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PREFACE

Welcome to Volume 51 of the *Golden Gate University Law Review*. The *Golden Gate University Law Review* is a student-run organization that publishes two issues each academic year: the *Ninth Circuit Survey* and the *Comments Edition*. The *Ninth Circuit Survey* issue features student-written Case Notes and Case Summaries focused exclusively on decisions of the United States Court of Appeals for the Ninth Circuit. The *Comments Edition* is a general interest edition, comprised of student-written Comments and Outside Articles written by practicing attorneys, judges, and academics. It provides a forum where students and legal professionals are free to explore deeply relevant and contemporary topics that dot the broader landscape.

Since its establishment in 1969, the *Golden Gate University Law Review* has dedicated itself to publishing scholarly writing on a wide range of legal topics that contributes to the intense legal discourse on state, national, and international levels. This year's *Comments Edition* continues this rich and vibrant tradition. America has continued to experience controversial legal quagmires and rulings and this issue of our *Comments Edition* reflects that dazzling variety of obstacles, solutions and questions yet to be answered.

The articles in this issue evaluate existing legal theory and practice, proposing changes to ensure the just administration of the law. Apple "App" controversies vis-à-vis traditional concepts of contractual privity; wealth-based discrimination and bail bond requirements; cosmetics disasters and a call for FDA intervention; sadomasochistic sex contracts gone awry in an LGBTQ+ subculture: these are the diverse topics our writers confront. In addition, we feature an interview with two civil rights attorneys who share their opinions on the many strands of the Black Lives Matter movement.

None of this writing would have materialized if we were not backed by a strong, supportive team of allies. Interviewees Walter Riley and Dewitt M. Lacy generously took the time to weigh in on urgent racial matters that fall under the #BLM umbrella. Dean Christiansen kept us afloat with his effervescent enthusiasm. Academic Dean Mark Yates ignited our creativity with his cosmic presence. Heather Varanini, a former *Law Review* member herself, continued to guide us with her *Bluebook* and editorial expertise. Our Faculty Advisor Professor Jennifer Babcock provided her signature convivial expertise and guidance. Line Editor Nicholas Joy, also a former journal member, supplied masterful commentary that helped perfect each piece. Executive Faculty Assistant

Emmy Pasternak was the connective tissue helping us put this volume together. We extend our gratitude to each person for his or her unique contributions. Finally, we are incredibly grateful to all our authors for their passionate contributions, and for giving us the opportunity to learn more about critically important issues. While the guidance of these individuals has been invaluable, we take full credit for any and all errors herein.

We have thoroughly relished our time as Editor-in-Chief and Managing Editor for the 2020–2021 year. It was a gift to meet and commence work with our new Staff Writers, to deepen our bonds with Associate Editors, and to strategize with our current Executive Board Members. Every publication—especially a law review—is an ecosystem. It crystallizes primarily as a result of collaboration. These pieces represent our ongoing dialogue with each other and with the world. It is our distinct privilege to present this edition of the *Golden Gate University Law Review Comments Edition*. We hope you enjoy reading it as much as we have relished creating it.

Michael Angelo Tata
Editor-in-Chief

Allyson M. McCain
Managing Editor

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INTERVIEW: Black Lives Matter—A Discussion with Two Civil Rights Attorneys

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INTERVIEW

BLACK LIVES MATTER—A DISCUSSION WITH TWO CIVIL RIGHTS ATTORNEYS

JUSTIN C. TRIMACHI
*WALTER RILEY**[1]
*DEWITT M. LACY**[2]

A MISSION OF INCLUSION AND EMPOWERMENT

Dr. Martin Luther King Jr. once said, "Human progress is neither automatic nor inevitable . . . every step towards the goal of justice requires sacrifice, suffering and struggle, the tireless exertions and passionate concern of dedicated individuals."[3] The Black Lives Matter ("BLM") movement has a formal presence in the United States, the United Kingdom, and Canada.[4] The founders' outrage at the acquittal of George Zimmerman, who they believed murdered Trayvon Martin in 2013, fueled BLM's mission to empower Black communities to intervene in the violence inflicted on those communities by both the State and vigilantes and to eradicate white supremacy.[5] Further, BLM goals include "combating

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* J.D., Golden Gate University School of Law, 1980; B.A. Political Science, Wayne State University, 1977.

[1] Zoom interview by Executive Articles Editor Justin Trimachi with Walter Riley (Dec. 7, 2020).

* J.D., Golden Gate University School of Law, 2005; B.A. Speech and Communications, San Francisco State University, 2000.

[2] Zoom interview by Executive Articles Editor Justin Trimachi with Dewitt M. Lacy (Nov. 30, 2020).

[3] *Reflections on Martin Luther King Jr.'s The Montgomery* Story, ALLIANCE FOR STRONG FAMILIES AND COMMUNITIES, https://alliance1.org/web/news/2018/jan/reflections-martin-luther-king-jr-montgomery-story.aspx (last visited Feb. 15, 2021).

[4] *About*, BLACK LIVES MATTER, https://blacklivesmatter.com/about/ (last visited Feb. 13, 2021).

[5] *Id*.

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and countering acts of violence, creating space for Black imagination and innovation, and centering Black joy to win immediate improvements."[6]

The movement seeks to center on those who have been marginalized by previous Black liberation movements. BLM affirms Black queer and trans individuals' lives and seeks to move Black communities beyond "narrow nationalism."[7] It also works to create a world where Black lives are not "systematically targeted for demise" and affirm humanity in all of those facing "deadly oppression." I reached out to two Black civil rights attorneys to give me their perspective on BLM. Both are alumni of Golden Gate University School of Law. The first, Walter Riley, graduated in 1968 and was recommended by Professor Leslie Rose,[8] and the second, Dewitt M. Lacy, spoke in my Criminal Procedure class about his work as a civil rights attorney.

LIFTING UP OTHERS, FROM THE JIM CROW SOUTH TO THE GOLDEN STATE

Walter Riley grew up in a large family in Durham, North Carolina, when Jim Crow laws were still in force. He learned early from his parents how the world was different for Black people in the South than their white counterparts. This knowledge, combined with experiencing the stories of the brutal lynching of Mack Parker[9] and Emmet Till,[10] fueled his desire to get involved as a teenager in the civil rights movement in the late 1950s and early 1960s. He had the opportunity to work with such influential leaders as Floyd McKissick[11] and often interacted with the movement's lawyers. Mr. Riley's law school journey took him on several unforeseen turns, such as being a union organizer as a bus driver and being part of a rent strike in Chicago and Detroit. Upon returning to California in 1977, he enrolled at Golden Gate University School of Law with the desire to engage in social justice in the area of housing law.

Dewitt M. Lacy grew up in California in a family of modest means. For over a decade, Mr. Lacy has successfully prosecuted wrongful death

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[6] *Id*.

[7] *Id*.

[8] *Faculty: Leslie Rose*, GGU.EDU, https://www.ggu.edu/shared-content/faculty/bio/leslie-rose, (last visited Feb. 13, 2021).

[9] *Lynching of Mack Charles Parker*, MISSISSIPPI CIVIL RIGHTS PROJECT, https://mscivilrights project.org/pearl-river/event-pearl-river/lynching-of-mack-charles-parker/ (last visited Jan. 4, 2020).

[10] *Emmett Till Is Murdered*, HISTORY.COM, https://www.history.com/this-day-in-history/the-death-of-emmett-till, (last visited Jan. 4, 2020).

[11] Floyd McKissick was an influential civil rights leader and a contemporary of Dr. Martin Luther King, Jr. *McKissick, Floyd Bixler*, STANFORD UNIVERSITY, THE MARTIN LUTHER KING, JR. RESEARCH AND EDUCATION INSTITUTE, https://kinginstitute.stanford.edu/encyclopedia/mckissick-floyd-bixler (last visited Feb. 3, 2021).

actions and civil rights violations against various municipalities. After attending Golden Gate, Mr. Lacy first practiced in the area of corporate law. However, he soon found this work unsatisfying and went to work in the San Francisco District Attorney's office under Kamala Harris. Mr. Lacy cites his experience growing up as a Black man in America as a significant influence on his ultimate decision to practice as a civil rights attorney. "You see some stuff that a lot of people don't see, and you experience things in a different way than many other Americans." His heightened awareness of the law's potentially unfair application against uneducated people paved the way to his current practice.

WHY THE *TRUTH* WILL SET US FREE

Mr. Riley and Mr. Lacy expressed their viewpoint on several topics, such as the myths surrounding the Black Lives Matter movement. They discussed significant impediments, how the legal community and law schools could support BLM and similar organizations, and how BLM compares to previous civil rights movements. Both agree that irresponsible and dangerous mistruths exist that distort how BLM's purposes and goals are viewed by the general public.

The first myth debunked was that BLM exists solely to get out the vote for Democratic candidates. Mr. Lacy pointed out that each particular regional group of BLM activists' goals can vary slightly by region but does not have the sole focus of getting the vote out for the Democratic party. Mr. Riley discussed that the Black Lives Matter primary focus in the Bay Area is geared more towards local grassroots efforts, such as housing, welfare rights, police reform, and other social issues. Both agree that one focus of the movement is to educate people about the importance of participating in the democratic process. This education includes ways to improve police training.

Another myth surrounding BLM is that it calls for the police to be defunded entirely, resulting in a society with no police protection. Mr. Riley believes that the focus lies more on a reprioritization of funds. He would shift funds from recent police departments' militarization to focus more on proper training concerning healthcare, youth education and development, and correctly responding to those in crisis. Mr. Lacy agrees that completely defunding the police is not the right focus and thinks that this idea is a minority opinion within the movement. He would also spend money to retrain officers to interact with historically marginalized communities, specifically Black and Hispanic ones, in a more humane and understanding way. Specifically, he highlighted retraining officers to be more sensitive to those in the community's mental health issues. Also,

as a first step, Lacy supports mandating implicit bias[12] training for officers, which is used to identify and help overcome unconscious racist thoughts and reactions.

BLM seeks to lift those who are marginalized by society and even by previous civil rights movements.[13] Mr. Riley views the myth that BLM is only for the benefit of "queers, gay, transgender folks who are immoral" as very dangerous to the movement. He expressed that this view makes it easy for Black people and other groups of color who are Christian to dismiss BLM. Mr. Riley feels this anti-LBGTQ+ myth undermines the goals of the movement. Similarly, Mr. Lacy is troubled by the myth that BLM is an anarchist movement. He acknowledges that a small portion of those who identify with BLM may want anarchy, but not the group as a whole. Both agree that another dangerous myth is that BLM is an "anti-white" movement. Mr. Lacy points out that many of the movement's goals are "in lock step" with many of the concerns of rural white Americans.

When discussing this anti-white myth, Mr. Riley poignantly addressed the perceived differences between "Black Lives Matter," "All Lives Matter," and "Blue Lives Matter." He stated that the movement did not seek to negate the truth that "All Lives Matter." "Black Lives Matter" is a statement meant to bring attention to the fact that Black lives have not mattered for far too long due to a disparity in access to education, healthcare, and fairness in the criminal justice system. Mr. Riley stated that BLM seeks to empower Black people by lifting them to a place of equality, and "Black Lives Matter" is a statement to the world to pay attention and address the genuine injustices that exist.

Mr. Lacy believes that education is crucial to addressing the gap between groups that espouse different versions of "X Lives Matter," but it is not the sole remedy. He hopes that the racial dichotomy in America would be addressed from the top down by elected officials showing a willingness to have difficult conversations. He feels they must address the "ills that we have in our social makeup," such as police brutality in historically marginalized communities and income inequality, by seeking to understand why those difficulties exist rather than engaging in superficial analysis. Mr. Lacy is particularly encouraged that the younger generation's intolerance for the status quo will help resolve these issues by challenging outdated patriarchal and racist systems and stereotypes. When I introduced this topic, the conversation shifted from myths to hard truths in current law that impede change, specifically BLM's goals.

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[12] *Implicit Bias*, NATIONAL INSTITUTE FOR BUILDING COMMUNITY TRUST &JUSTICE, https://trustandjustice.org/resources/intervention/implicit-bias (last visited Feb. 1, 2021).

[13] *About*, *supra* note 4.

JUSTICE IS NOT COLORBLIND

Both attorneys agree that reforming the criminal justice system is necessary to further BLM's central tenets of empowerment and inclusion. Mr. Riley points out how the community has suffered because of the stigma that follows many Black people after being processed through the criminal justice system. Once someone wears a "criminal jacket," he or she can find it more challenging to move forward in society. While Mr. Riley believes that civil rights suits are helpful, he feels more emphasis and focus is needed on legislative agendas starting with local city councils up to the federal level to change current laws and penalties. Mr. Lacy believes that one significant difficulty the movement faces is police brutality and the officers who are often protected under the qualified immunity doctrine. Qualified immunity protects police officers from lawsuits unless they have violated the victim's "clearly established" statutory or constitutional rights.[14] Courts will apply the law in effect at the time of the violation, rather than the law in effect when the court considers the case.[15] The immunity is not granted against paying damages, but rather the cost of a trial.[16] Therefore, if qualified immunity is granted, the defendant officer is usually granted summary judgment,[17] and the case is dismissed.

Mr. Lacy views this issue as particularly restricting. He explained that courts apply qualified immunity when considering cases where officers use excessive force. Officers are granted qualified immunity and shielded from facing any liability for their actions when the facts of an incident do not exist in settled case law. Mr. Lacy stated that officers have no incentive to avoid acting egregiously. He discussed how this lapse delays justice for many, specifically concerning the use of Tasers by officers in the early 2010s. Due to a lack of court rulings defining excessive force with Tasers, many victims could not obtain compensation. Even though these victims were either shocked too long or more times than was necessary, not enough rulings existed that put the officers on notice that their actions were constitutional violations.

Mr. Lacy believes that two effects of this doctrine exist that may not be obvious. First, it essentially forces Black communities to subsidize incorrect behavior because their tax dollars purchase the insurance policies that law enforcement agencies rely on to pay damages. Second, by

[14] *Qualified Immunity*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/qualified_immunity (last visited Jan. 10, 2020).

[15] *Id*.

[16] *Id*.

[17] *Summary Judgment*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/rules/frcp/rule_56 (last visited Feb. 13, 2020).

allowing this doctrine to continue, the courts are indirectly encouraging officers who seek to brutalize minorities to find creative ways to do so that will enable them to raise the shield of qualified immunity to succeed on a summary judgment motion. When a case is dismissed in this way, there is no ruling on whether a constitutional violation occurred to which future plaintiffs can refer. I then asked both attorneys how law schools, law students, and lawyers who do not practice civil rights law can use their platforms to help both BLM and the larger struggle for equality.

LEVERAGING THE LAW TO FURTHER THE GOALS OF BLM

Lawyers who do not practice civil rights law can still use their skills to assist the movement. Mr. Lacy pointed out that amicus briefs, filed by non-parties to a suit seeking to influence the court's ultimate ruling,[18] are useful to further both BLM and civil rights law because they can give the court a fresh, neutral perspective on an issue before it. In addition to offering their legal services, attorneys can get involved by volunteering or attending city council meetings to further the movement's goals and agendas. Mr. Lacy highlighted that lawyers also wield political leverage because they generally have more financial resources available to pressure elected officials to make a change. Mr. Riley agrees that lawyers have a responsibility to leverage the respect and influence that comes with a law degree to help foster change and social justice in their local communities. When lawyers are directly involved in civil rights suits, he believes it is essential not to adopt a paternalistic mindset.[19] Instead, attorneys should view themselves as part of the struggle and part of the group seeking change. An inability to exhibit the empathy that Mr. Riley calls for hinders law students from realizing how they can help make a change, according to Mr. Lacy.

Mr. Lacy challenges law students to educate themselves about the world outside their zone as much as possible. He attributes much of the problem to the lack of diversity in law school and other graduate programs. Mr. Lacy also believes that many law schools should diversify their staff to present varied viewpoints to the student body. He encourages law students to volunteer in different organizations and be involved in democracy, not just sit on the sidelines and watch. Mr. Riley feels that law schools are too focused on arguing both sides, resulting in a dilution

[18] *Amicus Curiae*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/amicus_curiae (last updated Jun. 2017).

[19] One of BLM's core values is to empower those who are marginalized and ignored to determine their own destiny in their communities. *See Herstory*, BLACK LIVES MATTER, https://blacklivesmatter.com/herstory/ (last visited Feb. 13, 2020).

of what matters. Without having conviction and discussing hard truths in law school, Mr. Riley believes law students will be ill-prepared for the future and lack the necessary strength behind their words and actions to convince others. He then noted that many others have this conviction and use it to further anti-LGBTQ+, racist, and oppressive legal agendas against the BLM movement. Both Mr. Lacy and Mr. Riley see BLM as a legitimate movement and not just a moment in civil rights history.

Mr. Lacy believes BLM presents a sharp contrast with previous short-lived reactions to civil rights violations that faded from the national consciousness and so failed to have the same impact. He believes that so many younger people's willingness to challenge societal norms speaks to BLM's longevity as a force for change. He hopes that people rise to change some of the other contributing factors to the current movement, such as inequality in income, healthcare, and education. Mr. Riley contrasts BLM by noting that it enjoys much more support from national leaders and leaders that came before. He speaks of the difficulty the 1960s movement faced because the previous generations criticized their actions as too radical. Mr. Riley noted that there are more organizations for change in the Bay Area than existed in the civil rights era. He is very encouraged by the national and international efforts to effect change in many nations, not just the United States. Both attorneys agreed that BLM is a significant next chapter in fighting for justice and equality for all people. BLM strives to be the force for change missing for years in the United States and the world.

FIGHTING FOR THE EQUALITY OF ALL

BLM distinguishes itself from other Black liberation movements by purposefully including those previously ignored.[20] BLM affirms the lives of Black "queer and trans folks, disabled folks, undocumented folks, women and all Black lives along the gender spectrum."[21] Mr. Lacy and Mr. Riley have contributed to advancing Black civil rights in the United States, but they are only two pieces of the larger puzzle. The founders of BLM, Patrisse Cullors, Alicia Garza, and Opal Tometi, strive every day to ensure that *all* Black Lives are empowered.[22] Without the passion and inspiration embodied in the three women, others may have stayed silent instead of standing up and fighting for their rights.

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[20] *About*, *supra* note 4.

[21] *About*, *supra* note 4.

[22] *Herstory*, *supra* note 19.

BLM is approaching seven years of fighting for equality and justice for Black people by liberating them from oppression.[23] In a letter on the sixth anniversary of the movement, Ms. Cullors made a passionate statement that perfectly captures BLM's essence: "We have fought like hell for our freedom and will continue to fight like hell. Because we deserve more than what we have been given. Because we deserve the healing and the transformation and most importantly, we deserve to be free."[24] This statement embodies the ideals of Coretta Scott King,[25] who pronounced, "Struggle is a never-ending process. Freedom is never really won; you earn and win it in every generation."[26] Cullors, Garza, Tometi, and others have acted on Mrs. King's words and struggle to ensure that all Black Lives are treated with equality, dignity, and freedom.

[23] *About*, *supra* note 4.

[24] *6 YEARS STRONG,* BLACK LIVES MATTER, https://blacklivesmatter.com/six-years-strong/ (last visited Feb. 3, 2021).

[25] Coretta Scott King was a civil rights activist and Dr. Martin Luther King's wife. *Coretta Scott King*, THE KING CENTER, https://thekingcenter.org/about-tkc/about-mrs-king/ (last visited Feb. 15, 2021).

[26] 109 CONG. REC. 119 (2006), CONGRESS.GOV, https://www.congress.gov/109/crec/2006/02/01/CREC-2006-02-01-pt1-PgH115-5.pdf.

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COMMENT

PRIVITY VS. PROXIMITY: THE SUPREME COURT'S ERRONEOUS READING OF THE *ILLINOIS BRICK DOCTRINE* IN *APPLE INC. V. PEPPER*

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INTRODUCTION

In the words of Justice Kavanaugh, "'there's an app for that' has become part of the 21st-century American lexicon."[1] Whether to help us count our steps, give us directions, or edit our photos, it is difficult to imagine daily life without a smartphone and the various mobile applications ("apps") that help us do just about anything. In 2007, it was a different world; the first iPhone had just been released and Apple Inc.'s App Store ("App Store") was still in the works.[2] Apple launched its revolutionary App Store in July 2018, and a new digital marketplace for apps developed where users paid and downloaded mobile applications.[3] In the decade that followed, the App Store transformed software distribution.[4] The App Store started out with 500 apps at the time of launch and grew exponentially to 2.56 million apps available to download as of September 2020,[5] with more than 500 million people visiting weekly.[6]

The rapid development of this digital marketplace led the United States Supreme Court to revisit the forty-two year old antitrust precedent set in *Illinois Brick Co. v. Illinois.*[7] In *Illinois Brick,* the Supreme Court decided that under Section 4 of the Clayton Act,[8] direct purchasers have

[1] Apple Inc. v. Pepper, 139 S. Ct. 1514, 1518 (2019).

[2] Stephen Silver, *Apple Details History of App Store on its 10th Anniversary*, APPLE INSIDER, https://appleinsider.com/articles/18/07/05/apple-details-history-of-app-store-on-its-10th-anniversary (last visited Sept. 23, 2020).

[3] *Id.*

[4] *What is Digital Transformation?*, THE ENTERPRISERS PROJECT, https://enterprisersproject.com/what-is-digital-transformation#q1 (last visited Oct. 6, 2020) ("In general terms, we define digital transformation as the integration of digital technology into all areas of a business resulting in fundamental changes to how businesses operate and how they deliver value to customers").

[5] J. Clement, *Number of Apps Available in Leading App Stores 2020*, STATISTA (Sept. 1, 2020), https://www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-stores/.

[6] Silver, *supra* note 2.

[7] Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

[8] Section 4 of the Clayton Act allows the recovery of damages by "any person injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. §§ 12-27 (1914).

standing to sue for treble damages due to unfair business practices, while indirect purchasers do not.[9] Over four decades later, in *Apple Inc. v. Pepper*, the Court reevaluated this doctrine.[10] This time, the Court had to determine which party received the "direct purchaser" status in a situation where plaintiffs bought apps from third-party developers in Apple's App store at prices set by the developers.[11]

iPhone users argued that Apple unlawfully monopolized the retail market for the sale of apps, setting higher-than-competitive prices and locking consumers into buying apps only from Apple.[12] Apple asserted a statutory standing defense under *Illinois Brick*, arguing that the plaintiffs did not have standing because they were not direct purchasers from Apple.[13] The Court found that iPhone users who purchased apps from the App Store were direct purchasers because they purchased apps directly from Apple and thus have standing under *Illinois Brick* to sue for damages due to alleged antitrust violations under Section 4 of the Clayton Act.[14]

This decision will potentially change the relationship between digital platforms and their users by allowing consumers to sue technology platforms, despite the presence of third-party developers who made the apps.[15] Additionally, there may be troublesome implications from a procedural standpoint. The Court erred in the manner it interpreted the *Illinois Brick Doctrine* as a contractual privity rule that bars consumers at the bottom of a vertical distribution chain from bringing suit.[16] The Court's errant interpretation led them to declare that the app users had standing to sue for damages as direct purchasers because they contracted directly with Apple and therefore had privity.[17] This declaration contradicts the traditional reading of Section 4 that is based in common law torts, in which plaintiffs who are most proximately harmed are granted standing to sue.[18]

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[9] *Ill. Brick Co.,* 431 U.S. at 729.

[10] *Apple Inc.*, 139 S. Ct. 1514 (2019).

[11] *See Apple Inc.*, 139 S. Ct. at 1527.

[12] *Id.* at 1519.

[13] *Id.*

[14] *Id.* at 1519; *see also* 15 U.S.C. § 15 (a) (stating "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue").

[15] *See* Adi Robertson, *How Apple's Supreme Court Loss Could Change the Way You Buy Apps*, THE VERGE (May 14, 2019), https://www.theverge.com/2019/5/14/18618127/apple-pepper-supreme-court-loss-kavanaugh-opinion-app-store-antitrust-explainer-vergecast.

[16] *Apple Inc.*, 139 S. Ct. 1514 at 1521.

[17] Privity of contract refers to "the relationship between parties to a contract, allowing them to sue each other but preventing a third party from doing so." *Privity*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see Apple Inc.*, 139 S. Ct. 1514 at 1519.

[18] *See* Standard Oil Co. of N. J. v. United States, 221 U.S. 1, 60 (1911) (concluding that the standard of reason applied at common law was intended to be a measure used for the purpose of

Furthermore, as Justice Gorsuch's dissent points out, the majority's interpretation would allow iPhone users to pursue a claim based on pass-on damages.[19] The pass-on defense is a claim that a member of the distributive chain who was overcharged passed on the price adjustment to reflect the charge and thereby suffered no damage.[20] The theory has been rejected by both *Hanover Shoe, Inc. v. United Shoe Mach. Corp*[21] and the *Illinois Brick Doctrine*.[22] In *Hanover Shoe*, the defendant raised a passing-on defense, stating that plaintiffs did not suffer a Section 4 injury because they overcharged their own customers due to the defendant's alleged illegal price-fixing.[23] Under this pass-on theory, damages would be calculated based on a showing that a direct or intermediate purchaser (in this case, the app developers) passed on the alleged price overcharge to another purchaser in the distribution chain and either suffered no damages or limited damages.[24] The theory was rejected by the Court in *Hanover Shoe*[25] and *Illinois Brick*[26] because it was incompatible with the legislative intent of the Sherman and Clayton Acts.[27]

The majority's reading of the *Illinois Brick Doctrine* as a privity-based rule, whereby iPhones users have standing to sue because they purchased directly from Apple's App Store and hence have "privity," is also erroneous because it is inconsistent with the objectives of the Clayton Act.[28] Antitrust laws were created in order to promote competition and encourage vigorous enforcement of the antitrust laws.[29] The majority's finding that the plaintiffs had standing due to evidence of contractual privity is easily manipulated. Furthermore, recasting the *Illinois Brick Doctrine* in this manner undermines the goals of the antitrust statutes to effectively deter monopolists and encourage private rights of ac-

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determining whether certain conduct violates the Sherman Act); *see also* Franklin D. Jones, *Historical Development of the Law of Business Competition*, 36 YALE L. REV. 42, 42 (1926) (discussing early common law antitrust policies in colonial America).

[19] *See Apple Inc.*, 139 S. Ct. 1514 at 1526 (Gorsuch, J., dissenting).

[20] *Pass-on Defense*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[21] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 483 (1968).

[22] *See Ill. Brick Co.,* 431 U.S. at 729.

[23] *Hanover Shoe, Inc*., 392 U.S. at 488.

[24] *California Supreme Court Rejects "Pass-on" Defense for Antitrust Damages*, CROWELL MORING (July 13, 2010), https://www.crowell.com/NewsEvents/AlertsNewsletters/all/California-Supreme-Court-Rejects-Pass-on-Defense-for-Antitrust-Damages.

[25] *Hanover Shoe, Inc*., 392 U.S. at 488.

[26] *Ill. Brick Co.*, 431 U.S. at 730.

[27] The Clayton Antitrust Act is codified at 15 U.S.C. §§ 12-27 and outlaws the following conduct: (1) Price discrimination; (2) Conditioning sales on exclusive dealings; (3) Mergers and acquisitions when they may substantially reduce competition; and (4) Serving on the board of directors for two competing companies. 15 U.S.C. §§ 12-27 (1914); *see* 15 U.S.C. § 2 (2004).

[28] *See* 15 U.S.C. §15(a) (1970).

[29] Brief of Antitrust Scholars as Amici Curiae in Support of Respondents at 10, Apple, Inc. v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204) (quoting *Ill. Brick Co.*, 431 U.S. at 745).

tion. Alleged violators may avoid liability by structuring their transactions so that no formal contract exists between them and the consumer.

This Comment proposes that the *Apple* majority should have read the *Illinois Brick Doctrine* through the traditional proximate cause analysis of the Clayton Act.[30] In its primary context, antitrust law was considered a codification of the common law, and any conduct that restrained trade was considered on par with other harmful torts.[31] Accordingly, under the tort concept of proximate cause, the correct plaintiff with standing to bring suit for damages is the one most proximately harmed by the antitrust conduct.[32] iPhone users have a causal link between Apple and themselves due to purchasing apps directly from the App Store and are thus directly harmed by Apple's alleged monopolistic conduct.[33] Moreover, by declaring that iPhone users were direct purchasers under the *Illinois Brick Doctrine* because they contracted with Apple, the majority confirmed a pass-on theory that was rejected by both *Illinois Brick*[34] and *Hanover Shoe.*[35] The *Illinois Brick* opinion was concerned with tracing complex economic adjustments and stated that pass-on cases would allow for apportionment of the recovery throughout the distribution chain and increase the overall costs of recovery.[36] Under a proximate cause analysis, this complexity would be eliminated, as the Court may compute damages through a comparison of markets, rather than estimating the amounts passed on at each stage of the distribution chain.[37]

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[30] 15 U.S.C. §§ 12-27 (1914).

[31] *See generally* Donald Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759 (1955) (discussing creation of Sherman Act as codifying common law antitrust principles); *see also* William H. Page, *The Scope of Liability for Antitrust Violations,* 37 STAN. L. REV. 1445, 1450-51 (1985) (analyzing the appropriate scope of liability in antitrust via the proximate cause doctrine in tort law).

[32] *See* Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L. J. 809, 810-13 (1977).

[33] *See Apple Inc.*, 139 S. Ct. at 1519.

[34] *Ill. Brick Co.*, 431 U.S. at 730.

[35] *Hanover Shoe, Inc*., 392 U.S. at 488 (holding that courts below properly rejected the assertion of the 'passing on' defense raised by the defendant, claiming the plaintiff suffered no legally cognizable injury because it increased its prices to its own customers).

[36] *Ill. Brick Co.,* 431 U.S. at 745.

[37] *See Apple Inc.*, 139 S. Ct. at 1518.

I. THE PROCEDURAL HISTORY OF *APPLE V. PEPPER*

A. *IN RE APPLE IPHONE ANTITRUST LITIGATION*: THE LOWER COURTS GRAPPLE WITH WHETHER IPHONE USERS HAVE STANDING

In 2011, Robert Pepper and three other consumers filed a class action complaint in the District Court of the Northern District of California alleging antitrust claims against Apple.[38] The plaintiffs alleged that Apple unlawfully monopolized the aftermarket for iPhone applications in violation of Section 2 of the Sherman Act.[39] Section 2 of the Sherman Antitrust Act of 1890 makes it unlawful for any person to monopolize, attempt to monopolize or combine or conspire with any other person or persons.[40]

The plaintiffs contended that Apple had monopolized and attempted to monopolize the market for iPhone apps.[41] The plaintiffs argued that Apple seized the entire distribution market for iPhone applications because the App Store was the only marketplace available for iPhone users to purchase apps.[42] Apple also prohibited app developers from selling iPhone apps through channels other than the App Store and threatened to void iPhone warranties if users downloaded unapproved apps.[43] Furthermore, Apple collected a 30% commission off the price of the apps from independent software developers.[44] Developers also had to purchase a "software development kit" released by Apple that enabled software developers to design applications for an annual price of $99.[45] Due to these fees, the plaintiffs alleged that third-party developers who contract with Apple are forced to sell their applications for higher-than-competitive prices.[46]

Apple argued that the plaintiffs had no standing because the plaintiffs were impermissibly seeking damages for injuries sustained as indi-

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[38] *See* In re Apple iPhone Antitrust Litigation, No. 11-cv-06714-YGR, 2013 WL 6253147, at *1 (N.D. Cal. Dec. 2, 2013).

[39] *Id*.

[40] 15 U.S.C. § 2 (2004).

[41] In re Apple iPhone Antitrust Litigation, No. 11-cv-06714-YGR, 2013 WL 6253147, at *1-2 (N.D. Cal. Dec. 2, 2013).

[42] *Id.* at *1.

[43] In re Apple iPhone Antitrust Litigation, 846 F.3d 313, 316 (9th Cir. 2017).

[44] In re Apple iPhone Antitrust Litigation, No. 11-cv-06714-YGR, 2013 WL 6253147, at *1-2 (N.D. Cal. Dec. 2, 2013).

[45] *Id.* at *2.

[46] *See Apple Inc.*, 139 S. Ct. at 1518.

rect purchasers.[47] Section 4 of the Clayton Act authorizes a private right of action for violation of antitrust laws, allowing the recovery of damages by "any person injured in his business or property by reason of anything forbidden in the antitrust laws."[48] The Supreme Court has promulgated a two-part test to determine standing.[49] There must first be a traditional "case or controversy,"[50] and the plaintiffs must allege an "injury-in-fact."[51] Under the *Illinois Brick Doctrine*, in order to maintain an "injury-in-fact" and claim damages under the Clayton Act, only the first party in the chain of distribution to purchase a price-fixed product has standing to sue.[52] Indirect purchasers are precluded from bringing suit based on the theory that unlawful overcharges were passed on to them by intermediaries who purchased from the alleged violator.[53]

Apple conceded that there is a 30% fee that Apple collects and that app purchasers pay the fee directly to Apple for every app they purchase.[54] However, Apple argued that collection of the fees from the app purchasers is irrelevant because the app developers first bear Apple's fee.[55] In Apple's view, the cost is passed through from the app developers to the app purchasers.[56] As such, the plaintiffs achieved indirect purchaser status.[57] The district court agreed with Apple and granted Apple's motion to dismiss, holding that iPhone users were indirect purchasers without standing under the *Illinois Brick Doctrine*.[58] The plaintiffs appealed.[59]

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[47] In re Apple iPhone Antitrust Litigation, 11-cv-06714-YGR, 2013 WL 6253147, at *10 (N.D. Cal. Dec. 2, 2013).

