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NEW ENGLAND LAW REVIEW

VOLUME 60 | FALL 2025 | NUMBER 1

CONTENTS

SYMPOSIUM ISSUE
MORE THAN PLAY: HOW LAW, POLICY, AND POLITICS SHAPE AMERICAN YOUTH SPORT

FOREWORD

MaryCate Cassidy.....*xi*

RESPONSES TO *MORE THAN PLAY*

More on *More Than Play*
Dionne Koller.....*1*

Explicit and Primary Implied Assumption of Risk
Alfred C. Yen.....*31*

The Sports Parent's Predicament
Katharine B. Silbaugh.....*55*

NOTES

A Heartbeat Away: How a Two-Term President Could Serve a Third Term and Actions to Prevent It
Oscar Fullerton.....*63*

Knock, Knock. Who's There? It's Gideon: Tenants' Right to Counsel and the Massachusetts Eviction Crisis
Teresa Guerra….....*99*

Ordinary Criminal or Domestic Terrorist?: Addressing Inconsistencies and Deficiencies in U.S. Domestic Terrorism Laws
Rebecca Shan.....*133*

Litigating the Discretionary Enforcement of Public-Camping Laws Against the Homeless in the Wake of *City of Grants Pass v. Johnson*
Grace Keith.....159

A Law Fostering Innovation or Big Tech Manipulation?: The Unduly Broad Immunity Granted by Section 230 and Its Harmful Effects on Quiet Voices
Kate McQuaide.....191

Foreword

MaryCate Cassidy[*]

This past fall, the *New England Law Review* had the honor and privilege of hosting a symposium to explore and discuss an emerging area of the law: youth sports reform. As Dionne Koller asserts in her book, *More Than Play: How Law, Policy, and Politics Shape American Youth Sport*, and in her postscript, *More on More Than Play*, the industry of American youth sport suffers from a serious lack of regulation, which is perpetuated by preconceived notions, the great "myth" of youth sports, and the industries that benefit from its success. As a result, she argues, the law should pivot to protect youth sports' vulnerable participants rather than cater to the institutional interests.

In emphasizing the need for reform, Koller shows great admiration for youth sports. She approaches her writing in a way that persuasively advocates for reform and growth in this industry while maintaining a genuine respect for the conflicts she addresses. As did her colleagues, Alfred Yen and Katharine Silbaugh, who were invited by Professor Koller and the *New England Law Review* to participate in this issue and symposium panel on account of their diverse expertise and unique perspectives.

As the year has progressed, the dedication, discipline, and success so often celebrated in youth sports materialized within the *Law Review* membership. Practicing a kind of professional amateurism, the Associates and Editors of the *New England Law Review* dedicated substantial time, energy, and effort to ensure that this issue (and future issues of the *Law Review*) are replete with high-quality scholarship that contributes to relevant discourse and can walk alongside the legal professionals from whom we are inspired. This issue not only reflects the collective disciplined effort of our membership, but also the remarkable growth of our members' craft, confidence, and perspectives as we strove for professionalism, excellence,

[*] J.D. Candidate, New England Law | Boston (2026); Editor-in-Chief, *New England Law Review*, Vol. 60.

and integrity the whole year.

And like Koller and her contributors did so well at the symposium panel and in this issue, we hope that our readers find this issue of the *New England Law Review* to feature exceptional writing on novel, underdeveloped areas of the law that lead with our high regard for the legal profession. In all of the conversations enclosed within this volume, we hope that these pieces not only provide quality reading but also serve as tools to guide future discussions. We are immensely proud to debut the first issue of volume 60, and we hope you find as much enjoyment in it as we do pride.

More on *More Than Play*

DIONNE KOLLER*

I. Introduction

I started writing *More Than Play* after working with the Aspen Institute Sport & Society program's Project Play on their Children's Bill of Rights in Sports initiative.[1] Inspired by the United Nations Convention on the Rights of the Child, which states that children have, among other things, a right to play, the Children's Bill of Rights in Sports project did not propose legal rights for children with respect to sport but was intended to be a shared set of values. The goal was for sports organizations to endorse and operationalize these values as part of an effort to make children's wellbeing central to the youth sport experience. As a lawyer and legal academic, my initial goal was to write a law journal article that explored what youth sport in the United States would look like if the values expressed in the Children's Bill of Rights in Sports were translated into legal rights and protections. While the larger movement to expand rights for children remains an ongoing project, I believe the conversation should include children who participate in sports.

I had considerable enthusiasm for that work, and perhaps one day I will complete it. That work, however, was not what became *More Than Play*. After trying to write that piece, and workshopping the results, I hit the snag that ultimately was the catalyst for the book. When presenting my ideas, I was frequently asked questions about what American youth sport actually *was*. These questions helped me realize that, before I proposed solutions and made arguments for children having greater rights and protections related to their youth sport experience, I needed to back up and attempt to start at

* Professor of Law, University of Baltimore. Enormous thanks to MaryCate Cassidy and the members of the *New England Law Review* for selecting my book and putting on a terrific symposium, and to Professors Fred Yen and Kate Silbaugh for participating.

[1] Project Play, *Children's Bill of Rights in Sports*, ASPEN INST., https://perma.cc/NJ3A-V8NA (last visited Apr. 23, 2026).

the beginning, to explore a concept that likely most of us take for granted as entirely obvious. I needed, I believed, to first identify what American youth sport was, and I needed to adopt an interdisciplinary approach to do so.

That project became an article I published in the *Yale Journal of Law and the Humanities* titled *Identifying Youth Sport*.[2] The goal of that piece was to address what I saw as a gap in the legal literature, which largely overlooked youth sport, to explain the law and policy background conditions that permitted the activity to develop mostly unconstrained by federal or state regulation. I also wanted to list the key beneficiaries of this approach. I knew after writing that article, however, that there was much more work I wanted to do to explain how law and policy facilitate American youth sport, and that led to *More Than Play*.

Since the book was published, I am once again left with the sense that there is more to say, and I am grateful that the *New England Law Review* has permitted me the space to do so. I am also deeply grateful for Professor Katharine Silbaugh and Professor Alfred Yen's engagement with the book, as their analyses have given me much food for thought that I am certain will drive my additional work in this area. For now, this essay will highlight some of the issues that have emerged since I submitted the manuscript and will expand on an analysis I could not fully explore in writing the book, which is how youth sport reform is often stymied by predictions that change will doom the entire enterprise.

II. *More Than Play*'s Argument

The book takes up the question of what U.S. youth sport is by arguing that the features of our approach to the activity are not the result of happenstance but are instead permitted by the interplay of law and policy choices, including the choice not to regulate.[3] These choices have the effect of benefitting a range of actors (including two more I will highlight here) that have an interest in whether children participate in sport, and these actors claim a piece of the considerable surplus children's sport participation generates. As my title states, it is an approach that I conclude is much more than play.

The book makes this argument by first reviewing what we currently

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[2] Dionne Koller, *Identifying Youth Sport*, 35 YALE J.L. & HUMANS. 1, 1 (2024) [hereinafter Koller, *Identifying Youth Sport*].

[3] DIONNE KOLLER, MORE THAN PLAY: HOW LAW, POLICY, AND POLITICS SHAPE AMERICAN YOUTH SPORT (2025) [hereinafter KOLLER, MORE THAN PLAY] (summarizing material from my book in the following section).

know about youth sport—both what the usual messaging tells us youth sport is and what the relatively limited data shows. I then review what I argue are the underappreciated but important legal doctrines that permit youth sport to operate as it does; namely, the law and policy of sport and the law and policy of the child and family. In doing so, I explain the largely privatized structure of youth sport that Congress endorsed through the Ted Stevens Olympic and Amateur Sports Act and its rejection of the approach, common throughout the world, of a government agency with power to regulate. Pivotally, the largely privatized, unregulated youth sport system relies heavily on the legal power of parents. The law's emphasis on parental authority and the presumption that parents act in the best interests of their children (and the fact that children have few rights) provides a kind of legal shelter for the enterprise. I also explain the way the prevailing political ideology strongly influences the content of the youth sport experience, so that privatization and an emphasis on parental authority allow the values of the market (and now increasingly, the values of private equity investors) to define the experience. With all this background, I assert that we can better appreciate that U.S. youth sport is simply one particular approach, and not necessarily the only, or even best, method of engaging children in athletics.

I then explain that the key to fully understanding U.S. youth sport and understanding why the system is resistant to change is tracing the surplus the current model generates and revealing its distributional effects. In doing so, I draw on the work of sports philosophers to demonstrate that the surplus created by children who participate is represented by the difference between "play," which is an activity engaged in solely for the child's benefit, and "sport," which is an activity that generates benefits not only for those who participate but also for others. Importantly, the benefits are more than monetary, including values such as parental pride, national prestige, and general emotional boosts that persons connected to youth sport enjoy. The youth sport surplus can, therefore, be represented on a continuum, with children increasingly producing benefits for others as they move farther away from play-based activities and deeper into the professionalized youth sport model.

Finally, I demonstrate how the surplus created by our approach to youth sport flows to a wide range of stakeholders, from the youth sport industry, sport regulators, and state and local governments to parents, sports fans, future elite athletes, sports medicine practitioners, and society at large. I assert that this knowledge could help us move beyond the assumption that youth sport is somehow separate from systems of power in other sport settings that serve to appropriate value from athletes and, in some cases, lead

to athlete harm. We can instead see youth sport as it is, which is a necessary part of the wider global sport system with the same propensity to generate benefits for some at the expense of those who participate as all other levels of sport.

With this in mind, I outline below some additional thoughts about what youth sport is and how U.S. youth sport's law and policy background conditions are shaped by highlighting four issues that have emerged since I submitted *More Than Play*'s final manuscript: private equity investment in youth sports; gambling on youth sports; bans on trans girls' participation in youth sports; and high school athlete name, image, and likeness deals. I will do so by contextualizing these issues through the framework and concepts I used in the book.

III. Additional Beneficiaries of Our Current Youth Sports Approach

In *More Than Play*, I asserted that an important part of identifying what American youth sport is and who it is for, was revealing the beneficiaries of our current approach. To do that, I used a distributional analysis that explained the individuals and entities that benefit from the prevailing youth sport model and what the burdens or downsides might be if we adopted a different approach—one that emphasized children's wellbeing and de-emphasized the type of professionalization that continues to characterize the experience today. I continue that approach here with two issues that have emerged since the publication of the book: increased private equity investment and gambling on youth sport. I explore private equity's interest in youth sport with reference to a phenomenon I examined in the book, which was state and local government investment in youth sport tourism. Moreover, I add to my previous analysis by incorporating new trends in youth sports. Specifically, I highlight some of the ways the emergence of name, image, and likeness (NIL) deals for high school athletes may change the benefit/burden analysis for children, and I also explain the way professional sports teams may benefit even more from our current approach to youth sports by directly investing in, and profiting from, the activity.

A. *Private Equity & Local Government Investment in Youth Sport*

It is not hard to find information about the economic side of the youth sport industry. Websites like the Youth Sports Business Report[4] (YSB) track the many deals that are happening in and around youth sports. As the New

[4] YOUTH SPORTS BUS. REP., https://perma.cc/957Y-6APC (last visited Apr. 23, 2026).

York Times reported, "youth sports are a $40 billion business. Private equity is taking notice."[5] The reporting on this investment explains in concrete terms the type of youth sport model that is attracting investors' attention while also detailing why the investment is such a good one. For instance, YSB explains that private equity investment is for: "[d]evelopment of state-of-the-art training facilities; [g]rowth of specialized youth leagues and tournaments; [t]echnology platforms for performance analytics, recruitment, and participation management; [d]irect-to-consumer equipment and apparel brands focused on youth athletes; and [r]egional and national youth sports event companies."[6]

Notably, these investments are not necessarily aimed at the health and wellbeing of the children who participate. Instead, as YSB states, private equity investment in youth sport is "creating a more professionalized youth sports infrastructure . . . ."[7] Moreover, investing in youth sports is considered a smart financial move because it seems parents will keep paying to chase the dream of their child's athletic success. As YSB reports, "[p]arents prioritize their children's sporting activities, often making sacrifices in other discretionary spending categories before reducing sports-related expenses. This creates a resilient revenue base for companies serving the youth sports market."[8]

It seems the capital investment is everywhere, including the state of Massachusetts. This past summer, YSB reported on a deal through which Master's Academy International (MAI) will re-develop an 82-acre site in the state to make it into a private sports academy serving 600 athletes. The state provided over $2.5 million in tax credits. The vision is to combine "high-

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[5] Joe Drape & Ken Belson, *Youth Sports Are a $40 Billion Business. Private Equity Is Taking Notice.*, N.Y. TIMES (July 9, 2025), https://perma.cc/6M44-XHD3; *see also* Jordan Berger, *Youth Sports Development Fuels Billions in Real Estate Investmen*t, CRE DAILY (July 9, 2025), https://perma.cc/R98K-MG3F.

[6] *Youth Sports: The Hidden Gem in Private Credit's $3 Trillion Sports Investment Boom*, YOUTH SPORTS BUS. REP. (Apr. 30, 2025), https://perma.cc/NA87-GYM9 [hereinafter *Youth Sports: The Hidden Gem*]. *See generally New 118-Acre Youth Sports Complex Set to Open in Nashville Tennessee*, YOUTH SPORTS BUS. REP., https://perma.cc/CP8J-JJFK (last updated Sept. 16, 2025) (highlighting what the investment is focused on and the revenue potential, stating that "[t]he complex features 18 tennis courts, an 82,000-square-foot training center, and a full-sized football field with NFL-style facilities" and that the "[r]evenue model includes sponsorship, academy programs, tournaments, and eventual membership fees for the training facility").

[7] *Youth Sports: The Hidden Gem*, *supra* note 6.

[8] *Youth Sports: The Hidden Gem*, *supra* note 6.

performance" sports training with school.[9] In addition to creating nearly 200 new jobs for the region, the new sports mega-campus promises to generate revenue for USA Fencing, the National Governing Body for the sport, which reportedly has partnered with MAI and has been promised $350,000 in a "minimum" annual revenue guarantee, with the potential of up to $1 million.[10]

In my home state of Maryland, similar investments are increasingly part of the youth sports landscape. For instance, private equity investors acquired Ripken Baseball and the Ripken Experience, started in Aberdeen, Maryland by former Baltimore Oriole Cal and his brother Bill Ripken. Ripken Baseball promises tournaments, "week-long experiences," coaching, and state-of-the-art facilities to children who play baseball.[11] Ripken Baseball has at least eight locations throughout seven states[12] and professional trip planners to help families and teams have a "first-class" experience.[13] The cost to attend ranges from $330 to over $600 per child.[14]

Ripken Baseball's facility in Pigeon Forge, Tennessee (home of, among other things, Dollywood) well represents what private equity investment in youth sport can do for a community, at least economically. YSB states that Ripken Baseball's facilities have "welcomed more than 750,000 unique visitors, generating 480,000 room nights and an estimated $320 million in total economic impact for the city," and the extension of Ripken Baseball's agreement with the City of Pigeon Forge promises to continue the area's "sports tourism momentum."[15] Places like Pigeon Forge, and Ripken Baseball's private equity investors, count on parents paying the steep costs for their children to play youth sports. The media details that the primary beneficiaries of these approaches are state and local governments and the investors who bring these plans to them. Projects and deals like this are happening across the United States.

As I wrote in the book, it is unclear how much the children participating

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[9] *Masters Academy International Plans $83 Million Youth Sports Campus in Massachusetts*, YOUTH SPORTS BUS. REP., https://perma.cc/GV3S-56RS (last updated July 31, 2025).

[10] *Id.*

[11] *The Ripken Experience Aberdeen*, RIPKEN BASEBALL, https://perma.cc/7P58-3FEE (last visited Apr. 23, 2026).

[12] *Ripken Baseball Extends Pigeon Forge Partnership Through 2035, Continuing $320M Economic Impact*, YOUTH SPORTS BUS. REP. (Aug. 21, 2025), https://perma.cc/D7R6-FMP2 [hereinafter *Ripken Extends Pigeon Forge Partnership*].

[13] *The Ripken Experience Aberdeen*, *supra* note 11.

[14] *Find an Event*, RIPKEN BASEBALL, https://perma.cc/5NGU-PTU3 (last visited Apr. 23, 2026).

[15] *Ripken Extends Pigeon Forge Partnership*, *supra* note 12.

in sport benefit from these expensive facilities and the travel their families undertake to access them. On the one hand, travel to places like Pigeon Forge can provide the opportunity for positive family experiences. On the other hand, for the child, the travel is not simply a vacation but comes with a commitment to play a certain number of games or otherwise perform. To do that, the traveling child-athlete no doubt puts in time training to excel. While that can be a unique and enjoyable experience, it can also be exhausting. And, as the Aspen Institute and others have highlighted, it can significantly tax a family's finances.[16] Thus, as I concluded previously, while the more-is-more approach may certainly be true for youth sport investors and local governments, it may not be so for children and their families.

Moreover, projects like MAI also have obvious beneficiaries. Massachusetts hopes to generate more jobs, and the owners of the academy will enjoy the profits from the tuition and fees they charge. Yet, here too, it is unclear what the benefits are for children. The facility may certainly provide a sports-inclined child with top-notch training facilities that may be better than what families could otherwise access. However, a facility emphasizing sports training combined with education may do much more of the former and little of the latter. It also denies children who attend the benefit of taking a break—when your sports training and school are combined, the ability to have outside sport friendships and peer experiences may be limited. In this way, private sports training academies can bring to mind Chinese or Soviet-era state-run youth sport programs.

B. *The Sports Betting Industry*

A second category of stakeholder who benefits from our current approach to youth sport, that I did not list in *More Than Play*, is the sports betting industry. The professionalization of youth sport, including the investment in state-of-the-art facilities and sports tourism, combined with the widespread legalization of sports gambling, predictably brought betting into American youth sport.

In the book, I discussed the government's usual "hands-off" approach to sport generally, and youth sport specifically. Sports betting, however, has long been an exception. This changed with the Supreme Court's decision in *Murphy v. NCAA*, which permitted states to legalize sports betting.[17] Many states, along with platforms such as FanDuel and DraftKings, have made

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[16] *See* Drape & Belson, *supra* note 5.

[17] John T. Holden & Marc Edelman, *A Short Treatise on Sports Gambling and the Law: How America Regulates its Most Lucrative Vice*, 2020 WIS. L. REV. 907, 909.

sports betting a regular, easily accessible presence in American life. While the states that have approved sports betting have prohibited the activity in connection with youth sports, sportsbooks that operate outside the reach of United States law do offer opportunities to bet on youth sports—reportedly in response to consumer demand.[18] For instance, this past summer, offshore sportsbooks were taking bets on the Little League World Series,[19] with some stating that betting on children's games can be more popular than betting on some professional sports.[20] Moreover, an Aspen Institute study in one U.S. county found that over one-quarter of the children surveyed reported that they participated in a youth sports event where adults gambled on the outcome.[21]

With all this activity, it is clear that an additional beneficiary of the professionalized approach to American youth sport is the sports gaming industry. As private equity investors continue to build out youth sport in a way that emphasizes adult, professional features such as collecting data on athletes, frequent travel and tournaments or other competitions, sports academies, and additional training to ensure child-athletes are as skilled as possible, betting on youth sport should not be surprising. Moreover, exposing children to sports betting through the expansion of the industry in connection with professional and college sports, and having children in some cases aware that their sports are a target for such activity, may contribute to normalizing sports betting. Thus, expanding the range of options to include youth sports for adult sports gamblers will likely yield even more sports betting revenue and help feed gambling addictions. In addition, the sports betting industry no doubt benefits from gambling being part of the youth sport experience because it can act to entice the next generation of sports gamblers.

As with private equity and local government investment in youth sport, with respect to youth sports and gambling, a more-is-more analysis likely applies—at least from the perspective of the gambling industry. And while there seems at this point to be a strong policy consensus against betting on

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[18] Bethany Rodgers, *'We're Betting on Everything': Little League World Series Fans Irked by Offshore Gambling*, GOERIE, https://perma.cc/W3QE-FVJZ (last updated Aug. 20, 2025, 7:20 AM EDT).

[19] Associated Press, *Offshore Betting on Little League Baseball World Series Irks Managers*, ESPN (Aug. 20, 2025, 5:56 PM ET), https://perma.cc/QQW3-PTFY [hereinafter *Offshore Betting Irks Managers*].

[20] *See, e.g.*, Rodgers, *supra* note 18.

[21] *Offshore Betting Irks Managers*, *supra* note 19.

children's sports, other policy interventions may be needed to deter the practice and to address the risk that some of today's child athletes may grow into tomorrow's gambling addicts.

C. *Additional Benefits and Burdens from Emerging Youth Sport Trends*

The distributional analysis in the book ended by outlining a benefits and burdens calculation of the current youth sport model for parents and children. I concluded that the picture was complex, with research demonstrating that parents are clearly burdened by the cost and time commitments of the current approach. Yet, as I explained, they also are beneficiaries. Parents enjoy emotional boosts by watching their children perform and excel, and parents also enjoy the satisfaction of knowing that they are "good" parents by doing what it takes to put their child in sports.

I also concluded that the picture for the children that are ostensibly the center of the youth sport experience—who it is all for—is even less clear. As I explained, although exercise and physical play are good for children and adolescents, there is no evidence that costly youth sport travel—such as an expensive family trip to a tournament in Pigeon Forge, Tennessee, or any of the other hubs for youth sport tourism—pays off for kids any more than a lower-cost, lower-stakes, recreational league game would. Moreover, while sports-related travel may benefit children because it creates positive family experiences, the extra training hours of a more professionalized approach to youth sport takes a toll on children's minds and bodies. It can also cost children time focusing on friends, school, and interests outside of sports. Children might be better off with a regular family vacation.

Emerging trends in youth sport muddy the picture even more. For instance, proposed legislation such as the federal Promoting Lifelong Activity for Youth (PLAY) Act, which would provide parents and guardians with tax credits for some of the expenses of their children's youth sport participation, can help alleviate the burden on family budgets from youth sport costs.[22] On the other hand, legislation that helps families pay for the current youth sport model does little to address the harmful aspects of increased professionalization. If tax credits spur parents to push their children further into overtraining, there is not much benefit to children, and there could be considerable downsides.

Similarly, there has been increased federal and state government interest

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[22] *Release: Gottheimer Announces Bipartisan Legislation to Make Youth Sports More Affordable*, JOSH GOTTHEIMER N.J.'S FIFTH DIST. (Sept. 8, 2025), https://perma.cc/J2EE-CR3C.

in investing in youth sport infrastructure. For instance, the proposed federal Youth Sports Facilities Act would change the eligibility for federal Economic Development Administration grants to include youth sports facilities. The goal of the legislation would be to help communities "develop tournament-capable facilities" to harness the economic power of youth sport tourism, and "stimulate adjacent business growth."[23] Legislation like this has the potential to bring additional benefits to children, as it is targeted to under-served communities with a need for sport facilities. However, if these projects are aimed at attracting tournaments, and do not provide full access for local children who play at more of a recreational level, these projects may exacerbate the burdens of the current youth sport model, without much additional benefit to children.

Another emerging youth sport trend that potentially changes the benefit/burden calculation of our current youth sport approach is high school athlete name, image, and likeness (NIL) deals. Since the NCAA's decision in 2021 to suspend its requirement that college athletes relinquish these rights as a condition of eligibility, many states have changed their rules for high school athletes.[24] Currently, over half of all states permit high school athletes to enter into NIL deals.[25] As Epstein, Grow, and Schulze note, these deals can be beneficial to children because they may earn sizeable incomes from their youth sports participation. A model that empowers children to earn potentially life-changing amounts from their youth sport investment can therefore be counted among the benefits of our current approach to youth sport. Changing our approach, as I imagined in the book, to a model that emphasizes play, friendship, health, and wellbeing may produce athletes that are not as marketable and therefore limit the potential for young athletes to earn NIL income.

However, the potential to earn NIL income presents new and very real downsides, as it may lead to parents pushing their children too hard in the hopes of cashing in. In this way, NIL may put even more burdens on children.[26] And, of course, the benefits children may reap through NIL

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[23] *Bipartisan Youth Sports Facilities Act: A Strategic Investment in Community Development and Child Wellness*, YOUTH SPORTS BUS. REP. (Apr. 14. 2025), https://perma.cc/FL3E-232P. *See generally* Youth Sports Facilities Act of 2024, S. 1419, 119th Cong. (2024) (explaining how some youth sports facilities can become eligible for certain grants).

[24] Adam Epstein et. al., *An Evolving Landscape: Name, Image, and Likeness Rights in High School Athletics*, 77 VAND. L. REV. 845, 846–47 (2024).

[25] *Id.*

[26] *See id.* at 847–48.

income may flow more to parents, who could exercise their authority to take the income as reimbursement for the years of expensive youth sports training they funded, or for any reason at all. Without state legislation protecting children, the benefit of NIL income, at least for the children who earn it, has the potential to become a substantial burden.[27]

Finally, the examples above show that the stakeholders I highlighted in the book—such as the youth sport industry and state and local governments—continue to maximize the benefits they reap from the current approach through, among other things, expanded youth sport tourism and additional youth sport facilities. As I said in the book, for these stakeholders, at least so far, more appears to be more. Similarly, at least some professional sports teams, another stakeholder mentioned in the book, have also found a way to generate more benefits from our current youth sport approach. Professional teams and leagues most obviously benefit by having a ready supply of talented athletes to fill their rosters and generate fan interest (and increasingly, with the legalization of sports betting, stimulate fans' interest in gambling). Now, it appears that professional teams and leagues are investing directly in youth sports not just to support the future athlete pipeline, but to profit from the children playing today. For instance, the Dallas Stars National Hockey League team reportedly has "monopolized" Texas youth hockey through their ownership of most ice rinks.[28]

All of these developments reinforce the conclusion I came to in the book, which is that it is not certain that our current approach to youth sport benefits children to the extent, and in the ways, that our collective discourse assumes it does. It is one thing to make the well-supported claim that physical activity is good for children. It is quite another to claim that our professionalized model for youth sport delivers equivalent benefits, or that the professionalized youth sport experience is necessary for children to reap the many positives of exercise and physical literacy. What is apparent, however, is that all of the stakeholders listed here, and in the book, enjoy very real gains from the American approach to youth sport. With so many stakeholders enjoying so many economic and other benefits, it is little surprise that, despite the years of discussion of the need for youth sport reform, meaningful change does not materialize. As the next part explains, change also does not materialize because when youth sports reform makes its way onto policy agendas (or reform would be incentivized due to

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[27] *See id.* at 871–72.

[28] Kenny Jacoby, *'They Control Everything': How the Dallas Stars Monopolized Texas Youth Hockey*, USA TODAY, https://perma.cc/6W2C-GGXG (last updated Aug. 3, 2025, 12:26 PM ET).

litigation), defenders of the status quo often respond that it will destroy, or at least substantially harm, the activity.

IV. Deterrents to Change: The "Sportspocalypse" Threat

It is not new to identify problems with today's prevailing approach to youth sport. What is relatively new, however, is that more states are showing an interest in addressing youth sport issues or are at least exploring the possibility.[29] Given this policy attention, it is important to highlight a common response to proposed reform that often frustrates attempts to make change. The response is that regulation, tort lawsuits, or athlete-focused reforms to the sports status quo will significantly harm, if not destroy, youth sport. In previous work, I labeled this the "sportspocalypse" argument,[30] and I assert that this threat has had an important impact on the law and policy approach to youth sport.

As I discuss in the book, the underlying message of the doomsday predictions in response to proposed sports reform is that law and policy may (and in some cases must) be used to *promote* sports and support sport sponsors, but should not be used to *regulate* the experience.[31] For adults who engage in sports, this approach has important justifications, such as respecting an individual's autonomy and liberty by allowing them to choose activities they enjoy and assume an activity's risks. Adult sport therefore has a strong foundation in the notion of consent. These important values, however, cannot as readily be applied to children who participate in sports. Yet courts and legislatures largely sidestep a more nuanced, fulsome policy analysis that could—and should—be applied to children's participation in sports. Instead, courts and legislatures often do not focus on what the prevailing approach to youth sport is doing to children, but instead heavily weigh what proposed regulation or potential liability *might* do to sport. The result can be a missed opportunity to create a safer, better, youth sport

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[29] *See, e.g.*, Youth Sports for All Act, Assemb. 749, 2025–2026 Leg., Reg. Sess. (Cal. 2025) (codified as Cal. Health & Safety Code §124250 (West 2026)) (providing, for instance, that California has enacted the Youth Sports for All Act, which "would require the State Public Health Officer to establish and convene the Blue Ribbon Commission on the Development of a California Department of Youth Sports or an Equivalent Centralized Entity to conduct a comprehensive study on the need for and feasibility of creating a centralized entity charged with supporting and regulating youth sports").

[30] Dionne Koller, *Deterring Regulation Through the Threat of Sportspocalypse*, *in* THE ROUTLEDGE HANDBOOK ON SPORTS LAW AND GOVERNANCE ch. 5 (Annette Greenhow & John Wolohan eds., 2025) [hereinafter Koller, *Deterring Regulation*].

[31] KOLLER, MORE THAN PLAY, *supra* note 3, at 51.

system that is accessible to a wider number of children.

A. *How the Sportspocalypse Argument Shapes the Law and Policy of Sport*

In my research for *More Than Play*, I discovered many examples of how predictions of harm to sports helped shape the development of American sports law and policy, and I previously traced the history of its use from at least the earliest days of Major League Baseball.[32] As I explained, the prediction of sports doom derives much of its power from the pervasiveness of what sport sociologist Jay Coakley calls the "great sport myth."[33] This is the notion, frequently cited by policymakers and sports sponsors, that sport is inherently "pure" and "good" and that these values are "transmitted to those who participate in or consume it."[34] Sport is often said to foster numerous important individual benefits, such as developing character or teaching life lessons, and proposed legislation, such as the federal Youth Sports Facilities Act, heavily rests on these claims.[35] Sport is also frequently cited as producing societal and even universal benefits, such as reducing poverty and promoting international peace. As Barbara Keys explains, however, while "the claims are plentiful and pervasive," the actual support for them is "sparse and weak."[36] In the United States, the great sport myth connects with the view that the conduct of sport generally is a private, and not government, matter. Courts, Congress, and state legislatures therefore typically defer to private sports sponsors and administrators to regulate themselves.[37] As a result, courts and legislatures often view their role as protecting sport, not regulating it.[38]

Drawing from these long-held beliefs, the sportspocalypse argument defines it as a significant social problem to change the sport status quo. In doing so, the prediction of harm to sport both puts government intervention

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[32] Koller, *Deterring Regulation*, *supra* note 30; *see* Alfred Yen & Dionne Koller, *Federal Legislation and College Sports: Which Way Forward?*, 93 FORDHAM L. REV. 1671, 1682–83 (2025) (explaining the use of the argument by the NCAA).

[33] Jay Coakley, *Assessing the Sociology of Sport: On Cultural Sensibilities and the Great Sport Myth*, 50 INT'L REV. SOCIO. SPORT 402, 403 (2015).

[34] *Id.* at 403–04.

[35] *Sens. Ossoff, Young Introduce Bipartisan Bill to Boost Youth Sports Opportunities for Georgia Kids*, U.S. SENATOR FOR GEORGIA JON OSSOFF (Apr. 10, 2025), https://perma.cc/G9B8-BGEZ.

[36] BARBARA J. KEYS, THE IDEALS OF GLOBAL SPORT: FROM PEACE TO HUMAN RIGHTS 1 (2019); *see also* Coakley, *supra* note 33.

[37] Dionne L. Koller, *Putting Public Law into "Private" Sport*, 43 PEPP. L. REV. 681, 684 (2016) [hereinafter Koller, *Public Law into "Private" Sport*].

[38] KOLLER, MORE THAN PLAY, *supra* note 3, at 52; *see* Yen & Koller, *supra* note 32, at 1689.

on policy agendas—such as with the NCAA's recent pleas to Congress to provide it with an antitrust exemption and ensure that college athletes are not legally deemed employees—and it works to keep other types of government intervention off.[39] It also may influence litigation outcomes by serving as a policy reason to deny or limit liability in cases brought by athletes.

It can be easy to miss the sportspocalypse argument's impact. The individuals and groups who make doomsday predictions about the future of sport usually[40] do not claim to oppose the change at issue, such as greater rights or protections for athletes. Instead, defenders of the sport status quo assert that they are preserving or protecting all that is beloved about, and in fact, necessary to, sport, and they generally use the argument in a few ways. First, they often argue that a proposed regulation or form of liability will make sponsoring sport too costly, thereby curbing or altogether eliminating participation opportunities. Sport sponsors also often argue that greater regulation could make sport too difficult to administer or that competitive balance will be destroyed. Finally, defenders of the sport status quo often assert that a sought-after change to sport, for instance to make it more inclusive, would destroy the experience for currently participating athletes.

There are numerous examples of the sportspocalypse argument shaping the development of U.S. sport. Perhaps the earliest example is that of Major League Baseball, which successfully used the threat of the demise of America's pastime to justify the reserve clause—whereby the team that originally signed the player retained rights over him for the duration of the player's career—and to deter antitrust regulation by Congress and courts, including the Supreme Court. While the reserve clause in MLB is long gone, the league retains its unique exemption from antitrust liability.[41]

Similarly, the sportspocalypse argument was a key feature of the NCAA's opposition to Title IX. In the 1970s, and for decades thereafter, the NCAA maintained that gender equity mandates in education-based sports would destroy college athletics or at a minimum, destroy men's college sports. While these predictions did not fully defeat Title IX, they did contribute to the slow pace of change and lack of robust enforcement that continues today.[42]

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[39] Koller, *Deterring Regulation*, *supra* note 30; Yen & Koller, *supra* note 32, at 1672–73.

[40] A notable exception is the use of the argument to justify prohibiting trans girls and women from participating in sports consistent with their gender identity.

[41] Flood v. Kuhn, 407 U.S. 258, 282 (1972).

[42] Koller, *Deterring Regulation*, *supra* note 30.

The NCAA also has relied on sportspocalypting to oppose the application of antitrust law to its operations and oppose greater rights for intercollegiate athletes. The NCAA's argument led to decades of deference by courts until the Supreme Court's narrow but unanimous 2021 ruling in *NCAA v. Alston*, holding that the association's rules restraining the amount of education-related benefits that universities may provide athletes were a violation of the Sherman Act.[43] The NCAA also invoked the end-of-sport threat in urging Congress and state legislatures to prohibit athletes from earning income from their NIL rights, and has most recently made the argument to courts and Congress to oppose labor and employment rights for athletes.[44] There are many other examples of the sportspocalypse argument throughout the modern history of U.S. sport.[45]

Yet while sport sponsors have frequently raised the threat of a sportspocalypse in the development of U.S. sport, the predicted harm has never come to pass. Free agency did not destroy baseball, Title IX did not destroy college sports, and compensation for Olympic athletes did not destroy the Games. More recently, athlete NIL rights have not destroyed college sports. Nevertheless, the predictions of doom that are the heart of the sportspocalypse argument have a remarkable history of helping to stymie attempts to reform sport.

B. *How the Sportspocalypse Threat Shapes Youth Sports*

Although not always as readily apparent as the examples listed above, the threat that sport may be harmed by regulation or reform, such as through tort litigation, also plays a role in our approach to youth sport. Like its use in other sport settings, the sportspocalypse argument at the youth level relies heavily on the assumption that maintaining the status quo is necessary to preserve the many benefits that sport provides. Also, like the argument's use to derail proposed reform of other sport levels, the sportspocalypse threat often emerges in youth sport discourse when advocates or policymakers seek greater rights and protections for the children and adolescents who participate (or hope to participate) in sports. A local example illustrates the phenomenon.

In 2023, Massachusetts state legislators held a hearing on youth sports where they considered, as one commentator stated, "becoming the first . . .

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[43] NCAA v. Alston, 594 U.S. 69, 94 (2021).

[44] Koller, *Deterring Regulation*, *supra* note 30; Yen & Koller, *supra* note 32, at 1679–80.

[45] Koller, *Deterring Regulation*, *supra* note 30.

to directly regulate youth sports."[46] Lawmakers were reportedly concerned with, among other things, early sports specialization and overtraining, as well as lack of access. One commentator summarizing the hearing pointed out that requiring coaches to undergo health and safety training and certification "might reduce" the number of volunteer coaches[47] and predicted a lengthy parade of horribles, including a barrage of litigation and the need to provide "burdensome" constitutional protections, and other "perverse . . . outcomes." The author stated that it did not seem possible for the government to reduce the risk of injury in youth sports without also limiting the positive aspects of sports.[48] The initial interest in potentially regulating youth sports has not yet materialized into reform.

A recent opinion piece on youth sport in the Sports Business Journal, written by a sports marketing executive, also reflects how the predictions of doom enter policy conversations. The piece asserts that with respect to high school athletes' NIL rights, the "gold rush to monetize name, image and likeness is full of unintended consequences," and that the changes "will unintentionally crush entire sports and sideline thousands of athletes."[49] While the executive argues for preserving the "joy" and "soul" of sports, reining in the youth sports industry that is finding more and more ways to monetize children's participation is not one of the proposed solutions.[50]

These examples are not unusual. While there are many reasons why social issues are not addressed with public policy solutions, the sky-is-falling response to proposed regulation (or even modest reform) is particularly worth examining when it is used in the context of children's sports. As I recounted in the book, millions of children engage in sport,[51] and since at least the Progressive era, children's sport participation has been cited as a solution to numerous perceived societal problems such as juvenile

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[46] Christopher R. Deubert, *Massachusetts Lawmakers Considering Youth Sports Regulation*, SPORTS LITIG. ALERT (Nov. 17, 2023), https://perma.cc/MFN6-LYYX.

[47] *Id.*

[48] *Id.*

[49] Tom Kuhr, *NIL is Rewriting the Youth Sports Playbook*, SPORTS BUS. J. (Sept. 10, 2025), https://perma.cc/6KVM-Z2DC.

[50] *Id.*

[51] *Our Annual Report on Trends in Youth Sport*, PROJECT PLAY ASPEN INST., https://perma.cc/B9AY-DFDB (last visited Apr. 25, 2026).

delinquency and fitness for military duty.[52] Policymakers also continue to regularly highlight additional societal benefits of youth sport participation, such as combating childhood obesity, overcoming social divisions, building social capital, and empowering girls.[53] And nearly everyone is familiar with the claim that youth sport helps "build character" and teaches other socially useful values.[54]

This rosy picture[55] of what we believe or hope youth sport to be exists alongside research that has demonstrated there are very real downsides.[56] Data show problems with the experience, most of which can be connected to the "professionalization" of youth sport.[57] This involves pressure to specialize in one sport at a young age, over-training to develop talent, and an emphasis on competition and winning.[58] Professionalization has triggered what some in the medical community call an "epidemic" of youth sport injuries,[59] and sexual and other forms of abuse perpetrated against child athletes are far too common.[60] It is also clear that the youth sport system, as it exists today, is not inevitable, required, or even the best way of delivering the many benefits of, and meeting the various goals for, engaging children in athletics. And, of course, youth sport participants are minors and therefore have the greatest need for protection because they do not have full legal rights of their own.[61] If youth sport—with its impact on children's bodies and minds—was viewed primarily as a children's product or experience and not simply sport, one would reasonably expect at least some

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[52] Kathleen E. Bachynski, *Competitive Youth Sports, Pediatricians, and Gender in the 1950s*, *in* PINK AND BLUE: GENDER, CULTURE, AND THE HEALTH OF CHILDREN ch. 9, 154 (Elena Conis et al. eds., 2021); David Wiggins, *A Worthwhile Effort? History of Organized Youth Sport in the United States*, 2 KINESIOLOGY REV. 65 (2013); Coakley, *supra* note 33.

[53] Koller, *Identifying Youth Sport*, *supra* note 2, at 8.

[54] Coakley, *supra* note 33.

[55] Alfred C. Yen, *Explicit and Primary Implied Assumption of Risk*, 60 NEW ENG. L. REV. 31, 31 (2026) (describing the "tension between romanticism and realism" in sports law).

[56] Koller, *Identifying Youth Sport*, *supra* note 2, at 9.

[57] Koller, *Identifying Youth Sport*, *supra* note 2, at 9.

[58] Koller, *Identifying Youth Sport*, *supra* note 2, at 9.

[59] James R. Andrews, *Keynote Address: Why Are There So Many Injuries to Our Young Athletes? Professionalization and Specialization in Youth Sport*, 40 U. BALT. L. REV. 575, 575–77 (2011).

[60] U.S. GOV'T ACCOUNTABILITY OFF., YOUTH ATHLETES: SPORTS PROGRAMS' GUIDANCE, PRACTICES, AND POLICIES TO HELP PREVENT AND RESPOND TO SEXUAL ABUSE,

GAO-15-418 (2015), https://perma.cc/Y5BG-93TW.

[61] *See* Anne C. Dailey and Laura A. Rosenbury, *The New Law of the Child*, 127 YALE. L.J. 1448, 1463–64 (2018).

federal or state safety regulations, or at least serious policy discussions to adopt them.[62] Parents and guardians often believe that such regulations exist but, due at least in part to the effectiveness of the sportspocalypse threat, there is little to none.

In addition to helping shape our views on regulating youth sport, the sportspocalypse argument helps set the boundaries for what can be identified as a policy problem raised by youth sport. As I explained in the book, the primary framing of the policy problem with youth sport today is that too many children quit or never begin playing sports at all.[63] It is undeniably true that most children who take up youth sport quit by adolescence, and that cost is a significant barrier to initial and sustained youth sport participation. These issues can justifiably be viewed as policy problems because of, among other things, the underlying equity implications. Yet this framing of the issue, focusing on bringing children into sport and keeping them there, also sidesteps what could be a significant policy discussion about the actual youth sport experience, such as why it is so expensive, and how all the training and travel can lead to burnout and injury. The access-and-retention conception of the policy issue also is consistent with the interests of the many beneficiaries of our current approach. A focus on policy proposals that help ensure a steady supply of youth sport customers and a robust pool of elite athletes for higher levels of sport, I concluded in the book, may help keep other youth sport reforms off political agendas. When other policy reforms are proposed, such as banning or limiting tackle football for children, or even studying whether other types of regulation would benefit children, doomsday predictions help stall any change.

The tragic case involving high school football player Drew Swank may be viewed as an illustration of how focusing too much on harm to sport may harm the children who participate. In 2009, Swank suffered a concussion while playing football. He was removed from the game, and his parents later reported to Swank's physician that he was feeling better, so they sought to have him cleared to return to play sooner than the doctor originally recommended. During a subsequent game, despite the fact that he was exhibiting troubling, obvious concussion symptoms, Swank's coach verbally and physically reprimanded him for his sluggish play and kept him in the

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[62] *See* Katharine Silbaugh, *The Legal Design for Parenting Concussion Risk*, 53 U.C. DAVIS L. REV. 197, 203–04 (2019).

[63] *See* U.S. DEP'T OF HEALTH & HUM. SERVS., THE NATIONAL YOUTH SPORTS STRATEGY (2019), https://perma.cc/S4MX-3QDY.

game. Swank suffered another hit and later died.[64] Swank's parents brought a claim against the school, football coach, and physician who cleared Drew to play. The Washington State Supreme Court, *en banc*, held that there was an implied cause of action under the state's youth sport concussion law and that, due to evidence of willful or wanton conduct, the coach was not entitled to immunity, so the parents' claims could go forward. The result in *Swank v. Valley Christian School* is not typical.

Although the doomsday argument did not defeat the claim in *Swank*, the decades of policy choices, influenced by the sportspocalypse threat, contributed to Drew Swank playing in the game that ultimately took his life. Kathleen Bachynski has explained the history of the campaign that began in the 1970s by organizations such as helmet manufacturers and youth football providers against the increasing legal liability they faced for what were often catastrophic football injuries.[65] Bachynski detailed how a case brought on behalf of a high school football player whose participation resulted in a significant brain injury and quadriplegia galvanized supporters of youth football, who portrayed the litigation as "an existential threat" to both the game of football, if not all of sport.[66] The extensive sportspocalypting around the issue helped redefine the policy problem from the significant, often permanent (and even sometimes fatal) injuries to many boys who played football to instead focus on the way legal liability for such injuries would destroy sport. As Bachynski stated, "the notion that lawsuits threatened the very existence of football would persist . . . through the 1980s and early 1990s."[67]

As Bachynski also noted, the American Academy of Pediatrics (AAP) has long expressed concerns over the potential harm to children who engage in contact sports such as football.[68] Yet, the "sky-is-falling" claims even influence how the AAP has approached the issue of youth tackle football's toll on children's bodies. The AAP's most recent policy statement includes recommendations that avoid urging a change to the game, stating that:

> Removing tackling from football altogether would likely lead to a decrease in the incidence of overall injuries, severe injuries, catastrophic injuries, and concussions. The [AAP] recognizes, however, that the removal of tackling from

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[64] Swank v. Valley Christian Sch., 398 P.3d 1108, 1114 (Wash. 2017).

[65] KATHLEEN BACHYNSKI, NO GAME FOR BOYS TO PLAY (2019).

[66] *Id.* at 141.

[67] *Id.* at 152.

[68] *Id.*

> football would lead to a fundamental change in the way the game is played.[69]

The AAP goes on to state that "[p]articipants in football must decide whether the potential health risks of sustaining these injuries are outweighed by the recreational benefits associated with proper tackling."[70] Researchers have subsequently challenged this position, arguing that it is "not sufficient" for parents to understand the risks of playing the game.[71] Notably, the sportspocalypse argument in the history of youth football not only held off policy changes that would have regulated that game; it also worked to limit future tort liability by advancing the solution to the problem of football injuries as "personal responsibility" and individual knowledge of the game's potential harms through application of the doctrine of assumption of the risk.[72]

This approach continues today across all youth sport as, for instance, some states permit parents to waive tort liability on behalf of their child who participates in sport. Alfred Yen and Matthew Gregas explain the reasoning adopted by courts:

> [T]he primary argument . . . asserts that youth sports releases serve minors' interests, even at the cost of greater uncompensated injury. Without enforceable waivers, youth sports providers may reduce their offerings or go out of business to avoid tort liability risks. Conversely, allowing youth sports providers to avoid liability increases youth sports opportunities, and youth sports participation by extension, which confers benefits on youths outweighing any increased risk of uncompensated injury.[73]

Yen and Gregas studied the issue to determine, in effect, whether enforcing tort liability waivers was necessary to avert a youth sportspocalypse. They concluded that "the major argument given by courts for enforcing youth

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[69] William P. Meehan & Gregory L. Landry, *Tackling in Youth Football*, 136 AM. ACAD. FOR PEDIATRICS 1419, 1426 (2015).

[70] *Id.*

[71] *UW Pediatrician and Medical Student Challenge the American Academy of Pediatrics Policy Statement on Youth Tackle Football,* UNIV. OF WIS. SCH. OF MED. AND PUB. HEALTH DEP'T OF PEDIATRICS (Mar. 17, 2020), https://perma.cc/MA9V-9863.

[72] *See generally* BACHYNSKI, *supra* note 65.

[73] Alfred C. Yen & Matthew Gregas, *Liability Waivers and Participation Rates in Youth Sports: An Empirical Investigation*, 10 ARIZ. ST. SPORTS & ENT. L. J. 1, 3–4 (2020).

sports releases lacks empirical support."[74]

As I noted in *More Than Play*, although there is little evidence supporting the conclusion, many courts continue to believe that "negligence claims pose grave risks to the viability of youth sports."[75] For instance, the Court in *Nat'l & Int'l Brotherhood of Street Racers* stated, "[u]nless courts are willing to dismiss such actions without trial, many popular and lawful recreational activities are destined for extinction."[76] A concurring opinion in the case of *Woodman v. Kera* also reflects this belief, stating that failing to enforce a parental waiver of tort liability on behalf of a child would cause youth sports opportunities to "dwindle out of a reasonable fear of tort liability."[77] Similarly, the Illinois Supreme Court in *Karas v. Strevell* asserted that tort liability would mean that "contact sports would be fundamentally altered or, perhaps, eliminated altogether" and then further stated that "[i]f liability could be established every time a body check or tackle resulted in injury—because that conduct demonstrates a conscious disregard for the safety of the opposing player—the games of ice hockey and football as we know them would not be played."[78]

The *Karas* case illustrates well the power the sportspocalypse argument can have in youth sport tort litigation. In that case, a high school hockey player was catastrophically injured in a game after being hit from behind—a play that is prohibited by the rules of the game. The plaintiff alleged that, in addition to the rule prohibiting such hits, players had the word "stop" stitched on the backs of their jerseys to remind players not to hit from behind, and also alleged that, despite the prohibition, the defendant team and officials failed to enforce the rule, failed to instruct players not to hit from behind or discipline them for doing so, and indeed "encouraged or otherwise condoned" such hits.[79] Further allegations included that the hit was done while the plaintiff was in a particularly vulnerable position, near the boards, which made it even more dangerous. The player's suit against the team and league alleged that these and other facts amounted to "willful

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[74] *Id.* at 5; *see* Yen, *supra* note 55, at 5o (elaborating further on this point in his essay for this volume by stating, "youths in states that refuse to enforce waivers should experience a lack of youth sports opportunities," but that is not the case. As Professor Yen points out, Vermont and Iowa enjoy the highest rates of youth sports participation, and they also do not enforce youth sport liability waivers).

[75] *Id.* at 8.

[76] Nat'l & Int'l Brotherhood of St. Racers v. Sup. Ct., 264 Cal. Rptr. 44, 47 (Ct. App. 1989).

[77] Woodman v. Kera LLC, 785 N.W.2d 1, 42 (Mich. 2010) (Hathaway, J., concurring).

[78] Karas v. Strevell, 884 N.E.2d 122, 133 (Ill. 2008).

[79] *Id.* at 125.

and wanton disregard" for the player's safety,[80] a standard often adopted in sports cases that is higher than ordinary negligence. The lower court found that the plaintiff's allegations met this heightened standard and held that the claims could go forward.

On appeal to the Supreme Court of Illinois, USA Hockey filed an amicus brief invoking the sportspocalypse argument, positioning the litigation as an attack on the game itself. Stating that "[h]ockey is an exciting contact sport that carries inherent risks of injury," USA Hockey argued that:

> If allowed to stand, the appellate court's decision may undermine the very nature of ice hockey and other contact sports . . . . [I]f this Court affirms the appellate court's decision, local hockey associations, schools, and other athletic organizers throughout Illinois will face increased risks and costs of litigation . . . . [T]hose risks and costs could drive them away from participation altogether, induce timidity and second-guessing that would change the fundamental nature of contact sports, or impose significant financial penalties. Those results could extend beyond the borders of this state. Associations throughout the country could reconsider whether to participate in events in Illinois . . . .[81]

USA Hockey's argument continued by focusing on the game and contact sports generally, assuming that children who play the game must do so in the same way as an adult. For instance, USA Hockey stated that "participants and fans love hockey in part for its physical thrills. Hockey epitomizes contact sports," and that "[i]ce hockey is a rough sport, and players regularly commit contact beyond that which is permitted by the rules . . . . Penalty plays are part of the sport." USA Hockey went on to invoke previous litigation that demonstrates the risks of youth hockey, stating that those cases "reveal the wide spectrum of injuries that amateur hockey players face, from loss of their vision . . . to loss of mobility in their limbs . . . ."[82] The sportspocalypting worked: the court denied the plaintiff's claims, stating that there could only be recovery for intentional injury and conduct that is so extreme it can be characterized as completely outside the bounds of the sport.[83]

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[80] *Id.*

[81] Amicus Curiae Brief of USA Hockey Inc. at 7–8, Karas v. Strevell, 884 N.E.2d 122 (Ill. 2008) (Nos. 104123, 104133 cons.).

[82] *Id.* at 10–11.

[83] *Karas*, 884 N.E.2d at 134–35.

Like tort litigation involving children in sports, the issue of youth sport concussions, the underlying factual issue presented in *Swank*, also reflects the potency of the sportspocalypse argument. Concussions in sports, especially those suffered by children, became a prominent area of media, legal, and policy focus in the early 2000s.[84] One state high school athletic association stated at the time that the "potential repercussions" of concussion lawsuits would "threaten the future of all high school sports for the millions of students around the country who annually benefit from their participation experiences."[85] Although the fear that lawsuits would doom high school sports did not materialize, the harm of youth sports concussions did. Researchers report that the "majority of sports-related concussions are presumed to occur" in youth sports,[86] and researchers have explained that children "are especially vulnerable" to sport concussions because of their physical immaturity.[87] Moreover, the current rate of injury is believed to be underreported because of the lack of medical personnel at youth sport practices and games who can spot a concussion.[88]

Meaningful regulation of youth sports very likely could ensure safer experiences and reduce the number of youth sport concussions. As I explained in the book, that is not the approach states have taken. All fifty states and the District of Columbia currently have statutes aimed at youth sport concussions.[89] While the statutes require removal from play if a child suffers a concussion, none of them mandate changes to the game that would protect the child from the initial brain injury, taking it as a given that the injury will occur.[90] Instead, incorporating the approach taken to youth football injuries decades earlier, the statutes focus on promoting awareness by mandating that athletes, parents, and coaches be educated about the dangers of concussions.[91] Youth sport concussion statutes also have no

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[84] *See generally* Koller, *Identifying Youth Sport*, *supra* note 2, at 14, 21.

[85] Koller, *Public Law into "Private" Sport*, *supra* note 37, at 697 n.109.

[86] Benjamin J. Chun et al., *Concussion Epidemiology in Youth Sports: Sports Study of a Statewide High School Sports Program*, 13 SPORTS HEALTH 18, 18 (2021).

[87] Sungwon Kim et al., *Legislative Efforts to Reduce Concussions in Youth Sports: An Analysis of State Concussion Statutes*, 27 J. OF LEGAL ASPECTS OF SPORT 162, 163 (2017).

[88] Chun et al., *supra* note 86.

[89] Sydney Diekmann et al., *The Failure of Youth Sports Concussion Laws and the Limits of Legislating Health Education*, 19 YALE J. HEALTH POL'Y L. & ETHICS 1, 5 (2019).

[90] Hosea H. Harvey, *Refereeing the Public Health*, 14 YALE J. HEALTH POL'Y L. & ETHICS 66, 92 (2014).

[91] *Id.* at 69.

enforcement mechanism, as most do not create any new cause of action,[92] and many include immunity provisions for coaches and health professionals. Although the Court in *Swank* implied a cause of action,[93] this is not the usual approach, and many statutes explicitly deny potential plaintiffs a claim.

Katharine Silbaugh has explained that the emphasis on education, awareness, and parental authority evident in youth sport concussion statutes protects sports that frequently cause concussions, such as football, more than they protect the children who play.[94] Silbaugh notes that, in the youth sport setting, it is widely known that many parents lose the ability to make decisions solely in their child's best interests. This is especially so given that most parents do not have the training necessary to diagnose a head injury. Nevertheless, youth sport concussion statutes emphasize informing parents of the risks of concussions, not regulating sport. Moreover, Silbaugh points out that notifying parents of the harms of sport concussions may legally strengthen a youth sport sponsor's defense that the parent, on behalf of the child, assumed the risks of the game, including head injury. Silbaugh recognizes the sports exceptionalism at work in this area, explaining that while there are numerous examples of states regulating in various areas to protect children, including where it is assumed parental judgment alone would be ineffective, states have taken a very different approach in the context of head injuries in youth sport. Thus, while youth sport concussion statutes may ostensibly be aimed at protecting children, in reality, they primarily operate to protect the games as currently played.

The *Swank* case illustrates her point.[95] Although Drew Swank exhibited clear signs that he was not well, and family members were present at the game, he was permitted to continue playing.[96] Warning Swank's parents of the risks of concussion was not enough in the context of a youth sport ecosystem that encouraged him to play. As Silbaugh explains in her essay for this volume, youth sport relies on "myth-making around parents." The law assumes that parents well understand the risks of youth sport participation and are therefore responsible when a child is injured. In reality,

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[92] Kerri McGowan Lowrey & Stephanie R. Morain, *State Experiences Implementing Youth Sports Concussion Laws: Challenges, Successes, and Lessons for Evaluating Impact*, 42 J.L. MED. & ETHICS 290, 296–97 (2014).

[93] Swank v. Valley Christian Sch., 398 P.3d 1108, 1115 (Wash. 2017).

[94] *See* Silbaugh, *supra* note 62, at 228.

[95] *See generally Swank*, 398 P.3d at 1108.

[96] *Id.* at 1113–14.

as Silbaugh points out, parents like Swank's are in a bind, forced to choose between "denying their children formative experiences in our culture, or accepting unreasonable risks."

The sportspocalypse argument does not just act to defeat liability or deter safety regulation. It often underpins the reasoning in cases brought by minors seeking greater participation rights. A case involving a high school athlete with a disability reflects this view. In *Holzmueller v. IHSA*, a high-school student with significant physical disabilities who participated on his school's track-and-field team petitioned the state high-school athletic association to create a separate division with different state qualifying times for para-ambulatory athletes like himself. While on the track team and fully able to participate, his disability and the association's state qualifying times meant he had no chance to qualify for the state championships because he had to race against able-bodied competitors. The Court stated that although the proposed accommodation of a separate category and qualifying times for those with a similar disability would not affect the standards for able-bodied athletes, the accommodation would lower standards overall. The Court stated that the state's qualifying standards underscore the essence of the sport:

> [O]ne must run as fast as possible to achieve the predetermined times. According to the IHSA, the qualifying time standards ensure a certain level of competition and maintain a necessary scarcity of opportunity. To lower the qualifying times for State by creating a new division of runners would fundamentally alter the essential nature of the . . . State track and field meet.[97]

The requested accommodation was therefore deemed "unreasonable as a matter of law."

