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A RUNWAY FOR CHANGE: HOW CALIFORNIA'S PROPOSITION 22 AND AN INSIDE-OUT APPROACH TO REFORM MAY PAVE THE WAY FOR LONG AWAITED CHANGE IN THE MODELING INDUSTRY

BETINA A. BAUMGARTEN, ESQ.*

> [W]e cannot promote healthy images without taking steps to protect the faces of this business… Correcting these abuses starts with seeing models through a different lens: not as dehumanized

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* If I know one thing to be true, it is that catalysts for change exist everywhere so long as we are willing to see and seize upon them. To that end, I thank Representative Mark Levine for spearheading California legislation in this area, and models Nikki DuBose and Sarah Ziff for your advocacy, vulnerability, and dedication to improving the industry. Thank you to Professor Ashley R. Brown of Fordham University for her class in Modeling Law, and to Professor Susan Scafidi for the gift of participating in the Fordham Law Fashion Law LLM program—something geography long prevented and ironically COVID-19 facilitated. Adam, Zach, and Gabby—this Note is dedicated to you as you are the reasons for everything I do. Thank you for your boundless love and support and understanding beyond measure. If anything, I hope you see from my endeavors that it's never too late to reinvent yourself—so remain curious; know that the only limits in life are the ones you set for yourselves; and that where there is a will, there is always a way. I love you all more. I also dedicate this Note to the young girls who have runway aspirations: may you know your worth and your rights; and never settle for less.

Baumgarten graduated from Loyola Law School and worked in private practice for over 15 years as a civil defense litigator in California and Arizona. After having two kids and putting her husband through medical school, her sabbatical from law turned into a personal endeavor to empower women through personal styling, with her business, Best Foot Forward. After having the privilege of dressing the modern woman for her life, which included dressing news and sportscasters, local politicians, Oscar nominees and the Oscar winner for Best Picture 2016, Covid-19 hit and Best Foot Forward shuttered. A Covid silver lining, Baumgarten remotely enrolled in the Fashion Law LLM program at Fordham Law School and began working as Corporate Counsel for The RealReal. The assertions and opinions contained herein are hers alone, and do not reflect those of Fordham Law School or The RealReal.

images, *but as human beings who deserve the same rights and protections as all workers*.[1]

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INTRODUCTION

Behind the toned enviable physiques, perfectly chiseled cheekbones, designer clothes, lights, cameras, and glamour, the modeling industry is a thinly veiled facade of perfection. One peek behind the proverbial curtain reveals a workforce deprived of the most basic protections workers deserve and the law otherwise provides. Remarkably, the only applicable law is the California Talent Association Act, which regulates modeling agencies' licensure and procedural business operations. It is notably silent as to models' rights and protections, thereby facilitating the "standard

[1] Sarah Ziff, *The Ugly Truth of Fashion's Model Behaviour*, THE GUARDIAN (Feb. 13, 2012, 11:28 EST) (emphasis added), https://www.theguardian.com/commentisfree/cifamerica/2012/feb/13/ugly-truth-fashion-model-behavior.

practice"[2] of models' exploitation and mistreatment. Absent any laws or regulations ensuring basic workplace protections, models are left with little leverage, no rights, and no means of recourse. Worse, recent legislative attempts to afford models more protection and a voice in the industry have elicited fierce opposition from the industry's power players, namely the modeling agencies, yielding legislation that barely moves the needle.

However, after decades trying to affect change from the outside, the change models seek may lie in an unlikely place: Proposition 22. The ballot initiative, approved by California voters in the Fall 2020 election, promulgated and paid for by Uber, DoorDash, and other technology and California based drivers and transportation businesses, constituted an attempt to thwart the California legislature's codification of the Supreme Court's decision in *Dynamex*.[3] Here, employers must classify "gig workers" as employees, and not as independent contractors. Proposition 22 established a hybrid third class of workers who maintained their "independent contractor" status but received benefits such as healthcare subsidies for drivers at specified hours, a calculated minimum wage, accident insurance, compensation for lost income, and protections such as sexual harassment and anti-discrimination policies.

A thinly veiled attempt by Uber, DoorDash, and Proposition 22 proponents to circumvent state taxes and other mandated costs associated with hiring "employees." The initiative nonetheless afforded minimum wage, benefits, and other basic protections which gig workers lacked. Though Proposition 22 was marketed as benefitting Uber and Lyft drivers, DoorDash deliverers, and other technology based "gig" part time workers, models clearly fall within the provision's bounds. In theory, this is what the modeling industry has longed for regarding employment benefits and labor reform. However, in practice, its application to the modeling industry may upend, instead of reform it.

Unlike the technology service companies "employing" the "gig workers," the modeling industry's infrastructure is not designed to support what either AB 5 or Proposition 22 mandate because: (1) there is no clear "employer;" (2) the industry's commission based fee structure cannot support an "employee

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[2] Isabel Cristo, *Fashion Week's Labor Problem is Our Labor Problem*, THE NEW REPUBLIC (Sept. 11, 2019), https://newrepublic.com/article/155020/fashion-weeks-labor-problem-labor-problem.

[3] Dynamex Operations West, Inc. v. Superior Court, 416 P.3d 1 (Cal. 2018).

business model;" (3) the increased costs associated with having "employees" raises antitrust concerns in driving out smaller agencies and discouraging competition; and (4) inclusivity and diversity would dissipate as agencies and clients would have to restrict their "employee model" roster to only "it" models, guaranteed sizeable contracts, to stay profitable.

Notwithstanding decades of valiant efforts, AB 5 and Proposition 22 afford models and model advocates one thing they have strived for but have not successfully generated on their own: momentum. The media attention and millions of campaign dollars invested into Proposition 22's passage (and opposition) has raised awareness. Coupled with COVID-19, it also cemented the independent contractors' plight as a critical issue in public discourse and the political arena. With the opportunity to piggyback on the momentum generated by the "gig worker" legislation, this Note addresses how this timely opportunity, bolstered by the number of models, could be the very momentum the modeling industry needs to begin paving the way to long awaited and desperately needed reform. This time, reform would come from the inside out.

Part I addresses the agency centric modeling industry infrastructure and the under-regulation of the industry overall. Part II addresses the California legislature's failed attempts to reform the Modeling Industry from the outside in through model specific legislation. Part III addresses how California legislature's promulgation and adoption of AB 5's ABC worker classification test, as applied to models, would force their reclassification from independent contractors to employees, and show how its application would ultimately upend the modeling industry. Part IV addresses how Proposition 22's creation of a hybrid worker classification model has finally created the momentum, legal precedent, and leverage, models and modeling advocates previously lacked in advocating for reform. Part V addresses how models' alignment with the "gig worker" movement allows them to capitalize on the movement to affect change in their industry from the inside out.

I. THE MODELING INDUSTRY'S INFRASTRUCTURE, UNDER-REGULATION AND INDEPENDENT CONTRACTOR CLASSIFICATION LEAVE MODELS UNPROTECTED AND WITHOUT LEGAL LEGS TO STAND ON

A. THE MODELING INDUSTRY'S FAILURE TO EVOLVE IS THE DIRECT RESULT OF AN AGENCY-CENTRIC INDUSTRY INFRASTRUCTURE

Insiders often describe the modeling world as the "wild west" in its inability to self-regulate.[4] The reason is simple: the industry's business infrastructure revolves around and filters through a single industry player—the agencies. This infrastructure, the agencies' under-regulation, and models' status as independent contractors are to blame for the industry's "dark side."[5] Agencies' industry positioning affords them seemingly unfettered power and influence as every industry player is beholden to them. Fashion, cosmetic, advertising, and consumer product brand clients rely on agencies to source models for their advertising or marketing campaigns, while aspiring models clamor to be signed by these employment gatekeepers. Relationships are the key to agencies' power and success. Why self-police when neither the clients nor models, who feel "totally replaceable,"[6] would ever dare whistle blow and jeopardize their precarious positions?

Moreover, minimal industry accountability further contributes to an agency's power and industry positioning. Unlike other contractual agreements, the agency-model representation agreement confers agents with exclusive rights to steer models' careers and image use.[7] They do so without any legal obligation to find models work or even pay them, let alone pay them minimum

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[4] Letter from Amy Lemons, In Support of A.B. 2539, March 31, 2016.

[5] Alexandra R. Simmerson, *Not So Glamorous: Unveiling the Misrepresentation of Fashion Models' Rights as Workers in New York City*, 22 CARDOZO J. INT'L & COMP. L. 153, 154 (2013) (citing Paula Viola, Assoc., Paul Weiss, Rifkind, Wharton & Garrison LLP, Address at Violations En Vogue? Labor and Employment Laws Concerning Fashion Models and Interns (Feb. 12, 2013)).

[6] Cristo, *supra* note 2.

[7] *See id.*

wage.[8] Aspiring models know "[j]ust like you wouldn't go into a courtroom without a lawyer, you shouldn't represent yourself as a model."[9]

With these employment gatekeepers, models are wholly dependent on an agent's discretion to submit their portfolio for clients' consideration, or as to which "go sees" or casting calls to attend.[10] The agent negotiates the model's pay,[11] dictates the model's schedule, advises the model as to the shoot's time and location, who they will be working with, the shoot's duration, as well as what the shoot requires of them.[12] The agent often arranges the models' transportation, or travel and accommodations if the shoot is out of town.[13] But, the agent's gatekeeper role only goes so far. Though agents can influence a client's hiring decisions, the decision ultimately rests with the client.[14] In sum, though the industry affords agencies great power and discretion, they bear little responsibility—or accountability—to those dependent on them.

Finally, the compensation structure further contributes to the industry's grim reality and agencies' adamance against an infrastructure overhaul. As it stands, the industry compensation structure affords agents dual revenue streams: agents receive 20 percent commission on a given booking from both the employer

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[8] Agency agreements under the California Labor Code only provide that licensed agents offer, procure, attempt to procure employment and engagements for their models without any legal or contractual obligation to do so. *Compare* CAL. LAB. CODE § 1700.4 (West 1986), *with* N.Y. GEN. BUS. L. § 172 (McKinney 1988) (requiring agents to procure a license in connection with employment agency work)*, and* N.Y. GEN. BUS. LAW § 171(8) (McKinney 2012) (defining an agency as "any person . . . who procures or attempts to procure employment or engagements for . . . models"). Unlike California, non-licensed managers in New York are permitted to procure employment engagements for models they represent where the procurement was incidental to their management duties. *See* N.Y. GEN. BUS. L. § 171(8).

[9] Vanessa Helmer, *Why Models Need an Agency*, LIVEABOUT, https://www.liveabout.com/reasons-for-modeling-agency-2379478 (Nov. 20, 2019).

[10] *Id.*

[11] *Moving Forward Together*, ASS'N TALENT AGENTS, https://www.agentassociation.com/frontdoor/index.php?src=gendocs&ref=FAQ&category=Main (last visited Oct. 28, 2020).

[12] *Professional Agency Modeling: How It Works*, NEWMODELS.COM, http://www.newmodels.com/works.html (last visited Nov. 24, 2020).

[13] Helmer, *supra* note 9.

[14] Cristo, *supra* note 2.

client and the model.[15] This double dipping affords little incentive for change—at least from the agency's perspective. With clients feeding them job opportunities, and a seemingly endless supply of young faces desperate to be signed, agencies have little incentive to seek or endorse reform absent oversight.[16] As such, the very nature of the industry's compensation structure reinforces the modeling agencies' stronghold.

B. CALIFORNIA'S UNDER-REGULATION OF THE INDUSTRY AND ITS POWER PLAYERS IS ALSO TO BLAME

Though California promulgated legislation aimed at regulating modeling agencies, namely California Labor Code § 1700 et seq. (the California Talent Agencies Act),[17] its application and breadth are limited in scope. The Act addresses only (1) modeling agency licensure;[18] (2) procedural business requirements and permissible business dealings,[19] and (3) conferring the Labor Commissioner with oversight and dispute resolution power that is reactive, not proactive in application.[20] While the statute imparts general safeguards as to impermissible licensee or modeling agent conduct, such as imparting general safeguards in broadly requiring a model's health and safety, and generally defining permissible conduct,[21] it is devoid of any safeguards or proscriptions against inappropriate workplace conduct and affords models few avenues for recourse.

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[15] Blake Ellis & Melanie Hicken, *The Outrageous Cost of Being a Model,* CNN MONEY (May 12, 2016, 10:15 AM), https://money.cnn.com/2016/05/09/news/runway-injustice-model-expenses/index.html.

[16] Blake Ellis & Melanie Hicken, *How the Modeling Industry Exploits Young and Vulnerable Workers*, CNN MONEY (May 12, 2016, 10:11 AM), https://money.cnn.com/2016/05/04/news/runway-injustice-modeling/index.html.

[17] *See* CAL. LAB. CODE § 1700.4 (defining models as "artists" and modeling agencies as "talent agencies").

[18] *See* CAL. LAB. CODE § 1700.5 (requiring talent agents to be licensed by the Labor Commission); CAL. LAB. CODE § 1700.6 (delineating the application disclosure requirements, which include fingerprinting, affidavits attesting to the applicant's good moral character and reputation for fair dealing).

[19] *See* CAL. LAB. CODE § 1700.4-00.5.

[20] *See* CAL. LAB. CODE § 1700.44 (authorizing the referral of all disputes arising under § 1700 to the Labor Commissioner, who shall hear and decide them; the Labor Commissioner's decisions are appealable within 10 days to the superior court where the matter is heard *de novo*).

[21] *See* CAL. LAB. CODE §§ 1700.9, 1700.21, 1700.33, 1700.35.

C. MODELS' INDEPENDENT CONTRACTOR CLASSIFICATION DEPRIVES THEM OF BASIC LEGAL WORKER PROTECTIONS AND FOSTERS INDUSTRY-WIDE ABUSE AT THE HANDS OF UNREGULATED INDUSTRY PLAYERS

Finally, models' employment status leaves them with few options for legal recourse and fewer legal protections. Legally regarded as independent contractors, models are arguably afforded "inherent flexibility" in setting their work hours and schedule. However, the allure and supposed attractiveness [22] associated therewith is something agencies tout because the "models are not given a choice … [i]n order to book jobs, models must be part of a modeling or talent agency." [23] The harsh reality is "only the modeling agency benefits by classifying models as independent contractors" [24] because in so doing, modeling agencies skirt otherwise mandatory labor code tax obligations to their "employees." These obligations include federal, state, and social security taxes, workers' compensation, minimum wage, unemployment insurance and taxes, access to collective

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[22] *See e.g.*, CAL. LAB. CODE §1700.31 (prohibiting illegal contracts or provisions therein); CAL. LAB. CODE § 1700.33 (prohibiting talent agencies from sending an artist to any place where their health, safety, and welfare, could be adversely affected); CAL. LAB. CODE § 1700.35 (prohibiting agencies from knowingly employing people of bad character).

[23] Anais V. Paccione, *On Trend: Continuing the Effort to Inspire Fashion Industry Reform and Protect Underage Fashion Models,* 41 SETON HALL LEGIS. J. 413, 428 (2017) (citing Gina Neff et al., *Entrepreneurial Labor Among Cultural Producers: "Cool" Jobs in "Hot" Industries,* 15 SOC. SEMIOTICS 307, 307 (2005)).

[24] Paccione, *supra* note 23.

bargaining,[25] guaranteed breaks, maximum work hours,[26] among others. This worker classification structure undeniably deprives not only the government of significant tax revenue, but also deprives models of the safety net most workers enjoy if injured or unemployed.[27]

As independent contractors, models are tasked with ascertaining their state and federal tax liability—which is immensely difficult given how "modeling industry accounting can be quite opaque."[28] Moreover, models, in signing contracts with an agency, confer agents with power of attorney, or the "extraordinary power over a model's finances and career . . . the power to accept payments on behalf of the model, deposit checks and deduct expenses" [29] while essentially disclaiming any fiduciary obligations.[30] Models do not receive minimum wage or any pay for the casting calls for which the agency sends them, the hours spent traveling to and from the casting calls, and time spent waiting at the casting calls for bookings they are not even guaranteed.[31]

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[25] Elisabeth Schiffbauer, THE FASHION L., https://www.thefashionlaw.com/resource-center/models-employees-or-independent-contractors/ (last visited Sept. 6, 2021) (citing Steven Cohen & William B. Eimicke, *Independent Contracting Policy and Management Analysis*, (Aug. 2013)) http://www.columbia.edu/~sc32/documents/IC_Study_Published.pdf); *see also* Matthew Bidwell & Forrest Briscoe, *Who Contracts? Determinants of the Decision to Work as an Independent Contractor Among Information Technology Workers*, 52 ACAD. MGMT. J. 1148, 1148 (2009).

[26] Models work excessive hours, with "many runway models performing in back-to-back shows, staying up until the wee hours of the mornings for fittings and pulling sixteen-hour days during Fashion Week." Elizabeth Cline, *Fashion Models Are Workers, Too*, THE NATION (Sept. 13, 2013), https://www.thenation.com/ article/archive/fashion-models-are-workers-too. *See also* Letter from Milla Jovovich to Marc Levine, Assemblyman, (Apr. 5, 2016) (on file with author) (others work "all day and all night, to go directly to another [unpaid] 'editorial' job . . . [so the workday] ends up being 36 hours long.")

[27] Cristo, *supra* note 2.

[28] Jenna Sauers, *Models Sue Agency for $3.75 Million*, JEZEBEL (Nov. 26, 2010, 1:00 PM), https://jezebel.com/models-sue-agency-for-3-75-million-5698562.

[29] Lisa Lockwood, *The Model Conundrum: Waiting to Be Paid,* WWD (Sept. 11, 2019, 12:01 AM) https://wwd.com/business-news/media/models-wait-to-be-paid-1203209908/.

[30] *Id.*

[31] Further, the median hourly wage for a model is well below the actual minimum wage. *See, e.g.*, Cristo, *supra* note 2.

In the rare instance models do book a gig, "[s]ame-day pay for agency-booked gigs are rare."[32] Models generally wait thirty days for payment, some waiting upwards of 120–250 days to be paid.[33] While agencies fault the client for payment delays, the clients blame the agencies in a game of finger pointing, all at the model's expense.[34] Worse, "the culture in the modeling industry is that unless you are asked to be paid, they [the agencies] won't take the initiative to pay you."[35] Models are afraid to take the initiative and ask to be paid "because of the power the agency has over their career."[36] Between delays and being paid in "trade,"[37] namely designer garments offered in lieu of payment for work performed, models find themselves in a "debt hole"[38] keeping them "in a perpetual state of dependence,"[39] "indentured to their agency."[40] Because after all, "you can't pay your rent with a tank top."[41]

Models' independent contractor status also deprives models of federal and California Occupational Safety and Health Act

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[32] Dania Denise, *How Models Get Paid*, A MODEL'S DIARY (Nov. 30, 2013), http://amodelsdiary.blogspot.com/2013/11/how-models-get-paid.html.

[33] *See* Lockwood, *supra* note 29.

[34] *Id.*

[35] *Id.*

[36] *See* Vanessa Padula, *White Washed Runways: Employment Discrimination in the Modeling Industry,* 17 BERK. J. AFR.-AM. L. & POL'Y, 117, 126 (2016); *see* Cristo, *supra* note 2 (noting that models' innate fear of rocking the boat with their agencies so much that many opted out of collecting their share of a $22 million dollar class action lawsuit for fear they would never work again or be dropped by their agency); *see also* Ashley Mears, *Poor Models. Seriously.*, N.Y. TIMES (Sept. 14, 2011), *https://www.nytimes.com/2011/09/15/opinion/its-fashion-week-poor-models.html*.

[37] Cristo, *supra* note 2; *see also* Elizabeth Cline, *Fashion Models Are Workers, Too*, THE NATION (Sept. 30, 2013) https://www.thenation.com/article/archive/fashion-models-are-workers-too/.

[38] Lockwood, *supra* note 29; *see also* Shannon Quinn, *10 Facts About the Ugly Side of the Modeling Industry,* LISTVERSE (Mar. 28, 2018), https://listverse.com/2018/03/28/10-facts-about-the-ugly-side-of-the-modeling-industry/ (discussing that when models are not timely paid, they are often forced to seek advances on their earnings from their agencies—which their agencies are happy to offer subject to high interest rates. Often times, what they end up owing the agency exceeds their earnings, whereby even after the model leaves the agency, she remains indebted to them).

[39] Ellis & Hicken, *supra* note 15.

[40] Cline, *supra* note 37.

[41] Sara Ziff, *Viewpoint: Do Models Need More Rights?*, BBC (Nov. 29, 2012), https://www.bbc.com/news/magazine-20515337.

protections, which assure "safe and healthful" working conditions.[42] Without healthy weight guidelines or regulations, the pressure "to fit into the tiny clothes of a famous designer, to lose weight so as to fulfill the demands of the modeling industry, to be chosen for castings, photo-shoots or runway shows . . . can lead to addictions or health problems."[43] Models are told to "go on a Diet Coke and cigarette diet;"[44] or to "eat one rice cake a day. And if this "diet" doesn't work, only half a rice cake."[45] In stark contrast to other countries[46] with established minimum Body Mass Index "thresholds

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[42] *See generally* Christine Baker & Juliann Sum, *Health and Safety Rights: Facts for California Workers*, DEP'T INDUS. REL. CAL./OSHA (June 2015), https://www.dir.ca.gov/dosh/documents/h ealth-and-safety-rights-for-workers.pdf.

[43] Ligia Carvalho Abreu, *The Work of Models Through a Fundamental Rights' Perspective,* FASHION L., http://www.fashionmeetsrights.com/page/viewp/the-work-of-models-through-a-fundamental-rights-perspective (last visited Sept. 7, 2020).

[44] Letter from Carolyn Kramer, President of the Academy for Eating Disorders, to Assemb. Marc Levine (Apr. 3, 2016).

[45] Ziff, *supra* note 41.

[46] Countries that have established minimum Body Mass Index thresholds include France, Spain, Denmark, and Israel. *See* Theresa Santoro, *The Pro's and Con's of France's New Eating Disorder Legislation*, NAT. EATING DISORDERS ASS'N, https://www.nationaleatingdisorders.org/blog/pros-cons-frances-new-eating-disorder-legislation (last visited Oct. 15, 2021); *see also* Priya Elan, *My Agents Told Me to Stop Eating - The Reality of Body Image in Modeling,* THE GUARDIAN (Apr. 7, 2016), https://www.theguardian.com/fashion/2016/apr/07/my-agents-told-me-to-stop-eating-the-reality-of-body-image-in-modelling (following the death of model Isabelle Caro due to anorexia, the French Assembly banned excessively thin models by requiring all working models have a minimum body mass index of 18; and requiring any photographic touch ups to be marked as "retouched"); *see also* Selina Sykes, *Six Countries Taking Steps to Tackle Super-Skinny Models*, EURO NEWS (June 9, 2017), https://www.euronews.com/2017/09/06/counties-fighting-underweight-modelling (noting that Madrid's regional government and the Spanish Association of Fashion Designers, which sponsors fashion shows, banned models with a body mass index of less than 18, in 2006, and has since continued to enforce this threshold); *see also* Abrehu*, supra* note 43 (describing that Denmark's Code of Conduct does not impose a BMI limit but in modeling agencies committed to the Danish Fashion Ethical Charter, there is an annual compulsory health check for all models under 25); *see also* Sykes*, supra* note 46 (citing Israel's adoption of legislation limiting model's access to work based on meeting a body mass index requirement of at least 18.5; and a law banning

and require doctors to certify models as "healthy" before working, no similar legislation exists in California, New York or at the federal level.[47]

Models' physical safety is further jeopardized by rampant workplace sexual harassment. Inappropriate touching and physical and sexual assaults occur routinely during photoshoots.[48] Models are dehumanized when deprived of basic privacy rights, like when they are forced to change in front of photographers and others during castings and events.[49] Told where to be, how to dress, how to behave, where to go or not to go, even "models' private lives have been recast as a kind of labor [which] contributes to the devaluation of their work."[50]

Some models consider these hardships "part of the job."[51] This is the case even after #MeToo, which spotlighted these issues and bolstered victims' credibility. However, the power disparity

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the use of underweight models in advertising and on the catwalk in requiring medical proof of a "healthy weight;" and noting in all photographs whether the photograph was "retouched" to make the model look thinner).

[47] Fashion trade organizations, such as the Council of Fashion Designers of America ("CFDA"), have formed a health initiative to address the health issues plaguing the modeling industry. Though the Guidelines set forth goals to educate the industry about eating disorders, encouraging models to seek professional counsel if they suffer from an eating disorder; discouraging the hiring of models under the age of 16; supplying healthy food for models at shoots, and encouraging healthy backstage environments by raising awareness about the impact of smoking and underage drinking, the CFDA Guidelines stop short of implementing minimum body mass indices to work or demanding the industry alter their sizing standards. *See* COUNCIL FASHION DESIGNERS AM., COUNCIL OF FASHION DESIGNERS OF AMERICA HEALTH INITIATIVE GUIDELINES (2011).

[48] Cristo, *supra* note 2.

[49] Michael Love Michael, *Edie Campbell: Lack of Model Changing Rooms is 'Humiliating*,*'* PAPER (Sept. 17, 2008), https://www.papermag.com/edie-campbell-changing-rooms-2605702191.html?rebelltitem=3#rebelltitem3.

[50] As a matter of fact, one model reported that her agent went so far as to direct her public behavior: "be mysterious but not all the way mysterious. . . they would tell me to act cool and edgy in public even though that's not my personality. They would tell me I shouldn't go out to certain clubs, or that I shouldn't go out with certain people." Cristo, *supra* note 2.

[51] *Id.*

remains.[52] "When exploitation is standard practice, when you are often the most subordinate worker in the room with no recourse to a human resources department and when compliance and agreeability are prized above all else, modeling, like other low wage work, fosters abuse."[53]

II. THE CALIFORNIA LEGISLATURE'S ATTEMPTS TO REFORM THE MODELING INDUSTRY THROUGH MODEL SPECIFIC LEGISLATION DO LITTLE TO MOVE THE NEEDLE

Recognizing the industry's need for reform,[54] the California Legislature tried, but only modestly succeeded, in passing model-specific legislation – in large part due to agency opposition. Between 2016 and 2019, the California Legislature introduced three separate bills aimed at implementing worker protections for models. The first bill, AB 2539 (2016), mandated[55] (1) models be classified as employees of the service recipient; and (2) occupational safety and health standards be established to address eating disorders and their prevention, workplace safety, and protection from sexual

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[52] Janelle Okwodu, *Ending Harassment Backstage is Becoming a NYFW Priority*, VOGUE (FEB. 7, 2018), https://www.vogue.com/article/nyfw-fall-2018-changing-rooms-model-alliance-sara-ziff-interview.

[53] Cristo, *supra* note 2.

[54] Telephone Interview with Marc Levine, California Assemblyman, 10th District of California, (Sept. 8, 2020); Interview with Nikki Dubose, Former Model, Model Advocate, Writer and Activist (Sept. 5, 2020).

[55] A.B. 2539 also proposed that anyone engaged in the occupation of a modeling industry was required to obtain a license pursuant to Section 1700 of the California Labor Code. A.B. 2539, 2015-2016 Reg. Sess. (Cal. 2016). The Association of Talent Agents, the trade association representing talent agencies, under which modeling agents are "regulated," opposed the bill in toto, and argued this provision was "redundant." *See Modeling Agencies: Licensure: Models: Employees: Hearing on AB 2539 Before the Cal. Assemb. Comm. on Lab. and Emp.,* 2015-2016 Reg. Sess. 8, (Cal. 2016).

exploitation.[56] However, the Association of Talent Agents ("ATA") fiercely opposed AB 2539 on multiple grounds. First, the ATA believed the bill was overarching and contrary to law, as it disregarded "realities of the work environment and unfairly prejudice[d] models . . . who exhibit control over their work and structure their business as independent contractors."[57] Second, it challenged the proposed OSHA standards as to what constituted "healthy" on vagueness grounds.[58] The ATA also argued the bill impeded First Amendment rights to freedom of expression[59] and imposed burdensome duties on agencies to monitor models' health—duties falling outside the scope of their work.[60] Though the bill ultimately passed the Assembly Committee on Labor and Employment, it died in the Appropriations Committee.[61]

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[56] A.B. 2539, 2015-2016 Reg. Sess. (Cal. 2016) (emphasis added). The legislation was supported by California Labor Federation, AFL-CIO, multiple eating disorder associations, as well as the Model Alliance. The Model Alliance is non-profit labor group that advocates for model's rights. It was started by model turned advocate, Sara Ziff, with the support of other models and the Fashion Law Institute at Fordham Law School in 2012. *See Modeling Agencies: Licensure: Models: Employees: Hearing on AB 2539 Before the Cal. Assemb. Comm. on Lab. and Emp.,* 2015-2016 Reg. Sess. 8, (Cal. 2016).

[57] A.B. 2539, 2015-2016 Reg. Sess. (Cal. 2016); *Modeling Agencies: Licensure: Models: Employees: Hearing on AB 2539 Before the Cal. Assemb. Comm. on Lab. and Emp.,* 2015-2016 Reg. Sess. 8, (Cal. 2016).

[58] *Compare* Aja Frost, *How These Six Countries Are Making The Fashion Industry Safer, https://web.archive.org/web/20160115142444/https://groundswell.org/ethical-modeling/ (*April 17, 2015); (addressing legislation aimed at keeping models safe and healthy from countries such as Israel, Denmark, France, and Italy. Though some countries employ the specific word healthy in their statutory language, none take issue with the word specifically or allege it is vague); Selina Sykes, *Six Countries Taking Steps to Tackle Super Skinny Models,* EURONEWS (June 9, 2017), *https://www.euronews.com/2017/09/06/counties-fighting-underweight-modelling*.

[59] A.B. 2539. Specifically, the agencies disclaimed any responsibility for the oversight and/or management of models' health. *See* A.B. 2539, Leg. Hist., https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160AB2539. Some industry insiders speculate that the industry lobbies pressured the legislature to ultimately let the bill die in Appropriations.

[60] A.B. 2539, Leg. Hist., https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160AB2539.

[61] *See id.* Some industry insiders speculate that the industry lobbies pressured the legislature to ultimately let the bill die in Appropriations. *See also* Interview with Nikki Dubose (Sept. 5, 2020).

Concerned that AB 2539 was too far reaching in scope,[62] its successor, AB 1576, abandoned AB 2539's employee reclassification proposal. Instead, the bill focused squarely on models' health,[63] seeking still to implement OSHA health and safety standards[64] concerning the prevention of eating disorders. It further required modeling agencies to provide all agency employees with sexual harassment prevention and health standards training within 30 days of hiring.[65]

After AB 1576 also failed to pass the Appropriations Committee,[66] AB 2338 was introduced. Entitled the "Talent Agencies: Education and Training Bill,"[67] AB 2338 was the most "watered down"[68] of the three bills. What appeared as an attempt to placate the agencies, AB 2338 abandoned all previous attempts to codify health standards, proposing only that modeling agencies "make available educational materials regarding nutrition and eating disorders to an adult model artist within 90 days of agreeing to representation by the licensee or agency." Unsurprisingly, AB 2338 passed.[69] Proponents felt it was an effective "compromise" with "important components," paving the way "to pass . . . more complex legislation" in the future.[70] In reality it did little to move the needle. Practically speaking, the bill left models in virtually the same backseat position they found themselves prior to AB 2338's passage, with agencies still at the wheel.

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[62] Interview with Nikki DuBose, *supra* note 61; *See* Modeling Agencies: Licensure: Models: Employees, A.B. 1576, 2017-2018 Reg. Sess. (Cal. 2018).

[63] *See* A.B. 1576.

[64] *See id.* Proposed Section §1707.2(a) (2018).

[65] *See id.*

[66] *See* A.B. 2539, Leg. History, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160AB2539.

[67] Talent Agencies, Training, A.B. 2338, 2017-2018 Reg. Sess. (Cal. 2018).

[68] Interview with Nikki Dubose, *supra* note 61.

[69] The bill required, that at a minimum, the educational materials included components specified in the National Institute of Health's Eating Disorder Internet website and that materials be provided in the models' native language. It also required the agencies to keep a record for three years confirming said materials were provided. *See* A.B. 2338, *supra* note 67*,* codified on January 1, 2019, as CAL. LAB. CODE §1700.51: Nutrition and eating disorder materials to be provided to adult model artists; time limit; language and content of materials.

[70] Interview with Nikki DuBose, *supra* note 61.

III. AB 5'S ABC TEST AS APPLIED TO THE MODELING INDUSTRY WOULD ARGUABLY FORCE THE RECLASSIFICATION OF MODELS AS EMPLOYEES AND IMPLEMENT LONG AWAITED REFORM IN THEORY, WHILE UPENDING THE INDUSTRY IN PRACTICE

A. AB 5'S CODIFICATION OF THE CALIFORNIA SUPREME COURT'S *DYNAMEX* HOLDING ADOPTS THE ABC TEST TO DETERMINE WHETHER A WORKER IS AN EMPLOYEE OR INDEPENDENT CONTRACTOR UNDER CALIFORNIA LAW

Though models' direct attempts to legislate impactful worker protections proved largely unsuccessful, the California legislature's codification of the California Supreme Court's 2018 holding in *Dynamex Ops. West. v. Sup. Ct.*[71] in AB 5[72] may have indirectly achieved the reform they sought – at least in theory. In *Dynamex*, the Court applied the "ABC" test to determine whether a delivery driver was an employee or independent contractor per applicable wage order definition.[73] The Legislature adopted *Dynamex*'s ABC test as the applicable legal standard, but broadened its application to apply to all workers,[74] a "legislative fix"[75] to "create a clear and consistent definition for employment and raise . . . the working standards for millions of workers"[76] by affording them "minimum wage, paid sick leave, workers compensation benefits if they're injured on the job, or unemployment benefits if

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[71] *See* Dynamex Operations West, Inc. v. Superior Court, 416 P.3d 1 (Cal. 2018).

