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Word Games: Raising and Resolving the Shortcomings in Accident-Insurance Doctrine That Autoerotic-Asphyxiation Cases Reveal

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NOTE

Word Games: Raising and Resolving the Shortcomings in Accident-Insurance Doctrine That Autoerotic-Asphyxiation Cases Reveal

Sam Erman*

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INTRODUCTION

As sirens wail and smoke appears on the horizon, one passenger remarks to the driver on the injuries the accident caused. Elsewhere a woman drops and shatters a water glass and the friend whose home she is visiting cuts herself on the shards; when she apologizes for the injury, her friend accepts. After all, anyone could see it was an

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accident. Both cases capture the apparent simplicity of identifying accidents and injuries. In many cases people intuitively and instantly know they have occurred. Yet it is much more difficult to explain why a child announces that she has had an “accident” when she has soiled herself or whether the addictive, life-threatening pleasure that accompanies cocaine use constitutes an “injury.” Does a soldier who unintentionally triggers a landmine purposefully set by enemy troops or a drunk driver who wraps his car around a tree die accidentally? What distinguishes the injury a strangler causes from the experience of holding one’s breath under water?

Courts, it turns out, have had many conflicting answers to these questions. The issue arises because most accident-insurance policies guarantee recovery for injuries and deaths occasioned by “external, violent and accidental means” but exclude intentionally self-inflicted injury.¹ In adjudicating such cases, courts must apply intuitions about the occurrence of accidents and injuries to a dizzying array of exotic fact patterns.² The insurance policies provide little guidance beyond the sparse language above.³ And because courts have found it difficult to articulate the intuitions behind identifications of accidents and injuries, they have come to inconsistent results.⁴

Cases involving autoerotic-asphyxiation deaths illustrate the difficulty. Autoerotic asphyxiation is the practice of temporarily depriving oneself of oxygen while masturbating in order to increase sexual sensation, and death can result when the flow of oxygen is not restored in a timely manner.⁵ Practitioners die either because they pass

1. Adam F. Scales, *Man, God and the Serbonian Bog: The Evolution of Accidental Death Insurance*, 86 IOWA L. REV. 173, 234 (2000) (quoting MARTIN P. CORNELIUS, ACCIDENTAL MEANS 4-5 (1916) (“external, violent and accidental means”)); *id.* at 294 (“intentionally self-inflicted injury”); *see also* Oldring v. Metro. Life Ins. Co., 492 F. Supp. 994, 997 (D.N.J. 1980) (discussing prior cases of “courts interpreting accidental means provisions”); Padfield v. AIG Life Ins. Co., 290 F.3d 1121 (9th Cir. 2002) (involving an intentionally self-inflicted injury clause).

2. The Supreme Court most recently struggled with this question during oral arguments in *Olympic Airways v. Husain*, while considering an accidental death claim in which an airline passenger died after prolonged exposure to tobacco smoke. Oral Argument, *Olympic Airways v. Husain*, 540 U.S. 644 (2004) (No. 02-1348), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-1348.pdf (last visited June 6, 2005).

3. Scales, *supra* note 1, at 234, 294.

4. *See, e.g.*, Wickman v. Northwestern Nat’l Ins. Co., 908 F.2d 1077, 1087 (1st Cir. 1990) (“Much of the inconsistency in the case law defining and applying the definition of accident is traceable to the difficulty in giving substance to a concept which is largely intuitive.”); Gordon v. Metro. Life Ins. Co., 260 A.2d 338, 340 (Md. 1970) (“[T]he entire field of accident law” is a bog and “[t]he main component of the bog is a wide variety of facts in a context even broader than the fact-smothered field of negligence law.”); Scales, *supra* note 1, at 294 (discussing the different outcomes courts have reached when applying intentionally self-inflicted-injury exclusions).