The result in *Holzmueller* is defensible as a matter of legal doctrine. It is not hard to see that, as a matter of sports policy, a strong argument can be made that state high school athletic associations cannot create special categories for every type of student who wishes to compete in a state meet. On the other hand, it can be argued that the reasoning in the case implicitly incorporates the sportspocalypse threat through the conclusion that a new category would "fundamentally alter" the core premise of a state track and field meet. In doing so, the opinion overlooks ample legal and policy room to favorably address the student's claim. As the dissent noted, there is little reason to assume that a different state qualifying time for runners with

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[97] A.H. v. Ill. High Sch. Ass'n, 881 F.3d 587, 595 (7th Cir. 2018).

disabilities (just as there are for runners who are female) would somehow erase the purpose of a state track and field competition. *Holzmueller's* majority opinion shows the way that even the suggestion that what is special about sport could be, essentially, destroyed ("fundamentally altered" in the language of the law) can short-circuit other important policy discussions, such as why children with disabilities often do not yet enjoy the full ability to participate in high school sports.

Additionally, the sportspocalypse threat is not only in the background of cases brought by children who seek greater participation rights. Since the book was finished, the doomsday prediction has emerged as a potent and explicit weapon to deny trans girls the opportunity to participate in sports consistent with their gender identity, with policymakers and activists claiming that trans girls' participation threatens, or even will destroy, girls' and women's sport.[98] In response, currently more than half of all states ban trans girls from participating in school sports.[99] There are of course many reasons for the attacks on trans girls and women who seek to participate on sports teams that are consistent with their gender identity. However, it is useful to situate this rhetoric within the long history of sportspocalypting when individuals seek greater access and rights to participate in sports. Indeed, the predictions of doom made in connection with trans girls participating in sport echo the threats made when Title IX was enacted in the 1970s. At that time, as explained above, defenders of the sports status quo claimed providing sports opportunities for women would destroy men's sports.[100]

Yet in highlighting the use of the sportspocalypse argument, I do not mean to assert that harm to sport should never be part of a youth sport policy analysis. True concerns over the viability of sport are not unimportant and, where empirically supported, might in some cases be entitled to significant weight. In general, sports participation at a minimum provides children with exercise, and at least some sport experiences may provide other important benefits. Policy changes or court decisions that actually did have

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[98] Thomas R. O'Donnell, *Can Transgender Females 'Destroy' Girls' Sports? What the Numbers, Science, and Common Sense Say*, IOWA CAP. DISPATCH (Mar. 3, 2022, 11:10 AM), https://perma.cc/W64D-NC8S; *The Real Threat to Women's Sports Isn't Transgender Athletes – It's Underfunding and Lack of Resources*, HUM. RTS. CAMPAIGN, https://perma.cc/TD6Z-PUVQ (last visited Apr. 25, 2026); Megan Peterson, *The Real Threat to Women's Sports? It's Not Trans Athletes*, GENDER JUST. (Feb. 25, 2025), https://perma.cc/7N4X-CR36.

[99] *Sports Ban*, HUM. RTS. CAMPAIGN, https://perma.cc/6KNN-8LPD (last updated Nov. 14, 2024).

[100] Koller, *Deterring Regulation*, *supra* note 30.

the effect of significantly reducing or eliminating the supply of youth sports participation opportunities could therefore be a legitimate concern. The problem then is not that courts and policymakers consider the viability of sport. It is when courts and policymakers assume this is the only consideration, and too easily conclude that such arguments must be determinative. Focusing too heavily on the speculative viability of a particular version of a sport generally sweeps far too broadly when adopted in connection with the very real issues involving youth sport. It also necessarily assumes that children's bodies and minds must engage in sport in much the same way adults do.

Moving past the predictions of doom and assumption that children participating in sports must face the same level of risk as an adult opens up much room for law and policy re-calibration in youth sports, to give consideration to a wider array of children's needs and interests, and to see the interests of sport in a more nuanced way (as Professor Yen points out, some courts do). For instance, while it is surely in children's interest to ensure a robust supply of youth sport participation opportunities, it is not clear that the type of opportunities most frequently provided in today's youth sport landscape should be the only option, or that they are the best opportunities. Much evidence suggests they are not.[101] Further, a handful of states have recently enacted modest requirements for at least some youth sport programs, generally aimed at safety training for coaches, and there is no evidence that these initiatives have harmed the enterprise. For example, Alabama enacted legislation encouraging, for designated sports, coach safety training.[102] Starting July 1, 2025, Colorado now requires youth sports abuse prevention training.[103] And in the years since the *Swank* decision, no evidence shows that allowing the claim to go forward led to a loss of participation opportunities.

Additionally, the arguments made about the potential harm to sports—

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[101] KOLLER, MORE THAN PLAY, *supra* note 3, at 92–108.

[102] *See* Coach Safely Act, ALA. CODE 2018-496 § 3(a) (2018) ("Any youth athletics association that sponsors or conducts sports training or high risk youth athletic activities for children age 14 years and younger shall require all coaches and athletics personnel to complete an online or residence course approved by the Department of Public Health, if available at no cost, which provides him or her with information and awareness of actions and measures that may be used to decrease the likelihood that a youth athlete will sustain a serious injury while engaged or participating in a high risk youth athletic activity."); *see also* Coach Safely Act, ARK. CODE ANN. § 6-18-721 (2023); TENN. CODE. ANN. § 49-6-3601 (2024) (noting Arkansas and Tennessee adopted similar provisions).

[103] COLO. REV. STAT. § 26.5-4-402 (2024).

reflected in the USA Hockey brief and many court decisions—overlooks the points that the way a game is played at the youth level is not how it must be played by adults, in other settings, and that a different, safer version for children causes no harm to the game itself.[104] Thus, in *Karas*, the court reasoned that imposing liability for a hit that was known to be dangerous, and for which there was a prohibition in the game's rules, would damage the game of hockey. Yet, if the hit at issue in that case, which the sport itself had already declared unsafe and against the rules, were the basis for liability, the likely result would not be a fundamental change to the game. More likely it would spur a greater emphasis on following the rules and not engaging in such hits, making the game, and the children who play it, far safer.[105]

Such an outcome might also encourage more parents to enroll their children in sports. The dissenting opinion of the Massachusetts Appeals Court in the case of *Borella v. Renfro* makes such a case. The dissent explained that while the majority's holding—dismissing plaintiff's claim for injuries sustained by a minor athlete who was rendered unconscious and with permanent injuries—was purportedly to ensure sport opportunities continued to be provided for children, the decision had significant costs. The dissent stated that the outcome served to deprive "children who play competitive sports of the protections against reckless violence to which they are entitled" and could lead not only to more serious injuries in youth sport but also to parents not allowing their children to play.[106]

In 2024, the bi-partisan Commission on the State of U.S. Olympics and Paralympics[107] released its final report. Part of Congress's charge to the Commission was to study the U.S. pipeline to the Olympic and Paralympic level, which required an analysis of the American youth sports system. The Commission concluded that there were significant issues with grassroots

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[104] The National Football League (NFL) provides an example. After the harms of football concussions, particularly at the youth level, became apparent, the NFL began encouraging children to play the flag, not tackle, version of the game. Indeed, USA Hockey delays body checking for 12-and-under programs. Football and hockey as sports remain intact, and the popularity of the games at all levels has never been higher.

[105] In addition, such a holding would be consistent with the treatment of sports in other areas. While courts generally defer to sports programs to enforce their rules and structure their programs, courts have long found that they must follow their own rules. *E.g.*, Tiffany v. Ariz. Interscholastic Ass'n, 726 P.2d 231, 236 (Ariz. Ct. App. 1986); Harding v. U.S. Figure Skating Ass'n, 851 F.Supp. 1476, 1477–80 (D. Or. 1994).

[106] Borella v. Renfro, 137 N.E.3d 431, 444 (Mass. App. Ct. 2019) (Rubin, J., dissenting).

[107] This author was appointed by Sen. Maria Cantwell to serve as co-chair of the Commission, whose activities ended on March 1, 2024, with the release of its final report to Congress.

youth sport that could impact the future of the American Olympic and Paralympic program, including lack of access and gaps in protections for the children who participate. Among its proposals, the Commission recommended a designated office within the Department of Health and Human Services to coordinate existing and any new federal grant funding; collect data; and propose uniform, minimum safety standards, such as coach safety certification and background checks. The proposal was formulated after the Commission considered hundreds of interviews and surveys of youth sport parents and providers, public opinion polls, and an independent study by the Aspen Institute's Sport & Society Program, among other things.

The response was a version of the sportspocalypse argument. Senator Ted Cruz issued a statement asserting that the recommendations would effectively end youth sport as we know it, as it "amount[ed] to a federal government takeover of the U.S. athletic structure."[108] Sen. Cruz further stated that "if the goal is to have fewer kids participating in sports—and fewer parents volunteering to help—I can think of no more effective idea than having youth leagues micromanaged by virtue-signaling bureaucrats."[109] Leaving aside the issue of whether requiring background checks to keep serial abusers out of youth sports or ensuring coaches have first-aid training is "micromanaging" or "virtue signaling," Sen. Cruz's sportspocalypting was effective. Congress and most states have by and large shown little interest in considering minimal safety regulations or funding support for youth sports. And the children who do not yet enjoy the full rights, autonomy, and ability to consent that the adults who sponsor, consume, and participate in sports do may suffer the consequences. This begs the question of whether the sportspocalypse rationale is, in fact, about benefitting the children who participate in sports or protecting the benefits enjoyed by those who want them to.

V. Conclusion

When *More Than Play* was published, I was asked over and over by parents, youth sport coaches, state officials, and many others who care about children's experiences in sport one question: What can we do? People wanted to know what I thought youth sport should be—what the "right" approach or model was. My response is that I did not propose a solution in the book because I do not yet believe we have had the foundational policy

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[108] *Sen. Cruz: SafeSport Faces Serious Challenges in Carrying Out Its Mission*, U.S. S. COMM. ON COM., SCI., & TRANSP. (Mar. 20, 2024), https://perma.cc/PX4X-32P9.

[109] *Id.*

conversations that we should be having about youth sport.

To achieve real reform that responds to the longstanding concerns about youth sports, we must go beyond rose-colored assumptions that any and all sport experiences are good for children. We must not so readily conclude that because exercise is good for children, a multi-million-dollar youth sports facility aimed at attracting travel tournaments and spurring the local economy will be as well. We should not assume that because physical play and developing physical literacy are good for children, a win-at-all-costs, overtraining approach to sports provides the same benefit. And we should avoid placing all the responsibility on parents for ensuring children in sport are safe.

Instead, we should explore models where we conceive of children who participate in sports as children first, rather than athletes (or future elite athletes), and recalibrate our law and policy approach to youth sports accordingly. We should inject our policy discussions with more nuance, recognizing that youth sport can be different things, with many different goals and approaches; so that, for example, a youth sport program embedded in school can be based on different values than a National Governing Body-affiliated club program.

Once we identify our various goals for youth sport participation and resist the all-too-common argument that reform will doom the enterprise, we can work toward solutions that produce meaningful change. I therefore have urged those who want to address the longstanding issues in youth sport to, among other things, talk with their state and local officials and federal representatives. I have also urged youth sport parents and children's advocates to not simply assume that nothing can be done. This is one of the reasons why, in the book, I highlighted the changes—once thought of as impossible—happening in nearly all other levels of sport. And it is also why, in my previous work, I have explained that changes like Title IX, once fiercely resisted, have only made sport more popular, lucrative, and fair.

In sum, while in the book and here I criticize the romanticized version of youth sport that has so deeply shaped our law and policy approach to the activity, I do so as a firm believer in the value of sport at all levels. It is for this reason that I hope we do meaningfully address the issues in youth sport. The games, and most importantly children, are undoubtedly worth it.

Explicit and Primary Implied Assumption of Risk

ALFRED C. YEN*

INTRODUCTION

Depictions of sports express a tension between romanticism and realism. The romantic account treats sports as something special, pure, and inherently beneficial. The realistic account emphasizes how sports is a business where money compromises the ideals advanced by the romantic account. For example, one need only contrast portrayals of college sports as a noble endeavor in which student-athletes compete for the love of sport while concentrating on their studies with those depicting college sports as de facto professional sports where colleges underpay the athletes who make billions of dollars in revenue possible.

Not surprisingly, romanticism and realism struggle for control over the legal treatment of sports. Those involved in sports tend to advance romantic narratives to argue that laws of general applicability should not be applied to sports enterprises because, almost by definition, all in the world of sports is inherently good and interfering would ruin a good thing. Conversely, those seeking reform embrace realist narratives because exposing the importance of money and the pursuit of revenue turns sports and sports enterprises into ordinary businesses that should follow the same laws as other businesses.

To see this in action, consider how the National Collegiate Athletic Association ("NCAA") avoided antitrust liability for years because courts accepted the romantic trope of the student-athlete participating in amateur

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competition. More recently, however, the NCAA has suffered a long string of antitrust defeats because courts no longer accept that trope, preferring instead to recognize the NCAA and its members as profit-seeking businesses that have refused to pay their key workers.[1]

Professor Koller's "More Than Play: How Law, Policy, and Politics Shape American Youth Sport" offers a valuable addition to the struggle between romanticism and realism. The book is thoroughly realist.[2] It recognizes the benefits of youth sport (which are substantial) while advancing the idea that youth sport is also a massive industry that transforms raw inputs (i.e., youth athletes) into finished products (i.e., elite athletes capable of playing high level college, professional, and Olympic sports). She astutely describes how professional teams, colleges, and Olympic sports showcase these athletes for billions of dollars in broadcast rights.[3]

Professor Koller's ideas have significant implications for the legal treatment of youth sports providers. As she notes, romantic accounts describe youth sports providers as selfless volunteers who forego profits in order to give youths the uniquely valuable, inherently beneficial and pure experience of playing sports.[4] This implies that youth sports providers should be considered charities deserving of preferential treatment to ensure their viability. However, if youth sports providers are (as Professor Koller describes) profit-seeking entities who participate in a revenue-generating industry, the argument for preferential treatment evaporates because youth sports providers are simply ordinary businesses.

I believe that Professor Koller is absolutely right to describe youth sports as a revenue-generating industry, even if volunteers continue to play meaningful roles. Parents know only too well how expensive it is to pay for a child's participation in sport. The Aspen Institute estimates that families collectively spend $30-40 billion per year on youth sports,[5] an amount so

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[1] *See* NCAA v. Alston, 594 U.S. 69, 112 (2021) (Kavanaugh, J., concurring) (describing "the NCAA's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated").

[2] *See* DIONNE KOLLER, MORE THAN PLAY: HOW LAW, POLICY, AND POLITICS SHAPE AMERICAN YOUTH SPORT 10 (2025) (stating that meaningful reform requires getting beyond, among other things, "romanticized images").

[3] *See generally id.* at 109–40 (citing, in part, to professional league and college sports contracts).

[4] *See id.* at 113.

[5] *Youth Sports Facts: Challenges*, PROJECT PLAY ASPEN INST., https://perma.cc/B44D-35AR (last visited Feb. 26, 2026).

large that private equity has now begun to invest in youth sports.[6]

Money flows into youth sports because elite athletes gain privileges, the most immediate of which is a distinct advantage in college admissions. With admission rates at some schools declining to under 10%,[7] the benefit of being recruited to a college team can be enormous. To take a particularly striking example, consider a hypothetical white applicant with a 1% chance of admission to Harvard who is not a recruited athlete, alumni legacy, donor legacy, or child of faculty and staff.[8] If that applicant were instead a recruited athlete, the chance of admission would jump to 98%. Additionally, a recruited athlete would, on average, have an 86% chance of admission to Harvard, but only a 0.1% chance absent the athletic advantage.[9] Indeed, the admissions advantage enjoyed by recruited athletes is even larger than that enjoyed by the children of major donors.[10] When one adds to this the possibility of an athletic scholarship and (in some sports) monetary payments from name/image/likeness deals or professional earnings, it is easy to see why parents with money will pay handsomely to enroll their

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[6] Joe Drape & Ken Belson, *Youth Sports Are a $40 Billion Business. Private Equity is Taking Notice*, N.Y. TIMES (July 9, 2025), perma.cc/XX4Z-WXLY.

[7] *See, e.g.*, Christopher Rim, *Class of 2030 Early Admissions Results Are Rolling In—Here's What To Know*, FORBES (Dec. 19, 2025, 12:11 PM EST), https://perma.cc/2A9S-JTW3 (reporting admissions rates from selective universities with many under 10%); Arkesh P., *Harvard University's Acceptance Results for the Class of 2029,* CRIMSON EDUC. (Sept. 27, 2025), perma.cc/6JQM-5SNQ (reporting Harvard University's admissions rate to be under 5%).

[8] Peter Arcidiacono et al., *Legacy and Athlete Preferences at Harvard* 28 (Nat'l Bureau Econ. Rsch., Working Paper No. 26316, Sept. 2019), https://perma.cc/7X2M-BUVR.

[9] *Id.* at 28.

[10] *Id.* at 5 (explaining that a hypothetical white non-ALDC (athlete, legacy, dean's interest or child of staff) applicant with a 10% chance of admission would become five times more likely to gain admission if they were also a donor legacy and nearly certain to gain admission if a recruited athlete). The authors of the paper mention in note 1 that "dean's interest" includes applicants whose parents or relatives have donated to Harvard.

children in programs where this kind of advantage becomes possible.[11]

Because parents will happily pay to give their children a leg up in college admissions,[12] a youth sports provider profits by positioning itself between youth athletes and colleges. If a youth sports provider operates a pathway for athletes to colleges, it can sell places in its program and charge for coaching services. This can generate millions of dollars per year in revenue. And indeed, even non-profit youth sports providers pursue this revenue.[13]

I would like to use this Essay to consider the struggle between romanticism and realism in the context of youth sports injuries caused by negligent sports providers. Like many human endeavors, the provision of sports opportunities comes with side effects that may be problematic. For example, the emotional pain and burnout suffered by those who do not make it[14] is literally the byproduct of a youth sports system that produces elite athletes. Similarly, physical injuries suffered by youth athletes comprise another inevitable byproduct of youth sports. Sports obviously carry risk. If developing elite athletes requires many years of training by thousands of

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11 One could describe a portion of the youth sports industry as the sale of a peculiar investment opportunity to well-to-do parents. For the cost of participating in youth sport programs, the parents receive the possibility that their child will enjoy a form of privilege even greater than that enjoyed by the wealthiest college applicants. To get a sense of what this privilege is worth, consider the recent Varsity Blues case, in which parents were reported to have spent $200,000 and more to guarantee their children's admission to selective colleges as fake athletic recruits. Interestingly, the Varsity Blues defendants were largely individuals entirely capable of making the kind of large donations that increase an applicant's chances of admission to a private university. That these defendants chose instead to fake the athletic credentials of their children suggests that these parents understood that the admissions advantages enjoyed by athletic recruits are even larger than those enjoyed by the children of large donors. *See* Associated Press, *College Coaches, Celebrities Charged in Admissions Bribery Case in Federal Court,* PBS NEWSHOUR (Mar. 12, 2019, 11:42 AM EST), perma.cc/PA3R-HUAU; Michael Levenson, *Private Equity Investor Sentenced to 15 Months in College Bribery Case*, N.Y. TIMES (Feb. 16, 2022), perma.cc/3GM2-Z2D3 (reporting guilty plea by defendant accused of paying more than $1.2 million to gain admission of three children to elite universities).

12 Stephen Borelli, *Survey: Parents Shell Out $3k Annually on Kids Sports with College, Pros in Mind*, USA TODAY, perma.cc/8TQ4-8SET (last updated Apr. 22, 2025, 1:13 PM ET); *see New York Life Wealth Watch: Parents Face Growing Financial Strain Pursuing Youth Sports for Their Children*, BUS. WIRE (Apr. 22, 2025, 9:00 AM EDT), https://perma.cc/2CW6-MPQA.

13 *See* Drape & Belson, *supra* note 6.

14 *See* KOLLER, *supra* note 2, at 7; Rossy Soto et al., *Competitive Youth Sports Culture Leads to Burnout and Quitting for Many in U.S.*, YOUTH TODAY (Aug. 12, 2025), https://perma.cc/J79A-PD37.

youths, some of them will suffer injury.[15] Those injuries may be severe, crippling, or life-threatening.

The inevitable occurrence of injuries associated with youth sports raises an interesting question about who should bear the associated costs. Perhaps athletes and their families should bear these costs because injury is an individual risk that an athlete accepts as a cost of participating in sport—an investment made for the possibility of athletic success and the concomitant benefits. Or perhaps the legal system should shift these costs, in whole or in part, onto sports providers because these entities profit handsomely from running a youth sport system that necessarily injures youths.

Basic tort law handles this question in a nuanced way by relying on the concept of fault, typically in the form of negligence, to identify situations in which one person fairly deserves to bear the cost of another's injury. Accordingly, an injured youth athlete has no recourse for her injury unless she can identify someone whose negligence proximately caused the injury she suffered. This basic principle of tort law starts with the premise that injuries are a form of bad luck, and the law generally does not make one person pay for another's bad luck. Things change, however, when a person's unreasonable behavior injures another, generally by increasing the risk of injury to which the victim is exposed. The unreasonable actor has done something wrong and now deserves to pay for the consequences of that wrongful behavior. The victim's injury is no longer bad luck; it is the consequence of someone else's wrongdoing. This explains why it is fair to make a negligent defendant pay for injuries she proximately causes to others.

The imposition of negligence liability does more than distribute the costs of injury fairly. It also incentivizes youth sports providers to limit the risks associated with youth sport to reasonable levels. For any sport, a certain level of risk is reasonable. The reasonable level of risk in a golf tournament is different from that in a football game. But whatever that level of reasonable risk is, additional risk becomes unreasonable. Holding youth sports providers liable for injuries that result when they expose youth athletes to unreasonable risk often gives those providers a financial incentive

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[15] The CDC reports that the rate of "sports, recreation, and leisure injuries" for youths aged 1-17 was 82.9 per 1,000 population. For those aged 12-17, the rate was 117.1 per 1,000 population. *See Quick Stats: Rates of Injury from Sports, Recreation, and Leisure Activities Among Children and Adolescents Aged 1-17 Years, by Age Group – National Health Interview Survey, United States 2015-2017*, CDC (May 24, 2019), https://perma.cc/8Q8S-J6BS.

to eliminate unreasonable risks in youth sports. To the extent that youth sports providers respond to that incentive, youth sports remain reasonably safe. To the extent that those providers fail to respond, liability ensures that the youth sports providers compensate injured athletes for injuries caused by unreasonable risk.

Almost all businesses face liability if they negligently injure someone. Shop owners, bus companies, carpenters, and delivery services all have a basic duty to take reasonable precautions against injuries to others. However, as Professor Koller points out, because courts often relieve youth sports providers of negligence liability, they often have no obligation to avoid ordinarily negligent behavior.

This happens in two ways. First, the doctrine of primary implied assumption of risk sometimes prevents youth athletes from recovering against sports providers whose negligent behavior injured them on the ground that sports providers have no obligation to manage risks "inherent to sport."[16] Second, courts sometimes enforce liability waivers signed by parents as a condition of participating in sports. Because these waivers are ubiquitous, their enforcement effectively allows youth sports providers to override the tort system by unilaterally disclaiming negligence liability.[17]

These exemptions from liability may seem trivial or commonplace, but they have meaningful consequences. If providers know that they cannot be held responsible for negligently injuring youth athletes, they will pay less attention to athlete safety. Injuries to youth athletes will increase, and injured athletes will go without compensation. The desirability of these exemptions therefore depends on whether they generate benefits larger than the losses associated with increased unreasonable risk in youth sport.

Romanticism and realism affect perceptions about the desirability of exemptions from liability for youth sports enterprises. If courts adopt a romantic view of youth sport, they will think of youth sports as something inherently good for children and see providers as selfless actors who forgo money to bring special sports opportunities to children. Courts might then be receptive to an exemption from liability as a form of financial subsidy to entities who cannot afford to take reasonable safety precautions or pay for the costs of negligent behavior. Alternatively, if courts become realists, they will consider sports an ordinary activity like any other and youth sports providers revenue-seeking businesses. These courts would probably think

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[16] *See* KOLLER, *supra* note 2, at 3 (referencing Campagna-McGuffin v. Diva Gymnastics Acad., Inc., 199 N.E.3d 1034 (Ohio Ct. App. 2022)).

[17] *See generally* KOLLER, *supra* note 2, at 3.

that a liability exemption makes little sense because revenue allows youth sports providers to pay for reasonable precautions against injury and insurance.

In her book, Professor Koller expresses concern that courts generally adopt a romantic perspective about sports that leads to broad exemptions from negligence liability that favor youth sports providers.[18] Given her commitment to understanding youth sport as an industry, Professor Koller understandably worries that, despite some "recent evidence of change," the legal system improperly places the interests of business ahead of the interests of youth athletes because courts see sports as an intrinsic good that the application of law can only damage.[19]

I agree that Professor Koller has correctly identified a matter of concern in sports law. Courts do sometimes give youth sports providers (and indeed all sports providers) exemptions from liability that block athletes from recovering damages that they would recover in other contexts. However, I am not sure that this problem is as ubiquitous as Professor Koller suggests. Many courts limit or even eliminate exemptions from liability that favor youth sports providers, and they do this because they do not adopt romantic understandings of sports and youth sports providers. The ultimate shape of law is therefore far from settled. Instead, it depends heavily on whether romantic or realist accounts of youth sport prevail.

The pages that follow describe how this happens. Part I studies primary assumption of risk, describing how some courts aggressively apply the doctrine to exempt sports providers from negligence liability and how other courts limit, or even eliminate, the doctrine. We will see how courts use a romantic understanding of sports to make the case that law should not regulate how sports are administered. And, when courts limit primary assumption of risk, we will see that those courts treat youth sports providers as ordinary actors instead of participants in a special activity. Part II then considers the use of waivers to exempt youth sports providers from negligence liability. It describes how courts differ in enforcing these waivers, with some enforcing them and others refusing enforcement to various degrees. Here, we will see that courts favoring exemptions see youth sports

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[18] *See* KOLLER, *supra* note 2, at 76–79 ("[T]he notion that sport is good and to be encouraged has significantly affected our approach, limiting potential recovery and any subsequent regulatory effects.") (describing exemptions from liability in favor of youth sport).

[19] *See* KOLLER, *supra* note 2, at 79–80 ("In the language of law and economics, the 'optimal liability rule' in youth sport will be set to promote sport, not protect children.").

providers in explicitly romantic terms, while courts limiting exemptions perceive them as ordinary businesses pursuing profit. The Essay concludes with some thoughts about the value of Professor Koller's insight and its effect on the future of this area of law.

I. Primary Implied Assumption of Risk

Let us begin with a simple hypothetical to illustrate how primary implied assumption of risk works.

Pat, an elite sixteen-year-old youth baseball player, has always used a batting helmet that incorporates a wire face mask. Pat began using such a helmet when he was ten years old because his parents worried that the helmets provided by his local little league team (which had no face mask) would not adequately protect him from injury should a pitch strike him in the face. Pat continued using such a helmet as he progressed in the sport. Now, playing on an elite youth team, Pat has experienced a batting slump. Pat's coach told Pat that Pat couldn't see the pitched balls well enough because of the face mask. The coach told Pat that he would have to bat in the next game without a face mask. Pat objected, but the coach insisted. Pat went up to bat without a face mask and was struck in the face by a pitch, suffering permanent damage to his eye.

Pat has at least two good claims for negligence against youth sports providers.[20] First, the coach's behavior seems negligent, and his employer (presumably the team or club) would face liability under *respondeat superior*.[21] Pat expressed well-founded concerns about eye injuries. A 2025 study published in *Clinical Ophthalmology* notes that sports-related eye injuries "can pose a significant threat not only to the orbit and surrounding adnexa but also to vision itself."[22] The authors identify baseball as the most "common and detrimental" cause of youth sport eye injuries, with over 20,000 such injuries occurring in the pediatric population each year.[23] A

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[20] If the reader isn't convinced that there are any good negligence claims for Pat, one can easily imagine changing the hypo so that negligence appears. For example, perhaps the coach knew that Pat had previously suffered a detached retina in one eye, making trauma to the eye particularly risky.

[21] *See* RESTATEMENT (SECOND) OF AGENCY § 219 (AM. L. INST. 1958).

[22] Aysha Chaudhary et al., *An Analysis of Ocular Trauma Resulting from Pediatric Sports Injuries*, 19 CLINICAL OPHTHALMOLOGY 507 (2025), perma.cc/YX88-G3ER [hereinafter *Analysis of Ocular Trauma*].

[23] *Id.* at 507, 509, 513–14.

mask of the sort worn by Pat offers excellent protection against such injury.[24] Moreover, in this case, the cost of such precaution was minimal. Pat provided the equipment at his family's cost. The coach sacrificed this protection based on his (potentially mistaken) determination that the protective gear was responsible for Pat's slump.

Second, the league seems negligent for not requiring batters to wear masks while at the plate. The American Academy of Ophthalmology recommends mandatory eye protection,[25] but leagues typically require only helmets with openings that leave the eyes unprotected.[26] Given the modest cost of adding eye protection to helmets, it seems unreasonable not to require them given the tragic consequences of eye injuries. Indeed, girls routinely wear face masks when playing softball,[27] making it hard to understand why baseball should not follow suit. Other sports, including squash, racquetball, and hockey, experienced "a dramatically reduced rate of ocular injury" upon making protective equipment mandatory.[28]

If primary implied assumption of risk did not exist, Pat's negligence claim would probably survive a motion to dismiss or motion for summary judgment. Unless the case settled, a judge or jury would hear evidence about the risk of eye injuries in baseball, the effectiveness and costs of face masks, and possibly any deleterious consequences of using face masks in baseball games.[29] The factfinder would then decide if, in light of this evidence, the defendants behaved reasonably under the circumstances.[30]

If applied, primary implied assumption of risk destroys Pat's negligence claim because it prevents plaintiffs from recovering in negligence against

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[24] *See id.* at 508 (stating approximately 90% of ocular sports injuries are preventable with proper precautions and equipment).

[25] *Id.*

[26] *Id.* at 515.

[27] *Id.*

[28] *Analysis of Ocular Trauma*, *supra* note 22, at 515.

[29] For example, the defendants might introduce evidence that face masks obscure the batter's vision, making it more likely that the batter will be struck and injured by a ball or more difficult for the batter to hit the ball.

[30] In general, a defendant is negligent if she fails to behave reasonably under the circumstances. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARMS §3 (AM. L. INST. 2010) ("A person acts negligently if the person does not exercise reasonable care under all the circumstances.").

defendants for injuries caused by risks inherent to the sport.[31] The intuition behind the doctrine is initially attractive. Sports involve risks that might be unreasonable in other, everyday contexts. Those skiing or playing soccer face higher risks of leg injuries than they would when walking down the street. Because athletes choose to play sports, they should not be able to make others responsible for injuries of the sort that come with the sport. Critically, courts identify the risks inherent to a sport as a matter of law. Accordingly, defendants can use primary assumption of risk in motions to dismiss and motions for summary judgment to avoid litigating whether their behavior was negligent. This effectively relieves the defendant of any obligation to avoid negligently exposing the plaintiff to risk.

The leading case of *Avila v. Citrus Community College District*[32] illustrates this possibility. In that case, the plaintiff Avila was a student who played on the Rio Hondo Community College's baseball team. During a preseason game against the Citrus Community College team, a pitch thrown by the Rio Hondo pitcher hit a Citrus Community College batter. When Avila came to bat during the next inning, the Citrus Community College pitcher struck him in the head with a pitch, causing personal injury.[33] Avila sued, among other parties, the Citrus Community College District for battery and negligence. Avila alleged that the District was negligent for, among other things, failing to properly supervise the pitcher and failing to provide umpires or other supervisory personnel to prevent retaliatory or reckless pitching. Notably, Avila did not sue the opposing pitcher.[34]

The District demurred on grounds of immunity and the claim that it owed no duty of care to Avila. It won at the trial court, but the California Court of Appeal reversed.[35] The case continued to the California Supreme Court, which ruled in the District's favor under primary implied assumption of risk.[36] The Court started with the proposition that tort law precludes liability for "injuries . . . deemed inherent in a sport."[37] This removed any

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[31] *See* RESTATEMENT (SECOND) OF TORTS §495A (AM. L. INST. 1965) (stating that assumption of risk prevents a plaintiff from recovering in negligence); *infra* notes 32-38 and accompanying text.

[32] 131 P.3d 383 (Cal. 2006).

[33] *Id.* at 385–86.

[34] *Id.* at 386.

[35] *Id.*

[36] *Id.* at 394 (holding that the District "owed no duty to Avila to prevent the Citrus College pitcher from hitting batters, even intentionally").

[37] *Id.* at 391.

duty on the part of potential defendants to eliminate or otherwise protect athletes from those risks.[38]

For purposes of this Essay, the claim of interest is Avila's allegation that a sports provider (the District) was negligent for failing to supervise the pitcher, perhaps by ensuring that the pitcher did not retaliate by deliberately throwing at Avila. The opinion recognized that throwing deliberately at a batter violates the rules of baseball.[39] Nevertheless, the Court held that being hit by a pitched ball is an inherent risk of baseball. Thus, Avila could not recover because he was struck by a pitched ball, even if this occurred because the opposing manager told the pitcher to throw at him.[40]

The Court reasoned that baseball custom accepts deliberately throwing baseballs at batters despite the rule against it. The Court noted the strategic use of "brushbacks" and "beanballs" as a tactical tool used by Hall of Fame professional pitchers to upset batters and make them easier to retire.[41] This custom made Avila's injury the result of a risk inherent to baseball, even if the rules of baseball prohibited the conduct that allegedly injured him. If Avila were able to sue, the Court feared that the threat of liability would deter players from "'vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule.'"[42] In short, the Court made a policy decision that tort law should tolerate deliberate and dangerous violations of baseball rules to protect against the possibility that pitchers might otherwise stop throwing pitches at batters in violation of the rules. This policy applied regardless of whether the game in question was professional, collegiate, or youth.[43]

Avila is a relentlessly romantic opinion that eschews the application of ordinary tort principles because sport (in this case baseball) provides enormous social value as it is. Accordingly, using law to change how players play baseball would obviously damage baseball's value. One cannot read the opinion without considering the possibility that the judges were baseball fans who revered some of the game's greatest pitchers. The Court glorified the aggressive, rule-breaking tactics adopted by these pitchers and accepted them as so important that baseball games would be forever impoverished if

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[38] *Id.*

[39] *Id.* at 394.

[40] *See id.*

[41] *Id.* at 393–94.

[42] *Id.* (quoting Knight v. Jewett, 834 P.2d 696, 710 (Cal. 1992)).

[43] *Avila*, 131 P.3d at 394 (stating that the level of play is irrelevant to the decision).

those organizing or supervising the games had any responsibility to consider or mitigate the risks of being hit by pitched balls, regardless of whether the game was professional, amateur, or little league.[44]

Avila's romanticism seems to insulate all of the defendants in our hypothetical from liability. Being hit by a pitched ball is an inherent risk of baseball, so neither the coach, the club, nor the league would have any duty to protect Pat from that risk. However, it is important to realize that the *Avila* result is neither universal nor inevitable.

A realist would surely disagree with *Avila*'s view about baseball and its associated risks. A realist would avoid glorifying the rule-breaking practices of certain pitchers and ask why violating a safety rule is an inherent part of any game. To the contrary, the rule's existence excludes the prohibited conduct from the game. True, *Avila* correctly observed that some players, primarily pitchers in professional baseball, consider it entirely appropriate to throw at batters in violation of the relevant rule. However, that does not explain why the views of these players establish the inherent characteristics of baseball. Indeed, to the extent that other pitchers or players consider it inappropriate to throw at batters, one must ask why any court should prefer the sensibilities of those who do not follow rules because they can get away with it.

Additionally, even if *Avila* were correct in its assessment of baseball's inherent nature, that does not mean that the associated consequences are indeed a social benefit. The Court does not explain why baseball is "better" when those associated with the game can unreasonably endanger players without consequence. Numerous games are played, even at the professional level, without deliberate violations of the rule against throwing at batters, but it is hard to imagine that the players in those games or the spectators who watch them think they are not really playing baseball or that the games are somehow inferior to watch. It is entirely possible that they prefer playing in or watching those games.

Finally, even if the social benefit exists, how does the Court conclude that this benefit is worth the concomitant uncompensated injuries? Assuming for the sake of argument that baseball is "better" when pitchers can throw at opposing batters, is that value larger than the serious injuries and ruined careers caused by beanballs? And perhaps more poignantly, is it

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[44] Note that Avila did not sue the opposing pitcher, so the Court's opinion was entirely about excusing the opposing manager, his employer, and the Citrus Community College District from having to defend their behavior as reasonable.

worth risking these injuries in youth sports?[45]

These observations raise questions about *Avila*'s conclusion that the plaintiff's injury was caused by a risk inherent to baseball, and that nothing should be done to reduce that risk. And indeed, there are gaps in the opinion's logic. When one identifies a risk as inherent to a sport, one does not simply recognize that, for example, a batter might get injured by a pitched ball. One must also contemplate a particular level of risk. To continue with baseball, the risk associated with being hit by a pitched ball depends on whether throwing at batters is allowed, the skill of the pitchers, how hard the ball is thrown, and any safety equipment the batter may be wearing. The inherent risk of baseball might be enormous if the game allowed deliberate beanballs and batters wore no helmets. The risk would be much lower if the game prohibited deliberate beanballs and batters wore helmets and facemasks.

So, what is the level of risk "inherent" in baseball? One might be tempted to answer this question by referring to a typical baseball game, but this only begs the question: What is a typical baseball game? Professional, college, elite youth, or children's little league? *Avila* identified professional baseball as the typical game, but it did not explain why. Even if one granted that those organizing Major League Baseball had no duty to control the risk of batters being hit by pitched balls, why would that level of risk be appropriate for a youth game?

In short, one cannot truly identify the baseline or "inherent" risks of a sport without making a judgment about the level of risk appropriate for the context in which the sport is being played. The level of risk appropriate for an NFL game is different from the risk appropriate for a Pop Warner game. This implies that one can identify risks inherent to a sport only by asking whether the risk is reasonable under the circumstances in which the sport is being played. Major League Baseball games are played by trained adult professionals who are paid to play a risky sport. Little league games are played by children, many of whom have little training in the game and play for recreation. These circumstances explain why a relatively high level of risk of being injured by a pitched ball might be reasonable for a major league game and therefore properly considered inherent, while that same level of risk would be unreasonable for a Little league game and therefore not

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[45] *See* Associated Press, *Jack Hamilton, Pitcher Who Hit Tony Conigliaro on Eye, Dead at 79*, BOSTON.COM (Feb. 25, 2018), https://perma.cc/9EHE-PW9N (recounting death of pitcher whose pitch caused career-shortening injury to Red Sox player Tony Conigliaro).

inherent.

The foregoing shows the problem with *Avila*'s broad implications. Imagine the plaintiff were a ten-year-old boy in a little league game and that the manager of the opposing team instructed the pitcher to throw at the plaintiff's head. Insulating this manager (and by extension the youth sports provider employing him) from liability under *Avila* makes no sense because, even if such behavior is accepted in professional baseball, it is unreasonable to countenance it in a children's game.

The obvious importance of context and reasonableness has led other courts to interpret primary implied assumption of risk differently than *Avila* did. These courts may identify certain risks as inherent in a sport, but they impose on defendants a duty not to unreasonably increase these risks. This has the effect of restoring the ability of plaintiffs to sue for negligence.

For example, in *Grady v. Chenango Valley Central School District*,[46] the plaintiff, a high school student, suffered a serious eye injury when struck by a thrown baseball during a "fast-moving, intricate drill."[47] The plaintiff sued the sports provider (the school district), alleging that the coaches "'created a dangerous condition over and above the usual dangers that are inherent' in baseball."[48] Although the Appellate Division below affirmed a trial court grant of summary judgment in the defendants' favor, the New York Court of Appeals reversed on the ground that even though being struck by an errant ball "may be an inherent risk of playing baseball," summary judgment was inappropriate because the Court could not decide, as a matter of law, whether the plaintiff was injured by risks unreasonably enhanced by the defendants.[49]

Although the facts of *Grady* do not precisely match those of *Avila,* the difference between the two opinions is striking. The *Avila* Court decided for the defendants on demurrer because the danger of being hit by a pitch, even one thrown in violation of the rules, was an inherent part of baseball. The Court took as a given the risks of baseball, no matter how unreasonable those risks might be. Thus, even if a jury might find it negligent to increase the risks of baseball by intentionally throwing at the plaintiff in violation of the rules, assumption of risk shielded the defendants from responsibility.

By contrast, the *Grady* Court did not accept the risks of baseball as given, opting instead to have a jury assess the reasonableness of the risk. Consider

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[46] 215 N.E.3d 1157 (N.Y. 2023).

[47] *Id.* at 1162.

[48] *Id.* at 1163 (quoting Owen v. R.J.S. Safety Equip., Inc., 591 N.E.2d 1184, 1185 (N.Y. 1992)).

[49] *Id.*

how easily *Avila*'s reasoning could have applied to the *Grady* facts. Baseball drills surely involve the risk that players will be struck by errantly thrown balls. Thus, it should not matter how the plaintiff's injury happened. That an errant ball struck the plaintiff is all that need be known. Therefore, *Grady* stands for the proposition that the risks inherent to a sport need not be accepted at face value. Instead, a jury should evaluate those risks and the defendants' behavior affecting the risks for reasonableness. That is precisely what *Avila* allows negligent defendants to avoid.

Similarly, in *Wattenbarger v. Cincinnati Reds, Inc.*,[50] the plaintiff was a seventeen-year-old pitcher participating in a professional tryout.[51] While pitching to a batter, the plaintiff felt his arm "pop" without experiencing pain. He told the defendant's personnel but received no response. He resumed pitching and suffered a severe arm injury.[52] The plaintiff sued, alleging that defendants were negligent in allowing him to continue pitching.[53] The defendants successfully moved for summary judgment at the trial level on the basis of primary implied assumption of risk.[54]

The California Court of Appeal recognized that arm injury is an inherent risk of baseball.[55] However, it also found that the defendants had a duty to not unreasonably increase that risk.[56] Thus, the defendants owed the plaintiff a duty to protect against aggravating injuries during the tryout. Under the circumstances, there were factual ambiguities about whether the defendants discharged that duty, making primary implied assumption of risk inapplicable.[57]

At the very least, cases like *Grady* and *Wattenbarger* significantly compromise the ability of sports providers to escape liability under primary implied assumption of risk. A plaintiff can oppose any summary judgment motion based on *Avila* by arguing that identification of a risk as inherent (perhaps the risk of being hit by a pitched baseball) cannot excuse a defendant from liability because defendants have a duty not to increase inherent risks unreasonably. Deciding whether defendants breached this

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[50] Wattenbarger v. Cincinnati Reds, Inc., 28 Cal. App. 4th 746 (1994).

[51] *Id.* at 749.

[52] *Id.* at 750.

[53] *Id.*

[54] *Id.* at 751.

[55] *Id.* at 753.

[56] *Wattenbarger*, 28 Cal. App. 4th at 755.

[57] *Id.* at 756.

duty generally requires a jury, making summary judgment inappropriate.

To see how significant this would be, consider how *Avila* might have come out if *Grady* and *Wattenbarger* had been applied. The Court would have identified the risk of being hit by a pitched ball as inherent to baseball, but it would then have had to consider whether the defendants unreasonably increased this risk—perhaps by instructing the pitcher to throw at Avila or failing to ensure that players and coaches followed the rules of baseball. Under *Grady* and *Wattenbarger*, a jury would need to make this determination, and the defendants' summary judgment motion would have to be denied.

It is possible to read cases like *Grady* and *Wattenbarger* as the *de facto* elimination of primary implied assumption of risk in the context of sports.[58] Granted, these cases do not explicitly eliminate the doctrine; they only interpret it. However, it is difficult to conclude that primary implied assumption of risk has any analytical value after cases like *Grady* and *Wattenbarger*.

The heart of any negligence action is the plaintiff's claim that the defendant failed to behave reasonably under the circumstances.[59] A plaintiff will therefore often argue that the defendant failed to take a precaution against a risk that a reasonable person would have taken. Thus, if the defendant were the league in our hypothetical, Pat would claim that a reasonable person in the league's position would require players to wear facemasks while batting. This would in turn require the factfinder (typically a jury) to compare the severity of the risk associated with being struck in the face by a pitch against the cost or difficulty of implementing the facemask requirement.[60]

This is precisely what would happen under *Grady* and *Wattenbarger*. *Grady* denied summary judgment for the defendants because the Court insisted on using a jury to determine if the defendants unreasonably increased the risks associated with baseball, presumably by failing to take precautions to make the drill safer.[61] Similarly, *Wattenbarger* also denied summary judgment so that a jury could decide whether the defendants acted

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[58] *See* RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 70 (AM. L. INST., Tentative Draft No. 3, 2024).

[59] *See supra* note 30.

[60] *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (analyzing negligence by comparing the likelihood of accident and the gravity of harm against the burden of precaution).

[61] Grady v. Chenango Valley Cent. Sch. Dist., 215 N.E.3d 1157, 1163 (N.Y. 2023).

reasonably by allowing the plaintiff to continue pitching.[62] In short, *Grady* and *Wattenbarger* appear to be completely ordinary negligence cases that make sense without considering primary implied assumption of risk.

One might argue that primary implied assumption of risk still exists because both of these courts identified certain risks as inherent to baseball. However, this determination adds nothing to the analysis. If a defendant has the duty to behave reasonably with respect to a particular risk, it does not matter if the risk is inherent to a sport. If it is inherent, a defendant must not unreasonably increase the risk. And if it is not inherent to a sport, a defendant must still refrain from unreasonably increasing the risk. Thus, while primary implied assumption of risk may still be "on the books," cases like *Grady* and *Wattenbarger* render the doctrine meaningless because the identification of risk inherent to a sport does not affect the defendant's liability.

The foregoing illustrates how the struggle between romanticism and realism affects the shape of tort law. *Avila*'s aggressive exemption from liability rests on a romantic view of baseball and its inherent value. By contrast, *Grady* and *Wattenbarger* take the realist view that baseball is an activity like any other. Like all activities, baseball comes with risks, but that does not relieve people supervising baseball from a duty not to unreasonably increase those risks. This effectively makes ordinary negligence principles applicable to youth sports providers.

II. Waivers of Liability

The law of youth sports waivers expresses the tension between romanticism and realism differently than does the law of primary implied assumption of risk. Here, romanticism and realism are used to describe youth sports providers, not a sport itself. Once again, the outcome of cases depends on which narrative prevails. It is difficult for a youth to participate in sports without having her parents required to sign a waiver.[63] If courts enforce these waivers, their routine use means that youth athletes have effectively lost the ability to recover for injuries caused by negligent sports

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[62] 28 Cal. App. 4th at 756.

[63] *See e.g.*, *Participant Waiver and Release of Liability, Assumption of Risk and Indemnity Agreement*, USATF, https://perma.cc/R6X3-H47W (last updated May 2020).

providers.[64]

To understand the law of waivers in youth sport, it is important to distinguish waivers of an adult's rights signed by the adult and waivers of a minor's rights signed by a parent or other guardian. The vast majority of courts enforce adult waivers in the context of sports.[65] These courts state that waivers are disfavored, so they limit their use in notable ways. First, they allow individuals to waive only causes of action for negligence. Regardless of a waiver's language, individuals cannot waive claims of recklessness or intentional tort.[66] Second, courts require the agreements to specifically mention the waiver of negligence.[67] Finally, courts refuse to enforce waivers in the context of essential services like medical care.[68] Only four states refuse to enforce waivers in all contexts on grounds of public policy.[69]

When the context shifts to youth sport, things change. As an initial matter, it is one thing for an adult to waive her own rights. It is problematic for one person to waive another's rights. Even though parents generally have the ability to make decisions for their children, courts become uncomfortable when those decisions take away the ability of children to gain compensation for injury. This has led to considerable variation in the law concerning waivers in youth sport.

Some courts follow the law enforcing adult waivers. In so doing, they express the belief that waivers are beneficial for youths because the financial burden of liability would put youth sports providers out of business. For

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[64] *See* Ryan Martins et al., *Contract's Revenge: The Waiver Society and the Death of Tort*, 41 CARDOZO L. REV. 1265, 1269 (2020) (taking the position that "Americans are on the verge of living in a waiver society").

[65] *See* Stelluti v. Casapenn Enterprises, LLC, 1 A.3d 678, 695 (N.J. 2010) (enforcing release in favor of gym); Schlobohm v. Spa Petite, Inc., 326 N.W.2d 920 (Minn. 1982); Platzer v. Mammoth Mountain Ski Area, 104 Cal. App. 4th 1253, 1259 (2002) ("California courts have consistently declined to…invalidate exculpatory agreements in the recreational sports context."); Chepkevich v. Hidden Valley Resort, L.P., 2 A.3d 1174, 1191 (Pa. 2010) (enforcing release in favor of ski operator because skiing is a "voluntary recreational activity").

[66] Jones v. Dressel, 623 P.2d 370, 376 (Colo. 1981) (stating releases do not protect defendant against a claim for "willful and wanton negligence"); Tayar v. Camelback Ski Corp., 47 A.3d 1190, 1202 (Pa. 2012) (stating waivers of reckless behavior violate public policy and noting that states ruling on the question generally agree).

[67] *See Schlobohm*, 326 N.W.2d at 922–23; *Jones*, 623 P.2d at 376–78.

[68] *See* Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 447 (Cal. 1963).

[69] *See* Hanks v. Powder Ridge Rest. Corp., 885 A.2d 734, 744–45 (Conn. 2005); Bagley v. Mt. Bachelor, Inc., 340 P.3d 27, 30 (Or. 2014); Hiett v. Lake Barcroft Cmty. Ass'n, 418 S.E.2d 894, 895–97 (Va. 1992); Dalury v. S-K-I, Ltd., 670 A.2d 795, 797 (Vt. 1995).

example, in *Zivich v. Mentor Soccer Club*,[70] a seven-year-old child was injured when climbing on a soccer goal after practice.[71] The child sued, but the club successfully moved for summary judgment on the basis of a waiver signed by the child's mother.[72] When the Ohio Supreme Court affirmed on appeal, it argued that allowing children to sue sports providers for negligence would reduce the sports opportunities available to youths:

> [F]aced with the very real threat of a lawsuit, and the potential for substantial damage awards, nonprofit organizations and their volunteers could very well decide that the risks are not worth the effort. Hence, invalidation of exculpatory agreements would reduce the number of activities made possible through the uncompensated services of volunteers and their sponsoring organizations. . . . Accordingly, we believe that public policy justifies giving parents authority to enter into these types of binding agreements on behalf of their minor children.[73]

Opinions like *Zivich*[74] clearly adopt a romanticized description of youth sports providers. *Zivich*'s focus on nonprofits and volunteers portrays youth sports providers as selfless actors who give time to bring the inherent good of sports to children while foregoing profit. Cloaking these providers with such virtue makes them seem deserving of exemption from legal responsibilities that other actors must shoulder. And what's more, giving this exemption to youth sports providers is actually good for youth athletes because the financial subsidy of nonliability will increase sports opportunities by keeping youth sports providers in business.

A realist would surely object to this. As noted earlier, youth sports are not dominated by impecunious entities that cannot afford insurance. Billions of dollars a year flow into youth sport. Even when youth sports providers do not seek revenue, they are far from insolvent. For example, governmental

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[70] 696 N.E.2d 201 (Ohio 1998).

[71] *Id*. at 204.

[72] *Id*. at 203–04.

[73] *Id*. at 205.

[74] *See* Sharon v. City of Newton, 769 N.E.2d 738, 747 (Mass. 2002) ("To hold that releases of the type in question here are unenforceable would expose public schools, who offer many of the extracurricular sports opportunities available to children, to financial costs and risks that will inevitably lead to the reduction of those programs."); Hohe v. San Diego Unified Sch. Dist., 224 Cal. App. 3d 1559, 1564 (1990) (enforcing waiver and asserting that the "overwhelming costs of litigation" and risks are decreasing the opportunities for recreation that benefit youths).

entities such as schools and towns provide youth sports opportunities, and these entities routinely carry insurance to cover negligence. And finally, to the extent that youth sports providers are organized as nonprofits, they also frequently raise significant revenue. Indeed, the 2002 Schedule A to Form 990 for the *Zivich* defendant Mentor Soccer Club reported $139,712 in income (largely from "membership fees received") for 1998.[75] Thus, it seems likely that Mentor could have afforded to take reasonable safety precautions and purchase insurance. And today, youth soccer clubs easily earn far more than that, with three top Massachusetts soccer clubs reporting 2024 revenues of $13.7 million, $9.89 million, and $7.66 million. Each of these clubs pays its top employees well over $100,000 per year and enjoys the added financial benefits of being tax-exempt.[76]

These observations create reason to doubt that youth sports providers would really be driven out of business by the threat of negligence liability. Indeed, if the premise behind *Zivich* were true, youths in states that refuse to enforce waivers should experience a lack of youth sports opportunities. However, the Aspen Institute identifies Vermont and Iowa as the top two states in terms of youth sports participation,[77] and those states refuse to enforce waivers for youths.[78]

Even if some youth sports providers would be driven out of business by the cost of insurance, it is unclear why keeping these providers in business is a good idea if doing so makes youth sports riskier. Financially strapped entities of any kind try to lower costs, including safety precautions. Because negligence liability incentivizes these firms to maintain safety precautions, enforcing waivers removes these incentives, making sports more dangerous. This suggests that society is better off if negligence liability drives

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[75] *See* Andrea Suozzo et al., *Mentor Soccer Club: Form 990-R for Period Ending May 2002*, PROPUBLICA, perma.cc/3W5H-P42R (last updated Sept. 25, 2025).

[76] Andrea Suozzo et al., *New England Futbol Club Inc*, PROPUBLICA, perma.cc/FEH4-8U6L (last updated Sept. 25, 2025); Andrea Suozzo et al., *FC Stars Inc,* PROPUBLICA, perma.cc/2267-W3QP (last updated Sept. 25, 2025); Andrea Suozzo et al., *Fc Greater Boston Bolts Inc*, PROPUBLICA, perma.cc/AA7C-3SP3 (last updated Sept. 25, 2025).

[77] Youth Sports Facts: Participation Rates, PROJECT PLAY ASPEN INST., perma.cc/84ZU-XX84 (last visited Feb. 26, 2026).

[78] *See* Dalury v. S-K-I, Ltd., 670 A.2d 795 (Vt. 1995); Galloway v. State, 790 N.W.2d 252 (Iowa 2010) (providing that a broader and more systematic attempt to measure the effect of enforceable waivers also suggests that youth participation in extracurricular activities is not significantly related to the enforceability of waivers); Alfred C. Yen & Matthew Gregas, *Liability Waivers and Participation Rates in Youth Sports: An Empirical Investigation*, 10 ARIZ. ST. SPORTS & ENT. L.J. 1, 39 (2020).

marginally solvent youth sports providers out of business, leaving the field to providers who have the financial means to provide reasonably safe experiences.

Not surprisingly, many courts see these problems and disagree with *Zivich*. In some states, courts continue to enforce waivers signed by adults on their own behalf while invalidating youth waivers. In other states, youth waivers become unenforceable only when they concern a commercial entity. In so ruling, these courts reject the romantic premises of *Zivich*.

Scott v. Pacific West Mountain Resort[79] shows the reasoning of courts who enforce waivers by adults but refuse to enforce liability waivers involving minors. In that case, the plaintiff apparently missed a slalom gate that was part of a skiing racecourse laid out by the owner of a ski school. He crashed into one of the supports for an unused tow rope shack, suffering severe head injuries.[80] The plaintiff sued the ski school for negligence but lost at the trial level on the basis of a waiver signed by the plaintiff's mother.[81]

On appeal, the Washington Supreme Court affirmed existing Washington law upholding waivers in sports contexts.[82] However, it further held that parents lack the legal authority to waive a child's future ability to sue for injuries suffered as the result of another's negligence.[83] The Court drew its public policy primarily from the "settled law in many jurisdictions that, absent judicial or statutory authority, parents have no authority to release a cause of action belonging to their child."[84] The Court reasoned that if parents legally could not release a child's cause of action after an injury, it made little sense to allow parents to release causes of action before an injury.[85] The Court specifically noted and rejected the argument that the threat of liability would make youth sports prohibitively expensive, finding no reason to treat youth sports any differently than any other business or activity that might involve negligent behavior.[86]

Hojnowski v. Vans Skate Park[87] shows how some courts try to split the

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[79] 834 P.2d 6 (Wash. 1992).

[80] *Id.* at 8.

[81] *Id.* at 9.

[82] *Id.* at 11.

[83] *Id.* at 10.

[84] *Id.* at 11.

[85] *Scott*, 834 P.2d at 11–12.

[86] *Id.* at 12.