[48] 15 U.S.C. §§ 12-27.

[49] "Standing" is a party's right to make a legal claim or seek judicial enforcement of a duty or right. To have standing in federal court, a plaintiff must show (1) that the challenged conduct has caused the plaintiff actual injury, and (2) that the interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question. *Standing*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[50] *See* Flast v. Cohen, 392 U.S. 83, 95 (1968) (holding that "no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, [or] when the question sought to be adjudicated has been mooted by subsequent developments").

[51] *See* Lujan v. Defenders of Wildlife, 504 U.S. 556, 560 (1992) (holding that respondents bear the burden of showing standing by establishing an injury in fact is "(a) concrete and particularized, and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical' ") (quoting Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)).

[52] *See Ill. Brick Co.,* 431 U.S. at 724.

[53] In re Apple iPhone Antitrust Litigation, 11-cv-06714-YGR, 2013 WL 6253147, at *9 (N.D. Cal. Dec. 2, 2013).

[54] *Id.* at *5.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.* at *6-7.

[59] *See* In re Apple iPhone Antitrust Litigation, 846 F.3d 313 (9th Cir. 2017).

The United States Court of Appeals for the Ninth Circuit reversed the district court's decision.[60] The Ninth Circuit reasoned that because Apple was the distributor of the apps and sells them directly to purchasers through its App Store, the plaintiffs had standing to sue Apple as direct purchasers.[61] The Ninth Circuit did not discuss whether the developers of the apps were also direct purchasers because the issue had no impact on the analysis of the case.[62] The court narrowed down the issue to deciding whether Apple is a manufacturer from whom the plaintiffs purchased indirectly, or whether Apple is a distributor from whom the plaintiffs purchased directly.[63] The court struck down Apple's argument that it does not sell apps, but rather sells software services to developers and thus cannot simultaneously be a distributor of apps to iPhone users.[64] Instead, the court reasoned that these third-party developers did not have their own "stores," and as part of Apple's alleged anti-competitive behavior, Apple specifically forbade developers and iPhone users to purchase apps from anywhere other than the App Store.[65] The Ninth Circuit concluded that purchasers of apps were not indirect purchasers because Apple was a distributor selling directly to consumers through its App Store.[66] The court interpreted the *Illinois Brick* standing analysis as a question of whether the party is a manufacturer or a distributor.[67] Consequently, the court concluded that the plaintiffs were direct purchasers of the apps and thus had standing under the Clayton Act to seek damages for Apple's alleged monopolization.[68] Apple appealed the decision, and the Supreme Court granted writ of certiorari.[69]

B. *APPLE INC. V. PEPPER:* THE SUPREME COURT'S TAKE ON THE *ILLINOIS BRICK DOCTRINE*

In deciding *Apple*, the Supreme Court construed the *Illinois Brick Doctrine* as a rule that bars suits from indirect purchasers who are two or more steps removed from the antitrust violator in a vertical distribution

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[60] *Id.* at 324.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 322.

[64] *Id.* at 323.

[65] *Id.* at 324.

[66] *Id*.

[67] *Id.*

[68] *Id.* at 322.

[69] "Certiorari" refers to an "extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review." *Certiorari*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see Apple Inc.,* 138 S. Ct. 1514.

chain.[70] The majority stated that the ruling followed from a statutory analysis of Section 4 of the Clayton Act, in which immediate buyers from the alleged antitrust violators may maintain a suit against the antitrust violators.[71] The majority ruled that plaintiffs were not consumers at the bottom of the distribution chain because the plaintiffs purchased the apps directly from Apple.[72] Despite the presence of the third-party developers, the plaintiffs paid the alleged overcharge directly to Apple and thus there was no intermediary in the distribution chain between Apple and the plaintiffs.[73]

In Justice Gorsuch's dissenting opinion, he argued that the majority should have interpreted the *Illinois Brick Doctrine* as a proximate cause rule instead of a contractual privity rule, in which only consumers who directly buy from the alleged violator have standing to sue.[74] Gorsuch noted that the *Illinois Brick* decision had "nothing to do" with privity of contract.[75] In Gorsuch's opinion, unless Congress provides otherwise, the Court generally reads the Clayton Act's statutory cause of action as limited to plaintiffs who are proximately injured by violations of the statute.[76] Under this analysis, suits are barred from plaintiffs who are derivatively injured by a third-party due to the defendant's acts.[77]

Furthermore, Gorsuch argued that the majority let a pass-on case proceed by wrongfully recasting the *Illinois Brick Doctrine* as a rule that only forbade suits where the plaintiff does not contract directly with the defendant.[78] Gorsuch noted that *Illinois Brick* ruled against the pass-on theory, holding that a plaintiff does not have standing to sue based on an allegation that an intermediary distributor may have passed the defendant's alleged overcharge onto the plaintiff.[79] In Gorsuch's view, *Illinois Brick* rejected pass-on theories of damages because it would allow plaintiffs at each level in the distribution chain to assert conflicting claims to a common fund.[80] Gorsuch argued that the majority's decision would re-

[70] The vertical distribution chain is exemplified in the following scenario: if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A, although B may. In this scenario, C exemplifies an indirect purchaser two or more steps removed from the alleged violator. In contrast, direct purchasers, such as B, are immediate buyers of the distributor's product and have standing to sue. *Apple Inc.*, 139 S. Ct. at 1519-21.

[71] *Id.* at 1521 (quoting Kansas v. UtiliCorp United Inc., 497 U.S. 199, 207 (1990)).

[72] *Id.*

[73] *Id.*

[74] *Id.* at 1529-30 (Gorsuch, J., dissenting).

[75] *Id.* at 1530 (Gorsuch, J., dissenting).

[76] *Id.* at 1527 (Gorsuch, J., dissenting).

[77] *Id.* (Gorsuch, J., dissenting).

[78] *Id.* at 1526 (Gorsuch, J., dissenting).

[79] *Id.* (Gorsuch, J., dissenting).

[80] *Id.* at 1528 (Gorsuch, J., dissenting). A common fund is a monetary amount recovered by a litigant or lawyer for the benefit of a group that includes others, the litigant or lawyer then being

sult in the federal courts having the cumbersome burden of apportioning claims among all potential plaintiffs that could have absorbed part of the overcharge.[81] The calculation of damages would be difficult, considering that each app is sold at a different price and it is uncertain how much of that price is passed on from the developers.[82] Gorsuch concluded that calculating damages for pass-on plaintiffs (in this case, the app purchasers) would be "unduly complicated."[83] Therefore, the best plaintiff to bring suit are the app developers, as they were directly engaged with and injured by the defendant.[84]

II. THE DEVELOPMENT OF ANTITRUST STANDING TO SUE

A. THE ANTITRUST STATUTES AND THEIR APPLICATIONS

The Sherman Act was enacted in 1890, proscribing trusts and conspiracies that would restrain trade and reduce economic competition.[85] The Act was passed in response to the fast-paced industrialization of the United States, where huge fortunes were amassed by businessmen and builders and operators of the railroad.[86] The rest of Americans who worked as farmers, traders, laborers, and individual business proprietors were frequently rendered helpless, and Congress wanted to address the disparity of wealth that was due to businesses maximizing profits by minimizing competition.[87] Although Congress passed the Act to preserve the economic values of competition in business and freedom in trade, the general trend towards *laissez-faire* economics made the courts less inclined to enforce the laws.[88] The Supreme Court declared in multiple cases that the Sherman Act did not prohibit every restraint of trade but

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entitled to reasonable attorney's fees from the entire amount. *Common Fund*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[81] *Id.* at 1526 (Gorsuch, J., dissenting).

[82] *See id.* at 1528-29 (Gorsuch, J., dissenting).

[83] *Id.* at 1530 (Gorsuch, J., dissenting).

[84] *Id.* at 1530-31 (Gorsuch, J., dissenting).

[85] Trusts are groups of businesses that team up or form a monopoly in order to dictate pricing in a particular market. Will Kenton, *Sherman Antitrust Act,* INVESTOPEDIA (June 29, 2020), https://www.investopedia.com/terms/s/sherman-antiturst-act.asp.; *see* Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7).

[86] Philip Fairbanks, *Antitrust and the Consumer Interest: Can Section 4 of the Clayton Act Survive the Current Supreme Court?*, 27 CATH. U. L. Rev. 81, 82 (1978).

[87] *See* Rush H. Limbaugh, *Historic Origins of Antitrust Legislation,* 18 MO. L. REV. 215, 230-33 (1953).

[88] "Laissez-faire" is a doctrine that favors governmental abstention from interfering in economic or commercial affairs. *Laissez-faire*, BLACK'S LAW DICTIONARY (11th ed. 2019). Philip Fairbanks, *Antitrust and the Consumer Interest: Can Section 4 of the Clayton Act Survive the Current Supreme Court?*, 27 CATH. U. L. Rev. 81, 85 (1978).

only reasonable ones.[89] The lack of enforcement created public outcry for Congress to take action.[90] The Clayton Act was passed in 1914, amending and strengthening the Sherman Act by including specific practices that the Sherman Act did not clearly prohibit, such as activities with undesirable monopolistic tendencies.[91] Sections 4 and 16 of the Clayton Act also provide antitrust plaintiffs with private rights of action.[92]

Under Section 4 of the Clayton Act, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue."[93] Federal courts interpreted this provision to require that (1) the plaintiff be a person;[94] (2) a violation of the antitrust laws has occurred;[95] (3) the plaintiff suffered an injury to his business or property;[96] and (4) the causal connection between the antitrust violation and the injury to the plaintiff's business or property is sufficiently proximate.[97] The injury must also be reducible to a reasonable dollar amount.[98]

The open-ended language of Section 4 did not provide much guidance about which plaintiff in a chain of distribution would be accorded standing to bring suit.[99] It was not until *Hanover Shoe* that the Supreme Court developed the basis of the current "indirect purchaser" theory of standing.[100] In *Hanover Shoe,* the defendant, a shoe machine company, raised a pass-on defense, stating that the plaintiff, a shoe manufacturer, suffered no legally cognizable injury by the alleged price-fixing or monopolization because it increased the price charged to its own customers.[101] The Court rejected this argument, reasoning that if buyers can show that the price they paid was illegally high, as well as the amount of the overcharge, they have made a prima facie case of injury and damage within the meaning of Section 4.[102] *Illinois Brick* confirmed this analysis, holding that plaintiffs who are not direct purchasers from the alleged

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[89] *Id.*

[90] *Id.*

[91] 15 U.S.C. §§ 12-27 (1970).

[92] 15 U.S.C. § 15 (1970); 15 U.S.C. § 26 (1970).

[93] 15 U.S.C. § 15 (1970).

[94] *Id.*

[95] *Id.*

[96] *See, e.g*., Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972) (the Court interpreting "business or property" as "commercial interests").

[97] Fairbanks, *supra* note 86.

[98] *Id.*

[99] *Standing to Sue in Antitrust Cases: The Offensive Use of Passing-On*, 123 U. PA. L. REV. 976, 978 (1975).

[100] *Hanover Shoe, Inc.*, 392 U.S. at 502.

[101] *Id.* at 488.

[102] *Id.*

violators may not maintain an antitrust suit under Section 4 of the Clayton Act.[103]

B. THE SUPREME COURT'S DISMISSAL OF PASS-ON DAMAGES AND INDIRECT PURCHASER STANDING

1. Hanover Shoe *and the Rejection of the Pass-on Damages Defense*

Hanover Shoe was a major case that shaped the jurisprudence of indirect purchaser lawsuits, with the Court's first dismissal of a passing-on defense.[104] The Court declared that the plaintiff suffered an injury within the meaning of Section 4 of the Clayton Act, despite the possibility that it overcharged its own customers due to the alleged illegal price-fixing or monopolization.[105]

In 1968, Hanover Shoe ("Hanover") accused United Shoe ("United") of monopolizing the shoe machinery industry in violation of the Sherman Act.[106] Hanover, a shoe manufacturer and a customer of United, alleged that United's refusal to sell its shoe machinery resulted in unlawful monopolization.[107] Hanover argued that it should recover the difference between what it paid United in shoe machine rentals and what it would have paid had United been willing to sell the machines.[108] Hanover would have bought rather than leased from United had it been given the opportunity to do so, and the cost to Hanover would have been less than the rental paid for leasing the same machines.[109]

United countered that Hanover suffered no legally cognizable injury within the meaning of Section 4, as the price that Hanover charged its own customers would have included any of the alleged overcharge that fell upon Hanover.[110] United further contended that if Hanover had bought the machines at a lower price, it would have charged less for the shoes and made no more profit than it made by leasing.[111] United argued that in the circumstance where the alleged victim of the violation could charge his customers a higher price due to alleged illegal price-fixing, the buyer suffers no loss from the overcharge.[112]

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[103] *Ill. Brick Co*., 431 U.S. at 729.
[104] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).
[105] *Id.* at 488.
[106] *Id.* at 483.
[107] *Id.*
[108] *Id.* at 483-84.
[109] *Id.* at 487.
[110] *Id.* at 484.
[111] *Id.* at 488.
[112] *Id.* at 491.

The Court rejected United's pass-on defense, emphasizing the deterrent objective of the antitrust laws.[113] The Court reasoned that as long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows.[114] Furthermore, no matter the price the buyer sells, had the seller not raised illegally high prices, the buyers' profits would be greater.[115] In the Court's opinion, if the pass-on defense were to be allowed, then victims of the alleged overcharge would have to prove that they did not pass on the higher price to their customers.[116] In rejecting United's argument, the Court left open the question of whether only the illegally overcharged direct purchaser can sue for damages, or if others in the chain of distribution may bring suit.[117] However, the Court acknowledged such an issue arising in the future and generally disapproved of it.[118] The Court stated that if the buyers are subjected to the passing-on defense, the ultimate consumers who buy from them would also have to prove that the buyers passed on the higher price.[119] The Court concluded that these ultimate consumers would only have a tiny stake in the lawsuit and would not have interest to attempt a class action, resulting in violators "retain[ing] the fruits of their illegality" because no one was available to bring suit against them.[120]

2. Illinois Brick *and the Indirect Purchaser Rule*

In 1977, the Supreme Court took the case of *Illinois Brick Co. v. Illinois* and addressed whether consumers who did not buy directly from the alleged antitrust violator but from an intermediary have standing to sue and obtain the entire overcharge as damages.[121] The Illinois Brick Company ("the Company") was a manufacturer of concrete bricks that allegedly fixed its prices and sold them to contractors who then built buildings for the State of Illinois ("the State").[122] The State contended that the Company had engaged in a price-fixing conspiracy in violation of the Sherman Act.[123] The Company moved for partial summary judgment against the State, arguing that the State did not directly purchase

[113] *Id.* at 489.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 494.
[117] *Id.* at 504.
[118] *Id.* at 504.
[119] *Id.* at 494.
[120] *Id.*
[121] Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).
[122] *Id.* at 726-27.
[123] *Id.*

bricks from them and that under the precedent of *Hanover Shoe,* only direct purchasers could sue for the alleged overcharge.[124]

Although there is an underlying assumption that an intermediary firm (the contractors who bought the bricks) would pass on at least part of the illegal price-fixing to its customers, *Illinois Brick* determined that pass-on damages could not be used offensively for the plaintiff if they could not be used defensively for the defendant, as occurred in *Hanover Shoe*.[125] The Court reasoned that allowing offensive uses of pass-on damages but not allowing defensive uses would create a serious risk of multiple liability for defendants.[126] *Illinois Brick* declined to abandon *Hanover Shoe*'s construction of Section 4, whereby the overcharged direct and not others in the chain of distribution is the "party injured in his business or property."[127]

In response to the State's argument to limit *Hanover Shoe* and allow a pass-on theory to be used offensively, the Court stated that the risk of duplicative recoveries created by unequal application of *Hanover Shoe* is "much more substantial" than in situations where a defendant is sued by two different plaintiffs asserting claims to a common fund.[128] The Court determined that "a one-sided application of *Hanover Shoe* substantially increases the possibility of inconsistent adjudications and. . . unwarranted multiple liability for the defendant."[129] The result, in the Court's opinion, would be overlapping recoveries that are *certain to result* unless the indirect purchaser is unable to establish any pass on whatsoever.[130]

Consequently, the Court held that the first purchaser in a vertical distribution chain was the direct purchaser, and this direct purchaser should obtain the entire overcharge as damages, without reduction for the amount that it had passed onto other purchasers beneath it in the distribution chain.[131] Accordingly, the *Illinois Brick Doctrine* developed, whereby indirect purchasers are unable to bring suit for damages due to violations of the Sherman Act, as they are presumed to have already been recovered in full by the direct purchaser.[132]

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[124] *See id*. at 729 (citing Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 483 (1968)).

[125] *Id.* at 727.

[126] *Id.* at 730.

[127] *Id.* at 729.

[128] *Id.* at 730.

[129] *Id.*

[130] *Id.*

[131] *Id.* at 732-33.

[132] *See id.* at 729-31.

III. THE COURT'S ERRONEOUS APPLICATION OF THE *ILLINOIS BRICK DOCTRINE* IN *APPLE V. PEPPER*

A. DIRECT PURCHASER STANDING BASED ON CONTRACTUAL PRIVITY CONTRADICTS THE OBJECTIVES OF THE CLAYTON ACT

The majority in *Apple* concluded that because the plaintiffs purchased the apps directly from Apple, they were direct purchasers with standing to bring suit.[133] In the majority's view, evidence of privity of contract between the two parties is what establishes standing under the *Illinois Brick Doctrine*.[134] A privity-based analysis of *Illinois Brick*'s rule is erroneous, as it is plainly inconsistent with the objective of Section 4 of the Clayton Act.[135] As such, thirty states and many associations filed amicus briefs advocating that the indirect purchaser rule contradicts the purpose of the Clayton Act.[136] In an amicus brief filed by The Antitrust Scholars, the Scholars argued that antitrust laws were created in order to promote competition and encourage the "vigorous private enforcement of the antitrust laws."[137] The Sherman Act and the Clayton Act created a private right to action, and in the opinion of the Antitrust Scholars, maintaining robust private enforcement of the antitrust laws is particularly important in our current technological market.[138]

Apple's majority's decision can impact private enforcement by making wronged parties less likely to pursue litigation. The majority rejected Apple's argument that barring iPhone owners from suing will better promote effective enforcement of antitrust laws.[139] In the majority's view, leaving consumers "at the mercy of" monopolistic retailers because upstream suppliers could *also* sue the retailers "make[s] little sense" and

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[133] *Apple Inc.*, 139 S. Ct. at 1519.

[134] *Id.*

[135] "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. §15(a) (1970).

[136] *See* Kathy L. Osborne, Susanne A. Johnson & Anna E. Salstrom, *Future of Antitrust Class Actions Foreshadowed in* Apple Inc. v. Pepper, FAEGRE DRINKER (May 23, 2019), https://www.faegredrinker.com/en/insights/publications/2019/5/future-of-antitrust-class-actions-foreshadowed-in-apple-inc-v-pepper.

[137] Brief of Antitrust Scholars as Amici Curiae in Support of Respondents at 10, Apple, Inc. v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204) (quoting Ill. Brick Co. v. Illinois 431 U.S. 720, 745 (1977)).

[138] *Id.*

[139] *Apple Inc.*, 139 S. Ct. at 1524.

would directly contradict the longstanding goal of effective enforcement and consumer protection in antitrust cases.[140]

However, the majority failed to address the role of the app developers in the chain of distribution. By categorizing Apple as a distributor and the plaintiffs as direct purchasers because they contracted directly with Apple, the majority ignored the presence of the app developers–the party who is presumably most harmed by Apple's alleged monopolization.[141] To construe the *Illinois Brick Doctrine* as a privity-based standing theory makes it so that the app developers are less likely to bring suit successfully, as Apple may avoid liability through structuring their transactions so that no formal contracts exist between the parties.

The Antitrust Scholars raised this issue, emphasizing that the number of individuals with incentive to bring suit against giant technology companies such as Apple is already limited.[142] Furthermore, the brief claimed that this analysis would undermine enforcement by permitting monopolists to avoid liability through "clever transactional structuring."[143] In the Scholars' opinion, such an analysis would directly conflict with the Clayton Act's objectives of promoting competition and deterring complete concentrations of power, as economically identical transactions could be structured to vest the "direct purchaser" status on the party that is least likely to sue.[144]

The majority agreed with the brief's claim that plaintiffs should be accorded standing as direct purchasers.[145] However, the justification behind its rationale fundamentally contradicts the objectives of the Clayton Act because the interpretation of the *Illinois Brick Doctrine* is formulistic in nature. In its holding, the majority highlighted the three primary goals promoted by the *Illinois Brick* decision: "(1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants."[146] The majority's interpretation of the *Illinois Brick Doctrine* is contradictory to these objectives. Extending the *Illinois Brick Doctrine* to bar app store purchasers because of the presence of an intermediary would limit the pool of potential private enforcers. Yet the majority found that the plaintiffs had established standing for the reason that they

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[140] *Id.*

[141] *See Apple, Inc*., 139 S. Ct. at 1519.

[142] Brief of Antitrust Scholars as Amici Curiae in Support of Respondents at 9, Apple, Inc. v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204).

[143] *Id.*

[144] *Id.*

[145] *Apple Inc.*, 139 S. Ct. at 1524.

[146] *Id*. at 1524.

were not consumers at the bottom of the vertical distribution chain.[147] The majority determined that there was no intermediary in the distribution chain because the plaintiffs purchased directly from Apple's App Store and therefore were direct purchasers.[148] The opportunity to overrule *Illinois Brick* was declined by the majority, the reason being that there was "no occasion" to consider that argument because the plaintiffs purchased directly from Apple.[149]

The majority's reasoning is flawed, however, because it essentially ignores the presence of the third-party developers and fundamentally misstates that *Illinois Brick* forbids only suits where plaintiffs do not have standing under the Clayton Act because they did not contradict directly with the alleged violator.[150] This contractual privity analysis is inconsistent with the objective of the Clayton Act and the guidelines set by *Illinois Brick*, as it is easily manipulated. Recasting the *Illinois Brick Doctrine* in this manner would undermine the deterrence effects of the antitrust statutes and private enforcement, as pass-on cases may proceed only by showing the plaintiff contracted directly with the defendant. A privity analysis expands the *Illinois Brick Doctrine,* as potential antitrust violators may avoid liability by structuring their transactions such that no formal contract exists between them and the consumer. This liability avoidance contradicts the Clayton Act's objective of giving action to "any person" injured by the antitrust violation.[151]

Moreover, the *Apple* majority's privity analysis cuts against *Illinois Brick*'s intention to avoid complicated damages calculations and eliminate duplicative damages.[152] The majority dismissed long-standing arguments from *Hanover Shoe* and *Illinois Brick* which state that allowing indirect purchasers to sue cuts sharply against deterrence and may render damages calculations incredibly complex.[153] The majority reasoned that a complex damages calculation is "hardly unusual in antitrust cases," and that the *Illinois Brick Doctrine* is not a "get-out-of-court free card" for monopolistic retailers to play any time that a damages calculation may be complicated.[154] However, *Illinois Brick* stated that *whole new dimensions of complexity* would be added to treble-damages suits, undermining their effectiveness, if the use of pass-on theories were allowed. *Illinois*

[147] *Id.* at 1521.
[148] *Id.*
[149] *Id.* at 1521 n.2.
[150] *Id.* at 1521.
[151] *See* 15 U.S.C. § 15 (1970).
[152] *Ill. Brick Co*., 431 U.S. at 730-3.
[153] *Apple Inc.*, 139 S. Ct. 1524-25.
[154] *Id.*

Brick's concern was not matched by the *Apple* majority's dismissal that these damages calculations are "hardly unusual" in antitrust cases.[155]

Furthermore, the majority reasons that damages calculations under the *Illinois Brick Doctrine* may be equally as complicated, stating that there may be no difference between a retailer markup case and a retailer commission case.[156] However, the majority gave no grounds on how to conduct the damages analysis.[157] Managing these calculations in "the real economic world rather than an economist's hypothetical model" was a concern *Hanover Shoe* expressed.[158] Through its refusal to discuss a method to calculate these damages, the majority failed to heed the warning established by the prior court decisions. Furthermore, they did not acknowledge the impact that a lack of a damages calculation method may have on private enforcement.

B. A Proximate Cause Analysis Has Been Traditionally Used to Establish Standing Under the Clayton Act

The language of the Clayton Act is open-ended in nature, and many antitrust standing cases represent a judicial effort to instill the statute with greater specificity, based upon judgments about the goals of antitrust law.[159] In its primary context, antitrust law was originally considered to be a codification of the common law.[160] Although Congress did not debate particular common-law limitations in creating the Act, the frequent references to common-law principles implied that Congress assumed antitrust cases are subject to constraints comparable to common-law rules.[161] Any conduct that restrained trade was considered on par with other harmful torts, and consequently courts adopted the tort concept of proximate cause to determine the appropriate antitrust standing and scope of damages.[162] Various cases showcase the application of the traditional common-law tort principle of proximate cause in Section 4 actions.

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[155] *Id.*

[156] *Id.* at 1524.

[157] *See id.*

[158] *Hanover Shoe*, 392 U.S. at 493.

[159] *Clayton Antitrust Act and Sherman Antitrust Act—Antitrust Trade and Regulation—Antitrust Standing*—Apple Inc. v. Pepper, 133 Harv. L. Rev. 382, 387 (2019).

[160] *See generally* Dewey, *supra* note 29 (discussing the creation of Sherman Act as codifying common law antitrust principles).

[161] *Id.*

[162] *See* Page, *supra* note 31 (analyzing the appropriate scope of liability in antitrust via the proximate cause doctrine in tort law).

The Supreme Court has observed that Congress enacted Section 4 with language borrowed from Section 7 of the Sherman Act.[163] Before the Clayton Act was passed, lower federal courts had read Section 7 to incorporate common-law principles of proximate causation, and the Supreme Court has reasoned that the congressional use of Section 7 language in Section 4 of the Clayton Act presumably carried the intuition to "adopt the judicial gloss" that avoided a simple literal interpretation.[164] As such, the Supreme Court has held that a plaintiff's right to sue under Section 4 required a showing that the defendant's violation not only was a "but for" cause of injury, but was the proximate cause as well.[165] Proximate cause has been described as "reasonably foreseeable" or "anticipated as a natural consequence."[166] A jury may infer that a causal relation exists in cases where the plaintiff proves a loss that an antitrust violation would be likely to cause.[167] Under such a proximate cause analysis, plaintiffs are entitled to recover all damages proximately caused by the antitrust violation.[168]

Additionally, for plaintiffs to recover treble damages, they must prove more than injury causally linked to an alleged violator's illegal acts.[169] The Supreme Court articulated that in order to maintain a cause of action under Section 4, plaintiffs must prove "antitrust injury."[170] An antitrust injury reflects the anticompetitive nature of either the alleged violation or of the anticompetitive acts made possible by the violation.[171] The Court has stated that an antitrust injury does not necessarily mean that plaintiffs bringing claims under Section 4 must prove an "actual les-

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[163] Section 7 of the Sherman Act states, "No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. §18.

[164] *See* Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 520, 534 (1983).

[165] Holmes v. Securities Investor Prot. Corp., 503 U.S. 258, 267 (1992).

[166] Proximate cause is a cause that is legally sufficient to result in liability: an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor. It is a cause that directly produces an event and without which the event would not have occurred. *Proximate Cause*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see, e.g.*, First Nationwide Bank v. Celt Fund Corp., 27 F.3d 763, 799 (2nd Cir. 1984).

[167] *See* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 697 (1962).

[168] *See id.* (stating that a causal relation exists where plaintiff proves an injury likely to be caused by antitrust violation).

[169] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

[170] *See id.*

[171] *Id.*

sening of competition" in order to recover.[172] Plaintiffs may prove antitrust injury before competitors are driven out of the market and competition is directly lessened.[173] Furthermore, the antitrust injury must be "attributable to an anti-competitive aspect of the practice under scrutiny."[174] In other words, an antitrust injury is the type of injury that the claimed violations would be likely to cause and one which the antitrust statutes were created to prevent.[175] As the focus of the Sherman Act and the Clayton Act is consumer welfare and protection of the marketplace, courts have construed that an antitrust injury occurs when the injury flows from acts harmful to the consumer.[176] The court has stated that the essence of antitrust injury is the "restriction or distortion of consumer choice by reason of the antitrust defendant's conduct in the market."[177]

Courts have also concluded that an antitrust injury involves a causation requirement in order to define the class of potential plaintiffs eligible to bring suit.[178] The court must determine whether the violation was the cause-in-fact of the injury–that "but for" the violation, the injury would not have occurred.[179] The link between the parties cannot be too remote to satisfy the proximate cause requirement.[180] There must be some direct relation between the injury asserted and the injurious conduct alleged.[181] Therefore, a plaintiff who alleges harm flowing merely from the misfortunes visited upon a third person by the defendant's act is generally too remote to bring a Section 4 claim.[182] The plaintiff must show that the antitrust violation was a "material and substantial factor" that caused their alleged injuries.[183] Findings of numerous intervening economic and market factors may cause a plaintiff to fail to prove injury.[184]

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[172] *Id.*

[173] *Id.* at 489 n.14.

[174] *See* Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990).

[175] *Brunswick Corp.*, 429 U.S. at 489 (quoting Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 125 (1969)).

[176] *See* Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1445 (9th Cir. 1993) (finding plaintiff alleging "primary-line discrimination" must prove antitrust injury by showing injury flows from effects of conduct that are harmful to consumer welfare).

[177] *See* Sullivan v. Tagliabue, 34 F.3d 1091, 1101 (1st Cir. 1994).

[178] *See* Greater Rockford Energy and Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 404 (7th Cir. 1993).

[179] *Id.* at 395 (quoting MCI Communications Corp. v. American Telephone & Telegraph Co., 798 F.2d 1081, 1161 (7th Cir. 1983)).

[180] *See* Holmes v. Securities Investor Prot. Corp., 503 U.S. 258, 286 (1992).

[181] *Id.* at 268.

[182] *Id.*

[183] Greater Rockford Energy and Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 402 (7th Cir. 1993) (finding that there were many alternative explanations for the injuries which the plaintiffs alleged, such as reports in the media, state laws that hurt sales, and a termination of state subsidy).

[184] *Id.*

C. J. GORSUCH DISSENTS–THE KEY RELATIONSHIP HE MISSED

Justice Gorsuch critiqued the Kavanaugh-led majority opinion in *Apple,* stating that its interpretation of the *Illinois Brick Doctrine* confused established precedence and created a standard that could be easily manipulated by defendants in antitrust litigation.[185] He reasoned that unless Congress provided otherwise, the courts generally read statutory causes of action as "limited to plaintiffs whose injuries are proximately caused by violations of the statute."[186] This proximate cause requirement typically bars suit from plaintiffs with injuries that are "derivative" and caused by a third-party who is injured directly by the defendant's alleged acts.[187]

Gorsuch primarily argued that app purchasers relied upon pass-on theories to establish damages that were rejected by *Illinois Brick*.[188] Gorsuch stated that these purchasers may only be injured if the developers were able to *and* chose to pass on the overcharge in the form of higher app prices.[189] However, Gorsuch overlooked a key component that the majority honed in on: the relationship between the plaintiffs and Apple. The plaintiffs in *Apple* are able to establish proximate cause because there is a causal link between Apple and themselves, due to their having purchased apps directly from Apple's App Store. This link is *not* too remote to satisfy the proximate cause requirement, because Apple bars iPhone users from purchasing apps from anywhere other than the App Store.[190] Moreover, Apple's alleged monopolization and price-fixing that led to the anti-competitive prices of apps is exactly the type of injury that the antitrust laws were intended to prevent.

Therefore, while Gorsuch's proximate cause analysis was valid because traditionally, courts have construed a proximate cause requirement in determining standing, he failed to discern and recognize the relationship between Apple and the plaintiffs. As the majority points out, iPhone users contract directly with Apple in order to purchase the apps, despite the fact that a third-party develops and markets them on the App Store. Gorsuch's failure to appreciate the relationship entailed his misinterpretation that the plaintiffs are unable to establish standing because they are

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[185] *Apple Inc.*, 139 S. Ct. at 1526 (Gorsuch, J., dissenting).

[186] *Id.* at 1527 (Gorsuch, J., dissenting) (quoting Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 132 (2014)).

[187] *Id.* (Gorsuch, J. dissenting).

[188] *Id.* at 1528 (Gorsuch, J., dissenting).

[189] *Id.* (Gorsuch, J., dissenting).

[190] *See* In re Apple iPhone Antitrust Litigation, No. 11-cv-06714-YGR, 2013 WL 6253147, at *2 (N.D. Cal. Dec. 2, 2013).

relying on the pass-on theory and are not proximately harmed.[191] However, the direct relationship between Apple and the plaintiffs as distributor and purchaser satisfies the proximate cause requirement. Consequently, plaintiffs should have standing because Apple's alleged antitrust violation proximately caused their injuries, as the majority correctly concluded.

