (Feb. 26, 2021), https://www.politifact.com/factchecks/2021/feb/26/instagram-posts/chart-comparing-new-york-and-florida-covid-19-flaw/.

10 Gabriel Hays, *NY Times Says School COVID Closures May Be 'Most Damaging Disruption' to Kids' Education in U.S. History*, FOX NEWS (Nov. 18, 2023, 2:43 PM), https://www.foxnews.com/media/ny-times-says-school-covid-closures-may-most-damaging-disruption-kids-education-u-s-history.

11 *See* Amy Orben et al., *The Effects of Social Deprivation on Adolescent Development and Mental Health*, 4 LANCET CHILD ADOLESCENT HEALTH 634 (2020).

12 Michael Conklin, *Legality of Explicit Racial Discrimination in the Distribution of Lifesaving COVID-19 Treatments*, 19 IND. HEALTH L. REV. 315, 324–27 (2022).

13 PARMET, *supra* note 1, at 4 ("Indeed, in some cases it appeared that the courts cared neither about what the science said . . .").

14 Although, Parmet conceded that such restrictions "can backfire." *Id.* at 67.

15 *Id.* at 113.

16 Carlie Porterfield, *Dr. Fauci on GOP Criticism: 'Attacks On Me, Quite Frankly, Are Attacks On Science,'* FORBES (June 9, 2021), https://www.forbes.com/sites/carlieporterfield/2021/06/09/fauci-on-gop-criticism-attacks-on-me-quite-frankly-are-attacks-on-science/?sh=60968f844542.

travel restrictions, and vaccine mandates.[17] Science can help better inform decision-makers about the tradeoffs involved, but it cannot dictate which decision should ultimately be chosen.[18] Therefore, someone supporting a vaccine mandate is no more "following the science" than someone opposing the mandate.

The evidence further refutes the notion that this discoverable scientific truth tells us what public policy decisions must be made.[19] For example, Dr. Fauci initially stated that there was "no reason" to wear masks and that wearing a mask might even make matters worse.[20] Then, the Centers for Disease Control and Prevention supported mask mandates.[21] Studies then showed that mask mandates had no positive effect on health outcomes.[22] Mask mandates are now being reinstated.[23] Interestingly, Parmet never references the studies demonstrating that mask mandates produce no positive effects.[24]

III. DOES DEMOCRACY PROTECT AGAINST COVID-19?

Parmet interestingly connects a healthy democracy with COVID-19 health outcomes. She argues that, just as preexisting unhealthy lifestyles led to worse health outcomes from COVID-19, so too does a preexisting unhealthy democracy lead to worse health outcomes from COVID-19.[25] At first, this appears to be a hyperbolic stretch, but Parmet provides some evidence to support the claim. While an autocratic regime may be able to respond more quickly to a health crisis, it may also produce great distrust in government pronouncements.[26] In non-pandemic times, numerous empirical studies found a positive association between democracy and population

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17 NICHOLAS A. CHRISTAKIS, APPOLLO'S ARROW: THE PROFOUND AND ENDURING IMPACT OF CORONAVIRUS ON THE WAY WE LIVE 89 (2020).

18 PARMET, *supra* note 1, at 72–73.

19 *See id.* at 12.

20 *Id.*

21 Deborah Netburn, *A Timeline of the CDC's Advice on Face Masks*, L.A. TIMES (July 27, 2021), https://www.latimes.com/science/story/2021-07-27/timeline-cdc-mask-guidance-during-covid-19-pandemic.

22 Bret Stephens, *The Mask Mandates Did Nothing. Will Any Lessons Be Learned?*, N.Y. TIMES (Feb. 21, 2023), https://www.nytimes.com/2023/02/21/opinion/do-mask-mandates-work.html (reporting the findings of the most comprehensive analysis of mask mandate efficacy, which emphatically found they make no difference).

23 Brad Brooks, *Mask Mandates Return at Some US Hospitals as COVID, Flu Jump*, REUTERS (Jan. 4, 2024, 10:44 AM), https://www.reuters.com/world/us/mask-mandates-return-some-us-hospitals-covid-flu-jump-2024-01-04/.

24 Although, Parmet does acknowledge that some of the decisions allegedly based on the science, such as California's closing of beaches and parks, restricted liberty "for little or no public health benefit." PARMET, *supra* note 1, at 67.

25 *Id.* at 183.

26 *Id.* at 185–86.

health.[27] It is hypothesized that this results from governments in a healthy democracy being more responsive to popular demands regarding education and healthcare investments.[28] Another theory not mutually exclusive to the previous one is that autocratic regimes choose officials largely based on loyalty, while healthy democracies choose officials based more on competency—thus leading to a more pragmatic health policy.[29]

Parmet goes even further and attempts to link America's poor COVID-19 outcomes to the product of the Electoral College system, the unwillingness of some states to expand absentee voting in the 2020 election, gerrymandering, and permitting corporate campaign donations.[30] The stated logic behind these claims is highly tenuous. For example, Parmet claims, "As certain communities face more barriers to voting and reduced representation, politicians have less and less reason to consider their health . . . ."[31] This may be somewhat true for special interest group considerations, such as a politician reasoning, "Let's not fund the XYZ cultural event because that demographic does not vote in large numbers." However, governments do not target COVID-19 policies toward isolated special interest groups in that way. For example, policies that increase COVID-19 death rates in the Black community would also increase the death rates in other communities.[32] Furthermore, politicians seemingly paid special attention to minority groups during COVID-19, which undermines the claim that they were underserved as a result of a weak democracy.[33]

While ultimately unknowable, it seems highly unlikely that America would have experienced significantly better COVID-19 health outcomes without the Electoral College system, gerrymandering, and corporate campaign donations. However, America certainly would have experienced significantly better COVID-19 health outcomes if Americans minimized unhealthy lifestyles.[34] Therefore, healthy lifestyles—something barely covered in the book—are a far more significant contributor to COVID-19 deaths than issues with American democracy.[35] The emphasis on democracy is further peculiar because citizens democratically voted with their feet

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27 *Id*. at 186.

28 *Id*.

29 PARMET, *supra* note 1, at 187.

30 *Id*. at 189–208.

31 *Id*. at 208.

32 *See, e.g.*, Michael Conklin, *Racial Preferences in COVID-19 Vaccination: Legal and Practical Implications*, 5 HOW. HUM. & C.R. L. REV. 141, 150 (2021).

33 Executive Order 13995, 86 Fed. Reg. 7193 (Jan. 26, 2021).

34 Heidi Godman, *Harvard Study: Healthy Diet Associated with Lower COVID-19 Risk and Severity*, HARV. HEALTH PUBL'G. (Dec. 1, 2021), https://www.health.harvard.edu/staying-healthy/harvard-study-healthy-diet-associated-with-lower-covid-19-risk-and-severity; Siwen Wang, *Adherence to Healthy Lifestyle Prior to Infection and Risk of Post-COVID-19 Condition*, 183 JAMA INTERNAL MED. 232 (2023).

35 *Id*.

during the pandemic by moving away from states with more restrictive COVID-19 policies and into states with less restrictive policies.[36] Finally, Florida Governor DeSantis overwhelmingly won reelection after refusing to implement more stringent COVID-19 policies.[37]

IV. MISCELLANEOUS CONSIDERATIONS

In addition to the three main focus points in this review, Parmet discusses numerous related issues, including ivermectin and hydroxychloroquine as potential treatments[38] and how the precedents set during the COVID-19 pandemic culminate in childhood vaccine laws.[39] These precedents could reach even further. For example, they could potentially erode the federal government's ability to mitigate harms associated with climate change.[40] Parmet also discusses various tangentially-related constitutional law topics, such as affirmative action in college admissions,[41] qualified immunity for police officers,[42] *New York State Rifle & Pistol Ass'n v. Bruen*, which struck down as unconstitutional New York's law requiring a special need to obtain a license to carry a concealed firearm,[43] and *Dobbs v. Jackson Women's Health Organization*, which overturned *Roe v. Wade*.[44] Parmet additionally mentions the interesting effects of how highly politically partisan COVID-19 became. For example, Marin County, a strongly liberal county in California, was known as the anti-vaccine capital of America before COVID-19.[45]

CONCLUSION

This review focuses on three main criticisms regarding the book. However, an overarching criticism throughout is that Parmet appears to

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36 *The Great Blue to Red State Migration Continues*, WALL ST. J. (Dec. 22, 2023), https://www.wsj.com/articles/census-states-migration-population-california-new-york-c6553426.

37 Patricia Mazzei & Eric Adelson, *Gov. DeSantis Wins Florida Re-election in a Rout*, N.Y. TIMES (Nov. 8, 2022), https://www.nytimes.com/2022/11/08/us/politics/desantis-wins-florida-governor.html; Steve Contorno, *Florida Gov. DeSantis signs legislation against Covid-19 mandates*, C.N.N. (Nov. 18, 2021), https://www.cnn.com/2021/11/18/politics/desantis-florida-covid-mandates/index.html.

38 PARMET, *supra* note 1, at 162.

39 *Id.* at 115.

40 *Id.*

41 *Id.* at 146.

42 *Id.* at 148–50.

43 PARMET, *supra* note 1, at 212; N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022).

44 PARMET, *supra* note 1, at 212; Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); Roe v. Wade, 410 U.S. 113 (1973).

45 Soumya Karlamangla, *Once Known for Vaccine Skeptics, Marin Now Tells Them 'You're Not Welcome,'* N.Y. TIMES (Oct. 2, 2022), https://www.nytimes.com/2022/10/02/us/covid-vaccine-marin-california.html.

implement an ends-justify-the-means approach to constitutional interpretation. In other words, certain actions are constitutional because they allegedly produce beneficial results. Parmet explicitly states her intent to "purposefully eschew[] long-standing debates about originalism versus living constitutionalism."[46] However, such a standard is functionally no standard at all, as different people will inevitably have different ends they want to justify.

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[46] PARMET, *supra* note 1, at 6.

A RIGHT TO BE HEARD: A PROPOSAL FOR INDEPENDENT VICTIM'S COUNSEL FOR SEXUAL ASSAULT SURVIVORS

Madelyn Hayward*

INTRODUCTION

In 2018, an estimated 734,630 people were raped in the United States.[1] Each year, nearly 470,000 individuals aged twelve and older become victims of rape and sexual assault.[2] One out of every six American women have been the victim of an attempted or completed rape.[3] One out of every ten rape victims are male.[4] Members of the LGBTQIA+ are four times more susceptible to violent victimization than non-LGBTQIA+ individuals.[5]

Many survivors[6] endure in silence, not reporting the crime committed against them.[7] In 2010, the Department of Justice estimated that 188,280

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1 *Statistics*, NAT'L SEXUAL VIOLENCE RES. CTR., https://www.nsvrc.org/statistics (last visited Aug. 15, 2024).

2 *16 Sexual Assault and Rape Statistics for 2023*, DORDULIAN L. GRP., https://www.dlawgroup.com/sexual-assault-statistics-for-2023/ (last visited Sept. 11, 2024). *See also Victims of Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/victims-sexual-violence (last visited Sept. 11, 2024) ("On average, there are 463,634 victims (age 12 or older) of rape and sexual assault each year in the United States.").

3 *Victims of Sexual Violence: Statistics*, *supra* note 2. 14.8% of women have been the victim of rape in their lifetime. *Id.* 2.8% of women have been the victim of an attempted rape. *Id.* "Nearly every woman can tell you about an experience with either sexual harassment or assault. Whether it is someone they know or a stranger, a relative[,] or someone they have never seen before, women across the world experience all different levels of sexual violence." Erin J. Heuring, *Til It Happens to You: Providing Victims of Sexual Assault with Their Own Legal Representation*, 53 IDAHO L. REV. 689, 692 (2017).

4 *Victims of Sexual Violence: Statistics*, *supra* note 2. "About 1 in 9 men were made to penetrate someone during his lifetime." *About Sexual Violence*, CDC, https://www.cdc.gov/violence prevention/sexualviolence/fastfact.html (last visited Sept. 11, 2024).

5 *2023 Sexual Assault Statistics*, CHARLIE HEALTH, https://www.charliehealth.com/post/2023-sexual-assault-statistics (last visited Sept. 11, 2024).

6 "It has been suggested that the first step toward empowerment of victims is a change in language from the term 'victim' to that of 'survivor.' 'Survivor' implies taking control over one's situation." Ellen Yaroshefsky, *Balancing Victim's Rights and Vigorous Advocacy for The Defendant*, 1989 ANN. SURV. AM. L. 135, 136 n.1 (1990).

7 *See About Sexual Violence*, *supra* note 4 ("Sexual violence affects millions of people each year in the United States. Researchers know the numbers underestimate this problem because many cases are unreported.").

people were victims of sexual assault, but fewer than forty percent of those assaults were reported to law enforcement.[8] There are many reasons why sexually violent crimes are not reported to the police, including victims fearing the criminal justice system.[9] Former President Barack Obama stated:

> It is up to all of us to ensure victims of sexual violence are not left to face these trials alone. Too often, survivors suffer in silence, fearing retribution, lack of support, or that the criminal justice system will fail to bring the perpetrator to justice. We must do more . . . .[10]

One critical problem is that the criminal justice system has silenced crime victims in matters that directly concern them.[11] It has been over a decade since President Obama launched the "It's On Us" campaign against sexual assaults with no significant change in the treatment of sexual assault survivors.[12] The criminal justice system must do more![13]

The solution lies in the military's current advocacy program for sexual assault victims.[14] Much like the general population, the epidemic of sexual violence is seen within the military ranks.[15] The military recognized the need to have sexual assault survivors *be heard* and now provides victims with an attorney whose sole responsibility is representing the victim's interest

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8 Heuring, *supra* note 3, at 692.

9 *Id.* at 725. Of the sexual violence crimes not reported to police from 2005-2010, 13% of victims believed the police would not do anything to help, 2% believed the police could not do anything to help, 8% believed it was not important enough to report, and 13% believed it was a personal matter. *The Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system (last visited Aug. 15, 2024). "This is a problem that faces not only the United States but also neighboring countries like Canada." Heuring, *supra* note 3, at 725.

10 Heuring, *supra* note 3, at 727 (internal citation omitted).

11 *See* Yaroshefsky, *supra* note 6, at 138–39, 154.

12 *See* Tanya Somanader, *President Obama Launches the "It's On Us" Campaign to End Sexual Assault on Campus*, THE WHITE HOUSE (Sept. 19, 2014, 2:40 PM ET), https://obama whitehouse.archives.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus.

13 *See* Heuring, *supra* note 3, at 727 (internal citation omitted).

14 *See* Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO STATE J. CRIM. L. 67, 85 (2015).

15 *See* Katherine V. Norton, Comment, *From Court Martial to College Campus: Incorporating the Military's Innovative Approaches to Sexual Violence into the University Setting*, 55 CAL. W. L. REV. 465, 468–69 (2019) ("Statistics revealing the prevalence of sexual violence within the military can be overwhelming. Female service members 'are now more likely to be raped by fellow soldiers than they are to be killed in combat.'"). *See also* Beloof, *supra* note 14, at 85. 18,900 military servicemembers experienced unwanted sexual contact. *Scope of the Problem: Statistics*, RAINN, https://www.rainn.org/statistics/scope-problem (last visited Sept. 11, 2024). However, sexual violence in the military remains vastly underreported. Norton, *supra* note 15, at 469. In 2017, a total of 696 formal sexual assault complaints were filed within the military, 81% of these incidents occurred while the service members were on duty. *Id.*

throughout the criminal prosecution.[16] All sexual assault survivors, civilian and military alike, should be appointed independent counsel to represent them throughout the criminal justice process.[17]

Meg Garvin, executive director of the National Crime Victims Law Institute, stated: "In the criminal justice system, there are three entities: defendant, state, and victim. All three need *to be heard*. All three need to have legal counsel."[18] While victims of all violent crimes could benefit from independent representation, an initial step needs to be taken to start such a program.[19] Like medical triage, the criminal justice system must prioritize those survivors in the most critical condition.[20] Sex-related offenses differ from other crimes because of their deeply invasive impact on the victim, the difficulty in collecting evidence, and the demeaning social attitudes of the victim and the justice system.[21] As such, this Note focuses on providing independent representation for sexual assault survivors.[22]

This Note considers the military's Special Victim Counsel program in Part I.[23] Part II explains why such counsel is needed and compares the current services provided by victim advocates or victim coordinators to the potential of independent counsel.[24] Part III suggests how to implement an Independent Victim's Counsel program and furnishes model legislation for federal and state governments to enact.[25] It is time for the criminal justice system to do more by showing survivors they are worth being heard.[26]

I. THE VOICE OF THE VICTIM: THE MILITARY'S SVC PROGRAM

Sexual violence is prevalent in the military, though these crimes are not normally reported.[27] The military has experienced several high-profile

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16 Beloof, *supra* note 14, at 85 ("The established procedures, including Special Victim Counsel for sexual assault victims have been established in an effort to 'ensur[e] that sexual assault victims are treated with . . . dignity and respect.'").

17 *See id.* at 67; Heuring, *supra* note 3, at 689.

18 Joseph Darius Jaafari, *A Unique Military Program Helps Sexual Assault Survivors. But Not All of Them.*, THE MARSHALL PROJECT (July 20, 2019, 6:00 AM), https://www.themarshallproject.org/2019/07/30/a-unique-military-program-helps-sexual-assault-survivors-but-not-all-of-them. (emphasis added).