[87] 901 A.2d 381 (N.J. 2006).

difference between cases like *Zivich* and *Scott*. In that case, the plaintiff was injured while skateboarding at a park operated by the defendant.[88] The Appellate Division below found that the waiver signed by the plaintiff's mother was unenforceable, and the New Jersey Supreme Court affirmed.[89]

The *Hojnowski* court's take on public policy largely followed *Scott*. The Court began by noting that waivers "encourage a lack of care," making them subject to invalidation for reasons of public policy.[90] The Court then cited to New Jersey law prohibiting a parent or guardian from releasing a minor's cause of action without judicial approval. It noted that enforcing waivers risked leaving children without compensation for injuries of unknown severity, leaving them in potentially "unacceptably precarious" situations.[91] However, the Court did not find that public policy invalidated all waivers involving minors because New Jersey had passed legislation granting civil immunity to "certain volunteer athletic coaches, managers, officials, and sponsors of non-profit sports teams."[92] This led the court to conclude that public policy required the invalidation of waivers only in the case of for-profit entities. In so ruling, the court rejected the defendant's argument that liability would drive providers of youth activities out of business. The court saw no reason to treat commercial sports providers any differently from other commercial enterprises.[93]

When compared to *Zivich, Scott* and *Hojnowski* adopt a dedicated realist perspective.[94] Neither court centered its analysis on selfless, financially impecunious nonprofits and volunteers who would be driven out of business by the cost of liability and insurance. Instead, both courts saw that youth sports providers are often ordinary businesses with revenues that would presumably support insurance. Accordingly, there was no reason to give these entities further financial subsidies by allowing them to ignore obligations that other businesses have to follow. It is therefore clear that the struggle between romanticism and realism affects the law of youth sports waivers.

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[88] *Id*. at 383.

[89] *Id*.

[90] *Id*. at 386.

[91] *Id*. at 387–88.

[92] *Id*. at 389.

[93] *Hojnowski*, 901 A.2d at 390–91.

[94] *See Scott*, 834 P.2d at 12; *Hojnowski*, 901 A.2d at 390–91.

CONCLUSION

Romanticism and realism lead courts to very different applications of tort law to youth sports providers. When courts accept the narrative that sports are an inherently beneficial form of activity that should be preserved in its current state and that youth sports providers selflessly forego profit to bring the benefit of sports to youths, courts often accept the argument that youth sports providers should not be held responsible for any negligent behavior that injures youth athletes. Unfortunately, the romantic narrative of sport is not really accurate, especially in today's youth sports world where the pursuit of money has come to occupy center stage. This implies that broadly excusing youth sports providers from negligence liability is wrong, making cases like *Zivich* and *Avila* mistakes that should ideally be corrected.

Of course, as long as the romantic view of sports retains credibility, cases like *Zivich* and *Avila* will remain good law that will sometimes block injured youth athletes from recovery that they deserve. Professor Koller's book is therefore valuable because it so clearly explains why the romantic view of sports is inaccurate. Her book will therefore play an important role in giving courts and society an accurate depiction of youth sports, a depiction that will help courts improve the law.

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The Sports Parent's Predicament

KATHARINE B. SILBAUGH*

Youth sport enjoys a favored status in American culture, encouraged by policymakers and local communities, pursued by parents, and remembered through rose-colored lenses by adults. Most lawyers are familiar with Justice Harry Blackmun's ode to the magical qualities of baseball in *Flood v. Kuhn*, in which he took the liberty of running through his own memories of scores of baseball legends.[1] Congress and presidents want children to continue in sport.[2] Many in the health field argue that sport is important because exercise is important, and sport is treated as the natural manifestation of exercise.[3] An enormous number—perhaps as many as half—of children participate in American youth sports every year.[4] At the same time, children want to quit, and do quit, youth sports well before completing school or becoming adults. As many as 80% of children who participate in youth sports quit by the age of fifteen.[5] Far too many children are injured before they quit, and many experience exhaustion and diminished interest. Making sense of this paradox is urgent for anyone who cares about the physical and emotional health of children. The clear-eyed look at youth sport we consider here is timely and urgently needed.

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[1] *See* Flood v. Kuhn, 407 U.S. 258, 260–64 (1972).

[2] DIONNE KOLLER, MORE THAN PLAY: HOW LAW, POLICY, AND POLITICS SHAPE AMERICAN YOUTH SPORT 73 (2025); Office of Disease Prevention and Health Promotion, *Top Ten Things to Know About the National Youth Sports Strategy*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://perma.cc/VC7X-NUYY (last updated Jan. 14, 2022).

[3] *See* Donna L. Merkel, *Youth Sport: Positive and Negative Impact on Young Athletes*, 2013 OPEN ACCESS J. OF SPORTS MED. 151, 152–53.

[4] *See id.* at 151.

[5] *Id.*

Youth Sport

Youth play is the activity children engage in spontaneously for its own sake. It can improve fitness but is at its core fun and chosen moment-to-moment by the child. It is not, in its nature, goal-oriented. Because the child chooses what to do for its own sake, play does not produce a surplus beyond the child's enjoyment.[6] Youth sport, unlike youth play, does produce a surplus beyond a child's enjoyment and well-being. We speak culturally of the emotional and psychological development that youth sports produce for the child, but an industry gains economic surplus as well. That surplus is expressed in the ever-expanding nineteen-billion-dollar youth sport industry, including private training programs, travel teams, specialty coaching, and youth sport-related goods including branded equipment and clothing. The surplus is taken in by school-based sports programs, professional sports leagues, sports fans, the U.S. Olympic and Paralympic movements, the handful of actual future elite athletes in need of competitors, state and local governments, and the sports medicine field. Parents are also a part of the ecosystem of youth sport, sometimes as emotional beneficiaries, and almost always as funders, coordinators, and facilitators of a child's sport participation.

In light of the widespread financial and institutional entanglements with the world of youth sports, the touchstone of benefit to children becomes an essential ideology to mask the troubling amount of potential exploitation in the system. That same ideology supports an unusual amount of deference to private actors in deciding what youth sport will look like: how much it will cost, who can access it, and what risks are acceptable. What sociologist Jay Coakley calls the "Great Sport Myth-[Making]" is infused in law and policy, with judges and legislators routinely waxing on effortlessly about the near-magical quality of youth sport. These policymakers speak from within the Great Sport Myth, the pervasive essentialist belief that youth sport is inherently good and its outcomes are overwhelmingly positive. They express an intense nostalgia that feels less about the actual experience of children and more about their idealized childhood memories. Sport is believed to have the power to teach leadership, character, social connection, and discipline, somehow without pain or harm. That nostalgia, the wistful revision of the past that draws on only the good and sentimental and forgets the messy reality, is certain to make changes to the contours of youth sport more difficult.

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[6] KOLLER, *supra* note 2, at 115.

Capitalism

In this fascinating mix, capitalism lurks. First, we see its simple incarnation in the profit from the sport travel industry and the league enrollment price. If we want to increase youth sport participation and reduce its high rates of attrition, we could address those concerns with targeted or broad subsidies and regulation designed to deal with attrition, belonging, injury, and other safety issues.

Dionne Koller points to a deeper embedding of capitalism within youth sports, one not so easily managed with our traditional regulatory tools. In contrast to play, which is cooperative, spontaneous, and driven by children, youth sport is competitive at its core and by design. That competition serves as the training ground for a "tournament" economic order in which competition produces "ideal, just, [and] legitimate outcomes."[7] There is a widely held belief that a combination of talent and effort places individuals somewhere along a ladder of success in a moral ordering. Agonism, unlike play, must be taught. Youth sports' myth-making will be more effective if it is dispersed throughout the culture and normalized rather than concentrated within the self-interested, such as private sports coaching programs. Youth sport becomes a training ground for the production of winners and losers.[8]

This framing may supply a partial explanation for our failure to fix the high attrition rates in youth sports: the production of losers is essential to the production of winners in that system, and only the fittest survive. Indeed, some adults look back at youth sports without the rose-colored glasses of some policymakers and judges, instead seeing it as a place of minor trauma where they were unable to meet expectations of adults or peers and may have internalized a sense of failure or low status that lives into adulthood. Attrition is not a design flaw; it is a mechanism for sorting children into roles that will later reflect their ideas about positions in the economy. Attrition is a feature, rather than a bug, of youth sport's commitment to competition.

Parents

What role do parents have in this myth-making machine? As the people charged by both law and culture with making essential decisions about their children's activities, the buy-in of parents is critical to the maintenance of the

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[7] KOLLER, *supra* note 2, at 95.

[8] *See generally* Katharine B. Silbaugh, *Testing as Commodification*, 35 WASH. U. J.L. & POL'Y 309, 331–32 (2011) (describing a similar process for standardized testing).

existing youth sports model. Scholars in sociology, psychology, and law recognize the centrality of parents to the world of youth sports. These scholars supply important insights. Perhaps parents are indulging their own egos in a desire to win by proxy, losing their sense of perspective and forgetting that the child is the player, not the parent. Parents are not separate from the cultural Great Sports Myth-making any more than judges who wax on about the benefit of sport, so they are not able to disentangle their own emotional needs from their child's needs. Perhaps these parents are instead responding to a false hope of a college scholarship or other "competitive kid capital"[9] that will ultimately improve their child's standing in the adult world. Both of these explanations seem accurate as a part of the explanation for parental behavior.

I offer a third explanation that I believe finds its way into the mix, complicating parental agency in the system: the appropriation by capital of parental authority to ease the glare of child exploitation in the sport system.[10] In this telling, the protective role parents have to make safe, healthy decisions for their child is real. At the same time, it is also a gateway through which capital can access children with all of the legitimacy of that parental authority itself. The parental role is co-opted into moral cover that allows the youth sport industry to function free of accountability. In this way, the industry can use parental authority in a shell game of responsibility to avoid its own need to adjust rules of play for both safety and for enhancing child welfare.

In an earlier work, I described one such example in the movement of Lystedt concussion legislation across all fifty states between 2009 and 2015.[11] These laws were promoted to address the risk of concussions in youth sports. The Lystedt legislation required parental education about concussion risk, followed by a signature affirming that education. Yet the legislation focused on return-to-play rules post-concussion, with no aim at rules of play that might reduce the primary risk of an initial concussion.[12] Indeed, all versions of Lystedt laws require the education of the parents, while only half require education of coaches. Yet, it is the coaches who will make the minute-

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[9] KOLLER, *supra* note 2, at 134.

[10] Katharine Silbaugh, *The Legal Design for Parenting Concussion Risk*, 53 U.C. DAVIS L. REV. 197, 243 (2019).

[11] *See generally id.* at 218 (stating "[i]n 2009, Washington State became the first to pass a concussion return to play law, commonly called the Lystedt law. By 2015, all fifty states and the District of Columbia had followed suit").

[12] *Id.* at 218–19.

to-minute risk decisions that might reduce the incidence of primary concussions. Parents make only one single decision authorizing their child to join a sports team and have almost no practical power to control the risk after the decision to play is made. The fact that half of the states only require the education of parents and not of coaches indicates that the legislation is focused on engaging with the parental authority to make participation decisions, and using that authority to legitimize the day-to-day operations of the league, instead of educating coaches on how to reduce risk.[13] Seeking and obtaining signatures from parents becomes a ritual of legitimation that effectuates the shifting of responsibility from institutions, experts, and those in control of game and league design, to individuals who are able only to opt in or opt out.

Opting in or opting out assumes the naturalization of rules of play, rather than their adaptation to safety. The structure of the Lystedt legislation, in effect, exploits the authority to legitimize risk without addressing that risk. Professional sports leagues, including the NFL, supported the Lystedt legislation in its current form.[14] Arguably, then, its design represents an example of the way capital uses parents to access children. Parent-blame, in this telling, functions only to obscure the role of capital. Parents are left in an enormous bind: they retain the authority to deny their child access altogether to what is viewed as a significant source of cultural capital, but they have no power to reduce risk within the decision to give permission. Indeed, the entire concept of reducing risk is obscured. Capital puts parents in this bind regularly: deny a child a phone altogether, or allow unfettered access to the child by data brokers, targeted advertisement, and third parties seeking to influence the child.[15] The format of the phone seems naturalized, beyond regulation, and the parent simply facilitates the access to the child. Parents, too, can be pawns in a system that is designed and sustained by a culture of agonism that itself supports the profit motive.

The Great Parent Myth

If myth-making about youth sports is essential to the unusual legal regime that responds to it, myth-making is hyper-charged in the context of the parent-child relationship. Parents are the full plan in culture and law for

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[13] *See id.* at 219.

[14] *See* KOLLER, *supra* note 2, at 87; Silbaugh, *supra* note 9, at 218, 227.

[15] *See* Katharine B. Silbaugh & Adi Caplan-Bricker, *Regulating Social Media Through Family Law*, 15 U.C. IRVINE L. REV. 1, 56 (2024).

ensuring that children can be cared for fully from birth through adulthood. Indeed, parents are legally obligated to ensure that their children have food, clothing, medical care, housing, education, and supervision around the clock.[16] Repeatedly, courts and policymakers refer to the natural drive to shoulder this obligation, acknowledging the weight, but noting that it is counteracted by intangible rewards of the highest order.[17]

Myth-making around parents serves multiple purposes. It naturalizes decision-making frames that are defined by external forces. The mythical version of a parent is well-informed about the nature of risks and the benefits of youth sports. In reality, parents have a choice between denying their children formative experiences in our culture, or accepting unreasonable risks. Parental myth also deflects institutional responsibility. When a child is injured, parents are criticized for pushing too hard, living vicariously through their child, losing perspective, or otherwise failing to protect their child. Parental myth-making also guides parents culturally into an expectation about their behavior that is pro-sport and anti-inquiry into risk. The image of supportive sports parents is cast culturally as a person who spends hours in a car managing the logistics of participation unfailingly, not a parent who inquires of the coach or league about its decisions.

Parents are not simply involved in a child's identity formation; they are tasked with guiding that identity formation to successful adulthood. This is both fundamental to the status of the child in society, and so naturalized that it can at times seem to be forgotten. The parental role often surfaces only where parents seem to fail children, whether as sports parents or in nurturing a child's academic abilities, in being too permissive or too strict managing relations with peers, or as social media supervisors. A near infinite list of potential parental mistakes arises when parents are believed to own the child's identity formation. Often, the parent's role is invoked as though they work on a blank slate rather than within a preset landscape. How is that landscape set? The landscape is set by capital and state, which are two forces that are far larger than the parent themself. Yet when criticizing any phenomenon appearing to afflict children, parent-blame can serve to exonerate engineers of the existing system within which parents make their choices. Youth sport exemplifies this shell game perfectly, as

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[16] *See* Katharine B. Silbaugh, More than the Vote: 16-Year-Old Voting and the Risks of Legal Adulthood, 100 B.U. L. REV. 1689, 1695 (2020).

[17] *E.g.*, Parham v. J.R. 442 U.S. 584, 602 (1979); Meyer v. Nebraska, 262 U.S. 390, 400 (1923); *see* RESTATEMENT OF THE L. OF CHILD. AND THE L. pt. 1, ch. 1, intro. (AM. L. INST., Tentative Draft No. 1, Apr. 6, 2018).

society shifts blame for overuse injuries and failure to stay with sport onto parents.

Parents become a way to avoid questions about child welfare, supplying the answer to every question about what is wrong with kids these days. This analytical move serves to shift responsibility from entities to individuals as well. This reflects a substantial feature of contemporary economic structure, whether we are describing the shift from social security to defined benefit retirement savings, or of educational expenses to the higher education student:

> Western society has not only embraced risk as a useful conceptual framework, but has also embraced risk as a matter of social policy. Governments, large employers, and other big institutions that used to spread risks are encouraging and sometimes requiring individuals to embrace the actual risks that they encounter in their lives. Across Western society, governments and other big institutions are to a degree cutting people loose from social structures that spread risk, exposing individuals to more risk, making them more individually responsible—all in the name of creating a more dynamic, entrepreneurial, and creative society.[18]

As risk shifts from institutions to individuals, myth-making is essential to obscuring the shell game. In the case of youth sports, Dionne Koller details the deep and widespread myth-making that conceals the operation of interests. With respect to the parent, child, and outside institution, the same phenomenon appears.[19]

One way to address the bind parents are in is to override their choices with regulation if their choice set seems designed to help the youth sports industry rather than the child. One example is the varied reactions to the enforcement of liability waivers. Many states will not enforce a waiver against a child that has been signed by the parent.[20] Perhaps this is because when a child arrives in court, it becomes difficult to imagine how the waiver can benefit them rather than the recreational operator. That enforcement denial serves as an example of a doctrine that examines whether parental authority is being expropriated by a third party, and then adjusts the response to parental authority accordingly.

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[18] Tom Baker, *Embracing Risk, Sharing Responsibility*, 56 DRAKE L. REV. 561, 562 (2008).

[19] *See generally* Katharine Silbaugh, *Corporate Childrearing*, 76 DUKE L.J. *(forthcoming 2027), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=6283518.*

[20] Silbaugh, *supra* note 10, at 242.

Just as parental authority cannot be used by recreational operators in many states to avoid making their facilities safer, parental authority and the parental role should not be useful to, or used by, the youth sport industry. While true parental decision-making should still be respected, it should never serve to insulate the industry from culpability for youth injuries and burnout, or for the uneven distribution of public spaces like public parks used by private entities that do not take all comers.

One solution is to move to a play-based conception of sport, where children drive the creation of rules and the timing of interactions, and where competition only emerges as children choose it. In play-based sport, the interests of sports leagues, coaches, universities, professional leagues, and parents do not inform the choices about physical activity. Once the play-based conception of sport is understood, all decisions about youth sports policy can be run through its lens, and adjustments to policy can be guided by the goals and values of play-based sport.[21]

Just as the adjustment to the overall framework informing youth sports can improve the organization and delivery of sport, so too can an adjustment to conceptions of the parent in sport improve the organization and delivery of opportunities. Yes, parents become emotionally involved in sport and make decisions with imperfect information and a distorted sense of the economic opportunities that sports can deliver. At the same time, parents make these choices within, not above, the Great Sport Myth that envelopes the youth sport culture. Parents, whether as coach or as bystander, function within the constraint of preset options that are made invisible by myth. Refocusing policy away from placing burdens on the individual, either parent or child, and toward restraining the self-interested institutions—be they universities, sports leagues, or Olympic committees—would advance our ability to design an appropriately child-centered youth sport landscape. Only by addressing the myth-making around sport and around parenthood can we work toward building a system that authentically meets the needs of children.

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[21] *See generally* KOLLER, *supra* note 2, at 122–28 (explaining how many problems with our current approach are revealed when looking at all levels of sports (e.g. youth, high school and college, professional and Olympic) through a play-based lens).

A Heartbeat Away: How a Two-Term President Could Serve a Third Term and Actions to Prevent It

Oscar Fullerton[*]

INTRODUCTION

On more than one occasion, President Donald Trump has caused his constituency to speculate one increasingly relevant question—can he serve more than two terms in the White House? The Twenty-Second Amendment to the United States Constitution seems clear—"[n]o person shall be elected to the office of the President more than twice . . . ."[1] On November 13, 2024, shortly after winning his second bid for the presidency, President Trump suggested he could exceed his constitutionally-limited tenure in the White House.[2] He continues to indicate his willingness and desire to run for a third term. However, it remains unclear how he plans to circumvent the Twenty-Second Amendment, given that, since its adoption, no president has seriously tested the rigidity of this constitutional limitation.

The guiding principle of the Twenty-Second Amendment—that no person shall serve more than two terms in the office of the Executive—is

[*] J.D. Candidate, New England Law | Boston (2025). Foremost, to my Allison for all her sacrifice, motivation, and inspiration. To Scott Waddell, Esq. and Wyatt West, Esq. for being my best friends. Anthony Truisi, Esq., for always talking things through with me. To Kat Bassey, Esq. and Marcus DiBacco, Esq. for editing my paper when they had better things to do. And to Professors Victor Hanson, for invaluable guidance on this paper, and Lawrence Friedman, for believing in me.

[1] U.S. CONST. amend. XXII.

[2] Neil Vigdor, *No, Trump Cannot Run for Re-election Again in 2028*, N.Y. TIMES (Oct. 1, 2025), https://perma.cc/NS82-WQQG.

rooted in American history, beginning with President George Washington.[3] Since then, every subsequent president except President Franklin Delano Roosevelt contributed to this longstanding precedent solidifying this principle.[4] In response to Roosevelt's fourth term, Congress codified the two-term principle in the Constitution.[5] No serious efforts to circumvent the Twenty-Second Amendment have garnered much attention, until now.[6]

It is commonplace to have different legal interpretations of the Constitution's text to arise. However, legal scholarship is skeptical at any notion that a branch of the government would openly disregard the constitutional safeguards embodied in the separation of powers. Recent actions by the President highlight his willingness to test the boundaries of the executive branch's constitutional powers, even if that means refusing enforcement of judicial orders.[7] When court orders pertain to the Supreme Court of the United States' ("SCOTUS") interpretation of the executive branch's constitutional powers, presidential defiance poses serious constitutional problems.

This Article will argue that there are three ways a two-term president can circumvent the Twenty-Second Amendment. Two of these paths require interpretations of relevant Amendments favorable to the two-term president, which the judiciary should deny because it would run counter to the Founding Fathers' vision for the executive branch and the just discussed centuries-long precedent. Even if the judiciary ruled against the two-term president, the president's role as the enforcer of the law presents a conflict of interest, potentially leading to a president serving a third term and ultimately a constitutional crisis. In such a scenario, congressional action would be the final safeguard.

To that end, Part I of this Article defines the contours under which the

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[3] U.S. CONST. amend. XXII.

[4] NCC Staff, *FDR's Third-Term Election and the 22nd Amendment*, NAT'L CONST. CTR. (Nov. 5, 2020), https://perma.cc/JRY4-446L [hereinafter *FDR Third Term*].

[5] *Id.*; *see* George Clinton, *Cato, V.*, *in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787–1788 at 265, 265 (Paul Leicester Ford ed., 1892) (providing that lack of presidential term limits in the Constitution was a concern of opponents during ratification).

[6] *See* H.R.J. Res. 29, 119th Cong. (2025); *FDR Third Term*, *supra* note 4.

[7] *E.g.*, Ellen Knickmeyer & Lindsay Whitehurst, *Trump Administration Is Flouting an Order to Temporarily Lift a Freeze on Foreign Aid, Judge Says*, AP NEWS, https://perma.cc/5SLP-D3GZ (last updated Feb. 20, 2025, 6:55 PM EDT); Nicholas Riccardi, *Trump's Moves Test the Limits of Presidential Power and the Resilience of US Democracy*, AP NEWS, https://perma.cc/7GB3-JUQQ (last updated Mar. 1, 2025, 1:49 PM EDT).

Twenty-Second Amendment was drafted, and how it interacts with the Twelfth and Twenty-Fifth Amendments. It will also provide a brief overview of the different branches of the federal government and the system of checks and balances. Part II underscores the necessity of preserving the integrity of the Twenty-Second Amendment in light of its potential loopholes and presidential attempts to circumvent it. Part III argues that there are three ways a two-term president could bypass the Twenty-Second Amendment and discusses the advantages and drawbacks of each. Finally, Part IV explains that even if the two-term president successfully circumvents the Twenty-Second Amendment, Congress can and must take action to prevent it.

I. Background

A. *The Founding Fathers' Intent for Presidential Term Limits*

1. The Federalist Papers and Anti-Federalist Papers

After declaring independence from England in 1776, the newly formed United States of America slowly began slipping into turmoil.[8] In response, various representatives from each of the thirteen colonies endeavored to form a stronger, more centralized national government.[9] The product of these efforts was the first Constitutional Convention of 1786 in Annapolis, Maryland, whereby delegates from each state organized a new governing document to replace the Articles of Confederation.[10] Two parties emerged from this Convention—the Federalists, who supported the adoption of a Constitution, and the Anti-Federalists, who opposed it.[11] Both parties debated how best to formulate the document to ensure a lasting and representative form of democracy. In 1787, the second Constitutional Convention took place in Philadelphia where debate spanned over five months, resulting in the final version of the Constitution.[12] Notably, the Federalists and Anti-Federalists were instrumental to the formation of the Constitution, despite having opposing views.

Drafters of the Constitution sought maximal participation from those

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[8] *Constitution of the United States—A History*, NAT'L ARCHIVES, https://perma.cc/G4T9-BEV5 (last updated Oct. 7, 2021).

[9] *Id.*

[10] *Id.*

[11] *See* NAT'L CONST. CTR., CONSTITUTION 101: WHO WERE THE FEDERALISTS AND THE ANTI-FEDERALISTS?, https://perma.cc/3TTZ-MMWT.

[12] *See id.*

whom the Constitution would govern: the People. To reach the masses, both the Federalists and Anti-Federalists took their positions on each matter to the press, resulting in the highly influential collections of essays known as the *Federalist Papers* and the *Anti-Federalist Papers*.[13] Scholars of the Constitution often quote these collections given their extreme historical significance and accounts from the men who eventually drafted and signed the Constitution itself. Authors of the *Federalist Papers* were Alexander Hamilton, James Madison, and John Jay, each of whom wrote under the pseudonym "Publius."[14] Similarly, authors of the *Anti-Federalist Papers* wrote under pseudonyms and included George Clinton as "Cato," and Robert Yates as "Brutus," among a few others.[15]

While textual debate volleyed between the competing essays, the purpose and function of the executive office—particularly term limits—sparked significant controversy. An early draft of the Constitution provided that the president be eligible to serve one seven-year term.[16] Later versions, and ultimately the final adopted version, authorized the president to serve an unspecified number of four-year terms.[17]

Three separate *Anti-Federalist* papers opposed the absence of presential terms limits and expressed those concerns in print.[18] One paper, titled *Cato No. 5*, argued that four-year terms would lead to "oppression and ruin" and too closely resembled an "elective monarchy."[19] Furthermore, Cato argued that it would be naive to rely on one man's disposition and goodwill, warning that if the executive is "held by a single bad man," the People would be subjected to his "tyrannical whims."[20] Similarly, an Anti-Federalist speech by George Mason at the Virginia Convention focused on the idea that if a president could be reelected, it was very likely they would.[21] This is in part because interested parties such as foreign entities would have an interest in building improper connections with the president, leading to offers of

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[13] *Constitution of the United States—A History*, *supra* note 8.

[14] John Kincaid, *Publius & Journal of Federalism*, ROBERT B. & HELEN S. MEYNER CTR. LAFAYETTE COLL., https://perma.cc/PTU3-6FVN (last visited May. 4, 2026).

[15] *Id.*

[16] Const. Convention, 1787, *Constitution, Printing of First Draft, Committee of Detail*, GILDER LEHRMAN INST. OF AM. HIST., https://perma.cc/LPT7-KXAW (last visited Nov. 25, 2025).

[17] *See generally* U.S. CONST. art. II, § 1 (leaving out a limit on presidential terms).

[18] *E.g.*, Clinton, *supra* note 5.

[19] Clinton, *supra* note 5.

[20] *See* Clinton, *supra* note 5.

[21] George Mason, Speech at the Virginia Convention (June 17, 1788) (transcript available at https://perma.cc/AP2Z-HJE8).

emoluments.[22] Mason ended his speech by calling for term limits as a way to rectify this situation.[23]

In response, the Federalists argued against limiting the number of terms.[24] More specifically, the *Federalist Paper No. 72*, authored by Hamilton, offered various reasons in support of this proposition.[25] First, prospects of reelection would incentivize the president to act in the best interest of their constituency rather than in their own self-interest.[26] Second, the president, their staff, and the constituency would all benefit from the executive's accumulated experience in the position.[27] Third, a change in administration could needlessly cause disruptions at critical times, such as during a war.[28] Lastly, necessitating change could destabilize a well-functioning system.[29]

Ultimately, the Federalists prevailed and the final draft of the Constitution did not contain any limit on the number of terms a president could serve.[30]

2. Establishing a Tradition Regarding Term Limits

Shortly after ratifying the Constitution, the presidential electoral process began, and George Washington was unanimously elected as the first American president.[31] Understanding Washington's accession to the presidency is central to understanding his impact on the behavior of every president who came after him. After leading the Continental Army to victory during the Revolutionary War, Washington retained command of the military, yet rather astonishingly, surrendered his power back to the

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[22] *Id.*

[23] *Id.*

[24] *E.g.*, THE FEDERALIST NO. 72 (Alexander Hamilton).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Cf.* U.S. CONST. art. II, § 1 (containing no limit on presidential terms prior to the adoption of the Twenty-second Amendment).

[31] Jason Berggren, *Presidential Election of 1789*, MOUNT VERNON, https://perma.cc/GKR6-FX8E (last updated Apr. 9, 2025) (explaining how, before it was supplemented by the Electoral Votes Act, the Twelfth Amendment allowed for a president to be selected unanimously. Under this original scheme, each state would select electors to vote on their behalf, and each elector would vote for one presidential candidate and one vice presidential candidate. To elect unanimously, each elector would have to vote for the same presidential candidate, as was the case for George Washington in both elections he participated in, and no other candidate).

government.[32] Many saw this as a "[t]estament to his republican values," and "of monumental civic importance," so much so that shortly after retiring from the military, he was called back to preside over the Second Constitutional Convention in Philadelphia.[33] Having played an instrumental role in the formation of the newly-formed country's governing document, and having earned the respect of his countrymen for his vision for the country, many saw him as the only viable option to shape the role and function of the President of the United States.[34] Understanding this unique position of power, President Washington established many crucial presidential precedents.[35]

After two terms in office, Washington decided not to seek re-election despite calls for him to do so.[36] In his farewell address, Washington framed his departure as an act of self-restraint in the best interest of the public.[37] Further, he emphasized the need to avoid excessive concentration of power in any one person or group.[38] By voluntarily stepping down as president, Washington created the unspoken rule, or norm, of limiting presidential tenure to two terms.

Two other Founding Fathers, Thomas Jefferson and James Madison, went on to serve as the President of the United States.[39] Both of these early

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[32] George Hillman, *Resignation of Military Commission*, MOUNT VERNON, https://perma.cc/REC7-288T (last visited May 4, 2026).

[33] *Id.*

[34] Berggren, *supra* note 31.

[35] Berggren, *supra* note 31.

[36] George Washington, The Address of Gen. Washington to the People of the United States on His Declining of the Presidency of the United States, CLAYPOOLE'S AM. DAILY ADVERTISER, Sept. 19, 1796 ("I should now apprize you of the resolution I have formed, to decline being considered among the number of those out of whom a choice is to be made.").

[37] *Id.* ("I beg you, at the same time, to do me the justice to be assured that this resolution has not been taken without strict regard to all the considerations appertaining to the relation which binds a dutiful citizen to his country—and that, in withdrawing the tender of service which silence in my situation might imply, I am influenced by no diminution of zeal for your future interest, no deficiency of grateful respect for your past kindness; but am supported by a full conviction that the step is compatible with both.").

[38] *Id.* ("It is important, likewise, that the habits of thinking in a free country should inspire caution in those entrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one and thus to create whatever the form of government, a real despotism.").

[39] *Chronological List of Presidents, First Spouses, and Vice Presidents of the United States*, LIBR. OF CONG., https://perma.cc/RN5P-8PCY (last visited May 4, 2026).

presidents served two terms, and neither ran for a third term despite receiving requests to do so.[40] However, there are three notable instances where a two-term president attempted to abrogate the norm. President Ulysses S. Grant attempted to run for a third term but fell short of enough votes to garner his party's nomination.[41] In a more ambiguous situation, Theodore Roosevelt, who ascended to the presidency after the death of President William McKinley, attempted to bypass the party nomination and ran as a third-party candidate.[42] Lastly, in 1920, after serving two terms in office, Woodrow Wilson considered running for a third term but ultimately decided against it.[43]

3. Franklin D. Roosevelt Successfully Abrogated the Tradition

The first and only successful abrogation of the tradition came from President Franklin Roosevelt. From 1933 to 1941, President Roosevelt served his first and second terms as president.[44] As the end of his second term neared, the U.S. entered World War II, which prompted Roosevelt to run for a third term.[45] Whether to amend the Constitution became an election topic of debate throughout the 1940 election campaign.[46] Despite receiving criticism from both parties, Roosevelt won reelection decisively, becoming the first and only president to serve more than two elected terms.[47]

In December of 1941, Congress declared war on the Axis Powers in Europe.[48] With the war still raging, Roosevelt ran for a fourth term, and again won handily.[49] In the 1944 electoral campaign, both parties voiced concerns that allowing unlimited terms for the president would lead to an excessive

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[40] *Id.*

[41] *FDR Third Term*, *supra* note 4.

[42] *FDR Third Term*, *supra* note 4; *see infra* Part III(b) (arguing that doing so would have run counter to the Twenty-second Amendment had it been signed at the time when he ran as a third-party candidate).

[43] Health Scis. Libr., *Woodrow Wilson—Strokes and Denial*, THE UNIV. OF ARIZ. UNIV. LIBRS., https://perma.cc/5MH6-ELUZ (last visited May 4, 2026).

[44] *FDR Third Term*, *supra* note 4.

[45] *FDR Third Term*, *supra* note 4.

[46] *See 1940: FDR's Third Presidential Campaign*, ROOSEVELT HOUSE, https://perma.cc/6FH7-DLTR (last visited May 4, 2026).

[47] *FDR Third Term*, *supra* note 4.

[48] Franklin D. Roosevelt, Message to Congress Requesting War Declarations with Germany and Italy (Dec. 11, 1941) (transcript at https://perma.cc/9A4H-BELU).

[49] *FDR Serves Four Terms as President*, THE N.Y. HISTORICAL (Nov. 6, 2014), https://perma.cc/J8EM-BZ7S.

consolidation of power by the executive branch.[50] The resulting controversy harkened back to the Anti-Federalists' "elective-monarchy" concerns.[51] Once Roosevelt won reelection for a fourth time in 1944, his Republican counterpart, Thomas E. Dewey, announced his support for a Constitutional Amendment ending the open-ended presidential tenure.[52]

B. *The Twenty-Second Amendment*

Just eighty-two days into his fourth term, President Roosevelt passed away, prompting his vice president, Harry Truman, to ascend to the presidency.[53] On March 24, 1947, Congress approved a joint resolution to amend the Constitution to include the Twenty-Second Amendment.[54] In just under three years, the requisite supermajority, comprised of thirty-eight states, completed the ratification process, solidifying President George Washington's guiding principle as part of the Constitution.[55] The relevant part, as it stands today, reads:

> No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once.[56]

The Twenty-Second Amendment does not grant any branch of government additional powers, which is especially relevant in determining whether it is a self-executing document. Self-executing documents do not require any additional statutes for them to be given legal effect.[57] Assuming the Twenty-Second Amendment is self-executing, the implication is that once the Amendment is violated, it operates in full force to prevent an

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[50] *See 1944: FDR's Fourth Presidential Campaign*, ROOSEVELT HOUSE, https://perma.cc/U8PD-VBBD (last visited May 4, 2026).

[51] *See* Clinton, *supra* note 5.

[52] *See* Scott Bomboy, *How the 22nd Amendment Came Into Existence*, NAT'L CONST. CTR. (Apr. 5, 2019), https://perma.cc/N63M-NCFK.

[53] History.com Editors, *Harry S. Truman*, HIST., https://perma.cc/MR3F-FP6L (last updated May 28, 2025).

[54] Brian P. Smentkowski & Michael Levy, *Twenty-Second Amendment*, BRITANNICA, https://perma.cc/55NL-7STQ (last updated Apr. 21, 2026).

[55] *Id.*

[56] U.S. CONST. amend. XXII.

[57] *Self-Executing*, CORNELL L. SCH. LEGAL INFO. INST., https://perma.cc/GC5C-QHNK (last updated Apr. 2025).

individual from taking the office of the executive (at least in theory).[58]

Since its adoption, there have been a variety of efforts to repeal the Twenty-Second Amendment.[59] Once elected, Truman, Reagan, and Clinton each expressed desires to repeal or change the Amendment in some form.[60] For Truman, the Twenty-Second Amendment provided a carveout grandfathering him into open-ended tenure in stating:

> But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.[61]

This means that by serving virtually all of FDR's fourth term and winning reelection in 1948, Truman could have run for a third term without running afoul of the Amendment. However, consistent with Washington's precedent, Truman decided against it. Neither Reagan nor Clinton took any meaningful action to sidestep the two-term limit. Congress, however, first attempted to repeal the Amendment just five years after it was ratified.[62] Since then, Congress has introduced over forty joint resolutions to repeal it, meaning a bill has been formally presented to Congress and referred to the appropriate committee.[63] None of these joint resolutions have passed.[64] The most recently introduced joint resolution seeks to allow President Trump a third term.[65]

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[58] *See infra* p. 72 (discussing that the Twenty-Second Amendment has never been interpreted by SCOTUS, so there is no definitive ruling on this basis).

[59] H.R.J. Res. 15, 113th Cong. (2013–2015) ("[p]roposing an amendment to the Constitution of the United States to repeal the twenty-second article of amendment, thereby removing the limitation on the number of terms an individual may serve as President"); H.R.J. Res. 25, 108th Cong. (2003–2004) ("[p]roposing an amendment to the Constitution of the United States to repeal the 22nd amendment to the Consitution"); H.R.J. Res. 61, 102nd Cong. (1991–-1992) ("[p]roposing an amendment to the Constitution of the United States repealing the twenty-second article of amendment thereto").

[60] *See, e.g.*, Irvin Molotosky, *Reagan Wants End of Two Term Limit*, N.Y. TIMES (Nov. 29, 1987), https://perma.cc/N3WW-U4F7.

[61] U.S. CONST. amend. XXII.

[62] THOMAS H. NEALE, CONG. RSCH. SERV., PRESIDENTIAL TERMS AND TENURE: PERSPECTIVES AND PROPOSALS FOR CHANGE, R40864 at 5 (2019), https://perma.cc/6DQ8-T46Z.

[63] *Id.*

[64] *Id.*

[65] *See* H.R.J. Res. 29, 119th Cong. (2025–2026).

There has never been a direct legal challenge to the Twenty-Second Amendment's constitutionality, meaning that no one has attempted to run for a third term or ascend to the presidency by other means since its adoption. As a result, SCOTUS has never had a case requiring it to interpret the Amendment's meaning. With that in mind, there are a few ambiguities within the text that still confound legal scholars which are centered on the language that reads: "No person shall be *elected* to the Office of the President . . . ." This language suggests alternative means of rising to the presidency exist other than by election.

The second half of the Amendment provides that "[n]o person who . . . has acted as President for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once."[66] This language is the only other textual qualification on the Amendment's limiting language, perhaps as an indication that the drafters did not intend for anyone challenging the Amendment to use any other means to obtain the office. Because the Amendment does not contain limitations by other laws or amendments, it can be interpreted that the drafters intended it to be broad.[67] This means that the Amendment could stand on its own without being restricted by others. However, such an interpretation misses the fundamental principle of how Amendments ought to be read in harmony and give effect to all language. Moreover, the absence of additional enumerated limitations in the Amendment does not necessarily mean such limitations were intentionally excluded; it may may just as plausibly suggest they were left implicit. This question becomes particularly important when considering whether the Twelfth Amendment has any bearing on who is "constitutionally ineligible" to run for president under the Twenty-Second Amendment, or whether they should be interpreted independently.

C. *Interpreting the Twelfth and Twenty-Fifth Amendments*

As touched on above, at least two Amendments potentially interact with the Twenty-Second Amendment and are relevant to how one assumes the presidency—the Twelfth and Twenty-Fifth Amendments.

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[66] U.S. CONST. amend. XXII.

[67] Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 613–14 (2009).

1. The Twelfth Amendment

Proposed by Congress on December 9, 1803, and ratified by the requisite number of states on June 15 of the following year, the Twelfth Amendment sets forth the procedures for electing the president and vice president.[68] Rather than relying on the original constitutional electoral system, which often produced a president and vice president with conflicting policy goals, the Twelfth Amendment requires electors to cast distinct votes for each office.[69] Every election since the 1804 election has been conducted in accordance with the Twelfth Amendment.

Like the Twenty-Second Amendment, the Twelfth Amendment has never been challenged in court, and thus, SCOTUS has never had to interpret the many ambiguities within the text. The most relevant ambiguity arises in the very last sentence which speaks to one's eligibility to run for the Office of the Vice President: "[b]ut no person *constitutionally ineligible* to the office of President shall be eligible to that of Vice-President of the United States."[70] It is unclear what "constitutional ineligibility" entails. One way to look at it is that when viewing the Amendment through a strict textualist lens, the only constitutional limitations are that the person running for president, as set forth in Article II, must be a natural-born citizen of the United States, be at least thirty-five years old, and have been a resident of the United States for fourteen years.[71] Another way to look at it would be that the Twenty-Second Amendment imposes an additional constraint: by limiting an individual's ability to be elected president, it also renders that person constitutionally ineligible to serve as vice president.[72] Under this view, someone who has already served two terms as president would likewise be barred from running for vice president.

2. The Twenty-Fifth Amendment

Article II, Section 1, Clause 6 of the Constitution is also ambiguous and fails to adequately indicate whether the vice president becomes the president, or just assumes the "power and duties" of the presidency.[73] The issue first arose in 1841 when President William Harrison died in office and

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[68] U.S. CONST. amend. XII.

[69] *Id.*

[70] *Id.* (emphasis added).

[71] *Id.* art. II.

[72] *Id.* amend. XXII.

[73] *Id.* art. II, § 1, cl. 6.

his vice president, John Tyler, asserted that he had ascended to the presidency.[74] In accordance with this precedential understanding of Article II, seven vice presidents have ascended to the presidency with the last being Gerald Ford in 1974.[75]

Submitted to the states on July 6, 1965, and adopted by Congress on February 10, 1967, the Twenty-Fifth Amendment was born.[76] It codifies the vice president's ascension to the presidency if the president dies, resigns, or is removed from office through impeachment.[77] This allows the ascending president to officially take office as president, receiving all the benefits and powers of the presidency.

The president can voluntarily and temporarily transfer his presidential authority to the vice president by providing the president Pro Tempore of the Senate and the Speaker of the House of Representatives with a written declaration of his inability to discharge his duties.[78] Doing so allows the vice president to assume the "powers and duties" of the president, however a strict reading of the text indicates that they do not actually become president, but rather "act[] as president."[79] This has some interesting effects, namely that it is unclear what limitations apply to the president that would also apply to the "vice-president acting as president." For example, the Twenty-Second Amendment's term limitation only applies to the president, not the vice president, leaving open the possibility someone can run for vice president an unlimited number of times.[80] Similarly, and more to the point, a vice president acting as president may not be constrained by the Twenty-Second Amendment because the vice president never attains the presidency or the role of president.[81]

So, in the instance where the vice president is acting within the "powers and duties" of the president, they could seemingly utilize the powers of the presidency without being restrained by the tenure limitation. The crucial

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[74] Callie Hopkins, *John Tyler and Presidential Succession*, WHITE HOUSE HIST. (Mar. 22, 2019), https://perma.cc/9C7P-2EEV.

[75] *See* Scott Bomboy, *Gerald Ford's Unique Role in American History*, NAT'L CONST. CTR. (July 14, 2024), https://perma.cc/98KU-L2ST.

[76] *The Twenty-Fifth Amendment*, HOUSE HIST., ART & ARCHIVES, https://perma.cc/Y9BS-ZSED (last visited May 4, 2026).

[77] U.S. CONST. amend. XXII, § 1.

[78] *Id.* amend. XXV, § 3.

[79] *Id.* (stating ". . . such powers and duties shall be discharged by the Vice President as Acting President").

[80] *See id.* amend. XXII, § 1.

[81] *See id.*

drawback to this theory is that the president could resume his authority at any time so long as the elected president initiates the process allowing the vice president to act as a president by voluntarily declaring themself "un-incapacitated" and transmitting a written declaration that they are no longer incapacitated.[82]

D. *The Judiciary and Judicial Review*

Established as the highest court in the United States under Article III of the Constitution, SCOTUS has appellate jurisdiction over all cases arising under the Constitution.[83] The express power to interpret the Constitution, otherwise known as judicial review, is notably missing from Article III.[84] However, the concept of judicial review was not lost on the Founding Fathers as it was contemplated in *Federalist No. 78* by Alexander Hamilton who wrote that the power to interpret the Constitution rested with the courts.[85]

It was not until 1803 that the Chief Justice John Marshall, established judicial review as a power of the courts in the landmark case *Marbury v. Madison*.[86] The Court stated that it was authorized to interpret laws to determine if they conform with the Constitution.[87] Where they do not, the Court has the power to strike them down, making the Constitution the supreme law of the land.[88] Together these holdings confirm that interpreting the Constitution is the foremost responsibility of the Court and that the Judiciary is the lone branch of government whose interpretation has the power of law. In contrast, the power to enforce these decisions rests solely with the Executive Branch.

E. *Congressional Powers of Impeachment and Election Vote Certification*

Article I of the Constitution establishes the Legislative Branch of the federal government, consisting of the House of Representatives and the Senate.[89] Each member of Congress is elected by their constituency in their

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[82] *See id.* amend. XXV, § 3.

[83] U.S. CONST. art. III, § 2.

[84] *See id.* art. III.

[85] THE FEDERALIST NO. 78 (Alexander Hamilton).

[86] Marbury v. Madison, 5 U.S. 137, 173–74 (1803).

[87] *Id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

[88] *Id.* at 178 ("The constitution is superior to any ordinary act of the legislature.").

[89] U.S. CONST. art. I.

respective states, with the number of seats in the House being determined by the population of the state, and the number in the Senate always being two per state. The Constitution grants a small host of enumerated powers to Congress with some powers specifically reserved for either the House or the Senate, while others are shared.[90] Subject to few exceptions, legislation may originate in either the House or in the Senate but generally must be passed by both to be codified into law.[91]

1. Impeachment

The House retains the sole ability to impeach a sitting president, vice president, or civil federal officer.[92] The impeachment of an official in one of these capacities requires charging them with "[t]reason, [b]ribery, or other high crimes and misdemeanors," and only requires a simple majority of the House.[93] The phrase "high crime and misdemeanors" is not defined by the Constitution; however, *Federalist Paper No. 65*, authored by Hamilton, provides that the Federalists intended impeachment for "the abuse[s] or violation of some public trust," which are not inherently judicial, but political.[94] In line with this reasoning, SCOTUS has held that impeachment proceedings are non-justiciable political actions.[95] Once impeached, the official is then tried by the Senate, and if two-thirds of the Senate vote to convict, the official is removed from office.[96]

Only three presidents have been impeached.[97] Notably, President Trump has been impeached twice which represents half of the four total impeachments.[98] Of the three presidents impeached, none of them have

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[90] *See id.*

[91] *Id.* art. I, § 7.

[92] *Id.* art. I, § 2.

[93] *Id.* art. II, § 4.

[94] THE FEDERALIST NO. 65 (Alexander Hamilton).

[95] Nixon v. United States, 506 U.S. 224, 228 (1993) (citing Baker v. Carr, 369 U.S. 186, 217 (1962)) ("[C]ontroversy is nonjusticiable -- *i.e.*, involves a political question -- where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . .'").

[96] U.S. CONST. art. I, § 3, cl. 6.

[97] *Impeachment in U.S. History*, BILL OF RTS. INST., https://perma.cc/6M6U-MWX5 (last visited May 4, 2026) (noting which presidents have been impeached: Andrew Johnson, Bill Clinton, and Donald Trump (twice)).

[98] *Id.*

received the requisite votes to remove them from office.[99]

2. Electoral Vote Counting

Congress is also responsible for certifying the results of each presidential election.[100] The Twelfth Amendment provides a framework for presidential election certification.[101] The basic process consists of having electors cast votes for the president and vice president which are then sent to Congress.[102] The sitting vice president, as President of the Senate, presides over a joint session whereby Congress counts the votes, certifying the election.[103]

The Twelfth Amendment's electoral certification process is supplemented by the Electoral Count Vote Act of 1887 ("ECA").[104] While the ECA primarily outlines a more detailed process for counting votes and resolving disputes during presidential elections, it also provides a mechanism whereby Congress can object to a state's electoral votes.[105] This halts the process until the objection is resolved.[106] The ECA initially required at least one member from each chamber of Congress, but eventually raised that number to one-fifth of the members from each chamber in 2022,.[107]

F. *The Executive Branch and Its Responsibility of Enforcing the Law*

The president, the vice president, the president's Cabinet, and various other executive and independent administrative agencies, together make up

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[99] *How Federal Impeachment Works*, USA, https://perma.cc/4NZF-3WC3 (last updated Nov. 13, 2025).

[100] U.S. CONST. amend. XII.

[101] *Id.*

[102] *Id.*

[103] *Id.* ("The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."); U.S. CONST. art. I, § 3, cl. 4 (stating "the Vice President of The United States shall be President of the Senate . . . .").

[104] *See* 3 U.S.C. § 15.

[105] SAM R. GARRET ET AL., CONG. RSCH. SERV., JOINT SESSION OF CONGRESS FOR COUNTING ELECTORAL VOTES FOR PRESIDENT, R48309, at 1 (2024), https://perma.cc/69VR-6UGC.

[106] *Id.*

[107] 3 U.S.C. § 15(d)(2)(B)(i)(II).

the executive branch.[108] The Constitution mandates that the president "take care that the laws be faithfully executed."[109] Roughly three million people are employed by the executive branch, a considerable number of whom report up to the president.[110] The vast majority work for executive agencies.[111] Administrative agencies are the means by which the president implements and enforces the laws promulgated by Congress and court orders by the judiciary.

1. Executive's Enforcement Role

The executive branch's role as the enforcer of laws takes a few different forms. One way is through the Department of Justice ("DOJ"), led by the Attorney General who is responsible for representing the United States in civil cases as well as criminal prosecutions.[112] Various sub-agencies make up the DOJ. For example, the Federal Bureau of Investigation, which investigates threats and national security, among much else;[113] the U.S. Drug Enforcement Administration, which investigates crimes relating to illegal drug manufacture and distribution;[114] and the U.S. Marshals Service, which is tasked with, among other things, executing all lawful writs, processes, and orders under the authority of the U.S.[115]

2. Presidential Compliance and Non-Compliance of Court Orders

When a president takes action that runs counter to a court order, there are effectively two means by which they can defend their actions. The more

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[108] U.S. CONST. art. II, §§ 1, 2 (stating "[t]he executive Power shall be vested in a President of the United States of America. He shall hold his Office . . . together with the Vice President . . ." and "[t]he President . . . may require the Opinion, in writing if the principal Officer in each of the Executive Departments, upon any Subject relating to the Duties of their Respective Offices . . ." and implying the existence of Cabinet members and their positions under the President).

[109] U.S. CONST. art. II, § 3.

[110] USAFacts team, *How Many People Work for the Federal Government?*, USAFACTS, https://perma.cc/YY5X-EY5F (last updated Nov. 12, 2025) (mentioning that there are notable instances where agencies report to the executive).

[111] *Id.*

[112] *See About DOJ*, U.S. DEP'T OF JUST., https://perma.cc/5JL9-65KP (last visited May 5, 2026); Office of the Attorney General, U.S. DEP'T OF JUST., https://perma.cc/VED8-U673 (last visited May 5, 2026).

[113] *What We Investigate*, FED. BUREAU OF INVESTIGATION, https://perma.cc/MN4M-9MN6 (last visited May 4, 2026).

[114] *About*, U.S. DRUG ENF'T AGENCY, https://perma.cc/PM8E-4RLK (last visited May 4, 2026).

[115] *Mission*, U.S. MARSHALS SERV., https://perma.cc/4UPW-A2SQ (last visited May 4, 2026).

common of the two approaches is simply to either assert that the president *did comply* with the court order despite the evidence to the contrary or argue that the order was in some way defective. In this situation, the president still, at least outwardly, manifests respect for the rule of law. For example, in 2025, President Trump issued an executive order directing the U.S. Immigration and Customs Enforcement agency to deport alleged Venezuelan gang members who were then placed on planes and flown towards Venezuela.[116] Within a few hours, the American Civil Liberties Union sought a court order directing the president to turn the planes around.[117] Seemingly, in contravention of the court order, the president did not take the court-mandated actions while arguing that they did not violate the court order.[118] Regardless of whether the President prevails in the arguments, the sense of respect for the rule of law remains intact because the President recognized the court's authority to issue court orders and his obligation to comply with them.

Alternatively, the president could openly defy a court order. In this situation, the president either fails to recognize the Court's authority to issue court orders, or if they do, then fail to comply. Doing so results in a constitutional crisis—a situation where the system is unable to resolve an intra-branch conflict.[119] In this scenario, the constitutional conflict is the executive branch failing to submit to another branch's authority and, in doing so, it exceeds its own constitutional authority. Although instances of a president openly defying SCOTUS's orders are exceedingly rare, they are nonetheless historically significant.

For example, dating back to the early months of the American Civil War, President Abraham Lincoln suspended habeas corpus, a fundamental constitutional right against unlawful detention.[120] In 1861, SCOTUS held that President Lincoln did not have the power to suspend the right without congressional approval.[121] President Lincoln defied the Court ruling, but later sought congressional approval to continue, which he received two

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[116] Marc Caputo, *Exclusive: How the White House Ignored a Judge's Order to Turn Back Deportation Flights*, AXIOS (Mar. 16, 2025), https://perma.cc/TU9N-HTP3.

[117] *Id*.

[118] Luc Cohen & Ted Hesson, *Trump Administration Argues Venezuelan Deportations Did Not Violate Judge's Order*, REUTERS, https://perma.cc/ZN7H-67T9 (last updated Mar. 25, 2025).

[119] Adam Liptak, *Trump's Action Have Created a Constitutional Crisis, Scholars Say*, N.Y. TIMES, https://perma.cc/A58N-L4FD (last updated Feb. 12, 2025).

[120] *A Proclamation on the Suspension of Habeas Corpus, 1862*, GILDER LEHRMAN, https://perma.cc/23TC-TUKK (last visited May 4, 2026).

[121] *Ex parte* Merryman, 17 F. Cas. 144, 149 (C.C.D. Md. 1861).

years later in 1863.[122] While Lincoln's defiance could be seen as a direct non-compliance and thus a constitutional crisis, his subsequent request for congressional approval demonstrates that he recognized the Court's authority.

In another situation, more than a century later than the first, SCOTUS ordered President Nixon to turn over audiotapes relating to his involvement in the infamous Watergate scandal.[123] Initially, Nixon refused to comply by refusing to surrender the tapes.[124] The House took preliminary steps to impeach him, and Nixon eventually complied with the order before officially being charged.[125] Shortly thereafter, Nixon resigned from his presidency, halting the impeachment process.[126] Similar to Lincoln, Nixon's subsequent actions after his initial non-compliance demonstrated his respect for the rule of the law.

A reexamination of the Trump deportation case discussed above in light of this history yields a similar lesson. Recall that the White House's response was that the President *did comply* with the Court order.[127] While this argument is trivial and is poised to fail, it demonstrates that President Trump still demonstrates respect for the judiciary's autonomy, if at least on a surface level. If President Trump, however, openly notifies the Court that he will not comply, a constitutional crisis arises because he will have failed to recognize the Court's constitutional authority and in doing so, exceed his presidential authority.

There has been one instance where a President openly defied an order by SCOTUS seemingly without repercussions. In 1832, SCOTUS overturned the conviction of a missionary then living with the Cherokee Nation because he refused to take an oath to obey Georgia law, reasoning that the Cherokee Nations constituted an "independent political community" and therefore Georgia's law was inapplicable.[128] Georgia refused to comply with the Court

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[122] *See* H.R. 591, 37th Cong. (1861–1863).

[123] United States v. Nixon, 418 U.S. 683, 700 (1974).

[124] NCC Staff, *Looking Back: The Supreme Court Decision That Ended Nixon's Presidency*, NAT'L CONST. CTR. (July 24, 2024), https://perma.cc/FU6K-JD3R.

[125] *See* H.R. Res. 803, 93rd Cong. (1974).

[126] Letter from Richard Nixon, President of the United States, to Henry Kissinger, Secretary of State, Resigning the Presidency (Aug. 9, 1964) (on file with the National Archives, General Records of the Department of State, https://perma.cc/5WWE-CPJR).

[127] Cohen & Hesson, *supra* note 118.

[128] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

order and retained custody of the missionary.[129] President Andrew Jackson refused to enforce the order, famously touting that "[Chief Justice] John Marshall has made his decision, now let him enforce it."[130] Jackson then took affirmative action in contravention of the Court's order by sending federal troops to evict the Cherokees from their land, resulting in what is known as the Trail of Tears.[131] In doing so, President Jackson set a dangerous precedent for executive overreach, which has laid dormant since.

The public's confidence in the separation of powers doctrine is foundational to upholding a democracy and preventing a constitutional crisis. Since the founding era, presidents have established a strong, centuries-weathered precedent of presidential compliance with court orders. Any deviation by a president from this precedent is an attack on the values of the Founding Fathers' vision for the country.

II. Failing to Close Existing Loopholes within Amendments that Allow a Two-Term President to Serve a Third Term is Problematic

Literature surrounding the Twenty-Second, Twelfth, and Twenty-Fifth Amendments is exceedingly limited, which is unsurprising given that they have never weathered a legal challenge. Because there is no individual court analysis, there is resultingly no primary source of guidance on how these Amendments interact with one another. The culmination of this lack of guidance is that interpretations of their text are completely hypothetical and would result in a case of first impression before the Court. Interpreting the ambiguities of the Twenty-Second Amendment would require interpreting the other two discussed above as well.

Perhaps because the textual interpretation of the Twenty-Second Amendment is unsettled, rhetoric about its potential utilization is increasingly common. Those with the prowess strong enough to obtain the presidency are uniquely situated to contemplate a third term and do so under the guise that it would benefit the country. The deep polarization of the United States today suggests that someone like President Trump, who has openly expressed discontent with the Twenty-Second Amendment and who often phrases verifiably detrimental legislation as in the best interest of the country, may employ efforts to challenge it. This article does not take a stance on whether this is correct but rather acknowledges President

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[129] *Executive Enforcement of Judicial Orders*, FED. JUD. CTR., https://perma.cc/W3X8-SBG8 (last visited May 4, 2026).

