NEW ENGLAND LAW REVIEW

VOLUME 57
Fall 2022

NEW ENGLAND LAW | BOSTON

New England Law Review (ISSN 0028-4823) is published by the *New England Law Review*, New England Law | Boston, 154 Stuart Street, Boston, Massachusetts 02116-5616. *New England Law Review* maintains a Web site at http://www.NewEngLRev.com.

Individual issues of *New England Law Review* are available for $15.00. The annual subscription rate for domestic subscribers is $35.00 ($40.00 for foreign subscribers), payable in advance. Subscriptions are renewed automatically unless notice to the contrary is received. Address changes or other requests regarding subscriptions should be directed to the Business Managing Editor by email at lawreview@nesl.edu

Back issues may be obtained from William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, New York 14068. William S. Hein & Co., Inc. can be reached by telephone at (716) 882-2600, and by fax at (716) 883-8100. William S. Hein & Co., Inc. maintains a Web site at http://www.wshein.com. Recent issues may be obtained directly from *New England Law Review*. The *Law Review* is also available on LEXIS and WESTLAW, and individual articles from recent editions may be obtained from the *Law Review*'s website located at www.NewEngLRev.com.

The *Law Review* invites the submission of unsolicited manuscripts either through the mail or electronically. Directions for electronic submission are available on the *Law Review*'s website at http://www.nesl.edu/lawrev/submissions.cfm. Manuscripts should be sent to the attention of the Editor-in-Chief. Manuscripts submitted through the mail cannot be returned. The *Law Review* requests that submitting authors disclose any economic interests and affiliations that may influence the views expressed in submissions.

The citations in the *Law Review* conform to THE ALWD GUIDE TO LEGAL CITATION (Coleen M. Berger ed., 7th ed. 2021).

Postage is paid at Boston, Massachusetts, and additional mailing offices. POSTMASTER: send address changes and corrections to *New England Law Review*, New England Law | Boston, 154 Stuart Street, Boston, MA 02116-5616.

NEW ENGLAND LAW REVIEW

VOLUME 57 | 2022-2023 | NUMBERS 1-2

NEW ENGLAND LAW | BOSTON

CORPORATION

HON. PETER L. BROWN, B.A., J.D.
President

CARY W. SUCOFF, B.A., J.D.
Treasurer

DIANA L. WHEELER, B.A., J.D.
Secretary

WILLIAM M. CASEY, B.S., J.D.
Vice President

ALBERT A. BALBONI, B.A., J.D.
HON. SUSAN J. CRAWFORD, B.A., J.D., Jur. D.
RICHARD J. LAWTON, B.A., J.D.
HON. JACKIE A. COWIN, B.A., J.D.
PETER G. FLAHERTY II, B.A., J.D.
JOHN F. O'BRIEN, B.A., J.D., LL.M., Jur. D.
C. BRENDAN NOONAN III, B.S., J.D.

BOARD OF TRUSTEES

ALBERT A. BALBONI, B.A., J.D.
Chairman

RICHARD C. BARDI, B.A., J.D.
Treasurer

WILLIAM M. CASEY, B.S., J.D.
Secretary

C. BRENDAN NOONAN III, B.S., J.D.
Vice Chairman

HON. PETER L. BROWN, B.A., J.D.
HON. WAYNE A. BUDD, B.A., J.D.
HON. JACKIE A. COWIN, B.A., J.D.
HON. SUSAN J. CRAWFORD, B.S., J.D., Jur. D.
PETER G. FLAHERTY II, B.A., J.D.
STEPHANIE C. NARANJO, B.A., J.D.
JORDAN HOWLETTE, B.A., J.D.
KATHLEEN M. PFEIFER SPURLING, B.S., J.D.
CARY W. SUCOFF, B.A., J.D.
DIANA L. WHEELER, B.A., J.D.

FACULTY

LISA R. FREUDENHEIM, *Dean and Professor of Law*, B.A., J.D.
PETER J. KAROL, *Associate Dean, Professor of Law, and Director of Intellectual Property Certificate Program*, B.A., J.D.

CHRISTINE ABELY, *Assistant Professor of Law*, B.A., J.D.
BREANISHEA AMAYA, *Clinical Teaching Fellow*, B.A., J.D.
GARY M. BISHOP, *Professor of Law and Director of Legal Research and Writing*, B.A., J.D.
ROBERT A. COULTHARD, *Professor of Academic Excellence and Director of Bar Examination Preparation Services*, B.A., J.D., LL.M.
ALLISON M. DUSSIAS, *Professor of Law*, A.B., J.D.
TIGRAN W. ELDRED, *Professor of Law*, A.B., J.D.

RUSSELL ENGLER, *Professor of Law and Director of Clinical Programs*, B.A., J.D.
ELLEN FARWELL, *Faculty Fellow*, B.A., J.D.
ERIN FITZGERALD, *Faculty Fellow*, B.A., J.D.
LAWRENCE M. FRIEDMAN, *Professor of Law*, B.A., J.D., LL.M.
JASON GIANNETTI, *Faculty Fellow*, B.A., M.A., J.D.
LOUISA GIBBS, *Visiting Clinical Professor of Law*, B.A., J.D.
BEN GOLDEN, *Visiting Clinical Professor of Law*, B.A., J.D.
JUDITH G. GREENBERG, *Professor of Law*, B.A., J.D., LL.M.
VICTOR M. HANSEN, *Professor of Law and Director of Criminal Practice and Procedure Certificate Program*, B.A., J.D., LL.M.
DINA FRANCESCA HAYNES, *Professor of Law and Director of Immigration Law Certificate Program*, B.A., J.D., LL.M.
ALIZA HOCHMAN BLOOM, *Faculty Fellow*, B.A., J.D.
WILTON B. HYMAN, *Professor of Law*, B.A., J.D., LL.M.
LISA J. LAPLANTE, *Professor of Law and Director of the Center for International Law and Policy*, B.A., M.Ed., J.D.
ERIC A. LUSTIG, *Professor of Law, Director of the Center for Business Law, and Director of Compliance and Risk Management Certificate Program*, B.S., M.S., J.D., LL.M.
SEAN LYNESS, *Visiting Assistant Professor of Law*, A.B., J.D.
PETER M. MANUS, *Professor of Law*, B.A., J.D.
CHANAL MCCAIN, *Faculty Fellow*, B.A., J.D.
KRISTIN C. MCCARTHY, *Director of the Law Library and Assistant Professor of Law*, B.A., J.D., M.L.S.
CHANCE MEYER, *Academic Excellence Lecturer on Law*, B.S., J.D.
CARYN R. MITCHELL-MUNEVAR, *Clinical Law Professor*, B.A., J.D.
LYNN S. MUSTER, *Visiting Professor of Practice*, B.A., J.D.
NICOLE NOËL, *Assistant Professor of Law and Acting Director of the Academic Excellence Program*, B.A., J.D.
KENT D. SCHENKEL, *Professor of Law*, B.A., J.D., LL.M.
DAVID M. SIEGEL, *Professor of Law and Director of the Center for Law and Social Responsibility*, B.A., J.D.
JORDAN M. SINGER, *Professor of Law*, A.B., J.D.
ELIOT TRACZ, *Faculty Fellow*, B.A., J.D.
NATASHA N. VARYANI, *Associate Professor of Law*, B.A., M.B.A., J.D.
J. RUSSELL VERSTEEG, *Professor of Law*, A.B., J.D.
BHAMATI VISWANATHAN, *Faculty Fellow*, B.A., J.D., LL.M.

ADJUNCT PROFESSORS OF LAW

ANTHONY ABELN, *Lecturer on Law*, B.A., M.A., J.D.
KEPLIN K. U. ALLWATERS, *Lecturer on Law*, B.A., J.D.
DAVID M. BAE, *Lecturer on Law*, B.A. & Sc., J.D.
MAX BAUER, *Lecturer on Law*, A.B., J.D.
HON. AMY LYN BLAKE, *Lecturer on Law*, B.A., J.D.
ERIC K. BRADFORD, *Lecturer on Law*, B.A., J.D.
DARREN L. BRAHAM, *Lecturer on Law*, LL.B., LL.M.

DINA BROWNE, *Lecturer on Law*, B.A., J.D.
MATT BURRILL, *Lecturer on Law*, B.S., J.D.
HON. ANTHONY CAMPO, *Lecturer on Law*, B.A., J.D.
COLLEEN CARCONE, *Lecturer on Law*, B.A., J.D.
RYAN CARROLL, *Lecturer on Law*, B.S., M.B.A., J.D.
LINDA CHAMPION, *Lecturer on Law*, B.S., J.D., LL.M.
ALAN L. CHOW, *Lecturer on Law*, B.A., J.D.
JACK CINQUEGRANA, *Lecturer on Law*, B.A., J.D.
PETER COLLI, *Lecturer on Law*, B.A., J.D.
ANDREW P. CORNELL, *Lecturer on Law*, B.A., J.D.
HON. PETER M. COYNE, *Lecturer on Law*, B.A., J.D., M.S.
BERNARDO G. CUADRA, *Lecturer on Law*, B.S., J.D.
MICHAEL CURRY, *Lecturer on Law*, B.A., J.D.
THOMAS H. DAY, *Lecturer on Law*, A.B., J.D.
SHAWN DEANE, *Lecturer on Law*, B.A., M.Ed., J.D.
WILLIAM DELANEY, *Lecturer on Law*, A.B., M.B.A., J.D., LL.M.
MATTHEW DESMEULES, *Lecturer on Law*, B.S., J.D.
GREGORY DEVLIN, *Lecturer on Law*, B.S., J.D.
ALICIA DOWNEY, *Lecturer on Law*, B.A., M.A., J.D.
DAWN D. EFFRON, *Adjunct Professor of Law*, B.A., J.D.
TYSON R. ENCE, *Lecturer on Law*, B.S., J.D.
KYLE FAGET, *Lecturer on Law*, A.B., J.D.
JUSTIN FABELLA, *Lecturer on Law*, B.A., J.D.
WALTER FOSTER, *Lecturer on Law*, B.A., J.D.
DAVID J. FREDETTE, *Lecturer on Law*, B.A., J.D.
LAURA GREENBERG-CHAO, *Lecturer on Law*, B.A., J.D.
RYAN GROFF, *Lecturer on Law*, B.A., M.A., J.D.
HON. SYDNEY HANLON, *Lecturer on Law*, A.B., J.D.
R. DAVID HOSP, *Lecturer on Law*, B.A., J.D.
JARED HUBBARD, *Lecturer on Law*, B.S./B.A., J.D., LL.M
TODD R. JOHNSON, *Lecturer on Law*, B.A., J.D., ARM, ARM-E, ARM-P, AIC
PATRICIA A. JONES, *Adjunct Professor of Law,* A.B., M.M.E., J.D
HON. HÉLÈNE KAZANJIAN, *Lecturer on Law*, A.B., J.D.
JUSTIN KELSEY, *Lecturer on Law*, B.S., J.D.
JOHN KIERNAN, *Adjunct Professor of Law*, A.B., J.D.
ANDREW LELLING, *Lecturer on Law*, B.A., J.D.
ROSA LICEA-MAILLOUX, *Lecturer on Law*, B.A., J.D.
DAVID H. LONDON, *Lecturer on Law*, B.A., J.D.
ROBIN LOPORCHIO, *Lecturer on Law*, B.S., J.D.
HON. DAVID A. LOWY, *Adjunct Professor of Law*, B.A., J.D.
ROSEMARY MACERO, *Lecturer on Law*, B.A., J.D.
MAUREEN MACFARLANE, *Lecturer on Law*, B.A., J.D., M.S., M.A.
JOSEPH MAKALUSKY, *Lecturer on Law*, B.S., J.D.
YAKOV MALKIEL, *Lecturer on Law*, LL.B., LL.M.

ELIZABETH MARCUS, *Lecturer on Law*, B.A., J.D.
CARLY MCCLAIN, *Lecturer on Law*, B.A., J.D.
ERIN MCGUINE, *Lecturer on Law*, B.S., J.D.
HON. GARRETT MCMANUS, *Lecturer on Law*, B.A., J.D.
HALIM MORIS, *Lecturer on Law*, B.S., J.D.
FRANCIS C. MORRISSEY, *Lecturer on Law*, B.A., J.D.
MATTHEW C. MOSCHELLA, *Lecturer on Law*, B.A., M.S.W., J.D.
MALGORZATA MRÓZEK, *Lecturer on Law*, B.A., J.D.
HON. MARYLOU MUIRHEAD, *Lecturer on Law*, B.S., J.D.
YEN NGUYEN, *Lecturer on Law*, B.S., J.D.
ELENA NOUREDDINE, *Lecturer on Law*, B.A., J.D.
DANIEL P. PARADIS, *Lecturer on Law*, B.A., J.D., LL.M.
PETER J. PERRONI, *Lecturer on Law*, B.A., J.D.
MARTIN POMEROY, *Lecturer on Law*, B.S., J.D.
MELISSA ROBBINS, *Lecturer on Law*, B.A., J.D.
HON. JAMES P. ROONEY, *Lecturer on Law*, A.B., J.D.
DAVID P. RUSSMAN, *Lecturer on Law*, B.A., J.D.
BENNETT R. SAVITZ, *Lecturer on Law*, B.A., M.A., J.D.
ERIC SAVOY, *Lecturer on Law*, B.S., J.D., LL.M.
BRENDAN SHARKEY, *Lecturer on Law*, B.A., J.D.
TINA SHELDON, *Lecturer on Law*, B.S., B.S.N., J.D.
STACY SILVEIRA, *Lecturer on Law*, B.A., M.A., J.D.
JUSTIN SILVERMAN, *Lecturer on Law*, B.A., J.D.
HON. ROBERT TOCHKA, *Lecturer on Law*, B.A., J.D.
GARY OWEN TODD, *Lecturer on Law*, B.A., J.D.
HON. RICHARD E. WELCH III, *Adjunct Professor of Law*, B.A., J.D.
ALEX WEST, *Lecturer on Law*, B.A., J.D.
TANASIA WHITE, *Lecturer on Law*, B.S., J.D.
TIMOTHY L. WILLIAMSON, *Lecturer on Law*, B.A., J.D.
KENNETH WOODLAND, *Lecturer on Law*, B.A., J.D.
JEFFREY WOOLF, *Lecturer on Law*, B.A., M.A., J.D.
HECTOR ZUMBADO, *Lecturer on Law*, B.S., M.B.A., J.D.

LEGAL RESEARCH AND WRITING FACULTY

BRYAN M. ABRAMOSKE, *Instructor of Legal Writing*, B.A., J.D.
JUSTIN AMOS, *Instructor of Legal Writing*, B.F.A., J.D.
TERESA ANDERSON, *Instructor of Legal Writing*, B.A., M.A., J.D.
ASHLEY BARKOUDAH, *Instructor of Legal Writing*, B.A., J.D.
XIORLIVETTE BERNAZZANI, *Instructor of Legal Writing*, B.A., J.D.
PAVEL BESPALKO, *Instructor of Legal Writing*, B.A., B.A., M.B.A., J.D.
BARRY BISSON, *Instructor of Legal Writing*, B.S., J.D.
JULIE BLAKE, *Instructor of Legal Writing*, B.A., J.D., LL.M.
KEVIN BUONO, *Instructor of Legal Writing*, B.A., J.D.

SANDRA WYSOCKI CAPPLIS, *Instructor of Legal Writing*, B.S., J.D.
KATHRYN COLSON, *Instructor of Legal Writing*, B.A., J.D., LL.M.
ALEXANDER CONLEY, *Instructor of Legal Writing*, B.A., J.D.
BETH PIRRO COOK, *Instructor of Legal Writing*, B.A., J.D.
LISA DELL'ANNO, *Instructor of Legal Writing*, B.S., J.D.
STEVEN E. DICAIRANO, *Instructor of Legal Writing*, B.A., J.D.
DANIEL DOLAN, *Instructor of Legal Writing*, B.A., J.D.
JOSEPH M. GALVIN, *Instructor of Legal Writing*, B.A., J.D.
MELISSA A. GAUTHIER, *Instructor of Legal Writing*, B.A., J.D.
LANE N. GOLDBERG, *Adjunct Professor of Legal Writing*, B.S., J.D.
KAREN GUTHRIE, *Instructor of Legal Writing*, B.A., J.D.
MIKALEN HOWE, *Instructor of Legal Writing*, B.A., J.D.
DOUGLAS R. HYNE, *Instructor of Legal Writing*, B.A., J.D.
SALLYANN JANULEVICUS, *Instructor of Legal Writing*, B.A., J.D.
LISA JOHNSON, *Adjunct Professor of Legal Writing*, B.A., J.D.
JULIA KOCH, *Instructor of Legal Writing*, B.A., J.D.
ALISSA KOENIG, *Instructor of Legal Writing*, B.A., J.D.
JOHN KULEVICH, *Instructor of Legal Writing*, B.M., M.M., J.D.
CHIA CHI LEE, *Instructor of Legal Writing*, B.A., LL.B., LL.M.
ANDREW LEVRAULT, *Instructor of Legal Writing*, B.A., J.D.
MARIAN MCGRATH, *Instructor of Legal Writing*, B.A., J.D.
NANCY L. MCPHEETERS, *Adjunct Professor of Legal Writing*, B.S., J.D.
STEPHEN MELTZER, *Instructor of Legal Writing*, B.A., J.D.
RACHAEL MICHAUD, *Instructor of Legal Writing*, B.S., J.D.
ELIZABETH MONE, *Instructor of Legal Writing*, B.A., J.D.
BRANDON MOSS, *Instructor of Legal Writing*, B.S., J.D.
SHANE O'SULLIVAN, *Instructor of Legal Writing*, B.S., J.D.
NICOLE PAQUIN, *Instructor of Legal Writing*, B.A., J.D.
DONNA PATALANO, *Instructor of Legal Writing*, B.S., J.D.
KRISTEN SCHULER SCAMMON, *Instructor of Legal Writing*, B.A., J.D.
MEGAN SHAUGHNESSY, *Instructor of Legal Writing*, B.A., J.D.
ALISON SHEA, *Instructor of Legal Writing*, B.A., J.D.
STACY J. SILVEIRA, *Instructor of Legal Writing*, B.A., M.A., J.D.
SIDRA VITALE, *Instructor of Legal Writing*, B.S., J.D.
KENNETH WOODLAND, *Instructor of Legal Writing*, B.A., J.D.

NEW ENGLAND LAW REVIEW

VOLUME 57 FALL 2022 NUMBER 1

CONTENTS

SYMPOSIUM ISSUE
TYRANTS ON TWITTER: PROTECTING DEMOCRACIES FROM INFORMATION WARFARE

* * * *

Balkanizing Social Media

IDO KILOVATY*

Ever since the internet has become a truly global phenomenon, for better or worse, there have been debates over whether the global internet needs to be fragmented into smaller, nationalized pieces.[1] This has been true in authoritarian regimes like Russia[2] and China,[3] inching towards heavily monitored and filtered internets, separate from the global internet that we have all gotten accustomed to.[4] The same debates have also been taking place in democratic regimes in the wake of the Snowden revelations,[5] as the growing distrust in the U.S.-controlled internet has led these countries to consider the creation of their own domestic internet.

Enter David Sloss's *Tyrants on Twitter*,[6] a book that thoroughly diagnoses the problem of information warfare conducted on U.S.-based social media platforms by China and Russia. According to Sloss, calling it information *warfare* denotes the seriousness of the phenomenon and how it threatens,

* Frederic Dorwart and Zedalis Family Fund Associate Professor of Law, University of Tulsa College of Law.

[1] Mark A. Lemley, *The Splinternet*, 70 DUKE L.J. 1397, 1400 (2021) (arguing that the Internet is being balkanized); James Ball, *Russia Is Risking the Creation of a "Splinternet"—And It Could Be Irreversible*, MIT TECH. REV. (Mar. 17, 2022), https://perma.cc/FA64-AJA4 ("[I]instead of the single global internet we have today, we have a number of national or regional networks that don't speak to one another and perhaps even operate using incompatible technologies.").

[2] Ball, *supra* note 1.

[3] Geremie R. Barme & Sang Ye, *The Great Firewall of China*, WIRED (June 1, 1997, 12:00 PM), https://perma.cc/XC94-MXHW; Noah Smith, *Balkanization Is Bad for Facebook's Business*, BLOOMBERG (July 3, 2020, 7:00 AM EDT), https://perma.cc/DAX7-P54Z.

[4] Smith, *supra* note 3.

[5] *See generally* Matthew Taylor et al., *NSA Surveillance May Cause Breakup of Internet, Warn Experts*, THE GUARDIAN (Nov. 1, 2013, 12:03 EDT), https://perma.cc/FHU8-YQFH; Jonathan Watts, *Brazil to Legislate on Online Civil Rights Following Snowden Revelations,* THE GUARDIAN (Nov. 1, 2013, 12:16 EDT), https://perma.cc/M67Z-GY5U.

[6] *See generally* DAVID L. SLOSS, TYRANTS ON TWITTER: PROTECTING DEMOCRACIES FROM INFORMATION WARFARE (2022).

and potentially erodes, liberal democracies in the world.[7] Indeed, the problem of information warfare is well-documented, and its destructive nature is generally undisputed.[8] For example, in the last few years, U.S. social media platforms themselves have employed moderators whose role is to investigate, monitor, and suspend accounts linked to foreign regimes and engaged in information warfare.[9] Despite those efforts, information warfare has been permeating social media platforms in recent years.

To tackle the problem of Russian and Chinese information warfare on social media platforms, Sloss proposes a regime of nationality verification for any public user on U.S. social media.[10] According to this proposal, users on social media will have to verify their nationality with their home government, which in turn will greenlight the user's registration and participation on the social media platform. To achieve this, Sloss calls for the creation of the "Alliance for Democracy," a group of democratic nations whose citizens will be allowed to have public accounts on social media. If the registration system is implemented, foreign agents residing outside of the Alliance for Democracy, such as those in Russia or China, will not be allowed to participate on U.S. social media platforms.

Sloss is fully aware of the challenges with such verification systems, in particular the many data security and privacy ones.[11] For example, Chinese and Russian agents may be able to hack public social media accounts, purchase hacked accounts on the dark web, or pay a legitimate user in order for them to engage in information warfare.[12] The same foreign agents would also be able to circumvent the verification system by using compromised credentials, such as U.S. passport photos and social security numbers, to create seemingly legitimate accounts on U.S. social media.[13] While these are serious concerns, they could be addressed at the outset of the verification system's design. In other words, if the system is designed properly, Sloss says, these weaknesses will be resolved. Some examples include features like encryption, hashing, data retention, and more. All in all, even Sloss admits that the verification system is not foolproof, as excluded states would still try to penetrate the digital gate imposed by the registration system. Yet, despite these inherent flaws in such a system, Sloss's proposal is not to eliminate information warfare entirely, but rather to increase the costs of

---

[7] *Id.* at 4.

[8] *See* Waseem Ahmad Qureshi, *Information Warfare, International Law, and the Changing Battlefield*, 43 FORDHAM INT'L L.J. 901, 914–19 (2020).

[9] *See, e.g.*, Twitter Safety, *Disclosing Networks of State-Linked Information Operations*, TWITTER (Feb. 23, 2021), https://perma.cc/58WH-PBUS (disclosing an information warfare network of Twitter accounts which were removed by Twitter).

[10] SLOSS, *supra* note 6, at 16–17.

[11] *See, e.g.*, SLOSS, *supra* note 6, at 175–77, 209–15.

[12] SLOSS, *supra* note 6, at 147–51.

[13] SLOSS, *supra* note 6, at 147–51.

information warfare on social media to such levels that it becomes less likely (though not impossible) for China and Russia to engage in it on U.S. social media platforms.

This contribution focuses on the data security risks associated with the proposed verification system. At the outset, it is important to note that Sloss does not shy away from these risks, and he provides many observations and prescriptions to these risks.[14] In fact, the proposal itself includes a requirement of "[r]igorous safeguards to protect informational privacy and data security."[15] Indeed, the centralized collection of user data for citizenship verification purposes may serve as an appealing target for authoritarian regimes attempting to bust through the digital gate of U.S. social media. The same registration system would also be appealing from a data standpoint, as these regimes would benefit from accessing, and potentially misusing the registration system data. In other words, data security is even more important given the sensitive nature of the data collected as well as the potential consequences of the data getting compromised by authoritarian regimes. Any compromise to the registration system's data could seriously jeopardize national security, privacy, and the wellbeing of social media users. This essay builds on the data security risks laid out in *Tyrants on Twitter*, and presents them as distinct issues, providing a reflection on each one by making the appropriate recommendations to alleviate them.

I. Basic Cybersecurity and Cybersecurity as a Process

Centralizing the nationality verification process in a government entity would inevitably create distrust among some social media users in the government's capacity to sufficiently safeguard the security of user data pertaining to nationality. Already today, as many as 74% of Americans distrust government institutions in keeping their personal data private and secure.[16] The distrust is understandable when one considers the many data breaches that afflicted the U.S. government in recent years. For example, the 2015 Office of Personnel Management (OPM) breach compromised the "sensitive information, including the Social Security numbers (SSNs) of 21.5 million individuals" which included "19.7 million individuals that applied for a background investigation."[17] The question then is, how should the government safeguard the data collected by the verification system to minimize the distrust that some users may experience? To deal with the distrust, one must ask what its causes are. In this context, there may be many

---

[14] SLOSS, *supra* note 6, at 175–77.

[15] SLOSS, *supra* note 6, at 146.

[16] *Most U.S. Citizens Want Government Agencies to Strengthen Cyber Defense Mechanisms to Protect Their Digital Data, Accenture Research Finds*, ACCENTURE (Apr. 10, 2017), https://perma.cc/WYM6-22SY.

[17] *Cybersecurity Incidents*, U.S. OFF. OF PERS. MGMT., https://perma.cc/6MRU-RBY9 (last visited Nov. 24, 2022).

potential responses.

First and foremost, one should assume that many of the data breaches seen in recent years were entirely preventable.[18] While not offering silver bullet solutions, the knowledge and experience developed over the years by information security specialists offer some basic security practices that significantly reduce the likelihood of a data breach, as well as the fallout in case of a breach. The OPM breach is a good example of the unfortunate consequences of the failure to instate basic security features like two-factor authentication.[19] A security audit by the OPM Inspector General determined that the OPM failed to secure its sensitive data, among other things, because its information security was managed by unqualified, uncertified personnel.[20]

While the OPM has since improved its cybersecurity practices, the Government Accountability Office has reported that further security implementations are required.[21] For example, the OPM did not implement its own security policies in all of its assets. Technically, this means that some sensitive data was not encrypted when it should have been.[22]

The two key takeaways from the 2015 OPM breach are as follows. First, implementing basic cybersecurity practices is the single most important step in securing sensitive data. Second, cybersecurity is a process rather than a list of checkboxes. There is a constant need to reevaluate the organization's cybersecurity posture and implement new policies and safeguards to keep up with hacking trends.

For the registration system proposed by Sloss, the lesson would be the same. Indeed, implementing rigorous security measures is important, but the cybersecurity of the system would have to be reevaluated periodically to ensure that it is not breached.

II. Data Retention

With the basic cybersecurity in mind, another important issue is data retention. Assuming that the data is secure against external hackers, how long should the government keep the data collected through its user registration system? As Sloss points out, the government would be expected

---

[18] *See* Gretel Egan, *OTA Report Indicates 93% of Security Breaches Are Preventable*, PROOFPOINT (Feb. 7, 2018), https://perma.cc/F9U8-868R ("The OTA's analysis of security breaches . . . 'found that 93% were avoidable . . . .'"); Zack Whittaker, *Equifax Breach Was 'Entirely Preventable' Had It Used Basic Security Measures, Says House Report*, TECHCRUNCH (Dec. 10, 2018, 4:20 PM EST), https://perma.cc/DU84-JM2M.

[19] Thu T. Pham, *OPM Security Audit: No Two-Factor Authentication*, DUO SEC. (June 10, 2015), https://perma.cc/3P8G-U5P2.

[20] *Id.*

[21] OPM Has Improved Controls, but Further Efforts Are Needed, No. GAO-17-614 10 (GAO 2017), https://perma.cc/PW5S-PF54.

[22] *Id.* at 18–19.

"to destroy records obtained during the account registration process after a relatively brief time period."[23] However, there is currently no mandatory U.S. law on data retention.[24] If anything, it is likely that the U.S. government would want to keep some of the data collected by the verification system, especially in cases of suspicious online activity by certain users. But the U.S. government's hunger for personal data is not without criticism, and in recent years, there have been calls for Congress to enact privacy and cybersecurity statutes to address issues such as data retention, remedies, and mandatory safeguards.[25] Some of these calls have been inspired by the General Data Protection Regulation (GDPR), which requires that the data collector keep the personal data for "no longer than is necessary for the purposes for which the personal data are processed."[26]

Due to the centralized nature of the user registration process, any government entity holding user information in its database may be an appealing target for data breaches, especially by authoritarian regimes. India's Aadhaar, the largest biometric ID database in the world, has been subject to multiple breaches, exposing the personal data of more than 1 billion people, which are now reportedly on sale on apps like WhatsApp for as little as ten dollars.[27] The same fate could threaten the user registration system if data retention is not taken seriously.

While data retention is one of the most critical data security issues, it is not by any means the only one. Storing user information for only a brief, not-more-than-necessary period of time is essential, but inevitably, some information will be nonetheless stored in the centralized database. It is therefore just as important, if not more, to secure the information that exists at any single point in time in the database. Encryption may offer one tool to address the risk faced by such information. Access controls would similarly limit the access to the information on a need-to-know basis. All in all, the user registration database should not store sensitive information for longer than is necessary.

III. Encryption and Hashing

As Sloss aptly notes, "both companies and government entities" would

---

[23] SLOSS, *supra* note 6, at 176.

[24] *See Mandatory Data Retention*, ELEC. FRONTIER FOUND., https://perma.cc/QP7J-3YDM (last visited Nov. 24, 2022).

[25] *See* Jacob Bogage & Cristiano Lima, *House and Senate Members Unveil Stalled Data Privacy Bill*, WASH. POST, https://perma.cc/4K49-RDP4 (last updated June 3, 2022, 3:00 PM EDT).

[26] Official Journal of the European Union, 'Article 5, Regulation (EU) 2016/679 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)' OJ L 119 1-88 (Apr. 5, 2016), https://perma.cc/V4KF-ZQ4U.

[27] Ashish Malhotra, *The World's Largest Biometric ID System Keeps Getting Hacked*, VICE (Jan. 8, 2018, 11:07 AM), https://perma.cc/74KX-EJ2Z.

have to use hashing to store account registration information securely. Hashing, Sloss explains, is "a special cryptographic function to transform one set of data into another of fixed length by using a mathematical process."[28] Indeed, hashing is an important data security practice to ensure that any compromise would not reveal to the adversary the plaintext of the stored data.

Encryption is a powerful and vital tool to securely store account registration information as securely as possible. In other words, even if a compromise of data is successful by either China or Russia, the attackers would not have access to the actual information, which could otherwise allow foreign agents to register imposter accounts on U.S. social media platforms.[29]

In addition, strong encryption is essential for the effective protection against attempts to hack or interfere with the functioning of the user registration system. One example of encryption technology that would be desirable in this context includes digital signatures, to provide for secure "authentication, integrity, non-repudiation, and privacy/confidentiality" of the database.[30]

In the context of both Russia and China, the need for strong encryption of user registration information is even stronger. The race for quantum computing technology among the superpowers means that encryption protocols commonly used today may not be secure once quantum computing is achieved. To this end, the U.S. Department of Commerce's National Institute of Standards and Technology (NIST) has recently announced the selection of four quantum-resistant encryption algorithms that would ensure data security even in the wake of quantum computers,[31] which both China and Russia are racing to attain.[32]

IV. Government Access to User Registration Information

As *Tyrants on Twitter* proposes, we need "bright-line limits on the government's authority to retain and utilize data disclosed to the government under the social media registration system."[33] Such a bright-line limit or rule would have to establish the access control aspect of data security, meaning who can access the data, as well as under what circumstances the data may be accessed. While such a rule is much needed

---

[28] SLOSS, *supra* note 6, at 176.

[29] SLOSS, *supra* note 6, at 147.

[30] SANS INST., INFORMATION WARFARE: CYBER WARFARE IS THE FUTURE WARFARE 12 (2004), https://perma.cc/3M3Q-RCGR.

[31] *NIST Announces First Four Quantum-Resistant Cryptographic Algorithms*, NAT'L INST. OF STANDARDS & TECH. (July 5, 2022), https://perma.cc/S2BK-LBFS.

[32] Zhanna Malekos Smith, *Make Haste Slowly for Quantum*, CTR. FOR STRATEGIC & INT'L STUD. (Feb. 11, 2022), https://perma.cc/ZWW9-QZQB.

[33] SLOSS, *supra* note 6, at 210.

to ensure that data is private and secure, save for the narrowly defined exceptions, it needs to clearly establish the penalties should the rule be broken.

Establishing penalties for access to data in violation of the government's data access policy would be needed to address the insider threat problem, which the Cybersecurity & Infrastructure Security Agency (CISA) defines as "the potential for an insider to use their authorized access . . . to harm that organization. This harm can include malicious, complacent, or unintentional acts that negatively affect the integrity, confidentiality, and availability of the organization, its data, personnel, or facilities."[34] In particular, such limits and penalties are much needed in a post-*Van Buren v. U.S.* world, where computer crime laws do not apply to insiders using their authorized access to information for "bad" purposes.[35] One such example is the many instances in which National Security Agency (NSA) employees used surveillance information to spy on their lovers.[36] Therefore, the user registration information database would have to be on a need-to-know basis,[37] and even then, with clear penalties for any violations of the data access policies, which should be clearly delineated.

V. Ensuring Public-Private Cybersecurity

Due to the nature of the user registration system, its design would likely have to focus on information sharing, a data pipeline of sorts, between the government (the verifier) and the social media platforms. It is likely to assume that any such system would not necessarily have to be the direct sharing of user registration information (such as passport/ID copies, social security numbers, etc.) between the government and social media platform, as the government would simply be acting as a verifier who can securely "vouch" for a certain user as being the national of an Alliance for Democracy member state by using authentication tokens.[38]

Nonetheless, the newly emerging relationship under the user registration proposal would involve the government and social media. This relationship may seem uneasy to some, especially when private tech companies are co-opted to do the government's bidding. From a similar perspective, the co-optation of U.S. social media platforms to do the government's bidding (e.g. the exclusion of foreign agents from authoritarian regimes from U.S. social media platforms) may encourage the

---

[34] *Defining Insider Threats*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, https://perma.cc/T8TB-TV2P (last visited Nov. 24, 2022).

[35] *See* Van Buren v. United States, 141 S. Ct. 1648, 1662 (2021).

[36] Evan Perez, *NSA: Some Used Spying Power to Snoop on Lovers*, CNN, https://perma.cc/6P7U-WTX4 (last updated Sep. 27, 2013, 7:58 PM EDT).

[37] SLOSS, *supra* note 6, at 177.

[38] *See Authentication Token*, FORTINET, https://perma.cc/K8UL-ZTXU (last visited Nov. 24, 2022).

excluded authoritarian regimes to look for alternative methods of destabilization and disruption.

One such alternative attack method would be more disruptive and less verbal than information warfare—attacks against the social media platforms themselves. This could, for example, result in an increase of distributed denial-of-service attacks against U.S. social media platforms. This is considering the fact that U.S. social media platforms will remain part of the global internet, which they likely would. If left unprepared, these attacks may lead to further user distrust in social media platforms, and potentially the global internet as a whole.

All in all, any hindrance on authoritarian regimes' ability to engage in information warfare could result in cyber-attacks elsewhere. It would be wise for both the government and the tech industry to prepare for a world of balkanized social media.

CONCLUSION

Tyrants on Twitter is a bold call for action. It proposes the balkanization of social media to restrict access to foreign agents from non-democratic regimes, and to a certain extent, ordinary citizens from those regimes. The proposal is compelling, though not without issues. Data security and privacy remain major hurdles in this context, some of which are explored in this symposium piece. Further design and refinement of the registration system may resolve some of these issues, though it is unclear whether social media platforms would welcome such a paradigm shift. It remains to be seen whether information warfare efforts will continue to proliferate on social media platforms, or whether social media can deal with the problem on their own. If not, Sloss's proposal may seem reasonable to tackle the dangerous problem of information warfare online.

Review of *Sanctions: What Everyone Needs to Know*

CHRISTINE ABELY*

INTRODUCTION

As the title would suggest, *Sanctions: What Everyone Needs to Know* by Bruce Jentleson[1] is indeed a useful overview of much of the current scholarly landscape on sanctions. Sanctions, of course, have reached new prominence with the general public this year as historic sanctions were imposed against Russia for its invasion of Ukraine.[2] Sanctions have only grown in relevance as they have been ratcheted up in response to the continuing conflict and Russia's annexation of the four territories of Donetsk, Kherson, Luhansk, and Zaporizhzhia.[3] More generally, sanctions have also grown in frequency of use in recent years, particularly by the United States, but also increasingly by the European Union and China.[4]

This book is timely and relevant for understanding the Russia sanctions as well as sanctions in general, both modern and historic. And of particular note, the book deals with recent major developments that may shift or at least refine our prior understanding of the effects and potential capabilities

* Assistant Professor, New England Law | Boston. Special thanks to Christos Nikolos for research assistance on the topic of overcompliance with sanctions.

1 BRUCE W. JENTLESON, SANCTIONS: WHAT EVERYONE NEEDS TO KNOW (2022).

2 CORY WELT & CONG. RESEARCH SERV., IN11869: RUSSIA'S 2022 INVASION OF UKRAINE: OVERVIEW OF U.S. SANCTIONS AND OTHER RESPONSES 1 (2022), https://perma.cc/GY7N-NNNW; Edward Wong et al., *Five Ways Sanctions Are Hitting Russia*, N.Y. TIMES (Nov. 4, 2022), https://perma.cc/X7XU-3XJQ.

3 *See, e.g.*, Council of the EU, *EU Adopts Its Latest Package of Sanctions Against Russia over the Illegal Annexation of Ukraine's Donetsk, Luhansk, Zaporizhzhia and Kherson Regions*, EUR. COUNCIL (Oct. 6, 2022, 10:55), https://perma.cc/ES8S-FQHG; Charles Maynes, *Putin Illegally Annexes Territories in Ukraine, in Spite of Global Opposition*, NPR (Sept. 30, 2022, 3:50 PM EST), https://perma.cc/J93W-FCGM.

4 Richard Haas, *Economic Sanctions: Too Much of a Good Thing*, BROOKINGS (June 1, 1998), https://perma.cc/RC6H-RCNR.

of sanctions.