[72] *See* A.B. 5, 2018-2019 Reg. Sess. (Cal. 2019).

[73] *See Dynamex*, 416 P.3d at 7. Though the decision addressed other issues, including the appropriate test to distinguish an employee from an independent contractor, and the commonality of factual and legal issues of the drivers themselves under the ABC test in determining whether the lower courts' class certification was appropriate, the discussion of the case will be limited to the ABC test and its application as codified by A.B. 5.

[74] *Worker Status: Employees and Independent Contractors: Hearing on A.B. 5 Before the Assemb. Comm. On Appropriations*, 2019-2020 Reg. Sess. (Cal. 2019) [hereinafter *Worker Status*].

[75] Bruce Sarchet et al., *Independent Contractor Issues in California: Summer 2020 Update*, LITTLER WPI REP. (Sept. 1, 2020), https://www.littler.com/publication-press/publication/independent-contractor-issues-california-summer-2020-update.

[76] *Worker Status*, *supra* note 74.

they are laid off, as well as the protection of other workplace health and safety rights."[77]

The ABC test presumes a worker is an employee *unless the hiring entity can prove that all three conditions are met:* (A) the individual is free from the control and direction of the hiring entity, in connection with the performance of the service, both under contract for the performance of service and in fact; (B) the service is performed outside the usual course of the business of the employer; and (C) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.[78] AB 5 excludes numerous categories[79] of workers from the test's application and instead subjects them to the *Borello* test[80] and other specified criteria.[81]

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[77] *See Gonzalez Bill Expands Employee Protections In Rigged Economy,* Official Website – Assemblyman Lorena Gonzalez Representing the 80th California Assembly District (Dec. 4, 2018), https://a80.asmdc.org/press-releases/20181205-gonzalez-bill-expands-employee-protections-rigged-economy.

[78] CAL. LAB. CODE § 2750.3(a)(1).

[79] Interestingly, AB 5 articulates the ABC test in approximately 130 words, and the exceptions with 27 times that number, or almost 3500 words. *See* Sarchet et al., *supra* note 75.

[80] The *Borello* test served as the test previous to *Dynamex's* ABC test, employed to distinguish employees from independent contractors emanated from the California Supreme Court case of the same name. Less strict than the ABC test, the key factor in *Borello* is whether the hiring entity has control or the right to control the worker both as to the work done and the manner and means in which it is performed. The test also considers eleven other factors: (1) whether the worker is engaged in an occupation different than the hiring firm; (2) whether the work is part of the hiring firm's regular business; (3) who supplies the equipment and tools to perform the work; (4) the worker's financial investment in the equipment materials used; (5) occupational skill; (6) if the occupation or work done is under the hiring firm's direction or by a specialist without supervision; (7) the worker's opportunity for profit or loss; (8) duration of services; (9) degree of the working relationship's permanence; (10) payment method, aka by time or by job; (11) whether the parties believe there is an employee or employer relationship. Unlike the ABC test, no single factor in *Borello* is determinative, but the first factor has the greatest weight. *See* S. G. Borello & Sons, Inc. v. Dept. of Indus. Relations, 769 P.2d 399 (Cal. 1989).

[81] *See* CAL. LAB. CODE § 2750.3 (C)*; see also Worker Status*, *supra* note 74.

B. IF APPLIED TO MODELS, THE ABC TEST CLASSIFIES MODELS AS EMPLOYEES

Under the ABC test, models qualify as employees because the "employee" presumption cannot be rebutted. Prong (A) cannot be met because agents and clients control virtually every aspect of a model's finances, career, and work. Agents—not models—dictate which go-sees the model attends, the jobs for which a model may be hired.[82] Agencies bind models to multi-year, exclusive contracts—some with automatic renewals—and have power of attorney to control all financial aspects of the model's career.[83] In reality, the representation agreement confers agents with a "monopoly"[84] to the use of a model's image both during and after the contract period.[85] Similarly, fashion clients exercise a great deal of control over booked models, dictating every aspect of the model's look, behavior, posing, conduct, schedule, and can hire or fire the model at will.[86] Apart from deciding whether to accept a job or when to take vacation, every aspect of a model's work is subject to outside control[87]—weighing in favor of an employee classification under this prong.

The same is true as to Prong (B) because a model's work falls squarely within the agencies and clients' usual course of work. Models are the cornerstone of the agency's business as agencies represent models in an attempt to procure them work. Just as agencies need models to earn their commission-based income when clients book the agency's models for their marketing and advertising campaigns, models are equally integral to clients' business. Central to any company's profitability are advertising and marketing campaigns to drive consumer awareness and engagement. These campaigns are premised on the careful selection of models whose look and aesthetic convey the brand's messaging

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[82] Ellis & Hicken, *supra* note 16 (stating that "[M]odels say agencies control much of their lives (down to their eating habits and the pay they receive").

[83] *Id.*

[84] Sauers, *supra* note 28.

[85] *Id.*

[86] *See* Ariel Sodomsky, *Models of Confusion: Strutting the Line Between Agent and Manager, Employee, and Independent Contractor In the New York Modeling Industry*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 269, 289 (2014); *see e.g.,* Zaremba v. Miller, 113 Cal. App. 3d Supp. 1, 5 (1980) (finding that a model is subject to the complete control of whomever she is working, and of the photographer, in this case, who controlled all of the details concerning her work and performance, i.e., every movement, the dress, hours, and place of work, etc.).

[87] *See supra* Section II.

as the public face of the brand. This formula is what ultimately drives sales and plays a huge role in making or breaking the company's ultimate success and profitability. As models' work falls squarely within the marketing and promotional work of the fashion brand, Prong (B) similarly favors a model's employee classification.

Finally, Prong (C) also weighs in favor of an employee classification because there is no way to distinguish or separate a model from her work. They are one and the same: a model's work is how she utilizes her look, persona, presence, and physique to convey the brand aesthetic. Though one could argue performing modeling services for various clients would constitute "business activity existing independently of . . . the service relationship with hiring firm,"[88] models' work is transitory by nature and does not constitute the type of "stable, lasting enterprise that survives termination with the hiring firm" that the test requires.[89]

Except for the "it" supermodels of the moment, few models have ongoing, guaranteed work with a single client, let alone at all. Most work a few hours, or a day or two for a fashion brand and then go weeks to months without work. Moreover, models' ability to obtain work is wholly dependent on—and not independent of—their agent and the agency clients booking them. Without a separate business or office location, a financial investment in the business' equity or profit scheme, a business license, and most significantly, the ability to contract more than one agency at the same time due to their exclusive agency contracts,[90] models cannot be deemed independent contractors under Prong (C).

In sum, the ABC test's application fails to rebut the presumption that models are employees. Moreover, the fact neither the statutory language nor any delineated exception expressly or

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[88] Stephen Fishman, *California Passes Historic AB5 Gig-Worker Law*, NOLO, https://www.nolo.com/legal-encyclopedia/ca lifornia-gig-worker-law-AB-5.html (last visited Nov. 14, 2020).

[89] Indeed, Prong (C)'s usual steps to promote an independent business include incorporation and licensure. As models themselves do not incorporate, nor are they licensed, their working arrangement is transitory in nature. *See* Dynamex Operations West, Inc. v. Superior Court, 416 P.3d 1, 39 (Cal. 2018); *see also* LEGAL TESTS FOR INDEPENDENT CONTRACTOR CLASSIFICATION UNDER CALIFORNIA LAW (2020), Westlaw PLLE. *available at* Westlaw Practical Law Labor & Employment (discussing various tests for independent contractor status in California).

[90] Fishman, *supra* note 88.

impliedly refers to models bolsters this conclusion.[91] Though various businesses and industries have sued the State of California challenging AB's application,[92] no suit to date involved a model or challenged AB 5's application to the modeling industry. As the ATA has too remained silent on the issue,[93] an argument can be made that AB 5 affords models the employee status they legislatively sought but failed to directly achieve.

C. ALTHOUGH AB 5 SEEMINGLY AFFORDS MODELS THE PROTECTIONS THEY SEEK, ITS APPLICATION WOULD UPEND THE MODELING INDUSTRY BECAUSE THE CURRENT INDUSTRY INFRASTRUCTURE SIMPLY CANNOT SUPPORT A MODEL EMPLOYEE BUSINESS MODEL

On its face, AB 5 seemingly provides a messiah-like solution for which the modeling world has long hoped. However, AB 5's employee status determination is only effective if the industry can and will support it—and it is clear that even if there is a will—the lack of industry infrastructure flexibility demonstrates that there is no way.

Although AB 5 confers employee status and the accompanying benefits and protections models sought under the

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[91] Even though the California Talent Agencies Act defines models as "artists," the statute accepts only fine artists. *See* CAL. LAB. CODE § 1700.4(b).

[92] A variety of companies sought (but were denied) injunctions against AB 5's enforcement including Postmates, a service-based delivery company (*see* Olson v. California, No. 19-cv-10956-DMG-RAO, 2020 WL 905572, (C.D. Cal. Feb. 10, 2020)); and independent non-fiction writers (*see* Am. Soc'y of Journalists and Authors, Inc. v. Becerra, No. 19-cv-10645 PSG-KSX, 2020 WL 1434933, (C.D. Cal. Mar. 20, 2020)). Other businesses, including data processing entities and the California Tricking Trucking industry, sought declaratory relief (*see* Crossley v. Cal. 479 F. Supp. 3d 901 (S.D. Cal. 2020); Cal. Trucking Ass'n v. Becerra, 438. F. Supp. 3d 1139 (S.D. Cal. 2020)); while others still challenged AB 5 on pre-emption grounds (*see* Western W. States Trucking Ass'n v. Becerra, No. 19-cv-02447-CAS-KKX, 2020 WL 2542062, (C.D. Cal. May. 18, 2020)).

[93] In response to a written inquiry regarding AB 2539's attempted classification of models as employees, and AB 5's application to models, the ATA's response was as follows: "ATA supported and worked with Assembly Member Levine to pass the legislation. ATA has not taken a position on behalf of employers as to the employment status of models as either employees or independent contractors. That determination is made and entered into between the 'talent' and the employer – models are not employees of the talent agency." E-mail from Karen Stuart, Exec. Dir., Ass'n of Talent Agents (Sept. 17, 2020) (on file with author).

Labor Code, its application to the industry will undermine its existence for several reasons. First, the current industry infrastructure presents no clear "employer." Models[94] and other U.S. jurisdictions and countries argue[95] agencies are the natural employer candidate[96] because "the agency selects which models it will represent, chooses which models to send to clients, generally establishes the models' fee after consultation with the client, requires the models to submit completed job vouchers and then directly pays the models their wages"[97] pursuant to their exclusive contracts—as a traditional employer would.[98] Agents' power of attorney, and their exclusive control over a model's financial affairs, use of her image, her career direction, and the like via exclusive contracts, provide a constant, emblematic characteristic of an employer-employee relationship.[99]

On the other hand, one can argue the client is better suited to employ the model. While agents act as "middle men"[100] in contracting with the client on behalf of the model for the model's services,[101] it is the fashion client who "takes control over the

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[94] Model Nikki Dubose believes that "the agency should be their [i.e., models'] employers. . . The agencies should be the ones to provide adequate protections to the models (health care, timely pay, etc.) and should be safe, structured business environments that made models feel safe and proud to work at." Interview with Nikki DuBose, *supra* note 54.

[95] Insurance Appeals Boards in New York have held that models should be regarded as employees of the agencies. *See, e.g.*, *In re* Chopik, 535 N.Y.S.2d 268, 270 (App. Div. 1988); *In re* Barnes, 627 N.Y.S.2d 479 (App. Div. 1995). Moreover, in France, models are agency employees protected under applicable Labor Laws. *See* Simmerson, *supra* note 5, at 163-65 (citing and explaining French modeling law).

[96] Schiffbauer, *supra* note 25.

[97] Sodomsky, *supra* note 86, at 294 (citing *In re* Chopik, 535 N.Y.S.2d 268, 270 (App. Div. 1988); *In re* Barnes, 627 N.Y.S.2d 479 (App. Div. 1995)).

[98] *See* Sauers, *supra* note 28; *see also id.* Sodomsky, *supra* note 86, at 293-94 (noting that all of the Unemployment Appeals Board cases found that models should be employees of the agencies).

[99] *See also* Sodomsky, *supra* note 86.

[100] Lockwood, *supra* note 29.

[101] *See* E-mail Interview with Karen Stuart, Exec. Dir. of Ass'n of Talent Agents, (Sept. 17, 2020) ("[D]etermination is made and entered into between the 'talent' and the 'employer' – models are not employees of the talent agency," explaining the ATA Executive director believes clients are the model's employer) (on file with author); *see also* Padula, *supra* note 36, at 128 (explaining that the agency books jobs for the model but is not likely the model's employer).

assignment"[102] with respect to the model's work. "[D]esigners and photographers, as clients, exercise far-reaching control over the models"[103] as "the client decides the date of the work, provides the facilities, equipment tools, and supplies, stipulates the hours, often requires exclusive services and can terminate the model's services."[104] Most importantly, the client—not the agent—pays the model and agent for their respective services.[105] As the industry deep-pockets with ultimate financial responsibility and steadier revenue streams, fashion brand clients are better positioned financially to "employ" models.[106] However, without a clear "winner" and no volunteers, any employee reclassification would be rendered moot in practice, despite being effective in theory.

Second, even if an employer emerges, the current industry commission structure could not support a "model employee" business model. Agencies and models both work on commission. Accordingly, they are not paid until the model is booked and completes the work. To increase placement odds with clients, agencies contract with established, rising, and up-and-coming models but neither bookings nor commission are guaranteed. Agencies routinely contract and then terminate model contracts because not all agency-signed models get booked. If models were agency employees, agencies would be required to pay every model they sign minimum wage and benefits, as well as state social security, unemployment taxes, and other benefits regardless of whether the model ever gets booked.

Based on the current compensation structure, this would not sustain a profitable business. To financially support "model employees," the agency compensation structure would require an overhaul—something agencies would vehemently oppose, as evidenced by their opposition to AB 2539 and AB 1576. While some would argue that clients' deeper pockets could afford model "employees," their business models also cannot accommodate an employer-employee relationship because of the "transitory nature of

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[102] Padula, *supra* note 36, at 128.

[103] *Id.* (citing Interview with Ali Grace Marquart, Marquart & Small, LLP (Apr. 2, 2014); *see also* Zaremba v. Miller, 113 Cal. App. 3d Supp. 1, 5 (1980).

[104] Sodomsky, *supra* note 86, at 290.

[105] Padula, *supra* note 36, at 121.

[106] *See Zaremba*, 113 Cal. App. 3d Supp. at 5.

modeling work . . . [that] makes it more difficult for each client to be seen as an employer"[107] in California and the US.[108]

Third, the adoption of an employee business model necessitates a complete restructuring of how agencies and clients do business—something the industry has historically been reluctant to even consider.[109] Agencies would no longer be able to sign models simply because they "have potential." They would be unable to afford to keep them on their payroll while also remaining profitable. Forced to slash some models they represent, agencies would be limited to signing only established, top models who could "guarantee" bookings. This would drastically limit opportunities in the modeling industry, making the industry more exclusive and competitive and drive models to greater extremes to remain competitive.[110] Similarly, if fashion brand clients became the employers, the brands would be pigeonholed into relying on a few select models. This reliance would inhibit the brand's business prospects and target audience, creativity in devising marketing strategies and campaigns, and their ability to pivot or rebrand with ease.

Fourth, increased financial responsibilities would drive smaller agencies out of business, leaving only larger corporate entities left to service the industry. In eliminating smaller agencies, and ultimately competition, the industry would be concentrated in the hands of a few large companies—which could potentially raise antitrust issues under the Clayton and Sherman Acts.[111] It would also further constrict opportunity in an already hyper-competitive industry. Furthermore, with increased financial demands, agencies would be deprived the freedom to think outside the box in selecting their model pool. Their decisions would be bottom line driven, forcing them not only to scale back their boards but to limit them only to a models' "guaranteed" bookings. Gone would be the days

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[107] Sodomsky, *supra* note 86, at 290.

[108] Models working in France—also working in a transitory nature—become agency employees with a limited contract for said purposes. *See* Simmerson, *supra* note 5, at 165.

[109] *See supra* note 55 and accompanying text.

[110] Interview with Roman Young, Founder/Owner, Nomad Mgmt. (Sept. 16, 2020).

[111] *See* Fears v. Wilhelmina Model Agency, Inc., No. 02 Civ. 4911 (HB), 2007 WL 1325297, at *2 (S.D.N.Y. Jun. 20, 2005) (establishing a ten-year consent decree creating defining clear contract language all modeling contracts must contain, in holding that various Model Management companies engaging in schematic price fixing that violated antitrust law, to promote transparency and competition).

of models with diverse sizes and ethnicities. This would hinder industry diversity and inclusion—something the modeling industry certainly cannot afford from a public relations standpoint. As such, while industry reform is needed, dictating change in the form of employee reclassification may ultimately do more harm than good.

IV. CALIFORNIA'S PROPOSITION 22 MAY BE THE CATALYST FOR CHANGE IN THE MODELING INDUSTRY

As AB 5, in application, proves not to be the conduit for change models hoped for, its aftermath may offer that beacon. In response to the California legislature's adoption of AB 5, technology-based transportation and delivery service application companies like Uber, Lyft, DoorDash and others sought a compromise in promoting the most expensive ballot measure in California history.[112] Namely, Proposition 22, the Protect App-Based Drivers and Services Act.

Proposition 22 constituted the gig worker industry's attempt to circumvent AB 5's mandatory reclassification of their gig workers from independent contractors to employees. AB 5 was concerned the reclassification would bankrupt their industry by requiring these companies to pay state taxes, insurance, benefits, workers compensation and other employee mandated fees and costs. Proposition 22 instead created a third category of workers that could still function independently, but who would be provided "with certain minimum welfare standards and to set minimum consumer protection and safety standards to protect the public."

This hybrid "employment structure exempted gig workers from AB 5's ABC test by classifying them as independent contractors; but simultaneously afforded limited "employee" benefits. These limited benefits include maximum work hours, healthcare subsidies for drivers working an average of 25 hours per week, a calculated minimum wage, accident insurance, and compensation for lost income, among others.[113] While workers were afforded worker's compensation insurance, independent

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[112] Technology giants—Uber, Lyft, and DoorDash, among others—spent over $200 million dollars defending Proposition 22, which was approved in the November 2020 election by over 58 percent of California voters. *See* Kimberly Valladaras, *Uber, Lyft Win on Prop 22: The Most Expensive Ballot Measure in California's History*, BERKELEY L. (Nov. 16, 2020, 5:47 AM),

https://sites.law.berkeley.edu/thenetwork/2020/11/16/uber-lyft-win-on-prop-22-the-most-expensive-ballot-measure-in-californias-history/.

[113] *See* 2020 Cal. Legis. Serv. Prop. 22 (West).

contractors lacked access to worker's compensation by virtue of their independent contractor status.[114] Proposition 22 also mandated companies' development of anti-discrimination and sexual harassment policies.[115] Advocates urged its passage because it was about "starting to move into the best of two worlds."[116]

In application, Proposition 22 enabled Uber, Lyft, and DoorDash to sidestep more comprehensive, costly obligations imposed by the Labor Code, such as full benefits and minimum wage.[117] Viewed as both a bellwether[118] and a compromise (on the tech companies' terms), the proposition seemingly achieved a hybrid solution Uber, Lyft, DoorDash and independent contractors themselves sought, knowing these companies would fight AB's full application to their industries to the bitter end.[119]

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[114] *See* Castellanos v. State, No. RG21088725, 2021 LEXIS 7285, at *2-3 (Cal. Super. Aug. 20, 2021).

[115] *See id.* (citing CAL. BUS. & PROF. CODE § 7450(c) (Deering 2020)).

[116] *See* Our Wkly. L.A., *Proposition 22 Helping or Hurting Independent Contract-Drivers*, OUR WKLY. L.A. (Oct. 22, 2020), https://ourweekly.com/news/2020/10/22/proposition-22/.

[117] *See* Kari Paul, *Prop 22 Explained: How California Voters Could Upend the Gig Economy*, THE GUARDIAN (Oct. 15, 2020, 6:00 AM), https://www.theguardian.com/us-news/2020/oct/15/proposition-22-california-ballot-measure-explained, (noting the cost of Proposition 22 dwarfed the combined costs of compliance with the Labor Code mandates, previously incurred litigation costs as well as pending litigation costs and fees concerning AB 5's application).

[118] *Id.*

[119] In truth, Uber, Lyft, DoorDash and others, would have continued to challenge AB 5's application. Pending litigation, which spanned the course of 2020, up until 2 weeks before the election, enabled these companies to avoid complying with AB 5. Perhaps facing a losing battle, or simply being prepared to fight one on all fronts, Proposition 22 was their attempt to provide some benefits and worker protections short of what the Labor Code otherwise mandated. *See, e.g.*, The People v. Uber Technologies, 270 Cal. Rptr. 3d 290, 296 (2020); Paul, *supra* note 117. While it is true that some independent contractors working for Uber, Lyft, and DoorDash did support Proposition 22, many felt cheated by the meek benefits it afforded in comparison to what they were otherwise legally entitled to under AB 5 and the California Labor Law as employees. *See* Alissa Walker, *Uber and Lyft Just Bought a Law in California*, N.Y. MAG.: CURBED, (Nov. 5, 2020), https://www.curbed.com/2020/11/california-uber-lyft-prop-22.html.

Despite overwhelming voter support for Proposition 22,[120] there are still legal hurdles ahead. Drivers for Uber, Lyft and DoorDash, together with Service Employees International Union, sued the State of California in California state court and prevailed on their constitutional challenges to Proposition 22.[121] Most recently, the Alameda Superior Court ruled Proposition 22's designation of workers as independent contractors for purposes of worker's compensation ineligibility and ability to organize, unconstitutionally restricted the California legislature's right to make those designations.[122] As a result, Proposition 22 was held to be unconstitutional in its entirety because these provisions were deemed inseverable from the remainder of the statute.[123] Although its provisions remain in effect as the case is appealed, its future as currently drafted remains uncertain as a result of the "unusual provisions in it."[124]

Proposition 22, especially in the wake of the Coronavirus pandemic, shines a long overdue spotlight on the plight of independent contractors and has raised awareness about the need for

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[120] California voters passed Proposition 22 with a 58 percent majority. *See* Danielle Abril, *Uber, Lyft, and Gig Companies Win Big After Prop 22 Passes in California,* FORTUNE (Nov. 4, 2020, 12:42 AM), https://fortune.com/2020/11/04/prop-22-california-proposition-uber-lyft-gig-companies-workers-passes/.

[121] *See* Castellanos v. State, No. RG21088725, 2021 LEXIS 7285, at *17-18 (Cal. Super. Aug. 20, 2021).

[122] *Id.* at *6.

[123] *Id.* at *18. Note that Judge Frank Roesch's opinion also stated that Ca. Bus. & Prof. Code § 7465, which required a 7/8 supermajority approval, would be unconstitutional because it limited the Legislature's ability to pass future legislation that does not constitute an "amendment" under Article II, Section 10, Subdivision (c) of the California Constitution. However, the opinion narrowly construed the requirement to apply only to non-referendum procedures in order to avoid the constitutional conflict, severing it from the remaining part of the statue.

[124] Kate Conger, *California's Gig Worker Law Is Unconstitutional, Judge Rules*, N.Y. TIMES (Aug. 20, 2021), https://www.nytimes.com/2021/08/20/technology/prop-22-california-ruling.html.

protections and benefits for independent contractors. [125] In following the fourteen other states whose definition of employee includes "gig workers," [126] Massachusetts recently instituted litigation against Uber and Lyft to challenge their independent contractor misclassification, while the Albany legislature contemplates legislation that provides for a limited form of unionization for its gig workers.[127] The Department of Labor is also taking note as U.S. Labor Secretary, Marty Walsh, recently announced a Department of Labor policy shift in favor of classifying gig workers as employees.

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[125] *See* Rebecca Smith, *Independent Contractors & COVID-19: Working Without Protections*, NAT'L. EMP. L. PROJECT (Mar. 24, 2020), https://www.nelp.org/publication/independent-contractors-covid-19-working-without-protections/ (highlighting that the pandemic painfully highlighted the critical shortcomings in gig work as gig workers were deprived of "financial and physical security" as a result of their "independent contractor status." It also noted the disparate impact the pandemic had on gig workers of color who comprised almost half the gig worker workforce at companies such as Uber, Postmates and Amazon).

[126] Such states include Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Nebraska, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Vermont, and Washington. *See* National Employment Law Project, *Independent Contractors & COVID-19: Working Without Protections* (Mar. 24, 2020), https://www.nelp.org/publication/independent-contractors-covid-19-working-without-protections/#_ftn5.

[127] For example, Massachusetts sued Uber and Lyft over the status of drivers, arguing that drivers should be classified as employees with the right to receive benefits on the grounds that the "business model is unfair and exploitive…. [D]rivers have a right to be treated fairly." Kate Conger & Daisuke Wakabayashi, *Massachusetts Sues Uber and Lyft Over the Status of Drivers*, N.Y. TIMES (July 14, 2020), https://www.nytimes.com/2020/07/14/technology/massachusetts-sues-uber-lyft.html?referringSource=articleShare. The case remains pending in the Massachusetts courts as of the date of this article. Moreover, lawmakers in New York are evaluating whether to pass a bill that would create a structure for bargaining among gig workers that labor experts regard as "a watered-down version of union representation, closely controlled by the companies . . . [that strips] away essential worker rights and protections." Kate Andrias et al., *Lawmakers Should Oppose New York's Uber Bill: Workers Need Real Sectoral Bargaining Not Company Unionism*, ON LAB. (May 26, 2021), https://onlabor.org/lawmakers-should-oppose-new-yorks-uber-bill-workers-need-real-sectoral-bargaining-not-company-unionism/https://onlabor.org/lawmakers-should-oppose-new-yorks-uber-bill-workers-need-real-sectoral-bargaining-not-company-unionism/.

Believing companies' misclassification of gig workers as independent contractors results in their unfair treatment in favor of companies' profits, the Department of Labor took notice. Secretary Walsh made an announcement that followed the Labor Department's Wage and Hour Division's proposal to rescind rules making it easier for companies to classify workers as independent contractors. He did so for one simple reason: to address the need to ensure "workers have access to consistent wages, sick time, health care and 'all of the things that an average employee in America can access.'"[128]

While modeling industry advocates acknowledge important differences exist between Uber drivers and models, "many of the kinds of abuses that models face, financial and otherwise, [are] strikingly similar to those faced by other low wage workers in the gig economy." [129] Like tech-based gig workers, models lack minimum wage, access to subsidized healthcare, maximum hour limits, protections from workplace harassment, insurance benefits, among others. A modified, broader construction of independent contractor should include models. As models lack the resources to fund an independently funded and similarly sized campaign, [130] Proposition 22 affords models both a template and an opportunity to piggyback off its momentum and political attention.

As Uber, Lyft and DoorDash continue to face both legal and political challenges ahead in their attempts to seemingly usurp the

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[128] *See* Nandita Bose, *Exclusive: U.S. Labor Secretary Supports Classifying Gig Workers as Employees*, REUTERS (Apr. 29, 2021, 8:50 AM), https://www.reuters.com/world/us/exclusive-us-labor-secretary-says-most-gig-workers-should-be-classified-2021-04-29/.

[129] Cristo, *supra* note 2.

[130] Companies in support of Proposition 22 spent almost $200 million in marketing and advertising, making it the most costly ballot measure marketing campaign in California's history. *See* Ryan Menses et al., *Billions Have Been Spent on California's Ballot Measure Battles. But This Year is Unlike Any Other*, L.A. TIMES, (Nov. 13, 2020), https://www.latimes.com/projects/props-california-2020-election-money/. Interestingly, the campaign costs paled in comparison to the cost of employing its independent contractors and speak to what's at stake for these companies. To comply with A.B. 5, employment costs would rise up to 30 percent or more. *See* Salvador Rodriguez, *Uber and Lyft Pledge $60 Million to Ballot Measure in Fight to Keep Drivers' Classification as Contractors*, CNBC, (Aug. 29, 2019, 8:15 PM) https://www.cnbc.com/2019/08/29/uber-and-lyft-pledge-60-million-to-fight-california-ballot-measure.html; Michelle Cheng, *A Ballot Measure Backed by Uber and Lyft Is Now the Most Expensive in California History,* QUARTZ.COM, (Sept. 23, 2020), https://qz.com/1907040/uber-lyft-doordash-are-spending-millions-on-california-prop-22/.

government's right to classify workers as evidenced by the California Supreme Court's recent decision, models now have the leverage to utilize the political process to expand Proposition 22's language. The language should include models and similarly situated independent contractors within its parameters and definitions. Indeed, whether by coincidence or otherwise, the industry has begun to respond. On the precipice of Proposition 22's passage, Elite Model Management USA introduced "Insurance for Models." [131] The program affords models reduced rates for insurance plans for medical coverage, third party liability coverage, and limited travel insurance.[132]

While optimists see this as a positive step in the direction of reform, with workers' rights issues at the forefront in California voters' minds, it is only a matter of time until models find themselves center stage for this long overdue battle worth fighting.

V. THE GREATEST CHANGE OFTEN COMES FROM WITHIN: WAYS MODELS CAN START TO IMPLEMENT REFORM BY HARNESSING THEIR OWN POWER AND RESOURCES, AND CAPITALIZING ON INDUSTRY SHIFTS

Recognizing the modeling industry is slow to innovate, the law often fails to keep pace with social change, and policies can only go so far.[133] Regardless of legal and social change, the key to *immediate* change actually lies in the models' own hands. Despite its origins as a cost saving measure for tech-based transportation and delivery companies, the breadth of Proposition 22's application has shifted independent contractors' overall approach to change. While independent contractors and models have long sought to change the industry from the outside in, Proposition 22's passage revealed the key to change may be from the inside out. In harnessing one of their

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[131] Lisa Lockwood, *Elite Model Management to Offer Insurance for Models*, WOMEN'S WEAR DAILY, (Nov. 12, 2020, 12:01 AM), https://wwd.com/business-news/media/elite-model-management-to-offer-insurance-for-models-1234655121/.

[132] *Id.*

[133] *See* Maya Singer, *The Model Alliance Will Receive CFDA's Positive Social Influence Award, But Founder Sara Ziff is Still "at the Beginning of a Very Long Fight,"* VOGUE (Nov. 10, 2021), https://www.vogue.com/article/sara-ziff-model-alliannce-cfda-positive-social-change-award (interviewing Sara Ziff).

most valuable assets—their numbers[134]—models can affect industry change by moving the needle from within, through: (1) education and mentorship; (2) strategic organization; (3) disruptive entrepreneurship; and (4) ballot initiatives.

A. EDUCATING AND MENTORING MODELS CAN IMPROVE THEIR INDUSTRY EXPERIENCE AND EMPOWER THEM TO SELF-ADVOCATE

Simply stated, knowledge is power. Educating and mentoring young models can facilitate fundamental industry change by teaching them about their rights, and about how the industry *really* operates. The more models know and understand, the better armed they are to navigate the business, its challenges, and pitfalls.[135] Models need to better understand the complex provisions set forth in agency representation contracts, and they deserve more than the mere suggestion that outside counsel review it for them. For all intents and purposes, models need to know what questions to ask, what rights they retain versus relinquish (like rights to use their image), and how the compensation structure truly works before they sign on the dotted line with an agency. [136]

While imparting industry knowledge and insight may not wholly correct the industry's inherent power imbalance, it will cause models to fear less[137] and question more. Moreover, an industry-wide shift in this regard, with a more educated and knowledgeable model population, can eradicate any risk of models

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[134] *See* Sara Ziff, *A New Model for Fashion*, Mission Statement, THE MODEL ALL., https://www.modelalliance.org/our-mission (last visited Nov. 25, 2020); Cristo*, supra* note 2.

[135] Interview with Brad Lemack, Owner/President, Lemack and Co. Talent Mgmt./Pub. Rels. (Sept. 21, 2020).

[136] *See* Vanessa Helmer, *5 Questions You Should Ask a Modeling Agency Before Signing*, LIVEABOUTDOTCOM, (Oct. 31, 2019), https://www.liveabout.com/signing-with-a-modeling-agency-2379373.

[137] *See generally*, R. Sebastian Gibson, *Modeling Contracts - Answers to common Questions of How Models Can Protect Themselves*, HG.ORG, https://www.hg.org/legal-articles/modeling-contracts-answers - to-common-questions-of-how-models-can-protect-themselves-5597 (last visited Nov. 17, 2020).

being "labelled as difficult if [they] ask questions,"[138] thereby facilitating improved industry transparency and workplace equality.