19 *See id.*

20 *See generally* Charles C. Yancey & Maria C. O'Rourke, *Emergency Department Triage*, STATPEARLS PUBL'G (Aug. 28, 2023), https://www.ncbi.nlm.nih.gov/books/NBK557583/.

21 Heuring, *supra* note 3, at 729.

22 *See generally id.*

23 *See generally* Louis P. Yob, *The Special Victim Counsel Program at Five Years: An Overview of Its Origins and Development*, 2019 ARMY L. 64, 65 (2019).

24 *See generally* Margaret Garvin, *Giving Meaning to Apostrophe in Victim[']s Rights*, 87 BROOK. L. REV. 1209 (2022).

25 *See generally* 10 U.S.C. § 1044e.

26 *See* Heuring, *supra* note 3, at 727.

27 *See id.* at 701–02 ("It is in the best interests of the military and society as a whole to attempt to eliminate rapists from the ranks because of the negative effects sexual assault has on military

incidents that have caught media attention and alerted the nation of the sexual assault epidemic.[28] For example, in 2003, there were many allegations of sexual violence from cadets living at the Air Force Academy in Colorado Springs.[29]

Many solutions were enacted to prevent these crimes.[30] In 2004, Congress passed a law requiring public submission of annual sexual assault reports.[31] In 2005, the Department of Defense established the Sexual Assault Prevention and Response Office (SAPRO) to address the overall prevalence of sexual violence between service members.[32] However, none of these actions fully supported survivors of sexual assault.[33] In 2012, fifty-nine enlistees accused thirty-two instructors at Lackland Air Force Base[34] of crimes ranging from seeking unprofessional relationships to sexual assaults.[35]

Criminal cases like those from the Lackland Air Force Base and the documented voices of victims in the film *The Invisible War* pushed Congress to a new solution.[36] Since 1985, military lawyers had statutory authority to provide general legal assistance to eligible individual clients, but it was not until 2012 that legislation expanded this authority to sexual assault victims.[37]

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members and units. But, in hindrance of this goal, sexual assault victims' reluctance to report their assaults continues to be a problem today.").

28 Yob, *supra* note 23, at 65.

29 Norton, *supra* note 15, at 470 ("One survey found that 12% of the 2003 female graduates 'were the victims of rape or attempted rape in their four years at the academy.' Another survey of 579 female cadets revealed almost 70% of female cadets 'said they had been the victims of sexual harassment, of which 22 [%] said they experienced 'pressure for sexual favors.'").

30 *See id.* at 65–66.

31 Heuring, *supra* note 3, at 700. *See also id.* at 706 ("The Defense Authorization Act for FY 2005 established the first requirement for the DoD to answer to Congress about the number of incidents of sexual assault."). Since the reporting requirement was passed into law, the number of sexual assaults reported has steadily climbed. *Id.* at 708.

32 Norton, *supra* note 15, at 470. "In the decade since the SAPRO was created, the military has made great strides in implementing programs to address sexual violence among service members." *Id.* at 470–71. See *id.* at 475–75, for a discussion on the military's two-tiered reporting system and expedited transfer procedures for allegations of sexual assault.

33 *See* Heuring, *supra* note 3, at 703–04.

34 "Lackland AFB is the first stop for newly enlisted Airmen to begin training. There, enlistees undergo boot camp and experience the military way of life for the first time." *Id.* at 703.

35 *Id.* at 704. The crimes at Lackland Air Force Base began in 2009 but were not reported until 2012. *Id.* "An aspect of military life that sometimes can differ from civilian life is the control a superior can exert over a subordinate, especially a new and vulnerable enlistee." *Id.* at 703–04. "A few years earlier, more than 80 women were assaulted during several days of drunken revelry at the Tailhook Association convention in Las Vegas, a case that led to the resignation of the Navy secretary and two admirals." *Id.* at 704.

36 *Id.* at 718–19.

37 Yob, *supra* note 23, at 66.

This allowed the U.S. Air Force to initiate the Special Victims Counsel (SVC) pilot program.[38]

The U.S. Air Force worked with the National Crime Victim Law Institute to train sixty of their judge advocates to begin representing sex assault victims starting on January 28, 2013.[39] The SVC was tasked with both advising the survivor of sexual violence of the legal process and protecting the victim's interest throughout all stages of the investigation process, including any judicial proceedings.[40] The first actual test of the scope and limits of the SVC in a courtroom setting was decided in *LRM v. Kastenberg*.[41]

In *Kastenberg*, the trial judge ruled that the victim had a right to be heard on factual matters but held that the victim had no standing to present legal arguments to the court through her SVC.[42] The Air Force Judge Advocate General certified the matter for review by the Court of Appeals for the Armed Forces.[43] On appeal, LRM argued that the military judge had violated her procedural rights under Military Rules of Evidence (MRE) 412 and 513, the Crime Victim's Rights Act, and privacy interests protected by the Fourteenth Amendment by denying her right to be heard through the SVC.[44] The Court of Appeals for the Armed Forces decided that the victim

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38 *Id.* "Most military justice practitioners first viewed the concept of a legal representative for victims as foolhardy as it was foreign . . ." John C. Olson, Jr., *Discovery for Three at a Table Set for Two: An Alteration of Rule for Courts-Martial 701 to Accommodate the Practical and Philosophical Realities of the Victim as a Limited Third Party*, 2015 ARMY L. 30, 33 (2015).

39 Yob, *supra* note 23, at 66.

40 Erin Gardner Schenk & David L. Shakes, *Into the Wild Blue Yonder of Legal Representation for Victims of Sexual Assault: Can U.S. State Courts Learn from the Military?*, 6 U. DENVER CRIM. L. REV. 1, 2 (2016); Norton, *supra* note 15, at 471.

41 LRM v. Kastenberg, 72 M.J. 364, 367 (C.A.A.F. 2013). *See* Yob, *supra* note 23, at 66.

42 Yob, *supra* note 23, at 66. Specifically, LRM wanted to assert "legal arguments as to why certain factual information was not relevant, and therefore inadmissible evidence, as well as why medical records and counseling conversations were inadmissible" under psychotherapist-patient privilege. Shakes, *supra* note 40, at 15–16.

43 Yob, *supra* note 23, at 66. The SVC initially filed a petition with the Air Force Court of Criminal Appeals, which was denied for lack of jurisdiction to rule on the victim's request through her SVC. *Id.* However, the Court of Appeals for the Armed Forces held that the court had subject matter jurisdiction to decide the issue of victim's rights. *Kastenberg*, 72 M.J. at 367. The United States Court of Appeals for the Armed Forces is the highest appellate court in the U.S. military justice system. Shakes, *supra* note 40, at 2.

44 Christopher J. Goewert & Seth W. Dilworth, *The Scope of a Victim's Right to be Heard Through Counsel*, 40 THE REP. 27, 27–28 (2013). *See also What is the Function of the Counsel for the Victim?*, 4 L.A. PUB. INT. L.J. 65, 65 (2013-2014). *Compare* MIL. R. EVID. 412 *with* FED. R. EVID. 412. "Military Rule of Evidence 412 'is intended to shield victims of sexual assaults from the often embarrassing and degrading cross-examination and evidence presentations common to sexual offense prosecutions.'" United States v. Taylor, No. ARMY 20160744, 2018 CCA LEXIS 499, at *10–11 (A. Ct. Crim. App. Oct. 16, 2018) (quoting United States v. Gaddis, 70 M.J. 248, 252 (C.A.A.F. 2011)). *Compare* MIL. R. EVID. 513 *with* FED. R. EVID. 501.

would be characterized as a non-party with limited participant standing to be heard through their SVC attorney,[45] subject to reasonable limitations.[46]

The *Kastenberg* decision set a precedent for courts to respect and protect victims' rights by allowing an SVC to advocate for the victims' interests in a trial.[47] Congress reaffirmed the decision in the National Defense Authorization Act of 2015 by requiring the Military Rules of Evidence to be amended to reflect that victims may exercise their right to be heard through counsel, "including a Special Victims' Counsel."[48]

The SVC legislation—10 U.S.C. § 1044e—signed into law on December 23, 2013, mandated that each military service provide SVCs to eligible victims who requested representation.[49] The majority of the military branches refer to attorneys representing victims as SVCs, except for the Navy and Marine Corps, which refer to them as Victims' Legal Counsel (VLC).[50]

The Judge Advocate General certifies SVCs.[51] Under 10 U.S.C. § 1044e, the different military branches must "provide enhanced specialized training for all prospective SVCs."[52] Their training includes the related legal

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45 *Kastenberg*, 72 M.J. at 368–69, *superseded by statute*, 10 U.S.C.A. § 806b (West 2021), *as recognized in In re* C. P-B, 78 M.J. 824, 827 (C.G. Ct. Crim. App. 2019). *See* Yob, *supra* note 23, at 66.

46 *Kastenberg*, 72 M.J. at 371 ("A military judge has discretion under [Rule for Courts-Martial] 801, and may apply reasonable limitations, including restricting the victim or patient and their counsel to written submissions if reasonable to do so in context."); U.S. v. Wells, No. ACM 40222, 2023 CCA LEXIS 222, at *24 (A.F. Ct. Crim. App. May 23, 2023) ("Notwithstanding a victim's right to be reasonably heard, a military judge has the responsibility to ensure that the dignity and decorum of the proceedings are maintained, and exercise reasonable control over the proceedings.").

47 Yob, *supra* note 23, at 66 (explaining that the *Kastenberg* ruling was codified in Article 6b of the Uniform Code of Military Justice, which denotes many specific rights for victims including the right to petition military appellate courts for redress).

48 Shakes, *supra* note 40, at 3; Rhea A. Lagano, Sarah W. Edmundson, & L. Dustin Grant, *The Air Force SVC Program: The First Five Years*, 44 THE REP. 31, 33 (2017) ("In the 2015 NDAA, Congress further addressed sexual assault in the military and expanded the role of SVCs."); *see* Yob, *supra* note 23, at 69–70 ("The 2015 [National Defense Authorization Act] included: [e]xpanding eligibility for SVC to sexual assault victims in the Reserve Component and National Guard; [a]llowing victims to express their preference to convening authorities as to whether they desire prosecution in military or civilian courts; [a]mending Article 6b of the UCMJ to reflect that SVCs can represent victims and speak for them at proceedings, as opposed to merely accompanying victims; [e]xpanding the privilege under MRE 513 concerning communications between psychotherapists and patients to include other licensed mental health professionals and increasing the burden on a party seeking production or admission of medical records to obtain these records or ask for a judicial in camera review.").

49 Yob, *supra* note 23, at 67.

50 *Special Victims' Counsel/ Victims' Legal Counsel*, U.S. DEP'T OF DEF. SEXUAL ASSAULT PREVENTION & RESPONSE, https://sapr.mil/svc-vlc (last visited Aug. 25, 2024). As with the small name differences, each military branch has implemented its victims' counsel program slightly different. Grant, *supra* note 48, at 34 ("Generally speaking, regardless of which Service the [defendant] is from, a victim requesting [representation] . . . will receive a victim's counsel from the same Service as the victim.").

51 Yob, *supra* note 23, at 67.

52 *Id.* "In October 2013, the Army conducted its first SVC certification course." *Id.* at 68 ("The course offered training on SVC roles and responsibilities, professional responsibility, victim psychology,

issues for sex-related offenses, the victims' rights, the effect of trauma on memory, interviewing techniques, and other technical case management skills.[53]

The SVC law covers a broad spectrum of sexual offenses, from rape to indecent touching or exposure, forcible sodomy, and any sexual violence against child victims.[54] Victims are eligible for legal assistance services if the offender is subject to the Military Justice Code.[55] Victims may be active-duty military members and their adult dependents, Department of Defense civilians (if the offender was a military service member),[56] child victims of sexual assault by representing the child through the child's guardian,[57] retired veterans, and other specialized categories.[58] The National Defense Authorization Act of 2020 authorized SVCs to represent victims of domestic violence offenses.[59] The SVC program also narrowed eligible clients to

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investigative issues, victim services, relevant MREs, and included a presentation from an experienced Air Force SVC on lessons learned.").

53 Heuring, *supra* note 3, at 723–24.

54 Yob, *supra* note 23, at 67 ("Defining a sexual offense as a violation of Articles 120, 120a, 102b, 120c, or 125 of the UCMJ, or an attempt to commit any of those offenses.").

55 David Thompson, *Supporting Victims of Sexual Misconduct: Three Judge Advocate General's Corps-Driven Solutions to Three Problems Revealed by the Fort Hood Independent Review Committee Report*, 101 TEX. L. REV. 653, 659 (2023) ("Then, in 2020 the [SVC] program narrowed eligible clients to those victims whose offenders are subject to [Uniform Code of Military Justice] jurisdiction.").

56 *Special Victim Counsel (SVC) Program*, U.S. ARMY JAPAN, https://www.usarj.army.mil/staff/sja/svc/#:~:text=Family%20Member%20of%20a%20Soldier,the%20offender%20was%20a%20Soldier) (last visited Aug. 25, 2024). The 2016 National Defense Authorization Act authorized the armed Services to expand SVC representation to Department of Defense employees. Yob, *supra* note 23, at 70.

57 Aerotech News, *Army Special Victims' Counsel Program*, HIGH DESERT WARRIOR, (Sept. 3, 2020, 12:18PM), https://www.aerotechnews.com/ntcfortirwin/2020/09/04/special-victims-counsel-program/. *See also* Yob, *supra* note 23, at 69 ("Initially, the SVC Program did not authorize child representation. The statutory requirement for representation, enacted shortly after the SVC Program stood up, included dependent children as eligible clients[,] and included all offenses under Article 120c, UCMJ, covering sexual offenses against children. As a result, the Army SVC Program began training SVCs [in] child representation courses in August 2014. Army SVCs who complete child representation courses in addition to their baseline SVC certification can represent child sexual assault clients, with prior SVC PM permission."); Grant, *supra* note 48, at 32.

58 Yob, *supra* note 23, at 67; Aerotech News, *supra* note 57. The Secretary of the Army extended SVC serves to Reserve Component Soldiers and their adult family members in May 2014. Yob, *supra* note 23, at 69. However, "[h]undreds of civilian victims are excluded from legal representation because the National Defense Authorization Act does not have language that specifically includes civilians." Jaafari, *supra* note 18 ("Leaders among the military's sexual assault prevention teams said they do allow exceptions for civilians to get a lawyer, but it's rare to grant those requests.").

59 Joshua D. Bell, Note, *The Domestic Violence Victim Addition to the SVC and LA Programs*, 2021 ARMY L. 23, 23 (2021). The 2020 NDAA provided that each Service must implement a program for "legal counsel" for victims of domestic violence offenses before December 1, 2020. *Id.* While the term "legal counsel" was not defined in the Act, the Army gave this role to the legal assistance attorneys (LAAs). *Id.* at 24 ("On certain occasions, an LAA and SVC will dually represent a domestic violence victim."). An LAA will represent the client on specific issues such as marriage, legal separation, divorce, financial nonsupport, and child custody and visitation. *Id.* Meanwhile, the

victims whose offenders are subject to the Uniform Code of Military Justice.[60]

Officials who receive reports of such sex-related offenses are required to inform the victim of their right to consult with an SVC at the time they report the crime under the statute.[61] The military provides an SVC attorney at no cost to the victim.[62]

The statute also specifies that a victim and SVC have an attorney-client relationship.[63] The SVC's duty and loyalty is to the client—"not any other person, organization, or entity, including the [military]."[64] As the victim's sounding board, SVCs become the person the survivor can trust and confide in.[65] SVCs educate clients on their enumerated rights, the process of the military justice system, and the various non-legal aid available to them.[66] Survivors are empowered to "make the right decision for them[selves] personally, professionally, and emotionally."[67]

"SVC provides legal services associated with the criminal case or any adverse administrative cases." *Id.*

60 Thompson, *supra* note 55, at 659.

61 Yob, *supra* note 23, at 67–68. "On November 25, 2015, President Obama signed the FY 2016 National Defense Authorization Act (NDAA) into law, which 'expanded both the categories of victims entitled to [Special Victims Counsel] services and the types of services that SVC provides[. . .].'" Heuring, *supra* note 3, at 722–23. The 2016 National Defense Authorization Act requires investigators and trial counsel to inform the victim that they are entitled to SVC representation before questioning a sexual assault victim. Yob, *supra* note 23, at 70; Grant, *supra* note 48, at 33 ("The 2016 NDAA continued the trend of expanding victims' rights and SVC involvement in the military justice process."). *See also* Thompson, *supra* note 55, at 667 ("Congress passed [the] National Defense Authorization Act for Fiscal Year 2022 (NDAA 2022) Section 545. Section 545 amended Section 549 by expanding the disposition notification requirement to include victims of any 'alleged sex-related offense' (from the more limited definition of only victims of 'alleged sexual assault'). Section 545 also now explicitly requires commanders to include in the notification the type of action taken on such case, the outcome of the action (*including any punishments assigned or characterization of service, as applicable*), and such other information as the commander determines to be relevant.") (internal quotation marks omitted) (emphasis in original).

62 Shakes, *supra* note 40, at 2.

63 Yob, *supra* note 23, at 67–68. *See also* Heuring, *supra* note 3, at 720–22 ("Section 1716 gave the victim another important protection: the relationship between a Special Victim's Counsel (SVC) and a victim is a relationship between an attorney and a client, making it subject to attorney-client privileges.").