The value of a high-level overview such as this—the book covers centuries of history and a plethora of legal provisions in relatively brief measure—is that it provides an opportunity to discern common characteristics of sanctions and a chance to appreciate the staggering variety of sanctions over time, both in nature and in effects. Various chapters outline key themes recurring throughout multiple case studies of sanctions. Major challenges to the effective and targeted use of sanctions include issues around accurately measuring their impact; the relationship between sender states and private actors affected by their sanctions, including the tendency of private actors to overcomply with legal provisions; and the use of sanctions to address human rights violations compared to sanctions' tendency to wreak humanitarian harms when deployed in a comprehensive manner. While this review focuses on these particular themes, Jentleson's book covers many other sanctions-related considerations and is valuable to understanding the topic as a whole.

I. How to Measure the Impact of Sanctions

Jentleson recognizes a key difficulty in understanding the impact of already-imposed sanctions and designing a sanctions program ex ante: the challenge of measuring the effectiveness of sanctions, and even defining what effectiveness means. He identifies a key aspect of sanctions: that they have been used in different situations to attempt to reach different goals, which can vary in scope and nature. Often, a single set of sanctions may have disparate goals.

To explain the range of sanctions goals, Jentleson characterizes sanctions as primary or secondary. He further classifies the goals of primary sanctions as limitation of military capabilities, foreign policy restraint, or domestic political change. Secondary sanctions similarly break down further into the subcategories of target deterrence, third party deterrence, or symbolic action.[5] Jentleson notes that the use of sanctions to reach the more limited objectives is more likely to be successful.

The various goals of sanctions must be considered when asking the broad question of whether sanctions can be considered effective. The question of effectiveness is often construed as whether sanctions have achieved their intended goals. This question is complicated by the variety of goals a particular set of sanctions may attempt to achieve, or by a lack of clarity around those articulated goals. And indeed, as others have noted, the stated goals of sanctions might not be the only goals by which to evaluate effectiveness. "Another challenge in sanctions effectiveness assessment lies in the ability to learn the expected outcomes behind sanctions. Official announcements do not necessarily expose the motives and grounds behind

[5] JENTLESON, *supra* note 1, at 13–14.

sanctions."[6] This further impedes the assessment process.

Jentleson also identifies various complications that impede quantitative assessment of sanctions. What, for instance, constitutes a single example of imposing sanctions where the restrictions were escalated or otherwise changed over time? The success of sanctions also often depends on a longer temporal scope.[7] For example, the recent export controls imposed against Russia might undermine the Russian economy—but it might take a relatively long period of time to observe the full extent of the effects.[8]

While judging the effectiveness of already-imposed sanctions can be difficult[9], anticipating the effects of sanctions ex ante poses even greater challenges. Such an assessment requires "accurate and timely information on not only the sanctioned country's economy, but also on its commercial and financial relationships with other countries—both current and potential."[10] The design of sanctions and features affecting their potential success also depends on factors such as whether they are imposed multilaterally or unilaterally, along with other attributes.[11]

The effects of sanctions are not the only factor to be used in calculating their effectiveness; they must be weighed against their costs. In response to an article by Pape, Baldwin argued that "only the combined analysis of costs and effectiveness allows one to make judgments about the efficiency of economic sanctions."[12] While sanctions may produce notable economic effects on the target nation, they may be considered effective only if they do not outweigh the costs those same measures impose on targeting states, third-party nations, and others who are not the intended targets of the sanctions.[13]

Other factors impact the effectiveness of sanctions as well. Bryan Early's work has examined why economic sanctions often fail, breaking down many

---

[6] Beata Stepien et al., *Challenges in Evaluating Impact of Sanctions – Political vs Economic Perspective*, 4 PRZEGLAD POLITOLOGII 156, 165, https://perma.cc/T8DU-R88Q.

[7] Robin Wright, *Why Sanctions Too Often Fail*, THE NEW YORKER (Mar. 7, 2022), https://perma.cc/NE27-V898 ("Sanctions take a comparative eon in the scheme of war or a humanitarian crisis").

[8] *Western Sanctions Will Eventually Impair Russia's Economy*, THE ECONOMIST (Aug. 24, 2022), https://perma.cc/62Z5-2ZKF.

[9] *See, e.g.*, Jill Jermano, *Economic and Financial Sanctions in U.S. National Security Strategy*, 7 PRISM 63, 71 (2018) ("Measuring effectiveness and comparative utility can be difficult if there are multiple objectives or if the combined use of several instruments produces synergies or multiplier effects.").

[10] JOHN FORRER & ATL. COUNCIL, ALIGNING ECONOMIC SANCTIONS 2 (2017), https://perma.cc/W3R5-J688.

[11] *See, e.g.*, William H. Kaempfer & Anton D. Lowenberg, *Unilateral Versus Multilateral International Sanctions: A Public Choice Perspective*, 43 INT'L STUDIES Q., 1999, at 37, 48, 52.

[12] David Baldwin, *Evaluating Economic Sanctions*, 23 INT'L SEC. 13 (1998).

[13] *See, e.g.*, Esfandyar Batmanghelidj & Erica Moret, *The Hidden Cost of Sanctions*, FOREIGN AFFS. (Jan. 17, 2022), https://perma.cc/4HTA-VA2Y.

failures into the major categories of trade-based and aid-based sanctions busting.[14] The readiness of other states to engage in sanctions-busting activity may depend on numerous factors such as existing commercial ties between states, the diplomatic stance of a sanctioning and target state, or the economic profile of third-party states.

Jentleson provides a useful introduction to the difficulties of assessing the impact and success of sanctions. While questions around sanctions' effectiveness remain outstanding and will certainly perplex the easy design and analysis of sanctions well into the future, this book does an excellent job of highlighting some of the most notable difficulties associated with assessing the effectiveness of sanctions.

II. Overcompliance by Private Actors

Jentleson also details the role of private actors in determining how legal provisions are actually implemented in practice. Private actors may overcomply with sanctions beyond the scope of actual legal restrictions. Such was the case with how many private companies responded in early 2022 to sanctions imposed against Russia, a trend Jentleson describes:

> In contrast to most cases in which major multinational companies resist sanctions, close to 1000 companies—oil companies like BP and ExxonMobil, retail companies like Nike and Ikea, restaurant chains like McDonald's and Starbucks, auto companies like BMW and Ford, entertainment companies like Disney, tech companies like Apple and Google, and Coinbase the largest US cryptocurrency exchange—ended or at least suspended business in and with Russia.[15]

Jentleson's sanctions framework thus acknowledges an interesting aspect of sanctions today: they are often expanded in reality by the behavior of private firms. These private entities may overcomply with sanctions for a variety of different reasons. Overcompliance may be cheaper to implement than strict compliance with a complex set of restrictions. The potential legal and reputational penalties associated with imperfect compliance may induce a risk-averse private entity to instead select overcompliance as an insurance policy against incurring such penalties. Or certain legal provisions can contribute to overcompliance, like the 50% Rule of the United States Department of the Treasury's Office of Foreign Assets Control (OFAC).[16]

---

[14] BRYAN R. EARLY, BUSTED SANCTIONS: EXPLAINING WHY ECONOMIC SANCTIONS FAIL 3–4 (2015).

[15] JENTLESON, *supra* note 1, at 95.

[16] Cameron Johnston, *Sanctions Against Russia*: *Evasion, Compensation and Overcompliance*, E.U. INST. FOR SEC. STUDIES 1, 4 (May 2015) https://perma.cc/4U2S-SC5G; Emmanuel Breen, *Corporations and US Economic Sanctions: The Dangers of Overcompliance*, *in* RSCH. HANDBOOK ON UNILATERAL & EXTRATERRITORIAL SANCTIONS 256, 256–57, 262–63 (Charlotte Beaucillon ed.,

Under this rule, an entity may be subject to sanctions restrictions, even when not specifically designated, if it is owned 50% or more by parties designated as Specially Designated Nationals and Blocked Persons (SDNs).[17] Determining ownership may be unavailable, so private entities might instead simply choose to not do business with an entity where ownership is unclear.

Extraterritorial sanctions regulations may also encourage overcompliance. For example, robust extraterritorial enforcement by a sanctions regulator (as has been the case with the United States)[18] might encourage overcompliance abroad. The trend of overcompliance may also interact with the expanded use of secondary sanctions, whereby a party may become formally sanctioned due to its support of an already-sanctioned party, even if such support was permitted by the existing legal framework.[19] Where secondary sanctions are possible or anticipated, overcompliance may be desirable to a regulated party to avoid the risk of direct sanctions being imposed, along with the reputational harm that would accompany such a designation. Public opinion and reputational risks may provide additional non-legal impetus to select overcompliance instead of strict compliance.[20] Financial institutions also have the power to propagate trends of overcompliance as they require their customers to adhere to their own understanding and implementation of sanctions and other legal restrictions.[21]

2021).

[17] *Entities Owned by Blocked Persons (50% Rule)*, U.S. DEP'T OF THE TREASURY (Aug. 11, 2020), https://perma.cc/L9ZS-D7CP.

[18] BRYAN R. EARLY & KEITH A. PREBLE, ENFORCING ECONOMIC SANCTIONS: ANALYZING HOW OFAC PUNISHES VIOLATORS OF U.S. SANCTIONS 28 (2018), https://perma.cc/MH5L-FZ9J; Sachsa Lohmann, *Extraterritorial U.S. Sanctions: Only Domestic Courts Could Effectively Curb the Enforcement of U.S. Law Abroad*, STIFTUNG WISSENSCHAFT UND POLITIK (Feb. 6, 2019), https://perma.cc/MH5L-FZ9J.

[19] *See* Daniel Meagher, *Caught in the Economic Crosshairs: Secondary Sanctions and the American Sanctions Regime*, 89 FORDHAM L. REV. 999, 1014–15 (2020).

[20] JIM WOODSOME ET AL., POLICY RESPONSES TO DE-RISKING: PROGRESS REPORT ON THE CGD WORKING GROUP'S 2015 RECOMMENDATIONS 5 (2018), https://perma.cc/FVL8-4VFJ ("[D]e-risking is driven by several interacting factors, including AML/CFT risk, compliance risk, and compliance costs, but also profitability considerations and financial institutions' unrelated business strategy decision. Reputational risks and heightened concerns about the security climate may also be a factor."); Paul L. Lee, *Compliance Lessons from OFAC Case Studies – Part II*, 131 BANKING L.J. 717, 742 (2014) ("In addition to the regulatory and financial consequences, there were significant reputational and governance consequences for HSBC from these law enforcement and regulatory actions.").

[21] *Schemes and Subversion: How Bad Actors and Foreign Governments Undermine and Evade Sanctions Regimes: Hearing Before the H.R. Subcomm. on Nat'l Security, Int'l Development, and Monetary Policy of the Comm. on Fin. Serv.*, 117th Cong. 13 (2021) (Testimony of Lakshmi Kumar), https://perma.cc/8S8X-SCWN, ("[G]atekeepers [such as traditional centralized exchanges] often understand and implement sanctions compliance programs and have served as key force

As other research has noted, overcompliance is also often a function of targeted sanctions and overlapping sanctions regimes.[22] Targeted sanctions, or smart sanctions, are unlike comprehensive sanctions regimes in that they sanction particular individuals or entities, rather than an entire jurisdiction.[23] While many the imposition of many new sanctions have been coordinated among jurisdictions in the case of the recent Russia sanctions, some significant differences do exist in cases of particular provisions between jurisdictions, thus raising the cost of strict compliance as opposed to a wholesale de-risking by way of overcompliance.[24] Targeted sanctions may be more precise instruments, but they may be harder to understand and implement than a comprehensive ban on most types of financial transactions with a particular nation or area.

De-risking and overcompliance have certainly become notable trends in recent years, significantly with recent sanctions against Russia, but they are by no means universal across different types of sanctions. Jentleson notes the limits of overcompliance: "Indeed at the same time that a number of companies were ending and cutting back on their Russia business, they were trying to get around the Uyghurs sanctions in China."[25] A recent op-ed noted instances of non-compliance with the Uygher sanctions, suggesting a combination of imperfect enforcement and similar shortfalls in corporate compliance.[26] But, while no means universal, overcompliance is certainly a significant factor in determining what effects sanctions may produce in reality.

Overcompliance is not without greater societal drawbacks. In the financial sector, the World Bank has commented that broad de-risking:

> may threaten progress that has been achieved on financial inclusion…has the potential to reverse some of the progress made in reducing remittance prices and fees, may result in humanitarian organizations losing access to financial

---

multipliers of U.S. sanctions, ensuring that a wide range of individuals and companies abide by their obligations.") (contrasting behavior of such gatekeepers with the risks posed by cryptocurrency platforms).

[22] *See* Francesco Giumelli & Michal Onderco, *States, Firms, and Security: How Private Actors Implement Sanctions, Lessons Learned from the Netherlands*, 6 EUR. J. INT'L SEC. 190, 191 (2021).

[23] Gary C. Hufbauer & Barbara Oegg, *Targeted Sanctions: A Policy Alternative?*, 32 LAW & POL'Y INT'L BUS. 11, 11–12 (2000).

[24] *See, e.g.*, *The Differences Between UK and EU Russian Sanctions*, KOBRE & KIM (May 9, 2022), https://perma.cc/3EQS-SVPM.

[25] JENTLESON, *supra* note 1, at 195.

[26] Josh Rogin, *There's Never a Convenient Time to Try to Stop a Genocide*, WASH. POST (Sept. 1, 2022, 4:02 PM EDT, https://perma.cc/EVX3-VCA ("[A]gricultural products such as red dates from Xinjiang (which are produced by a state-run paramilitary conglomerate banned…) can still be found today in supermarkets across the Washington metropolitan area. Moreover, although the Biden administration has imposed sanctions on Chinese companies and officials for atrocities in Xinjiang in the past, it hasn't used the new law's sanctions powers even once.").

> services, and can frustrate AML/CFT [anti-money laundering/counter-terrorist financing] objectives…by pushing higher risk transactions out of the regulated system into more opaque, informal channels.[27]

The United Nations Office of the High Commissioner for Human Rights cited "[a] Swedish bandage maker's decision to halt shipments to Iran [as an example of] how over-compliance with U.S. sanctions harms the ability of Iranian patients to enjoy their human rights, particularly the rights to health."[28] The general counsel of Access Now commented on digital access for Iranians: "Corporate overcompliance with Iran sanctions deprives vulnerable and marginalized people of the goods and services they need to stay safe and active in defense of human rights."[29]

Jentleson's book therefore identifies the impact that overcompliance has on the implementation of sanctions and their effects. This is a core strength of the book; in addition to identifying the legal provisions of sanctions, it identifies a myriad of other factors, political and economic, that may affect the outcome of sanctions measures.

III. Humanitarian Impacts, and Addressing Human Rights Violations Through the Use of Sanctions

In his conclusion, Jentleson deals with the humanitarian problems often caused by sanctions. While sanctions are often imposed in the name of protecting human rights and vindicating human rights abuses, they can paradoxically become the source of harm for those suffering human rights abuses:

> [E]thical issues remain if the sanctions bring high civilian pain. I especially wrestle with putting all these considerations together when it comes to human rights and atrocities. How could the US not impose sanctions on the Myanmar military amid its brutal February 2021 coup? Or against Serbia for the 1990s ethnic cleansing perpetrated against Bosnian Muslims? Or China for atrocities against the Uyghurs? Shouldn't brutalizers be made to pay a price? Don't internal opponents deserve to know that the international community stands with them? Isn't there soft power value to affirming principles? Rarely, though, have such sanctions brought about substantial policy change. In some instances, they have been net negative, backfiring and making the problems even worse, and misfiring in hitting

---

[27] *De-risking in the Financial Sector*, WORLD BANK (Oct. 7, 2016), https://perma.cc/83TY-R68T.

[28] *Over-Compliance with US Sanctions Harms Iranians' Right to Health*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R (Oct. 19, 2021), https://perma.cc/32NB-CYCK.

[29] *The World Must Support People in Iran: Sanctions Relief Helps Connect the Nation*, ACCESS NOW (Sept. 26, 2022, 10:31 AM), https://perma.cc/A49Z-BBBJ.

> the populace more than the regime.[30]

Indeed, the humanitarian concerns that Jentleson describes are often the basis for serious criticism of modern sanctions regimes, and ones which targeted sanctions are designed to address.[31] As Jentleson notes, the sanctions against Iraq created a humanitarian crisis: "The 1990s Iraq sanctions, while succeeding in disarming Saddam's WMD programs, hit the populace as 'sanctions of mass destruction' with thousands of deaths from malnutrition, lack of necessary medical supplies, inadequate drinking water, and poor sanitation."[32] As Farrell stated in his review of Mulder's history of economic sanctions in the interwar period:

> In the 21st century too, the economic weapon may inflict wounds that cannot heal. Lord Curzon has long since fallen to dust and bones, but the cries of hundreds of thousands in Afghanistan, threatened by sanctions-induced starvation, seem nearly as hard for modern policymakers to hear as they were a century ago.[33]

And as Jentleson notes, sanctions designed to address human rights abuses may paradoxically trigger greater repression and human rights violations by targeted governments.[34] Research findings support this conclusion.[35]

Targeted sanctions to address human rights abuses, however, have been adopted as measures intended to send a strong international message about

---

[30] JENTLESON, *supra* note 1 at 191.

[31] Joy Gordon, *Smart Sanctions Revisited*, 25 ETHICS & INT'L AFFS. 315, 320–21 (2011).

[32] JENTLESON, *supra* note 1 at 27; *see also Iraq: 1989-1999, A Decade of Sanctions*, INT'L COMM. OF THE RED CROSS (Dec. 14, 1999), https://perma.cc/UF9D-BKBU; Daniel W. Drezner, *How Smart are Smart Sanctions?*, 5 INT'L STUDIES REV. 107, 107 (2003), https://perma.cc/79GJ-HDBW ("[f]or over a decade, the comprehensive trade sanctions against Iraq have hung like a millstone around the practice of economic statecraft. Scholars and policymakers alike recognize that the sanctions have had a devastating humanitarian impact on the Iraqi population"); *Razing the Truth About Sanctions Against Iraq*, GENEVA INT'L CTR. FOR JUST., https://perma.cc/GQC5-N8FD (last visited Feb. 14, 2023); Daniel W. Drezner, *How Not to Sanction*, 98 INT'L AFFS. 1533, 1534–40 (2022). *See also* Tim Dyson & Valeria Cetorelli, *Changing Views on Child Mortality and Economic Sanctions in Iraq: A History of Lies, Damned Lies and Statistics*, 2 BMJ GLOB. HEALTH, Mar. 2017, at 1, 1, 2, 4–5.

[33] Henry Farrell, *The Modern History of Economic Sanctions*, LAWFARE (Mar. 1, 2022, 2:40 PM), https://perma.cc/GVB2-WHYZ.

[34] *See* Dursun Peksen, *Better or Worse? The Effect of Economic Sanctions on Human Rights*, 46 J. PEACE RSCH. 59, 74 (2009), https://perma.cc/J9PE-CE3L.

[35] *See, e.g.*, *id.* at 74 ("[I]t is evident that the use of 'sticks,' at least in the form of economic coercion as a foreign policy tool, does not contribute to the advancement of human rights."); U.S. GOV'T ACCOUNTABILITY OFFICE, ECONOMIC SANCTIONS: AGENCIES ASSESS IMPACTS ON TARGETS, AND STUDIES SUGGEST SEVERAL FACTORS CONTRIBUTE TO SANCTIONS' EFFECTIVENESS 25–26 (2019), https://perma.cc/XQH3-TUSU (noting that some studies "suggest that sanctions may also have unintended consequences. For example, some studies suggest that sanctions have had a negative impact on human rights, the status of women, public health, or democratic freedoms in target countries.").

the importance of protecting human rights, while attempting to limit the humanitarian harms arising from the use of more broadly constructed sanctions. Research suggests that while sanctions may not affect the behavior of human rights violators themselves, they can serve a signaling function to would-be bad actors that the international community will take action against similar abuses elsewhere.[36] Nations have clearly seen a place for sanctions to address human rights abuses. For example, sanctions imposed by the United States for human rights violations worldwide have sharply increased in recent years.[37] They have been deployed by the United States regarding human rights violations involving Bangladesh, Burma, Uyghurs in China, and North Korean workers in other countries, among other situations.[38]

In the context of Russia, the 2012 Sergei Magnitsky Act allowed the United States to sanction human rights abusers in Russia, spurred by the death of attorney Sergei Magnitsky in Russian police custody. The 2016 Global Magnitsky Act extended the United States' sanctioning power to address human rights abuses worldwide.[39] Countries and jurisdictions across the world adopted similar Magnitsky legislation, including the European Union, the United Kingdom, Canada, Australia, Estonia, Latvia, and Lithuania.[40] An account of the origin of these acts can be found in Bill Bowder's book Red Notice and its sequel Freezing Order.[41] Provisions of the Countering America's Adversaries Through Sanctions Act (CAATSA) also impose sanctions against human rights violators, including those in Russia.[42]

Similarly, the human rights abuses against the Uyghurs seem to call for a response from the global community. In August, the Office of the United

---

[36] Timothy M. Peterson, *Taking the Cue: The Response to US Human Rights Sanctions Against Third Parties*, 31 CONFLICT MGMT. & PEACE SCI. 145, 150 (2013).

[37] Jason Bartlett & Megan Ophel, *Sanctions by the Numbers: Spotlight on Human Rights and Corruption*, CTR. FOR A NEW AM. SEC. (Apr. 1, 2021), https://perma.cc/H5F4-BEF3.

[38] *Treasury Sanctions Perpetrators of Serious Human Rights Abuse on International Human Rights Day*, U.S. DEP'T OF THE TREASURY (Dec. 10, 2021), https://perma.cc/NX3L-F2KK; *Treasury Sanctions Chinese Government Officials in Connection with Serious Human Rights Abuse in Xinjiang*, U.S. DEP'T OF THE TREASURY, (Mar. 22, 2021), https://perma.cc/SQ2T-XEDG.

[39] *Permanent Global Magnitsky Act Will Ensure Perpetrators Face Consequences*, FREEDOM HOUSE (Apr. 12, 2022), https://perma.cc/PW5G-ARF2.

[40] CONG. RSCH. SERV., NO. IF10576: THE GLOBAL MAGNITSKY HUMAN RIGHTS ACCOUNTABILITY ACT 1 (2020); BEN SMITH & JOANNA DAWSON: BRIEFING PAPER NO. CBP 8374: MAGNITSKY LEGISLATION (2020), https://perma.cc/8LRG-QWPC; Christina Eckes, *EU Global Human Rights Sanctions Regime: Is the Genie Out of the Bottle?*, 30 J. CONTEMP. EUR. STUD. 255, 262 (2021).

[41] *See How to Get Human Rights Abusers and Kleptocrats Sanctioned Under the Global Magnitsky Act: Hearing Before the U.S. Helsinki Commission*, 115th Cong. 2 (2018).

[42] Ivan N. Timofeev, *Unilateral and Extraterritorial Sanctions Policy: The Russian Dimension*, *in* RSCH. HANDBOOK ON UNILATERAL & EXTRATERRITORIAL SANCTIONS 90, 94, 96, 98, 100 (Charlotte Beaucillon ed., 2021).

Nations High Commissioner for Human Rights issued a report concluding that "[t]he treatment of persons held in the system of so-called VETC facilities" was of concern, and that "[a]llegations of patterns of torture or ill-treatment, including forced medical treatment and adverse conditions of detention, are credible, as are allegations of individual incidents of sexual and gender-based violence."[43] In 2018, Human Rights Watch issued a report documenting "the Chinese government's mass arbitrary detention, torture, and mistreatment" of the Uyghur population.[44] These abuses seem to call for some sort of response—and the weapon of economic sanctions, though imperfect, is less incendiary in nature than some other direct action might be.[45]

Indeed, some sanctions and trade measures have been considered or enacted in response. In 2022, the United States reportedly considered sanctioning Chinese company Hikvision, under the Global Magnitsky Act, for providing cameras and marketing facial recognition systems to monitor Uyghers and enable China's human rights abuses against that group.[46] In the context of the Uyghur genocide, import restrictions have also been enacted to supplement sanctions measures. At the end of 2021, President Biden signed into law the Uyghur Forced Labor Prevention Act, which acts to prevent the importation of goods mined, produced, or manufactured in the Xinjian Uyghur Autonomous Region of China into the United States, absent evidence sufficient to rebut the presumption that such goods were manufactured using forced labor.[47]

Jentleson thus identifies a core tension inherent in the design and implementation of sanctions programs: the imperfection of sanctions to prevent or halt human rights abuses, compared with the moral imperative to address human rights violations. Such sanctions, as they are implemented in practice, seem to be designed for a moral principle rather than for economic effect.[48] A sanctioning power might also refuse, for moral reasons,

---

[43] OHCHR ASSESSMENT OF HUMAN RIGHTS CONCERNS IN THE XINJIANG UYGHUR AUTONOMOUS REGION, PEOPLE'S REPUBLIC OF CHINA, OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS. 43 (2022), https://perma.cc/363H-DHPT.

[44] *China: Massive Crackdown in Muslim Region*, HUM. RTS. WATCH (Sept. 9, 2018, 8:01 PM EDT), https://perma.cc/38LB-D936. *See also* Tirana Hassan, *The UN Needs to Address China's Abuse of Uyghurs, Without Further Delay*, THE GLOBE & MAIL (Sept. 15, 2022), https://perma.cc/KX2U-9H9X.

[45] *See* Peterson, *supra* note 36, at 25–27 (positing that human rights-related sanctions signal to third party states the importance of complying with human rights norms).

[46] Jon Bateman, *U.S. Sanctions on Hikvision Would Dangerously Escalate China Tech Tensions,* CARNEGIE ENDOWMENT FOR INT'L PEACE (May 6, 2022), https://perma.cc/L4T2-25AL; Demitri Sevastopulo, *U.S. Moves Towards Imposing Sanctions on Chinese Tech Group Hikvision*, FT (May 4, 2022), https://perma.cc/FXX8-8SFA.

[47] *Uyghur Forced Labor Prevention Act*, U.S. CUSTOMS & BORDER PROT. (last visited Feb. 14, 2023), https://perma.cc/RVK8-K89V.

[48] *See* Aryeh Neier, *Do Economic Sanctions in Response to Gross Human Rights Abuses Do Any*

to economically fund or aid the target, even if there is some economic alternative which the target will use; even if the effects of the sanctions are muted; or even if they cause harm to the sanctioning power itself.[49] A constant challenge of sanctions is foreseeing economic effects, such that the moral justification of refusing to economically supply a targeted human rights violator is not used in such a way that results in economic hardship or greater repression for the very people the sanctions are intended to aid.

CONCLUSION

Jentleson's book is an interesting, informative work that describes significant examples of sanctions throughout history and raises important questions around the expansive use of sanctions. It highlights the important facts one needs to know about sanctions—as well as those issues for which we do not yet have answers.

Good?, JUST SECURITY (Apr. 29, 2021), https://perma.cc/B63Q-6DCG ("The real effect of Western sanctions is to tarnish the reputation of China's leader, President Xi Jinping.").

[49] Elizabeth Ellis, *The Ethics of Economic Sanctions*, IEP, https://perma.cc/MS7L-CVPE (last visited Feb. 14, 2023) ("[U]nder a clean hands conception of economic sanctions the imposition of sanctions is…a moral *duty*—a duty derived from the duty not to be complicit in human rights violations," citing Noam Zohar, *Boycott, Crime and Sin: Ethical and Tulmudic Responses to Injustice Abroad*, ETHICS & INT'L AFFAIRS (1993)).

* * * *

The Future is Automatic: Necessary Changes to Massachusetts' CORI Sealing Process

Andrew Tucker Bobbitt[*]

INTRODUCTION

Criminal records and the laws surrounding them are more relevant now than ever, as today, one in three Americans has a criminal record.[1] While the United States has committed itself to providing equal housing and employment opportunities to *all citizens* countless times throughout its history,[2] those with criminal records continue to struggle securing access and stability for both.[3] Laws regulating access to criminal records and the ways in which employers and landlords may consider them vary from state to state, with Massachusetts widely considered more progressive than most.[4] The protections that Massachusetts law affords to

[*] J.D., New England Law | Boston (2023). This Note was inspired by my experience with the New England Law CORI Sealing Initiative and by all those affected by inadequate criminal justice laws. I want to thank Anna Hagg, Nicole Barrett, Benito Zappia, and the entire New England Law Review staff for their contributions to this Note. Finally, I want to thank my wife, Rachel Tucker Bobbitt, for supporting and encouraging me in everything that I do.

[1] Chidi Umez & Rebecca Pirius, *Improving Access to Licensed Occupations for Individuals with Criminal Records*, NCSL: NAT'L CONF. OF ST. LEGISLATURES (July 17, 2018), https://perma.cc/ZU5W-5SFY.

[2] *See No Second Chance: People with Criminal Records Denied Access to Public Housing*, HUMAN RIGHTS WATCH § 3 (Nov. 18, 2004), https://perma.cc/JM8U-L77P (mentioning several acts throughout America's history that call for equal opportunities for all) [hereinafter *No Second Chance*].

[3] *See generally Collateral Consequences*, PRISON POL'Y INITIATIVE, https://perma.cc/KP52-ANH4 (last visited Nov. 25, 2022) (emphasizing the millions of people dealing with collateral consequences).

[4] Lisa Guerin, *Massachusetts Law on Employer Use of Arrest and Conviction Records*, NOLO, https://perma.cc/G44Z-JPQF (last visited Nov. 25, 2022) (describing Massachusetts as having "among the strongest protections for applicants with criminal records").

those with criminal records aim to reduce the accompanying collateral consequences—adverse effects in housing, employment, and other social and economic aspects of life—but they simply do not go far enough.[5] Recent changes in Massachusetts' criminal record system brought greater protection than previously enjoyed under Massachusetts law, but landlords and employers still maintain broad access to applicants' criminal records.[6]

Several states, including Massachusetts, have recognized the need for change in recent years by proposing and passing laws that advance or automate the criminal record sealing process.[7] Some have passed more far-reaching legislation than others, but none have enacted a system with an adequate balance of both eligibility for and access to criminal record sealing.[8] Simply put, it is difficult, if not impossible, for criminal record sealing reform to be effective without ensuring at least three things: (1) eligibility requirements must be reasonable; (2) the sealing process must be accessible and navigable; and (3) those with criminal records must be adequately informed of how the process works.[9]

This Note discusses the current criminal record sealing process in Massachusetts and calls for changes such as "no action" automatic record sealing and adequate community outreach aimed at reducing the collateral consequences of criminal records. Specifically, Part I describes the current protections afforded to those with criminal records and how criminal records can be accessed or sealed. Part II explains the impact that landlord and employer access to criminal records has on individuals, particularly focusing on discrimination in housing and employment applications. Part III argues that the Massachusetts legislature must act immediately to capitalize on the widespread, bipartisan support for automatic sealing and other criminal record reforms. Part IV proposes several changes to Massachusetts' criminal record sealing system including automatic sealing of qualified charges, discretionary early sealing, and effective community

---

[5] *See generally* AM. BAR ASS'N, COLLATERAL CONSEQUENCES OF CRIM. CONVICTIONS (2018), https://perma.cc/6RMN-UKGX (defining collateral consequences of criminal records).

[6] *See generally* GREATER BOS. LEGAL SERVS., KNOW YOUR CORI RIGHTS: APPLYING FOR JOBS, HOUSING OR OTHER OPPORTUNITIES AFTER SEALING CRIMINAL RECORDS 5 (2019), https://perma.cc/9SY6-UU24 [hereinafter KNOW YOUR CORI RIGHTS] (describing the state of criminal record sealing following the 2018 reforms).

[7] *See, e.g.*, CCRC Staff, *After a Haul of Record Relief Reforms in 2020, More States Launch Clean Slate Campaigns*, COLLATERAL CONSEQUENCES RES. CTR. (Feb. 17, 2021), https://perma.cc/228N-Q4H6 [hereinafter *More Clean Slate*].

[8] *Compare* 18 PA. CONS. STAT. ANN. § 9122.2(a), (c) (West 2022) (calling for automatic *sealing* of eligible charges), *with* UTAH CODE ANN. § 77-40a-203(1), (2) (West 2022) (calling for automatic *expungement* of eligible charges).

[9] *See generally* CCRC Staff, *"From Reentry to Reintegration: Criminal Record Reforms in 2021,"* COLLATERAL CONSEQUENCES RES. CTR. (Jan. 24, 2022), https://perma.cc/SQ89-TZ43 [hereinafter *Reentry to Reintegration*] (calling for increased access to criminal record sealing and providing information on the availability of sealing).

outreach programs to ensure the sealing process is accessible and successful.

I. Background

Massachusetts has a prominent history as a leader in criminal justice reform, replete with far-reaching changes in policing, sentencing, and criminal records.[10] In 2010, Massachusetts overhauled its laws on criminal record access, with a focus toward providing greater protections in employment and housing for those with criminal records.[11] In 2018, the Commonwealth passed further amendments to these laws, including changes to what appears on a criminal record requested by an employer or landlord.[12] Today, Massachusetts' Criminal Offender Record Information ("CORI") is a "[n]ame-based court arraignment record" that keeps track of each arraignment and its respective outcome, even if that outcome is not a conviction.[13] Law enforcement and the courts can request a CORI as part of their law enforcement duties, and individuals can request their own CORI for a fee.[14] Otherwise, private individuals (including landlords and employers) must get written permission to request access to an individual's CORI.[15] While this permission requirement is intended to protect the privacy of individuals with records, it fails to provide much protection in the area of employment or housing because the individual lacks choice; nine out of ten employers and four out of five landlords make that request of all applicants.[16]

A. *Current Protections in Housing and Employment*

Applicants with criminal records are afforded some protection in both housing and employment but are better protected when applying for employment, particularly in how their criminal record can be requested and

---

[10] *See, e.g.*, Michael Crowley, *Massachusetts Sets an Example for Bipartisan Criminal Justice Reform*, BRENNAN CTR. FOR JUST. (May 1, 2018), https://perma.cc/KY4W-UJ9L.

[11] GABRIELLA PRIEST ET AL., THE CONTINUING CHALLENGE OF CORI REFORM: IMPLEMENTING THE GROUNDBREAKING 2010 MASSACHUSETTS LAW 5 (2012), https://perma.cc/A74R-2HKP.

[12] *Massachusetts Restoration of Rights & Record Relief*, COLLATERAL CONSEQUENCES RES. CTR. §§ III–IV, https://perma.cc/5EA6-BZ7T (last updated Nov. 19, 2022).

[13] *See Massachusetts Criminal Offender Record Information (CORI)*, MASS.GOV, https://perma.cc/UR4Q-945M (last visited Nov. 25, 2022).

[14] Greater Bos. Legal Servs., *Who Can See My CORI?*, MASSLEGALHELP, https://perma.cc/ED4A-PKSY (last updated Oct. 2015) [hereinafter *Who Can See My CORI?*]; *see also* GREATER BOS. LEGAL SERVS., BOOKLET 1: HOW TO GET A COPY OF YOUR CRIMINAL RECORD (CORI) (2016), https://perma.cc/38WX-P3RM (explaining that individuals receiving certain public assistance automatically qualify for a fee waiver).

[15] *Who Can See My CORI?*, *supra* note 14.

[16] Rebecca Vallas et al., *A Criminal Record Shouldn't Be a Life Sentence to Poverty*, CTR. FOR AM. PROGRESS (May 28, 2021), https://perma.cc/3TKA-ALR9.

considered.[17] For instance, both employers and landlords are prohibited from requesting that applicants provide a copy of their own CORI and instead must procure it through their own means after gaining permission from the applicant.[18] However, employers are prohibited from asking applicants about their criminal records on initial applications, while landlords are not restricted by these "Ban the Box" laws.[19] Beyond controlling how a landlord or employer may obtain an applicant's criminal record, the breadth of information contained in a CORI tempers the protections provided by Massachusetts law.[20]

Under Massachusetts law, an employer or private landlord generally has access to an applicant's "standard" CORI.[21] This access allows the employer or landlord to see all pending criminal charges (including continuations without findings), misdemeanor convictions within the past five years, felony convictions within the past ten years, and all convictions for murder, manslaughter, or sexual crimes, regardless of how long ago the conviction occurred.[22] The time for convictions to be excluded from a CORI is measured from the date of the final disposition or release from incarceration, whichever is later.[23] Hypothetically, someone convicted for marijuana distribution that served ten years would still have the conviction on their CORI for an additional ten years (at least) after leaving prison unless sealed by the state.[24] However, even if enough time has passed for a charge to be excluded from the individual's CORI, the employer or landlord may still see the charge if it has not been sealed and the individual has been convicted of another misdemeanor in the last five years or a felony in the last ten.[25]

Further, the law affords individuals certain protections that only apply in employment.[26] First, Massachusetts' "Ban the Box" law states that employers may not ask about criminal records on initial applications.[27] Once

---

[17] *Guide to Criminal Records in Employment and Housing*, MASS.GOV, https://perma.cc/7HVC-9D9Q (last visited Nov. 25, 2022) [hereinafter *Guide to Criminal Records*].

[18] *Id.* (explaining that the "Ban the Box" law only applies to employers and prohibits them from asking applicants about their criminal record on initial applications).

[19] *Id.*; Guerin, *supra* note 4.

[20] *See* Osborne Jackson & Bo Zhao, *The Effect of Changing Employers' Access to Criminal Histories on Ex-Offenders' Labor Market Outcomes: Evidence from the 2010-2012 Massachusetts CORI Reform* 5, 8–9 (Fed. Rsrv. Bank of Bos., Working Paper No. 16-30, 2017), https://perma.cc/T44C-2CPS.

[21] Mass. Dep't of Crim. Just. Info. Servs., *iCORI Policy for Organizations,* MASS.GOV 6, https://perma.cc/8WJ9-CQEC (last visited Nov. 25, 2022).

[22] *Id.*

[23] *Id.*

[24] *See id.*

[25] Jackson & Zhao, *supra* note 20, at 8–9.

[26] Laura Franks, Mark W. Batten & Samantha Regenbogen Manelin, *Massachusetts Modifies "Ban the Box" Law,* PROSKAUER (May 2, 2018), https://perma.cc/K6GH-P57Y.