[130] *Id.*

[131] *Id.*

Trumps's actions to demonstrate why jurisprudence on this issue could shift from theoretical to practical soon. But if someone like President Trump challenged the Amendment, it is not immediately clear what constitutional checks could be utilized to protect the spirit of the Amendment or how effective they would be. The result would be a string of SCOTUS rulings clarifying the matter.

The constitutional limitations on the executive powers, especially with regard to how those might interact with other branches of government, are ceaselessly being challenged. Given that the foremost responsibility of SCOTUS is to hear cases regarding constitutional interpretation, the Court will likely hear a record number of cases on executive powers in the coming years as a result. Cases involving the Twelfth, Twenty-Second, and Twenty-Fifth Amendments, none of which have been interpreted by the Court, will likely find their way to SCOTUS. This assertion is especially true given the Amendments' bearing on future national elections.

Lastly, executive efforts to circumvent the spirit of the Twenty-Second Amendment pose a threat to democracy, for without the Twenty-Second Amendment, the U.S. is poised to become the "elective monarchy" the Founding Fathers so feared.

ANALYSIS

III. There Are Three Paths to a Third Presidential Term, Two of Which Require Constitutional Interpretation by SCOTUS

If the Twenty-Second Amendment is held to follow the tradition George Washington created, that no person shall serve more than two terms as president, then the matter is settled—no president can serve more than two terms, regardless of how they are elected. Yet, like all things law-related, it is not so clear-cut. There are at least three ways in which a person could circumvent the Twenty-Second Amendment—some more legitimate than others.

The first means of circumvention is by constitutional amendment—recall that Article V of the Constitution expressly allows for a constitutional amendment and lays out the procedures for doing so. It follows, then, that a constitutional amendment allowing someone to serve more than two terms offers the path of least resistance. The second path requires SCOTUS's interpretation of whether a president, having served two terms, can run as vice president. The last path requires someone seeking a third term to run for the office either without any ruling from SCOTUS or by presidential

refusal to acknowledge an unfavorable ruling. Given that this last method seems to be a direct dereliction of the text of the Constitution, this is the least legitimate path. Each path is discussed in greater detail in the following sections in order of legitimacy.

A. *A Constitutional Amendment*

No doubt, in pursuit of a more perfect union, the Founding Fathers realized that societal and political values would change and they intended the Constitution to change with them. Indeed, Article V accounts for this change by allowing Congress to amend the Constitution as one way to adjust with the change of values.[132] However, amending the Constitution is no small task, requiring two-thirds of both houses of Congress to approve the amendment, followed by ratification by three-fourths of the states.[133] Needless to say, when a constitutional amendment follows these procedures and is ultimately ratified, it was seemingly done so with overwhelming public support. Most importantly, ratification requires no constitutional violations and thus is the most legitimate path to a third term.

With this in mind, amendments, such as the one proposed by Congressman Andy Ogles in January 2025, are constitutionally sound methods of extending presidential term limits.[134] Ogles's amendment, proposed by a joint resolution in the House of Representatives, purports to allow a president to serve no more than three terms so long as they are not elected in consecutive terms.[135] Notably, the adoption of this amendment is constitutionally viable even though it would abrogate George Washington's tradition, the Founding Fathers' visions for the country, and centuries of presidential compliance with tradition. Its adoption seems unlikely, given that public sentiment would likely deviate from the views of its proponent and the significant constitutional hurdles all proposed amendments must overcome.[136] However, adoption of such an amendment would signal a

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[132] U.S. CONST. art. V.

[133] *Id.*

[134] *See* H.R.J. Res. 29, 119th Cong. (2025).

[135] *Id.* ("No person shall be elected to the office of the President more than three times, nor be elected to any additional term after being elected to two consecutive terms, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than twice.").

[136] *See* U.S. CONST. art. V.; Oliver Milman, *Contempt as Trump Claims He Can Run for Third Term: 'This Is What Dictators Do'*, THE GUARDIAN (Mar. 31, 2025, 11:11 EDT), https://perma.cc/EW6R-TEKV.

change in public sentiment indicating that Article V works as designed.

B. *Presidential Ascension to a Third Presidency*

The second way to circumvent the Twenty-Second Amendment is through the vice presidency. This method is a less legitimate path to the presidency given how much SCOTUS's intervention would be required. Whether a president who serves two terms can then subsequently attempt to run as a vice president is unsettled law. Getting this case to SCOTUS for interpretation requires a few components. First, a two-term president seeking a third term must have served two full terms as president by the time of the next election. Second, the two-term president will have to secure their party's nomination to run as vice president which typically happens between July and early September of an election year. This point presents the first moment in which someone opposed to the president's nomination could raise a challenge under the Twelfth Amendment. Simply having the two-term president's name on the ticket may be sufficient to trigger the case. Once the case is initiated, the two-term president must secure various favorable interpretations of the Twelfth, Twenty-Second, and Twenty-Fifth Amendments by SCOTUS. The following sections dictate the order and outcomes required.

1. The Twelfth Amendment Hurdle

The first step requires establishing standing, meaning the party challenging the potential two-term president must show that they suffered an injury in fact that is "concrete and particularized" as a result of the two-term president's conduct, in this case the attempt to enter a third term, and "actual or imminent, not conjectural or hypothetical," in other words the harm is presently happening.[137] They must also demonstrate that the injury is "traceable to the challenged action of the defendant."[138] Lastly, they must show that the injury is likely to be redressable by a favorable decision, "as opposed to merely speculative."[139]

Various interest groups could potentially bring the claim, however the opposing political party possesses the best chance at establishing standing, given that courts have recognized a party's standing where electoral rules threaten its own candidate's viability. Memphis Law Professor Steven J.

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[137] Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000).

[138] *Id.*

[139] *Id.*

Mulroy suggests that candidates themselves generally have standing where "allegedly illegal voting or electoral rules make the competitive environment worse for the candidate," which is "sufficiently concrete, non-generalized harm to confer standing."[140] Professor Mulroy further states that courts consider campaign organizations and political parties similarly and in some instances may be better situated to confer standing than individuals because of the diversity of the voters they represent.[141] His article lists several instances where courts have conferred standing such as "to challenge a last-minute replacement of one rival candidate with another on the ballot" and "to challenge ballot access laws."[142] Here, the opposing political party would have to argue that including the two-term president's name on the ballot constitutes unlawful candidacy, insofar as he is constitutionally ineligible to run for office, and that his candidacy itself creates an unfair electoral disadvantage for the party's nominee. Court intervention would be the only adequate redress.

Once standing is established, the case is poised to be heard by SCOTUS for a few reasons. Courts are willing to expedite decisions where the cause is of national significance through the "emergency docket," also referred to as the "shadow docket."[143] Furthermore, 28 U.S. Code Section 3904 requires that appeals from interlocutory or final judgments concerning the constitutionality of provisions of the U.S. Code relating to presidential powers—including those governing presidential elections—be taken directly to SCOTUS [144]

Because electoral campaigns span mere months, the earliest time this claim could be brought would be roughly five months before the election, so a case determining a vice-presidential candidate's eligibility is prime for the emergency docket. Moreover, if sections of the U.S. Code that govern the presidency are implicated, the Court might be statutorily required to accelerate review.[145] An accelerated hearing of the case limits the chance of prolonged judicial resolution. This is important because prolonged judicial resolution could cause a post-election crisis, especially if the candidate wins

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[140] Steven J. Mulroy, *Baby & Bathwater: Standing in Election Cases After 2020*, 126 DICK. L. REV. 9, 22 (2021).

[141] *Id.* at 55.

[142] *Id.* at 55 n.242 (citing Tex. Democratic Party v. Benkiser, 459 F.3d 582, 585–86 (5th Cir. 2006); Schulz v. Williams, 44 F.3d 48, 52 (2d Cir. 1994)).

[143] *Emergency Docket*, SCOTUSBLOG, https://perma.cc/2DAP-3YP7 (last visited May 4, 2026).

[144] 28 U.S.C. § 3904.

[145] *See id.*

or if they are inaugurated. Swift resolution provides voters with certainty regarding whom they can vote for and increases the chance the election will run smoothly without undermining the legitimacy of election.

Once the case gets to the Court, the first issue would be whether someone having served two terms as president is "constitutionally ineligible" to run for vice president under the Twelfth Amendment. The party bringing the claim would argue that the Twelfth Amendment provides that "no person *constitutionally ineligible* to the office of [the] President shall be eligible to that of Vice-President of the United States," and that because the Twenty-Second Amendment prohibits one from serving more than two terms as president, the person running would be constitutionally ineligible to run for vice president.[146] The two-term president's argument would likely be that the words "constitutionally ineligible" pertain to only those set forth in Article 2, as discussed above.

SCOTUS should simply hold that the two-term president is constitutionally ineligible from holding office. Allowing otherwise would be a complete abrogation of the constitutional norm established by President Washington and subsequently followed by generations of two-term presidents. Given that the Twelfth Amendment was adopted in 1804, and at that time President Washington's vision for the presidency was widely held, it is reasonable to conclude that he and the framers of the Twelfth Amendment intended it to encompass the two-term tradition.[147] Evidence that this tradition was deeply rooted in America's vision for the executive is demonstrated by the quick adoption of the Twenty-Second Amendment after President Franklin Roosevelt was reelected for the third time.[148] Thus, to find that a two-term president who runs for vice president is constitutionally eligible to do so flies in the face of a constitutional amendment enacted for the purpose of codifying over two centuries of tradition.

2. Twenty-Fifth Amendment Hurdle

The next hurdle for the two-term president would be winning the election to the vice presidency followed by ascension to the presidency under the Twenty-Fifth Amendment.[149] If those conditions were met, the practical issue before the Court would be whether a vice president, having

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[146] U.S. CONST. amends. XII, XXII (emphasis added).

[147] *See generally id.* amend. XII.

[148] *See generally id.* amend. XXII.

[149] *See id.* amend. XXV.

served two terms as president, may ascend to the presidency under the Twenty-Fifth Amendment.[150]

The narrower issue before the Court would be whether the Twenty-Fifth Amendment's Ascension clause permits a vice president to ascend to the presidency where the Twenty-Second Amendment prohibits them from serving a third term.[151] The two-term president's argument would likely stand on the text of the Twenty-Second Amendment, which states "no person shall be *elected* to the office of the President more than twice . . . ."[152] The argument goes that because vice presidential ascension constitutes a means other than *election*, the vice president may lawfully succeed the president.[153] The opposing party would argue that, although there is a distinction between election and succession, treating that distinction as dispositive would create a loophole that undermines not only the purpose of the Twenty-Second Amendment, but the centuries of precedent.[154] Viewed in context, the Amendment was drafted as a response to President Franklin Roosevelt's third reelection and reflects the congressional concern with repeated reelection and concentration of executive power, regardless of whether a two-term president was elected or obtained the president by other means. Accordingly, SCOTUS could should conclude that a two-term president serving as vice president cannot ascend to the presidency.

As with the Twelfth Amendment, a political opponent likely has standing to bring the claim against the two-term president.[155] However, the analysis for determining *when* the claim can be brought differs significantly. Unlike claims brought under the Twelfth Amendment analysis—which arise *before* the election—a Twenty-Fifth Amendment claim would almost certainly be brought *after* the election.[156] If such a claim were brought beforehand, the two-term president could argue lack of standing, under the guise that the alleged harm is not imminent and therefore not ripe because the two-term president has not yet been elected to the office.[157]

At this point, the issue of timing becomes more complex, because

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[150] *See id.*

[151] *See id.* amend. XXV, XXII.

[152] U.S. CONST. amend. XXII (emphasis added).

[153] *See* Peabody & Gant, *supra* note 67 at 565.

[154] *See* U.S. CONST. amend. XXII.

[155] *See id.* amend. XII.

[156] *See id.* amends. XII, XXV.

[157] *See id.* amend. XII (recall: the Twelfth Amendment is ripe before the election because the harm occurs if an ineligible person appears on the ballot.)

SCOTUS would need to determine whether the claim may be brought before the vice president attempts to ascend. The two-term president could argue again that the case is not ripe because no attempted ascension occurred as long as the two-term president remains in the capacity of a vice president. The counterargument is that the vice president is "only a heartbeat away," which may be sufficiently "imminent" to warrant standing.[158] In other words, if the claim is brought *before* the election concludes or before an attempted ascension, there is a substantial risk that the court will dismiss it for lack of standing. However, if brought *after* the election, and particularly *after* an attempted ascension, there is a greater chance that the Court will find the case justiciable.

3. Ascension and Succession to the Presidency

Recall that the Twenty-Fifth Amendment is triggered when the sitting President resigns, dies, is incapacitated, or is removed from office (hereinafter referred to as "triggering event(s)").[159] If SCOTUS agreed with the two-term president's interpretation of the Twenty-Second Amendment, effectively holding that a twice-serving president may lawfully ascend to the presidency via the vice presidency, imagining triggering events is easy.[160] A presidential death is not uncommon, with eight of forty-six presidents having died in office. Removal from office through the impeachment process is far-fetched, given that only three sitting presidents have been impeached, and none were removed from office.

Looking to resignation—Richard Nixon is the only president to resign from office, making resignation a relatively untenable, but not impossible, triggering event. However, it is not hard to imagine a situation where an ideologue runs under the guise of intending to hold the office as president only to resign on the first day of his presidency, allowing the two-term president (serving as vice president) to serve his third term in office. And since the Twenty-Second Amendment only limits how many times one may run for the office of the president, one could lawfully run as vice president and ascend as many times as they wish.[161]

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[158] *Heartbeat Away from the Presidency*, POL. DICTIONARY, https://perma.cc/NYV4-8BK6 (last visited May 4, 2026) ("The phrase 'heartbeat away from the presidency' refers to the fact that the vice president will automatically succeed the presidency in the case of the president's death, disability, or resignation.").

[159] U.S. CONST. amend. XXV.

[160] *See id.* amend. XXII.

[161] *See id.*

Another avenue to achieve this would be through Section 3 of the Twenty-Fifth Amendment.[162] Section 3 provides a mechanism by which the president declares himself temporarily incapacitated, thereby making the two-term president (serving as vice -president), the "Acting President," and granting him the presidential duties and powers.[163] A strict textualist interpretation of the language provides a promising loophole—it grants the Acting President all the benefits of the presidency without any of the limitations. The theory goes that because they never retain the title of president, none of the constitutional limitations on the president apply. For example, where the Twenty-Second Amendment limits how many times someone can be elected president, and because the vice president does not technically become president under this section, they never run afoul to limitations on tenure, allowing them to hold an equivalent of the highest office in the land for an unlimited number of terms.[164] Notably, Section 3 has been utilized exactly three times,[165] however, never to the extent just described.

The last means by which the two-term president (serving as vice president) could ascend would be through the never-before-utilized Section 4 of the Twenty-Fifth Amendment. This section provides that the vice president and "a majority of either the principal officers of the executive departments or of such other body as congress may by law provide," transmit a declaration to the Pro Tempore of the Senate and the speaker of the House that the president is incapacitated.[166] If such provision were enacted, the vice president would again retain the power and duties of the presidency as Acting President.

Before considering how tenable each of the triggering events is, remember that the various previously discussed legal challenges must first occur. Provided that the two-term president prevails on all those challenges, the triggering events themselves act as an additional hurdle to attaining the

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[162] *See id.* amend. XXV, § 3.

[163] *Id.*

[164] *See id.* amend. XXII.

[165] *President for a Day: Ronald Reagan, George H.W. Bush and the 25th Amendment*, LIVEJOURNAL: PRESIDENTIAL HISTORY GEEKS (July 21, 2021, 1:43 AM), https://perma.cc/TQZ5-3XTM (explaining how President Ronald Reagan informally (by not sending a written declaration) invoked to transfer power to Vice President George H.W. Bush while undergoing a colonoscopy); *Bush Colonoscopy Leaves Cheney in Charge*, THE GUARDIAN (July 20, 2007, 1:24 PM EDT), https://perma.cc/6FUY-HVRK (explaining that President George W. Bush formally invoked twice, transferring power to Vice President Dick Cheney, both times).

[166] U.S. CONST. amend. XXV, § 4.

presidency. In light of this, the situation where a two-term president runs as vice president with a fellow ideologue as president, intending to have the fellow step aside after winning the election and allowing the two-term president to take control, is very plausible. Doing so would be an attack on the Twenty-Second Amendment, and the centuries of tradition that support its enactment.[167]

C. *A Two-Term President Runs for a Third Term*

The last method by which a two-term president could obtain the presidency is simply by running for a third term and waiting for someone to oppose it. This approach is not without precedent—Teddy Roosevelt ran for a third term after not securing his party's nomination and did so unchallenged by his party before dropping out.[168] However, he did so prior to the adoption of the Twenty-Second Amendment.[169] Since its adoption, any prospects of prevailing under this avenue are slim considering that it would be a direct challenge to the text of the Twenty-Second Amendment.[170]

D. *Enforcement of the Adverse SCOTUS Rulings Turns on Whether the Two-Term President Already Holds the Office*

In each of the scenarios above, this article makes one large assumption—the two-term president would comply with court orders. While uncommon, presidents have defied court orders at pivotal times in the nation's history without any legal repercussions or punishment. The current administration provides a contemporary example of how a president's conduct might be considered non-complying. For example, President Trump is openly testing the boundaries of executive power, seemingly each day, by not complying with court orders.[171] However, he does so, at least for now, under the guise that he believes he is in fact complying. In doing so, he continues the façade of compliance, though it remains unclear whether this will continue. Each test of the rule of law has been quickly challenged in court, resulting in

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[167] *Id.*

[168] *Theodore Roosevelt Runs for a Third Term*, ANNENBERG CLASSROOM, https://perma.cc/JZ2N-34X3 (last visited May 4, 2026) (noting that President Roosevelt served substantially all of President McKinley's term. If the Twenty-second Amendment serves as a basis for how the Founding Fathers intended utilizing the two-term tradition, this would constitute two terms).

[169] *See generally* U.S. CONST. amend. XXII.

[170] *See generally id.*

[171] *See* Mattathias Schwartz, *Judge Rules the White House Failed to Comply with Court Order*, N.Y. TIMES, https://perma.cc/K497-JAHZ (last updated Feb. 12, 2025).

overwhelmingly adverse rulings for the president and always leading to speculation as to whether the president will comply.

Given this ongoing attempted expansion of presidential power, failure to overcome the Twelfth or Twenty-Fifth Amendment hurdles would not necessarily end the pursuit of a third term, even if a court issues an adverse ruling at any of the steps described above. Whether the two-term president is in office at the time the orders are given plays a crucial role in determining the two-term president's next steps.

1. Where the President is Already in Office

Recall that for the vice-president (having already served two terms) to ascend to the presidency, they would need a favorable ruling from SCOTUS that they are constitutionally eligible to run for the vice presidency under the Twelfth Amendment, as well as a ruling that they can succeed the president under the Twenty-Fifth Amendment.[172] Regardless of how the court rules in any of the scenarios above, there is no guarantee that the executive would comply. In other words, the president could simply run for a third term or the vice presidency without obtaining the blessing of SCOTUS. Requesting the two-term president to enforce the law on himself would present its own set of challenges. Ultimately, winning the election would be tantamount to taking the presidency by force and would require alternative measures by Congress to ensure this does not occur.

2. Where The Two-Term President Is Not in Office, But Has Won the Election to the Vice Presidency or a Third Term

Now imagine another scenario where the two-term president is not in office at the time of the election. At this point they do not yet have the power to defy a SCOTUS order. However, if they manage to win their election, they could get very close to reobtaining this power. National elections occur on the first Tuesday after the first Monday in November, and the presidential inauguration is January 20th of the following year, meaning there are roughly seventy-five days in between the two.[173] Once this period has elapsed, and the two-term president is inaugurated, there is likely no chance they comply with the court order that comes out *after*, given that they have already taken measures to abrogate the Constitution. If, on the other hand, the Court rendered its ruling *prior to* inauguration, despite the heaps of

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[172] *See* U.S. CONST. amend. XII, XXV.

[173] 3 U.S.C. §§ 1, 21.

election litigation that would undoubtedly arise, there is a stronger chance that the sitting president ensures compliance with SCOTUS orders, denying the two-term president a third term.

To illustrate the difference that holding office has, consider the following example. In November of 2020, President Trump lost his first presidential reelection. On January 6th, 2021, President Trump held a rally at the National Mall in Washington D.C., just a few blocks from where Congress was certifying the results of the 2020 Election.[174] President Trump told his supporters to descend on the Capitol building to disrupt Congress's certification.[175] The mob outside the Capitol erected a gallows while the others inside attempted to hunt down members of Congress.[176] All members of Congress were able to escape or hide long enough for additional law enforcement to secure the scene.[177] Had Donald Trump not been president when he directed his followers to engage in an insurrection, it is unlikely they would have done so. Had they succeeded, the results of the 2020 U.S. presidential election might not have been certified, potentially leaving him in power.

IV. Amendment Enforcement Requires Agency, State, and Congressional Action

No one has ever enforced the Twenty-Second Amendment, and so how to go about doing so, like much of this paper, remains theoretical.[178] Courts have held that some constitutional amendments are self-executing, meaning no further action is required by Congress to enforce it.[179] So, in theory, the Twelfth, Twenty-Second, and Twenty-Fifth Amendments should be treated similarly.[180] But, as discussed above, it is unclear at which point a two-term president would face challenges to his ascension. For example, self-

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[174] Nicholas Frandos & Emily Cochrane, *After Pro-Trump Mob Storms Capitol, Congress Confirms Biden's Win*, N.Y. TIMES (Jan. 6, 2021, 7:47 AM ET), https://perma.cc/32AA-MXQG.

[175] *Id.*

[176] *See* Scott MacFarlane, *Newly Obtained Video Shows Movement of Group Suspected of Constructing Jan. 6 Gallows Hours Before Capitol Siege*, CBS NEWS, https://perma.cc/S477-64DQ (last updated Mar. 18, 2024, 8:55 PM EDT).

[177] Frandos & Cochrane, *supra* note 174.

[178] *See* U.S. CONST. amend. XXII.

[179] Wilson v. Hawaii, 145 S. Ct. 18, 20 (2024) (holding the Second Amendment is self-executing); Knick v. Twp. of Scott, 588 U.S. 180, 192 (2019) (holding the Fifth Amendment is self-executing); Guinn v. United States, 238 U.S. 347, 363 (1915) (holding that the Fifteenth Amendment is self-executing).

[180] *See* U.S. CONST. amends. XII, XXII, XXV.

execution could occur as early as the moment a two-term president files the requisite paperwork to run for a third term, or as late as their inauguration. Because the current processes in place are too weak or require too much red tape to ensure any meaningful enforcement, more robust measures are necessary. Each of the following sections describe potential actions that could bolster enforcement of the Amendments.

A. *The Federal Election Committee Could Refuse to Process the Application to Run for Re-election*

The Federal Election Commission (FEC) is an independent agency of the executive branch, which Congress established in 1974 as an entity to oversee campaign finance law.[181] It performs its duties through imposing limitations and prohibitions on campaign contributions and administering public funding programs for presidential campaigns.[182] Enforcement mechanisms in place are mostly limited to assessing civil fines, however, it can refer violations to the Department of Justice for criminal enforcement.[183]

So, in a situation where SCOTUS has not yet resolved the ambiguities discussed above and a two-term president runs either as a vice president or a third-term president, the FEC could enforce the Amendments by assessing civil penalties or refusing to release tens of millions of dollars in public funding to his campaign. The more challenging method of enforcement comes from referring the two-term president's actions to the DOJ. Generally, to do so, a candidate must have taken actions amounting to fraud or other serious wrongdoing and it remains unclear whether unconstitutionally running for candidacy would warrant such an action. Thus, the primary form of enforcement would not necessarily disqualify the two-term president but instead financially cripple their campaign.

The drawbacks for FEC enforcement are twofold. First, the primary function of the FEC is to regulate campaign finance laws. Absent a campaign finance violation, the agency likely does not have the authority to refuse to sponsor a candidate. Depending on how the actions are brought before SCOTUS, the issue would likely be framed as whether the FEC may refuse to disburse public funds to a candidate, having served two terms as president, where there is no evidence of campaign finance violations. Here,

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[181] *Mission and History*, FED. ELECTION COMM'N, https://perma.cc/9ZNW-PL93 (last visited May 4, 2026).

[182] *Id.*

[183] *FEC Approves Advisory Opinion, Memorandum of Understanding with Department of Justice*, FED. ELECTION COMM'N. (Apr. 19, 2023), https://perma.cc/KZ8U-T6BA.

the "constitutionally ineligible" issue of the Twelfth Amendment could arise, providing another avenue for standing.[184] Unless the Court rules against the two-term president on the basis that they are "constitutionally ineligible" to run for president, a loss on this issue would only prohibit the FEC from disbursing funds. Given the Court's recent proclivity of determining cases on a textual basis, this seems like the most promising outcome.[185]

Second, recall that agencies fall under the direction and control of the Executive branch. So, where a sitting president seeks reelection, a conflict of interest arises where the president directs the FEC or the DOJ to not enforce the law. The FEC and other independent agencies are, by design, supposed to be insulated from political pressure. However, recent attempts by a sitting president to diminish that political independence suggest that the likelihood of executive interference is high.[186] Notably, interference such as this would likely bypass any challenges discussed in the immediately preceding paragraph.

In sum, the FEC does not provide the most robust avenue for Amendment enforcement, but it is better than taking no action. Supporters of the Constitution can find solace in crippling a two-term president's campaign.

B. *States Could Refuse to Place the Two-Term President on the State Ballot*

Another avenue that could arise is by a state's refusal to include the two-term president on the ballot. Once a candidate files his financial paperwork with the FEC, the FEC requires that he contact the Secretary of State or state equivalent entity for information on how to get access to the ballots.[187] Depending on the state's election laws, interested groups could petition the Secretary of State to refuse to include the two-term president on the ballot, depending on for which office the two-term president runs. Given the gravity of the electoral consequences, a claim of this nature would likely find its way to SCOTUS with the issue being: whether individual states possess

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[184] U.S. CONST. amend. XII.

[185] *See* William N. Eskridge, Jr. et al., *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1614–15 (2023).

[186] Ensuring Accountability for All Agencies, Exec. Order No. 14215, 90 Fed. Reg. 10447 (Feb. 24, 2025); Continuing the Reduction of Federal Bureaucracy, Exec Order No. 14238, 90 Fed. Reg. 13043 (Mar. 14, 2025).

[187] *Gaining Ballot Access*, FED. ELECTION COMM'N, https://perma.cc/38E9-F6RW (last visited May 4, 2026).

the authority to determine and enforce disqualifications for federal office under the Twelfth or Twenty-Second Amendment.

A similarly reasoned case was heard by SCOTUS in 2024, where the Supreme Court of Colorado held that the Insurrection Clause of the Fourteenth Amendment prohibited then Former-President Trump from running for office.[188] The State Court held that the Colorado Secretary of State could validly remove Trump from the state ballot.[189] SCOTUS heard the case and unanimously determined that enforcement of the Insurrection Clause was within Congress's exclusive authority and therefore the Colorado Supreme Court could not bar Trump from the ballot on that basis.[190] In other words, the Court left open the possibility that a state may eliminate a presidential candidate, but just not on the basis of the Insurrection Clause.[191] This left open the possibility that other interested parties could seek the removal of a presidential candidate from the ballot.

C. *Congress Could Refuse to Certify the Election Results*

Should the two-term president win the election, congressional action becomes considerably more important, since Congress is responsible for certifying election results in a joint session. Thus, the first method Congress could employ to prevent the "illegal" presidential succession, would be refusal to certify the results of the election.

On the sixth day of January following the 2020 presidential election, Congress convened to certify the electoral votes.[192] During the process, members from the House and the Senate count the votes by reading them aloud and recording them.[193] Objections are limited to two instances: where the "electors . . . were not lawfully certified," or the electoral votes were not "regularly given."[194] An objection on the basis that the president is constitutionally ineligible would have to fall under the latter, unless there is an indication that the electors were improperly certified.[195] The electoral votes could be considered "not . . . regularly given" because they were for, in this article's view, someone who fails to meet the constitutional

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[188] Anderson v. Griswold, 543 P.3d 283, 326 (Colo. 2023).

[189] *Id.* at 343 (Boatright, J., dissenting).

[190] Trump v. Anderson, 601 U.S. 100, 117 (2024) (per curiam).

[191] *See id.*

[192] 3 U.S.C. § 15.

[193] *Id.* § 16.

[194] *Id.* § 15.

[195] *Id.*

requirements to hold the office.[196]

At this point in the process, the House and Senate separate and debate for two hours, after which they reconvene and vote on the objection.[197] A successful objection to the certification process could prevent the two-term president from being confirmed and taking the Oath of Office.[198]

D. *Congress Could Impeach and Remove the President*

Conviction by impeachment and removal is the primary means by which Congress can act against a president who exceeds their constitutional authority. Accordingly, the second method Congress can employ is to impeach the two-term president. The Court has underscored Congress's role in enforcing constitutional eligibility for federal offices.[199]

Recall impeachment is a multistep process, beginning with a vote of impeachment in the House.[200] If the House approves the articles of impeachment, the process moves to the Senate for a trial.[201] Relating back to how this applies to the two-term president, the central roadblock is determining the grounds for impeachment. Section 4 of Article II allows for impeachment of the president for "Treason, Bribery, or other high Crimes and Misdemeanors."[202] Given that no president has been removed using this language, it is unlikely a successful removal from office would occur on any other basis, including constitutional prohibition on the president's ability to serve. Even if it did, the question of whether a two-term president can be impeached on a basis other than those in Section 4 would go to SCOTUS for interpretation.[203]

Of the three grounds for impeachment, "high Crimes and Misdemeanors" offers the best path for removal because there is effectively no way to link "[b]ribery" or "[t]reason" to constitutional ineligibility. In contrast, "high Crimes and Misdemeanors" is sufficiently ambiguous and untested to the point where using it as grounds for impeachment is feasible. However, if SCOTUS has already interpreted the Constitution to mean the president is constitutionally eligible, then Congress would not have grounds

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196 *See id.*

197 *See id.* § 17.

198 *See* 3 U.S.C. § 15.

199 *See* Anderson v. Griswold, 543 P.3d 283, 297 (Colo. 2023).

200 U.S. CONST. art. I, § 2, cl. 5.

201 *Id.* art. I, § 3, cl. 6–7.

202 *Id.* art. II, § 4.

203 *See id.* art. II, § 4.

for impeachment under this theory. Absent that ruling, filing the articles of impeachment by the House could be the catalyst for raising the claim to SCOTUS for interpretation, not only for the previously discussed ambiguities in the Twelfth, Twenty-Second, and Twenty-fifth Amendments, but also to whether constitutionally ineligibility falls within "high Crimes and Misdemeanors." Given that this relates directly to constitutional questions of law pertaining to the separation of powers, SCOTUS must take the case.

A finding that the president is constitutionally ineligible would still require Congress to take the remaining steps in the impeachment process. If the House vote yields the requisite number of votes, the process moves to the Senate for a trial to determine removal. Should the Senate vote to convict the president after the trial commences, the two-term president would be removed from office and potentially barred from holding future office. Thus, this presents a viable path for enforcement.

CONCLUSION

The Twenty-Second Amendment was adopted to codify centuries of American presidential tradition and precedent. Attempts to circumvent it present grave threats to the rule of law and jurisprudence. Recent comments by President Donald Trump and his Administration indicate they will try to hold onto control of the Executive Branch even where the Constitution dictates doing so would be unconstitutional, similar to how he attempted to do so after losing the 2020 Presidential Election. If these attempts succeed, this article could see itself played out in the courts.

Attempting to circumvent the Twenty-Second Amendment poses extraordinary challenges, requiring several favorable rulings from SCOTUS, and perhaps a very well-motivated (and maybe minority) electorate. The Court has in recent times delivered rather tortured interpretations favoring President Trump's policies and personal liability regarding committed crimes, indicating that an extreme situation, such as the ones contemplated here, is not just possible, but maybe even likely. If such a scenario plays out, the other branches of the government must be willing to act quickly and decisively against the Trump Administration. While there are some mechanisms in place to do so, most are untested or present difficult obstacles to enact. Regardless, failure to act would result in a constitutional crisis, deeply altering how democracies work in the modern day.

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Knock, Knock. Who's There? It's Gideon: Tenants' Right to Counsel and the Massachusetts Eviction Crisis

Teresa Guerra[*]

INTRODUCTION

The right to safe housing is one of society's most fundamental and necessary rights.[1] Today, this right is under attack, as the housing market consistently lacks affordable, habitable housing[2] and eviction rates skyrocket.[3] This issue exists across the nation but is especially devastating in the state of Massachusetts.[4] Paradoxically, Massachusetts is a tenant-friendly state[5] and has recently enacted legislation to protect its

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[1] *See generally* Maria Massimo, *Housing as a Right in the United States: Mitigating the Affordable Housing Crisis Using an International Human Rights Law Approach*, 62 B.C. L. REV. 273, 273–275 (2021) (stating that the 1948 Universal Declaration of Human Rights includes the right to housing and that right is "contained in several foundational international human rights treaties").

[2] Mary Louise Kelly et al., *Housing Experts Say There Just Aren't Enough Homes in the U.S.*, NAT'L PUB. RADIO (Apr. 23, 2024, 4:04 PM ET), perma.cc/A3UW-ARZR ("[T]here's a massive shortage of homes—somewhere between 4 and 7 million.").

[3] Jesse Bedayn & Michael Casey, *A Record Number of Americans Can't Afford Their Rent. Lawmakers Are Scrambling to Help*, BILLINGS GAZETTE (Feb. 12, 2024), perma.cc/VD45-ZJFE (explaining that the lack of affordable homes and the increasing number of rent-burdened individuals has resulted in a significant rise in eviction filings).

[4] *See* Matija Jankovic, *Housing Stability Monitor: Massachusetts Evictions & Foreclosures*, MASS. HOUS. P'SHIP (Aug. 26, 2025), perma.cc/68SS-9JA9 (explaining that eviction filings in Massachusetts have surpassed pre-pandemic rates).

[5] ROS Team, *10 Most Tenant Friendly States 2024*, RENT OWN SELL N.Y., perma.cc/VNK2-LWGS (last visited Jan. 29, 2026) ("Massachusetts is widely known as the most tenant-friendly

tenants and resolve its housing crisis.[6] However, these policies, while designed to protect Massachusetts tenants, cannot be fully effectuated unless tenants are provided the right to counsel in every eviction hearing.[7]

Housing law is complex, and the eviction process is fast-moving.[8] Without a lawyer, tenants face an adversarial judicial system in which they are unable to assert the rights and defenses Massachusetts has provided.[9] In other words, without the right to counsel, the protections the State has sought to establish for its residents exist only on paper.[10] However, recently proposed legislation in Massachusetts seeks to establish access to counsel for indigent tenants facing eviction.[11]

This Note argues that while the proposed Massachusetts tenant right to counsel legislation could serve as a significant step in addressing the ongoing eviction crisis, it remains insufficient in ensuring that *all* tenants facing eviction have meaningful access to counsel, and more comprehensive, permanent solutions are needed to fully protect vulnerable tenants. Part I analyzes the current eviction crisis plaguing Massachusetts, and the steps Massachusetts has taken to resolve this crisis. Part II describes the impact of the increasing eviction and homelessness rates on the state of Massachusetts. Part III presents the arguments for and against the right to counsel ("RTC") in eviction cases. Part III also analyzes the proposed Massachusetts tenant right to counsel ("TRTC") legislation and a similar, previously enacted,

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state in the US.").

[6] Victoria DiLorenzo, *How Big Are the Investments in the Affordable Homes Act? A Closer Look at the 2024 Housing Bond Bill*, MASS. BUDGET & POL'Y CTR. (Oct. 2, 2024), perma.cc/WWL2-HU88 (discussing the recently enacted Affordable Homes Act which "aims to address the housing crisis" in Massachusetts).

[7] Greta Jochem, *A Look Inside a Mass. 'Poverty Court,' Where No One Has the Right to an Attorney*, MASSLIVE, perma.cc/7ECX-WWZA (last updated June 18, 2024, 12:53 PM) (explaining that tenants' rights are meaningless unless one understands the process and knows how to assert these rights in court).

[8] Esme Caramello, *A Moment of Truth for the Housing Court*, MASS. LAWYERS WKLY. (Feb. 10, 2023), perma.cc/S2UX-63M6.

[9] *Id.* (explaining that while Massachusetts has passed a variety of tenant protections, "due to the impossibility of navigating eviction law and procedure as a pro se tenant, these rights are rarely adjudicated").

[10] *See id.* (explaining that research shows tenants rarely assert claims or defenses in eviction proceedings).

[11] *Several Tenant RTC Bills Introduced*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS. (Aug. 1, 2024), perma.cc/8QBU-636C (explaining the cross-filed TRTC bills in the Massachusetts Senate and House of Representative).

TRTC program, and seeks to highlight the shortcomings of this legislation. Finally, Part IV will address whether there is a more permanent way for the Commonwealth to establish tenants' right to counsel.

I. Background

A. *The Current Housing Crisis in Massachusetts*

The United States is currently experiencing a housing crisis.[12] The lack of affordable housing has resulted in increasing eviction rates across the nation.[13] Massachusetts, like many other states, is facing its own housing crisis.[14]

The Massachusetts Housing Partnership ("MHP") has researched housing stability in Massachusetts between October 2020 and September 2024, and the reported numbers are staggering.[15] From August of 2022 to September of 2024, eviction filings in the state have surpassed average pre-pandemic rates.[16] During this period, Massachusetts landlords, in all but one month, have initiated eviction filings against more than three thousand households.[17] According to MHP, non-payment of rent was the most common cause of eviction filings across the state.[18]

While not every eviction filed in the state results in an execution, i.e., a judge's order granting possession to the landlord resulting in a tenant's removal from the unit, monthly eviction execution rates for non-payment have remained elevated in recent months.[19] In fact, between April and August of 2024, Massachusetts saw an average of 850 non-payments of rent eviction executions per month.[20] Moreover, even if a filing does not

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[12] Brian Callaci & Sandeep Vaheesan, *The Market Alone Can't Fix the U.S. Housing Crisis*, HARVARD BUS. REV. (Sept. 12, 2024), perma.cc/WSN8-8QRV.

[13] Joy Addison, *Increased Rental Rates Causing Widespread Evictions*, FOX BUS., perma.cc/46R3-LUH3 (last updated June 7, 2024, 1:10 AM EDT).

[14] Jankovic, *supra* note 4 (explaining that increased eviction rates have become "the norm" in Massachusetts).

[15] Jankovic, *supra* note 4.

[16] Jankovic, *supra* note 4.

[17] Jankovic, *supra* note 4.

[18] Jankovic, *supra* note 4.

[19] Jankovic, *supra* note 4.

[20] *See* Jankovic, *supra* note 4 (referencing Eviction Filings vs. Eviction Executions chart displaying the total number monthly filings for non-payment versus the total number of monthly evictions for non-payment).

ultimately result in execution, the presence of an eviction filing on one's record can significantly impact the tenant's ability to find new housing.[21]

The obvious, immediate effect of eviction is the loss of one's housing.[22] In fact, evictions are one of the most direct causes of homelessness.[23] Therefore, unsurprisingly, increased filings and execution rates across the state have resulted in increased homelessness rates.[24] The U.S. Department of Housing and Urban Development ("HUD")'s 2024 Annual Homelessness Assessment Report shed light on the increasing rate of homelessness across the state.[25] From 2023 to 2024 in Massachusetts, the homeless population increased from approximately 19,100 to about 29,300.[26] This 53% increase is nearly three times the national rate.[27] While many local homelessness agencies suggest that the rising rates are a result of Massachusetts's right-to-shelter law and the influx of refugees, asylum seekers, and migrants, HUD's report noted that the state's high cost of living and skyrocketing rents also contributed to increasing homelessness rates.[28] Moreover, research shows that Massachusetts urban areas, in particular, are experiencing increasing rates of homelessness.[29] According to a study conducted by Boston Indicators, the city of Boston has one of the highest homelessness rates in the country.[30] Specifically, the study found that in 2023, 12,674 people were

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[21] Jankovic, *supra* note 4.

[22] Liel Sterling et al., *No Eviction Without Representation: Evictions' Disproportionate Harms and the Promise of Right to Counsel,* AM. C.L. UNION (May 11, 2022), perma.cc/VDB2-7PCK.

[23] *Id*.

[24] *See* Jankovic, *supra* note 4.

[25] Yoohyun Jung & Neena Hagen, *Charts Show Which States Have Seen Most Dramatic Increases in Homeless Population*, BOS. GLOBE, perma.cc/7DHD-ALLD (last updated Jan. 2, 2025, 10:40 AM) (explaining that HUD's report uses estimates reported by local agencies to evaluate homelessness across the country).

[26] *Id*.

[27] *Id*.

[28] *Id*. *See generally* Laticia Walker-Simpson, *Life Raft or Quicksand?: Emergency Assistance's Role in Greater Boston's Homelessness Crisis*, 64 BOS. BAR J., no. 2, Spring 2020, at 23, 23 (explaining that Massachusetts is referred to as a "right to Shelter" jurisdiction because there is a statutory right to shelter for families and pregnant women searching for stable housing, so long as these individuals meet certain statutory requirements).

[29] *See* Jankovic, *supra* note 4 (explaining that urban areas including Worcester, Brockton, and Springfield have experienced increased homelessness rates in recent years).

[30] Tréa Lavery, *Boston Has Second-Highest Rate of Homelessness of Major U.S. Cities: Report*, MASSLIVE, perma.cc/V56P-H3KM (last updated Aug. 6, 2024, 6:09 PM) (explaining that Boston

unhoused in Greater Boston.[31] Sadly, children under 18 accounted for 31% of Greater Boston's homeless population, the highest rate of any one age group.[32]

Research suggests that the rising eviction and homelessness rates across the Commonwealth are in large part due to the lack of affordable housing.[33] Massachusetts ranks as the third-most expensive state in the country for renters.[34] Therefore, it is not surprising that housing affordability is one of the most pressing issues facing the Commonwealth today.[35] Affordability of the rental market generally is measured in terms of rent burden.[36] A "rent-burdened" individual is anyone who pays more than one-third of their income in rent.[37] A person is considered *severely* rent-burdened when they spend half of their income on rent.[38] As of 2023, the U.S. Census Bureau estimated that more than half of renter households in Massachusetts are considered rent-burdened.[39]

B. *Massachusetts as a Tenant-Friendly State*

Despite the lack of affordability and increasing eviction rates, Massachusetts is generally considered a tenant-friendly state.[40] Massachusetts has established a specialized Housing Court to exclusively handle disputes between landlords and tenants[41] and has codified several

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Indicators also utilized the annual "Point in Time" count to determine how many individuals were homeless in the Greater Boston area).

[31] *Id*.

[32] *Id*.

[33] *See, e.g.*, DiLorenzo, *supra* note 6.

[34] Camilo Fonseca, *Mass. Rents Are High, But Increases in Greater Boston Are Projected to Slow This Year, Study Says*, BOS. GLOBE, perma.cc/C22N-XJ97 (last updated Jan. 15, 2025, 2:53 PM).

[35] DiLorenzo, *supra* note 6.

[36] DiLorenzo, *supra* note 6.

[37] Catherine Elton, *The Greater Boston Eviction Crisis Will Hurt You, Too*, BOS. MAG. (Dec. 11, 2024, 12:00 PM), perma.cc/5GNG-E6KD.

[38] *Nearly Half of Renter Households Are Cost-Burdened, Proportions Differ by Race,* U.S. CENSUS BUREAU (Sept. 12, 2024), perma.cc/L9KL-3CAK.

html.

[39] DiLorenzo, *supra* note 6.

[40] *See* ROS Team, *supra* note 5 (explaining that Massachusetts has enacted strong protections for tenants).

[41] Caramello, *supra* note 8.

tenant protections over the years.[42]

1. The Massachusetts Housing Court System

Massachusetts created its Housing Court in 1971.[43] The Housing Court aimed to bring "specialized expertise and resources to the complex legal, social and economic problems"[44] involved in housing disputes.[45] The Commonwealth staffs its Housing Court with expert housing judges and housing specialists.[46] These resources exist to provide timely and nuanced relief to all parties involved.[47] In 2017, the late Supreme Judicial Court Chief Justice Ralph Gants successfully campaigned to extend the Housing Court's jurisdiction statewide.[48]

One specific point of pride for the Massachusetts Housing Court is the presence of Housing Court specialists.[49] Housing Court specialists are employees of the court.[50] These specialists train in mediation and Massachusetts housing law, including the "State's sanitary, building, and fire codes."[51] Housing Court specialists can "resolve disputes outside [of] the courtroom."[52] Specialists are neutral parties who can investigate disputes between litigants[53] and provide information regarding "government

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[42] *See* ROS Team, *supra* note 5 (listing legislation designed to protect Massachusetts tenants such as capping security deposits, providing a grace period for paying rent, and requiring proper notice for rent increases); *see also* Zoe Harper, *Things Landlords Cannot Do in Massachusetts*, STEADILY (Jan. 18, 2024), perma.cc/M8FL-SQ5K (explaining that in Massachusetts landlords are required by law to maintain habitable units, refrain from engaging in discriminatory practices, and comply with lead laws).

[43] Caramello, *supra* note 8.

[44] Caramello, *supra* note 8.

[45] Caramello, *supra* note 8.

[46] Caramello, *supra* note 8.

[47] Caramello, *supra* note 8 (explaining that housing judges and specialists could provide both subject matter expertise and dispute resolution).

[48] Caramello, *supra* note 8.

[49] Diana H. Horan, Voice of the Judiciary: Comments from Newly Appointed Housing Court Chief Justice Diana H. Horan, 67 BOS. BAR J., no. 4, Fall 2023, at 19, 19.

[50] *Id*.

[51] *Id*.

[52] Caramello, *supra* note 8.

[53] Horan, *supra* note 49, at 19.

agencies, housing authorities, and non-profit agencies."[54]

2. Massachusetts's Pro-Tenant Legislation

Massachusetts has codified several measures designed to protect tenants.[55] Moreover, the State has passed specific legislation to protect tenants during the housing crisis.[56] In August 2024, Massachusetts Governor Maura Healey passed the Affordable Homes Act.[57] The bond bill authorizes Massachusetts to borrow $5.16 billion[58] to create more homes and reduce housing costs for all Massachusetts residents.[59] More specifically, the Act directs funds toward creating and repairing public housing, building affordable housing units, supporting first-time homebuyers, and more.[60]

Moreover, the Act includes various policy proposals.[61] One important policy proposal is the sealing of eviction records.[62] Passing the eviction record sealing portion of the Affordable Homes Act resulted from years of legislative advocacy led by the Massachusetts Law Reform Institute, a tenant-rights advocacy group.[63] Under the Act, tenants can petition the Court to seal their eviction record at various times depending on two factors: (1) the type of case and (2) the outcome of the case.[64] For instance, if a tenant wins their case or the case is dismissed, the record can be sealed immediately after the case ends.[65] Similarly, if the case involves a no-fault eviction where

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[54] Horan, *supra* note 49, at 19.

[55] *See* ROS Team, *supra* note 5 (explaining that Massachusetts laws allow tenants to withhold rent due to Sanitary Code violations and require tenants to agree to rent increases in writing).

[56] *See* DiLorenzo, *supra* note 6.

[57] DiLorenzo, *supra* note 6.

[58] DiLorenzo, *supra* note 6.

[59] Claire O'Callahan, *100 Days Since Signing, the State Reports Progress on Implementing Affordable Homes Act*, THE BERKSHIRE EAGLE (Nov. 24, 2024), perma.cc/7DFX-ZKBQ.

[60] *Senate Unanimously Passes $5.4 Billion Affordable Homes Act*, BUSINESSWEST (July 19, 2024), perma.cc/48KK-V9D3 [hereinafter *Senate Passes Affordable Homes Act*].

[61] *Id.* (explaining multiple policy measures proposed in the Affordable Homes Act, e.g., establishing equity-focused housing offices to address housing discrimination).

[62] *Id.*

[63] Elaine McArdle, *Housing Clinic Helps with Landmark Legislation to Seal Eviction Records*, WILMERHALE LEGAL SERVICES CTR. OF HARVARD L. SCH. (Aug. 22, 2024), perma.cc/8MAM-3W56.

[64] *Id.*

[65] *Id.*

the landlord does not allege any wrongdoing by the tenant, the record can be sealed immediately after the case ends.[66] In non-payment of rent cases where the tenant has paid the amount owed, the record can be sealed as soon as the judgment is satisfied, i.e., the amount owed has been paid.[67] Moreover, the Act makes it illegal for a consumer reporting agency to include information about a sealed record in their reports.[68]

C. *Housing Court's Inherent Imbalance*

While Massachusetts has enacted strong tenant protections, from the tenant's perspective, "the eviction process is almost always unfair."[69] This is because most tenants facing evictions must navigate the legal system alone, while most landlords have the advantage of legal representation.[70] Summary process cases are adversarial proceedings in which a judge determines who is entitled to possession of real property.[71] Navigating these proceedings requires specific knowledge of housing laws, rules of evidence, and rules of procedure.[72] A lawyer will almost always have the upper hand in these proceedings.[73] A lawyer knows what documents must be filed and their deadlines.[74] A lawyer knows how to create a compelling narrative of their case and how to make strong arguments, both orally and in writing.[75] Most simply, a lawyer has expertise and experience in the practice of law.[76] These

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[66] *See generally The True Cost of No-Fault Evictions in Massachusetts: What Landlords Need to Know*, COTE L. GRP., perma.cc/G98L-G3CZ (last visited Jan. 15, 2026) (explaining that no-fault evictions occur when the landlord seeks to remove a tenant without alleging any wrongdoing, misconduct, or fault).

[67] McArdle, *supra* note 63.

[68] McArdle, *supra* note 63.

[69] Jeff Yungman & Michelle Mapp, A Civil Right to Counsel: A Viable Solution to South Carolina's Eviction Crisis, 34 S.C. LAW., no. 6, May 2023, at 48, 48.

[70] *Id*.

[71] Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 699, 702 (2006); Legal Serv. Ctr. of Harvard L. Sch., *Fighting an Eviction in Court*, MASS LEGAL HELP, perma.cc/8TLV-VL5G (last visited Jan. 15, 2026).

[72] *See* Scherer, *supra* note 71, at 702–03.

[73] Caramello, *supra* note 8.

[74] Caramello, *supra* note 8.

[75] Caramello, *supra* note 8.

[76] Caramello, *supra* note 8.

are all advantages over an unrepresented tenant.[77]

Therefore, successfully navigating a summary process case poses a "formidable challenge"[78] for most tenants.[79] The emotional stress involved in a summary process case—mainly the anxiety and stress of a potential looming eviction—compounds this challenge.[80] The result of such a system, where unrepresented tenants must defend themselves against a landlord who is represented by counsel, is "a dramatic imbalance of power and access to justice."[81] More practically, the result of such a system is an increase in the likelihood of a devastating judgment against the tenants.[82]

II. Why Massachusetts Residents Should Care About Unrepresented Tenants

Evictions result in a variety of hardships for the individual: homelessness, material hardships, unemployment, school disruption, physical and mental health problems, etc.[83] But putting aside these individual hardships, evictions place a great hardship on communities as a whole.[84] Community costs associated with evictions include the costs of emergency shelters, emergency medical services, additional educational services, mental health treatment, and more.[85]

In 2020, the Boston Bar Association published a report assessing the benefits of full legal representation in eviction cases.[86] This report detailed the cost-saving estimates for eviction cases across Massachusetts by calculating the money and resources saved by preventing homelessness.[87] In

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[77] Caramello, *supra* note 8.

[78] Caramello, *supra* note 8 (quoting Adjartey v. Central Division of Housing Court Department, 120 N.E.3d 297, 306 (Mass. 2019)).

[79] Caramello, *supra* note 8.

[80] Caramello, *supra* note 8.

[81] Caramello, *supra* note 8.

[82] *See* Yungman & Mapp, *supra* note 69, at 50 (explaining that research has shown that represented tenants are more likely to avoid an eviction judgment and remain housed than unrepresented tenants).

[83] Yungman & Mapp, *supra* note 69, at 48.

[84] *See* Yungman & Mapp, *supra* note 69, at 50.

[85] Yungman & Mapp, *supra* note 69, at 50.

[86] Martha Samuelson et al., *Assessing the Benefit of Full Legal Representation in Eviction Cases in Massachusetts*, BOS. BAR ASS'N , June 2020, at 4, perma.cc/B8B7-XBZJ.

[87] *Id*. at 12 (explaining that because many evicted tenants ultimately experience homelessness,

assessing the savings derived from preventing homelessness, the report focused on three factors: (1) the reduction in emergency housing and shelter costs; (2) the reduction in health care costs; and (3) the reduction in foster care costs.[88] Notably, these expenses were measured against the cost of providing full legal representation for defendants whose income is below 200% of the federal poverty guidelines.[89] While this Note argues for the right to counsel for all parties, regardless of income, the report's cost analysis remains instructive in considering the arguments presented in this Note.[90] According to the report, Massachusetts would approximately save $41.0 million annually on emergency housing and shelter costs if defendants whose income is below 200% of the federal poverty guidelines received full legal representation in eviction proceedings.[91] Moreover, according to the report, Massachusetts would save approximately $17.8 million in health care costs and $4.13 million in foster care costs if defendants whose income is below 200% of the federal poverty guidelines were provided full legal representation in eviction proceedings.[92] In other words, providing tenants with the right to counsel would, in practice, save the Commonwealth and taxpayers money by limiting the need for various social services associated with evictions and homelessness.[93]

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decreasing eviction rates through representation could save the Commonwealth money and resources).

[88] *Id*. at 14–17.

[89] *Id*. at 8 n.18.

[90] *See generally id*. at 6 (explaining that the majority of unrepresented tenants in Massachusetts are low-income); Tim Redmond, *Protecting a Program that Saves Hundreds from Becoming Unhoused . . .*, 48HILLS (Apr. 28, 2024), perma.cc/2H84-CFU7 (showing that, despite not being income-limited, San Francisco's TRTC program has still saved the city money because the majority of tenants participating in the program were low-income and representation prevented homelessness).

[91] Samuelson et al., *supra* note 86, at 14 (explaining that, by providing legal counsel to tenants facing eviction, more tenants would remain housed, thereby reducing the number of individuals experiencing homeless and thus the amount spent on emergency housing and shelter).

[92] Samuelson et al., *supra* note 86, at 16–17 (explaining that providing legal counsel will reduce the number of individuals experiencing homelessness, which will reduce the amount spent on healthcare costs and foster care costs).

[93] Samuelson et al., *supra* note 86, at 18 (estimating the minimum cost savings to be $63.02 million).

ANALYSIS

III. When Considered in Light of the Arguments for TRTC, the Proposed Massachusetts Legislation Has Certain Shortcomings that Must Be Addressed to Protect Tenants

A. *The Arguments for Providing Tenants with the Right to Counsel Often Have Moral and Constitutional Underpinnings*

The landmark case *Gideon v. Wainwright* held that indigent individuals were guaranteed the right to counsel in criminal cases.[94] Since the *Gideon* decision, many advocates and scholars have argued that its holding should extend to civil proceedings.[95] However, the United States Supreme Court ("Supreme Court") has yet to do so.[96] As there is no federal right to counsel in eviction proceedings, advocates seek to ground a tenant's right to counsel in some legal argument or framework.[97] Two of the most common arguments rest on the morality and constitutionality of providing tenants with representation.[98] States' and cities' efforts to pass tenant right-to-counsel legislation rely on these arguments.[99]

1. Housing Is a Basic Need for which the United States Must Recognize and Protect

The human costs of housing insecurity and homelessness are well documented.[100] Research shows that housing—or lack thereof—directly

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[94] Gideon v. Wainwright, 372 U.S. 335, 344–345 (1963); Shera C. Grant, *Civil Gideon: A Judge's Perspective on the Right to Counsel in Eviction Cases*, 20 STAN. J. C.R. & C.L. 101, 105 (2024).

[95] Grant, *supra* note 94, at 106–07.

[96] Grant, *supra* note 94, at 106 (explaining that there is actually a presumption against a right to counsel in civil cases unless the person faces a possible loss of liberty).

[97] See Natalie D. Fulk, Note, The Rising Popularity of the Right to Counsel in Eviction Cases: Rationales Supporting It and Legislation Providing It, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 325, 329 (2021).

[98] *Id*.

[99] *Id*. at 328 (suggesting that legislators have looked to human rights concerns and constitutional concerns when advocating for TRTC policies).

[100] Matthew P. Main, *An Unqualified Prohibition of Self-Help Eviction: Providing a Right to Court Process for All Residential Occupants*, 43 CARDOZO L. REV. 2205, 2248–49 (2022) (explaining that housing instability can "have detrimental impacts on employment, education, civic involvement, personal relationships, and on physical and emotional health").

impacts a person's physical health.[101] High blood pressure, diabetes, and respiratory diseases disproportionately affect individuals experiencing housing instability.[102] Moreover, these individuals are more likely to contract communicable diseases such as hepatitis and COVID-19 as a result of having to "double up" with friends and family or live on the street.[103] Unsurprisingly, housing instability affects a person's mental health as well.[104] Evictions and homelessness can lead to increased stress, anxiety, and depression.[105] Finally, housing instability and homelessness impact an individual's safety.[106] Research shows that these individuals are disproportionately targets of both physical and sexual assault.[107]

Evictions also create significant instability.[108] Most obviously, an eviction results in the loss of one's home, and often, the loss of one's possessions.[109] Losing one's house in an eviction proceeding can also impact one's ability to find new housing.[110] Loss of housing can result in an eviction record, poor credit, and a lack of referrals from previous landlords.[111] These factors make it substantially more difficult for evicted tenants to find new housing.[112] Evictions can also result in a lack of employment.[113] Without a place to prepare for work, it is more likely that a person will lose their job.[114] Therefore, unsurprisingly, individuals experiencing eviction have a roughly

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[101] Grant, *supra* note 94, at 108; Yungman & Mapp, *supra* note 69, at 48.