64 Aerotech News, *supra* note 57 ("The SVC's primary duty and loyalty is to the client, not to any other person, organization, or entity, including the Army.").

65 *What is the Function of the Counsel for the Victim?*, *supra* note 44, at 65.

66 Allison A. DeVito, *Military Justice: An Introduction to Special Victims' Counsel Program*, 40 THE REP. 4, 5 (2013); Beloof, *supra* note 14, at 73–74; Heuring, *supra* note 3, at 722. 10 U.S.C. § 1044e authorized "SVCs to provide legal consultation to their clients on [many] issues related to available services and procedures, and to accompany their clients at any proceeding in connection with the reporting, military investigation, and military prosecution of an alleged sexual offense." Yob, *supra* note 23, at 67–68; Aerotech News, *supra* note 57 ("The SVC's primary duties are to advocate for the best interest of the client and advise them on a range of legal matters related to the assault.").

67 Chrissy L. Schwennsen, Note, *A Voice for the Victim: A Day in the Life of an SVC*, 2020 ARMY L. 22, 23 (2020) ("A client may decide against participating in a court-martial even if the evidence is strong and the chance of conviction is high. On the other hand, the client may want to push forward

SVCs protect the victim's rights at every step of the justice process, including law enforcement interviews, prosecution and defense interviews, pre-trial hearings, and court-martial proceedings.[68] Any victim interview by the defense must occur in the presence of the trial counsel and the SVC.[69] In the client's interest, SVCs can limit contact with prosecutors, defense investigators, and law enforcement.[70]

A rape victim who an SVC represented throughout the process explained that a court-martial is like a chess game: "The defense and the prosecution are the people making the moves, and the victims are just chess pieces that don't know the overall plan. The SVC was able to support me while the prosecution and defense were moving their chess pieces."[71] SVCs engage with the court in motions.[72] During the trial, SVCs can only be heard if the military judge explicitly requests so.[73] "There is no third table in the courtroom,"[74] instead, the SVC observes the hearing or trial from the gallery and stands when addressed by the court.[75]

The SVC Program motto is *Vox Victimarum*—the voice of the victim, which SVCs successfully become by removing barriers and empowering clients.[76] One of Richard Hanrahan's experiences as an SVC in the United

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even though there are significant evidentiary issues that the government may not be able to overcome at trial."). SVCs counsel their clients on their legal options and guide what to expect based on the facts and information available to them. Grant, *supra* note 48, at 35. "Also, no one in a victim's chain of command or the accused's chain of command may influence a special victims' counsel in providing legal support to a victim." *Army Special Victim Counsel Program*, MIL. REP., https://www.military.com/military-report/army-special-victim-counsel-program.html (last visited Aug. 25, 2024).

68 *Special Victims' Counsel Program*, U.S. AIR FORCE, https://www.afjag.af.mil/Portals/77/documents/SVC/Victms'_Counsel_Program_Jan_22.pdf?ver=wy6gftNFAHuWjgw_94qwTA%3d%3d (last visited Aug. 25, 2024) ("SVCs enforce victims' rights to safety, privacy, and right to be treated fairly and respectfully."). *See also* Schwennsen, *supra* note 67, at 22; Yob, *supra* note 23, at 70; Grant, *supra* note 48, at 33–34.

69 1 Manual for Courts-Martial § 5-11.60 (2023) (citing UCMJ Article 6(f)(2)). The Uniform Code of Military Justice mandates that defense counsel make any request to interview the victim through the SVC. *Id. See also* Yob, *supra* note 23, at 70 ("The 2017 [National Defense Authorization Act] [a]mended Article 46 of the UCMJ to require a defense counsel request to interview a sex assault victim to go through the victim's counsel (if the victim is represented) and codified the victim's right to have their SVC or the trial counsel present at any defense interview [and] [p]rovided that on sentencing, a court-martial shall consider the impact of the offense on 'the financial, social, psychological, or medical well-being of any victim of the offense.'") (internal citation omitted).

70 Frank E. Kostik Jr. & Elizabeth L. Lippy, *Consequence of Change: An Argument to Increase Litigation Experience to Fill the Void Left by the Changes to the Preliminary Hearing in the Military Justice System*, 43 AM. J. TRIAL ADVOC. 109, 125 (2019).

71 Shakes, *supra* note 40, at 10.

72 Yob, *supra* note 23, at 70.

73 *What is the Function of the Counsel for the Victim?*, *supra* note 44, at 65.

74 *Id.*

75 Dilworth, *supra* note 44, at 30.

76 Schwennsen, *supra* note 67, at 23; James Krauer, *Special Victims' Counsel, Here to Help*, JOINT BASE CHARLESTON (Feb. 23, 2015), https://www.jbcharleston.jb.mil/News/Commentaries/Display/Article/860594/special-victims-counsel-here-to-help/. *See also* Michael Hopkins, *Victims'*

States Air Force illustrates this.[77] He represented a victim raped by her former military training instructor.[78] The victim requested that her family not find out about the case because the victim's cultural beliefs viewed such an incident as disgracing her and her family.[79] Amid the court-martial process, a friend of the accused threatened to contact the victim's family and tell them about the case.[80] The SVC shut down this intimidation plot, and the friend's commander issued them a reprimand and a no-contact order.[81] Richard Hanrahan, as the SVC, also advised and asserted the victim's rights, connected her with culturally-based support groups, and ran interference for her with other witnesses.[82] After the case, the victim indicated that "she couldn't have imagined going forward with the case" without an SVC, and she would have likely become another statistic by giving up on the legal system before the trial even began.[83]

The SVC program is imperfect and has problems that must be resolved.[84] However, it is an innovative approach to victim rights because no other system in the United States gives victims their own lawyer.[85] Regardless of whether the survivor obtained their desired outcome, many survivors surveyed reported having a positive experience working with Special Victim's Counsel.[86] The victim's voice plays a meaningful role in the justice system.[87]

Counsel Program, U.S. A.F. (Jan. 10, 2018), https://www.afjag.af.mil/Portals/77/documents/SVC/Victms'_Counsel_Program_Jan_22.pdf?ver=wy6gftNFAHuWjgw_94qwTA%3D%3D.

77 Richard A. Hanrahan, *Through Her Eyes—The Lessons Learned as a Special Victim's Counsel*, 40 THE REP. 23, 23 (2013).

78 *Id.*

79 *Id.* ("She spoke up, told the truth [about the incident], but decided not to tell her husband and family. She decided to face this process alone.").

80 *Id.* at 24.

81 *Id.*

82 *Id.*

83 *Id. See also* Beloof, *supra* note 14, at 74 ("Once the criminal process is engaged, SVCs provide significant legal support to the victim.").

84 *See generally* Thompson, *supra* note 55; Sean P. Mahoney, *Taking Victims' Rights to the Next Level: Appellate Rights of Crime Victims Under the Uniform Code of Military Justice*, 225 MIL. L. REV. 682 (2017).

85 Heuring, *supra* note 3, at 713. *See also* Norton, *supra* note 15, at 471 ("The SVC program is described as 'innovative,' because it not only provides legal advice to survivors of sexual assault, but also enables Air Force attorneys 'to have standing in court to represent the interests of their clients.'") (internal citations omitted).

86 Norton, *supra* note 15, at 484–85. *See also* Beloof, *supra* note 14, at 75 ("The outcome of an acquittal in some of the cases did not lessen the value the victim placed on the SVC's representation."). "Of related significance are the results of SVC victim satisfaction surveys from the Air Force (the only branch to conduct a survey): 92% were "extremely satisfied" with the advice and support the SVC provided during the Article 32 hearing and court-martial; 98% would recommend that other victims request an SVC; and, finally, 96% indicated their SVC helped them understand the investigation and court-martial processes." *Id.* at 74.

87 Schwennsen, *supra* note 67, at 23.

II. SEEN, BUT NOT HEARD: WHY INDEPENDENT VICTIM'S COUNSEL ARE NEEDED

Just as Congress enacted different laws to help the sexual assault epidemic in the military, progressive reforms have been taken at federal and state levels to better care for victims of crime.[88] However, the failure to authorize independent victim's counsel leaves the victim seen but not heard—undermining the victim's rights and revictimizing them throughout the criminal justice process.[89] This section describes the evolution of victims' rights and the current services provided to survivors of sexual assault in the court system, then compares such services to the potential of independent counsel.[90]

A. The Powerlessness of the Victim—The Victims' Rights Movement

History has relegated the role of a victim in the criminal justice system to a participatory role—a witness or a piece of evidence.[91] The Crime Victims' Rights Movement developed because the victim's absence from criminal prosecutions conflicted with the public's sense of justice.[92] With the increase in sex crimes in the late-1960s to early-1970s, the feminist movement kickstarted reform by advocating for better treatment of women who were raped.[93] This ultimately led to passing rape shield laws to protect survivors of sexual violence.[94]

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88 *See* Shakes, *supra* note 40, at 8–9; Mahoney, *supra* note 84, at 685–87.

89 Garvin, *supra* note 24, at 1125.

90 *See generally id.* at 1209.

91 *Id.* at 1111 ("Crime victims have a long history of having a participatory role in criminal investigation and prosecution in this country, a role which began to regress in the late nineteenth century and continued regressing through the mid-twentieth century."). "...[V]ictim powerlessness is a structural problem." Yaroshefsky, *supra* note 6, at 154. The President's Task Force on Victims of Crime report, in 1982, concluded that "the criminal justice system has lost an essential balance . . . . [T]he system has deprived the innocent, the honest, and the helpless of its protection . . . . The victims of crime have been transformed into a group oppressively burdened by a system designed to protect them." Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 865 (2007). "In its most sweeping recommendation, the Task Force proposed a federal constitutional amendment to protect crime victims' rights 'to be present and to be heard at all critical stages of judicial proceedings.'" *Id.* at 866.

92 Cassell, *supra* note 91, at 865. *See also* Garvin, *supra* note 24, at 1111–12 ("[T]he modern Crime Victims' Rights Movement emerged with a goal of improving the criminal justice system by reclaiming a meaningful role for crime victims through rights.").

93 Shakes, *supra* note 40, at 8–9; Yaroshefsky, *supra* note 6, at 141.

94 Yaroshefsky, *supra* note 6, at 141 ("[W]omen are no longer subjected to cross-examination about their past sexual history unless it is relevant to issues in the case."); Shakes, *supra* note 40, at 8–9 ("[B]y the mid-1980s, most states had some type of rape reform law. Among those reforms was the integration of statutory rape shield laws, the first of which was developed in 1975, which generally prevent--although to varying degrees and with varying levels of specificity--questioning as to evidence, opinion, or reputation of a sexual assault victim's past sexual conduct.").

A decade later, Congress passed the first federal victims' rights legislation—the Victim and Witness Protection Act.[95] Congress began seriously examining the rights of crime victims in the mid-1980s by addressing victim restitution, compensation, and participation of victims at presentencing proceedings.[96] The Victims' Rights and Restitution Act of 1990 (VRRA) provided crime victims with a statutory list of rights.[97]

In 2004, Congress passed the Justice for All Act, which repealed the VRRA and replaced it with the Scott Campbell, Stephanie Roper, Wendy Preston, Louarna Gillis, and Nila Lynn Crime Victims' Rights Act (CVRA).[98] The CVRA created a bill of rights for victims, provided funding for victims' legal services, and created remedies when victims' rights were violated.[99] Senator Feinstein, who cosponsored the CVRA with Senator Kyl, explained that the CVRA was "meant to correct, not continue, the legacy of the poor treatment of crime victims in the criminal process."[100]

Through the CVRA, crime victims have the right to be notified of court hearings, the right to attend those hearings, the right to be treated with fairness, and the right to be reasonably heard at any public proceeding in the

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95 Cassell, *supra* note 91, at 866. The Victim and Witness Protection Act "gave victims the right to make an impact statement at sentencing and provided expanded restitution." *Id.*

96 Mahoney, *supra* note 84, at 685. Congress passed several acts to protect victims' rights, including "the Victims of Crime Act of 1984, the Victims' Rights and Restitution Act of 1990, the Violent Crime Control and Law Enforcement Act of 1994, the Antiterrorism and Effective Death Penalty Act of 1996, and the Victim Rights Clarification Act of 1997." Cassell, *supra* note 91, at 866.

97 Mahoney, *supra* note 84, at 685 ("The VRRA required federal law enforcement and prosecutors to make their best efforts to ensure that all crime victims are afforded seven rights identified in the statute: 1) notice of court proceedings; 2) opportunity to confer with the prosecutor; 3) be present at public court proceedings regarding the crime; 4) reasonable protection from the accused; 5) fair and respectful treatment for the victim's dignity and privacy; 6) restitution; and 7) information about the offender's conviction, sentencing, imprisonment, and release."). *See also* Cassell, *supra* note 91, at 866–67. "The prime illustration of the ineffectiveness of the Victims' Rights Act comes from the Oklahoma City bombing case, where victims were denied rights protected by statute in large part because the rights were not listed in the criminal rules." *Id.* at 867.

98 Mahoney, *supra* note 84, at 686; Heuring, *supra* note 3, at 730. "In addition to slightly expanding the rights provided in the VRRA, the CVRA included a definition of 'crime victim': a 'person directly and proximately harmed as a result of the commission of a federal offense or an offense in the District of Columbia.' [T]o protect the rights provided in the CVRA, victims were given statutory authority to petition the court of appeals for a writ of mandamus if they believed a trial judge's decision violated their rights." Mahoney, *supra* note 84, at 686–87.

99 Cassell, *supra* note 91, at 869–70. "The CVRA reflects a careful Congressional balance between the rights of the defendant, the discretion afforded to prosecution, and the new rights afforded to victims." *Id.* at 872. *Compare* 18 U.S.C. § 3771(a) (2006) *with* 10 U.S.C.S. § 806b. *See also* Josh Bell, *Understanding the Special Victims' Counsel Program*, DEF. VISUAL INFO. DISTRIB. SERV. (Jan. 30, 2020), https://www.dvidshub.net/news/361026/understanding-special-victims-counsel-program.

100 Cassell, *supra* note 91, at 880. Senator Kyl, a cosponsor of the CVRA, stated: "A central reason for these rights is to force a change in a criminal justice culture which has failed to focus on the legitimate interests of crime victims . . . ." *Id.*

district court involving release, plea, sentencing, or any parole proceeding.[101] The CVRA directly confers standing onto the victim to assert their rights personally or through their lawful representative.[102] While victims have a right to access private counsel, this access does not ensure the provision of counsel.[103]

In 2006, the Ninth Circuit, the first appellate court to interpret the CVRA, stated that "[t]he criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children—*seen but not heard*. The Crime Victims' Rights Act sought to change this by making victims independent participants in the criminal justice process."[104]

B. Seen by Victim Advocates

Currently, sexual assault victims have access to social services, housing and employment aid, health care, and legal services through non-lawyer advocates.[105] Victim advocates, sometimes called victim coordinators or liaisons, work closely with crime victims and witnesses during criminal investigations—before, during, and after court proceedings.[106] Victim advocates work to ensure that the rights of crime victims are respected.[107]

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101 *Id.* at 870, 874. Senator Feinstein explained that the basic goal of the CVRA was to give victims the right to "participate in the process where the information that victims and their families can provide may be material and relevant . . . ." *Id.* at 957. See *id.* at 873–78, for an analysis of the right to fairness granted in the Crime Victims' Rights Act.

102 18 U.S.C. § 3771(d)(1).

103 Heuring, *supra* note 3, at 730 ("More reform is needed, under the CRVA, to afford victims the right to 'retain and instruct counsel' so that 'their voice may be heard alongside the defendant and state.'"). See Beloof, *supra* note 14, at 80–82, for an analysis of the rights granted by the Crime Victim's Rights Act and the conflict victims face in realizing these rights without independent counsel.

104 Kenna v. U.S. Dist. Ct., 435 F.3d 1011, 1013 (9th Cir. 2006) (emphasis added).

105 Heuring, *supra* note 3, at 710 ("[A]ttorneys focusing on 'statewide issues such as training, legislative action, and advice to rape crisis centers,' which may be more appealing to victims than reporting their sexual assaults."). Historically, there has been an inattention to victims who are women by providers of these civil legal services. *Id.* Numerous factors caused this inattention including, "the realities of rape and its crippling impact on victims, the myth of criminal justice remedies, and the screening out of most rape victims by seemingly neutral eligibility requirements." *Id.*

106 Ellie Williams, *What Are the Qualifications for Becoming a Victim/Witness Coordinator?*, CHRON (June 17, 2022), https://work.chron.com/qualifications-becoming-victim-witness-coordinator-17009.html. "The role of victim assistance personnel in investigative agencies is particularly critical to ensuring victims who suffer emotional injury receive timely intervention, information, and referrals. Later, criminal justice proceedings may reopen emotional wounds, and timely and appropriate assistance from prosecution-based victim assistance personnel can help meet victims' needs at this critical stage." *The Attorney General Guidelines for Victim and Witness Assistance*, U.S. DEP'T JUST. (Oct. 21, 2022), https://www.justice.gov/d9/pages/attachments/2022/10/21/new_ag_guidlines_for_vwa.pdf.

107 Jenifer Kuadli, *What Is a Victim Advocate and What Do They Do?*, LEGALJOBS (Aug. 11, 2022), https://legaljobs.io/blog/victim-advocate/.