[27] MASS. GEN. LAWS ch. 151B § 4(9.5) (2022).

an individual advances past the application stage, employers may access the individual's CORI (with permission), but employers still may not *ask* about non-convictions, certain first convictions, or misdemeanor convictions from over three years ago.[28] The employer also must provide all criminal record information it finds to the applicant before the employer may ask about the record or make a decision based on it.[29] Finally, any employer that uses criminal record information must give notice to an applicant that they may answer "no record" for anything sealed or expunged.[30]

There are relatively fewer protections in housing for those with criminal records than in employment.[31] For instance, a landlord may not make a blanket rule that rejects any applicant that has a criminal record, but so long as that landlord claims to have done an "individualized assessment" of the applicant, they are free to reject that application based solely on the criminal record.[32] Further, while private landlords only have access to an applicant's standard CORI, public housing and multi-family, subsidized housing landlords have access to an individual's CORI at a "required 1" level which includes all convictions, regardless of when they occurred, unless sealed or expunged by the state.[33] However, for both private and public housing, if a landlord denies the application based on information in the CORI, the landlord must show the applicant which part of the CORI is objectionable and give the applicant a chance to dispute that information.[34] A landlord is also legally permitted to ask about an individual's sealed records, but that individual is free to answer that they have no record, just as they are with employers.[35] After an individual successfully petitions the Commissioner of Probation to seal their record, any charges sealed will not appear on the CORI pulled by landlords or employers (although courts and law enforcement will still have access to the sealed information).[36]

B. *The State of Record Sealing in Massachusetts*

A full CORI—the type only accessible by law enforcement—contains all of an individual's arraignments, including sealed convictions and most

---

[28] *Guide to Criminal Records*, *supra* note 17 (explaining that employers may not *ask* about some offenses they nonetheless see).

[29] *Guide to Criminal Records*, *supra* note 17.

[30] *Guide to Criminal Records*, *supra* note 17.

[31] *See generally* Vallas et al., *supra* note 16 (discussing the bipartisan momentum for clean slate and fair chance licensing policies which are designed to help remove economic and employment barriers from those with criminal records).

[32] *See Guide to Criminal Records*, *supra* note 17.

[33] ANNETTE R. DUKE, LEGAL TACTICS: TENANTS' RIGHTS IN MASSACHUSETTS 31 (8th ed. 2017), https://perma.cc/2SDY-RBUP.

[34] *Id.*

[35] *See* KNOW YOUR CORI RIGHTS, *supra* note 6, at 5.

[36] KNOW YOUR CORI RIGHTS, *supra* note 6, at 5–6.

other dispositions, unless expunged by the state.[37] When a record is expunged by the state, it is effectively destroyed and no longer accessible by anyone, including law enforcement and the courts.[38] Sealing is similar to expungement in that the record is no longer accessible by the general public (including landlords and employers), but differs significantly in that the record still exists and is accessible by law enforcement and the courts.[39] The process and requirements to seal a charge depend on whether the individual was convicted and how long it has been since the final disposition of the charge.[40] Conviction or not, the record sealing process is complex and sometimes unnavigable absent assistance of counsel.[41]

The Massachusetts administrative sealing process ("100A process") is commonly referred to as "automatic" sealing because, if the individual meets the eligibility requirements to seal a charge, the Commissioner of Probation must approve a petition to seal without discretion.[42] An individual can elect the 100A process for any charge on the individual's record that meets the statutory requirements, conviction or not, but all convictions must go through this process to be sealed.[43] A misdemeanor charge may be sealed through the 100A process three years after the date of the final disposition of the charge.[44] Similarly, a felony charge is eligible to be sealed after seven years from the date of the final disposition.[45] No convictions qualify for sealing under the 100A process if the individual has been convicted of another misdemeanor or felony in the past three or seven years respectively.[46] Both "time out" periods are measured from the date of the final disposition of the charge, whether that be conviction, release from prison, or some other non-conviction outcome.[47] There are several exceptions to these rules, including: (1) 100A does not apply to most firearms charges or crimes against public justice (as defined in Mass. Gen. Laws ch.

---

[37] MASS. GEN. LAWS ch. 276, § 100C (including charges that ended in a not guilty verdict from a judge or jury, a no bill returned from a grand jury, or a finding of no probable cause on an individual's CORI); *see Who Can See My CORI?*, *supra* note 14.

[38] *Find Out if You Can Expunge Your Criminal Record*, MASS.GOV, https://perma.cc/NV53-SRBB (last visited Nov. 25, 2022).

[39] KNOW YOUR CORI RIGHTS, *supra* note 6, at 5.

[40] *Find Out if You Can Seal Your Criminal Record*, MASS.GOV, https://perma.cc/Z69Q-P93P (last visited Nov. 25, 2022).

[41] *See generally* David Russcol, *How to Seal Records of State Criminal Charges in Massachusetts*, BOS. LAW. BLOG (Sept. 11, 2015), https://perma.cc/T4E5-JTNC (describing the legal intricacies of both processes of sealing).

[42] MASS. GEN. LAWS ch. 276, § 100A (2022).

[43] *Id.*

[44] *Id.* (defining final disposition as "court appearances and court disposition records, including any period of incarceration or custody").

[45] *Id.*

[46] *Id.*

[47] *See id.*

268, §§ 1-40); (2) sex offense convictions require an individual to wait fifteen years; and (3) decriminalized offenses are automatically eligible without a waiting period.[48] The Commissioner of Probation will automatically approve an individual's petition to seal their record if all charges meet the 100A requirements (at no cost to the petitioner).[49] However, absent a petition to the Commissioner, charges that meet these eligibility requirements remain on an individual's CORI and are accessible by landlords and employers—a feature of the system indicating that the colloquial reference to the 100A process as "automatic" is a bit of a misnomer.[50]

For charges that did not end in convictions and have not met the time-out requirement, individuals must petition the court and appear before a judge in a process commonly referred to as 100C sealing.[51] With the petition, individuals submit an affidavit describing how they have been affected by their record and provide reasons why their record should be sealed.[52] At the hearing, the judge considers this affidavit, along with potential testimony from the individual petitioning the court and anyone involved in the incident that led to the charges in the first place.[53] Under the standards set forth in *Commonwealth v. Pon*, an individual must show "good cause" to have their record sealed.[54] *Pon* set forth a non-exhaustive list of discretionary factors that favor record sealing and should be considered by the judge, including: the Commonwealth's compelling interest in reducing recidivism by promoting housing and employment opportunities; the barriers a criminal record presents to the individual; credible and foreseeable disadvantages from the CORI; and the nature and reason of a particular disposition.[55] *Pon* also reiterated that judges are not to consider the value to law enforcement in keeping the record open to the public, as law enforcement maintains *full access* to all sealed records.[56]

Similar to the housing and employment protections afforded under Massachusetts statutory law, wherein the legislature tells landlords and employers how they should consider criminal records, the *Pon* standard tells judges how to evaluate sealing petitions but leaves the ultimate decision in

---

[48] MASS. GEN. LAWS ch. 276, § 100A.

[49] *Id.*; *see also Request to Seal Your Criminal Record*, MASS.GOV, https://perma.cc/Z7J9-YMCY (stating "there is no fee to seal your criminal record") (last visited Nov. 25, 2022).

[50] *See* MASS. GEN. LAWS ch. 276, § 100A (providing no mechanism for automatic sealing).

[51] *Id.* § 100C.

[52] Commonwealth v. Pon, 469 Mass. 296, 316–17 (2014) (explaining that the affidavit should point out specific hardships caused by the individual's CORI and positive changes the individual has made in their life that support sealing their record).

[53] *Id.* at 318–19.

[54] *Id.* at 322.

[55] *Id.* at 316–19.

[56] *Id.* at 319.

the hands of the individual judge.[57] Unfortunately, those with criminal records face the harsh reality that one judge may deny a petition to seal for lack of "good cause" where another would have found the requirement satisfied.[58] This inconsistency is another factor leading to harsh, inequitable collateral consequences that affect a large portion of Massachusetts citizens.[59]

II. Collateral Consequences of Criminal Records

While expungement is a powerful tool for reducing or even eliminating some collateral consequences, sealing legislation is more easily expanded because it ensures that law enforcement maintains access to these records while still greatly alleviating the impact of the record on the individual.[60] The Supreme Judicial Court of Massachusetts acknowledged the need for easier access to sealing when it instructed Massachusetts judges to consider the real-life impact of criminal records when ruling on 100C petitions to seal.[61] The effects of criminal records are hard to accurately quantify because it is impossible to account for all situations.[62] For example, a study aiming to quantify the effect that criminal records have on housing application approval ratings cannot accurately account for those with records that choose not to apply at all for fear of rejection under the current system.[63] However, even without mathematical certainty, it is clear that employer and landlord access to criminal records can and does produce substantial collateral consequences.[64]

A. *Collateral Consequences in Housing*

Studies indicate that formerly incarcerated individuals are ten times more likely to experience homelessness than those without a record.[65] While many factors outside of a criminal record contribute to homelessness—such as cost of housing, lack of available housing, and unemployment—an individual's inability to gain housing due to their CORI often serves as an

---

[57] *Id.* ("providing guidance to the lower courts on how to apply the *balancing test* . . . .") (emphasis added)).

[58] *See Pon*, 469 Mass. at 315–20.

[59] *See* Chris Skall, Journey Out of Neverland: CORI Reform, Commonwealth v. Pon, and Massachusetts's Emergence as a National Exemplar for Criminal Record Sealing, 57 B.C. L. REV. 337, 376 (2016).

[60] *See generally Massachusetts Restoration of Rights & Record Relief*, *supra* note 12, § III (distinguishing the effects of sealing from those of expungement).

[61] *See Pon*, 469 Mass. at 319.

[62] *No Second Chance*, *supra* note 2, § V.

[63] *No Second Chance*, *supra* note 2, § V.

[64] *See* Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (Aug. 2018), https://perma.cc/MPH3-R2QC.

[65] *Id.*

insurmountable barrier.[66] While Massachusetts has done an admirable job in limiting the number of offenses that warrant automatic denial of housing, the level of criminal record access that landlords currently enjoy results in troubling consequences.[67] Many landlords deny housing to those with criminal records, not because they are required to by law, but because they are simply unwilling to rent to anyone with a criminal record under any circumstance.[68] A study of private landlords consisting of mostly older white men (the most common landlord demographic in America) showed that as little as 43% of landlords are willing to even *consider* applications of those with felony convictions, and 67% are willing to consider those with misdemeanor convictions.[69] Under Massachusetts' current system, if an applicant has a single conviction that qualifies to be included on their CORI, and is applying for public housing generally, the landlord can access all of the applicant's convictions (unless sealed), further decreasing the individual's chance of obtaining housing.[70]

The lack of available housing runs counter to the goals of rehabilitation as it inhibits an individual from fully reintegrating into society after fulfilling their court-ordered punishments.[71] Many individuals with a criminal record that struggle to secure housing are faced with rampant discrimination based on both their record and housing status.[72] Many additional collateral consequences exacerbate this inability to reintegrate into society and often lead to recidivism.[73] Those experiencing homelessness or unstable housing are more likely to "reoffend" as many individuals report being arrested for activities that they would not otherwise be involved in absent their living conditions.[74] In fact, in 2019, homeless individuals made up almost 13% of all arrests in Boston.[75] Most arrests of homeless individuals result from small

---

[66] Lynn M. Clark, Research Study, *Landlords Attitudes Toward Renting to Released Offenders*, 71 FED. PROBATION, June 2007, at 1–3.

[67] *See* Mass. Law Reform Inst., *Reasons for Denial*, MASSLEGALHELP, https://perma.cc/NC32-YGCP (last updated Dec. 2009) (explaining that Massachusetts law allows more discretion for state-funded housing than federally funded housing).

[68] *See* Clark, *supra* note 66, at 5.

[69] Clark, *supra* note 66, at 4–6.

[70] *See Guide to Criminal Records*, *supra* note 17.

[71] Skall, *supra* note 59, at 344–45 (discussing the effects criminal records have in housing applications).

[72] Sarah Golabek-Goldman, *Op-Ed: Homeless Shouldn't Face Job Discrimination Just Because They Lack an Address*, L.A. TIMES (Oct. 10, 2016, 4:00 AM PT), https://perma.cc/VL97-NCAC (finding that, "70.4% of homeless respondents felt that they had been discriminated against . . . based on housing status.").

[73] *See Homelessness - What We Know*, REENTRY & HOUSING COAL., https://perma.cc/Z7EC-CGLG (last visited Nov. 25, 2022).

[74] *Id.* (finding that 25% of those experiencing homelessness surveyed recounted being arrested for actions incident to homelessness).

[75] Nick McCool et al., *For the Homeless in Boston and Beyond, Laws Can Criminalize Life Itself*,

"nuisance crimes," but those incidents and arrests beget more encounters with law enforcement in adversarial situations and more opportunities for things to go wrong.[76]

B. *Collateral Consequences in Employment*

Today, nearly half of all unemployed men in America have a criminal conviction that hinders their ability to secure employment.[77] While criminal records are not the only barrier to employment, 92% of all employers perform background checks on some or all of their applicants, indicating that criminal records are an extremely prevalent factor in employment decisions.[78] Not only do employers frequently check criminal records, many of them hold strong biases against anyone with a criminal record, erroneously believing that the record itself categorically indicates danger or unreliability.[79] Surveys of employers show that the stigma against criminal records can sometimes lead to denial of employment or promotion opportunities that the individual would receive if the employer found out about the situation that led to the criminal record in a different way.[80] Overall, these surveys indicate that 60% of employers would likely not be willing to hire an individual that they know has a criminal record.[81] No matter how an employer is instructed by law to consider an applicant with a criminal record, if the employer can see the record, they can hold their misplaced biases against the applicant.[82]

The effects of employer bias are most prominent in the disparity in unemployment rates between those with a criminal record and those without.[83] At times, the unemployment rate among those with criminal

---

BOS. GLOBE, https://perma.cc/K4KA-NCWH (last updated June 28, 2020, 5:32 PM).

[76] *See* M. Price, *New Insights on Homelessness and Violence*, AM. PSYCH. ASS'N. (Dec. 2009), https://perma.cc/PF85-38L9.

[77] Rodrigo Pérez Ortega, *'Staggering' Study Reveals Nearly Half of Unemployed U.S. Men Have Criminal Convictions*, SCIENCE, https://perma.cc/W38H-LAF9 (last updated Feb. 18, 2022, 3:10 PM).

[78] *See* Guerin, *supra* note 4.

[79] *See* Dylan Minor et al., *Criminal Background and Job Performance*, SPRINGER OPEN (Sept. 12, 2018), https://perma.cc/4U7T-RRQ5 (finding that employees with records stay employed for longer on average than those without); *see generally Criminal Conviction Discrimination in Employment*, JUSTIA, https://perma.cc/8HZS-K3VT (last updated Oct. 2021).

[80] *E.g.*, DALLAS AUGUSTINE ET AL., WHY DO EMPLOYERS DISCRIMINATE AGAINST PEOPLE WITH RECORDS? STIGMA AND THE CASE FOR BAN THE BOX 4–5 (July 2020), https://perma.cc/7F8U-2CFK (finding that some employers would hire someone with signs of past drug addiction on their Facebook but not someone with a criminal record including possession).

[81] *Employment Discrimination Against Women with Criminal Convictions*, ACLU, https://perma.cc/JZ26-4VWX (last visited Nov. 25, 2022).

[82] *See* DALLAS AUGUSTINE ET AL., *supra* note 80, at 4.

[83] Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (July 2018), https://perma.cc/3JK6-UXKK.

records is four to five times higher than that of individuals without records.[84] Many advocates of criminal record screening believe that fear of negligent hiring suits against employers likely causes such disparity.[85] However, employer bias against criminal records is not specific to one particular field and is evident even in office jobs where negligent hiring litigation risk is at its lowest.[86] Communities of color and women feel the effects of such biases the most, as white men with criminal records secure employment post-incarceration more regularly and in higher-paying positions than anyone else with a record.[87] Employers' reluctance or refusal to hire and promote those with criminal records leads to additional collateral consequences such as poverty and recidivism.[88]

ANALYSIS

Despite the protections Massachusetts affords to people with criminal records, the collateral consequences of those records continue today, in part because of the level of access to CORIs that landlords and employers currently enjoy.[89] Unlike laws that instruct how landlords and employers may consider applicants' criminal records, laws that expand sealing take the records out of the landlords' and employers' hands completely, but ensure that law enforcement maintains access.[90] A large portion of both citizens and lawmakers support changes to the sealing and access of criminal records, but consensus on how to resolve these issues appears distant.[91] Laws such as Pennsylvania's Clean Slate Act and several bills currently pending in Massachusetts' legislature provide innovative ideas for the future of criminal record access laws and should serve as a base model for more consequential changes to the CORI system in Massachusetts.[92] If laws like

---

[84] *Id.* (finding that in 2008, "[t]he unemployment rate of formerly incarcerated [individuals] . . . was 27.3% (compared to 5.8% [for] the general public).").

[85] *See, e.g.*, DALLAS AUGUSTINE ET AL., *supra* note 80, at 7.

[86] *See* DALLAS AUGUSTINE ET AL., *supra* note 80, at 7 (noting that there is less risk of negligent hiring suits in office jobs because employees are generally barred from suit by worker's compensation laws).

[87] Couloute & Kopf, *supra* note 83.

[88] *See* Tianyin Yu, *Employment and Recidivism*, EVIDENCE-BASED PRO. SOC'Y (Jan. 30, 2018), https://perma.cc/U68U-2LB6 (finding that holding a "higher occupational level" is related to a lower risk of recidivism).

[89] *See generally Massachusetts Restoration of Rights & Record Relief*, *supra* note 12, § III (distinguishing the effects of sealing from those of expungement).

[90] *See* KNOW YOUR CORI RIGHTS, *supra* note 6, at 5.

[91] *E.g.*, Editorial, *Search for a 'Clean Slate' Remains Elusive*, BOS. GLOBE, https://perma.cc/KK2L-2T3G (last updated Jan. 18, 2022, 4:00 AM).

[92] *See* Margaret Potter, *Expanding and Fine-Tuning Pennsylvania's Clean Slate Law*, JURIS MAG. (Aug. 20, 2020), https://perma.cc/2XJM-GLMZ (describing Pennsylvania's Clean Slate Act as a "national model").

these are implemented—with some adjustments and effective dissemination of information to the community—Massachusetts can reduce or even eliminate some of the collateral consequences that result from living with a criminal record.[93]

III. Massachusetts Must Capitalize on the Momentum for Record Sealing Reform

Bipartisan support for criminal record reform continues to grow as the general public becomes more aware of the collateral consequences of criminal records.[94] Several interest groups across the country have found recent success in lobbying state legislatures to enact changes to criminal record access by way of the Clean Slate Initiative ("CSI") and automatic sealing.[95] Massachusetts is among the many state legislatures showing recent support for criminal record reform with several proposed bills that aspire to make criminal record sealing more equitable, accessible, and even *automatic*.[96] With support for criminal record reform growing both in the Commonwealth and nationwide, Massachusetts must capitalize on the momentum by further expanding access to CORI sealing.[97]

A. *Nationwide Support for Criminal Record Sealing Reforms Continues to Grow*

Today, a vast majority of Americans support removing the economic and social barriers caused by the criminal justice system, making now the most opportune time for state legislatures to pass changes to criminal record access laws.[98] Widespread support for expanded criminal record sealing stands in sharp contrast with the "tough-on-crime" stance utilized by many successful politicians throughout our history, but most Americans now realize that such policies do more harm than good.[99] This change of heart

---

[93] *See, e.g.*, Aaron Moselle, *Pa. Residents with Court Debt Could Have Their Records Automatically Sealed Under New Bill*, WHYY (Oct. 22, 2020), https://perma.cc/R9SR-6HJY (emphasizing that the Clean Slate Act in Pennsylvania is effective).

[94] Reintegration Team, *National Survey Shows Strong Bipartisan Support for Reducing Barriers for People with Criminal Records*, ARNOLD VENTURES (Apr. 15, 2021), https://perma.cc/9GXU-M96K.

[95] *See More Clean Slate*, *supra* note 7.

[96] *See, e.g.*, An Act to Remove Collateral Consequences and Protect the Presumption of Innocence, H.R. 1568, 192d. Gen. Court (Mass. 2021); An Act Providing Easier and Greater Access to Record Sealing, S. 1037, 192d. Gen. Court (Mass. 2021).

[97] *See generally* Reintegration Team, *supra* note 94.

[98] *See* Vera Staff, *Overwhelming Majority of Americans Support Criminal Justice Reform, New Poll Finds*, VERA INST. OF JUST. (Jan. 25, 2018), https://perma.cc/P93D-C7DL (finding that among Americans "90 percent believe that barriers to employment . . . should be removed").

[99] *See generally* Lauren-Brooke Eisen, *Criminal Justice Reform in 2015: Year End Review*, BRENNAN CTR. FOR JUST. (Dec. 28, 2015), https://perma.cc/83LA-WUHS (describing the nationwide shift away from "tough-on-crime" stances).

toward more lenient criminal record systems makes sense in light of the general public's increasing desire to undo the negative effects of past criminal justice failures like the Violent Crime Control and Law Enforcement Act of 1994 ("Crime Bill"), a law widely considered to be the cornerstone of mass incarceration.[100] Public support for criminal justice reform is not new,[101] but tragic events in 2020, such as the murders of George Floyd and Breonna Taylor, intensified calls for widespread changes in the criminal justice system across the nation.[102] As more citizens joined this call for change in criminal justice, legislatures across the country became more amenable to reconsidering many aspects of criminal justice, such as how we treat those with criminal records.[103]

Many legislatures responded to increased public pressure for criminal justice reform by proposing and passing laws aimed at expanding access to criminal record sealing.[104] Just months after public support led to the passage of Pennsylvania's historic Clean Slate Law in 2018, large bipartisan interest groups like the CSI formed with an eye toward increasing access to criminal record sealing across the country.[105] In the three years following CSI's formation, Utah, Michigan, Connecticut, and Delaware enacted their own versions of Clean Slate laws, and several more states, including Texas, Missouri, and North Carolina, advanced legislation to further criminal record clearance in some way.[106] These bills were passed by legislatures in states on all parts of the political spectrum[107] and are likely a reflection of the support for criminal record reforms within their constituencies.[108] Although

---

[100] *See* Ed Chung et al., *The 1994 Crime Bill Continues to Undercut Justice Reform–Here's How to Stop It*, CTR. FOR AM. PROGRESS (Mar. 26, 2019), https://perma.cc/QDR2-ZL3C (criticizing the Crime Bill for wasting taxpayer dollars, over-incarcerating citizens, and delaying inmates' release, all while having a "marginal effect" on public safety).

[101] *See Public Opinion on Sentencing and Corrections Policy in America*, PEW CHARITABLE TRS. (Mar. 30, 2012), https://perma.cc/8GHV-95EE (finding widespread support for sentencing and correction reforms in 2012).

[102] *See generally A Decade of Watching Black People Die*, NPR (May 31, 2020, 11:15 AM ET), https://perma.cc/7VXA-DYR4 (discussing the many wrongful killings by police that led to increased calls for criminal justice reform).

[103] *See generally* Daniel Nichanian, *Criminal Justice Reform in the States: Spotlight on Legislatures*, THE APPEAL, https://perma.cc/9VMF-UC9W (last updated June 2021) (listing criminal justice developments by state from 2019 to 2021).

[104] *See More Clean Slate*, *supra* note 7.

[105] Julia Cusick, *CAP and More than 25 Partners Launch National Bipartisan 'Clean Slate' Initiative to Automate Clearing of Criminal Records*, CTR. FOR AM. PROGRESS (Nov. 15, 2018), https://perma.cc/4F38-25XR.

[106] *Delaware Becomes Fifth State in the Nation to Offer Clean Slate, Reducing Barriers for People with Arrest and Conviction Records*, CLEAN SLATE INITIATIVE (Nov. 9, 2021), https://perma.cc/T4DB-FDNH [hereinafter *Delaware Becomes Fifth State*].

[107] *See generally Political Ideology by State*, PEW RES. CTR., https://perma.cc/H5XR-QJS3 (last visited Nov. 25, 2022) (showing political ideologies by state).

[108] *See* Cusick, *supra* note 105 (finding as much as seventy percent of Americans support clean

support for criminal record reforms existed well before 2020, it grew substantially within legislatures in 2021, as thirty-six states enacted laws that supplement or limit public access to criminal records.[109] If Massachusetts is to remain a leader in criminal justice reform, the Commonwealth must capitalize on this nationwide momentum for meaningful change.[110]

B. *Massachusetts Legislature is Headed in the Right Direction*

Massachusetts received high praise for its 2010 overhaul of the CORI system, but many criminal justice advocates called for immediate improvements, some even before the law went into effect in 2012.[111] In response to this call for change, Massachusetts restructured the CORI system again in 2018 by changing the requirements for sealing and further reducing barriers for those with criminal records.[112] Today, like the majority of states passing laws that increase access to criminal record sealing, Massachusetts has several bills pending in its legislature that should serve as a blueprint for sealing laws that will cement the Commonwealth's reputation as a leader in criminal justice reform.[113]

First, Senate Bill Number 1037, introduced in 2021 by Massachusetts Senator Cindy F. Friedman, calls for automatic sealing of all charges that do not result in prosecution and, most notably, a ninety-day time limit for the Commissioner of Probation to automatically seal charges that become eligible.[114] This bill calls for an automatic sealing system similar to that of Pennsylvania's 2018 Clean Slate Act, and effectively replaces the current 100C discretionary sealing process.[115] Similarly, Massachusetts Representative Brandy Fluker Oakley introduced House Bill Number 1568 in 2021 which calls for automatic sealing of any charge that did not end in a guilty verdict, although it stops short of calling for widespread automatic sealing.[116] Both of these bills call for some form of automatic criminal record sealing and evince the support that CORI reform has in the Massachusetts legislature.[117] However, with such widespread support nationwide and in the Commonwealth, Massachusetts should take this opportunity not only to pass these popular bills, but to supplement them with more far reaching

---

slate policies).

[109] *See Reentry to Reintegration*, *supra* note 9.

[110] *See generally Reentry to Reintegration*, *supra* note 9.

[111] *See, e.g.*, GABRIELLA PRIEST ET AL., *supra* note 11, at 17.

[112] *See Massachusetts Restoration of Rights & Record Relief*, *supra* note 12, § III.

[113] *See, e.g.*, An Act to Remove Collateral Consequences and Protect the Presumption of Innocence, H.R. 1568, 192d. Gen. Court (Mass. 2021); An Act Providing Easier and Greater Access to Record Sealing, S. 1037, 192d. Gen. Court (Mass. 2021).

[114] Mass. S. 1037, §§ 2, 5.

[115] *Id.* § 5.

[116] *Compare* Mass. H.R. 1568, § 5, *with* Mass. S. 1037, §§ 2, 5.

[117] Mass. H.R. 1568, § 5; Mass. S. 1037, § 5.

changes to CORI sealing.[118]

IV. Restructure, Automate, and Supplement the CORI Sealing Process

If Massachusetts hopes to maintain its long-held reputation as a leader in criminal justice, it must pass additional measures that increase eligibility for and automation of CORI sealing.[119] Additionally, Massachusetts must ensure the efficacy of the new program by maintaining effective, state-funded outreach and post-incarceration counseling programs that focus on ensuring individuals know the CORI system and how their CORI can be viewed or sealed.[120] The bills currently pending in Massachusetts' legislature provide expanded eligibility for CORI sealing and call for automation of the process.[121] Pennsylvania's Clean Slate Act provides a viable and proven system for such automation.[122] If Massachusetts considers, passes, and builds on these laws, the CORI system can finally work to reduce the collateral consequences of criminal records.[123]

A. *Repurposing the 100C Petition Process*

House Bill Number 1568 calls for automatic sealing of any charge that does not end in a guilty verdict, effectively abolishing the current 100C discretionary sealing process for non-convictions.[124] This bill is a vital step toward automatic CORI sealing that leaves open the possibility of a different system of discretionary sealing—one that considers sealing convictions on a case-by-case basis before the statutorily required waiting period has lapsed.[125] While Massachusetts decreased the waiting period for both misdemeanors and felonies to three and seven years respectively in 2018,[126] it still broadly categorizes crimes as felonies and misdemeanors when determining the waiting period under the 100A sealing process.[127] This often means that one felony, such as a violation of an abuse prevention order issued in response to a domestic violence allegation, is treated the same as

---

[118] *See generally* Cusick, *supra* note 105 (referencing widespread support for criminal record reform).

[119] *See generally* Shira Schoenberg, *Gov. Charlie Baker Signs Landmark Massachusetts Criminal Justice Overhaul, Despite Concerns*, MASSLIVE (Apr. 13, 2018, 8:32 PM), https://perma.cc/4B36-V5DL (describing the 2018 CORI reforms as landmark legislation).

[120] *See* GABRIELLA PRIEST ET AL., *supra* note 11, at 15.

[121] An Act to Remove Collateral Consequences and Protect the Presumption of Innocence, H.R. 1568, 192d. Gen. Court § 5 (Mass. 2021); An Act Providing Easier and Greater Access to Record Sealing, S. 1037, 192d. Gen Court (Mass. 2021).

[122] *See* Moselle, *supra* note 93.

[123] *See* Vallas et al., *supra* note 16 (pointing to the benefits of increased access to sealing).

[124] Mass. H.R. 1568, § 5.

[125] *See generally id.*

[126] *See Massachusetts Restoration of Rights & Record Relief*, *supra* note 12, § III.

[127] *See* MASS. GEN. LAWS ch. 276, § 100A (2022).

other felonies, such as possession with intent to distribute.[128] While these acts are both illegal and present some danger to society, they are fundamentally different crimes and should be treated as such.[129] Massachusetts has already shown that it is amenable to an offense-based eligibility system by recognizing that felony convictions for firearms crimes, sexual crimes, and crimes against the public, should be treated more seriously than less dangerous felony convictions.[130]

Some scholars suggest that a more equitable system for sealing convictions must consider the degree of the offense and the circumstances surrounding it.[131] Of course, any system that allows for discretion has the potential for inequitable results in the future, indicating that discretion should be avoided as much as possible.[132] Trusting judges to make an individualized assessment of what convictions should qualify for a decreased waiting period is not ideal, but neither is a blanket mandate for how long each felony and misdemeanor should remain unsealed without regard to the specific facts of the conviction.[133] In order to quell the fear of unfettered discretion by judges and still avoid treating all felonies (or misdemeanors) the same as others, the legislature should provide factors that indicate whether an individual should be eligible to seal their conviction before the end of the waiting period.[134] This system should be a combination of simple factors such as whether the crime was a violent offense or a first offense, and more complex factors such as a requirement to consider the facts of the individual conviction, similar to the *Pon* standard.[135] This system would maintain the maximum three- and seven-year requirements for eligibility for automatic sealing, but would give some individuals the opportunity to seal their less serious convictions earlier.[136] This approach is imperative because not all crimes are equal, but the mere existence of a criminal record can categorically disqualify an individual in the eyes of some landlords and employers.[137] Additionally, Massachusetts can avoid harm from potential abuses of discretion by lower courts (whether that abuse is intentional or not) by making the denial of sealing applications reviewable

---

[128] *See generally id.*

[129] *Compare* MASS. GEN. LAWS ch. 209A, § 7 (2022) (describing violation of abuse prevention orders), *with* MASS. GEN. LAWS ch. 94C, § 32A (2022) (describing distribution of narcotics).

[130] *See* MASS. GEN. LAWS ch. 276, § 100A.

[131] *E.g.*, Skall, *supra* note 59, at 375.

[132] *See Race and Discretion in the Criminal Legal System*, NYU SCH. OF L., https://perma.cc/23DM-KWUL (last visited Nov. 25, 2022).

[133] *See* Skall, *supra* note 59, at 375.

[134] *See* Skall, *supra* note 59, at 375.

[135] *See* Skall, *supra* note 59, at 375.

[136] *See* Skall, *supra* note 59, at 375.

[137] *See* Clark, *supra* note 66, at 4.

by an appeals court.[138] In sum, this new system should adopt automatic sealing of charges that do not end in a guilty verdict—as proposed in House Bill 1568—and should retain a discretionary sealing approach similar to that employed under 100C, but re-deploy it as a method of allowing early sealing of convictions that satisfy discretionary factors chosen by the legislature.[139]

B. *The Future of CORI Sealing Must Be Automatic*

Once an individual's CORI meets all requirements for sealing, actual sealing should naturally follow, yet Massachusetts law requires further action on the part of the individual seeking to seal their CORI.[140] Today, less than seven percent of criminal records are sealed within five years of becoming eligible, in part because of the intricate requirements of a petition-based sealing system.[141] This contributes to additional and unnecessary hurdles in a number of situations, including where a recent conviction reinstates an old, timed-out conviction onto an individual's CORI because the individual failed to petition the Commissioner when eligible.[142] There is little, if any, justification for requiring further action from an individual once their CORI is eligible for sealing, and continuing to require such action only weakens Massachusetts' standing as a leader among states in criminal justice reform.[143] Recently, several states automated their criminal record sealing system with a specific objective to make criminal record sealing more accessible, understandable, and equitable.[144] Both chambers of Massachusetts' legislature have bills calling for no-action automatic sealing of eligible charges but neither chamber presents a workable system to effectuate that change.[145] Pennsylvania has sealed a record number of cases in the few years since implementing automatic sealing, offering a proven model of success that Massachusetts should consider as it automates its criminal record sealing system.[146]

---

[138] *See generally* Legal Info. Inst., *Abuse of Discretion*, CORNELL L. SCH., https://perma.cc/ZZ39-R8X3 (last visited Nov. 25, 2022) (describing the process for review of lower court decisions for abuse of discretion).

[139] *See* An Act to Remove Collateral Consequences and Protect the Presumption of Innocence, H. R. 1568, 192d. Gen. Court (Mass. 2021).

[140] *See* MASS. GEN. LAWS ch. 276, § 100A (2022).

[141] *See* Vallas et al., *supra* note 16.

[142] *See generally* Jackson & Zhao, *supra* note 20, at 8–9.

[143] *See generally* MASS. GEN. LAWS ch. 276, § 100A (requiring a petition to seal charges once all eligibility requirements are met).

[144] *Delaware Becomes Fifth State*, *supra* note 106.

[145] *See, e.g.*, An Act to Remove Collateral Consequences and Protect the Presumption of Innocence, H.R. 1568, 192d. Gen. Court (Mass. 2021); An Act Providing Easier and Greater Access to Record Sealing, S. 1037, 192d. Gen. Court (Mass. 2021).

[146] Aaron Moselle, *Historic Pennsylvania Law to Seal Million of Criminal Charges Automatically*, NPR (June 28, 2019, 8:23 AM ET), https://perma.cc/94ML-8QRW.

Pennsylvania's sealing process is the first sealing process that is truly automatic for individuals with a record, requiring no action from the individual, not even a petition.[147] Under this system, the Administrative Office of Pennsylvania Courts transmits the record of any charge that did not end in a conviction to the State Police repository within thirty days of the final disposition to validate that the charge is eligible for sealing.[148] In addition, every thirty days the Administrative Office reviews its files and transmits all records of convictions that have timed out and are now eligible for sealing.[149] Once received, the repository has thirty days to confirm eligibility of the charges, after which each court of common pleas issues an order to seal eligible charges.[150] Once the order is issued, members of the general public (including landlords and employers) lose all access to the records, still with no action required from the individual whose record is sealed.[151] Finally, under this system the records are *sealed*, not *expunged*, so law enforcement maintains access to them.[152]

This program offers a workable solution to calls for automatic record sealing in Massachusetts and translates well to the CORI system, as the Commonwealth already has the offices, resources, and support needed to implement it.[153] Massachusetts' Department of Criminal Justice Information Services (DCJIS) can take the place of the Administrative Office of Pennsylvania Courts, and Massachusetts' Commissioner of Probation is a natural corollary to Pennsylvania's State Police repository in this record sealing process.[154] The system could be nearly identical; the county clerks' offices send records of any charges that did not end in a conviction to the Commissioner of Probation for sealing within thirty days of the final disposition, and every month DCJIS reviews its files for charges that have become eligible for sealing.[155] This automatic system would naturally negate those inequitable situations wherein an employer or landlord can see timed-out charges on an applicant's criminal record if the applicant is convicted of

---

147 *Id.*

148 18 PA. CONS. STAT. § 9122.2(b) (2022).

149 *Id.*

150 *Id.*

151 *See* 18 PA. CONS. STAT. § 9122.2(c).

152 *See About Pennsylvania's New Clean Slate Law*, RECORD ERASER (Feb. 26, 2019), https://perma.cc/33BS-KQ4J.

153 *See* MASS. GEN. LAWS ch. 6, § 167A(e) (2022) (tasking the Department of Criminal Justice Information Services to adopt rules for "the collection, storage, access, [and] dissemination" of criminal record information requested); *see also* An Act Providing Easier and Greater Access to Record Sealing, S. 1037, 192d. Gen. Court (Mass. 2021) (showing support for automatic sealing legislation).

154 *See generally* MASS. GEN. LAWS ch. 6, § 167A(a) (2022) (mandating that the Commissioner of Probation oversee the Department of Criminal Justice Information Services).

155 *Compare* 18 PA. CONS. STAT. § 9122.2(b) (2022), *with* MASS. GEN. LAWS ch. 6, § 167A (2022) (describing the duties of state offices that handle criminal record information).

another offense.[156] Additionally, a no-action, automatic sealing system would finally effectuate the provision in § 100A that calls for immediate sealing of decriminalized marijuana charges, a protection that is tragically underutilized by those with criminal records.[157]

C. *Supplement the System with State-Funded Outreach*

Regardless of which eligibility and automation provisions Massachusetts enacts, the ultimate goal of expanded criminal record sealing will fail without adequate community outreach and post-incarceration counseling.[158] While many organizations in the Commonwealth provide information to individuals about their eligibility for sealing and the process behind it pro bono, Massachusetts does not offer a widely available, state-funded program to inform individuals on the CORI sealing process.[159] The result is that even when a charge is eligible for sealing, many individuals do not realize it and fail to petition the Commissioner to seal their record.[160] Even if Massachusetts adopts a no-action, automatic sealing process, continued lack of outreach to eligible individuals will render the program ineffective, because many with sealed records will disclose those records to employers and landlords, not realizing they are no longer required to do so.[161] Some Massachusetts cities have initiated programs like Project Opportunity, a largely volunteer-based Boston initiative that offers information, consultation, and training on the CORI system.[162] Funding programs like Project Opportunity and expanding them across all of Massachusetts could achieve the outreach necessary to ensure an expanded CORI sealing program is effective.[163]

One objective of programs like Project Opportunity is helping residents navigate the petition process for sealing their CORI, a valuable function that will be greatly reduced if Massachusetts adopts a no-action, automatic sealing (although still immensely helpful should Massachusetts adopt the

---

[156] *See* Jackson & Zhao, *supra* note 20, at 9.

[157] *See generally* Dan Adams, *'An Utter Failure': Law Meant to Clear Old Convictions, Including for Marijuana Possession, Helps Few*, BOS. GLOBE, https://perma.cc/ZC74-ACHM (last updated Nov. 28, 2021, 4:49 PM).

[158] *See* PRIEST ET AL., *supra* note 11, at 15.

[159] *See, e.g.*, *Criminal Record Sealing Pilot Project*, BOS. BAR ASS'N, https://bostonbar.org/in-the-community/public-service/cori-sealing-project (last visited Nov. 25, 2022) (explaining the Boston Bar Association's program to help individuals seal their CORI).