D. CALCULATION OF DAMAGES UNDER THE PROXIMATE CAUSE ANALYSIS

Under the proximate cause analysis, damages will be awarded if it is shown that the nexus between the alleged antitrust misconduct and the injury suffered by the plaintiff is sufficiently close.[192] As discussed above, once the plaintiff shows the defendant's violation was a material cause of the plaintiff's injury, a proximate cause analysis justifies an award of damages.[193] Damages are calculated by presenting evidence that compares the before and after effects of the unlawful violation.[194] In prior cases, the Supreme Court had considered it sufficient to qualify damages through a presentation of evidence that compares profits before and after the alleged unlawful violation.[195] The Court has stated that while this approach to qualify the amount of damages is mainly circumstantial, it is competent and "sufficiently showed the extent of the damages, as a matter of just and reasonable inference, to warrant the submission of this question to the jury."[196]

In prior cases, the Supreme Court also allowed damages based upon a showing of the difference between a violated market and what the market would have been "but for" the alleged antitrust violation.[197] If the causal connection is less clear-cut, such as when there are multiple alleged violators, plaintiffs may seek damages calculations in the form of the difference between "the amount actually realized by the petitioner and what would have been realized by it from sales at reasonable prices except for the unlawful acts of the respondents."[198] The reasoning behind this logic is that there existed no other economic condition that would

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[191] *Apple Inc.*, 139 S. Ct. at 1526 (Gorsuch, J., dissenting).

[192] *See* Perkins v. Standard Oil Co., 395 U.S. 642, 649-50 (1969).

[193] *See* Earl E. Pollock, *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action*, 57 NW. U. L. REV. 691, 692 (1963).

[194] *See* Eastman Kodak Co. v. S. Photo Materials Co., 273 U.S. 359, 364-65, 379 (1927).

[195] *Id.* at 379.

[196] *See id.*

[197] *See* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931).

[198] *Id.* at 561.

have caused the difference in the price, as but for the defendant's alleged violation, the prices would have remained the same.[199]

In *Apple,* the majority found that the plaintiffs had standing based on their contractual privity with Apple.[200] The majority ignored the complexity of computing to what extent the individual third-party app developers were able to, and opted to, pass on the 30% commission to customers by increasing the sales price.[201] If the majority had adopted a proximate cause interpretation, the calculation of damages would be based upon a showing that the defendant's violations were a material cause of injury for the plaintiffs. Similarly to established precedence, a proximate cause interpretation would allow the majority to look at the market as a whole.[202] The App Store is the sole marketplace where Apple allows its iPhone users to purchase apps.[203] The market therefore consists solely of Apple, independent third-party developers, and the plaintiffs who purchased the apps.[204] A causal relationship to form proximate causation is satisfied by the fact that the plaintiffs purchased apps directly from Apple's App Store.[205] As a result, the plaintiffs are able to quantify and compute their damages based on a comparison of the current market (with Apple's alleged price-fixing) and a market where such a violation does not occur. Following prior precedence by looking at the market as a whole and computing damages based upon this approach would eliminate the need to estimate "passed-on" damages. As such, the decision would align with the *Illinois Brick* Doctrine's objectives of avoiding complicated damages calculations and duplicative damage awards.

CONCLUSION

The majority in *Apple* should have interpreted the *Illinois Brick* Doctrine under a proximate cause analysis instead of a privity analysis.[206] *Hanover Shoe* and *Illinois Brick* established precedence to effectively deter monopolistic conduct by rejecting pass-on theories, both offensively and defensively.[207] Both courts recognized that Congress's intent in passing the Clayton Act was to encourage private enforcement

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[199] *Id.* at 562.

[200] *See Apple Inc.*, 139 S. Ct. at 1519.

[201] *See id.*

[202] *See Story Parchment Co*., 282 U.S. at 563; *see also Eastman Kodak Co*., 273 U.S. at 364–65, 379.

[203] *See Apple Inc.*, 139 S. Ct. at 1519.

[204] *See id.*

[205] *See id.*

[206] *See id.*

[207] *See Ill. Brick Co*., 431 U.S. 720 at 729; *see also Hanover Shoe, Inc*., 392 U.S. 481 at 510.

of the antitrust laws while avoiding complicated calculations of damages.[208] The majority's reading of the *Illinois Brick* Doctrine as a contractual privity rule undermines Congress's intent behind the antitrust statutes and contradicts the statutory language of Section 4 of the Clayton Act.[209] Furthermore, the majority dismissed a long-standing argument that pass-on damages will be too complicated to calculate, stating that complex damages calculations are "hardly unusual" in antitrust cases.[210] By ignoring the presence of third-party app developers and avoiding the computation of what extent these developers were able to and opted to pass on the alleged overcharge, the majority counterintuitively confirmed a "pass-on" theory of damages.[211]

The language of Section 4 of the Clayton Act is broad and provides recovery to "any person" injured in his business or property by reason of anything forbidden in the antitrust laws.[212] Traditionally, courts have read Section 4 statutory causes of action to be limited to plaintiffs with proximate injuries, whereby there is a showing of an antitrust injury of the kind the antitrust laws were intended to prevent.[213] Furthermore, courts have looked at whether the alleged violation by the defendant was a material and substantial factor that caused the alleged injuries of the plaintiff.[214]

Under a proximate cause analysis, it could be established that the plaintiffs were proximately harmed by Apple's alleged monopoly because Apple bars iPhone users from any other alternative than using Apple's App Store.[215] As a result, the plaintiffs dealt directly with Apple as a distributor of apps, rather than the individual app developers, and thus were subjected to the App Store's alleged price-fixing. Categorizing the iPhone users as proper plaintiffs due to a proximate cause analysis will avoid the pass-on theory of damages that *Illinois Brick* sought to avoid. As such, the district courts will not have the complex task of calculating the amount of overcharge passed on at each stage of the distribution chain. Rather, the district court will simply calculate damages based on the "before and after" method that has been used in prior cases.[216] Such a

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[208] *See Ill. Brick Co*., 431 U.S. 720 at 729; *see also Hanover Shoe, Inc*., 392 U.S. 481 at 510.

[209] *See* 15 U.S.C. § 15 (1970); *see also Apple Inc.*, 139 S. Ct. 1514 at 1519.

[210] *See Apple Inc.*, 139 S. Ct. 1514 at 1524.

[211] *See id.* at 1519.

[212] 15 U.S.C. § 15 (1970).

[213] *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977), *see also* Holmes v. Securities Investor Prot. Corp., 503 U.S. 258 (1992).

[214] *See Greater Rockford Energy and Tech. Corp*., 998 F.2d 391 at 401.

[215] *See Apple Inc.*, 139 S. Ct. 1514.

[216] *See Eastman Kodak Co.,* 273 U.S. at 364–65, 379; *see also Story Parchment Co*., 282 U.S. at 563.

calculation will allow the courts to compute damages based on a comparison of markets and is a more straightforward task.

The *Apple* majority favored compensation to victims in lieu of traditional precedence and objectives set by Congress when enacting the antitrust statutes. However, the decision set the stage for future antitrust defendants to manipulate the privity analysis of the *Illinois Brick Doctrine*. While the majority did not overrule *Illinois Brick,* the nature of the *Illinois Brick Doctrine* has been narrowed and the traditional readings of proximate causation elements into antitrust standing have been rejected. Although the Supreme Court has yet to grant certiorari in the upcoming term for another antitrust case that implicates the *Illinois Brick Doctrine*, it is clear that there is mounting support for its reversal.[217]

Following *Apple*, there also remain looming questions for other large digital platforms, as they could face potential antitrust liability to consumers, despite the presence of an intermediary.[218] The precedent set by *Apple* is that contractual privity gives a purchaser standing to sue, and antitrust violators could open themselves up to potential liability when they act as a distributor, even if they do not set the prices and only facilitate a transaction between buyers and sellers.[219] This precedent may cause companies like Apple to restructure their business models such that they do not maintain privity with parties likely to sue. The ramifications of *Apple* remain unclear. However, the majority's reading of the *Illinois Brick Doctrine* strikes down the private enforcement and deterrence objectives of the antitrust statutes and is likely to lead to easy manipulation by potential defendants. This result is a troubling one, as properly injured private plaintiffs may soon be barred from bringing suit.

[217] *See* Osborne, *supra* note 136.
[218] *See Apple Inc.*, 139 S. Ct. at 1519; *see* Osborn, *supra* note 136.
[219] *See Apple Inc.*, 139 S. Ct. at 1519.

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An Absolute Deprivation of Liberty: Why Indigents' Wealth-based Discrimination Claims Brought Under the Equal Protection Clause Should Be Subject to Intermediate Scrutiny

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COMMENT

AN ABSOLUTE DEPRIVATION OF LIBERTY: WHY INDIGENTS' WEALTH-BASED DISCRIMINATION CLAIMS BROUGHT UNDER THE EQUAL PROTECTION CLAUSE SHOULD BE SUBJECT TO INTERMEDIATE SCRUTINY

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INTRODUCTION

Across the United States, roughly 740,000 people are held in local jails, two-thirds of whom have not been convicted of a crime.[1] Those two-thirds represent what is known as pretrial detention,[2] a common practice and direct result of monetary bail used by the United States Criminal Justice system.[3] Pretrial detention and crime rates share an inverse relationship: though crime rates are at historic lows, pretrial detention has expanded.[4] Between 1970 and 2015, the number of people held in pretrial detention increased from 82,922 to 441,790, a 433% increase.[5]

The purposes of pretrial detention are to ensure both public safety and court appearances by the accused individual.[6] But in practice, pretrial detention especially for misdemeanor crimes is often a result of a person's financial inability to pay their bail, without regard for either of its intended purposes.[7] This means that pretrial detention disproportionately affects already marginalized communities—poor people, women, and people of color.[8] The disproportionate effect of pretrial detention on poor people raises Equal Protection claims, begging the question of whether pretrial detention violates the Equal Protection Clause of the

[1] Leon Digard, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention,* VERA INSTITUTE OF JUSTICE, at 1 (April 2019), https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf.

[2] "Pretrial detention refers to detaining of an accused person in a criminal case before the trial has taken place, either because of a failure to post bail or due to denial of release under a pre-trial detention statute." *Pretrial Detention,* U.S. LEGAL, https://definitions.uslegal.com/p/pre-trial-detention (last visited Mar. 3, 2020).

[3] Digard, *supra* note 1, at 2.

[4] *Id.* at 10.

[5] *Id.* at 1.

[6] P.R. Lockhart, *Thousands of Americans are jailed before trial. A new report shows the lasting impact.,* VOX (May 7, 2019), https://www.vox.com/2019/5/7/18527237/pretrial-detention-jail-bail-reform-vera-institute-report.

[7] This Comment, when not referring to a specific person, will use the inclusive "their" plural possessive pronoun, instead of singular gendered pronouns, such as "his" or "her."

[8] Digard, *supra* note 1, at 2.

Fourteenth Amendment because it infringes on the pretrial liberty of the indigent, but never infringes on the liberty of their similarly-situated wealthy counterparts.

Criminal justice reform advocates argue that practical solutions exist.[9] Widely-suggested alternatives to pretrial detention include meaningful bail hearings, court date reminders, the use of unsecured bonds, and pretrial supervision.[10] Other proposed reforms include modest solutions, such as simply not arresting mentally-ill persons, replacing arrests with citations for certain crimes, accelerating the pace of court processes, and placing calls to released people to remind them of their court dates.[11]

Though crime rates have steadily declined, pretrial detention is still being expanded—but only for those who cannot pay.[12] The detriment of the trend toward expanding pretrial detention is that it erodes equal protection for indigents by categorically refusing to grant them the same protections afforded to their similarly-situated wealthy counterparts. Pretrial detention is also incredibly costly compared with alternative measures: the average daily cost of pretrial detention is $74.61, while pretrial supervision averages $7.17.[13] This economic burden is compounded by the fact that pretrial incarceration often breeds recidivism, creating a cycle of crime.[14]

The Supreme Court has long held that detention based on indigency is unconstitutional because it denies indigents equal protection under the law while reserving legal protection for the indigent's wealthy counterpart.[15] In reviewing these claims, the Supreme Court has employed heightened scrutiny.[16]

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[9] *Id.* at 8.

[10] *Id.*

[11] *How to Fix Pretrial* Justice, PRETRIAL JUSTICE INSTITUTE (2018), https://www.pretrial.org/get-involved/learn-more/how-to-fix-pretrial-justice/#replace-money-bail.

[12] Digard, *supra* note 1, at 1.

[13] *How to Fix Pretrial Justice*, *supra* note 11, at 3.

[14] *See* ODonnell v. Goodhart 900 F.3d 220, 232 (5th Cir. 2018) (Graves, Jr., J., dissenting) (citing ODonnell v. Harris Cty., 251 F.Supp.3d 1052, 1121 (S.D. Tex. 2017)) ("[S]tudies of bail systems in the United States have concluded that even brief pretrial detention because of inability to pay a financial condition of release increases the likelihood that misdemeanor defendants will commit future crimes . . . one study found that for misdemeanor defendants, even two to three days of pretrial detention correlated at statistically significant levels with recidivism").

[15] *See, e.g.,* Williams v. Illinois*,* 399 U.S. 235 (1970); Tate v. Short, 401 U.S. 395 (1971); Bearden v. Georgia, 461 U.S. 660 (1983).

[16] *See, e.g.,* Williams v. Illinois, 399 U.S. 235 (1970); Tate v. Short, 401 U.S. 395 (1971); Bearden v. Georgia, 461 U.S. 660 (1983); *see generally* Craig v. Boren, 429 U.S. 190, 197 (1976). Under intermediate scrutiny, statutory classifications are constitutional if they serve important governmental objectives and are substantially related to the achievement of those objectives. "Heightened scrutiny" and "intermediate scrutiny" are often used interchangeably; this Comment will so use them.

In 2018, the Fifth Circuit in *ODonnell v. Harris County* followed Supreme Court precedent and employed heightened scrutiny to a claim concerning detention based on indigency.[17] The *ODonnell* court held that the challenged government scheme violated the indigent defendant's equal protection rights and, as such, did not survive heightened scrutiny.[18] At the time of the *ODonnell* opinion, the Fifth Circuit was the only circuit that had decided this issue. That is, until the Eleventh Circuit's opinion in *Walker v. City of Calhoun*.[19] The Eleventh Circuit's decision in *Walker* created a split in the circuit courts by deciding an analogous case the other way.[20] In upholding the City of Calhoun's bail policy, the Eleventh Circuit employed rational basis review[21] instead of heightened strict scrutiny.[22] The Eleventh Circuit held that this was the right standard of review because the petitioner did not suffer an "absolute deprivation" of pretrial release and therefore was not entitled to any form of heightened scrutiny.[23] In April 2019, the Supreme Court denied plaintiff Maurice Walker's petition for writ of certiorari without a statement as to the reason for denial, and solidified the Federal circuit split on the issue.[24]

This Comment argues that wealth-based discrimination claims concerning pretrial detention of indigents should be analyzed under an Equal Protection framework and subjected to intermediate scrutiny. In order to provide an overview of the Supreme Court precedent established for these types of claims, Part I of this Comment will discuss the relevant and historic Supreme Court cases which have analyzed wealth-based incarceration claims in the United States. To further establish how Federal Courts have treated wealth-based incarceration Equal Protection claims, Part II will discuss the Fifth Circuit's relevant opinions. Part III outlines the court's decision in *Walker*, discussing how the Eleventh Circuit panel arrived at its holding and consequently created a split among the federal circuit courts that is yet to be resolved.

This Comment further argues that the Eleventh Circuit's decision in *Walker* is erroneous. Part IV will outline why the Eleventh Circuit should have applied intermediate scrutiny to Walker's wealth-based dis-

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[17] ODonnell v. Harris Cty., 892 F.3d 147, 162 (5th Cir. 2018).

[18] *Id.*

[19] Walker v. City of Calhoun, 901 F.3d 1245 (11th Cir. 2018).

[20] *Compare Walker*, 901 F.3d 1245, *with ODonnell*, 892 F.3d 147.

[21] Under rational basis review, a law is constitutional if it is rationally related to a legitimate government interest. *See generally* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

[22] *Walker*, 901 F.3d at 1261-62.

[23] *Id.*

[24] *Walker v. City of Calhoun, Georgia*, SCOTUSBLOG (Apr. 1, 2019), https://www.scotusblog.com/case-files/cases/walker-v-city-of-calhoun-georgia/.

crimination claim, and highlights the fallacious logic the court employed in reaching its holding. Additionally, this section will also argue that *Walker* sets a harmful precedent for indigent defendants. Wealth-based discrimination claims concerning an indigent's pretrial liberty are categorically different from other wealth-based discrimination claims which don't concern a liberty right. As such, these claims should be analyzed with a heightened level of scrutiny beyond mere rational basis review.

I. THE UNITED STATES SUPREME COURT HAS ESTABLISHED THAT INDIVIDUALS HAVE A RIGHT AGAINST WEALTH-BASED INCARCERATION

More than fifty years ago, the United States Supreme Court established that individuals have a right to be free from wealth-based discrimination in the context of incarceration.[25] Under the *Williams-Tate-Bearden* Rule, individuals cannot be subjected to imprisonment solely because of their indigency.

In *Williams v. Illinois*, the case from which the rule derives, the Supreme Court held that, under the Equal Protection Clause, a state may not subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely because of their indigency.[26] Williams was given the maximum sentence for petty theft under Illinois law: one year's imprisonment and a $500 fine, plus $5 in court costs.[27] The judgment, as permitted by statute, provided that if, when the one-year sentence expired and he did not pay the monetary obligations, he would remain in jail to work them off at the rate of $5 a day.[28] The Court concluded that when the aggregate imprisonment exceeded the maximum cost fixed by statute, and results directly from involuntary nonpayment of a fine or court costs, impermissible discrimination rests on the inability to pay.[29] Because petitioner was imprisoned beyond the one year maximum due solely to his inability to pay the fines and court costs, the court violated his right to Equal Protection under the Fourteenth Amendment.[30]

One year after *Williams,* in *Tate v. Short*, the Supreme Court held that it is a denial of equal protection to limit punishment to payment of a fine for those who are able to pay it, but to convert that same fine to

[25] *Williams*, 399 U.S. at 240-241.
[26] *Id.* at 239-245.
[27] *Id.*
[28] *Id.* at 236.
[29] *Id.* at 240-241.
[30] *Id.* at 241.

imprisonment for those who are unable to pay it.[31] Tate, an indigent, was convicted of traffic offenses and fined a total of $425.[32] Texas law provided only fines for such offenses, but it required that persons unable to pay must be incarcerated for sufficient time to satisfy their fines, at the rate of $5 per day.[33] In Tate's case, this meant an 85-day term.[34] Despite minor factual differences between the two cases, the Court extended *Williams*, stating that, "[a]lthough the instant case involves offenses punishable by fines only, petitioner's imprisonment for nonpayment constitutes precisely the same unconstitutional discrimination since, like Williams, petitioner was subjected to imprisonment solely because of his indigency."[35] The court held that Tate's continued imprisonment based on his inability to pay fines was a denial of equal protection of the law.[36]

Next, in *Bearden v. Georgia*, the Supreme Court held that the trial court erred in automatically revoking Bearden's probation and sentencing him to prison for his inability to pay fines, without determining whether the petitioner had made bona fide efforts to pay and whether alternative forms of punishment existed.[37] The Court relied on *Williams* and *Tate* in its analysis.[38]

Petitioner Bearden had a ninth-grade education and an inability to read.[39] As a result, he could not pay fines for his felony burglary and theft convictions because he could not find a job.[40] The Court found that if the petitioner could not pay despite sufficient efforts to do so, the trial court should have considered measures other than imprisonment.[41] The Court held that Bearden could only be imprisoned if alternative measures were not adequate to meet the state's interests in punishment and deterrence.[42] The majority explained that due process and Equal Protection principles converge in an analysis of wealth-based incarceration claims, but the part of the claim that asks whether the state has denied a group of

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[31] *Tate*, 401 U.S. 395.

[32] *Id.* at 397.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 397-98.

[36] *Id.* at 399.

[37] *Bearden*, 461 U.S. at 668-69.

[38] *Id.* at 674.

[39] *Id.* at 662.

[40] *Id.* at 663.

[41] *Id.* at 672.

[42] *Id.*; *see generally* Deterrence, 1 SUBST. CRIM. L. § 1.5(a)(4) (3d ed.) ("punishment and deterrence" being longstanding central tenets of criminal law in the United States). At the core, deterrence is a theory of punishment. As the criminal code explains, "the sufferings of the criminal for the crime he has committed are supposed to deter others from committing future crimes, lest they suffer the same unfortunate fate."

individuals a substantial benefit available to another group is to be reviewed under the Equal Protection Clause.[43]

II. THE FIFTH CIRCUIT HAS REVIEWED WEALTH-BASED INCARCERATION CLAIMS UNDER AN EQUAL PROTECTION ANALYSIS AND APPLIED INTERMEDIATE SCRUTINY

A. *PUGH V. RAINWATER*

In *Pugh v. Rainwater*, the Fifth Circuit held that the government can impose wealth-based incarceration upon a showing that the practice is necessary to assure a defendant's presence at trial.[44] The Fifth Circuit noted that it accepts "the principle that imprisonment solely because of indigent status," that is, without regard for the defendant's appearance at trial, "is invidious discrimination and not constitutionally permissible."[45] Though the court did not find the challenged government scheme unconstitutional, the court noted that in the case of the indigent they have "no doubt. . .that pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint."[46]

Notably, the *Rainwater* court did not explicitly state what level of scrutiny they found appropriate in analyzing the constitutionality of the government scheme in question.[47] Rather, in describing the appropriate analysis, the court *implied* heightened scrutiny is appropriate.[48] The court stated that absent meaningful consideration of other possible alternatives to paying bail, incarceration of indigent defendants infringes on equal protection requirements.[49]

B. *ODONNELL V. HARRIS COUNTY*

More than thirty years later, the Fifth Circuit again reviewed an Equal Protection claim brought by an accused indigent under intermedi-

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[43] *Id.* at 665.

[44] Pugh v. Rainwater, 572 F.2d 1053, 1058 (5th Cir. 1978) (en banc).

[45] *Id.* at 1057 (5th Cir. 1978).

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*; *see also* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151 (1980) (holding that the consideration of "alternative" measures is highly relevant and often dispositive to intermediate scrutiny); Orr v. Orr, 440 U.S. 268, 281 (1979). *Contra* Vance v. Bradley, 440 U.S. 93, 103 n.20 (1979) (holding that under rational basis review, it is "irrelevant to the equal protection analysis . . . that other alternatives might achieve approximately the same result"); Heller v. Doe, 509 U.S. 312, 330 (1993) (holding that under rational basis review, courts "'must disregard' the existence of alternative methods of furthering the objective").

ate scrutiny.[50] In *ODonnell v. Harris County*, the Fifth Circuit applied heightened scrutiny under the Equal Protection Clause to a bail policy that effected wealth-based incarceration of misdemeanor arrestees.[51]

Discussing the appropriate level of scrutiny, the *ODonnell* court acknowledged that, ordinarily, prisoners and indigents do not constitute a suspect class, and therefore would not ordinarily receive a heightened scrutiny analysis.[52] However, the court noted that the Supreme Court's decisions in *Williams* and *Tate* provided that heightened scrutiny is required when a criminal defendant is detained because of their indigence.[53]

Further, the court relied on the Supreme Court's instruction in *San Antonio Independent School District v. Rodriguez*.[54] There, the Court noted that "indigents receive a heightened scrutiny where two conditions are met: (1) because of their impecunity they were completely unable to pay for some desired benefit, and (2) as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."[55]

The facts of ODonnell's case met the exception for heightened scrutiny because the two conditions laid out in *Rodriguez* were both satisfied.[56] In Harris County, indigent arrestees were unable to pay for the desired benefit of secured bail.[57] As a consequence, they sustained an absolute deprivation of that benefit."[58] The court found that the bail policy subjected indigent arrestees to an absolute deprivation of their most basic liberty—freedom from incarceration.[59] The court elaborated, "[m]oreover, this case presents the same basic injustice: poor arrestees in Harris County are incarcerated, where similarly-situated wealthy arrestees are not, solely because the indigent cannot afford to pay a secured bond."[60] The Fifth Circuit Court concluded that Harris County's bail policy violated the Equal Protection Clause.[61] Thus, the policy was uncon-

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[50] *ODonnell*, 892 F.3d 147.

[51] *Id.* at 163.

[52] *Id.* at 16; *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (describing that a class is considered *suspect* "when the class is [*sic*] saddled with disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

[53] *Id.* at 163 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20 (1973)) (internal quotation marks omitted).

[54] *Id.* at 161.

[55] *Id.* at 162.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.* at 163.

[60] *Id.* at 162.

[61] *Id.* at 163.

stitutional because it detained defendants solely based on their inability to pay bail, resulting in their detention pretrial.[62]

III. THE ELEVENTH CIRCUIT IN *WALKER V. CITY OF CALHOUN* SPLIT FROM THE FIFTH CIRCUIT PRECEDENT THAT WEALTH-BASED INCARCERATION CLAIMS ARE SUBJECT TO INTERMEDIATE SCRUTINY

A. FACTS

On September 3, 2015, Maurice Walker was arrested in the City of Calhoun, Georgia for being a pedestrian under the influence of alcohol.[63] In Georgia, this type of violation carries no possible jail sentence.[64] Despite the statutory punishment of a fine not to exceed $500, Walker was jailed and told by a police officer that he would not be released unless he paid the $160 cash bond.[65] This bond amount was calculated by Calhoun's bail schedule at the time, which allowed pretrial release for arrestees who could pay the fine they would be ordered to pay if found guilty, plus applicable fees.[66] However, neither Walker nor his family had enough money to post the bond.[67] Walker was a fifty-four-year-old unemployed man with a mental health disability.[68] His income was limited to $530 a month from Social Security disability payments.[69] While in jail, Walker was not given his necessary medication and was confined to a single-person cell for all but one hour each day.[70]

Five days after his arrest, while still in jail, Walker filed a suit alleging that the City of Calhoun was violating the Equal Protection Clause of the Fourteenth Amendment by "jailing the poor because they cannot pay a small amount of money."[71] The day after Walker filed the suit, he was released on a personal-recognizance bond[72] in agreement with the City's

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[62] *Id.*

[63] *Walker*, 901 F.3d at 1251.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 1252.

[67] *Id.* at 1251.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 1251-52.

[72] In a personal recognizance bond, an accused person is released without paying a monetary bond. Rather, the accused person must sign a written promise to appear at their scheduled court appearance. Personal recognizance bonds are also subject to other obligations a judge can impose, such as requiring the accused person to refrain from certain activities or to meet with a probation officer. If the accused fails to adhere to these requirements, then they can be arrested. *Release on*

counsel.[73] In response to Walker's suit, the Municipal Court of the City of Calhoun altered its bail policy by issuing a Standing Bail Order.[74]

The main difference between this new bail policy and the previous was the limit on the amount of time an indigent could be detained pretrial.[75] While the previous bail policy subjected Walker to five days in jail, the new policy would subject him and other indigents alike to a maximum of forty-eight hours.[76] "'For those individuals who do not obtain release pursuant to the secured bail schedule,' the Standing Bail Order provides that they 'shall. . .be brought before the [Municipal] Court' within 48 hours from their arrest. . . ."[77] The municipal court would then determine whether accused individuals are unable to post secured bail because they are indigent.[78] If the court finds that the accused is indigent, the accused would be subject to release on recognizance without making a secured bail payment.[79] If no hearing was held within forty-eight hours, the accused would be released on a recognizance bond.[80]

The district court found the city's new bail policy to be unconstitutional and issued a preliminary injunction.[81] Specifically, the district court found that the Standing Bail Order violated the Constitution because it permitted individuals with financial resources to post a bond affording them immediate release, while individuals who do not have those resources must wait forty-eight hours for a hearing.[82] To replace the city's policy, the district court prescribed an affidavit-based process for making a determination of indigency for pretrial arrestees.[83] The process provided that if an arrestee indicates an inability to pay bail, then "arresting officers, jail personnel, or Municipal Court staff must, as soon as practicable after booking verify the arrestee's inability to pay. . . by means of an affidavit sworn before an authorized official."[84] Addition-

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Own Recognizance, JUSTIA, https://www.justia.com/criminal/bail-bonds/release-on-own-recognizance/ (last updated May 2019).

[73] *Walker*, 901 F.3d at 1252.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.* at 1253 (quoting Walker v. City of Calhoun (*Walker III*), No. 4:15-CV-0170-HLM, 2017 WL 2794064, at *2-3 (N.D. Ga. June 16, 2017)).

[82] *Id.* (quoting *Walker III*, No. 4:15-CV-0170-HLM, 2017 WL 2794064, at *2-3 (N.D. Ga. June 16, 2017)).

[83] *Id.* (quoting *Walker III*, No. 4:15-CV-0170-HLM, 2017 WL 2794064, at *4 (N.D. Ga. June 16, 2017)).

[84] *Id.* (quoting *Walker III*, No. 4:15-CV-0170-HLM, 2017 WL 2794064, at *4 (N.D. Ga. June 16, 2017)).

ally, an official must evaluate the affidavit within twenty-four hours after arrest.[85] Those determined to be indigent would be subject to release on recognizance without having to make secured bail.[86] The City of Calhoun appealed this injunction order with the Eleventh Circuit Court of Appeals.[87]

B. MAJORITY OPINION

The Eleventh Circuit Court of Appeals established that Walker's claim fit into the *Williams-Tate-Bearden* and *Rainwater* line of cases.[88] However, they disagreed with the district court that heightened scrutiny applied and that a traditional Equal Protection analysis was required.[89] Additionally, it disagreed with the district court's contention that wealth-based incarceration is an exception to the application of rational basis review within wealth-based classifications.[90] The majority read the Bearden line of cases to say that claims concerning pretrial bail release should be evaluated under a traditional due process rubric.[91] The majority reasoned that a due process analysis made sense in Walker's case because the relief he sought was "essentially procedural: a prompt process by which to prove his indigency and to gain release."[92] The fundamental requirement in a due process analysis of wealth-based-discrimination cases criminal in nature is "the opportunity to be heard at a meaningful time and in a meaningful manner."[93] A due process analysis is flexible and considers the governmental and private interests that are affected.[94] The Eleventh Circuit Court concluded that the district court should have applied this type of analysis in deciding whether the City of Calhoun's bail policy violated due process guarantees.[95]

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[85] *Id.* (quoting *Walker III*, No. 4:15-CV-0170-HLM, 2017 WL 2794064, at *5 (N.D. Ga. June 16, 2017)).

[86] *Id.* (quoting *Walker III*, No. 4:15-CV-0170-HLM, 2017 WL 2794064, at *5 (N.D. Ga. June 16, 2017)).

[87] *Id.* at 1254.

[88] *Id.* at 1265.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* (quoting Matthews v. Eldridge, 424 U.S. 319, 333 (1976)).

[94] *Id.* (quoting *Matthews*, 424 U.S. at 334); *see also* U.S. v. Juvenile Male 670 F.3d 999, 1013 (9th Cir. 2012) (explaining that a procedural due process claim involves two steps: "[T]he first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient").

[95] *Id.*

The disagreement as to the appropriate standard of review was rooted in part by the Eleventh Circuit and the district court's reading of *Rainwater*, respectively.[96] There, the Eleventh Circuit majority stated that the *Rainwater* court "approved the utilization of a master bond schedule without applying any form of heightened scrutiny."[97] The majority further acknowledged that *Rainwater* explained that a bond schedule provided for speedy and convenient pretrial release for those who could pay.[98] The court inferred from this that, "if the bond schedule provided 'speedy' release to those who could meet its requirements, it necessarily provided less speedy release to those who could not."[99] The resulting logic was that *Rainwater* approved the use of a bond schedule that treated arrestees differently based on their ability to pay. The court further noted that the Fifth Circuit in *Rainwater* upheld a bail schedule because it provided a bail hearing for indigent defendants who could not pay the bond "at which the judge could consider all the relevant factors when deciding the conditions of release."[100] This bail hearing was a constitutionally permissible alternative option.[101]

The Eleventh Circuit majority then looked to *San Antonio Independent School District v. Rodriguez* to explain how wealth-based discrimination claims have been analyzed under the Equal Protection Clause.[102] The panel acknowledged that in *Rodriguez*, the Supreme Court held that wealth-based discrimination was impermissible only if it imposes an absolute deprivation of a benefit.[103] The majority read *Rodriguez* to say that the "[m]ere diminishment of a benefit was insufficient to make out an [E]qual [P]rotection claim."[104]Applying this standard to Walker's case, the court held that forty-eight hours of incarceration is not an *absolute* deprivation of the benefit of pretrial release because indigents must merely wait some amount of time to receive the same benefit afforded to the more affluent.[105] The court opined that if they held in favor of Walker, the indigent here would receive preferential treatment by being released from jail without having to pay any money or otherwise provide any security.[106]

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[96] *Id.*

[97] *Id.*

[98] *Id.* at 1260.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.* at 1261.

[103] *Id.* (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973)).

[104] *Id.* (quoting *San Antonio Indep. Sch. Dist*., 411 U.S. at 24) ("the Equal Protection Clause does not require absolute equality or precisely equal advantages").

[105] *Walker*, 901 F.3d at 1261.

[106] *Id.* at 1262.