Advocates offer various services, "such as crisis intervention, emotional support, information about the criminal justice system, and referrals to community resources."[108] Victim advocates' most important role is emotional support.[109] To help alleviate the victims' anxiety and stress, advocates often have counseling certificates and training.[110] They provide information on victimization, legal rights and protections, and crime prevention.[111] Advocates help victims file police reports and other crime victim-related forms like Crime Victims' Compensation applications.[112] Advocacy services include assisting victims and their family members in submitting statements to the court, intervening with landlords and employers on behalf of the victim, assisting with funeral arrangements, assisting with safety planning, and navigating the medical system.[113]

A victim's advocate is authorized to perform legal services, like filing complaints or orders for protection,[114] under the supervision of a licensed attorney within the District Attorney's Office.[115] Victim advocates typically earn an associate or bachelor's degree in social work, psychology, criminal justice, victimology, or a related field.[116] Many states also insist on certifications or licenses comprised of approved training and a written exam.[117] However, without legal training, victim advocates leave the victim seen but not heard in the courtroom.[118]

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[108] *Id. See, e.g., Statewide Victim Assistance (SVA) Program*, OFF. ILL. ATT'Y GEN. KWAME RAOUL, https://www.illinoisattorneygeneral.gov/Safer-Communities/Supporting-Victims-of-Crime/Statewide-Victim-Assistance-Program/ (last visited Oct. 25, 2024). *See also Help for Victims*, HEALTH & HUM. SERVS., https://www.michigan.gov/mdhhs/safety-injury-prev/publicsafety/crimevictims/assistance (last visited Oct. 25, 2024) ("The Division of Victim Services (DVS) provides a voice advocating for and responding to all victims of crime in Michigan. In addition to funding community-based programs that provide vital services to crime victims and their families throughout Michigan, DVS also provides reimbursement for sexual assault medical forensic examinations, direct compensation to victims through Michigan's Crime Victim Compensation program, and supports the statewide victim notification system (MI-VINE).").

[109] Kuadli, *supra* note 107.

[110] *Id.*

[111] *What is a Victim Advocate?*, VICTIM SUPPORT SERVS., https://victimsupportservices.org/help-for-victims/what-is-a-victim-advocate/ (last visited Oct. 25, 2024).

[112] *See* Kuadli, *supra* note 107.

[113] *What is a Victim Advocate?*, *supra* note 111.

[114] Kuadli, *supra* note 107.

[115] *See* Stacy Lee, *Crime Victim Awareness and Assistance Through the Decades*, NAT'L INST. JUST. (June 9, 2019), https://nij.ojp.gov/topics/articles/crime-victim-awareness-and-assistance-through-decades.

[116] Kuadli, *supra* note 107 ("Some master's degree programs in social work or counseling also include coursework in victimology and advocacy.").

[117] *Id.*

[118] *See* Garvin, *supra* note 24, at 1125. Without appropriate assistance for victims, the Justice Department's ability to pursue and achieve justice is impeded. Merrick B. Garland, Foreword, *The Attorney General Guidelines for Victim and Witness Assistance*, U.S. DEP'T JUST. (Oct. 2022), i, https://www.justice.gov/d9/pages/attachments/2022/10/21/new_ag_guidlines_for_vwa.pdf.

C. A Comparative Analysis of Victim Advocates to Independent Counsel

Independent Victim's Counsel would be unlike victim advocates or coordinators—who fill the psychiatric, emotional, or logistical counselor role.[119] An Independent Victim's Counsel would be a licensed attorney, provided upon request, dedicated solely to advocating the victim's legal interests throughout the criminal justice process.[120]

During a hearing, an unrepresented victim becomes lost in the legal jargon and wonders what the parties and judge are discussing.[121] While a victim advocate can provide the victim with general information about the proceedings,[122] they would not be able to aid the victim in articulating legal arguments.[123] Even if a victim can afford a personal lawyer, they rarely object to questioning or filing orders for their clients.[124] An Independent Victim's Counsel would be the victim's legal advocate who overcomes these limitations.[125]

Despite the victim's rights movement and legislation, the victim's role in the courtroom has been limited to that of a witness.[126] For many victims who believe they will have their day in court, it is a devasting surprise to find that the prosecutor is not fighting for them.[127] The ABA Standards on Prosecutorial Investigations clearly state that the prosecutor's client is the public.[128] To the state government, the crime is a violation against the community, which alienates victims throughout the court process because they are at the mercy of the prosecution for information and assistance.[129]

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119 *See* Shakes, *supra* note 40, at 5.

120 *See id.* ("Just as defense counsel represents the accused and [the prosecutor] represents the government, every SVC [would be] charged to zealously represent his or her client, even when that interest is not in the government's interest.") (internal citations omitted).

121 *See* Dilworth, *supra* note 44, at 28 ("References to case precedents and statutory authorities can be confusing to any layperson, especially those who have experienced recent trauma.").

122 *See* Kuadli, *supra* note 107; *What is a Victim Advocate?*, *supra* note 111.

123 *See* Dilworth, *supra* note 44, at 29.

124 Jaafari, *supra* note 18.

125 *See* Dilworth, *supra* note 44, at 29.

126 Yaroshefsky, *supra* note 6, at 138–39. Victims are not mere witnesses in a case but are participants. Dilworth, *supra* note 44, at 30 (citing Douglas E. Beloof, *The Third Wave of Crime Victim's Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255, 269–70 (2005)). "Thinking of the victim as a participant places a more appropriate label on the role of a victim, which is different than the role of other fact witnesses. The primary difference is that the victim has privacy rights that often become an issue at trial" *Id.*

127 Yaroshefsky, *supra* note 6, at 139.

128 Shakes, *supra* note 40, at 25. *See* also MODEL RULES PRO. CONDUCT r. 3.8 cmt 1 (AM. BAR ASS'N 2022) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

129 Yaroshefsky, *supra* note 6, at 139 ("Many victims have had no prior contact with the legal system. They are surprised at their limited role. They are beholden to the police and to the prosecutor's office for basic information about the progress of the case and their role in it. They have no independent party to consult who operates only in their interest."). *See also* Walker A. Matthews, *Proposed Victims' Rights Amendment: Ethical Considerations for the Prudent Prosecutor*, 11 GEO. J. LEGAL

The interests of sexual assault victims and the prosecutor are aligned more often than not.[130] However, when the victim's interest departs from the government, prosecutors cannot provide legal representation or advice to the victims outside the scope of the victim coordinators.[131] A victim's interests include retribution—or seeing the case resolved justly; protecting their reputation and privacy; avoiding harassment by the defendant; avoiding revictimization; and telling their story.[132] A prosecutor may act directly contrary to the victim's interests to uphold their responsibility as a government representative.[133] As the victim advocates essentially work for the prosecutor, victims are left with no control or power.[134] Independent Victim's Counsel would be duty-bound to work for no one but the victim and would give the victim back a voice in their interests.[135]

Along the lines of the victim's interest, there is no obligation for the court or parties, including victim advocates, to inform the victim of their privileges.[136] *United States v. Ray* stated that the "[g]overnment has the right to assert the victim's right to privacy, provided that the victim herself wants the [g]overnment to assert it."[137] Yet, it has been long recognized that no one in the criminal justice system could be expected to "advocate as vehemently for the victim's rights or interests" than the victim.[138] Leaving the protection

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ETHICS 735, 739-41 (1998) [hereinafter *Ethical Considerations for the Prudent Prosecutor*] (discussing the traditional role of the prosecutor); Shakes, *supra* note 40, at 9.

130 DeVito, *supra* note 66, at 5.

131 *See id.* ("However, *even when interests coincide*, trial counsel are unable to provide legal representation to victims or advice outside the scope of the Victim and Witness Assistance Program."). "When in conflict, the prosecutor cannot serve two masters, and the victim necessarily becomes the odd person out." Beloof, *supra* note 14, at 86.

132 Ksenia Mathews, *Who Tells Their Stories?: Examining the Role, Duties, and Ethical Constraints of the Victim's Attorney Under Model Rule 3.6*, 90 FORDHAM L. REV. 1317, 1334–36 (2021). *See also* Dilworth, *supra* note 44, at 27–28 ("Victims' interests vary, but most simply want to get through the trial as quickly as possible with minimal invasion of their personal lives.").

133 Shakes, *supra* note 40, at 25. *See also* Dilworth, *supra* note 44, at 29 ("[The Government's] greater obligation may grate against or clash with a victim's own personal and intimate interest."); Shakes, *supra* note 40, at 9 ("[T]he victim's risk of personal exposure combined with the potential incongruences between the public interest and the victim's privacy interest 'create[] a zone of perpetual friction [that] acutely curbs the capacity of prosecutors to protect complainants from harsh or undignified treatment.'") (internal citation omitted).

134 Yaroshefsky, *supra* note 6, at 139 ("Others make decisions for [victims], often without prior consultation. Sometimes the victim's representative in the court explicitly goes against her will.") (internal quotation marks omitted); Shakes, *supra* note 40, at 18.

135 *See* Shakes, *supra* note 40, at 17–18.

136 *What is a Victim Advocate?*, *supra* note 111.

137 United States v. Ray, 337 F.R.D. 561, 571 (S.D.N.Y. 2020). *See also* E.H. v. Slayton, 468 P.3d 1209, 1213–14 (Ariz. 2020) ("A victim may agree to a restitution cap as part of a plea agreement, and thereby forego her statutory right to full restitution, if that amount exceeds the cap, but the prosecutor may not do it for her."); U.S. v. Wells, No. ACM 40222, 2023 CCA LEXIS 222, at *24 (A.F. Ct. Crim. App. May 23, 2023) ("The right to make an unsworn victim statement solely belongs to the victim or the victim's designee and cannot be transferred to trial counsel.") (internal citations omitted); Garvin, *supra* note 24, at 1122.

138 Garvin, *supra* note 24, at 1114–15.

of victims' rights to the prosecutor only gives them control over the existence and scope of the victims' rights.[139] Parties will put forward their interpretation of the victims' rights, seeking to deny the rights their full potential.[140]

Independent Victim's Counsel is the best solution as it is well-known that representation by an attorney holds "the most promise for positive outcomes."[141] The Supreme Court has long accepted this reality in the context of criminal defendants.[142] As no other party in the evidentiary proceeding shares the victim's interest "to the extent that they might be viewed as a champion of the victim's rights," an independent victim's counsel is needed.[143]

The subsequent legislation proposal does not seek to demean or replace victim advocates and the support they give to victims.[144] Trial counsel, case paralegals, and victim liaisons do an outstanding job working with sexual assault survivors.[145] Eva Maria Lewis, an American activist and founder of Free Root Operation,[146] stated, "[t]o be an activist is to speak. To be an advocate is to listen. Society can't move forward without both."[147] The criminal justice system needs both victim advocates and independent victim's counsel for survivors of sexual violence to both be seen *and* heard.[148]

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139 Beloof, *supra* note 14, at 85.

140 *Id.* "Without lawyers for victims, the Justice Department remains free to disregard or degrade victims' rights with impunity." *Id.* at 82.

141 Garvin, *supra* note 24, at 1123.

142 *Id.* Justice Black stated that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

143 Doe v. United States, 666 F.2d. 43, 46 (4th Cir. 1981) ("No other party in the evidentiary proceeding shares these interests to the extent that they might be viewed as a champion of the victim's rights."). *See also* Beloof, *supra* note 14, at 85–86 ("There are circumstances in which the State and defendants are both adverse to victims' interests, like a victim's right to speak in opposition to plea agreements. Just as importantly, the prosecution's counsel to victims is never free of the prosecution's primary duty to the State."). United States v. Ray, 337 F.R.D. 561, 570 (S.D.N.Y. 2020), held that CVRA rights belong solely to the victim. *See* Garvin, *supra* note 24, at 1121–22.

144 *See generally* DeVito, *supra* note 66, at 5.

145 *Id.*

146 *See Welcome to Oasis*, EVA MARIA LEWIS, https://evamarialewis.com (last visited Sept. 24, 2024).

147 *Top 12 Quotes About Advocacy*, HUM. RTS CAREERS, https://www.humanrightscareers.com/issues/quotes-about-advocacy/#:~:text="To%20be%20an%20activist%20is,both."%20–%20Eva%20Marie%20Lewis (last visited Sept. 24, 2024).

148 *See* Heuring, *supra* note 3, at 694 ("A change must be made and that change should be the provision of Special Victims' Counsel to represent victims of sexual assault."); Garvin, *supra* note 24, at 1125 ("Fundamentally, the failure to take [a] step toward victim counsel leaves the victim 'seen but not heard'—an outcome that undermines the victim's rights, revictimizes crime victims, and is an abdication of the court's duty."); Yaroshefsky, *supra* note 6, at 155 ("Change is essential if one expects the public to maintain respect for the law. The legal profession appears to be losing public esteem with each passing year, and lawyers are increasingly perceived as unethical. It is critical to examine, explain, and change the legal system's treatment of victims.").

III. HEAR US ROAR:[149] HOW TO IMPLEMENT AN INDEPENDENT VICTIM'S COUNSEL PROGRAM

Attorneys for crime victims is not a novel idea.[150] Even before the military's SVC program, many have advocated for state-funded victims' rights lawyers as they provide for criminal defendants.[151] Victims are inadequately or erroneously informed about the criminal justice system and what their participation can look like because sexual assault victims have never had a private attorney to advise them.[152] While survivors of sexual violence may be lawfully represented by an attorney,[153] most victims cannot afford an attorney.[154] As a result, the "right to be heard" is an empty gesture to promise victims.[155]

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149 *See* HELEN REDDY, I AM WOMAN (Capitol Records 1971) ("I am woman, *hear me roar* in numbers too big to ignore.") (emphasis added).

150 Garvin, *supra* note 24, at 1124.

151 Jaafari, *supra* note 18.

152 Beloof, *supra* note 14, at 77.

153 *Id*. at 80. Although victims have the right to retain a lawyer, "there is no explicit right to an attorney for victims in criminal trials. Thus, for victims to be sufficiently represented in the criminal justice system, victims may need independent counsel." Matthews, *supra* note 134, at 1332. *See, e.g.*, ARIZ. REV. STAT. §13-4437(A) (LexisNexis 2019) (stating that a victim's lawyer "shall be endorsed on all pleadings and, if present, be included in all bench conferences and in chambers meetings and sessions with the trial court that directly involve a victim's right enumerated in article II, section 2.1, Constitution of Arizona."); E.H. v. Slayton, 468 P.3d 1209, 1216 (Ariz. 2020) (citing ARIZ. REV. STAT. §13-4437(D) (LexisNexis 2019)).

154 Beloof, *supra* note 14, at 80. *See also* Cassell, *supra* note 91, at 879 ("Unlike the government and criminal defendants who always have legal representation, crime victims have no right to appointed counsel and are often indigent or otherwise unable to afford to hire an attorney.").

155 Cassell, *supra* note 91, at 879; *see also* Powell v. Alabama, 287 U.S. 45, 68–69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has [little] and sometimes no skill in the science of law . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he ha[s] a perfect one. He requires the guiding hand of counsel at every step in the proceedings . . . ."); Garvin, *supra* note 24, at 1123. Victims have no control over how their story will be told at trial. Mathews, *supra* note 132, at 1332 ("Short of adopting versions of European systems where victims have a recognized status in a case akin to the private prosecution function, the victim can be given a greater sense of control by providing her with a lawyer, particularly in those cases where potential gender or racial bias is evident from the very nature of the case, such as sexual or interracial assault."); Yaroshefsky, *supra* note 6, at 145. *See also* Richard E. Ouellette, *World Criminal Justice Systems, a Survey by Richard J. Terrill, Criminal Justice Studies, Anderson Publishing Co., Cincinnati, Ohio. 1884: Pp. 417. Price: $8.35.*, 36 NAVAL L. REV. 319, 320 (1986) (book review) ("Many countries provide for the active participation of the victim of crime in the judicial process. France has instituted a procedure whereby the victim has an attorney at trial. The victim's counsel is allowed to examine witnesses, present evidence, and make argument[s]. Once the accused is convicted, the judges can decide on appropriate damages to be levied against the offending party. Almost all countries surveyed (England, France, Sweden, Japan, and the Soviet Union) authorize some form of participation by the victim to include the authority to prosecute and seek damages with or without the assistance of the state.").

The criminal justice system can learn from the military's SVC program in state and federal courts and adapt it to its own.[156] While much legal literature calls for states to enact independent victim's counsel, there is a lack of direction for legislatures beyond general advice to enact legislation based on the military's SVC program.[157] The below-proposed model legislation is designed to fit the civilian criminal justice system and offers practical guidance on enacting and financing an Independent Victim's Counsel program.