Mentoring will prove instrumental in achieving this with the Model Alliance's Mentorship Program[139] being one such example. There, the Model Alliance, in partnership with some participating agencies, pairs experienced models with younger ones to afford young models support and career guidance.[140] In addition, these programs facilitate community and comradery by opening channels of communication, promoting leadership skill development, and instilling confidence in younger models, arming models with the lessons only industry experience afford. The success of these mentorship programs will ideally spur the creation of similar independent or inter-intra agency programs. Programs that will not only support and guide models as they traverse their careers, but also create a new generation of models whose enhanced understanding and knowledge will force agencies to finally come to the table.

B. POWER IN NUMBERS: INNOVATIVE ALLIANCES THAT ORGANIZE MODELS AND HARNESS THEIR COLLECTIVE POWER IS CRITICAL TO IMPLEMENT INDUSTRY REFORM

Secondly, innovative model organization will facilitate moving the needle. Models have long "grappled with the difficulties of organizing"[141] in large part because their efforts, historically, resembled shoving a square peg into a round hole.[142] As demonstrated by the Model's Guild, attempts to unionize as

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[138] AFP, *'Slaves to Debt': Fashion Models Speak Out About Catwalk Misery*, FASHIONUNITED UK (Sept. 27, 2018), https://fashionunited.uk/news/fashion/slaves-to-debt-fashion-models-speak-out-about-catwalk-misery/2018092739173; *see also* Mears, *supra* note 36 (discussing how in spite of a $22 million dollar settlement, the court had to donate most of it because they could not find enough models willing to cross their agencies and identify themselves to collect their share).

[139] Since amalgamated into the RESPECT program, *infra* note 159.

[140] *See, e.g.*, Ziff, *supra* note 134.

[141] Cristo, *supra* note 2.

[142] The fight to allow independent contractors to unionize continues be an expensive uphill legal battle as evidenced by a recent 9th Circuit case whereby the U.S. Chamber of Commerce successfully challenged a Seattle City Council Ordinance that permitted for-hire drivers (e.g., Uber drivers) to unionize. *See* Chamber of Com. v. City of Seattle, 890 F.3d 769, 775-76 (9th Cir. 2018).

independent contractors—who cannot legally unionize—have failed. The "proto-union,"[143] which achieved only some short-lived success,[144] could neither withstand the "overwhelming might" of the agencies[145] nor eradicate models' "legitimate concerns about agency blacklisting"[146] should they affiliate. As "a union makes a strong oppositional statement that scares off people,"[147] the road to reform lies not in collective bargaining, but rather in "vigorously promoting a long-time labor strategy—strength in numbers—to press for better conditions."[148]

On the heels of #MeToo, and in following in the footsteps of other emerging freelancer "unions'" work, [149] the Model Alliance's establishment may be the industry's fighting chance at organized reform. Serving as an industry "voice and a guardian,"[150] the Alliance recognizes the path to effective change and longevity requires working with, not against, the industry.[151] In so doing, within the span of a few short years, the Model Alliance gained more traction than any other organization in growing its membership. [152] The Alliance was successful in establishing a

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[143] Cristo, *supra* note 2.

[144] Former model, Donna Eller, founded the Model's Guild in 1995, and after securing labor backing, managed to secure insurance and credit union financial services for models. *See* Steven Greenhouse*, Models Join Together to Make Unionism a Thing of Beauty*, N.Y. TIMES (Nov. 20, 1995), https://www.nytimes.com/1995/11/20/nyregion/models-join-together-to-make-unionism-a-thing-of-beauty.html; Cristo, *supra* note 2. However, the Guild struggled to find a foothold in the industry because of the agencies' resistance and inclination to blacklist models who joined. Cristo, *supra* note 2.

[145] Cristo, *supra* note 2.

[146] *See* Steven Greenhouse, *A New Alliance Steps Up to Protect a New Generation of Models,* N.Y. TIMES (Dec. 23, 2013), https://www.nytimes.com/2013/12/24/business/a-new-alliance-steps-up-to-protect-the-next-generation-of-models.html.

[147] *Id.*

[148] *Id.*

[149] *See, e.g.*, *About Freelancers Union*, FREELANCERS UNION, https://www.freelancersunion.org/about/ (last visited Nov. 27, 20). The Freelancers Union is a non-profit, started in 1995, that uses the power of numbers to affect change, through policy advocacy work. *See id.*

[150] Greenhouse, *supra* note 144.

[151] *See* Ziff, *supra* note 134.

[152] *See generally,* THE MODEL ALLIANCE (last visited Nov. 26, 2020), https://modelalliance.org/our-team (demonstrating that the Model Alliance quickly boasted a membership of over 400 models, overseen by a board of directors of industry veterans); *see also* Greenhouse, *supra* note 146.

Modeling Bill of Rights,[153] educating and empowering models to demand fair treatment, and partnering with agencies to create mentorship programs through the Model Alliance Mentorship Program.[154] Externally, the Alliance also successfully tackled the following "winnable" issues:[155] persuading New York Fashion Week to bar photographers from model changing areas; working with designers and agencies to fight model anorexia; and getting fashion publications, like Vogue, to cease hiring models under the age of 16.[156]

The Alliance also achieved political success in its work with legislators and the New York Department of Labor to pass the New York child model law, which incorporated models into the "child performer" definition.[157] This affords them better workplace protections. Most significantly, in 2018 and with the support of over 100 models and a handful of industry players, the Alliance established the "Respect Program."[158] This global initiative program was regarded by the New York Times as a "most ambitious solution."[159] The Respect Program calls on brands and agencies to sign legally binding agreements with the Model Alliance[160] to follow "a set of comprehensive industry standards developed by

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[153] Tracey Lomrantz Lester, *The Models' Bill of Rights: Check Out the Demands of the New Model Alliance, Bill of Rights*, GLAMOUR (Feb. 8, 2012), https://www.glamour.com/story/the-models-bill-of-rights-chec (outlining the Bill of Rights, including a models' right to professionalism, transparent accounting practices, and control of their career).

[154] THE MODEL ALLIANCE, *supra* note 152.

[155] Greenhouse, *supra* note 146.

[156] *Id.*

[157] THE MODEL ALLIANCE, *supra* note 152.

[158] *The RESPECT Program*, THE MODEL ALLIANCE (last visited Nov. 16, 2020), https://programforrespect.org/learn.

[159] *A Comparative Analysis of the Model Alliance's RESPECT Program*, WORKER-DRIVEN SOCIAL RESPONSIBILITY NETWORK (last visited Nov. 29, 2020), https://wsr-network.org/model-alliance-respect-program/ (presenting the RESPECT Program as a significant improvement from previous industry initiatives).

[160] As recently as February 2020, over 100 models signed a letter calling out Victoria's Secret's detrimental work environment, calling on the company to sign on to the RESPECT Program's Pledge. *See* Shoshy Ciment, *Over 100 models signed an open letter to Victoria's Secret's CEO decrying a 'culture of misogyny, bullying, and harassment' at the lingerie company,* BUS. INSIDER (Feb. 5, 2020), https://www.businessinsider.com/models-criticize-victorias-secret-open-letter-to-ceo-2020-2.

models to govern behavior, rights, payment, and recourse, as well as a detailed list of consequences and processes"[161] intended to train and educate industry members "to prevent abuses from happening in the first place."[162]

The Alliance and its initiatives are designed not only to raise industry and global awareness, but to also affect incremental reform that other attempts at "organizing" failed to achieve through vis a vis industry player partnership.[163] Though models have successfully unionized in countries such as Great Britain,[164] they succeeded because both their market and country embraced the need for reform.[165]

Regrettably, the modeling industry in the United States lags far behind, as evidenced by decades of contemplation as to why the fashion and modeling industry has not—and cannot—create a fashion or modeling counterpart to the Screen Actors Guild.[166] Some attribute it to the fact "[m]odels are younger, less securely employed and more interchangeable than workers in other non-arts and entertainment-related professions."[167] Others contend that unlike Hollywood, where the film and television industry hubs reside, the modeling industry is international. Since "models are working all over the world without knowing [] schedules and without there being a place to congregate,"[168] organization is difficult.[169] Instead of continually trying to fit a square peg into a round hole, acknowledging and embracing these industry challenges is the key to reform, as alliances and partnerships have affected thus far.

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[161] *The RESPECT Program*, *supra* note 158.

[162] Lisa Lockwood, *Model Alliance Releases Video About Fashion Industry Abuses and the Respect Program,* FAIRCHILD MEDIA WWD (Sept. 17, 2020), https://wwd.com/fashion-news/fashion-scoops/model-alliance-releases-video-about-fashion-industry-abuses-and-the-respect-program-1234589589/.

[163] Abreu, *supra* note 43.

[164] Ariel Sodomsky, *Models of Confusion: Strutting the Line Between Agent and Manager, Employee and Independent Contractor in the New York Modeling Industry*, 25 Fordham Intell. Prop. Media & Ent. L.J. 269, 302 (2014).

[165] Denis Campbell, *Models Reveal Why They Need a Union*, THE GUARDIAN (Dec. 16, 2007), https://www.theguardian.com/uk/2007/dec/16/fashion.lifeandhealth.

[166] *See generally,* Paccione, *supra* note 23, at 425.

[167] *Id.* at 434.

[168] Cristo, *supra* note 2.

[169] *Id.*

Moreover, in light of the #MeToo movement and the awareness it cultivated in and around 2017,[170] it seems that models may likewise find an ally in the fashion client brands themselves. Actually, the movement seemingly prompted individual brands, fashion conglomerates and fashion trade organizations to pledge commitments, and to develop and announce initiatives and charters in an effort to protect models. For instance, building on its 2007 Health Initiative to address "the overwhelming concern about unhealthily-thin models and whether or not the industry should impose restrictions," [171] the Council of Fashion Designers of America, [172] in partnership with Sara Ziff's Model Alliance, established the Initiative for Health, Safety, and Diversity. This initiative comprehensively addressed additional issues like the lack of diversity and inclusion in the modeling industry, as well as establishing a no-tolerance policy for sexual harassment and assault.[173]

The association's industry-specific educational efforts, standards, mental and physical health awareness programs, support systems, and evaluation and treatment options that the CFDA offers reflects the recognition that "designers share a responsibility to protect women, and very young girls in particular, within the business, sending the message that beauty is health."[174] The CFDA also adopted both a zero-tolerance policy for unsafe environments and for abuse in the workplace and partnered with the Model Alliance in affording models recourse in the case of abuse, unwelcomed advances or other inappropriate conduct.[175]

In addition to the over 500 brand members of the CFDA, two of the largest fashion conglomerates, Louis Vuitton Moet Hennessey ("LVMH") (which includes brands such as Celine, Stella McCartney, Christian Dior, Givenchy, among others, including the namesake brands) and the Kering Group (which

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[170] *See* Stephanie Zacharek, Eliana Dockterman & Haley Sweetland Edwards, *The Silence Breakers*, TIME (Dec. 6, 2017), https://time.com/time-person-of-the-year-2017-silence-breakers/.

[171] *Initiative for Health, Safety, and Diversity*, CFDA, https://cfda.com/philanthropy/initiative/initiative-for-health-safety-and-diversity (last visited Oct.16, 2021).

[172] The CFDA is a not-for-profit fashion trade organization, comprised of 477 fashion brands, whose mission is to strengthen the impact of American fashion in the global economy. *See* CFDA, https://cfda.com/about-cfda (last visited Oct.16, 2021).

[173] *Initiative for Health, Safety, and Diversity*, *supra* note 171.

[174] *Id.*

[175] *Id.*

includes luxury brands such as Gucci, Balenciaga, Alexander McQueen, and Bottega Venetta), also sought to address model health and safety in 2017 and 2018. LVMH and Kering collaborated to develop an initiative comprising both a charter on working relations with models, and established a website dedicated to the same, entitled "wecareformodels.com."[176]

The charter, adopted by both conglomerates' respective brands, commits to provide safe working conditions and healthy standards for models by: (1) banning extremely thin models from casting; (2) requiring models to present valid medical records attesting to their good health within six months of the booking; (3) banning the casting of any model under the age of 16; (4) mandating education requirements, work hours and the presence of a chaperone for any model ages 16-18; (5) affording models a means of recourse in the case of disputes with an agency, casting director, or brand; (6) requiring private spaces for models to change without public access; (7) requiring a model's explicit consent to any nudity or changes in appearance; and (8) prohibiting alcohol consumption during work (except as permitted by the brand because of the nature of the shoot, or after the shoot) and providing models access to healthy food and drink, as well as information about maintaining a healthy diet.[177]

These brands' recognition of the pervasive issues plaguing the modeling industry, and their attempts to bring awareness to them and create accessible means for models to seek assistance and recourse, demonstrates the allies that models have in these brands. Capitalizing on these by forming alliances that harness models' power and influence, in partnerships that tackle universal industry issues in ways less undermining will yield change—one tiny step forward at a time. Moreover, a model-fashion brand alliance may to afford models the industry leverage they need, in the face of the agencies, to affect the greater change models ultimately seek.

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[176] *See LVMH and Kering Have Drawn Up a Charter on Working Relations with Fashion Models and Their Well-Being*, LVMH (Sept. 6, 2017), https://www.lvmh.com/news-documents/press-releases/lvmh-and-kering-have-drawn-up-a-charter-on-working-relations-with-fashion-models-and-their-well-being/ [hereinafter *LVMH and Kering Have Drawn Up a Charter*]; *see also* Shweta Gandhi, *Fashion's Biggest Rivals LVMH and Kering Launch A Wellness Website For Models to Combat Abuse*, ELLE (Feb. 20, 2018), https://elle.in/article/lvmh-and-kering-wellness-website-for-models/; *We Care*, WE CARE FOR MODELS, https://www.wecareformodels.c om/we-care/ (last visited Oct. 17, 2021).

[177] *See LVMH and Kering Have Drawn Up a Charter*, *supra* note 176.

C. MODEL BUSINESS ENTERPRISES, NAMELY ENTREPRENEURIAL START-UPS AND WORKER COOPERATIVE PARADIGMS, MAY AFFORD MODELS WITH OPPORTUNITIES TO CIRCUMVENT THE AGENCIES ALL TOGETHER

A third alternative means of achieving industry reform is circumventing the agencies altogether through the advent of a model-owned and -run enterprise. Industry veterans have long recognized agencies' failure to evolve along with the industry.[178] As the industry's business has "moved online and the culture of celebrity has created massive changes [as m]ost jobs pay less, few jobs pay a lot, and only a handful of supermodels and 'it girls' book these high-paying jobs," a market gap has emerged.[179]

In trying to "keep the good of the traditional agency system and leave out the bad," and leveraging technology to allow models to book their own jobs, models are founding their own start-ups, such as UBOOKER.[180] Offering a more "democratic" approach to booking model jobs,[181] UBOOKER enables models to book their jobs independently, allowing them to have "control over their careers, including full transparency, access to more jobs and a way

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[178] *See* Laura Jones, *Sarah Ziff and Her Model Alliance*, THE FRONTLASH, https://www.thefrontlash.com/sara-ziff-and-her-model-alliance/ (last visited Nov. 22, 2020).

[179] Rachel Deeley, *The Future of the Modelling Industry*, BUS. FASHION, (Aug. 11, 2020, 5:20 AM), https://www.businessoffashion.com/articles/workplace-talent/future-of-the-modelling-industry-agencies-img-elite-amck?from=2020-08-10&to=2020-08-11.

[180] *Id.*; *see also* Amelia Heathman, *UBOOKER: This Digital Modelling Agency Wants to Transform the Fashion World*, EVENING STANDARD (Sept. 13, 2019), https://www.standard.co.uk/tech/ubooker-digital-modelling-agency-change-fashion-a4236336.html; *see also* UBOOKER, https://u-booker.com/ (last visited Nov. 8, 2021).

[181] *See* Heathman, *supra* note 180. Another similar business is Agent, Inc. It is a web-based app whereby models can create a unique link to their body of work and profile to market themselves to clients and set their own rates, thus "deliver[ing] a more transparent, safer environment for models." AGENT, https://joinagent.com/models (last visited Nov. 8, 2021). Agent launched in March 2018 after two years of beta testing, and it is intended to "disrupt" the industry by empowering models to manage their own careers in connecting directly with clients without an agent intermediary. *See* Lisa Lockwood, *Agent Inc., a New Modeling Platform, Seeks to Disrupt Status Quo*, WWD (Mar. 28, 2018, 4:23 PM), https://wwd.com/fashion-news/fashion-features/agent-inc-new-modeling-platform-to-disrupt-status-quo-1202640074/.

to increase their earning potential, including supplemental income." [182] Unlike traditional agencies, UBOOKER charges models low, fixed commission rates without requiring exclusive representation contracts, affording models true independent contractor status.[183] With modeling agencies slow to innovate, and the industry moving online, start-ups such as UBOOKER allow models to grow in the direction of the industry while affording them business ownership opportunities, flexibility, and career self-determination.

Additionally, worker cooperatives, such as the Cooperative Labor Contractor (CLC) paradigm, are also emerging as agency alternatives. Building on the 2016 California Worker Cooperative Act, [184] which was legislation that promulgated the creation and infrastructure for worker-owned cooperative businesses in California, and in the wake of AB 5, union and labor organizations are exploring the hybrid alternative business structures, where workers can receive employee worker protections while owning and governing their workplaces.[185]

These efforts culminated in the Cooperative Economy Act ("CEA"), or AB 1391. California State Assemblywoman Lorena Gonzalez first introduced AB 1391 in February 2021 and subsequently amended it in March 2021, the amendment to which remains pending in committee to date.[186] In an attempt to address the hardships independent contracts suffered during COVID-19, and even prior due to the insecurities around "gig work," the CEA is designed to "scale up the worker co-op model" whereby workers

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[182] *See* Heathman, *supra* note 180.

[183] *See How it Works*, UBOOKER, https://u-booker.com/how-it-works (last visited Oct. 17, 2021).

[184] A.B. 816, The California Worker Cooperative Act was the result of a multi-year effort to remove barriers to the creation of worker cooperatives in California and to improve operations for existing ones. With a goal of empowering small businesses that are democratically owned and operated by their workers, it eases barriers to raising capital investment from within the community, and mandates that a worker cooperative have a class of worker-members who control the cooperative. *See* Christina Oatfield, *Governor Brown Signs California Worker Cooperative Act, AB 816*, SUSTAINABLE ECONOMIES L. CTR. (Aug. 12, 2015), https://www.theselc.org/governor_brown_signs_california_worker_cooperative_act.

[185] *See generally* UPSIDE DOWN CONSULTING, https://www.upside-down.co / (last visited Nov. 8, 2021).

[186] *See* The Cooperative Economy Act, A.B. 1319, 2021-2022 Assem. (Cal. 2021), https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=202120220AB1319; E-mail from Ra Criscitiello to author (Sept. 28, 2020) (on file with author).

"share in the profits, oversight, and governance using the democratic process."[187]

Indeed, the CEA promotes the formation and growth of worker co-ops and establishes additional incentives for working with co-ops.[188] In creating a new labor market intermediary, worker co-ops can serve as staffing firms that are designed to employ workers, including those in the gig economy.[189] Workers at worker co-ops, who prior to AB 5's enactment would be classified as independent contractors, are instead classified as W2 employees who both own and govern the business, working to maximize profits for, and not at, the workers' expense.[190]

Whereas AB 5 would necessitate that a business whose workforce consisted of independent contractors classify them as employees, under the CEA, the same businesses can contract with worker co-ops, who pay the workers as employees. [191] This relieves the contracting company of the required gig-employee reclassifications and other AB 5 mandated employment responsibilities.[192]

In sum, the CEA affords companies whose business models dictate hiring independent contractors or whose business otherwise prefers the opportunity and ability to exist without having to directly

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[187] *The Future of Work*, COOP. ECON. ACT, https://www.cooperativeeconomyact.org/about (last visited Oct. 17, 2021).

[188] *Id.*; *see also FAQs*, COOP. ECON. ACT, https://www.cooperativeeconomyact.org/faqs (last visited Oct. 17, 2021).

[189] *FAQs*, *supra* note 188.

[190] *Id.*

[191] *See* Ra Criscitiello, *Anchoring America's Solidarity Economy Helps to Heal Pandemic Inequality Challenges*, 1WORKER1VOTE (Apr. 5, 2020), http://1worker1vote.org/anchoring-americas-solidarity-economy-helps-to-heal-pandemic-inequality-challenges/?fbclid=IwAR26SSfDPmajXUZ-ey9r53pLtWRKdzKOOEb8l61mT5AevDmDB1i3wm6wIX4.

[192] *Id.*

employ their workers[193]—something that may further incentivize companies to work with co-ops in this manner.[194]

As applied to the modeling industry, the CEA would not only resolve the employer-employee question but could also strike the balance that agencies and clients need to comply with AB 5. It could also provide an alternative to bypass the agencies completely. Working within the current industry infrastructure, a model-run and -operated worker co-op could, for example, contract with the agencies (who would join the FCWC), who would in turn contract with clients on models' behalf. This option affords models more protection and leverage as the co-op would negotiate with agencies on their behalf. Moreover, with a compensation structure mirroring between agencies and mother agents, models would receive additional oversight in holding agencies accountable.

Alternatively, models could create their own worker co-op type agency under the ATA and bypass the agencies completely. The Model worker co-op could directly contract with fashion brands to secure work for their employees. Given the industry shift to conducting business online, model worker co-ops provide models with a viable industry infrastructural alternative.

VI. CONCLUSION

Like models on a runway, Proposition 22 commands attention. Its future, as currently drafted, remains uncertain. However, what is certain is the attention it garners will no longer allow companies to continue to misclassify their workers, skirt financial obligations they owe to employees and the state, and avoid offering employee benefits and protections. Designed as a means to circumvent AB 5's mandate for gig worker employee classification, Proposition 22 offers more viable solutions for models while preventing the industry's upending that applying AB 5 would inevitably cause.

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[193] *See id.*

[194] *Id. See also* The Cooperative Economy Act, A.B. 1319, 2021-2022 Assem. (Cal. 2021), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB1319 *(*explaining that to work with a worker co-op, the entity would need to become a member of the Federation of California Worker Cooperatives ("FCWC"). By statute, the Labor Commissioner would organize the FCWC, require the Governor to appoint a Board of Directors to maintain the federation, and afford voting power proportionate to the workers' owner's share of the total federation workforce. The FCWC would also set labor policy and manage and oversee FCWC operations and those its members.)

Undeniably, the current modeling industry infrastructure—with agencies as the lynchpins—affords few clear answers or volunteers as to which industry player would serve as the "employer." The commission-based compensation structure is not only incapable of supporting an "employee" business model but being forced to embrace one would further stymie diversification and inclusion in a hyper-competitive industry; an industry already reluctant to embrace anyone shorter than 5'10" and a size zero.

Short of dismantling and rebuilding the industry from scratch—which an industry already slow to change would not readily allow—reform lies elsewhere. It lies in the models' hands and in harnessing the momentum that Proposition 22 has garnered, as well as models' inherent power in their numbers. Through strategic alliances and organizations working alongside the industry, small wins, like ones the Model Alliance has achieved, can affect comprehensive change one success at a time. Moreover, California's cooperative legislation as well as models' entrepreneurial efforts, may further turn the tides by competing with the agencies in bypassing them altogether, all the while affording models more control, business ownership, and true flexibility. In combination, the will to change will ultimately create the runway for it, even if it occurs at a walking, instead of running pace.

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SMART CONTRACTS: THE FUTURE OF BLOCKCHAIN IN THE ENTERTAINMENT INDUSTRY

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CONTENTS

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ABSTRACT

Streaming services like Spotify, while convenient for the consumer, diminish artists' hard-earned royalties. Artists split their rewards between services, labels, and intermediaries. As a result, most artists get paid little for their content. Many artists today are seeing a decline in sales and an increase in infringement. In 2015, a class action suit was brought against Spotify for using musicians' music without proper licensing. Though the resulting $43.45 million settlement provided some justice, the entertainment industry has still not found a way to circumvent low royalty distribution rates and infringement by large corporations.

The emergence of blockchain technology over the past decade has signaled a shift that may help artists protect themselves against copyright infringement. Currently, this technology is best known for its digital cryptocurrency, Bitcoin. Blockchain implements a decentralized ledger with the power and potential to simultaneously heighten data security while lowering transaction costs. For example, blockchain-based smart contracts have made their way into the legal world, providing automatic monitoring, execution, and enforcement of legal agreements. This technology could revolutionize the entertainment industry. Blockchain technology, with the help of Bitcoin and smart contracts, could be used to track and manage copyright-related rights and licenses for music, videos, software, and publications.

This Note discusses what blockchain technology is and has to offer, the enormous burden copyright infringement has placed on the entertainment industry, and how smart contracts have the potential to decrease copyright infringement, increase security, and streamline copyright management and royalty distribution in the entertainment industry.

INTRODUCTION

The entertainment industry is the backbone of modern commerce and consumption.[1] Film and music have increasingly made headway thanks to streaming convenience.[2] Streaming provides enhanced access to consumers and creates new avenues of exposure for artists. However, streaming services keep disproportionately large portions of revenue received from

[1] *See* David Sarokin, *Analysis of the Entertainment Industry*, HOUS. CHRON. (Oct. 20, 2020), https://smallbusin ess.chron.com/ana lysis-entertainment-industry-78237.html.

[2] *See id.*

consumers.[3] Music and movie creators are at a great disadvantage.[4] Indeed, Spotify pays artists only $0.0032 per stream.[5] An increase in pushback by artists has brought more attention to the disparity in royalty distribution from intermediaries.[6] Notably, in 2014, Taylor Swift pulled all of her music from Spotify.[7] Swift reasoned that music should not be free because "[m]usic is art, and art is important and rare."[8] However, this option is not feasible for many artists. Swift's immense earnings allow her and others in similar positions to avoid intermediaries without considerable detriment to their careers or earnings,[9] while smaller artists rely on intermediaries for their livelihoods.

In addition to artist criticism, Spotify has faced legal challenges. In 2015, Spotify was sued for copyright infringement.[10] Plaintiffs David Lowery and Melissa Ferrick filed two separate class actions asserting that Spotify reproduced and distributed thousands of musical compositions without a license.[11] Despite the outcome of the case, a $43.45 million settlement payable to all

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[3] Spyros Makridakis & Klitos Christodoulou, *Blockchain: Current Challenges and Future Prospects/Applications*, FUTURE INTERNET, Dec. 12, 2019, at 1, 8.

[4] *Id.*

[5] Dmitry Pastukhov, *What Music Streaming Services Pay Per Stream (And Why It Actually Doesn't Matter)*, SOUNDCHARTS: BLOG (June 26, 2019), https://soundcharts.com/blog/music-streaming-rates-payouts#:~:text=Spotify%20paid%20the%20artists%20%240,fell%20slightly%20lower%20at%20%240.00436.

[6] Imogen Heap, *Blockchain Could Help Musicians Make Money Again*, HARV. BUS. REV. (June 5, 2017), https://hbr.org/2017/06/blockchain-could-help-musicians-make-money-again.

[7] Hannah Ellis-Petersen, *Taylor Swift Takes a Stand Over Spotify Music Royalties*, THE GUARDIAN (Nov. 5, 2014, 3:53 PM), https://www.theguardian.com/music/2014/nov/04/taylor-swift-spotify-streaming-album-sales-snub.

[8] *Id.*

[9] Swift's net worth is estimated to be $550 million as of December 2021. *See* Abigail Freeman, *Begin Again: Taylor Swift is Looking for Another Win with Today's 'Red' Release*, FORBES (Nov. 12, 2021, 9:16 AM), https://www.forbes.com/sites/forbesmoneyteam/202 1/11/16/how-to-get-ready-to-buy-your-first-home/?sh=4798885f5f1a.

[10] Complaint at ¶ 1, Lowery v. Spotify USA Inc., No. 2:15-cv-09929-BRO-RAO (filed C.D. Cal. Dec. 28, 2015), 2015 WL 10434834 [hereinafter Lowery Complaint].

[11] *Id.*; Complaint at ¶ 1, Ferrick v. Spotify USA Inc., No. 2:16-cv-00180-BRO-RAO (C.D. Cal. 2016), 2016 WL 871108 [hereinafter Ferrick Complaint].

plaintiffs, Spotify's business has not materially changed. Recently, Spotify CEO Daniel Ek responded to complaints regarding Spotify's low royalty distribution to artists by shifting the blame onto the artists themselves.[12] Ek stated: "you can't record music once every three to four years and think that's going to be enough."[13] When met with backlash and criticism, Ek doubled down, saying that "the ones that aren't doing well in streaming are predominantly people who want to release music the way it used to be released."[14] These statements ignore Spotify's culpability and attempt to shift focus solely onto artists.

Spotify exploits the very artists without whom the platform could not exist. Powerful business interests, whether CD publishing companies or streaming services, take advantage of creators without providing much benefit in return. After giving away large portions of their proceeds, artists face the challenge of holding music streaming companies accountable. Blockchain technology presents a potential solution to this dilemma.

In 1991, researchers Stuart Haber and W. Scott Stornetta first outlined blockchain technology.[15] Its first real-world application came later, in 2009, with the digital cryptocurrency, Bitcoin.[16] Blockchain eliminates the need for intermediaries to establish ownership and trust.[17] More specifically, blockchain technology enables the use of smart contracts, which "execute the terms of a contract automatically under conditions and outcomes encoded into the program."[18] In recent years, multiple states have

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[12] Robert Pasbani, *Spotify CEO Pushes Back on Royalty Debate: You Can't Record Music Every Three or Four Years & Think That's Enough*, METAL INJECTION (July 31, 2020), https://metalin jection.net/its-just-business/spotify-ceo-pushes-back-on-royalty-debate-you-cant-record-music-every-three-or-four-years-think-thats-enough.

[13] *Id.*

[14] Nina Corcoran, *Nigel Godrich, Lupe Fiasco, Massive Attack, Dee Snider, More Slam Spotify CEO*, CONSEQUENCE OF SOUND (Aug. 5, 2020, 2:19 PM), https://consequenceofsound.net/2020/08/nigel-godrich-lupe-fiasco-spotify-ceo-comments/.

[15] Luke Conway, *Blockchain Explained*, INVESTOPEDIA, https://www.investopedia.com/terms/b/blockchain.asp#citation-6 (last updated Nov. 4, 2021).

[16] *Id.*

[17] Bryce Suzuki, Todd Taylor & Gary Marchant, *Blockchain: How It Will Change Your Legal Practice*, ARIZ. ATT'Y, Feb. 2018, at 12, 14.

[18] *Id.* at 16.

passed laws regarding the legality of smart contracts.[19] In 2017, Arizona enacted House Bill (HB) 2417, which amended the Arizona Electronic Transactions Act.[20] By effectively stating that smart contracts may exist in commerce, blockchain records are legitimate, and blockchain may show proof of ownership, this legislation encourages the development and use of blockchain.[21]

While state laws may provide a foundation for this technology, coordination and clarity is needed to determine how smart contracts will be designed, verified, implemented, and enforced on a federal level. Policy makers should provide broad uniform definitions for blockchain technology. To ensure blockchain's compliance with current laws while simultaneously allowing for innovation, current copyright laws should be amended, and new federal laws should be created.

This Note examines the revolutionizing effect blockchain technology could have on the entertainment industry. Part II explains the evolution of blockchain technology, Bitcoin, non-fungible tokens, and the emergence of smart contracts. Next, Part III provides an overview of copyright law, licensing agreements, and the legal foundation for blockchain. Part IV analyzes the *Ferrick v. Spotify* case and its overall effect on streaming and copyright infringement. Part V discusses potential actions and implementations of blockchain technology to effectively enhance the interaction between the entertainment industry and its consumers while ensuring artists and creators receive the full benefits of their work. Finally, Part VI concludes.

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[19] Craig A. de Ridder, Mercedes K. Tunstall & Nathalie Prescott, *Recognition of Smart Contracts in the United States*, 29 INTELL. PROP. & TECH. L. J. 17, 17 (2017).

[20] Jeffrey Neuburger, *Arizona Passes Groundbreaking Blockchain and Smart Contract Law – State Blockchain Laws on the Rise*, PROSKAUER: NEW MEDIA & TECH. L. BLOG (Apr. 20, 2017), https://newmedialaw.proskauer.com/2017/04/20/arizona-passes-groundbreaking-blockchain-and-smart-contract-law-state-blockchain-laws-on-the-rise/.

[21] H.B. 2417, 53rd Leg., 1st Reg. Sess. (Ariz. 2017); *see also* Suzuki et al., *supra* note 17, at 12-13.

I. BLOCKCHAIN, DIGITAL ASSETS, AND SMART CONTRACTS

A. INTRODUCTION TO BLOCKCHAIN TECHNOLOGY

A blockchain is a distributed, decentralized, public ledger that safely and effectively provides a method for creating and recording transactions between parties.[22] Senior Advisor at the MIT Digital Currency Initiative and co-author of *The Truth Machine*, Michael Casey explains that a shared and distributed ledger is important in facilitating secure peer-to-peer exchange.[23] Rather than depending on a single entity, which permits human fallibility and inevitable security risks, a decentralized ledger collectively produces multiple versions of a transaction through a simultaneous and consensus algorithm.[24] The term "blockchain" is derived from its functionality—blockchain technology receives data in discrete aggregates, called *blocks*, which are then time-stamped and ordered, forming an immutable *chain* of sequential data.[25] Blockchain gathers and orders data into blocks and then chains them together using cryptography.[26]

Such transaction ledgers are more secure than a centralized technology because the information is shared by a distributed network of computers and is secured by cryptography.[27] Because the blockchain records are visible to all computers on the network, it is therefore virtually impossible to add, remove, or change data without being detected by other users.[28] This system offers a secure

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[22] *See* Conway, *supra* note 15; *see also* Makridakis, *supra* note 3, at 1.