5. *See, e.g.*, Parker v. Danaher Corp., 851 F. Supp. 1287, 1289 (W.D. Ark. 1994) (describing autoerotic asphyxiation as “an attempt to increase sexual gratification from

out before restoring the flow of oxygen or because a mechanical safety apparatus fails.⁶ Courts have not characterized such deaths as suicides but have struggled with whether to deem them “accidents” that are covered by insurance policies.

To date, hard numbers on the death rate of autoerotic asphyxiation have been difficult to produce. The number of deaths per year resulting from autoerotic asphyxiation has been variously calculated to lie between forty and two-thousand.⁷ But because of underreporting, the number of annual incidents or practitioners is largely unknown.⁸ Thus the only firm statement one can make about autoerotic asphyxiation is that throughout the general population “death by autoerotic asphyxiation is statistically rare.”⁹ Nonetheless, experts and courts have tended to concur that most incidents of autoerotic asphyxiation end in survival and do not produce serious or permanent injury.¹⁰ As a result of this information and its obscure and

masturbation . . . by . . . restricting the supply of oxygen to the brain in an attempt to intensify the sensations of masturbation”); *Critchlow v. First UNUM Life Ins. Co.*, 198 F. Supp. 2d 318, 325-26 (W.D.N.Y. 2002) [hereinafter *Critchlow I*] (“It is common knowledge that strangulation will result in death if it continues long enough . . .”), *aff’d*, 340 F.3d 130 (2d Cir. 2003), *vacated and rev’d*, 378 F.3d 246 (2d Cir. 2004).

6. *Bennett v. Am. Int’l Life Assurance Co.*, 956 F. Supp. 201, 204 (N.D.N.Y. 1997) (quoting AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 302.83 (4th ed. 1994)) (describing how due to “equipment malfunction, errors in the placement of the noose or ligature, or other mistakes, accidental deaths sometimes occur”); *Cronin v. Zurich Am. Ins. Co.*, 189 F. Supp. 2d 29, 38 (S.D.N.Y. 2002) (“This loss of awareness and control in the search for an ever more intense high risks death, and limits the conscious ability to reverse death’s grasp.”).

7. *See, e.g.*, *Conn. Gen. Life Ins. Co. v. Tommie*, 619 S.W.2d 199, 202 (Tex. App. 1981) (summarizing expert testimony to the effect that “forty deaths per year were reported in the United States as a result of such activity”); *Lonergan v. Reliance Standard Life Ins. Co.*, No. CV-96-11832-PBS, 1997 U.S. Dist. LEXIS 24075, at *3 (D. Mass. May 29, 1997) (quoting *Kessler Aff.* at 6-7) (“approximately 2,000 deaths occur per year in this country arising out of autoerotic stimulation”). Courts have also acknowledged the difficulties in finding reliable numbers. *See, e.g.*, *Todd v. AIG Life Ins. Co.*, No. 3:93CV0054-R, 1994 U.S. Dist. LEXIS 21539, at *20 (N.D. Tex. Mar. 24, 1994) [hereinafter *Todd I*] (quoting Katherine Seigenthaler, *No Intention of Killing Themselves*, WASH. POST, June 12, 1985, Health Section at 7) (“The *Washington Post* reported that the actual number of annual deaths ‘is difficult to gauge because experts believe many are mistaken for suicides or murders.’”), *modified*, 47 F.3d 1448 (5th Cir. 1995).

8. The numbers are so scarce that few sources even comment on the question. *But see* Peter M.E. Cummings et al., *Auto-erotic Asphyxia*, at <http://www.geocities.com/pathologypete/autocase1.html> (last visited June 6, 2005) (“The exact number of individuals practicing autoerotic asphyxiation in the general population is unknown . . .”).

9. *Critchlow v. First UNUM Life Ins. Co.*, 340 F.3d 130, 138 (2d Cir. 2003) [hereinafter *Critchlow I*] (Kearse, J., dissenting) (summarizing expert opinions), *vacated and rev’d*, 378 F.3d 246 (2d Cir. 2004). Note that this provides little insight into the cumulative risks that ongoing practitioners of autoerotic asphyxiation face.