[102] Grant, *supra* note 94, at 108; Main, *supra* note 100, at 2248.

[103] Main, *supra* note 100, at 2248.

[104] Grant, *supra* note 94, at 108; Main, *supra* note 100, at 2248; Yungman & Mapp, *supra* note 69, at 48.

[105] Grant, *supra* note 94, at 108; Main, *supra* note 100.

[106] Main, *supra* note 100, at 2248; Fulk, *supra* note 97, at 337.

[107] Main, *supra* note 100, at 2248.

[108] Grant, *supra* note 94, at 109; Yungman & Mapp, *supra* note 69, at 48.

[109] Grant, *supra* note 94, at 109; Yungman & Mapp, *supra* note 69, at 48.

[110] Ericka Petersen, *Building a House for Gideon: The Right to Counsel in Evictions*, 16 STAN. J. C.R. & C.L. 63, 70 (2020); Yungman & Mapp, *supra* note 69, at 50 (explaining that eviction records block tenants from housing opportunities).

[111] Petersen, *supra* note 110, at 70; Jennifer S. Prusak, Expanding the Right to Counsel in Eviction Cases: Arguments for and Limitations of "Civil Gideon" Laws in a Post-COVID-19 World, 36 J. C.R. & ECON. DEV. 235, 237 (2022).

[112] Petersen, *supra* note 110, at 70; Prusak, *supra* note 111, at 237.

[113] Grant, *supra* note 94, at 109; Yungman & Mapp, *supra* note 69, at 48.

[114] *See* Grant, *supra* note 94, at 109; Fulk, *supra* note 97, at 337.

15% higher likelihood of losing their job.[115]

Evictions affect all of those living in the household, especially children.[116] Evictions can contribute to a parent's loss of custody, as housing instability is a factor considered by courts in care and custody proceedings.[117] Moreover, housing instability affects a child's ability to succeed in school.[118] Evictions can contribute to chronic absenteeism in schools, as children experiencing housing instability miss more days of school and are often forced to change schools.[119] Housing instability also creates a greater risk of developmental delay, behavioral disturbances, and decreased academic achievement in schools.[120]

Interestingly, the United States stands as an outlier in the international community.[121] Many other industrialized countries provide a right to counsel in civil cases.[122] Numerous European countries have established a statutory right to counsel in civil proceedings.[123] Moreover, the international community widely recognizes the right to adequate housing.[124] This right has manifested in the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; and

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[115] Grant, *supra* note 94, at 109; *see* Yungman & Mapp, *supra* note 69, at 50.

[116] Maria Roumiantseva, *A Nationwide Movement: The Right to Counsel for Tenants Facing Eviction Proceedings*, 52 SETON HALL L. REV. 1351, 1356 (2022); Prusak, *supra* note 111, at 237.

[117] Roumiantseva, *supra* note 116, at 1356; *see* Yungman & Mapp, *supra* note 69, at 48; Prusak, *supra* note 111, at 237.

[118] Petersen, *supra* note 110, at 69; Prusak, *supra* note 111, at 237.

[119] Petersen, *supra* note 110, at 69; Peter Hepburn, et al., *Losing Your Home, Losing Your School: How Evictions Affect Kids' Educational Trajectories*, EVICTION LAB (Apr. 28, 2025), perma.cc/Y5LW-QMVS (suggesting that the stress associated with moving and adjusting to a new environment contributes to increased absences and suspensions).

[120] Petersen, *supra* note 110, at 69; *see* Prusak, *supra* note 111, at 237; Hepburn *supra* note 119 (explaining that when children move schools due to an eviction, they are often moving to schools characterized by lower standardized test scores and higher drop-out rates, which affects students' ability to succeed in the classroom).

[121] Grant, *supra* note 94, at 112.

[122] Grant, *supra* note 94, at 112.

[123] Grant, *supra* note 94, at 112 (explaining that France has provided a civil RTC since 1851, England has provided its citizens with RTC in civil cases since 1495, and in the 1970s, following a ruling of the European Court of Human Rights, the Council of Europe required member countries to provide indigent individuals with free civil counsel).

[124] Fulk, *supra* note 97, at 330.

the Universal Declaration of Human Rights.[125] While it is true that there is no requirement that the United States follow all international laws, "the United States Supreme Court has looked to international legal policy to determine how to address issues of human rights in the United States."[126] In deciding that it was unconstitutional to impose the death penalty for crimes committed by individuals under the age of 18, the Supreme Court "noted that the imposition of the death penalty on a child violated international human rights laws."[127] Moreover, when ruling that mentally disabled individuals could not receive the death penalty, the Supreme Court noted that the international legal community widely condemns such practices.[128] The international community has taken steps to recognize housing as a basic need and to protect this need by providing the right to counsel.[129] The United States, either through its courts or its lawmakers, must do the same.[130]

2. The Fourteenth Amendment's Due Process Clause Demands Providing Tenants with the Right to Counsel

Since the Supreme Court recognized the right to counsel in criminal cases, advocates argue that a right to counsel must be recognized in civil cases.[131] Advocates stress that the stakes are just as great in civil cases involving basic human rights and needs, such as housing.[132] Advocates look to the Supreme Court's Fourteenth Amendment Due Process jurisprudence to advance this position.[133]

Some advocates argue that the failure to provide counsel to tenants in eviction cases violates procedural due process.[134] Procedural due process focuses on maintaining safeguards and ensuring fair access to the courts.[135] In arguing that the right to counsel is necessary under procedural due

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[125] Fulk, *supra* note 97, at 330.

[126] Lee Shevell, *Civil Gideon: The Poor Man's Fight*, 16 PUB. INT. L. REP. 32, 35 (2010).

[127] Grant, *supra* note 94, at 113; *see* Shevell, *supra* note 126, at 35.

[128] Grant, *supra* note 94, at 113; *see* Shevell, *supra* note 126, at 35.

[129] Fulk, *supra* note 97, at 330.

[130] *See* Shevell, *supra* note 126, at 36 (arguing that international human rights law requires providing RTC in civil cases). *See generally* Grant, *supra* note 94, at 108.

[131] Grant, *supra* note 94, at 113–14; Petersen, *supra* note 110, at 80.

[132] Grant, *supra* note 94, at 113–14.

[133] Fulk, *supra* note 97, at 333; Grant, *supra* note 94, at 115–16.

[134] Fulk, *supra* note 97, at 333; *see* Grant, *supra* note 94, at 115.

[135] Grant, *supra* note 94, at 115.

process, advocates use the *Mathews v. Eldridge* balancing test:[136]

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[137]

Advocates maintain that tenants have both a property interest and a liberty interest.[138] From a property interest perspective, proponents assert that tenants have a property interest in their homes.[139] Proponents point to the fact that in an eviction case, tenants stand to lose their homes and possibly the possessions within their homes.[140] From a liberty interest perspective, proponents look to the repercussions of evictions—mainly the risk of homelessness.[141] Scholars argue that the effects of homelessness implicate physical liberty interests.[142] Homelessness results in physical consequences, e.g., chronic physical and mental health issues, as well as social consequences, such as the loss of connection to a community and the severing of social ties; looking at these consequences, proponents stress that the lack of permanent shelter effectuates a loss of personal freedom.[143]

Turning to the second factor, proponents argue there is a significant risk of erroneous deprivation.[144] Summary Process is the formal adversarial

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[136] Fulk, *supra* note 97, at 333; *see* Rachel Kleinman, Comment, *Housing Gideon: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507, 1512 (2004).

[137] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[138] *See* Grant, *supra* note 94, at 115–16; Fulk, *supra* note 97, at 333–34.

[139] Fulk, *supra* note 97, at 334 (suggesting that a tenant's property interest is heightened when considered in light of the lack of affordable homes and the possibility that landlords will refuse to rent to tenants with an eviction record); Kleinman, *supra* note 136, at 1512.

[140] Kleinman, *supra* note 136, at 1512.

[141] Kleinman, *supra* note 136, at 1513.

[142] Kleinman, *supra* note 136, at 1513 (explaining that scholars look to establish a physical liberty interest in eviction cases because the *Lassiter* presumption requires a risk of deprivation of physical liberty).

[143] Kleinman, *supra* note 136, at 1513–14 (explaining the possible repercussions of homelessness, e.g., institutionalization, incarceration, physical health issues, etc., "can be compared to the liberty interest at stake in criminal prosecutions"); Fulk, *supra* note 97, at 334.

[144] Kleinman, *supra* note 136, at 1515; Fulk, *supra* note 97, at 334.

proceeding of being evicted.[145] Successfully arguing a Summary Process case requires specific knowledge of housing law, rules of procedure, and rules of evidence.[146] Unrepresented tenants are likely unaware of this information or lack the time and resources to educate themselves.[147] This is especially true when considering the fast-paced nature of housing courts.[148] Scholars argue that the absence of legal knowledge could lead to incorrect outcomes.[149]

Looking at the third factor, scholars claim that no government interest could outweigh the "interest at stake, the risk of error, and the advantages of having counsel in eviction proceedings."[150] While there are clear and significant administrative costs associated with providing tenants' right to counsel, proponents point to the money and resources saved in preventing homelessness, one of the most direct consequences of evictions.[151] The benefits of providing legal representation in eviction cases clearly outweigh the cost of such representation.[152]

Conversely, other advocates seek to ground the argument in substantive due process jurisprudence by arguing that the right to counsel in evictions is a fundamental right.[153] Scholars argue that *Washington v. Glucksberg* provides a framework in support of tenants' right to counsel as a

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[145] Fulk, *supra* note 97, at 334.

[146] Kleinman, *supra* note 136, at 1515; Fulk, *supra* note 97, at 334 (explaining that tenant rights include complicated issues such as lease obligations and housing habitability).

[147] Kleinman, *supra* note 136, at 1515.

[148] Kleinman, *supra* note 136, at 1516 (suggesting that the "time pressures of court appearances and filings can intimidate" pro se tenants); Fulk, *supra* note 97, at 334 (suggesting that eviction proceedings are further complicated by their "swift nature").

[149] *See* Kleinman, *supra* note 136, at 1515–16 (suggesting that a lack of legal knowledge could prevent a pro se tenant from presenting a valid legal defense or counterclaim); Fulk, *supra* note 97, at 334 (suggesting that questions of tenants' rights may not be fully addressed in a quick eviction proceeding).

[150] Kleinman, *supra* note 136, at 1516.

[151] Kleinman, *supra* note 136, at 1517 (suggesting that preventing homelessness would decrease the need for certain social services which would in turn offset the cost of providing TRTC); Fulk, *supra* note 97, at 334.

[152] Kleinman, *supra* note 136, at 1516–17 (arguing that the benefits of preventing homelessness, improving tenants' quality of life, and conserving social services outweigh the cost of providing legal representation); Fulk, *supra* note 97, at 334.

[153] *E.g.*, Vamsi A. Damerla, The Right to Counsel in Eviction Proceedings: A Fundamental Rights Approach, 6 COLUM. HUM. RTS. L. REV. 355, 399 (2022).

fundamental right.[154]

Under the *Glucksberg* formulation, a liberty interest must be "deeply rooted in this Nation's history and tradition"[155] and "implicit in the concept of ordered liberty."[156] All individuals possess a deeply rooted interest in meaningful access to the courts.[157] Access to the courts can be seriously impaired when an individual is not provided counsel.[158] This is especially true in the context of housing courts, where the vast majority of landlords have legal counsel.[159] Moreover, tenants possess a deeply rooted interest in the continued occupancy of their homes.[160] The court's recent treatment of landlord-tenant relationships reflects this interest.[161] Based on these deeply rooted interests, a tenant's right to counsel seems to be implicit in the concept of ordered liberty.[162] Without legal representation, there is a significant risk of deprivation of either of these rights.[163]

B. *Opponents of TRTC Often Ground Their Case in Economic Arguments*

Unsurprisingly, one of the most common arguments against providing tenants facing eviction the right to counsel is that it would cost the

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[154] *E.g.*, Damerla, *supra* note 153, at 359–60, 372. *See generally* Washington v. Glucksberg, 521 U.S. 702 (1997).

[155] *Glucksberg*, 521 U.S. at 721 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

[156] *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[157] Damerla, *supra* note 153, at 399 ("Like all litigants, tenants enjoy deeply rooted liberty interests in meaningful access to the judicial system."); *see* Fulk, *supra* note 97, at 336 (arguing that access to justice is a fundamental right).

[158] Damerla, *supra* note 153, at 399.

[159] *See* Damerla, *supra* note 153, at 399.

[160] Damerla, *supra* note 153, at 396.

[161] *See generally* Damerla, *supra* note 153, at 396–99 (explaining that, in recent years, courts have imposed more duties on landlords and have recognized, in certain contexts, that tenants have an interest in the continued occupancy of their homes).

[162] Damerla, *supra* note 153, at 402 (explaining that continued occupancy of their homes and access to the courts are two interests deeply rooted in our nation's history, and that limiting the analysis to eviction proceedings ensures that rights are carefully described, as required by the Court's substantive due process jurisprudence).

[163] Damerla, *supra* note 153, at 395 ("[T]hat tenants appearing in housing court without attorney representation risk arbitrary deprivation of their right to continued occupancy of their homes and are generally not provided with meaningful access to and interaction with the judicial system.").

government too much money and resources.[164] However, as discussed above, this is not entirely true.[165] Regardless, many landlords opposed to providing tenants with the right to counsel make a similar economically-rooted argument.[166]

1. Opponents Argue That the Costs Associated with Providing Tenants with Representation Are Too High

Opponents of the tenants' right to counsel stress that providing tenants with the right to counsel will lead to increased expenses for landlords.[167] If tenants have legal counsel, Summary Process cases will take longer to litigate.[168] This is because with the assistance of counsel, more tenants would raise defenses, present affirmative evidence of their defenses, and examine adverse witnesses.[169] Longer litigation would result in increased legal fees and financial burdens placed on the landlords.[170] It is quite possible that landlords would pass on these costs to their tenants through rent increases.[171]

Similarly, opponents argue that providing tenants with the right to counsel will simply make tenants "overly litigious."[172] Opponents suggest that represented tenants would clog the housing court dockets with frivolous claims or meritless defenses.[173] In reality, the landlord initiates an eviction proceeding, not the tenant.[174] More importantly, a hallmark of the American judicial system is that any party has a right to bring any claims

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[164] *See* Grant, *supra* note 94, at 117.

[165] *See* Grant, *supra* note 94, at 117 ("Many studies demonstrate that providing counsel to tenants in eviction hearings actually saves money by avoiding negative consequences.").

[166] Kleinman, *supra* note 136, at 1521.

[167] Kleinman, *supra* note 136, at 1521.

[168] Kleinman, *supra* note 136, at 1521.

[169] *See* Ingrid Gould Ellen et al., *Do Lawyers Matter? Early Evidence on Eviction Patterns After the Rollout of NYC's Universal Access to Counsel* 3 (N.Y.U. Furman Ctr., Working Paper, 2021), https://perma.cc/E2XT-SVDU (explaining that pro se tenants "lack the strategic insight of more experienced litigators").

[170] Kleinman, *supra* note 136, at 1521.

[171] Kleinman, *supra* note 136, at 1521–22; Grant, *supra* note 94, at 117.

[172] Grant, *supra* note 94, at 118 (citing Kleinman, *supra* note 136, at 1523).

[173] Grant, *supra* note 94, at 118; Kleinman, *supra* note 136, at 1523.

[174] Grant, *supra* note 94, at 118; Kleinman, *supra* note 136, at 1523.

believed to have legal merit.[175] A tenant represented by counsel will have a better understanding of the law and of which claims and defenses should be raised based on the specific facts of their case.[176] What these arguments really seem to suggest is that opponents of the tenants' right to counsel fear that providing tenants with legal representation would enable tenants to effectively, and potentially successfully, defend a case.[177]

2. Opponents Argue That Providing Tenants with Representation Would Not Substantially Change the Outcome of Most Cases

Finally, opponents argue that providing tenants with a right to counsel in eviction proceedings will not change the outcome of the case.[178] Opponents point out that most tenants are evicted for non-payment of rent, for which there are limited defenses.[179] However, research suggests that this argument is also flawed.[180] In the cities and states that have provided a right to counsel for tenants, lawyers have been able to raise valid defenses on behalf of their clients.[181] These defenses exist with or without the assistance of counsel, as many are codified in state housing laws.[182] However, a pro se tenant would likely fail to file the defense or fail to effectively communicate the defense at trial.[183] Moreover, even if the tenant does not have a valid defense, a trained lawyer can negotiate favorable settlements on behalf of their clients, such as extending the move-out date to allow the tenant to find new housing and assisting tenants in applying for rental assistance.[184] In

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[175] Grant, *supra* note 94, at 118; Kleinman, *supra* note 136, at 1523.

[176] *See* Grant, *supra* note 94, at 118.

[177] Grant, *supra* note 94, at 118.

[178] Grant, *supra* note 94, at 117; *see* Kleinman, *supra* note 136, at 1526 (expressing scholars' concerns that the RTC in eviction cases may not significantly change the courts' bias towards landlords).

[179] Grant, *supra* note 94, at 117; Kleinman, *supra* note 136, at 1523.

[180] Grant, *supra* note 94, at 117; Kleinman, *supra* note 136, at 1523.

[181] Grant, *supra* note 94, at 117; Yungman & Mapp, *supra* note 69, at 50.

[182] *See* Roumiantseva, *supra* note 116, at 1360. *See generally* Legal Serv. Ctr. of Harvard L. Sch., *Important Legal Defenses and Counterclaims*, MASS LEGAL HELP, perma.cc/H49B-VVCM (last visited Oct. 29, 2025) (listing legal defenses and counterclaims available in Massachusetts eviction cases such as bad conditions, retaliation, discrimination, and unfair and deceptive trade practices).

[183] *See* Grant, *supra* note 94, at 117; Roumiantseva, *supra* note 116, at 1360; Prusak, *supra* note 111, at 245.

[184] Grant, *supra* note 94, at 117; Roumiantseva, *supra* note 116, at 1360; Prusak, *supra* note 111,

sum, a lawyer's assistance can help tenants defend themselves in housing court and potentially remain housed.[185]

C. *The Proposed Massachusetts Legislation is Promising and is Modeled After Previous TRTC Programs*

Massachusetts advocates have pushed to establish a right to counsel for tenants facing eviction.[186] In 2021, state senators proposed SD. 874 *An Act Promoting Housing Stability and Homelessness Prevention in Massachusetts*.[187] This legislation sought to establish a statewide right to counsel program.[188] Under this Act, eligible individuals would receive full legal representation in certain covered proceedings.[189] An eligible individual is any *indigent* tenant or occupant of a rented or leased dwelling or an owner-occupant of a one to three-family dwelling.[190] The Act defined "indigent" as someone receiving public assistance through a variety of programs—including veterans' benefits, Medicaid, food stamps, and more—or earning an income that is 80% or less of the current median income.[191] The Act stated that the right to counsel program would be "funded by a specifically dedicated general court appropriation."[192]

Ultimately, this bill did not pass, but legislators have reintroduced a version of it each year since.[193] The most recent version of the Act was introduced in January of 2025.[194] This version covers the same proceedings

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at 245.

[185] *See* Grant, *supra* note 94, at 117; Roumiantseva, *supra* note 116, at 1360; Prusak, *supra* note 111, at 245.

[186] *See* Julie Lee, Balancing the Scales of Justice: Why Right to Counsel in Eviction Cases Is a Racial Justice and Housing Justice Issue, AM. C.L. UNION OF MASS. (Jan. 16, 2024), perma.cc/BPV2-6KP6.

[187] S. 874, 192d Gen. Ct. § 1 (Mass. 2021), perma.cc/8DKH-5UW3.

[188] *Id.*

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *See generally* Mass. S. 874; *Several Tenant RTC Bills Introduced*, *supra* note 11 (explaining that during the 2023–2024 legislative session the Massachusetts legislature introduced TRTC legislation).

[194] S. 968, 194th Gen. Ct. (Mass. 2025), perma.cc/WK55-W5NK.

and the same individuals.[195]

1. The Proposed Massachusetts Legislation is Similar to New York City's Landmark TRTC Program

In the last decade, many state and local governments have taken steps to provide tenants facing eviction with the right to counsel.[196] In fact, since 2017, nineteen cities, two counties, and five states have passed legislation providing tenants with the right to counsel.[197]

New York City was the first government to pass a tenant right to counsel measure.[198] Prior to 2017, landlords filed over 200,000 eviction cases annually in New York City.[199] Reports suggest that approximately 90% of New York City tenants did not have legal counsel in housing court.[200] Conversely, New York City landlords had legal representation in 95% of the cases.[201] Ultimately, many of these tenants lost their cases or received default judgments for failing to appear in court.[202]

In 2017, New York City decided it was time to make a change and became the first jurisdiction in the nation to create a right to counsel for tenants facing evictions.[203] This landmark legislation was the result of zealous advocacy and campaigning by tenants and community organizers.[204] Supporters of New York City's right to counsel program argued it would be a cost-effective means of "level[ing] the playing field"[205] in New York housing courts.[206] In passing the legislation, proponents stressed the cost-saving effects of providing tenants with legal

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[195] *Id.*

[196] *Tenant Right to Counsel*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS., perma.cc/UQY5-G7HE (last visited Oct. 25, 2025) (listing cities and states that have established TRTC programs including Washington, Connecticut, and Maryland).

[197] *Id.*

[198] Grant, *supra* note 94, at 119; Roumiantseva, *supra* note 116, at 1363.

[199] Prusak, *supra* note 111, at 254.

[200] Grant, *supra* note 94, at 119; *see* Prusak, *supra* note 111, at 253 (stating NYC tenants "had legal assistance roughly one percent of the time").

[201] Prusak, *supra* note 111, at 253–54.

[202] Prusak, *supra* note 111, at 254.

[203] Grant, *supra* note 94, at 119.

[204] Roumiantseva, *supra* note 116, at 1363.

[205] Grant, *supra* note 94, at 119.

[206] Grant, *supra* note 94, at 119.

representation.[207] Proponents pointed to research showing that, while providing representation would cost the city approximately $2,500 per tenant, the effects of an eviction, including shelter costs, emergency room visits, increased unemployment rates, etc., would cost the city tens of thousands of dollars.[208]

New York City's right to counsel is also income limited.[209] Under the legislation, covered, income-eligible individuals receive full legal representation.[210] A "covered individual" is defined as any New York City tenant who is the respondent in an eviction case.[211] An "income-eligible" individual is defined as anyone whose annual gross income does not exceed 200% of the federal poverty guidelines.[212] Covered and income-eligible individuals are entitled to full legal representation.[213] This includes legal advice, advocacy, and assistance with representation.[214] Conversely, covered individuals who are not income eligible may have access to brief legal counsel—typically only a single consultation with a designated organization.[215]

Reports suggest that New York City's right to counsel program has been successful.[216] According to the Office of Civil Justice's report, during the fourth quarter of 2021, 84% of tenants represented through the program were able to remain housed.[217] However, such sweeping and innovative legislation is never without its shortcomings.[218] For instance, in passing its right to counsel legislation, New York City chose to roll out its program over several years due to the size and scope of the program.[219] Therefore, legal representation for all income-eligible tenants was not expected until 2022.[220]

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[207] Grant, *supra* note 94, at 119.

[208] Grant, *supra* note 94, at 119.

[209] Grant, *supra* note 94, at 119; Roumiantseva, *supra* note 116, at 1364.

[210] Prusak, *supra* note 111, at 254–55; Roumiantseva, *supra* note 116, at 1364.

[211] Roumiantseva, *supra* note 116, at 1364.

[212] Roumiantseva, *supra* note 116, at 1364.

[213] Roumiantseva, *supra* note 116, at 1364.

[214] Roumiantseva, *supra* note 116, at 1364.

[215] Prusak, *supra* note 111, at 255; Roumiantseva, *supra* note 116, at 1364.

[216] Grant, *supra* note 94, at 119-20. *See generally* Roumiantseva, *supra* note 116, at 1364.

[217] Grant, *supra* note 94, at 119. *See generally* Roumiantseva, *supra* note 116, at 1364.

[218] *See* Prusak, *supra* note 111, at 257–59.

[219] Prusak, *supra* note 111, at 257.

[220] Prusak, *supra* note 111, at 257.

In rolling out the program, the city began with zip codes where the most at-risk tenants lived and then gradually phased in more zip codes.[221] While this approach made sense on paper, it had adverse effects for the many New York City tenants who were unable to secure legal representation due to their zip code.[222]

D. *The Proposed Massachusetts TRTC Legislation Has Certain Shortcomings*

As Massachusetts tenants wait to see whether the access to counsel legislation will be passed, in July of 2024, the State passed a statewide Access to Counsel Pilot Program.[223] Governor Healey dedicated $2.5 million to the creation of the pilot program in the FY25 budget.[224] The FY26 budget has proposed another $2.5 million to further support the pilot program.[225] In the meantime, Massachusetts should examine its proposed TRTC bill to determine if changes to this legislation could better protect Massachusetts tenants.[226]

The proposed Massachusetts TRTC legislation is income-limited, i.e., only tenants who qualify as indigent will be able to participate in the access to counsel program.[227] As discussed above, there is a compelling argument that housing is a basic need, and the loss of housing exposes individuals and families to devastating effects.[228] These devastating effects of an eviction are also true for median-income families.[229] Moreover, many individuals have limited resources and yet do not qualify as indigent under state or federal

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[221] Prusak, *supra* note 111, at 257.

[222] Prusak, *supra* note 111, at 257.

[223] *City of Boston and State of Massachusetts Create Access to Counsel Pilot Programs for Tenants Facing Eviction*, NAT'L LOW INCOME HOUS. COAL. (Feb. 10, 2025), https://perma.cc/A3R4-YCKK.

[224] *Id.*

[225] *Id.*

[226] *See generally* S. 968, 194th Gen. Ct. (Mass 2025) https://perma.cc/6WUH-8TBS; John Pollock, *Right to Counsel for Tenants Facing Eviction*, NAT'L LOW INCOME HOUS. COAL. 7–20, perma.cc/2YB5-DZXZ (last visited Sept. 15, 2025) (explaining that the "gold standard" for TRTC legislation is legislation that provides legal representation for all tenants).

[227] S. 968, 194th Gen. Ct. (Mass 2025), perma.cc/52NM-7U3S.

[228] Grant, *supra* note 94, at 108–09.

[229] *See* Elton, *supra* note 37 ("Evictions once primarily affected those who'd lost jobs or lived on fixed incomes or disability. Now they're hitting the fully employed.").

guidelines.[230] An income-limited access to counsel program would likely deny these individuals meaningful access to justice.[231] The idea of providing a right to counsel without income limitations is not unheard of.[232] In 2018, San Francisco became the second city to pass tenants' right-to-counsel legislation.[233] Like New York City, San Francisco's legislation was the result of campaigning efforts led by tenants and community organizers.[234] Prior to the enactment, research suggested that 80% to 90% of San Francisco's tenants were unrepresented.[235]

San Francisco's right to counsel is unique because the program does not restrict eligibility based on income.[236] Rather, the city's legislation sought to provide legal representation to *any* tenant facing eviction proceedings, regardless of their income.[237] San Francisco lawmakers suggested that the decision to exclude income requirements was intentional; the city found that even families reaching median income in the city could still struggle to afford a lawyer.[238]

Moreover, as noted above, the proposed Massachusetts access to counsel

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[230] Colum. L. Sch. Hum. Rts. Clinic, *Access to Justice: Ensuring Meaningful Access to Counsel in Civil Cases*, 64 SYRACUSE L. REV. 409, 433 (2014) [hereinafter *Ensuring Meaningful Access*]; *see* Petersen, *supra* note 110, at 79 ("Many individuals with incomes well above the cut-off for legal aid cannot afford the cost of a lawyer.").

[231] Yungman & Mapp, *supra* note 69, at 50 (explaining that forcing an unrepresented tenant to defend themselves against a represented landlord "effectively denies tenants the access to justice they deserve"); *see Ensuring Meaningful Access*, *supra* note 230; Lee, *supra* note 186 ("Since most eviction cases are due to non-payment of rent, defendants, who can't afford rent, probably can't afford a lawyer.").

[232] *See generally The Right to Counsel for Tenants Facing Eviction: Enacted Legislation*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS., perma.cc/K9DX-ML4N (last modified Oct. 2025) (listing right to counsel legislation that is not income-limited including TRTC programs in New Orleans, St. Louis, and Kansas City).

[233] Cassie Chambers Armstrong, *Gideon is in the House: Lessons from the Home-Renters' Right-to-Counsel Movement*, 29 HARV. C.R.-C.L. L. REV. 201, 231 (2024); Prusak, *supra* note 111, at 261; Roumiantseva, *supra* note 116, at 1367.

[234] Armstrong, *supra* note 233; Roumiantseva, *supra* note 116, at 1368.

[235] Armstrong, *supra* note 233, at 232.

[236] Armstrong, *supra* note 233, at 232; Roumiantseva, *supra* note 116, at 1368; Prusak, *supra* note 111, at 261.

[237] Armstrong, *supra* note 233, at 232; Roumiantseva, *supra* note 116, at 1368; Prusak, *supra* note 111, at 261.

[238] Armstrong, *supra* note 233, at 232.

legislation is subject to appropriation.[239] This is not uncommon in tenant right to counsel legislation, as most right to counsel laws function as appropriations bills.[240] In other words, the legislation establishes the right to counsel by authorizing the government to expend funds for this purpose and appropriating the funds needed to pay for the access to counsel program.[241] There is an inherent danger presented in formatting tenants' right to counsel legislation that functions as an appropriations bill.[242] Mainly, these programs exist at the mercy of elected officials and their budget decisions.[243] This means that the right "created by these programs is not really a 'right' at all."[244]

San Francisco's right to counsel program can serve as an example for addressing this question as well.[245] The city's program required full funding upon enactment.[246] In other words, the city's future lawmakers had no discretion in deciding to fund the program.[247] This funding is in direct comparison to other right-to-counsel programs where lawmakers can decline to appropriate adequate funds to effectuate the program.[248]

IV. If a Statute Is Not Enacted, Massachusetts Should Consider an Alternative Route in Establishing TRTC by Looking to the Courts

Some state courts have "identified a categorical right to counsel in various civil proceedings involving basic human needs."[249] These courts have relied on a variety of rationales, including due process, equal

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[239] *See* S. 968, 194th Gen. Ct., (Mass 2025), https://perma.cc/QDW3-TSWM.

[240] Armstrong, *supra* note 233, at 236.

[241] Armstrong, *supra* note 233, at 236.

[242] Armstrong, *supra* note 233, at 236.

[243] Armstrong, *supra* note 233, at 236; *see also* Petersen, *supra* note 110, at 93 (explaining that New York City's TRTC program, which functions as an appropriations bill, requires the program coordinator to collect data about the program's progress which informs funding decisions in the future).

[244] Armstrong, *supra* note 233, at 236.

[245] Armstrong, *supra* note 233.

[246] Armstrong, *supra* note 233.

[247] Armstrong, *supra* note 233.

[248] Armstrong, *supra* note 233, at 232.

[249] John Pollock, The Case against Case-by-Case: Courts Identifying Categorical Rights to Counsel in Basic Human Needs Civil Cases, 61 DRAKE L. REV. 763, 766 (2013).

protection, the court's inherent powers, fundamental fairness, and more.[250] These courts often rely on their respective state constitutions to provide more protection than what is provided by the Supreme Court's jurisprudence.[251] These decisions highlight the state court's ability to close the justice gap.[252]

A. *The Supreme Judicial Court Stands in a Unique Position to Provide Tenants with the Constitutional Right to Counsel*

1. The Massachusetts' State Constitution Is Flexible

As noted above, state courts have relied on their respective constitutions to provide protection in certain civil proceedings.[253] The Massachusetts Supreme Judicial Court ("SJC") could utilize the state constitution, specifically Article X and Article XI, to find a categorical right to counsel in eviction proceedings.[254]

Article X of the Massachusetts Constitution is the State's primary source of due process jurisprudence.[255] The Massachusetts due process jurisprudence recognizes a distinction between substantive due process and procedural due process.[256] Substantive due process involves government action that interferes with fundamental rights.[257] The SJC has deemed certain rights fundamental and has "expressed a willingness to hold the Massachusetts Constitution more protective in this area than its federal counterpart."[258]

On the other hand, procedural due process concerns the fairness of government action.[259] The SJC applies standards similar to those for due

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[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *See* MASS. CONST. pt. 1, art. X; MASS. CONST. pt. 1, art. XI; Pollock, *supra* note 249, at 766 (explaining that states have relied on their own constitution to find a right to counsel in certain civil proceedings).

[255] MASS. CONST. pt. 1 art. X; Lawrence Friedman & Lynnea Thody, The Massachusetts State Constitution, 50 (G. Alan Tarr ed., 2011).

[256] FRIEDMAN & THODY, *supra* note 255, at 50.

[257] FRIEDMAN & THODY, *supra* note 255, at 50.

[258] FRIEDMAN & THODY, *supra* note 255, at 50.

[259] FRIEDMAN & THODY, *supra* note 255, at 50.

process in the federal constitution.[260] The Court's analysis is two-fold and looks first at the individual interest involved.[261] The SJC's due process jurisprudence applies only to the deprivation of property or liberty interests.[262] The Court then balances the individual interest against the risk of erroneous deprivation of interests under the current procedures along with the governmental interest.[263]

In civil cases, Massachusetts courts have interpreted Article XI as providing "rights to a remedy and access to the courts."[264] Moreover, the SJC has relied on the fundamental role that access to justice plays in society as a basis for significant initiatives.[265] For instance, in 2005, the SJC created the Massachusetts Access to Justice Commission.[266] This Commission was created to improve access to justice for all Massachusetts residents, specifically those who are unable to afford counsel.[267] Originally, the SJC's "order in 2005 created a five-year mandate" for the Commission.[268] In 2010, the SJC reauthorized the Commission for another five years.[269] Finally, in 2015, the SJC made the Commission a permanent body.[270]

Taken together, these two articles could support a finding that tenants facing eviction are entitled to representation.[271]

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[260] FRIEDMAN & THODY, *supra* note 255, at 50.

[261] FRIEDMAN & THODY, *supra* note 255, at 51.

[262] FRIEDMAN & THODY, *supra* note 255, at 51.

[263] FRIEDMAN & THODY, *supra* note 255, at 51.

[264] MASS. CONST. pt. 1 art. XI; FRIEDMAN & THODY, *supra* note 255, at 54.

[265] *See History*, MASS A2J, https://perma.cc/UQ6D-H9JH (last visited Sept. 15, 2025) (initially created by a five-year mandate, the SJC appointed members to serve on the Access to Justice Commission, which is aimed at improving access to justice in cases involving "essential civil legal needs").

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] *See* MASS. CONST. pt. 1, art. X; MASS. CONST. pt. 1, art. XI; Pollock, *supra* note 249, at 766 (explaining that states have relied on their own constitution to find a right to counsel in certain civil proceedings).

2. The SJC Has Provided a Right to Counsel in Other Civil Proceedings

The SJC has recognized a categorical right to counsel in certain civil proceedings.[272] For instance, in *Department of Public Welfare v. J.K.B.*, the SJC considered whether indigent parents are constitutionally entitled to court-appointed counsel in parental termination proceedings.[273] Interestingly, in analyzing this question, the SJC highlighted both the due process concerns and access to justice concerns present in parental termination proceedings.[274]

In evaluating the due process concerns, the SJC noted that a parent's interest in a relationship with their child "has been deemed fundamental, and is constitutionally protected."[275] The SJC reasoned that before the State can deprive a parent of such a fundamental right, the parent must be afforded due process.[276] While the level of due process "varies with the nature of the private and governmental interests at stake,"[277] due process requires, at minimum, the opportunity to be heard in a meaningful time and manner.[278] The SJC reasoned that an indigent parent cannot be meaningfully heard without the assistance of counsel.[279] The SJC stressed that this is particularly true where an opposing party, i.e., the State, is represented by counsel.[280] The Court also noted that these proceedings involved complex questions.[281] The Court suggested that providing counsel in these proceedings would both protect parents' rights and assist the Court in issuing its rulings.[282]

Moreover, the SJC's opinion also expressed that providing counsel

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[272] *Massachusetts*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS., https://perma.cc/Z7ZB-UDND (last visited Jan. 15, 2026) (listing specific civil proceedings where Massachusetts has provided a right to counsel such as parental termination proceedings, abuse/neglect proceedings, and civil confinement proceedings).

[273] 393 N.E.2d 406, 407 (Mass. 1979).

[274] *See id.* at 407–08.

[275] *Id.* at 408.

[276] *Id.*

[277] *Id.*

[278] *Id.*

[279] *J. K. B.*, 393 N.E.2d at 408.

[280] *Id.*

[281] *Id.*

[282] *Id.*

would promote fairness throughout the proceedings.[283] The SJC noted that providing counsel was "essential to the administration of justice and to the fair and accurate resolution of . . . proceedings."[284] Therefore, the SJC declared that indigent parents have the constitutional right to counsel in parental termination proceedings.[285]

3. The SJC Has Outwardly Discussed the Concerns Inherent in Summary Process Proceedings

The SJC's discussion of the right to counsel in parental termination proceedings seems to highlight certain concerns—mainly the right to be heard, the complexity of the legal issues, and access to justice.[286] These concerns are undeniably also present in eviction cases.[287] Therefore, there is an argument that the Court's reasoning in *J. K. B.* sets the groundwork for the SJC to find a constitutional right to counsel in eviction cases.[288]

Evaluating tenants' right to be heard requires one to look at the state's due process jurisprudence.[289] Again, the SJC analyzes questions of procedural due process by examining an individual's interests and balancing them against the risk of erroneous deprivation of interests under the current procedures and the governmental interest.[290] As previously noted, scholars suggest that tenants have both a property interest and a liberty interest at stake in eviction cases.[291] Moreover, scholars argue that the benefits of providing representation outweigh any government interest, e.g., the cost of providing counsel to tenants.[292] This is especially true in Massachusetts, as the state stands to save money by providing tenants with

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[283] *Id.*

[284] *Id.*

[285] *J. K. B.*, 393 N.E.2d at 408.

[286] *See id.*

[287] *See* Adjartey v. Central Division of Housing Court Department, 120 N.E.3d 297, 304–06 (Mass. 2019) (describing due process concerns present in Summary Process proceedings and the complexity of the law involved in Summary Process proceedings).

[288] *See* 393 N.E.2d at 408; Armstrong, *supra* note 233, at 217 (suggesting that the development of the right to counsel in parental termination proceedings can inform and shed light on the tenants right to counsel movement).

[289] *See* FRIEDMAN & THODY, *supra* note 255.

[290] FRIEDMAN & THODY, *supra* note 255, at 51.

[291] Kleinman, *supra* note 136, at 1512–13.

[292] Kleinman, *supra* note 136, at 1516.

the right to counsel.[293] Therefore, we must examine the risk of erroneous deprivation under the current procedures.[294]

Interestingly, the SJC has already examined and expressed concerns regarding the current procedures in eviction cases.[295] In fact, in *Adjartey v. Central Division of the Housing Court*, former SJC Chief Justice Gants' detailed opinion spoke of the inherent imbalance present in housing court.[296] His opinion identified the three defining features of eviction cases: eviction proceedings are "complex, fast-moving, and generally litigated by landlords who are represented by attorneys and tenants who are not."[297]

In evaluating the complexity of eviction cases, former Chief Justice Gants spent five paragraphs outlining the procedures involved and went into further detail in his appendix.[298] He discussed the unfairness in the rules, the confusing titles of the documents, and the absence of information conveyed to tenants.[299]

Moreover, he highlighted that the tight deadlines required in eviction cases make the process more difficult for pro se tenants.[300] The average eviction case, from serving the tenant with a Notice to Quit to issuing the judge's final order, takes between seven and nine weeks.[301] Chief Justice Gants explained that the Legislature designed this expedited timeline to provide both landlords and tenants with "just, speedy, and inexpensive resolution[s]."[302] However, he noted that the fast-paced nature of eviction proceedings "leaves little room for error."[303]

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[293] Samuelson et al., *supra* note 86, at 18.

[294] FRIEDMAN & THODY, *supra* note 255, at 51 (explaining that the procedural due process analysis is twofold and requires looking at both the interests involved and the risk of erroneous deprivation).

[295] *See* Adjartey v. Central Division of Housing Court Department, 120 N.E.3d 297, 304 (Mass. 2019).

[296] *Id.* at 306.

[297] *Id.* at 304.

[298] *Id.* at 304–06.

[299] Larisa G. Bowman et al., R*emembering Chief Justice Gants as a Champion for Housing Justice*, 62 B.C. L. REV. 2840, 2852 (2021).

[300] *Adjartey*, 120 N.E.3d at 306 (explaining that understanding the rules and procedures involved in Summary Process proceedings is "a formidable challenge for an unrepresented litigant seeking to comply with fast-moving deadlines").

[301] *Id.*

[302] *Id.* (quoting Bank of N.Y. v. Bailey, 951 N.E.2d 331 (2011)).

[303] *Id.*

Finally, Chief Justice Gants' opinion noted the basic reality of most eviction cases—the majority of landlords have legal representation, while the majority of tenants do not.[304] He noted that while housing court judges have the discretion to accommodate pro se tenants, the requirements and deadlines of eviction proceedings still create difficulties for unrepresented tenants.[305] While resources are available for tenants, such as legal aid organizations, they are often insufficient to help the vast number of tenants who do not have access to counsel.[306] Moreover, the online resources available to help unrepresented tenants are often inadequate due to the complexity and speed of Summary Process proceedings.[307] Simply put, most tenants are unable to understand these resources and represent themselves effectively.[308]

The current Summary Process procedures create a significant risk of erroneous deprivation, which the SJC itself has acknowledged.[309] Where countless tenants face the devastating effects of losing their housing, including potential homelessness, the SJC should find that the state's due process jurisprudence requires providing tenants with a categorical right to counsel in eviction proceedings.[310] However, the nature of Summary Process proceedings may also interfere with tenants' access to justice under Article XI of the Massachusetts Constitution.[311] As explained above, Summary Process proceedings are governed by complex laws and rules and are subject to restrictive timelines.[312] Without legal representation, tenants struggle to navigate the court systems and secure favorable outcomes.[313] Therefore,

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[304] *Id.* at 306–07.

[305] *Id.* at 307.

[306] *Adjartey*, 120 N.E.3d at 307.

[307] *Id.* at 307–308.

[308] *Id.*

[309] *See id.* at 304–06 (discussing the due process concerns present in eviction proceedings).

[310] Michael Millemann, *The State Due Process Justification for a Right to Counsel in Some Civil Cases*, 15 TEMP. POL. & C.R. L. REV. 733, 757 (2006) (explaining that state courts can "develop more protective rights in interpreting their own constitutions.").

[311] *See* MASS. CONST. art. XI; Deborah Perluss, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest,* 2 SEATTLE J. SOC. JUST. 571, 573–74 (2004) (arguing that Washington state's Constitution, with its emphasis on access to the courts and access to justice, requires the court to appoint counsel in civil proceedings).

[312] *See Adjartey*, 120 N.E.3d at 304–06.

[313] Human Rights Institute, *Access to Counsel in Civil Cases*, COLUM. L. SCH. HUM. RTS. INST. 1 (2015), perma.cc/2S3U-QBRT [hereinafter *Access to Counsel in Civil Cases*].

without representation, tenants may not have fair access to justice.[314]

B. *If the SJC Were to Decide TRTC is a Constitutional Right, then this Would be More Permanent and Lasting Protection than the Current TRTC Legislation*

One of the concerns with the proposed Massachusetts TRTC legislation is that it is subject to appropriations.[315] The danger of formatting the right to counsel as an appropriations bill is that the existence of the so-called right is subject to budget decisions made by elected officials.[316] The current state of Legal Services Corporation ("LSC") provides evidence of this danger.[317] LSC is the primary system for providing civil legal aid to indigent people in the United States.[318] However, LSC has experienced significant budget cuts in the past as congressional appropriations have decreased.[319] As a result, LSC-funded organizations were forced to close offices and eliminate positions.[320] With a lack of funding and resources, LSC-funded organizations have been unable to meet the demands for representation.[321]

If LSC funding has decreased with changes in federal lawmakers, it is also possible that state funding for the access to counsel program could decrease with changes to state lawmakers.[322] It is possible that a state legislature would be unwilling or unable to appropriate sufficient funds.[323] However, a judicially recognized constitutional right to counsel, which the court enforces, could force the legislature's hand in providing adequate

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[314] Gabe Siegel, *Access to Justice in "Lawyerless" Housing Courts: A Discussion of Potential Systemic and Judicial Reforms*, COLUM. J.L. & SOC. PROBS. COMMON L. 91 (2024), perma.cc/3JFR-75GA (explaining that where "[o]nly one side has access to lawyers. . . . only one side has genuine access to justice"); Yungman & Mapp, *supra* note 69, at 50 (explaining that forcing an unrepresented tenant to defend themselves against a represented landlord "effectively denies tenants the access to justice they deserve").

[315] S. 968, 194th Gen. Ct., § 17(a) (Mass. 2025).

[316] Armstrong, *supra* note 233, at 236.

[317] Access to Counsel In Civil Cases, *supra* note 313, at 4.

[318] Access to Counsel In Civil Cases, *supra* note 313, at 4.

[319] Access to Counsel In Civil Cases, *supra* note 313, at 4.

[320] Access to Counsel In Civil Cases, *supra* note 313, at 4.

[321] Access to Counsel In Civil Cases, *supra* note 313, at 4.

[322] *See* John Nethercut, "This Issue Will Not Go Away": Continuing to Seek the Right to Counsel in Civil Cases, 38 CLEARINGHOUSE REV. J. OF POVERTY L. & POL'Y 481, 484 (2004).

[323] *See id.* (expressing concerns that other states' legislatures may not adequately fund right to counsel initiatives).

funding regardless of the political climate or motivations.[324] A judicially recognized constitutional right would be more permanent and lasting in this sense.[325]

CONCLUSION

Massachusetts is experiencing an eviction crisis where hundreds of tenants are being hauled into court and displaced from their homes. The devastating effects of this eviction crisis on both the individual tenants and the state cannot be overstated. A solution is needed, and this solution is providing tenants with the right to counsel in eviction proceedings. As discussed above, providing tenants with legal representation increases a tenant's likelihood of remaining housed. The proposed Massachusetts access to counsel program is promising, but this legislation is insufficient. The income limitations could prevent many tenants who need legal representation from getting help. Moreover, the access to counsel program is subject to appropriations therefore leaving the program's future vulnerable to budget decisions and political climates. A more permanent solution could rest in the SJC finding tenants have a judicially enforceable right to counsel in eviction proceedings. State courts can provide greater protections for their residents than those afforded at the federal level. The arguments presented for TRTC, when considered in light of the Massachusetts Constitution, could provide a basis for the SJC to find a right to counsel in eviction cases.

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[324] *Id.*

[325] *See* Armstrong, *supra* note 233, at 236 (explaining that right to counsel legislation exists "at the mercy of general budget decisions").

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Ordinary Criminal or Domestic Terrorist?: Addressing Inconsistencies and Deficiencies in U.S. Domestic Terrorism Laws

Rebecca Shan[*]

INTRODUCTION

On December 4, 2024, Luigi Mangione allegedly shot and killed UnitedHealthcare CEO Brian Thompson in Manhattan before fleeing to the Upper West Side.[1] On December 9, Mangione was arrested at a McDonald's in Pennsylvania, where police found him with, among other things, the 9mm pistol and sound suppressor he allegedly carried out the murder with.[2] Multiple charges, totaling twenty counts, were filed against Mangione across federal, New York State, and Pennsylvania State courts.[3] The federal charges, which include using a firearm to commit murder and interstate stalking, carry maximum penalties that include both life in prison and death.[4] In New York, Mangione was indicted on three

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[1] Office of Public Affairs, *Luigi Mangione Charged with the Stalking and Murder of UnitedHealthcare CEO Brian Thompson and Use of a Silencer in a Crime of Violence*, U.S. DEP'T OF JUST., https://perma.cc/4BFG-SKGV (last updated Feb. 6, 2025).

[2] *Id.*

[3] Associated Press & Michael R. Sisak, *Inside the State and Federal Charges Against the Man Accused of Killing UnitedHealthcare's CEO*, WHYY (Dec. 24, 2024), https://perma.cc/EKB2-Q6FD.

[4] Office of Public Affairs, *supra* note 1.

counts of murder, six counts of possession of a weapon, and one count of possession of a forged instrument.[5] Among the murder charges, Mangione was notably indicted for "murder in the second degree as a crime of terrorism" in violation of N.Y. Penal Law §§ 125.25(1) and 490.25.[6] An individual violates N.Y. Penal Law § 490.25 when they commit a specified offense "with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination, or kidnapping."[7]

Across the United States, thirty-two states and Washington, D.C. specifically criminalize the act of domestic terrorism.[8] Federally, there is no specific charge for domestic terrorism.[9] Consequently, federal prosecutors are very limited when charging individuals involved in domestic terrorism, having to rely on more traditional criminal offenses related to firearms, homicide, or destruction of federal property.[10] However, for sentencing purposes, prosecutors are not so limited as they can invoke the Terrorism Sentencing Enhancement ("terrorism enhancement") codified in U.S.S.G. § 3A1.4,[11] which allows for an increase in both the level of the underlying charged crime and the defendant's criminal history category.[12] In other words, a first-time offender who would usually be placed in criminal history Category I would be placed in Category VI—the highest criminal history category—if the terrorism enhancement is applied to their sentence.[13]

As the frequency of domestic terrorism attacks in the United States

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[5] Indictment at 1, *The People of the State of New York v. Luigi Mangione,* No. IND-75657-24, (N.Y.Sup. Dec. 17, 2024), 2024 WL 5210216.

[6] *Id.*

[7] N.Y. PENAL LAW § 490.25(1) (McKinney 2001).

[8] Elly Page & Nick Robinson, *State Domestic Terrorism Laws in the United States*, INT'L CTR. FOR NOT-FOR-PROFIT L., https://perma.cc/K8NV-ML4T (last updated Nov. 18, 2025).

[9] Note, *Responding to Domestic Terrorism: A Crisis of Legitimacy*, 136 HARV. L. REV. 1914, 1915 (2023).

[10] John D. Cella & Craig R. Heeren, *The "Terrorism" Sentencing Enhancement and Its Application to Domestic Terrorism*, 71 DOJ J. FED. L. & PRAC. 195, 196 (2023).

[11] Sophia Brill, *What Is Domestic Terrorism and Why Does the Definition Matter?*, 71 DOJ J. FED. L. & PRAC. 7, 11 (2023).

[12] U.S. SENT'G GUIDELINES MANUAL § 3A1.4 (U.S. SENT'G COMM'N 2002).

[13] Madeline Johl, Note, *Activism or Domestic Terrorism? How the Terrorism Enhancement Is Used to Punish Acts of Political Protest*, 50 FORDHAM URB. L.J. 465, 473–74 (2023).

increases,[14] the tools available for properly punishing the perpetrators have come under close scrutiny, particularly due to their ambiguity and inconsistent application.[15] For instance, after January 2024, only three of the hundreds of defendants involved in the January 6 U.S. Capitol attack received the terrorism enhancement,[16] one of whom was not present in D.C. during the riots.[17] However, contrast those cases with that of Jessica Reznicek—a climate activist who was sentenced under the terrorism enhancement for destruction of Dakota Access Pipeline property;[18] or Jack Dowell—who received a sentence increase of twenty-five years for setting fire to an empty Internal Revenue Service building in protest of taxation.[19]

This Note will argue that in their current form, domestic terrorism laws and the terrorism sentencing enhancement are insufficient tools for consistent punishment of domestic terrorism, indicating a need for revision of the federal definition of domestic terrorism, an elimination of the sentencing enhancement, and a harmonization of state laws under a revised definition. Part I of this Note examines current domestic terrorism-related federal and state laws and the terrorism enhancement. Part II discusses why reform of domestic terrorism laws is critical for both legal and social reasons, especially considering how the current legal tools available for labeling and properly punishing domestic terrorists are insufficient to adequately foster views of government legitimacy. Part III argues for a revision of the federal definition of domestic terrorism and encourages that it be made a punishable federal crime in light of the modern reform debate on domestic terrorism laws. Part IV argues for the eradication of the terrorism enhancement due to its historically inconsistent application and its failure to bridge the gap in proper prosecution of domestic terrorists created by the lack of a domestic terrorism offense in multiple states. Part V argues that states without domestic terrorism offenses should be encouraged to adopt one in light of the proposed revised federal definition of domestic terrorism, ensuring that domestic terrorists will be labeled properly and punished consistently.

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[14] Catrina Doxsee et al., *Pushed to Extremes: Domestic Terrorism amid Polarization and Protest*, CTR. FOR STRATEGIC & INT'L STUD. (May 17, 2022), https://perma.cc/D5ZW-4RLF (providing data indicating "a significant rise in the number of domestic terrorist attacks and plots at demonstrations in the United States").

[15] *See, e.g.*, *Responding to Domestic Terrorism: A Crisis of Legitimacy*, *supra* note 9, at 1920.

[16] Amanda Nhek, Comment, *Judicial Uncertainty and Domestic Terrorism: Reforming the Sentencing Guidelines After January 6*, 11 NAT'L SEC. L. J. 262, 278 (2024).

[17] *Id.* at 284.

[18] Johl, *supra* note 13, at 466–67.

[19] Johl, *supra* note 13, at 485.

I. Background

A. *Domestic Terrorism on the Federal Level*

1. "Domestic Terrorism": 18 U.S.C. § 2331(5)

Title 18 of the U.S. Code contains an entire chapter on terrorism, Chapter 113B, which provides a definition of domestic terrorism.[20] In response to the September 11th attacks, the USA PATRIOT Act ("PATRIOT Act") amended U.S.C. § 2331.[21] When enacting the PATRIOT Act, the U.S. Senate explained that the domestic terrorism definition was for the limited purpose of aiding authorities in their investigations of terrorism occurring within the United States.[22] Given the fairly broad range of conduct that this definition could encompass, it is no surprise that many legislators were concerned about civil liberty infringement.[23]

18 U.S.C. § 2331(5) ("§ 2331(5)") provides that "domestic terrorism" means activities that:

> (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended-- (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States.[24]

However, there are no criminal penalties attached to this definition, so federal prosecutors cannot bring domestic terrorism charges based on conduct even if it fits this statutory definition.[25] Additionally, although this definition contains a terrorist-intent element, none of the criminal statutes in Chapter 113B require a defendant to act with such intent to be held liable.[26]

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[20] 18 U.S.C. § 2331(5).

[21] Brill, *supra* note 11, at 12.

[22] Brill, *supra* note 11, at 13.

[23] Thomas E. Brzozowski, *18 U.S.C. § 2331(5): Domestic Terrorism—A Brief Legislative History*, 71 DOJ J. FED. L. & PRAC. 25, 33 (2023).

[24] 18 U.S.C.A. § 2331(5).

[25] Jacob Ware & Ania Zolyniak, *Jan. 6 and Beyond: Why the U.S. Should Pass Domestic Terrorism Legislation*, THE LAWFARE INST. (May 28, 2023, 11:00 AM), https://perma.cc/TPU5-YJLL.

[26] Francesca Laguardia, *Considering a Domestic Terrorism Statute and Its Alternatives*, 114 NW. U. L. REV. 212, 219 (2020).

2. "Federal Crime of Terrorism": 18 U.S.C. § 2332b(g)(5)

In response to the 1995 Oklahoma City bombing and the 1993 New York World Trade Center bombing, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") enacted 18 U.S.C. § 2332b.[27] It defines "federal crimes of terrorism," and is used to determine whether an individual may be subjected to the terrorism enhancement once they are convicted.[28]

18 U.S.C. § 2332b(g)(5) ("§ 2332b(g)(5)") provides that a "federal crime of terrorism" is "an offense that (A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and (B) is a violation of" several enumerated federal offenses relating to, among other things, "violence at international airports," "congressional, cabinet, and Supreme Court assassination and [kidnapping]" and "killing or attempted killing of officers and employees of the United States."[29] Since this statute only applies if a specific enumerated offense has been violated, federal crimes of terrorism are essentially predicate offenses.[30]

Most courts interpret the "calculation" prong in Subsection (A) to require that a defendant specifically "inten[d] to influence, affect, or retaliate against the government by force or threat of force."[31] This intent does not need to be direct, nor does it need to be the defendant's sole or primary goal.[32] Notably, this definition of intent focuses only on the government—including foreign or U.S. state and local governments—and does not consider the coercion or intimidation of a civilian population, as the intent for domestic terrorism in § 2331(5) does.[33]

Additionally, the offenses listed in Subsection (B) are subject to an eight-year statute of limitations period instead of the standard five years, and no limitations period applies if the offense "resulted in, or created a foreseeable risk of, death or serious bodily injury."[34] The enumerated offenses primarily include crimes against government officials, while crimes against ordinary

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[27] Brill, *supra* note 11, at 9.