[23] Yan Kulakov, *What is the Blockchain Marketplace and How to Start One*, CS-CART: ECOMMERCE BLOG ON RUNNING AN ONLINE MARKETPLACE (May 12, 2021), https://www.cs-cart.com/blog/what-is-the-blockchain-marketplace-and-how-to-start-one/.

[24] *See* Conway, *supra* note 15; *see also* Makridakis, *supra* note 3, at 5.

[25] Suzuki et al., *supra* note 17, at 13-14.

[26] *Blockchain – The New Technology of Trust*, GOLDMAN SACHS, https://www.goldmansachs.com/insights/pages/blockchain/ (last visited Jan. 24, 2021).

[27] *See* Dave Berson & Susan Berson, *Overview of Blockchain Technology and US Blockchain Law*, COMPUT. & INTERNET L., June 2019, at 1, 1.

[28] *Id.*; *see also Blockchain – The New Technology of Trust*, GOLDMAN SACHS, https://www.goldmansachs.com/insights/pages/blockchain/ (last visited Oct. 31, 2021).

means of storing information while simultaneously allowing users to exchange goods without an intermediary.[29]

Using a blockchain, parties may transact without the aid of a central intermediary to authenticate transactions or verify records.[30] Doing so has the potential to lower transaction costs, increase speed and efficiency, and reduce disputes.[31] A common example is the Bitcoin blockchain. Transactions between users are cryptographically added to a ledger, and copies of the ledger are stored on thousands of computers worldwide.[32] These computers compete with one another to verify new transactions on the ledger through a computationally difficult procedure.[33] The successful computers are rewarded with Bitcoin in a process called Bitcoin mining, thereby incentivizing the duplication and accuracy of the shared ledger.[34] Each user possesses a unique piece of data, known as a private key, used to sign transactions.[35] Once added to the blockchain, the transaction is verified and, except in the occurrence of a fork,[36] generally cannot be altered, protecting parties from fraud.[37]

B. BITCOIN

After pseudonymous Satoshi Nakamoto's invention of Bitcoin in August 2008, Nakamoto released a white paper entitled *Bitcoin: A Peer-to-Peer Electronic Cash System*.[38] The paper described Bitcoin as a new form of currency allowing online

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[29] Suzuki et al., *supra* note 17, at 14.

[30] Makridakis, *supra* note 3, at 3.

[31] *Id.*

[32] Ollie Leech, *Bitcoin Is Not a Stock*, COINDESK (Mar. 17, 2021, 10:13 AM), https://www.coindesk.com/markets/2021/03/17/b itcoin-is-not-a-stock/.

[33] Florian Tschorsch & Björn Scheuermann, *Bitcoin and Beyond: A Technical Survey on Decentralized Digital Currencies*, HUMBOLDT UNIV. OF BERLIN, Mar. 2016, at 2084, 2086.

[34] *Id.*

[35] SATOSHI NAKAMOTO, BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM 2 (2008).

[36] A "fork" is a change or divergence from a previous version of the blockchain. Forks occur when a unanimous consensus regarding the future state of the blockchain cannot be reached, resulting in a split in the chain of blocks. A fork thus creates multiple valid chains that were originally one. Roshan Raj, *Blockchain Fork*, INTELLIPAAT, https://intellipaat.com/blog/tutorial/blockchain-tutorial/blockchain-forks/ (last updated Apr. 7, 2021).

[37] *See id.*

[38] Nakamoto, *supra* note 35.

transactions to take place without requiring trust between parties.[39] In January 2009, the Bitcoin protocol, built on blockchain technology, made its way into public view.[40] Over 1,500 cryptocurrencies have been created since the rise of Bitcoin, though Bitcoin remains the most popular in terms of market capitalization and usage today.[41]

Bitcoin is essentially its own payment network, held electronically and independently of any central bank or government.[42] This network creates a blockchain of every Bitcoin transaction without a central server or intermediary.[43] Within the entertainment industry, Bitcoin could be used for payment without the use of an intermediary.[44] Moreover, blockchain could be used to securely track and manage copyright-related rights, contracts, and licenses for music, videos, software, and publications at a lower cost.[45]

Several platforms already use blockchain to provide direct payments to musicians.[46] For example, PeerTracks uses blockchain technology to create an "artist equity trading system."[47] PeerTracks relies on the SounDAC[48] blockchain, a global ledger specifically engineered for the music industry, to manage copyrights and payment mechanisms.[49] SounDAC is completely owned and controlled by the copyright holders using the platform.[50] Copyright holders upload their content through the SounDAC's Rights

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[39] *Id.* at 1.

[40] *See* Conway, *supra* note 15.

[41] *Cryptocurrency and Exchanges*, GLOBAL INDUS. SNAPSHOTS 3, 4 (2018).

[42] Suzuki et al., *supra* note 17, at 14.

[43] *Id.* at 15.

[44] *See Cryptocurrency and Exchanges*, *supra* note 41, at 11.

[45] *See* Suzuki et al., *supra* note 17, at 17.

[46] *Id.*

[47] *Three Startups Trying to Transform the Music Industry Using the Blockchain*, BITCOIN MAG. (Nov. 13, 2015), https://bitcoinmagazine.com/articles/three-startups-trying-to-transform-the-music-industry-using-the-blockchain-1447444594 [hereinafter *Three Startups*].

[48] In 2018, this blockchain, formerly known as MUSE, was rebranded as SounDAC to avoid confusion with The Muse, a New York-based online career platform. David Hamilton, *Last Week's Biggest Gainer: SounDAC +5,834%*, COINCENTRAL (Sept. 10, 2018), https://coincentral.com/soundac-biggest-gainer/.

[49] *Id.*; *see also Three Startups*, *supra* note 47.

[50] Grace Muthoni, *SOUNDAC is Using Blockchain to Solve a Major Problem in the Music Industry*, BLOCKTELEGRAPH (Sept. 11, 2018, 9:00 AM), https://blocktelegraph.io/soundac-using-blockchain-solve-major-problem-music-industry/.

Management Portal and specify how royalties should be distributed.[51]

PeerTracks serves both artists and consumers.[52] The platform enables artists to sell music and engage with fans without a middleman. PeerTracks finds new songs in the SounDAC database and determines which songs to include in their catalog.[53] When PeerTracks users stream music, the copyright holders are paid directly from SounDAC's royalty pool.[54] For consumers, the platform offers a place to discover and buy cheaper music while ensuring all the funds go directly to the artists.[55]

Users on the platform are not required to use Bitcoin for transactions. PeerTracks creator, Cédric Cobban, explained that the platform has no public keys, no transaction fees, and is user-friendly.[56] Cobban also stated that the model can be used for movies, e-books, and physical goods traded online.[57] These kinds of platforms rely on blockchain technology to facilitate major aspects of music distribution, copyright, and royalty payments through smart contracts.[58] Further implementation of such platforms for videos, software, publications, and other physical goods presents great potential to revolutionize the entertainment industry.

C. NON-FUNGIBLE TOKENS

As of early 2021, a new kind of technology emerged in the entertainment industry. Non-fungible tokens, or NFTs, allow digital

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[51] *Id.*

[52] *See* Kevin Cruz, *PeerTracks: Paradigm Shift in Music World*, BITCOIN MAGAZINE (Oct. 22, 2014), https://bitcoinmagazine.com/articles/peertracks-paradigm-shift-in-music-world-1414000069.

[53] Muthoni, *supra* note 50.

[54] *Id.*

[55] Cruz, *supra* note 52.

[56] *Streaming Platform PeerTracks Uses the SounDAC Blockchain to Provide Free Music For Us All*, SUPERBCREW (Sept. 26, 2018), https://www.superbcrew.com/streaming-platform-peertracks-uses-the-soundac-blockchain-to-provide-free-music-for-us-all/ ("Within the SounDAC ecosystem, you simply create an account by entering a username and a password – just as you would do on a traditional website! No need to buy crypto or pay transaction fees. Everything looks and feels exactly as user friendly as a traditional app. We are truly ready to onboard the masses with this.").

[57] Cruz, *supra* note 52.

[58] *See id.*

artists to monetize their works.[59] NFTs are digital tokens tied to assets that can be bought, sold, and traded.[60] Unlike cryptocurrencies, NFTs are non-fungible.[61] In fact, NFTs are "one-of-a-kind" assets that have no tangible form of their own.[62] NFTs possess unique signatures using blockchain technology for any digital asset, including images, videos, or songs.[63] These kinds of digital assets have traditionally been copied and shared on the internet for free. NFTs thus provide a means for artists to sell their work in a way that enables true ownership of digital art.[64] While NFTs can still be copied, the artwork is "tokenized," creating a digital certificate of ownership.[65] The original work then becomes lucrative and one-of-a-kind for consumers.

On March 11, 2021, the American digital artist Mike Winkelmann, known as Beeple, set a new precedent for the value of NFTs. The auction company Christie's hosted an auction for an NFT of Beeple's work titled "Everydays: The First 5000 Days."[66] The work, a collage of every image Beeple had posted online each day since 2007, sold for $69.3 million.[67] While the image of Beeple's work can still be copied and shared, the buyer of the NFT owns a "token," proving that he owns the original work.[68] Beeple also plans to work directly with the buyer to find ways to physically display the work.[69]

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[59] *See* Andrew R. Chow, *NFTs Are Shaking Up the Art World—But They Could Change So Much More*, TIME (Mar. 22, 2021, 12:38 PM), https://time.com/5947720/nft-art/.

[60] *Id.*

[61] *What Are NFTs and Why Are Some Worth Millions?*, BBC (Mar. 12, 2021), https://www.bbc.com/news/technology-56371912 [hereinafter *What Are NFTs?*].

[62] *Id.*

[63] Andy Serwer & Max Zahn, *69 Million Reasons Why You Should Care About NFTs*, YAHOO! FINANCE (Mar. 27, 2021), https://www.yahoo.com/now/69-million-reasons-why-you-should-care-about-nf-ts-121858223.html.

[64] Chow, *supra* note 59.

[65] *What Are NFTs?*, *supra* note 61.

[66] Beeple, *Everydays: The First 5000 Days*, CHRISTIE'S (Mar. 11, 2021), https://onlineonly.christies.com/s/beeple-first-5000-days/be eple-b-1981-1/112924.

[67] *Id.*

[68] *What Are NFTs?*, *supra* note 61.

[69] Jacob Kastrenakes, *Beeple Sold an NFT for $69 Million*, THE VERGE (Mar. 11, 2021, 10:09 AM), https://www.theverge.com/2021/3/11/22325054/beeple-christies-nft-sale-cost-everydays-69-million.

According to technologists, NFTs may be the next step toward a blockchain-oriented technological revolution.[70] Indeed, this successful and lucrative transaction indicates that blockchain-minted digital art is now an acceptable medium of art.[71] Artists of NFTs may retain copyright ownership of their work.[72] NFTs may also contain smart contracts, allowing artists the potential to receive a percentage of any future sale of the token.[73] This provides yet another means for artists to profit off of their works. The rise of NFTs further shows the need to revolutionize the entertainment industry and reward artists for their creative works. Using blockchain technology, NFTs are merely the latest attempt to provide direct communication between artists and consumers.

D. SMART CONTRACTS

A smart contract—a type of "conditional transaction"—automatically executes the terms of a contract through blockchain technology.[74] In practice, smart contracts are pieces of computer code that generate transactions typically using "if-then" conditions.[75] Nick Szabo, one of the first people to define the smart contract concept, characterized the vending machine as the

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[70] Chow, *supra* note 59.

[71] Lucas Matney, *Beeple's $69 Million NFT Sale Marks a Potentially Transformative Moment for the Art World*, TECHCRUNCH (Mar. 11, 2021, 1:32 PM), https://techcrunch.com/2021/03/11/beeples-69-million-nft-sale-marks-a-potentially-transformative-moment-for-the-art-world/.

[72] *What Are NFTs?*, *supra* note 61.

[73] *Id.* For example, a smart contract could entitle an artist to a 10% royalty for any future sale of the token; if the NFT originally sold for $30,000 and later sells for $100,000, the artist would then receive a $10,000 royalty. *Id.*

[74] *See* Jelena Madir, *Smart Contracts: (How) Do They Fit Under Existing Legal Frameworks?*, SSRN 1, 3 (Dec. 14, 2018), https://ssrn.com/abstract=3301463; *see also* NICK SZABO, SMART CONTRACTS (1994), https://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart.contracts.html.

[75] Balázs Bodó, Daniel Gervais & João Pedro Quintais, *Blockchain and Smart Contracts: The Missing Link in Copyright Licensing?*, 26 INT'L J.L. & INFO. TECH. 311, 316 (2018).

"primitive ancestor of smart contracts."[76] He further explained, "the machine takes in coins, and via a simple mechanism . . . dispense[s] change and product[s] fairly."[77] Smart contracts have already been used for simple transactions, and further implementation is underway.[78] New applications are in development for Internet of Things service contracts, supply chain contracts, mortgage and property transfers, and insurance.[79]

Several states have recently passed laws incentivizing smart contracts. In 2017, Arizona became one of the first states to legally recognize smart contracts. HB 2417 recognizes the legitimacy of transactions using blockchain technology.[80] Specifically, HB 2417 defines a smart contract as an "event-driven program, with state, that runs on a distributed, decentralized, shared and replicated ledger and that can take custody over and instruct transfer of assets on that ledger."[81] As of 2020, eighteen states[82] have either (1) passed state legislation on smart contracts or blockchain technology, or (2) formed legislative committees to explore topics related to smart contracts and blockchain technology.[83]

Blockchain's implementation in the entertainment industry could streamline artist-to-consumer interactions. For example, smart contracts could automate and standardize copyright-related transactions and earnings.[84] In the entertainment industry, smart contracts and blockchain technology have the ability to unlock new

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[76] NICK SZABO, SMART CONTRACTS: BUILDING BLOCKS FOR DIGITAL MARKETS (1996), https://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart_contracts_2.html; *see also* Kristin B. Cornelius, *Smart Contracts and the Freedom of Contract Doctrine*, 22 J. INTERNET L. 3, 3 (2018).

[77] Szabo, *supra* note 76.

[78] Cornelius, *supra* note 76.

[79] *Id.*

[80] *See* de Ridder et al., *supra* note 19, at 17.

[81] H.B. 2417.

[82] These eighteen states include Arizona, Arkansas, California, Connecticut, Illinois, Maryland, Nevada, New Jersey, New York, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, and Washington.

[83] Christopher Adcock, *An Update on State Smart Contract Legislation*, HUNTON ANDREWS KURTH: BLOCKCHAIN LEGAL RESOURCE ANALYSIS & INSIGHT BLOCKCHAIN L. (Apr. 15, 2020), https://www.blockchainlegalresource.com/2020/04/an-update-on-state-smart-contract-legislation/.

[84] Bodó et al., *supra* note 75, at 312.

financing opportunities for independent artists.[85] Artists will no longer need to sacrifice ownership, contract rights, or control of future royalties to intermediaries.[86] Smart contracts can increase commercial efficiency, lower transaction costs, and increase transparency.[87] However, further work is needed. Many complications, obstacles, and complexities exist to effectively implement smart contracts for copyrightable works. Nevertheless, technology is ever evolving. We are at the cusp of a new technological era.

II. U.S. COPYRIGHT LAW & THE PROTECTION OF CREATIVE WORKS

A. HISTORICAL ROOTS: THE CONSTITUTION AND COPYRIGHT ACTS

The foundations of copyright law are outlined in the U.S. Constitution.[88] Article I, Section 8, Clause 8 states that Congress has the power "[t]o promote the progress of science and useful arts" by granting exclusive rights to "authors" for their "writings."[89] The first federal statute governing copyright was the Copyright Act of 1790 (the "Act").[90] The Act adopted dual fourteen-year terms with reversion to surviving authors after the initial fourteen-year term.[91] The Act also included certain registration and deposit formalities.[92] The 1909 Copyright Act (the "1909 Act") extended state copyright protection, or common law copyright, for unpublished works, and extended the federal copyright term to twenty-eight years, which was then subject to renewal for an additional twenty-eight years.[93]

Copyright law today is codified in Title 17 of the United States Code. The Copyright Act of 1976 (the "1976 Act") provides

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[85] *See* Andrew Rossow, *Blockchain Aims to Be the Biggest Stage for Empowering Music Artists*, FORBES (May 27, 2018, 8:39 PM), https://www.forbes.com/sites/andrewrossow/2018/05/27/blockchain-aims-to-be-the-biggest-stage-for-empowering-music-artists/?sh=5960bac3e0bb.

[86] *Id.*

[87] Madir, *supra* note 74, at 1.

[88] U.S. CONST. art. I, § 8, cl. 8.

[89] *Id.*

[90] JANE C. GINSBURG & ROBERT A. GORMAN, COPYRIGHT LAW 4 (Foundation Press, 2012).

[91] *Id.* at 5.

[92] *Id.*

[93] *Id.* at 6.

the basic framework for most current copyright law issues,[94] though the 1909 Act still covers works created or published before the 1976 Act's effective date of 1978.[95]

Today, copyright rights automatically come into existence the moment a work of authorship is created. However, to file suit for infringement, a copyright must be registered with the U.S. Copyright Office. Under Section 102, copyrightable subject matter includes (1) works of authorship, (2) that are original, and (3) fixed in a tangible medium. [96] Section 102 further provides a non-exhaustive list of works of authorship: (1) literary works, (2) musical works, (3) dramatic works, (4) pantomimes and choreographic works, (5) pictorial, graphic, and sculptural works, (6) motion pictures and other audiovisual works, (7) sound recordings, and (8) architectural works.[97]

A copyrightable work must satisfy the standards of "originality" and "fixation." The originality requirement set forth in the statute has been defined by the Supreme Court. The standard for originality is fairly low, as the two requirements to satisfy a work as original are merely that the work: (1) be independently created by the author (i.e., not copied), and (2) possess at least some minimal degree of creativity.[98] The fixation requirement is defined in Section 101. A work is fixed in a tangible medium of expression when it is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[99]

B. EXCLUSIVE RIGHTS AND INFRINGEMENT

Section 106 of the Copyright Act establishes six exclusive rights for a copyright owner. This includes the rights to:

(1) reproduce the copyrighted work in copies;
(2) prepare derivative works;
(3) distribute copies to the public;
(4) perform the work publicly;
(5) display the work publicly; and

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[94] *Id.* at 7.
[95] *Id.* at 6.
[96] 17 U.S.C. § 102.
[97] *Id.*
[98] Feist Publ'n, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).
[99] 17 U.S.C. § 101.

> (6) perform a sound recording publicly by means of a digital audio transmission.[100]

Copyright infringement occurs when an infringer violates one of these exclusive rights.[101] Specifically, two elements must be proven to establish infringement: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.[102]

Copyright infringement can occur without an entire work being copied.[103] Courts must determine the extent of similarity necessary to prove infringement.[104] There are two methods for proving copying: (1) a defendant's admission that they copied, or (2) circumstantial evidence, such as a defendant's access to the original work.[105] The trier of fact must then determine whether the similarities between the two works are sufficient to prove copying.[106] In other words, the copied work must be "substantially similar" to the original work.[107] An inverse proportion between the weight of proof of access and similarity exists when proving copying through the use of circumstantial evidence.[108] Disproving access or otherwise showing independent creation is a defense to a certain degree of similarity.[109]

C. THE MUSIC MODERNIZATION ACT

In 2018, the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (or the "MMA") became law. The MMA updated laws to reflect modern consumer preferences and technological developments in the music marketplace.[110] The MMA created a new compulsory licensing system for digital music

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[100] ALFRED C. YEN & JOSEPH P. LIU, COPYRIGHT LAW ESSENTIAL CASES AND MATERIALS 228 (3d ed. 2016).

[101] 17 U.S.C. § 501.

[102] *Feist*, 499 U.S. at 361.

[103] YEN & LIU, *supra* note 100, at 229.

[104] *Id.*

[105] Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946).

[106] GINSBURG & GORMAN, *supra* note 90, at 134.

[107] *Id.*

[108] *Id.* (explaining that, "the less likely it is that the defendant had access to the plaintiff's work, the more convincing must be proof of similarities in the two works; the fewer the similarities, the more compelling must be the proof of access").

[109] *See id.*

[110] *The Music Modernization Act*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/music-modernization/ (last visited Jan. 24, 2021).

services, provided federal protection to sound recordings fixed before February 15, 1972, and authorized royalties for any contributing producers, mixers, and sound engineers. [111] Accordingly, the MMA includes three titles: Title I–Music Licensing Modernization (or the "Musical Works Modernization Act"), Title II–Classics Protection and Access (originally called the Compensating Legacy Artists for Their Songs, Service, and Important Contributions to Society ("CLASSICS") Act), [112] and Title III–Allocation for Music Producers.[113]

The Musical Works Modernization Act creates an efficient music-licensing process and makes it easier for rights holders to get paid when their music is streamed online.[114] This section creates a blanket license, which allows digital music providers to make both permanent and limited downloads and create interactive streams while improving royalty rate proceedings. [115] The Mechanical License Collective (the "MLC"), created within the Act, issues and administers the blanket license in addition to voluntary licenses for digital downloads and reproductions.[116] This effectively allows a single license to provide copyright protection for both the composer or songwriter and for the sound recording itself rather than having separate licenses for each.[117]

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[111] Music Modernization Act, H.R. 5447, 115th Cong. (as passed by H.R. Apr. 25, 2018), https://www.congress.gov/bill/115th-congress/house-bill/5447.

[112] The Classics Protection and Access Act provides an exclusive federal right for sound recordings fixed before February 15, 1972 by preempting actions under state and common law claims for these recordings. Moreover, Title II includes a rolling timeline for any pre-1972 sound recordings to enter the public domain, providing protection for at least 95 years after publication. *Summary of H.R. 1551, the Music Modernization Act (MMA)*, COPYRIGHT ALLIANCE 2, https://copyrighalliance.org/wp-content/uploads/2018/10/CA-MMA-2018-senate-summary_CLEAN.pdf [hereinafter *Summary of H.R. 1551*].

[113] The Allocation for Music Producers Act requires SoundExchange, the entity in charge of collecting/distributing digital performance royalties for copyright owners, to distribute a portion of royalties to contracted producers and engineers who were involved in the creative process of making a sound recording. Previously, producers were not covered by copyright law. *See* STEPHEN WADE NEBGEN & WENDY KEMP AKBAR, ENTERTAINMENT LAW: MUSIC 13-14 (Kathy Kay et. al eds., 2020).

[114] Titles II and III of the MMA are beyond the scope of this Note.

[115] *See Summary of H.R. 1551, supra* note 112, at 1.

[116] *See id.*

[117] *See* NEBGEN & AKBAR, *supra* note 113, at 13-14.

This legislation not only simplifies the licensing process, but it also allows copyright holders to negotiate for and collect fair royalty shares.[118] Specifically, the Musical Works Modernization Act replaced the song-by-song compulsory licensing structure with a blanket licensing system.[119] Digital music providers may now use the blanket license to make and distribute phonorecord deliveries (for example, permanent downloads, limited downloads, or interactive streams).[120]

After digital music providers report streaming and download data to the MLC, the MLC distributes royalties to the identified rights holders.[121] If the MLC cannot match royalty-receiving musical works to the copyright holders, the MLC distributes the unclaimed royalties to copyright owners identified in the MLC records, basing the amounts distributed on the relative market shares of such copyright owners.[122] While its effects are newly underway, the MMA ensures fair and timely payment to copyright holders while lowering licensing costs.

D. LICENSING AGREEMENTS

Copyright owners possess the ability to grant another person or entity the rights to use the copyrighted work in a particular capacity.[123] Transfers of rights can occur via license or assignment.[124] A license includes specific terms regarding the transfer of rights, such as the rights being licensed, the number of uses allowed, to what extent the work may be used, and the length of time until expiration.[125]

Copyright licenses can be terminated notwithstanding any terms in the license to the contrary. Section 203 describes termination rights of a copyright holder. Excluding a work made for hire, a transfer of rights or license of a copyright made on or after January 1978 may be terminated by the author if certain conditions

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[118] Charles Wallace, *The Music Modernization Act: Supporting Music Artists 3 Steps at a Time*, CREEDON (Dec. 4, 2019), https://www.creedonpllc.com/blog/2019/12/4/the-music-modernization-act-supporting-music-artists-3-steps-at-a-time.

[119] *The Music Modernization Act*, *supra* note 110.

[120] *Id.*

[121] Wallace, *supra* note 118.

[122] *Id.*; *see also The Music Modernization Act*, *supra* note 110.

[123] *Copyright Licensing*, JUSTIA, https://www.justia.com/intellectual-property/copyright/copyright-licensing/ (last visited Jan. 24, 2021).

[124] *Id.*

[125] *Id.*

are met.[126] For example, termination of a grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the grant's date of execution.[127] This cannot be done retroactively.[128] If the license covers the right of publication, termination can occur thirty-five years from the work's date of publication or at the end of forty years from the license's date of execution, whichever is earlier.[129]

While many licenses can be executed at the will of the copyright holder, there are also several "compulsory" licenses. Section 115 defines the scope and content of certain compulsory copyright licenses. If a copyright holder has authorized the manufacture and distribution of at least one recording of their musical work, any person may make recordings of the work.[130] When this occurs, any persons making a recording of the work must give notice of such a recording, comply with statutory formalities, and pay the prescribed fee.[131] A "mechanical" royalty must be paid to the original copyright holder. Currently, the royalty rate is $0.091 for each copy sold by the person making the new version for a recording under five minutes, or $0.0175 per minute per copy for a recording over five minutes, whichever is greater.[132]

Other compulsory licenses exist, including secondary transmissions by cable television companies,[133] public performances of music by jukeboxes,[134] public television companies,[135] and secondary transmission of "superstation" programs.[136] The emergence of new digital technologies has created challenges for copyright law.[137] Therefore, courts must be free to adapt the doctrine to particular situations on a case-by-case basis.[138]

E. DEFENSES TO INFRINGEMENT

Once a *prima facie* case of infringement is established, the burden shifts to the alleged infringer to raise any defenses.[139] There

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[126] 17 U.S.C. § 203.
[127] *Id.*
[128] *See* NEBGEN & AKBAR, *supra* note 113, at 32.
[129] 17 U.S.C. § 203.
[130] YEN & LIU, *supra* note 100, at 322.
[131] *Id.*
[132] NEBGEN & AKBAR, *supra* note 113, at 87.
[133] 17 U.S.C. § 111.
[134] *Id.* § 116.
[135] *Id.* § 118.
[136] *Id.* § 119; *see also* YEN & LIU, *supra* note 100, at 323.
[137] *See generally* YEN & LIU, *supra* note 100, at 339.
[138] GINSBURG & GORMAN, *supra* note 90, at 181.
[139] YEN & LIU, *supra* note 100, at 370.

are numerous defenses to copyright infringement. The most common and important of these is fair use.[140] Congress first incorporated the fair use doctrine into the 1976 Copyright Act after its creation and use in the common law. The following factors must be considered to determine whether a use is fair:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[141]

These factors are not exclusive.[142] Because fair use is broadly defined, its use has been applied to many circumstances in litigation.[143]

The first factor asks whether a work is transformative. A transformative work must be "something new, with a further purpose or different character, altering the first with new expression . . . ."[144] Additionally, courts consider whether the use of the work is commercial or non-commercial.[145] A work created for commercial use is less likely to bear fair use protection.[146]

The second factor examines the nature of the work. Specifically, creative works are entitled to more protection than those factual in nature.[147] Courts recognize that some works are closer to the "core of intended copyright protection than others . . . ."[148] When former works are copied, fair use is more difficult to establish.[149] Moreover, unpublished works do not bar a finding of fair use.[150]

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[140] *Id.*
[141] 17 U.S.C. § 107.
[142] YEN & LIU, *supra* note 100, at 374.
[143] *Id.*
[144] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
[145] YEN & LIU, *supra* note 100, at 385.
[146] *Campbell*, 510 U.S at 580.
[147] YEN & LIU, *supra* note 100, at 385.
[148] *Campbell*, 510 U.S at 586.
[149] *Id.*
[150] 17 U.S.C. § 107.

The third factor considers whether the amount and substantiality of the portion used in the infringing work from the original work is reasonable. Courts measure this both quantitatively and qualitatively.[151] For example, if a work takes more than is necessary from the original work, this weighs against a finding of fair use.[152]

The fourth factor assesses the potential harm to the market relevant to the original copyright owner. If an infringing work causes market harm to the original work or has a "substantially adverse impact" on its potential market or value, it weighs against fair use.[153] Arguably, if a defendant's use is one that the original copyright holder could license, the defendant's unlicensed exploitation cannot be fair use.[154]

Other defenses available to a defendant include copyright misuse, abandonment, statute of limitations, and fraud on the Copyright Office. Copyright misuse applies in cases where a copyright owner attempts to use that copyright to exceed the rights granted in the Copyright Act.[155] Because this "misuse" violates public policy, the copyright becomes unenforceable until the effects of the misuse are exhausted.[156] If a copyright owner abandons their work, the copyright can no longer be enforced.[157] However, abandonment occurs only when an owner *intends* to abandon the copyright.[158] The Copyright Act establishes a three-year statute of limitations for civil copyright claims.[159] Therefore, a plaintiff can only recover damages for acts that occurred within three years prior to the filing of a suit.[160] Lastly, if a copyright holder makes any fraudulent statements to the Copyright Office during registration, the copyright registration may be invalidated.[161]

Fair use poses unique challenges for smart contracts. Because fair use is applied on a case-by-case basis, it is not difficult to imagine possible scenarios where smart contracts may inherently undermine the intended use of fair use. For example, if a smart contract is designed to only permit use through an express license or under certain circumstances, a user will be unable to access the

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[151] YEN & LIU, *supra* note 100, at 385.
[152] *See Campbell*, 510 U.S at 587.
[153] *Id.* at 590.
[154] GINSBURG & GORMAN, *supra* note 90, at 191.
[155] YEN & LIU, *supra* note 100, at 467.
[156] *Id.*
[157] *Id.* at 470.
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.* at 471.

content under conditions typically provided by fair use.[162] Smart contracts may then unintentionally limit the scope of rights available to those operating under fair use. Policy makers will need to provide certain regulations to prevent this technology from impeding existing legal rights. Many unanswered questions exist surrounding this issue that exceed the scope of this Note. It is imperative to continue asking such questions to develop a system that will work with laws already in place.

III. CASE STUDY: INFRINGEMENT BY DIGITAL MUSIC TRANSMISSION

A. THE RISE OF STREAMING

The way consumers listen to music changed over twenty years ago with the rise of peer-to-peer digital music sharing.[163] In 1999, Shawn Fanning, a then-nineteen-year-old U.S. computer programmer, created Napster.[164] The online service enabled music consumers to freely share MP3 song files with each other.[165] Napster enabled users to download albums and access alternate cuts, demo versions, and live songs for free.[166] Prior to Napster and online file sharing systems, "[m]usic had been a collectible. Suddenly, it was disposable."[167]

Napster spread rapidly on college campuses nationwide.[168] Thereafter, artists such as Metallica and Dr. Dre brought copyright infringement suits against Napster.[169] In July 2001, Napster settled

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[162] *See* TIMOTHY K. ARMSTRONG, DIGITAL RIGHTS MANAGEMENT AND THE PROCESS OF FAIR USE 71 (Harvard Journal of Law & Tech., 20th ed. 2006).

[163] Stephen Dowling, *Napster Turns 20: How it Changed the History of Music Streaming*, BBC (May 31, 2019), https://www.bbc.com/culture/article/20190531-napster-turns-20-how-it-changed-the-music-industry.

[164] *Musicology: The History of Music Streaming*, MIXDOWN MAG., https://mixdownmag.com.au/features/columns/musicology-the-history-of-music-streaming/ [hereinafter *Musicology*].

[165] *Id.*

[166] *Id.*

[167] Sam Law, *Metallica vs Napster: The Lawsuit That Redefined How We Listen to Music*, KERRANG! (Apr. 19, 2020), https://www.kerrang.com/features/metallica-vs-napster-the-lawsuit-that-redefined-how-we-listen-to-music/.

[168] *See id.*

[169] *Id.*

several lawsuits.[170] However, in the landmark case *A&M Records, Inc. v. Napster, Inc.*, the Ninth Circuit ruled against Napster.[171] The court found Napster liable for contributory and vicarious copyright infringement, as Napster's users engaged in direct infringement.[172] Napster then filed for bankruptcy in 2002.[173]

Although Napster shut its doors in less than three years after its creation, it changed music and entertainment consumption forever. New streaming services including YouTube, Netflix, Spotify, Pandora, and Hulu have seen rapid growth in the twenty-first century.[174] These services generally provide legal methods of consuming music and media, but artists receive low royalties and continue to experience infringement.