10. *See Crutchlow II*, *supra* note 9, 340 F.3d at 137 (Kearse, J., dissenting) (quoting a February 18, 2002 report by Stephen J. Hucker, Medical Director, Professor of Psychiatry, and Head of the Division of Forensic Psychiatry in the Forensic Program of McMaster University) (“[A]utoerotic asphyxial episodes do not, inevitably, or even substantially likely,

inconclusive nature, one cannot say that practitioners of autoerotic asphyxiation ought to expect to die.¹¹ Nonetheless, courts have reached disparate decisions on the practice's accidentalness and injuriousness.¹²

Most courts have assigned "accident" a lay definition when interpreting accident-insurance policies.¹³ The difficulty has arisen in

lead to a fatal outcome."); *Cronin*, 189 F. Supp. 2d at 38 ("If the practitioner retains his senses, and the experts maintain that most do, the pressure on the carotid arteries can be relieved in time to prevent permanent damage to the tissues of the neck or brain, and the body can recuperate."); *Tommie*, 619 S.W.2d at 202 (summarizing expert testimony to the effect that "death is not the normal expected result"); ROBERT R. ET AL., AUTOEROTIC FATALITIES 49 (1983) (stating that autoerotic asphyxiation ends "more often than not with a nonfatal outcome"). For more examples, see *infra* note 11.

11. Courts that grant recovery take this approach. *E.g.*, *Tommie*, 619 S.W.2d at 202 (granting recovery after explaining that "death is not the normal expected result of that behavior" (summarizing expert testimony)). *Cf. Todd I*, *supra* note 7, 1994 U.S. Dist. LEXIS 21539, at *23 (arguing that because most people do not perceive the risks of sexual asphyxia, fatal results are not reasonably foreseeable). They often explain that it is more likely than not that practitioners will survive autoerotic asphyxiation or at least assert that death is not quite "substantially certain" and hold that such levels of foreseeability are insufficient to preclude classification as accidents. *Id.* at *33 ("This Court finds as a matter of law that death is not a *substantially certain* result to be expected from participating in autoerotic acts."); *Tommie*, 619 S.W.2d at 202-03 ("[A]lthough the type of activity in which Mr. Tommie was engaged was foolish and fraught with substantial risk of injury or death, it was not of such a nature that the insured should have reasonably known that it would probably result in his death."); *Kennedy v. Wash. Nat'l Ins. Co.*, 401 N.W. 2d 842, 846 (Wis. Ct. App. 1987) ("It was a foolish act involving some risk of injury or death, but it was not of such a nature that Kennedy knew or should have known that it probably would result in death" and "[d]eath was not a normal expected result."); *id.* ("Although Kennedy's act can be considered bizarre or unusual, we agree . . . that there is no evidence that Kennedy's death was highly probable, expected, or a natural result."). Pro-recovery courts sometimes concede that autoerotic asphyxiation is relatively risky, but still argue that it is not so risky as to be nonaccidental. *See Todd v. AIG Life Ins. Co.*, 47 F.3d 1448, 1456 (5th Cir. 1995) [hereinafter *Todd II*] ("[T]he materials before the court clearly indicated that the likelihood of death from autoerotic activity falls far short of what would be required to negate coverage . . ."); *MAMSI Life & Health Ins. Co. v. Callaway*, 825 A.2d 995, 1001 (Md. 2003) [hereinafter *MAMSI III*] (summarizing *MAMSI Life & Health Ins. Co. v. Callaway*, 806 A.2d 274 (Md. Ct. App. 2002) [hereinafter *MAMSI II*], *vacated*, *MAMSI III*, *supra*) (explaining that the lower court "analogized autoerotic asphyxiation with other activities that are inherently dangerous, although apparently more socially acceptable in the mainstream of extreme human recreational activities — skydiving, bungee jumping, white water rafting, parasailing, mountain climbing, and scuba diving — to support its finding that the injuries" resulted from an accident).