[28] Laguardia, *supra* note 26, at 220.

[29] 18 U.S.C. § 2332b(g)(5).

[30] Laguardia, *supra* note 26, at 221.

[31] Cella & Heeren, *supra* note 10, at 206.

[32] Cella & Heeren, *supra* note 10, at 206, 208–09.

[33] Jason J. Sullivan-Halpern, Note, *The Globalization of Hate: Are Domestic Terrorism Laws Sufficient to Quell New Threats from Alt-Right Lone-Wolf Extremists?*, 9 PENN ST. J. L. & INT'L AFFS. 133, 151 (2020).

[34] 18 U.S.C. § 3286.

citizens are only potentially implicated by these offenses depending on the means or weaponry used.[35] Notably, despite their prevalence as an act of domestic terrorism,[36] there "is no federal crime of terrorism prohibiting the use of motor vehicles to attack pedestrians, nor are mass shootings included in the list of terrorism crimes."[37]

B. *Domestic Terrorism on the State Level*

Across the United States, thirty-two states and Washington, D.C. specifically criminalize the act of domestic terrorism.[38] The state statutes generally require that (1) "an individual committ[ed] a predicate criminal offense,"[39] which varies considerably among the states,[40] and (2) that they committed that offense with a specific intent.[41] Unlike the federal terrorism statutes in Chapter 113B of Title 18 of the U.S. Code,[42] almost every state terrorism statute contains a required element of terrorist intent, and most include an intent to harm, threaten, or intimidate civilians specifically.[43]

In New York, an individual violates N.Y. Penal Law § 490.25 when they commit a specified offense "with intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping."[44] When Luigi Mangione was arrested, he had a handwritten letter on his person criticizing parasitic health insurance

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[35] *See* 18 U.S.C. § 2332b(g)(5).

[36] Katie Dilts, Note, *One of These Things Is Not Like the Other: Federal Law's Inconsistent Treatment of Domestic and International Terrorism*, 50 U. PAC. L. REV. 711, 733 (2019).

[37] Laguardia, *supra* note 26, at 221–22.

[38] Page & Robinson, *supra* note 8.

[39] NICK ROBINSON & ELLY PAGE, INT'L CTR. FOR NOT-FOR-PROFIT L., STATE DOMESTIC TERRORISM LAWS IN THE UNITED STATES: A GROWING THREAT TO FIRST AMENDMENT RIGHTS 5 (2024), https://perma.cc/V9FK-UKM9.

[40] *Id.* at 6 ("In Oklahoma, a predicate offense for terrorism includes any act of violence that results in damage to property or the threat of such violence . . . In Florida and some other states, assault on an officer would meet the predicate offense for domestic terrorism . . . In Alabama, 'stalking' is a predicate offense.").

[41] *Id.* at 5.

[42] Laguardia, *supra* note 26, at 217, 219.

[43] Page & Robinson, *supra* note 8.

[44] N.Y. PENAL LAW § 490.25 (McKinney 2001).

companies and complaining about corporate greed.[45] The bullets found near Brian Thompson's body were marked with the words delay, deny, and depose,"[46] allegedly referencing a book about health insurance companies and their denial of claims.[47] The public responded strongly to this evidence, with many viewing Mangione as a "crusader against the for-profit health care system."[48] Consequently, health insurance corporations "scrambled to scrub information about their C-suites from the internet and called up private security details."[49] Manhattan District Attorney Alvin Bragg indicated that Mangione's alleged conduct fell within the confines of the New York domestic terrorism offense because his "intent was to sow terror,"[50] as evidenced by the public reaction to the murder.[51]

In Washington, D.C., the Anti-Terrorism Act of 2002 prohibits "committing a specified offense intended to intimidate a significant portion of the civilian population"[52] or "[influencing] the policy or conduct of a unit of government by intimidation or coercion."[53] Specified offenses include murder in the first or second degree, manslaughter, murder of a law enforcement officer or public safety employee, kidnapping and conspiracy to kidnap, and mayhem or maliciously disfiguring.[54] In one case, Floyd Lee Corkins pled guilty to domestic terrorism charges in D.C. after he "opened fire on an unarmed security guard at the Family Research Council," which he targeted because of the organization's views, "including its advocacy against recognition of gay marriage."[55]

Virginia defines domestic terrorism as "engaging in or taking a substantial step to commit a violation of the criminal laws of [Virginia] with

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[45] Jennifer Peltz, *How New York Prosecutors Used a Terrorism Law in the Charges Against Luigi Mangione*, THE ASSOCIATED PRESS, https://perma.cc/4RJW-NXZM (last updated Dec. 18, 2024, 11:54 PM EDT).

[46] *Id.*

[47] Schuyler Mitchell, *Luigi Mangione & The Dangers of Terrorism Charges*, CONSORTIUM NEWS (Dec. 28, 2024), https://perma.cc/9NKF-88AU.

[48] *Id.*

[49] *Id.*

[50] Peltz, *supra* note 45.

[51] Mitchell, *supra* note 47 ("'This was a killing that was intended to evoke terror and we've seen that reaction . . . This was not an ordinary killing.'").

[52] Page & Robinson, *supra* note 8.

[53] D.C. CODE ANN. § 22-3152(1)(B) (West 2002).

[54] D.C. CODE ANN. § 22-3152(8) (West 2002).

[55] Nathan Carpenter, Note, *The Ad Hoc Federal Crime of Terrorism: Why Congress Needs to Amend the Statute to Adequately Address Domestic Extremism*, 92 ST. JOHN'S L. REV. 393, 408 (2018).

the intent to: (A) cause death or serious bodily injury to multiple persons; or (B) threaten any civilian population with mass destruction, mass killings, or kidnapping."[56] By contrast, Oregon also has a crime of domestic terrorism, but it differs from the aforementioned states with its focus on biological terrorism.[57]

These variations highlight how many states tailor their domestic terrorism statutes to address specific threats, whereas the federal government applies a broader framework that lacks a terrorist intent requirement covering civilian harm and focuses instead on prosecuting acts that transcend state boundaries or implicate national security.[58]

C. *The Terrorism Enhancement*

In 1994, Congress directed the Sentencing Commission to enact U.S.S.G. § 3A1.4 which added the terrorism enhancement.[59] Two years later, with the enactment of the AEDPA, Congress directed the Commission to amend the guideline so that it applies to § 2332b(g)(5) federal crimes of terrorism.[60]

1. U.S.S.G. § 3A1.4 and Relevant Definitions

U.S.S.G. § 3A1.4 ("§ 3A1.4") provides

> (a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism [as defined in § 2332b(g)(5)], increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32. (b) In each such case, the defendant's criminal history category from Chapter Four . . . shall be Category VI.[61]

Defendants who are first-time offenders are normally placed in the first

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[56] Sullivan-Halpern, *supra* note 33, at 152.

[57] H.R. 2772, 82d Legis. Assemb., Reg. Sess. (Or. 2023); OR. REV. STAT. ANN. § 166.125 (West 2024) ("A person commits the crime of domestic terrorism in the first degree if the person, with the intent to cause widespread sickness, contagion, serious physical injury, death or the disruption of services provided by critical infrastructure: (a) Intentionally destroys or substantially damages critical infrastructure; or (b) Intentionally introduces, releases, or disperses a toxic substance into widespread contact with human beings.").

[58] *Compare* 18 U.S.C. § 2331(5), *and* 18 U.S.C. § 2332b(g)(5), *with* N.Y. PENAL LAW § 490.25 (McKinney 2001), *and* D.C. CODE ANN. § 22-3152(1)(B) (West 2002), *and* H.R. 2772, 82d Legis. Assemb., Reg. Sess. (Or. 2023), *and* OR. REV. STAT. ANN. § 166.125 (West 2024).

[59] Brill, *supra* note 11, at 17.

[60] Brill, *supra* note 11, at 17.

[61] U.S. SENT'G GUIDELINES MANUAL § 3A1.4 (U.S. SENT'G COMM'N 2002).

criminal history category, but the terrorism enhancement automatically places them in the highest one, which is usually reserved for career offenders or those with a serious criminal record.[62] Consequently, regardless of the underlying base offense guideline, a defendant who receives the terrorism enhancement will be sentenced to 210–262 months in prison at a minimum.[63]

In *United States v. Awan*, the Court identified that § 3A1.4 "includes two distinct analytic prongs . . . 'involved' or 'intended to promote.'"[64] Courts analyzing the terrorism enhancement have held that to involve a § 2332b(g)(5) federal crime of terrorism, the defendant's conviction must "include" such a crime, meaning "the defendant's offense must be the commission of, or the attempt or conspiracy to commit" one of the enumerated offenses, or the defendant's conduct must satisfy the elements of one of those offenses.[65]

Alternatively, the terrorism enhancement can be applied to defendants who commit a non-terrorism offense "where the offense was intended to influence government conduct by intimidation or coercion or was intended to promote" a § 2332b(g)(5) offense "with the intention of intimidating or coercing a civilian population."[66] The federal circuit courts have varied in their interpretations of "intended to promote."[67] The Fourth and Eleventh Circuits hold that enhancement "require[s] that the 'promotion' of an enumerated offense be a 'purpose' or 'goal' of the defendant's unenumerated offense of conviction."[68] The Second Circuit has applied the enhancement "where the enumerated offense of conviction was 'intended to help bring about, encourage, or contribute to' an enumerated offense."[69] For the Fifth and Seventh Circuits, "an unenumerated offense that 'helps or encourages' an enumerated offense is 'intended to promote' it."[70] In the Sixth

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[62] Johl, *supra* note 13, at 473–74.

[63] Cella & Heeren, *supra* note 10, at 201.

[64] Stephen Floyd, Note, *Irredeemably Violent and Undeterrable: How Flawed Assumptions Justify a Broad Application of the Terrorism Enhancement, Contradict Sentencing Policy, and Diminish U.S. National Security*, 109 GEO. L.J. 142, 149 (2021).

[65] Cella & Heeren, *supra* note 10, at 204.

[66] Rachael Hanna & Eric Halliday, *Discretion Without Oversight: The Federal Government's Powers to Investigate and Prosecute Domestic Terrorism*, 55 LOY. L.A. L. REV. 775, 832 (2022).

[67] Cella & Heeren, *supra* note 10, at 204–05.

[68] Cella & Heeren, *supra* note 10, at 204.

[69] Cella & Heeren, *supra* note 10, at 204 (quoting United States v. Awan, 607 F.3d 306, 314 (2d Cir. 2010)).

[70] Cella & Heeren, *supra* note 10, at 204 (quoting United States v. Fidse, 862 F.3d 516, 522-23 (5th Cir. 2017)).

Circuit, "the 'intended to promote' prong is satisfied in the context of a conspiracy to commit unenumerated offenses where a defendant's conduct made the commission of an enumerated offense 'reasonably foreseeable to the defendant.'"[71]

Finally, for defendants whose convictions either do not "involve" or are not "intended to promote" one of the enumerated offenses, the terrorism enhancement can still be applied.[72] Application Note 4 of § 3A1.4 allows for a discretionary upward departure[73] if the defendant has the "calculation" defined in § 2332b(g)(5): specific intent "to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct."[74]

2. Standard of Review and Prosecutorial Discretion

United States v. Booker establishes that while it is mandatory to review and consider the U.S. Sentencing Guidelines, they are ultimately advisory because mandating compliance with them violates the Sixth Amendment.[75] Consequently, trial judges have broad discretion in applying the terrorism enhancement.[76]

Prosecutors similarly have significant discretion regarding the use of the terrorism enhancement because they decide whether to seek it, whether to charge crimes that would implicate it (i.e., enumerated offenses in § 2332b(g)(5)), or whether to seek the upward departure.[77] Although prosecutors are required to make factual showings to support why the enhancement or a departure should apply, the burden of proof for sentencing enhancements is a preponderance of the evidence, which is lower than the beyond a reasonable doubt standard for criminal charges.[78] Evidence otherwise inadmissible at trial can be used to make these showings,[79] and evidence of a defendant's "relevant conduct," or anything

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[71] Cella & Heeren, *supra* note 10, at 205 (quoting United States v. Graham, 275 F.3d 490, 517–19 (6th Cir. 2001)).

[72] Cella & Heeren, *supra* note 10, at 210.

[73] Cella & Heeren, *supra* note 10, at 200–01.

[74] Cella & Heeren, *supra* note 10, at 210–11 (quoting U.S. SENT'G GUIDELINES MANUAL § 3A1.4 cmt. n.4(A) (U.S. SENT'G COMM'N, Westlaw Precision Nov. 2002)).

[75] United States v. Booker, 543 U.S. 220, 245 (2005).

[76] Nhek, *supra* note 16, at 265.

[77] *Responding to Domestic Terrorism: A Crisis of Legitimacy*, *supra* note 9, at 1929.

[78] *Responding to Domestic Terrorism: A Crisis of Legitimacy*, *supra* note 9, at 1929.

[79] *Responding to Domestic Terrorism: A Crisis of Legitimacy*, *supra* note 9, at 1929.

that "occurred during, in preparation for, or to evade responsibility for" the offense of conviction is particularly relevant.[80] Consequently, evidence of intent or motivation is of significant importance even if it does not relate directly to the convicted offense.[81] A defendant's statements tend to be the most widely used evidence of intent, but given their rarity, a court "may find the requisite calculation or intent existed based on circumstantial evidence and reasonable inferences drawn from the facts."[82]

This judicial and prosecutorial discretion has a great impact on the jury's role in criminal cases where the terrorism enhancement is potentially applicable.[83] In light of *Booker*, prosecutors do not need to make their sentencing enhancement-related factual showings to the jury, nor do juries need to find sentence determinative facts because "[t]he decision of whether or not to apply the terrorism enhancement is not a question of criminal liability" that goes to them.[84] Instead, the decision to apply the terrorism enhancement or not rests solely with the judge.[85] After applying the law to the facts, the judge must also consider policy factors outlined in 18 U.S.C. § 3553(a), "posing the risk that the judge will make decisions based on intuition or bias."[86]

D. *Previous "Applications" of the Terrorism Enhancement*

1. January 6th: Attack on the Capitol

As of January 2024, the terrorism enhancement was only successfully applied to three January 6 defendants.[87] In numerous other cases, however, the enhancement was either denied or not requested.[88] Guy Reffitt was sentenced to eighty-seven months, a little over seven years, in prison after the judge declined to apply the terrorism enhancement, citing concerns that it "would cause 'an unwanted sentencing disparity' between Reffitt and other January 6" defendants.[89] On record, Reffit said he "wanted to drag

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[80] Cella & Heeren, *supra* note 10, at 207 (citing United States v. Abu Khatallah, 314 F. Supp. 3d 179, 187–88 (D.D.C. 2018)).

[81] Cella & Heeren, *supra* note 10, at 207.

[82] United States v. Arcila Ramirez, 16 F.4th 844, 854 (11th Cir. 2021).

[83] *See Responding to Domestic Terrorism: A Crisis of Legitimacy*, *supra* note 9, at 1929.

[84] Johl, *supra* note 13, at 475.

[85] Johl, *supra* note 13, at 475.

[86] *Responding to Domestic Terrorism: A Crisis of Legitimacy*, *supra* note 9, at 1930.

[87] Nhek, *supra* note 16, at 278.

[88] Nhek, *supra* note 16, at 278–79.

[89] Nhek, *supra* note 16, at 281.

lawmakers outside of the Capitol 'kicking and screaming' and wanted to see House Speaker Nancy Pelosi's head hit every stair on the way down."[90] He had also been "armed with a handgun, body armor, a helmet, and flex cuffs" during the riot.[91] If the terrorism enhancement had been applied, Reffitt's sentence would have increased to eleven years.[92]

The following individuals were also sentenced without application of the terrorism enhancement: Thomas Webster, who swung a large metal flagpole at an officer before tackling and choking him; Devlyn Thompson, who assaulted a police officer with a metal baton; Robert Scott Palmer, who "hurled wooden boards and a fire extinguisher at police"; and Thomas Robertson, who was charged with "obstruction of an official proceeding, civil disorder, and carrying a weapon in a restricted building."[93]

In the cases of Enrique Tarrio, Joseph Biggs, and Zachary Rehl, however, the terrorism enhancement was successfully applied.[94] These three individuals "hand-selected 'rally boys' to take to the Capitol" and coordinated several parts of the January 6 attack, including choosing a time and place for it, implementing a chain of command, and intentionally recruiting individuals who would follow them and engage in physical violence if necessary.[95] Rehl was sentenced to fifteen years in prison, and Biggs received seventeen years with thirty-six months of supervised release.[96] Interestingly, Tarrio, who was not even present in Washington, D.C. during the riot, was sentenced to twenty-two years.[97]

2. Jessica Reznicek

In 2016, Jessica Reznicek, "climate activist and member of the Catholic Workers' Movement[,] . . . set fire to a bulldozer and other construction equipment along the [Dakota Access] pipeline."[98] She also did further damage to the valves along the pipeline by melting holes in them.[99] As a result, "Reznicek was charged with nine felony counts, and pled guilty to

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[90] Nhek, *supra* note 16, at 280.

[91] Nhek, *supra* note 16, at 280.

[92] Johl, *supra* note 13, at 468.

[93] Nhek, *supra* note 16, at 281–82.

[94] Nhek, *supra* note 16, at 283.

[95] Nhek, *supra* note 16, at 283.

[96] Nhek, *supra* note 16, at 283–85.

[97] Nhek, *supra* note 16, at 284.

[98] Johl, *supra* note 13, at 466.

[99] Johl, *supra* note 13, at 466.

conspiracy to damage an energy facility." [100] Reznicek argued in her defense that "her goal was to encourage public discourse" about corporate stealing of landowner permissions, not to influence government policy.[101]

Despite her arguments, the court held that Reznicek's actions qualified for the enhancement requirement of "calculated to influence or affect the conduct of government," and that it was "intended as retaliation against government conduct."[102] Normally, without enhancement, a defendant in this position would receive a thirty-seven to forty-six month sentence, but the judge applied the terrorism enhancement in Reznicek's case, ultimately sentencing her to eight years in prison "followed by three years of supervised release."[103]

3. Jack Dowell

In 1997, Jack Dowell and others carried out a premeditated plan to set fire to the Colorado Springs office of the IRS in protest of taxation.[104] They broke into the building in the middle of the night, unlocked all of the filing cabinets, and dumped gasoline on the files and throughout the office.[105] Nobody else was present in the building when this occurred.[106]

Dowell was convicted for destruction of government property with fire and forcible interference "with IRS employees and administration."[107] For his crimes, the sentencing court also applied the terrorism enhancement.[108] The jury found that Dowell "intentionally 'endeavored to obstruct or impede' IRS operations, thus permitting the upward departure" from a normal sentence under the terrorism enhancement.[109] Without the enhancement, Dowell would have received a sentence of fifty-one to sixty-three months in prison since he was a first-time offender.[110] With the enhancement, however, Dowell was sentenced to three hundred sixty

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[100] Johl, *supra* note 13, at 467.

[101] Johl, *supra* note 13, at 482.

[102] Johl, *supra* note 13, at 482–83.

[103] Johl, *supra* note 13, at 467.

[104] United States v. Dowell, 430 F.3d 1100, 1105 (10th Cir. 2005); Johl, *supra* note 13, at 485.

[105] *Dowell*, 430 F.3d at 1105.

[106] Johl, *supra* note 13, at 485.

[107] *Dowell*, 430 F.3d at 1104.

[108] Johl, *supra* note 13, at 485.

[109] Johl, *supra* note 13, at 485.

[110] Johl, *supra* note 13, at 485.

months.[111]

Evidently, the inconsistent application of the terrorism enhancement raises concerns about disparities in sentencing and "seems to contradict the stated goals of the Sentencing Guidelines for individualized, tailored sentencing."[112]

II. Relevance

A. *Legal Relevance: The Issue of Inconsistent Application*

As evidenced by the cases above, the inconsistent application of the terrorism enhancement and the lack of uniformity in domestic terrorism law reveals a larger legal issue: "it has proven difficult to articulate a definition of domestic terrorism that does not implicate the right to political protest."[113] It appears sentencing courts have struggled with differentiating between "peaceful, First Amendment-protected conduct and genuine threats of domestic terrorism."[114] Additionally, the wide breadth of discretion that prosecutors and judges have with respect to the sentencing enhancement creates further risk that they will "use it against political actors who engage in non-violent property destruction as a form of protest."[115]

In the case of the January 6 rioters, there are a few reasons why sentencing judges have declined to impose the terrorism enhancement.[116] First, some judges are unsure if the actions of those involved in the January 6 attacks constitute "crimes of terrorism."[117] Second, some judges are worried about labeling certain defendants "domestic terrorists" if other defendants have not been labeled as such.[118] Prosecutors have also been inconsistent in deciding whether or not to seek the enhancement, raising "the issue of unspecified 'facts and circumstances.'"[119]

Compare the reasoning provided in the January 6 cases with that of Reznicek's, where the judge decided to impose the terrorism

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[111] Johl, *supra* note 13, at 485.

[112] Floyd, *supra* note 64, at 143.

[113] Johl, *supra* note 13, at 468.

[114] *Responding to Domestic Terrorism: A Crisis of Legitimacy*, *supra* note 9, at 1926.

[115] Johl, *supra* note 13, at 481.

[116] Nhek, *supra* note 16, at 286.

[117] Nhek, *supra* note 16, at 286.

[118] Nhek, *supra* note 16, at 286.

[119] Nhek, *supra* note 16, at 286.

enhancement.[120] Like Reznicek, who admitted to property destruction along the Dakota Access Pipeline and surrounding equipment, many of the January 6 defendants "similarly used objects to damage and destroy property and obstructed the functioning government."[121] By contrast, neither Dylann Roof nor James Fields were given the terrorism enhancement for their crimes, which involved the killing of "nine people at a Charleston bible study," and the killing of a "Charlottesville demonstrator" with a vehicle, respectively.[122]

B. *Policy/Social Relevance: The Issue of Not Labeling Terrorists as Such*

Beyond the legal issues of inconsistent application and varying domestic terrorism laws, the need for reform is exacerbated by the consideration of how "domestic terrorism" as a term carries "moral, social, and even political weight."[123] For instance, "many of the American Revolutionaries committed conduct that could be understood as terrorism," but because many people's understanding of terrorism is shaped by their personal political beliefs, few Americans would characterize such conduct as terrorism "because the modern view is that the[ir] conduct was legitimate."[124]

Another example of how society's understanding of terrorism is shaped by political beliefs can be found in the response to the Las Vegas Shooting of 2017, the deadliest mass shooting by a lone gunman in American history to date.[125] Joe Lombardo, the Clark County Sheriff, was asked after the incident whether the shooting was an incident of domestic terrorism.[126] However, Nevada law does not define an act of domestic terrorism in terms of ideology.[127] It only requires "that an act of 'sabotage, coercion, or violence' be intended to 'cause great bodily harm or death to the general population' or to destroy or impair buildings, infrastructure, communications, or services."[128] Yet, Lombardo's response highlights the unavoidable social

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[120] Nhek, *supra* note 16, at 289.

[121] Nhek, *supra* note 16, at 289.

[122] Nhek, *supra* note 16, at 289.

[123] Brill, *supra* note 11, at 20.

[124] *Responding to Domestic Terrorism: A Crisis of Legitimacy*, *supra* note 9, at 1923.

[125] *See generally* Dilts, *supra* note 36, at 720.

[126] Dilts, *supra* note 36, at 720.

[127] Dilts, *supra* note 36, at 720–21.

[128] Dilts, *supra* note 36, at 721.

reality that many Americans understand terrorism in terms of ideology.[129]

Finally, in the case of the January 6 attackers, the legal record of the events from that day will not label those individuals domestic terrorists; "they merely trespassed, obstructed proceedings, or scuffled with police."[130] Without the "terrorist" label, "the attackers will avoid the shame and judgment so often placed on [other] violent extremists," and "the United States also fails to signal . . . that it seriously condemns the political nature of the violence that occurred."[131]

In its current political and social scheme, America has become increasingly polarized and distrusting in the country's institutions.[132] However, "in order to prosecute terrorism effectively, the violence must be viewed as illegitimate, and the government's response must be viewed as legitimate."[133] With the "simultaneous increase in the perception of political violence as legitimate," the current legal landscape for domestic terrorism is not equipped to foster views of government legitimacy.[134]

ANALYSIS

III. Congress Should Enact a Federal Statute Criminalizing Domestic Terrorism

A. *"Federal Crime of Domestic Terrorism" – Revised*

1. A Proposed "Federal Crime of Domestic Terrorism" Statute

Using the structure and content of both § 2332b(g)(5) and § 2331(5), the statute for a "federal crime of domestic terrorism" should state:

> The term "federal crime of domestic terrorism" means an offense that—
>
> (A) involves acts "that are a violation of the criminal laws of the United States or of any State";[135]

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[129] Dilts, *supra* note 36, at 720 (stating that when asked whether "the incident was being considered an act of domestic terrorism," Joe Lombardo replied, "'No, not at this point, we believe it is a local individual, he resides here locally. We don't know what his belief system was at this time.'").

[130] Ware & Zolyniak, *supra* note 25.

[131] Ware & Zolyniak, *supra* note 25.

[132] *Responding to Domestic Terrorism: A Crisis of Legitimacy*, *supra* note 9, at 1924.

[133] *Responding to Domestic Terrorism: A Crisis of Legitimacy*, *supra* note 9, at 1924.

[134] *Responding to Domestic Terrorism: A Crisis of Legitimacy*, *supra* note 9, at 1924.

[135] 18 U.S.C. § 2331(5)(A).

> (B) "is calculated"[136] or "appear[s] to be intended"[137] to—
>
> (i) "intimidate or coerce a civilian population";[138]
> (ii) "influence the policy of a government";[139] or
> (iii) "affect the conduct of a government";[140] and
>
> (C) "occur[s] primarily within the territorial jurisdiction of the United States."[141]

This sample statute incorporates and adjusts the already existing definitions related to domestic terrorism.[142]

2. Prioritizing Intent over Enumerated Offenses

This proposed statute does away with the enumerated offenses of § 2332b(g)(5) because a federal crime of domestic terrorism should not be a predicate offense, especially when the enumerated offenses under § 2332b(g)(5) "are so specific and limited that they fail to account for many of the typical tactics of modern terrorists."[143] Those offenses include "crimes ranging from property damage (that causes substantial risk of serious injury) to murder."[144] They also "represent both a more stereotypically international form of terrorism and an older form of terrorism, involving attacks that tend to be the product of careful planning by a sophisticated organization."[145] Prosecutors would not charge an individual who illegally brings a firearm across state lines intending to commit a racially motivated shooting with one of the specific enumerated offenses listed in § 2332b(g)(5).[146] That act would

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[136] 18 U.S.C. § 2332b(g)(5)(A).

[137] 18 U.S.C. § 2331(5)(B).

[138] 18 U.S.C. § 2331(5)(B)(i).

[139] 18 U.S.C. § 2331(5)(B)(ii).

[140] 18 U.S.C. § 2331(5)(B)(iii).

[141] 18 U.S.C. § 2331(5)(C).

[142] *See* 18 U.S.C. § 2331(5); 18 U.S.C. § 2332b(g)(5).

[143] Laguardia, *supra* note 26, at 217.

[144] Laguardia, *supra* note 26, at 228.

[145] Laguardia, *supra* note 26, at 221; *see* 18 U.S.C. § 2332b(g)(5)(B)(i) (including "section[s] 32 (relating to destruction of aircraft or aircraft facilities), . . . 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death), . . . 1114 (relating to killing or attempted killing of officers and employees of the United States), . . . 1203 (relating to hostage taking), . . . 1751(a), (b), (c), or (d) (relating to Presidential and Presidential staff assassination and kidnaping), . . . [and] 2332f (relating to bombing of public places and facilities)" in the enumerated offenses).

[146] Hanna & Halliday, *supra* note 66, at 784–85.

only be chargeable as ordinary criminal conduct, not terrorism.[147] Similarly, an individual who murders three people to "prevent 'a genocide by Jews,'" would not be charged under § 2332b(g)(5) if they chose to use a gun rather than a bomb.[148]

Rather than focusing on the type of crime that was committed, as § 2332b(g)(5) does, the proposed statute correctly emphasizes terrorist intent as a requirement for domestic terrorism.[149] Terroristic intent should not focus solely on the government, especially because nearly every state with a domestic terrorism statute already requires an intent to harm, threaten, or intimidate civilians specifically.[150] As the court in *Awan* observed, an individual who murders a head of state, without terrorist intent, should not be labeled a terrorist simply because of the importance of the victim.[151] In other words, "[i]f someone acts violently without motivation to inspire mass panic, it should not be deemed terrorism."[152] This reflects the generally accepted belief that the motivation or purpose of terrorism is to intimidate or threaten the public or the government through the use of violence.[153]

To illustrate the importance of emphasizing terrorist intent over enumerated offenses, consider the fact that currently, "a hate crime can only be considered a federal crime of terrorism if it is carried out with a weapon of mass destruction or carried out at a particular facility."[154] 18 U.S.C. § 249 criminalizes "willfully caus[ing] bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempt[ing] to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person."[155] Instead of focusing on whether a particular hate crime was carried out in a certain way, the proposed statute focuses on intent, promoting the recognition that sometimes "hate crimes are also terrorism—calculated not

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[147] Hanna & Halliday, *supra* note 66, at 784–85.

[148] Carpenter, *supra* note 55, at 401 ("Although Cross intended to intimidate or coerce a civilian population, his slaying of three people did not constitute terrorism because he chose to use a gun instead of a bomb. Instead, Cross was convicted of capital murder.").

[149] *See generally* Brill, *supra* note 11, at 21 ("Indeed, it doesn't matter why the defendants oppose capitalism and the United States government—if they use violence and intimidation to further their views, they are terrorists.").

[150] Page & Robinson, *supra* note 8.

[151] Johl, *supra* note 13, at 498.

[152] Johl, *supra* note 13, at 498.

[153] Laguardia, *supra* note 26, at 231.

[154] Carpenter, *supra* note 55, at 415–16.

[155] 18 U.S.C. § 249(a)(1).

only to harm an individual who is hated based on his or her status, but also to intimidate or coerce others in that subgroup of the civilian population, and sometimes the civilian population as a whole."[156] Ultimately, prosecuting an act as domestic terrorism should not depend on whether the behavior or conduct was in furtherance of an enumerated offense, but whether the defendant "intended to intimidate or coerce a civilian population or unit of government."[157]

B. *Addressing Previously Proposed Solutions and Potential Counterarguments*

The modern discourse over domestic terrorism reform is split into two sides: the "Wholesale Reform" camp and the "Status Quo" camp.[158] The proposed solutions of this Note align well with the former camp in terms of pushing for an official domestic terrorism statute and recognizing the significance of proper labeling of domestic terrorists.[159] Furthermore, the Wholesale Reform Camp point out that the current tools available to the federal government for investigating and prosecuting these crimes create "'gaps' through which certain conduct related to domestic terrorism falls unprosecuted, under-prosecuted, or not investigated at all."[160]

On the other hand, those in the "Status Quo" camp acknowledge the government's shortcomings in responding to domestic terrorism threats, but they contend that this is due to a lack of proper utilization, not a lack of statute.[161] Opponents of a new domestic terrorism statute are primarily concerned with increasing the federal government's power due to the inherent risk of abuse.[162] Criticisms of previously proposed federal domestic

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156 Laguardia, *supra* note 26, at 242.

157 Carpenter, *supra* note 55, at 411–12.

158 *Responding to Domestic Terrorism: A Crisis of Legitimacy*, *supra* note 9, at 1919.

159 *Responding to Domestic Terrorism: A Crisis of Legitimacy*, *supra* note 9, at 1919–20 ("[E]xpressive value is lost when an alleged domestic terrorist is criminally charged without being expressly labeled as a terrorist.").

160 Hanna & Halliday, *supra* note 66, at 788 ("The most significant gap identified by advocates of a domestic terrorism statute is the federal government's limited ability to pursue domestic terrorists for pre-attack acts, such as stockpiling weapons in preparation for a mass shooting.").

161 *Responding to Domestic Terrorism: A Crisis of Legitimacy*, *supra* note 9, at 1921.

162 *Responding to Domestic Terrorism: A Crisis of Legitimacy*, *supra* note 9, at 1921; PETER G. BERRIS ET AL., CONG. RSCH. SERV., DOMESTIC TERRORISM: OVERVIEW OF FEDERAL CRIMINAL LAW AND CONSTITUTIONAL ISSUES, R46829 (2021), https://perma.cc/32UD-6C9L ("[I]ncreasing federal authority will 'most likely, only lead to additional disparities affecting minorities and disfavored political groups within the United States.'").

terrorism statutes center on concerns that they would "open the door to terrorism prosecutions for vandalism."[163]

Concerns about the risk of abuse inherent in expanding the federal government's authority are valid, but since domestic terrorism comes in a variety of forms, enumerating some of them in a federal statute would inevitably result in gaps.[164] Terrorist intent is what separates acts of domestic terrorism from ordinary criminal conduct, hence why intent should be the focus of any inquiry into domestic terrorism.[165]

IV. The Terrorism Sentencing Enhancement Should be Eradicated Due to its Inconsistent Application

A. *The Terrorism Enhancement Results in Similar Sentences for Dissimilar Crimes*

As previously discussed, the terrorism enhancement could potentially be applied to a multitude of defendants: those convicted of the § 2332b(g)(5) federal crime of terrorism; those "convicted of harboring, concealing, or obstruction" of justice offenses in connection to crimes of terrorism; those convicted of promoting terrorism or crimes of terrorism; or those whose crimes were committed with terrorist intent, whether related to the government or the civilian population.[166] The terrorism enhancement applies to a set of offenses that is too broad and increases sentences by an often unjustified magnitude.[167] Instead of considering the impact and harm of the defendant's conduct, the terrorism enhancement takes "a per se mandatory minimum approach to any successful conviction (or guilty plea) for a federal crime of terrorism."[168]

Based on the wording of the terrorism enhancement, as well as the *Awan*

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[163] Laguardia, *supra* note 26, at 233.

[164] *See generally* Hanna & Halliday, *supra* note 66, at 785–88 ("The most significant gap identified by advocates of a domestic terrorism statute is the federal government's limited ability to pursue domestic terrorists for pre-attack acts, such as stockpiling weapons in preparation for a mass shooting.").

[165] *See* Laguardia, *supra* note 26, at 231 (explaining how the purpose of terrorism is to send an intimidating or threatening message to the public or the government through the use of violence).

[166] Pinky Wassenberg, *U.S. Circuit Courts & the Application of the Terrorism Enhancement Provision*, 42 S. ILL. U. L.J. 85, 86–87 (2017).

[167] *Id.* at 87.

[168] George D. Brown, *Punishing Terrorists: Congress, the Sentencing Commission, the Guidelines, and the Courts*, 23 CORNELL J.L. & PUB. POL'Y 517, 539 (2014).

court's interpretation of it, "the link to terrorism can be as thin as the defendant being found to have intended to promote terrorism, a standard considerably lower than a requirement that the defendant personally commit a federal crime of terrorism."[169] As one judge has noted, "to treat a first-time offender as if they were the most hardened of career criminals is 'incompatible with 18 U.S.C. § 3553' and 'contrary to and subversive of' the Guidelines' stated goals."[170] The concern lies in the fact that "[i]t's one thing to adjust the offense level upward to signify the seriousness of the offense. It is entirely another to say that [the] defendant has a history of criminal activity that he does not, in fact, have."[171]

B. *Addressing the Risk of Abuse in Prosecutorial and Judicial Discretion*

Furthermore, given the significant penalties that the enhancement imposes, its importance to prosecutors has outweighed that of the offense itself.[172] Given the risk of abuse inherent in the prosecutorial discretion, eradicating the enhancement would safeguard against the risk that "judges would use the issue of the terrorism enhancement as a vehicle to express their whole-hearted involvement in the nation's counterterrorism strategy."[173] This creates a serious risk that, post-*Booker*, "unless a jury finds beyond a reasonable doubt that a defendant had the intent required to apply Sentencing Guideline 3A1.4, there is a violation of the Due Process Clause of the Fifth Amendment and the Trial by Jury Clause of the Sixth Amendment."[174] The U.S. Supreme Court has sent lower courts mixed signals post-*Booker* about how much discretion they have in departing from the Guidelines, since the Court ruled the sentencing guidelines are advisory not mandatory.[175] Furthermore, it is unclear to what extent a circuit court "should defer to the judgment of the trial court regarding the presence or absence of factual justifications for sentencing a defendant" under the

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[169] Wassenberg, *supra* note 166, at 87–88.

[170] Floyd, *supra* note 64, at 156–57.

[171] Brown, *supra* note 168, at 539.

[172] Brown, *supra* note 168, at 535 ("[T]he government can get a large sentence by having the jury convict the defendant of an easy-to-prove offense, and then having the judge increase the sentencing through the enhancement he or she finds applicable through a preponderance of the evidence standard.").

[173] Wassenberg, *supra* note 166, at 94.

[174] Brown, *supra* note 168, at 535–36.

[175] Wassenberg, *supra* note 166, at 89.

enhancement provisions.[176]

Thus, the terrorism enhancement should be eradicated, or at least revised, because it "represents the worst in U.S. sentencing policy."[177] In practice, the terrorism enhancement creates "similar sentences for dissimilar crimes."[178] Since the enhancement can be applied equally to first-time nonviolent offenders as well as deeply engaged and committed criminals, its "sweeping scope creates inconsistent sentencing variations, undermines the goals of the Sentencing Guidelines, and denies first-time offenders the chance for disengagement and rehabilitation" due to the lengthy sentences they could receive.[179]

V. States Should Adopt or Revise Domestic Terrorism Statutes Modeled After the Proposed Federal Crime of Domestic Terrorism Statute

States that currently have domestic terrorism offenses should consider reforming their statutes to focus on intent instead of conduct, like the proposed federal statute, given the wide variation in predicate offenses of current statutes.[180] The recent motivations of legislators to enact or amend domestic terrorism laws highlights a lack of consensus about the objective of such laws.[181]

A. *Existing State Statutes and Applications*

1. Washington, D.C.'s Intent-Based Domestic Terrorism Statute Captures Conduct Excluded by Federal Law

Washington, D.C.'s domestic terrorism statute[182] enumerates certain acts, including murder and manslaughter, which qualify as terrorism; however, any potentially terroristic act must be committed with a terrorist intent directed towards civilians or the government.[183] Regarding the earlier mentioned case of Floyd Lee Corkins, "a similar case would not be eligible for a charge that falls within the federal crime of terrorism" because

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[176] Wassenberg, *supra* note 166, at 89.

[177] Floyd, *supra* note 64, at 169–70.

[178] Floyd, *supra* note 64, at 143.

[179] Floyd, *supra* note 64, at 169.

[180] ROBINSON & PAGE, *supra* note 39, at 6.

[181] Nick Robinson, *The Growing Threat of State Domestic Terrorism Laws to the First Amendment*, JUST SECURITY (Sep. 5, 2024), https://perma.cc/L69T-54BW.

[182] D.C. CODE ANN. § 22–3152 (West 2002).

[183] Carpenter, *supra* note 55, at 407.

Corkins's intended target was not the government.[184] Furthermore, he did not use a weapon of mass destruction, nor was he associated with a foreign terrorist entity.[185] In other words, since Corkins did not commit or intend to promote one of the enumerated offenses of § 2332b(g)(5),[186] it is unlikely he would have been appropriately prosecuted and labeled as a domestic terrorist without the D.C. statute.[187]

Under the D.C. statute, one of the specified offenses is "[m]alicious burning, destruction, or injury of another's property, if the property is valued at $500,000 or more."[188] Given that the estimated historical value of the U.S. Capitol building was $133 million as of 2003,[189] the January 6 attackers met the requirements of the malicious destruction offense by committing over $2 million in property damage.[190] Additionally, in his statement before the House Oversight and Reform Committee, previous FBI Director Christopher Wray emphasized that the January 6 attackers "showed a blatant and appalling disregard for our institutions of government and the orderly administration of the democratic process."[191] This, coupled with Guy Reffitt's statement that he "wanted to drag lawmakers outside of the Capitol 'kicking and screaming' and 'wanted to see House Speaker Nancy Pelosi's head hit every stair on the way down,'"[192] indicates that the January 6 attackers had the requisite terrorist intent to intimidate the civilian population and "influence the policy or conduct of a unit of government by intimidation or coercion."[193]

Despite all of this, the January 6 attackers were not properly labeled domestic terrorists because their conduct was outside the scope of the enumerated offenses in § 2332b(g)(5).[194] Consequently, states should consider revising their statutes to mirror the proposed federal statute and do away with enumerated offenses, since any violation of a state's criminal laws

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[184] Carpenter, *supra* note 55, at 408.

[185] Carpenter, *supra* note 55, at 408.

[186] 18 U.S.C. § 2332b(g)(5).

[187] Carpenter, *supra* note 55, at 408.

[188] D.C. CODE ANN. § 22-3152(8)(J) (West 2002).

[189] *How Much Did It Cost to Build the Capitol?*, ARCHITECT OF THE CAPITOL, https://perma.cc/Y9G5-9W4X (last visited Apr. 13, 2026).

[190] D.C. CODE ANN. § 22–3152(8)(J) (West 2002).

[191] Christopher Wray, *Examining the January 6 Attack on the U.S. Capitol*, FED. BUREAU OF INVESTIGATION (June 15, 2021), https://perma.cc/KB5V-FTUY.

[192] Nhek, *supra* note 16, at 280.

[193] D.C. CODE ANN. § 22–3152(1)(B) (West 2002).

[194] *See generally* 18 U.S.C. § 2332b(g)(5); Nhek, *supra* note 16, at 280–83.

with the requisite terroristic intent will ensure appropriate prosecution and labeling of domestic terrorists.[195]

2. New York's Domestic Terrorism Framework Avoids Sweeping in Ordinary Criminal Conduct

New York's domestic terrorism statute has a similar requisite terrorist intent to Washington, D.C.'s statute,[196] and it specifically allows for various offenses, such as murder, "to be prosecuted as a crime of terrorism."[197] The New York domestic terrorism statute is exemplary in modeling how "the actions that may constitute a crime of terrorism" can be expanded without "improperly [encompassing] common criminal acts."[198] Specifically, the "New York Court of Appeals has found that charging a gang member under the terrorism statute was inappropriate because the defendant did not intend to intimidate or coerce a civilian population."[199] Although gang activity might affect civilians, the intent is not established "when the 'objective was to intimidate or coerce'" other gangs.[200]

Taking the evidence available against Luigi Mangione as inculpatory, specifically his handwritten letter criticizing the health insurance industry and the carved bullets that were found near Brian Thompson's body,[201] his alleged conduct could qualify for domestic terrorism under New York law.[202] As it turns out, in September of 2025, a NY judge dropped two of the terrorism charges against Mangione because "prosecutors had failed to establish that there was enough evidence to justify the terrorism-related murder charges."[203]

To date, Mangione has not been charged under § 2332b(g)(5) because he

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[195] *See* Carpenter, *supra* note 55, at 406–07.

[196] *Compare* N.Y. PENAL LAW § 490.25 (McKinney 2001), *with* D.C. CODE ANN.§ 22-3152 (West 2002).

[197] Carpenter, *supra* note 55, at 409; N.Y. PENAL LAW § 490.25 (McKinney 2001).

[198] Carpenter, *supra* note 55, at 410.

[199] Carpenter, *supra* note 55, at 409.

[200] Carpenter, *supra* note 55, at 409.

[201] Peltz, *supra* note 45.

[202] *See generally* N.Y. PENAL LAW § 490.25 (McKinney 2001).

[203] Mike Wendling & Pratiksha Ghildial, *Judge Dismisses Terrorism Charges Against Luigi Mangione*, BBC (Sept. 16, 2025), https://perma.cc/5NZZ-RFVV; *see also* People v. Mangione, 243 N.Y.S.3d 309, 316 (N.Y. Sup. Ct. 2025) (reasoning that even assuming employees of a company could constitute a civilian population, "there was no evidence presented that defendant's *conscious objective or intent* was to intimidate or coerce the employees of United Healthcare").

did not commit one of the enumerated offenses.[204] As the court observed in *Awan*, an individual who murders someone without terroristic intent should not simply be labeled a terrorist "because of the importance of the victim."[205] What remains key for proper prosecution of domestic terrorism is that people who act violently *with* the motivation to inspire mass panic are deemed terrorists, not those who commit violence without such intent.[206]

B. *States Without Domestic Terrorism Offenses Should Enact Them to Adequately Address Threats from Extremists*

Currently, without a specific domestic terrorism statute, "[s]tate law enforcement cannot adequately address the threat posed by domestic extremists."[207] The proposed federal statute should "signal[] to states and citizens that a given policy is important and should be recognized broadly."[208] Additionally, the above examinations of New York and D.C. laws should serve as an indicator to states without a domestic terrorism statute that adopting one modeled after the proposed statute in this Note will allow them to fill any gaps left by the federal government.[209] State lawmakers should be cautious and "prioritize First Amendment and other civil liberties concerns" when enacting or revising domestic terrorism legislation.[210] Finally, since "state domestic terrorism statutes are no substitute for a comprehensive federal law," it is critical that each solution proposed by this Note be implemented in order to confront domestic terrorism issues consistently and properly.[211]

CONCLUSION

The current legal framework for addressing domestic terrorism in the United States is fragmented, inconsistent, and inadequate. Although federal

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[204] *See generally* 18 U.S.C. § 2332b(g)(5).

[205] Johl, *supra* note 13, at 498.

[206] Johl, *supra* note 13, at 498.

[207] Carpenter, *supra* note 55, at 410.

[208] Carpenter, *supra* note 55, at 410.

[209] *See generally* Hanna & Halliday, *supra* note 66, at 788 ("The most significant gap identified by advocates of a domestic terrorism statute is the federal government's limited ability to pursue domestic terrorists for pre-attack acts, such as stockpiling weapons in preparation for a mass shooting.").

[210] Robinson, *supra* note 181.

[211] AMY C. COLLINS, THE NEED FOR A SPECIFIC LAW AGAINST DOMESTIC TERRORISM 9 (2020), https://perma.cc/4RXY-MXXR.

law provides a definition of domestic terrorism, it does not criminalize it as a standalone offense, forcing prosecutors to rely on a fragmented arsenal of traditional criminal charges which reflect an outdated understanding of domestic terrorism and its forms. Without a clear and enforceable federal domestic terrorism statute, perpetrators of politically motivated violence often evade the "terrorist" label, resulting in disparate treatment of similar crimes. The terrorism sentencing enhancement has proven especially problematic on that front as well, with its inconsistent application resulting in sentencing disparities that contradict the stated goals of the Sentencing Guidelines. Furthermore, state domestic terrorism laws vary widely in scope and effectiveness, leading to uneven prosecution and punishment of domestic terrorists.

To address these deficiencies, this Note proposes a three-pronged approach. First, Congress should enact a federal statute criminalizing domestic terrorism, ensuring that terrorist intent, rather than the specific nature of the offense, is the defining criterion for prosecution. Second, the terrorism enhancement should be eradicated due to its history of arbitrary and excessive application. Third, states should consider reforming or adopting domestic terrorism laws modeled after the proposed federal statute, ensuring a more consistent and uniform approach for prosecution and punishment.

As the threat of domestic terrorism increases, it is imperative that the United States adopt a legal framework that is clearly and consistently intolerant of domestic terrorism. By implementing the suggested reforms of this Note, the United States can create a more effective and just system for combating domestic terrorism, reinforcing the legitimacy of government responses to politically motivated violence and prioritizing the protection of the people.

Litigating the Discretionary Enforcement of Public-Camping Laws Against the Homeless in the Wake of *City of Grants Pass v. Johnson*

Grace Keith[*]

INTRODUCTION

Public-camping laws are a type of vagrancy statute that criminalizes camping, sleeping, or sitting on public property "for the purpose of maintaining a temporary place to live."[1] While local governments favor these laws as tools for clearing homeless encampments from their streets, critics argue that the laws unjustly criminalize individuals experiencing homelessness.[2]

In *Martin v. City of Boise*, the Ninth Circuit Court of Appeals held that enforcing public-camping laws against "involuntarily homeless" individuals when no "practically available" shelter space exists violates the

[*] J.D. Candidate, New England Law | Boston (2026). I want to thank my family, close friends, and loved ones for their unwavering love and support throughout my time in law school. Their continued encouragement has been instrumental to my success. I'd also like to give a special thank you to all of my criminal law professors for inspiring me to write on this topic, and to the members of the *New England Law Review* for taking the time out of their busy days to guide me throughout this writing process.

[1] City of Grants Pass v. Johnson, 603 U.S. 520, 546 (2024) (quoting GRANTS PASS, OR., MUN. CODE §§ 5.61.030, 5.61.010); *see* Ave Mince-Didier & Rebecca Pirius, *What is a Vagrancy Charge?*, CRIM. DEF. LAW., https://perma.cc/KK5D-L9D2 (last updated July 1, 2024).

[2] Jennifer Ludden, *100-Plus Cities in the U.S. Banned Homeless Camping This Year. But Will it Work?*, NPR (Dec. 26, 2024, 5:00 AM ET), perma.cc/53Y3-3YK8; *Johnson v. Grants Pass Decision: Dangerous Precedent for People Facing Homelessness*, COVENANT HOUSE (June 28, 2024), perma.cc/8Q8S-23KX [hereinafter *Dangerous Precedent for the Homeless*].

Eighth Amendment's Cruel and Unusual Punishments Clause.[3] This 2018 holding conflicted with settled Eighth Amendment principles established by the U.S. Supreme Court.[4] Local governments in the Ninth Circuit revised their public-camping laws to comply with *Martin*, including guidelines on how to enforce these laws specifically against homeless individuals.[5] Due to the dynamic nature of homelessness, the *Martin* standard proved unworkable, making it difficult for officers to properly enforce public-camping laws.[6] Local governments faced costly lawsuits over alleged improper enforcement, ultimately deterring them from enforcing these laws altogether.[7] This non-enforcement, coupled with a growing homeless population, led to an increase in both the size and number of homeless encampments across Ninth Circuit states.[8] These encampments created various health and safety hazards for communities, affecting homeowners and businesses while costing cities thousands of dollars in cleanup expenses.[9]

In the 2024 case, *City of Grants Pass v. Johnson*, the U.S. Supreme Court overruled *Martin v. City of Boise,* holding that the "enforcement of generally applicable" public-camping laws against homeless individuals does not violate the Cruel and Unusual Punishments Clause, even when no shelter space is available.[10] Following this decision, hundreds of local governments revised and enacted new public-camping laws, broadening the scope of

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[3] 902 F.3d 1031, 1048–49 (9th Cir. 2018).

[4] *City of Grants Pass*, 603 U.S. at 548.

[5] *See*, *e.g.*, LONG BEACH, CAL., MUN. CODE § 9.42.110.

[6] *See* Boyd v. City of San Rafael, No. 23-cv-04085-EMC, 2023 U.S. Dist. LEXIS 202038, at *5–7 (N.D. Cal. Nov. 2, 2023); Brief of Amici Curiae International Downtown Ass'n et al. in Support of Petitioner at 13–15, *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024) (No. 23-175); K. Rambo, *Despite Historical Failures, Portland Wants to Fine, Jail Homeless Portlanders*, ST. ROOTS (June 6, 2023), perma.cc/YM34-PF4J; Vanessa Rancaño, *How a Pivotal Case on Homelessness Could Redefine Policies in California and the Nation*, KQED (Apr. 19, 2024), perma.cc/XC5R-E683.

[7] *See* Edvard Pettersson, *West Coast Cities Implore Supreme Court to Scrap Ninth Circuit Roadblock to Anti-Camping Ordinances*, COURTHOUSE NEWS SERV. (Sept. 28, 2023), perma.cc/59W2-XM4F.

[8] *See* Billy Cole et al., *Breaking the Legal Paralysis: Combatting California's Homelessness Crisis After* Martin v. City of Boise, 39 CAL. REAL PROP. J. 34, 35 (2021), perma.cc/M4XU-HH2Z; TANYA DE SOUSA ET AL., THE 2023 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS: PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 2, 17 (2023), perma.cc/FLG4-449K.

[9] *See* Cole et al., *supra* note 8, at 35; THEODORE B. OLSON & THEANE EVANGELIS, *MARTIN V. CITY OF BOISE* WILL ENSURE THE SPREAD OF ENCAMPMENTS THAT THREATEN PUBLIC HEALTH AND SAFETY 2–12 (2019), perma.cc/3V85-6X5C.

[10] City of Grants Pass v. Johnson, 603 U.S. 520, 521 (2024).

prohibited conduct and removing language previously required for compliance with *Martin*.[11] These new laws are vague and generally lack enforcement guidelines,[12] granting officers broad discretion in how and against whom they are enforced.[13] Due to the severe health and safety issues caused by crowded homeless encampments, executive officials are now relying on *City of Grants Pass* as authority to aggressively enforce their "generally applicable" public-camping laws, specifically against homeless individuals.[14]

This Note will argue that courts are unlikely to interfere with the broad discretion that vague public-camping laws confer on executive officials to aggressively enforce them against the homeless. Furthermore, public defenders will rarely bring unlawful camping cases to trial, preventing the development of common-law doctrines that could limit such excessive discretion. As a result, the only recourse available for homeless individuals will be favorable plea bargains or case dismissals—neither of which will solve the homelessness crisis or limit further enforcement of these laws against the homeless.

Part I of this Note examines the precedent that interprets the Cruel and Unusual Punishments Clause and the factors related to the homelessness crisis that led the U.S. Supreme Court to their decision in *City of Grants Pass*. Part I also discusses the legal representation available to homeless individuals and the challenges attorneys may raise against public-camping laws. Part II explores how the U.S. Supreme Court's political agenda influences the constitutionality of public-camping laws, and underscores the importance of litigating unlawful camping charges, given local governments' slow response to addressing homelessness. Part III argues that the vague public-camping laws enacted after *City of Grants Pass* grant

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[11] *See*, *e.g.*, Memorandum from Teresa Chandler, Deputy City Manager, to Thomas B. Modica, City Manager, City Response to Grants Pass v. Johnson Decision 4 (Aug. 12, 2024), perma.cc/VSQ5-5QPF; *see* Robbie Sequeira, *Many More Cities Ban Sleeping Outside Despite a Lack of Shelter Space*, R.I. CURRENT (Jan. 28, 2025, 5:00 AM), https://perma.cc/8MXY-QUNG.

[12] *See*, *e.g.*, Anna Patrick, *Auburn Strips Requirement of Shelter from Homeless Camping Ordinance*, SEATTLE TIMES (Oct. 4, 2024, 10:00 AM), perma.cc/UH22-8LXG.

[13] Kolender v. Lawson, 461 U.S. 352, 358 (1983); *see* Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1171, 1184 (2011).

[14] *E.g.*, Emry Dinman & Alexandra Duggan, *Spokane's Proposition 1 is Now Being Enforced*, THE SPOKESMAN-REV., perma.cc/CY9B-HH3P (last updated Nov. 19, 2024, 1:49 PM); *see* Marisa Kendall, *No Sleeping Bags, Keep Moving: California Cities Increase Crackdown on Homeless Encampments*, CALMATTERS (Sept. 12, 2024), perma.cc/TDJ5-UL6B (showing different policies and how they vary).

executive officials excessive discretion to enforce these laws disproportionately against the homeless. Part IV argues that challenges to the selective enforcement of these laws are unlikely to succeed, both on the merits and under separation of powers principles. Part V argues that public defenders will resolve unlawful camping cases through plea bargains or case dismissals rather than trials, preventing the development of common-law doctrines that could limit officer discretion.

I. Background

A. *Laws that Criminalize Status Violate the Cruel and Unusual Punishments Clause, While Laws that Criminalize Involuntary Acts Do Not*

The Cruel and Unusual Punishments Clause (CUPC) of the Eighth Amendment sets a substantive limit on what state governments may criminalize.[15] In *Robinson v. California,* the Supreme Court considered whether a statute that made it a criminal offense for a person to "be addicted to the use of narcotics" violated the CUPC.[16] The statute did not criminalize an "act"—such as the use, purchase, sale, or possession of narcotics—but rather the mere condition or "status" of being addicted to narcotics.[17] The Court held that while states may exercise their police powers to punish individuals who engage in certain acts that society has an interest in preventing, the CUPC precludes them from punishing individuals solely on the basis of their status or condition.[18]

In *Powell v. Texas*, the U.S. Supreme Court held that the CUPC does not limit a state's power to create or enforce laws regulating "acts" that society has an interest in preventing, even if those acts are "'involuntary' or 'occasioned by' a particular status."[19] The defendant in *Powell* was an alcoholic convicted for violating a statute that criminalized the "state of intoxication in a public place."[20] He argued that the *Robinson* rule should preclude states from criminalizing "involuntary acts" because his public

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[15] U.S. CONST. amend. VIII; Ingraham v. Wright, 430 U.S. 651, 667 (1977); *see* Martin v. City of Boise, 902 F.3d 1031, 1046 (2018); Estelle v. Gamble, 429 U.S. 97, 102 (1976); Weems v. United States, 217 U.S. 349, 386–87 (1910).

[16] 370 U.S. 660, 660, 667 (1962).

[17] *Id.* at 666.

[18] *See* Powell v. Texas, 392 U.S. 514, 532–33 (1968); *Robinson*, 370 U.S. at 666–67.