The court next considered Walker's contention that this type of wealth-based discrimination claim requires a heightened scrutiny analysis.[107] The court disagreed, stating that this type of scheme does not trigger intermediate scrutiny under Equal Protection jurisprudence.[108] If Walker was correct in applying heightened scrutiny as courts typically do in cases of race, sex, or religion, then the courts would be flooded with litigation.[109] As a result, the court predicted "innumerable government programs" would be in "grave constitutional danger" by this logic:[110]

> If the Postal Service wanted to continue to deny express service to those unwilling or unable to pay a fee, it would have to justify that decision under the same standard it would have to meet to justify providing express service only to white patrons. The University of Georgia would be unable to condition matriculation on ability to pay tuition unless it could meet the same constitutional standard that would allow it to deny admission to Catholics. In Walker's preferred constitutional world, taxes that are independent of income, such as property taxes or sales taxes, would be the target of perpetual litigation. All that is to say, we do not believe that *Bearden* or *Rainwater* announced such radical results with so little fanfare, and we therefore reject Walker's equal protection theory. The district court was wrong to apply heightened scrutiny under the Equal Protection Clause.[111]

The court turned to the forty-eight-hour holding time which the Standing Bail Order required of the accused before their indigency determination hearing was held.[112] The Eleventh Circuit Court needed to determine what constituted the constitutionally required prompt probable cause hearing for those arrested without a warrant.[113] They relied on the Supreme Court's decision in *County of Riverside v. McLaughlin* regarding the meaning of *prompt*.[114] Thus, the Eleventh Circuit concluded that "indigency determinations for purposes of setting bail are presumptively constitutional if made within 48 hours of arrest."[115] Accordingly, the court ruled that the Standing Bail Order was constitutional.[116]

In a footnote, the Eleventh Circuit addressed the Fifth Circuit's *ODonnell* opinion, asserting that its views do not break with Fifth Circuit

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[107] *Id.*
[108] *See id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.* at 1265.
[113] *Id.* at 1266.
[114] *Id.* (citing County of Riverside v. McLaughlin, 500 U.S. 44, 55 (1991)).
[115] *Id.* at 1266.
[116] *Id.* at 1269.

precedent because facts between the two respective cases were dissimilar.[117] The court acknowledged that *ODonnell* applied heightened scrutiny under the Equal Protection Clause after concluding that there, the plaintiff suffered an absolute deprivation of his most basic liberty interests.[118] The court maintained, however, that the Fifth Circuit in *ODonnell* ruled this way because the challenged policy there did not provide arrestees *any* opportunity to prove indigency, unlike the City of Calhoun's forty-eight-hour policy.[119]

C. DISSENTING OPINION

Judge Beverly B. Martin disagreed with the majority's decision to not apply heightened scrutiny.[120] Her dissent was based on a reading that the Supreme Court opinions in *Williams*, *Tate*, and *Bearden* and the Fifth Circuit's *Rainwater* supported the district court's application of heightened scrutiny under the Equal Protection Clause to the city's Standing Bail Order.[121]

The dissent specifically disagreed with the majority's reliance on *Rodriguez* to support a finding that heightened scrutiny did not apply.[122] In Judge Martin's reading of *Rodriguez*, Walker was entitled to make an Equal Protection claim warranting heightened scrutiny because his case satisfied both parts of the test established in *Rodriguez*: (1) whether the challenged scheme uses indigency as a classification because it treats persons totally unable to pay differently, and (2) whether the class has suffered an "absolute deprivation" of a benefit.[123] The dissent asserted that the majority never addressed part one of the test in *Rodriguez*: that is, whether the Standing Bail Order discriminates against indigents.[124]

Judge Martin contended that the Standing Bail Order clearly used indigency as a classification because when two people are arrested for the same crime under identical circumstances, the Standing Bail Order allows the person with money to pay it and walk away while the indigent, unable to pay, goes to jail.[125] She then addressed the majority's claim that reviewing wealth-based discrimination with heightened scrutiny would extend to various kinds of wealth-based interactions.[126] She

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[117] *Id.* at 1266 n.12.
[118] *Id.*
[119] *Id.*
[120] *Id.* at 1273 (Martin, J., dissenting).
[121] *Id*. (Martin, J., dissenting).
[122] *Id.* (Martin, J., dissenting).
[123] *Id.* (Martin, J., dissenting).
[124] *Id.* (Martin, J., dissenting).
[125] *Id*. (Martin, J., dissenting).
[126] *Id.* at 1274 (Martin, J., dissenting).

argued that the majority's claim would never be realized according to the Supreme Court's opinion in *M.L.B. v. S.L.J*: there, the Court distinguished lawsuits seeking to alleviate the consequences of differences in economic status as different from those which vindicate "a person's right to participate in political processes or to have access to the courts in criminal cases."[127] *M.L.B.* precludes wealth-based discrimination claims that do not concern basic fundamental rights which implicate Equal Protection under the law.

Addressing the second prong of the test laid out in *Rodriguez*, Judge Martin called the majority's characterization that forty-eight hours of detention is a "diminishment" of a benefit, rather than an absolute deprivation of a benefit, simply "word play."[128] Forty-eight hours in jail is not a diminishment but *surely* a deprivation of liberty.[129] This characterization, Judge Martin asserts, aligns with *Rodriguez* because there the Court found an "absolute deprivation" of liberty where the challenged state laws subjected indigents to incarceration simply because of their inability to pay their fines.[130] Further, *Rainwater* also described pretrial confinement as a "deprivation of liberty."[131]

Additionally, "[n]either *Rodriguez* nor *Rainwater* qualified how long the confinement had to last before it became a deprivation of liberty."[132] For further support, the dissent cited the recent Supreme Court case *Rosales-Mireles v. United States*.[133] In *Rosales*, the Supreme Court reaffirmed that "any amount of actual jail time is significant, and ha[s] exceptionally severe consequences for the incarcerated individual [and] for society which bears the direct and indirect costs of incarceration."[134] The second prong of the *Rodriguez* test, Judge Martin maintained, is satisfied in Walker's favor, because forty-eight hours in jail is an absolute deprivation of liberty.[135]

Next addressing the majority's claim that *ODonnell* is factually distinct from *Walker*, the dissent maintained that the only difference between the two cases is the length of detainment in each respective policy.

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[127] *Id.* (Martin, J., dissenting).

[128] *Id.* (Martin, J., dissenting).

[129] *Id.* (Martin, J., dissenting).

[130] *Id.* (Martin, J., dissenting).

[131] *Id.* (Martin, J., dissenting).

[132] *Id.* at 1275 (Martin, J., dissenting) (citing *San Antonio Indep. Sch. Dist*., 411 U.S. at 20-22 and *Pugh*, 572 F.2d 1053 at 1056).

[133] *Id.* at 1275 (Martin, J., dissenting) (quoting Rosales-Mireles v. United States, 138 S. Ct. 1897, 1907 (2018)) (internal quotation marks omitted).

[134] *Rosales-Mirales*, 138 S. Ct. at 1907 (2018) (quoting Glover v. United States, 531 U.S. 198, 203 (2001) and United States v. Jenkins, 854 F.3d 181, 192 (2d Cir. 2017)) (internal quotation marks omitted).

[135] *Walker*, 901 F.3d at 1274-1275 (Martin, J., dissenting).

In *ODonnell*, the challenged system allowed indigents to be detained longer than the forty-eight hours that the challenged system in *Walker* allowed.[136] The factual difference here in length of detention between the two systems is not a *meaningful* one.[137] Being jailed for forty-eight hours is more than a mere inconvenience, contrary to the majority's claim, because it has "very real consequences for detained indigents."[138] Judge Martin cited the fact that indigents, as a result of detainment, can "lose their homes and transportation. Their family connections can be disrupted. And all this is to say nothing of the emotional and psychological toll a prison stay can have on an indigent person and her family members."[139] These consequences occur and can be just as dire for a short jail sentence, such as two days, as for a longer jail sentence.[140]

Judge Martin rejected the majority's claim that treating wealth-based discrimination the same as race, sex, or religion by applying heightened scrutiny would flood the courts.[141] The reason is because the Supreme Court has "already placed limits on bringing equal protection challenges to wealth-based classifications."[142] These limits consist of the test set out in *Rodriguez* as well as the *M.L.B.* Court's statement that fee requirements are examined only for rationality except when they implicate basic rights to participate in political processes and access to judicial processes in criminal cases.[143] Because of these Supreme Court limitations, Mr. Walker's claim falls into a narrow exception that does not implicate tuition fees or express postal service.[144] The dissent claims that here, the court simply needed to make explicit what was already made implicit by the court in *Rainwater*, "namely that pretrial detention based solely on indigency is subject to heightened scrutiny."[145]

The dissent offers, however, that even if the courts were flooded and the workload increased, the importance of resolving these types of cases outweighs the burden. "[T]he constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience

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[136] *Id.* at 1275 (Martin, J., dissenting) (citing *ODonnell*, 892 F.3d 147 at 154).

[137] *Id.* (Martin, J., dissenting).

[138] *Id.* at 1275-1276 (Martin, J., dissenting).

[139] *Id.* at 1276 (Martin, J., dissenting) (citing Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html).

[140] *Id.* (Martin, J., dissenting) (citing Juleyka Lantigua-Williams, *Why Poor, Low-Level Offenders Often Plead to Worse Crimes*, THE ATLANTIC (July 24, 2016)), https://www.theatlantic.com/politics/archive/2016/07/why-pretrial-jail-can-mean-pleading-to-worse-crimes/491975/.

[141] *Id.* at 1277 (Martin, J., dissenting).

[142] *Id.* (Martin, J., dissenting).

[143] *Id.* (Martin, J., dissenting).

[144] *Id.* (Martin, J., dissenting).

[145] *Id.* at 1278 (Martin, J., dissenting).

of the status quo."[146] Because *Rodriguez* required that Walker's claim be reviewed under heightened scrutiny in an equal protection framework, the dissent would affirm the district court decision that the city's pretrial detention of indigents for forty-eight hours is a violation of equal protection.[147]

IV. ANALYSIS

A. THE ELEVENTH CIRCUIT SHOULD HAVE APPLIED INTERMEDIATE SCRUTINY UNDER AN EQUAL PROTECTION ANALYSIS TO WALKER'S WEALTH-BASED INCARCERATION CLAIM

The Supreme Court has "long been sensitive to the treatment of indigents in our criminal justice system."[148] Both the majority and the dissent in *Walker* assert that the *Bearden* line of cases is unclear as to what standard of analysis should be applied to wealth-based discrimination claims, yet they reach different results, respectively.[149] The majority reasons that the relevant Supreme Court cases do not prescribe heightened scrutiny for these cases, and instead require a rational basis review.[150]

Judge Martin reads those same cases to say that some level of heightened scrutiny applies, though the *Bearden* line of cases does not make clear what level of scrutiny applies to wealth-based incarceration claims: intermediate or strict scrutiny.[151] Judge Martin is correct that the *Bearden* line of cases suggests a level of scrutiny beyond a rational basis review, yet the *Walker* majority chose to employ neither level of scrutiny. The application of a rational basis review was an erroneous decision based largely on a misunderstanding of both Supreme Court precedent as the *Bearden* line of cases established, as well as Fifth Circuit precedent which the court in *Rainwater* and *ODonnell* established. Although the relevant Supreme Court and Fifth Circuit decisions may not have been explicit in their decision to employ heightened scrutiny, that these cases discussed "alternatives" in their analysis makes clear that scrutiny was heightened beyond a rational basis.

Alternatives are a distinguishing factor between rational-basis review and heightened scrutiny because only in the case of the latter are "alternatives" relevant to a court's analysis. Under rational-basis review, which the Eleventh Circuit employed instead of heightened scrutiny,

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[146] *Id.* (Martin, J., dissenting) (quoting *Williams*, 399 U.S. 235 at 245).
[147] *Id.* (Martin, J., dissenting).
[148] *Bearden*, 461 U.S. at 664.
[149] *See Walker*, 901 F.3d at 1273-78 (Martin, J., dissenting).
[150] *Id.* at 1264-65 (Martin, J., dissenting).
[151] *Id.* at 1278 (Martin, J., dissenting).

courts "must disregard the existence of alternative methods of furthering the objective."[152] The Supreme Court has articulated that when employing a rational-basis review, "that other alternatives might achieve approximately the same result" is irrelevant to the Equal Protection analysis.[153]

By contrast, the Supreme Court has consistently analyzed whether "alternatives" to the government's challenged system are available in its application of heightened scrutiny. In *Orr v. Orr* the Court found that Alabama could not use gender as a classification for financial need in alimony cases when its alimony laws provided an alternative solution that had already occurred.[154] Similarly, in *Wengler v. Druggists Mutual Ins. Co.*, the Court found that gender-based classification was invalid because an adequate gender-neutral alternative was available.[155] And more recently in *McCullen v. Coakley*, the Court concluded that the challenged law failed heightened scrutiny because the government had a "variety of approaches that appear[ed] capable of serving its interests."[156]

Most relevantly, in *Williams*, *Tate*, *and Bearden*, the United States Supreme Court also looked at alternatives to the challenged government practice. Because alternative means were relevant to the analysis there, it follows that heightened scrutiny applies when a government scheme or law imposes wealth-based incarceration. Since *Walker* "fits squarely" within the *Bearden* line of cases, the majority was wrong to not apply the same level of scrutiny as the Court in those cases applied.[157] That is not to say that wealth-based discrimination claims are always reviewed with heightened scrutiny—and the court in *Rodriguez* held that normally they are not.[158] However, *Rodriguez* further held that when a class is composed of persons who are "totally unable to pay," wealth-based discrimination claims are exempted from rational basis review.[159]

Even if the Supreme Court had not clearly established that heightened scrutiny applies, the high court's two-pronged test for whether to heighten scrutiny of wealth-based discrimination claims as laid in *Rodriguez* should have controlled.[160] Walker's claim would have met both prongs and, consequently, would have fit squarely into a heightened scrutiny analysis. Ultimately, Walker, not the City, would have pre-

[152] Heller v. Doe, 509 U.S. 312, 330 (1993) (quoting Schweiker v. Wilson, 450 U.S. 221, 235 (1981)).

[153] Vance v. Bradley, 440 U.S. 93, 102, n.20 (1979).

[154] Orr v. Orr, 440 U.S. 268, 281 (1979).

[155] *See* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151 (1980).

[156] McCullen v. Coakley, 573 U.S. 464, 493-94 (2014).

[157] *Walker*, 901 F.3d at 1273 (Martin, J., dissenting).

[158] *San Antonio Indep. Sch. Dist*., 411 U.S. at 29.

[159] *See id.* at 22.

[160] *Id.* at 1, 20.

vailed. His claim would have satisfied the first prong because the City of Calhoun's bail policy targets indigent arrestees who, because of their indigency, are completely unable to pay for the desired benefit of freedom from pretrial incarceration. The claim would have also satisfied the second prong because as a consequence of being indigent, and therefore being unable to pay for freedom from pretrial incarceration, indigent arrestees sustain an absolute deprivation of a meaningful opportunity to enjoy freedom from pretrial incarceration.

Having satisfied both prongs of the *Rodriguez* test, the court should have then proceeded to analyze Walker's claim under intermediate scrutiny.[161] The questions then would have been whether the City of Calhoun had a compelling interest in enforcing the new bail policy, and whether that policy was narrowly tailored to meet that interest, or whether other alternatives were better suited to meet the interest. The city's new bail policy would not survive intermediate scrutiny because it was not narrowly tailored to meet this interest since it subjected an arrestee to pretrial incarceration for as long as forty-eight hours before determining indigency.[162]

If the *Walker* majority had subjected the City of Calhoun's bail policy to intermediate scrutiny, the court would have, at a minimum, affirmed the district court's ruling that forty-eight hours of pretrial detention for indigents was a violation of Equal Protection because alternative measures were available.[163] Alternative measures relevant here would have been shorter pretrial detention, such as the twenty-four hours which the district court injunction ordered, or other pretrial reforms suggested by the relevant body of literature.[164]

B. THE ELEVENTH CIRCUIT'S OPINION SETS HARMFUL PRECEDENT FOR INDIGENT ARRESTEES

Though the *Walker* majority entertained application of the *Rodriguez* test, the majority's analysis of the test was misguided at best. As Judge Martin points out in her dissent, in its analysis, the court never addressed whether the City of Calhoun's Standing Bail Order discriminated against indigents.[165] Instead, its analysis started at part two of the *Rodriguez* test, which asks whether the class has suffered an absolute deprivation of a benefit.[166] However, this part of the test was analyzed

[161] *ODonnell*, 892 F.3d at 162.
[162] *Walker III*, WL 2794064 n.2 (N.D. Ga. June 16, 2017).
[163] *Cf. Walker*, 901 F.3d at 1263.
[164] *See* Digard, *supra* note 1, at 2; *see also How to Fix Pretrial Justice*, *supra* note 11, at 3.
[165] *Walker*, 901 F.3d at 1273 (Martin, J., dissenting).
[166] *Id.* at 1274 (Martin, J., dissenting).

incorrectly. In its analysis of the second prong of the *Rodriguez* test, the majority does not refer to the benefit in Walker's case as *liberty* or even *freedom from pretrial incarceration* but rather labels the benefit as "pretrial release."[167] That is, the *Walker* majority relied erroneously—when considering whether there was an "absolute" deprivation of a benefit—on the amount of time that indigent arrestees are detained pretrial. And reliance on forty-eight-hour pretrial detention led it to the conclusion that "pretrial release," the benefit here, is only diminished for the indigent arrestee but not something of which they are absolutely deprived.[168] Judge Martin was correct, though generous in the claim that the majority's faulty analysis here was "word play."[169]

No other federal or circuit court had discussed a diminished benefit in this context prior to *Walker*, and relevant case law does not proscribe the length of time of pretrial detention for indigents as a relevant consideration under this analysis. As Judge Martin points out in her pragmatic dissenting opinion, neither *Rodriguez* nor *Rainwater* qualified how long the confinement had to last before it became a deprivation of liberty.[170] The *Walker* majority simply inferred the concept of a diminished benefit (and its distinction from an absolute deprivation) from the *Rodriguez* court's assertion that "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."[171] Further, it reasoned "[t]he duty of the State. . .is not to duplicate the legal arsenal that may be privately retained by a criminal defendant. . .but only to assure the indigent defendant an adequate opportunity to present his claims fairly."[172] To the Eleventh Circuit, the Equal Protection Clause is satisfied with diminished benefits for some, and full benefits for others.

To arrive at the holding that forty-eight-hours is constitutional confinement for indigent arrestees in a pretrial setting, the *Walker* majority relied on *McLaughlin*, a factually distinct case.[173] *McLaughlin* should not have controlled because that case concerned the length of wait-time for probable cause hearings, and challenges to pretrial confinement by accused indigent persons are inherently and categorically different from other claims.[174] Additionally, as the dissent points out, *McLaughlin* asserted that hearings which are delayed for the sake of delay are unconsti-

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[167] *Id.* at 1261.
[168] *Id.*
[169] *Id.* at 1274 (Martin, J., dissenting).
[170] *Id.* at 1275 (Martin, J., dissenting).
[171] *Id.* at 1261 (quoting *San Antonio Indep. Sch. Dist.*, 411 U.S. at 24).
[172] *Id.* (quoting Ross v. Moffitt, 417 U.S. 600, 616 (1974)).
[173] *Id.* at 1266; City of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).
[174] *City of Riverside*, 500 U.S. at 54; *Bearden*, 461 U.S. 660 at 64-65.

tutional, and here, the city of Calhoun did not state a reason as to why indigent arrestees had to wait forty-eight hours before a determination of indigency.[175] The court's decision in *Mclaughlin* should have guided the *Walker* majority toward a ruling for Walker, not the City of Calhoun.

The *Walker* majority also relied on the *ODonnell* opinion for a constitutional time of pretrial confinement, as the *ODonnell* court ultimately concluded that a forty-eight-hour maximum confinement time was appropriate.[176] This reliance is seemingly more appropriate, given the similar pretrial incarceration discrimination claims at issue in each case (though elsewhere in the opinion the *Walker* court also alleged that the facts here were distinguishable from *ODonnell*).[177] But this reliance was misplaced because in *ODonnell*, Harris County alleged that a maximum of 24-hour confinement for indigent arrestees was an administrative burden for them.[178] Here, however, the City of Calhoun offered no reason for the chosen forty-eight-hour maximum, resulting in an arbitrary wait-time, or a delay for the sake of delay.[179] Nevertheless, an arbitrary waiting time was sufficient for the Eleventh Circuit.

The Eleventh Circuit was wrong to uphold this arbitrary time and to not require any justification by the City of Calhoun. This result is ultimately problematic because it sets a new precedent that forty-eight hours is a magic number of sorts, the constitutional length of time that an indigent arrestee can be detained pretrial. Further, the *Walker* court's characterization of forty-eight hours of pretrial detention for indigents as only a "diminishment" of a benefit rather than a deprivation is also problematic. Even the court in *ODonnell* felt forty-eight hours was in some ways not a deprivation.[180] That a benefit, such as the liberty at stake here, changes from a diminishment to a deprivation after forty-eight hours is highly questionable. But at least in *ODonnell*, it is apparent that any time before the forty-eight-hour maximum pretrial incarceration, an indigent's pretrial liberty interests are outweighed by the administrative burdens of the Harris County court system.[181] But what *Walker* presents is more vexing because the liberty interests of indigents are not outweighed by any other stated, competing interests.[182] Forty-eight-hour pretrial detention because of indigency, *Walker* implies, is simply a fact of life; yet another luxury

[175] *Walker*, 901 F.3d at 1279 (Martin, J., dissenting).

[176] *Id*. at 1266 (citing *ODonnell*, 892 F.3d at 160-61).

[177] *Id.* at 1269 n.12.

[178] *See ODonnell*, 892 F.3d at 159.

[179] *Walker*, 901 F.3d at 1279 (Martin, J., dissenting).

[180] *ODonnell*, 892 F.3d at 160.

[181] *Id*. at 159.

[182] *See Walker*, 901 F.3d at 1279 (Martin, J., dissenting).

service indigent people simply cannot afford, such as with express mail service and university tuition.

One need not wonder why a federal court such as this one would employ a shallow analysis of an Equal Protection claim to pretrial confinement based on indigency—an analysis that has dire consequences for underprivileged communities.[183] The answer lies in the court's engagement of hypotheticals. Such as the court's suggestion that holding in favor of Walker would result in "preferential treatment" to the indigent.[184] The glaring irony in this logic is that pretrial detention, as it stands in the United States, already affords preferential treatment to the affluent. In this country, those who can afford to post bail are never subjected to pretrial detention simply because of their wealth. The court's conflating of rights with luxuries also serves as a window into the court's faulty logic. The court's suggestion that applying heightened scrutiny to Walker's claim would result in innumerable government programs being in "grave constitutional danger" blatantly ignores, perhaps even feigns ignorance of, Supreme Court case law as well as Fifth Circuit precedent that characterized pretrial confinement based on indigency as categorically different from other claims.[185]

The Eleventh Circuit's radical predictions for what would ensue if they ruled in favor of Walker requires an equating of university tuition and express mail service with freedom from pretrial incarceration. Conflating the right to freedom with luxuries may reveal an elitist worldview: for the wealthy and affluent, freedom from incarceration, express mail service, and university tuition may appear the same because the barriers to affording them simply do not exist. This reading may be further bolstered by the fact that a majority of federal judges cannot identify with people too poor to pay bail: many of them come from elite schools and affluent upbringings, are not from diverse backgrounds, and certainly not from underrepresented communities.[186]

The Eleventh Circuit's hypothesizing about ruling in favor of Walker is dictum, but it should not be any less concerning for two rea-

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[183] *See How to Fix Pretrial* Justice, *supra* note 10, at 3.

[184] *Walker*, 901 F.3d at 1261-62.

[185] *Compare Walker*, 901 F.3d at 1262 *with Bearden*, 461 U.S. at 665 (1983) (explaining that wealth-based incarceration is distinct from other wealth-based classifications because it involves both Equal Protection claims as well as due process claims) *and San Antonio Indep. Sch. Dist*., 411 U.S. at 20 (holding that when a class is composed of persons who are "totally unable to pay," wealth-based discrimination claims are exempted from rational basis review). *See also Walker*, 901 F.3d at 1274 (Martin, J., dissenting).

[186] *See* Danielle Root et al., *Building a More Inclusive Federal Judiciary*, CENTER FOR AMERICAN PROGRESS (Oct. 3, 2019, 8:15 AM), https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/.

sons. One, since dictum by definition means an opinion or belief,[187] we can read this harmful conflation as the opinion or beliefs of federal judges about an indigent's disposition in the criminal justice system, if not their disposition in the world at large. Federal judges are quite literally public servants, who swear an oath to serve justice equally to the poor and to the rich.[188] The belief that access to pretrial incarceration and express mail service are categorically similar is egregious. The former implicates freedom, while the latter concerns a trivial luxury especially by comparison. That this belief is held by a majority of federal judges in a particular circuit, by those who decide the fate of thousands of indigent defendants in multiple states, is incredibly disturbing.

Two, even if we can cast aside the harmful conflation as mere non-controlling opinion, concerns about Equal Protection should still remain because lawyers and judges alike often conflate dicta with holdings.[189] This risk of conflation here compounds the dangerous precedent that *Walker* creates for indigent arrestees. Other lawyers or courts may confuse *Walker'*s dicta with its holding, erroneously citing it to argue that Equal Protection analysis is unwarranted for indigent defendants claiming discrimination under a city's bail policy because this discrimination is no different from innumerable other government programs that discriminate based on wealth. In this unsavory scenario, indigent arrestees would suffer harm nationally.[190]

CONCLUSION

Supreme Court precedent, as well Fifth Circuit holdings, have established that intermediate scrutiny is the appropriate level of scrutiny for claims brought by indigent defendants challenging a government policy that prescribes pretrial incarceration for them but never their similarly-

[187] Dictum is defined as "a statement of opinion or belief considered authoritative because of the dignity of the person making it." *Dictum*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[188] William M. Richman, Comment, *Elitism Expediency and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL. L. REV. 273, 277 (1996).

[189] Judith M. Stinson, Comment, *Why Dicta Becomes Holding and Why it Matters*, 76 BROOK. L. REV. 219, 221 (2010).

[190] *See ODonnell*, 251 F. Supp. 3d at 1158 (S.D. Tex. 2017) ("Pretrial detention of misdemeanor defendants, for even a few days, increases the chance of conviction and of nonappearance or new criminal activity during release," and. . . "[c]umulative disadvantages mount for already impoverished misdemeanor defendants who cannot show up to work, maintain their housing arrangements, or help their families because they are detained"). *See also id.* at 1121 (noting that "[r]ecent studies of bail systems in the United States have concluded that even brief pretrial detention because of inability to pay a financial condition of release increases the likelihood that misdemeanor defendants will commit future crimes or fail to appear at future court hearings," and that one study "found that for misdemeanor defendants, even two to three days of pretrial detention correlated at statistically significant levels with recidivism").

situated wealthy counterparts. Even if a court fails to read the relevant case law to proscribe intermediate scrutiny for pretrial incarceration claims brought by indigents, the two-prong test laid out in *Rodriguez* can help such a claim fall into intermediate scrutiny. To address these wealth-based discrimination claims with a higher standard than rational basis review would be a step toward true Equal Protection for all in the context of pretrial incarceration.

However, the issue still remains as to the specific declaration in *Walker* that forty-eight hours is a constitutionally permissible length of time indigents must wait to receive freedom from incarceration. Why should indigents be discriminated against in a pretrial setting when creative alternative solutions to pretrial incarceration exist, and the harms of pretrial confinement on indigent communities of color are well-documented?

The Eleventh Circuit implicitly answers this question with the rationalization that the Equal Protection Clause does not require "absolute equality" between indigent arrestees and their wealthy counterparts.[191] As long as this type of rationale forms federal circuit precedent of wealth-based discrimination claims brought by indigents, then poor people, women, and people of color will continue to be adversely and disproportionately affected by pretrial incarceration in this country.[192]

The denial of pretrial liberty to indigent arrestees sooner than forty-eight hours "is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law."[193] An absolute deprivation of liberty in the context of indigents' ability to pay versus their similarly-situated wealthy counterparts is *any* length of time, but surely all lengths beyond twenty-four hours. Alternative solutions to pretrial confinement should be required of the counties that detain indigents pretrial for an inability to pay, alternatives which do not concern any amount of jail time, or at a minimum no longer than twenty-four hours. It need not be a radical claim that indigents are entitled to the protections that the law affords their similarly-situated wealthy counterparts, nor that the pretrial liberty interests of indigents should inherently outweigh the administrative burdens on courts. As Judge Martin correctly declared, "[t]he constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo."[194]

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[191] *Walker*, 901 F.3d at 1261 (quoting *San Antonio Indep. Sch. Dist*., 411 U.S. at 24.

[192] Lockhart, *supra* note 6, at 2.

[193] *ODonnell*, 900 F.3d at 228–29 (quoting Griffin v. Illinois, 351 U.S. 12, 19 (1956)).

[194] *Walker*, 901 F.3d at 1278 (Martin, J., dissenting) (quoting *Williams*, 399 U.S. at 245).

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Total Makeover: Federal Cosmetics Regulation and Its Need for Legislative Overhaul to Ensure Consumer Protection

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COMMENT

TOTAL MAKEOVER: FEDERAL COSMETICS REGULATION AND ITS NEED FOR LEGISLATIVE OVERHAUL TO ENSURE CONSUMER PROTECTION

*JUSTICE TECSON**

"History has repeatedly shown that when there is insufficient regulatory oversight, a few unscrupulous people or companies will exploit the vulnerable public for profit."[1]

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[1] Robert M. Califf, et al., *Cosmetics, Regulations, and the Public Health: Understanding the Safety of Medical and Other Products,* 177 JAMA INTERNAL MED. 1080, 1080 (2017).

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INTRODUCTION

A woman in Florida purchased hair conditioner after viewing advertisements that promoted the product's "safe, innovative and gentle qualities."[2] Within two weeks of using the product, she lost significant and abnormal amounts of hair.[3] Despite discontinuing usage of the product, she continued experiencing hair loss, ultimately losing one-quarter to one-third of the hair on her head.[4] Such is the story of Amy Friedman, one of more than 200 consumers[5] harmed by WEN Cleansing Conditioner haircare products.[6]

Haircare products like WEN Cleansing Conditioner are categorized as cosmetics.[7] Cosmetics are defined as articles and ingredients "intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance."[8] The Food & Drug Administration ("FDA" or "Agency") regulates cosmetics marketed in the United States primarily through the Federal Food Drug & Cosmetic Act ("FFDCA" or "Act") of 1938.[9]

Over the last century, the sale and manufacturing of cosmetic products has evolved into a multibillion-dollar industry.[10] In May of 2012, the worldwide cosmetic, beauty supply, and perfume retail industry had more than $250 billion in annual retail sales.[11] In 2017, the global cosmetics market was valued at approximately $532 billion.[12] Research

[2] Complaint at 8, Friedman v. Guthy-Renker LLC, No 2:14-cv-06009, 2014 WL 3944013 (C.D. Cal. July 31, 2014) [hereinafter *Friedman Complaint*].

[3] *Id.*

[4] *Id.*

[5] Jane E. Brody, *For Cosmetics, Let the Buyer Beware*, N.Y. TIMES (Aug. 7, 2017), https://www.nytimes.com/2017/08/07/well/for-cosmetics-let-the-buyer-beware.html; *see also Class Action Lawsuits Over Wen Hair Products Gets Preliminary Settlement Approval*, CBS LOS ANGELES (Oct. 31, 2016), https://losangeles.cbslocal.com/2016/10/31/class-action-lawsuit-over-wen-hair-products-gets-preliminary-settlement-approval/ (providing details of the WEN lawsuit and preliminary settlement proceedings).

[6] *Friedman Complaint*, *supra* note 2, at 8-14.

[7] *See* 21 U.S.C. § 321(i).

[8] *Id.*

[9] *See* 21 U.S.C. §§ 321-399 (providing the FDA with regulatory authority over food, drugs, medical devices and cosmetics); *see also FDA Authority Over Cosmetics: How Cosmetics are not FDA-Approved, but are FDA-Regulated*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/cosmetics/cosmetics-laws-regulations/fda-authority-over-cosmetics-how-cosmetics-are-not-fda-approved-are-fda-regulated (last updated Aug. 24, 2020).

[10] JAMES T. O'REILLY & KATHERINE A. VAN TASSEL, FOOD & DRUG ADMIN. § 17:1, at 1 (4th ed. 2020).

[11] AMALIA K. CORBY-EDWARDS, CONG. RESEARCH SERV., R42594, FDA REGULATION OF COSMETICS AND PERSONAL CARE PRODUCTS 1 (2012).