A. Proposed Model Legislation

There are some challenges in adopting the military's SVC program because of the differences between the military and civilian systems.[158] The military has a steady stream of personnel to train to fill new positions, whereas, in the civilian sector, the Independent Victim's Counsel program would need to attract and train qualified attorneys for the job.[159] However, an Independent Victim's Counsel program that is designed to fit the civilian system would be the best way to ensure survivors of sexual violence fully realize their constitutional and statutory rights.[160]

Connecticut enacted a Victim Advocate law that established an Office of the Victim Advocate that acts independently of any state department.[161] Connecticut's Victim Advocate is an attorney appointed by the governor with knowledge of victims' rights and services.[162] The Victim Advocate's responsibilities include evaluating the delivery of state services to victims, reviewing procedures of state agencies providing services to victims, receiving complaints concerning state services, coordinating with private and

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156 Heuring, *supra* note 3, at 695; *see also* Beloof, *supra* note 14, at 67–68 ("The relationship of crime victims to the criminal justice process is evolving within the civilian and military legal systems. This evolution is based upon values of dignity, fairness, and respect for victim privacy that are becoming established in state constitutions and federal and state statutes and that are also present in the Military Code of Justice. These values provide the foundation for victims' due process rights in both civilian and military criminal processes. These due process rights take the form of notice and opportunities to be heard, as well as other measures that require respect for the victim's dignity and privacy.").

157 *Compare* Yaroshefsky, *supra* note 6, *and* Charles L. Hobson, *Appointed Counsel to Protect the Child Victim's Rights*, 21 MCGEORGE. L. REV. 691 (1990), *and Ethical Considerations for the Prudent Prosecutor*, *supra* note 129, *and* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 (1999) [hereinafter *The Victim Participation Model*], *and* Cassell, *supra* note 91, *and* Beloof, *supra* note 14, *and* Shakes, *supra* note 40, *and* Norton, *supra* note 15, *and* Jaafari, *supra* note 18, *and* Matthews, *supra* note 134, *and* Garvin, *supra* note 24, *with* Heuring, *supra* note 3.

158 Heuring, *supra* note 3, at 730.

159 *Id.*

160 *See id.* at 730–31.

161 CONN. GEN. STAT. § 46a-13b (2023).

162 § 46a-13b(a). The Victim Advocate is permitted to appoint staff as necessary. § 46a-13b(c).

public agencies to enforce victims' rights, recommending state policies for victims, and educating the public about victim services.[163]

The only statutory responsibility for the Victim Advocate, similar to the military's SVC program, is to file a limited special appearance in any court proceeding to advocate for the victim's state constitutional rights.[164] It is unclear from this statutory language if the Victim Advocate represents victims of crime in the limited appearance or at all in the criminal proceedings. Moreover, Connecticut's statute does not stipulate that an attorney-client relationship forms.[165]

While Connecticut's Victim Advocate legislation is a step in the right direction, it does not provide the legal representation that victims of sexual violence need in their court cases.[166] Connecticut's Victim Advocate law helps victims on a larger legislative scale rather than a personal approach, as the military uses.[167] To fully recognize a victim's right to be heard, legislatures must imitate the military's SVC program.[168] The following model legislation proposed for states to enact Independent Victim's Counsel is based on 10 U.S.C. § 1044e and is designed to fit the civilian criminal justice system.[169]

Model Legislation: Independent Counsel for Victims

(a) DESIGNATION; PURPOSE—
  (1) A court shall designate legal counsel (to be known as "Independent Victim's Counsel") for the purpose of providing legal assistance to an individual who is the victim of a sex-related offense.[170]
  (2) This Act shall be liberally construed and applied to promote its underlying purposes, which are to:

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163 § 46a-13c.

164 § 46a-13c(5).

165 *See* § 46a-13d(b).

166 *See* §§ 46a-13b—46a-13i (2023). Studies have shown that it is "the participation in the process, rather than the outcome of the case, which has had the greatest significance for victims." Yaroshefsky, *supra* note 6, at 142.

167 *See generally* §§ 46a-13b—46a-13i (2023).

168 *See* Garvin, *supra* note 24, at 1113 ("The person with the apostrophe owns the rights and thereby has the power to identify with those rights and to exercise, waive, or authorize the exercise of those rights. For crime victims, agency means that they can choose whether and how to participate in or disengage from the system, and if participating, choose whether, when, and how to be heard regardless of the other actors.").

169 *See* 10 U.S.C. § 1044e.

170 *See* 10 U.S.C. § 1044e. *See also* UTAH CODE ANN. § 78B-22-203 (LexisNexis 2023) (indicating that indigent defense is appointed by the court). "Courts have practices in place for [the] appointment of paid for counsel for indigent persons, as well as processes for [the] appointment of guardians ad litem for children or other vulnerable persons. These same avenues can [be used for crime victims]." Garvin, *supra* note 24, at 1125.

(A) Recognize that sexual violence is a serious crime against the individual and society, affecting thousands of people across the United States; [171]

(B) Recognize that the legal system has ineffectively dealt with survivors of sex-related offenses in the past, revictimizing them through the investigation and prosecution process, leading to sexual violence being underreported and permeating a society-wide distrust in the criminal justice system; that, although many laws have changed, in practice there is still a widespread failure to appropriately protect and represent victims' rights;[172]

(C) Recognize that there is no other party in the evidentiary proceeding that shares the victim's interest to be viewed as a champion of the victim's rights, as the prosecutor is ethically bound to represent the State's interest and defense counsel protects the defendant's constitutional liberties;[173]

(D) Adapt the United States military's Special Victim's Counsel program, authorized by 10 U.S.C. § 1044e, to [State]'s criminal justice system by providing state-funded attorneys to represent survivors of sex-related offenses throughout the investigative and criminal process;[174]

(E) Recognize survivors of sex-related offenses as non-parties with limited participant standing in criminal proceedings,[175] who have a right to be heard through their Independent Victim's Counsel subject to reasonable limitations by the judge.[176]

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171 *See* Garvin, *supra* note 24, at 1113.

172 *See id.*

173 *See* Doe v. United States, 666 F.2d 43, 46 (4th Cir. 1981) ("No other party in the evidentiary proceeding shares these interests to the extent that they might be viewed as a champion of the victim's rights."). United States v. Ray, 337 F.R.D. 561, 570 (S.D.N.Y. 2020), held that CVRA rights belong solely to the victim. *See also* Beloof, *supra* note 14, at 85–86 ("There are circumstances in which the State and defendants are both adverse to victims' interests, like a victim's right to speak in opposition to plea agreements. Just as importantly, the prosecution's counsel to victims is never free of the prosecution's primary duty to the State.").

174 *See* 18 U.S.C. § 1044e(a).

175 *See* LRM v. Kastenberg, 72 M.J. 364, 368–69 (C.A.A.F. 2013).

176 *See id.* at 371 ("A military judge has discretion under [Rule for Courts-Martial] 801, and may apply reasonable limitations, including restricting the victim or patient and their counsel to written submissions if reasonable to do so in context."); United States v. Wells, No. ACM 40222, 2023 CCA LEXIS 222, at *24 (A.F. Ct. Crim. App. May 23, 2023); United States v. Clark-Bellamy, No. ACM 39709, 2020 CCA LEXIS 391, at *13 (A.F. Ct. Crim. App. Oct. 27, 2020) (*citing* United States v. Hamilton, 77 M.J. 579, 586 (A.F. Ct. Crim. App. 2017) (en banc), *aff'd*, 78 M.J. 335 (C.A.A.F. 2019)).

(b) PERSONS ELIGIBLE FOR REPRESENTATION—An individual is eligible for legal representation under this Act who is the victim of a sex-related offense as defined in subsection (c) of this Act. [177]

(c) SEX-RELATED OFFENSE DEFINED—In this section, the term "sex-related offense" means any allegation of—

(1) [insert related state code sections for crimes such as rape; sexual assault; aggravated sexual contact; abusive sexual contact; rape of a child; sexual abuse of a child; indecent viewing, visual recording, or broadcasting; forcible pandering; indecent exposure]; or [178]

(2) an attempt to commit an offense specified in paragraph (1).[179]

(d) TYPES OF LEGAL ASSISTANCE AUTHORIZED—The types of legal assistance authorized by subsection (a)(1) include the following:

(1) Legal consultation regarding the potential civil actions the victim has stemming from or in relation to the circumstances surrounding the sex-related offense.[180]

(2) Legal consultation regarding the criminal justice system, including (but not limited to)—

(A) the roles and responsibilities of the prosecutor, the defense counsel, the victim [coordinator or advocate], and investigators;[181]

(B) any proceedings of the criminal justice process which the victim may observe; and[182]

(C) the Government's authority to compel cooperation and testimony.[183]

(3) Representing the victim at any proceedings in connection with the reporting, investigation, and prosecution of the sex-related offense.[184]

(A) Such representation includes presenting legal arguments in motions and briefs filed to the court, supporting motions at oral arguments before the judge, and conferences held in chambers.

(4) Legal consultation regarding eligibility and requirements for services available from appropriate agencies or offices for emotional and mental health counseling and other medical services.[185]

(5) Legal consultation and assistance—

(A) in any proceedings of the criminal justice process in which a victim can participate as a witness or other party; and[186]

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177 *See* 10 U.S.C. § 1044e.
178 *See* § 1044e(h).
179 *See id.*
180 *See* § 1044e(b)(1).
181 *See* § 1044e(b)(5)(A).
182 *See* § 1044e(b)(5)(B).
183 *See* § 1044e(b)(5).
184 *See* § 1044e(b)(6).
185 *See* § 1044e (b)(7).
186 *See* § 1044e (b)(8).

(B) in understanding bond conditions and the availability of and obtaining any protective or restraining orders.[187]

(e) NATURE OF RELATIONSHIP—The relationship between an Independent Victim's Counsel and a victim in the provision of legal advice and assistance shall be the relationship between an attorney and client.[188]

(f) AVAILABILITY OF INDEPENDENT VICTIM'S COUNSEL—An individual who is the victim of a sex-related offense shall be offered the option of receiving assistance from an Independent Victim's Counsel upon reporting an alleged sex-related offense or at the time the victim seeks assistance from a law enforcement investigator, a victim/witness liaison, a District Attorney or an attorney working in the District Attorney's Office, a healthcare provider, or any other personnel designated by [a state assigned authority] concerned for purposes of this subsection.[189]

(1) The individual shall also be informed that the assistance of an Independent Victim's Counsel may be declined, in whole or in part, but that declining such assistance does not preclude the individual from subsequently requesting the assistance of an Independent Victim's Counsel.[190]

(g) EFFECTIVE DATE—This Act will be effective on [date].[191]

The model legislation to enact Independent Victim's Counsel is specific to states but could easily be altered for a federal program. A nationally run Independent Victim's Counsel program by the federal government is ideal because it would promote uniformity and ensure that legal counsel can represent victims in every state.[192] However, a national-level Independent Victim's Counsel program may be a challenging sale.[193] It will also take time for Congress to draft, debate, and agree upon a bill before implementation.[194] While waiting for the Legislature to act, the states should take the next step toward progress.[195]

As this is a model, states may alter, add, and remove sections to adapt to their population's needs. States could consider adding a subsection on administrative responsibilities[196] and could even redefine eligibility to include domestic violence victims.[197]

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187 *See* § 1044e (b)(8).

188 *See* § 1044e (c).

189 *See* § 1044e (f)(1).

190 *See* § 1044e (f)(3).

191 *See* § 1044e.

192 Heuring, *supra* note 3, at 731.

193 *Id.* at 734.

194 *Id.*

195 *Id.*; Cassell, *supra* note 91, at 866 ("Realizing the difficulty of achieving the consensus required to amend the United States Constitution, advocates decided to go first to the states to enact state victims' rights amendments.").

196 *See* § 1044e (e).

197 *See* Bell, *supra* note 59, at 23.

States could also consider adding subsections defining qualifications for Independent Victim's Counsel.[198] Qualifications may include being admitted to the state's bar and certified through a training program.[199] The training program would cover the elements of proof for various sex-related offenses; crime scene management; DNA collection requirements; identifying, obtaining, preserving, and transporting forensic evidence; the rights of crime victims; support available for victims; and the sensitivities and trauma experienced by survivors of child abuse, sexual assault, and domestic violence.[200]

The best practice would be to have an Independent Victim's Counsel office near each state district courthouse and separate from the district attorney's office.[201] This allows the Independent Victim's Counsel to be close to the survivor and the court where the case will be prosecuted.[202] The separate office from the prosecutor also helps focus all attorneys on their responsibilities, especially at the program's start.[203]

This proposed legislation informs victims of the availability of a state-funded attorney for every sexual assault victim who reports to the police.[204] After the assignment, the Independent Victim's Counsel and the victim form an attorney-client relationship.[205] The Independent Victim's Counsel could explain the criminal justice process and the victim's role in it, assist the victim in decision-making, and help prepare the client for cross-examination.[206] The Independent Victim's Counsel would also accompany the victim to any interview or proceeding connected to the reporting, investigation, and prosecution of the alleged offense.[207]

Like an SVC in a court-martial, the Independent Victim's Counsel would observe the hearing or trial from the gallery with the victim.[208] When the victim's constitutional or statutory rights are at issue, the Independent

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198 *See* § 1044e (d); Heuring, *supra* note 3, at 733 (qualifying an attorney as an SVC by admission to the state bar where they are practicing and certified through an SVC training).

199 Heuring, *supra* note 3, at 733.

200 *Id.*

201 *See* Doe v. United States, 666 F.2d. 43, 46 (4th Cir. 1981); United States v. Ray, 337 F.R.D. 561, 570 (S.D.N.Y. 2020); Beloof, *supra* note 14, at 85–86.

202 *See id.*

203 *See id.*

204 Heuring, *supra* note 3, 732–33.

205 *See id.* at 733.

206 Yaroshefsky, *supra* note 6, at 145. *See also* Beloof, *supra* note 14, at 77 ("Victims of sexual assault are confronted with potential privacy intrusions at nearly every turn following an assault, from subpoenas for their confidential or privileged records held by third parties (e.g., counseling, medical, and education records), to rape shield issues, to motions to examine the victim's body, mind, or dwelling. Victims need lawyers to explain the law and process, as well as the consequences of choices so that they can meaningfully choose how to respond. When the chosen response requires lawyering, the victim's attorney can engage the process on the victim's behalf.").

207 Heuring, *supra* note 3, at 733.

208 Dilworth, *supra* note 44, at 30.

Victim's Counsel would be permitted to sit in front of the bar in the courtroom.[209] The model legislation allows the lawyer to argue on behalf of the survivor, providing them the advantage of making a legal argument while removing the personal exposure that comes with making a public statement and the survivor's emotional interest in the issue.[210]

To further support the model legislation, states can amend their Rules of Evidence Rule 412 to allow victims a right to be heard at the evidentiary hearing.[211] Kentucky, Louisiana, North Dakota, and Utah already codified provisions similar to FRE 412, providing victims with this right.[212] Louisiana's rule goes beyond a right to be heard by expressly stating that the victim "may be accompanied by counsel."[213]

All jurisdictions should construct their state statutes to interpret a victim's right to be heard as meaning *through counsel*.[214] Congress required that the Military Rules of Evidence be amended to reflect that the victim could exercise their right through counsel, and state legislatures need to make this same distinction to the right to be heard.[215] Implementing the right to be heard through evidence rules improves the treatment of sexual violence survivors and the overall effectiveness and reliability of the criminal justice system.[216]

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209 E.H. v. Slayton, 468 P.3d 1209, 1213 (Ariz. 2020).

210 Dilworth, *supra* note 44, at 28 ("Where a victim acting alone would surely struggle to articulate his or her desires in the context of legal arguments already framed by written motions, the SVC is the victim's legal advocate who overcomes these limitations and solely pursues the victim's wishes with objectivity while guarding against the victim's perceived objectification.").

211 *See* FED. RULES EVID. 412(c)(2) ("Before admitting evidence under this rule, the court must conduct an in camera hearing and give *the victim* and parties *a right to* attend and *be heard*.") (emphasis added). In the military, an evidence rule first allowed victims to be heard through counsel. *See* LRM v. Kastenberg, 72 M.J. 364, 368–69 (C.A.A.F. 2013). *See also* Shakes, *supra* note 40, at 16.

212 KRE 412(c)(2); LA. CODE EVID. ANN. ART. 412(e)(2) (2023); N.D. R. EVID. 412(c)(2); UTAH R. EVID. 412(c)(3). *See also* Shakes, *supra* note 40, at 33.

213 LA. CODE EVID. ANN. ART. 412(e)(2) (2023) ("The victim, if present, has the right to attend the hearing and may be accompanied by counsel.").

214 Shakes, *supra* note 40, at 33.

215 *See id.* at 3.

216 *Id.* at 33. "The fundamental justification for providing due-process-like rights of participation (and other types of rights) is to prevent the two kinds of harm to which the victim is exposed. The first harm is primary harm, which results from the crime itself. The other harm is secondary harm, which comes from governmental processes and governmental actors within those processes. These harms place the concepts of "dignity," "fairness," and "respect" in context, and provide the fundamental basis for victim participation in the criminal process." *The Victim Participation Model*, *supra* note 157, at 295. *See also* Hobson, *supra* note 157, at 728 (focusing on the need for independent counsel for child victims from a psychological standpoint because the justice system can re-victimize children to cause lifetime mental and emotional issues); Dilworth, *supra* note 44, at 28 ("Research shows that some military victims experience secondary victimization in the criminal justice system. Choosing to be heard through counsel for any reason may minimize these effects."); Yob, *supra* note 23, at 65 ("Someone who feels re-victimized will struggle with resiliency and be far less likely to participate in a prosecution or disciplinary action than a victim who has an advocate to help ensure the system supports them.").