[160] Vallas et al., *supra* note 16.

[161] *See* PRIEST ET AL., *supra* note 11, at 13–15.

[162] Workforce Development, *Project Opportunity to Help Residents Gain Access to Jobs, Housing, Education*, CITY OF BOS. (July 14, 2020), https://perma.cc/99V2-EBCK (describing Project Opportunity, a Boston based CORI outreach program).

[163] *See* PRIEST ET AL., *supra* note 11, at 15.

new discretionary sealing process proposed above).[164] However, the program also offers training for city employees who interact with individuals who have criminal records, referrals to CORI-friendly employment and housing opportunities, and information about how sealing eligibility works.[165] These outreach efforts are essential to a more effective CORI system.[166] Unfortunately, many of these initiatives rely on grants, pro bono work, and organizational fundraisers to stay afloat; this may result in inconsistent budgets, staffing, and programming.[167] In a perfect world, state funding would be unnecessary because every lawyer in America would give the fifty hours of pro bono work per year, as suggested by the American Bar Association;[168] in reality, almost fifty percent of lawyers give no pro bono hours at all, and only twenty percent meet or exceed the fifty-hour goal.[169] This reality often leaves organizations that rely on pro bono services understaffed and under-resourced, which leads to more accessibility issues for those seeking to seal their criminal records (among many other unmet needs for legal services).[170] While relying on the goodness of lawyers to consistently dedicate their services is noble, it is unrealistic, and a modest state-funded fee could substantially increase participation in these initiatives.[171]

In addition to funding outreach programs generally, special emphasis should be placed on CORI sealing in post-incarceration counseling (also commonly called inmate reentry programs) to assist the most vulnerable among those with criminal records.[172] While Massachusetts has a number of programs aimed at helping formerly incarcerated individuals reenter society, none directly mention counseling on how CORI works and the protection provided by the Commonwealth.[173] Although recently released individuals are not eligible for sealing for several years after release, there is still value in ensuring all are aware of the protections from landlord and employer discrimination afforded under Massachusetts law.[174] Further, if

---

[164] *See* Workforce Development, *supra* note 162.

[165] Workforce Development, *supra* note 162.

[166] *See* PRIEST ET AL., *supra* note 11, at 15.

[167] *See, e.g.*, *Frequently Asked Questions*, LAWS. CLEARINGHOUSE, https://perma.cc/4VNP-YTXL (last visited Nov. 25, 2022).

[168] MODEL RULES OF PRO. CONDUCT 6.1 (A.B.A. 2019).

[169] *Pro Bono*, A.B.A., https://perma.cc/SRQ4-K8K7 (last visited Nov. 25, 2022).

[170] *New Findings: 68% of Nonprofit Professionals Report Not Having Enough Financial Resources to Do the Work They Do*, JUST MEANS (Oct. 19, 2017, 10:45 AM ET), https://perma.cc/ZJZ2-2D7Q.

[171] *See generally Pro Bono*, *supra* note 169 (finding that lawyers do not fulfill the ABA suggested hours of pro bono work).

[172] *See* EBONY N. RUSS ET AL., PRISON & JAIL REENTRY & HEALTH 1–3, 5–7 (2021), https://perma.cc/8VLL-GTK5.

[173] *See Inmate Reentry Programs*, MASS.GOV, https://perma.cc/4JCM-2G4P (last visited Nov. 25, 2022).

[174] *See generally* ANDREA TAYLOR, COMING HOME: A GUIDE TO RE-ENTRY PLANNING FOR

Massachusetts adopts no-action automatic sealing or a discretionary early sealing system, this post-incarceration counseling would ensure that former inmates know when their CORI is eligible for sealing, how to ensure their CORI becomes eligible for sealing, and when landlords and employers can no longer ask about charges.[175] If the CORI sealing system sees no other change, it must see an increase in outreach and counseling or it will fail its only purpose—giving those with criminal records a second chance.[176] Project Opportunity and similar programs like the CORI Sealing Initiative offer valuable resources for a more equitable criminal record system in Massachusetts, and state funding and expansion of such programs is the only way to ensure their continued success.[177]

CONCLUSION

Massachusetts' history of success in criminal justice reform, both in the legislature and the courts, is admirable and should not be understated. The relief from collateral consequences afforded by those successes is incalculable. However, more progress is needed. Those with criminal records are still underhoused and underemployed at rates that far exceed those without criminal records, and there is much the Commonwealth can do. While there are many admirable criminal record reforms to pursue, expanded criminal record sealing is unique in that it greatly reduces collateral consequences without interfering with law enforcement's access to information. This, along with a shift in general public sentiment toward the current American criminal justice system, has led to widespread support and momentum for expanded sealing access. Massachusetts should capitalize on this momentum by installing a sealing system that finally gives those with criminal records the second chance they were promised when CORI was first established in 2010. The system must reconsider eligibility, automate the sealing process, and provide adequate outreach to those with criminal records. Without these changes, the long-repeated promise of equal opportunity in housing and employment for *all citizens* rings hollow for those with a criminal record.

PRISONERS LIVING WITH MENTAL ILLNESSES (2013), https://perma.cc/M8XH-THMX (discussing post-incarceration counseling).

[175] *See id.* at 7 (counseling formerly incarcerated people to consult state laws on what charges employers may ask about).

[176] *See* Dan Ring, *Massachusetts Gov. Deval Patrick Signs Law Changing CORI System*, MASSLIVE MEDIA, https://perma.cc/N9EH-A9B7 (last updated Mar. 25, 2019, 5:42 AM) ("This legislation . . . helps people get back to work . . . .").

[177] *See* PRIEST ET AL., *supra* note 11, at 15.

* * * *

A Fundamental Right to Bleed

Tyra Cameron[*]

INTRODUCTION

Teachers are requiring students to refer to menstrual "pads as 'penguins' and tampons as 'turtles.'"[1] Students are bleeding through their pants because their teachers restrict when and where they can use the bathroom.[2] Correctional officers at prisons are distributing menstrual products only in exchange for sex.[3] Inmates are bleeding all over their cells because they cannot afford tampons at the commissary.[4] Homeless menstruators are choosing between spending money on food or bleeding through their only pair of pants.[5] States are taxing tampons, but not condoms or Viagra.[6]

Archaic and degrading practices such as these occur throughout the United States today.[7] Despite menstruation being a natural bodily process, it is considered a time where menstruators are "irrational, fragile,

* J.D., New England Law | Boston (2023). B.A., Legal Studies specializing in Constitutional Law & Social Justice, University of Massachusetts Amherst (2018). This Note was inspired by my mom, Donna Cameron, who is the quintessence of strength, perseverance, and resilience. I also want to thank the entire New England Law Review staff for all their contributions and support.

1 Margaret E. Johnson, Emily Gold Waldman & Bridget J. Crawford, *Title IX & Menstruation*, 43 HARV. J.L. & GENDER 225, 235 (2020).

2 *See id.* at 234.

3 Mitchell O'Shea Carney, *Cycles of Punishment: The Constitutionality of Restricting Access to Menstrual Health Products in Prisons*, 61 B.C. L. REV. 2541, 2546–47 (2020).

4 *See* Margaret E. Johnson, *Menstrual Justice*, 53 UC DAVIS L. REV. 1, 57–60 (2019).

5 *See, e.g.*, DePaul's Ctr. for Journalism Integrity and Excellence, *Women Forced to Choose Between Food and Menstrual Products*, WTTW (Nov. 20, 2019, 6:04 PM), https://perma.cc/5HGF-UZLG.

6 Bridget J. Crawford & Emily Gold Waldman, *The Unconstitutional Tampon Tax*, 53 U. RICH. L. REV. 439, 441 (2019) [hereinafter Crawford & Waldman, *Unconstitutional Tampon Tax*].

7 *See generally* Johnson, *supra* note 4 (discussing menstrual injustice and how it stems from the stigmas surrounding menstruation).

incompetent, and emotional."[8] Society views menstruation as "dirty and impure."[9] Although there are products to control menstruation, many people in this country do not have the means or access to them.[10] Thus, many menstruators choose to skip school, work, and other social events to hide their menstruation or use makeshift products that can create long-lasting health risks.[11] A lack of access to adequate menstrual products results in menstruators "lack[ing] the ability to participate fully in civic society."[12]

This Note will argue that access to adequate menstrual products is a fundamental right subject to strict scrutiny under the Fourteenth Amendment's Due Process Clause. Because most governmental restrictions on such products will not survive a due process analysis, deeming access to adequate menstrual products a fundamental right would result in significant change by eradicating menstrual injustices and period poverty among the most vulnerable menstruators.

Part I of this Note will introduce the concept of menstruation and the shame and taboos surrounding it, as well as the concept of menstrual injustice and period poverty. It will also identify three vulnerable classes of menstruators that are especially affected by a lack of access to adequate menstrual products: students, prisoners, and the homeless. It will conclude with a description of four relevant analyses used to determine the constitutionality of a governmental restriction and the lack of access to adequate menstrual products. Part II will explain how deeming access to adequate menstrual products a fundamental right will trigger a strict scrutiny analysis under the Due Process Clause. It will also explain why similar arguments under the Equal Protection Clause ("EPC") and the Eighth Amendment are unlikely to bring about substantial change. Part III argues why access to adequate menstrual products should be deemed a fundamental right based on U.S. Supreme Court precedent and the concept of human dignity. Part IV asserts that once access to adequate menstrual products is deemed a fundamental right, restrictions that are placed on students, prisoners, and the homeless through policies and taxes must be held unconstitutional. This Note concludes with several recommendations for how states can help end menstrual injustice and period poverty.

---

[8] Johnson, *supra* note 4, at 19.

[9] Johnson, *supra* note 4, at 16.

[10] *See generally* Bridget J. Crawford & Emily Gold Waldman, *Period Poverty in a Pandemic: Harnessing Law to Achieve Menstrual Equity*, 98 WASH. U. L. REV. 1569 (2021) [hereinafter Crawford & Waldman, *Period Poverty*] (discussing period poverty).

[11] *See* Carney, *supra* note 3, at 2548–49; Johnson, *supra* note 4, at 5, 30–31; *see generally* Valerie Siebert, *Nearly Half of Women Have Experienced 'Period Shaming,'* N.Y. POST, https://perma.cc/GQ8F-7764 (last updated Jan. 3, 2018, 1:14 PM) (providing statistics on menstrual shaming).

[12] ACLU NAT'L PRISON PROJECT & PERIOD EQUITY, MENSTRUAL EQUITY: A LEGISLATIVE TOOLKIT 9 (2019) https://perma.cc/WWB6-VMVJ.

I. Background

A. *The Menace of Menstruators*

The menstrual cycle is a reproductive and biological process that occurs in a female body every month to prepare for a potential pregnancy.[13] An average menstrual cycle lasts about twenty-eight days.[14] On the first day of the cycle, the menstruation process (or "period") begins.[15] In this phase, if pregnancy did not occur during the last month's cycle, hormone levels lower and the body sheds the tissue in the lining of the uterus that has formed since the menstruator's last period.[16] As a result, "[m]enstrual fluid contain[ing] blood, cells from the lining of the uterus (endometrial cells) and mucus" release from the vagina.[17] Menstruators use menstrual products such as sanitary pads, tampons, menstrual cups, menstrual disks, period underwear, or medication to control the flow of their period.[18] During menstruation, menstruators often have cramping, bloating, acne, sore breasts, tiredness, headaches, and mood swings.[19] Some menstruators experience light bleeding, while others experience heavy bleeding.[20] An average period usually lasts between three to seven days.[21] Menstruation occurs every month from the time of puberty to menopause, for an average of forty years.[22]

For menstruators, "[a] regular monthly period . . . is considered healthy and a sign of proper body functioning."[23] However, in this country, "there are cultural narratives of menstruation as shameful and taboo, and menstruators [are treated] as dirty, impure, and incompetent."[24] The ancient Romans believed that menstrual blood had the ability to kill seeds, plants, and animals, and that it reduced a razor's sharpness.[25] They also believed

---

[13] *See generally* Nemours KidsHealth, *The Menstrual Cycle*, at 00:45–01:57 (Aug. 6, 2015), https://perma.cc/N3NG-BLXL (explaining the menstrual process).

[14] *Id.* at 00:37–00:46.

[15] *Id.* at 00:47–00:50.

[16] Johnson, *supra* note 4, at 9.

[17] Victoria State Gov't Dep't of Health & Jean Hailes, *Menstrual Cycle*, BETTER HEALTH CHANNEL, https://perma.cc/3HA2-H35M (last visited Feb 20, 2023) [hereinafter *Menstrual Cycle*].

[18] Johnson, *supra* note 4, at 11; *Period Products: What Are the Options?*, IPPF (Nov. 18, 2020), https://perma.cc/GFB5-TV6P.

[19] Corey Whelan, *10 Signs Your Period Is About to Start*, HEALTHLINE, https://perma.cc/EP26-SGHH (last updated Feb. 4, 2022).

[20] Johnson, *supra* note 4, at 10.

[21] *Menstrual Cycle*, *supra* note 17.

[22] Johnson, *supra* note 4, at 9–10.

[23] Johnson, *supra* note 4, at 9.

[24] Johnson, *supra* note 4, at 15.

[25] Johnson, *supra* note 4, at 16.

that a woman's contact with another's menstrual blood could result in a miscarriage.[26] Similarly, some Native American tribes believed that menstruators had the power to impair the benefits of medicine and were bad luck.[27] Early forms of Christianity required menstruators to live in isolation until their period was over to avoid spreading impurity to others.[28] Some Christian denominations continue to forbid menstruators from engaging in religious activities during menstruation.[29] Orthodox Judaism still forbids menstruators from physically touching their husbands during and shortly after menstruation.[30] Some Islamic denominations continue to prohibit menstruators from engaging in sexual activity while menstruating and often forbid them from participating in prayer.[31]

Views of menstruators as "impure [and] inferior" remain today.[32] The term "menstrual injustice" represents "the oppression of menstruators, women, girls, transgender men and boys, and nonbinary persons, simply because they menstruate."[33] Because menstruation can vary by month, "menstruators are often caught off guard by the onset of their period."[34] Coworkers stigmatize menstruators for bleeding through clothes or being late to work due to menstrual pain.[35] Some menstruating children even skip school to avoid harassment from peers and restrictive bathroom policies.[36]

The stigmas surrounding menstruation also exist in the media today.[37] Advertising for menstrual products continues to illustrate menstruation as a hygienic issue, rather than a biological process.[38] One of our country's recent leaders publicly acknowledged menstruation as something debilitating and embarrassing.[39] At a Republican Presidential Debate in

---

[26] Johnson, *supra* note 4, at 16.

[27] *See, e.g.*, Johnson, *supra* note 4, at 16.

[28] Johnson, *supra* note 4, at 16; *see Leviticus* 15:19–20.

[29] Johnson, *supra* note 4, at 17.

[30] Johnson, *supra* note 4, at 17; *Leviticus* 15:19–27.

[31] Johnson, *supra* note 4, at 18; *see* Qur'an 2:222.

[32] Johnson, *supra* note 4, at 19.

[33] Johnson, *supra* note 4, at 5.

[34] Johnson, *supra* note 4, at 10 (noting how sixty-one percent of menstruators acknowledged that they have suffered from unanticipated periods in the past).

[35] Johnson, *supra* note 4, at 5.

[36] Johnson, Waldman & Crawford, *supra* note 1, at 229, 252, 254.

[37] Johnson, Waldman & Crawford, *supra* note 1, at 233 ("One recent study called the 'Tampon Experiment' demonstrated that the average individual sees menstruating women as 'less competent, [and] less likeable' than women who are not menstruating.").

[38] Coshandra Dillard, *Educators Can Help Reduce Stigmas Associated with Menstruation by Challenging Rigid School Policies and Advocating for Equitable Health Education*, 61 TEACHING TOLERANCE, Spring 2019, at 47, https://perma.cc/KG7D-58KB ("Advertisements use the word 'feminine' in the same breath as 'sanitary' and 'protection.'").

[39] *See, e.g.*, Philip Rucker, *Trump Says Fox's Megyn Kelly Had 'Blood Coming Out of Her Wherever*,' WASH. POST (Aug. 8, 2015, 10:30 AM EDT), https://perma.cc/X8BC-YTS8.

2016, the moderator, Megyn Kelly, asked then-presidential candidate Donald Trump about derogatory comments that he had made about women.[40] In an interview shortly after the debate, Trump stated how "[y]ou could see the blood coming out of her eyes, blood coming out of her wherever. In my opinion, she was off base."[41] Social media also reflects menstrual injustice.[42] In 2015, poet Rupi Kaur posted a photo on Instagram of her lying in bed, fully clothed, with a red stain on the crotch of her pants.[43] Instagram took the photo down not once, but twice, claiming that it violated "community guidelines," which "formally forbid nudity, illegal activity[,] and images that glorify self-harm."[44] Instagram reuploaded the photo and apologized for its "mistake" only after Kaur wrote a "sternly worded open letter" on Facebook exposing Instagram's arbitrary policies.[45] Society continues to "expect[] menstruators to hide menstruation, to be shamed by menstruation, and to be solely and invisibly responsible for the care of and the effects of their menstruation."[46]

B. *The Effect of a Lack of Access to Adequate Menstrual Products on Vulnerable Classes*

Students, prisoners, and those who are homeless strongly feel the impacts of menstrual injustices.[47] "Period poverty" is the result of not having enough money to buy menstrual products, the lack of access to adequate menstrual products, the lack of education about menstruation, and the long-held stigmas surrounding menstruation.[48] As a result of period poverty, menstruators in vulnerable classes have a difficult time participating in society while they are menstruating because the inability to afford and access menstrual products "affects a person's freedom to work and study, to be healthy, and to participate in daily life with basic dignity."[49]

Menstruators who lack the means, access, or education about menstruation often end up making their own products to control their periods.[50] A 2019 study involving low-income women found that one-third admitted that they had "used other things to make homemade tampons and

---

[40] *Id.*

[41] *Id.*

[42] *See, e.g.*, Caitlin Dewey, *Why Did Instagram Censor This Photo of a Fully Clothed Woman on Her Period?*, WASH. POST (Mar. 27, 2015, 3:01 PM EDT), https://perma.cc/NL8C-X2SU.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] Johnson, *supra* note 4, at 6.

[47] Johnson, *supra* note 4, at 5.

[48] Crawford & Waldman, *Period Poverty*, *supra* note 10, at 1572.

[49] JENNIFER WEISS-WOLF, PERIODS GONE PUBLIC: TAKING A STAND FOR MENSTRUAL EQUITY 16 (2017).

[50] *See* Johnson, *supra* note 4, at 55.

pads like rags, tissues, toilet paper, paper towels, diapers, and adult incontinence products."[51] For menstruators who do not even have access to these items, their only option may be to bleed through their clothes, of which many low-income menstruators only have a limited supply.[52] Low-income menstruators who do have access to adequate menstrual products often use the same products for longer than is recommended or opt to reuse them.[53]

There are health risks associated with these practices.[54] Failing to change a tampon regularly or leaving a makeshift product inside the vagina for too long can result in toxic shock syndrome, "a rare but life-threatening condition caused by bacteria getting into the body and releasing harmful toxins."[55] Similarly, wearing the same pad for longer than is recommended can result in severe bacterial infections, such as yeast infections.[56] Failure to practice adequate menstrual health may also lead to sepsis, cervical cancer, ovarian cancer, and infertility.[57]

1. Menstrual Injustice in Schools

Menstrual injustice disproportionately impacts menstruating students, a vulnerable class, who are granted little privacy during the school day and often financially rely on their parents.[58] The inability to afford and access products, such as pads and tampons, is but one issue that menstruators face in the school environment.[59] Dress codes, restrictions on bathroom use, little privacy from faculty and other students, and society's emphasis on "silence and stigma" when it comes to menstruation make having a period in school frustrating and burdensome.[60] Some schools even instruct their students to use code words for pads and tampons to keep menstruation a secret and place signs in bathrooms encouraging menstruators to keep period products out of sight.[61] Schools that do provide free menstrual products to students often keep the products in the nurse's office, which may deter students from

---

[51] Johnson, *supra* note 4, at 55.

[52] Johnson, *supra* note 4, at 56.

[53] ACLU NAT'L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 8.

[54] Carney, *supra* note 3, at 2548.

[55] *Toxic Shock Syndrome*, NAT'L HEALTH SERV., https://perma.cc/VE49-AVWE (last updated Sept. 27, 2019); *accord* Carney, *supra* note 3, at 2548.

[56] Lauren Shaw, *Bloody Hell: How Insufficient Access to Menstrual Hygiene Products Creates Inhumane Conditions for Incarcerated Women*, 6 TEX. A&M L. REV. 475, 484 (2019).

[57] Carney, *supra* note 3, at 2541; ACLU NAT'L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 9.

[58] *See* Johnson, Waldman & Crawford, *supra* note 1, at 234, 252–53 (noting that about fifty-one percent of students in public schools live in poverty and are eligible for free lunches).

[59] *See* Johnson, Waldman & Crawford, *supra* note 1, at 234.

[60] Johnson, Waldman & Crawford, *supra* note 1, at 241, 260; *see, e.g.*, Johnson, *supra* note 4, at 47 ("One girl described the school as treating them like 'animals.'").

[61] Johnson, Waldman & Crawford, *supra* note 1, at 235–36.

obtaining them because they either fear embarrassment or the risk of bleeding through their clothes before they can get there.[62] Restrictive bathroom policies in Chicago charter schools recently led to numerous menstruating students getting urinary tract infections and bleeding through their pants.[63] At the same schools, the dress codes require students to wear khakis, which make blood stains even more prominent.[64] Because of the shame surrounding menstruation, even when students are able to use the bathroom to take care of their menstrual needs, many are sure to open their menstrual products quietly so as to keep their menstruation a secret.[65] Students may even skip school to avoid the harassment and embarrassment of bleeding through their clothes or asking school staff for products.[66]

There is also a lack of adequate education related to menstruation in many schools and society in general.[67] Failing to educate society on menstruation "contribute[s] to a culture that treats menstruation as something shameful and something to be hidden," which perpetuates "menstruation-based harassment."[68] Further, many schools that do provide menstrual education only provide it to certain students based on gender, which can exclude transgender students who are also menstruating.[69] Therefore, scholars argue that expanding menstruation-related education is a crucial step in achieving menstrual justice.[70]

2. Menstrual Injustices in Prisons

Menstrual injustice also disproportionately impacts the vulnerable class of imprisoned menstruators.[71] The First Step Act, passed in 2018, requires that all federal prisons provide imprisoned menstruators with free and accessible menstrual products.[72] However, it does not apply to state prisons.[73] In most state prisons, there is no free or unlimited access to

---

[62] Johnson, Waldman & Crawford, *supra* note 1, at 251, 253–54 n.150.

[63] Dillard, *supra* note 38, at 46.

[64] Dillard, *supra* note 38, at 46.

[65] Dillard, *supra* note 38, at 47.

[66] *See* Johnson, Waldman & Crawford, *supra* note 1, at 241, 254; *Morning Edition: Periods! Why These 8th-Graders Aren't Afraid to Talk About Them* (NPR broadcast May 15, 2019) (transcript and audio at https://perma.cc/QGG4-22KB).

[67] Johnson, Waldman & Crawford, *supra* note 1, at 258, 261 n.195, 270 n.238 (explaining how many states do not require menstrual education in schools, and when they do, it is often at an age where most menstruators have already experienced their first period).

[68] Johnson, Waldman & Crawford, *supra* note 1, at 236.

[69] Dillard, *supra* note 38, at 47.

[70] *See* Johnson, Waldman & Crawford, *supra* note 1, at 258–61.

[71] *See* Carney, *supra* note 3, at 2542, 2545–46.

[72] First Step Act of 2018, Pub. L. No. 115–391, § 611, 132 Stat. 5194, 5247.

[73] Carney, *supra* note 3, at 2542–43 ("Thirty-eight states currently do not have any legislation requiring prisons to provide adequate supplies of pads or tampons, and instead leave the

menstrual products; instead, correctional officers are responsible for giving them out.[74] Some state prisons limit menstruating inmates to about ten pads per month even though medical experts recommend changing "pads every four to eight hours."[75] Given the length of an average period, ten pads per month results in inmates wearing the same pad for up to seventeen hours (depending on the individual's flow).[76] Some prisons allow menstruators to receive more pads, but only if they pay for an appointment to get a doctor's note—which most inmates cannot afford.[77] Although tampons are often for sale in the commissary, many menstruating prisoners cannot afford them.[78] In prisons that pay inmates for working prison jobs, each inmate makes about $0.14 an hour, requiring an inmate "to work sixty-four hours in order to afford a sixteen-count box of tampons" from the commissary, which can be insufficient for a single period.[79]

In prisons where correctional officers are responsible for giving out menstrual products, the officers often use this power as a form of control, forcing inmates to beg for them.[80] Some officers even condition receipt of menstrual products on sexual acts.[81] Further, prisons provide pads that "are generally of such poor quality that women are unable to use them effectively" and are "generally wingless and low-absorbency."[82] Thus, menstruators will bleed through their uniforms, which in some prisons subjects them to punishment.[83] Correctional officers sometimes force inmates to wear the stained uniform for a long period of time before getting a new one, subjecting them to "humiliation and health concerns."[84] Lack of access forces menstruating inmates to create makeshift products, often using toilet paper, stuffing from mattresses, or dirty rags.[85] These practices increase the health risks associated with poor menstrual hygiene as discussed above.[86]

---

distribution of menstrual health products to individual prison officials.").

[74] Carney, *supra* note 3, at 2545.

[75] Carney, *supra* note 3, at 2545.

[76] Carney, *supra* note 3, at 2545–46.

[77] Carney, *supra* note 3, at 2546.

[78] Carney, *supra* note 3, at 2547.

[79] Carney, *supra* note 3, at 2547–48 ("The average commissary charges $0.56 per tampon, whereas tampons are available on Amazon.com for as low as $0.19 per tampon.").

[80] *See, e.g.*, Johnson, *supra* note 4, at 46–47 ("One woman, Ms. Whaley, recounted at the New York Rikers Island jail facility . . . 'a correction officer threw a bag of tampons into the air and watched as inmates dived to the ground to retrieve them, because they didn't know when they would next be able to get tampons.'").

[81] Carney, *supra* note 3, at 2546–47.

[82] Carney, *supra* note 3, at 2547.

[83] Carney, *supra* note 3, at 2547.

[84] ACLU NAT'L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 8.

[85] Carney, *supra* note 3, at 2548.

[86] Carney, *supra* note 3, at 2548–49.

Imprisoned menstruators also suffer additional humiliation during strip searches after prison visits, where they are required to remove any menstrual products and are usually not provided with replacements.[87] Thus, prisons force these menstruators back to their cells with stained clothes.[88] Such practices have deterred many menstruators from scheduling visits with either family or lawyers while menstruating in order to spare such an "erosion of dignity," which emphasizes the disproportionately negative impact that menstrual injustice has on prisoners.[89]

3. Menstrual Injustices Among the Homeless

Over 560,000 individuals living in the United States today suffer from homelessness—210,000 of them are women.[90] Unsurprisingly, menstrual injustice disproportionately impacts the vulnerable class of homeless menstruators.[91] If employed, most homeless individuals work low-income jobs.[92] Such jobs are usually not as flexible as higher paying jobs and management may not excuse menstruation-related issues, which could result in "reprimands, pay reductions, suspensions or terminations."[93]

The price of menstrual products and pain relief is another menstrual injustice that homeless and low-income individuals face.[94] Economic realities force them to pick between buying menstrual products or saving their money to pay for other necessities.[95] The average menstruator spends about $20 a month on period products, which is about $18,000 a lifetime.[96] Food stamps, WIC benefits, and Medicaid do not cover menstrual products.[97]

Many homeless people (including those living in shelters) lack access to sanitary bathrooms with soap and water, making it difficult to practice

---

[87] Johnson, *supra* note 4, at 45–46 (highlighting how a correctional officer called one woman "disgusting" as blood ran down her legs during a strip search).

[88] Johnson, *supra* note 4, at 45–46.

[89] Johnson, *supra* note 4, at 9, 46; *accord* Carney, *supra* note 3, at 2541–42.

[90] Kim, *Female Homelessness and Period Poverty*, NAT'L ORG. FOR WOMEN (Jan. 22, 2021), https://perma.cc/6W2G-CANP.

[91] *See* Johnson, *supra* note 4, at 9 ("Menstrual injustice is . . . the erosion of dignity for menstruators, including those . . . who are homeless without products, water, and privacy to attend to their periods.").

[92] *See* Johnson, *supra* note 4, at 53.

[93] Johnson, *supra* note 4, at 53 (explaining how menstruators may arrive late to work or not at all due to an unanticipated period or menstrual pain, which is an often occurrence for many menstruators).

[94] Johnson, *supra* note 4, at 55.

[95] Johnson, *supra* note 4, at 53.

[96] Kim, *supra* note 90.

[97] Johnson, *supra* note 4, at 55.

adequate menstrual health.[98] Further, they often do not have access to laundry facilities to clean any makeshift products or stained clothing.[99] This puts most, if not all, homeless menstruators at risk of serious health conditions such as toxic shock syndrome and bacterial infections.[100] The inability to afford mild painkillers forces homeless menstruators to suffer through menstrual pain on the streets.[101] Although some homeless shelters provide menstrual products, they are often low in quality and limited in supply, and many homeless menstruators cannot obtain transportation to stores that sell them at lower prices.[102] Further, even when they can obtain menstrual products, many are afraid to use public restrooms because they fear assault.[103] Homeless menstruators therefore suffer significantly from menstrual injustice and period poverty, both of which are influenced by the "tampon tax."[104]

C. *The Tampon Tax*

Many states impose a sales tax on menstrual products—the "tampon tax."[105] Some states have added a sales tax of up to ten percent on such products.[106] States that tax menstrual products do not consider them to be basic necessities, such as food or medication, but rather, a luxury.[107] Thus, the tampon tax "places an additional burden on people who menstruate and discriminates against them by making items crucial for everyday life unaffordable for some."[108]

Although some states do not recognize menstrual products as eligible for a sales tax exemption, these same states consider "roughly analogous male or unisex products [tax] exempt on grounds of 'necessity.'"[109] Wisconsin taxes menstrual products but deems drugs to treat erectile

---

[98] Johnson, *supra* note 4, at 56.

[99] Johnson, *supra* note 4, at 55–56.

[100] Kim, *supra* note 90.

[101] Kim, *supra* note 90; *see* Jennifer Weiss-Wolf, *The Era Campaign and Menstrual Equity*, 43 HARBINGER 168, 169 (2019) [hereinafter Weiss-Wolf, *The Era Campaign and Menstrual Equity*] (noting how homeless menstruators often suffer from isolation due to inadequate access to menstrual products).

[102] Johnson, *supra* note 4, at 56, 70.

[103] Johnson, *supra* note 4, at 56, 70 (highlighting the importance of having a private and safe place to practice menstrual hygiene, especially for those homeless menstruators who are transgender).

[104] *See generally* Johnson, *supra* note 4.

[105] Johnson, *supra* note 4, at 37.

[106] Johnson, *supra* note 4, at 37.

[107] ACLU NAT'L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 10.

[108] Leah Rodriguez, *The Tampon Tax: Everything You Need to Know*, GLOBAL CITIZEN (June 28, 2021), https://perma.cc/B25F-WT4Z [hereinafter Rodriguez, *The Tampon Tax*].

[109] Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 442.

dysfunction and condoms as tax-exempt necessities.[110] California taxes menstrual products but deems face wash, lotion, and baby oil as necessities.[111] Until recently, New York taxed menstrual products but not "'Rogaine, dandruff shampoo, foot powder, chapstick, and so many other less medically necessary products also used by men.'"[112] Opponents of the tampon tax have noted how "products 'used to stop the flow of blood from nonfeminine parts of the body are "medical supplies," while tampons and pads, used to stop the flow of blood from the uterus, are not.'"[113] Other states tax menstrual products but not "Pixy Stix, golf club memberships, arcade game tokens, garter belts, and gun club memberships."[114] Still others exempt "bingo supplies, cotton candy . . . and tattoos," all apparently more "necessary" than controlling a natural bodily function.[115] Recognizing that "[a] society signals its values through the decisions . . . about whom and what to tax," these state legislatures have made clear their stance on menstruation.[116]

D. *Relevant Analyses to Determine the Constitutionality of a Governmental Restriction*

1. The Fourteenth Amendment's Equal Protection Clause

The Equal Protection Clause ("EPC") is one vehicle used to analyze whether governmental action is unconstitutional.[117] The first requirement for an equal protection analysis is that the harm complained of must be the result of governmental action, as the EPC does not apply to private action.[118] If the first requirement is met, the next step is to determine what level of scrutiny the court should use in determining whether the government violated the EPC.[119] If the government action complained of creates a certain classification of people, either on its face or in its effect, it may be entitled to strict scrutiny—the highest degree of scrutiny.[120] Courts apply strict scrutiny to governmental action that discriminates against a class of people based on

---

[110] Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 441.

[111] Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 441.

[112] Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 462.

[113] Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 462; *accord* Hannah Recht, *What Life Would Look Like Without the 'Tampon Tax'*, BLOOMBERG (Oct. 30, 2018), https://perma.cc/T7VE-ZYSF (noting how Band-Aids are often tax exempt in states that continue to tax menstrual products).

[114] ACLU NAT'L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 8.

[115] *See* ACLU NAT'L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 15.

[116] Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 483.

[117] *See generally, e.g.*, Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 121 (1989) ("This article describes the basic structure of equal protection analysis.").

[118] *Id.* at 123.

[119] *Id.* at 124.

[120] *Id.* at 123–24.

their membership in a suspect class (i.e., on account of race, religion, national origin, or alienage) or infringes on a group's fundamental rights.[121] A strict scrutiny analysis is the most plaintiff-friendly, and requires "the government [to] demonstrate a compelling interest, and . . . that a challenged statute or regulation is . . . narrowly tailored to protect that interest."[122]

If the government action complained of discriminates on the basis of gender or illegitimacy, the court must apply intermediate scrutiny.[123] To pass intermediate scrutiny, "the government must prove both that it has acted to further an actual important interest and the classification is substantially related to that interest."[124] The third level of review, rational basis, is the least stringent form of judicial review and therefore the most likely to uphold governmental action.[125] It applies to any classification not covered by strict scrutiny or intermediate scrutiny.[126] Under rational basis review, "the classification [must] be a rational means for furthering a valid government purpose."[127] If the challenged governmental action survives the applicable means-end analysis, it will be deemed constitutional.[128] However, if it fails the applicable means-end analysis, the court will deem it unconstitutional and determine a remedy for the plaintiff.[129]

2. The Fourteenth Amendment's Substantive Due Process Clause

Substantive due process is another vehicle that can be used to deem a governmental action unconstitutional.[130] A substantive due process claim "involve[s] the states' power to regulate certain activities."[131] A substantive due process analysis is used to determine whether a governmental regulation of an activity exceeds that which is allowed under the Constitution.[132] Similar to an equal protection analysis, different levels of scrutiny apply for different types of rights.[133] Fundamental liberty interests are rights subject to strict scrutiny, where the government must show that the "infringement is narrowly tailored to serve a compelling state

---

[121] *Id.* at 124.

[122] Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1283 (2007).

[123] Galloway, *supra* note 117, at 125.

[124] Galloway, *supra* note 117, at 142–43.

[125] Galloway, *supra* note 117, at 160.

[126] Galloway, *supra* note 117, at 124.

[127] Galloway, *supra* note 117, at 126.

[128] Galloway, *supra* note 117, at 126.

[129] Galloway, *supra* note 117, at 126.

[130] *See generally* Nat'l Paralegal Coll., *Substantive Due Process - Fundamental Rights*, LAWSHELF EDUC. MEDIA, https://perma.cc/GE9J-9UR4 (last visited Feb 20, 2023) (providing an overview of a substantive due process analysis).

[131] *Id.*

[132] *See generally id.*

[133] 16C C.J.S. *Constitutional Law* § 1876, Westlaw (database updated Nov. 2022).

interest."[134] A right is deemed fundamental if it is "'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor our justice would exist if they were sacrificed.'"[135] The U.S. Supreme Court deemed most of the rights enumerated in the Bill of Rights as fundamental, and both the federal and state governments cannot infringe on these rights without a compelling reason to do so.[136] However, the U.S. Supreme Court has recognized other fundamental rights that, although not explicitly mentioned in the Constitution, also receive the highest protection.[137] A governmental restriction on any non-fundamental right is subject to rational basis review, where the government must prove that the restriction is merely "rationally related to a legitimate governmental end."[138]

3. Application of the *Turner* Standard Under the Fourteenth Amendment

In *Turner v. Safley*, the U.S. Supreme Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[139] Thus, a lower standard of scrutiny is applied in claims based on the infringement of fundamental rights in the prison context—one which is highly deferential to prison officials.[140] In applying the *Turner* standard, the courts rely on four factors to determine the reasonableness of a regulation.[141] "First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it."[142] Many courts will hold the regulation unconstitutional if it does not meet this first prong.[143] Second, courts will consider "whether there are alternative means of exercising the right that remain open to prison inmates."[144] Third, courts consider "the impact accommodation of the asserted constitutional right will

---

[134] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

[135] *Id.* (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977); Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)).

[136] McDonald v. City of Chicago, 561 U.S. 742, 764–65 (2010).

[137] *See, e.g.*, U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); Lawrence v. Texas, 539 U.S. 558, 560 (2003) (deeming as fundamental the right to engage in intimacies in the home); Pierce v. Soc'y of Sisters, 268 U.S. 510, 532 (1925) (deeming as fundamental a parent's right to make decisions regarding their child's upbringing).

[138] 16C C.J.S. *Constitutional Law*, *supra* note 133, § 1876.

[139] 482 U.S. 78, 89 (1987).

[140] *See id.* at 87, 89.

[141] *Id.* at 89–91.

[142] *Id.* at 89 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).

[143] Carney, *supra* note 3, at 2558.