[12] *Global Cosmetics Products Market expected to reach USD 805.61 billion by 2023 –Industry Size & Share Analysis*, MARKETERS MEDIA (Mar. 13, 2018), https://marketersmedia.com/global-

shows that the global cosmetics products market is expected to reach approximately $805 billion by 2023.[13]

Although revenue within the cosmetics industry has dramatically increased in recent years, the same cannot be said of its regulation.[14] Among all the FDA product categories, cosmetics products are among the least regulated.[15] Under current federal regulations, which have not changed since 1938, the FDA has no authority to require registration and product information from cosmetic companies, mandate pre-market testing or approval of products, or order mandatory recalls of proven or potentially hazardous products.[16] Additionally, the current scheme does not require cosmetic companies to report adverse events related to their cosmetic products to the FDA.[17]

In recent years, several legislative attempts to solve the lack of FDA cosmetic regulation proved unsuccessful.[18] For instance, the Safe Cosmetics and Personal Care Products Act of 2019 ("SCPCPA") proposed to amend the FFDCA to require cosmetic companies to register their facilities[19] and provide information regarding their cosmetics' ingredients to the FDA.[20] The SCPCPA would provide the FDA with the authority to recall cosmetics that posed threats to consumer safety,[21] ban most use of animal testing in cosmetics,[22] and fund research into safer alternatives to hazardous ingredients that negatively affect women and girls of color.[23] However, like cosmetics bills that came before it, the SCPCPA was never passed.[24]

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cosmetics-products-market-expected-to-reach-usd-805-61-billion-by-2023-industry-size-share-analysis/313185.

[13] *Id.*

[14] O'REILLY & VAN TASSEL, *supra* note 10, § 17:1, at 1 (providing a historical overview of cosmetics regulation in the United States).

[15] Some scholars believe that this is because there has not yet been an established need for extensive federal cosmetics regulation in the United States. On the other hand, because cosmetics are a gendered industry primarily targeted to women, some see the lack of legislative prioritization of cosmetics law as a consequence of women's exclusion from political participation and representation. *See* O'REILLY & VAN TASSEL, *supra* note 10, § 17:1, at 1; *see also* Marie Boyd, *Gender, Race & the Inadequate Regulation of Cosmetics*, 30 YALE J. L. & FEMINISM 275, 307-10 (2019).

[16] *FDA Authority Over Cosmetics: How Cosmetics are not FDA-Approved, but are FDA-Regulated*, *supra* note 9.

[17] *Id.*

[18] *See* Safe Cosmetics and Personal Care Products Act of 2019, H.R. 4296, 116th Cong. (2019).

[19] *Id.* § 612.

[20] *Id.* § 615.

[21] *Id.* § 622.

[22] H.R. 4296, 116th Cong. § 624; *see also National Cosmetic Safety Reform*, BREAST CANCER PREVENTION PARTNERS, https://www.bcpp.org/resource/federal-cosmetic-safety-reform/ (last visited Mar. 11, 2020).

[23] H.R. 4296, 116th Cong. § 463C; *see also National Cosmetic Safety Reform*, *supra* note 22.

[24] *See* H.R. 4296, 116th Cong. § 612.

The cosmetic industry's lack of federal oversight has given rise to concerns regarding consumer safety.[25] Amy Friedman's story is one example of how the current lack of FDA cosmetic regulation causes actual harm to consumers.[26] The current regulatory scheme allows cosmetic companies to operate with little to no government review, leaving consumers vulnerable to potential bad actors.[27] This Comment discusses the problematic effects of the current regulatory framework on the health and safety of consumers, and explores the SCPCPA and its proposed amendments to the FDA's regulatory authority over cosmetics. This Comment argues that the SCPCPA is a necessary legislative solution to the current lack of federal cosmetics regulation. Consequently, this Comment argues that the SCPCPA should be re-introduced and passed in order to protect the health and safety of consumers.

Part I begins with a discussion of the FFDCA and the FDA's limited authority to regulate cosmetics. Part II provides an overview of the proposed SCPCPA bill and its provisions. This section explores how the bill purported to amend the FFDCA by broadening the FDA's regulatory power over the cosmetics industry. Part III details two instances wherein the lack of federal oversight over cosmetics threatened consumer safety: the WEN incident and a second one involving Johnson & Johnson talcum powder found to be contaminated with asbestos. Lastly, Part IV argues that Congress should enact the SCPCPA because it would provide the FDA with the necessary authority to effectively regulate cosmetics and protect consumers. This section begins by examining the provisions of the SCPCPA in the context of the WEN and Johnson's incidents, and argues that these incidents could have been prevented or minimized if the FDA had the authority the SCPCPA aimed to provide. To illustrate the feasibility of the SCPCPA provisions, this section then looks to the success of similar provisions in California's existing cosmetics legislature including the state's recently enacted Toxic-Free Cosmetics Act. Lastly, this section addresses legislators' concerns as to federal preemption and the SCPCPA's effect on small businesses.

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[25] *See* Brody, *supra* note 5; Tiffany Hsu & Roni Caryn Rabin, *Johnson & Johnson Recalls Baby Powder Over Asbestos Worry*, N.Y. TIMES, https://www.nytimes.com/2019/10/18/business/johnson-johnson-baby-powder-recall.html (last updated Nov. 19, 2019).

[26] *See Friedman Complaint*, *supra* note 2.

[27] *See* Priyanka Narayan, *The cosmetics industry has avoided strict regulation for over a century. Now rising health concerns has FDA inquiring*, CNBC (Aug. 2, 2018, 10:08 AM), https://www.cnbc.com/2018/08/01/fda-begins-first-inquiry-of-lightly-regulated-cosmetics-industry.html.

I. FEDERAL COSMETICS REGULATION AND THE FDA

A. THE FEDERAL FOOD, DRUG, AND COSMETIC ACT

The federal regulation of cosmetic products began in 1938 when Congress passed the Federal Food, Drug, and Cosmetic Act ("FFDCA").[28] Prior to its enactment, cosmetics were regulated by a collection of state laws that were in place to regulate food and drugs.[29] The FFDCA granted the FDA the authority to regulate cosmetic products and their ingredients.[30] The FFDCA provisions that regulate the cosmetics industry, with the exception of those pertaining to color additives, have not changed since the Act was first passed nearly a century ago.[31]

The FFDCA prohibits the adulteration and misbranding of cosmetic products in interstate commerce.[32] The Act also prohibits the introduction, delivery for introduction, and receipt of such adulterated or misbranded cosmetic products into interstate commerce.[33] Legislators included these provisions in the FFDCA in reaction to several incidents in which cosmetics allegedly caused serious problems to consumer health.[34]

B. FDA REGULATORY AUTHORITY AND ITS LIMITATIONS OVER COSMETICS

Under the FFDCA, if the FDA finds an adulterated or misbranded cosmetic product in interstate commerce, the Agency has the power to seize the product, seek an injunction preventing production and distribution of the product, and, in some instances, pursue criminal penalties.[35] A cosmetic company may also be sued for product liability for products

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[28] O'REILLY & VAN TASSEL, *supra* note 10, § 17:1, at 1.

[29] CORBY-EDWARDS, *supra* note 11, at 5.

[30] *Id.*

[31] Some types of cosmetics are also federally regulated under the Fair Packaging and Labeling Act (FPLA) and related regulations. CORBY-EDWARDS, *supra* note 11, at 5.

[32] 21 U.S.C. § 331(b); *see also* 21 U.S.C. § 361(stating that a cosmetic is deemed adulterated if it contains a poisonous substance, a substance that may otherwise injure the user under the product's prescribed usage, or any filthy, putrid, or decomposed substance); *see also* 21 U.S.C. § 362 (explaining that a cosmetic is considered misbranded if its labeling is false or misleading, if its packaging does not contain the proper labeling information or meet the listed labeling requirements, or if the container holding the product was made, formed, or filled in a misleading manner).

[33] 21 U.S.C. § 331(a), (c).

[34] CORBY-EDWARDS, *supra* note 11, at 5.

[35] *Id* (quoting 21 U.S.C. §§ 331-334).

that are adulterated, misbranded, or are otherwise in violation of the FFDCA.[36]

The FDA also has the power to conduct inspections of cosmetic establishments, to ensure that the products manufactured and sold at the facility are safe, and to evaluate the products for potential adulteration or misbranding violations.[37] The FDA may decide to inspect a facility based on its own surveillance initiatives, the facility's compliance history, or complaints made by a consumer.[38]

During these inspections, the FDA may collect samples from cosmetics establishments for examination and analysis.[39] The FFDCA does not require the FDA to notify the establishments prior to conducting inspections, only that the inspections be conducted "at reasonable times and within reasonable limits and in a reasonable manner."[40] The FDA does not have a required schedule for conducting inspections in cosmetic facilities.[41] The Agency acknowledges its limited inspectional authority over cosmetics establishments as well as its lack of authority to obtain cosmetic testing records.[42]

The FDA also lacks the authority to collect cosmetics information[43] from companies.[44] The FFDCA neither requires cosmetic facility registration nor cosmetics manufacturers to report the ingredients they use in their products.[45] Furthermore, the FFDCA does not require cosmetic establishments to report cosmetic-related injuries to the FDA.[46] In contrast, other FDA-regulated products such as food, drugs, medical devices, and

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[36] Id at 9-10 (citing Nicole Abramowitz, *The Dangers of Chasing Youth: Regulating the Use of Nanoparticles in Anti-Aging Products,* U ILL. TECH & POLICY 199, 208-09 (Spring 2008)).

[37] Id at 6.

[38] *Id* (quoting FDA*, Inspection of Cosmetics: An Overview*, http://www.fda.gov/Cosmetics/GuidanceComplianceRegulatoryInformation/ComplianceEnforcement/ucm136455.htm).

[39] *Id* (quoting 21 U.S.C. § 374(d); FDA*, Inspection of Cosmetics: An Overview*, http://www.fda.gov/Cosmetics/GuidanceComplianceRegulatoryInformation/ComplianceEnforcement/ucm136455.htm; FFDCA § 704(c)).

[40] 21 U.S.C. § 374; CORBY-EDWARDS, *supra* note 11, at 6 (quoting 21 U.S.C. § 374(a); FFDCA § 704(a)).

[41] CORBY-EDWARDS, *supra* note 11, at 6.

[42] O'REILLY & VAN TASSEL, *supra* note 10, § 17:10, at 1.

[43] "Cosmetics information" includes, but is not limited to, cosmetic facility registration, cosmetic product ingredient statements, and information regarding the discontinuation or amendment of product formulations. *See Voluntary Cosmetic Registration Program*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/cosmetics/voluntary-cosmetic-registration-program (last updated Aug. 24, 2020).

[44] *See* 21 U.S.C. § 374; O'REILLY & VAN TASSEL, *supra* note 10, § 17:10, at 1.

[45] CORBY-EDWARDS, *supra* note 11, at 6 (citing 21 C.F.R. Parts 710, 720; FDA, *Bad Reaction to Cosmetics? Tell FDA*, http:www.fda.gov/ForConsumers/ConsumerUpdates/ucm241820.htm).

[46] *Id* (quoting FDA Authority Over Cosmetics, http://www.fda.gov/Cosmetics/Guidance/ComplianceRegulatoryInformation/ucm074162.htm; Donald R. Johnson, *Not in my Makeup: The Need for Enhanced Premarket Regulatory Authority Over Cosmetics In light of Increased Usage of Engineered Nanoparticles*, 26 J. CONTEMP. HEALTH L. & POLICY 82, 114 (2009)).

tobacco have several registration requirements.[47] Drug manufacturers, unlike cosmetics manufacturers, are required to report to the FDA adverse reactions to the drugs they produce.[48]

Since the FDA cannot mandate the registration of cosmetic information, whether or not a company notifies the FDA of its existence or the formulation of its products is entirely the company's choice.[49] The Agency created a Voluntary Cosmetic Registration Program ("VCRP") to be used by "manufacturers, packers, and distributors of cosmetic products that are in commercial distribution in the United States."[50] The VCRP applies to establishments regardless of whether or not their products enter interstate commerce.[51] The FDA encourages cosmetic manufacturers and packaging companies to register their establishments and product ingredients through the VCRP within 30 days of beginning operation.[52]

Furthermore, since the FDA cannot require companies to report unfavorable reactions to their cosmetic products, the Agency finds out about adverse events in the cosmetic industry only when consumers, manufacturers, or healthcare professionals voluntarily report them.[53] Adverse events include any problems a consumer experienced when using a cosmetic product.[54] A consumer, healthcare professional, attorney, or member of the cosmetic industry may report an adverse event related to cosmetics by calling an FDA Consumer Complaint Coordinator, or by completing a "Voluntary MedWatch form" on the FDA's website.[55]

The FDA's regulatory authority over the cosmetics industry is significantly less comprehensive than its authority over other FDA-regulated products such as food, biologics, and medical devices.[56] For instance, although the FDA can pursue enforcement actions against products or entities that do not comply with the law, the law does not require

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[47] CORBY-EDWARDS, *supra* note 11, at 6 (quoting 21 U.S.C. § 350d (food); 21 U.S.C. § 360 (drugs and devices); 21 U.S.C. § 387e (tobacco)).

[48] *Id.*

[49] *See FDA Authority Over Cosmetics: How Cosmetics are not FDA-Approved, but are FDA-Regulated*, *supra* note 9.

[50] *Voluntary Cosmetic Registration Program*, *supra* note 43.

[51] 21 C.F.R. § 710.1 (2019).

[52] 21 C.F.R. §§ 710.2, 720.4 (2019); *see also* CORBY-EDWARDS, *supra* note 11, at 22.

[53] *Using Adverse Event Reports to Monitor Cosmetic Safety*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/cosmetics/how-report-cosmetic-related-complaint/using-adverse-event-reports-monitor-cosmetic-safety (last updated Nov. 3, 2017).

[54] *Id*.

[55] *How to Report a Cosmetic Related Complaint*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/cosmetics/cosmetics-compliance-enforcement/how-report-cosmetic-related-complaint (last updated Aug. 24, 2020).

[56] *See FDA Authority Over Cosmetics: How Cosmetics are not FDA-Approved, but are FDA-Regulated*, *supra* note 9; *see also* CORBY-EDWARDS, *supra* note 11, at 6.

FDA approval for cosmetic products or ingredients before they go on the market, with the exception of color additives.[57] Also, the FDA does not have the statutory authority to require pre-market notification, safety testing, or pre-market review of these cosmetic products and ingredients.[58] As such, the burden falls on cosmetic establishments to ensure products are safe before being marketed to the public.[59] Cosmetics manufacturers and companies who market cosmetics in the United States have a legal duty to substantiate the safety of their products.[60] However, neither the law nor any FDA regulations require specific testing methods to demonstrate safety.[61] The FDA promulgated that the safety of a product may be substantiated through "(a) reliance on already available toxicological test data on individual ingredients and on product formulations that are similar in composition to the particular cosmetic, and (b) performance of any additional toxicological and other tests that are appropriate in light of such existing data and information."[62]

Since the FFDCA failed to specify how cosmetic products and their ingredients should be tested, the Personal Care Products Council ("PCPC"), the cosmetic industry's trade association, created a Cosmetic Ingredient Review ("CIR") program to help provide some guidance on the matter.[63] The program reviews the safety of cosmetic product ingredients with the use of existing data, published and unpublished, of each individual cosmetic ingredient.[64] Under this program, an expert panel analyzes the safety of cosmetic ingredients from an annual priority list.[65] The list is generated based on ingredients currently used in cosmetics commercially available in the United States, and considers information from the VCRP as well as "toxicological considerations."[66] The panelists then analyze the data and determine whether an ingredient is safe for use in cosmetic products.[67] However, although the CIR findings on cosmetic ingredients are published, the cosmetic industry is under no legal obligation to act in accordance with these findings.[68]

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[57] *FDA Authority Over Cosmetics: How Cosmetics are not FDA-Approved, but are FDA-Regulated*, *supra* note 9.

[58] CORBY-EDWARDS, *supra* note 11, at 7.

[59] *Id* at 11.

[60] *FDA Authority Over Cosmetics: How Cosmetics are not FDA-Approved, but are FDA-Regulated*, *supra* note 9.

[61] *Id.*

[62] *FDA Authority Over Cosmetics: How Cosmetics are not FDA-Approved, but are FDA-Regulated*, *supra* note 9 (citing 40 Fed. Reg. 8763, 8916 (Mar. 3, 1975)).

[63] CORBY-EDWARDS, *supra* note 11, at 13.

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id* at 14.

Additionally, under the current regulatory framework, the law does not require cosmetics manufacturers to use Good Manufacturing Practices ("GMPs") unless their cosmetic products are also drugs as defined by statute.[69] This is significant because, according to the FDA, adherence to GMPs minimizes the risk of having products that violate the FFDCA.[70] And although the FDA created a Draft Guidance Document establishing what it deems to be GMPs for cosmetics, the document lays out non-binding recommendations rather than legally enforceable responsibilities.[71] The opposite is true for the drug industry: the FDA strictly monitors industry compliance with the current GMP regulations that apply to drugs, as these regulations are legally enforceable and codified in the Code of Federal Regulations.[72]

Unlike food and medical devices, the FDA does not have the authority to order a mandatory recall of cosmetic products found to be in violation of the FFDCA.[73] Rather, the FDA may request that a company recall certain cosmetic products.[74] Recalls of cosmetic products are voluntary actions on the part of the manufacturers and distributors.[75] Once a company voluntarily recalls a cosmetic product, the FDA retains the authority to monitor the progress of a recall,[76] evaluate the health hazard presented by the product,[77] and ensure the public is notified when necessary.[78]

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[69] *Id* at 7.

[70] *See Good Manufacturing Practice (GMP) Guidelines/Inspection Checklist for Cosmetics*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/cosmetics/cosmetics-guidance-documents/good-manufacturing-practice-gmp-guidelinesinspection-checklist-cosmetics (last updated Aug. 24, 2020).

[71] *Draft Guidance for Industry: Cosmetic Good Manufacturing Practices*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/regulatory-information/search-fda-guidance-documents/draft-guidance-industry-cosmetic-good-manufacturing-practices (last updated Nov. 14, 2018).

[72] *Current Good Manufacturing Practice (CGMP) Regulations*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/drugs/pharmaceutical-quality-resources/current-good-manufacturing-practice-cgmp-regulations (last updated Sep. 21, 2020).

[73] *FDA Authority Over Cosmetics: How Cosmetics are not FDA-Approved, but are FDA-Regulated*, *supra* note 9; CORBY-EDWARDS, *supra* note 11, at 10.

[74] CORBY-EDWARDS, *supra* note 11, at 10.

[75] *See FDA Authority Over Cosmetics: How Cosmetics are not FDA-Approved, but are FDA-Regulated*, *supra* note 9.

[76] 21 C.F.R. § 7.53 (2019); *FDA Recall Policy for Cosmetics*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/cosmetics/cosmetics-recalls-alerts/fda-recall-policy-cosmetics (last updated Aug. 24, 2020).

[77] 21 C.F.R. § 7.41 (2019); *FDA Recall Policy for Cosmetics*, *supra* note 76.

[78] 21 C.F.R. §§ 7.42(b)(2), 7.50 (2019); *FDA Recall Policy for Cosmetics*, *supra* note 76.

II. THE PROPOSED SAFE COSMETICS AND PERSONAL CARE PRODUCTS ACT OF 2019

The Safe Cosmetics and Personal Care Products Act of 2019 ("SCPCPA") bill, introduced by Rep. Jan Schakowsky, purported to reform the regulation of cosmetics by amending the FFDCA to broaden the FDA's regulatory powers over cosmetics.[79] The Safe Cosmetics and Personal Care Products Act of 2019 was the reintroduced version of the 2018 and 2013 bills with the same name that had died in previous Congresses.[80]

If Congress had enacted the SCPCPA, the FDA would have finally been granted some of the authority it needs to effectively regulate the cosmetics industry. First, the SCPCPA would have required cosmetic establishments to register with the FDA.[81] The FDA would then make the list of registered establishments available to the public through publication on its website.[82] The SCPCPA would have also required cosmetic establishments to submit all safety information on their products and product ingredients to the FDA.[83] Based on the information submitted, the FDA would then review and evaluate the safety of the cosmetic product.[84] In evaluating cosmetic safety under the SCPCPA, the Agency would be allowed to consider certain authoritative sources, such as the Environmental Protection Agency, the International Agency for Research on Cancer, the National Institutes of Health, the California Environmental Protection Agency, and any other government entity determined by the FDA.[85] Under the SCPCPA, cosmetic companies would also be required to report all serious adverse events to the FDA within fifteen days after the companies receive knowledge of them.[86]

In addition to reporting and registration requirements, and akin to FDA's authority over food products, the SCPCPA would have provided the FDA with the authority to issue mandatory recalls of products determined to be hazardous.[87] Similarly, the bill would have directed the FDA to establish a safety standard for cosmetics and issue regulations on

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[79] *National Cosmetic Safety Reform*, *supra* note 22.

[80] *See H.R. 4296 (116th): Safe Cosmetics and Personal Care Products Act of 2019*, GOVTRACK, https://www.govtrack.us/congress/bills/116/hr4296 (last visited Jan. 12, 2021).

[81] Safe Cosmetics and Personal Care Products Act of 2019, H.R. 4296, 116th Cong. § 612 (2019).

[82] *Id* § 612(d)(1)(B).

[83] *Id* § 615(a).

[84] *Id* § 615(c).

[85] *Id* § 615(c).

[86] *Id* § 622.

[87] *Id* § 620(d).

GMPs for the industry.[88] The SCPCPA bill also aimed to institute an immediate ban on over one dozen of the most hazardous chemicals in cosmetics[89] and required full disclosure of fragrance product ingredients.[90] The bill would have also banned most use of animal testing in the development of cosmetics.[91]

The SCPCPA also included provisions specifically designed for the protection of "highly exposed and vulnerable populations."[92] These vulnerable populations include infants, children, pregnant women, the elderly, salon workers, and communities of color.[93] The SCPCPA is the only federal bill to date to address the severe exposure to hazardous chemicals experienced by salon workers and communities of color.[94] The bill would have provided for the funding of research into safer alternatives to the hazardous ingredients that negatively affect these communities.[95]

III. THE FDA'S LACK OF REGULATORY AUTHORITY OVER COSMETICS POSES A RISK TO CONSUMER SAFETY

The cosmetics industry's heavy reliance on the self-regulation of its establishments poses significant risks to consumer health and safety.[96] Due to the FDA's lack of statutory authority to regulate cosmetics, the Agency is essentially powerless to protect consumers from unsafe products. Several instances illustrate this point.

In 2016, the FDA had received 1,386 adverse-event reports that were obtained from consumers of WEN by Chaz Dean Cleansing Conditioner products ("WEN"), which marked the highest number of reports ever received by the FDA for any haircare product.[97] However, after fur-

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[88] *Id* § 614.

[89] H.R. 4296, 116th Cong. § 616(b)(2); *see also National Cosmetic Safety Reform*, *supra* note 22.

[90] H.R. 4296, 116th Cong. § 613(g).

[91] *Id* § 624.

[92] *See National Cosmetic Safety Reform*, *supra* note 22.

[93] H.R. 4296, 116th Cong. § 611(13); *see also National Cosmetic Safety Reform*, *supra* note 22.

[94] *New Federal Bill Will Be the First in the Nation to Ensure That Beauty and Personal Care Products Are Safe for All*, BREAST CANCER PREVENTION PARTNERS (Sept. 12, 2019), https://www.bcpp.org/resource/new-federal-bill-will-be-the-first-in-the-nation-to-ensure-that-beauty-and-personal-care-products-are-safe-for-all/.

[95] H.R. 4296, 116th Cong. § 463C; *National Cosmetic Safety Reform*, *supra* note 22.

[96] *See* Narayan, *supra* note 27.

[97] The FDA published a safety alert announcing that it would conduct investigations based on the consumer reports of hair breakage, balding, rashes, and itching as a result of using WEN. *Statement on FDA Investigation of WEN by Chaz Dean Cleansing Conditioners*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/cosmetics/cosmetic-products/statement-fda-investigation-wen-chaz-dean-cleansing-conditioners (last updated Nov. 15, 2017).

ther investigation the Agency discovered that Chaz Dean, Inc. and Guthy-Renker, LLC, manufacturers of WEN, received more than 21,000 complaints of hair loss and scalp damage from consumers who had used the Cleansing Conditioner products.[98] The manufacturers did not disclose information to the FDA as to what could have caused the reactions.[99]

In 2016, Chaz Dean, Inc. and Guthy-Renker, LLC settled a class action lawsuit against it filed by more than 200 consumers for $26.3 million.[100] When the settlement was announced, WEN released a statement saying that its products were safe and the decision to settle was merely a business decision meant to avoid the time-consuming and costly process of litigation.[101] As such, despite tens of thousands of complaints, an ongoing FDA investigation, and a $26.3 million settlement of consumer claims, WEN is still allowed to sell its products and continues to do so today.[102]

There has also been concern of asbestos contamination in cosmetic products containing talc.[103] In 2018, the FDA initiated an ongoing survey of cosmetic products for asbestos contamination.[104] As part of this survey, the FDA tested approximately 50 cosmetic products for the presence of asbestos, among which were two samples of Johnson's baby pow-

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[98] Brody, *supra* note 5.

[99] *FDA Information for Consumers About WEN by Chaz Dean Cleansing Conditioners*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/cosmetics/cosmetic-products/fda-information-consumers-about-wen-chaz-dean-cleansing-conditioners (last updated Nov. 3, 2017).

[100] Brody, *supra* note 5; *Class Action Lawsuits Over Wen Hair Products Gets Preliminary Settlement Approval*, CBS LOS ANGELES (Oct. 31, 2016, 11:18 PM), https://losangeles.cbslocal.com/2016/10/31/class-action-lawsuit-over-wen-hair-products-gets-preliminary-settlement-approval/.

[101] *Class Action Lawsuits Over Wen Hair Products Gets Preliminary Settlement Approval*, *supra* note 100.

[102] Julie Edgar, *WEN Case Spurs Call for Beauty Product Regs*, WEBMD HEALTH NEWS (Feb. 7, 2018), https://www.webmd.com/beauty/news/20180207/wen-case-spurs-call-for-beauty-product-regs; Brody, *supra* note 5.

[103] Talc is a naturally occurring mineral that is used in cosmetic and personal care products to absorb moisture, improve the feel of a product, and to prevent "caking" in makeup. Some literature suggests a connection between the usage of talc powders and the development of ovarian cancer. However, the research on the matter has been non-conclusive and the FDA is still conducting further research in this area. Asbestos, on the other hand, is a known carcinogen. Since both minerals may be found in close proximity to each other, there is the potential for contamination of talc with asbestos. As such, it is important that manufacturers select talc mining sites carefully and take steps to purify the talc ore sufficiently. *Talc*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/cosmetics/cosmetic-ingredients/talc (last updated Aug. 18, 2020); *see also Baby powder manufacturer voluntarily recalls products for asbestos*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/news-events/press-announcements/baby-powder-manufacturer-voluntarily-recalls-products-asbestos (last updated Oct. 18, 2019).

[104] *Baby powder manufacturer voluntarily recalls products for asbestos*, *supra* note 103.

der.[105] The results revealed that a sample from one lot of baby powder contained chrysotile fibers, a type of asbestos.[106]

In October of 2019, Johnson & Johnson Consumer Inc. ("J&J") voluntarily recalled the lot of baby powder that tested positive for asbestos, which totaled around 33,000 bottles.[107] Thirteen days before the FDA released its findings, J&J CEO Alex Gorsky testified that the products were safe.[108] Despite the FDA findings, J&J stood by the safety of its products and executed the recall only "out of an abundance of caution."[109] At the time of the announcement, there were approximately 15,000 ongoing lawsuits against J&J by plaintiffs who claimed that the company's talc powders had caused their cancer.[110] However, this incident is the first in which J&J recalled its baby powder for asbestos contamination, and the first time the FDA announced a finding of asbestos in the J&J product.[111]

In both of these cosmetic-related incidents, the public perceived a dire lack of cosmetics regulation by the federal government.[112] Consumers noted the lack of pre-market approval and testing, as well as the FDA's inability to order a mandatory recall of potentially injurious products.[113] These concerns may have played a part in cosmetics legislation gaining brief Congressional attention.[114]

IV. THE SCPCPA IS A NECESSARY AND FEASIBLE SOLUTION THAT CONGRESS SHOULD ENACT TO PROTECT CONSUMERS

The SCPCPA's proposal to broaden the FDA's regulatory authority over cosmetics is necessary to protect consumer safety. The harmful effects and safety risks resulting from the WEN and Johnson's incidents[115]

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[105] *Id.*

[106] *Id.*

[107] *Johnson & Johnson Consumer Inc. to Voluntarily Recall a Single Lot of Johnson's Baby Powder in the United States*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/safety/recalls-market-withdrawals-safety-alerts/johnson-johnson-consumer-inc-voluntarily-recall-single-lot-johnsons-baby-powder-united-states (last updated Oct. 18, 2019); *see also Johnson & Johnson confirms no asbestos in Johnson's Baby Powder*, CNBC (Dec. 3, 2019, 7:18 PM), https://www.cnbc.com/2019/12/03/johnson-johnson-confirms-no-asbestos-in-johnsons-baby-powder.html.

[108] Chad Terhune, Lisa Girion, & Mike Spector, *J&J CEO testified Baby Powder was safe 13 days before FDA bombshell*, REUTERS (Oct. 22, 2019, 1:03 PM), https://www.reuters.com/article/us-johnson-johnson-talc-ceo-insight/johnson-johnson-ceo-testified-baby-powder-was-safe-13-days-before-fda-bombshell-idUSKBN1X12GF.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *See* Brody, *supra* note 5; Hsu & Rabin, *supra* note 25.

[113] Hsu & Rabin, *supra* note 25.

[114] Narayan, *supra* note 27.

[115] *See* Brody, *supra* note 5; Hsu & Rabin, *supra* note 25.

could have been prevented—or at the very least, minimized—if the FDA had the statutory power that the SCPCPA aimed to provide.

First, apart from being required to register with the FDA, the cosmetics establishments would have had to submit safety information to the Agency.[116] This information would have been made readily available to the public through the FDA website.[117] From these provisions alone, the public could have received advanced notice regarding the safety of a particular product.[118] Additionally, the mandatory adverse-event reporting proposed by the SCPCPA bill could have more swiftly alerted the FDA to the potentially hazardous products.[119] For example, in the WEN incident, if the FDA had the authority to require cosmetic establishments to report adverse events, the Agency would have known about the adverse effects of the cosmetic sooner.[120] Under the SCPCPA, companies would have been required to inform the FDA of any adverse events relating to its products within fifteen days of the company's knowledge.[121] As such, the Agency would have learned of consumer complaints regarding the WEN products before that number reached 21,000.[122]

Similarly, in the Johnson's incident, if the SCPCPA had been implemented, the FDA would have had information on the company's talc sources and testing methods to better substantiate the likelihood of asbestos contamination in the products.[123] The FDA, through reviewing and evaluating the safety information submitted by the respective companies,[124] could have been able to identify safety concerns and notify the public earlier, thus minimizing any consumer exposure to potentially injurious products. Additionally, had the FDA possessed the authority to order mandatory product recalls[125] in both of the instances described, the Agency could have acted in order to lessen consumer exposure to the potentially hazardous cosmetics. This power would have been particu-

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[116] Safe Cosmetics and Personal Care Products Act of 2019, H.R. 4296, 116th Cong. §§ 612, 615 (2019).

[117] *Id* §§ 613, 615.

[118] *Id* §§ 613, 615.

[119] *See id* § 622.

[120] *See Statement on FDA Investigation of WEN by Chaz Dean Cleansing Conditioners*, *supra* note 97.

[121] H.R. 4296, 116th Cong. § 622.

[122] *See Statement on FDA Investigation of WEN by Chaz Dean Cleansing Conditioners*, *supra* note 97; *Using Adverse Event Reports to Monitor Cosmetic Safety*, U.S. FOOD & DRUG ADMIN., https://www.fda.gov/cosmetics/how-report-cosmetic-related-complaint/using-adverse-event-reports-monitor-cosmetic-safety (last updated Nov. 3, 2017).

[123] *See* H.R. 4296, 116th Cong. § 615.

[124] *See id* § 615.

[125] *See id* § 620.

larly beneficial in the instance of WEN, whose harmful haircare products are still on the market today.[126]

The SCPCPA's proposal to provide the FDA with more comprehensive regulatory authority over cosmetics is also reasonable. In fact, some of the regulatory powers proposed by the SCPCPA are already within the Agency's authority over other FDA-regulated products.[127] For instance, the SCPCPA would have provided the FDA with the authority to order mandatory recalls of harmful cosmetic products—something that the FDA already has the power to do with respect to food products.[128] The FDA can and does use its statutory power to force companies to recall unsafe food products, effectively taking those products off the market.[129] Mandatory recall authority is necessary for consumer protection, particularly in instances where a company refuses to recall products voluntarily.[130] By having the power to order recalls of food products, the FDA shields consumers from the harm that could result from companies continuing to sell unsafe food products to the public. Providing the FDA with mandatory recall authority over cosmetics would similarly protect consumers from harm caused by having hazardous cosmetic products on the market.

The SCPCPA's mandatory registration, ingredient disclosure, and adverse-event reporting provisions would provide the FDA with the power to collect vital information on cosmetics, allowing for swifter regulation and added protection for consumers. With this power, the FDA would be able to find out earlier whether a product is hazardous or in violation of the FFDCA. The Agency would no longer be limited to whatever information, if any, a company is willing to provide as to a product's ingredients and safety. Neither would the Agency have to rely solely on voluntary adverse event reports from consumers and other parties in order to know if a product has caused harm. And since information on a product's ingredients and safety would be made available to the public under the SCPCPA, consumers would have notice of potentially harmful cosmetic products.[131]

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[126] Edgar, *supra* note 102.

[127] *See* CORBY-EDWARDS, *supra* note 11, at 10.