A benefit of the model legislation is that the Independent Victim's Counsel could provide victim assistance beyond the criminal prosecution.[217] Such counsel would be able to assist in "reducing re-victimization, reducing reporting inconsistencies in the investigation, protecting victims from unwarranted mental health examinations, reducing the inherent conflict of interest between victim and prosecution, and reducing the victim's exposure to collateral legal consequences."[218]

An Independent Victim's Counsel program will increase society's faith in the criminal justice system, thereby increasing the reporting rate.[219] Increased reporting deters future perpetrators because there is a higher likelihood that the crime will be reported.[220] Ultimately, this cumulative effect could dramatically improve the criminal justice system's treatment of sexual violence survivors.[221]

B. Financing an Independent Victim's Counsel Program

Funding for implementing the Independent Victim's Counsel program is a concern, but there are many avenues states and the federal government can consider. Currently, there are no dedicated funds for victim legal services.[222]

The Victim of Crime Act[223] established state funding to pay for the medical and therapeutic needs of the victim.[224] As the Victim of Crime Act funds are typically in surplus, this is a potential funding source for attorneys, at a minimum, on an experimental level.[225] Congress substantially restricted the availability of these funds by requiring that "[a] state must promote victim cooperation with the reasonable requests of law enforcement authorities."[226] Thus, to receive state compensation, the sexual assault victim must report the crime to law enforcement and cooperate with the prosecution.[227] As presently

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217 Shakes, *supra* note 40, at 29.

218 *Id.* at 30–32.

219 *See generally* Heuring, *supra* note 3, at 725 ("Victims of sexual assault continue to fear the criminal justice system, which leads to a low level of reporting for sex-based crimes."). *See also* Thompson, *supra* note 55, at 670 ("Victims should not be left wondering what happened with their cases. They should know the results of their reports. To allow otherwise lends weight to victims' fears that the [justice system] is somehow covering up their allegations.").

220 Shakes, *supra* note 40, at 7–8.

221 *Id*.

222 *See* Beloof, *supra* note 14, at 76 n.34.

223 42 U.S.C. § 10602(b)(1)(A) (2006).

224 Beloof, *supra* note 14, at 76.

225 *Id.* at 76 n.34.

226 *Id.* at 76 ("The rationale for the approach is articulated in the handbook of the National Association of Crime Victim Compensation Boards, which states that '[v]ictims who frustrate law enforcement efforts should not be rewarded with public funds.' All eligible crime victims are lumped into this requirement, including sexual assault victims.") (internal citations omitted).

227 *Id.*

stated, the Independent Victim's Counsel would only be assigned after the crime is reported and would be there to help the victim cooperate with the police investigation and the prosecutor—satisfying the requirements for such funding.[228]

Beyond this, victim compensation funds also exist as an option.[229] Additionally, federal and state budgets could be re-examined for specific cuts or taxes increased to fund the Independent Victim's Counsel program.[230] Another possible resource is to establish a non-profit organization similar to those established for children or domestic violence victims in the legal system.[231] "A combination of state government oversight and non-profit organization management" could also create an Independent Victim's Counsel.[232] A pro-bono network to offer representation services to victims of sexual assault could be another method because representing a victim would require less intensive work than representing a defendant in court.[233] A volunteer pool could be established, and those volunteer lawyers could be trained as Independent Victim's Counsel.[234] This proposal urges every state to evaluate all possible options for funding the much-needed Independent Victim's Counsel program.

C. Constitutional Criticisms of Independent Victim's Counsel

Many scholars have expressed apprehension over introducing a represented third party with legal standing in a prosecution because it would violate the criminal defendant's constitutional rights.[235] While this proposal

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228 *See* Heuring, *supra* note 3, at 731–33.

229 Beloof, *supra* note 14, at 76 n.34.

230 Heuring, *supra* note 3, at 734.

231 *Id.* at 735. "For example, Legal Services for Children provides representation and legal advice to persons under the age of twenty-one at no cost. LSC employs attorneys, social workers, and support staff to aid clients with guardianship, education, foster care, emancipation, and immigration cases." *Id.* The non-profits that provide legal services for domestic violence victims do not necessarily provide legal representation but usually offer legal advice. *Id.*

232 *Id.* at 736 ("Like the Legal Services for Children nonprofit, the SVC program would begin by providing services to those who called in or came to a drop-in clinic. Once the SVC program approves an attorney to take on a client, the attorney may begin accompanying the client to any proceedings regarding the reporting, investigation, and prosecution of the case. The responsibilities of the SVC attorneys will be much like those of the military SVC attorneys. This pilot program will also provide advice about any civil litigation option the victim may have, the rights the victim has regarding testifying, and the judicial process generally. Non-profit organizations and other groups could compete for the grant money to create this pilot program by proposing plans for how to most efficiently establish the program and presenting these plans to a committee formed in the Idaho state legislature. Then, the winning group would use the grant money to create the pilot program and manage it day-to-day.").

233 *Id.* at 734.

234 *Id.* at 735.

235 Shakes, *supra* note 40, at 23. *See generally* Mathews, *supra* note 132, at 1317 (discussing how private lawyers retained by victims fall within the traditional two-party adversary system).

seeks to address the issue of victim powerlessness, it maintains—not diminishes—the defendant's rights.[236] The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[237] The Confrontation Clause envisions a defendant's cross-examination of the witness as an opportunity to test recollection and have the jury look at them to judge their demeanor to determine whether they are to be believed.[238]

Yet, an Independent Victim's Counsel would not be the first time the victim has been seen as a third party with legal standing in a criminal trial.[239] The Federal Rules of Criminal Procedure Rule 60 explicitly states that victims have the right to be heard through counsel at a hearing involving the accused's release, plea, or sentencing.[240] *In re Dean* held that victims may exercise their right to be reasonably heard personally or through counsel in pretrial decisions of the judge and prosecutor.[241] In *United States v. Saunders*, the court permitted the victim's counsel to present arguments at a pretrial FRE 412(c)(1) hearing.[242] *United States v. Stamper* allowed the victim's counsel to examine witnesses—including the victim—in a pretrial evidentiary hearing.[243] While the model legislation permits an Independent Victim's Counsel to represent the victim in a pretrial hearing, it does not go to the extent of *Stamper* in allowing the lawyer to examine the victim.[244]

This existing precedent allows the Independent Victim's Counsel to attend court proceedings with the victim, satisfying the Confrontation Clause because it would not prevent defense counsel from exposing the reliability of the victim-witness to the jury.[245] The Independent Victim's Counsel would

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236 Yaroshefsky, *supra* note 6, at 144.

237 U.S. CONST. amend. VI. The right of confrontation applies to both federal and state prosecution. Crawford v. Washington, 541 U.S. 36, 42 (2004). *See also* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009). For a historical background on the Confrontation Clause, see Crawford v. Washington, 541 U.S. 36, 43–47 (2004).

238 Mattox v. United States, 156 U.S. 237, 242–43 (1895) (superseded by statute for New York evidence rules). *See also* Yaroshefsky, *supra* note 6, at 137 ("The defense lawyer's role is to "test" the version of reality offered by the victim. It is his or her role to discredit, or at least undermine, the reliability and credibility of the victim's testimony, even if the lawyer believes the witness is being truthful."); DAVID S. RUDSTEIN, C. PETER ERLINDER & DAVID C. THOMAS, CRIMINAL CONSTITUTIONAL LAW § 14A.03 (Matthey Bender & Company, 3d ed. 2024).

239 *See* Shakes, *supra* note 40, at 28.

240 *Id.* "This change insures that victims' representatives will be able to assert victims' rights." Cassell, *supra* note 91, at 967.

241 *In re* Dean, 527 F.3d 391, 393 (5th Cir. 2008). *See also* Brandt v. Gooding, 636 F.3d 124, 136–37 (4th Cir. 2011) (motions from attorneys were "fully commensurate" with the victim's "right to be heard.").

242 United States v. Saunders, 736 F. Supp. 698, 700 (E.D. Va. 1990).

243 United States v. Stamper, 766 F. Supp. 1396, 1396 (W.D.N.C. 1991).

244 *Id. See also* Yaroshefsky, *supra* note 6, at 146; Shakes, *supra* note 40, at 29.

245 *See* JAMES MOORE, MOORE'S FEDERAL PRACTICE—CRIMINAL PROCEDURE § 643.02 (Daniel R. Coquillette et al. eds., 3d ed. 2023) (citing United States v. Restivo, 8 F.3d 274, 278 (5th Cir. 1993)); Yaroshefsky, *supra* note 6, at 138 ("So long as the system is founded upon the notion that truth is

only enforce protections already legally afforded to the victim.[246] Moreover, the judge still maintains control over the court and can ensure the rights of all parties are observed.[247]

In *Kastenberg*, it was argued that an attorney-client relationship between the victim and an SVC would reduce the amount of impeachment evidence available to the accused, which would incidentally diminish the defendant's right to confront the victim.[248] However, the nature and extent of impeachment evidence available to the defendant continues to be governed by the trial judge's evidentiary rulings.[249] The Independent Victim's Counsel's authority to argue the victim's interests does not make the underlying impeachment evidence any less admissible.[250]

Similarly, an Independent Victim's Counsel would not interfere with *Brady* disclosures.[251] In *Brady v. Maryland*, the Supreme Court held that the prosecution must disclose any exculpatory information to defense counsel.[252] However, *Brady* did not create a constitutional right to discovery in a criminal case.[253] While the Independent Victim's Counsel may obtain exculpatory evidence through the attorney-client relationship,[254] this would not alter the victim's duty to answer the prosecutor's questions honestly and completely.[255] The model legislation includes informing the survivor of the prosecution's authority to compel cooperation and testimony.[256]

Both criminal defendants and victims have constitutional rights but are relatively powerless without a lawyer to protect them.[257] This proposal does not seek to diminish a criminal defendant's constitutional rights but, instead, seeks to offer the same protection of sexual assault victims' constitutional and statutory rights.[258] Both criminal defendants and victims must have legal counsel to be heard.[259]

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elicited through confrontation, the rules of evidence must permit, as they do, the credibility of the victim or other witnesses to be tested.").

246 Shakes, *supra* note 40, at 24. *See also* Cassell, *supra* note 91, at 870–74 (listing the rights granted under the Crime Victims' Rights Act).

247 *See Ethical Considerations for the Prudent Prosecutor*, *supra* note 129, at 750–51.

248 Shakes, *supra* note 40, at 27.

249 *Id.*

250 *Id.*

251 *See generally id.* at 26.

252 Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). *See also* Shakes, *supra* note 40, at 26.

253 Weatherford v. Bursey, 429 U.S. 545, 559 (1977). *See generally, e.g.*, Kaley v. United States, 571 U.S. 320, 335 (2014).

254 Lippy, *supra* note 70, at 125.

255 Shakes, *supra* note 40, at 26.

256 *See* MODEL LEGISLATION (d)(2)(C).

257 Yaroshefsky, *supra* note 6, at 143.

258 *See* Beloof, *supra* note 14, at 83.

259 *See* Jaafari, *supra* note 18 (emphasis added).

CONCLUSION

In the last two decades, there have been several helpful and progressive reforms dedicated to changing the landscape of sexual violence.[260] Yet, sexual assault statistics reflect that survivors of these crimes are still not fully heard.[261] This Note contends that the criminal justice system, both state and federal, must implement an Independent Victim's Counsel program.[262] The military recognized the need to have sexual assault survivors *be heard* throughout the investigative process and court proceedings.[263] Survivors of sexual violence lack a voice in the criminal justice process.[264] The support offered by victim advocates and coordinators allows victims to be seen but not heard by the court.[265]

This Note proposes model legislation establishing an Independent Victim's Counsel program in federal and state criminal justice systems.[266] The model legislation maintains the accused's constitutional rights[267] and solves the inherent conflict of interest between victims and the prosecution.[268]

"Every 68 seconds, an American is sexually assaulted."[269] In the time taken to read this proposal, approximately twenty-seven Americans were sexually assaulted.[270] It is time for state legislators to do more by enabling survivors a right to be heard through independent counsel.[271]

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260 Jenifer Kuadli, *32 Shocking Sexual Assault Statistics for 2023*, LEGALJOBS (May 20, 2023), https://legaljobs.io/blog/sexual-assault-statistics/.

261 *Id.*

262 *See* Heuring, *supra* note 3, at 729 ("The military SVC program has shown that providing legal counsel to victims results in more confidence and satisfaction with the legal system by victims."). "It is apparent that independent lawyers for sexual assault victims are needed to ensure victims can knowingly and voluntarily choose whether and when to engage with the criminal justice system and, having engaged, whether to exercise or waive any specific right." Beloof, *supra* note 14, at 86.

263 Beloof, *supra* note 14, at 85.

264 *See* Greg J. Thompson, *Victims' Rights in the Military: Empowering Sexual Assault Victims with a Meaningful DOD Victims' Bill of Rights*, 21 VA. J. SOC. POL'Y & L. 423, 425 (2014).

265 *See* Garvin, *supra* note 24, at 1125 ("Fundamentally, the failure to take the step toward victim counsel leaves the victim "seen but not heard"--an outcome that undermines the victim's rights, revictimizes crime victims, and is an abdication of the court's duty.").

266 Shakes, *supra* note 40, at 29.

267 *See id.* at 24–26; Yaroshefsky, *supra* note 6, at 146.

268 *See Ethical Considerations for the Prudent Prosecutor*, *supra* note 129, at 750.

269 *Victims of Sexual Violence: Statistics*, *supra* note 2.

270 *See* Marc Brysbaert, *How Many Words Do We Read Per Minute? A Review and Meta-analysis of Reading Rate*, 109 J. MEMORY & LANGUAGE 104, 147 (2019) ("[T]he average silent reading rate for adults in English is 238 words per minute.").

271 *See* Shakes, *supra* note 40, at 29.

WAVES OF CHANGE: A CALL TO FEDERALLY SAFEGUARD AGAINST CLIMATE-DRIVEN FLOODS

Trevor Johnson*

INTRODUCTION

The average flood event in the United States costs Americans $4.7 billion.[1] The Environmental Defense Fund estimates that 21.8 million U.S. homes and businesses are at risk of flooding, 67% higher than the number recognized by federal flood-risk maps.[2] These extreme events have become "more frequent, widespread, or of longer duration."[3] Many natural disasters are expected to continue to increase or worsen, implicating a variety of new complications that affect towns and cities, agriculture, and natural resources.[4] Among these increased climate-related disasters is the risk of catastrophic flooding from historic rainfall.[5] The increased frequency and severity of heavy rainfall events are projected to continue in most of the United States, requiring further action to combat flooding.[6]

In 2016 alone, historic flooding from rainfall caused significant swathes of the United States to be devastated.[7] A large area of Southern Louisiana was hit with up to thirty inches of precipitation, causing over $10 billion in damages and "destroyed more than 50,000 homes, 100,000 vehicles, and 20,000 businesses."[8] Around the same time, similar flooding hit many West Virginia towns, causing considerable loss of life, and severe urban flooding wrecked cities in Hawaii.[9] Very few regions of our country will be safe from the changes observed in extreme weather events.[10]

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1 *Why are floods hitting more places and people?*, ENV'T DEF. FUND, https://www.edf.org/why-are-floods-hitting-more-places-and-people (last visited Aug. 27, 2024).

2 *Id.*

3 DAVID REIDMILLER ET AL., IMPACT, RISKS, AND ADAPTATION IN THE UNITED STATES: THE FOURTH NATIONAL CLIMATE ASSESSMENT VOLUME II 57 (U.S. Glob. Change Rsch. Program ed., 2018).

4 *Id.*

5 *Id.* at 58.

6 *Id.* at 81.

7 *Id.* at 58.

8 *Id.*

9 REIDMILLER ET AL., *supra* note 3, at 58.

10 *Id.* at 85.

The United States attempts to combat the emerging threat of climate-related flooding through federal and private insurance programs.[11] As the difficulty of understanding and preparing for flooding risks rises, property owners are burdened by this responsibility.[12] Rural communities and large swathes of crucial farmland are most vulnerable to the increased risk of flooding.[13] The National Flood Insurance Program (NFIP) grapples with several shortcomings, including outdated flood maps that fail to accurately assess risks and the program's financial instability due to a reliance on borrowed funds.[14] The program's bureaucratic processes cause slow adaptation to the changing climate, threatening agriculture and small municipalities nationwide.[15]

Part I of this Note discusses how a rural community in Southwest Wisconsin responded to a catastrophic flood event in 2008. Part II provides a historical analysis of how and why the threat of climate-related flooding has grown in recent years for rural Americans. Next, Part III analyzes the United States' current response to catastrophic flooding and the shortcomings of federal and state insurance procedures. Finally, Part IV of this Note recommends that the current NFIP be adapted to account for these shortcomings and broaden protections for individuals who experience climate-related flooding.

I. AMERICA'S DAIRYLAND DISASTER

In 2008, Southern Wisconsin was hit with a devastating flood that killed three people and caused an estimated $763 million in property damage—permanently altering the landscape of many Wisconsin counties.[16] The flooding was caused by Wisconsin's record-breaking snowfall over the winter, followed by heavy, continuous rain events, including fifteen days of rain in June.[17] The combination of heavy snowfall and unremitting rain left the ground saturated and more susceptible to further flooding.[18] As a result,

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11 FEMA, INDIVIDUAL ASSISTANCE PROGRAM AND POLICY GUIDE (IAPPG) 3–4 (2021).

12 Ernest B. Abbot, *Floods, Flood Insurance, Litigation, Politics – and Catastrophe: The National Flood Insurance Program*, 1.1 SEA GRANT L. & POL'Y J. 129, 132 (2008).