12. *Compare, e.g.*, *Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121 (9th Cir. 2002) (finding autoerotic-asphyxiation deaths accidental), *with Sigler v. Mut. Benefit Life Ins. Co.*, 663 F.2d 49 (8th Cir. 1981) [hereinafter *Sigler II*] (opposite); *compare Fawcett v. Metro. Life Ins. Co.*, No. C-3-97-540, 2000 U.S. Dist. LEXIS 10061 (S.D. Ohio June 28, 2000) (finding autoerotic asphyxiation injurious), *with Padfield*, 290 F.3d 1121 (9th Cir. 2002) (opposite).

13. Courts generally reason that the word "accident" is only susceptible to its lay meaning. *Cf., e.g.*, *Olson v. Am. Bankers Ins. Co.*, 35 Cal. Rptr. 2d 897, 901-02 (Ct. App. 1994) (quoting *Pilcher v. N.Y. Life Ins. Co.*, 102 Cal. Rptr. 82, 85 (Ct. App. 1972)) ("[T]he words 'accident' and 'accidental' have never acquired any technical meaning in the law and must be construed according to ordinary understanding and common usage.").

application.¹⁴ As one justice of the California Supreme Court noted, most laypeople can agree on a heartland of cases that do and do not constitute accidents but cannot formulate the principles underlying their categorizations.¹⁵ The problem is that while accidents clearly involve an unintended and unforeseen result, they do not include all such results.¹⁶ Substantially all laypeople would likely agree, for instance, that an accident “is not . . . a death from disease, nor a death from the natural causes of old age.”¹⁷ But when courts have tried to articulate how laypeople make these intuitive distinctions, they have generally failed.¹⁸ As one rather resignedly explained, “Probably the best definition is Cardozo’s tautology that an accident is what the public calls an accident, which aids jurists in deciding individual cases only slightly.”¹⁹ And because of this difficulty, they have come to inconsistent results in assessing the accidentalness of autoerotic-asphyxiation deaths.²⁰

Most accident-insurance policies also include a clause that forbids recovery where the harm results from an intentionally self-inflicted injury.²¹ To trigger the clause, the insured must intentionally injure herself in a way that results in a further, unintentional injury. For instance, a person who slit her wrists as a cry for help but then bled to death on the way to the hospital would not recover for either the

14. One could contest the existence of common, lay definitions of words, and thus argue that this difficulty arises because words are always slippery and ambiguous. Whatever the merits of that position in general, this Note argues that in this context lay definitions produce determinate outcomes.

15. *Weil v. Fed. Kemper Life Assurance Co.*, 866 P.2d 774, 803 (Cal. 1994) (Mosk, J., dissenting) (reasoning that most people would define accidents through examples); *see also* *Burr v. Commercial Travelers Mut. Accident Ass’n of Am.*, 67 N.E.2d 248, 251 (N.Y. 1946) (noting that most people would stumble “if asked to formulate a written definition of the word”).

16. *Burr*, 67 N.E.2d at 251 (reasoning that a layperson “would say that the term applied only to an unusual and extraordinary happening; that it must be the result of chance; that the cause must be unanticipated or, if known, the result must be unexpected”).

17. *Weil*, 866 P.2d at 803 (Mosk, J., dissenting). In *Weil*, dissenting Justice Mosk contrasted this observation with the claim that a layperson forced to define an accident “would probably be reduced to describing the deaths in such broad and general terms as happening by chance, unusual, unforeseen, unanticipated, unexpected, and unintended.” *Id.*

18. *Scales*, *supra* note 1, at 236-37 (noting that while “courts could turn to this reservoir of common understanding where the strict technical definition was unavailing or inapposite” they “often entertained implausible, if not bizarre, notions regarding the average person’s understanding of the term ‘accident’”); *see also* *Wickman v. Northwestern Nat’l Ins. Co.*, 908 F.2d 1077, 1087 (1st Cir. 1990) (“Much of the inconsistency in the case law defining and applying the definition of accident is traceable to the difficulty in giving substance to a concept which is largely intuitive.”).