B. FERRICK V. SPOTIFY USA INC.

Spotify has seen its fair share of lawsuits from artists. Notably, on December 28, 2015, David Lowery brought a class action suit against Spotify in the U.S. District Court for the Central District of California for copyright infringement, seeking damages and injunctive relief.[175] Shortly afterwards, on January 8, 2016, Melissa Ferrick filed a similar class action suit in the same California Court.[176] Both plaintiffs were musicians claiming that Spotify used their music without proper licensing or permission.[177] Lowery and Ferrick amended their separate complaints to include additional plaintiffs over the next few months.[178]

On February 12, 2016, Spotify then filed a motion to either dismiss the suit for lack of personal jurisdiction or to transfer venue

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[170] *Id.*

[171] *See Case Study: A&M Records, Inc. v. Napster, Inc.*, WASHULAW (Aug. 1, 2013), https://onlinelaw.wustl.edu/blog/case-study-am-records-inc-v-napster-inc/ [hereinafter *Case Study*].

[172] A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).

[173] Law, *supra* note 167.

[174] *See A Brief History of Streaming Media*, PACE TECHNICAL (Jan. 17, 2014, 4:49 AM), https://www.pacetechnical.com/brief-history-streaming-media/ .

[175] Lowery Complaint, *supra* note 10, at 1.

[176] Ferrick Complaint, *supra* note 11, at 1.

[177] Lowery Complaint, *supra* note 10, at 4, ¶ 9; Ferrick Complaint, *supra* note 11, at 1.

[178] Ferrick v. Spotify USA Inc., No. 2:15-cv-09929-BRO-RAO (C.D. Cal. 2016), 2016 WL 11623778.

to the Southern District of New York.[179] On May 23, 2016, Ferrick and Lowery filed a Motion to Consolidate the two cases, which was granted by Judge Beverly Redi O'Connell.[180] Lowery and Ferrick, along with other named plaintiffs, filed a Consolidated Complaint on June 27, 2016, naming Ferrick, Jaco Pastorius, Inc., and Gerencia 360 Publishing, Inc. as the class representatives.[181] After Spotify refiled a Motion to Transfer Venue to the Southern District of New York, Judge O'Connell granted the motion and ultimately transferred the case to the Southern District of New York.[182]

The class action involved thousands of musical composition copyright owners.[183] Spotify allegedly reproduced and distributed music by Ferrick, Lowery, and other artists on their platform without acquiring proper licenses.[184] To avoid more cross-filings and motions, the parties agreed on a settlement of over $112.5 million, $43.45 million of which would be paid immediately in cash to all class plaintiffs.[185] However, Spotify continued to deny "any fault, wrongdoing, or liability of any kind to Class Plaintiffs" even after the settlement was finalized.[186]

As noted in the Consolidated Complaint, Spotify could have negotiated direct licenses with the relevant copyright owners or pursued compulsory licenses under 17 U.S.C § 115.[187] Instead, Spotify outsourced its licensing obligations to the Harry Fox

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[179] Notice of Motion and Motion to Dismiss for Lack of Personal Jurisdiction or to Transfer Venue to the Southern District of New York at 1, Ferrick v. Spotify USA Inc., No. 2:15-cv-09929-BRO-RAO (C.D. Cal. 2016), 2016 WL 11623778 [hereinafter Motion to Transfer].

[180] *Id.*

[181] Consolidated Class Action Complaint at 1, Ferrick v. Spotify USA Inc., No. 2:15-cv-09929-BRO-RAO (C.D. Cal. 2016), 2016 WL 11623778 [hereinafter Consolidated Complaint].

[182] *See* Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Settlement at 6, Ferrick v. Spotify USA Inc., No. 1:16-cv-08412 (AJN) (S.D.N.Y. May 22, 2018), 018 U.S. Dist. LEXIS 86083 [hereinafter Preliminary Approval of Settlement].

[183] *See* Eriq Gardner, *Spotify Wins Approval of $112.5 Million Deal to Settle Copyright Class Action*, THE HOLLYWOOD REPORTER (May 23, 2018, 8:42 AM), https://www.hollywoodreporter.com/thr-esq/spotify-wins-approval-1125-million-deal-settle-copyright-class-action-1114307.

[184] Consolidated Complaint, *supra* note 181, at 2-3, ¶¶ 6-7.

[185] Settlement Agreement and Release at 15-16, Ferrick v. Spotify USA Inc., No. 2:15-cv-09929-BRO-RAO (C.D. Cal. 2016), 2016 WL 11623778 [hereinafter Settlement Agreement].

[186] *Id.* at 3.

[187] Consolidated Complaint, *supra* note 181, at 2, ¶ 4.

Agency (the "HFA"), a music rights organization.[188] Both Spotify and the HFA allegedly neglected to comply with the Copyright Act, resulting in copyright infringement for thousands of musical works over the course of three years.[189]

Despite the resolution of this case, more lawsuits were filed after the fact by those enraged by the small amount of the settlement.[190] Many objectors to the *Ferrick* settlement argued that the $112.5 million deal practically gave Spotify a "free pass" on willful infringement.[191] Wixen Publishing Group, originally part of the *Ferrick* lawsuit, ultimately opted out of the settlement agreement and filed its own lawsuit on behalf of music from Rage Against the Machine, The Doors, Steely Dan, and others for "at least $1.6 billion."[192]

Copyright infringement remains an enormous burden in the entertainment industry, even when laws and regulations are put in place. Licensing, while abundant in options, is not always sought. Quasi-monopolies like Spotify can afford extensive litigation or settle when caught exploiting the rights of its artists. On the other hand, many artists cannot afford to enforce their rights. In fact, many may not even realize their works are being infringed upon. Often, infringers choose to avoid paying artists because even if their uses are illegal, the burden is upon the artists to prove ownership and to enforce their respective rights.[193]

These situations can be mitigated using blockchain technology. Using blockchain, records of licenses and transactions

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[188] *Id.* at 3, ¶ 8.

[189] *Id.* at 3, ¶ 7.

[190] Eriq Gardner, *Spotify Hit with $1.6B Copyright Lawsuit Over Tom Petty, Weezer, Neil Young Songs*, THE HOLLYWOOD REPORTER (Jan. 2, 2018, 10:57 AM), https://www.hollywoodreporter.com/thr-esq/spotify-hit-16-billion-copyright-lawsuit-tom-petty-weezer-neil-young-songs-1070960.

[191] Gardner, *supra* note 183.

[192] Gardner, *supra* note 190. This case, *Wixen Music Publishing, Inc. v. Spotify USA Inc.*, was ultimately dismissed in 2018 after being settled out of court for an undisclosed amount. *Spotify Settles $1.6bn Lawsuit Over Songwriters' Rights*, BBC (Dec. 21, 2018), https://www.bbc.com/news/business-46646918.

[193] *See How Blockchain Technology Can Be Used to Protect Intellectual Property*, 99DESIGNS (2018), https://99designs.com/blog/freelancing/blockchain-protect-intellectual-property/ [hereinafter *Blockchain Technology*].

can be recorded permanently.[194] Obligations of both parties are encrypted and specified through smart contracts, providing evidence of wrongdoings or diversions from the agreement.[195] Moreover, each transaction is aggregated with other blocks, forming one block of transactions.[196] Simply put, the artist can automatically detect any changes, new transactions, or unwarranted use at no additional cost.[197]

IV. ENTERTAINMENT SMART CONTRACTS

A. IMPLEMENTATION OF SMART CONTRACTS

Massive transactional efficiencies can be achieved using smart contracts. For example, smart contracts can automatically charge consumers when they download songs and distribute the revenue in pre-negotiated proportions to any specified stakeholder.[198] Infringement may be easier to detect using blockchain technology, thus potentially deterring such behavior entirely.[199]

The key here is to start small. There are many moving pieces—our economic and social infrastructures will have to adapt accordingly.[200] This technological revolution is beginning now, and newly passed state laws are the foundation for this change. Specifically, these laws may provide examples for blockchain's capabilities. Policy makers need coordination and clarity when deciding how smart contracts will be designed, verified, implemented, and enforced.[201] At the federal level, administrations and agencies, such as the Securities and Exchange Commission, the Federal Trade Commission, and the Internal Revenue Service,

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[194] Paul Niculescu-Mizil, Bogdan Ţigănoaia & Andrei Niculescu, *Blockchain and Smart Contracts in the Music Industry – Streaming vs. Downloading*, UNIVERSITY OF POLITEHNICA OF BUCHAREST, ROMANIA 215, 216 (2017).

[195] *See id.*

[196] *Id.*

[197] *See id.*

[198] Andre Dutra, Andranik Tumasjan & Isabell M. Welpe, *Blockchain is Changing How Media and Entertainment Companies Compete*, 60 MIT SLOAN MANAGEMENT REVIEW 39, 40 (2018).

[199] *See* Bodó et al., *supra* note 75, at 322.

[200] Marco Iansiti & Karim R. Lakhani, *The Truth About Blockchain*, HARV. BUS. REV. (2017), https://hbr.org/2017/01/the-truth-about-blockchain.

[201] *Id.*

already acknowledge the risk of overregulating.[202] Additionally, states have not found a general consensus for blockchain regulation, especially with regard to currencies.[203]

Though the current pieces of state legislation in place are an important first step in recognizing the legality of this technology, federal policy makers should define certain terms. For example, "cryptocurrency" does not have a uniform definition.[204] This is the case with many technological terms associated with blockchain technology. Thus, the next logical step is to outline and implement broad, uniform definitions nationwide. This will not only guarantee some sense of consistency but will also provide clarity for new regulations as blockchain technology develops.

Regulators should also administer guiding principles to provide safeguards against anticompetitive practices.[205] Policy makers and artists need to work together to ensure the operability of blockchain technology while complying with existing legislation.[206] Existing state laws may establish a foundation upon which federal laws may be built. Copyright law should be amended to account for blockchain technology, while leaving room for further expansion and clarification as the technology develops.

However, amending laws to include such a new and evolving technology poses the risk of creating unintended consequences.[207] Therefore, where blockchain technology does not fit into existing areas of law, federal legislators should create new laws specifically designed to regulate and accommodate this technology. Again, the key here is to begin small and to provide broad language to account for rapid growth and change. While this bears the risk of creating conflicting laws,[208] such language provides at least some stability and clarity for nationwide implementation of this technology in the coming years. This practice would provide

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[202] Joe Dewey, *Blockchain & Cryptocurrency Regulation 2021 | USA*, GLOBAL LEGAL INSIGHTS (2021), https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/usa.

[203] *See id.*

[204] *Id.*

[205] TOM LYONS ET AL., THE EUROPEAN UNION BLOCKCHAIN OBSERVATORY FORUM, LEGAL AND REGULATORY FRAMEWORK OF BLOCKCHAINS AND SMART CONTRACTS 10 (2019), https://www.eublockchainforum.eu/sites/default/files/reports/report_legal_v1.0.pdf.

[206] *Id.*

[207] For example, such amendments could create loopholes in blockchain's use or application. *See id.*

[208] *Id.*

protection of existing rights in place by current law while allowing room for innovation.

B. TRANSFORMATION OF OWNERSHIP, RETENTION OF COPYRIGHTS, AND OTHER PLAYERS

Blockchain technology establishes ownership via the distributed ledger. Once a block is created, it cannot be changed or altered.[209] Additionally, because it is formed through automation, artists can protect their work at a lower cost and with a higher level of reliability.[210] This, of course, does not take into account the rights established through copyright. For these rights to be legally enforced, the works in question would still need to comply with copyright law and be registered with the Copyright Office.

If and when artists buy into this blockchain-run system, the technology will not render copyright law moot. In fact, copyright law and blockchain-based smart contracts must work together to succeed. Specifically, artists will retain their copyright exclusive rights.[211] Rather than partnering with intermediaries, each artist could independently license their works' different uses, either exclusively or non-exclusively.[212] Smart contracts authorizing licenses or uses of the creative works would be *prima facie* valid in each territory.[213] Blockchain may precisely track digital assets, thus establishing evidence of authorship while allowing verification of the time and date of the assets' creation.[214] Specifically, this time-stamped record may enable an artist to prove copyright authorship and ownership.[215]

Smart contracts can automate who has access to a work, under what conditions, and for how long.[216] Metadata on ownership and other aspects of a copyright can be stored on the blockchain, thus making the work easier to track and manage.[217] The

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[209] *Blockchain Technology*, *supra* note 193.

[210] *Id.*

[211] Iansiti & Lakhani, *supra* note 200.

[212] *See id.*

[213] *Id.*

[214] Michèle Finck & Valentina Moscon, *Copyright Law on Blockchains: Between New Forms of Rights Administration and Digital Rights Management 2.0*, SPRINGERLINK (Dec. 20, 2018), https://link.springer.com/article/10.1007/s40319-018-00776-8.

[215] *See id.*

[216] *See* Simon Stokes, *Digital Copyright: AI and Blockchain*, LEXOLOGY (Apr. 8, 2019), https://www.lexology.com/library/detail.aspx?g=f470dbbf-eb8e-44e5-9d45-1f55bfc25e2a.

[217] *Id.*

transparency offered through blockchain may diminish the need to have a third party, like the court system, determine ownership.[218] This will simultaneously enable various players to cooperate.[219] For example, blockchain technology may allow numerous stakeholders in the entertainment industry to own a "piece" of each work.[220] Because ownership and control of a work is, in a sense, a source of power, sharing data openly may be disincentivized.[221] While this technology is gaining speed, it is still far from complete.

C. DRAWBACKS AND OBSTACLES

Blockchain technology has great potential, but it is a long way from becoming the new standard. With cheaper and less complicated alternatives available, blockchain applications may fail to "address enforcement [of copyright infringement] in a meaningful way," at least in the near future.[222] Moreover, when information is first put into the blockchain system, the technology cannot check the validity of the information.[223] Specifically, blockchain could not analyze a work in the same way a court can determine whether a work satisfies all the requirements of a copyright.

Blockchain, while generally safe and immune to change, poses a significant issue if used for unlawful purposes.[224] Despite the technology set in place, it may remain difficult to prevent the occurrence of infringing activity.[225] Additionally, copyright holders must register with a blockchain-based system to receive the protection outlined in this Note. While it is not necessary for all artists to transact via smart contracts, a wider implementation would expedite the licensing process and exploit blockchain's advantages. Furthermore, conflicts between smart contracts and traditional licenses could arise with artists who may already have transactions in place and then begin utilizing this system.[226] If these traditional transactions are not properly recorded on a digital ledger, desynchronization of a blockchain may occur, thus thwarting the efforts of maintaining a complete-tracking system.[227]

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[218] Bodó et al., *supra* note 75, at 328-329.
[219] *Id.* at 328.
[220] *See id.*
[221] *Id.*
[222] *See id.*
[223] *Id.*
[224] Stokes, *supra* note 216.
[225] *Id.*
[226] Bodó et al., *supra* note 75, at 323.
[227] *Id.*

Some artists may not have the opportunity to take advantage of this system if they have already sold their rights or signed a contract forbidding negotiating with others. Even if this is the case, using a blockchain system can at least create a digitalized system of tracking, though unfortunately, artists may not have the bargaining power to utilize these systems if they are already using an intermediary. Clearly, this system puts intermediaries at a disadvantage and would thus create a disincentive for intermediaries to "allow" their artists to use this system.

V. CONCLUSION

Smart contracts have the potential to revolutionize the entertainment industry by increasing security while lowering transaction costs. If implemented correctly, smart contracts, through blockchain technology, can increase artists' royalties by removing the need for intermediaries. Artists may receive more direct payments while increasing security. This could also streamline copyright management and royalty distribution.

Rather than million-dollar corporations and companies controlling how artists use and distribute their creative works, artists would enjoy more autonomy over their works. A universal system would create a useful weapon against artist-harming monopolies. This system must start small. Like many great technologies of the past, it once seemed impossible. The difference here is that this system will put artists in control. Once this system proves effective, artists will flock.

The small steps taken now by individual jurisdictions are paving the way for success. Policy makers and artists must work together to understand this technology, its integration, and the regulations needed for ensuring its success. Blockchain technology should be uniformly defined, and copyright laws should be amended to reflect this technology's capabilities. Moreover, federal laws should be created to establish blockchain technology's place in our social and economic infrastructures. While lawmakers are key to unlocking this technology's potential, the ultimate leap will be made by the artists.

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ABDICATING NEUTRALITY: TURNING AGGRESSORS INTO VICTIMS

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CONTENTS

INTRODUCTION

"Boermeester was a member of the USC football team, who kicked the game-winning field goal for USC at the 2017 Rose Bowl."[1] This was the California Court of Appeal for the Second Appellate District's ("the Court") opening line in *Boermeester v.*

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[1] Boermeester v. Carry, 49 Cal. App. 5th 682, 687 (2020), *depublished by* 472 P.3d 1062 (Cal. 2020).

Carry, a case brought by a football player at the University of Southern California ("USC") who was expelled for engaging in intimate partner violence, violating USC's misconduct policies.[2]

In 2015, public outrage sparked after Brock Turner was sentenced to six months jail time after sexually assaulting an unconscious woman behind a dumpster at Stanford University and attempting to flee when caught.[3] Turner ended up serving only three months jail time, even though one of his charges carried a three-year minimum.[4] Both the judge and the media made a point to emphasize the fact that Turner was a prominent member of the Stanford swimming team, recognizing his achievements in the sport.[5] The judge justified sentencing Turner to a miniscule portion of the fourteen-year sentence he could have imposed because of the potential impact a tough sentence could have on the accomplished athlete's life.[6]

In 2020, the Court showed a pattern adopting the same mentality, by focusing on the accused's athletic abilities. In the *Boermeester* case, and in similar cases involving gender-based violence on university campuses, the Court implicitly promoted a sex-discriminatory culture of hypermasculinity.[7]

This article analyzes *Boermeester v. Carry,* and the Court's other decisions in campus gender-based violence cases involving male athletes and concludes the decisions are being influenced by the Court's approval of sex-discriminatory hypermasculine sports cultures. Part I of this article provides a case overview and analysis of the Court's decision. Part II discusses hypermasculinity characteristics as well as hypermasculine sports cultures and explains how these characteristics can lead to sex discrimination,

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[2] *Id.* at 693-94.

[3] Lynn Neary, *Victim of Brock Turner Sexual Assault Reveals Her Identity*, NPR (Sept. 4, 2019, 4:44 PM), https://www.npr.org/2019/09/04/757626939/victim-of-brock-turner-sexual-assault-reveals-her-identity.

[4] The American Lawyer, *Inside the Brock Turner Sentencing Memos*, LAW.COM (June 10, 2016), https://plus.lexis.com/document/?pdmfid=1530671&crid=1cb41f6c-02e3-4406-97a2-439fc0f1c319&pddocfullpath=%2Fshared%2Fdocument%2Flegalnews%2Furn%3AcontentItem%3A5K7B-DTB1-JBM3-R0R2-00000-00&pdcontentcomponentid=7599&pdteaserkey=&pdislpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=zt4k&earg=sr0&prid=11eb3c81-0d0f-4089-bda0-1a76c2ecb2c6.

[5] Neary, *supra* note 3.

[6] *Id.*

[7] *See* Doe v. Allee, 242 Cal. Rptr. 3d 109 (Cal. Ct. App. 2019); Doe v. Univ. of S. Cali., 200 Cal. Rptr. 3d 851 (Cal. Ct. App. 2016).

including gender-based violence. Part III explains how the Court's decisions on campus gender-based violence cases promote a sex-discriminatory culture of hypermasculinity by excusing gender-based violence committed by hypermasculine college athletes and by ignoring or minimizing the sex-discriminatory harm done to their victims. Finally, this article urges the California Supreme Court to overturn the Court's decision in *Boermeester v. Carry,* because its legally irrelevant lionization of hypermasculine male athletic culture in the case has led it to make a discriminatory decision rife with gender bias.

I. BOERMEESTER V. CARRY

A. THE INCIDENT

In the early morning hours on January 21, 2017, Zoe Katz, an accomplished USC tennis team member, picked up her boyfriend, Matthew Boermeester, a popular member of the school's football team, from a party.[8] When the couple went back to Katz's home and took her dog, Ziggy, into the back alley, an intoxicated Boermeester began to yell at Katz about letting Ziggy off leash.[9] When Katz refused, Boermeester grabbed her by her hair and said, "drop the fucking leash."[10] Boermeester tightened his grip on her hair until she dropped the leash out of pain; then, he grabbed her by the neck and pushed her up against a concrete wall.[11]

Katz's three neighbors came outside to check on the commotion that woke them up; they tried to convince Katz to spend the night away from Boermeester, but she refused, blaming Boermeester's intoxication for his actions.[12] Later that night, Katz texted one of the neighbors saying, "I am safe. Thanks for looking out for me."[13]

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[8] Boermeester v. Carry, 49 Cal. App. 5th 682, 687 (2020), *depublished by* 472 P.3d 1062 (Cal. 2020).

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at 687-92.

[13] *Id.* at 692.

The next day, Katz's neighbors reported the incident and the Title IX[14] office launched an investigation.[15] In her first interview with the investigator, Katz recapped the story above and stated she was in a "bad situation" with Boermeester, but she wished to remain anonymous throughout the investigation.[16] Katz chose to exercise her option of an "avoidance of contact" order ("AOC order") because she was scared of Boermeester.[17]

One week after Katz's interview with the Title IX investigator, the case began to receive significant media attention due to Boermeester's status on the football team.[18] Katz recanted her initial interview statement and came forward on the social media platform Twitter to publicly unmask herself as the alleged victim and to deny the reports.[19] Katz reached out to the witnesses and her other friends pleading they refrain from participating in the investigation because she did not want to see Boermeester punished, nor did she want to negatively impact his potential NFL career.[20] Although Katz recanted her statement, the case was at a point where the Title IX investigator was obliged to move forward.[21]

B. WITNESS STATEMENTS AND EVIDENCE

Each neighbor who witnessed the incident provided statements about what they saw that night in interviews with the Title IX investigator.[22] Each neighbor's statement corroborated Katz's original version of the incident from her first interview with the Title IX investigator.[23] Additionally, there was video footage, although somewhat fuzzy, from Katz's housing complex.[24] The recording

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[14] "Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in education programs and activities that receive federal financial assistance. Title IX states 'No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.'" Title IX is enforced by the Office of Civil Rights within the Department of Education. *Sex Discrimination: Overview of the Law*, OFF. FOR C.R. (Aug. 20, 2021), https://www2.ed.gov/about/offices/list/ocr/sexovervie w.html.

[15] Boermeester v. Carry, 49 Cal. App. 5th 682, 687 (2020), *depublished by* 472 P.3d 1062 (Cal. 2020).

[16] *Id.* at 688.

[17] *Id.*

[18] *Id.* at 689.

[19] *Id.*

[20] *Id.* at 689-92.

[21] *Id.* at 688.

[22] *Id.* at 689-92.

[23] *See id.* at 691-92.

[24] *Id.* at 693.

showed Boermeester and Katz pushing each other, Boermeester grabbing her by some portion of her upper body, and the pair going out of view when Boermeester pushed her up against the wall.[25]

Finally, the investigator spoke with Katz's friends and Boermeester's ex-girlfriend of nearly three years.[26] Katz confided in her friends when Boermeester gave her bruises on other previous occasions.[27] Boermeester's ex-girlfriend stated there were numerous times when she and Boermeester would be "goofing around" and Boermeester would take it too far by putting his hands around her neck.[28] His ex-girlfriend also recalled two instances when Boermeester shoved her during an argument.[29]

C. USC'S RESPONSE

After providing notice to Boermeester that he was being investigated for violating USC's sexual misconduct policy by engaging in intimate partner violence, USC placed him on a temporary suspension.[30] Boermeester was directed to not be in contact with Katz until further notice due to the AOC order.[31]

The Title IX investigator interviewed Boermeester, and he confirmed the facts of the incident as Katz described them but said he did not intend to harm her.[32] Boermeester added he and Katz sometimes put their hands on each other's necks during sex and the neighbors likely just misinterpreted how the pair interacts.[33]

About two weeks after his interview, Boermeester was notified he was being investigated for violating the AOC order.[34] He denied contacting Katz;[35] however, text messages between Katz and a friend indicated Katz and Boermeester were likely in contact while the AOC order was in place.[36]

After evaluating all of the evidence and interviews, the Title IX investigator determined Boermeester violated USC's sexual misconduct policy by engaging in intimate partner violence, and

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[25] *Id.*
[26] *Id.* at 692-93.
[27] *Id.* at 692.
[28] *Id.* at 692-93.
[29] *Id.* at 693.
[30] *Id.* at 688.
[31] *Id.*
[32] *Id.* at 690.
[33] *Id.*
[34] *Id.*
[35] *Id.* at 690-91.
[36] *Id.* at 692.

violated the AOC order.[37] Accordingly, the investigator passed along the findings to the Misconduct Sanctioning Panel, which concluded expulsion was the appropriate punishment.[38]

Boermeester appealed the panel's decision to the Vice President of Student Affairs.[39] The Vice President had an Appellate Panel review the decision of the Sanctioning Panel.[40] The Appellate Panel recommended a two-year suspension, but the Vice President was not required to accept the Panel's recommendation and decided to affirm the expulsion.[41]

D. ANALYSIS OF COURT DECISION

After his expulsion was affirmed, Boermeester filed a writ of administrative mandate[42] to set aside the expulsion.[43] The Superior Court of Los Angeles County denied the writ,[44] finding substantial evidence supported Boermeester's expulsion.[45]

On appeal, for the first time, Boermeester claimed he was denied the opportunity to cross-examine key witnesses at a live, in-person hearing, violating his right to fair procedure.[46] As Justice Wiley's dissent notes, neither Boermeester nor his lawyer raised this objection during the USC disciplinary proceedings.[47] This is likely because Boermeester and his lawyer recognized that cross-

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[37] *Id.* at 693.

[38] *Id.*

[39] *Id.* at 693-94.

[40] *Id.*

[41] *Id.*

[42] A writ of mandate, otherwise referred to as "writ of *mandamus*" is where the appealing party (here, Boermeester) asks the court to instruct or force a lower court or administrator to carry out an official action. *Mandamus*, L. INFO. INST., https://www.law.cor nell.edu/wex/mandamus (last visited Nov. 30, 2020). In California, there are two types of mandamus: (1) ordinary mandate, where the court compels agencies to perform ministerial acts, CAL. CODE CIV. PROC. § 1084, and (2) administrative mandate is used to review the validity of an administrative decision made in a required hearing, CAL. CODE CIV. PROC. § 1094. Here, Boermeester is seeking an administrative mandate. *See generally* Boermeester v. Carry, 49 Cal. App. 5th 682 (2020), *depublished by* 472 P.3d 1062 (Cal. 2020).

[43] *Boermeester*, 49 Cal. App. 5th at 694; *see* CAL. CIV. PROC. CODE § 1094.5 (statute providing for setting aside of expulsion).

[44] *Boermeester*, 49 Cal. App. 5th at 694.

[45] *Id.* at 714.

[46] *Id.* at 703 (indicating Boermeester failed to raise the issue in his administrative appeal); *id.* at 698 (citing Doe v. Allee, 242 Cal. Rptr. 3d 109, 130 (Cal Ct. App. 2019)).

[47] *Boermeester*, 49 Cal. App. 5th at 715.

examining Katz and the witnesses would only give them the opportunity to strengthen their credibility by recounting the incident as it happened, just as they did in their interviews with the Title IX investigator prior to Katz recanting.[48]

Even though Boermeester chose to forego objecting to the lack of live cross-examination in the USC disciplinary proceedings, the Court nonetheless agreed with Boermeester, holding a university must provide cross-examination of witnesses in order to comply with fair procedure.[49] The decision to require these procedures reveals the Court's gender-biased attitude towards cases involving gender-based violence.[50] Although the Court insists on procedures likely to harm victims, it does not do the same regarding procedures intended to protect victims.

1. THE COURT IMPLEMENTS PROCEDURES THAT ONLY PROTECT ASSAILANTS, NOT VICTIMS

Professor Michelle J. Anderson explains how federal rape shield laws were passed with the intention of protecting victims' privacy and leaving their past sexual history out of the courtroom.[51] Particularly, proponents of the federal rape shield laws wanted to protect women who previously had consensual sex, generally with husbands or boyfriends – like Katz – and who would likely feel embarrassed and/or degraded having their sexual history brought into the courtroom.[52]

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[48] *Id.* at 715-17.

[49] *Id.* at 705 (citing Doe v. Occidental College, 252 Cal. Rptr. 3d 646, 659 (Cal. Ct. App. 2019); *Allee*, 242 Cal. Rptr. 3d at 113).

[50] *See* Brief for the California Women's Law Center et al. as Amici Curiae Supporting Petitioner, Boermeester v. Carry 49 Cal. App. 5th 682 (2020) (No. S263180) at 2.

[51] Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 86-94 (2002). Michelle J. Anderson is currently serving as the President of Brooklyn College. She is a leading scholar in rape and sexual assault law. She received a J.D. from Yale Law School where she was recognized for her academic achievement and served as an editor for the Yale Law Journal. After law school, she clerked for Judge William A. Norris on the United States Court of Appeals for the Ninth Circuit. She then earned her LL.M. in Advocacy while working at the Georgetown University Law Center. In 2014, she received the New York City Bar Association's Diversity and Inclusion Champion Award. PRESIDENT ANDERSON'S BIOGRAPHY, BROOK. COLL., https://www.brooklyn.cuny.edu/web/about/administration/president/anderson.php (last visited Nov. 30, 2020).

[52] Anderson, *supra* note 51, at 94.

By requiring strict due-process-like procedures protecting the assailant, and allowing the avoidance of court-like procedures intended to protect victims, the Court implies it does not care that Katz's private sexual history, particularly her history with Boermeester, will be put on trial, all under the guise of establishing fair procedure. By requiring procedures protecting aggressors and allowing the avoidance of procedures intended to protect victims in cases involving sexual and domestic violence where gender bias already exists,[53] the Court is creating a significant risk for sex-discriminatory processes involving cases of campus gender-based violence.

Even if the Court were to require procedures intended to protect victims, the victims are still at a disadvantage to their aggressor. Professor Anderson points out the rape shield laws have ultimately failed to protect the victims they are intended to protect because of the exceptions created.[54] In criminal cases, three exceptions allow for the admission of evidence regarding a victim's sexual history or sexual predisposition: (1) if it is offered to prove someone other than the defendant was the source of the semen, injury, or other physical evidence; (2) specific instances of the victim's sexual behavior with the defendant when offered to prove consent, and (3) when exclusion of such evidence would violate the defendant's constitutional rights.[55]

Professor Anderson notes how the second exception is especially detrimental to the purpose of the rape shield laws because it invites biased inferences about the temporal constraints of a victim's consent.[56] The exception allows courts to infer that because the victim and defendant previously engaged in consensual sex, the victim's credibility as to the claimed non-consensual encounter should be more heavily scrutinized;[57] putting the victim on trial, rather than the defendant.

Research from the National Institute of Justice shows how this exception creates gender bias under the guise of intending to protect

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[53] Nearly two-thirds of victims aged eighteen to twenty-nine had a prior relationship with their assailant, and women are almost six times more likely to be victims of sexual violence than men. PATRICIA TJADEN & NANCY THOENNES, NAT'L. INST. OF JUST., U.S. DEPT. OF JUST., PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM NATIONAL VIOLENCE AGAINST WOMEN SURVEY 27 (1998).

[54] *Id.*

[55] FED. R. EVID. 412.

[56] Anderson, *supra* note 51, at 70.

[57] *Id.* at 121-22.

women and their privacy.[58] Thus, even if the Court required USC to implement into its disciplinary hearings procedures identical to those required by the rape shield laws, it still would have contributed to the gender-bias in sexual violence cases, just with a facially neutral intent. Instead, the Court is picking and choosing which procedures for USC to adopt, showing its own gender-biased attitude towards cases of campus sexual violence.

2. *APPLYING THIS "PICK AND CHOOSE" PERSPECTIVE TO THE COURT'S REASONING*

The Court justified requiring a live hearing with cross examination when the credibility of witnesses is at issue;[59] however, no facts regarding Boermeester's conduct that night were disputed by Boermeester, Katz, or the witnesses.[60] In his dissent, Justice Wiley pointed out that part of Katz's initial statements, overlooked by the majority, explained Boermeester's conduct during a previous semester where she allowed him to live in her apartment rent free.[61]

> He told her when she could speak and when she was too close to him. He used physical abuse when she did not obey. He poked and hit her, causing bruising. He told her to shut up. He kicked her when she got too close. He took her by the neck to "freeze her" when he wanted to stop her. . . He told her she was stupid and a lousy tennis player. . . He never apologized or took responsibility [and] [w]hen she asked if he would feel bad or sorry if he hurt her, he said no, because she brought it on herself.[62]

Justice Wiley also regarded Katz's recanting of the above statements as less credible than the initial statements themselves because of the propensity for victims of intimate partner violence to recant and change their story to protect the aggressor. [63] A separate

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[58] Among victims aged 18-29, two-thirds had a prior relationship with their offender. NAT'L INST. OF JUST., VICTIMS & PERPETRATORS (Oct. 26, 2010), https://nij.ojp.gov/topics/articles/victims-and-perpetrators.