13 DAVID HALES ET AL., CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT 334 (U.S. Glob. Change Rsch. Program ed., 2014).

14 *FEMA Flood Maps and Zones Explained*, FEMA (July 28, 2023), https://www.fema.gov/blog/fema-flood-maps-and-zones-explained; FEMA, *supra* note 11, at 5.

15 FEMA, *supra* note 11, at 5; Amal Ahmed, *Last year's historic floods ruined 20 million acres of farmland*, POPULAR SCIENCE (Jan. 20, 2020, 10:30 PM), https://www.popsci.com/story/environment/2019-record-floods-midwest/.

16 *Flood of 2008 Changed Wisconsin Landscape, Taught Lessons*, CLAIMS J. (June 11, 2013), https://www.claimsjournal.com/news/midwest/2013/06/11/230605.htm.

17 *Id.*

18 *Id.*

rivers rose, and flood plains formed, topping over bridges and stranding more than 200 people to await rescue.[19]

Response to this flooding event varied in its efficacy.[20] In larger municipalities, such as the City of Lake Delton, the flooding breached the lake's bank, causing it to drain into the Wisconsin River.[21] The destruction of the bank took five homes into the river, and an estimated $20 million was lost in summer business from hotels, bait shops, and local boat rental companies.[22] Despite these losses, Lake Delton spent $9 million to rebuild, repair, and improve the breached bank and dam in time for the 2009 summer tourist season.[23] The project also enhanced the lake by removing carp and creating a new park with a fishing pier.[24] Unfortunately, a rebound like this is a rare occurrence after a devastating flood event, and for many smaller municipalities that were affected, there was no comeback.[25]

Rural communities, like Spring Green, Wisconsin, were hit particularly hard by the flooding.[26] The Town and Village of Spring Green is in Sauk County within the Lower Wisconsin River Valley, west of Madison, Wisconsin. Steep sandstone cliffs and deep river valleys uniquely brand the Driftless Area of the state, which survived untouched by glaciers in the Paleozoic age.[27] The area around Spring Green and surrounding townships is known as the River Valley Area due to its close proximity to the Wisconsin River.[28] However, despite the abnormal rainfall and snow accumulation in 2008, the Wisconsin River never reached a flood stage.[29] Even so, nearly 4,400 acres within the River Valley Area were flooded by localized stormwater runoff due to the nature of the local terrain prohibiting drainage to the Wisconsin River or its tributaries.[30] "Homes were damaged or even swept away, dams were breached, crops were destroyed, roads were flooded, public works systems failed, and residents were displaced," in some instances permanently.[31]

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19 *Id.*
20 *Id.*
21 *Id.*
22 *Flood of 2008 Changed Wisconsin Landscape, Taught Lessons*, *supra* note 16.
23 *Id.*
24 *Id.*
25 *Id.*
26 *Id.*
27 Jewell Assoc. Eng'r, Inc. & Montgomery Assoc. Res. Sol., LLC, *River Valley Flood Control Investigation Report* (2009), https://www.co.sauk.wi.us/sites/default/files/fileattachments/conservation_planning_and_zoning/page/1948/sg_flood_study_report.pdf.
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.*

The June rainfall events that inundated the River Valley Area and Spring Green exceeded the five-day 100-year rainfall depth for the region.[32] Even though these storms were not enough to lead the Wisconsin River to a flood event, the soil in the area was already overwhelmingly saturated, which caused the water table elevation to be much higher than usual.[33] In many locations, the elevated water table caused the groundwater to breach the ground surface and pond, which devastated homes and businesses that were affected.[34] In Spring Green alone, a town of 1,800 people, more than forty-one homeowners were forced to apply for buyouts, and 1,600 homes were damaged or destroyed countywide.[35] The Township spent over $7 million to remove the flood-damaged Prairie House Motel and fourteen homes from the Prairie View subdivision, only for those streets to now sit abandoned within fields of nothing but dandelions.[36] Although the Federal Emergency Management Agency (FEMA) partially compensated the Township of Spring Green, the town still had to spend substantial portions of its 2008 operating budget and lost countless man-hours without compensation, placing a heavy financial burden on residents to respond to this catastrophe on their own.[37]

Wisconsin's federally-declared 2008 flooding disaster impacted thirty-one counties in the state's southern half, and nearly 24,000 residents received monetary assistance from FEMA.[38] Many residents were granted relief awards related to the flooding, but the average household FEMA reward was less than $4,000.[39] Residents who did not reside in designated floodplains were left with limited options for flood insurance, resulting in inadequate coverage and catastrophic outcomes.[40] This situation is not uncommon; "people living outside of mapped high-risk flood areas file nearly 25% of all [NFIP] claims and receive one-third of Federal Disaster Assistance for flooding."[41]

The floods had a staggering financial effect on the surrounding small communities.[42] A University of Wisconsin Extension Agriculture Agent estimated that Sauk County farmers suffered over $9 million in agricultural

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32 *Id.*

33 Jewell Assoc. Eng'r, Inc. & Montgomery Assoc. Res. Sol., LLC, *supra* note 27.

34 *Id.*

35 *Spring Green still suffering from severe flooding*, TWINCITIES PIONEER PRESS, (Nov. 14, 2015, 12:41 AM), https://www.twincities.com/2008/08/17/spring-green-still-suffering-from-severe-flooding/.

36 *Flood of 2008 Changed Wisconsin Landscape, Taught Lessons, supra* note 16.

37 *See* Jewell Assoc. Eng'r, Inc. & Montgomery Assoc. Res. Sol., LLC, *supra* note 27, at viii.

38 *Do I Need Flood Insurance?*, WIS. DEP'T OF NAT. RES., https://dnr.wisconsin.gov/topic/FloodPlains/insurance.html (last visited Aug. 24, 2024).

39 *Id.*

40 *Id.*

41 *Id.*

42 Jewell Assoc. Eng'r, Inc. & Montgomery Assoc. Res. Sol., LLC, *supra* note 27, at 13.

losses.[43] Many farmers in Spring Green declared the summer a total loss because the extensive flooding inundated so much farmland that it crippled lifelong farmers and wholly wiped out younger farmers with large mortgages.[44] Local businesses in Spring Green suffered an estimated $1.4 million in property and inventory damages and $850,000 in lost revenue, which does not include the loss of regular summertime business that keeps many businesses afloat.[45] The magnitude of the damage to private residences is more challenging to estimate. However, FEMA data shows that 270 households in Spring Green applied for assistance under the FEMA Individuals & Households Program (IHP).[46] Yet, only 191 claims were paid out, totaling just over $1 million.[47] The village incurred roughly $140,000 in flood response costs submitted to FEMA, not including the over 1,700 hours of volunteer labor that those in the community gave to help bring the town back to life.[48]

The trend of increased flooding is likely to continue for rural communities in Wisconsin.[49] The Wisconsin Department of Natural Resources (DNR) calculates that a 1% chance flood, commonly known as a 100-year flood event, can happen four or more times during a thirty-year mortgage.[50] The state's annual average precipitation increased by 10% between 1950 and 2006, about 3.1 inches.[51] These trends show no signs of slowing down, with annual precipitation expected to continue to rise over the next fifty years.[52]

Climate change is largely to blame for the increased precipitation and extreme weather events Wisconsin is currently experiencing.[53] As of 2021, only roughly 64% of Wisconsin counties recognize and discuss climate change in their local emergency mitigation plans because of the community-held belief that this topic is taboo.[54] However, there is documented evidence of changing weather patterns in Wisconsin.[55] Over the past fifty years, mean annual temperatures have increased, accompanied by a rise in high-magnitude precipitation events.[56] National Weather Service records for

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43 *Id.*
44 *Spring Green still suffering from severe flooding*, *supra* note 35.
45 Jewell Assoc. Eng'r, Inc. & Montgomery Assoc. Res. Sol., LLC, *supra* note 27, at 13.
46 *Id.*
47 *Id.*
48 *Id.*
49 *Do I Need Flood Insurance?*, *supra* note 38.
50 *Id.*
51 *Id.*
52 *Id.*
53 *See* Wis. Emergency Mgmt., *2021 State Hazard Mitigation Plan* 4-8 (2021), https://wem.wi.gov/wp-content/library/Mitigation/Section4_Local_Hazard_Mitigation_Planning.pdf.
54 *Id.* at 4-9.
55 *Id.* at 4-8.
56 *Id.*

nearby Madison, Wisconsin, revealed that six of the top ten twenty-four-hour rain events since 1879 recordkeeping began occurred in the past twelve years.[57] If that is not evidence enough, data from the University of Wisconsin Center for Climatic Research shows that in the 1990s, Madison experienced only twelve two-inch twenty-four-hour rain events.[58] Between 2000 and 2010, that number doubled, counting twenty-five similar events.[59] Undoubtedly, these extreme weather events will become increasingly common, so local communities must protect against flooding, even in areas not recognized as floodplains.[60]

II. VULNERABILITIES OF RURAL AMERICA

Climate change-induced global warming increases evaporation and moisture accumulation in the atmosphere, amplifying rainfall intensity in regions prone to precipitation.[61] In 2021, over twenty states set new wettest-day records, receiving more rain than any other day since recording national weather data began over fifty years ago.[62] For farmers in 2020, this increase led to corn being planted at its slowest pace in the past forty years.[63] Most flood protection is based on an outdated concept of 100-year floods, but numerous studies predict that these 100-year events will occur 25% to 100% more frequently over the next couple of decades.[64]

As demonstrated by the 2008 flood in Spring Green, Wisconsin, when the water table is high, the soil has little or no capacity to absorb additional moisture.[65] As a result, the region becomes vulnerable to flooding, leaving very few areas in the country safe from the potentially devastating effects.[66] Rural communities are particularly vulnerable to the impacts of climate change due to rural economic foundations and community cohesion that are intricately linked to these natural systems.[67] Such rural areas are generally underserved by local governments.[68] Although more than 95% of the U.S. land area is classified as rural, only 19% of the population lives there.[69] Rural

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57 Jewell Assoc. Eng'r, Inc. & Montgomery Assoc. Res. Sol., LLC, *supra* note 27, at 15.
58 *Id.* at 13.
59 *Id.* at 15.
60 *See* Wis. Emergency Mgmt., *supra* note 53, at 4-8.
61 *Why are floods hitting more places and people?*, *supra* note 1.
62 *Id.*
63 ClimateAi, *The Impact of Floods on Agriculture in the U.S. – Taking a Look Under the Hood*, MEDIUM (May 14, 2020), https://climateai.medium.com/the-impact-of-floods-on-agriculture-in-the-u-s-taking-a-look-under-the-hood-5b3d3ddf307e.
64 *Id.*
65 Jewell Assoc. Eng'r, Inc. & Montgomery Assoc. Res. Sol., LLC, *supra* note 27, at 13.
66 *Id.* at 14.
67 HALES ET AL., *supra* note 13, at 334.
68 *See id.*
69 *See id.*

America's importance to the country's economic and social well-being is disproportionate to its population, so it is crucial these communities are not left drowning during exacerbated weather events with no helpful aid.[70] These vast rural areas provide natural resources that much of the country depends on for energy, food, water, forests, recreation, national character, and quality of life.[71] Consequently, urban areas that rely on these rural resources will also face the effects of climate change across the country.[72]

Many rural communities face considerable infrastructure, livelihood, and quality of life challenges from observed and projected warming trends, climate volatility, extreme weather events, and environmental changes.[73] Exacerbated flooding is not the only thing that climate change will affect; it will also progressively increase volatility in food commodity markets, shift the ranges of plant and animal species, increase water scarcity, and increase the intensity and frequency of wildfires across the rural landscape.[74] Many rural communities are less diverse in economic activities than their urban counterparts, presenting a unique challenge in adapting to changes in the timing of seasons, temperatures, and precipitation, which could alter where commodities, value-added crops, and recreational activities are best suited.[75] In a rural town, the changes in the viability of a single traditional economic sector are enough to place disproportionate stresses on community stability.[76]

Modern rural populations face various unique challenges when adapting to climate change.[77] The inhabitants of rural areas tend to be older, have lower incomes, and possess lower levels of education compared to those in urban areas.[78] They are also characterized by elevated unemployment rates, greater reliance on government assistance, less varied economic activities, and reduced availability of social and financial resources essential for adapting to significant shifts in daily life.[79] Specifically, the combination of an aging population and poverty heightens the susceptibility of rural communities to shifts in climate patterns.[80]

The transportation infrastructure in rural areas is especially at risk from flooding and rising sea levels.[81] With fewer transportation alternatives and less backup infrastructure, any disruptions to roads, railways, or air travel

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70 *See id.*
71 *See id.*
72 *Id.*
73 HALES ET AL., *supra* note 13, at 334.
74 *Id.* at 334.
75 *Id.*
76 *Id.*
77 *See id.* at 338.
78 *Id.*
79 HALES ET AL., *supra* note 13, at 338.
80 *Id.*
81 *Id.* at 339.

will significantly impact rural communities.[82] During severe events, power and communication outages in rural areas often require more time to be restored, leading to increased isolation and vulnerability for elderly residents who may not have access to modern cell phones.[83] Additionally, the absence of cellular coverage in some rural regions poses challenges for emergency response efforts during power outages.[84]

The limited resources available cause rural governments to frequently rely on volunteers to address community needs such as flood response.[85] Moreover, rural communities typically have constrained local financial resources to cope with the impacts of climate change.[86] The small size of these communities often results in higher service costs or the need to travel longer distances to access them.[87] Seventy-three percent of metropolitan counties have land-use planners compared to 29% of rural counties with the same.[88] This leads to land-use planning exacerbating local flood plains and riparian runoff.[89]

For rural communities to effectively address forthcoming climate changes, they will likely require assistance evaluating risks and vulnerabilities, organizing and overseeing projects, securing and distributing financial and human resources, and implementing tools for sharing information and aiding in decision making.[90] Effective adaption measures should be closely tailored to a particular rural locality's unique circumstances and requirements, and they should also consider the pre-existing social networks in place.[91] However, for these local efforts to be practical, federal assistance may be necessary to provide the means to accomplish these unique local goals.[92]

III. CURRENT FEDERAL RESPONSE

Under FEMA IHP guidelines, assistance is authorized based on the disaster's need.[93] It is generally only made available under emergency declarations and is limited to supplemental emergency assistance to the affected state, territory, or tribal government.[94] Individual Assistance (IA)

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82 *Id.*
83 *Id.*
84 *Id.*
85 HALES ET AL., *supra* note 13, at 340.
86 *Id.*
87 *Id.*
88 *Id.*
89 *See id.*
90 *Id.*
91 HALES ET AL., *supra* note 13, at 340.
92 *See id.* at 349.
93 FEMA, *supra* note 11, at 4.
94 *Id.*

programs may be authorized only after the President has declared a major disaster.[95] These guidelines make it difficult for rural communities affected by flooding to break the glass ceiling of federal flood assistance.[96]

The issue with the current FEMA guidelines for major disaster funding is that IA programs may only be authorized once the President formally declares the disaster.[97] The President is authorized to declare two kinds of incidents subject to assistance: an "emergency declaration" or a "major disaster declaration."[98] An emergency declaration is any instance the President determines to warrant supplemental emergency assistance to "save lives and protect property, public health, and safety, or to lessen or avert the threat of catastrophe."[99] A major disaster declaration is any natural catastrophe (flooding) or man-made hazards, regardless of cause, "that produces damage of sufficient severity and magnitude in the President's determination to warrant supplemental assistance . . . ."[100] These declarations would specify an incident period, indicating the duration of aid available to those who have suffered losses.[101] Additionally, they would designate eligible recipients to receive the aid, such as counties, parishes, tribes or tribal lands, municipalities, villages, or districts.[102] This bureaucratic process of determining who is eligible to receive aid inevitably leaves cracks, making some affected by catastrophic events helpless.[103]

FEMA states that the goals of IHP are to "provide[] financial assistance and direct services to eligible individuals and households who may be uninsured or underinsured in serious need[] . . . ."[104] IHP is intended to meet basic needs and supplement disaster recovery efforts.[105] Still, it is not a substitute for insurance and cannot compensate for all losses caused by a disaster.[106] The federal policy relies on the premise that most individuals or households affected already have insurance that will pay for some of their losses.[107] Affected individuals who do not fall within the disaster declaration regions are expected to have private flood insurance or coverage through the

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95 *Id.*
96 *Id.*
97 *Id.*
98 *Id.* at 5.
99 FEMA, *supra* note 11, at 5.
100 *Id.*
101 *Id.*
102 *Id.*
103 *See id.*
104 *Id.* at 6.
105 FEMA, *supra* note 11, at 6.
106 *Id.*
107 *Id.*

NFIP.[108] The NFIP, managed by FEMA, is administered to the public by a network of more than fifty insurance companies and the NFIP Direct.[109]

Given the severity of the threat, one would expect private flood insurance to be standard for U.S. households, as FEMA emergency protection declarations often leave so many uninsured at risk of enormous losses.[110] However, this is not the case. Standard homeowners' and renters' insurance in the United States does not cover flood damage under any circumstances.[111] Individuals living within a designated flood zone are often advised to purchase flood insurance, but this is optional.[112] Individuals with homes or property at risk of flood "by melting snow, an overflowing creek or pond, or water running down a steep hill" are also expected to understand these risks and control them by purchasing flood insurance.[113] These risks, however, are challenging to determine absent witnessing a flood event on the property, leaving many uninsured as the NFIP requires a "30-day waiting period before the coverage takes effect" for any NFIP policies.[114] If individuals do not have an NFIP policy, their only option is to purchase one of two types of flood insurance from a private insurer.[115]

First, it is essential to understand how FEMA designates areas as Special Flood Hazard Areas (SFHAs).[116] An SFHA is an area that will be "inundated by the flood event having a 1% chance of being equaled or exceeded in any given year."[117] Communities then use maps to set minimum building requirements for coastal areas and floodplains, while lenders use them to determine flood insurance requirements.[118] SFHAs are the most high-risk areas, and federal mortgage owners who own households or businesses within the SFHA are the only individuals required to buy flood insurance.[119] To qualify for NFIP flood insurance, the household or business must be in a community that has joined the NFIP and agree to enforce "sound floodplain management standards."[120] The NFIP relies on local governments to pass and

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108 *See id.*; *Flood Insurance*, FEMA (Sept. 27, 2023), https://www.fema.gov/flood-insurance.