[19] City of Grants Pass v. Johnson, 603 U.S. 520, 548 (2024); *Powell*, 392 U.S. at 533.

[20] 392 U.S. at 517.

intoxication was involuntary and caused by his alcoholism—a status he was "powerless to change."[21] The Court disagreed, ruling that the act of public intoxication—regardless of whether it is performed involuntarily or as a consequence of a certain status—still presents health and safety hazards that the state has an interest in preventing.[22]

B. *Contrary to Precedent, the Ninth Circuit Held that Criminalizing Involuntary Acts that Are the Consequence of One's Status Violates the Cruel and Unusual Punishments Clause*

In the 2018 Ninth Circuit case, *Martin*, the Court considered the constitutionality of a public-camping law that made the use of public spaces or structures for sitting, lying, and sleeping a criminal offense.[23] The Court held that enforcing laws that criminalize "involuntarily" homeless individuals for sitting, lying, and sleeping outside, when no "practically available" shelter space exists, violates the CUPC.[24] It reasoned that, "just as the state may not criminalize the [status] of being 'homeless in public places' the state may not 'criminalize conduct that is an unavoidable consequence of being homeless — namely sitting, lying, or sleeping on the streets.'"[25] Following *Martin*, local governments could not prosecute homeless individuals for sitting, lying, or sleeping in public if no alternative shelter options were available.[26]

In 2022, in *Johnson v. City of Grants Pass*, the Ninth Circuit adopted and expanded the *Martin* rule, holding that the acts of sitting, lying, or sleeping now includes doing so with rudimentary forms of protection from the elements, such as a tent or a blanket.[27] The *Johnson* holding also permitted plaintiffs, regardless of whether they were homeless, to bring class-wide

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[21] *Id.*

[22] *City of Grants Pass*, 603 U.S. at 548–49; *Powell*, 392 U.S. at 532–33.

[23] 902 F.3d 1031, 1035 (9th Cir. 2018).

[24] *Id.* at 1048–49.

[25] *Id.* at 1048; *see* Johnson v. City of Grants Pass, 50 F.4th 787, 811 (9th Cir. 2022) (explaining that the *Martin* Court adopted Justice White's concurrence in *Powell v. Texas*, which argued that people should not be "prosecuted for involuntary conduct if it is an unavoidable consequence of one's status").

[26] 902 F.3d at 1048.

[27] *Johnson*, 50 F.4th at 813; *Martin*, 902 F.3d at 1049 (explaining in dicta that punishing individuals for taking "the most rudimentary precautions to protect themselves from the elements," like using a blanket to sleep in the cold, *could* violate the CUPC).

injunctions to challenge public-camping laws.[28]

Under *Martin* and *Johnson*, shelter space was not "practically available" if the number of homeless individuals in a jurisdiction exceeded the number of available shelter spaces or beds.[29] Additionally, individuals were not considered "involuntarily homeless" if they had the means to pay for shelter or if free shelter space was realistically available to them.[30] Whether shelter space qualified as "practically available" also depended on a shelter's admission prerequisites, rules, and restrictions, such as those relating to religion, gender, work, substance use, or age.[31] Notably, neither *Johnson* nor *Martin* required government officials to provide homeless individuals with shelter space or housing.[32]

1. The Unworkable *Martin* and *Johnson* Standards and Their Negative Impact on Ninth Circuit Communities

Officials across the Ninth Circuit struggled to enforce their public-camping laws in accordance with *Martin* and *Johnson*.[33] Major cities with large, fluctuating populations found that tracking "practically available" shelter space and timely reporting it to officers in the field was both expensive and inaccurate due to the dynamic nature of homelessness, the varying restrictions shelters imposed, and the differing standards lower courts set for what physically qualified as "shelter."[34] Officials also did not know whether an individual would qualify as "involuntarily homeless" if they technically—but just barely—could afford temporary housing, if available shelters imposed restrictions that excluded them, or if they chose

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[28] Pettersson, *supra* note 7.

[29] *Johnson*, 50 F.4th at 795–96; *Martin*, 902 F.3d at 1048.

[30] *Martin*, 902 F.3d at 1048 n.8.

[31] *Johnson*, 50 F.4th at 796; *Martin*, 902 F.3d at 1041, 1049.

[32] *What is Martin v. Boise?*, GRANTS PASS OR., perma.cc/DJ6A-FQMP (last visited Sept. 28, 2025).

[33] *See*, *e.g.*, Boyd v. City of San Rafael, No. 23-cv-04085-EMC, 2023 U.S. Dist. LEXIS 202038, at *5–7 (N.D. Cal. Nov. 2, 2023); Fund for Empowerment v. City of Phoenix, 646 F. Supp. 3d 1117, 1125 (D. Ariz. 2022); Warren v. City of Chico, No. 2:21-CV-00640-MCE-DMC, 2021 U.S. Dist. LEXIS 128471, at *6–9 (E.D. Cal. July 8, 2021).

[34] *See Warren*, 2021 U.S. Dist. LEXIS 128471 at *7–8 (holding that an umbrella-like cover stretching over an airport tarmac did not constitute "shelter" because it was "outdoors", and "shelter", as defined in Webster dictionary is an "indoor" space); Brief of Amici Curiae International Downtown Ass'n et al. in Support of Petitioner, *supra* note 6, at 13–15 (explaining the difficulty of tracking available shelter space).

to live outdoors because their housing options were unsafe.[35] The uncertainty surrounding the *Martin* and *Johnson* standards opened the door to challenges against the improper enforcement of public-camping laws, resulting in a flood of litigation in the Ninth Circuit.[36] Fearing the prospect of costly lawsuits, local governments discouraged officers from enforcing public-camping laws altogether.[37]

Because many homeless individuals prefer the freedom of encampment-living over the restrictive nature of shelter-living,[38] the non-enforcement of public-camping ordinances led to a drastic increase in the number and size of homeless encampments across Ninth Circuit states.[39] During this era of non-enforcement, the nationwide homeless population reached a record high, with Ninth Circuit states having the highest rate of "unsheltered" homeless individuals—those living outdoors rather than in shelters.[40] The growth of homeless encampments created numerous health and safety hazards for surrounding cities, business owners, and taxpaying citizens.[41] Individuals living within encampments stole from and vandalized private properties, cluttered sidewalks with piles of trash, human feces, and hypodermic needles, and openly engaged in illicit drug use, all activities which scared customers away from local businesses and encouraged homeowners to move.[42] The clutter surrounding encampments pushed

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[35] *See*, *e.g.*, *Boyd*, 2023 U.S. Dist. LEXIS 202038 at *5–7 (explaining that a woman who chose encampment living, because she felt unsafe living in her own apartment with her abuser, was involuntarily homeless); Rambo, *supra* note 6 (asking whether a person with "their last $40" would be involuntarily homeless if they technically could afford shelter for the night); Rancaño, *supra* note 6.

[36] *See* City of Grants Pass v. Johnson, 603 U.S. 520, 534 (2024); *Boyd*, 2023 U.S. Dist. LEXIS 202038 at *5–7; *Fund for Empowerment*, 646 F. Supp. 3d at 1125; Rancaño, *supra* note 6; *Warren*, 2021 U.S. Dist. LEXIS 128471 at *6–9.

[37] *See* Pettersson, *supra* note 7.

[38] REBECCA COHEN ET AL., UNDERSTANDING ENCAMPMENTS OF PEOPLE EXPERIENCING HOMELESSNESS AND COMMUNITY RESPONSES: EMERGING EVIDENCE AS OF LATE 2018, at 5 (2019), perma.cc/3EZA-ELF4; *see* Alicia Bones, *What Factors Increase the Likelihood Unhoused People Will Seek Out Shelters? Part One*, MRSC (Feb. 28, 2024), perma.cc/4RQH-BFGJ; Daniel Wu, *When a Homeless Encampment was Cleared, No One Went to a Shelter. The Reasons are Complicated*, SEATTLE TIMES (Aug. 19, 2021, 6:00 AM), perma.cc/NG29-WDAB.

[39] *See* Cole et al., *supra* note 8, at 35.

[40] DE SOUSA ET AL., *supra* note 8, at 2, 17.

[41] OLSON & EVANGELIS, *supra* note 9, at 4–6, 8–9.

[42] Jade Cunningham, *'It's in Desperate Need of TLC': Feces, Trash, Drug Paraphernalia Litter North Phoenix Park*, 12 NEWS (Apr. 14, 2023), perma.cc/58UY-3WHV; Bigad Shaban et al., *Mayor Breed's First Year: Feces, Needles Complaints Decline; Trash Gripes, Homelessness Rise*, NBC BAY AREA (July

civilians traveling on sidewalks into oncoming traffic and attracted rats, which facilitated the spread of highly contagious and fatal, flea-born illnesses because of the close-quartered nature of tent cities.[43] Crime rates both between and against the homeless soared, and because officers could not enter tents without cause, some individuals, homeless or not, hid within encampments to engage openly yet covertly in drug and sex trafficking.[44] A number of volunteer outreach workers and law enforcement officers who worked in areas with encampments contracted illnesses, with one worker losing his leg as a result.[45] When civilians complained to their local governments about these issues, their complaints were either ignored because officials were directed not to enforce their public-camping laws, or cities would spend thousands of dollars cleaning up encampment areas only for them to deteriorate again.[46]

In 2023, the city of Grants Pass, along with nearly forty other state and city governments, expressed frustration to the U.S. Supreme Court regarding their inability to use public-camping laws as a tool to address the issues homeless encampments created in their communities.[47] In a petition for a writ of certiorari, the city of Grants Pass urged the Supreme Court to overrule *Johnson* and its precedent, *Martin*.[48] An amicus curiae brief, filed

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10, 2019), perma.cc/KCM2-C4S2; Fox40 News, *Local Business Concern with Growing Homeless Encampment*, YOUTUBE, at 00:00–02:07 (May 17, 2024), perma.cc/SF6G-LL8F; CBS 13 News, *Portland Businesses Complain About Influx of Homeless Campers on City's West Side*, YOUTUBE, at 0:00–01:44 (June 1, 2023), perma.cc/3W75-SYDS; KGW News, *Impact of a Single Homeless Camp: $18,347 in Clean-up, One Thousand Complaints and Endless Conflict*, YOUTUBE, at 02:31–03:33 (Sept. 1, 2021), perma.cc/LW35-9T7V.

[43] Eric Johnson, *Paradise Lost: Homeless in Los Angeles*, KOMO NEWS (June 18, 2019, 6:50 PM), perma.cc/M8DR-T8GS.

[44] OLSON & EVANGELIS, *supra* note 9, at 8; Kate Cagle, *Crime Rate Among Homeless Skyrockets in Los Angeles*, SPECTRUM NEWS 1 (May 7, 2019, 8:30 AM PT), perma.cc/TDW9-HP9V; Lolita Lopez & Phil Drechsler, *Gangs of LA on Skid Row*, NBC4 LOS ANGELES, perma.cc/9DYR-Z2DL (last updated Mar. 19, 2018, 3:05 PM).

[45] Johnson, *supra* note 43.

[46] KATU News, *Southeast Portland Residents Fed Up with Never Ending Homeless Camps*, YOUTUBE, at 00:10–01:08 (July 16, 2024), perma.cc/X2M5-5U5M; KGW News, *supra* note 42, at 02:20–02:35.

[47] Petition for a Writ of Certiorari at 30–35, *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024) (No. 23-175), 2023 LEXIS 2456; Brief of Idaho, Montana and 22 Other States as Amici Curiae in Support of Petitioner at 3–4, *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024) (No. 23-175), 2024 LEXIS 890 [hereinafter Brief of Idaho et al.]; *see Docket for No. 23-175*, U.S., perma.cc/BQM8-5FZ5 (last visited Oct. 28, 2025).

[48] Petition for a Writ of Certiorari, *supra* note 47, at 2–6.

jointly by nearly twenty-four other states and cities in support of the petitioners, argued that "addressing homelessness is States' and cities' job" and the "Court [should] let them do it."[49] The U.S. Supreme Court granted certiorari in 2023 and issued its decision in *City of Grants Pass v. Johnson* in June of 2024.[50]

C. *The United States Supreme Court Overruled* Martin *and* Johnson *in* City of Grants Pass v. Johnson

In *City of Grants Pass,* the U.S. Supreme Court overruled *Martin v. Boise*, holding that the "enforcement of generally applicable laws" that criminalize sleeping or camping on public property, against homeless individuals, does not violate the CUPC.[51] The Court held that the law at issue was not unconstitutional under *Robinson v. California* because it did not criminalize the *status* of being homeless; rather, it prohibited the *act* of camping on public property and could be enforced against anyone.[52] Because criminalizing an "involuntary act" does not violate the CUPC under the holding in *Powell v. Texas*, the Court held that it would not be unconstitutional to enforce the law against "involuntarily homeless" individuals even when no shelter space is available.[53] While this allows state governments to enact public-camping laws and enforce them against the homeless even when there is no available shelter space, it does not prevent state governments from setting additional substantive standards to limit the enforcement of public-camping laws against the homeless under certain circumstances.[54] Following *City of Grants Pass*, hundreds of local governments across the country revised, enacted, and began enforcing new public-camping laws that expanded the range of prohibited conduct.[55] Some governments issued policies that directed officers to enforce these laws more aggressively against the homeless, while others directed officers to be more lenient.[56]

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[49] Brief of Idaho et al., *supra* note 47, at 23.

[50] 603 U.S. 520 (2024).

[51] *Id.* at 521.

[52] *Id.* at 546–47; *see* Robinson v. California, 370 U.S. 660, 666–67 (1962); Kirk Mylander, *Exploring the Implications of the U.S. Supreme Court Decision in Grants Pass v. Johnson*, LEAGUE OF OR. CITIES, perma.cc/5MTM-BP2J (last visited Oct. 28, 2025).

[53] *See City of Grants Pass*, 603 U.S. at 522–23; Powell v. Texas, 392 U.S. 514, 533 (1968).

[54] *City of Grants Pass*, 603 U.S. at 550.

[55] Sequeira, *supra* note 11.

[56] *Compare* Makenna Sievertson et al., *Long Beach to Use Supreme Court's Grants Pass Ruling to Clear Encampments of Unhoused People*, LAIST (Aug. 15, 2024, 2:55 PM), perma.cc/G5M3-X5TF

Both the majority and dissenting opinions in *City of Grants Pass* pointed to criminal defenses and constitutional provisions other than the CUPC that defense attorneys can use to challenge the enforcement of public-camping laws against the homeless.[57] Justice Gorsuch noted that common-law criminal defenses such as necessity, "[i]nsanity, diminished-capacity, and duress" could be available in numerous jurisdictions.[58] He argued that if criminal defense attorneys raise these challenges, state courts can adjust their doctrines over time "to suit their evolving communities," and that legislatures may revise their laws to do the same.[59] Justice Sotomayor explained that defendants could challenge the enforcement of public-camping laws under the "void for vagueness" doctrine of the Due Process Clause and the selective enforcement doctrine of the Equal Protection Clause.[60] These challenges are fact sensitive, so their applications will depend on the facts and circumstances surrounding each case.[61]

D. *Legal Representation for the Homeless and Alternative Challenges to Public-Camping Laws*

1. The Public Defender System

The most common form of legal representation for criminal defendants experiencing homelessness is provided by licensed public defenders and court-appointed attorneys, who are paid by the county or state where they practice.[62] The Sixth Amendment guarantees the accused the right to counsel in all criminal prosecutions and requires state courts to provide attorneys for

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(explaining that "particularly for encampments," Long Beach will use *City of Grants Pass* as authority to issue misdemeanor trespassing citations "to any person sleeping in public who refuses services or housing…punishable by up to six months in prison or a $1,000 fine"), *with* Raegan Loughrey & Ryan Trowbridge, *Getting Answers: State's Homeless Encampment Laws*, W. MASS NEWS (Nov. 18, 2024, 12:29 PM EST), https://perma.cc/6EYN-THK7 (explaining that North Hampton Officials are inclined to "look the other way" if an instance of public camping "stays non-controversial in recognition of crisis").

[57] 603 U.S. at 550 (majority opinion), 590 (Sotomayor, J., with Kagan and Jackson, JJ., dissenting).

[58] *Id.* at 550 (majority opinion).

[59] *See id.*; Brief of Idaho et al., *supra* note 47, at 21.

[60] *City of Grants Pass*, 603 U.S. at 590–91 (Sotomayor, J., with Kagan and Jackson, JJ., dissenting).

[61] *See id.*; Brief of Idaho et al., *supra* note 47, at 13–14, 21.

[62] *See* Legal Info. Inst., *Public Defender*, CORNELL L. SCH., perma.cc/G4M5-VMY6 (last visited Oct. 28, 2025).

all criminal defendants who cannot afford one.[63] Indigent criminal defendants cannot choose their own public defender; instead, judges assign a certain public defender's office to a defendant, and that office will manage which attorneys work on the case.[64] Nearly 80% of all criminal defendants cannot afford a lawyer, making public defenders the attorneys who represent the stark majority of them.[65] However, most public defenders offices receive limited government funding, are understaffed, and offer low salaries.[66] Thus, most public defenders grapple with unmanageable caseloads and inadequate resources, which hinders their ability to provide adequate legal representation to indigent clients, especially in misdemeanor cases.[67] Because public defenders rarely have the resources necessary to go to trial, approximately 90% of their cases are resolved through the plea bargaining process.[68]

2. The Void for Vagueness Doctrine

As Justice Sotomayor noted in *City of Grants Pass*, criminal defendants can challenge a public-camping law as "void for vagueness," in violation of the Due Process Clause, if it is unclear what conduct the statute prohibits and if it promotes arbitrary or discriminatory enforcement by conferring excessive discretion on executive officials.[69] This doctrine encourages legislatures to enact statutes with minimal guidelines for enforcement to protect citizens from "policemen, prosecutors, and juries" who use the law

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[63] U.S. CONST. amend. VI; *see* Gideon v. Wainwright, 372 U.S. 335, 339–43 (1963).

[64] *Public Defenders & Defendants' Legal Rights*, JUSTIA, https://perma.cc/25LV-KNLG (last updated Oct. 2024).

[65] Eric M. Mark, *Underfunded Public Defender's Offices Cost Criminal Defendants*, L. OFF. OF ERIC M. MARK, perma.cc/79W7-5FNX (last visited Oct. 28, 2025) [hereinafter *Underfunded P.D.'s Offices*].

[66] *See id.*

[67] *See* Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771, 771, 778 (2010); *Do Public Defenders Win Many Cases?*, SPODEK L. GRP. (May 10, 2024), perma.cc/6FUB-4AW3; *see, e.g.*, *DUI Public Defender Versus Private Lawyer*, MICH. DEF. L. PAUL J. TAFELSKI (Nov. 20, 2023), perma.cc/7MWL-CRSR.

[68] Lindsey Devers, RESEARCH SUMMARY: PLEA AND CHARGE BARGAINING 1, 1 (2011), perma.cc/J9R6-KLNJ (estimating that about 90 to 95 percent of state and federal criminal cases are resolved through the plea bargaining process).

[69] 603 U.S. 520, 590–91 (2024) (Sotomayor, J., with Kagan and Jackson, JJ., dissenting); Kolender v. Lawson, 461 U.S. 352, 357–58 (1983); Desertrain v. City of Los Angeles, 754 F.3d 1147, 1155 (9th Cir. 2014); Sekhon, *supra* note 13, at 1184.

to "pursue their personal predilections."[70] Governments can save vague statutes from being void for vagueness if they promulgate policies that further explain how the statute should be enforced.[71] If these policies still fail to prevent arbitrary or discriminatory law enforcement, defendants may challenge the statute under the doctrine of selective enforcement.[72]

3. Selective Enforcement

Selective enforcement is an equal protection violation that occurs when executive officials enforce laws in a discriminatory manner.[73] The claim is a post hoc remedy that provides a defense against discriminatory law enforcement tactics.[74] To succeed in these claims, a criminal defendant must show clear evidence that the government's actions had a discriminatory effect on a certain class of individuals ("disparate impact") and were motivated by a discriminatory purpose ("intentional discrimination").[75]

To prove disparate impact, a defendant must show that there are other "similarly situated" offenders of a law, not a part of the defendant's class, against whom the government has historically not enforced the law.[76] To prove intentional discrimination, defendants must show evidence that the government intentionally enforced the law against members of their specific class on account of their status as a member of that class.[77] Only after defendants make both of these showings may they obtain discovery from the government to embolden their claim, because "in the absence of clear evidence to the contrary, courts presume that [executive officials] have properly discharged their official duties."[78]

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[70] *Kolender*, 461 U.S. at 358.

[71] *Desertrain*, 754 F.3d at 1157.

[72] Elias Neibart, *Equal Protection Prophylaxis,* 138 HARV. L. REV. 632, 632 (2024).

[73] United States v. Armstrong, 517 U.S. 456, 463–65 (1996) (explaining analysis for "selective prosecution" claims); United States v. Barlow, 310 F.3d 1007, 1010 (2002) (explaining that courts use the same analysis for selective enforcement and selective prosecution claims); Sekhon, *supra* note 13, at 1182–83.

[74] Neibart, *supra* note 72, at 632.

[75] Sekhon, *supra* note 13, at 1182–83; *see Armstrong*, 517 U.S. at 465; *Barlow*, 310 F.3d at 1010.

[76] *Armstrong*, 517 U.S. at 465; Neibart, *supra* note 72, at 634–35 (meaning defendants must prove that state actors *permit* individuals who are not a part of the defendant's class to engage in the unlawful activity but *enforce or prosecute* individuals of the defendant's class who engage in that identical activity).

[77] *See*, *e.g.*, Sekhon, *supra* note 13, at 1182–83.

[78] United States v. Chemical Foundation, Inc., 272 U.S. 1, 14–15 (1926).

4. Prosecutorial Discretion

Courts are reluctant to interfere with the powers that the U.S. Constitution confers on executive officials to exercise their discretion when enforcing laws or prosecuting individuals who violate them.[79] Prosecutors have broad discretion to decide whether to initiate or dismiss charges against individuals accused of violating the law.[80] In exercising this discretion, prosecutors will assess the availability of evidence necessary to secure a conviction and whether pursuing a conviction serves the public's best interest.[81]

II. Importance and Relevance

A. *The Current U.S. Supreme Court Is Not Likely to Grant Certiorari to Reconsider the Constitutionality of Public-Camping Laws Under Any Other Constitutional Doctrine*

The U.S. Supreme Court in *City of Grants Pass* set the precedent that state governments should be able to dictate how their police powers handle issues relating to homelessness without interference from the federal government.[82] The decision did not come as a surprise given the incentive of the Court's 6-3 conservative supermajority to return to "the people and their elected representatives" the power to settle the issues that polarize America the most.[83] Critics argue that in leaving states with this power, the Court has abandoned constitutional principles in favor of advancing an "antidemocratic, far-right policy agenda."[84] Thus, although Justice Sotomayor's dissent proposes constitutional doctrines other than the CUPC

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[79] Nieves v. Bartlett, 587 U.S. 391, 417–18 (2019); *Armstrong*, 517 U.S. at 464–65; Neibart, *supra* note 72, at 635.

[80] U.S. CONST. art. II, § 3; *Armstrong*, 517 U.S. at 464; Heckler v. Chaney, 470 U.S. 821, 832 (1985).

[81] Delton Walker, *Topic: Why do Prosecutors Dismiss Charges or Cases?*, WASH. CNTY., IDAHO, perma.cc/HQC3-U778 (last visited Oct. 28, 2025).

[82] *See* 603 U.S. 520, 533 (2024).

[83] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231, 239 (2022) (holding that the Federal Constitution does not guarantee the right to abortion and that state legislatures may instead regulate abortion access as they see fit); Frank Newport, *Americans' Views on Federalism as States Take on More Power*, GALLUP (July 15, 2022), https://perma.cc/3U7L-TPHH; *Mayor Bass Slams Supreme Court's Ruling to Allow Failed Homeless Policies Across the Nation*, MAYOR KAREN BASS, CITY OF L.A. (June 28, 2024), perma.cc/LZ2N-YQPM.

[84] Devon Ombres, *The Supreme Court has Fully Embraced an Antidemocratic, Right-Wing Agenda*, CTR. FOR AM. PROGRESS (July 3, 2024), https://perma.cc/Q4ZV-KFJ4.

that defense attorneys could use to challenge public-camping laws, it is unlikely that the current Court will ever grant certiorari to reconsider the constitutionality of enforcing public-camping laws against the homeless under other constitutional doctrines.[85] Defense attorneys may raise alternative constitutional challenges in lower courts, but the chances of those challenges making their way back to the current U.S. Supreme Court are slim.[86]

B. *Defendants Need Alternative Strategies for Relief Because Governments Will Not Execute Long-Term Solutions to the Homelessness Crisis Quick Enough to Prevent Public-Camping Laws from Criminalizing the Homeless*

Public-camping laws are now a tool government leaders can use to remove homeless encampments; however, they should not be used as a long-term solution to the homelessness crisis.[87] Although the health and safety risks that homeless encampments present in communities certainly render their removal necessary, enforcing public-camping laws against the individuals living within encampments makes it harder for them to escape homelessness.[88] The prospect of facing jail time, having to pay a debt to the city, or obtaining a criminal record may undermine a homeless individual's efforts to find gainful employment and create a "costly revolving door that circulates [those] individuals . . . from the street to the criminal justice system and back."[89]

Neither the enforcement of public-camping laws nor the building of more temporary shelter space will eliminate the homeless from our streets.[90]

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[85] *See City of Grants Pass*, 603 U.S. at 557.

[86] *See* Jayson Parsons, *Anti-Camping Laws: U.S. Supreme Court Holds that Enforcement of Anti-Camping Laws Does Not Violate the Eighth Amendment Regardless of an Individual's Access to Alternative Shelter*, RUTAN & TUCKER, LLP (July 1, 2024), perma.cc/3Z2A-FHTT (showing how the Court does not think these matters should be resolved "from the bench"). *See generally City of Grants Pass*, 603 U.S. at 590–91 (Sotomayor, J., with Kagan and Jackson, JJ., dissenting).

[87] Ludden, *supra* note 2.

[88] *See City of Grants Pass*, 603 U.S. at 568 (Sotomayor, J., with Kagan and Jackson, JJ., dissenting). *See generally* OLSON & EVANGELIS, *supra* note 9, at 2–12.

[89] *City of Grants Pass*, 603 U.S. at 568 (Sotomayor, J., with Kagan and Jackson, JJ., dissenting); *Dangerous Precedent for the Homeless*, *supra* note 2; NBC 10 WJAR, *Fall River Bans Homeless Encampments*, YOUTUBE, at 01:03–01:22 (Sept. 25, 2024), perma.cc/9F4H-ELQ8 (showing the sheriff of Fall River Police Department expressing frustration with the resulting increase in inmates).

[90] *Would Adding More Emergency Shelter Help Reduce Unsheltered Homelessness? It's Complicated*,

Instead, communities must consider how to enable homeless individuals to transition from shelter to housing.[91] Federal and local governments can facilitate this transition by funding projects that dismantle systematic barriers to employment opportunities, increase accessibility to mental health care or substance abuse services, and create affordable housing options.[92] However, local governments have historically been slow to initiate these types of projects because they implicate competing public and private economic interests, and when these projects *are* initiated, they often are executed inefficiently.[93] Following *City of Grants Pass*, it is unlikely that local governments will implement plans that address the root causes of homelessness quickly enough to get homeless individuals off the streets before they are arrested and prosecuted for violating public-camping laws.[94] To avoid criminalization, homeless individuals will have to depend on their overworked public defenders to be zealous advocates or hope that prosecutors are willing to dismiss the charges against them.[95]

NAT'L ALL. TO END HOMELESSNESS (Aug. 21, 2018), perma.cc/9H5F-7KG6.

[91] *Id.*

[92] *See Homelessness Programs and Resources*, SAMHSA, perma.cc/R8U7-46NZ (last updated Aug. 28, 2025) [hereinafter *Homelessness Programs*]; Jeremiah Hayden, *Grants Pass v. Johnson: Here's What Led to Key Homelessness Case Before High Court*, OR. PUB. BROAD. (Apr. 4, 2024, 9:00 AM), perma.cc/9UGP-BXE8; Nicole DuBois, *New Federal Funding Boosts Unsheltered Homelessness Response*, NAT'L ALL. TO END HOMELESSNESS at 1 (Feb. 27, 2024), perma.cc/6S9Q-WXQ2; Nisha Bharat et al., *Homelessness and Job Security: Challenges and Interventions*, UNIV. OF MICH. SCH. OF PUB. HEALTH (May 11, 2020), https://perma.cc/VTT9-R4K3.

[93] *See* Lee Ohanian, *The Economics of Why Homelessness Worsens as Governments Spend Even More on the Problem*, HOOVER INST. (June 18, 2019), perma.cc/9MEK-ZVZ6; Pat Williams-Henry, *How Profit and Policy Keep the Homeless Crisis Alive*, MEDIUM (Nov. 15, 2024), https://perma.cc/3KRB-79BM; *The Affordable Housing Crisis Grows While Efforts to Increase Supply Fall Short*, U.S. GOV'T ACCOUNTABILITY OFF. (Oct. 12, 2023), perma.cc/4L2F-SYGQ; *see, e.g.*, Todd Wallack & Christine Willmsen, *Mass. Has a Huge Waitlist for State-Funded Housing: So Why Are 2,300 Units Vacant?*, WBUR (Sept. 19, 2023), perma.cc/5Q6S-DWSM.

[94] *See, e.g.*, Wallack & Willmsen, *supra* note 93.

[95] *See infra* Part V.

ANALYSIS

III. Because the Public-Camping Laws Enacted After *City of Grants Pass* Are Vague, They Confer Excessive Discretion on Executive Officials to Enforce a Generally Applicable Law Disproportionately Against the Homeless

A. *Vague Public-Camping Laws Confer Excessive Discretion on Individual Officers to Enforce Laws in an Arbitrary, Inhumane, or Discriminatory Manner Because They Lack Enforcement Guidelines*

Since the Supreme Court decided *City of Grants Pass*, approximately 150 cities and 32 states have enacted or revised public-camping laws to prohibit camping or sleeping on public property regardless of whether shelter space is available.[96] The governments that revised their public-camping laws eliminated language that had provided officials with minimal guidance regarding how to enforce them specifically against homeless individuals—language that was previously required under *Martin* and *Johnson*.[97] One of the first Ninth Circuit cities to revise their public-camping laws by striking out such language was Richland, Washington.[98] The revisions made by hundreds of other local governments are nearly identical to those Richland made, so Richland's new law accurately represents how public-camping laws have changed across the country after *City of Grants Pass*.[99]

Richland's new law eliminated language that stated that the imposition of criminal sanctions against the homeless should be suspended if there is no available shelter space and when it is evident that a homeless individual

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[96] Sequeira, *supra* note 11.

[97] *See, e.g.*, Josh Cohen, *Six WA Cities Pass Anti-Homeless Laws After Grants Pass Decision*, CASCADE PBS (Dec. 29, 2024), perma.cc/V7ZA-96BL.

[98] RICHLAND, WASH., ORDINANCE NO. 2024-27 (2024); Wendy Culverwell, *'More Heavy Handed.' One Tri-Cities Counsel to Crack Down on Homeless Camping in Parks*, TRI-CITY HERALD (Aug. 29, 2024, 12:18 PM), perma.cc/TRU8-S4KW.

[99] *E.g.*, ABERDEEN, WASH., MUN. CODE § 12.46 (2024); AUBURN, WASH., CITY CODE § 9.50.03003 (2024); BOZEMAN, MONT., CODE OF ORDINANCES § 2.08.2 (2024); FORT LAUDERDALE, FLA., CODE OF ORDINANCES § 16.32 (2024); KINGSBURG, CAL., CODE OF ORDINANCES § 8.28 (2024); PHOENIX, ARIZ., CITY CODE § 23.30 (2024); RENO, NEV., CODE OF ORDINANCES § 8.12.011 (2025); RICHLAND, WASH., MUN. CODE § 8.10.030 (2024); WEST WARWICK, R.I., CODE OF ORDINANCES § 12.83 (2024). *See* Patrick, *supra* note at 12 (explaining that "Auburn's City Council unanimously approved striking language in its camping ordinance that required city employees to offer overnight shelter to unhoused people before charging them with a misdemeanor for sleeping on public land.").

is actively engaging in "the process of exiting homelessness."[100] The city also eliminated a list that included the specific names of buildings, parks, and streets where it had been illegal to camp and swapped it with language stating that now, it is illegal to camp on any "city-owned" property. [101] Richland's new law explicitly cited *City of Grants Pass* to insulate it from constitutional challenges.[102]

Richland's revised law now has no language explaining how or when to enforce it— specifically against homeless individuals.[103] Its revisions also drastically expand the area within which camping is illegal.[104] Public-camping laws like Richland's—which lack specific guidelines for enforcement and broaden the range of prohibited conduct—are susceptible to "void for vagueness" challenges because they confer substantial discretionary enforcement power on executive officials.[105] These laws leave significant room for officers to choose when, where, how, and against whom to enforce them.[106] The breadth of this decision-making power risks enforcement that is inhumane, arbitrary, and discriminatory.[107]

Vague public-camping laws that lack specific guidelines for enforcement grant individual officers the discretion to enforce them against a homeless individual regardless of the circumstances surrounding that individual's unlawful camping.[108] For example, pursuant to a state-wide public-camping law, an officer in Louisville, Kentucky issued a homeless woman a misdemeanor citation for unlawful camping while she was in *active* labor.[109] Because the city's law lacked enforcement guidelines, this

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[100] RICHLAND, WASH., MUN. CODE § 8.10.070(B) (2024).

[101] *Id.* §§ 8.10.070 (A)(1), 8.10.030(E) (prohibiting camping in "[a]ny other city-owned or maintained property.").

[102] RICHLAND, WASH., ORDINANCE NO. 2024-27 (2024).

[103] RICHLAND, WASH., MUN. CODE § 8.10.

[104] *Id.* § 8.10.030.

[105] *See id.* § 8.10; Kolender v. Lawson, 461 U.S. 352, 357–58 (1983); Sekhon, *supra* note 13, at 1184 (arguing that even narrowly drafted criminal laws confer wide-ranging discretion on individual officers).

[106] *See Kolender*, 461 U.S. at 357–58.

[107] *See id.*

[108] *See*, *e.g.*, Dinman & Duggan, *supra* note 14 (showing that officers would yell at groups of campers, screaming that they are "all being detained" as they packed up their things to leave); Emmett Lindner, *Homeless Woman Going Into Labor is Cited for Violating Camping Ban*, N.Y. TIMES (Dec. 21, 2024), perma.cc/8GKT-2FVE.

[109] *Shocking Bodycam Footage Shows Police Giving a Woman in Active Childbirth a Citation for Being Homeless*, NAT'L HOMELESSNESS L. CTR. (Dec. 19, 2024), perma.cc/MQB2-SMX4.

individual officer had the discretion to enforce it even when it would be inhumane to do so, as it was here.[110] The city of Louisville should have issued a policy to interpret its public-camping law and further outline what circumstances would render its enforcement against homeless individuals appropriate.[111]

After *City of Grants Pass*, individual officers are likely to gear the enforcement of their public-camping laws toward resolving the severe health and safety issues encampments created during the *Martin* and *Johnson* eras.[112] They will likely take advantage of the broad discretion that vague public-camping laws grant them by prioritizing enforcement in areas where homeless encampments are prevalent.[113] Although using these laws to clear homeless encampments may effectively address the issues they cause, aggressively enforcing a so-called generally applicable law *specifically* against homeless individuals may constitute discriminatory enforcement.[114]

Unlike the city of Louisville, Kentucky, most of the governments who enacted or revised vague public-camping laws after *City of Grants Pass* supplemented them with policies that promulgate additional enforcement guidelines.[115] Enacting such policies will save a law from challenges under the "void for vagueness" doctrine.[116] Because so many cities have and continue to take this precaution, void for vagueness challenges to public-camping laws will be rare.[117] However, even government policies

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[110] *See* Paige Thompson, *Body Camera Video Shows LMPD Cite Woman for Unlawful Camping After She Said She Was in Labor*, WDRB (Dec. 19, 2024), perma.cc/CQ2E-3N7M.

[111] *See id.* (explaining that the LMPD supported their officers using their individual discretion "and the information available to them at the time" in making the decision to enforce public-camping laws); Sekhon, *supra* note 13, at 1175 (explaining that "[i]n the absence of departmental directives, patrol officers were free to devise enforcement protocol based on hunch, habit, and bias").

[112] *See* Ludden, *supra* note 2 (showing that officials plan to ramp up arrests and fines in areas where homelessness has become problematic and to take the homeless people off the streets).

[113] *See* Ludden, *supra* note 2.

[114] *See* Kolender v. Lawson, 461 U.S. 352, 357–58 (1983).

[115] *See* Kendall, *supra* note 14 (implying that some cities issued policies to gear public-camping laws toward cracking down on homelessness while others sought to be more lenient and enforce the laws only in specific situations).

[116] *See* Desertrain v. City of Los Angeles, 754 F.3d 1147, 1157 (9th Cir. 2014); *An Over-Expanded Application of Vagrancy Statues*, 1961 WASH. U. L. REV. 425, 427 (1961) (explaining that void for vagueness challenges are rarely successful against vagrancy laws because courts see these laws as valid exercises of state police powers to preserve order and security in communities).

[117] *See* Kendall, *supra* note 14 (pointing to the many executive orders issued across California

themselves can promote inhumane, arbitrary, or discriminatory enforcement.[118]

B. *Vague Public-Camping Laws Also Confer Excessive Discretion on Police Departments and Executive Leaders to Promulgate Policies That Dictate How Individual Officers Distribute Enforcement Across Their Jurisdiction*

Just as vague public-camping laws confer excessive discretion on *individual* officers to enforce the law in an arbitrary, discriminatory, or inhumane manner; the laws confer on executive leaders excessive *departmental* discretion to implement policies that do the same.[119] Vague laws give executive leaders a license to issue policies that dictate how the enforcement of a law gets distributed across their jurisdiction.[120]

After *City of Grants Pass*, many local governments promulgated policies—either publicly or solely to law enforcement officers—explaining their intention to use the case as an authority to begin more aggressively enforcing "generally applicable" public-camping laws specifically against the homeless.[121] An example of one such city is Long Beach, California.[122] In a city-wide memo, Long Beach stated that while it encourages officers to offer homeless individuals who are found unlawfully camping outreach services or shelter options, officers are not required to do this and can issue

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cities after *City of Grants Pass* that direct law enforcement agencies to start aggressively enforcing public camping ordinances as a way to immediately clear encampments). *See generally Desertrain*, 754 F.3d at 1156–57 (explaining that when law enforcement officers are given an executive order with guidelines on how to enforce a new law, only if officers either routinely do not follow it, or are subsequently instructed by their Captains not to follow it, will the memo not be enough to save the statute from void for vagueness challenges).

[118] *See* Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521, 522–23 (2015); Sekhon, *supra* note 13, at 1186.

[119] *See* PRINCIPLES OF THE L. OF POLICING § 5-5.02 (AM. L. INST., Combined Revised Tentative Drafts 2023) (explaining the purpose of written policies is to "help . . . cabin officer discretion by setting out the criteria that officers must use in deciding which individuals or entities may be subject to suspicion-less policing activity"); Sekhon, *supra* note 13, at 1211–12.

[120] *See* Sekhon, *supra* note 13, at 1186.

[121] *See, e.g.*, Dinman & Duggan, *supra* note 14 (showing that Spokane's police department may have directed officers to enforce the law more aggressively based on a recent increase in officer response rates to complaints); Kendall, *supra* note 14 (explaining Gavin Newsom's executive order which "[directed] state agencies to clear encampments on state property, and [encouraged] local governments to do the same").

[122] LONG BEACH, CAL., MUN. CODE § 9.42.110 (2024); Sievertson et al., *supra* note 56.

homeless individuals misdemeanor citations whether or not they have repeatedly refused offers for assistance.[123] The memo further stated that officers should consider certain circumstantial factors before enforcing public-camping laws, including: the availability of after-hours shelter services, city resources, operational staffing, situational workload, and the "severity of [the] issue to ensure police response remains proportional to the situation."[124]

Long Beach's policy *does* cabin an individual officer's discretion, limiting the risk of inhumane enforcement by requiring officers to consider what factors might render enforcement absolutely necessary—such as the level of controversy a homeless encampment has reached and the number of complaints received about an encampment.[125] However, the policy is still innately geared toward *aggressively* enforcing the law *specifically* against the homeless and implies that officers should prioritize their resources to enforce the law in areas where homeless encampments have become controversial.[126] Thus, Long Beach used the departmental discretion conferred by their vague public-camping law to implement a policy that directed individual officers to distribute enforcement more harshly against homeless individuals, resulting in discriminatory enforcement.[127] Hundreds of other local governments have done the same.[128] Discriminatory law enforcement policies might make these local governments susceptible to claims of selective enforcement.[129]

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[123] *See* Chandler, *supra* note 11, at 4.

[124] Chandler, *supra* note 11, at 4.

[125] *See* Chandler, *supra* note 11, at 2; Kolender v. Lawson, 461 U.S. 352, 358 (1983) (explaining that minimal enforcement guidelines limit discretion and decrease the risk that executives will discharge their official duties only to "pursue their personal predilections").

[126] *See* Sievertson et al., *supra* note 56.

[127] *See* Kendall, *supra* note 14; Ludden, *supra* note 2 (implying that departments are encouraging discriminatory enforcement because they have evidently "ramped up fines and arrests" against the homeless to "get them off the streets"); Neibart, *supra* note 72, at 632.

[128] *See* Ludden, *supra* note 2; Sequeira, *supra* note 11; Kendall, *supra* note 14; Dinman & Duggan, *supra* note 14.

[129] *See* Neibart, *supra* note 72, at 632.

IV. Efforts to Challenge Policies That Encourage the Selective Enforcement of Public-Camping Laws Against the Homeless Are Unlikely to Succeed

Policies that direct officials to aggressively enforce "*generally* applicable" public-camping laws *specifically* against homeless individuals may encourage challenges under the selective enforcement doctrine of the Equal Protection Clause.[130] However, it is unlikely that these claims will be successful for a number of reasons.[131] First, the U.S. Supreme Court has never recognized homeless individuals as a protected class under the Equal Protection Clause.[132] Second, it will be incredibly difficult for defendants to obtain evidence pre-discovery showing that governments have historically enforced a public-camping law against homeless individuals and not against non-homeless individuals.[133] Finally, courts will not want to interfere with the power of executive officials to use public-camping laws as a tool to address the unique issues homelessness has created in their communities.[134]

A. *Defendants Will Likely Fail in Claims of Selective Enforcement Because Courts Do Not Recognize the Homeless as a Suspect Class*

Homeless individuals prosecuted for unlawful camping might claim that they are a "victim of selective enforcement" and allege that officers have routinely enforced "generally applicable" public-camping laws against homeless individuals who unlawfully camp, but permitted those who are not homeless to engage in identical conduct.[135] In making such a claim, the defendant assumes that homeless individuals are a class that the Equal Protection Clause protects against unequal enforcement of the law.[136]

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[130] *See generally* City of Grants Pass v. Johnson, 603 U.S. 520, 590–91 (2024) (Sotomayor, J., with Kagan and Jackson, JJ., dissenting).

[131] *See infra* text accompanying note 132–34. *See generally* United States v. Armstrong, 517 U.S. 456, 464 (1996); Sanchez v. City of Fresno, 914 F. Supp. 2d 1079, 1108 (E.D. Cal. 2012); Sekhon, *supra* note 13, at 1183–84.

[132] *Sanchez*, 914 F. Supp. 2d at 1108 (stating that the Supreme Court has "declined to define suspect classifications based upon housing status").

[133] *See* Sekhon, *supra* note 13, at 1183–84 (explaining the difficulty of establishing a case of selective enforcement due to the barriers courts place on obtaining discovery).

[134] *See Armstrong*, 517 U.S. at 464 (explaining that executive officials "retain 'broad discretion' to enforce the Nation's criminal laws.").

[135] *C.f.* Sekhon, *supra* note 13, at 1182–83.

[136] *See* Fisher v. Univ. of Tex., 570 U.S. 297, 309–10 (2013); *Section VII: Proving Discrimination-Disparate Impact*, CIV. RIGHTS DIV. U.S. DEP'T OF JUST., perma.cc/4YMH-GG7Q (last visited Oct.

However, courts have historically ruled that the homeless are not a "suspect class" deserving of heightened protection from discriminatory state action.[137] Courts are more inclined to strictly scrutinize discriminatory state action that affects an established "suspect class" or group of individuals that the law has historically discriminated against due to their race, national origin, or sex.[138] Even the fact that a significant percentage of homeless individuals belong to a minority race that has historically faced discrimination under the law has not been enough to make courts recognize the homeless as a suspect class.[139]

Because the homeless are not considered a suspect class, courts will defer to the government's interest when evaluating claims that public-camping laws have been selectively enforced against them.[140] After *City of Grants Pass*, governments are likely to contend that their interest in aggressively enforcing these laws against the homeless is to extinguish the health and safety hazards that homeless encampments created during the *Martin* and *Johnson* eras.[141] Given the fact that the homeless are a non-suspect class, courts are highly likely to find this government interest important enough to defeat a homeless defendant's claim of selective enforcement.[142]

B. *Defendants Will Likely Fail in Claims of Selective Enforcement Because They Will Not Have Access to the Evidence Necessary To Show Disparate Impact and Intentional Discrimination*

To allege a claim of selective enforcement, defendants must show that the enforcement of a public-camping law has had a discriminatory effect ("disparate impact") on homeless individuals and was motivated by a discriminatory purpose ("discriminatory intent").[143] In order to prove

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1, 2025) [hereinafter *Proving Discrimination-Disparate Impact*].

[137] *Sanchez*, 914 F. Supp. 2d at 1108.

[138] *See Proving Discrimination-Disparate Impact*, *supra* note 136.

[139] Johnson v. City of Phoenix, No. CV-23-00495-PHX-GMS, 2024 U.S. Dist. LEXIS 190580, at *5–9 (D. Ariz. 2024).

[140] *See*, *e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996) (explaining that a government action implicating a non-suspect class will be sustained under Equal Protection if it advances a legitimate government interest, "even if it seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.").

[141] *See* Petition for a Writ of Certiorari, *supra* note 47, at 30–35; Brief of Idaho et al., *supra* note 47, at 5–7.

[142] *See Romer*, 517 U.S. at 631–32; Neibart, *supra* note 72, at 634–36.

[143] United States v. Armstrong, 517 U.S. 456, 465 (1996).

disparate impact, defendants would have to show—before having the opportunity to request discovery from the government—that there are other "similarly situated" offenders against whom the government has not enforced public-camping laws.[144] To meet the "similarly situated" requirement, the evidence presented must clearly show that while officers enforce public-camping laws against homeless individuals who engage in public-camping, they *permit* individuals who are not homeless to engage in identical conduct.[145]

Newspaper articles or studies that show that homeless individuals are the predominant class public-camping laws have been enforced against will not be enough to satisfy the similarly situated requirement.[146] Defendants must show that there are a substantial number of offenders who are *not* homeless whom the law has *not historically* been enforced against, not merely that the law has been enforced against a substantial number of homeless offenders.[147] While defendants might be able to show some *instances* of non-enforcement through evidence such as an officer's body-camera footage, witness testimony, or police records, they will struggle to obtain the substantial amount of evidence necessary to show a *historical pattern* of non-enforcement before having the opportunity to obtain discovery.[148] Furthermore, the public defenders representing the homeless individuals who bring these claims are unlikely to have the resources needed to produce this evidence through their own private investigations.[149]

To then prove discriminatory intent, defendants will have to show evidence that the government intentionally and deliberately enforced the law more aggressively against homeless individuals than non-homeless individuals.[150] Evidence that shows that the government has routinely failed

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[144] *See id.*

[145] *See id.* at 466; Sekhon, *supra* note 13, at 1183.

[146] *See Armstrong*, 517 U.S. at 470.

[147] *See id.* at 465.

[148] *See generally Law Enforcement Abuse of Power*, STROUD FLECHAS & DALTON, perma.cc/VU9D-XKT7 (last visited Oct. 28, 2025) (showing the importance of documenting instances of discriminatory enforcement and that police reports including the time and place of the instance, witness evidence, and medical reports, could be used for proof); Joy, *supra* note 67, at 777.

[149] *See* Joy, *supra* note 67, at 777 (explaining that a factor "contributing to poor quality of defense services are excessive caseloads, lack of funds for expert witnesses and investigators, and extremely low pay rates for court-assigned lawyers and contract defense services").

[150] *See* Oyler v. Boles, 368 U.S. 448, 456 (1962); Maggie Angst & Elizabeth Wilson, *Mayor Breed Says 'Very Aggressive' Sweep of S.F. Homeless Encampments Will Launch in August*, S.F. CHRON. (July 18, 2024), https://perma.cc/W4PF-QY5T; Sekhon, *supra* note 13, at 1183.

to enforce public-camping laws against non-homeless offenders due to a lack of knowledge of their offensive conduct is not enough to prove discriminatory intent.[151] Defendants must show evidence that the government purposefully engaged in a deliberate scheme to enforce the law in a discriminatory manner against the homeless.[152] Criminal defense attorneys might be able to prove intentional discrimination by citing policies in which executive leaders have *publicly* announced their intent to aggressively enforce public-camping laws specifically against the homeless.[153] This will be difficult to do in cases where these policies are *not publicized*, and are instead promulgated exclusively between executive leaders and their law enforcement officers.[154]

Even if defendants can show discriminatory intent, they would still need to survive the "similarly situated" requirement of the disparate impact prong, which is an incredibly high evidentiary hurdle.[155] The "similarly situated" requirement is a barrier to recovery because courts presume that, "in the absence of clear evidence to the contrary," executive officials "properly discharge[] their official duties" in ways that best serve their communities.[156]

C. *Selective Enforcement Claims Are Likely to Fail Because Courts Will Be Reluctant to Interfere with Executive Officials' Discretion to Enforce Public-Camping Laws in Ways That Address the Issues Homelessness Creates in Their Communities*

The *City of Grants Pass* holding is specifically geared toward giving state executive officials the authority to use public-camping laws to address homelessness without federal judicial interference.[157] With *City of Grants Pass* as an authority, it is unlikely that defendants will prevail in selective enforcement claims over the interests that state executive officials have in

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[151] *See Oyler*, 368 U.S. at 456.

[152] *See id.*

[153] *See* Kendall, *supra* note 14 (explaining recent policies that instruct officers to directly enforce public-camping laws on encampments). *See generally* Sekhon, *supra* note 13, at 1174 (arguing that arrest policies do not always direct fair distribution of enforcement).

[154] *See*, *e.g.*, Dinman & Duggan, *supra* note 14 (showing a likelihood that Spokane police department discretely directed officers to enforce the law more aggressively against the homeless, based on a reported increase in officer response rates to complaints).

[155] *See* United States v. Armstrong, 517 U.S. 456, 463–65 (1996).

[156] *See* United States v. Chemical Foundation, Inc., 272 U.S. 1, 14–15 (1926).

[157] *See* 603 U.S. 520, 560–61 (2024).

using public-camping laws to remove controversial homeless encampments from their streets.[158] Even if defendants provide evidence that is substantively strong enough to satisfy the "similarly situated" requirement, courts might disregard it, and instead conclude that the evidence cannot overcome the strong presumption that executive officials properly discharge their official enforcement duties.[159] Thus, an executive leader's departmental discretion to implement policies that prioritize enforcement against the homeless is heavily insulated from constitutional challenges like selective enforcement by basic separation of powers principles.[160]

V. It is Unlikely That Common-Law Doctrines Will Develop to Limit Executive Officials' Discretion to Enforce Public-Camping Laws Because These Cases Will Be Resolved Through Plea Bargaining or Dismissal

A. *Public Defenders Will Not Have the Resources to Litigate Common-Law Defenses at Trial and Will Resolve Unlawful Camping Cases Through Plea Bargaining*

Homeless individuals prosecuted for violating public-camping laws will likely be unable to afford private attorneys and will most often be represented by public defenders.[161] Following *City of Grants Pass*, it is unlikely that the public defenders handling these cases will bring them to trial.[162] Instead, they will resolve them through plea bargaining.[163] Public defenders manage significantly heavier caseloads than private attorneys and

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[158] *See id.*; Romer v. Evans, 517 U.S. 620, 632 (1996); Petition for a Writ of Certiorari, *supra* note 47, at 30–32, 34–35; Brief of Idaho et al., *supra* note 47, at 1–2.

[159] *See Armstrong*, 517 U.S. at 463–64; *Chemical Foundation, Inc.*, 272 U.S. at 14–15.

[160] *See* Neibart, *supra* note 72, at 635 (explaining that "[a] selective-prosecution [or enforcement] claim" is "nearly impossible to prove" because it "asks a court to exercise judicial power over a 'special province' of the Executive"); Sekhon, *supra* note 13, at 1181–84.

[161] *See* Mark Pickett, *Public Defenders Unwittingly Face the Homelessness Crisis*, 38 CRIM. JUST. 44, 44–46 (2023).

[162] *See* Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICATURE 26, 28 (2017); Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), perma.cc/HTE3-W5PC (explaining that "public defenders almost never take a case to trial" due to time shortages).

[163] *See* Smith & MacQueen, *supra* note 162, at 28 (explaining that the likelihood of a criminal case proceeding to trial in state court is 1.3% and that most are resolved by plea bargaining or dismissal).

receive limited government funding for investigations and witness procurement.[164] Due to these constraints, they often rely on plea bargaining as a cost-effective alternative to trial.[165]

When bargaining for a plea, public defenders will ideally negotiate with prosecutors to dismiss their case or minimize charges and sentencing, as these attorneys are ethically required to zealously advocate for their client.[166] While defendants maintain the affirmative right to decide whether to accept or reject a plea deal, public defenders are sometimes inclined to pressure obviously guilty clients into pleading guilty as a way to quickly resolve cases and manage their heavy caseloads.[167] Another reason public defenders may opt for plea bargaining as a way to resolve unlawful camping cases is to avoid trial, because there it will be easy for prosecutors to prove beyond a reasonable doubt that a defendant has engaged in conduct constituting unlawful camping.[168] To prove that a defendant engaged in unlawful camping, a prosecutor needs only to present straightforward evidence—such as a police report or witness testimony—showing that a defendant was *seen* camping in a prohibited area.[169] Because public-camping laws are vague, and therefore criminalize a broad range of conduct, governments can easily obtain the evidence necessary to prove a defendant's guilt.[170] If public defenders choose to take these cases to trial, they will likely lose on the merits.[171]

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[164] *See* Mark, *supra* note 65.

[165] *See* Oppel Jr. & Patel, *supra* note 162.

[166] *See* MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 1983); Oppel Jr. & Patel, *supra* note 162 (explaining that plea deals are often "good for defendants, ending in lesser sentences than they would have faced at trial.").

[167] *See* Joy, *supra* note 67, at 779; Oppel Jr. & Patel, *supra* note 162 (showing that when public defenders have unmanageable caseloads "arrestees sometimes agree . . . to plea deals that can have a profound impact on their lives."). *See generally* Missouri v. Frye, 566 U.S. 134, 145 (2012).

[168] *See Steps in the Federal Criminal Process: Plea Bargaining*, OFF. OF THE U.S. ATTY'S U.S. DEP'T OF JUST., perma.cc/2B6R-ZWAX (last visited Sep 16, 2025); Mince-Didier & Pirius, *supra* note 1 (showing how vagrancy laws criminalize a broad range of conduct, making it easy for prosecutors to convict those who violate them).

[169] *See generally* Dinman & Duggan, *supra* note 14 (presenting the testimony of the bystanders and officers that witnessed or carried out enforcement in these cases could be sufficient to prove unlawful camping).

[170] *See* William F. Maher & William E. Williams, *Vagrancy–A Study in Constitutional Obsolescence*, 22 FLA. L. REV. 384, 397 (1970) (explaining how vagrancy laws, like public-camping statutes, are a "trap" because of the broad range of conduct they criminalize).

[171] *See id.* (implying that it's difficult for defendants to succeed on the merits in vagrancy cases

In the rare event that public defenders do bring an unlawful camping case to trial and the facts of the case clearly inculpate a defendant, public defenders may raise common-law criminal defenses to the charges instead of challenging them on the merits.[172] Justice Gorsuch stated that defenses like necessity, duress, or insanity could be available in multiple jurisdictions.[173] In an ideal world, these defenses would develop court-made doctrines that limit the broad discretion that vague public-camping laws confer on executive officials to enforce public-camping laws disproportionately against homeless individuals.[174]

To succeed on a necessity defense, defendants would need to demonstrate that they reasonably believed unlawful camping was immediately necessary to avoid imminent harm, that the harm they sought to avoid outweighed the harm public-camping laws are intended to prevent, and that there was no other legal means through which the defendant could avoid harm.[175] A defendant could prevail on this defense by proving that no safe or available shelter options existed, leaving them with no choice but to camp in public.[176] If courts adjudicate this defense, the resulting legal doctrines could discourage officers from enforcing public-camping laws against homeless individuals who have no other available or safe shelter alternatives.[177]

Another avenue of potential recourse, specifically for *mentally ill* homeless individuals who are prosecuted for unlawful camping, is the insanity defense.[178] Under this defense, individuals would not be held

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because even "'well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law'").

[172] *See* City of Grants Pass v. Johnson, 603 U.S. 520, 550 (2024).