[59] Boermeester v. Carry, 49 Cal. App. 5th 682, 703 (2020), *depublished by* 472 P.3d 1062 (Cal. 2020) (citing Doe v. Allee, 242 Cal. Rptr. 3d 109, 136 (Cal. Ct. App. 2019)).

[60] *See id*. at 706-07.

[61] *Id*. at 712.

[62] *Id*.

[63] *Id.* at 711.

2011 study found victims tended to recant when contact between the abuser and the victim sparks feelings of blame in the victim, the victim feels lonely or isolated, and when the victim becomes sympathetic to the abuser.[64] Katz's actions of asking her friends not to cooperate with the investigation and expressing concerns Boermeester was being unfairly punished indicated that she sympathized with Boermeester and may have felt like she was partially to blame. She told the investigator she wanted to end the investigation because she still cared about Boermeester, and she must have recognized following through with the investigation would end their relationship. Also, although the opinion is silent on what Boermeester and Katz discussed when he violated the AOC order, a reasonable person might assume they discussed the investigation, and Katz may have been convinced she was partially to blame for the abuse (even though that is inaccurate).

Justice Wiley also pointed out USC's procedures were more than fair to Boermeester, providing four layers of review in determining he violated USC's misconduct policy by engaging in intimate partner violence.[65] The first layer was the extensive investigation conducted by the Title IX investigator.[66] The second layer was the separate Misconduct Sanctioning Panel.[67] The third layer was the Appellate Panel.[68] The fourth and final layer of review was USC's Vice President for Student Affairs, who ultimately affirmed Boermeester's expulsion.[69] Justice Wiley concluded USC's process was careful and fair, and the case was straightforward.[70] He also noted throughout the process, USC accommodated Boermeester and his lawyer on multiple occasions.[71]

Indeed, Justice Wiley points out the Court's majority opinion constructed a defense regarding unfair procedures in an effort to protect Boermeester, shifting the focus between the students to such a degree the "aggressor emerges as the victim."[72] The opinion overlooked Boermeester's history of intimate partner violence in an effort to make this particular incident appear as a one-time occurrence for which he should not be held accountable. Thus, the

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[64] *See* Amy E. Bonomi et al., *"Meet Me at the Hill Where We Used to Park": Interpersonal Processes Associated with Victim Recantation*, 73 J. SOC. SCI. & MED. 1054, 1056-60 (2011).

[65] *Boermeester*, 49 Cal. App. 5th at 713 (Wiley, J., dissenting).

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.* at 714.

[70] *Id.*

[71] *Id.* at 715.

[72] *Id.* at 709.

reader easily forgets that the real issue at hand is that Boermeester inflicted violence and pain on Katz. This sort of manipulation has the effect of aggrandizing a dangerous culture of hypermasculinity.

II. BACKGROUND ON HYPERMASCULINITY, SPORTS, AND GENDER-BASED VIOLENCE

A. MASCULINITY AND HYPERMASCULINITY

From a young age, boys are taught the meaning of masculinity through different facets of everyday life, such as educational settings, sports, and social interaction.[73] Nearly everything boys learn about "being a man" revolves around their respective levels of strength, performance in public competition, and dominance over both women and other men.[74] "Masculinities scholars have identified the ideal traits of traditional masculinity as heterosexual, aggressive, active, sports-obsessed, competitive, and stoic."[75]

Professor Nancy Chi Cantalupo points out male insecurity about not being masculine enough in comparison to other men around them creates a near obsession with constantly building up one's "manliness" in the eyes of other men.[76] These dynamics lead some men to overcompensate through various behaviors, including violence.[77] Scholars refer to this overcompensation as

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[73] *See* Nancy Chi Cantalupo, *Masculinity & Title IX: Bullying and Sexual Harassment of Boys in the American Liberal State*, 73 MD. L. REV. 887, 967 (2014).

[74] *See* MICHAEL A. MESSNER, TAKING THE FIELD: WOMEN, MEN AND SPORTS 27, 41 (2002).

[75] Cantalupo, *supra* note 73, at 904 (citing David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135, 153 (2009)); DAVID SADKER, MYRA SADKER & KAREN ZITTLEMAN, STILL FAILING AT FAIRNESS: HOW GENDER BIAS CHEATS GIRLS AND BOYS IN SCHOOL AND WHAT WE CAN DO ABOUT IT 125-26 (2009).

[76] Nancy Chi Cantalupo is an Associate Professor at California Western School of Law. Professor Cantalupo is a nationally recognized scholar and expert on Title IX, sexual harassment, and gender-based violence in education. Her past positions include Assistant Dean for Clinical Programs at Georgetown Law, Associate Vice President for Equity, Inclusion & Violence Prevention at a higher education professional association, Research Fellow with the Victim Rights Law Center, and attorney with Drinker Biddle & Reath LLP. She has also consulted with President Obama's White House Task Force to Protect Students form Sexual Assault. *See* Cantalupo, *supra* note 73, at 906-07.

[77] *Id.* at 907.

"hypermasculinity." [78] Boiled down, hypermasculinity is an intensified form of traditional masculinity, and increases the likelihood for men to engage in violence.[79] It is used as a mechanism to ease male insecurity and is connected to a lack of empathy.[80] Dr. Michael Messner clarifies a common misconception when talking about male-violence; he states the phrasing "male-violence" itself is skewed to lead readers to believe the propensity for violence is a biological uniformity among men, but in reality, similar to masculinity, violence is learned.[81]

Professor Cantalupo points out another key factor in the hierarchy of masculinity: not being a woman.[82] This resonates in the competition men have amongst themselves, which is why homophobic and other slurs that gender men as women are used as mechanisms for boys to prop themselves up as more masculine over other men.[83] Men also try to affirm their masculinity over other men by equating the others to women.[84] By placing women in a position of inferiority, men feel able to use women as objects in an attempt to heighten their image of masculinity.[85] Men face a constant test to prove their own traits of masculinity, and because of this consistent pressure to conform to the standards of masculinity, the result is a hypermasculine performance.[86]

The propensity to engage in sexual violence is heightened in social settings involving hypermasculine performance because

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[78] Hypermasculinity is defined as a particularly strong form of traditional masculinity. *Id*.

[79] *Id.*

[80] *Id.* at 908.

[81] Michael A. Messner, *When Bodies Are Weapons: Masculinity and Violence in Sport*, 25 INT'L REV. FOR SOC. SPORT 203, 205 (1990). Dr. Messner is currently serving as a Professor of Sociology and Gender Studies at the University of Southern California. His research has focused into four categories: (1) gender and sport; (2) sports media; (3) men, feminism, and politics; and (4) war and peace. He has authored several books and chapters and was in the first generation of scholars to study men's lives within women's and gender studies. *Michael Messner: Home*, MICHAEL MESSNER, http://www.michaelme ssner.org/ (last visited Nov. 30, 2020).

[82] Cantalupo, *supra* note 73, at 905.

[83] *Id.* (citing Michael Kimmel, *Men, Masculinity, and the Rape Culture, in* TRANSFORMING RAPE CULTURE 139, 142 (Emilie Buchwald, Pamela R. Fletcher & Martha Roth, eds., revised ed. 2005)).

[84] *Id.*

[85] *See* MESSNER, *supra* note 74, at 33-37; Cantalupo, *supra* note 73, at 910.

[86] Cantalupo, *supra* note 73, at 907.

sexual conquests are often used as a form of currency to increase one's own masculinity.[87]

Masculinity contributes to the common gendered stereotypes generalizing both men and women. Such stereotypes include traditional societal constructs and views of family and relationships.[88] The hypermasculine behavior of having an extreme need to dominate others, and a readiness to resort to violence makes these stereotyped relationships extremely vulnerable to intimate partner violence.[89] These relationships are where men expect and are expected to achieve respect and control, and there is a connection linking stereotyped beliefs about family and relationships with a tolerance for intimate partner violence.[90]

Intimate partner violence is a common form of obtaining dominance over ones' partner.[91] The violence may be another form of overcompensation when men feel they are lacking masculine dominance amongst their peers or in other aspects of their lives. Emotional and physical abuse are commonly seen as forms of domestic abuse.[92] Emotional abuse is inflicted by making the woman feel bad about herself, putting her down, and calling her names.[93] Justice Wiley unequivocally states in his dissenting opinion that the *Boermeester* case shows "substantial evidence [of] a textbook domestic violence case."[94] As noted above, Boermeester displayed a history of attempts to physically and emotionally abuse Katz in an effort to assert his dominance over her.[95]

Although these gendered stereotypes also create significant challenges for male victims of domestic violence,[96] the conclusion overlooks the fact women are almost twice as likely to experience

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[87] *Id.* at 908.

[88] Melissa L. Breger, *Reforming by Re-Norming: How the Legal System Has the Potential to Change a Toxic Culture of Domestic Violence*, 44 J. LEGIS. 170, 179 (2017).

[89] *See id.* at 179-80.

[90] *Id.* at 180.

[91] Domestic Abuse Intervention Project, *Power and Control Wheel*, NAT'L CTR. ON DOMESTIC AND SEXUAL VIOLENCE, http://www.ncdsv.org/images/powercontrolwheelnoshading.pdf.

[92] *Id.*

[93] *Id.*

[94] Boermeester v. Carry, 49 Cal. App. 5th 682, 709 (2020), *depublished by* 472 P.3d 1062 (Cal. 2020) (Wiley, J., dissenting).

[95] *See id.* at 712.

[96] *See* Donald G. Dutton & Katherine R. White, *Male Victims of Domestic Violence*, 2 NEW MALE STUDIES: INT'L J., 2013, at 5.

severe intimate partner violence.[97] Men already feel a constant need to compete with other men in order to prove themselves, and this craving for domination is exacerbated in settings where such domination is glorified.[98]

B. HYPERMASCULINITY AND SPORTS

Hypermasculinity is very common in sports – especially in more physical sports – because boys learn success is achieved through being the strongest or most aggressive player.[99] By deeming the aggressiveness or violence of male athletes in these sports as a positive factor that raises their status on the hierarchy, men's athletics promotes the exertion of hypermasculinity. This encouragement sets a tone of acceptance of the resulting violence, even when the violence seeps outside of the boundaries of the sport. Anthony F. Green acknowledges sports can be a good outlet for anger and found varsity athletes (such as Boermeester) have a better ability to control their anger than non-varsity athletes.[100] While Green's conclusion suggests a sports outlet positively influences the expression of anger, the data also lends support that varsity sports players may be more prone to angry outbursts.[101] Thus, the common phrase of using sports to "take it all out on the field" is inaccurate.

As Professor Deborah Brake explains, one consequence of this acceptance is diminished public outrage when, for example, professional football players, boxers, or basketball players engage

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[97] *Statistics*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE, https://www.ncadv.org/statistics#:~:text=1%201%20in%203%20women%20and%201%20in,partner.%20Data%20is%20unavailable%20on%20male%20victims.%201 (last visited Jan. 2, 2020).

[98] *See* Breger, *supra* note 88, at 178.

[99] *See* MESSNER, *supra* note 74, at 50-51.

[100] Anthony F. Greene et al., *Anger and Sports Participation*, 72 PSYCHOL. REPS., Apr. 1993, at 523.

[101] *Id.* at 528.

in sexual or domestic violence.[102] The public stage of these sports is centered on strength, competition, and aggression. The participating athletes are deemed as the most masculine and provided more leeway for "flagrant promiscuity,"[103] referring to how athletes in the most masculine sports are generally accustomed to being surrounded by women who idolize them, and therefore have greater difficulty in understanding when a woman says "no" to sexual contact.[104]

The facts show Boermeester experienced this same inability to compartmentalize his violent behaviors within the boundaries of football when he attempted to justify his abusive conduct with his ex-girlfriend as mere "horseplay" and his similar conduct with Katz as sexual foreplay.[105] Looking back to Brock Turner, the judge and the media encouraged the same desensitized approach for a male athlete in even a nonviolent sport that is not considered the most masculine, showing how society and courts alike have placed an unreasonable amount of importance on the accused's athletic capabilities.

Dr. Messner describes a "triad of violence" that has been weaved into the culture of male athletics; the triad being: (1) violence against women, (2) violence against other men, and (3)

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[102] *See* Deborah L. Brake, *Sport and Masculinity: The Promise and Limits of Title IX*, *in* MASCULINITIES AND LAW: A MULTIDIMENSIONAL APPROACH 201, 218 (Frank Rudy Cooper ed. 2012). Professor Brake is a graduate of Harvard Law School, where she earned the distinction of *magna cum laude*. She is currently serving as the Associate Dean for Research and Faculty Development at the University of Pittsburgh School of Law. Before joining the University of Pittsburgh faculty, she was senior counsel at the National Women's Law Center in Washington, D.C. She is a nationally recognized scholar on gender equality and the law, with expertise in Title IX and athletics, sexual harassment and sexual violence, employment discrimination, pregnancy discrimination, and retaliation. She has co-authored multiple books and has published several articles in law review journals across the country. Her work has been cited twice in the United States Supreme Court. *Deborah Brake: Biography*, UNIV. OF PITTSBURGH SCH. L., https://www.law.pitt.edu/people/deborah-brake#:~:text=She%20is%20a%20graduate%20of%20Harvard%20Law%20School%20and%20Stanford%20University.&text=Before%20joining%20the%20faculty%20of,cum%20laude%2C%20and%20Stanford%20University (last visited Nov. 30, 2020).

[103] Brake, *supra* note 102, at 212.

[104] *See id.*

[105] Boermeester v. Carry, 49 Cal. App. 5th 682, 687-88 (2020), *depublished by* 472 P.3d 1062 (Cal. 2020).

violence against themselves.[106] In isolation, each segment of the triad reads as a negative factor, but the foundations of sport and masculinity have warped these violent qualities into factors that male athletes use to boost their own image of masculinity.[107]

The glorification of aggression and violence in men's athletics by the media further encourages engaging in hypermasculine conduct because the attention centers around athletes' abilities to inflict and receive violence. This is portrayed through media reports from popular channels like the Entertainment and Sports Programming Network ("ESPN"), where entire segments dedicated to the "best hits" land a place in the weekly highlight reels.[108] Stated in a simple, yet alarming way: more violence equals more fame. A likely result is that some athletes are not only engaging in the normal levels of aggression and violence associated with their respective sports, but instead are striving to be as aggressive and violent as possible to instill fear, assert their masculinity, and be glorified and idolized by the public media.

In addition, voyeurism[109] is used as a social bonding experience, especially when considering building the team environment and culture of loyalty among male athletic teams.[110] This loyalty heavily emphasizes a culture of silence because trust is an important factor for a team to have success, and teammates count on one another to not betray the team by telling outsiders about these "bonding experiences." Voyeurism also contributes to the male suppression of empathy because sexual interaction and activity becomes a less intimate experience for boys.[111] It is also a prime example of the masculine tendency to dehumanize women and treat them as objects.

Like the hypermasculine culture, men's athletics also encourages and promotes the suppression of empathy for oneself, which in turn, spills over into these athletes not only suppressing their own empathy, but also lacking empathic considerations for others, especially women.[112] Research shows a lack of empathy has

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[106] MESSNER, *supra* note 74, at 30.

[107] Brake, *supra* note 102, at 218.

[108] *E.g.*, *Roman Reigns Ranks College Football's Biggest Hits*, ESPN, https://www.espn.com/video/clip/_/id/18546580 (last visited Nov. 30, 2020).

[109] Voyeurism is where one male engages in sexual activity with a woman while other men watch. MESSNER, *supra* note 74, at 31-32.

[110] *Id.* at 38-42; Cantalupo, *supra* note 73, at 909.

[111] MESSNER, *supra* note 74, at 33.

[112] *See* Messner, *supra* note 81, at 212.

significant connection to a male's propensity to engage in violent behavior.[113]

C. HYPERMASCULINITY, SPORTS, AND GENDER-BASED VIOLENCE

Hypermasculine behaviors are known to exacerbate the violence and aggression connected to lacking empathy. [114] Preliminary research studies of empathic deficits indicate a heightened propensity to engage in physical violence in batterers who "have difficulty identifying with the perspective of others and have a poor ability to tolerate negative emotions." [115] The importance of not being a woman or even manifesting feminine qualities, contributes to a suppression of empathy, especially towards women. This is because boys are encouraged to not only detach from their mothers at an extremely young age but also to dehumanize and objectify women.[116]

Pairing male insecurity with a learned and encouraged lack of empathy also results in what has been coined "The Big Impossible," representing how the pressure society puts on men, and the pressure men put on themselves to be more masculine than their male peers leads most of them to feel like they can never measure up to this imaginary standard of masculinity. [117] This leads to a hypermasculine overcompensation.

Male difficulties with empathy arise from what scholars refer to as "The Boy Code." This code views emotion and empathy as feminine and encourages young boys to emotionally distance themselves from their mothers at extremely young ages in order to suppress both.[118] Scholars have also referred to the lack of empathy resulting from disconnecting young boys from their mothers as a

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[113] Eva-Maria Seidel et al., *Empathic Competencies in Violent Offenders*, 210 PSYCHIATRY RES. 1168 (2013); Christmas N. Covell, Matthew T. Huss & Jennifer Langhinrichsen-Rohling, *Empathic Deficits Among Male Batterers: A Multidimensional Approach*, 22 J. FAM. VIOL. 165 (2007); David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73 (2002).

[114] *See* Cantalupo, *supra* note 73, at 905-07.

[115] Covell, *supra* note 113, at 172.

[116] *See* Cantalupo, *supra* note 73, at 906; *see also* Messner, *supra* note 81 at 208, 212.

[117] Cantalupo, *supra* note 73, at 906 (citing NANCY E. DOWD, THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE 41 (2010)).

[118] *Id.*

lack of emotional literacy.[119] Emotional literacy is the ability to identify and understand the emotional content of things like facial expressions and tone of voice.[120]

Studies show a connection between the propensity to engage in gender-based violence and a lack of empathy.[121] A 2002 study of rapists who have escaped accountability but are incarcerated for other reasons discovered that hypermasculinity and lack of empathy were common characteristics among the rapists.[122] This study also found the majority of undetected rapists also committed other acts of interpersonal violence, such as battery.[123] Although this is a self-report study, perpetrators tend to underreport violent behavior.[124]

A 2013 study of violent offenders and their associated empathic deficits, found violent offenders displayed a lower ability to recognize emotion in others.[125] Particularly, fear and disgust were the emotions where the violent offenders showed a larger deficit in recognition as compared to the control group.[126] Additionally, Dr. Messner suggests the propensity of male athletes to engage in violence against themselves contributes to men's lack of empathy, and their heightened ability to erase the emotional connection associated with pain.[127] For example, "sucking it up" when injured and continuing to play.

Perceiving women as objects further inhibits male ability to identify with the perspective of women and creates a lack of empathy towards women.[128] The "team" athletics environment contributes to the propensity to engage in violence against women. Combining a lack of empathy towards oneself with a team philosophy emphasizing loyalty leads to a culture of silence, where team members who are not the ones engaging in the violence do not speak out against the teammates who are.[129] The team environment

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[119] Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J. L. GENDER & SOC'Y 201, 219 (2008).

[120] *Id.*

[121] Seidel et al., *supra* note 113; Covell, *supra* note 113; Lisak & Miller, *supra* note 113.

[122] Other common characteristics identified were high levels of anger at women, the need to dominate women, and psychopathy and antisocial traits. Lisak & Miller, *supra* note 113, at 73.

[123] *Id.* at 80.

[124] Covell, *supra* note 113, at 168.

[125] Seidel et al., *supra* note 113, at 1179.

[126] *Id.*

[127] MESSNER, *supra* note 74, at 37-38.

[128] *Id.*

[129] *Id.* at 38-39 (discussing voyeurism as a mechanism for social bonding amongst men and as a method of objectifying women).

impacts how male athletes view and treat women. For example, in situations involving voyeurism or even hearing about how their teammates assaulted or abused a woman, passive silence reinforces the dehumanization and objectification of women as acceptable and deserved.[130]

Although Dr. Messner describes each prong of the triad of violence in isolation, the combination of violence against themselves and against other men suggests an increased propensity for men, especially male athletes, to engage in violence against women.[131] This increased propensity is a result of the suppression of empathy, particularly in athletes who are taught to ignore pain and therefore have difficulty identifying or understanding the pain of others, and an inability to turn off the hypermasculine violent mentality that is encouraged on the field.[132] Dr. Messner interviewed several professional athletes who described their difficulties in stepping off the field and returning to a civilized mentality.[133] One interview with a professional football player explained the violent environment of the games carried over into the players' personal lives, resulting in abuse of their spouses.[134]

Resorting to hypermasculine acts of violence, especially gender-based violence, is a way for boys to ease their own insecurities of failing to be the most masculine in the room.[135] Combining the insecurities about lacking masculine qualities, a hypermasculine overcompensation to ease such insecurity, and a belief in women's inferiority is likely why gender-based violence is a common result. Especially in settings such as collegiate athletics where hypermasculinity occurs at high rates, studies found the risk of sexual violence is increased at schools with top division athletic programs as compared to schools with lower division athletics or no athletics at all.[136] The inability to compartmentalize violent behaviors within the boundaries of sport, paired with a lack of

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[130] *Id*. at 33-35.

[131] *Id.* at 37-40.

[132] *See id*. at 39-40.

[133] *Id.*

[134] *Id.* at 40.

[135] *See* Cantalupo, *supra* note 73, at 907.

[136] "[R]eports of sexual violence were higher on campuses with National Collegiate Athletic Association (NCAA) Division I athletic programs [such as USC] as compared to Division II, III and campuses with no athletics." Jacquelyn D. Wiersma-Mosley & Kristen N. Jozkowski, *A Brief Report of Sexual Violence Among Universities with NCAA Division I Athletic Programs*, BEHAV. SCI. J. U.S. NAT'L LIBR. MED. (Feb. 4, 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC 6406521/.

empathy, creates a lopsided gender vulnerability for women on these university campuses. This vulnerability is ignored when the Court chooses to focus on the violent offender's glorified athletic status or abilities.

III. THE CALIFORNIA COURT OF APPEAL FOR THE SECOND APPELLATE DISTRICT'S APPROVAL AND PROMOTION OF SEX-DISCRIMINATORY HYPERMASCULINITY

In *Boermeester*, the Court's focus on legally irrelevant facts regarding the accused's prowess as an athlete shows the Court shares Boermeester's hypermasculine attitudes, especially as they are connected to football. Recall, the Court begins its opinion stating, "Boermeester was a member of the USC football team, who kicked the game-winning field goal for USC at the 2017 Rose Bowl,"[137] but fails to address evidence of Boermeester's history of intimate partner violence against Katz and his ex-girlfriend. The Court's focus on irrelevant facts related to Boermeester's athletic success while refusing to acknowledge ample facts pointing to his gender-based abuse of multiple female intimate partners clearly justifies Justice Wiley's characterization that the "aggressor emerges as the victim."[138]

Likewise, the Court ignores Boermeester's blatant lack of empathy and its consequences for Katz in terms of the violent and aggressive manner of Boermeester's attack on her. Indeed, nowhere in the record does Boermeester state he is sorry or remorseful that he caused her pain on the evening resulting in his expulsion from USC. Boermeester's lack of empathy is also evident in Katz's description of their relationship, during which he abused her repeatedly but never acknowledged it or apologized.

This is not the only case where the Court has limited its focus to the accused assailant's athletic status while ignoring or dismissing the sex-discriminatory harm he caused to women victims. In fact, in multiple cases involving accused USC football players, the Court has repeatedly pointed out a male-accused student's status on the football team, even though that fact is completely irrelevant to its analysis of the legal question before the Court: whether or not the student received fair procedure.[139]

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[137] Boermeester v. Carry, 49 Cal. App. 5th 682, 687 (2020), *depublished by* 472 P.3d 1062 (Cal. 2020).

[138] *Id.* at 709.

[139] *Id.* at 687; Doe v. Allee, 242 Cal. Rptr. 3d 109, 116 (Cal. Ct. App. 2019); Doe v. Univ. of S. Cali., 200 Cal. Rptr. 3d 851, 856 (Cal. Ct. App. 2016).

USC happens to be a very football-centric school, where football players are treated like superstars, on and off campus. USC also has significant gender discrepancies in campus sexual violence. [140] Sexual assault and sexual misconduct surveys conducted at USC in 2019 show thirty-one percent of undergraduate women reported experiencing nonconsensual sexual contact by physical force or inability to consent since entering USC, compared to about ten percent of undergraduate men.[141] The study showed undergraduate women are being raped at a rate almost four times higher than undergraduate men.[142]

The overall discrepancy in nonconsensual sexual contact at USC shows about thirty-seven percent of undergraduate women experience it as compared to about thirteen percent of undergraduate men.[143] The study also indicates undergraduate women at USC are over two times more likely to be the victim of intimate partner violence as compared to undergraduate men.[144] This research shows women at USC are already more vulnerable to gender-based violence. Pairing these results with the hypermasculine culture of male athletics exposes an increased risk for gender-based violence on campuses like USC.

However, the Court's opinions in these USC cases not only fail to criticize, but also focus on the accused assailant's roles as USC football players. These opinions glorify the culture of hypermasculinity associated with the sport, which also exists at USC. Uncoincidentally, football is one of the top sports that propels men who excel in the sport to the top of the hierarchy of masculinity.[145] Lauding their positions on the football team while minimizing the sexually aggressive culture of football and USC shows the gender-biased and sex-discriminatory attitude of the Court.

In *Doe v. Allee* ("*Allee*"), a case in which the Court began its opinion by noting Doe, accused of sexual assault, was attending USC on a football scholarship.[146] Various aspects of the Court's own restatement of the case in favor of the accused student shows an inherent bias. First, whereas the Court discussed in detail about

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[140] *See* DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT: THE UNIVERSITY OF SOUTHERN CALIFORNIA (Sept. 16, 2019).

[141] *Id.* at 18.

[142] *Id.* at 19.

[143] *Id.* at 29.

[144] *Id.* at 34.

[145] Brake, *supra* note 102, at 5.

[146] *Allee*, 242 Cal. Rptr. 3d at 116.

how the victim, Roe, was drinking, smoking marijuana, and became "cross-faded"[147] on the night of the incident,[148] it was not until nearly ten pages into the opinion when the Court notes Doe, the accused assailant, was "not sober" on the night of the incident.[149]

Second, in its introduction of the dispute about whether Doe and Roe engaged in consensual sexual intercourse, the Court frequently manipulates its word choice.[150] This manipulation expresses and builds sympathy for the accused while expressing skepticism of the victim, saying, "Doe *believed* the encounter was consensual. Roe *claimed* it was not."[151]

Third and related, the Court's recounting of the facts endeavors to picture the accused assailant as sympathetic as possible, minimizing the victim's injuries and the accused assailant's aggression.[152] For instance, the Court failed to acknowledge, and by its silence, seemed to approve of, Doe dismissing the bruises he had left on Roe's arms, legs, and chest as inconsequential. Similarly, in its restatement of Doe's factual claims, the Court implies that, rather than experiencing a sexual assault, Roe was enjoying herself during the incident with Doe.[153] The Court describes Roe's actions as portraying pleasure, while downplaying Doe's aggressive conduct during the encounter.[154] Even where Doe either attempted to be untruthful or genuinely mixed up his story, the Court distracted from this by including a needless statement that Doe thought Roe's story of the incident was "crazy".[155]

Fourth, the Court expresses concern for the accused assailants, but not the victim's, future. For example, the Court refuses to declare Doe's claims as moot, even though Doe had been convicted of other crimes and was not eligible to return to USC, because of the Court's concern about the impact that being labeled a sex offender by a university could have on Doe's life.[156] Thus, the Court

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[147] A colloquial term describing when an individual is intoxicated and high on marijuana at the same time.

[148] *Allee*, 242 Cal. Rptr. at 116.

[149] *Id.* at 122.

[150] *Id.* at 116 (emphasis added).

[151] *Id.*

[152] *See id.*

[153] *See id.* at 116, 123.

[154] *See id.*

[155] *Id.* at 120. In Doe's initial statement, he stated he used a condom during the sexual encounter with Roe, but after the Title IX investigator pointed out the differences in his and Roe's stories, he changed his story and said he did not wear a condom. *Id.* at 116.

[156] *Id.* at 128. Additionally, universities cannot and do not have sex offender registries, and usually the cases are kept confidential. *Id.*

repeatedly shows a biased attitude in favor of the accused assailant, reasoning, and borderline sympathizing with his claims, and showing great concern for him, but not for the victim.

In contrast, rather than treating Roe's concern, that her position at the school as an athletic trainer could be jeopardized if she were thought to be having consensual sex with a member of the football team, as legitimate, the Court signals its agreement with Doe's defense – Roe lied about being assaulted to protect her job. Moreover, at no point does the Court acknowledge Doe would similarly have an incentive to lie to avoid suspension or expulsion and lose his football scholarship.

In another case, *Doe v. University of Southern California*, the Court again makes sure to specify that the accused, John, was a member of the USC football team.[157] On the night in question, John and the victim, Jane, had consensual sex.[158] However, during a portion of their sexual encounter, other men, without Jane's consent, also began performing violent sexual acts on Jane.[159] All the men, including John, did not stop until Jane started crying, and when she did John immediately left the room.[160]

Although John's initial sexual encounter with Jane was consensual, he was suspended by the Appellate Panel for violating USC's misconduct policy by encouraging and permitting the other men to slap Jane during the nonconsensual encounter, and for endangering Jane by leaving her alone in the room with the other men.[161] The trial court found there was substantial evidence to support the finding that John violated USC policy by encouraging and permitting the other men to slap Jane, but did not find substantial evidence as to endangering Jane.[162]

In this case, the Court criticizes University policy by determining the notice of the Student Code of Conduct violations to John was not specific enough to be fair procedure.[163] In its determination of whether substantial evidence existed to show if John violated the policy prohibiting "encouraging or permitting others to engage in misconduct"[164] the Court highlights John's

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[157] Doe v. Univ. of S. Cali., 200 Cal. Rptr. 3d 851, 856 (Cal. Ct. App. 2016).

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.* at 855.

[162] *Id.*

[163] *Id.* at 868.

[164] *Id.* at 874.

versions of the incident.[165] The Court found John's version to be clear and unequivocal evidence, while casting doubt upon Jane's version because at times in her interviews she was unclear or was mixed up about which men slapped her and which men said degrading things to her (even though they did so from behind her).[166] Whereas in *Allee*, the Court overlooked Doe's complete misstatement of a portion of what occurred on the night in question.[167] Thus, the Court is implicitly creating a sex-discriminatory double-standard for victims and aggressors regarding the accuracy or clarity of their account of what happened.

Similar to the gender-bias created by the exceptions to the rape shield laws, the Court is showing its biased attitude favoring John by accepting his statements as factual and solid, simply because he and Jane had a prior consensual encounter. John essentially engaged in a form of voyeurism, and the Court has ignored the objectification Jane experienced that night. Although John's actions, in this case, are not centralized around aggression, they demonstrate the associated lack of empathy towards Jane. Even though Jane was crying and giving obvious cues as to her emotion, John still had no issue with leaving her in the room, showing a disconnect from empathic considerations. John's status on the football team was enough for the Court to construct another defense under the guise of fair procedure in an attempt to mask its concern for protecting yet another member of the USC football team.

In focusing on the athletic status of these accused assailants, the Court is signaling it agrees with the hypermasculine attitudes glorified by sports cultures like football and has adopted the sex-discriminatory biases of those cultures when deciding gender-based violence cases. Although the Court vaguely recognized the athletic status of the victims, the Court failed to use that status to overlook the gender-biased presumptions about victims of gender-based violence, as it did for the aggressors in these cases.

When combined with other indications of gender-bias found in these campus sexual assault cases, the Court's ultimate conclusions about procedural unfairness towards these accused assailants must be viewed skeptically. Cumulatively, these cases suggest the Court has abdicated its position of neutrality and is making judicial decisions based on its approval of sex-discriminatory hypermasculine sports cultures.

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[165] *Id.* at 875.
[166] *Id.*
[167] Doe v. Allee, 242 Cal. Rptr. 3d 109, 116 (Cal. Ct. App. 2019).

IV. CONCLUSION

The Court's glorification of hypermasculine sports cultures is leading to sex-discriminatory decision making in these campus gender-based violence cases. The procedure-based defenses the Court is creating solely for those accused of gender-based violence risk inscribing gender-bias into California law. Therefore, the California Supreme Court should overturn the *Boermeester* decision. Overturning the decision will also give the Court the opportunity it needs to recognize and correct the inherent gender-biased attitude it embraces when deciding cases related to campus gender-based violence. The Court needs to be reminded who the real victims of these cases are, and overturning the decision can do just that.

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THE REIGN OF PAPARAZZI: THE RENEWED CALL FOR FEDERAL LEGISLATION TO CURB PAPARAZZI

Owen Sandstrom*

CONTENTS

* I would like to thank Professor Dragnich and the *SELJ* staff. I would also like to thank my mother Gail, my father Robert, and my sister Olivia for making this publication possible. Thank you to my friends Noah and Evan for their words of encouragement.