19. *Wickman*, 908 F.2d at 1086 (summarizing *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491 (1934) (Cardozo, J., dissenting)).

20. *See supra* note 12.

21. *See supra* note 1 and accompanying text.

intended loss of blood (nonaccidental) or the accidental fatality that followed (result of intentionally self-inflicted injury). Courts have divided over whether such clauses preclude recovery in cases of autoerotic-asphyxiation deaths. Some have concluded that decedents intentionally injure themselves when they temporarily cut the supply of oxygen to their brains.²² Others have disagreed, holding that temporary and voluntary deprivation of oxygen does not constitute an injury within a lay definition.²³ A third group has found the question sufficiently close to allow insurers to settle it under clauses granting them the right to interpret policy terms.²⁴ As with accidents, the controversy arises from difficulties in defining a common and seemingly uncomplicated word.

This Note argues that autoerotic-asphyxiation deaths are accidents and not the results of intentionally self-inflicted injuries. Part I formally analyzes accident-insurance case law to show that current, viable approaches to accident insurance indicate that autoerotic-asphyxiation deaths are accidental. Part II claims autoerotic-asphyxiation deaths should not trigger intentionally self-inflicted-injury exclusion clauses because the practice does not intentionally injure. This Note concludes beneficiaries should recover when accident-insurance policyholders die during autoerotic asphyxiation.

I. AUTOEROTIC-ASPHYXIATION DEATHS ARE ACCIDENTAL

This Part advances a new test for determining whether death from autoerotic asphyxiation is accidental and contends that this new test is superior to alternative approaches.²⁵ The first step under this test is

22. See *infra* note 123 and accompanying text.

23. See *infra* note 124 and accompanying text.

24. See *infra* note 125 and accompanying text; *Cozzie v. Metro. Life Ins. Co.*, 140 F.3d 1104, 1107 (7th Cir. 1998) ("When language granting . . . broad power to interpret the document is vested in the fiduciary, we have held that the appropriate standard of review ought to be the 'arbitrary and capricious' standard." (summarizing *Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293, 1295 (7th Cir. 1993))).

25. Courts do not currently explicitly follow the approach I delineate. Instead, they undertake analyses that do not explain the results they reach, especially in autoerotic-asphyxiation cases. Today, a majority of courts purport to equate accidental harms with unforeseeable ones. See *infra* note 92. These courts come out both ways in autoerotic-asphyxiation cases. Compare *Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121 (9th Cir. 2002), *Parker v. Danaher Corp.*, 851 F. Supp. 1287 (W.D. Ark. 1994), *Todd I*, *supra* note 7, 1994 U.S. Dist. LEXIS 21539 (N.D. Tex. 1994), *modified*, 47 F.3d 1448 (5th Cir. 1995), *Conn. Gen. Life Ins. Co. v. Tommie*, 619 S.W.2d 199 (Tex. App. 1981), and *Kennedy v. Wash. Nat'l Ins. Co.*, 401 N.W.2d 842 (Wis. Ct. App. 1987) (all granting recovery), with *Sigler II*, *supra* note 12, 663 F.2d 49 (8th Cir. 1981), *Int'l Underwriters, Inc. v. Home Ins. Co.*, 662 F.2d 1084 (4th Cir. 1981), *Cronin v. Zurich Am. Ins. Co.*, 189 F. Supp. 2d 29 (S.D.N.Y. 2002), and *Loneragan v. Reliance Standard Life Ins. Co.*, No. CA 96-11832-PBS, 1997 U.S. Dist. LEXIS 24075 (D. Mass. May 29, 1997) (denying recovery), with *Bennett v. Am. Int'l Life Assurance Co.*, 956 F. Supp. 201 (N.D.N.Y. 1997) (denying insurer motion for summary judgment and sending case to trial). In two instances, courts denied recovery because the absence of a mechanical

resolving whether death is the expected result of the practice. If not, courts should then grant recovery unless they determine autoerotic asphyxiation constitutes either a crime or a “high-risk act of bravura.” A high-risk act of bravura is (1) an extremely dangerous activity; (2) that practitioners engage in for the purpose of exposing themselves to risk; and (3) that serves no valuable end.²⁶