[128] *See id.*

[129] *See, e.g.,* Maggie Fox, *FDA forces mandatory recall of kratom, says it's a first*, NBC NEWS, https://www.nbcnews.com/health/health-news/fda-forces-mandatory-recall-kratom-says-it-s-first-n862481 (last updated Apr. 4, 2018) (recounting an instance where the FDA forced a company to recall its potentially contaminated kratom products after the company had refused to recall the products voluntarily).

[130] *See, e.g., id.*

[131] *See* Safe Cosmetics and Personal Care Products Act of 2019, H.R. 4296, 116th Cong. §§ 612, 613, 615 (2019).

The success of mandatory ingredient disclosure and reporting provisions is best seen in California's cosmetics legislation. In 2005, California enacted the California Safe Cosmetics Act, codified in California Health & Safety Code, section 111791.[132] This California Act was the country's first state cosmetics regulatory act.[133] In passing the statute, the legislature noted the lack of federal regulation and weaknesses in FDA regulatory authority over cosmetics.[134] As a way of strengthening cosmetic regulation, the California Safe Cosmetics Act requires cosmetics establishments to report the use of potentially harmful products or ingredients to California's Department of Health Services ("DHS").[135] Manufacturers selling cosmetic products in California must notify the DHS of any product containing "any ingredient that is a chemical identified as causing cancer or reproductive toxicity."[136] The DHS then notifies the public of this information.[137] Additionally, under the California Safe Cosmetics Act, the DHS has the authority to require manufacturers to submit health effects data, and to investigate whether products could be toxic under a consumer's ordinary usage.[138] Manufacturers in California that do not comply with the DHS could face legal action.[139]

From 2007 to 2013, California has identified five additional hazardous chemicals that manufacturers are required to disclose, under the act's mandatory reporting requirements.[140] Within this time, in addition to making the reporting system available online, the state notified approximately 7,000 manufacturers that they were out of compliance with the act's provisions.[141] Furthermore, and perhaps most notably, under the act the California Attorney General was able to obtain an injunction against the manufacturer of "Brazilian Blowout," a Brazilian hair relaxing treatment that was found to emit formaldehyde gas, a known carcinogen.[142]

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[132] *See* Meryl C. Maneker & Vickie E. Turner, *Cosmetics and Beauty Product Litigation*, 59 THE PRACTICAL LAW. 29, 31 (2013), http://www.wilsonturnerkosmo.com/tasks/sites/wtk/assets/Image/TPL1302_Maneker.pdf.

[133] Cynthia Washam, *Legislation: California Enacts Safe Cosmetics Act*, 114(7) ENVTL. HEALTH PERSPECTIVES (2006), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1513294/.

[134] *See* Maneker & Turner, *supra* note 132, at 31.

[135] Washam, *supra* note 133.

[136] Cal. Health & Safety Code § 111792(a) (2020); *see also* Maneker & Turner, *supra* note 132, at 32.

[137] Washam, *supra* note 133.

[138] *Id.*

[139] *Id.*

[140] Maneker & Turner, *supra* note 132, at 32.

[141] *Id.*

[142] Maneker & Turner, *supra* note 132, at 32; *see also Formaldehyde and Cancer Risk*, NAT'L CANCER INST., https://www.cancer.gov/about-cancer/causes-prevention/risk/substances/formaldehyde/formaldehyde-fact-sheet#:~:text=the%20International%20Agency%20for%20Research,Report%20on%20Carcinogens%20(3). (last updated June 10, 2011).

The achievements of the California Safe Cosmetics Act indicate that mandatory reporting and ingredient disclosure provisions are essential to strengthening cosmetics regulations. Furthermore, the success of such provisions on a state level help show the kind of impact similar provisions may have on a federal level. In enacting the California Safe Cosmetics Act and requiring companies to report key cosmetic information to the DHS, California essentially expedited the regulatory process for cosmetics by eliminating any prior hurdles the state agency faced due to a lack of access to information. Through the act, the state is able to effectively protect its consumers by identifying hazardous chemicals in cosmetic products and promptly notifying the public. The act also enables the state to hold companies accountable for the safety of their products. The SCPCPA's proposal to provide the FDA with the power to collect cosmetics information from companies would similarly expedite the federal cosmetics regulatory process, afford additional protection for consumers, and hold companies accountable for the safety of products they sell on the market.

Additionally, the SCPCPA's proposal to ban certain known toxic chemicals from cosmetics and personal care products is an attainable solution that is a necessary step in ensuring the safety of consumers. Again, California's state legislature best illustrates this point. As of September 2020, California became the first state to ban twenty-four toxic chemicals in cosmetics and personal care products.[143] The Toxic-Free Cosmetics Act, codified in California Health & Safety Code, section 108980, is the nation's first state-level ban of certain toxic ingredients for use in cosmetic products and personal care products.[144] Among these banned ingredients are formaldehyde and the most toxic types of phthalates and parabens,[145] some of which the SCPCPA proposed to ban as well.[146] The passing of such state legislation is a testament to the shortcomings of current federal legislation, and an indication that banning toxic chemicals from cosmetics and personal care products is necessary and feasible. A parallel federal level proposition is a reasonable solution.

Through its provisions, the SCPCPA would have protected not only regular consumers but vulnerable populations as well.[147] The SCPCPA

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[143] Monica Amarelo, *California First State to Ban 24 Toxic Chemicals in Personal Care Products and Cosmetics*, ENVTL. WORKING GROUP (Sept. 30, 2020), https://www.ewg.org/release/california-first-state-ban-24-toxic-chemicals-personal-care-products-and-cosmetics.

[144] *Id.*

[145] *See* CAL. HEALTH & SAFETY CODE § 108980 (2021).

[146] *See* Safe Cosmetics and Personal Care Products Act of 2019, H.R. 4296, 116th Cong. § 616 (2019).

[147] *See* Erika Wilhelm, *New Federal Bill Will Be the First in the Nation to Ensure That Beauty and Personal Care Products Are Safe for All*, BREAST CANCER PREVENTION PARTNERS (Sept.

was the only federal bill to tackle the disparate effect of the cosmetics industry on people of color and professional salon workers.[148] An analysis by the Environmental Working Group ("EWG") showed that cosmetics marketed towards Black women were more likely to contain harmful ingredients than those marketed towards the general public.[149] The EWG also found that in 1,177 beauty and personal care products which were aimed towards Black women, about one in twelve was classified as "highly hazardous," according to the EWG's scoring system.[150] By supporting research on cosmetics-related health disparities that impact these communities, the SCPCPA purported to lessen their exposure to toxic chemicals.[151] The bill also proposed to create a safety standard for cosmetics and to fund research into safer alternatives for toxic ingredients,[152] which would have helped ensure a level of protection for these vulnerable and highly-exposed communities.[153]

Republican lawmakers had expressed concerns regarding the SCPCPA's proposed changes to FDA regulatory authority.[154] Rep. Michael Burgess noted that the SCPCPA did not adequately address the issue of federal preemption and harmonization between federal and state legislature.[155] According to Rep. Burgess, any law passed on this issue should contain language stating that federal laws preempt any state laws.[156] Yet although the concerns regarding preemption are valid, having a robust preemption clause may discourage states and local governments from enacting laws stronger or more tailored to their residents than the prevailing federal law.[157] Rather than a preemption clause, the

12, 2019), https://www.bcpp.org/resource/new-federal-bill-will-be-the-first-in-the-nation-to-ensure-that-beauty-and-personal-care-products-are-safe-for-all/.

[148] *See id.*

[149] Paul Pestano et al., *Big Market for Black Cosmetics, But Less-Hazardous Choices Limited*, ENVTL. WORKING GRP. (Dec. 6, 2016), https://www.ewg.org/research/big-market-black-cosmetics-less-hazardous-choices-limited#.WgpqtBNSwXo.

[150] *Id.*

[151] *See* H.R. 4296, 116th Cong. § 463C; *see also* Wilhelm, *supra* note 147.

[152] H.R. 4296, 116th Cong. §§ 4, 614.

[153] *See National Cosmetic Safety Reform*, *supra* note 22.

[154] Isabella Isaacs-Thomas, *Why your cosmetics don't have to be tested for safety*, PBS NEWS HOUR (Dec. 16, 2019, 5:50 PM), https://www.pbs.org/newshour/health/why-your-cosmetics-dont-have-to-be-tested-for-safety.

[155] *Id.*

[156] *Id.*

[157] The preemption doctrine, derived from the Supremacy Clause of the U.S. Constitution, states that when state law and federal law are in conflict, federal law displaces state law. Where laws are unclear as to whether or not preemption should apply, as is the case with laws lacking preemption clauses, courts tend to follow lawmakers' intent, and thus favor interpretations avoiding the preemption of state laws. *Preemption*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/preemption (last visited Mar. 19, 2021); *see also* Lauren Nardella & Ryan Nelson, *Schakowsky's Loaded Cosmetics Bill Described as 'Floor, Not A Ceiling' for States to Build On*, HBW INSIGHT (Oct. 1,

SCPCPA contained a savings clause allowing states and local governments to establish stricter requirements than those set forth in the bill.[158] Rep. Schakowsky's office, in a section-by-section summary of the SCPCPA, stated: "This bill acts as a floor, not a ceiling."[159]

Rep. Burgess also voiced his concern on the bill's effect on small businesses, and noted that the bill would not exempt these businesses from the proposed registration fees and requirements.[160] However, the SCPCPA bill did contain an exemption for businesses with annual cosmetic sales less than $1,000,000.[161] Under the SCPCPA, these businesses, termed "microbusinesses," would be exempt from the bill's registration fees and requirements.

The introduction of the SCPCPA reinforced the notion that the current regulatory framework for cosmetics is outdated and in need of change. Allowing the cosmetics industry to continue to self-regulate with almost no federal oversight leaves the public at the mercy of cosmetic establishments and their inherently greedy business interests.[162] The FDA regulatory authority over cosmetics needs to be strengthened in order to protect consumer safety, and given the current state of federal cosmetics regulation in the country, anything less than the legislative makeover proposed by the SCPCPA may fall short of providing adequate consumer protection.

CONCLUSION

The current regulatory framework for cosmetics is detrimental to consumer safety.[163] Under the current scheme, the FDA has no statutory authority to require cosmetic companies to submit information on their products, to require pre-market testing or approval of cosmetic products, or to order mandatory recalls of proven or potentially hazardous products.[164] As it stands, the FDA is ill-equipped to prevent consumers from exposure to harmful cosmetics, as demonstrated by the WEN case and the recent instance of asbestos contamination in Johnson & Johnson's products.[165]

2019), https://hbw.pharmaintelligence.informa.com/RS149264/Schakowskys-Loaded-Cosmetics-Bill-Described-As-Floor-Not-A-Ceiling-For-States-To-Build-On.

[158] *Id.*

[159] *Id.*

[160] Isaacs-Thomas, *supra* note 154.

[161] H.R. 4296, 116th Cong. §§ 611(7), 612(a)(2).

[162] *See, e.g.,* Edgar, *supra* note 102.

[163] Narayan, *supra* note 27.

[164] *FDA Authority Over Cosmetics: How Cosmetics are not FDA-Approved, but are FDA-Regulated*, *supra* note 9.

[165] *See* Brody, *supra* note 5; Hsu & Rabin, *supra* note 25.

Congress should reintroduce and pass the SCPCPA, which would amend the FFDCA to provide FDA with the necessary regulatory authority over cosmetics in order to effectively protect consumers.[166] Under the SCPCPA, the FDA would have the authority to order mandatory recalls, require adverse-event reporting, and mandate the registration of cosmetics companies and reporting of their product ingredients and safety information.[167] Broadening the FDA's statutory authority through the SCPCPA could also expedite the regulatory processes for cosmetics and allow the Agency to identify potentially harmful products before they are exposed to unknowing consumers.

[166] Safe Cosmetics and Personal Care Products Act of 2019, H.R. 4296, 116th Cong. (2019).
[167] H.R. 4296, 116th Cong. §§ 612, 615, 620, 622.

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COMMENT

THE PLEASURE OF THE CONTRACT: LEGAL ROLE PLAY FROM LEOPOLD VON SACHER-MASOCH THROUGH NOODLES & BEEF

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INTRODUCTION

Not all contracts are enforceable: in fact, many are penned with other values in mind. One cluster of contracts that any court outside perhaps Nevada would not touch is sex contracts.[1] These agreements are the nontraditional examples of the contractual "offer and acceptance" structure found in the arrangements of sadomasochism (S&M), or BDSM (Bondage, Discipline, Sadism, Masochism).[2] Though these contracts are only "enforceable" on a television program like *Sex Court*,[3] one would not have to be a lawyer, jurist or even law student to understand how far afield these documents stand from actual legal remedy. However, recent judicial enforcement of arbitration clauses in Scientology contracts is promising for the undeveloped field of sexual arbitration, raising the possibility that the inclusion of an arbitration clause in an S&M contract might be enforceable.[4] If there can be binding "ecclesiastical arbitration" in a religious contract,[5] then why not offer binding sexual arbitration for

[1] This Comment does not look to the Nevada paradigm, by which a sexual contract off the Vegas Strip might very well be enforceable. *See, e.g.,* Michelle Rindels, *Indy Explains: How Legal Prostitution Works in Nevada*, THE NEVADA INDEPENDENT (May 27, 2018), https://thenevadaindependent.com/article/the-indy-explains-how-legal-prostitution-works-in-nevada (examining how licensed brothels like Pahrump's Chicken Ranch work in Nevada). Optimism for these brothels cuts both ways. *See* Julie Bindel, *'It's Like You Sign a Contract to be Raped*,' THE GUARDIAN (Sept. 7, 2007), https://www.theguardian.com/world/2007/sep/07/usa.gender (documenting contractual suffocation among female Nevada sex workers). *But see Cathouse: The Series*, HBO (2005-14) (playfully documenting the lives of sex workers at the Moonlite BunnyRanch and other popular legal Nevada brothels).

[2] *See Nonbinding Bondage: Exploring the (Extra)legal Complexity of BDSM Contracts*, 128 HARV. L. REV. 713, 713 (2014) (deciphering the acronym BDSM).

[3] *Sex Court* (Playboy TV, 1998-2002) (presenting various sexual disputes over which a scantily clad Judge Julie presides, offering judgments and remedies).

[4] *See* Eriq Gardner, *Leah Remini Assistant Headed to Scientology's "Religious Arbitration" Despite Gun Accusation* HOLLYWOOD REPORTER (Jan. 31, 2020), https://www.hollywoodreporter.com/thr-esq/leah-remini-assistant-headed-scientologys-religious-arbitration-gun-accusation-1275288 (discussing Los Angeles Superior Court's order that ex-Scientologist Valerie Haney partake in "ecclesiastical justice procedures" in her defamation suit against Scientology, based on contract theory); Eriq Gardner, *The Church of Scientology Says Danny Masterson Stalking Suit Must go to "Religious Arbitration,"* HOLLYWOOD REPORTER (Jan. 8, 2020), https://www.hollywoodreporter.com/thr-esq/church-scientology-says-danny-masterson-stalking-suit-go-religious-arbitration-1268021 (examining the decision that three female accusers of Danny Masterson attend Scientology arbitration as per contracts they previously signed with the church). *But see* Mike Rinder, *Concerning Scientology "Religious Arbitration,"* MIKE RINDER'S BLOG (Jan. 30, 2020), https://www.mikerindersblog.org/concerning-scientology-religious-arbitration/ ("[T]here is no such thing as 'Scientology arbitration.' It was a term invented by Scientology's in-house counsel to include in agreements to prevent civil litigation. Arbitration is not mentioned in any Hubbard policy letter anywhere").

[5] *See* Eriq Gardner, *Leah Remini Assistant Headed to Scientology's "Religious Arbitration" Despite Gun Accusation* HOLLYWOOD REPORTER (Jan. 31, 2020), https://www.hollywoodreporter.com/thr-esq/leah-remini-assistant-headed-scientologys-religious-arbitration-gun-accusation-1275288.

a sexual contract when both parties agree to abide by this strategy of alternate dispute resolution?

The general field of unenforceable contracts lays a foundation for what this Comment names the "Trans-enforceability Thesis": the idea that, in general, contracts transcend mere enforcement. This contractual transcendence within sex contracts is particularly "uncanny," a fissure that often emerges in daily life and which appears with the provisions of sex contracts.[6] This Comment coins the term *trans-enforceability* to indicate that sometimes contracts go beyond the legal obligation to perform. *trans-enforceability* includes everything that transcends the traditional enforceability of the contract, from self-enforcement to social enforcement, good conscience to fears of starving to death (if we posit a primal "Hunter-Gatherer" contract) or getting beaten to a pulp by an angry Mob boss (as in an informal Mafia contract).[7] *Trans-enforceability* is an intentionally metaphysical concept, raising the notion that there is a phenomenology, even a psychoanalysis, to contracting.[8] This Comment focuses on one particular trans-enforceable value of the sex contract: its aesthetic power, a performative force.[9] This Comment thus imports the definition of performance as an aesthetic expression from Gender Theory, in particular the early work of Judith Butler.[10]

Trans-enforceability also includes the notion that one is helping society stay together by preserving one's word, along with the idea that the promise is itself an act of *logos*.[11] When examined via 18th-century phi-

[6] For Sigmund Freud, the "uncanny" is the *unheimlich*. It relates to the workings of the id, where pleasure resides, but is masked, its secrets bubbling up into reality via slips of the tongue and humor. *See* SIGMUND FREUD, THE UNCANNY (David McLintock trans., Penguin Books 2003); *see also* SIGMUND FREUD, JOKES AND THEIR RELATION TO THE UNCONSCIOUS (W.W. Norton & Co. 1990) (examining humor as a gateway to the *unheimlich*).

[7] The social enforcement of contracts, which involves less the Law and more social mores and anxieties about inclusion and exclusion within a social group, has even led to the advent of Social Capital, as currently seen in China. Through Social Capital, one is given a number that reflects how trustworthy the individual is, based on how he or she has treated promises and obligations. This rating is public and affects which opportunities and benefits society will extend to the individual. *See* Ken Jackson, *Contract Enforceability and the Evolution of Social Capital*, 29:1 J. OF L., ECON. & ORG. 60 (2011).

[8] *See*, *e.g.*, NICHOLAS RUIZ III, THE METAPHYSICS OF CAPITAL (Intertheory Press 2006) (arguing that there is a metaphysics to the workings of capital, which would necessarily include its many contracts).

[9] Within Gender Studies, one persistent thesis has been that gender is more performative than biological. *See, e.g.,* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (Routledge 2006).

[10] *See, e.g.,* JUDITH BUTLER, *supra* note 9; *see also* Martha Merrill Umphrey, *Law in Drag: Trials and Legal Performativity*, 21 COLUM. J. GENDER & L. 114 (2012) (applying Butler's aesthetic theories to legal performance).

[11] *See* JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Spivak trans., Johns Hopkins Univ. Press, 4th ed. 2016) (defining "phallogocentrism" as the fantasy of word made incarnate).

losopher Jean-Jacques Rousseau's idea of a primordial Social Contract, what surfaces is an ancient promise that is less about its external enforcement than it is about symbology—a compliance that is its own transcendent reward.[12] Within a sexual setting, this symbology relies heavily upon the aesthetic in that it engages the contract at the level of its surface, miming its structure as an act of empowerment.[13]

Still, according to this Comment's Trans-Enforceability Thesis, the least interesting facet of contracts is whether or not they are legally enforceable, despite what common legal common sense might dictate.[14] Individuals draft and execute legally unenforceable contracts with the look and feel of "real" contracts all the time: everything from driving contracts between a parent and teenage minor to familial agreements about who takes out the trash and who does the dishes. Perhaps our sex lives should be no exception. As the ensuing case discussion demonstrates regarding meretricious exchanges, the lack of legal enforceability shown by sex contracts in a bondage setting simply does not make them evaporate.[15] Lack of enforceability might intensify the drive to follow these "pseudo"-contracts to the letter, all in the name of *mimesis*, or copying/simulating.[16] These "simulated" contracts open the discussion to self-enforcing mechanisms like peer pressure, sexual reputation, group cohesion and anxieties about ostracism: all realities borne up by the aesthetic fiction of contractuality.[17]

The recent article *Nonbinding Bondage: Exploring the (Extra)legal Complexity of BDSM Contracts* encapsulates the aesthetic legacy of the

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[12] *See* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS (Victor Gourevitch trans., Cambridge University Press 2007).

[13] "Aesthetic" derives from the branch of philosophy called Aesthetics, which deals with Art and is typically opposed to the field of knowledge production, or Epistemology, and social mores, or Ethics. Immanuel Kant has famously differentiated Aesthetics from these other fields in his tripartite structure of knowledge. *See, e.g.,* IMMANUEL KANT, CRITIQUE OF JUDGMENT (James Creed Meredith trans., Oxford Univ. Press 2009).

[14] For example, Stuart Macaulay steers developing economies away from a strict enforceability model in his work on contractual organicism, while the focus on winning legal cases that sexual historians studying gay marriage include in their analysis ignores important unenforceable cases that technically lose in court but succeed in impacting the *zeitgeist*. *See generally* Stewart Macaulay, *Organic Transactions: Contract, Frank Lloyd Wright and the Johnson Building*, 1996 WIS. L. REV. 75 (1996) (arguing for a "living" model of contractuality which incorporates variation and change); Chris Geidner, *The Court Cases That Changed L.G.B.T.Q. Rights*, N. Y. TIMES (June 19, 2019).

[15] *See* Marvin v Marvin, 18 Cal. 3d 660 (1976); Jones v. Daly, 122 Cal. App. 3d 500 (1981).

[16] *See, e.g.,* ARISTOTLE, POETICS (Anthony Kenny trans., Oxford Univ. Press 2013) (looking at how mimesis works within a poetic and theatrical framework); JACQUES DERRIDA, DISSEMINATION (Barbara Johnson trans., Univ. of Chicago Press 1981) (examining in detail the full power of mimesis via the work of French Symbolist poet Stéphane Mallarmé).

[17] *See* Daniel Villarreal, *Death of a Kinkster*, THE STRANGER (Nov. 5, 2018), https://www.thestranger.com/features/2018/11/07/35073826/death-of-a-kinkster (detailing various techniques of social enforcement instantiated through social media).

sex contract and its embodiment in what this Comment calls "legal role play," or how individuals perform contractual play-acting for sexual gratification.[18] In Part I, this Comment challenges *Nonbinding Bondage*'s historical arc, using this writing as a launchpad for a more extensive discussion of the sex contract's aesthetic interpretation.[19] Employing a vocabulary of parody, play and performance (all aesthetics terms), *Nonbinding Bondage* presents the most popular reading of subcultural BDSM contracts: that they mime aspects of traditional contracts to unearth truths about power relations.[20] Through the contractual mimesis of legal role play, BDSM practitioners experience with pleasure and gusto distorted versions of traditional societal power exchanges.[21]

What emerges when contracts are deconstructed aesthetically is one prevalent root narrative: the simulation of sexual contracting as *stimulation* in itself. This tale is the story of 19th-Century Austro-Hungarian novelist Leopold von Sacher-Masoch, whose novel *Venus in Furs* contains the first serious formulation of a master-slave contract.[22] It is also the contemporary story of Dylan Hafertepen ("Noodles & Beef") and Jack Chapman ("Tank"), two gay men, arguably trans-species, bound by a contractual arrangement that would prove deadly.[23] Curiously, *Nonbinding Bondage* ignores Masoch's foundational work completely. Masoch, from whose name the term *masochism* was derived, used his novel to detail the extraordinary steps one takes to make a contract *feel* enforceable, although it is technically not.[24] Hence, Masoch unearths a pleasurable core to contracting that persists within sexual contracting to this day, and this Comment salvages his important contribution.[25]

This examination of the literary and narrative roots of sexual contracting leads to an argument supporting the thesis that contracts are *trans-enforceable* entities with other value: here, the sexual allure of mimetic role play. In Part II, this Comment examines how mimesis and desire intertwined for two Washington State Pups—gay men whose fetish entailed dressing up as dogs—Noodles & Beef and Tank.[26] Pups

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[18] *See generally Nonbinding Bondage*, *supra* note 2.

[19] *See id.*

[20] *See id.*

[21] *Id.*

[22] LEOPOLD VON SACHER-MASOCH, *Venus in Furs*, *in* MASOCHISM 143, 220 (Jean McNeil trans., Zone Books 1991).

[23] *See* Villarreal, *supra* note 17 (analyzing the contractual morass of Pups Noodles & Beef and Tank).

[24] *See* RICHARD VON KRAFFT-EBING, PSYCHOPATHIA SEXUALIS (FQ Legacy Books, 2010) (naming masochism after Masoch in his litany of sexological disturbances); MASOCH, *supra* note 22.

[25] MASOCH, *supra* note 22, at 220.

[26] The author of this Comment has attended Pup parties in Miami, Fort Lauderdale and San Francisco between 2016 and 2021, and is in part deriving his sexual anthropology from these exper-

engage in a range of practices: they variously display symbolic contracts (doggie collars, chains), draft and sign consequential written agreements, and may even agree to have tracking software installed subcutaneously ("chipping").[27] This Comment looks to the notorious sex contract that Tank posted to his Tumblr page on December 20, 2012 in its social and legal context.[28] Though legally unenforceable, Tank performed the terms of this document to the letter, and it became a fatal fetish.[29] This fatality derived from the fact that the contract contained an implied provision mandating testicular silicone injections by the submissive Pup.[30] These injections killed Tank, but they did not have to. What exactly made them enforceable in the first place? The pleasure of the contract may be the best answer.

Next, Part II turns to the meretricious contract, or contract involving sexual exchange, as analogue to a BDSM contract like Noodles & Beef's. Though legally unenforceable, the meretricious contract can itself become the site of social and political liberation and empowerment, as critical California cases *Marvin v Marvin* and *Jones v. Daly* have demonstrated.[31] Such a contract will typically lose in court, as it did in both cases. Still, its loss can trigger the birth of new rights for genders and sexualities typically excluded from the protection afforded by constitutionally derived fundamental rights, like the right to marry.[32] Contracts that are meretricious in nature can also create new rights for victims of detrimental reliance[33]—whose non-monetary contributions to a non-marital arrangement have come to amount to nothing after the arrangement disintegrates—helping to equalize a gender imbalance. Because the unenforceable meretricious contract can increase sexual freedom and equality through notoriety, the performative aesthetics of Noodles & Beef's sex contract might contain a silver lining after all, adding to its legal and cultural importance.

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iences. These events serve as oases for men whose fetish is to don canine regalia and are reflective of the culture to which Noodles & Beef and Tank Chapman belong.

[27] *See* Interview with Handler Jack, via email (Oct. 1, 2019) (detailing the mechanics of chipping).

[28] *See* Villarreal, *supra* note 17 (detailing the "Pup" lifestyle, whose participants are typically gay men clothed in canine regalia).

[29] *See id.*

[30] *See id.*

[31] *Marvin*, 18 Cal. 3d at 665 (holding that although implied contacts for unmarried cohabitors are not necessarily meretricious, they produce complicated severability issues); *Jones*, 122 Cal. App. 3d at 507 (holding that the provision of romantic services constitutes a meretricious contract).

[32] *See Jones*, 122 Cal. App. 3d at 507.

[33] Within Contract Theory, detrimental reliance is the idea that one should not be penalized for relying on a contract into which one has presumably entered. *See* L.L. Fuller & William R. Purdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L. J. 52, 373 (1936) (theorizing reliance interest and distinguishing it from expectation interest); *Marvin*, 18 Cal. 3d 660.

I. THE PRACTICE OF SEXUAL CONTRACTING: THREE CENTURIES OF LEGAL PERFORMATIVITY

Sexual contracting has been around for centuries, or at least since Leopold von Sacher-Masoch penned his salacious novel *Venus in Furs* in 1870.[34] How strange it is that a theory of contracting should trace its origins back to a literary work: perhaps strange for the Law and Economics approach, but certainly not so for Law and Literature.[35] As the father of masochism, Masoch is an optimal place to begin any exposition of the background of sexual contracting.[36] From Masoch, the culture of sadomasochism flows, passing into the present, where the sex contract signed by Noodles & Beef and Tank has created a legal maelstrom in Washington.[37] Though separated by centuries, these contracts are of a piece, and help trace out a continuous arc of sexual aesthetics open to the future.

A. LEGAL AESTHETICS REVEAL THEMSELVES IN A BDSM SETTING

Since sadomasochism, sexual subculture and paraphilia are not something attorneys are expected to know as part of their training, it makes sense to delve further into the definition of BDSM and its history before the argument progresses further.[38] While S&M is a synonym for BDSM, the acronyms are not identical. BDSM represents a somewhat larger field, encompassing "a wide range of sexual acts and experiences, incorporating from light bondage to 'edgeplay' involving fire or cutting."[39] The acronym breaks down into four practices: Bondage, Discipline, Sadism and Masochism.[40] S&M refers only to the poles of sadism

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[34] GILLES DELEUZE, *Coldness and Cruelty*, *in* MASOCHISM 9, 20 (Jean McNeil trans., Zone Books 1991).

[35] RICHARD POSNER, LAW AND LITERATURE (Harvard Univ. Press, 3d ed. 2009) (discussing the salient differences between Law and Economics and Law and Literature: in particular, as each views "desire").

[36] *See* RICHARD VON KRAFFT-EBING, *supra* note 24.

[37] Villarreal, *supra* note 17.

[38] Dick Hebdige examines subculture as a site of semiotic subversion also presenting the dynamics of parodic play. *See* DICK HEBDIGE, SUBCULTURE: THE MEANING OF STYLE (Routledge 1979). A "paraphilia" is basically a fetish: this equation is common knowledge for psychoanalysis and sexology, yet not for Law. *See* Mark Moran, *DSM to Distinguish Paraphilias from Paraphilic Disorders*, PSYCHIATRIC NEWS (May 3, 2013), https://psychnews.psychiatryonline.org/doi/10.1176/appi.pn.2013.5a19 (defining paraphilias like sexual masochism or cross-dressing as fetish-like "atypical sexual practices" that cause pleasure but not distress); *see also* SIGMUND FREUD, THREE ESSAYS ON THE THEORY OF SEXUALITY (THE 1905 EDITION) (Ulrike Kistner trans., Verso 2016) (defining the fetish as the next object the young male child sees after realizing, traumatically, that his mother has been "castrated" and lacks the phallus).

[39] *Nonbinding Bondage*, *supra* note 2, at 715.

[40] *Id.* at 713.

and masochism.[41] As such, BDSM has a more "spectral" or inclusive structure.[42] On a practical level, "BDSM relationships operate through constructed scenes, forms of roleplay, and acts of control and discipline. Above, all, BDSM acts, scenes, and relationships ask parties to inhabit positions of power imbalance."[43] There is consequently a "radical honesty" about BDSM, which overtly tackles issues of sexual power and its relation to other forms of domination, subservience and subjugation.[44] Thus, while its contractual provisions are not enforceable, they serve an important function of social enforceability within the subculture itself, giving members the chance to exhibit values like loyalty, honor and dignity through the aesthetics of performance.[45] Furthermore, the contracts serve as perfect artifacts of how exactly power works outside the subculture, in settings far beyond the cloistered sanctity of the *boudoir*.[46]

Articles about sadomasochism and its uncanny contractuality are rare, and so it bears quoting *Nonbinding Bondage* further.[47] As its author correctly notes, the ultimate form of the BDSM relationship is the contract, an agreement that "set[s] 'limits' conscribing acceptable types of play and 'safe words' to release participants from the sexual scene."[48] Sex contracts reflect the monolithic presence of the law via a tactical mimesis.[49] Though legally unenforceable, these contracts possess an inherent symbolic value.[50] For practitioners within the culture, "BDSM contracts form an emblematic part of the BDSM's community's commitment to 'safe, sane and consensual sex' — so much so that many lifestyle guides recommend them, even providing mock contracts that can be personalized for easy use."[51] Such agreements are at the core mimetic

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[41] *Id.*

[42] *See* FREUD, *supra* note 38; SIGMUND FREUD, ON NARCISSISM: AN INTRODUCTION (Peter Fonagy et al. eds., Routledge 2012).

[43] *Nonbinding Bondage*, *supra* note 2, at 715.

[44] *Id.* at 716.

[45] *See Nonbinding Bondage*, *supra* note 2.

[46] NEIL SCHAEFFER, THE MARQUIS DE SADE: A LIFE, 91 (Harvard Univ. Press 1999) (detailing the sacrilegious dimension of Rose Keller's humiliations in her 1768 Easter Sunday assault by Sade and all that they reveal about the power dynamics of pre-Revolutionary France).

[47] *See generally Nonbinding Bondage*, *supra* note 2.

[48] *Id.* at 717.

[49] *See* ERIC AUERBACH, MIMESIS: THE REPRESENTATION OF REALITY IN WESTERN LITERATURE (Willard R. Trask trans., Princeton U. Press 2013); ARTHUR DANTO, THE TRANSFIGURATION OF THE COMMONPLACE: A PHILOSOPHY OF ART (Harvard Univ. Press 1983).

[50] *See Nonbinding Bondage*, *supra* note 2; Interviews with Beaux Jangles, via Facebook Messenger (Oct. 1, 2019, Oct. 13, 2019, Oct. 16, 2019, May 24, 2020); Interview with Handler Jack, via email (Oct. 1, 2019) (discussing the symbolic value of everything from a doggie collar to implanted NFC chips).