[144] *Turner*, 482 U.S. at 90.

have on guards and other inmates, and on . . . prison resources generally."[145] Lastly, the court will consider whether there are alternative regulations that would allow the prisoner to still exercise their fundamental rights.[146]

4. Eighth Amendment

The Eighth Amendment to the U.S. Constitution prohibits "cruel and unusual punishments."[147] The U.S. Supreme Court held in 1976 that intentionally disregarding a prisoner's "serious medical need[]" violates the Eighth Amendment.[148] To succeed on such a claim, a prisoner must prove both "deliberate indifference" (subjectively viewed) and "serious medical need[]" (objectively viewed).[149] To prove deliberate indifference, the prisoner must show that the prison officials knew or should have known that their actions were going to cause the prisoner a risk of serious harm.[150] To prove a serious medical need, courts look to a variety of factors and consider both present and future harm.[151]

II. Why Deeming Access to Adequate Menstrual Health Products a Fundamental Right Matters

A. *Deeming Access to Adequate Menstrual Health Products a Fundamental Right Would Require All Governmental Restrictions to Survive Strict Scrutiny*

Restrictions and taxes continue in many states, despite arguments by scholars that the tampon tax and restrictive policies in public schools, prisons, and homeless shelters are unconstitutional under the EPC and the Eighth Amendment.[152] Deeming access to adequate menstrual products a fundamental right would trigger the heightened standard of strict scrutiny in both equal protection and due process arguments.[153] Because strict scrutiny is more plaintiff-friendly, it is more likely that courts will deem state-initiated restrictions to adequate menstrual products

---

[145] *Id.*

[146] *Id.* at 90–91.

[147] U.S. CONST. amend. VIII.

[148] Estelle v. Gamble, 429 U.S. 97, 104 (1976).

[149] Carney, *supra* note 3, at 2563.

[150] Carney, *supra* note 3, at 2563–64 ("[A]ctual knowledge of risk is required.").

[151] Carney, *supra* note 3, at 2565–66.

[152] *See generally* Carney, *supra* note 3, at 2544 (arguing that such restrictions on menstrual products in prisons violates Equal Protection and the Eighth Amendment); ACLU NAT'L PRISON PROJECT & PERIOD EQUITY, *supra* note 12 (arguing for the advancement of menstrual equity).

[153] *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997); Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 NAT'L AFFS. 72, 72–73 (Fall 2019), https://perma.cc/VN8B-RS6E.

unconstitutional.[154]

In a strict scrutiny analysis under the Due Process Clause, the U.S. Supreme Court can uphold state sales tax on menstrual products and menstruation-based restrictions in public spaces only if the government can prove that such policies narrowly serve a compelling governmental interest.[155] For the reasons set forth in Part IV, the government cannot meet this strict standard.[156] As set out in the next sections, because analyzing such restrictions under the EPC or the Eighth Amendment triggers lower standards of scrutiny and unpredictability, deeming access to adequate menstrual products a fundamental right is the best approach to abolish these restrictions and the "indifference[s] toward (or squeamishness about) the . . . biological process of menstruation."[157] Doing so will help rid the long-held stigmas surrounding menstruation and further equality.[158]

B. *Analyzing a Lack of Access to Menstrual Products as Sex Discrimination in Violation of the EPC Triggers a Lesser Standard of Scrutiny and Results in Unpredictable Outcomes Within the Prison Context*

Menstrual justice advocates argue that taxing and otherwise limiting access to adequate menstrual products is unconstitutional sex discrimination.[159] They argue that a tax on tampons is a "tax on women" because women explicitly purchase such products, and thus, intermediate scrutiny applies.[160] These scholars contend that "[t]here is no exceedingly persuasive justification for taxing menstrual hygiene products more heavily than other necessities."[161] Restrictions to accessing adequate menstrual products "perpetuate[s] the legal, social, and economic inferiority of women" and is thus unconstitutional.[162]

While such arguments have their strengths, they also have weaknesses.[163] An argument based on sex-based discrimination, which triggers intermediate scrutiny, is not as strong an argument as one that recognizes that access to adequate menstrual products is a fundamental right, which would trigger strict scrutiny.[164] Strict scrutiny is more plaintiff-

---

[154] *See Glucksberg*, 521 U.S. at 720–21; Alicea & Ohlendorf, *supra* note 153, at 79.

[155] *See Glucksberg*, 521 U.S. at 721.

[156] *See infra* Part IV.

[157] Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 444–45; *see* Carney, *supra* note 3, at 2579–93; *infra* Part II(B)–(C), Part IV.

[158] *See generally* ACLU NAT'L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 8–16.

[159] *See, e.g.*, Carney, *supra* note 3, at 2541.

[160] Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 444.

[161] Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 481.

[162] United States v. Virginia, 518 U.S. 515, 534 (1996).

[163] *See, e.g.*, Johnson, *supra* note 4, at 26.

[164] *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997); Alicea & Ohlendorf, *supra* note 153, at 72–75.

friendly than intermediate scrutiny and therefore less likely to allow intrusions by the government and more likely to make substantial change.[165]

Further, an argument based on sex discrimination proposes that any state action that restricts adequate menstrual products (such as the tampon tax) merely creates a classification between men and women.[166] However, menstruators are not limited to only women, but also include those who are nonbinary, transmen, intersex, and genderqueer.[167] Similarly, not all cis women menstruate—pregnant, menopausal, and breastfeeding women may not menstruate, as well as women who have organ or hormone issues, or women who take certain medications.[168] A distinction between men and women does not encompass the entire class of menstruators.[169] Such an argument under the EPC will likely further society's feminization of menstrual products by failing to recognize that menstruators do not only consist of cis women.[170] Deeming access to adequate menstrual products a fundamental right rather than analyzing restrictions to such products as sex discrimination under the EPC will therefore protect more, if not all, menstruators.[171]

Applying an equal protection analysis in prison contexts has its own weaknesses, as "courts are split on whether intermediate scrutiny or the *Turner* standard applies to sex-based equal protection claims," and the U.S. Supreme Court has yet to decide the issue.[172] Thus, arguing that the failure to provide prisoners with access to adequate menstrual products is sex discrimination based on equal protection will lead to different results in different jurisdictions depending on what standard is applied.[173] Inconsistent rulings across jurisdictions would adversely impact a population of people that are already stigmatized and have minimal protections.[174] Deeming access to adequate menstrual products a fundamental right would allow any prison restrictions on such products to be analyzed under a due process analysis, thereby bypassing the unpredictability of an equal protection analysis.[175] Thus, analyzing restrictions to menstrual products under the Due Process Clause is a more

---

[165] *See Glucksberg*, 521 U.S. at 721; Alicea & Ohlendorf, *supra* note 153, at 72.

[166] *See* Johnson, *supra* note 4, at 26.

[167] Crawford & Waldman, *Period Poverty*, *supra* note 10, at 1573.

[168] Mary Ellen Ellis, *No Menstruation (Absent Menstruation)*, HEALTHLINE, https://perma.cc/73KM-PV9F (last updated May 29, 2020).

[169] *See* Johnson, *supra* note 4, at 26.

[170] *See* Johnson, *supra* note 4, at 27.

[171] *See* Johnson, *supra* note 4, at 26.

[172] Carney, *supra* note 3, at 2555, 2575.

[173] *See* Carney, *supra* note 3, at 2554–55.

[174] *See generally* Johnson, *supra* note 4, 35–40, 75–76.

[175] *See* Carney, *supra* note 3, at 2555, 2575; *see also* 16C C.J.S. *Constitutional Law*, *supra* note 133, § 1876.

direct vehicle to declare such restrictions unconstitutional.[176]

C. *Analyzing a Lack of Access to Menstrual Products as an Eighth Amendment Violation Requires the Plaintiff to Overcome a High Burden*

Scholars also argue that the lack of access to adequate menstrual products in prisons violates menstruators' Eighth Amendment rights because it constitutes a "deliberate indifference to serious medical needs of prisoners."[177] However, these same scholars have acknowledged how difficult it is to meet this standard.[178] Although restricting access to adequate menstrual products could lead to serious medical issues in the future (such as toxic shock syndrome), the prisoner would also have to prove that prison officials knew or should have known that their actions were going to cause the prisoner a risk of serious harm down the road.[179] This is an incredibly hard burden to overcome and would only succeed if the right facts existed.[180] Because this approach would only apply in the prison context and is inapplicable to claims involving other vulnerable classes, it is not as strong an argument that access to adequate menstrual products is a fundamental right under the Due Process Clause.[181]

ANALYSIS

III. Access to Adequate Menstrual Products is a Fundamental Right

A. *U.S. Supreme Court Precedent Demonstrates That Access to Adequate Menstrual Products Is Implicit in the Concept of Ordered Liberty*

A fundamental right is one which is "deeply rooted in this Nation's history and tradition"[182] and is "'implicit in the concept of ordered liberty.'"[183] Over the years, the U.S. Supreme Court has ruled certain rights so fundamental to our society that the government can interfere with those rights only if it has compelling grounds to do so.[184] The governmental interference will only survive if it is the narrowest means to achieve that compelling interest.[185] As noted above, the U.S. Supreme Court has held that

---

[176] *See* 16C C.J.S. *Constitutional Law*, *supra* note 133, § 1876; Carney, *supra* note 3, at 2555, 2575.

[177] Estelle v. Gamble, 429 U.S. 97, 104 (1976).

[178] Carney, *supra* note 3, at 2591.

[179] Carney, *supra* note 3, at 2564, 2591–93 ("[A]ctual knowledge of risk is required.").

[180] Carney, *supra* note 3, at 2591, 2594.

[181] *See generally* Carney, *supra* note 3.

[182] Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

[183] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citations omitted).

[184] Nathan S. Chapman & Kenji Yoshino, *The Fourteenth Amendment Due Process Clause: Common Interpretation*, NAT'L CONST. CTR., https://perma.cc/73LM-QUC9 (last visited Feb 20, 2023).

[185] *Glucksberg*, 521 U.S. at 721.

most of the rights listed in the Bill of Rights are fundamental, and any federal or state governmental interference with these rights is subject to the highest form of scrutiny.[186]

The U.S. Supreme Court has also deemed rights not explicitly mentioned in the Constitution as fundamental.[187] All of these rights are traced to the concepts of human dignity, bodily integrity, privacy, and personal autonomy.[188] The Court has declared the right to marry a fundamental right, holding that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[189] The right to make decisions regarding the care, education, custody, and upbringing of one's children is also a fundamental right, as children are "not the mere creature[s] of the state."[190] An individual also has a fundamental right to make the autonomous and personal choice as to whether to take birth control.[191] The U.S Supreme Court has also held that every individual has a fundamental right to refuse life-preserving medical treatment.[192] The right to make certain familial decisions, such as whether to live with extended family, is also a fundamental right.[193] Further, the right to engage in intimate conduct within the home is protected, as the Court has long recognized and "respected [a] private realm of family life which the state cannot enter."[194]

Rights implicit in the concept of ordered liberty include "the right to be

---

[186] Chapman & Yoshino, *supra* note 184 ("The exceptions are the Third Amendment's restriction on quartering soldiers in private homes, the Fifth Amendment's right to a grand jury trial, the Seventh Amendment's right to jury trial in civil cases, and the Eighth Amendment's prohibition on excessive fines.").

[187] Chapman & Yoshino, *supra* note 184 ("The idea of unenumerated rights is not strange—the Ninth Amendment itself suggests that the rights enumerated in the Constitution do not exhaust 'others retained by the people.'").

[188] *See* Maxine D. Goodman, *The Obergefell Marriage Equality Decision, with Its Emphasis on Human Dignity, and a Fundamental Right to Food Security*, 13 HASTINGS RACE & POVERTY L.J. 149, 150, 180, 192 (2016).

[189] Loving v. Virginia, 388 U.S. 1, 12 (1967) (citation omitted); *accord* Obergefell v. Hodges, 576 U.S. 644, 646 (2015).

[190] Pierce v. Soc'y of the Sisters, 268 U.S. 510, 535 (1925); *accord* Troxel v. Granville, 530 U.S. 57, 72 (2000) (refusing to grant visitation rights to a third party when the child's fit parent opposed such visitation, as this infringed on the parent's right to make decisions regarding the upbringing of the child); Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (holding that parents have a fundamental right to control their children's education).

[191] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[192] Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990).

[193] *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494, 500 (1977).

[194] Prince v. Massachusetts, 321 U.S. 158, 166 (1944); *see also* Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("[T]wo adults who, with full and mutual consent from each other, engage[] in sexual practices . . . are entitled to respect for their private lives.").

respected as a human being," as well as rights related to "[s]elf determination, bodily integrity, freedom of conscience, intimate relationships, political equality, dignity and respect."[195] In determining whether a right is implicit in the concept of ordered liberty, the U.S Supreme Court may consider history and tradition, but these concepts "do not set its outer boundaries."[196] Thus, the stigmas, shame, and humiliation that society historically attributed to menstruation are not dispositive factors in determining whether access to adequate menstrual products is a fundamental right.[197]

If privacy and bodily integrity require a fundamental right to engage in consensual intimate relationships and to deny unwanted medical treatment, it follows that a menstruator has a right to access safe and adequate products to control a biological, bodily function.[198] Maintaining menstrual hygiene is a practice closely related to personal autonomy and bodily integrity because the only alternative is bleeding through clothes or developing serious, life-threatening infections.[199] For a society that is dependent on the reproductive system of a menstruator's body for carrying and giving birth to future generations, it is illogical that menstruation, a reproductive process related to producing offspring, does not hold the same respect as giving birth.[200] At "[t]he heart of reproductive justice is the right to 'maintain personal bodily autonomy.'"[201] In fact, the mere concept of pregnancy has been the subject of many constitutional decisions.[202] Parents have a fundamental right to make decisions regarding their children's care and upbringing, but many of these same parents lack access to adequate menstrual products to control a bodily process that they only have because they are not currently pregnant.[203] Having to choose between bleeding through pants or using unsafe alternatives to control the blood flow because of lack of access to adequate products contradicts a menstruator's constitutional right to bodily

---

[195] McDonald v. City of Chicago, 561 U.S. 742, 880 (2010) (Stevens, J., dissenting).

[196] Obergefell v. Hodges, 576 U.S. 644, 645 (2015).

[197] *See id.*

[198] *See Lawrence*, 539 U.S. at 578; Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 (1990).

[199] *Menstrual Hygiene Management Enables Women and Girls to Reach Their Full Potential*, WORLD BANK (May 25, 2018), https://perma.cc/DKM8-RBKA ("[I]t is evident that promoting menstrual hygiene management (MHM) is not only a sanitation matter; it is also an important step towards safeguarding the dignity, bodily integrity and overall life opportunities of women and girls.").

[200] *See* Siebert, *supra* note 11.

[201] ACLU NAT'L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 9.

[202] *See generally* Roe v. Wade, 410 U.S. 113 (1973) (concerning a woman's right to abortion; a right that is still being debated today); Griswold v. Connecticut, 381 U.S. 479 (1965) (concerning the right to choose whether to take contraception).

[203] *Cf.* Pierce v. Soc'y of the Sisters, 268 U.S. 510, 534–36 (1925) (discussing "the liberty of parents and guardians to direct the upbringing and education of children under their control").

integrity.[204] Similarly, if marriage is deemed a fundamental right because it is "fundamental to our very existence and survival," then it follows that access to adequate menstrual products is also a fundamental right, as menstruation is a part of the reproductive process that is necessary for maintaining humanity.[205]

B. *Access to Adequate Menstrual Products Should Be Deemed a Fundamental Right Because It Is Inherent in Human Dignity*

All fundamental rights are inherent in human dignity and the idea that "'to treat people with dignity is to treat them as autonomous individuals able to choose their destiny.'"[206] In other words, "'respect for [human] dignity implies respect for the autonomy of each person, and the right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner.'"[207]

Some legal commentators believe that "the [U.S. Supreme] Court relies on human dignity only to affirm negative rights, not positive ones that create obligations on the part of the State."[208] Even assuming that this is true, this argument fails here because deeming access to adequate menstrual products can be viewed as both a negative and a positive right.[209] It is a negative right in that it would require all states to repeal the tampon tax and hold unconstitutional all prison and public school policies that restrict a menstruator's access to menstrual products and bathrooms.[210] Although it could be argued that a right of access to adequate menstrual products is also a positive right, "[o]ur nation has already obligated itself to provide assistance to [those] in need, through programs such as TANF [Temporary Assistance for Needy Families], WIC [Special Supplemental Nutrition Program for Women, Infants, and Children], and food stamps."[211] States that have already mandated that menstrual products be freely accessible in public schools, prisons, and homeless shelters illustrate this existing

---

[204] *See* Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269 (1990); Johnson, *supra* note 4, at 55–56.

[205] Loving v. Virginia, 388 U.S. 1, 12 (1967); *see Menstrual Cycle*, *supra* note 17.

[206] Goodman, *supra* note 188, at 155 (quoting Immanuel Kant, a German philosopher).

[207] Goodman, *supra* note 188, at 157–58 (quoting Arthur Chaskalson, former Chief Justice of the Constitutional Court of South Africa).

[208] Goodman, *supra* note 188, at 176.

[209] *Cf.* Goodman, *supra* note 188, at 176 (asserting that a fundamental right to food security is not a positive right because the government is already committed to helping low-income families).

[210] *See generally Positive Rights vs. Negative Rights*, LEARN LIBERTY (June 29, 2011), https://perma.cc/RN2L-WSPB (linked from YouTube) (explaining how a positive right requires the government to take action, while a negative right requires the government to abstain from doing something).

[211] Goodman, *supra* note 188, at 176.

obligation, as do the states that have abolished tampon taxes.[212] That the federal government already requires federal prisons to provide free and accessible menstrual products to prisoners also illustrates this existing obligation.[213] Thus, even if the right to adequate menstrual products is viewed as a positive right, such a right is unlikely to burden the government with obligations outside of those it has already pledged itself to.[214]

Even if creating a fundamental right of access to adequate menstrual products required the government to perform an obligation, "the Supreme Court has relied on human dignity to satisfy constitutional guarantees, even when doing so requires an affirmative obligation on the government's part."[215] Human dignity has been relied on in the prison context, where the U.S. Supreme Court has required federal and state prisons to provide prisoners with basic needs.[216] Similarly, the Court's ruling in *Brown v. Board of Education* created an affirmative obligation on the part of the government to desegregate schools because segregation diminished Black children's sense of human dignity to a point of no return.[217] That deeming access to adequate menstrual products a fundamental right may require some affirmative obligation on the government's part does not defeat the argument.[218]

Human dignity is necessary to participate freely in society.[219] In former President Franklin D. Roosevelt's "Second Bill of Rights" speech, he acknowledged that "true individual freedom cannot exist without economic security and independence."[220] Lacking access to adequate menstrual

---

[212] Rachel Epstein, *The Current State of the Tampon Tax—and How We're Going to Eliminate It*, MARIE CLAIRE, https://perma.cc/R355-TKCY (last updated Dec. 23, 2021); Jamie McConnell, *Period Health Policies: Is Your State Working to Make Menstrual Equity a Priority?*, WOMEN'S VOICES FOR THE EARTH, https://perma.cc/B5YC-68GE (last updated Sept. 25, 2021).

[213] First Step Act of 2018, Pub. L. No. 115–391, § 611, 132 Stat. 5194, 5247; Carney, *supra* note 3, at 2542–43.

[214] *Cf.* Goodman, *supra* note 188, at 176–77 (arguing that guaranteeing a fundamental right to food security should be viewed as part of the government's existing commitment to assisting low-income families).

[215] Goodman, *supra* note 188, at 178.

[216] *See, e.g.*, Brown v. Plata, 563 U.S. 493, 511 (2011) ("A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society."); *cf.* Goodman, *supra* note 188, at 178 (arguing for a fundamental right to food security by highlighting how the U.S. Supreme Court has created affirmative obligations on behalf of the government in the prison context).

[217] *See* 347 U.S. 483, 494 (1955); *cf.* Goodman, *supra* note 188, at 178–79 (arguing for a fundamental right to food security by highlighting how the Court's decision in *Brown* was based on human dignity and created an affirmative obligation on the part of the government to desegregate schools).

[218] *See* Goodman, *supra* note 188, at 178.

[219] *See* Goodman, *supra* note 188, at 185.

[220] Franklin D. Roosevelt, State of the Union Message to Congress (Jan. 11, 1944) (transcript at https://perma.cc/A7GE-PG7J) ("'Necessitous [people] are not free [people].'").

products lessens a menstruator's sense of human dignity and prevents them from participating in society to the extent that those with access can.[221] Menstruators report missing work, skipping school, and denying prison visits due to the lack of access to menstrual products.[222] Because of this inaccessibility, many menstruators turn to alternatives that have serious health risks.[223] Thus, "[i]n order to have a fully equitable and participatory society, we must have laws and policies that ensure menstrual products are safe and affordable and available for those who need them" to give all menstruators "[t]he ability to . . . participate in daily life with basic dignity."[224]

In deeming certain rights fundamental, the U.S Supreme Court has also relied on the concept of privacy, despite the word "privacy" not appearing anywhere in the Constitution.[225] This right of privacy is "grounded in human dignity; it protects individuals against unwarranted government intrusion in [] homes, bedrooms, and private affairs."[226] A menstruator who lacks access to menstrual products must choose between unsafe alternatives or bleeding through their clothing.[227] Making such a decision should not be anything *but* private, for it involves the "deeply personal matter" of bodily autonomy.[228] Either option is "degrading [and] humiliating."[229] Thus, as a matter of human dignity, there should be a fundamental right of access to adequate menstrual products, so no menstruator is forced to choose between such devaluing alternatives.[230]

C. *Recognizing Menstruation as a Fundamental Right Will Help Cure Institutionalized Stigma and Shame*

The U.S. Supreme Court has based various decisions on human dignity to remedy certain social stigmas, humiliation, and shame.[231] One example is

---

[221] *Cf.* Goodman, *supra* note 188, at 181, 185 ("Without food security and the accompanying dignity, an individual lacks the ability to participate in political, economic, and cultural life.").

[222] Johnson, *supra* note 4, at 5.

[223] *See, e.g.*, Carney, *supra* note 3, at 2548–49.

[224] WEISS-WOLF, *supra* note 49, at 16.

[225] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 482–83 (1965); *cf.* Goodman, *supra* note 188, at 187 (arguing for a fundamental right to food security by noting how the Court has deemed other rights fundamental that are not explicitly enumerated in the U.S. Constitution).

[226] Goodman, *supra* note 188, at 188 (citations omitted).

[227] *See* Johnson, *supra* note 4, at 55–56.

[228] Inga T. Winkler & Virginia Roaf, *Taking the Bloody Linen Out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality*, 21 CARDOZO J.L. & GENDER 1, 14 (2014) ("Human dignity is closely related to the right of privacy.").

[229] Goodman, *supra* note 188, at 157–58.

[230] *See* Goodman, *supra* note 188, at 157–58.

[231] Goodman, *supra* note 188, at 190–91.

in the context of prison disciplinary practices.[232] In *Hope v. Pelzer*, the Court struck down a disciplinary practice used in a prison where the prisoner was handcuffed to a post and was not allowed to use the bathroom or to be given water.[233] Another example is in Fourth Amendment[234] and Fourteenth Amendment jurisprudence.[235] In *Rochin v. California*, the police ordered medical professionals to pump the defendant's stomach to make him throw up drugs they suspected he had taken.[236] In *Winston v. Lee*, the state tried to force the defendant to have surgery to remove a bullet from his body so that it could be used as evidence against him in his trial.[237] In holding both practices unconstitutional, the U.S Supreme Court emphasized that the "extent of intrusion upon the individual's dignitary interest in personal privacy and bodily integrity" grossly violated the individual's constitutional rights.[238]

The U.S. Supreme Court has used human dignity in other contexts to eradicate shame and humiliation.[239] In holding that there is a fundamental right to engage in intimacies in the privacy of the home and that a criminal statute prohibiting sodomy was unconstitutional, the U.S. Supreme Court in *Lawrence v. Texas* relied on the concept of human dignity and the need to remedy the long-held stigmas and humiliation that resulted from such statutes.[240] Similarly, in recognizing that the fundamental right to marry extends to same-sex couples, the Court in *Obergefell v. Hodges* took into account the stigmas, humiliation, and shame that not only same-sex couples feel, but also that their children experience as a result of laws prohibiting same-sex marriage.[241] Further, the Court's decision in *Brown v. Board of Education* mandating the desegregation of public schools emphasized the humiliation and shame that Black students endured as a result of segregation and how it "affect[ed] their hearts and minds in a way unlikely ever to be undone."[242]

A long history of taboo, shame, humiliation, and stigma surrounds

---

[232] *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 730 (2002).

[233] *Id.* at 735.

[234] *See, e.g.*, Winston v. Lee, 470 U.S. 753, 760 (1985) (citing Schmerber v. California, 384 U.S. 757, 767 (1966)).

[235] *See, e.g.*, Rochin v. California, 342 U.S. 165, 174 (1952).

[236] *Id.* at 166.

[237] 470 U.S. at 755.

[238] *Id.* at 761; *accord Rochin*, 342 U.S. at 173–74.

[239] *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 668, 670 (2015); Lawrence v. Texas, 539 U.S. 558, 575, 578 (2003).

[240] 539 U.S. at 575, 578.

[241] 576 U.S. at 668, 670 ("The marriage laws at issue here thus harm and humiliate the children of same-sex couples.").

[242] 347 U.S. 483, 494 (1954).

menstruation.[243] Deeming access to adequate menstrual health products a fundamental right and necessary for a safe and healthy menstruation will help remedy these long-held stigmas and beliefs.[244] It will further gender equality by "challeng[ing] laws that are archaic, unfair, and discriminatory."[245] Holding such a right fundamental will also "communicate[] that [menstruators] are valued and necessary participants in all aspects of public life, and that they should no longer suffer . . . on account of their biology."[246]

D. *Period Poverty Initiatives Around the World Support the U.S. Supreme Court Recognizing Access to Adequate Menstrual Products as a Fundamental Right*

In deeming other rights fundamental, the U.S. Supreme Court has considered practices and customs in other countries.[247] For example, in holding that all individuals have a fundamental right to engage in consensual intimacies within the home, the Court in *Lawrence v. Texas* considered the European Court of Human Rights and its recent decisions regarding sodomy.[248]

Many countries around the world are acting against period poverty.[249] In 2017, Scotland became the first country in the world to supply schools with free menstrual products.[250] By 2020, Scotland was deemed the first country to provide free menstrual products for those who lack them.[251] Menstruators can obtain these products at "community centers, youth clubs, and pharmacies."[252] Shortly thereafter, the Canadian province of Prince Edward Island required that menstrual products be freely accessible in both schools and homeless shelters.[253] In 2021, New Zealand followed suit, announcing that menstrual products must be freely available in all schools.[254] In 2019, the United Kingdom required prisons to provide free menstrual products to imprisoned menstruators, grounding such efforts in

---

[243] Johnson, *supra* note 4, at 15–22.

[244] *Cf.* Goodman, *supra* note 188, at 190–91 (arguing that recognizing a fundamental right to food security will help cure stigmas surrounding poverty).

[245] ACLU NAT'L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 10.

[246] Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 487.

[247] *See* Goodman, *supra* note 188, at 199.

[248] 539 U.S. 558, 576 (2003).

[249] Leah Rodriguez, *20 Places Around the World Where Governments Provide Free Period Products*, GLOB. CITIZEN (Sept. 30, 2021), https://perma.cc/AP7E-XNPJ [hereinafter Rodriguez, *20 Places Around the World*].

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.*

human dignity.[255]

Other countries have also made efforts to abolish taxes on menstrual products.[256] In 2004, Kenya became the first country to abolish the tampon tax.[257] In 2018, South Africa followed suit.[258] South Korea has recognized "menstrual leave" for employees for over twenty years.[259] Although there has been some movement in the United States toward abolishing tampon taxes and providing free menstrual products in schools, prisons, and homeless shelters, there are many states that have not done so, and "there has been little success in addressing period equity on a national scale."[260] These progressive steps around the world to end period poverty and further human dignity support the argument that access to adequate period products is a fundamental right.[261] According to advocate Jennifer Weiss-Wolf, "'[m]enstruation is something that we can no longer afford to marginalize' . . . '[i]t will set us behind as a country if we don't own that reality.'"[262]

IV. If Access to Adequate Menstrual Products Is Deemed a Fundamental Right, Restrictive Menstruation-Related Policies and Tampon Taxes Will Not Survive a Substantive Due Process Analysis

Deeming access to adequate menstrual products a fundamental right would subject any governmental restriction on them to strict scrutiny.[263] Because strict scrutiny is the highest standard of review, the government's intrusion on a fundamental right is less likely to be found constitutional.[264] The governmental intrusion will not be upheld "unless the infringement is narrowly tailored to serve a compelling state interest."[265]

The state actions at issue here are the tampon tax and the restrictive bathroom and menstruation-related policies implemented in public spaces—such as public schools, state prisons, and homeless shelters.[266]

---

[255] Sushmita Roy, *Sanitary Products Will Be Free for Women in UK Detention Facilities*, GLOB. CITIZEN (Apr. 26, 2019), https://perma.cc/ZR7T-GRMQ.

[256] *See, e.g.*, Rodriguez, *20 Places Around the World*, *supra* note 249.

[257] Gina Reiss-Wilchins, *Kenya & Menstrual Equity: What You Didn't Know*, HUFFPOST, https://perma.cc/G8S2-DS3R (last updated Mar. 29, 2017).

[258] Rodriguez, *20 Places Around the World*, *supra* note 249.

[259] Rodriguez, *20 Places Around the World*, *supra* note 249.

[260] Kaanita Iyer, *New Zealand Schools Will Offer Free Menstrual Products. Where Is the U.S. on Period Equity? Far Behind, Experts Say.*, USA TODAY, https://perma.cc/6P79-AFKA (last updated Feb. 22, 2021, 2:34 PM ET); *see* McConnell, *supra* note 212.

[261] *See* Rodriguez, *20 Places Around the World*, *supra* note 249.

[262] Iyer, *supra* note 260.

[263] *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

[264] *See id.*

[265] Reno v. Flores, 507 U.S. 292, 302 (1993).

[266] *See generally* Johnson, *supra* note 4.

History reveals that the U.S. Supreme Court is hesitant to consider a government interest rooted in sex-based stereotypes valid, which—when viewed in light of the long-held stigmas surrounding menstruation—the tampon tax and restrictive policies clearly are.[267] Further, government interests that are based on administrative convenience do not constitute a compelling governmental interest.[268] To be a compelling governmental interest, a restriction or regulation must be "essential or necessary rather than a matter of choice, preference, or discretion," which does not apply to the tampon tax and restrictive bathroom and menstruated-related policies that are inflicted on students, prisoners, and the homeless.[269]

A. *Restrictive Bathroom and Menstruation-Related Policies in Schools Are Not Narrowly Tailored to Further a Compelling Governmental Interest*

A state may argue that restrictive bathroom and menstruation-related policies further the governmental interest of assuring that students are adequately monitored, that students spend more time in the classroom than the hallways or bathrooms, or that school dress codes help achieve uniformity.[270] However, these are not compelling governmental interests, as it cannot reasonably be said that such policies are "essential or necessary rather than a matter of choice, preference, or discretion."[271] This is evident by the schools that chose not to implement such policies and that operate just fine without them.[272]

Even if such governmental interests could be considered compelling, the policies are not "the most narrowly tailored, or least restrictive, means to achieve" them, as students actually report skipping school because of the policies.[273] Instead of implementing dress codes and limiting bathroom breaks, schools can simply provide free menstrual products in every student bathroom.[274] Opponents argue that such products are usually available in the nurse's office and in dispensers in girls' bathrooms.[275] However, having to go to the nurse's office to obtain such products is often embarrassing,

---

[267] *See* Carney, *supra* note 3, at 2555–56.

[268] Carney, *supra* note 3, at 2556.

[269] Ronald Steiner, *Compelling State Interest*, FIRST AMEND. ENCYCLOPEDIA (2009), https://perma.cc/7PVR-XJA2 ("Regulation vital to the protection of public health and safety . . . are examples of compelling governmental interests.").

[270] *See generally* 16C C.J.S. *Constitutional Law*, *supra* note 133, § 1876; Johnson, Waldman & Crawford, *supra* note 1, at 241.

[271] *See* Steiner, *supra* note 269.

[272] *But see* Johnson, Waldman & Crawford, *supra* note 1, at 235, 241.

[273] Steiner, *supra* note 269; *accord* Johnson, Waldman & Crawford, *supra* note 1, at 241.

[274] *See* Johnson, Waldman & Crawford, *supra* note 1, at 234, 251.

[275] *See, e.g.*, Johnson, Waldman & Crawford, *supra* note 1, at 270 n.238; Kaitlyn Krasselt, *Bill to Mandate Period Products Faces Opposition*, CT POST, https://perma.cc/984X-UDL5 (last updated Mar. 6, 2020, 9:02 PM).

inconvenient, and likely wastes more time than if the products were easily accessible in bathrooms.[276] Also, not only do schools fail to regularly refill such bathroom dispensers, but most cost money, which many students do not have.[277] Such dispensers are likely only in girls' bathrooms, which excludes menstruators who do not identify as female.[278] The fact that students often skip school because of restrictive policies directly contradicts the state's likely argument that such policies are necessary to monitor students and limit the time they spend outside of the classroom.[279]

Providing free menstrual products in each bathroom will help prevent menstruators from skipping school on account of their periods or from wasting class time to go to the nurse's office for a tampon.[280] Thus, students will spend more time in the classroom.[281] Although distributing free products in schools will cost the government money, such a price "is negligible when compared to the cost of actually running" public schools and the positive impact it will have on student menstruators by illustrating that menstruation is not an impediment to education.[282] Many states have already mandated that such products be freely available in public schools, which shows that doing so will not cast too great a financial burden on the state.[283] Because restrictive bathroom and menstruation-related policies in schools do not narrowly advance a compelling government interest, such policies would fail a strict scrutiny analysis and would be held unconstitutional.[284]

B. *Restrictive Menstruation-Related Policies in Prisons Cannot Overcome the Turner Standard*

As noted above, the "[U.S.] Supreme Court has never considered whether the *Turner* standard or intermediate scrutiny applies to equal protection claims based on sex discrimination within prisons, and lower courts are split as to which test to apply."[285] Analyzing restrictions to menstrual products as infringing on a fundamental right under the Due Process Clause eliminates such unpredictability and inconsistency, as a court

---

[276] *See* Johnson, Waldman & Crawford, *supra* note 1, at 253–54.

[277] *See* Johnson, Waldman & Crawford, *supra* note 1, at 270 n.238 ("As society has moved away from a cash economy, it is possible to buy a soda from a vending machine by swiping a credit card, but menstrual hygiene product machines lie empty.").

[278] *See* Crawford & Waldman, *Period Poverty*, *supra* note 10, at 1573.

[279] *See* Johnson, Waldman & Crawford, *supra* note 1, at 241.

[280] Johnson, Waldman & Crawford, *supra* note 1, at 254.

[281] Johnson, Waldman & Crawford, *supra* note 1, at 254.

[282] ACLU NAT'L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 8; *see* Johnson, Waldman & Crawford, *supra* note 1, at 279.

[283] *See* McConnell, *supra* note 212.

[284] *See generally* Steiner, *supra* note 269.

[285] Carney, *supra* note 3, at 2555.

would likely apply the *Turner* standard.[286] Although the *Turner* standard is highly deferential to prison officials' determinations, menstruation-related policies in prisons will not survive judicial scrutiny.[287] Further, even if a court decides to apply strict scrutiny within the prison context, such restrictions will fail for the same reasons they fail the lower *Turner* standard.[288]

Applying the first factor of the *Turner* standard reveals that these restrictions are not related to a legitimate prison interest, which "include security and safety, prisoner rehabilitation, and conservation of resources."[289] States have argued that providing free menstrual products in prisons may allow prisoners to "repurpose them for off-label uses, such as using the cotton inside the product to make earplugs or using pads to clean their cells."[290] However, such a risk does not implicate any safety or security concerns, as women are already allowed to have menstrual products.[291] Further, providing free access to menstrual products would not drain a significant amount of prison resources since the cost to do so is trivial in relation to operating a prison, as evidenced by the federal government and states that have already implemented such programs.[292] Second, although one could argue that there are "alternative means [for inmates] to exercise their [fundamental] rights" by buying products from the commissary, many inmates lack the means to do so.[293] Third, considering that correctional officers are already in charge of distributing menstrual products in many prisons, "there is no negative ripple effect stemming from providing unlimited access to menstrual health products; prisons that currently engage in this practice serve as proof that there are no negative side effects."[294] Lastly, providing free menstrual products is an obvious alternative to policies that restrict access to menstrual products, as evidenced by the federal government and other states that already do so.[295] Because the prison policies that restrict a menstruator's access to adequate menstrual products do not survive the *Turner* standard under the Due Process Clause, such restrictions will be deemed unconstitutional.[296]

---

[286] *See* Carney, *supra* note 3, at 2555–59; 16C C.J.S. *Constitutional Law*, *supra* note 133 § 1876.

[287] *See* Turner v. Safley, 482 U.S. 78, 90 (1987).

[288] *See* Carney, *supra* note 3, at 2586–88. *See generally* 482 U.S. at 89–91.

[289] *See* Carney, *supra* note 3, at 2558 ("If this first factor is not satisfied, many lower courts will end the inquiry and find for the plaintiff-prisoner."). *See generally* 482 U.S. at 89–91.

[290] Carney, *supra* note 3, at 2584.

[291] Carney, *supra* note 3, at 2585–86.

[292] Carney, *supra* note 3, at 2586–87 (estimating that the prison industry's budget would increase by 0.0000093%).

[293] Carney, *supra* note 3, at 2587–88.

[294] Carney, *supra* note 3, at 2587 ("If anything . . . [it will] put[ ] all prisoners on equal footing.").

[295] Carney, *supra* note 3, at 2587.

[296] Carney, *supra* note 3, at 2586–88.

C. *Restrictive Bathroom and Menstruation-Related Policies That Affect the Homeless Do Not Further a Compelling Governmental Interest*

Many homeless menstruators lack both access to adequate menstrual products and safe and sanitary facilities to exercise menstrual hygiene.[297] Many homeless shelters do not provide free menstrual products, and when they do, they are often low in both quality and supply.[298] In opposition to providing free menstrual products in homeless shelters, the states will likely assert the significance of maintaining a high state revenue as a compelling governmental interest.[299] However, the increased cost of providing these products in shelters is trivial "when compared to the cost of actually running the facilities."[300] The government provides toilet paper and soap in these restrooms, and "nobody suggests that it should stop doing that simply because it would be cheaper not to."[301] Further, that the government "has already obligated itself" to assisting low-income individuals supports the argument that these products should be provided for free in homeless shelters.[302] Because administrative convenience is not a compelling state interest, such an argument against providing free products in homeless shelters would fail under strict scrutiny, especially because many states already do so.[303]

D. *The Tampon Tax Is Not Narrowly Tailored to Further a Compelling Governmental Interest*

State governments are likely to assert that taxing menstrual products is an essential form of state revenue.[304] However, "the tax revenue from the tampon tax should not be enough to sustain its constitutionality, particularly given that it likely stems from discomfort with menstruation."[305] Even if state revenue from sales tax could constitute a compelling governmental interest, taxing menstrual products is in no way the narrowest means to achieve it.[306] This is illustrated by the many states that have already abandoned the

---

[297] *See generally* Bustle, *How Do Homeless Women Cope with Their Periods?*, (Oct. 18, 2016), https://perma.cc/2HC5-JSF6.