In defending the above test, this Part argues that it better reflects the actual practices of courts than do the workable alternatives that courts purport to apply. Section I.A argues that in most cases, courts have found unexpected results — like deaths during instances of autoerotic asphyxiation — to be accidents. It then observes that courts have hindered recovery in cases involving certain types of stigmatized activity, but explains that the stigma that attaches to autoerotic asphyxiation is of a different type. Section I.B contends that although some courts have advanced an alternate approach known as “accidental-means analysis,” the analysis depends upon a distinction without a difference and thus provides no grounds upon which to reach a contrary result. This Part concludes that autoerotic-asphyxiation deaths are accidents.

A. *Formal Analysis Reveals the Accidentalness of Autoerotic-Asphyxiation Deaths*

This Section proposes a test that reflects the current practices of courts. Section 1 explains that courts generally grant recovery in cases involving unexpected results. This encompasses the deaths that arise from autoerotic asphyxiation. Section 2 observes that courts have hindered recovery in cases involving crimes or high-risk acts of bravura. Because most courts have not explicitly acknowledged the role that these, but not other, stigmatized activities have factored into their considerations, their analyses of the issue have not been formal.

safety apparatus sufficiently increased the risk of death from autoerotic asphyxiation so as to make survival expectations unreasonable. *Sigler II*, *supra* note 12, 663 F.2d at 50; *Lonergan*, 1997 U.S. Dist. LEXIS 24075, at *17. One court that granted recovery reasoned that the fact that the decedent had survived autoerotic asphyxiation on many occasions weighed “in the determination of whether death was substantially likely to result.” *Bennett*, 956 F. Supp. at 212. Another court noted both the decedent’s twenty years of experience practicing autoerotic asphyxiation and the mechanical safety apparatus he had unsuccessfully employed in granting recovery. *Critchlow v. First UNUM Life Ins. Co.*, 378 F.3d 246 (2d Cir. 2004) [hereinafter *Critchlow III*]. For a discussion of autoerotic-asphyxiation cases in other jurisdictions, see *infra* notes 118-119 and accompanying text.

26. While bravura indicates both exposure to risk for its own sake and social display, this Note uses it more broadly to encompass solitary behaviors as well. 2 THE OXFORD ENGLISH DICTIONARY 498 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (defining bravura as a “[d]isplay of daring”). To the extent that solitarily subjecting oneself to a high-risk activity constitutes attempting suicide, the distinction becomes one without a difference for the purposes of this Note.

This has created problems in autoerotic-asphyxiation cases, where courts have observed the stigma that attaches to the activity and then implicitly and unconvincingly analogized it to a crime or high-risk act of bravura. This Section illuminates why only crimes and high-risk acts of bravura, and not other sources of stigma, should and do impede recovery. Consequently, courts ought to grant recovery in autoerotic-asphyxiation cases.

1. *Foreseeability*

In many cases, laypeople's determinations of accidentalness hinge on the likelihood that the injury-causing activity would cause a harm similar to the one that occurred.²⁷ This Note maintains that as a general matter, harms are only so likely to occur as to be nonaccidental if they are the expected result of an activity. This standard is consistent with courts' historical and modern tendencies. While different modern courts set the level of foreseeability necessary to preclude recovery at various levels,²⁸ recent courts have returned to definitions of accident that exclude harms on foreseeability grounds only when they represent the expected outcome of the injury-causing event. Federal courts have led and exemplified the change.²⁹ Under the Employee Retirement Income Security Act of 1974 ("ERISA"),