No government ought to be without censors: and where the press is free, no one ever will. If virtuous, it need not fear the fair operation of attack and defence. Nature has given to man no other means of sifting out the truth either in religion, law, or politics. I think it as honorable to the government neither to know, nor notice, it's sycophants or censors, as it would be undignified and criminal to pamper the former and persecute the latter.[1]

— Thomas Jefferson

INTRODUCTION

Jenny quickly exited the taxi as the porter pulled out her suitcase. Lights continued to flash as photographers swarmed her. She pulled out her ticket while pushing towards security at John F. Kennedy International Airport. Jenny had been planning her Hawaiian vacation for months and was excited to finally get away from work and, of course, the paparazzi. She could already hear the sound of the waves crashing onto the shore and the ukulele playing as she lay on a beach in her swimsuit. Jenny breathed a sigh of relief as she went through security, believing she had finally left those vexing photographers behind; however, to her surprise, the paparazzi were right on her tail again. Jenny asked herself, "how did the paparazzi get through security without a ticket?" Unfortunately for Jenny, many paparazzi had purchased tickets to follow her to Hawaii, all in the hopes of snapping that "money shot" for the tabloids. State lines and thousands of miles could not keep the paparazzi away.

Although hypothetical, Jenny's predicament is an all too true reality for many renowned individuals.[2] The age of social media, the ubiquity of cameras, and the ever-growing interest in celebrities has helped fuel the interminable growth of paparazzi pursuing their target day-and-night for the perfect shot to sell to tabloids. Tensions between celebrities and paparazzi have led to

[1] Letter from Thomas Jefferson to George Washington (Sept. 9, 1792), *in* 24 THE PAPERS OF THOMAS JEFFERSON, 1 June-31 Dec. 1792, 351-60 (John Catanzariti et al. eds., Princeton Univ. Press 2018). This article strives to show a balance between censorship and individual liberty.

[2] Herein referred to as "celebrities."

heated, even dangerous confrontations at times.[3] Many celebrities now live or spend the majority of their time abroad in order to avoid the paparazzi, seeking refuge behind stricter foreign laws that limit the extent to which paparazzi can pursue and follow them.[4]

Some states have enacted or attempted to enact legislation limiting paparazzi, to help protect individual privacy rights,[5] but no such federal legislation is currently in place. Congressional lawmakers had previously proposed and sponsored legislation to curb the seemingly limitless bounds of the paparazzi, but none have been enacted.[6] Moreover, paparazzi continue to claim constitutional protections under the First Amendment's freedom of the press.[7] Thus, legislation must not only be enacted by Congress, but be carefully drafted to withstand judicial scrutiny upon legal challenges to the legislation's constitutionality.

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[3] *See* Denise Quan & Jack Hannah, *Chris Brown Totals Car While Dodging Paparazzi, Rep Says*, CNN (Feb. 11, 2013, 5:26 AM), https://www.cnn.com/2013/02/10/showbiz/chris-brown-crash/index.html (Chris Brown cut off in car by paparazzi who ran out to take pictures); Alan Duke, *Official: Paparazzi Pursuit of Justin Bieber 'Tragedy Waiting to Happen,'* CNN (July 10, 2012, 11:43 AM), https://www.cnn.com/2012/07/10/showbiz/bieber-paparazzi-chase/index.html (City Councilman observed Justin Bieber speeding to evade four or five paparazzi cars while going down the U.S. 101 highway); *Justin Bieber-Chasing Paparazzo Killed by Car*, CBC (Jan. 2, 2013, 6:49 AM), https://www.cbc.ca/news/world/justin-bieber-chasing-paparazzo-killed-by-car-1.1374149 (paparazzi photographer killed darting across street to photograph Justin Bieber's car) (hereinafter *Paparazzo Killed by Car*).

[4] Natalie Finn, *American Stars Abroad: Why Angelina Jolie, Johnny Depp and More Celebs Have Preferred to Live Outside the United States*, E! NEWS (Dec. 6, 2016, 2:29 PM), https://www.eonline.com/news/813974/american-stars-abroad-why-angelina-jolie-johnny-depp-and-more-celebs-have-preferred-to-live-outside-the-united-states.

[5] *See, e.g.*, CAL. CIV. CODE § 1708.8 (West 2016); *Hawaii Senate Passes 'Steven Tyler Act' on Celeb Privacy*, FOX NEWS (Apr. 6, 2016), https://www.foxnews.com/politics/hawaii-senate-passes-steven-tyler-act-on-celeb-privacy.

[6] *See, e.g.*, Protection from Personal Intrusion Act, H.R. 2448, 105th Cong. (1997); Privacy Protection Act of 1998, H.R. 3224, 105th Cong. (1998).

[7] *See, e.g.*, Connell v. Town of Hudson, 733 F. Supp. 465 (1990) (photographer's First Amendment rights violated when prevented by police from taking pictures of accident).

This article renews the call for federal legislation to limit paparazzi's actions[8] by attempting to draft legislation that will both limit paparazzi and withstand constitutional scrutiny, using previously proposed federal legislation and current state laws as a starting point. In order to propose constitutional limitations on the paparazzi, it is essential to understand how courts determine if legislation comports with the first amendment.

Part I discusses the standards of review courts apply to determine the constitutionality of legislation which implicates the First Amendment. Part II discusses the legislative history of previously proposed federal legislation limiting paparazzi, and the legislation's potential inability to pass constitutional muster. Part III discusses current state laws attempting to limit paparazzi without offending the First Amendment. Part IV proposes federal legislation that attempts to curb paparazzi without violating the First Amendment. Part V concludes with a short summary encouraging renewed efforts to pass federal legislation which curbs the paparazzi.

I. CONSTITUTIONAL STANDARDS OF REVIEW FOR FIRST AMENDMENT LEGISLATION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.[9]

The First Amendment of the United States Constitution states that "Congress shall make no law . . . abridging the freedom of . . . the press."[10] When determining whether legislation violates the First Amendment, courts first categorize the legislation as either

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[8] Scholars have previously proposed federal legislation to protect individual privacy rights. *See* Larysa Pyk, Legislative Update, *Putting the Brakes on Paparazzi: State and Federal Legislators Propose Privacy Protection Bills*, 9 DEPAUL J. ART, TECH. & INTELL. PROP. L. 187, 201 (1998); *see generally* Jennifer R. Scharf, Note, *Shooting for the Stars: A Call for Federal Legislation to Protect Celebrities' Privacy Rights,* 3 BUFF. INTELL. PROP. L.J. 164 (2006).

[9] U.S. CONST. amend. I.

[10] *Id.*

(1) "content-neutral"[11] or (2) "content-based."[12] Content-neutral legislation "serves purposes unrelated to the content of the expression," while content-based legislation serves to suppress speech based on the message's content.[13] Courts consider the government's purposes in passing the legislation to be the "controlling consideration" when determining whether the legislation is content-neutral or content-based.[14] Legislation passed because the government disagrees with or disapproves of the message is content-based.[15] In contrast, legislation passed for purposes unrelated to the message's content is content-neutral, even if the legislation has an "incidental effect" on some individuals.[16] Once legislation is classified as content-based or content-neutral, courts apply the appropriate standard of review to determine whether the legislation violates the First Amendment.[17]

A. STANDARD FOR "CONTENT-NEUTRAL" LEGISLATION

Content-neutral legislation is reviewed for First Amendment constitutionality under the standard of "intermediate scrutiny."[18] Legislation satisfies intermediate scrutiny when it "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more

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[11] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 313 (1984) (finding general National Park Service regulation prohibiting camping in certain park areas when applied to demonstrations calling attention to homelessness content-neutral).

[12] *See* Sable Commc'ns of California, Inc. v. F.C.C., 492 U.S. 115, 126 (1989) (requiring fully scrambling or blocking sexually oriented programming during certain hours as content-based since it focused on the content of the speech).

[13] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791, 798 (1989).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *See, e.g.*, United States v. Playboy Ent. Grp., Inc. 529 U.S. 803, 813 (2000) (finding legislation was content-based and then applied standard of strict scrutiny to determine legislation's constitutionality under the First Amendment); Reno v. American C.L. Union, 521 U.S. 844, 871 (finding legislation under constitutional review was content-based and reviewed constitutionality of legislation); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984) (finding legislation is content-neutral and then begins review of constitutionality).

[18] *See* Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 186 (1997).

speech than necessary to further those interests." [19] Many government interests have been recognized as substantial or important under intermediate scrutiny.[20] In order to avoid burdening substantially more speech than necessary, legislation must be "narrowly tailored to serve the government's legitimate, content-neutral interests" and not restrict the speech itself or other forms of expression.[21] Under intermediate scrutiny, legislation is narrowly tailored when the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." [22] Notably however, courts do not require the government to employ the least restrictive means when tailoring the statute to withstand constitutional scrutiny.[23] For example, courts have found legislation to be content-neutral, despite the legislation having an "incidental effect" on certain messages or speakers, when the legislation "serves some purpose unrelated to [the] content of [the] regulated speech." [24] Additionally, courts have upheld legislation restricting the "time, place, or manner" of protected speech as content-neutral legislation.[25]

B. STANDARD FOR "CONTENT-BASED" LEGISLATION

Content-based legislation is presumptively unconstitutional, with the government bearing the burden of rebutting this presumption. [26] Courts review content-based legislation under the standard of "strict scrutiny."[27] In order to satisfy strict scrutiny, legislation must be "narrowly tailored to promote a compelling Government interest."[28] Narrowly tailored legislation in accordance with strict scrutiny uses "the least

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[19] *Id.* at 189.

[20] *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 377 (legislation ensuring continued availability of selective service certificates a substantial government interest); *Clark*, 468 U.S. at 297 (government regulation prohibiting people from sleeping in national parks served legitimate government interest of insuring national parks are adequately protected); Ginsberg v. New York, 390 U.S. 629, 639 (recognizing protection of children from harmful material as valid government interest).

[21] Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

[22] United States v. Albertini, 472 U.S. 675, 689 (1985).

[23] *See id.*

[24] *Ward*, 491 U.S. at 791.

[25] *Id.* (and cases cited therein).

[26] United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 816 (2000).

[27] *Id.* at 814.

[28] *Id.* at 813.

restrictive means to further the articulated interest."[29] Courts have declared content-based laws unconstitutional for failure to use the least restrictive means, despite furthering a compelling government interest.[30]

C. GENERAL FIRST AMENDMENT CONSTITUTIONAL CONCERNS: OVERBREADTH AND VAGUENESS

Whether legislation facing First Amendment challenges is classified as content-neutral or content-based, courts will also review the legislation for overbreadth and vagueness. Courts find statutes void for vagueness when the statute either (1) "fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or (2) "authorizes or even encourages arbitrary and discriminatory enforcement." [31] Overbreadth allows legislation to be challenged based on a "judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." [32] Courts therefore are concerned with legislation's ability to inadvertently deter constitutionally protected conduct when reviewing for overbreadth.[33]

II. PREVIOUSLY PROPOSED CONGRESSIONAL LEGISLATION ATTEMPTING TO CURB PAPARAZZI

Congressional lawmakers have previously proposed federal legislation to curb the paparazzi's quest for high-paying tabloid photos. [34] There was a major push to limit paparazzi through

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[29] Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

[30] *See, e.g.*, *Playboy*, 529 U.S. at 827 (declaring legislation requiring cable providers to block or scramble sexually oriented programming during hours children would likely watch television to be unconstitutional under First Amendment, despite compelling interest to shield children, because legislation was not the least restrictive means).

[31] Hill v. Colorado, 530 U.S. 703, 732 (2000).

[32] Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

[33] *See id.*

[34] *See, e.g.*, Protection from Personal Intrusion Act, H.R. 2448, 105th Cong. (1997).

legislation following Princess Diana's death.[35] Thus, the 105th Congressional session saw a plethora of bills that attempted to limit paparazzi.[36] However, any proposed legislation died in committee.[37] This section examines these proposed federal bills in an attempt to learn and draw from previous attempts by Congress to limit paparazzi when drafting legislation in section IV.

A. H.R. 2448

The Protection from Personal Intrusion Act, introduced in September of 1997, attempted to limit paparazzi through imposing criminal penalties for harassment of any person in the United States and its territories.[38] The definition of "[h]arass" under the bill was:

> persistently physically following or chasing a victim, in circumstances where the victim has a reasonable expectation of privacy and has taken reasonable steps to [e]nsure that privacy, for the purpose of capturing by a camera or sound recording instrument of any type a visual image, sound recording, or other physical impression of the victim for profit in or affecting interstate or foreign commerce.[39]

The bill also established a cause of action in civil court for violations through which the court can fashion "any appropriate relief."[40]

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[35] *See* Christina M. Locke, *Does Anti-Paparazzi Mean Anti-Press: First Amendment Implications of Privacy Legislation for the Newsroom*, 20 SETON HALL J. SPORTS & ENT. L. 227, 228-36 (2010) (discussing Princess Diana's death while being pursued by paparazzi and legislative action by the European Union and California following her death); *see generally* Alissa Eden Halperin, Comment, *Newsgathering after the Death of a Princess: Do American Laws Adequately Punish and Deter Newsgathering Conduct That Places Individuals in Fear or at Risk of Bodily Harm*, 6 VILL. SPORTS & ENT. L.J. 171 (1999).

[36] *See, e.g.,* H.R. 2448; Privacy Protection Act of 1998, H.R. 3224, 105th Congress (1998).

[37] *See* H.R. 2448 (last action referred to House Committee on the Judiciary); H.R. 3224 (last action referred to House Committee on the Judiciary); Personal Privacy Protection Act, S. 2103, 105th Cong. (1998) (last action referred to Senate Committee on the Judiciary); Personal Privacy Protection Act, H.R. 4425, 105th Cong. (1998) (last action referred to House Committee on the Judiciary).

[38] *See* H.R. 2448 § 2(a).

[39] *Id.* § 2(b).

[40] *Id.* § 2(d).

The bill required a two-prong objective test in which the victim had to (1) have a "reasonable expectation of privacy" and (2) "take reasonable steps to [e]nsure that privacy," ensuring that the statute would not be applied arbitrarily to the differing sensitivities of individuals.[41] At the same time, the lack of clarity as to what would constitute "reasonable steps" to ensure privacy might have deterred members of the press from pursuing newsworthy stories, opening up the legislation to a claim of unconstitutional vagueness. [42] Based on the bill's language, another potential issue was that law enforcement officials could arbitrarily use the bill to target members of the press pursuing a story, and the legislation might therefore have an overbearing effect on the press.[43]

In response to these concerns, legislators could have added a comment or definition section defining "reasonable steps," and provide examples. This clarification would have reduced the chances of a court finding the proposed legislation void for vagueness because people would have adequate warning of exactly what conduct was outlawed.[44] Additionally, this clarification would have reduced the chances of the bill deterring other members of the press from covering newsworthy stories, reducing the bill's chances of being struck down for overbreadth.[45] Additionally, it is difficult to imagine a specific situation where paparazzi could follow someone who has a reasonable expectation of privacy.[46] A person residing in their home with the blinds down likely has a reasonable expectation of privacy, but it would be a stretch to claim an

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[41] *Id.* § 2(b).

[42] *Id.*; Ashley C. Null, Note, *Anti-Paparazzi Laws: Comparison of Proposed Federal Legislation and the California Law*, 22 HASTINGS COMM. & ENT. L.J. 547, 560 (2000) (claiming bill contemplates reasonableness from the plaintiff's perspective rather than that of a "reasonable person").

[43] *See* Null, *supra* note 42.

[44] Under US Supreme Court precedent, a statute is void for vagueness when it fails to inform an average person what conduct is illegal. Members of the press may be uncertain when someone has taken reasonable steps and the lack of clarification may cause a court to find such statute overly vague. Hill v. Colorado, 530 U.S. 703, 732 (2000); *see* Null, *supra* note 42.

[45] Members of the press may fear criminal liability under this statue and therefore not cover otherwise newsworthy stories. This is the exact issue the overbreadth doctrine seeks to prevent. *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973); *see* Null, *supra* note 42.

[46] *See* Null, *supra* note 42, at 560 (claiming that federal legislation is potentially liable to overbreadth claim because author interprets legislation to protect privacy in public places).

individual has a reasonable expectation of privacy when in public.[47] One exception might be when a celebrity is inside a limo with tinted windows.

B. H.R. 3224

The Privacy Protection Act, introduced in February of 1998, also attempted to curb paparazzi through imposing criminal liability for harassment.[48] This bill defined harassment as "persistently follow[ing] or chas[ing]" someone when done for the purpose of obtaining a "visual image, sound recording, or other physical impression of that or another individual" for commercial purposes.[49]

Instead of a two-prong test, this bill had a three-prong objective test, requiring an additional prong that analyzed a reasonable fear of death or bodily injury from the following or chasing.[50] Compared to the Protection from Personal Intrusion Act, the additional prong limited the bill's scope because members of the press could still follow individuals and pursue stories as they normally would without fear of imprisonment, as long as they did not take outlandish or dangerous actions to cause in a reasonable person fear of injury or death.[51] The third prong also better guarded against a constitutional overbreadth challenge.[52] Thus, the free press would continue to be able to do its job, while the daring, dangerous escapades of paparazzi faced punishment.[53] Moreover, society at large would become safer because paparazzi would be deterred from going on high-speed car chases or taking other risky actions to capture celebrities photos.[54]

However, this bill could still have been improved upon. A comment or definition section that defines "reasonable steps" and provides examples would have made members of the press aware of

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[47] *See generally id.*

[48] *See* Privacy Protection Act of 1998, H.R. 3224, 105th Cong. (1998).

[49] *Id.* § 2(a).

[50] *Id.*

[51] *Compare* Protection from Personal Intrusion Act, H.R. 2448, 105th Cong. § 2(b) (1997), *with* H.R. 3224 § 2(a).

[52] Press members are arguably less likely to be deterred from covering the news when they know the statute only applies when inciting fear of death or bodily injury. This argument combats the claim members of the press will be deterred from exercising their freedom to cover the news (overbreadth concern). *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

[53] *See id.*; Pyk, *supra* note 8, at 200.

[54] *See generally* Pyk, *supra* note 8, at 200.

what conduct was prohibited and the bill would more likely have withstood a constitutional vagueness challenge.[55]

C. S. 2103

Introduced in May of 1998, the Personal Privacy Protection Act (PPPA-I), this bill was noticeably different from the two bills discussed above.[56] PPPA-I actually included an explanation section discussing the reasons for drafting the legislation and the need to protect individual and families from harassment and violations of privacy interests perpetrated by "photographers, videographers, and audio recorders."[57] The bill further stated that people whose privacy interests were threatened included "not only professional public persons and their families, but also private persons and their families for whom personal tragedies or circumstances beyond their control create media interest."[58] Liability was predicated on the captured physical impression being "for commercial purposes."[59]

PPPA-I also included rules of construction. The rules specified that a court may not find a physical impression of someone to have been intended "for commercial purposes" unless the physical impression was intended to be "sold, published, or transmitted in interstate or foreign commerce," or the person "moved in interstate or foreign commerce" to capture the physical impression.[60] The bill also contained a severability clause, so if one portion of the legislation was struck down as unconstitutional, the other parts would still be valid, avoiding Congress having to start from scratch.[61]

Under the PPPA-I, a person could be found liable for harassment, "trespass for commercial purposes," and the "invasion of [a] legitimate interest in privacy."[62] Harassment was defined as occurring when someone "persistently physically follows or chases a person in a manner that causes the person to have a reasonable fear of bodily injury."[63] Individuals found to have harassed someone in

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[55] Privacy Protection Act of 1998, H.R. 3224, 105th Cong. § 2(a) (1998); Null, *supra* note 42, at 560 (claiming that federal legislation is potentially liable to overbreadth claim because author interprets legislation to protect privacy in public places).

[56] Personal Privacy Protection Act, S. 2103, 105th Cong. (1998).

[57] *Id.* § 2(a).

[58] *Id.* § 2(a)(3).

[59] *Id.* § 3(a)(1)(B).

[60] *Id.*

[61] *Id.* § 5.

[62] *Id.* §§ 3-4.

[63] *Id.* § 3(a)(2).

violation of this bill faced a fine and sentence of (1) up to a year if neither death nor serious bodily injury occurred, (2) at least five years if "serious bodily injury" occurred, or (3) at least twenty years if death occurred.[64] The bill required death or serious bodily injury to be "proximately caused by such harassment,"[65] which ensured law abiding members of the press were differentiated from paparazzi who endangered individuals and the public.[66] Moreover, the sentencing levels based on the resulting harm were a far better legislative attempt to narrowly tailor the statute, as compared to a one-size-fits-all sentencing range where potential abuses in sentencing might result or where the fear of an excessive sentence might deter non-paparazzi press members.[67]

Under PPPA-I, harassment was the only violation that carried possible imprisonment; the other violations were enforceable through civil suits only.[68] The bill defined "trespass for commercial purposes" as trespassing on private property to capture a physical impression of someone.[69] "Invasion of legitimate interest in privacy" was defined as a constructive trespass with the use of a "visual or auditory enhancing device" when (1) there was a reasonable expectation of privacy and, (2) the physical impression could not have been captured without the sensory enhancing device.[70]

PPPA-I allowed the person whose property was trespassed upon and whose "visual or auditory impression" had been captured, to sue in civil court, even if it implicated the privacy rights of two individuals, further increasing violators' liability.[71] Also, PPPA-I allowed the court to award attorney's fees, and any expert's fees, to the winner in the lawsuit.[72] The inclusion of fees for the winning party helped to encourage attorneys and plaintiffs to bring these lawsuits. Even when the compensatory and punitive damages were nominal, the attorney would still be paid if victorious, and the plaintiff would not come away with a net loss from a large legal

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[64] *Id.* § 3(b).

[65] *Id.*

[66] *See* Pyk, *supra* note 8, at 199.

[67] *Compare* Personal Privacy Protection Act, S. 2103, 105th Cong. § 2(a) (1998), *with* Protection from Personal Intrusion Act, H.R. 2448, 105th Cong. (1997), *and* Privacy Protection Act of 1998, H.R. 3224, 105th Cong. (1998).

[68] *See* S. 2103 § 3.

[69] *Id.* § 4(b).

[70] *Id.*

[71] *Id.* § 4(c).

[72] *Id.*

bill.[73] Here, one potential concern is that the legislation had no limit on damages and fees, so defendants may have faced excessive fines; nevertheless, this could have been addressed by defense counselors and reviewed by appellate judges.[74] A broad definition of fees further allowed the court to tailor damages on a case-by-case basis.[75]

D. H.R. 4425

The Personal Privacy Protection Act (PPPA-II), proposed in August 1998, provided "protection from personal intrusion for commercial purposes" through imposing criminal liability for "reckless endangerment" and "tortious invasion of privacy."[76] Under this bill, an individual could be found liable for reckless endangerment when they:

> [I]n or affecting interstate or foreign commerce and for commercial purposes, persistently follow[ ] or chase[ ] a person, in a manner that causes that person to have a reasonable fear of bodily injury, in order to capture by a visual or auditory recording instrument any type of visual image, sound recording, or other physical impression of that person.[77]

When reckless endangerment "results" in death or serious bodily injury, the violator faced up to thirty years in prison.[78] Additionally, liability was imposed for tortious invasion of privacy which was defined as:

> [A] capture of any type of visual image, sound recording, or other physical impression of a personal or familial activity through the use of a visual or auditory enhancement device, if (i) the subject has a reasonable expectation of privacy with respect to that activity; and (ii) the image, recording, or impression could not have been captured without a trespass if not produced by the

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[73] *See id.*

[74] *Id.*

[75] *See id.*

[76] Personal Privacy Protection Act, H.R. 4425, 105th Cong. (1998).

[77] *Id.* § 2(a).

[78] *Id.* § 2(a)(1).

> use of the enhancement device; or (B) a trespass on private property in order to capture any type of . . . physical impression of any person.[79]

The reasonableness standard for both reckless endangerment and tortious invasion of privacy ensured an objective test that courts could apply to determine culpability, rather than a subjective test that could vary greatly between individuals.[80] Yet, under the bill, reckless endangerment only required a reasonable fear of bodily injury, not serious bodily injury.[81] Bodily injury is general.[82] Does bodily injury include a person's reasonable fear that he or she will trip and fall? A reasonable fear of scraping one's knee? Or is something more required?

Adding "serious" to a definition would provide clarity to the bill and ensure individuals could not use fears of minor injuries to inhibit members of the press from covering stories. Legislation should be aimed at preventing truly dangerous situations to protect individuals and the public at large, not to completely handicap the freedom of the press.

The bill allowed a sentence of up to thirty years if death or serious bodily injury "results;" however, the bill did not explicitly require causation.[83] An improvement on the statute would be a requirement that the following or chasing of an individual be a "proximate cause" of any death or serious bodily injury. Although arguably implied, an explicit causation requirement would help to limit constitutional claims of overbreadth while clarifying liability.[84] Members of the press, aside from paparazzi, would also be less deterred from their work because of this clarification. Additionally, there is a question of whether a range of up to thirty years in prison is excessive and not narrowly tailored to achieve the

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[79] *Id.* §§ 2(c)(2)(A)-(B).

[80] *Id.* §§ 2(a)-(c).

[81] *Id.*

[82] *Cf.* David A. Browde, *Warning: Wearing Eyeglasses May Subject You to Additional Liability and Other Foibles of Post-Diana Newsgathering - an Analysis of California's Civil Code Section 1708.8*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 697, 724 (2000) (noting general concern with vagueness of terms in statute).

[83] H.R. 4425.

[84] Press members are arguably less likely to be deterred from covering the news when they know the statute requires proximate cause and therefore has a limited applicability. This argument combats the claim members of the press will be deterred from their freedom to cover the news (overbreadth concern). *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

government's goal of insuring personal privacy and limiting paparazzi.[85]

E. COMMONALITIES AMONGST PROPOSED FEDERAL LEGISLATION

Much of the federal legislation proposed to limit paparazzi in the 105th Congress contains similar sections which are best analyzed together for the sake of brevity and to avoid repetitiveness.[86]

A court reviewing the three bills for constitutionality under the First Amendment would likely classify each bill as content-neutral because each bill applied regardless of the content produced.[87] The legislation targeted the manner in which photos and other physical impressions were obtained, not the resulting message.[88] Thus, the bills were arguably time, place, and manner restrictions because they did not altogether restrict taking photos and recordings; rather, they limited the location and manner in which photos and recordings were obtained.[89] Although the bills had an exemption for law enforcement officials,[90] legislation has

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[85] Content-neutral legislation must be narrowly tailored to achieve the government's interest. *See* United States v. Albertini, 472 U.S. 675, 689 (1985); *see* McCullen v. Coakley, 573 U.S. 464, 496-97 (2014) (striking down content-neutral statue on First Amendment grounds because State failed to show the time, place, and manner restrictions (buffer zones around health clinics) were necessary, i.e., that "less restrictive measures were inadequate"); *cf.* Null, *supra* note 42, at 561 (issue of measuring the true social cost based on the punishments for violations).

[86] *See* Protection from Personal Intrusion Act, H.R. 2448, 105th Cong. (1997); Privacy Protection Act of 1998, H.R. 3224, 105th Cong. (1998); H.R. 4425; Personal Privacy Protection Act, S. 2103, 105th Cong. (1998).

[87] Content-neutral legislation is passed regardless of the message's content. *See Ward*, 491 U.S. at 791; Pyk, *supra* note 8, at 200.

[88] Pyk, *supra* note 8, at 200.

[89] *See Ward*, 491 U.S. at 799-803 (upholding City's sound amplification restrictions under the First Amendment as valid and narrowly tailored time, place, and manner restrictions). *See generally* Pyk, *supra* note 8.

[90] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a).

been classified as content-neutral despite exemptions on its applicability.[91]

In addition to potential criminal prosecutions, each bill established a private civil cause of action to be brought by victims against violators.[92] In addition to criminal prosecutions, the use of civil actions allowed victims to be financially compensated for violations and provided another means of enforcing the bills.[93] The bills allowed any appropriate relief, which was sometimes further defined to include compensatory damages, punitive damages, equitable and declaratory relief. [94] The bills that specified appropriate relief types allowed paparazzi to be placed on notice of what types of civil damages and punishments they could face.[95]

Additionally, potential plaintiffs were equally aware what remedies they could seek in civil court, had law enforcement not adequately enforced the bill.[96] The bills' allowance for equitable relief allowed courts to tailor the remedies to each case rather than create overly broad decisions that would negatively impact all members of the press. [97] Additionally, the bills inclusion of compensatory and punitive damages ensured violators faced financial punishments, regardless of whether death or serious bodily injury occurred.[98]

Defenses were limited under the bills. Each bill precluded the defense that argued the violator failed to either capture or sell any image or recording, in both criminal and civil cases.[99] These limitations on defenses ensured plaintiffs and prosecutors had a far higher likelihood of success in these cases. Also, these limitations were further evidence the bills were content-neutral because the limitations showed the government was particularly concerned with

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[91] McCullen, 573 U.S. at 482-83 (finding statute creating buffer zones around reproductive healthcare clinics that included exceptions for healthcare workers was not content based).

[92] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a).

[93] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a); *see also* Pyk, *supra* note 8, at 193-97.

[94] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a); *see also* Pyk, *supra* note 8, at 199-200.

[95] *See* H.R. 4425 § 2(a); S. 2103 § 2(a).

[96] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a).

[97] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a); *see also* Pyk, *supra* note 8, at 199-200.

[98] *See* H.R. 4425 § 2(a); S. 2103 § 2(a).

[99] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a).

how the photos or recordings were obtained.[100] If the government was concerned with the message, the bills might have only applied when a photo or recording was obtained, and would specifically block the publishing of the photos obtained in violation of the statute.[101] The statute further discouraged paparazzi from violative conduct because penalties applied regardless of whether a major photo was obtained.[102] Thus, a paparazzo could be fined or jailed multiple times before or after getting a great shot, ultimately leading to a net loss financially and no real financial incentive.[103]

Liability under each bill required the violator engage in the conduct for a profit or commercial purpose.[104] While a requirement for an expectation of profit might seem to strengthen the statute, the requirement actually singled out paparazzi and served as evidence of a discriminatory motive by the government, suggesting protection of personal privacy was pretextual, rather than the true goal.[105] Thus te bills' requirements that the violative conduct be engaged in for a profit or commercial purpose was likely used by legislators to bring the conduct described in the bills within the federal government's jurisdiction under the Commerce Clause.[106]

However, the requirement authorized discriminatory enforcement of the statute against only paparazzi, rather than anyone who might recklessly endanger or invade another's privacy for a photo.[107] In the age of smartphones with built-in cameras, paparazzi are not the only people who might be culpable under such a bill.[108] Removing the "for profit" or "commercial purposes" requirement would give a statute general applicability. A broader

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[100] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (content-neutral legislation serves purposes regardless of the content's message); *see also* Pyk, *supra* note 8, at 201.

[101] *See Ward*, 491 U.S. at 791 (content-based legislation passed because of message disagreement); *cf.* Pyk, *supra* note 8, at 199.

[102] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a); *see also* Pyk, *supra* note 8, at 200.

[103] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a).

[104] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a).

[105] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a); *see also* Hill v. Colorado, 530 U.S. 703, 731 (2000) (discussing danger of a "discriminatory governmental motive" when reviewing content-neutral statute for constitutionality under the First Amendment); *see also* Null, *supra* note 42, at 561-62.

[106] U.S. CONST. art. I, § 8, cl. 3.; Null, *supra* note 42, at 562.

[107] Null, *supra* note 42, at 561-62.

[108] *Id.* at 557-58.

reaching statute would strengthen its constitutionality because wider application serves as evidence the government does not have a discriminatory motive and is truly interested in protecting privacy rights.[109]

Also, the length of the bills' sentences might have caused a court to declare these bills unconstitutional on the grounds the bills were not narrowly tailored to promote the government's interest.[110] Even if neither death nor bodily injury resulted, individuals faced serious jail time for a violation under any of the bills.[111] A court may have seen the sentences' length as excessive and struck down the legislation under the First Amendment for failing to be narrowly tailored to promote the government's interest under intermediate scrutiny.[112]

Making a bill impose only a fine rather than providing the option for jail time, or making the maximum sentence fifteen or thirty days in jail would likely increase a bill's chances to pass the tailoring requirement.[113] The legislation's effects could be observed over time and, if found insufficient to deter paparazzi, the

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[109] *See Hill*, 530 U.S. at 731 (pointing to a statute's broad applicability as a strength and supports arguments against a "discriminatory governmental motive"); *see id.* at 560-61; Patrick J. Alach, *Paparazzi and Privacy*, 28 LOY. L.A. ENT. L. REV. 205, 229 (2007) (discussing *Cohen v. Cowles Media Co.* and generally applicable laws incidentally affecting the press).

[110] Drawing parallels between excessive sentences and excessive buffer zones in U.S. Supreme Court precedents on time, place, and manner restrictions. *See McCullen*, 573 U.S. at 496-97 (Court strikes down content-neutral statue on First Amendment grounds because State failed to show the time, place, and manner restrictions (buffer zones around health clinics) were necessary, i.e., that "less restrictive measures were inadequate"); *see* Null, *supra* note 42, at 561.

[111] *See* Protection from Personal Intrusion Act, H.R. 2448, 105th Cong. § 2(a) (1997); Privacy Protection Act of 1998, H.R. 3224, 105th Cong. § 2(a) (1998); Personal Privacy Protection Act, H.R. 4425, 105th Cong. § 2(a) (1998); Personal Privacy Protection Act, S. 2103, 105th Cong. § 2(a) (1998); *see also* Null, *supra* note 42, at 561.