[298] Johnson, *supra* note 4, at 56, 70.

[299] *See* ACLU NAT'L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 8.

[300] ACLU NAT'L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 8.

[301] ACLU NAT'L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 8.

[302] *See* Goodman, *supra* note 188, at 176.

[303] Carney, *supra* note 3, at 2556; *see* McConnell, *supra* note 212.

[304] *See, e.g.*, Jason Murphy, *Why We Should Continue Taxing Tampons*, THE NEW DAILY, https://perma.cc/QJ7C-QVBP (last updated May 28, 2015, 9:04 PM).

[305] Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 483 (arguing that a governmental interest in state revenue would not even withstand rational basis review).

[306] *See* Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 485–86.

tampon tax, which has "promote[d] the affordability of menstrual hygiene products to low-income consumers."[307]

Most states that have abolished the tampon tax have done so by deeming menstrual products necessities and thus exempt from sales tax.[308] Necessities usually include items as basic as medicine and food.[309] In exempting "medical and health supplies" from sales tax, states have exempted Chapstick, Rogaine (used to treat hair loss), condoms, lotions, face washes, powders, and Viagra (used to treat erectile dysfunction).[310] By taxing menstrual products but not Viagra, these states consider men having sex more of a necessity than menstrual hygiene.[311] Similarly, Band-Aids are usually deemed a necessity to control the flow of blood exiting the body, while menstrual products are not—though both products perform the same function.[312] Because all "roughly analogous male or unisex products are exempt [from state sales tax] on grounds of 'necessity,'" it follows that "a tax on menstrual hygiene products [is] a functional tax on women."[313]

Critics highlight these discrepancies and urge states to cease taxing products that are essential to control the "'involuntary, biological'" process of menstruation.[314] They note that tampon taxes exist as a "result of a combination of indifference, lack of understanding, and discomfort with discussions about or consideration of women's biological processes."[315] Indeed, President Barack Obama acknowledged this logical inconsistency: "I have to tell [you], I have no idea why states would tax these as luxury items. I suspect it's because men were making the laws when those taxes were passed."[316] This highlights how some of our own lawmakers—the very people responsible for defining what is and what is not acceptable in society—are ignorant when it comes to menstruation.[317] Even those who the media praise for their brilliance are ignorant of what menstruation entails.[318]

---

[307] Christopher Cotropia & Kyle Rozema, *Who Benefits from Repealing Tampon Taxes? Empirical Evidence from New Jersey*, 15 J. EMPIRICAL LEGAL STUD. 620, 622 (2018); *see* Epstein, *supra* note 212.

[308] *See* Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 483.

[309] Linda Qiu, *Are Pads and Tampons Taxed but Viagra and Rogaine Not?*, POLITIFACT (Jan. 22, 2017), https://perma.cc/7PLA-YMW2.

[310] Johnson, *supra* note 4, at 37; *accord* Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 441.

[311] *See* Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 441.

[312] *See* Recht, *supra* note 113.

[313] Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 442, 474.

[314] Johnson, *supra* note 4, at 37. *See generally* Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 442.

[315] Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 477.

[316] Daily Mail, *President Obama Is Shocked to Learn About Tampon Tax in U.S.*, at 00:35–00:46 (Mar. 15, 2018), https://perma.cc/R3JD-96BD.

[317] *See, e.g.*, Amanda Taub, *NASA Thought Sally Ride Needed 100 Tampons for 1 Week "Just to Be Safe." From What?*, VOX (May 26, 2015, 2:50 PM EDT), https://perma.cc/L3C2-5VEQ.

[318] *See, e.g.*, *id.* (discussing how NASA engineers sent female astronaut Sally Ride with one

Such ignorance is directly attributable to society's failure to allow for open and candid discussion about menstruation.[319] Although some states have abolished sales tax on menstrual products, there are still many states that have not.[320]

Thus, if access to adequate menstrual products was deemed a fundamental right, the tampon tax would fail under strict scrutiny, because even if state revenue could be considered a compelling state interest, here "it strains credulity to argue that the tampon tax is the cornerstone of a state's sales tax system."[321] Further, the fact that states exempt items far less necessary than menstrual products illustrates that taxing such products is not the narrowest way to achieve a high state revenue.[322] This arbitrary and inexplicable sales tax on menstrual products places a burden on those who already cannot afford adequate products.[323]

CONCLUSION

Menstruation is an involuntary, biological process that half the population of the world experiences.[324] However, due to restrictions in society, a significant portion of individuals who menstruate do not have adequate access to menstrual products.[325] A lack of access to adequate menstrual products results in menstruators using products of lesser quality and for longer periods of time, which often results in severe health and hygiene issues and a struggle to engage actively in society.[326] Because recognizing access to adequate menstrual products as a fundamental right would trigger higher judicial standards and less unpredictability in a substantive due process analysis, state taxes and restrictions on menstrual products are more likely to be held unconstitutional.[327]

Given that the tampon tax and policies restricting access to adequate

---

hundred tampons for her one-week trip into space "'just . . . to be safe.'").

[319] *See Let's Talk About Periods*, SPUNOUT, https://perma.cc/266H-WY7E (last visited Feb 20, 2023).

[320] Johnson, *supra* note 4, at 38; Epstein, *supra* note 212.

[321] Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 480–83; *see* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (stating the standard for strict scrutiny).

[322] *See, e.g.*, Crawford & Waldman, *Unconstitutional Tampon Tax*, *supra* note 6, at 441; Johnson, *supra* note 4, at 37.

[323] *See* Bonnie Azoulay, *What Is the 'Tampon Tax'?*, CORA (July 28, 2022), https://perma.cc/R5T8-7K4K (noting how food stamps, WIC and SNAP benefits do not cover menstrual products); *see also* Rodriguez, *The Tampon Tax*, *supra* note 108.

[324] Christina Capatides, *The Bloody Truth About Getting Your Period in America*, CBS NEWS (May 23, 2019, 9:00 AM), https://perma.cc/5H7Z-HZ43.

[325] *See generally* Johnson, *supra* note 4, at 57–60.

[326] *See, e.g.*, ACLU NAT'L PRISON PROJECT & PERIOD EQUITY, *supra* note 12, at 8–9; Johnson, *supra* note 4, at 55.

[327] *See supra* Part II, Part III, Part IV.

menstrual products in schools, prisons, and homeless shelters will not survive a due process analysis, states should cease such practices.[328] Menstrual products should be freely accessible in public schools, state prisons, and homeless shelters.[329] Although many states have done so, there are still more states to go.[330] Doing so is necessary to achieve menstrual justice and end period poverty, along with all of the stigmas and humiliation that have clouded society's view of menstruation for so long.[331] Federal assistance programs should be extended to cover menstrual products, thus easing the financial burden for those who cannot afford them.[332] As advocate Jennifer Weiss-Wolf asserts, "[i]n order to have a fully equitable and participatory society, we must have laws and policies that ensure menstrual products are safe and affordable and available for those who need them."[333] Doing so will tell society not only that it is okay to talk about menstruation, but that it *should* and *must* be talked about.[334]

---

[328] *See supra* Part IV.

[329] *See, e.g.*, *Dignity Vending Machines*, SHARE THE DIGNITY, https://perma.cc/8UF3-B72U (last visited Feb 20, 2023) (explaining how schools and homeless shelters in Australia have installed "Dignity Vending Machines" that dispense free boxes of menstrual products).

[330] Epstein, *supra* note 212; McConnell, *supra* note 212 (listing the states that have made efforts to pursue menstrual equity).

[331] *See generally* Johnson, *supra* note 4.

[332] *See generally* Linda Carroll, *Even in the U.S., Poor Women Can't Afford Tampons, Pads*, REUTERS, https://perma.cc/N4SX-J46L (last updated Jan. 10, 2019, 5:37 PM).

[333] WEISS-WOLF, *supra* note 49.

[334] *See generally* WEISS-WOLF, *supra* note 49.

Non-Fungible Tokens: Expressly Incorporate into Assignment Contract Terms or Get $69 Million Burns

Alexandra Gleicher[*]

INTRODUCTION

On the twentieth anniversary of the film's release, a 2014 internet poll classified *Pulp Fiction* as the most definitive movie of the nineties.[1] Considering the subjective nature of movie reviews, as well as the other poll contenders that received their fair share of votes from dedicated fans, some would disagree with this ranking of the film.[2] Setting opinions aside, the facts speak for themselves to the tune of over $213,000,000 in worldwide box office sales during the 1994 *Pulp Fiction* release.[3] Generating an overwhelming amount of revenue and winning prestigious awards in the process, the film was an instant success that quickly became a cinema classic.[4] In the decades that followed its initial release, the popularity of *Pulp Fiction* has endured and captured a religious follower base, explaining why many have come to classify it as a cult film.[5] Not only impressing a stunning impact on the '90s zeitgeist in which the film was born, *Pulp Fiction* has since created its own culture with iconic scenes, characters, and quotes that are instantly recognizable by the masses.[6] With

[*] J.D., New England Law | Boston (2023). I would like to thank Professor VerSteeg for introducing me to the exciting area of intellectual property law. Special thanks to my family, friends, and Ellie for supporting me throughout the writing process.

[1] Stephen Marche, *20 Years Later, Pulp Fiction Defines Us Right Now*, ESQUIRE (Oct. 15, 2014), https://perma.cc/E2NV-U8CL.

[2] *See id.*

[3] Complaint ¶ 17, *Miramax, LLC v. Tarantino*, No. 2:21-cv-08979 (C.D. Cal. Nov. 16, 2021) 2021 WL 5359414 [hereinafter Compl.].

[4] *Id.*

[5] *10 Little Known Facts About Quentin Tarantino's Cult Classic Film 'Pulp* Fiction,' GLOBAL GRIND (May 12, 2021), https://perma.cc/D6R5-N9D5.

[6] James Luxford, *The Legacy of Pulp Fiction*, AM. EXPRESS ESSENTIALS, https://perma.cc/F4P7-

the initial screenplay written by Quentin Tarantino ("Tarantino") and the subsequent film produced by Miramax, LLC ("Miramax"), the pair received immense acclaim for their role in the creation of *Pulp Fiction*.[7] Not only did the film deliver in the form of immediate box office success, but its ability to create a culture of its own and an eager following of fans led to an additional market for *Pulp Fiction* derivative works, independent of the big screen.[8] Merchandise and memorabilia associated with the film, such as action figures, costumes, make-up, and clothing, continue to enjoy commercial profit nearly thirty years after the film's initial release.[9]

With the profitability of movie memorabilia at times exceeding a film's box office numbers, it is no surprise that Tarantino jumped at the opportunity to derive more value from his infamous screenplay by tapping into the newest, booming form of collectibles, otherwise known as non-fungible tokens ("NFTs").[10] In short, NFTs are collectible digital assets that can consist of various media including images, music, videos, or virtual objects.[11] Emerging during the prime of revolutionary, intangible cryptocurrencies, NFTs are similarly created, sold, and stored using a technical process that is entirely digital.[12] Just as famous works by Van Gogh or Banksy are bought as investments and collected as homage to one's wealth, many consider NFTs to be the next step of digitizing the evolution of fine art collecting.[13] However, the excitement of NFTs is not limited only to those who consider themselves art aficionados: celebrities, artists, and organizations have begun to market NFTs as a new medium for everyday fans to interact with their favorites and add to their collections.[14]

In November 2021, Tarantino decided to join in on the hysteria when a press release announced his intent to auction off several *Pulp Fiction* NFTs containing exclusive, uncut scenes from the film, images and graphics related to the film, and pages from the original script.[15] This announcement sparked an immediate response from Miramax, who filed a lawsuit accusing Tarantino of trademark and copyright infringement, unfair competition, and

---

4WWE (last visited Jan. 3, 2023).

[7] *See* Compl., *supra* note 3, ¶¶ 17–19.

[8] *See* Compl., *supra* note 3, ¶ 34.

[9] *See* Compl., *supra* note 3, ¶ 34.

[10] Johnny Diaz, *Miramax Sues Quentin Tarantino over Planned 'Pulp Fiction' NFTs*, N.Y. TIMES (Nov. 17, 2021, 23:38 EST), https://perma.cc/KE5M-M2Y6.

[11] Aleksandra Jordanoska, *The Exciting World of NFTs: A Consideration of Regulatory and Financial Crime Risks*, 10 J. INT'L BANKING & FIN. L. 716 (2021).

[12] *See* Mitchell Clark, *NFTs, Explained*, VERGE, https://perma.cc/3FUA-M3AW (last updated June 6, 2022, 8:30 AM EDT).

[13] *See id.*

[14] Stitch, *NFTs Are Disrupting Collector Culture. But Fans Aren't Buying It.*, MASHABLE (Nov. 30, 2021), https://perma.cc/XY5W-2M97.

[15] Samantha Handler, *Miramax Hits Tarantino with Copyright Suit on 'Pulp Fiction' NFTs*, BLOOMBERG L. (Nov. 16, 2021, 3:28 PM), https://perma.cc/W32K-8R6X.

breach of contract.[16] According to Miramax, Tarantino's decision to create NFTs relating to the film violated the "broad rights" of creatorship that Tarantino had assigned to Miramax back in 1993.[17] The uniqueness of NFTs, at times, makes it difficult to discern which category of copyrightable work they fall into; the case will ultimately come down to the deciding court's reading of the copyright contract terms created between Tarantino and Miramax back in 1993.[18]

This Note will argue that the novelty of NFTs and lack of precedent dictating how courts should handle ownership issues will begin to expose contractual holes in agreements between creators and producers. This Note will illustrate the argument by using the lawsuit between Miramax and Tarantino to explain how the current contractual terms used for the assignment of rights, and more specifically copyrights, are ill-suited to handle the tidal wave of legal issues resulting from the oncoming boom of NFT media. This Note will argue that the current terms are insufficient because the uniqueness of NFTs makes it difficult to categorize them within existing types of media and, in turn, will leave contracting parties unsure about who is permitted or prohibited from making subsequent NFTs based on their initial works. This Note will further suggest additional terms specifically related to the creation of NFTs that should be integrated into all future contracts to avoid ambiguity that could result in one party losing out on millions of dollars of fan-based NFT revenue.

Part I of this Note provides a brief overview of the novelty of NFTs, the basic laws of copyright protection and contractual assignment of rights, and the arguments of both parties in the Miramax lawsuit. Part II of this Note discusses the relevance of treating the creation of NFTs as another critical bargaining point in contracts to come. Part III of this Note analyzes how previous copyright disputes led to the current assignment terms negotiated in many entertainment contracts and why these terms are inefficient and will result in NFT litigation with parties seeking clarity from the courts. Part IV of this Note argues that until a clear standard of legal treatment of NFTs develops, parties should take it upon themselves to create and implement contract terms that expressly provide for who will be permitted to create NFTs related to the content of their initial contract.

I. Background

A. *Non-Fungible Tokens Explained*

To understand the suggestion that NFTs will change contract

---

[16] Compl., *supra* note 3, ¶ 11.

[17] Diaz, *supra* note 10.

[18] *See generally* Quentin Tarantino & Visiona Romantica Inc.'s Answer to the Complaint at ¶ 21, *Miramax, LLC v. Tarantino*, No. 2:21-cv-08979-FMO-JC (C.D. Cal. Dec. 09, 2021) [hereinafter Tarantino's Answer].

negotiations between artists and management companies, it is important to understand a general overview of cryptocurrency and the basic features that make NFTs so attractive.[19] In 2008, an individual using the pseudonym "Nakamoto" released a paper on the Internet suggesting a means for online merchants to avoid transfer fees through the use of direct, virtual barter made possible by "bitcoin."[20] With this abstract written proposal, the world of cryptocurrencies emerged; not even ten years later, bitcoin was being traded at a rate of over $18,000 a coin.[21] As suggested in the name alone, "cryptocurrency" is a form of exchange that exists entirely electronically and uses methods of encryption to serve as an independent mode of regulation.[22] Unlike other forms of currency, such as the United States dollar, that are created, regulated, and distributed by the government, cryptocurrency is created by individuals and reserved exclusively within a digital, decentralized ledger, otherwise known as the "blockchain."[23] Blockchain has become a widely favored system of recording information because of the "way that [it] makes it difficult or impossible to change, hack, or cheat the system."[24] Generally, cryptocurrency consists of two broad subcategories: coins and tokens.[25] Albeit virtual, coins are a form of currency that is understood to share many similarities with traditional money in that they are both interchangeable, divisible, and limited in supply.[26] Tokens, however, are much more elusive as they exist in a variety of forms where "some are used as currency[,] some provide a more specific utility (e.g., access to a product)[,] and some resemble financial instruments."[27]

NFTs, a popular form of the token subcategory mentioned above, are digital assets that have taken the investment world by storm.[28] Only similar to coin in the sense that both are stored on the virtual blockchain ledger, NFTs create a league of their own and diverge from both crypto and

---

[19] *See generally* Brad M. Kahn et al., *The Need for Clarity Regarding the Classification and Valuation of Cryptocurrency in Bankruptcy Cases*, 17 PRATT'S J. OF BANKR. L. 228, 229 (2021).

[20] *See* Jack J. Longley, Note, *The Crypto-Currency Act of 2020: Evaluating First Steps Toward Clarifying the Digital-Asset Regulatory Landscape*, 54 SUFFOLK U. L. REV. 549, 549, 552 (2021).

[21] *See* J. Scott Colesanti, *Sorry, They Were on Mute: The SEC's "Token Proposal 2.0" as Blueprint for Regulatory Response to Cryptocurrency*, 3 CORP. & BUS. L.J. 1, 4 (2022).

[22] *See* Kahn et al., *supra* note 19, at 229.

[23] Kahn et al., *supra* note 19, at 229.

[24] *What is Blockchain?*, EUROMONEY LEARNING, https://perma.cc/5R55-U2ZT (last visited Jan. 3, 2023) ("Each block in the chain contains a number of transactions, and every time a new transaction occurs on the blockchain, a record of that transaction is added to every participant's ledger.").

[25] Kahn et al., *supra* note 19, at 229–30.

[26] Longley, *supra* note 20, at 558.

[27] Roee Sarel, *Property Rights in Cryptocurrencies: A Law and Economics Perspective*, 22 N.C. J.L. & TECH. 389, 390–91 (2021).

[28] *See* Colesanti, *supra* note 21, at 47.

traditional currency in that each token is unique and not interchangeable.[29] More similar to physical property whose worth may vary depending on its level of uniqueness, such as a piece of land situated near a body of water, a painting created by an up-and-coming artist, or a rare trading card for a new star athlete, each NFT contains unique information that makes it different from any other, and thus not mutually interchangeable.[30] Because of this quality, NFTs have quickly become the hottest form of collectible digital assets generally viewed as investments that are expected to appreciate in value over time.[31] With these digital certificates of authenticity being accompanied by a growing range of digital media, including art, music videos, songs, memes, and domain names, NFTs have become increasingly popular because of the level of creativity they allow creators to display.[32]

However, facilitation of creativity is just one aspect of why content creators favor the use of NFTs as the focus of their new projects.[33] Digital creators have found a major upside in the level of security provided by the process of NFT creation, storage, and resale within the virtual blockchain.[34] While digital art circulating before the creation of NFTs was largely susceptible to copying and illegal pirating, making it nearly impossible for creators to enjoy the full proceeds of their popular works or for users to determine the authenticity of media, the use of blockchain technology has offered a solution.[35] Now, because of blockchain technology, each NFT not only appears as a unique piece of digital artwork to the naked eye, but also contains a thread of underlying unique information including "creator or source identification, current and previous ownership identification, information representing the [NFT's] authenticity, and information required to sell the NFT in a marketplace or auction."[36] Thus, because each NFT contains its own unique code, purchasers can now find assurance in the authenticity of the digital asset they have acquired.[37] However, perhaps the most appealing feature for many creators is the new found ability to receive additional proceeds for their work long after the transfer of its initial sale.[38]

---

[29] Kahn et al., *supra* note 19, at 231.

[30] Diana Qiao, *This is Not a Game: Blockchain Regulation and Its Application to Video Games*, 40 N. Ill. U. L. REV. 176, 186–87 (2020).

[31] *See id.* at 187.

[32] *See* Arthur Brown, *The 9 Different Types of NFTs*, MAKE USE OF, https://perma.cc/923X-BYPR (last updated Apr. 30, 2022).

[33] *See* Brandon Kochkodin, *What's an NFT? It's What Makes GIFs Worth Big Bucks*, BLOOMBERG, https://perma.cc/PPV6-A7LQ (last updated Oct. 29, 2021, 4:44 PM EDT).

[34] *See* RM Partners L. LLC, *NFTs and Their Intellectual Property Implications: Part I*, RM PARTNERS L. (Apr. 13, 2021), https://perma.cc/CZ88-E9ZH.

[35] *See id.*

[36] *Id.*

[37] *See id.*

[38] *See* Kochkodin, *supra* note 33.

By using "smart contracts," an address embedded in the NFT itself that assigns ownership rights and manages the transferability of the NFT, artists have the option to include provisions about resale royalties in the subsequent sale of their works.[39] While resale royalties are difficult to monitor in the tangible art world due to the private nature of most sales, the public nature of blockchain allows anyone to track the chain of a NFT's title and makes it easy for creators to benefit from their works on the secondary market.[40] Considering the attractiveness of creative freedom and continued profits for creators, along with a reputation as the hottest new form of digital investments for buyers, it is no surprise that NFTs are in the spotlight and set to become the focus of many new contracts.[41]

B. *Copyright Protection for NFTs and Assignment by Contract*

With the discussion of NFTs growing more prominent every day, legal professionals have questioned how these revolutionary digital assets will be governed by the traditional laws of intellectual property.[42] While patent and trademark protection is certainly a topic of interest for some, the artistic features of NFTs have steered the conversation towards the question of copyright protection.[43] Under the Copyright Act of 1976 ("Copyright Act"), copyright protection is afforded to "original works of authorship fixed in any tangible medium of expression . . . ."[44] In short, a creator establishes copyright protection in an original work at the moment they take an idea and express it in a medium; examples include taking a photograph, writing song lyrics, or painting a picture.[45] While Article I, § 8, cl. 8 of the United States Constitution requires that copyright protection only be afforded to works that are original, caselaw has clarified that originality in the copyright context does not require novelty, but rather elements of "independent creation plus a modicum of creativity."[46] From that definition of originality, it follows that even a secondary work that is created based upon another preexisting work, otherwise known as a "derivative work," may acquire

---

[39] *Non-Fungible Tokens (NFT)*, ETHEREUM, https://perma.cc/CR8Z-UKJP (last visited Jan. 3, 2023).

[40] Kochkodin, *supra* note 33.

[41] *See generally* Jazmin Goodwin, *What is an NFT? Non-Fungible Tokens Explained*, CNN, https://perma.cc/6C2F-B82Z (last updated Nov. 10, 2021, 3:03 PM EST).

[42] Andres Guadamuz, *Non-Fungible Tokens (NFTs) and Copyright*, WORLD INTELL. PROP. ORG. (Dec. 2021), https://perma.cc/Y898-C9W8.

[43] *See* Ali Dhanani & Chris Sabbagh, *How Nonfungible Tokens Could Disrupt the Legal Landscape*, LAW360 (Mar. 22, 2021, 3:54 PM EDT), https://perma.cc/3Y2T-476M.

[44] 17 U.S.C. § 102 (1976).

[45] *What is Copyright?*, COPYRIGHT.GOV, https://perma.cc/9T7A-WPVD (last visited Jan. 3, 2023).

[46] *See* Feist Publ'ns Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991); *but see* U.S. CONST. art. I, § 8.

copyright protection so long as the secondary artist independently composed the work and impressed a minimal degree of creativity upon it.[47] Accordingly, where an NFT creator produces a piece of work that meets these standards, they are automatically afforded copyright protection and may enjoy the exclusive rights of ownership.[48]

Copyright owners are awarded several exclusive rights under § 106 of the Copyright Act.[49] In this discussion of NFTs, however, the most relevant exclusive rights include the following: "(1) to reproduce the copyright work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending . . . ."[50] In a sense, this statute brings the law into conformity with the average creator's expectations that they are the only one entitled to create copies or secondary works based upon their original work, and most importantly, the only one who may distribute their work to the public for sale.[51] Where an NFT qualifies for copyright protection, these rights are important in the context of selling NFTs to purchasers because they ensure that the true creator is the only individual who may profit from its public sale.[52]

Just as ownership in real property allows owners to transfer away their discrete rights to others, ownership of intellectual property is no different.[53] Per 17 U.S.C. § 101, a transfer of copyright ownership may be performed through "an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright."[54] Specifically, an "assignment" is the transfer of rights to a third party.[55] The impact of an assignment is significant, as the "assignor," or initial owner, effectively transfers "all of the rights, title[,] or interest owned by the assignor in the subject assigned" to the "assignee," or secondary owner.[56] Although an oral assignment of copyrights is possible, courts have held that it may only be given effect if later memorialized in writing.[57] Accordingly, copyright assignments most

---

[47] *See* 17 U.S.C. § 101 (1976) (referencing the definition for "derivative work").

[48] *See* 17 U.S.C. § 106 (1976).

[49] *Id.*

[50] *Id.*

[51] *See id.*

[52] *See generally* Gregory J. Chinlund & Kelley S. Gordon, *What Are the Copyright Implications of NFTs?*, REUTERS, https://perma.cc/8NU6-9PYB (last updated Oct. 29, 2021, 11:41 AM EDT).

[53] *See* Davis v. Blige, 505 F.3d 90, 98 (2d Cir. 2007).

[54] 17 U.S.C. § 101 (1976).

[55] TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO 218 (2d ed. 2014).

[56] Knott v. McDonald's Corp., 985 F. Supp. 1222, 1225 (N.D. Cal. 1997).

[57] Fenf, LLC v. Groupon, Inc., No. 19-12278, 2021 U.S. Dist. LEXIS 258636, at *12 (E.D. Mich.

commonly transpire through contracts where the assignment itself may be the entire focus of the contract or merely a minor provision amongst many others.[58] Following what some would consider the golden rule of contract drafting, assignments of rights should be written in the most unambiguous manner possible to avoid the threat of multiple interpretations and unclear intent that could lead to costly litigation.[59]

C. *Miramax v. Tarantino: Battle of Rights*

Writer-director Quentin Tarantino first announced his intentions to create and sell seven secret *Pulp Fiction* NFTs in early November 2021.[60] By January 2022, the Twitter account promoting the sale, @LegendaoNFT, affirmed that the first NFT in the collection had sold for a whopping $1.1 million.[61] This sale received immense attention not only because of the overwhelming price paid for the secret NFT, but more accurately because it came as a bold act of defiance in the face of a lawsuit by Miramax.[62] As mentioned above, Miramax quickly made their position on Tarantino's NFT announcement known by immediately filing a complaint in November in the United States District Court in California.[63] At the heart of its complaint for breach of contract and copyright and trademark infringement, Miramax asserted that Tarantino "granted and assigned nearly all of his rights to *Pulp Fiction*" to Miramax in a 1993 contract, including the rights necessary to lawfully create the intended *Pulp Fiction* NFTs.[64] To assess the validity of Miramax's complaint and Tarantino's subsequent answer, it is necessary to look first to the subject matter of the NFTs at issue and next to the language of the 1993 assignment agreement between the parties.[65]

Unfortunately, it is impossible to give a precise answer about the exact subject matter of the *Pulp Fiction* NFTs—but that is the point.[66] While the

---

Feb. 16, 2021).

[58] *See generally Assignments: The Basic Law*, STIMMEL L., https://perma.cc/W5T6-2XNH (last visited Jan. 3, 2023) (explaining the common contractual event of assignment).

[59] *See id. See generally* STARK, *supra* note 55, ch. 21 (explaining the common causes of ambiguity in contracts and preventive drafting practices that can be used to avoid expensive litigation).

[60] Ryan Faughnder, *The 'Pulp Fiction' NFT Fight Isn't Really About NFTs*, L.A. TIMES (Nov. 23, 2021, 6:00 AM PT), https://perma.cc/3RCY-NDLZ.

[61] Legendao.io (@LegendaoNFT), TWITTER (Jan. 24, 2022, 7:23 AM), https://perma.cc/R559-ZWTE.

[62] *See* Ephrat Livni, *Quentin Tarantino Plans to Sell 'Pulp Fiction' NFTs, Defying a Miramax Suit.*, N.Y. TIMES (Jan. 5, 2022), https://perma.cc/8JXS-N6F8.

[63] Compl., *supra* note 3, ¶ 6.

[64] *Id.* ¶ 3.

[65] *See generally* Tarantino's Answer ¶ 21; Compl., *supra* note 3, ¶ 21.

[66] *See Quentin Tarantino Revealed as Iconic Artist Behind First-Ever Secret NFTs, Showcasing Never-Before-Seen Work Revealed Only to NFT Owner*, GLOBENEWSWIRE (Nov. 2, 2021, 9:00 AM ET), https://perma.cc/7UUX-T2QH [hereinafter GLOBENEWSWIRE].

typical NFT sale process consists of buyers accessing online marketplaces to view the digital content associated with the NFT and to eventually place bids on those that they find most appealing, Tarantino's announcement made it clear that the sale of his NFTs would deviate from the norm.[67] Evidently a man with a taste for theatrics, Tarantino partnered with SCRT Labs to develop the *Pulp Fiction* NFTs as the first-ever "secret" NFTs whose contents only become viewable to the eventual owner.[68] With that being said, eager buyers are not bidding completely in the dark as the promotional website created for the sale of the *Pulp Fiction* NFTs asserts that "[e]ach NFT in the collection consists of the original script from a single iconic scene, as well as personalized audio commentary from Quentin Tarantino himself."[69] Reiterated by subsequent interviews and other forms of promotional media, the key feature of the *Pulp Fiction* NFTs is the rare opportunity for owners to see the uncut, handwritten script that has been hidden away for twenty-five years.[70]

With the primary issue in *Miramax v. Tarantino* being which party has the better claim to owning the rights necessary to create *Pulp Fiction* NFTs, a 1993 assignment agreement executed by Tarantino is a key piece of evidence.[71] According to the agreement, Tarantino assigned to Miramax the:

> sole and exclusive right under copyright, trademark or otherwise to distribute, exhibit and otherwise exploit all rights (other than the [Tarantino Reserved Rights]) in and to the motion picture entitled "Pulp Fiction" (the "Work") (and all elements thereof in all stages of development and production) now or hereafter known including, without limitation, the right to distribute the Work in all media now or hereafter known (theatrical, non-theatrical, all forms of television and "home video") in perpetuity, throughout the Universe, as more particularly set forth and upon and subject to the terms and conditions in [the Original Rights Agreement].[72]

---

[67] *See id. See generally* Andy Rosen, *What Is a Non-Fungible Token (NFT)? Definition & What to Know Before You Buy*, NERDWALLET (May 23, 2022), https://perma.cc/BF48-P555 (referencing how the NFT of a Grimes music video that sold on the online marketplace Nifty Gateway is still available to watch on that same platform).

[68] *See* GLOBENEWSWIRE, *supra* note 66.

[69] *The Tarantino NFT Collection*, TARANTINO NFTS, https://perma.cc/3J5B-GZNB (last visited Jan. 3, 2023).

[70] *See* GLOBENEWSWIRE, *supra* note 66; Taylor Dafoe, *Quentin Tarantino Is Minting Seven 'Pulp Fiction' Scenes as NFTs That Will Reveal New Secrets About the Film*, ARTNET, (Nov. 3, 2021), https://perma.cc/BP2T-KPBW (providing that the NFTs will "feature digitized excerpts from the original handwritten script for the film").

[71] *See* Dominic Patten, *Quentin Tarantino & Miramax 'Pulp Fiction' NFT Legal Dust-Up Ends; Director & Studio Look Forward to "Future Projects,"* DEADLINE, https://perma.cc/GJY5-NTVB (last updated Sept. 8, 2022, 1:16 PM).

[72] Compl., *supra* note 3, ¶ 26.

Evident from the cumbersome language of the agreement itself, Tarantino did transfer many of his exclusive rights afforded by copyright ownership to Miramax.[73] However, Tarantino did not go as far as to assign away all of his rights and instead reserved rights to the "soundtrack album, music publishing, live performance, print publication (including, without limitation, screenplay publication, 'making of' books, comic books and novelization, in audio and electronic formats as well, as applicable), interactive media, theatrical and television sequel and remake rights, and television series and spinoff rights."[74]

Referring to this assignment in its complaint, Miramax argued that it retained the rights to all versions of the *Pulp Fiction* screenplay, including any scenes and elements that did not get incorporated into the final version of the film.[75] As the purported owner of the screenplay rights, Miramax asserted that Tarantino lacked the authority to partner with SCRT Labs and license the rights to develop and sell the *Pulp Fiction* NFTs, thus constituting a breach of the assignment agreement as well as copyright infringement.[76] In response, Tarantino denied Miramax's allegations of breach of contract and infringement arguing instead that he was acting within his reserved rights retained in the 1993 agreement.[77] Specifically, Tarantino's counsel argued that Tarantino's reserved rights to "screenplay publication" gave him the authority to use NFTs as a means of publishing digital scans of the screenplay itself.[78] Based on these arguments, the case turns on the language of the assignments contract and how the Court interprets the term "screenplay publication."[79]

II. Legal Professionals Should Care About Tarantino's NFTs

Admittedly, some may not feel particularly interested in the *Miramax v. Tarantino* outcome when it ultimately comes down to whether the millionaire writer or multi-million dollar corporation is entitled to squeeze out another couple of million dollars profit from *Pulp Fiction*.[80] However, this case is significant for the sake of the hypothetical client seeking to create NFTs and looking for reassurance that their rights to do so have not been assigned away in some pre-existing contract.[81] Regardless of the verdict,

---

[73] *See* Compl., *supra* note 3, ¶ 26.

[74] Compl., *supra* note 3, ¶ 28.

[75] Compl., *supra* note 3, ¶ 43.

[76] *See* Compl., *supra* note 3, ¶ 43.

[77] *See* Compl., *supra* note 3, ¶ 46.

[78] *See* Compl., *supra* note 3, ¶¶ 45–46.

[79] *See* Faughnder, *supra* note 60.

[80] *See* Rosie Perper, *Quentin Tarantino's First 'Pulp Fiction' NFT Sold for $1.1 Million USD*, HYPEBEAST (Jan. 25, 2022), https://perma.cc/532R-YB6R.

[81] *See generally* Faughnder, *supra* note 60 (referring to *Miramax v. Tarantino* as a contract dispute over rights).

Miramax v. Tarantino should serve as a wakeup call for all entertainment and intellectual property lawyers handling the rights of creators and management companies.[82] The lesson, put simply, is that careful and adaptive contract drafting should be used to avoid the unpredictable domain of NFT litigation.[83]

While the length of their heightened popularity is obviously undetermined, one thing is overwhelmingly clear—NFTs are the current "it" thing.[84] From a record $69.3 million sale of a Beeple NFT in March 2021 to a "never-before-seen-or-heard" *Pulp Fiction* NFT casually selling for $1.1 million, jaw-dropping amounts of money are being spent on NFTs every day.[85] With the average sale ranging anywhere between a couple hundred to a couple thousand dollars, consumers have proven their willingness to invest in the crypto market.[86] Feeding off the positive consumer response and anticipated profitability, some artists, celebrities, and major corporations have similarly shown their interest in the market by encouraging the excitement with announcements of new ideas and NFT projects to come.[87] With NFTs now being used for a variety of media, ranging anywhere between a video of Lebron James dunking to an entire Kings of Leon album release, the possibility of growth within the NFT market appears somewhat unlimited.[88]

What comes off as an opportunistic NFT goldmine for some, instead poses a set of unique challenges for legal professionals.[89] With the NFT boom leaving even the Securities and Exchange Commission struggling to keep up with regulation, it follows that the legal system has also found it difficult to

---

[82] *See generally Stranger than "Pulp Fiction*," AMINEDDOLEH & ASSOCS. LLC (Dec. 6, 2021), https://perma.cc/9FCU-GZH6 (explaining the influx of legal questions about NFTs and how the *Miramax* lawsuit will likely "serve as a model for future claims, both in and beyond the entertainment industry.").

[83] *See* Elise Hansen, *NFT Craze Generates Slew of Legal Questions*, LAW360 (Apr. 2, 2021, 7:56 PM EDT), https://perma.cc/8MQ8-3Z9N; Kal Raustiala & Chris Sprigman, *Guest Column: Tarantino v. Miramax—Behind the NFT 'Pulp Fiction' Case, and Who Holds the Advantage*, HOLLYWOOD REP. (Nov. 24, 2021, 6:55 AM), https://perma.cc/97K7-HHJG.

[84] *See* Jonathan Ponciano, *NFTs Shatter Monthly Trading Record With $4 Billion in Sales—Here's Why They're Still Booming Despite the Crypto Crash*, FORBES (Jan. 20, 2022, 6:30 AM EST) https://perma.cc/LVK2-3XW6.

[85] Scott Reyburn, *JPG File Sells for $69 Million, as 'NFT Mania' Gathers Pace*, N.Y. TIMES, https://perma.cc/E7LC-25PX (last updated Mar. 25, 2021); *SCRT Labs Announces Triumphant Sale of First Never-Before-Seen-or-Heard Tarantino NFT for $1.1 Million*, BUS. WIRE (Jan. 24, 2022, 7:00 AM EST), https://perma.cc/92HW-2VPN.

[86] *See* Eileen Kinsella, *Think Everyone is Getting Rich off NFTs? Most Sales Are Actually $200 or Less, According to One Report*, ART NET (Apr. 29, 2021), https://perma.cc/M73D-U4GX.

[87] *See* Ponciano, *supra* note 84 (referring to celebrities like Britney Spears and Eminem and corporations like Nike and GameStop who have joined the NFT hype).

[88] Kochkodin, *supra* note 33.

[89] *See* Hansen, *supra* note 83.

answer NFT related problems.[90] In many instances, legal questions about NFTs are so novel that there is a lack of existing caselaw for attorneys to turn to for guidance.[91] Furthermore, even where courts have issued opinions on cases involving cryptocurrencies, the rule of law applied varies and appears far from uniform.[92] These circumstances raise the importance of *Miramax v. Tarantino* and the argument that lawyers should take all possible precautions to avoid the uncertainty of NFT litigation.[93] Accordingly, analyzing the Miramax lawsuit to determine the best way to handle contractual assignments and NFTs will be a relevant form of guidance in the face of unresolved intellectual property questions.[94]

ANALYSIS

III. The Traditional Language of Contractual Assignments Will Lead to Ambiguities Over the Rights to Create Non-Fungible Tokens

A. *The Prevalence of Assignments in the Entertainment Industry and Why NFTs Will Not Comply with the Norm*

Although rights assignments have always played an important role in entertainment contracts, assignments related to the right to create NFTs will become the most significant provision for negotiating lawyers because of creators' unique ability to independently pursue NFT ventures without the support of producer funding.[95] As mentioned above, the codification of the exclusive rights held by copyright owners is significant because it ensures that the powers needed to profit off of a protected work, such as the authority to reproduce, display, and sell a copyrighted work, are solely bestowed upon the copyright owner.[96] Ironically, however, one of the most important powers in that bundle is actually the ability to forfeit some of these exclusive rights and give them away to others.[97] Indeed, the power to assign away exclusive rights is one of the most essential assets for content creators

---

[90] *See* Colesanti, *supra* note 21, at 47.