109 *See* FEMA, *supra* note 11, at 6; *Flood Insurance*, FEMA (Sept. 27, 2023), https://www.fema.gov/flood-insurance.

110 *See* FEMA, *supra* note 11, at 6.

111 *Do I need flood insurance for my home?*, INS. INFO. INST. (2024), https://www.iii.org/article/do-i-need-flood-insurance-for-my-home.

112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 *Flood Zones*, FEMA (2020), https://www.fema.gov/glossary/flood-zones.

117 *Id.*

118 *FEMA Flood Maps and Zones Explained*, FEMA (April 4, 2018), https://www.fema.gov/blog/fema-flood-maps-and-zones-explained.

119 *Id.*

120 *Id.*

enforce regulations for designated SFHAs, meaning individuals may live in an SFHA without the proper safeguards for responding to a flood event.[121]

The National Flood Insurance Act (NFIA) was adopted in 1968 because private insurance companies charged excessively high flood insurance premiums.[122] The act established the NFIP, making flood insurance more affordable to the general public by operating through a pool of private insurers under the supervision and support of the Department of Housing and Urban Development.[123] In 1977, management and funding were transferred to FEMA.[124] Under the NFIA, private insurers can issue flood insurance policies through write-your-own (WYO) companies or FEMA directly.[125]

These insurance policies generally cover "up to $250,000 for the home structure and $100,000 for personal possessions."[126] The policies issued by NFIP cover a single risk: direct physical loss, damage, or loss caused by a flood.[127] The NFIP defines a flood as "a general and temporary condition of partial or complete inundation of two or more acres of normally dry land or two or more properties."[128] This means floods may be caused by river overflows from storm surges, excess runoff from heavy rainfall, or flooding caused by erosion and mudflows.[129]

If someone owns a home with only basic building coverage through the NFIP, they can expect to be underinsured when faced with a significant flood.[130] Building coverage insures only the structure of the building itself and most of the permanent fixtures such as the electrical and plumbing systems.[131] There are exceptions for areas "below the lowest elevated floor of a post-FIRM" building or in a basement.[132] A "post-FIRM" building is one where "construction or substantial improvement" occurred after December 31, 1974, when FEMA created the Flood Insurance Rate Map.[133] These maps are seldom updated because they rely on local sources to collect data to

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121 *See id.*

122 Jason R. Richards, *The National Flood Insurance Program: A "Flood" of Controversy*, 82 FLA. BAR J. 8, 9 (2008); National Flood Insurance Act, Pub. L. No. 90-448, 82 Stat. 572 (1968) (current version at 42 U.S.C. 50 (2024)).

123 Jason R. Richards, *The National Flood Insurance Program: A "Flood" of Controversy*, 82 FLA. BAR J. 8, 9 (2008).

124 *Id.* at 9–10.

125 *Id.* at 10.

126 *Do I need flood insurance for my home?*, *supra* note 111.

127 FEMA, NAT'L FLOOD INS. PROGRAM, W-20025, SUMMARY OF COVERAGE 3 (2020).

128 *Id.*

129 *Id.*

130 *See id.* at 4.

131 *Id.*

132 *Id.*

133 FEMA, NAT'L FLOOD INS. PROGRAM, *supra* note 127, at 4.

inform the maps.[134] As such, maps do not reflect the actual risk of flooding since the system is set up to respond to floods after they happen.[135]

Homeowners who possess both building coverage and contents coverage are slightly better off.[136] They can recover the current value of personal belongings such as clothing, furniture, electronics, and certain portable appliances and valuable items (only up to $2,500 combined).[137] However, there are exceptions for areas below the "lowest elevated floor."[138] Many things intended to be included in the contents coverage will not be covered if they were damaged in a storage space or basement.[139] Clothes washers and dryers, food freezers (food included), and portable window air conditioners are specifically covered under contents coverage but also expressly excluded if found in any sub- or semi-terranean part of the household.[140] Individuals who furnish their basements or use the space for storage face little to no coverage in the event of a flood, even if they are insured by one of these NFIP policies.[141] These policies also would not adequately protect those living in apartments or below street-level dwellings.[142]

If an NFIP policy is unavailable or the homeowner has determined it does not provide adequate coverage, they may seek out one of two types of private market flood insurance.[143] First, private insurers have begun to offer "first-dollar" or primary flood insurance.[144] These policies are very similar to the NFIP policies regarding what is covered but generally offer higher levels of coverage, allowing for a higher payout if a flood causes damage beyond the typical $250,000.[145] Second, excess flood insurance is available for homeowners who live in a community that does not participate in the NFIP or if they need additional protection over the basic NFIP policy.[146] This type of private flood insurance is available in many parts of the country (except for flood-prone areas) and is purchased from specialized companies through independent insurance agents.[147] These private companies independently

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134 *Flood Maps*, FEMA (2023), https://www.fema.gov/flood-maps.
135 *See id.*; FEMA, NAT'L FLOOD INS. PROGRAM, *supra* note 127, at 4.
136 FEMA, NAT'L FLOOD INS. PROGRAM, *supra* note 127, at 4.
137 *Id.*
138 *See id.*
139 *Id.*
140 *See id.*
141 This undoubtedly includes most basement owners, resulting in nearly all basement owners having inadequate coverage. *See* FEMA, NAT'L FLOOD INS. PROGRAM, *supra* note 127, at 4.
142 *See id.*
143 *Do I need flood insurance for my home?*, *supra* note 111.
144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.*

assess the risk of flooding and charge their premiums accordingly.[148] As flooding increases in certain parts of the country, individuals who have lived their entire lives in these areas are being priced out of flood insurance due to rising premiums from higher risk assessments.[149] A business owner in Toad Suck, Arkansas, saw their flood insurance premiums rise from $3,500 to $7,000 annually over three years due to increased floods.[150] This is just one example of how hard-working individuals, despite making no mistakes, can suffer from the unaffordability of basic flood insurance in some regions of the country.[151]

IV. SOLUTIONS

The complexities of our current national flood insurance system create myriad multifaceted issues that must be addressed to achieve equitable living standards and risk.[152] Filling the voids of the current system could be accomplished at the federal or local level, with the most effective response utilizing both.[153] Many scholars believe that municipalities and other local governments will play a crucial role in the country's adaptation to climate change.[154] This presents the challenge of incentivizing local governments to take action.[155] FEMA reform has been suggested in the past and may be the most direct option for combating this issue from a federal perspective.[156] Congress may also intervene, much like it did in 1968 by creating the NFIA to establish equitable parameters that consider modern trends regarding climate change and its corresponding hazards.[157]

FEMA could be reformed to incentivize municipalities to obtain private flood insurance for their infrastructure.[158] This could be implemented either as a mandate or as an absolute condition upon receiving federal aid.[159] The difficulty lies within municipalities' needs to secure flood insurance within

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148 *Id.*

149 Rebecca Hersher, *Many People Living in Flood-Prone Areas Can't Afford Expensive Flood Insurance*, NAT'L PUB. RADIO (June 7, 2019, 4:24 PM), https://www.npr.org/2019/06/07/730758882/many-people-living-in-flood-prone-areas-cant-afford-expensive-flood-insurance.

150 *Id.*

151 *Id.*

152 *See Do I need flood insurance for my home?*, *supra* note 111.

153 *See* Thomas M. Gremillion, *Setting the Foundation: Climate Change Adaption at the Local Level*, 41 ENV'T L. 1221 (2011); David Dana, *Incentivizing Municipalities to Adapt to Climate Change: Takings Liability and FEMA Reform as Possible Solutions*, 43 B.C. ENV'T AFF. L. REV. 281 (2016).

154 David Dana, *Incentivizing Municipalities to Adapt to Climate Change: Takings Liability and FEMA Reform as Possible Solutions*, 43 B.C. ENV'T AFF. L. REV. 281, 281 (2016).

155 *Id.*

156 *Id.* at 282.

157 *See* Richards, *supra* note 123, at 10.

158 Dana, *supra* note 154, at 282.

159 *Id.*

the constraints of their local budgets.[160] New liabilities typically require reductions in essential local services, which are crucial to small or local governments,[161] unlike the higher budgets of state and federal governments, where deficit spending is typical.[162]

One potential solution is to link FEMA disaster assistance and federal flood insurance to the condition that localities and individuals must first have sufficient coverage for public buildings and infrastructure.[163] Critics argue that the current FEMA program disincentives municipalities and homeowners to purchase private flood insurance by providing state and local governments with disaster-related bailouts.[164] The federal government provides free insurance without creating incentives to shift that fiduciary burden back to state and local governments, which are better suited to make risk judgments.[165] Conditioning federal aid on a locality carrying adequate flood insurance, especially in coastal, floodplain, or other volatile areas, would give more deference to state and local governments, as disaster response is inherently local.[166]

A major drawback with this solution is that private insurance companies have already stopped participating in providing federal flood insurance policies.[167] Notably, they have been withdrawing from the market in areas of the country with the most climatic risk, fearing massive claims liability.[168] It is doubtful that private insurers would be open to covering flood risks for property and infrastructure, especially in areas affected by the most extreme events.[169] Opening themselves up to such broad coverage is adverse to the private insurance model in this country, where insurers try to reduce the potential of large claims.[170] In contrast, the likelihood of flooding has risen to the point where there is now a recurring annual risk of catastrophic floods across the country.[171] Private insurers would need to be incentivized in some way, like facilitating certain localities with high flood risks or otherwise

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160 *Id.* at 295.
161 *Id.*
162 *Id.*
163 *Id.* at 304.
164 Dana, *supra* note 154, at 306.
165 *Id.*
166 *Id.* at 311.
167 *See* Paige St. John, *State Farm Leaving Flood Insurance Program*, ASS'N OF STATE FLOODPLAIN MANAGERS (June 4, 2010), https://www.floods.org/whats-new/state-farm-leaving-flood-insurance-program/#:~:text=State%20Farm%20Mutual%20confirmed%20Thursday,their%20coverage%20through%20the%22company.
168 Dana, *supra* note 154, at 312.
169 *Id.*
170 *Id.* at 312–13.
171 *Id.* at 313.

lacking funding capabilities with government-backed promises or even a guarantee of reinsurance to protect from outrageous claims.[172]

FEMA reform is better suited to promote greater reliance on private insurance without creating harmful incentives for local and state governments.[173] However, this solution faces unique challenges in implementation because it places an increased burden on private insurers facing extraordinary risk.[174] The proposal suggests amending FEMA to address the challenges and implementing a system similar to the current one, where federally-backed insurance is issued through private insurance companies.[175]

FEMA's disaster relief fund is primarily funded through Congress's supplemental appropriations in response to particularly large or widespread disasters.[176] Over the past three decades, FEMA has spent over $347 billion on disaster relief, averaging $12 billion annually, with a disproportionate amount spent on hurricane response.[177] Presidents have issued over 1,700 declarations, including funding created in response to the coronavirus pandemic.[178]

Since most homeowners do not own flood insurance, they rely on either the President or Congress to appreciate and react to every nationwide flood to acquire assistance.[179] If individuals or local governments suffer from a flood large enough to do millions of dollars of damage but not large enough to be deemed a widespread disaster by Congress, this current system lets them drown.[180]

Since the federal government is already footing the bill for most of these disasters, why not alter the system so that aid to these disasters is dispersed equitably and appropriately?[181] Historically, there have been other insurance markets that were once thought to be uninsurable but are now widely insured due to demand for such products.[182] It is now possible that flood risks can be modeled, and realistic premiums can be calculated as long as we continue to use local efforts to predict them.[183] This allows for a quantifiable assessment of nationwide flooding risk, enabling the government to calculate and allocate emergency funding without relying upon the unpredictable cycle of

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172 *Id.*
173 *Id.* at 317.
174 Dana, *supra* note 154, at 312.
175 *Id.* at 310.
176 CONG. BUDGET OFF., FEMA'S DISASTER RELIEF FUND: BUDGETARY HISTORY AND PROJECTIONS (Nov. 2022).
177 *Id.*
178 *Id.*
179 *See id.*; Dana, *supra* note 154, at 313; *Do I need flood insurance for my home?*, *supra* note 111.
180 *See* CONG. BUDGET OFF., *supra* note 176.
181 *See id.*
182 Dana, *supra* note 154, at 313.
183 *Id.*

disaster and response.[184] Moreover, if everyone is insured, the range of exposures to these risks is much more profitable for the insurers. [185] The system could potentially begin to pay for itself or, at the very least, subsidize it.[186]

FEMA's mandatory purchase requirement already requires homeowners with federally-regulated mortgages to purchase flood insurance for areas designated as high-risk.[187] However, a problem arises when there is a lack of or insufficient flood coverage for properties subject to the requirement.[188] FEMA is actively creating methods to comprehensively assess flood risk to solve this problem.[189] Broadening this requirement to include more properties than federally-backed mortgages could put the onus on the insurers to create affordable policies.[190]

Congress should implement a policy of funding FEMA through regular annual appropriations based on a calculated level of risk for flooding and other disasters exacerbated by climate change.[191] Many individuals living in high-risk areas cannot afford the increased premiums offered by private insurance companies, no matter how hard they work,[192] due to the absence of a competitive product the federal government provides in the current market.[193] If FEMA were to offer a competitive product with subsidized rates funded by the disaster relief program, it could trigger a chain reaction among the individuals and municipalities most at risk.[194]

As precipitation events become more frequent and intense over the next century, preemptive action must be taken to address extreme weather events.[195] Changing FEMA to a direct funding program would allow them to offer competitive rates for individuals and municipalities seeking flood insurance.[196] It could also force the private insurance agency through a transitionary phase where flood insurance is more commonplace, and premiums can be offset due to the enlarged market participation.[197] Expect to

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184 *Id.* at 312; CONG. BUDGET OFF., *supra* note 176.
185 Dana, *supra* note 154, at 310.
186 *See id.* at 313.
187 *National Flood Insurance Program: Congress Should Consider Updating the Mandatory Purchase Requirement*, U.S. GOV'T ACCOUNTABILITY OFF. (July 30, 2021), https://www.gao.gov/products/gao-21-578.
188 *Id.*
189 *Id.*
190 *Id.*
191 CONG. BUDGET OFF., *supra* note 176.
192 *See* Hersher, *supra* note 149.
193 *See* Dana, *supra* note 154, at 314.
194 *See Do I need flood insurance for my home?*, *supra* note 111.
195 *See* REIDMILLER ET AL., *supra* note 3, at 88.
196 *See generally* Dana, *supra* note 154, at 313–14.
197 *See id.* at 312–14.

see many more devastating floods in the next century—preparation is crucial for an effective response.[198]

CONCLUSION

Adaption to climate change and the corresponding increased flooding events is necessary in the United States. The current flood risk is quantifiable, which allows the government to calculate and predict when and where flooding will impact the hardest. Local governments must partner with the federal apparatus to ensure equitable relief for flooding disasters. This will require altering federal procedures to account for current flood assessments. FEMA reform would be the quickest way to provide broader relief. Reform can be accomplished in many ways, with the best being expanding the current program to fit the needs of a changing climate. This can be achieved through direct funding to create a competitive and profitable market for flood insurance nationally or by a mandate to require broader implementation of flood insurance. Whatever that method may be, preemptive action must be taken to prevent continued catastrophic losses due to climate-related flooding.[199]

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198 *See* REIDMILLER ET AL., *supra* note 3, at 88.

199 This Note is being published during another historic flooding season in the United States. In early October 2024, Florida, Georgia, Tennessee, Virginia, South Carolina, and North Carolina were struck by the costliest storm in U.S. history, Hurricane Helene. Unusually warm surface waters of the Gulf of Mexico allowed the storm to grow from a category 1 to a category 4 hurricane within 24 hours. The storm left a path of destruction 500 miles long, and the death toll has surpassed 230 people due to the heavy rain causing rivers to overflow, flash flooding, road washouts, and landslides. The total damage is estimated to be as high as $200 billion. So far, only $344 million in federal assistance has been dispersed by FEMA in response. John P. Rafferty, *Hurricane Helene*, BRITANNICA (Oct. 18, 2024), https://www.britannica.com/event/Hurricane-Helene; Press Release, FEMA, Federal Assistance for Hurricane Helene Exceeds $344 Million as FEMA Expands Dual Response Efforts as Hurricane Milton Forecast to Make Landfall This Evening (Oct. 9, 2024).