[112] Drawing parallels between excessive sentences and excessive buffer zones in U.S. Supreme Court precedents on time, place, and manner restrictions. *See McCullen*, 573 U.S. at 496-97 (Court strikes down content-neutral statue on First Amendment grounds because State failed to show the time, place, and manner restrictions (buffer zones around health clinics) were necessary, i.e., that "less restrictive measures were inadequate").

[113] Bill would then arguably be using "less restrictive measures." *See McCullen*, 573 U.S. at 496-97; *see* Null, *supra* note 42, at 561 (discussing jail sentences not measuring the true social cost).

sentencing ranges could be increased. In cases where content-neutral legislation has failed to satisfy the constitutional tailoring requirement, courts have cited to the government's failure to demonstrate that less encumbering measures would not have sufficed.[114] Increasing the sentences over time after seeing the legislation's effect would provide strong objective proof the legislation is narrowly tailored to support the government's interest.[115]

Each bill's scope was limited by a section which explained the purchase or use of an image or recording obtained in violation of the bill was not itself a violation.[116] Vicarious liability through an employee or agent was also excluded.[117] The bills did lack a *mens rea* requirement, which could be added for further assurance that legitimate press activities are not infringed.[118] Also, the bills did not define "following," making the line of demarcation between lawful press activities and unlawful harassing unclear.[119] A definition with examples would greatly improve clarity and help avoid a potential void for vagueness challenge.

The bills also explained only individuals who were themselves committing the violation or assisting someone in the commission of the violation were culpable, which helped to narrowly tailor the bill to address issues in the methods employed to capture photos inhibiting rights of privacy.[120] Without such an explicit limitation in the bills, members of the press might otherwise refrain from publishing photos as they normally would for fear they might be inadvertently opening themselves up to liability because a photo was unknowingly obtained in violation of the bill.[121] Thus, the provision ensured the bills did not encumber constitutionally

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[114] *See McCullen*, 573 U.S. at 496-97; *see also* Null, *supra* note 42, at 561 (discussing jail sentences not measuring the true social cost).

[115] Increasing sentences as necessary would demonstrate to a court that the government is using limited methods and show lower sentencing ranges were insufficient to deter paparazzi. *See McCullen*, 573 U.S. at 496-97.

[116] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a).

[117] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); S. 2103 § 2(a).

[118] Null, *supra* note 42, at 560.

[119] *Id.* at 555-56.

[120] *Id.*

[121] This prevents basic overbreadth concerns. *See* Broadrick v. Oklahoma, 403 U.S. 601, 612 (1973).

protected activities of the press, which would potentially risk the legislation being found unconstitutional.[122]

Moreover, this explicit limitation on the scope of the bills further supports the assertion that the bills were content-neutral because the bills did not inhibit the publishing of photos or physical impressions.[123] On the other hand, the fact that tabloids would be free to use photos obtained in violation of these statutes under the guise of plausible deniability failed to discourage, if not incentivized, these individuals to continue to go to extreme lengths to get photos of individuals. Perhaps impunity in this regard is not the best solution to limit paparazzi overall.

III. STATE LEGISLATION LIMITING PAPARAZZI[124]

California has successfully passed and amended state legislation that limits paparazzi.[125] The legislation includes both civil[126] and criminal statutes.[127] California's statutes neither completely ban the paparazzi from taking celebrities' pictures, nor completely prevent the tabloids from publishing photos obtained by paparazzi.[128] Instead, the legislation attempts to balance individuals' rights to privacy against freedom of the press.[129]

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[122] *See id.*

[123] *See* Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 189 (1997) (content-neutral classification).

[124] Discussions of the cases applying the subsequent statutes is beyond the scope of this note and would likely require a separate note.

[125] *See, e.g.*, CIV. § 1708.7 (West 2015); CAL. PENAL CODE § 11414 (West 2014); *see generally* Lisa Vance, Note, *Amending Its Anti-Paparazzi Statute: California's Latest Baby Step in Its Attempt to Curb the Aggressive Paparazzi,* 29 HASTINGS COMM. & ENT. L.J. 99 (2006).

[126] CIV. §§ 1708.7; CIV. §§ 1708.8-1708.9 (West 2016).

[127] PENAL § 11414; *See* Michelle N. Robinson, Note, *Protecting a Celebrity's Child from Harassment: Is California's Amendment Penal Code § 11414 Too Vague to Be Constitutional*, 4 PACE INTELL. PROP. SPORTS & ENT. L.F. 559 (2014) (discussing the Constitutionality of California penal legislation); Dayna Berkowitz, Note, *Stop the 'Nazzi': Why the United States Needs a Full Ban on Paparazzi Photographs of Children of Celebrities*, 37 LOY. L.A. ENT. L. REV. 175 (2017).

[128] *See, e.g.*, CIV. §§ 1708.7-1708.9; PENAL § 11414.

[129] *See* CIV. § 1708.8; *see generally* Null, *supra* note 42.

This section focuses on § 1708.8 under California's civil code[130] because this section of California's code is similar to previously proposed federal legislation that remains relevant when drafting legislation to combat paparazzi.[131] Scholars have also voiced support for the California legislation's attempts to limit paparazzi.[132]

A. CALIFORNIA CIVIL CODE § 1708.8

Under this statute, a person may be found liable for "physical invasion of privacy" and "constructive invasion of privacy."[133] In order for the plaintiff to prove physical invasion of privacy, the plaintiff must show the defendant:

> [K]nowingly enter[ed] onto the land or into the airspace above the land of another person without permission or otherwise commit[ed] a trespass in order to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity and the invasion occurs in a manner that is offensive to a reasonable person.[134]

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[130] This note does not cover § 40008 which criminalizes certain traffic violations committed to take photos of someone; this note is interested in drafting broadly applicable legislation that covers various situations and is not limited to one area such as traffic. *See* CAL. VEH. CODE § 40008 (West 2011); *see generally* Christina M. Locke & Kara Carnley Murrhee, Article, *Is Driving with the Intent to Gather News a Crime? The Chilling Effects of California's Anti-Paparazzi Legislation*, 31 LOY. L.A. ENT. L. REV. 83 (2011).

[131] California has multiple laws that attempt to limit paparazzi, but this note will focus on one such law for brevity and primarily because of that law's similarities to the earlier discussed federal laws that can be drawn upon when drafting model legislation. *See, e.g.*, CIV. §§ 1708.7-1708.9; PENAL § 11414.

[132] *See, e.g.*, Devan Orr, Note, *Privacy Issues and the Paparazzi*, 4 ARIZ. ST. SPORTS & ENT. L.J. 319 (2015) (voicing support for California legislation limiting paparazzi, which "protect[s] the privacy interests of celebrities and their children . . . without materially infringing upon the First Amendment rights of paparazzi").

[133] CIV. §§ 1708.8(a)-(b).

[134] *See id.* § 1708.8(a).

Constructive invasion of privacy occurs when the defendant:

> [A]ttempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a private, personal, or familial activity, through the use of any device, regardless of whether there is a physical trespass, if the image, sound recording, or other physical impression could not have been achieved without a trespass unless the device was used.[135]

The statute also imposes liability on individuals who commit false imprisonment or assault while intending to capture any "visual image, sound recording, or other physical impression of the plaintiff."[136]

A defendant found guilty of any of the above violations has to endure significant civil penalties.[137] Specifically, the violator faces (1) up to three times the cost of any general and special damages from the violation, (2) disgorgement to the plaintiff of any profit from the photo, and (3) a civil fine from five-thousand dollars to fifty-thousand dollars.[138] Moreover, the statute also states anyone who "directs, solicits, actually induces, or actually causes another person," to engage in this behavior is also liable for: (1) general, special, and consequential damages, (2) punitive damages, and (3) a civil fine between five-thousand and fifty-thousand dollars.[139] In addition to civil damages, the statute also allows equitable relief through injunctions and restraining orders.[140]

A court would likely classify this legislation as content-neutral because it applies to all people, regardless of the message's content.[141] The legislation would arguably fit as a time, place, and manner restriction[142] used to promote the government interest of an

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[135] *Id.* § 1708.8(b).
[136] *Id.* § 1708.8(c).
[137] *Id.* § 1708.8(d).
[138] *Id.*
[139] *Id.* § 1708.8(e).
[140] *Id.* § 1708.8(h).
[141] *See* Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 189 (1997) (content-neutral classification); Null, *supra* note 42, at 561-62.
[142] *See* Ward v. Rock Against Racism, 491 U.S. 781, 491 U.S. at 799-803 (example of time, place, and manner restrictions); Joshua Azriel, *Restrictions Against Press and Paparazzi in California: Analysis of Sections 1708.8 and 1708.7 of the California Civil Code*, 24 UCLA ENT. L. REV. 1, 4 (2017); Null, *supra* note 42, at 561-62.

individual's constitutional right to privacy.[143] While the legislation may encumber paparazzi more than others, this is merely an incidental effect of its main goal to ensure the right to privacy is not infringed upon.[144] The statute's definition for actual and constructive invasion of privacy draws parallels with Fourth Amendment jurisprudence regarding the sanctity of the home and the use of advanced technologies to observe a person's home.[145] Protecting an individual's right to privacy, especially in his or her home, is likely to be viewed as a substantial government interest.[146]

Moreover, the inclusion of "airspace above the land of another" in the definition of physical invasion of privacy, covers the use of drones by paparazzi.[147] Even if courts may have found the use of drones to be a physical invasion of privacy, the explicit mention of airspace leaves out any ambiguity and puts paparazzi on notice.[148] As content-neutral legislation, the State would have to show this government interest is achieved less effectively without the statute.[149] Documented accounts of celebrities being photographed within their property could help to evidence this claim.

The statutory definition of physical invasion of privacy includes the *mens rea* of "knowingly," which makes only willful perpetrators liable and prevents other members of the press from being deterred in doing their lawful jobs.[150] Also, when defining constructive invasion of privacy, the statute uses the reasonable person standard to determine if the impression was obtained in an

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[143] The US Supreme Court has recognized the right to privacy regarding 4th Amendment searches and many states also recognize the individual right to privacy. *See* Gary Wax, *Popping Britney's Personal Safety Bubble: Why Proposed Anti-Paparazzi Ordinances in Los Angeles Cannot Withstand First Amendment Scrutiny*, 30 LOY. L.A. ENT. L. REV. 133, 139-41 (2009); *see also* Browde, *supra* note 82, at 724.

[144] Content-neutral legislation can have an "incidental effect" on certain speakers. *See, e.g.*, *Ward*, 491 U.S. at 791 (content-neutral legislation upheld despite "incidental effect" on certain speakers).

[145] *See, e.g.*, Kyllo v. United States, 533 U.S. 27 (2001) (use of a thermal-image device to look inside defendant's home a violation of his 4th Amendment rights).

[146] *See* Wax, *supra* note 143, at 139-41.

[147] CAL. CIV. CODE § 1708.8(a) (West 2015). *See generally* Amanda Tate, *Miley Cyrus and the Attack of the Drones: The Right of Publicity and Tabloid Use of Unmanned Aircraft Systems*, Note, 17 TEX. REV. ENT. & SPORTS L. 73 (2015).

[148] CIV. § 1708.8(a); *see generally* Tate, *supra* note 147.

[149] *See* United States v. Albertini, 472 U.S. 675, 689 (1985).

[150] CIV. § 1708.8(a); Null, *supra* note 42, at 560.

"offensive" manner , thereby preventing plaintiffs from enforcing the statute in overbroad and unpredictable ways.[151] "Private, personal, and familial activity" is also defined, and describes certain behaviors that are accompanied by a "reasonable expectation of privacy," ensuring paparazzi are alerted to exactly what constitutes a violation, as determined by an objective standard.[152] Therefore, the statute has a reduced likelihood of being struck down as constitutionally overbroad under the First Amendment.[153] Also, the legislation includes a severability clause which allows a reviewing court to declare portions of the legislation unconstitutional without striking down the entire statute.[154]

The statute's scope is limited by the subsequent section, which states only the purchaser involved in the first transaction after the illicit capturing of the plaintiff's impression is liable if the purchaser has "actual knowledge" the physical impression was taken in violation of the statute.[155] This is a potential constitutional concern because the requirement means members of the press must now be especially diligent determining where photos came from and how they were obtained.[156] A court may view this as excessive and strike this section down as unconstitutional, fearing the legislation may encumber press activities.[157]

On the other hand, the section disincentivizes paparazzi because obtaining financial compensation for the images violates the statute.[158] The statute further limits its reach by exempting any individual who subsequently "transmits, publishes, broadcasts, sells, or offers for sale, in any form, medium, format, or work" the illicitly obtained physical impression.[159] By making only the first purchaser of illicitly obtained photos liable, with the *mens rea* of

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[151] CIV. § 1708.8(b); Null, *supra* note 42, at 559-60.

[152] CIV. § 1708.8(l); Null, *supra* note 42, at 559-60.

[153] A clear standard reduces the likelihood of paparazzi ceasing to perform ordinary press activities, i.e., the basic overbreadth concern. *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

[154] CAL. CIV. CODE § 1708.8(n).

[155] *Id.* § 1708.8(f)(1).

[156] *See* Locke, *supra* note 35, at 233 ("The Supreme Court ruled in *Bartnicki v. Vopper* that, if information is illegally obtained by a third party but lawfully obtained by the press, it can be published."); Azriel, *supra* note 142, at 13.

[157] Courts are concerned legislation may inhibit the performance of ordinary press activities, i.e., the basic overbreadth concern. *See Broadrick*, 403 U.S. at 612; Null, *supra* note 42, at 560-61; Azriel, *supra* note 142, at 13.

[158] CIV. § 1708.8(f)(1).

[159] *Id.* § 1708.8(f)(3).

actual knowledge, fewer members of the press will be deterred from traditional press work, while protecting the privacy of celebrities.[160]

A predetermined civil fine range accomplishes two tasks. It alerts potential violators that, at a minimum, they will lose five-thousand dollars, and it prevents excessive fines that a court might deem unnecessary to deter paparazzi.[161] The civil fine minimum of five-thousand dollars also increases the chances that plaintiffs and attorneys will pursue such a cause of action, rather than deeming the venture not worthwhile.[162] Through making damages "up to three times the amount of any general and specific damages," the legislation further allows courts to tailor the damages to each case.[163] Tabloid photos can often be sold for staggering amounts, making civil damages a seemingly worthwhile risk;[164] however, the statute disincentivizes such behavior by paparazzi through disgorgement of profits from such images, in addition to damages and civil fines.[165]

The statute further disincentivizes paparazzi from invading individuals' privacy by precluding any defense that the violation did not result in any "image, recording, or physical impression" being captured or sold.[166] Although the legislation may require individuals to bring multiple suits against various paparazzi, celebrities have the financial means to pursue such actions.[167] Again, the statute's flexibility empowers courts to tailor punishments on a case-by-case basis.[168]

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[160] *Id.* § 1708.8(f)(1).

[161] *Id.* § 1708.8(d).

[162] *See id.*

[163] *Id.*

[164] *See* Richard Perez-Pena, *How Much for Those Baby Photos?*, N.Y. TIMES (May 5, 2008), https://www.nytimes.com/2008/05/05/business/media/05tabloid.html.

[165] CIV. § 1708.8(d); Null, *supra* note 42, at 561.

[166] CIV. § 1708.8(j).

[167] *See id.* §§ 1708.8(d)-(e); Kurt Badenhausen et al., *The World's Highest-Paid Celebrities*, FORBES, https://www.forbes.com/celebrities/.

[168] *See* CIV. §§ 1708.8(d)-(e).

B. ISSUES WITH § 1708.8

While the California legislation has many positive aspects, it is not infallible and could be improved upon.[169] First, rather than having simply compensatory and punitive damages, the legislation holds perpetrators liable for up to three times the amount of general and special damages along with a civil fine.[170] A court might view the totality of this financial punishment as excessive and question whether the legislation is narrowly tailored enough to protect the right to privacy without being overly broad.[171] Another argument is that the excessive fines reflect a general dislike for paparazzi in particular and the legislation should therefore be content-based.[172] Removing the option of damage awards of up to three times the actual damages, and decreasing the size of the civil fine awarded, would likely remedy this issue.

Second, the statute is still susceptible to a vagueness claim. Under "constructive invasion of privacy," liability is premised on the violator attempting to take a photo "in a manner that is offensive to a reasonable person."[173] This could potentially be subject to a vagueness claim because it is unclear how a paparazzo would actually know which method of obtaining a photo would be offensive.[174] While the requirement of attempting to capture private activities helps clarify this, there is still a degree of ambiguity in the

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[169] A full discussion of the attacks on § 1708.8 is beyond the scope of this article. Some critiques of § 1708.8 have been rendered moot by subsequent amendments. This section will provide a basic overview of the concerns other scholars have pointed to regarding § 1708.8 that are currently applicable. *See, e.g.*, Browde, *supra* note 82.

[170] CIV. § 1708.8(d).

[171] Courts require the measures employed by content-neutral legislation to not be overly restrictive. *See, e.g.*, McCullen v. Coakley, 573 U.S. 464, 496-97 (2014) (striking down content-neutral statute on First Amendment grounds because State failed to show the time, place, and manner restrictions (buffer zones around health clinics) were necessary, i.e., that "less restrictive measures were inadequate"); *cf.* Browde, *supra* note 82, at 716. *Contra* Null, *supra* note 42, at 561 (arguing the damages support the "true social cost" of actions by the paparazzi).

[172] *See* Azriel, *supra* note 142, at 13-15.

[173] CIV. §§ 1708.8(a)-(b); *cf.* Browde, *supra* note 80, at 724 (noting general concern with vagueness of terms in statute).

[174] Under U.S. Supreme Court precedent, a statute is void for vagueness when it fails to inform an average person what conduct is illegal. Hill v. Colorado, 530 U.S. 730, 732 (2000). Members of the press may be uncertain when someone has taken reasonable steps, and the lack of clarification may cause a court to find such statute overly vague.

statute.[175] Examples of obtaining a photo in an offensive manner would help to combat a claim of void for vagueness. On the other hand, such uncertainty can be clarified by court cases over time.

Third, portions of the statute are arguably discriminatory towards paparazzi and potentially even a content-based restriction. Disgorgement of profits is applicable only when the plaintiff proves the physical impression was obtained "for a commercial purpose," which specifically implicates paparazzi and is arguably a content-based restriction.[176] This wording could be argued as an attack on paparazzi with limited rather than broad applicability.[177] This provision could vary widely in its application, causing a paparazzo to lose all profits from a photo, but a salaried photographer to lose only a day's wages.[178] Removing a commercial purpose requirement and simply stating any use of the physical impression that leads to a profit would provide this portion of the statute with broader applicability and reduce the chances of the section being found content-based.

Moreover, the legislation's limitation on first transaction publishers with actual knowledge the photo was obtained in violation of the statute could be plausibly construed as a prior restraint on publication, which the United States Supreme Court has generally opposed.[179] Also, the legislation's exemptions arguably allow any conduct, aside from the work of freelance photographers, that discriminates against paparazzi.[180] One concern with the exemption provided in the statute is that press members will be deterred from traditional investigatory work and uncovering newsworthy stories.[181] Moreover, scholars have argued the legislation does not actually alleviate any harm, but merely punishes conduct after the fact and therefore is not narrowly tailored to achieve a governmental interest.[182] However, this argument glosses over the legislation's deterrent effect which alleviates the harm of

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[175] *See* CIV. §§ 1708.8(a)-(b); *cf.* Browde, *supra* note 82, at 724.

[176] *See* Browde, *supra* note 82, at 710, 714-15 (quoting CIV. § 1708.8(c)); Azriel, *supra* note 142, at 13.

[177] *See generally Hill*, 530 U.S. at 731 (pointing to a statute's broad applicability as a strength because it supports arguments against a "discriminatory governmental motive"); *see also* Azriel, *supra* note 142, at 13; Browde, *supra* note 82, at 710.

[178] *See* Browde, *supra* note 82, at 711.

[179] Azriel, *supra* note 142, at 4, 14 n.82.

[180] *See* Browde, *supra* note 82, at 710-11.

[181] *See* Locke, *supra* note 35, at 245-46.

[182] *See* Browde, *supra* note 82, at 719.

paparazzi by causing them to think twice before engaging in aggressive or outlandish conduct.

Fourth, the legislative history of the act, and subsequent amendments, shows an intent to target paparazzi.[183] Legislative history in California shows an intent to limit paparazzi, which, if taken into account or pointed out to a reviewing court, would serve as strong evidence the legislation is actually pretext for a discriminatory government motive.[184] Legislative history is therefore a potentially serious concern for any legislative body attempting to pass legislation limiting paparazzi.[185] The argument that the legislation is pretext for a discriminatory motive can be weakened with a general statement explaining the reasons for enacting the legislation. The general statement should appeal to the right to privacy overall, such as in PPPA-I, when reviewed alongside careful, cognizant phrasing and discussions.[186]

IV. PROPOSED FEDERAL LEGISLATION

The section attempts to draft sample federal legislation which both limits paparazzi and comports with the First Amendment, drawing from portions of previously proposed federal legislation and California's current legislation.[187]

Model Personal Privacy Security Act:

(a) **Reckless Endangerment**: a person knowingly follows another individual across state lines persistently to obtain a physical impression of the individual and proximately causes the individual serious bodily injury or death.

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[183] *See id.* at 710; Lisa Vance, Note, *Amending Its Anti-Paparazzi Statute: California's Latest Baby Step in Its Attempt to Curb the Aggressive Paparazzi*, 29 HASTINGS COMM. & ENT. L.J. 99, 110 (2006).

[184] *See* Browde, *supra* note 82, at 710; Vance, *supra* note 183, at 110.

[185] *See generally* Hill v. Colorado, 530 U.S. 730, 731 (2000) (discussing danger of a "discriminatory governmental motive" when reviewing content-neutral statute for constitutionality under the First Amendment); Null, *supra* note 42, at 561-62 (noting that if the government's motive was to inhibit certain speech, the statute would be content-based and subject to strict scrutiny) (first citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); and then citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

[186] *See* Personal Privacy Protection Act, S. 2103, 105th Cong. § 2(a) (1998).

[185] *See* CAL. CIV. CODE § 1708.8 (West 2016).

(b) **Harassment**: a person knowingly follows another individual across state lines persistently to obtain a physical impression of the individual and causes the person to have a reasonable fear of serious bodily injury or death.

(c) **Invasion of Personal Privacy**: a person knowingly enters onto an individual's land or airspace without permission to capture a physical impression of the individual when the individual has a reasonable expectation of privacy, and the physical impression is distributed through interstate commerce whether or not for a profit.

(d) **Constructive Invasion of Personal Privacy**: a person knowingly obtains a physical impression of an individual inside the individual's land or airspace without that individual's permission that could not be obtained without the use of sensory enhancing technology when the individual has a reasonable expectation of privacy, and the physical impression is distributed through interstate commerce whether or not for a profit.

(e) **Aiding and Abetting**: A person who encourages or assists a person to commit a violation under this statute is also in violation of the statute and will be subject to the same potential criminal and civil liability.

(f) **Purchasing of Illicit Photos**: An individual or organization who has actual or constructive knowledge that a physical impression was obtained illicitly and is the initial purchaser of the physical impression, shall be liable for civil and punitive damages under this statute.

(g) **Punitive Remedies**: A violation under this section is punishable by disgorgement of any profit obtained from selling the illicitly obtained physical impression and up to 15 days in jail.

(h) **Civil Causes of Action**: The victim of any violations under this statute shall have a civil cause of action in federal court to seek civil remedies, regardless of whether punitive remedies are sought or obtained. Plaintiff must prove a violation by a preponderance of the evidence.

(i) **Civil Remedies**: Plaintiff, upon court judgment in plaintiff's favor, shall be entitled to relief which may include attorney's fees, expert's fees, disgorgement of any profit obtained from selling the illicitly obtained physical impression, compensatory damages, punitive damages, declaratory relief, injunctive relief and a mandatory civil fine of up to $5000. Seeking or obtaining punitive remedies will not preclude or bar any civil remedies.

(j) **Exemptions**: Law enforcement and private investigators shall not be found liable under this statute when executing their occupational duties. An individual who is not the initial purchaser of a physical impression obtained in violation of this statute shall not be liable under this statute for subsequently transmitting the photos.

(k) **Limitations on Defenses**: It is not a defense in a criminal or civil prosecution for a violation under this statute that no physical impression was obtained or sold or both.

(l) **Preemption**: This statute does not preempt or preclude liability under other laws, or any other federal or state claim.

(m) **Applicability**: This statute shall apply to actions taken within the United States and its territories.

(n) **Definitions**:

a. **Physical Impression**: photograph, audio or visual recording
b. **Actual Knowledge**: awareness of what one is doing
c. **Constructive Knowledge**: based on the facts available to the individual at the time, a reasonable person would have had knowledge
d. **Knowingly**: awareness of what one is doing
e. **Persistently**: continuously without pausing for more than a few minutes
f. **Follow**: go in a given direction solely to observe or document the whereabouts of another without person from the person being followed
g. **Organization**: a business, nonprofit, or group
h. **Following across state lines**: requires the person following to physically cross state lines to continue following
i. **Distributed through interstate commerce**: physically or electronically in any form distributing the original or copies of the physical impression across state lines
j. **Reasonable expectation of privacy**: a reasonable person, based on the facts available to the individual at that time, would reasonably believe someone is unable to observe, watch, or record him or her without trespassing

(o) **Severability**: This statute is severable.

This model legislation incorporates parts of the previously proposed federal legislation and the currently active California

legislation.[188] Under this model, individuals are liable for reckless endangerment, harassment, and actual or constructive invasion of privacy. All these violations have the *mens rea* of knowingly. Similar to the California legislation, this model legislation explicitly includes airspace under its definitions of actual and constructive invasion of privacy, to outlaw the use of drones.[189] This model statute also borrows the federal limitations on defenses, precluding a defense that no physical impression was obtained or sold for profit.[190]

The model legislation employs the reasonable person to ensure an objective standard, but dispenses with the federal requirement that an individual has taken "reasonable steps" to ensure his or her privacy.[191] Instead, this requirement is encompassed by the reasonable expectation of privacy which further reduces ambiguity and uncertainty regarding what constitutes reasonable steps.[192] Civil and criminal liabilities include disgorgement of profits from physical impressions obtained in violation of the statute, borrowing from the California legislation to ensure paparazzi do not find the ends justify the means financially.[193] Also, the model legislation allows for both damages and equitable relief, again allowing the court to appropriately fashion remedies to each case. Additionally, the model discards the phrase, "in a manner that is offensive to a reasonable person," used in California's statute, thereby reducing ambiguity.[194] The model legislation also includes a plethora of definitions to reduce ambiguity and the likelihood of a court finding the statute void for vagueness, similar to the California legislation.[195]

The model legislation has noticeable differences from the previously examined legislation.[196] Here, the legislation includes

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[188] *See id.*

[189] *See id.* § 1708.8(a).

[190] *See* Protection from Personal Intrusion Act, H.R. 2448, 105th Cong. § 2(a) (1997); Privacy Protection Act of 1998, H.R. 3224, 105th Cong. § 2(a) (1998); Personal Privacy Protection Act, H.R. 4425, 105th Cong. § 2(a) (1998); S. 2103 § 3(a).

[191] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a).

[192] *See, e.g.*, H.R. 2448 § 2(a); H.R. 3224 § 2(a).

[193] *See* CAL. CIV. CODE § 1708.8(d) (West 2015).

[194] *See id.* §§ 1708.8(a)-(b).

[195] *See id.* § 1708.8.

[196] *See* H.R. 2448 § 2(a); H.R. 3224 § 2(a); H.R. 4425 § 2(a); Personal Privacy Protection Act, S. 2103, 105th Cong. § 2(a) (1998); CAL. CIV. CODE §§ 1708.7-1708.9 (West 2015); CAL. PENAL CODE § 11414 (West 2014).

liability for someone who aids or abets another in violating the statute, which is similar to the federal legislation holding liable a person physically present and assisting another in engaging a violation of the bill.[197] Also, violators do not need to have committed the act with the intention or expectation of profit, broadening the applicability of the statute and thereby reducing the likelihood of a court concluding the model legislation is pretext for governmental disagreement with paparazzi photos.

The legislation also invokes interstate commerce by requiring the pursuer to have crossed state lines physically, to follow someone, or through the distribution of photos or physical impressions, regardless of whether the purchaser actually sells the photo. An example of distribution through interstate commerce includes someone who obtains a physical impression of someone and then distributes the photo online.[198] This situation is broadly applicable to all individuals and ensures the legislation is within Congress' enumerated powers under the Commerce Clause, instead of encroaching upon State autonomy.[199]

Moreover, the legislation imposes liability on the first purchaser of physical impressions obtained in violation of the statute when the purchaser knows or should have known the photos were obtained in violation of the statute. An example of this constructive knowledge would be a picture from outside a house, showing inside a window, of an individual sitting on a toilet, seemingly unaware of the photographer. In this situation, a reasonable person would know the photo was obtained in violation of this statute, through actual or constructive invasion of privacy. Therefore, if the individual is the

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[197] This section is necessary because now paparazzi often work in teams and share information in order to get exclusive high-earning money shots; regular photos depicting normal activities like walking down the street no longer bring in the same revenue as they once did and therefore paparazzi are incentivized to work together to get high-paying photos with unusual depictions or activities. Allison Schrager, *The 'Golden Years' of Paparazzi Have Mostly Gone*, BBC (Apr. 24, 2019), https://www.bbc.com/worklife/article/20190423-how-the-paparazzi-make-their-money.

[198] The use of interstate electronic distribution follows parallels with federal criminal statutes that allow Congressional jurisdiction when actions or communications are done through interstate commerce. *See, e.g.*, 18 U.S.C. § 1343 ("transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice").

[199] An in-depth discussion of federal versus state powers and jurisdiction is beyond the scope of this journal article. *See* U.S. CONST. art. I, § 8, cl. 3; *see also* U.S. CONST. amend. X.

first purchaser of the photo, they are subject to the same criminal and civil liabilities as the photographer. This increases the scope of liability and makes it even harder for paparazzi to sell illicitly obtained photos, serving as an additional deterrent.

While making the first purchaser liable may seem ambitious, the *mens rea* of actual or constructive knowledge limits liability.[200] Allowing culpability for constructive knowledge also ensures purchasers do not simply turn a blind eye to evade culpability. Other members of the press will not be deterred from obtaining or using photos save for rare or extremely obvious cases. Simply asking the photographer where the photo was obtained would preclude liability because the test of constructive knowledge is based on the facts known to the initial purchaser at the time of purchase, rather than a hindsight test. Moreover, the severability clause ensures this section, if struck down, will not cause the entire statute to be declared unconstitutional.[201]

Additionally, the model legislation includes a mandatory $5,000 fine to ensure the violator takes a financial hit. This $5,000 fine is notably smaller than the maximum of $50,000 under the California legislation to reduce the likelihood of a court finding the legislation is not narrowly tailored to promote the government's interest of protecting personal privacy and prevent excessive fines.[202]

This legislation further includes a maximum sentence of fifteen days in jail. A heavy sentence might be justified in the case of reckless endangerment, but if a paparazzo is a proximate cause of serious injury or death, manslaughter and other criminal charges can be brought in addition to violations under this statute per the preemption section. The sentencing range and fine amounts can be adjusted with time, but by starting small and increasing the penalties as necessary over time, the legislature can demonstrate to the courts increased penalties are justified and necessary based on the failure of the legislation to initially deter violations of personal privacy.

While any of these individual deterrents may have minimal impact, the combination of these individual deterrents will have an aggregate effect to significantly deter paparazzi while protecting

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[200] Scholars have argued that the US Supreme Court's decision in *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) allowing a publisher to publish photos it obtained legally from a third party that obtained the photos illicitly is extremely limited. *See* Patrick J. Alach, Comment, *Paparazzi and Privacy*, 28 LOY. L.A. ENT. L. REV. 205, 231 (2007) (explaining why the *Bartnicki* holding is limited).

[201] CIV. § 1708.8(n).

[202] *Id.* § 1708.8(d).

personal privacy rights. Constitutional legislation will naturally require a balance between privacy rights and freedom of the press.

V. CONCLUSION

Continued bold and dangerous actions by paparazzi have led to a renewed need for federal legislation to ensure public safety and privacy protection rights.[203] Federal legislation following Princess Diana's death in tandem with recently amended California legislation serves as a guide for the pros and cons of past attempts to curb paparazzi.[204] Combining the benefits of previously proposed federal legislation and current California law, while improving on any deficits, helps to provide a guide for model legislation which Congress should consider when trying to limit paparazzi. Therefore, Congress should renew its attempt to pass legislation limiting paparazzi.

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[203] *See, e.g.*, Quan & Hannah, *supra* note 3; Duke, *supra* note 3; *Paparazzo Killed by Car*, *supra* note 3.

[204] *See* CIV. § 1708.8; Protection from Personal Intrusion Act, H.R. 2448, 105th Cong. (1997); Privacy Protection Act of 1998, H.R. 3224, 105th Cong. (1998); Personal Privacy Protection Act, H.R. 4425, 105th Cong. (1998); Personal Privacy Protection Act, S. 2103, 105th Cong. § 3(a) (1998).