[91] Richard Ong, *Hard Drive Heritage: Digital Cultural Property in the Law of Armed Conflict*, 53 COLUM. HUM. RTS. L. REV. 247, 291 (2021).

[92] *See* Sarel, *supra* note 27, at 393–94.

[93] *See infra* Part IV.

[94] *See infra* Part III.

[95] *See* Thomas N. Doty, *Blockchain Will Reshape Representation of Creative Talent*, 88 UMKC L. REV. 351, 357–58 (2019).

[96] *See* Talavera Hair Prods. v. Taizhou Yunsung Elec. Appliance Co., No. 18-CV-823 JLS (JLB), 2021 U.S. Dist. LEXIS 149179, at *32 (S.D. Cal. Aug. 6, 2021).

[97] *See generally* Jessica Litman, *Real Copyright Reform*, 96 IOWA. L. REV. 1, 35 (2010) (explaining how the copyright system in the United States is not creator-friendly and tends to encourage creators to create new works and then assign away rights to intermediaries to get the works disseminated successfully).

who possess an abundance of creative ideas, but lack the capital or support to produce them on their own.[98] The modern entertainment industry is dominated by multi-million dollar corporations, production companies, and management agencies who control nearly all forms of popular media; it is because of this culture that many talented, independent content creators struggle to succeed without commercially exploiting their works and joining forces with these larger powers to gain access to their repertoire of distribution resources.[99] In light of this relationship, it is typical for creators, such as song or film writers, to assign some of their exclusive rights to production and distribution companies in exchange for their help in creating the desired work.[100]

Considering the inequality of bargaining power evident in the traditional creator-producer relationship, many creators are being defrauded by assignment agreements that contain an essence of unconscionability.[101] Although courts find it difficult to give an all-purpose definition to the term "unconscionable," many agree that unconscionability may be found in agreements where "there is an absence of meaningful choice on the part of one of the parties together with contractual terms that unreasonably favor the other party."[102] Individual creators are often put in a position where the only prospect of success lies in striking a deal with major production companies and are left with no meaningful choice but to concede with the overwhelming demands of production powerhouses to merely get their projects off the ground.[103] Take the 1993 *Pulp Fiction* assignment agreement formed between Miramax and Tarantino, for example.[104] Although Tarantino is now a household name and "the single most influential director of his generation," in 1993 he was just an up-and-coming director trying to build his reputation with only one other highly criticized film under his belt.[105] Tarantino's need and desire to strike a deal put

---

[98] *See generally* Doty, *supra* note 95, at 357 (discussing the creative ecosystem that makes it nearly impossible for artists to put out work without relying on record deals, production companies, cable channels, etc.).

[99] *See* Doty, *supra* note 95, at 357; Joseph Bien-Kahn, *American Companies That Dominate the Media Landscape*, STACKER (July 5, 2018), https://perma.cc/3S98-WNHB.

[100] *See* Doty, *supra* note 95, at 357.

[101] *See* Tillman v. Com. Credit Loans, Inc., 655 S.E.2d 362, 370 (N.C. 2008). *See generally* Gabe Bloch, *Transformation in Publishing: Modeling the Effect of New Media*, 20 BERKELEY TECH. L.J. 647, 661–62 (2005) (referencing the lack of bargaining power between authors and publishers during contractual transactions).

[102] In re Marriage of Fults, No. 5-17-0290, 2018 Ill. App. Unpub. LEXIS 1493, at *12 (Sept. 5, 2018); *accord* Harrington v. CACV of Colorado, LLC, 508 F. Supp. 2d 128, 139 (D. Mass. 2007).

[103] *See* Bloch, *supra* note 101, at 661–62.

[104] *See, e.g.*, Compl., *supra* note 3, ¶¶ 19–20.

[105] Tom Shone, *The Glorious Bullshit of* "Reservoir Dogs," *Twenty-Five Years Later*, NEW YORKER (Oct. 8, 2017), https://perma.cc/79JP-Z2MC; *see* Maria Vu, *The Incredible Story Behind* Reservoir Dogs, METAFLIX (Nov. 20, 2020), https://perma.cc/837K-9LD2.

Miramax in a superior bargaining position to make heightened demands; as a result, Miramax was able to secure an assignment agreement where Tarantino assigned away nearly all rights in *Pulp Fiction* in exchange for Miramax's production and marketing services.[106] Even though such agreements bear serious potential for abuse and unfairness, assignments between creators and producers have continued to be an indispensable part of the entertainment industry.[107]

With the United States media and entertainment industry being worth approximately $717 billion, it is no surprise that those working in the field carry the expectation of continuously making a profit.[108] For those involved in production, this begins with finding a creator with an idea, like a film writer and director, working with the creator to produce the movie, and eventually releasing the movie in public theaters or on streaming services for profit.[109] Although the parties involved in creation may derive substantial economic return from the film's initial release, in many instances the profitability of derivative works based on the film, such as sequels or themed merchandise, can far exceed the revenue from the initial box office sales.[110] With a nearly unlimited potential for derivative commercial success in every work created, those in producer-like positions attempt to use assignment agreements, most commonly involving merchandising rights, to ensure that they will be entitled to ride the second wave of profits when it appears.[111] Considering the gravity of the economic interests involved, it follows that there is constant litigation over derivative rights and assignment agreements in the entertainment industry, with many cases involving infamous creators and production conglomerates going head-to-head.[112] In 2005, for example,

---

[106] Compl., *supra* note 3, ¶ 20.

[107] *See* Litman, *supra* note 97, at 35.

[108] *See* Brenden Czajka, *What Forms of Media Make the Most Money?*, GLOBALEDGE (Oct. 15, 2020, 10:03 AM), https://perma.cc/BWB5-6YTH.

[109] *See* Brandon Katz, *Every Movie Theater vs. Streaming Release is Riddled with Pros and Cons*, OBSERVER (July 8, 2021, 4:56 PM), https://perma.cc/V2WG-HAW6.

[110] *See, e.g.*, Claire Epting, *12 Movie Sequels That Outperformed the Original at the Box Office*, SCREENCRUSH (Aug. 14, 2020), https://perma.cc/PFC5-NPUM (listing film sequels that outperformed their original, such as *Toy Story 3*'s $1.067 billion box office sales that triumphed over the original's $373.6 million); Jacob Shelton, *Movies That Made More Money on Merchandising than at the Box Office*, RANKER (Sep. 23, 2021), https://perma.cc/BT5L-QG95 (listing hit films that made more off of merchandise than box office sales, such as the *Harry Potter* movies that made $7.7 billion in global box office sales and over $20 billion in its merchandise franchise).

[111] *See generally, e.g.*, Kaufman v. Warner Bros. Ent. Inc., No. CV-16-02248-PHX-JAT, 2019 U.S. Dist. LEXIS 79990, at *1–2 (D. Ariz. May 13, 2019); Blue Planet Software, Inc. v. Games Int'l, LLC, 334 F. Supp. 2d 425, 431–35 (S.D.N.Y. 2004); Brent Lang & Matt Donnelly, *Netflix Buys 'Knives Out' Sequels for $450 Million*, VARIETY (Mar. 31, 2021, 2:09 PM PT), https://perma.cc/FC6J-G4BH (displaying examples of studios who bought rights to sequels or had merchandising agreements).

[112] *See, e.g.*, Ryan Faughnder, *Disney Sues Former Marvel Artists over Iron Man and Spider-Man Rights*, L.A. TIMES (Sep. 24, 2021, 1:01 PM PT), https://perma.cc/NU6R-RWCH.

the Marvel Comics' founding father, Stan Lee, sued the comic publishing corporation, Marvel Enterprises, over the entitlement to profits from film and television merchandising of the Marvel characters he initially created.[113]

The impact of these assignment agreements was even more evident in a 2014 infringement action by Warner Brothers Entertainment, where the production company asserted its rights as the legal owner of all copyrights and merchandising rights associated with the classic films *Gone with the Wind* and *Wizard of Oz* and won to the tune of $2,570,000 in statutory damages.[114] Learning from these cases, where contractual failures resulted in parties losing out on millions in revenue, production companies now use their superior bargaining powers to push creators to assign away most of their commercially valuable rights in an attempt to ensure that they hold the key when it comes time to profit from the next form of derivative works.[115]

This is where NFTs enter the conversation.[116] With some already jokingly referring to them as the "Beanie Babies of the 2020s," NFTs quickly reached immense popularity as the newest "it" form of collectibles.[117] Seeing potential for revenue far exceeding that from the sale of traditional memorabilia such as action figures or t-shirts, film studios are eager to take advantage of NFTs as the next opportunity to capitalize on popular works.[118] Indeed, entertainment studios have already begun experimenting with NFTs and movie ticket sales by creating NFTs that serve as the tickets themselves, or by offering NFT "freebies" to the first thousands of consumers who buy advance tickets for a film's release.[119] Accordingly, NFTs are primed to become the next notch on the belt of producers in the entertainment industry and a critical point of assignment agreements.[120]

With that being said, the rights required to create NFTs may not be forfeited by creators and acquired by producers as smoothly as other creator-producer assignments of the past.[121] Unlike the rights to create and sell merchandise based on a work, which an individual creator may be more inclined to assign to a producer in exchange for royalties due to the

---

[113] Lee v. Marvel Enters., Inc., 386 F. Supp. 2d 235, 237–38 (S.D.N.Y. 2005).

[114] Warner Bros. Ent., Inc. v. Dave Grossman Creations, Inc., 13 F. Supp. 3d 963, 964, 972 (E.D. Mo. 2014).

[115] *See id.*; *Lee*, 386 F. Supp. 2d at 237–38.

[116] *See* Faughnder, *supra* note 60.

[117] Rik Nieu, *NFTs Are the New Beanie Babies*, RIKNIEU (Oct. 14, 2021), https://perma.cc/VQ3T-APUE (analogizing the Beanie Babies collectable toys craze in the 1990s to the current NFT boom).

[118] *See NFTs in Film and TV: How Hollywood is Embracing NFTs*, PROJECT CASTING (Dec. 7, 2021), https://perma.cc/P7EM-HHWL.

[119] *Id.*; J. Fingas, *AMC and Sony Will Hand Out NFTs to 'Spider-Man' Advance Ticket Buyers*, ENGADGET (Nov. 28, 2021), https://perma.cc/TW9D-E6VN.

[120] *See generally* Faughnder, *supra* note 60.

[121] *See* Doty, *supra* note 95, at 351.

staggering amount of capital required to pursue the merchandise venue on their own, the rights to create NFTs will not be forfeited so easily.[122] This distinction stems from the nature of blockchain technology and the relative ease with which NFTs can be created and distributed to the public, effectively removing the institutional "middlemen" from the creative process.[123] Unlike other creative projects whose economic success depends largely upon the capital and network of resources provided by production conglomerates, artists can successfully create and sell NFTs to the public after paying the trivial sales platform registration fees.[124] With blockchain features that automatically record NFT consumer interactions, public sales, and future royalties, creators no longer need the resources associated with production companies to profit from their intellectual property.[125] In the creator-friendly environment facilitated by blockchain, artists may not be as willing to succumb to the requests of powerful production companies and assign away any of the exclusive ownership rights required to create NFTs based on their original works.[126] Because of this potential shift in the creator-producer power dynamic created by the commercial popularity and overall accessibility of NFT-derivative works, legal professionals must pay significant attention to entertainment assignment provisions and retain the NFT copyrights their client desires.[127]

B. *Coverage of the Exclusive Rights Required to Create NFTs in Current Assignment Provisions is Questionable*

The contract terms typically used in entertainment assignment agreements are unsuitable and problematic for the assignment of rights to create NFTs because they largely consist of incompatible copyright terms.[128] Understanding the language typically included in these agreements and the type of rights most commonly contracted for is key to fully appreciate this argument.[129] As discussed above, where the bargaining power in the creator-producer relationship is completely disproportionate, producers may take an all-or-nothing approach and require creators to assign all of their exclusive rights in the copyrightable work in exchange for nominal royalties

---

[122] Doty, *supra* note 95, at 357–58.

[123] *See* Steven C. Beer & Kathryne E. Badura, *The New Renaissance: A Breakthrough Time for Artists*, 1 BERKELEY J. ENT. & SPORTS L. 66, 67–69 (2012).

[124] Doty, *supra* note 95, at 357; *see* Mitchell Clark, *How To Create an NFT—And Why You May Not Want To*, VERGE, https://perma.cc/TJJ3-5WLT (last updated Jun. 6, 2022, 8:00 AM EST) [hereinafter Clark, *How To*].

[125] Doty, *supra* note 95, at 358.

[126] Doty, *supra* note 95, at 351.

[127] *See* Doty, *supra* note 95, at 352.

[128] *See* Amineddoleh & Associates LLC, *supra* note 82.

[129] *See Entertainment Law: Intellectual Property*, JRANK, https://perma.cc/X4T6-F3EX (last visited Jan. 3, 2023).

and the producer's services.[130] In other cases, producers may take a more selective approach and negotiate only for the rights they deem valuable and necessary to create and profit from works based upon the artist's original work.[131] In the latter situation, parties commonly ensure that assignment agreements make express mention of who owns exclusive merchandising and marketing rights, not only in the work as a whole, but possibly in its underlying elements as well.[132] Take the 1993 rights agreement between Miramax and Tarantino for example, where Miramax secured "all rights (including all copyrights and trademarks) in and to [*Pulp Fiction*]" but allowed Tarantino to retain rights to seemingly insignificant elements such as the film's "soundtrack album, music publishing, live performance, [etc.] . . . ."[133]

Over time, assignment agreements in the entertainment industry came to utilize language that corresponds with the Copyright Act and commonly make express references to the exclusive rights of copyright owners.[134] This tendency to use copyright language in assignment agreements makes current provisions ill-suited to handle issues related to NFTs because the copyright terms create ambiguities and uncertainties regarding whether one party has retained or assigned the rights required to create NFTs.[135] For starters, copyright language in NFT assignment agreements is problematic because there is no clear, uniform body of law governing NFTs.[136] In fact, the lawsuit between Miramax and Tarantino "is notable because it marks the first opportunity for a federal court to opine on intellectual property rights in the NFT context."[137] Bearing that fun fact in mind, it follows that court opinions have not been much help in clarifying how NFTs align with copyright terms.[138] As disputes surrounding the rights to create NFTs arise and the ambiguous copyright language of assignment provisions proves to be overwhelmingly wrong in the NFT context, parties are without an

---

130 *See, e.g.*, Eden Arielle Gordon, *Before Taylor Swift: 6 Artists Who Were Screwed over by Their Labels*, POPDUST (July 6, 2019), https://perma.cc/MG64-Q3AZ (listing examples of music icons who "lost millions in legal battles over faulty contracts that they signed as teen[s]").

131 *See* JRank, *supra* note 129.

132 *See generally* Baisden v. I'm Ready Prods., No. 4:08-CV-00451, 2010 U.S. Dist. LEXIS 99366, at *26–27 (S.D. Tex. Sep. 22, 2010) (providing the contractual language at the heart of an author-producer rights dispute); Halicki v. Carroll Shelby Int'l, No. CV 07-06859 SJO (PJWx), 2009 U.S. Dist. LEXIS 138833, at *10–11 (C.D. Cal. May 6, 2009) (giving an example of how underlying elements of a work, such as characters featured in a film, can be the subject of marketing and merchandising rights agreements).

133 Compl., *supra* note 3, ¶¶ 20–21.

134 *See, e.g.*, *Baisden*, 2010 U.S. Dist. LEXIS at *26–27; Compl., *supra* note 3, ¶¶ 20–21.

135 *See* Amineddoleh & Associates LLC, *supra* note 82.

136 *See* Daniel Dubin & H. James Abe, *'Pulp Fiction' NFT Lawsuit Presents New IP Battleground*, LAW360 (Dec. 20, 2021, 4:34 PM EST), https://perma.cc/2PNU-NFDM.

137 *Id.*

138 *See id.*

abundance of caselaw to follow and instead are left trying to come up with creative or novel arguments.[139]

The Miramax lawsuit offers a prime example of the impending issues and ambiguities that will arise from using normative copyright language in rights assignments, specifically in the context of NFTs, and the extent to which attorneys will try to stretch the bounds of these terms in an attempt to make NFTs fit within them.[140] Tarantino responded to Miramax's allegations of breach of contract and infringement by clinging to the language of the 1993 assignment agreement and justifying his *Pulp Fiction* NFT venture under his reserved right to "screenplay publication."[141] As defined in § 101 of the Copyright Act, "publication" means the "distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending."[142] Per Tarantino's argument, publicly selling secret *Pulp Fiction* NFTs that consist primarily of images of his handwritten screenplay constitutes a form of screenplay publication and, as such, is a right that is solely under his control.[143] Although the definition does not make reference to the exact number of copies that must be sold to qualify as a publication, Miramax's argument rests on the fact that each NFT sale is merely a one-time transaction that does not constitute a publication in the copyright context.[144] Instead, Miramax would stand to benefit from the argument that the NFTs, which have been heavily advertised as the ultimate *Pulp Fiction* fan memorabilia, are more similar to merchandise and thus fall within the broad rights that Miramax was granted back in 1993.[145] With little authority on the subject matter of the implications of copyright law upon NFTs, disputes about NFTs and assignment agreements written primarily in copyright terms will continue to be an issue that baffles attorneys and courts alike.[146]

Presenting yet another issue for legal professionals attempting to properly navigate transactions involving NFTs and rights assignments, courts that have spoken on the topic of NFTs have produced largely inconsistent judgments and "have led to fragmentation and confusion in the legal treatment of digital assets . . . ."[147] Considering the quickness of technological innovation and underlying complexities of cryptocurrencies,

---

[139] Amineddoleh & Associates LLC, *supra* note 82.

[140] *See* Compl., *supra* note 3, ¶¶ 20–21; Amineddoleh & Associates LLC, *supra* note 82.

[141] *See* Tarantino's Answer, *supra* note 18, ¶ 1 ("As Miramax knows well, Tarantino has every right to publish portions of his original handwritten screenplay for *Pulp Fiction*, a personal creative treasure that he has kept private for decades.").

[142] 17 U.S.C. § 101 (1976).

[143] *See* Tarantino's Answer, *supra* note 18, ¶¶ 1–2.

[144] § 101; Amineddoleh & Associates LLC, *supra* note 82.

[145] *See* Faughnder, *supra* note 60.

[146] *See* Dhanani & Sabbagh, *supra* note 43.

[147] João Marinotti, *Tangibility as Technology*, 37 GA. ST. U. L. REV. 671, 674 (2021).

it is no surprise that legal professionals, who typically are not astute in the fields of technology or finance, are ill-suited to make consistent decisions regarding the governance of NFTs.[148] This unpredictability of decisions involving cryptocurrencies is especially prevalent in the context of remedies where "courts drastically diverge on the type of remedy that is available for individuals whose rights in a cryptocurrency are infringed."[149] Specifically, some courts have applied property rules, which allow for injunctions and the enforcement of property rights against infringing third parties; others found it more appropriate to use liability rules, which make the infringer liable for damages.[150] With a lack of uniform regulations, courts are without sufficient guidelines on how to treat disputes involving cryptocurrencies such as NFTs.[151]

As illustrated above, there is no shortage of legal issues and uncertainties that are beginning to trouble parties dealing with NFTs.[152] After recognizing problems ranging from the broad varying legal treatment of NFTs within courts to the specific lack of clarity regarding the interplay between NFTs and copyrights, it follows that parties must now question whether the terms of their own current assignment agreements will be enough to adequately protect the rights required to create NFTs.[153] By shedding light on the serious ambiguities that result from copyright terms used in assignment provisions, *Miramax v. Tarantino* stands as an important warning for those in the entertainment industry that NFT-related assignment disputes are impending and their resolution is largely unclear.[154] Contract drafters attempting to retain NFT-related rights according to their parties' desires must understand these issues in order to analyze the shortcomings of their own provisions and to avoid contractual failures that could end up costing their clients millions of dollars in NFT revenue.[155]

IV. Assignment Agreements Should Be Drafted with Express Reference to Non-Fungible Tokens to Avoid Ambiguities and Subsequent Litigation

A. *Added Protection from Added Terms*

Facing this heightened level of uncertainty surrounding the tribunal

---

[148] *See id.*

[149] Sarel, *supra* note 27, at 393–94.

[150] Sarel, *supra* note 27, at 391–92.

[151] *See generally NFTs: Key U.S. Legal Considerations for an Emerging Asset Class*, JONES DAY (Apr. 2021), https://perma.cc/Q47U-KVUL ("To date, no state regulator with oversight of virtual currency or money transmission has issued guidance directly about NFTs.").

[152] *See supra* Part III.

[153] *See* Marinotti, *supra* note 147, at 674; Dhanani & Sabbagh, *supra* note 43.

[154] *See* Dubin & Abe, *supra* note 136.

[155] *See* Marinotti, *supra* note 147, at 674; Dhanani & Sabbagh, *supra* note 43.

treatment of NFTs, legal professionals must fashion their own solutions in the form of taking necessary drafting precautions to ensure that their crypto-related contracts do not become the subject of litigation.[156] As explained above, a significant issue arises where assignment agreements between creators and producers utilize traditional terms related to copyright law.[157] With questions about how copyright terms apply to NFTs going largely unanswered, such assignment agreements will inevitably lead to contractual ambiguities and "[d]isputes over contractual meaning [that] are more likely to end up in litigation."[158] Invoking perhaps the most important overarching principle of contract law, contract drafters should avoid ambiguities at all costs and evaluate the possibility of various interpretations of the language used in their agreements.[159] Specifically speaking in the context of assignment agreements between creators and producers, there are a few strategies that drafters should use to ensure that their party retains the rights required to legally create NFTs based upon an original, creative work—if so desired.[160]

First, drafters can negate any claims of ambiguity or uncertainty by expressly referring to the cryptocurrency by its official title of non-fungible tokens or NFTs.[161] Just as most entertainment assignment agreements make explicit mention of merchandising rights, at times even going as far as to list items such as sweatshirts or mugs to provide common examples of merchandise, NFTs should be treated no differently.[162] Next, this express reference to NFTs should be paired with an equally explicit representation regarding which party owns the rights required to create the purported NFTs and distribute them for sale.[163] By drafting assignment agreements with precise provisions relating to NFTs, parties will avoid the confusion and unpredictability that results from trying to accurately describe NFTs in copyright terms.[164] That is not to say that the inclusion of copyright terms and language pertaining to the exclusive rights of ownership in all

---

[156] *See* Marinotti, *supra* note 147, at 674; Dhanani & Sabbagh, *supra* note 43.

[157] *See supra* Part III.

[158] Joshua M. Silverstein, *Contract Interpretation and the Parol Evidence Rule: Toward Conceptual Clarification*, 24 CHAP. L. REV. 89, 93 (2020).

[159] *See* STARK, *supra* note 55, ch. 21.

[160] *See generally* Kathryn Goldman, *NFTs and Publishing Contracts*, CREATIVE L. CTR., https://perma.cc/GPU7-RWPB (last visited Jan. 3, 2023) (discussing the strategies that creators can use to maintain the rights to their work, specifically in the context of authors and book publishing companies).

[161] *See* Dubin & Abe, *supra* note 136.

[162] *See* Baisden v. I'm Ready Prods., No. 4:08-CV-00451, 2010 U.S. Dist. LEXIS 99366, at *26 (S.D. Tex. Sept. 22, 2010).

[163] *See, e.g.*, *id.* (offering an example of explicit contractual language: "[t]he Parties agree that Producer owns exclusive merchandising rights . . . .").

[164] *See* Goldman, *supra* note 160 ("Would that language encompass the right to mint and sell NFTs? That is the question.").

assignment agreements will create a "patent ambiguity" that is so "obvious, gross, [or] glaring" that no party in their right mind would purposely include it in their agreement.[165] On the contrary, copyright language will be sufficient for most entertainment-related assignments and will only lead to non-obvious "latent ambiguities" that are discovered when attempting to apply these inadequate terms in the context of NFTs.[166] With the law still widely unclear about how NFTs fit within the world of copyrights, contract drafters should use express language when discussing NFT assignments to avoid being left with no choice but to spin creative arguments about how copyright terms like "screenplay publication" can apply to NFTs.[167]

Additionally, express reference to NFTs by their official title may be beneficial for providing rights to create future forms or subcategories of NFTs that have not yet been popularized or even invented.[168] At this time, it is fair to say that NFTs are digital assets that certify and record the ownership of digital items, primarily seen in the form of artwork or collectibles.[169] However, NFT creators have already shown their desire to break virtual boundaries and experiment with the different uses for NFTs.[170] As mentioned above, film studios have already tried to give this digital asset a more real-world, redeemable purpose by associating it with movie ticket sales.[171] With talk of future NFTs being created for physical items, it is only a matter of time before the already confusing definition and description of NFTs requires a rework.[172] To this point, merely asserting ownership rights over the ability to create and sell digital assets or any other limited description of NFTs without making express mention of NFTs may still result in contractual ambiguities.[173] To ensure that your party's desired rights in regard to NFTs remain certain, regardless of how much the nature or understanding of NFTs may change in the future, the best practice is to make explicit reference to the tokens by name.[174]

---

[165] H&M Moving, Inc. v. United States, 499 F.2d 660, 671 (Ct. Cl. 1974).

[166] *See* Blue Tech Inc. v. United States, 155 Fed. Cl. 229, 244 (2021) (defining a latent ambiguity as "neither glaring nor substantial nor patently obvious").

[167] *See* Tarantino's Answer, *supra* note 18, ¶¶ 1–2; Dubin & Abe, *supra* note 136.

[168] *See generally* Jeremy M. Evans, *Practice Tips: A Primer on Digitalizing Sports Collectibles*, 44 L.A. LAW., Nov. 2021, at 10, 10 (referencing areas such as fashion and music where NFTs are already expanding into and acknowledging the seemingly endless opportunities for digital collectibles).

[169] Gary P. Kohn, *NFTs and the Law*, 44 L.A. LAW., Nov. 2021, at 18, 18.

[170] Diego Geroni, *Understanding the Different Types of NFTs*, 101 BLOCKCHAINS (Aug. 31, 2021), https://perma.cc/FRG3-35BF.

[171] Jessica Bursztynsky, *AMC, Sony Offering NFTs to People Who Purchase Advance Spider-Man Tickets*, CNBC (Nov. 28, 2021, 5:22 PM EST), https://perma.cc/UE2N-J9TH.

[172] *See* Geroni, *supra* note 170.

[173] *See* Dubin & Abe, *supra* note 136.

[174] *See* Dubin & Abe, *supra* note 136.

B. *Forward-Facing Language*

For contract drafters tasked with ensuring that their party retains the rights to create NFTs while simultaneously seeking to avoid ambiguities that could lead to litigation, including language about future NFT technology within proposed assignment provisions is an efficient solution.[175] As a strategy frequently invoked in contracts between creators and producers, modern assignment provisions already attempt to bring unknown advancements in technology within reach of current contract terms by including "forward-looking language that takes into account new technologies."[176] Indeed, even Miramax made it a point to argue in its complaint that while Tarantino's reserved rights "do not contain forward-looking language," the broad rights assigned to Miramax did in the form of the following language, "all rights . . . now or hereafter known . . . in all media now or hereafter known . . . ."[177] While some may believe that such language alone is enough to account for the rights associated with NFTs, as it can obviously be argued that cryptocurrency is a new technology, the uncertainties surrounding NFT classification and governance could lead this language alone to be interpreted as insufficient to assure that NFTs will be appropriately accounted for in the average assignment provision.[178] Following the argument applied above, drafters should avoid any possibility of ambiguities and multiple interpretations that could land their NFT contracts in the hands of indecisive courts and instead should be sure to include express mention of NFT technology within these forward-facing phrases.[179] By crafting the future language in the context of NFTs, drafters will also ensure that any technological developments within the NFT field—which have yet to be created or discovered—will also be accounted for by current contractual terms.[180]

CONCLUSION

It is far too late for many big-name creators and production entities that have pre-existing assignment agreements with terms that have already been drafted and executed. In those cases, the subsequent issues that will arise, specifically relating to the rights required to create derivative NFTs, will likely result in costly litigation once both parties realize the copyright language used in their assignment provisions opened the door for multiple

---

[175] *See* Joe Flint, *Quentin Tarantino's 'Pulp Fiction' NFT Battle with Miramax Heats Up*, WALL ST. J. (Jan. 13, 2020, 12:12 PM ET), https://perma.cc/K454-LXY6.

[176] *Id.*

[177] Compl., *supra* note 3, ¶ 22.

[178] *See generally* Flint, *supra* note 175 (discussing the uncertainty about whether traditional forward-looking language is enough to account for NFT technology).

[179] *See generally* STARK, *supra* note 55, ch. 21.

[180] *See* Dubin & Abe, *supra* note 136.

interpretations and ambiguities. With the law surrounding the interplay between NFTs and copyrights remaining largely unknown and the legal treatment of NFTs being equally as uncertain, lawyers will be left to create novel arguments with no predictable answer as to how their litigation will resolve. In the end, one side will emerge victorious and become the rightful owner of the rights to create the desired NFTs, while the other will be forced to explain to their client how vague drafting cost them millions of dollars. While the future may be bleak and erratic for those like Miramax and Tarantino, who have already found themselves caught in this battle, future contract drafters should avoid these issues altogether by using the effective drafting strategies discussed in this Note. Drafters should expressly mention NFTs within assignment provisions and deviate from solely using inadequate copyright terms to discuss creators' exclusive rights to ensure that their transactions involving NFT rights escape the perils associated with ambiguous contract drafting and undecided NFT law.

* * * *

"Did You Get My Text?": Fourth Amendment Reasonable Expectation of Privacy in Sent Text Messages

Justin W. Stidham[*]

INTRODUCTION

The Fourth Amendment of the U.S. Constitution protects people in "their persons, houses, papers, and effects" from the government conducting "unreasonable searches and seizures" without a warrant supported by probable cause.[1] Many state constitutions, including Massachusetts, contain analogous provisions with similar safeguards.[2] Courts have long interpreted these constitutional guarantees to recognize the important balance between the public interest in criminal prosecution and personal interests in privacy, security, and protection from "arbitrary and oppressive interference" by the government.[3] But courts struggle to determine the precise contours of these rights in this digital age,[4] just as the Massachusetts Supreme Judicial Court ("the SJC") did in *Commonwealth v. Delgado-Rivera*.[5] For the first time in Massachusetts, the SJC considered

[*] Managing Editor, *New England Law Review*, Vol. 57. J.D., New England Law | Boston (2023). B.A., Political Science, University of North Carolina at Chapel Hill (2016). Many thanks to my friends and family for their endless support, and to the *New England Law Review* staff for their incredible work this year. Special thanks to Professor Laura Greenberg-Chao for her mentorship through the writing of this Comment; without her guidance and expertise, this would not have been possible.

[1] U.S. CONST. amend. IV.

[2] *E.g.*, MASS. CONST. art. XIV.

[3] United States v. Martinez-Fuerte, 428 U.S. 543, 554–55 (1976).

[4] *See* Laura Hecht-Felella, *The Fourth Amendment in the Digital Age: How Carpenter Can Shape Privacy Protections for New Technologies*, BRENNAN CTR. FOR JUST. (Mar. 18, 2021), https://perma.cc/CFL2-6CXZ; Devin W. Ness, *Information Overload: Why Omnipresent Technology and the Rise of Big Data Shouldn't Spell the End for Privacy as We Know It*, 31 CARDOZO ARTS & ENT. L.J. 925, 926–27, 955–56 (2013) (examining digital technology and the Fourth Amendment and advocating for a more functional legal framework).

[5] Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1093 (Mass. 2021).

whether an individual could assert an objectively reasonable expectation of privacy in his own sent text messages that were retrieved from another's phone; ultimately, the Court determined that the defendant had no reasonable expectation of privacy and could not suppress the evidence being used against him.[6]

This Comment will argue that the Court in *Commonwealth v. Delgado-Rivera* improperly deemphasized the role that unlawful police conduct played in exposing the defendant's text messages to the public. Part I provides an overview of Fourth Amendment case law with a focus on how courts have historically addressed the reasonable expectation of privacy, the third-party doctrine, and the assumption of the risk. Part II reviews the SJC's opinion and evaluates the Court's reasoning. Part III explains how the SJC failed to distinguish the matter from precedent cases and to account for the unlawful police conduct that underscored those searches, resulting in an interpretation that is inconsistent with the third-party doctrine. Part IV then explores the dangerous downstream effects of this decision. Part V advocates for alternative approaches to determine the objective reasonableness of one's expectation of privacy that the SJC should have taken to more effectively balance the twin aims of individual privacy and the duty of law enforcement.

I. Background

A. *Development of Fourth Amendment Case Law*

To determine what constituted a search under the Fourth Amendment, courts primarily considered whether or not there had been a "physical intrusion" that invaded one's property rights.[7] Thus, law enforcement did not conduct a Fourth Amendment search when they performed "surveillance without any trespass and without the seizure of any material object."[8] This allowed police to place a wiretap on a telephone cable,[9] or a recording device on the outside of a wall, without requiring a warrant.[10] Only when the police could not collect evidence without "trespass upon . . . property" would the physical intrusion be a Fourth Amendment search.[11]

In addition to trespasses, the Supreme Court held in *Katz v. United States* that the police also performed searches when they "violated the privacy upon which [one] justifiably relied," because the Fourth Amendment "protects people -- and not simply 'areas.'"[12] Justice Harlan wrote in his

---

[6] *Id.* at 1093–94, 1097.

[7] Katz v. United States, 389 U.S. 347, 353 (1967).

[8] *Id.*

[9] Olmstead v. United States, 277 U.S. 438, 466 (1928).

[10] Goldman v. United States, 316 U.S. 129, 135 (1942).

[11] Silverman v. United States, 365 U.S. 505, 510–11 (1961).

[12] *Katz*, 389 U.S. at 353.

concurrence that he understood there to be two prongs to privacy: an actual, subjective expectation of privacy, and an objective expectation of privacy that "society is prepared to recognize as 'reasonable.'"[13] The Court formally adopted this two-prong test of subjective and objective reasonable expectations of privacy in *Smith v. Maryland*.[14] The objective reasonableness of a search "depends upon all of the circumstances surrounding the search . . . and the nature of the search . . . itself."[15] Specific factors include the character of the item searched, the possessory interest in the item, and the precautions taken to protect its privacy.[16] Furthermore, there is no Fourth Amendment search if an individual has knowingly exposed information to the public, even if this is within a constitutionally protected area.[17]

The third-party doctrine, a natural extension of the *Katz* doctrine, focuses on "information . . . voluntarily turn[ed] over to third parties."[18] An individual has no objectively reasonable expectation of privacy in written records disclosed to third-party companies nor in incriminating information discussed with other parties in whom the individual has "misplaced confidence" that they will not share the information.[19] The rationale underlying the third-party doctrine is that one assumes the risk that the information will be shared when it is voluntarily disclosed to a third party, even if the information itself is private.[20] An individual relinquishes this expectation and "assume[s] the risk of disclosure," even if that person is unaware that there is a risk.[21] But courts have made exceptions for involuntary disclosures of records to third parties when individuals have not reasonably assumed the risk of disclosure with that level of access.[22]

---

[13] *Id.* at 361 (Harlan, J., concurring).

[14] Smith v. Maryland, 442 U.S. 735, 740 (1979).

[15] United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985).

[16] Commonwealth v. Pina, 549 N.E.2d 106, 110 (Mass. 1990).

[17] *Katz*, 389 U.S. at 351.

[18] *Smith*, 442 U.S. at 743–44.

[19] *See, e.g.*, *id.* at 742–44 (holding that there is no objective reasonable expectation of privacy in numbers dialed into a telephone since it is reasonable to assume that an individual is aware that this creates a permanent record with the telephone company); United States v. Miller, 425 U.S. 435, 442–43 (1976) (holding that there is no objective reasonable expectation of privacy in information "voluntarily conveyed to the banks . . . in the ordinary course of business"); Hoffa v. United States, 385 U.S. 293, 302 (1966) (holding that there is no objective reasonable expectation of privacy in information voluntarily shared with an accomplice who later revealed the information).

[20] United States v. Jacobsen, 466 U.S. 109, 117 (1984).

[21] *See* United States v. White, 401 U.S. 745, 751–52 (1971) (explaining that an individual who doubts a companion's trustworthiness yet still confides in that person has assumed the risk of disclosure and lost a legitimate expectation of privacy in that communication); Alinovi v. Worcester Sch. Comm., 777 F.2d 776, 784 (1st Cir. 1985).

[22] Carpenter v. United States, 138 S. Ct. 2206, 2218, 2220, 2222–23 (2018) (holding that police required a warrant to request cell phone records containing details about an individual's

B. *Text Messages and the Fourth Amendment*

The Supreme Court has not provided explicit guidance on the objectively reasonable expectation of privacy of text messages.[23] In *Kyllo v. United States*, the Court focused generally on technology's limits and to what extent it could be allowed to "shrink the realm of guaranteed privacy." [24] The Court ultimately adopted an approach that considered whether the technology is publicly available and whether it is being used to access information that would be unknowable without a physical trespass.[25] The *Kyllo* test was first applied to cell phones in *Riley v. California*, where the court noted the "immense storage capacity" of cell phones compared to other pieces of technology.[26] Because a cell phone contains information that extends beyond mere "physical records," such as photographs, calendars, contact lists, and text messages, it is most comparable to a personal diary.[27] Since text messages offer insight into an individual's private life, additional Fourth Amendment protections are necessary, and the Court held that a warrant is generally required before law enforcement can search one's cell phone.[28]

In *City of Ontario v. Quon*, the Court examined whether a government employer's search of an employee's government-provided cell phone was a Fourth Amendment search.[29] The majority held that the search was reasonable on other grounds, assuming that the employee retained a reasonable expectation of privacy in text messages on the phone, without confronting the issue directly.[30] Furthermore, the Court reiterated that the Fourth Amendment exists to protect the "privacy, dignity, and security of persons against certain arbitrary and invasive" searches by the police.[31] Beyond this guidance, the issue of an objectively reasonable expectation of privacy in sent text messages retrieved from a recipient's phone was a matter of first impression in Massachusetts.[32]

---

whereabouts since information was not voluntarily disclosed and it would be unreasonable to expect individuals to assume the risk that the police would have access to a "comprehensive dossier of [their] physical movements").