[51] *Nonbinding Bondage*, *supra* note 2, at 717 (quoting *Safe, Sane and Consensual Contemporary Perspectives on Sadomasochism* 10 (Darren Langdridge & Meg Barkers eds., 2007)); *see also* LAMAR VAN DYKE, in THE SECOND COMING: A LEATHERDYKE READER 205, 218 (Pat Cailifa &

(possibly parodic), "as they are framed to mirror standard contracts and (at least superficially) conform to basic principles of contract law."[52]

Some contracts "discuss dispute resolution, specifying norms of redress in case of breach," and most involve "'legalese,' some even witnessing and notarizing the documents, to give the contract the full imprimatur of legality."[53] In general, these contracts never wind their way into court for enforcement: an "obvious" truth, yet one that merits articulation.[54] Though specific performance could never be enforced in American law for these parodies of enforceable contracts, that fact does not preclude such agreements from transcending the threat of legal enforcement while capitalizing upon the aphrodisiacal value of the hammer of justice, which all parties pretend is poised to swing.[55]

B. LEOPOLD VON SACHER-MASOCH GROUNDS SEXUAL CONTRACTING IN LITERATURE AND SEXOLOGY

As illuminating as *Nonbinding Bondage* is regarding BDSM contracts, it bypasses Masoch's *Venus in Furs*—a foundational text for sexual contracting.[56] Because the sexual contract in *Venus in Furs* closely reflects the actual contracts Masoch drafted and employed in his colorful sex life, Masoch is critical to the historical analysis of sexual contracting: particularly within an aesthetic approach such as the one this Comment offers.[57]

A novel built around a *written* sexual contract replete with its own parol evidence,[58] *Venus in Furs* is the story of what this Comment calls

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Robin Sweeny eds., Alyson Books 2000) (presenting various sexual contracts used in the lesbian community, along with instructions on how to create one).

[52] Parody is one possible mode of mimesis, but there are others. *See Nonbinding Bondage*, *supra* note 2, at 717 (looking at the multifarious forms contractual mimesis can take); ARISTOTLE, *supra* note 16, at 18 (examining the full range of aesthetic forms mimesis may take, including but not limited to parody, which operates via the ridiculous).

[53] *Nonbinding Bondage*, *supra* note 2.

[54] Andrea E. White, *The Nature of Taboo Contracts: A Legal Analysis of BDSM Contracts and Specific Performance*, 84 UMKC L. REV. 1163 (2016).

[55] Specific performance is an equitable remedy that mandates one perform the duties one has promised to perform. *See generally id*. (foreclosing specific performance as a remedy for sex contracts).

[56] *Compare Nonbinding Bondage, supra* note 2, *with* MASOCH, *supra* note 22.

[57] *See* MASOCH, *supra* note 22, 143 app. at 273-79 (presenting contracts from Masoch's actual sex life).

[58] According to the Parol Evidence Rule, evidence of prior negotiations (parol evidence, from the French for "spoken") is inadmissible for invalidating a written contract, although there are exceptions (for example, contradiction). As such, parol evidence is the revenge of orality: that is, a deconstructive resurgence of the oral negotiations that precede the written contract. *Parol Evidence Rule*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/parol_evidence_rule. *See. e.g.*, Pacific Gas & Electric Co. v. G.W. Thomas Drayage etc. Co., 69 Cal.

le *plaisir du contrat*, or "the pleasure of the contract."[59] *Venus in Furs* tells the tale of aristocratic protagonist Severin Kuziemski, who browbeats a woman, Wanda von Dunajew, into entering into a sexual contract that would make him her slave.[60] Though never legally enforceable, the contract dominates Severin's obsessions, and it quickly becomes clear that the fantasy of the contract's enforcement is the true object of his desire.[61] For example, though Severin is prepared to sign the document Wanda initially drafts, the two wait to sign it until they have left their home country, Austria-Hungary, for another land, where he will be without money and dependent upon her entirely: one substitute for enforcement.[62] They choose Florence over Constantinople because Wanda realizes how banal it would be to possess a slave in a country where possession of such chattel was legal.[63] The edited final contract in Florence specifies Severin's name change to Gregor, that he become Wanda's "absolute property," and most importantly that she have the right to kill him if she so desires.[64] To this end, Wanda even has him write out a suicide note in advance in his own handwriting.[65]

Though *Agreement Between Mrs. Wanda von Dunajew and Mr. Severin von Kuziemski* is purely literary, it has at least two analogues from the actual life of Masoch: *Contract Between Miss Fanny von Pistor and Leopold von Sacher-Masoch* and *Contract Between Wanda and Sacher-Masoch*.[66] Provisions of the first include that Masoch "be the slave of Mrs. Fanny von Pistor, and to carry out all her wishes for a period of six months."[67] These six months "need not run consecutively; they may be subject to interruptions beginning and ending according to the whims of the sovereign lady."[68] Masoch is to be given six hours of free time per day, and Fanny, who agrees to wear furs "as often as possible, especially

2d 33, 37 (1968) (privileging the contract over its oral roots can be proof of "a remnant of a primitive faith in the inherent potency and inherent meaning of words" on the part of judges).

[59] *See* MASOCH, *supra* note 22. (incorporating the text of the conversations leading up to the final contract and its "integrated" terms, which become a form of sexual parol evidence); ROLAND BARTHES, THE PLEASURE OF THE TEXT (Richard Miller trans., Hill and Wang 1975) (examining the pleasures of textuality).

[60] MASOCH, *supra* note 22.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 197 (Wanda musing, "What is the point of having a slave in a country where slavery is common practice? I want to be the only one to own a slave. If we live in a cultivated, sensible, Philistine society, then you will belong to me not by law, right or power, nut purely on account of my beauty and my whole being").

[64] *Id.* at 220.

[65] *Id.* at 222.

[66] *Id.*, 143 app. at 273-79.

[67] *Id.* at 277.

[68] *Id.*

when she is behaving cruelly," may punish him either when he misbehaves, or at her whim.[69] It even includes a non-disclosure agreement ("NDA"): "this period of enslavement shall be considered by both parties as having not occurred, and they shall make no serious allusion to it."[70]

The contract with "Wanda," who was most likely Masoch's wife at the time, is even more "hardcore" than his contract with Fanny. It specifies no time frame.[71] As in the contract in *Venus in Furs*, here, in real life, he must "renounce his identity entirely."[72] He is to become "a blind instrument" who carries out all her orders without ever questioning them: "You shall carry out everything I ask of you, whether it is good or evil, and if I demand of you that you commit a crime, you shall turn criminal to obey my will."[73] Severin also agrees to give her the ultimate power over his life, which can be ended, should she determine such an act is necessary.[74] Further, she is free to harm and maim him on a whim: "I shall be allowed to exercise the greatest cruelty, and if I should mutilate you, you shall bear it without complaint."[75] As with *Venus in Furs*, only suicide can relieve the real-life Masoch of his duties.[76]

According to psychoanalytic philosopher Gilles Deleuze, "[T]he masochist draws up contracts while the sadist abominates and destroys them."[77] The importance of this point cannot be over-emphasized within the context of unenforceable sexual contracts, but also raises issues about the pleasure of contracting in general, which might secretly infuse something like standard business contracts with a twisted joy yet to be countenanced.[78] However, the contracts in *Venus in Furs* and those culled from the life of Masoch himself have no analogue within sadism, which takes no interest in consensuality, as the colorful sex life and literary creations of the Marquis de Sade prove (for example, his 1785 novel *The 120 Days of Sodom*).[79] Thus, BDSM might not be not an accurate representation of

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[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 278.

[73] *Id.* at 278-79.

[74] *Id.* at 277.

[75] *Id.* at 278.

[76] *Id.* at 279 ("Should you ever find my domination unendurable and should your chains ever become too heavy, you will be obliged to kill yourself, for I will never set you free").

[77] DELEUZE, *supra* note 34, at 20.

[78] It is Freud who misleads us. For in his seminal *Three Essays on the Theory of Sexuality*, "sadism" and "masochism" comprise one total complex, a "component instinct." What this means is that there is fluid interchangeability between the two poles, as a sadist may become a masochist, and vice versa. For Deleuze, this transformation is unthinkable, and best represented by the attitude each type has to the contract itself. *Compare e.g.*, FREUD, *supra* note 38, *with* DELEUZE, *supra* note 34.

[79] The psychoanalytic rationale behind this observation is that the sadist has no ego and is all superego, while the masochist is all ego and no superego: and the contract is but a vestige of the

how desire actually works within these subcultures and the desires of its practitioners to contract, a point demanding future scrutiny.[80]

C. SEXUAL CONTRACTING REACHES A CRISIS POINT WITH *CHAPMAN V. HAFERTEPEN*

Pups Noodles & Beef and Tank entered what can be viewed as an eminent post-Masochian contractual simulacrum with a meretricious edge.[81] In their relationship, Noodles & Beef was the dominant Pup ("Dom"), and Tank the submissive Pup ("Sub").[82] The contract was international: Tank was from Melbourne, Australia and Noodles & Beef, Seattle.[83] The pair met online, through dating site OkCupid, and soon rendezvoused in Seattle.[84] Tank returned to Melbourne, while Noodles & Beef commenced work drafting a contract.[85] Noodles & Beef then sent Tank a training collar.[86] Later, they revised the draft and Noodles & Beef gave him a "full collar."[87] Soon after, Tank moved to Seattle, where they would effectuate the contract.[88]

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superego, or crystallization of social power that one internalizes post-*Oedipus*. DELEUZE, *supra* note 34, at 123-34; *see also* THE MARQUIS DE SADE, THE 120 DAYS OF SODOM (Will McMorran and Thomas Wynn trans., Penguin Classics 2016).

[80] Sade's victims tell a different story than Severin. The historical record of displaced 18th-century German beggar and prostitute Rose Keller provides two lurid depositions which, because the details pertain to the Marquis de Sade, are squarely positioned at the opposite pole of contracting. Keller's depositions in what historians refer to as the "Arcueil Affair" highlight the discontinuity between both law and literature when it comes to crimes like sexual assault. Via the Sadean logic, these events are inherently a-contractual because the regulation of sex is purely a masochistic concern. For example: "He made Keller lie facedown on [his] bed and tied down her hands and legs. Then he took a fistful of switches and caned her—something he learned about as a disciplinary measure in school. Keller claimed that he had made several incisions in her buttocks with a knife. In her second deposition, she also said that he had struck and bruised her back with a stick." SCHAEFFER, *supra* note 46.

[81] *See* JEAN BAUDRILLARD, THE ECSTASY OF COMMUNICATION (Bernard and Carolyn Schütze trans., Semiotext(e) 2012) (exploring the semiotic force of the simulacrum within Communication Theory and the mass media). The "author" of masochism also dabbled in trans-species sex: "Masoch's taste in matters of love are well known: he enjoyed pretending to be a bear or a bandit or having himself pursued, tied up and subjected to punishments, and even acute physical pain by an opulent fur-clad woman with a whip. . .." DELEUZE, *supra* note 34, at 10. That the father of masochism shares a sexual proclivity with the Pup community knits the present together with the past across both law and literature.

[82] Villarreal, *supra* note 17.

[83] *Id.*

[84] *Id.* (detailing the digital history of Noodle's & Beef's relationship with Tank Chapman, including their having met on OkCupid).

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

Tank initially posted the contract to his Tumblr feed on December 20, 2012; it contained several unusual provisions.[89] For example, it forbade Tank from wearing deodorant, masturbating, watching TV or even speaking, unless first addressed by his "Master."[90] The contract specified social and financial transparency, and Tank agreed to hand his salary over to Noodles & Beef.[91] It also contract specified, "Master has explicit body goals for his pup regarding their weight, their muscle mass, their measurements, and their proportions."[92] In the case of Tank, this last requirement would impliedly mean that he receive genital silicone injections to satisfy Noodles & Beef's "explicit body goals."[93] Such injections led directly to his death by respiratory embolism.[94] Tank would die satisfying Noodles & Beef's platitude that ends the contract as last line, hovering over it: "There is always additional room for a pup to push their physical limits."[95] Was Noodles & Beef encouraging Tank to overdo it? The "there is" syntax reads like an imperative and a Sub would certainly have interpreted it as such: Tank obeyed it.[96]

Noodles & Beef was also a "Pumper"—he preferred monstrously enlarged testicles.[97] He wished for his Sub Pup to enlarge his genitals to unnatural proportions.[98] The mechanics of pumping involve injections of both silicone and collagen, such that "[w]hen injected, the body surrounds liquid silicone with collagen, permanently providing a rounder and fuller appearance, smoothing wrinkles and reshaping sagging butts and breasts."[99] Tank's Tumblr and the pages of his fellow Pups "contained numerous images of their engorged scrotums, dramatically increased in size due to liquid silicone injections."[100] In one picture, "Tank's testicles dangle outside his basketball shorts, his nuts roughly the size of two dodgeballs."[101] Tank died on October 15, 2018, from a respiratory embolism, after he had arranged for his scrotum to be injected

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[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.* (explaining that silicone injections can send a blood clot traveling to the lungs, as occurred with Tank). *See also What is a Pulmonary Embolism*, WEBMD (reviewed Dec. 7, 2020), https://www.webmd.com/lung/what-is-a-pulmonary-embolism (defining a respiratory or pulmonary embolism specifically as a blood clot traveling via pulmonary artery from the heart to the lungs).

[95] Villarreal, *supra* note 17.

[96] *See* JACQUES DERRIDA, GIVEN TIME I: COUNTERFEIT MONEY (Peggy Kamuf trans., Univ. of Chicago Press, 2017) (exploring the many meanings of the "there is" construction, semantically).

[97] *See* Villarreal, *supra* note 17.

[98] *See id.*

[99] *Id.* (detailing the popularity of "back alley" or "dirty" pumping since WWII).

[100] *Id.* (detailing the history of Tank's Tumblr).

[101] *Id.*

with illegally obtained liquid silicone in order to please his Master, in keeping with his contractual "explicit body goals."[102]

The legal quagmire that resulted from this contract and its implied provision is significant,[103] recalling other contracts and quagmires in the meretricious tradition.[104] Although there was a criminal investigation following Tank's death, there was no criminal indictment.[105] Tank's mother Linda Chapman has since sued for wrongful death and coercion in Washington District court, while also posing a probate challenge.[106] This case represents a contractual milestone, as it is arguably the first time that the subculture of the Pups will arrive in court to defend its practices.[107] What the situation between Noodles & Beef and Tank demonstrates is that, indeed, the unenforceability of something like an implied pumping provision does not drain the contract of value and energy: it might even be the *fantasy* of its enforcement that underwrites the document, a desire meaningful outside the law.

Such legal titillation becomes more evident once the history of the sex contract is traced back to its historical and sexological roots in Masoch.[108] The enforceability-based pleasure of Masoch's literary and real-life sex contracts recurs brilliantly in the linguistic texture of current sadomasochistic contracts, such as the ones provided by Lamar Van Dyke in sexual activist Pat Califia's *The Second Coming: A Leatherdyke Reader*.[109] There is nothing in the legal literature examining anything

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[102] One might consider the Florida criminal case of Oneall Ron Morris, convicted of using materials like Fix-a-Flat to reshape faces and *derrières* across South Florida, to get the gist of Pumping. *See* Carli Teproff, *"Toxic Tush" Doctor Sentenced to Ten Years in Prison*, MIAMI HERALD (Mar. 27, 2017), https://www.miamiherald.com/news/local/community/broward/article141148113.html.

[103] Chapman v. Hafertepen, No. 19-2-24066-1 (Wash. Super. Ct. King Cnty. 2019) (Lexis CourtLink). Washington Superior Court has sealed the *Chapman* case since the initial draft of this Comment. *See also* Villarreal, *supra* note 17.

[104] *See Marvin*, 18 Cal. 3d 660; *Jones*, 122 Cal. App. 3d 500.

[105] Villarreal, *supra* note 17 (specifying the Pup community's outcry for a criminal investigation, the ensuing investigation, and the resulting lack of criminal charges).

[106] *See Chapman*, No. 19-2-24066-1 (Wash. Super. Ct. King Cnty. 2019) (Lexis CourtLink) (sealed); *see also* Villarreal, *supra* note 17; *Mother Whose Son Died of Silicone Injections to His Genitals Sues His 'Master' and Posse for Wrongful Death*, TOWEL ROAD (Oct. 8, 2019), https://www.towleroad.com/2019/10/dylan-hafertepen/; Lauren Fruen, *Mother of Man, 28, Who Died After Injecting His Scrotum with Silicone Sues His Five Boyfriends After They 'Forced Her Son to Inflate His Testicles to the Size of a Basketball,'* DAILYMAIL.COM (updated Oct. 15, 2019), https://www.dailymail.co.uk/news/article-7571227/Mother-man-28-died-injecting-scrotum-silicone-sues-five-boyfriends.html.

[107] *See* Villarreal, *supra* note 17.

[108] MASOCH, *supra* note 22.

[109] *See* LAMAR VAN DYKE, *Contracts and Contract Negotiating*, *in* THE SECOND COMING: A LEATHERDYKE READER 218 (Pat Califa & Robin Sweeny eds., Alyson Books 2000) (presenting various sexual contracts used in the lesbian community, along with instructions on how to create one).

like the "pleasure of the contract" (this Comment's deliberate play on semiologist Roland Barthes' *plaisir du texte*), but the sexual contract might actually reveal a pleasurable kernel to the traditional enforceable contract after all, especially if one invokes the Law and Literature movement and its inclusion of psychoanalytic inquiry.[110] This reading of sexual contracting is actually a logical one, given what Masoch has to say about the specter of enforcement, or how Deleuze identifies contracting as an inherently masochistic enterprise.[111] This Comment thus looks to the history of sexual contracting and its revelation that enforcement is the *coup de grâs* of the contracting fantasy. Such a reading makes sense of the drama unfolding around Noodles & Beef, all to examine the thesis that contracts are trans-enforceable creations that do not simply disappear in the absence of legal enforcement. What remains might be pleasure itself, embodied in a promise that brushes up against enforcement in a kind of legal *frottage*, exposing a quintessential voyeuristic structure.[112]

II. THE POWER OF LEGAL AESTHETICS

Participants in a contract that is now headed to court, Noodles & Beef and Tank[113] are part of a larger tradition of sexual contracting stretching back nearly two centuries. For the most part, these agreements remain informal and oral, but as this Comment has indicated, enforcement can be an aphrodisiac, and so some are properly memorialized in print.[114] Tank's story is one of many, though most sex contracts do not culminate in such extreme results. When legal scholars decipher such a contract, one way that it can be read is aesthetically: that is, in terms of its textual surface. Such a reading exposes the power of mimesis, which copies aspects of the law in order to achieve, paradoxically, sexual liberation.[115]

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[110] *See* BARTHES, *supra* note 59; POSNER, *supra* 35.

[111] *See* MASOCH, *supra* note 22, at 196; DELEUZE, *supra* note 34, at 20.

[112] "Frottage" is essentially pleasure derived from rubbing, described as a "frotteuristic disorder" within sexology. *See* KRAFFT-EBING, *supra* note 24, at 395.

[113] Villarreal, *supra* note 17.

[114] Regarding written contracts, both men have been crystal-clear in their insistence that sexual accords are typically oral or symbolic only (e.g., represented by a doggie collar). Interviews with Beaux Jangles, via Facebook Messenger (Oct. 1, 2019, Oct. 13, 2019, Oct. 16, 2019, May 24, 2020); Interview with Handler Jack, via email (Oct. 1, 2019).

[115] *Nonbinding Bondage*, *supra* note 2, at 723.

A. *CHAPMAN V. HAFERTEPEN* EXPOSES THE DARK SIDE OF THE CONTRACTUAL FETISH

Tank's initial publication of his contract with Noodles & Beef to his Tumblr page was an act of exhibitionism speaking to the contract's value as sexual fetish. However, it would not last long, as he soon removed the post.[116] This agreement included the abovementioned implied "bodily modification" provision that Tank surely interpreted as "pumping."[117] One reason why Tank took the contract down was possibly because the combination of the contract's shocking text and his public submissiveness turned many Pups against Noodles & Beef.[118] In particular, many within the Pup community "worried that [Noodles & Beef's] massive social following would give outsiders an incorrect view of healthy Dom/sub relationships."[119]

Outside the erased Tumblr posting, there was other tangible proof of the contractual bond between Noodles & Beef and Tank and the sexual value of its "enforcement."[120] There was an "aesthetic" contract in the form of an art object, Tank's tattoo, which read "Property of Master Dylan," along with Noodles & Beef's Tumblr posts explaining, "A pup will identify as any name that his Master bestows upon him. If the name sticks, the pup will be encouraged to change the name legally."[121] Tank duly performed this feat of symbolism, legally changing his name from Jack to Tank Chapman: a relatively common move among the members of this subculture.[122]

As further evidence of sexual contracting, Noodles & Beef had, during a breakup, sued Tank for the cost of that silicone in a failed small claims action largely concerning outstanding rent Tank owed him, leaving a record of his involvement in the fatal process.[123] This move would come back to haunt Noodles & Beef after Tank's death.[124] For when the mimetic, a simulation *par excellence*, calls out to the real for support,

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[116] Villarreal, *supra* note 17.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*; *see also* MASOCH, *supra* note 22, at 205, 220 (documenting name change as part of the contractual fetish).

[122] Although Beaux Jangles has not yet legally altered his name, he plans to do so in the future. According to him there is a 65-70% chance a Pup will change his name. Interview with Beaux Jangles, via Facebook Messenger (May 24, 2019).

[123] Villarreal, *supra* note 17; *Mother Whose Son Died of Silicone Injections to His Genitals Sues his 'Master' and Posse for Wrongful Death*, *supra* note 106.

[124] *See Mother Whose Son Died of Silicone Injections to His Genitals Sues his 'Master' and Posse for Wrongful Death*, *supra* note 106 (quoting Blake Montgomery, *Lethal Dose: Boyfriends Sued over Man's Death from Silicone Genital Injections*, THE DAILY BEAST (Oct. 8, 2019), https://

there is always trouble, as the real and the simulated ultimately occupy separate orders.[125] After Tank died, the legal mess soon spawned other legal messes.[126] For example, Noodles & Beef slapped *Daily Beast* journalist Blake Montgomery with a restraining order, which Montgomery was soon arrested for violating.[127]

The arrangement between Noodles & Beef and Tank did not sit well with local Pups, who encouraged the Orange County police to investigate, as they had done with another pumping fatality, Peter Dovak.[128] In this instance, Washington police declined.[129] Among the putative "co-conspirators" themselves, both Dovak's and Tank's silicone supplier Joe Quader committed suicide in Orange County, California, on learning that an investigation loomed.[130] In general, members of the larger Pup subculture view the contract as little more than a screen for domestic violence, something revealed to the author of this Comment by interviews with members of the Pup community, including New Orleans Pup Beaux Jangles and Berkeley Pup trainer Handler Jack.[131]

Washington state chose not to indict Dylan, but it would not take an eternity for the specter of the law to appear.[132] It arrived in September 2019, when Tank's mother Linda Chapman decided to sue members of the Pup Den clustered around Noodles & Beef in King County District Court for wrongful death and probate issues verging on "brain-

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www.thedailybeast.com/mom-of-tank-hafertepen-killed-by-silicone-genital-injections-files-wrongful-death-claim-against-boyfriends).

[125] *See generally* JEAN BAUDRILLARD, AMERICA (Chris Turner trans., Verso 2010) (examining the intertwining of the real and the simulated in postmodern American culture).

[126] Villarreal, *supra* note 17.

[127] Eli Sanders, *BuzzFeed Slapped with "Outrageous" Restraining Order for Reporting on Noodles and Beef*, THE STRANGER (Nov. 15, 2018), https://www.thestranger.com/slog/2018/11/15/35582039/buzzfeed-slapped-with-outrageous-restraining-order-and-a-night-in-jail-for-reporting-on-noodles-and-beef; Blake Montgomery, *Lethal Dose: Boyfriends Sued over Man's Death from Silicone Genital Injections*, THE DAILY BEAST (Oct. 8, 2019), https://www.thedailybeast.com/mom-of-tank-hafertepen-killed-by-silicone-genital-injections-files-wrongful-death-claim-against-boyfriends.

[128] Villarreal, *supra* note 17.

[129] Villarreal, *supra* note 17.

[130] *Id.*

[131] There exists a communal belief that the accord between Noodles & Beef and Tank violated the social norms of this jubilant subculture, which is more about Puppy Play and the pleasures of the pack than violence, disfigurement or undue influence. The words of Beaux Jangles are characteristically fiery: "Fuck Dylan fuck everything about him. He is a murderer and a thief." The memes identifying him as a murderer have since abounded, even one face-swapping him with Tiger King's *femme fatale* Carole Baskin. Interview with Beaux Jangles, via Facebook Messenger (Oct. 9, 2019); *see also* Interview with Handler Jack, via email (Oct. 1, 2020).

[132] *Mother Whose Son Died of Silicone Injections to His Genitals Sues His 'Master' and Posse for Wrongful Death*, *supra* note 106.

washing."[133] Of particular concern was the fact that Noodles & Beef was the sole beneficiary of Tank's will, signed less than a month before his death, and a second Pup had been designated that will's Executor.[134] Furthermore, the original contract had contained an explicit financial provision making Noodles & Beef master of Tank's finances.[135] Ultimately, Linda Chapman sued for five causes of action: wrongful death, loss of consortium, intentional infliction of emotional duress, civil conspiracy, and negligence.[136] Her Complaint did not mention the Slayer Rule.[137] At the core, it alleged that under her son's contract, "Dylan [Noodles & Beef] obtained power over Jack's [Tank's] body in extreme ways," being able "to order Jack to obtain body piercings and tattoos, command steroid use," and "command that Jack submit to silicon [*sic*] and saline injections into his scrotum and penis to increase the size of both."[138] Noodles & Beef also fired off a volley, filing a defamation suit against Australian television show *The Project*, which aired an episode focused on Linda Chapman.[139] The host's claim that "Dylan had introduced Jack to dangerous body modification and master servant role-play" formed the core of Noodles & Beef's claim that the show had mischaracterized him.[140]

Social disequilibrium then came into play, as it would in an analysis of a potentially unconscionable contract: for example, Arthur Leff's quintessential analysis of *Williams v. Walker-Thomas Furniture Co.* in

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[133] *See Chapman*, No. 19-2-24066-1 at 11 (Wash. Super. Ct. King Cnty. 2019) (Lexis CourtLink) (sealed), (citing "brainwashing" as the essence of a civil conspiracy cause of action); Villarreal, *supra* note 17.

[134] *Mother Whose Son Died of Silicone Injections to His Genitals Sues His 'Master' and Posse for Wrongful Death*, *supra* note 106.

[135] Villarreal, *supra* note 17.

[136] *See, e.g., Chapman*, No. 19-2-24066-1 (Wash. Super. Ct. King Cnty. 2019) (Lexis CourtLink) (sealed) (listing these five causes of action and hence clarifying their definitions); *see also* Villarreal, *supra* note 17. According to the court's docket, the Washington court dismissed the case with prejudice on June 2, 2020 and reconsidered on July 16, 2020. The court then sealed the records on August 7, 2020. Though the court set the trial date for September 14, 2020, the docket suggests that the parties may have settled. *See also Mother Whose Son Died of Silicone Injections to His Genitals Sues His 'Master' and Posse for Wrongful Death*, *supra* note 106; Fruen, *supra* note 106.

[137] The Slayer Rule disqualifies murderers from inheriting property (real and personal) from those they feloniously and intentionally "slay." *See Slayer Rule*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/slayer_rule.

[138] *Chapman*, No. 19-2-24066-1 at 4 (Wash. Super. Ct. King Cnty. 2019) (Lexis CourtLink) (sealed); *see also* Villarreal, *supra* note 17.

[139] Defamation is a "speaking tort" that results when an individual sustains actionable injury to reputation. *See* Lane Sainty, *A Blogger Whose Boyfriend Died from Genital Silicone Injections Is Suing for Defamation*, BUZZFEED NEWS (Nov. 24, 2019), https://www.buzzfeed.com/lanesainty/dylan-hafertepen-jack-chapman-silicone-death-defamation (detailing the origin of Noodles & Beef's defamation claim).

[140] *Id.*

his essay *Unconscionability and the Code: The Emperor's New Clause*.[141] Leff focused on gross bargaining disparities faced by the poor, arguing that the unconscionable home furnishing contracts to which they consented in *Walker-Thomas* were so flagrantly unbalanced that they shocked the conscience.[142] Such a contract causes tension to arise between a legal desire to protect the innocent and the capitalist imperative to safeguard freedom of contract.[143] The contract at the center of the multiple international legal controversies plaguing Noodles & Beef speaks to this notion of unconscionability, as it involved peer pressure, digital duress and the threat of excommunication, a fetish gone hideously awry.[144]

Although S&M contracts are notoriously imbalanced, this disequilibrium is typically no more than the playful performance of disempowerment, an agreement that one act out a fantasy of powerlessness or omnipotence.[145] The most notable example of how this playful disparity can become toxic would be the ways Noodles & Beef used his popular online newsletter to jab at Tank, whose social media was not as robust, during a breakup:

> Hafertepen introduced his newsletter readers to his new pup, Pup Angus, a bearded ginger muscle cub who could've passed for Tank's cousin. Hafertepen included a picture of Angus' enlarged cock, a puncture mark bleeding through a piece of medical tape on its shaft, possibly from a silicone injection.[146]

Noodles & Beef had already cemented his fame in a 2016 interview on the topic of "bigorexia" on ABC news, which interrogated his body dysmorphia as it took the form of an addiction to muscle.[147] Arguably, Noo-

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[141] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

[142] See Arthur Leff, *Unconscionability and the Code: The Emperor's New Clause*, 115:4 U. PA L. REV. 485, 555 (1967) (delineating two types of unconscionability: one procedural, the other substantive).

[143] *See Williams*, 350 F.2d 445 (ruling that a contract specifying replevin for all items purchased on credit, including those paid for, was unconscionable); Leff, *supra* note 142, at 555 (arguing that the unenforceability of a contract like the one in *Walker-Thomas* robs the indigent of their contractual freedom, for "all we would have is a holding that one cannot enforce a contract pursuant to which one has sold luxuries to a poor person").

[144] *See* Villarreal, *supra* note 17.

[145] *Nonbinding Bondage, supra* note 2.

[146] Villarreal, *supra* note 17.

[147] In Noodles & Beef's words: "I would get very upset about how small my arms seemed in proportion to my waist. . .my shoulders to my neck. . .You don't see any average-looking superheroes. Everyone was this hypermasculine or superior male." Villarreal, *supra* note 17 (exploring how body dysmorphia, or the perception of one's body image in grotesquely exaggerated form, occurs among extreme body builders).

dles & Beef weaponized his fame, using it to manipulate Tank via public Internet postings making it clear he was easily replaced.[148]

Unconscionability appears in the context of BDSM contracts such as the one linking Noodles & Beef and Tank under the guise of extreme imbalance and lopsidedness.[149] While some "presupposition of equality" is required for any contract to maintain its legal value, the appearance of unconscionability can spell trouble, for this quality "voids contracts because they have been created out of substantive inequality due to gross bargaining disparity."[150] But BDSM contracts such as Tank's seek to rectify the unconscionable both through their replication of inequality via parody and through provisions which empower the one giving up power.[151] The social and sexual magic of role play is that it paradoxically celebrates "the 'gross inequality of bargaining power' derided by contract law as the catalyzing force between erotic conquest and fulfillment" — a planned unconscionability that resists simple martyrology.[152]

The victim of a BDSM contract like Tank Chapman seems to be at home with the cast of characters Leff identifies as belonging to the case law typology:

> In these cases one runs continually into the old, the young, the ignorant, the necessitous, the illiterate, the improvident, the drunken, the naïve and the sick, all on one side of the transaction with the sharp and hard on the other . . . Certain whole classes of presumptive sillies like sailors and heirs and farmers and women continually wander on and off stage.[153]

While Leff suggests that such contracts should be addressed by policy,[154] it seems that policy would be the worst place to govern sexual contracting. The inherent fragmentation of the community would almost instantly threaten to derail any uniform policy right out of the gate: "[F]eminist attempts to regulate sex may in fact undercut their regulatory goals by making sex less clear, consensual or safe."[155] In response to feminism, queer theory has responded with "queer anti-statism," defined

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[148] *Id.*

[149] *Nonbinding Bondage, supra* note 2.

[150] *Id.* at 721 (examining the sexual contract via a theory of unconscionability).

[151] *Id.* ("BDSM seeks to dissociate itself from normative concerns for substantive equality. Instead, its scenes announce that, while a particular hierarchical makeup may be subject to reversal, structures of inequality are endemic and inexorable—and moreover, can lead to pleasure and growth").

[152] *Id.*

[153] Leff, *supra* note 142, at 532-33.

[154] *Id.* at 532-35.