[173] *Id.*

[174] *See* Brief of Idaho et al., *supra* note 47, at 21 (explaining that state courts can adjust these doctrines over time to suit their evolving communities).

[175] *See* Legal Info. Inst., *Necessity Defense*, CORNELL L. SCH., perma.cc/HT7G-LZKP (last visited Oct. 1, 2025). *See generally* State v. Crawford, 521 A.2d 1193, 1200–01 (Md. 1987).

[176] *See generally Crawford*, 521 A.2d at 1200.

[177] *See generally* Brief of Idaho et al., *supra* note 47, at 21; Ethan Dewitt, *In Wake of Supreme Court Homelessness Decision, NH Advocates Say Fight Not Over*, N.H. BULL. (July 9, 2024), https://perma.cc/75MU-5K39 (showing that judges may be inclined to create such doctrines, as they already believe that the removal of encampments is unjust if there are "no safe alternatives available").

[178] *See generally* Legal Information Institute, *Model Penal Code Insanity Defense*, CORNELL L. SCH., perma.cc/F8BS-UKLL (last visited Sept. 28, 2025) [hereinafter *Insanity Defense*]; Rebecca Barry et al., *Prevalence of Mental Health Disorders Among Individuals Experiencing Homelessness: A*

criminally responsible for unlawful camping if, as a result of their "mental disease or defect," they "lack[ed] [the] substantial capacity either to appreciate the criminality of [their] conduct or to conform [their] conduct to the requirements of [the] law."[179] Litigating this defense could develop doctrines that deter officers from enforcing public-camping laws against the mentally ill and instead encourage officers to find these individuals medical health treatment or shelter.[180]

Duress is a much narrower defense, and in the public-camping context, it would only apply if another human being coerces a defendant to engage in unlawful camping by threat of death or serious bodily harm.[181] This defense might be applicable in cases where homeless individuals are forced to stay in encampments due to threats from gang members, human traffickers, or other criminals who prey on vulnerable populations.[182] Litigating the duress defense could lead to doctrines that encourage officers to ask homeless individuals questions about why they are camping and whether they are doing so for reasons that are beyond their control.[183]

Although raising these defenses could theoretically develop court-made doctrines that cabin the excessive discretion that vague public-camping laws confer on executive officials, public defenders are unlikely to have the time, resources, or incentive to take these cases to trial.[184] They will most often resolve these cases by negotiating with prosecutors for favorable pleas or case dismissals.[185] If these defenses are not litigated, courts and judges will not be able to issue opinions that limit the discretion that executive officials have to aggressively enforce public-camping laws against the homeless.[186] Thus, to avoid fines or jail time for unlawful camping, homeless individuals

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Systematic Review and Meta-Analysis, 81 JAMA PSYCH. 691 (2024) (showing the government's existing concern for the prevalence of mental health issues amongst the homeless).

[179] *Insanity Defense*, *supra* note 178.

[180] *See generally* Brief of Idaho et al., *supra* note 47, at 21; *Homelessness Programs, supra* note 92 (demonstrating that there is a possibility that judges would implement such doctrines because the government already emphasizes the importance of providing mentally ill, homeless individuals with treatment and housing).

[181] *See generally* United States v. Contento-Pachon, 723 F.2d 691, 693 (9th Cir. 1984) (outlining the elements of the duress defense).

[182] *See* OLSON & EVANGELIS, *supra* note 9, at 8.

[183] *See generally* Brief of Idaho et al., *supra* note 47, at 12; OLSON & EVANGELIS, *supra* note 9, at 8.

[184] *See* Oppel Jr. & Patel, *supra* note 162.

[185] *See* Smith & MacQueen, *supra* note 162, at 28.

[186] *See generally* Smith & MacQueen, *supra* note 162, at 28.

must now rely on their public defenders' plea bargaining skills, the likelihood that prosecutors will dismiss their case, and the efforts local governments take to expand access to shelter and housing.[187]

B. *Prosecutors Will Exercise Their Discretion to Dismiss Unlawful Camping Cases if It Is in the Best Interests of the Public*

The U.S. Constitution grants prosecutors, as executive officials, broad discretion to decide whether to initiate or dismiss criminal charges against criminal defendants.[188] When deciding whether to dismiss a case, prosecutors assess the public's interest in punishing a criminal defendant and the availability of evidence necessary to secure a conviction.[189] As previously discussed, it is likely that prosecutors will have access to the evidence needed to prove a defendant's guilt and secure convictions in unlawful camping cases.[190] All that prosecutors will need to inculpate a defendant is evidence—likely in the form of officer testimony and reports—explaining that the defendant was found camping, sleeping, or sitting on public property not designated for that purpose.[191] Therefore, the primary reason a prosecutor will dismiss an unlawful camping case where the defendant is homeless is if prosecuting them would run contrary to the public's best interests.[192] In determining whether prosecution runs contrary to public interest, prosecutors will consider factors such as the policies set by executive leaders, the court resources required to pursue charges, the accused's criminal record, and the circumstances under which enforcement of the law occurred.[193]

For example, prosecutors ultimately decided to dismiss the previously mentioned case in Kentucky, in which a homeless woman was cited for unlawful camping while in active labor, likely because enforcing the law under such circumstances was inhumane.[194] Although the prosecutors who

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[187] *See generally* Smith & MacQueen, *supra* note 162, at 28; *supra* Part II(B); *infra* Part V(B); *supra* text accompanying notes 161–71.

[188] *See* U.S. CONST. art. II, § 3; Heckler v. Chaney, 470 U.S. 821, 832 (1985); United States v. Armstrong, 517 U.S. 456, 464 (1996).

[189] Walker, *supra* note 81.

[190] *See* Walker, *supra* note 81.

[191] *See generally* Maher & Williams, *supra* note 170, at 397; Mince-Didier & Pirius, *supra* note 1.

[192] *See* Walker, *supra* note 81.

[193] *See* Walker, *supra* note 81.

[194] *See* Jason Riley, *Prosecutors Agree to Dismiss Louisville Police Citation of Homeless, Pregnant Woman*, WDRB (Jan. 29, 2025) perma.cc/PCV3-4N6T.

took on this case refused to comment on their decision to dismiss it, they likely did so because maintaining the charges would cause public mistrust in the police and encourage officers to use inhumane enforcement tactics.[195] A similar dismissal took place in Miami Beach, where prosecutors dismissed criminal charges against a homeless man who was found sleeping on a park bench.[196] The public complained that it was unjust to arrest this individual for doing something that did not disturb or offend anyone around him.[197] The lead prosecutor on the case did not initially want to dismiss the charges because the offender had a prior criminal record, including an open container violation and convictions "for battery and resisting an officer with violence."[198] After dismissing the case, the lead prosecutor stated that "if anything happens at this point afterwards where his release results in harm to other citizens . . . we were warned."[199] Thus, while prosecutors are more inclined to maintain charges against individuals who have a prior criminal record, the public's response to the initiation of those charges may still influence their dismissal.[200]

Prosecutors are also likely to consider the public-camping policies implemented by executive officials when determining whether dismissal is in the public's best interest.[201] If policies encourage the aggressive enforcement of public-camping laws against the homeless, then prosecutors are *less likely* to dismiss charges because doing so would not serve the public's interest in deterring homeless individuals from unlawfully camping.[202] If policies encourage lenient enforcement due to a shortage of available shelter space, prosecutors are *more likely* to dismiss charges because maintaining them could not incentivize homeless individuals to get off the streets and seek shelter if there is legitimately no available shelter space.[203]

In the wake of *City of Grants Pass*, prosecutors now hold substantial power to determine how public-camping laws will affect the lives of

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195 *See id.*

196 Aaron Leibowitz, *DeSantis Praised a Miami Beach Homeless Law. Is it as 'Compassionate' as the Mayor Says?*, MIAMI HERALD, perma.cc/7LQE-WFQR (last updated Apr. 10, 2025).

197 *See id.*

198 *Id.*

199 *Id.*

200 *See id.*; Walker, *supra* note 81.

201 *See* Gary L. Deel, *What is Criminal Law and Why Does it Matter?*, AM. PUB. UNIV. (July 14, 2023) perma.cc/EVP7-PL9V.

202 *See generally* Sievertson et al., *supra* note 56; Walker, *supra* note 81.

203 *See* Loughrey & Trowbridge, *supra* note 56.

homeless individuals.[204] They should seriously consider dismissing unlawful camping charges brought against homeless individuals in jurisdictions that lack available shelter.[205] They should also consider dismissing charges in jurisdictions where local governments have not implemented services or policies to reduce housing costs or connect homeless individuals with employment opportunities, mental health treatment, or rehabilitative aid.[206] If prosecutors do not exercise their discretion to filter out these cases, they will perpetuate the issues that led to the record high homelessness rates this country saw just before the Supreme Court decided *City of Grants Pass*.[207] This is because imposing fines and jail sentences on homeless individuals who have no choice but to live outdoors is more likely to hinder their ability to escape homelessness than deter them from unlawfully camping again.[208]

CONCLUSION

State executive officials are likely to continue citing *City of Grants Pass* as authority to use their public-camping laws as a tool to extinguish the issues homeless encampments have created in their communities. Even if the specific enforcement of these laws against the homeless constitutes discriminatory enforcement, courts are unlikely to interfere because they presume executive officials' exercise their discretion to enforce laws in ways that best serve their communities. If local legislatures continue to enact vague public-camping laws that lack guidelines for enforcement and expand the areas within which public-camping is illegal, officers are likely to continue aggressively enforcing these laws against the homeless.

Prosecutorial discretion and the plea bargaining process are the primary mechanisms through which homeless individuals prosecuted for unlawful camping are likely to find recourse. However, neither of these avenues for relief will help solve the homelessness crisis or limit the excessive discretion executive officials are granted to enforce public-camping laws against the homeless. Courts are unlikely to litigate common-law criminal defenses that could establish doctrines to limit such discretion, and local governments are

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[204] *See The Power of Prosecutors*, ACLU (Apr. 5, 2018), perma.cc/59UC-QGHZ.

[205] *See* Loughrey & Trowbridge, *supra* note 56.

[206] *See supra* pp. 27–28.

[207] *See* Nicole Dubois et al., *Criminalizing Homelessness Worsens the Crisis, Research Shows* 3-5, NAT'L ALLIANCE TO END HOMELESSNESS (2025), perma.cc/WXD4-NLYM.

[208] *Id.*

unlikely to execute plans to transition homeless individuals from the streets to housing before they are criminalized for unlawfully camping. Looking forward, both prosecutors and public defenders should recognize the substantial impact they will have on the fate of the homeless individuals charged for unlawful camping and strive to zealously advocate in ways that serve both their clients' and the publics' best interests.

A Law Fostering Innovation or Big Tech Manipulation?: The Unduly Broad Immunity Granted by Section 230 and Its Harmful Effects on Quiet Voices

Kate McQuaide[*]

INTRODUCTION

The verb "Google" was added to the Merriam-Webster dictionary in 2006 and is defined as "to use the Google search engine to obtain information about (someone or something) on the World Wide Web."[1] The addition of the brand name to the dictionary illustrates its unavoidable presence in our society, so much so that many of us forget there were days where you could not just "Google it."[2] For better or for worse, the immediate access to any general or niche information revolutionized the world we once knew at a blistering pace.[3]

Google is just one of *many* services that has been introduced to the internet since the law governing internet services was written.[4] Congress

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[1] *Google*, MERRIAM-WEBSTER, https://perma.cc/35Q3-P7PR (last visited Oct. 27, 2025).

[2] *See* HUNTER REID, SCIENCE, TECHNOLOGY, & SOCIETY: A STUDENT-LED EXPLORATION ch. 39 (Pressbooks 2020) (e-book).

[3] *See* Miriam Rivera, *How Google Has Changed the World*, ENTREPRENEUR (Sept. 29, 2016), https://perma.cc/2BBN-WTLW.

[4] *See* Dara-Abasi Ita, *Instagram: What It Is, Its History, and How the Popular App Works*, INVESTOPEDIA, perma.cc/K9BD-RGHQ (last updated May 5, 2025) ("Instagram launched in

wrote and enacted Section 230 of the Communications Decency Act in 1996 to address the rapidly growing World Wide Web.[5] In other words, 2025 internet service providers are controlled by rules written by lawmakers who had never even heard the phrase "Google it."[6] Obviously, these lawmakers could not have predicted the pace at which the internet would develop, the level to which it would take over our lives, or the shocking dangers that its users would face.[7] Regardless of the reality of today's internet and its ever-changing landscape, no changes have *ever* been made to Section 230: the law that was made before Google.[8]

Unsurprisingly, Section 230 no longer serves the function that the lawmakers of 1996 envisioned.[9] Those legislators aimed to encourage innovation and creativity through the promotion of a free and open internet by granting immunity to online service providers from "claims based on third-party content hosted by the platform."[10] While Section 230 undoubtedly served its purpose in the early days of the internet, we are well past the early days and the time for the law to reflect that is long overdue.[11] The 1996 immunity granted to online platforms has been unprecedentedly stretched by the courts to claims unrelated to those that the law was written to address.[12] As a result, Section 230 no longer functions to promote innovation but rather communicates to large platforms that they may

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October 2010"); *X*, ENCYCLOPAEDIA BRITANNICA, https://perma.cc/5S46-C39Q (last visited Oct. 27, 2025) ("Twitter debuted July 15, 2006"); William L. Hosch, *YouTube*, ENCYCLOPAEDIA BRITANNICA, https://perma.cc/3WMM-ZKNB (last updated Oct. 21, 2025) ("the site opened on a limited . . . basis in May 2005"); Brian O'Connell, *History of Snapchat: Timeline and Facts*, THESTREET (Feb. 28, 2020, 3:35 PM EST), perma.cc/EB52-GAMX ("Snapchat is one of the leading social media platforms in the world in 2020 - and it's not even 10 years old"); 47 U.S.C. § 230.

[5] The Wall St. J., *Section 230: The Law at the Center of the Big Tech Debate | WSJ*, YOUTUBE, at 03:14–03:36 (Nov. 18, 2020), perma.cc/3EBT-CHDC.

[6] *Compare The Web Back in 1996–1997,* PINGDOM (Sept. 16, 2008), https://perma.cc/4CCS-F3AP, *with* 47 U.S.C. § 230 (showing that the year the law was enacted, Google had yet to exist).

[7] House Committee on Energy and Commerce, *C&T Hearing: Where Are We Now: Section 230 of the Communications Decency Act of 1996*, YOUTUBE, at 11:47–16:36 (Apr. 11, 2024), https://perma.cc/GW5V-358H [hereinafter *C&T Hearing*].

[8] *Compare The Web Back in 1996–1997*, *supra* note 6, *with* 47 U.S.C. § 230.

[9] *See* C&T Hearing, *supra* note 7, at 11:47–16:36.

[10] William P. Barr, Letter to President of the Senate, DEP'T OF JUSTICE 1 (Sept. 23, 2020) https://perma.cc/DY5F-8W25 (explaining the need for Section 230 reform).

[11] *See id.*

[12] *See* C&T Hearing, *supra* note 7, at 28:42–34:09.

engage in any self-serving, profit-boosting behavior they desire without facing consequences.[13]

This Note will argue that Section 230 no longer functions as intended, and a full repeal is essential to protect American speech, children, and minorities. It will be argued that tech companies have been able to profit off harmful content that increases traffic to their site with no fear of legal consequences. The discussion will further compare and contrast social media companies to other forms of media who are subject to lawsuits which Big Tech is not, how they model their business to address such legal risks and how all tech companies, large and small, could learn from them. Finally, this Note will argue that harms caused by manipulative algorithms are not protected by Section 230.

Part I of this Note provides a history of Section 230, Congress's goals and motivations for enacting it, as well as a comparison of the internet in 1996 to the internet in 2025. Part II discusses the legal harms tech companies face no consequences for, as well as unanswered questions as to liability for manipulative and reckless algorithm construction. Part III of this Note discusses how tech companies take advantage of Section 230 to increase profits then argues they should be held to a "knew or should have known" standard to reflect their proven knowledge of harms on their platforms. Finally, Part IV argues that a repeal of Section 230 will *not* destroy the internet but actually allow all other areas of law to function as intended and, as a result, force tech companies to create new business models that address the changed landscape.

I. Background

A. *Historical Background and the Core Benefits of Section 230*

1. The Internet in 1996 Compared to 2025

The internet in 1996 consisted of no more than 100,000 websites, which were accessed almost exclusively by dial-up internet.[14] Dial-up internet, now used only in geographic areas where modern internet is unavailable,[15] uses phone lines to connect your device to the internet.[16] Today, there are over 1.5

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[13] *See* C&T Hearing, *supra* note 7, at 28:42–34:09.

[14] *The Web Back in 1996–1997*, *supra* note 6.

[15] Lewin Day, *Dial-Up is Still, Just Barely, A Thing*, HACKADAY (Mar. 6, 2024), perma.cc/WSF4-FVWW.

[16] Lizzy Schinkel et al., *What is Dial-up Internet and How Does it Work?*, WHAT IS MY IP

billion websites which Americans access almost exclusively through wireless internet, otherwise known as Wi-Fi.[17] Wi-Fi was popularized in the early 2000s, which broadened access to the internet by allowing users to access it from everywhere without requiring a wire connection.[18]

On average, Americans in 1996 spent "fewer than 30 minutes a month surfing the Web."[19] In contrast, Americans today spend about twenty-seven hours online per month.[20] The increased use of the internet can be shown by the 21% of Americans who responded that their primary source of news for the 2024 Presidential Election was online websites versus only 4% during the 1996 Presidential Election.[21] Additionally, 46% of Americans under the age of 30 used social media for their election news in 2024 which did not even exist in 1996.[22]

Social media, which today controls the lives of many, is a relatively recent introduction to the Web.[23] Some of the most popular platforms include: Instagram, launched in 2010;[24] X, formerly known as Twitter, launched in 2006;[25] YouTube, launched in 2005;[26] and Snapchat, launched in 2011.[27] These are just a few of the many platforms that have taken over the world with at least 70.1% of Americans reporting social media use in 2024.[28]

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https://perma.cc/839R-VNDX (last visited Oct. 27, 2025).

[17] *Total Number of Websites,* INTERNET LIVE STATS, perma.cc/QN9T-D6GV (last visited Oct. 27, 2025); James Murray, *A Brief History of WiFi,* COMPARE INTERNET (Jan. 22, 2022), perma.cc/8U8B-YLYL.

[18] Murray, *supra* note 17.

[19] Farhad Manjoo, *Jurassic Web,* SLATE (Feb. 24, 2009), https://perma.cc/L58J-A7UA.

[20] *Id*.

[21] Elisa Shearer et al., *Where Americans Turn for Election News,* PEW RSCH. CENTER (Oct. 10, 2024), perma.cc/CZL7-WL23; *Online Use,* PEW RSCH. CTR. (Dec. 16, 1996), perma.cc/ZN82-8LG7.

[22] Shearer et al., *supra* note 21.

[23] *See, e.g.*, O'Connell, *supra* note 4 ("Snapchat is one of the leading social media platforms in the world in 2020—and it's not even 10 years old.").

[24] Ita, *supra* note 4.

[25] *X*, *supra* note 4.

[26] *YouTube*, *supra* note 4.

[27] O'Connell, *supra* note 4.

[28] Simon Kemp, *Digital 2024: The United States of America,* DATAREPORTAL (Feb. 22, 2024), https://perma.cc/CG6C-TN47.

2. The Core Benefits of Section 230

The idea for Section 230 comes from the 1950s when courts became concerned with "bookstore owners . . . being held liable for selling books containing 'obscenity.'"[29] The Supreme Court of the United States found that where bookstore owners did not know or have reason to know a book contained obscene material, they could not be held liable.[30] Politicians had similar concerns when online forums were introduced to the internet.[31] Specifically, they worried that forum hosts would not moderate them for fear of being subjected to liability, presenting a lawless and dangerous space.[32] As Section 230 was developed, drafters also did not want to force platforms to overly moderate, so protections from liability for user posts were also written into the law.[33] The drafters wanted these protections as they thought it would encourage innovation on the internet if online service providers did not have to be concerned about being sued for user content.[34]

The core benefit, according to one of the drafters of Section 230, is protection of user speech.[35] Section 230 shields online platforms from liability for third-party content to allow platforms to act as forums for free speech, which in turn allows users to engage in diverse conversations that foster innovation and encourage participation.[36] Third party content is anything posted on the site by an internet user.[37] The drafters of the rule recognized the unique opportunity presented by the internet: to engage in communities you would otherwise never have access to, and wished to protect it.[38] The rule allows for platforms to moderate speech in order to reinforce the protections given to publishers under the First Amendment: to choose what platforms wish to distribute and allow users to go to whichever

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[29] Barbara Ortutay, *What You Should Know About Section 230, the Rule That Shaped Today's Internet,* PBS (Feb. 21, 2023, 10:55 AM EDT), https://perma.cc/Q4V3-UQKC; *See* Smith v. California, 361 U.S. 147, 153 (1959).

[30] *Smith*, 361 U.S. at 154.

[31] Ortutay, *supra* note 29.

[32] Ortutay, *supra* note 29.

[33] Ortutay, *supra* note 29.

[34] *See* Ortutay, *supra* note 29.

[35] C&T Hearing, *supra* note 7, at 11:47–16:36.

[36] *Section 230,* ELEC. FRONTIER FOUND., https://perma.cc/5YSF-DT5V (last visited Oct. 14, 2025).

[37] *See generally id.*

[38] *Id.*

platform's moderation structure suits them.[39] Overall, Section 230, inspired by 1950s bookstore litigation, was written with admirable objectives based on the 1996 internet and what they thought it would become.[40]

B. *Section 230*

1. 47 U.S.C § 230(c)(1) Immunity

Section 230 is often referred to as "the twenty-six words that created the internet" when in reality, it is significantly more words than just twenty-six.[41] This is because the twenty-six words in subsection (c)(1) are what grant online service providers broadly sweeping immunity from liability, paving the way for the internet as we know it.[42] The infamous subsection reads: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[43] Put another way, if someone posts false claims about you on Facebook causing you to lose your job, you may sue the person who posted it—assuming you can identify them—but you cannot seek any form of recovery from Facebook.[44] Section 230 *also* shields platforms from liability for removing any posts so long as they do so in "good faith."[45] This means that if, for example, you post an informative article on Facebook about a controversial political topic and Facebook takes it down before anyone can see it, you have no route to recovery for the violation of your First Amendment rights unless you can somehow prove they did so in bad faith.[46]

A final, but incredibly important, aspect of the statute to note is that it says nothing about the defendant platform's knowledge.[47] In other words, a platform can be fully aware that "they are publishing tortious or illegal third-party content—and still avoid liability for that content."[48] Further, even if a platform requires human pre-screening before the content is

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[39] *Id.*; U.S. CONST. amend. I.

[40] *See* C&T Hearing, *supra* note 7, at 11:47–16:36.

[41] C&T Hearing, *supra* note 7, at 28:42–34:09.

[42] *See* 47 U.S.C. § 230(c)(1).

[43] *Id.*

[44] Ortutay, *supra* note 29.

[45] 47 U.S.C. § 230(c)(2).

[46] Ortutay, *supra* note 29.

[47] ERIC GOLDMAN, *INTERNET LAW: CASES & MATERIALS* at 273 (2024).

[48] *Id.*

published to their site, they are still immune to liability for that content.[49]

2. Online Service Providers

This form of immunity is the *only* one of its kind in the American legal system and it is explicitly for interactive computer services, more commonly known as online service providers ("OSPs").[50] OSPs are defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server . . . ."[51] This encompasses a wide array of services from video sharing to restaurant review platforms, meaning that Big Tech, like Google or X, are shielded the same as smaller online businesses, like a personal blog that allows comments.[52] OSPs are treated much differently than other forms of media, such as a radio show, in which you may sue a radio host who defames you *as well as* the radio station itself.[53]

C. *Section 230 and The Courts*

Courts across the country began grappling with Section 230 soon after its enactment in *Zeran v. America Online, Inc.*[54] In that case, an anonymous user advertised horrifically offensive t-shirts on the defendant's platform ("AOL") making fun of the tragic 1995 Oklahoma City bombing and listed the plaintiff's home telephone number as the point of contact for any interested customers.[55] This resulted in round-the-clock harassment and death threats toward the plaintiff who explained the situation to AOL and repeatedly pleaded for the post's removal, but the defendant refused, causing Zeran to commence suit.[56] The Fourth Circuit interpreted Section 230(c)(1) broadly, finding that the suit was barred regardless of AOL's enablement which left Zeran without any path to recovery due to the anonymity of the person who made the false advertisements.[57]

Zeran laid the foundation for all Section 230 lawsuits to come by setting

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[49] *Id.*

[50] C&T Hearing, *supra* note 7 at 16:41–21:53.

[51] 47 U.S.C. § 230 (f)(2).

[52] *See id.*

[53] *See* C&T Hearing, *supra* note 7, at 32:16–34:10.

[54] Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

[55] *Id.* at 328.

[56] *Id.* at 329.

[57] *See id.* at 330–31.

a precedent that Section 230 shall be interpreted broadly, and courts have continued to follow suit.[58] Recently, the families of victims who were killed in a terrorist attack were unsuccessful in their attempts to hold Twitter, Facebook, and Google liable for knowingly allowing ISIS to continue to recruit new terrorists and raise funds in connection with the attack that took their loved ones.[59] While the Court ultimately did not resolve the case on Section 230 grounds, the outcome reflects the invincibility of Big Tech in the courtroom.[60]

The Court's decision to resolve *Taamneh* on alternate grounds also reflects their reluctance to be the ones to make changes to Section 230, effectively putting the pressure on Congress.[61] Recently, a 15-year-old boy was groomed by his teacher on Snapchat, "a social-media platform built around the feature of ephemeral, self-deleting messages."[62] The abuse was exposed when the young man eventually overdosed using prescription drugs that were provided by his teacher.[63] The Supreme Court declined the petition for certiorari leaving unanswered whether a platform such as Snapchat can be held liable for encouraging such misconduct through a manipulative construction of their platform, again, reflecting the Court's belief that it is not their question to resolve.[64]

Congress has heard the Court loud and clear and begun discussing potential reforms, though no action has been taken.[65] Over the course of the 116th and 117th Congresses, nearly twenty-five bills were introduced in an attempt to reform Section 230, but none were successful.[66] The intention of these bills has never been to get rid of Section 230, but rather change it in

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[58] ERIC GOLDMAN, *supra* note 47, at 285.

[59] Twitter, Inc. v. Taamneh, 598 U.S. 471, 471 (2023) (holding that social media companies were not liable for aiding ISIS recruitment efforts through suggestive algorithms).

[60] Alan Z. Rozenshtein, *Interpreting the Ambiguities of Section 230,* BROOKINGS (Oct. 26, 2023), https://perma.cc/U72N-QMCW

[61] *Id.*

[62] Doe v. Snap, Inc., 144 S. Ct. 2493, 2493 (2024) (Thomas, J., dissenting).

[63] *Id.*

[64] *Id.*

[65] *See* C&T Hearing, *supra* note 7, at 11:01.

[66] Energy & Commerce Democrats, *Hearing on Legislative Proposal to Sunset Section 230 of the Communications Decency Act*, YOUTUBE, at 22:26–22:38 (May 22, 2024), perma.cc/EZ4L-774K [hereinafter Sunset Hearing].

ways that allow it to work for today's internet.[67] However, due to the lack of success of these bills, legislators have now put a proposal before the 118th Congress to sunset Section 230 by the end of 2025.[68] Sunsetting Section 230 would mean that if no action is taken by the end of 2025 to reform the law, it will be terminated.[69] This is an attempt to motivate Congress to take the action that the courts will not.[70]

II. Importance/Relevance

A. *Selective Suppression and Promotion of Speech*

In today's divisive political climate, there seems to be few things the parties can agree on; one of the few exceptions to that reality is the awareness of the dangers presented by Section 230 and the need for change.[71] While the parties can agree that American speech is threatened by Section 230, they differ in their opinion on how it is threatened.[72]

Liberals are concerned with the way in which Section 230(c)(1) "encourages the spread of harmful content while Big Tech deflects accountability."[73] President Biden has spoken out about his party's concern that Section 230 allows OSPs to promote information they know is false.[74] On the other side, conservative lawmakers assert that Section 230 has allowed Big Tech to unfairly target and silence conservative voices violating their free speech.[75] The particular concerns of the parties may vary but, more importantly, they agree that Americans' speech and ideas are in danger as a result of Section 230.[76]

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[67] *Id.* at 22:20.

[68] *Id.* at 10:40; Sunset to Reform Section 230 Act H.R. 6746, 119th Cong. (2025) (reflecting that the proposal to sunset Section 230 by the end of 2025 was unsuccessful and the same proposal has been introduced with the goal to sunset the act by the end of 2026).

[69] Legal Information Institute, *Sunset Law,* CORNELL L. SCH., perma.cc/PS2S-TS79 (last updated Nov. 2021); *See* Sunset Hearing, *supra* note 66, at 22:50.

[70] Sunset Hearing, *supra* note 66, at 22:50.

[71] *See* Danielle Draper, *Summarizing the Section 230 Debate: Pro-Content vs. Anti-Censorship*, BIPARTISAN POL'Y CTR. (July 5, 2022), https://perma.cc/5JEJ-RZ44.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

B. *Allowing Willful Blindness*

Section 230 allows tech companies to deliberately turn a blind eye when doing so is beneficial to their business.[77] Over time, platforms have figured out that "providing socially harmful content can be economically valuable to platform owners while posing relatively little economic harm to their public image or brand name."[78] There are no incentives in Section 230 for tech companies to "protect their brands by policing their platforms" so they, unsurprisingly, only police in a manner most profitable to them with no fear of liability.[79]

C. *Algorithmic Concerns*

A now commonplace and key feature of most online services is the use of recommendation systems, or algorithms, to suggest personalized content to the user.[80] These systems operate based on the user's behavior on the site as well as sitewide trends.[81] This presents the question of whether Section 230 immunity stretches to protect OSPs from liability for the use of such systems, a question yet to be addressed by any court.[82]

Answers to this question are of the highest importance due to numerous harms that have been propagated by algorithms.[83] For example, a popular app, Snapchat, had a "speed filter" in which it allowed users to document how fast they were driving.[84] The app also had a rewards system based on a user's use of several features, including the speed filter.[85] Three young men were using these features, aimed at getting a higher speed than other users,

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[77] *See* Michael D. Smith & Marshall W. Van Alstyne, *It's Time to Update Section 230,* HARVARD BUS. REV. (Aug. 12, 2021), perma.cc/69XV-6QQZ.

[78] *Id*.

[79] *Id*.

[80] *See* ERIC N. HOLMES, CONG. RSCH. SERV., NO. R47753, LIABILITY FOR ALGORITHMIC RECOMMENDATIONS at 1 (2023).

[81] *Id*.

[82] *Id.*

[83] *See, e.g.*, Twitter, Inc. v. Taamneh, 598 U.S. 471, 473 (2023); Lemmon v. Snap, Inc., 995 F.3d 1085, 1090 (9th Cir. 2021); Sally Weale, *Social Media Algorithms 'Amplifying Misogynistic Content'*, THE GUARDIAN (Feb. 5, 2024), perma.cc/FBJ2-MG3R; *Social Media Addiction*, THE LANIER L. FIRM, https://perma.cc/G5H5-C9D8 (last modified Aug. 19, 2025).

[84] *Lemmon*, 995 F.3d at 1088.

[85] *Id.* at 1089.

when they crashed and died.[86] As it stands, it is unclear whether Snapchat could be held liable for motivating such reckless behavior which resulted in the premature deaths of the young men.[87]

Further, social media algorithms disproportionately push misogynistic content on young people, the effects of which have been seen in young men belonging to Generation Z.[88] Studies of these algorithms have shown that these young men "are more likely than baby boomers to believe that feminism has done more harm than good."[89] It is yet to be known if platforms will ever face consequences for these marginalizing effects.[90] Finally, these platforms have mastered the art of manipulative algorithms which result in social media addiction for children and adolescents.[91] Social media addiction is directly tied to mental health concerns because young users are still cognitively developing, with many reporting depression, anxiety, suicidal thoughts, and body dysmorphia.[92] Section 230's failure to explicitly address these algorithmic concerns will allow platforms to continue to worsen these effects without being held accountable.[93]

ANALYSIS

III. Big Tech Should Not Be Allowed to Profit Off of Harms to Americans

A. *How Tech Companies Take Advantage of Section 230 to Increase Profits*

Anyone with experience in creating content online knows that controversy increases engagement which increases advertisement revenue.[94] This is because our brains are attracted to hearing about tragedy or otherwise harmful content as a sort of preventative survival instinct.[95]

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[86] *Id.*

[87] *See* Holmes, *supra* note 80.

[88] Weale, *supra* note 83.

[89] Weale, *supra* note 83.

[90] *See* Holmes, *supra* note 80.

[91] *Social Media Addiction*, *supra* note 83.

[92] *Social Media Addiction*, *supra* note 83.

[93] *See generally* Holmes, *supra* note 80.

[94] Ann Bartow, *Online Harassment, Profit Seeking, and Section 230*, 95 B.U. L. REV. 101, 102 (2015).

[95] Danielle Page, *The Science Behind Why We Can't Look Away From Tragedy*, NBC NEWS,

Psychologist Dr. Renee Carr found in a study that humans are prone to negative bias, which is "the tendency to automatically give more attention to a negative event and negative information than positive information or events."[96] This psychological phenomenon can explain why internet consumers are attracted to alarming headlines, videos, and more.[97]

Social media platforms like X, Instagram, Facebook and more are all free for users, which is made possible by the advertisements hosted on those platforms.[98] Rather than directly profiting off one particular viral video, these platforms make money from increased traffic to the site generally.[99] Of course, this increased traffic could be generated by one incredibly viral video but more often it is generated by a combination of them.[100] Unsurprisingly, advertisers are going to spend the most money to advertise on sites where their products or services are going to be seen the most.[101] Advertisers are not concerned with what brings users to the site so long as their products and services are being shown.[102] With no consequence in place for boosting dangerous content, and advertisers offering the highest price tag to those platforms with the most eyes on them, platforms have every incentive to push the most harmful content onto users without regard for the effects it has.[103]

B. *Platforms Attract and Hook Users to Increase Their Time Viewing Ads Through the Construction of Manipulative and Addictive Algorithms*

Platforms have meticulously curated algorithms to recommend content that will keep users on the site as long as possible based on their personal information, past engagement, and more.[104] This is because "[i]f a social media company can keep a user online longer than before, more ads can be

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https://perma.cc/U7HL-9BK8 (last updated Nov. 6, 2017 3:55 PM EST).

[96] *Id.*

[97] *See id.*

[98] Greg McFarlane et al., *How Facebook (Meta), X Corp (Twitter), Social Media Make Money From You*, INVESTOPEDIA, perma.cc/SUM6-LRN7 (last updated Dec. 2, 2022).

[99] *Id.*

[100] *See id.*

[101] *See id.*

[102] *See id.*

[103] *See id.*; Danielle Page, *supra* note 95.

[104] Dorcas Adisa, *Everything You Need To Know About Social Media Algorithms,* SPROUT SOCIAL (Oct. 30, 2023), perma.cc/9K66-EC7Q.

shown to them."[105] Through the process of trying to keep users online as long as possible, these companies have figured out that humans like to be surrounded with like-minded people or content.[106] Because humans are attracted to negative content, recommendation algorithms intentionally expose casual users to extremist ideas.[107] Once those ideas are engaged with, the algorithm remembers and will only push that one idea onto the user, resulting in an echo chamber that only strengthens extremist ideologies.[108] This intentional segregation of the internet that works to keep users online to make social media companies as rich as possible directly contradicts the core purpose of Section 230: to allow users to engage in *diverse* conversations through the use of an open internet.[109]

These algorithms' number one goal is social media addiction or "an uncontrollable urge to browse social networking sites constantly."[110] This is particularly problematic for younger users as their brains are highly susceptible to rewards, making them easy targets for engagement.[111] Social media algorithms push individualized content that increases dopamine in users' brains so that they will return seeking that same rush.[112] This "dopamine cycle" carefully curated by social media platforms is the exact same as the cycle caused by opioids and other addictive chemicals.[113] Yet, in the United States, we aggressively prosecute dealers of addictive drugs and provide one of a kind protections to creators of addictive algorithms.[114]

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[105] Tom Muha, *Social Media Prioritizes Profit Over People*, THE MICH. DAILY (Oct. 9, 2022), perma.cc/666D-K4HR.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Compare id.*, *with Section 230, supra* note 36.

[110] Debasmita De et al., *Social Media Algorithms and Teen Addiction: Neurophysiological Impact and Ethical Considerations*, CUREUS, Jan. 8, 2025, at 1.

[111] *Id.* at 2 ("Adolescents may be particularly vulnerable to online gaming addiction due to genetic variations, such as those in genes encoding dopamine D2 receptors and dopamine-degrading enzymes, which increase susceptibility.").

[112] *Id.* at 3 (displaying chart at the top of the page illustrating the dopamine cycle).

[113] *Id.* at 2 ("There is evidence that all addictions, both drug-related and behavioral, result from a common mechanism in the brain. Social media systems are taking advantage of the system by increasing dopamine release via digital footprints and machine learning algorithms that flash personalized content").

[114] *Compare Drug Related Crime Statistics*, NAT'L CENTER FOR DRUG ABUSE STAT. https://perma.cc/9W7F-RNBW (last visited Oct. 27, 2025) ("1.16 million Americans are arrested

C. *The Tech Industry Should Be Held to a "Knew or Should Have Known" Standard*

Dangerous people use social media sites to commit or plan the commission of dangerous crimes, but there is no reason for tech companies to stop them when such content increases revenue and holds no consequence to them.[115] For example, Facebook should have, and likely did know, it needed to take steps to stop the circulation of content advocating for the violent storming of the Capitol on January 6, 2021; but where there was no incentive to do so and such content increased traffic to the site, they did not.[116] Further, Pornhub should have, and again likely did know, "that sexually explicit videos tagged as '14yo' had no place on its site," but so long as such a horrific thing is getting views, the platform will turn a deliberate blind eye.[117] This willful blindness frustrates the original purpose of Section 230 which "was to help clean up the Internet, not to facilitate people doing bad things."[118]

The phrase "knew or should have known" is used in the civil and criminal contexts and "implicates the standard of care which a reasonable person would exercise and therefore pertains to the lesser mental states of 'recklessness' and 'negligence.'"[119] In other words, holding the tech industry to a "knew or should have known standard" would simply hold them to the same minimum standard of care the law expects the rest of the world to meet.[120] Supporters of Section 230 argue this is too hard of an expectation to set for the tech industry and would open them up to endless litigation.[121] These supporters overlook the number of alarming cases that have been thrown out regardless of the platforms admitting prior knowledge of the wrongdoing.[122]

Attorney Carrie Goldberg, who represents victims of the big tech

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annually for drug related offenses"), *with* 47 U.S.C. § 230(c)(1).

115 Smith & Alstyne, *supra* note 77; *Section 230: A Key Legal Shield for Facebook, Google Is About To Change* (NPR broadcast Mar. 21, 2018) (transcript and audio at perma.cc/E6CK-CW5Q) [hereinafter *Legal Shield for Facebook*].

116 *See Legal Shield for Facebook*, *supra* note 115.

117 Smith & Alstyne, *supra* note 77.

118 *Legal Shield for Facebook*, *supra* note 115.

119 People v. Nash, 282 Ill. App. 3d 982, 986 (1996).

120 *See id*.

121 Sunset Hearing, *supra* note 66, at 42:00.

122 Sunset Hearing, *supra* note 66, at 31:00.

monopoly, testified before the House Committee on Energy and Commerce as to many of these alarming cases.[123] One case involved a child who was murdered on camera, the video of which remains online and continues to be viewed regardless of pleas for removal from her family.[124] To make matters worse, the child's Instagram account went from two thousand to nearly two *hundred* thousand followers after someone released the video of her death.[125] Regardless of countless requests putting them on notice, Instagram refuses to give the child's estate control of the account or to even remove the account themselves.[126]

Another case involved an eleven-year-old who was preyed on by a 30-year-old male on Omegle, a video chatting site.[127] He forced her to become his sex slave for three years before then forcing her to go back on the app and recruit other children.[128] Fortunately, this victim was able to negotiate a settlement which got the site shut down; however, this was not the path she wished to take.[129] The victim wished to obtain legal justice, but due to Section 230, "getting the site shut down was something [she] couldn't have achieved in court."[130] Section 230 prioritizes protecting big tech over protecting victims of child sex abuse.[131]

Serial rapist, Doctor Steven Matthews, who is now serving a prison sentence of 158 years, used the dating app Tinder to find new victims whom he would then drug and rape on their first date.[132] Tinder *knew* what he was doing and did not stop it.[133] Amazon, a popular retail app, allowed chemicals it knew were used for suicide and had absolutely *no* household use to be

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[123] Sunset Hearing, *supra* note 66, at 30:00.

[124] Sunset Hearing, *supra* note 66, at 31:00.

[125] Sunset Hearing, *supra* note 66, at 31:00.

[126] Sunset Hearing, *supra* note 66, at 31:00.

[127] Sunset Hearing, *supra* note 66, at 31:38.

[128] Sunset Hearing, *supra* note 66, at 31:38.

[129] Joe Tidy, *Omegle: 'How I Got the Dangerous Chat Site Closed Down'*, BBC (Nov. 22, 2023), https://perma.cc/MN9T-TEMF.

[130] *Id.*

[131] *See id.* ("In [2021 and 2023], the site has been mentioned in more than 50 cases against pedophiles and calls from child protection charities like the Internet Watch Foundation (IWF) and the United Nations were ignored.").

[132] Sunset Hearing, *supra* note 66, at 32:21.

[133] Sunset Hearing, *supra* note 66, at 32:22.

sold on its site.[134] This resulted in the horrific deaths of at least 24 individuals with, of course, no consequence to Amazon.[135] A popular ticketing site, Eventbrite, used its algorithm to suggest listings to buy illicit drugs including Xanax, Oxycodone, and Valium immediately next to recovery events for those who have or are currently struggling with substance use disorder.[136] These cases are just some of the many that result in victims being barred from meaningful damages because they cannot sue the deepest pockets that harmed them.[137]

Even members of the tech industry, albeit few, admit that they exploit users for the platform's gain.[138] Facebook's founding president, Sean Parker, admitted that the company's goal is to "consume as much user time as possible" and if that goal is achieved by "exploiting a vulnerability in human psychology" they will do exactly that because there is *nothing* keeping them from doing so.[139] A leading technology engineer, Aza Raskin, invented one of the many tools used to exploit such vulnerabilities: the infinite scroll.[140] This manipulatively designed feature "allows users to endlessly swipe down through content without clicking."[141] Raskin explains that "if you don't give your brain time to catch up with your impulses . . . you just keep scrolling", resulting in people spending significantly more time online than they ever realized or intended.[142] The business models of the tech industry encourage such addictive innovation because the time users spend on the app is directly linked to funding and stock prices.[143]

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[134] Sunset Hearing, *supra* note 66, at 33:13.

[135] *See* Sunset Hearing, *supra* note 66, at 33:06.

[136] Matt Burgess & Dhruv Mehrota, *Eventbrite Promoted Illegal Opioid Sales to People Searching for Addiction Recovery Help,* WIRED (May 21, 2024), https://perma.cc/B5AF-SUJS; Sunset Hearing, *supra* note 66 at 26:06.

[137] *See* Sunset Hearing, *supra* note 66, at 31:07–34:39 (listing off numerous cases that Attorney Goldberg has worked on where horrific harms were protected by Section 230).

[138] *See* Hilary Andersson, *Social Media Apps Are 'Deliberately' Addictive to Users,* BBC (July 3, 2018), perma.cc/T6SF-MYRP

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.* ("Mr. Raskin said he had not set out to addict people and now felt guilty about it. But, he said, many designers were driven to create addictive app features by the business models of the big companies that employed them.").

[143] *Id.* ("'In order to get the next round of funding, in order to get your stock price up, the amount of time that people spend on your app has to go up,' [Raskin] said. 'So, when you put

While few in the tech industry admit such intentions or knowledge, Big Tech has lobbied aggressively against every good faith attempt by Congress to reform Section 230.[144] This opposition reflects their fear of losing these protections because they know if they were held to the same standards as any other industry, their business model would not be viable.[145] All other industries in America cannot claim they were simply passive providers to get out of liability when something goes awry with their product or service; it is time that the tech industry be taken off its statutorily assigned pedestal and held to those same standards.[146]

IV. Repealing Section 230 Allows the Law to Work As it is Supposed To

A. *The First Amendment Provides Adequate Protections for Small and Large Tech Companies While Jurisprudence for the Internet Develops*

Section 230's blanket immunity does not allow the law this country has developed over hundreds of years to function as intended.[147] This law treats the internet as the first innovation American society has ever had to grapple with and develop rules of law to address when, of course, that is far from the truth.[148] For example in the late 20th century emails, digital documents, and more became the center of business practices and individual communications.[149] The legal industry, having always relied on paper documents, needed to address what these new digital records meant for litigation.[150] In *Zubulacke v. UBS Warburg*, the Court determined one's duty to preserve and produce electronic records and the sanctions for failing to

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that much pressure on that one number, you're going to start trying to invent new ways of getting people to stay hooked.'").

[144] Sunset Hearing, *supra* note 66, at 22:40.

[145] *See* Sunset Hearing, *supra* note 66, at 22:40.

[146] *See* Sunset Hearing, *supra* note 66, at 31:55.

[147] *See* Sunset Hearing, *supra* note 66, at 56:4—57:39 .

[148] *See* American Broadcasting Companies, Inc. v. Aereo, Inc., 573 U.S. 431, 431 (2014) (adjusting copyright law to address streaming services); National Broadcasting Co. v. United States, 319 U.S. 190, 215 (1943) (finding that the new radio broadcasting industry could be regulated); Zubulake v. UBS Warburg LLC, 220 F.R.D 212, 217 (S.D.N.Y. 2003) (establishing the duty to preserve e-discovery and sanctions for failing to do so).

[149] Maribel Rivera, *The Evolution of eDiscovery: From its Inception to the Future,* JDSUPRA (Aug. 29, 2024), https://perma.cc/HLK5-BQQU.

[150] *Id.*

do so, establishing new rules litigants are held to today.[151] Rather than write a law carving out exceptions for electronic documents in litigation, lawmakers made adjustments to the Federal Rules of Civil Procedure.[152] This allowed jurisprudence to address any unanswered questions as the American legal system was designed to do.[153] Other examples include redeveloping copyright law to address streaming services,[154] determining radio broadcasting could be regulated,[155] and establishing the freedom of the press through newspaper related litigation.[156] Section 230 assumes that the American legal system is not equipped to answer new, complicated questions when, clearly, it is.[157]

Those in opposition to a repeal or reform of Section 230 argue it will leave tech companies, large and small, vulnerable to lawsuits for overly moderating content out of a fear of being liable for such content.[158] Essentially, they argue that to avoid being sued for their user's words they will silence anything in the "gray area" of controversy, which in turn would present additional lawsuits for the suppression of these voices.[159] Fortunately, these fears are unfounded because of the First Amendment.[160] The First Amendment protects Americans from government interference with their speech, however, private companies may infringe upon your freedom of speech without consequence.[161] The First Amendment provides adequate protections for tech companies from content-moderation related lawsuits and allows the courts time to develop precedent around more particular and novel questions.[162] It is unnecessary to have Section 230's blanket immunity when America has the tools in place to create a new practical area of law that addresses the very real harms internet users face

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[151] 220 F.R.D. at 217.

[152] *Id.* at 217–18.

[153] *See* Rivera, *supra* note 149.

[154] *American Broadcasting Companies, Inc*, 573 U.S. at 451.

[155] *National Broadcasting Co.*, 319 U.S. at 215.

[156] *See* New York Times Co. v. United States, 403 U.S. 713, 724 (1971) (Black, J., concurring).

[157] *See* Sunset Hearing, *supra* note 66, at 56:30.

[158] Sunset Hearing, *supra* note 66, at 43:37.

[159] *See* Sunset Hearing, *supra* note 66, at 44:34.

[160] Sunset Hearing, *supra* note 66, at 57:26.

[161] *See* Julie Horowitz, *The First Amendment, Censorship, and Private Companies: What Does "Free Speech" Really Mean?*, CARNEGIE LIBR. (Mar. 9, 2021), https://perma.cc/P5G9-5PU4.

[162] Sunset Hearing, *supra* note 66, at 57:20.

every day.[163]

B. *The Rules of Professional Responsibility Protect Against the Fear of Frivolous Lawsuits*

Those in opposition to a reform or repeal of Section 230 have additional fears of facing endless, frivolous lawsuits.[164] They cite fears of being subject to so many of these meritless claims that they simply could not financially keep up.[165] This argument is flawed for two main reasons: first, there has to be a legitimate cause of action for user lawsuits, and second, lawyers will be sanctioned for filing frivolous lawsuits.[166]

In order to file a complaint, a plaintiff must have a legitimate legal reason, otherwise known as a cause of action, for filing the complaint.[167] A complaint filed with the court must "clearly identify the parties involved, describe the dispute, and specify what the plaintiff is asking the court to do."[168] Under these requirements, platforms' fears for constant, baseless lawsuits are unfounded because, again, our legal system has the parameters in place to protect against those fears.[169]

Even if a frivolous claim is filed, once again, there are protections in place to address such irresponsible behavior.[170] The American Bar Association's Model Rule of Professional Conduct 3.1 states, "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."[171] Every state in the country has their own version of this rule forbidding the filing of frivolous suits.[172] Additionally, Federal Rule of Civil

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[163] Sunset Hearing, *supra* note 66, at 57:12.

[164] Ash Johnson, *Sunsetting Section 230 Will Make the Internet Worse for Everyone,* INFO. TECH. & INNOVATION FOUND. (May 15, 2024), perma.cc/6AZD-4ASZ.

[165] Sunset Hearing, *supra* note 66, at 44:22.

[166] *See generally* Sunset Hearing, *supra* note 66, at 57:20.

[167] Makaela Stevens, *The Basic Requirement to Bring a Lawsuit,* HINKLE L. FIRM (Oct. 16, 2024), perma.cc/T7PX-C46V.

[168] *Id.*

[169] *See id.*

[170] *See* Sunset Hearing, *supra* note 65, at 58:00.

[171] MODEL RULES OF PRO. CONDUCT r. 3.1 (A.B.A. 1983), https://perma.cc/P7V3-F5BB (last visited Sept. 9, 2025).

[172] *Variations of the ABA Model Rules of Professional Conduct, Rule 3.1: Meritorious Claims and Contentions,* A.B.A. (Nov. 2022), https://perma.cc/X3JW-T8PQ.

Procedure 11 protects against such filings in the federal context.[173] Lawyers will be sanctioned at the state and federal level for violating these rules.[174] Federally, judges are instructed to impose sanctions that "deter repetition of the conduct or comparable conduct by others similarly situated."[175] This may include "nonmonetary directives; an order to pay a penalty into court . . ." or an order mandating the violating attorney to pay the attorney's fees of the party who they wrongfully sued.[176] At the state level, sanctions vary and wide discretion is given to judges, but they mostly follow these same guidelines.[177] If platforms still have concerns with these protections in place, it is because they know that their users have legitimate, meritorious claims that platforms have always been able to avoid and wish to continue doing so.[178]

C. *A Repeal of Section 230 Will Force Tech Companies to Create New Business Models Aimed at Safety and Innovation*

Many of the issues supporters of Section 230 have center around tech company financials and that the way these businesses are run depends on Section 230's blanket immunity.[179] This counterargument assumes that tech companies are utterly incapable of adaptation.[180] In a world without Section 230, tech companies would be forced to create new business models to address the problems they are currently permitted to ignore.[181] Additionally, without the absolute shield of Section 230 tech companies will have to choose what protections they wish to prioritize or forgo in their business model.[182] These choices will create a competitive market and give the power back to American users to choose which platforms align best with their wants and needs.[183]

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[173] FED. R. CIV. P. 11(b)(2).

[174] FED. R. CIV. P. 11(c)(4); *Variations of the ABA Model Rules of Professional Conduct, Rule 3.1: Meritorious Claims and Contentions*, *supra* note 172.

[175] FED. R. CIV. P. 11(c)(4)

[176] *Id.*

[177] MODEL RULES OF PRO. CONDUCT r. 3.1.

[178] *See* Sunset Hearing, *supra* note 66, at 30:54.

[179] *See* Sunset Hearing, *supra* note 66, at 43:00–46:41.

[180] *See* Sunset Hearing, *supra* note 66, at 43:00–46:41.

[181] C&T Hearing, *supra* note 7, at 44:20.

[182] C&T Hearing, *supra* note 7, at 44:20.

[183] C&T Hearing, *supra* note 7, at 42:56.

One of the many ways online service providers could address a repeal of Section 230 would be to utilize contract law.[184] This would mean platforms rewriting their terms of service, community guidelines, and privacy policies to unambiguously explain the parameters of the site to users and what will or will not be moderated.[185] This provides additional defenses to platforms if they are sued over conduct the user was clearly and conspicuously informed of and still agreed to.[186] Again, forcing platforms to rewrite these online contracts in a way that is clear and does not deceive users is simply holding them to the same standards as every other industry in the country.[187]

X, formerly Twitter, has already made changes to its platform's model to address the dangerous spread of false information, proving that platforms are *not* incapable of adaptation.[188] X introduced its "Community Notes" feature in late 2022; the feature is a crowdsourced approach which "empowers volunteer, independent, anonymous, and ideologically diverse contributors to identify posts containing misinformation and to rectify misinformation by appending informative 'notes' to suspect posts."[189] Studies of the feature have shown an overall impressive effectiveness, and other tech companies, like Meta, are learning from and modeling their own features after it.[190] Meta, owner of Instagram and Facebook, ended its original fact-checking feature which used independent third-party experts to correct false information on the sites.[191] It found that the expert fact-checkers had their own opinions and biases that were bleeding into their work and have seen that a community based system, like X's, is more reliable.[192] Meta is making these changes in recognition of the fact that their previous model was not meeting the needs of users, further proving the fact

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[184] *See* Benjamin Jacob, *The Impact of Section 230's Potential Repeal on Startups,* FOUR SCORE L. https://perma.cc/BB7Q-CJGZ (last visited Oct. 28, 2025).

[185] *See id.*

[186] *See* GOLDMAN, *supra* note 47, at 68–69.

[187] *See* C&T Hearing, *supra* note 7, at 32:26–32:50.

[188] *See* Associated Press, *Meta Says it Will Follow X, Replace Fact-Checking With Community Notes,* PBS (Jan. 7, 2025 10:30 AM), perma.cc/88HQ-V8VL.

[189] Mika Ono, *Study Finds X's Community Notes Provides Accurate Responses to Vaccine Misinformation,* UC SAN DIEGO TODAY (Apr. 24, 2024), perma.cc/TH5D-7QJX.

[190] *Id.*; Associated Press, *supra* note 188.

[191] Associated Press, *supra* note 188.

[192] Associated Press, *supra* note 188.

that big tech is capable of adaptation.[193]

Supporters of a reform of Section 230, rather than a full repeal, often argue there should be a carve out for smaller technology businesses who have less resources to defend against litigation.[194] This argument overlooks the fact that many of the most dangerous online services are run by small businesses.[195] For example, Omegle, the video chatting site responsible for enabling child predators before being shut down, was run by one person.[196] Further, a site that encourages and assists suicide, responsible for increasing rates of child suicide in America, is run by two people.[197] Additionally, 99.9% of companies in America are small businesses and yet none in any other industry receive special protections like tech companies do and they continue to find ways to thrive and adjust to the market.[198] Running a small business is undeniably a challenge, but there is no reason to create a special carve out for them simply because of this difficulty.[199] Small and large businesses can protect themselves by simply acting responsibly and not harming people.[200]

CONCLUSION

The biggest misconception that seems to plague Section 230 reform discussions is that there are only two options: allow internet service providers to get away with egregious harm, or have an overly moderated internet adverse to innovation and conversation. This is simply not true; there is a third option. This third option is to repeal Section 230 and allow the American legal system to do its job. The harms that are allowed by Section 230 are harms that American laws are written to address, and without Section 230 in the way, they could provide long overdue relief to hundreds of victims. In a world without Section 230, internet service

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[193] *See* Associated Press, *supra* note 188.

[194] Sunset Hearing, *supra* note 66, at 46:23; Tom Romanoff, *Implications for Changing Section 230*, BIPARTISAN POL'Y CENTER (Mar. 29, 2022), https://perma.cc/8M58-7XWA.

[195] Sunset Hearing, *supra* note 66, at 49:26.

[196] Sunset Hearing, *supra* note 66, at 49:32; Tidy, *supra* note 129.

[197] Sunset Hearing, *supra* note 66, at 49:40.

[198] *See Frequently Asked Questions About Small Business, 2023*, U.S. SMALL BUS. ADMIN. OFF. OF ADVOC. (Mar. 7, 2023), https://perma.cc/NY7Y-XCD3.

[199] *See* Sunset Hearing, *supra* note 66, at 50:36–51:16.

[200] Sunset Hearing, *supra* note 66, at 50:20.

providers would be forced to allocate resources to provide a safer internet, and those who refuse to do so will lose users. Repealing Section 230 makes the internet a competitive market and gives the power back to Americans to choose where they wish to spend their time online. Giving this power back to users also protects them from being subject to manipulative algorithms as platforms will have to be transparent about the tactics they use without their absolute shield. The time is now to take the power back from tech companies and protect the American people: the time is now to repeal Section 230.