[23] Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1093–94 (Mass. 2021).

[24] Kyllo v. United States, 533 U.S. 27, 34 (2001).

[25] *Id.* at 40.

[26] Riley v. California, 573 U.S. 373, 393 (2014).

[27] *Id.* at 375, 394.

[28] *Id.* at 394, 401, 403.

[29] City of Ontario v. Quon, 560 U.S. 746, 750 (2010).

[30] *Id.* at 760, 764.

[31] *Id.* at 755–56.

[32] Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1093–94 (Mass. 2021).

C. *Interpretations in State Courts and Other Jurisdictions*

State courts are free to interpret constitutional issues and extend individual rights when the Supreme Court is silent on a matter.[33] Justice Brennan argued that state courts have the ability to extend individual liberties even beyond the scope of the U.S. Constitution in order to maintain the "constitutional structure of . . . a free society."[34] While many state constitutions mirror the federal one, many individual rights first originated in state constitutions, so state courts should feel empowered to "breathe new life" into federal protections to safeguard individual freedoms.[35] The "common dialogue" between state and federal courts is essential to federalism, and state constitutional law can be an arena to develop jurisprudence when an issue has never been faced before.[36]

When analyzing new issues under state constitutional law, state courts often look to persuasive authority from other jurisdictions that have decided the issue, just as the SJC did in *Delgado-Rivera*.[37] State courts in Rhode Island and Washington analyzed the objectively reasonable expectation of privacy in sent text messages and applied their own "independent judgment" to these constitutional questions not yet established in federal jurisprudence.[38] In *State v. Patino*, the Supreme Court of Rhode Island held that one's objectively reasonable expectation of privacy does not extend to text messages on another's phone.[39] This holding relied on the sender's relinquishment of control once the text messages were on the recipient's phone, as the sender reasonably assumed the risk of disclosure by voluntarily sending the text message to a third party.[40] In *State v. Hinton*, the Supreme Court of Washington faced similar facts yet came to the opposite conclusion, holding that one maintained an objectively reasonable expectation of privacy in sent text messages even when there were copies on someone else's phone.[41] This decision hinged on the illegal search of the phone since the defendant could not have reasonably assumed the "risk of

---

[33] *See generally* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 489 (1977) (arguing that state courts can interpret constitutional rights to provide greater protection for individual rights); Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1307, 1332 (2017) (validating Brennan's argument and advocating for the continued importance of state courts developing constitutional jurisprudence).

[34] Brennan, *supra* note 33, at 491, 495.

[35] Brennan, *supra* note 33, at 501, 503.

[36] *See* Liu, *supra* note 33, at 1332–33.

[37] *See Delgado-Rivera*, 168 N.E.3d at 1094, 1096.

[38] *See id.*; Liu, *supra* note 33, at 1338.

[39] State v. Patino, 93 A.3d 40, 57 (R.I. 2014).

[40] *Id.* at 55–56.

[41] State v. Hinton, 319 P.3d 9, 14, 16 (Wash. 2014).

intrusion by the government" when the police conducted an illegal search.[42]

In both cases, the police illegally searched another person's phone and attempted to use that evidence against the defendant.[43] While the Court in *Hinton* focused on the effect of the police action of exposing the messages, the Court in *Patino* did not consider the nature of the search.[44] *Hinton* recognized that privacy cannot be held to such a rigid definition "[g]iven the realities of modern life," justifying an objectively reasonable expectation of privacy in the text messages.[45] But *Patino* adhered to an inelastic definition based primarily on property interest and ownership, and the Court did not find an objectively reasonable expectation of privacy in the text messages.[46] These diverging approaches in different states highlight the important role that state constitutional law plays in the federalist system.[47]

Even outside of the United States, though in another common-law legal system,[48] the Supreme Court of Canada held that an individual enjoys a reasonable expectation of privacy in sent text messages found on another's phone.[49] Under the totality of the circumstances test, the Court did not consider the lack of control of the recipient's phone fatal to the analysis; instead, it considered "the electronic conversation itself" to be the "subject matter of the search" and not the written records that existed on either phone.[50] The Court defined the search area as "a private electronic space accessible" only by the defendant and the text message recipient.[51] Thus, both of them had an objectively reasonable expectation of privacy in the messages regardless of what the police did to gain physical access.[52]

In *Commonwealth v. Delgado-Rivera*, the SJC confronted the same issue of an objectively reasonable expectation of privacy in sent text messages that faced the courts in Rhode Island, Washington, and Canada.[53]

II. The Court's Opinion

A. *Background of Case*

On September 18, 2016, a police officer in McAllen, Texas, followed a

---

[42] *Id.* at 15.

[43] *Patino*, 93 A.3d at 60; *Hinton*, 319 P.3d at 11, 14–16.

[44] *Compare Hinton*, 319 P.3d at 11, 14–16, *with Patino*, 93 A.3d at 60.

[45] *Hinton*, 319 P.3d at 15.

[46] *Patino*, 93 A.3d at 55–57.

[47] Brennan, *supra* note 33, at 503.

[48] *Where Our Legal System Comes From*, GOV'T OF CAN., https://perma.cc/WPS5-M6AP (last updated Sept. 1, 2021).

[49] R v. Marakah, [2017] 2 S.C.R. 608 at 611.

[50] *Id.* at 610.

[51] *Id.* at 611.

[52] *Id.*

[53] Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1093–94 (Mass. 2021).

vehicle suspected of containing narcotics.[54] After witnessing the driver, Leonel Garcia-Castaneda, commit a traffic violation, the officer stopped him and conducted canine, physical, and X-ray searches of the vehicle.[55] The officer did not find any contraband, but after searching Garcia-Castaneda's phone, he found text messages exchanged with a phone number in Massachusetts that appeared to discuss narcotics shipments and payments.[56] The officer alerted the police in Massachusetts, who looked into the phone number that sent the texts to Garcia-Castaneda and learned that it belonged to Jorge Delgado-Rivera.[57] A subsequent investigation resulted in indictments against Delgado-Rivera, Garcia-Castaneda, and five other co-defendants based upon the evidence of the text message exchanges revealed during the illegal police search in Texas.[58]

Garcia-Castaneda moved to suppress the evidence from the search because it was warrantless and unsupported by probable cause; accordingly, the judge excluded the evidence from the search because it was illegal.[59] Delgado-Rivera also claimed that the search violated his rights under the Fourth Amendment and sought to join the motion, which the judge allowed.[60] The Commonwealth sought an interlocutory appeal on this ruling, and the SJC heard the case.[61]

Before the SJC was one central issue: whether Delgado-Rivera had an objectively reasonable expectation of privacy in the text messages that he sent to Garcia-Castaneda, thus making the search of the phone a search of Delgado-Rivera under the Fourth Amendment.[62]

B. *Court's Holding and Analysis*

Relying on existing jurisprudence and persuasive opinions from other jurisdictions, the SJC held that there was no Fourth Amendment search, because Delgado-Rivera had no objectively reasonable expectation of privacy in the sent text messages, and allowed the evidence to be admitted against him.[63] To support its holding, the SJC determined that Delgado-Rivera lost control of the text messages once they were delivered to Garcia-Castaneda, effectively exposing those messages to the public.[64] The SJC noted the factual similarities in the *Patino* decision in Rhode Island

---

[54] *Id.* at 1089.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1089 n.3 (Mass. 2021).

[60] *Id.* at 1089.

[61] *Id.* at 1089–90.

[62] *Id.* at 1093–94.

[63] *Id.* at 1097.

[64] *Id.* at 1094–95.

demonstrating lack of control, specifically that the "memorialized record of the communication . . . was beyond the control of the sender" just as it would be if it was another form of written correspondence such as letters or email messages.[65] The delivery of a letter terminates the sender's objectively reasonable expectation of privacy, so the same principle would apply to a text message.[66] Like email messages that "create a record beyond the control of the original sender," text messages are "readily and lastingly available," so it would be unreasonable for a sender to continue to claim an expectation of privacy after they are sent.[67] The SJC considered whether text messages were more akin to oral conversation due to their casual and frequent exchange, but the Court determined that they should not be treated any differently than other forms of written communication.[68]

The SJC also connected the lack of control with the exposure to the public, rejecting a counterargument that it should distinguish between private exchanges and "communications that are released 'more generally.'"[69] Because text messages can be easily shared with others, Delgado-Rivera effectively exposed the messages to the public when Garcia-Castaneda assumed control and had the power to "share or disseminate the sender's message."[70] Since the text messages were "almost instantaneously disbursable," Delgado-Rivera assumed the risk that others would be able to see the text messages on Garcia-Castaneda's phone, including the police.[71] This potential exposure frustrated the expectation of privacy and made it no longer reasonable; the "once-private" information became "subject to disclosure" as recipients gained full control of the message from the sender and could show the text message to almost anyone by forwarding the message or posting it on social media.[72] Because Delgado-Rivera assumed the risk that his sent text messages "might be made accessible to others," the SJC applied the third-party doctrine and found that he had lost any reasonable expectation of privacy.[73]

The SJC also explicitly rejected the *Hinton* decision from Washington, which the lower court judge had relied upon in allowing Delgado-Rivera to join the motion to suppress.[74] Further, the SJC noted that most other courts have declined to extend Fourth Amendment protection to similarly sent text

---

[65] Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1094 (Mass. 2021).

[66] *Id.* at 1094–95.

[67] *Id.*

[68] *Id.* at 1096 (noting that an objectively reasonable expectation of privacy could be asserted in oral conversations "in very limited circumstances").

[69] *Id.* at 1095.

[70] *Id.* at 1095–96.

[71] Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1095 (Mass. 2021).

[72] *Id.* at 1095–96.

[73] *Id.* at 1095.

[74] *Id.* at 1097.

messages.[75]

ANALYSIS

III. The SJC Erred in Its Decision by Relying Too Heavily on Cases with Factual Distinctions and Deemphasizing the Impact of Wrongful Police Conduct on Defendant's Assumption of the Risk Under the Third-Party Doctrine

A. *The SJC Should Have Noted Factual Distinctions in Other Cases*

The SJC claimed that other courts that have considered the issue "uniformly have concluded that the Fourth Amendment does not protect" sent text messages on someone else's phone.[76] However, the cases cited to support this assertion were factually distinguishable from *Delgado-Rivera*, which dilutes their reliability as precedent.[77]

Unlike Delgado-Rivera, the defendants in several cited cases had a reduced expectation of privacy in their messages even before the police got involved.[78] In *City of Ontario v. Quon*, the Supreme Court ruled that the search did not violate the Fourth Amendment, without deciding the issue of reasonable expectation of privacy.[79] However, because the defendant was a city employee using a government-provided phone, the government had existing access to a transcript of the defendant's text messages as the subscriber to the phone plan.[80] The defendant was also the subject of an "investigation of work-related misconduct," which would have made the search "reasonable and normal" without infringing upon his Fourth Amendment rights.[81] The SJC also cited *United States v. Lifshitz* to support its holding that there was no reasonable expectation of privacy in Delgado-Rivera's electronic communications.[82] However, the defendant consented to police monitoring of his computer usage as a condition of his probation, so his reduced reasonable expectation of privacy is not comparable to Delgado-Rivera.[83]

Additionally, the SJC based its decision on the premise that Delgado-Rivera lost any objectively reasonable expectation of privacy when he relinquished control and sent the text messages, effectively exposing them to the public and assuming the risk that they "might be made accessible to

---

[75] *Id.*

[76] *Id.*

[77] *See* Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1094–97 (Mass. 2021).

[78] *See id.* at 1094.

[79] City of Ontario v. Quon, 560 U.S. 746, 749 (2010).

[80] *Id.* at 750–52.

[81] *Id.* at 757, 764.

[82] *Delgado-Rivera*, 168 N.E.3d at 1094–95.

[83] *See* United States v. Lifshitz, 369 F.3d 173, 177 (2d Cir. 2004).

others."[84] However, the SJC cited cases to support this finding where defendants had taken action that showed that they expected—or even encouraged—the recipient of the message to share the content more widely.[85]

The SJC relied on *United States v. Dunning*, where the Court found that the defendant had no objectively reasonable expectation of privacy in a letter he sent to his girlfriend.[86] However, in the letter, the defendant encouraged his girlfriend to share the contents of the letter with her parents, thus relinquishing control of the content and extinguishing any reasonable expectation of privacy that he could subsequently assert.[87] The defendant effectively exposed the message to the public and assumed the risk that others would view the letter, even if he sought to limit access to a small circle.[88] Comparatively, Delgado-Rivera never took additional action to demonstrate that he intended to relinquish control or that he assumed the risk of others sharing his messages since he did not ask Garcia-Castaneda to share the message with anyone else.[89]

The SJC also cited *Alinovi v. Worcester School Committee*, where the Court held that the defendant had no objectively reasonable expectation of privacy in a term paper she wrote for a course.[90] The defendant shared the term paper with her professor for class discussion and with a co-worker who she thought would find it helpful, but she sought to exclude her principal from seeing it.[91] By exposing the content to some and not to others, she lost an objectively reasonable expectation that the paper would remain private and assumed the risk that individuals to whom she directly gave the paper would share it.[92] In contrast, Delgado-Rivera took no action to share his text messages or to authorize the sharing of those messages with anyone other than the recipient.[93] The fact that the defendants in *Dunning* and *Alinovi* were directly responsible for sharing the content of their messages dulls their persuasiveness in *Delgado-Rivera*.[94] Delgado-Rivera never actively encouraged Garcia-Castaneda to share the text messages so it would not be objectively reasonable to expect him to assume the risk that the text

---

[84] *Delgado-Rivera*, 168 N.E.3d at 1094–95.

[85] *See id.*

[86] United States v. Dunning, 312 F.3d 528, 531 (1st Cir. 2002).

[87] *Id.*

[88] *See id.* at 530–31.

[89] *See Delgado-Rivera*, 168 N.E.3d at 1089.

[90] Alinovi v. Worcester Sch. Comm., 777 F.2d 776, 786 (1st Cir. 1985).

[91] *Id.* at 778–79.

[92] *Id.* at 786.

[93] *See Delgado-Rivera*, 168 N.E.3d at 1089.

[94] *See* United States v. Dunning, 312 F.3d 528, 530–31 (1st Cir. 2002); *Alinovi*, 777 F.2d at 778–79.

messages would be shared.[95]

Lastly, the SJC considered *United States v. Bereznak*, where the defendant had no objectively reasonable expectation of privacy in text messages sent to a minor whose parents then shared them with the police.[96] Fulfilling the SJC's prediction that the recipient of a text message would gain "full control of whether to share or disseminate" the content,[97] the defendant assumed the risk that the recipient would reveal the contents of the message, thus eliminating an objectively reasonable expectation of privacy.[98] The defendant in *Bereznak* communicated with a minor and should have expected to assume the risk that the minor's parents would have access to the messages and could voluntarily disclose them to the police.[99] However, Delgado-Rivera was not communicating with a minor and Garcia-Castaneda did not voluntarily show the police the text messages.[100] These factual differences give considerably less weight to the application of *Bereznak* and the other cases cited in the SJC decision.[101]

B. *The SJC Failed to Acknowledge the Relationship Between Wrongful Police Conduct and Defendant's Ability to Assume this Risk Under the Third-Party Doctrine*

The Fourth Amendment protects people from "arbitrary and oppressive interference" by the police,[102] and the exclusionary rule prevents evidence from being admitted when the source is unlawful police conduct.[103] By failing to acknowledge the police misconduct in *Delgado-Rivera* and its relationship with the defendant's assumption of the risk, the SJC's decision disregarded the deterrence value of the exclusionary rule.[104]

The SJC applied the third-party doctrine but ignored the police misconduct in *Delgado-Rivera* that exposed the text messages.[105] An individual who has disclosed information to a third party has no reasonable expectation of privacy because that person has assumed the risk of disclosure.[106] However, when the information is disclosed because of police misconduct, the third-party doctrine should not apply because it is

---

[95] *See Delgado-Rivera*, 168 N.E.3d at 1089.

[96] United States v. Bereznak, No. 3:18-CR-39, 2018 WL 1993904, at *1–3 (M.D. Pa. Apr. 27, 2018), *aff'd*, 860 F. App'x 805 (3d Cir. 2021).

[97] *See Delgado-Rivera*, 168 N.E.3d at 1096.

[98] *Bereznak*, 2018 Pa. WL at *3.

[99] *See id.* at *1, *3.

[100] *Delgado-Rivera*, 168 N.E.3d at 1089.

[101] *See id.* at 1097.

[102] United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976).

[103] Elkins v. United States, 364 U.S. 206, 220 (1960).

[104] *See id.* at 217.

[105] *See Delgado-Rivera*, 168 N.E.3d at 1094–97.

[106] United States v. Jacobsen, 466 U.S. 109, 117 (1984).

unreasonable to expect an individual to assume the risk of police overreach and government intrusion.[107]

The SJC mentioned both *Patino* and *Hinton* but did not acknowledge the role of police misconduct in those cases.[108] In *Patino*, the police accessed a phone in the defendant's apartment and claimed to check whether someone had called about the injured child; instead, they read numerous messages with the express intention of gathering evidence that the defendant caused the injuries.[109] The owner of the phone was not present during the search nor did she voluntarily share the contents of the messages with police.[110] Ultimately, the Court held that the "defendant did not have an objectively reasonable expectation of privacy" in the sent text messages, despite the unlawful search of the phone.[111] In *Hinton*, the police also conducted an illegal search of the phone, but they also impersonated the recipient and induced the defendant via text message to meet the police for a drug deal.[112] The Court ultimately ruled that there was a reasonable expectation of privacy in the sent text messages.[113] The facts in *Hinton* were similar to *Patino* and *Delgado-Rivera*, though only the Court in *Hinton* recognized that, because of the police misconduct, the defendant had not voluntarily disclosed the text messages.[114]

Delgado-Rivera involved an instance of police misconduct done deliberately and in bad faith, which the SJC should have considered more, just as the *Hinton* Court did, and just as the *Patino* Court failed to do.[115] The police officer was not in a lawful position to access the text message exchange between Delgado-Rivera and Garcia-Castaneda and clearly overstepped his bounds to gather incriminating evidence.[116] Therefore, Delgado-Rivera could not reasonably expect that the police might

---

[107] *See* Peter C. Ormerod & Lawrence J. Trautman, *A Descriptive Analysis of the Fourth Amendment and the Third-Party Doctrine in the Digital Age*, 28 ALB. L.J. SCI. & TECH. 73, 145 (2018) (interpreting the third-party doctrine to require that "all information . . . be voluntarily conveyed to a third party before it loses Fourth Amendment protection" so there is no assumption of the risk with police misconduct).

[108] *Delgado-Rivera*, 168 N.E.3d at 1094, 1097.

[109] *See* State v. Patino, 93 A.3d 40, 43–44 (R.I. 2014).

[110] *Id.*

[111] *Id.* at 57.

[112] State v. Hinton, 319 P.3d 9, 11 (Wash. 2014).

[113] *Id.* at 16–17.

[114] *See id.* at 15–16.

[115] *See* Sharon L. Davies, *The Penalty of Exclusion—A Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1326–27 (2000).

[116] *Compare* Commonwealth v. Panetti, 547 N.E.2d 46, 46–47 (Mass. 1989) (finding that police had permission from property owner to access the crawlspace and were in a lawful position to hear the conversation "unaided"), *with* Commonwealth v. Delgado Rivera, 168 N.E.3d 1083, 1088–89 (Mass. 2021) (determining that the police officer was not otherwise in a lawful position to view the text messages).

wrongfully search the recipient's phone and reveal the content of the text messages.[117] Additionally, the SJC would better deter further police misconduct by finding that "deliberately unconstitutional" police misconduct bars evidence from being used against any victim of that illegal search.[118] Text messages may be easy to share with others and some recipients may elect to forward them to others or share them with police, but none of the recipients in these cases took these actions.[119] By finding that Delgado-Rivera assumed the risk of disclosure when it was police misconduct that knowingly exposed his messages to the public, the SJC undercut the security protections of the Fourth Amendment, which should not fall apart merely because there is a potential for involuntary disclosures.[120]

IV. The SJC Decision Will Have Negative Ripple Effects on Fourth Amendment Jurisprudence

In *Delgado-Rivera*, the SJC seemed to ignore the caution from the Court in *Riley v. California*: cell phones contain a huge amount of intimate and private information, and an unlawful search of a cell phone is akin to a ransack of one's house.[121] The principal takeaway of *Riley* is that the police should obtain a warrant before searching a cell phone, regardless of whether the information is requested from the provider or accessed directly through the cell phone itself.[122] Although it left some questions unanswered, *Riley* provided a framework for future decisions about cell phones and the objective reasonableness of an expectation of privacy.[123] But in *Delgado-Rivera*, the SJC departed from this framework and suggested that the police could avoid warrants as long as they access a sender's text messages through the recipient's phone.[124]

This holding will tip the scale in favor of law enforcement to the detriment of the people and contribute directly to structural inequalities in

---

[117] *See* Candice Gliksberg, Note, Decrypting the Fourth Amendment: Applying Fourth Amendment Principles to Evolving Privacy Expectations in Encryption Technologies, 50 LOY. L.A. L. REV. 765, 782–83 (2017) (arguing that the mere ability to access content is "not sufficient to extinguish a reasonable expectation of privacy" and that assumption of the risk includes only voluntary disclosures).

[118] *See* Davies, *supra* note 115, at 1326–28.

[119] *See Delgado-Rivera*, 168 N.E.3d at 1089, 1094; State v. Patino, 93 A.3d 40, 43–44 (R.I. 2014); *Hinton*, 319 P.3d at 11.

[120] *Delgado-Rivera*, 168 N.E.3d at 1095; *see Hinton*, 319 P.3d at 15 (". . . the mere fact that an individual shares information with another party and does not control the area from which that information is accessed does not place it outside the realm of . . . protection").

[121] Riley v. California, 573 U.S. 373, 394–96 (2014).

[122] Adam Lamparello & Charles E. MacLean, Riley v. California*: Privacy Still Matters, but How Much and in What Contexts?*, 27 REGENT U. L. REV. 25, 29 (2015).

[123] *See id.* at 27–29.

[124] *Delgado-Rivera*, 168 N.E.3d at 1089, 1097.

the law.[125] Criminal law has largely developed in a way that regulates these "structural imbalances" to ensure that "intrinsically disadvantaged" groups are not overpowered by the government.[126] And while technology has enabled some individuals to more easily protect their private information, law enforcement has also benefited from stronger surveillance tools.[127] Countries with common-law systems may be better equipped than countries with statutory systems to account for these inequities and reinterpret laws and norms, but courts will not address inequality if they are unwilling to follow the *Riley* holding.[128]

Additionally, the SJC ruled that this lack of an expectation of privacy in sent text messages was objectively reasonable without including research to support the finding.[129] Empirical studies are a powerful tool to support court holdings in matters of first impression, but the SJC did not cite research that measures objective reasonableness by societal standards.[130] The effectiveness of empirical research would be especially relevant in this case, as opinion polls suggest that people have a higher expectation of privacy in digital information than what is recognized as objectively reasonable by the courts.[131] Even if relying on case law alone, the SJC should have considered "all of the circumstances surrounding the search . . . and the nature of the search . . . itself" to determine the objectively reasonable expectation of privacy.[132] Yet the SJC disregarded the fact that the search of Garcia-Castaneda's cell phone was ultimately held to be illegal.[133] Thus, the SJC's failure to check the discretionary power of law enforcement in *Delgado-Rivera* poses a threat to all privacy under the Fourth Amendment and not just the privacy of those subject to a few arbitrary searches.[134]

With its implicit disregard of *Riley*, this decision could easily lead to a slippery slope where the lack of an objectively reasonable expectation of privacy in sent text messages on someone else's phone could extend to those

---

[125] *See generally* Bert-Jaap Koops, *Law, Technology, and Shifting Power Relations*, 25 BERKELEY TECH. L.J. 973, 974–75 (2010) (exploring how technology has affected power shifts in law enforcement and arguing that case law is one way to address inequality).

[126] *Id.* at 978.

[127] *Id.*

[128] *See id.* at 1027; *see also* Bert-Jaap Koops & Ronald Leenes, '*Code' and the Slow Erosion of Privacy*, 12 MICH. TELECOMMS. & TECH. L. REV. 115, 184, 188 (2005).

[129] *See Delgado-Rivera*, 168 N.E.3d at 1094.

[130] *Id.*; *see generally* Christine S. Scott-Hayward et al., *Does Privacy Require Secrecy? Societal Expectations of Privacy in the Digital Age*, 43 AM. J. CRIM. L. 19, 22 (2015) (arguing that courts should rely more on empirical research when determining objective reasonableness of an individual's expectation of privacy).

[131] *Id.* at 46, 49.

[132] United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985).

[133] *Delgado-Rivera*, 168 N.E.3d at 1089.

[134] *See* Julian Sanchez, *Encryption Originalism*, CATO INST. (July 16, 2021), https://perma.cc/E85E-NCDF.

same messages on one's own phone.[135] Since those text messages are identical copies of the same "memorialized record of the communication" that is technically "beyond the control of the sender," this decision could lead to an untenable shrinking of the reasonable expectation of privacy that could allow the police to access an individual's cell phone without implicating the Fourth Amendment.[136] The SJC likely did not intend to extend the doctrine in such a manner, but if a similar fact pattern were to appear before the Court in the future, the holding in *Delgado-Rivera* could warp the case law against itself.[137]

The SJC referenced encrypted messaging services but acknowledged that the issue is outside the scope of *Delgado-Rivera*.[138] In a separate case, *Commonwealth v. Carrasquillo*, the SJC held that a sender of encrypted messages over Snapchat had no objectively reasonable expectation of privacy over the content because he did not "adequately 'control[] access' to his Snapchat account."[139] Snapchat is one of many encrypted messaging services that are becoming more popular, particularly among people who use them for illegal purposes.[140] Thus, cases involving encrypted messaging may come before courts more frequently, especially as law enforcement asserts a belief in their absolute right to decode and access encrypted messages in the interest of investigating accused criminals.[141] If a court were to side with law enforcement and hold that there is no objectively reasonable expectation of privacy in encrypted messages, even when a sender has taken all possible steps to shield the information from the public, the Fourth Amendment would be manipulated beyond repair, and the SJC's decision in *Delgado-Rivera* will have facilitated that erosion.[142]

---

[135] *See* Riley v. California, 573 U.S. 373, 394, 401–03 (2014).

[136] *Delgado-Rivera*, 168 N.E.3d at 1094.

[137] *See id.* at 1097.

[138] *Id.* at 1093, 1095.

[139] Commonwealth v. Carrasquillo, 179 N.E.3d 1104, 1120 (Mass. 2022).

[140] Adi Gaskell, *Cybercriminals Are Using Encrypted Chat Apps as Illegal Marketplaces*, CYBERNEWS https://perma.cc/94PP-FKQD (last updated Sept. 28, 2021) (announcing high growth in downloads of two encrypted messaging applications, Signal and Telegram, but also mentioning that they are ripe with undetectable illegal activity); *see* David Nield, *7 Apps That Will Let You Send Disappearing Messages*, POPULAR SCI., https://perma.cc/TUF4-KWDC (last updated Jun. 27, 2022) (mentioning the most popular encrypted messaging services).

[141] *See* Tonya Riley, *The Cybersecurity 202: Encrypted Messaging App Signal Finds Serious Flaws with a Phone Cracking Tool Favored by Law Enforcement*, WASH. POST (Apr. 22, 2021, 7:46 AM EDT), https://perma.cc/PCM3-5XNX.

[142] *See* Sanchez, *supra* note 134 (supporting the idea that the Founders used encryption and ciphers to secure personal communications against general warrants).

V. The SJC Should Have Adopted a Standard That Appropriately Applies the Principles of the Fourth Amendment

A. *The SJC Should Have Held That Defendants Cannot Assume the Risk of Wrongful Police Conduct Exposing Their Sent Text Messages*

The SJC should have interpreted the Fourth Amendment in *Delgado-Rivera* to recognize an objectively reasonable expectation of privacy when police misconduct is the source of exposure because individuals cannot assume the risk of an arbitrary and illegal government search that unjustifiably encroaches on their privacy.[143] This interpretation of the third-party doctrine ensures that law enforcement assumes the risk of police misconduct rather than the individual who is subject to the search.[144] However, in *Delgado-Rivera*, the SJC wrongfully equated the right of access and the risk of disclosure with the extinguishment of an individual's objectively reasonable expectation of privacy.[145]

A central tenet of the third-party doctrine is the risk that an individual reasonably assumes when sending a written communication and voluntarily disclosing information to someone else.[146] That individual loses any reasonable expectation of privacy and assumes the risk of disclosure when the individual sends a message to someone else, knowing that the content could be revealed by the recipient.[147] The SJC cited *Dunning* and *Alinovi*, both of which display this approach in action, because the defendants had shared the information in their messages and knowingly exposed the content to the public.[148] While not every case under the third-party doctrine would require such overt action, the sender assumed the risk of disclosure by failing to further protect the information, and the recipient of the message did indeed voluntarily disclose the content.[149]

Even voluntary disclosure by the recipient to the police would be within the bounds of the third-party doctrine, since the sender properly assumed

---

[143] *See* Brian Frazelle & David Gray, *What the Founders Would Say About Cellphone Surveillance*, AM. C.L. UNION (Nov. 17, 2017, 1:45 PM), https://perma.cc/LXB2-WXNP.

[144] *See* Gliksberg, *supra* note 117, at 782–83.

[145] *See* Gliksberg, *supra* note 117, at 782.

[146] United States v. Jacobsen, 466 U.S. 109, 117 (1984).

[147] *See id.* (requiring action to reveal private information to another in order for the expectation of privacy to be frustrated); Katz v. United States, 389 U.S. 347, 351 (1967) (finding that action taken to "preserve [something] as private" warrants constitutional protection and implying that failure to take that action would justify losing a reasonable expectation of privacy); Commonwealth v. Pina, 549 N.E.2d 106, 110 (Mass. 1990) (implying that there is no reasonable expectation of privacy since one of the factors in the reasonableness analysis is the precaution taken to protect privacy).

[148] United States v. Dunning, 312 F.3d 528, 530–31 (1st Cir. 2002); Alinovi v. Worcester Sch. Comm., 777 F.2d 776, 778–79 (1st Cir. 1985).

[149] *Jacobsen*, 466 U.S. at 117.

the risk that the recipient would voluntarily disseminate the content to others, including the police.[150] This situation occurred in *Bereznak* when the minor-recipient's parents shared the messages with the police out of concern for their child.[151] The defendant had no reasonable expectation of privacy where the third-party doctrine applied because the defendant assumed the risk of voluntary disclosure when sending the text messages.[152] The SJC considered this principle in *Delgado-Rivera* and the Court's holding would have been justified if Garcia-Castaneda had shared Delgado-Rivera's messages with the police.[153] However, Garcia-Castaneda did not share the messages with the police—the police conducted an illegal search of the phone to find the evidence that was used against Delgado-Rivera.[154]

The core of the SJC's ruling is that an individual sending a written message assumes the risk of involuntary disclosure due to police misconduct.[155] This holding is an unjust interpretation of the third-party doctrine that further exacerbates structural inequalities between law enforcement and individuals in the digital age.[156] The SJC improperly interprets the doctrine and forces criminal defendants to be responsible for unlawful searches by the police by allocating the risk to individuals instead of law enforcement, effectively going against the principles of the Fourth Amendment.[157] In both *Patino* and *Hinton*, the source of the disclosure was the police's unlawful search without warrants or alternative justifications, and neither the sender nor the recipient voluntarily shared this content with the police.[158] The defendants should not be required to take additional action to safeguard their messages from police misconduct, and they should not be expected to assume the risk that law enforcement would conduct an illegal search.[159] Just because the police have the ability to access information by conducting an unlawful search, does not mean that the SJC should shrink an individual's Fourth Amendment protection to allow space for this wrongful action.[160] The SJC should have considered the larger context of the unlawful police search in *Delgado-Rivera* when determining the objectively reasonable

---

[150] *Id.*

[151] United States v. Bereznak, No. 3:18-CR-39, 2018 WL 1993904, at *1, *3 (M.D. Pa. Apr. 27, 2018), *aff'd*, 860 Fed. App'x 805 (3d Cir. 2021).

[152] *Id.* at *3.

[153] *See* Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1094–96 (Mass. 2021).

[154] *See id.* at 1089.

[155] *See id.* at 1095.

[156] *See* Koops, *supra* note 125, at 978–79.

[157] *See* Gliksberg, *supra* note 117, at 782–83.

[158] State v. Patino, 93 A.3d 40, 43–44, 60 (R.I. 2014); State v. Hinton, 319 P.3d 9, 11, 15–16 (Wash. 2014).

[159] *See* Gliksberg, *supra* note 117, at 782–83.

[160] *See* Gliksberg, *supra* note 117, at 782.

expectation of privacy in sent text messages.[161]

B. *The SJC Should Have Recognized a Reasonable Expectation of Privacy in a Shared Digital Space Between Senders and Recipients of Text Messages*

Courts should rely on evidence-based law and empirical research to determine the contours of constitutional protection in a world where people have a higher expectation of privacy in digital content than that recognized by courts.[162] As society moves further into the digital age, and as changing circumstances force a reconsideration of objective reasonableness, empirical research can offer more clarity, guidance, and assistance to courts as they develop jurisprudence and determine Fourth Amendment protections of technology.[163] Thus, courts should consider the different perspectives that empirical research can offer on objective reasonableness.[164]

The SJC could have taken a novel approach and extended the physical trespass doctrine to include a shared digital space where one's reasonable expectation of privacy and property interest can protect content from warrantless police searches.[165] The Supreme Court of Canada took this approach in *R. v. Marakah*, holding that the subject of the search was the electronic conversation between sender and recipient so that both had a reasonable expectation of privacy in the "private electronic space," independent of the actual phone from which police accessed the messages.[166]

---

[161] *See* Commonwealth v. Delgado-Rivera, 168 N.E.3d 1083, 1089, 1097 (Mass. 2021).

[162] *See* Henry F. Fradella, *A Content Analysis of Federal Judicial Views of the Social Science "Researcher's Black Arts,"* 35 RUTGERS L.J. 103, 105 (2003) (noting that empirical evidence is "far richer and more accurate than the suppositions that thoughtful reflection can provide" and arguing that it should be considered an "'equally important source of authority'" for courts (quoting David L. Faigman, "*Normative Constitutional Fact-Finding:" Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 544 (1991)); Scott-Hayward et al., *supra* note 130, at 46, 49, 58–59 (citing a study that determined that people have a higher expectation of privacy in digital content and mentioning that "empirical research . . . can assist judges in . . . constitutional fact-finding" by combining "normative principles and empirical evidence"). *See generally* Jeffrey J. Rachlinski, *Evidence-Based Law*, 96 CORNELL L. REV. 901, 901, 910-14, 923 (2011) (defining evidence-based law and noting the potential impact of empirical studies on court decisions).

[163] *See* Scott-Hayward et al., *supra* note 130, at 46, 49, 58–59 (". . . we sought to be forward-looking by ascertaining what 'society' feels are reasonable expectations of privacy with regard to a range of digital information . . . . Our hope is to provide empirical data upon which the courts can make 'evidence-based law' as they move forward with setting the parameters for moving the Fourth Amendment into the digital age.").

[164] *See* Fradella, *supra* note 162, at 105; Scott-Hayward et al., *supra* note 130, at 46, 49, 58–59.

[165] *See* United States v. Jones, 565 U.S. 400, 407–08 (2012) (contending that both trespassory intrusions and intrusions upon one's reasonable expectation of privacy can violate the Fourth Amendment); *cf.* Riley v. California, 573 U.S. 373, 393–94, 401–03 (2014) (finding that the sheer amount of information contained on cell phones heightens privacy interests and calls for protection from warrantless government searches).

[166] *R v. Marakah*, [2017] 2 S.C.R. 608 at 610–11.

Marakah expanded the jurisprudence in a novel way, but this approach is also consistent with the common-law tradition of judicial systems "adapt[ing] to . . . challenges" of the digital age.[167]

The *Marakah* court's approach is also consistent with Justice Brennan's philosophy that state courts should be a source of independent constitutional protection when federal courts have not faced an issue before or when federal protections fall short.[168] After all, it was not the first time that the SJC declined to follow the federal interpretation of the Fourth Amendment in favor of greater protection for criminal defendants.[169] Until the Supreme Court has an opportunity to reconsider *Quon* and determine the reasonable expectation of privacy in text messages, the SJC and other state courts should do as much as they can to protect individual liberties threatened by government intrusion, something that the SJC failed to do in *Delgado-Rivera*.[170]

CONCLUSION

The SJC held in *Commonwealth v. Delgado-Rivera* that there is no objectively reasonable expectation of privacy in sent text messages because the sender of those messages has relinquished control and assumed the risk that the information could be disclosed to others. By applying the Fourth Amendment precedent to a new fact pattern, the SJC believed that it was following the direction taken in other jurisdictions. Instead, the SJC interpreted the doctrine in a manner that lessens Fourth Amendment protections. Not only are the cited cases factually distinguishable, but the police uncovered the defendant's text messages through an illegal search, and it would be unreasonable to expect the sender to have assumed that risk. The SJC's failure to consider this impact means that *Delgado-Rivera* will have negative effects on future decisions, particularly as people retain a high expectation of privacy in their own digital content, as law enforcement continues to wage a war against privacy in digital information, and as technology remains constantly present in everyone's life.

By interpreting the question in a rigid manner, the SJC missed an opportunity to create a new standard that more appropriately protects private information on someone's cell phone by accounting for unlawful police conduct and its impact on the sender's ability to assume a risk that the recipient would disseminate the information. Alternatively, the SJC could have recognized a property interest in a shared digital space that would be

---

[167] *Id.* at 611.

[168] *See* Brennan, *supra* note 33, at 491, 495; Liu, *supra* note 33, at 1333.

[169] *See, e.g.*, Commonwealth v. Gonsalves, 711 N.E.2d 108, 111 (Mass. 1999) (declining to follow federal jurisprudence and requiring police to establish a reasonable safety concern before ordering a driver out of a motor vehicle).

[170] *See* Brennan, *supra* note 33, at 491, 503.

free from unwarranted governmental intrusion, expanding the scope of protection from unlawful searches, just as Canada has done. This decision lessens individual protection while doing nothing to deter police misconduct or disincentivize bad behavior.

Justice Brennan championed a judicial philosophy that encouraged state courts to take individual liberties further than federal courts to assure their citizens of the "full protections of the federal Constitution."[171] Unfortunately, the SJC's decision in *Commonwealth v. Delgado-Rivera* does not take the opportunity to provide more protection for the people of Massachusetts, thus endangering their constitutional rights and contributing to a significant erosion of Fourth Amendment protections in the digital age.

[171] Brennan, *supra* note 33, at 491.