[155] *Nonbinding Bondage supra* note 2, at 733.

as a quasi-political urge "that sex be left to the private where it can flourish apart from the state's restraining hand."[156] The instant problem of regulating BDSM contracts becomes that "efforts to privatize may prove as self-subversive as efforts to regulate: removing strictures may, for instance, remove critical triggers for social destabilization and instead turn individuals' creative efforts away from questioning and toward construction of vigilante lawmaking, an outcome less than cheering for the queer project."[157] Unconscionability in its procedural and substantive guises thus potentially disrupts the hegemony of the BDSM contract, revealing the sexual accord it represents to be the unbalanced yet desirable effects of bargaining disparity and inequality.[158]

It is unclear how common pseudo-legal contracts are among the Pup community: something that speaks to its potential unconscionability for Noodles & Beef and Tank. What stands out is that Tank had an active role in writing up the terms of the contract that would eventually doom him.[159] According to Beaux Jangles, it is certainly odd for Pups to compose or sign such a contract.[160] In his opinion, the Pup contract is generally more symbolic, and takes the form of a "lock and chain" doggie collar indicating some combination of Alpha (the dominant Pup in a pack) and Handler (the person who trains all Pups, including the Alpha).[161] For Handler Jack, this jewelry is the equivalent of a "wedding band in kink."[162] As Handler Jack further explains, though written contracts are rare, the symbolic contract has evolved to a qualitatively new stage among the Pups: "chipping."[163] In a chipping situation, a sub Pup has a Near Field Communication (NFC) chip inserted into its "paw" so that the name of the Handler appears in a handheld electronic device in the vicinity. In Handler Jack's words:

> I have chipped a pup before. . .This falls under the realm of body modification. In this case, I inserted a small NFC chip into the hand of a previous pup of mine. Upon putting a phone to his hand, it would read 'Owned by Handler Jack' as well as my phone number.[164]

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[156] *Id.* at 734.

[157] *Id.*

[158] *Id.* at 721.

[159] Villarreal, *supra* note 17.

[160] Interview with Beaux Jangles, via Facebook Messenger (Oct. 10, 2019).

[161] Beaux Jangles does not wear a lock at all, but a Batman collar inscribed with the words "Owners Daddy Mike & Sir Ryan." Interview with Beaux Jangles, via Facebook Messenger (Oct. 12, 2019).

[162] Interview with Handler Jack, via email (Oct. 1, 2019).

[163] Interview with Handler Jack, via email (Oct. 1, 2019).

[164] When asked about "chipping," Beaux Jangles was taken aback; for him, "chipping" meant something closer to biting, an essential component of Puppy Play, not a symbolic form flashing ownership for a lost Pup. As he explains, "[c]hipping to me is something that you have to have

For Handler Jack, the rarity of written contracts, even when compared with chipping and other symbolic contracts, casts doubt on the intent behind Noodles & Beef's contract with Tank, which to both Handler Jack and Beaux Jangles employed performativity to mask domestic abuse.[165]

Beaux Jangles and Handler Jack believe that the contractual mimesis and fetishism at work with Tank obscured a core of psychological violence behind the ruse of play, and this fact continues to shock their respective consciences.[166] While Noodles & Beef did not "chip" Tank, the ways in which their contractual arrangement reinforced the idea of ownership appears to transcend the playful aesthetics of sexual contracting and the benign value of the contractual fetish in BDSM culture.[167] Such a legal device is normally a sexual prop, not a death sentence.[168]

B. THOUGH AESTHETIC, LEGAL MIMESIS MAY GENERATE SUBSTANTIAL SOCIO-POLITICAL EFFECTS

At Masoch's pole—where masochism and contracting unite via mimesis—one core legal issue has been sexual exchange: typically, sex for money.[169] Cases involving meretricious arrangements have reached American courts but have never succeeded.[170] Noodles & Beef and Tank did have a relationship that combined money and sexual subjugation as regards both Tank's relinquishment of his wages and his will, placing its contracts under the umbrella of meretriciousness.[171]

Though unenforceable, such agreements have served the important function of calling attention to rights involving gender and sexuality and the people to whom they have been denied.[172] Consequently, meretri-

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extreme trust and 110% faith in someone to be able to do that. I personally could never do it. The most I'm tracked is my owners have my location on their iPhone. . .I may be a pup but I'm also a human first." Interview with Beaux Jangles, via Facebook Messenger (Oct. 30, 2019); Interview with Handler Jack, via email (Oct. 1, 2019).

[165] Interview with Beaux Jangles, via Facebook Messenger (Oct. 10, 2019); Interview with Handler Jack, via email (Oct. 1, 2019).

[166] Interview with Beaux Jangles, via Facebook Messenger (Oct. 10, 2019); Interview with Handler Jack, via email (Oct. 1, 2019).

[167] Interview with Handler Jack, via email (Oct. 1, 2019).

[168] *See Nonbinding Bondage*, *supra* note 2 (exploring the fetish-value of the sex contract); *see also* Raja Mishra, *Dominatrix Acquitted of Manslaughter*, THE BOSTON GLOBE (Jan. 31, 2006), http://archive.boston.com/news/local/articles/2006/01/31/dominatrix_acquitted_of_manslaughter/ (analyzing a BDSM scenario in which an agreement turned deadly when the individual being tortured died on the rack).

[169] *See Marvin*, 18 Cal. 3d at 665; *Jones*, 122 Cal. App. 3d at 507.

[170] *See Marvin*, 18 Cal. 3d at 665; *Jones,* 122 Cal. App. 3d at 507.

[171] Villarreal, *supra* note 17.

[172] *See Marvin*, 18 Cal. 3d at 665; *Jones*, 122 Cal. App. 3d at 507.

cious arrangements are paragons of *trans-enforceability*, as their value exceeds their legal enforcement.[173] In this Zodiac, they are mimetic and fall under the sign of the aesthetic, as they involve subcultural copies of enforceable contracts from aboveground.[174] Suits centered on these cases have bravely faced the changing nature of the heterosexual marriage unit head on, becoming vanguard cases where the evolution of law's marital "heterocomplicity" has been symbolically challenged.[175] As such, the meretricious case, involving unenforceable contracts, has taken the need to change society upon itself. This type of case has helped to point out how out of tune marital law has been with regard to changing gender and sexual roles in a nation whose pluralism would extend to both nontraditional heterosexual living arrangements and the LGBTQ community.[176]

1. The Marital Analogue: Marvin v. Marvin, Jones v. Daly

Two influential cases testing meretriciousness have taken place in California: common-law marriage case *Marvin v. Marvin* and gay marriage case *Jones v. Daly*.[177] Both cases have helped clarify the revolutionary value of the meretricious contract, with applications to the BDSM contract that ripple beyond California.[178] *Marvin v. Marvin* presented a common law Hollywood "divorce" case combusting among celebrities.[179] The common-law wife of famous actor Lee Marvin, Michelle Marvin, filed suit when their long-term, live-in relationship dissolved.[180] While the two had never signed any agreement regarding who would contribute what either financially or in terms of services, Michelle argued that the two were bound by an oral agreement.[181] As an example, she offered the fact that she had given up her career as an "entertainer [and] singer" in order to help his career along.[182] In her own words, they had agreed to "hold themselves out to the general public as husband and wife" and she would render "services as a companion, homemaker,

[173] *See Marvin,* 18 Cal. 3d at 665; *Jones* 122 Cal. App. 3d at 507.

[174] *Nonbinding Bondage, supra* note 2.

[175] *See generally* Judith Butler, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF SEX (Routledge 2011) (examining "queer" and radically democratic terrains that fall outside "heterocomplicity," defined as compulsory heterosexuality).

[176] *See Marvin*, 18 Cal. 3d at 665; *Jones*, 122 Cal. App. 3d at 507.

[177] *Marvin*, 18 Cal. 3d 660; *Jones*, 122 Cal. App. 3d 500.

[178] *See Marvin*, 18 Cal. 3d at 665; *Jones*, 122 Cal. App. 3d at 507.

[179] *Marvin*, 18 Cal. 3d 660.

[180] *Id.*

[181] *Marvin*, 18 Cal. 3d at 666 ("Plaintiff avers that in October of 1964 she and defendant 'entered into an oral agreement' that while 'the parties lived together they would combine their efforts and earnings and would share equally any and all property accumulated as a result if their efforts whether individual or combined'").

[182] *Id.*

housekeeper, and cook."[183] She alleged that in return for her sacrifices, Mr. Marvin agreed to "provide. . .financial support and needs for the rest of her life."[184] To protect her interest, she requested an equitable remedy: that a constructive trust be placed over 50% of the assets they acquired during their relationship.[185]

In *Jones v. Daly*, a plaintiff lodging an early gay marriage claim found it doomed to failure by the necessary meretriciousness of its central cause of action—a claim that must nonetheless be lodged if others in the community are to one day benefit from its failure.[186] Here, the surviving partner in a gay relationship that verged on "marriage" sought declaratory relief as to his interest in the estate of his deceased lover.[187] He faced a very different problem from Michelle Marvin, since it was impossible for him to make his claim without emphasizing the fact that the two had also been sexual partners.[188] Thus Jones had to argue for a physical basis to his relationship with Daly, contending that the two "met on frequent occasions, dated, engaged in sexual activities and, in general, acted towards one another as two people do who had discovered a love, one for the other."[189] Michelle Marvin had never been forced to make such a claim because her relationship mimed heterosexual marriage, and any sexual intercourse would have been presumed.[190] Faced with a society hostile to gay marriage, Jones could not rely on tacit cultural assump-

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[183] *Id.*

[184] *Id.*

[185] *Id.* A constructive trust is an equitable remedy in which the court converts a *res* (Latin for "thing") into a trust to avoid unjust enrichment. The Restatement weaves Justice Cardozo's explanation into the fabric of the definition: "A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 (AM. LAW. INST. 2021) (quoting Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 386 (2019)) (internal quotes omitted); *see, e.g.,* Ruffin v. Ruffin, 2000 Va. App. LEXIS 128 (holding that a lottery win does not constitute a *res* and thus cannot create a constructive trust over it).

[186] *Jones*, 122 Cal. App. 3d at 507.

[187] *Id.* at 505. Declaratory relief is a remedy that defines the relationship among parties as regards their rights in a matter before the court. *Declaratory Judgment*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/declaratory_judgment.

[188] *Id.* at 507 (the Court's restating Jones' claim as prostitution).

[189] *Id.* at 505. In addition, the poetic texture of the statement, which veers from the simplicity of direct legal language, is an important syntactical decision: the clause "one for the other" emphasizes with redundancy the reciprocity of their love and is one of the poetic nodes that legal language so often disavows. *See* Michael Angelo Tata, *The Submerged Metaphoricality of Legal Language*, GGU LAW REVIEW BLOG (Feb. 25, 2020), https://ggulawreview.com/2020/02/25/the-submerged-metaphoricality-of-legal-language/ (using Paul de Man's literary analysis of geometrician Blaise Pascal to unearth figurative language from case opinions).

[190] *Marvin*, 18 Cal. 3d at 666; *see* PARIS IS BURNING (Lionsgate 1990) (deconstructing heterosexual marriage through a transsexual perspective).

tions about marriage, and would have to spell out the elements of his relationship for the Court.[191]

Both cases are important analogues for overtly sexual contracts because they, too, have proven to be *trans-enforceable* and to rely upon contractual aesthetics.[192] They illuminate another rationale as to why the contract signed by Noodles & Beef and Tank would be internally honored but never externally enforced while also opening a new window on the effect bringing such a contract to light may have on a contemporary, "post-gender" society.[193] Although meretricious claims typically fail, they are often introduced to succeed on another level; the most important example is promoting enhancing fundamental constitutional rights like the right to marry.[194] It is hard to imagine what will change in light of Linda Chapman's case, but it seems likely that the situation will generate ramifications extending beyond the Pup subculture to other non-traditional groups.

Applying the mimetic perspective of *Nonbinding Bondage* to *Marvin v. Marvin* and *Jones v. Daly* reveals that the strategy of parody and play borrowed from aesthetics can produce contractual arrangements that mime those of heterosexual culture in an important way.[195] In the end, such mimesis can produce an effect of liberation, despite its legal failure. Specifically, *Marvin v. Marvin* introduced a new word into the legal vocabulary, "palimony," and a new class of rights: so-called Marvin Rights.[196] These rights pertain to non-marital cohabitation situations in

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[191] *Jones*, 122 Cal. App. 3d at 507; *see* PARIS IS BURNING (Lionsgate 1990).

[192] *See generally Nonbinding Bondage*, *supra* note 2 (unearthing aesthetic strategies of parody and play common among sexual contracts).

[193] Two examples of post-gender society include the Latinx movement as well as a recent decision in Berkeley to cease using the word "manhole." *See* Luis Noe-Bustamante, Lauren Mora, and Mark Hugo Lopez, *About One-in-Four U.S. Hispanics Have Heard of Latinx, But Just 3% Use It*, PEW RESEARCH CENTER (Aug. 11, 2020), https://www.pewresearch.org/hispanic/2020/08/11/about-one-in-four-u-s-hispanics-have-heard-of-latinx-but-just-3-use-it/#:~:text=the%20emergence%20of%20Latinx%20coincides,more%20than%20a%20decade%20ago; Nina Aron, *Attention Everyone: That Manhole Is Now a Maintenance Hole*, CALIFORNIA MAGAZINE (Aug. 9, 2019), https://alumni.berkeley.edu/california-magazine/just-in/2019-08-09/attention-everyone-manhole-now-maintenance-hole.

[194] *Jones*, 122 Cal. App. 3d at 507. *See generally* Loving v. Virginia, 388 U.S. 1 (1967) (ruling that freedom to marry cannot be racially restricted); Obergefell v. Hodges, 577 U.S. 644 (2015) (ruling that the fundamental right to marry extends to same-sex couples).

[195] *Compare Marvin*, 18 Cal. 3d at 665 *with Jones*, 122 Cal. App. 3d at 507.

[196] An online advertisement for Pride Legal says it all: "Marvin does not limit non-marital cohabitant remedies to opposite-sex partners. Accordingly, express (written or oral) are as equally enforceable as those between Marvin action claimants of the opposite sex. The focus is on whether they in fact had an agreement supported by lawful consideration. . .." *Marvin Actions & Palimony Rights in California*, PRIDE LEGAL (Feb. 3, 2019), https://pridelegal.com/marvin-actions-california/.

which something like "divorce" occurs and the question of a distribution of property or assets is necessary to avoid injustice.[197]

In addition, it is impossible to imagine the Defense of Marriage Act's ("DOMA") 2011 repeal in the absence of cases like *Jones v. Daly*, which helped redefine marriage as larger in scope than an arrangement between "one man and one woman," as it had been codified under DOMA.[198] Though Jones, too, lost his suit, his loss was critical. When a new right is being articulated, the process often begins with cases that cannot be victorious because society is not yet ready to expand its jurisprudence beyond the current horizon of intelligibility.[199] *Jones v. Daly* is situated somewhere between *Lawrence v. Texas*, which decriminalized sodomy, and *Kerrigan v. Commissioner of Public Health*, which permanently legalized gay marriage in Connecticut.[200] Along with *Marvin v. Marvin*, it is a case that helped redefine marriage as a more plastic entity capable of expansion beyond the heterosexual milieu.

Though meretriciousness is without legal merit, this "convention" does not prevent it from abounding in other types of merit. These sources of value can include symbolic value, social enforceability, or the types of illicit exchange that solidify other valid contracts, like a marriage contract, which can also be read as meretricious.[201] Though she is no contract attorney, transsexual performer Venus Xtravaganza from the iconic documentary film *Paris Is Burning* makes such a claim.[202] This critical LGBTQ film took as its subject matter the lives of transsexuals and drag queens who comprised the Ballroom Culture of 1980s New York City,

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[197] *Id.*

[198] Defense of Marriage Act, 1 U.S.C. § 7 (1996) ("defending" marriage by relegating it to a relationship between two genders only), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013).

[199] Think of the unenforceable contract in early surrogacy case *Baby M*: its unenforceability certainly did not affect its importance for the future of parental rights under more exotic circumstances. *See In re* Baby M, 537 A.2d 1227, 1234 (N.J. 1988) (invalidating a surrogacy contract because it clashed with public policy at the time: specifically, that a surrogacy payment to a birth mother is "illegal, perhaps criminal, and potentially degrading to women").

[200] Geidner, *supra* note 14. While the article does not mention *Jones v. Daly*, as it focuses on *wins*, it is fledgling cases like *Jones v. Daly* which paved the way for the legalization of gay marriage: the losses they incur are an essential ingredient to the dialectical process of change. *See* Lawrence v. Texas, 539 U.S. 558 (2003); Kerrigan v. Commissioner of Public Health, 289 Conn. 135 (Conn. 2007); *In re* Marriage Cases, 43 Cal. 4th 757 (2008). *Jones* is allied with *Kerrigan* and not *In re Marriage Cases* because the California Supreme Court presented only a brief window of opportunity during which gay marriage would be legal, while the Connecticut ruling was permanent and unchallenged.

[201] *See* PARIS IS BURNING (Lionsgate 1990) (exposing a meretricious core to the marriage contract).

[202] *See id.*

and Venus was its fatal star, dead by the time the film ends.[203] She explains the inherent meretriciousness of marriage in response to a question from filmmaker Jenny Livingston about her behavior as a prostitute.[204] Venus' words almost speak directly to Judge Lillie in *Jones v. Daly*:

> If you're married, a woman in the suburbs, a regular woman, married to her husband, and she wants him to buy her a washer and dryer set, in order for him to buy that, I'm sure she'd have to go to bed with him anyway to give him what he wants for her to get what she wants, so, in the long run, it all ends up the same way."[205]

However contract theorists receive Venus' words, they speak to the truth of marital contracts as containing a secret meretriciousness, a reality that perhaps could only be revealed by a transsexual or drag queen operating on the fringes of society. Venus' sheer outsiderliness reveals silent yet potent presumptions against a backdrop of deprivation and exclusion, revelations that can only be made from a position of dispossession and otherness.[206] As philosopher Jacques Derrida opines, it is perhaps only from the periphery that the center might be correctly observed.[207] This Comment agrees with Venus and with Derrida. BDSM contracts and marital contracts are built around similar sexual exchanges, speaking to how meretriciousness has appeared in American jurisprudence through the back door, so to speak.[208]

2. Why the Meretricious Contract Mimes Marriage

As Judge Tobriner explains in his opinion in *Marvin v. Marvin*, express contracts between nonmarital partners should be enforced unless they are "explicitly founded on the consideration of meretricious sexual services."[209] Specifically, "a contract between nonmarital partners is unenforceable only *to the extent* that it *explicitly* rests upon the immoral and illicit consideration of meretricious sexual services."[210] Tobriner avers that " '[t]he law does not award compensation for living with a man

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[203] *See id*.; *see also* BELL HOOKS, BLACK LOOKS: RACE AND REPRESENTATION (South End Press, 1992) (asking the question, "Is Paris Burning?" from a black feminist perspective in response to the class structure of voguing culture).

[204] PARIS IS BURNING (Lionsgate 1990).

[205] *Id.*

[206] *See* Judith Butler, *supra* note 175 (examining the "realness" of the Ballroom scene and its paradoxical relevance for queer liberation).

[207] In the deconstructive method, rule and exception switch places so that each may unravel the other's script. *See*, *e.g.,* DERRIDA, *supra* note 11.

[208] *See id.*

[209] *Marvin*, 18 Cal. 3d at 665.

[210] *Id.* at 669.

as a concubine,'" if only because no court could "sever the contract and place an independent value upon the legitimate services provided," as these are fatally intermingled with sexual services.[211] Financially, "[s]o long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose," a fact which worked to Michelle Marvin's favor, as her claim for marital compensation was able to withstand the defense claim of meretriciousness.[212]

Overturning a trial court ruling for the defendant, Judge Tobriner displayed a modern outlook on marriage, one which speaks to participants in future sex contracts.[213] His relaxed stance toward sexual morals is best showcased by his clarification that the court has only taken issue with conduct that "pertained to and encompassed prostitution."[214] Thus, the combination of sex and money is the issue for these types of contracts, most of which are implied in fact and not written down, as with many BDSM contracts.[215] Operating on the far side of power, meretricious contracts mime aspects of traditional marital contracts as a strategy of empowerment.[216]

Jones v. Daly provides further insight into contractual meretriciousness and the fate of sexual contracts in general when these culminate in a prayer for relief, this time within a homosexual arena and the clash for the gay right to marriage.[217] As with *Marvin v. Marvin*, and in keeping with Venus Xtravaganza, the powerlessness of the individual in a relationship not traditionally defined as marriage is at stake in an arrangement that, like marriage, involves reciprocal exchanges of duties and responsibilities.[218] Here, the substance of the Daly's claim was an oral "cohabitors agreement" that he and his deceased lover had entered into specifying the joint combination of resources and assets.[219] The cohabitors agreement also contained the provision that the two "would hold themselves out to the public at large as cohabiting mates."[220] At the same time, the plaintiff "would render his services as a lover, companion,

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[211] *Id.* at 671 (quoting Hill v. Estate of Westbrook, 95 Cal. App. 2d 599, 603 (1950)) (internal quotation marks omitted).

[212] *Marvin*, 18 Cal. 3d at 674.

[213] *See id.* at 684.

[214] *Id.* at 683.

[215] Interview with Beaux Jangles, via Facebook Messenger (Oct. 10, 2019) (expressing the rarity of written Pup sex contracts (on file with author); Interview with Handler Jack, via email (Oct. 1, 2019) ("Most contracts I've encountered are either verbal or symbolic").

[216] *See, e.g.*, DERRIDA, *supra* note 16 (examining in detail the full power of mimesis via the work of French Symbolist poet Stéphane Mallarmé).

[217] *Jones*, 122 Cal. App. 3d at 507.

[218] PARIS IS BURNING (Lionsgate 1990).

[219] *Jones*, 122 Cal. App. 3d at 507.

[220] *Id.* at 505.

homemaker, traveling companion, housekeeper and cook."[221] As with Ms. Marvin, Jones gave up his job, a modeling career, in exchange for financial security that was backed by an oral promise, a parallel countenanced by Judge Lillie, who cites to its commentary on meretriciousness:

> [T]hey may agree to pool their earnings and to hold all property acquired ruling the relationship in accord with the law governing community property; conversely they may agree that each partner's earnings and the property acquired from those earnings remains the separate property of the earning property. So long as the agreement does not rest upon illegal meretricious considerations, the parties may order their economic affairs as they choose.[222]

No matter how the relationship materializes, "services as a paramour" cannot be the basis for economic consideration.[223] Because Jones and Daly "dated, engaged in sexual activities, and, in general, acted toward the other as two people who have discovered a love, one for the other," their contract encouraged an expansion of marriage to include groups traditionally denied its benefits.[224] To circumvent claims of prostitution stemming from the oral contract's language, *Jones* relies heavily upon the ordinary usage of the term "cohabit," which is "the mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but *not necessarily dependent upon sexual relations*."[225] Jones continues his linguistic argument through an act of synonymy or substitution: that is, citing the definition of "lover" in Merriam-Webster and its relation to "paramour." Thus "while one meaning of the word 'lover' is paramour, it may also mean a person in love or an affectionate or benevolent friend."[226] Judge Lillie is unpersuaded by this construction:

> Pleadings must be reasonably interpreted; they must be read as a whole and each part must be given the meaning that it derives from the context wherein it appears. . .. Viewed in the context of the complaint as a whole, and the words 'cohabiting' and 'lover' do not have

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[221] *Id.*

[222] *Id.* at 507.

[223] *Id.* (quoting *Marvin*, 18 Cal. 3d at 672 (1976)).

[224] *Id.* at 505.

[225] *Id.* at 508 (quoting Boyd v. Boyd, 228 Cal. App. 2d 374, 381 (Cal. Ct. App. 1964)) (emphasis in *Jones*).

[226] *Id.* (quoting Merriam-Webster, WEBSTER'S THIRD NEW INT'L DICT. 1340 (Phillip B. Grove et. al. eds., 3rd ed. 1966).

> the innocuous meanings which plaintiff ascribed to them. These terms can only pertain to plaintiff's rendition of sexual services to Daly."[227]

Further, unlike *Marvin v. Marvin*, there is no severability, as it is impossible to assign independent value to each of the responsibilities listed in the oral agreement.[228] These included Daly's roles as "traveling companion, housekeeper or cook as distinguished from acting as his lover."[229]

Contracts that court meretriciousness, like the "cohabitors agreement" in *Jones v. Daly*, are simply not enforceable based on what this Comment, rooted in sexology, deems a primal legal taboo against prostitution.[230] The potential meretriciousness of these situations speaks to the blatant sexual content of BDSM contracts, which are nothing but a series of sexual barters.[231] Because they are blatantly meretricious, these contracts would never be enforceable on their face, but his lack of legal recourse regarding the various provisions they contain does not make them devoid of meaning.[232] For though the "cohabitors agreement" in *Jones v. Daly* was not something the court was inclined to uphold, the symbolic import of this oral contract has made an important contribution to the right to marriage sought by gay, lesbian, trans- and queer communities.[233] Such excluded groups could only couch their arguments in support of a marriage decoupled from heterosexuality by invoking the broader sense of terms like "cohabitation" and "lover." This crucial maneuver exposed the tacit assumptions that inform and structure heterosexual marriage, known all too well by someone like Venus Xtravaganza.[234]

3. Legal Mimesis as a Path to Liberation

Thus, with regard to the sexual S&M contract, though it is designed to be unenforceable legally, when it does appear within the legal arena, it can and has been used to achieve far greater ends than individual Plaintiff triumph. Contrary to what contract theorists might believe, doomed cases like those involving sexual contracts that are "experimental" are

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[227] *Id.*

[228] *Id.*

[229] *Id.* at 509.

[230] *See generally* MICHEL FOUCAULT, THE HISTORY OF SEXUALITY VOL. 1: AN INTRODUCTION (Robert Hurley trans., Vintage 1980) (exploring how the Repressive Hypothesis has influenced European culture).

[231] *See generally Nonbinding Bondage, supra* note 2.

[232] *See* PAT CALIFIA, THE SECOND COMING: A LEATHERDYKE READER (Pat Califia & Robin Sweeny eds., Alyson Books 2000).

[233] *Jones*, 122 Cal. App. 3d at 508.

[234] PARIS IS BURNING (Lionsgate 1990).

thus capable—albeit paradoxically—of transforming society through the spectacle of their failure. Consequently, the Trans-Enforceability Thesis takes a turn, revealing that contractual success or failure are not the true indicia of these documents' value. The Masochian root narrative and its reliance upon aesthetic strategies is an important source driving the engine of empowerment.[235] What mimetic cases like *Marvin v. Marvin* and *Jones v. Daly* reveal for the Noodles & Beef situation is precisely that though unenforceable contracts involving sexual exchanges could never be subjected to something like an order for specific performance, they still may jump-start the crystallization of social change, which proceeds from but a single seed.[236]

Tank Chapman provides a cautionary tale about the challenges of performative power transfers within a sexual scenario.[237] These tender but loaded "mimetic" exchanges can easily spill over into over concrete areas of the law, like probate, criminal or contract law itself, as seen with Tank's unfolding legal miasma.[238] His case follows the legacy of the meretriciousness cases, which are largely spectacular failures of unenforceability, but which trigger important social changes regarding gender, sexuality and fundamental constitutional rights like marriage.[239] It is thus possible that Tank's case, too, can exert a liberational effect that enhances the lives of the Pups or other participants in paraphiliac subcultures.[240]

Hopefully, the media attention Tank's case generates will cause people to be more humane in their sexual contracting without chilling the

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[235] Even within philosophy, aesthetics is often considered inferior to epistemology (the philosophy of knowledge production) or ethics (the philosophy of right and wrong): yet the social force of mimesis, an aesthetic practice, is still a powerful one. *See generally* AVITAL RONELL, STUPIDITY (Univ. of Ill. Press, 2002) (identifying the destabilizing power of aesthetics, which in a classic thinker like Immanuel Kant corrodes both pure and practical reason, despite its apparent powerlessness).

[236] *See* DONNA HARAWAY, CRYSTALS, FABRICS AND FIELDS: METAPHORS OF ORGANICISM IN TWENTIETH-CENTURY DEVELOPMENTAL BIOLOGY (Yale Univ. Press 1976) (examining the creation of elaborate crystals from seeds and the metaphorical value such a process has held over the Western scientific imagination).

[237] *See generally Nonbinding Bondage, supra* note 2 (examining the power dynamics of S&M relationships); Villarreal, *supra* note 17.

[238] *See* Villarreal, *supra* note 17; *Mother Whose Son Died of Silicone Injections to His Genitals Sues His 'Master' and Posse for Wrongful Death*, *supra* note 106.

[239] *Jones*, 122 Cal. App. 3d at 507 (1981).

[240] Two such subcultures are the Furries and Adult Baby communities. The Furries are people who dress up and sometimes live as giant stuffed animals; the Adult Babies are people who dress up and sometimes live as infants. *See, e.g*., Thom Patterson, *Inside the Misunderstood Culture of Furries*, CNN (updated Nov. 14, 2018), https://www.cnn.com/2018/11/14/us/furries-culture/index.htmlhttps://www.cnn.com/2018/11/14/us/furries-culture/index.html (exploring the Plushie phenomenon and its history as a fetish); *Adult Babies*, SEXINFO ONLINE (updated Feb. 21, 2018), https://sexinfoonline.com/adult-babies/.

freedom of expression these agreements embody. Hopefully, it will also make parties to sex contracting more attentive to the fact that the appearance of unconscionability might one day cause the law to be summoned by someone whom, beyond the *boudoir*, their contract impacts (like Tank's brother).[241] One positive outcome would be if this legal morass inspires contracting parties to invoke sexual arbitration at the formation stage and work it into their agreements as a "binding" provision. Those entering into such agreements should at minimum learn from Noodles & Beef's small claims filing, that fateful and fatal calling to the Law from within the mimetic, that such a bad-faith move can only lead to a legal disaster worthy of Aeschylus.[242] For though the goddess Athena's services come free in his *Oresteia*, the Greek drama that replaces the extralegal blood feud with the judicial process, the same cannot be said of the American legal machinery, which always exacts a toll.[243]

CONCLUSION

For three centuries, trans-enforceable sexual contracts have exposed a fetishistic value to the contract itself, raising the possibility that *le plaisir du contract* extends even to non-sexual contracts: an area yet to be explored in either contract theory or psychoanalysis, an area of future inquiry this Comment hopes to precipitate. Through aesthetic tactics based upon concepts of role play, performance and parody, BDSM contracts have presented the possibility that the contract engages legal enforceability for the sexual charge it creates.[244] Such agreements are generally the product of consent and should be left untouched by the Law, which should only intervene when these contracts have simply gone too far, "edging" too close to the nefarious or the unconscionable. Tank Chapman's case almost certainly arrived there once it crossed over into probate bequests, but possibly not with regard to bodily modification, which is a matter of personal taste and fantasy.

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[241] Alexandria Klausner, *Man Dies After Injecting Silicone in Genitals, Mom Blames Sex 'Cult' Master*, N. Y. POST (Nov. 7, 2018), https://nypost.com/2018/11/07/man-dies-after-injecting-silicone-in-genitals-mom-blames-sex-cult-master/ (identifying Tank's autistic brother Ben as the one to whom his estate was originally promised).

[242] Athena appears in the *Oresteia* trilogy's conclusion, the *Eumenides*. Her role is to interrupt the blood feud through the implementation of a proper trial-and-verdict structure. Within this Comment, she stands for both the Law's dominance and its otherness. *See* Aeschylus, THE ORESTEIA: AGAMEMNON, THE LIBATION BEARERS, THE EUMENIDES (Robert Fagles trans., Penguin Classics 1984).

[243] *Id.*

[244] *See Nonbinding Bondage*, *supra* note 2 (exploring strategies of powerlessness within BDSM contracting).

Following the meretricious cases, the legacy of *le plaisir du contrat* might indeed be an expansion of societal norms regarding companionship and marriage beyond the binary. Members of the LGBTQ+ community have come a long, long way from Krafft-Ebing and his pathologization of sexual difference for Victorian criminology.[245] The worst reading of the Noodles & Beef fiasco would be that subcultural sexual contractors need to be stripped of their freedom of contract and returned to the asylum, metaphorically.[246] However, as Beaux Jangles and Handler Jack have expressed, sexual contracting should never be used to mask abuse through the parody of consent.[247] In such situations, we are beyond the freedom of contract that Arthur Leff feels is due everyone, *especially* the outcasts of our society.[248]

For here, the performativity of disempowerment that is central to BDSM play might have slipped unconscionably into the actual disempowerment of physical and psychological abuse.[249] Given that simulation is a game of mirrors, it might be as easy to become disoriented in the *boudoir* as it was in the famous *Galerie des Glaces* at Versailles.[250] The Noodles & Beef situation should encourage the BDSM community to be more cautious in its contracting, especially when dangerous bodily modifications are involved, for the Law lurks just outside the four corners of their agreements.

Finally, as regards sexual contracting itself, a system of sexual mediation would be ideal to help dissatisfied parties reap the pleasures of their BDSM accords. Contracting parties might willingly opt for such arbitration, in particular as it would likely amplify the uncanny sexual charge inherent to enforcement. Pushing role play and mimesis even closer to the legal realities they simulate is one way to amplify the pleasure of the contract and might even help reveal a surprising hedonistic core to contractuality in general.

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[245] *See* KRAFFT-EBING, *supra* note 24.

[246] *See id.*

[247] Interview with Beaux Jangles, via Facebook Messenger (Apr. 12, 2020) (identifying Noodles & Beef with *Tiger King*'s potentially murderous anti-heroine Carole Baskin).

[248] Leff, *supra* note 142, at 555.

[249] *Nonbinding Bondage*, *supra* note 2, at 721 (exploring strategies of powerlessness within BDSM contracting).

[250] DERRIDA, *supra* note 16 (attempting to get beyond the mirror's reflecting "tain," in an effort to interrupt the dangerous but alluring infinite regress of mimesis).