27. See *infra* notes 36-39 and accompanying text.

28. While most modern courts have purported to use foreseeability tests, they have often disagreed over the level of foreseeability that precludes recovery. Compare *Todd II*, *supra* note 11, 47 F.3d 1448, 1456 (5th Cir. 1995) (holding that a subjective expectation of survival indicates accidentalness unless the risk of death "reach[es] the level of 'substantial certainty'"), with *Sigler II*, *supra* note 12, 663 F.2d at 49 (quoting *Sigler v. Mut. Benefit Life Ins. Co.*, 506 F. Supp. 542, 544 (S.D. Iowa 1981) [hereinafter *Sigler I*], *aff'd*, 663 F.2d 49 (8th Cir. 1981)) (summarizing Iowa law to the effect that no accident occurs where "a reasonable person would have recognized that his actions could result in his death"). They have also differed over whether to measure perceptions of risk subjectively or objectively. Compare *Santaella v. Metro. Life Ins. Co.*, 123 F.3d 456, 462 (7th Cir. 1997) (quoting JOHN ALAN APPLEMAN, *INSURANCE LAW AND PRACTICE, WITH FORMS* § 360, at 452-53 (1981) ("[I]t is customary to look at the casualty from the point of view of the insured."), with *Gaskins v. N.Y. Life Ins. Co.*, 104 So. 2d 171, 177 (La. 1958) (quoting *Preferred Accident Ins. Co. v. Clark*, 144 F.2d 165, 167 (10th Cir. 1944)) (characterizing the test as "whether the average man, under the existing facts and circumstances, would regard the loss so unforeseen, unexpected, and extraordinary that he would say it was an accident."), with *MAMSI III*, *supra* note 11, 825 A.2d 995, 1000 (Md. 2003) ("The test has subjective and objective components."). Nonetheless, many courts have agreed that once these criteria are set, the test should be dispositive. See, e.g., *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491, 501 n.2 (1934) (Cardozo, J., dissenting) (quoting *W. Commercial Travelers' Ass'n v. Smith*, 85 F. 401, 405 (8th Cir. 1898)) (finding no accident where result "is the natural and probable consequence of an act or course of action"); *Weil v. Fed. Kemper Life Assurance Co.*, 866 P.2d 774, 809 (Cal. 1994) (Mosk, J., dissenting) (quoting *Collins v. Nationwide Life Ins. Co.*, 294 N.W.2d 194, 196 (Mich. 1980)) ("[C]onduct would in all probability result in his death." (footnote omitted and emphasis added in *Weil*)).

29. See, e.g., *MAMSI III*, *supra* note 11, 825 A.2d at 1001 (discussing federal ERISA jurisprudence in the context of a state-court accident-insurance claim).

federal common law reaches large numbers of accident-insurance cases, preempting much state law and increasing the influence of the federal courts.³⁰ In exercising its influence over accident-insurance law, much of the federal judiciary applies an accidentalness test that the First Circuit initiated in *Wickman v. Northwestern National Insurance Co.*³¹: injuries are nonaccidental only if they were all but certain to occur.³²

Early courts attempting to decide whether harms constituted accidents agreed. They also distinguished situations in which decedents intentionally killed themselves or engaged in an activity whose expected outcome was death from those in which decedents intentionally undertook a risky activity which they anticipated surviving.³³

30. 29 U.S.C. §§ 1001-1461 (2000). ERISA's scope is quite broad, encompassing nearly "any employee benefit plan . . . established or maintained — (1) by any employer engaged in commerce or in any industry or activity affecting commerce; or (2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or (3) by both." *Id.* § 1003(a). "ERISA trumps everything — almost any state law cause of action you can think of will be preempted by ERISA." Jayne Elizabeth Zanglein, *Employee Benefits for General Practitioners: Ten Rules that Every Attorney Should Know About ERISA*, 26 TEX. TECH UNIV. L. REV. 579, 580 (1995).

31. 908 F.2d 1077 (1st Cir. 1990).

32. See, e.g., *Todd II*, *supra* note 11, 47 F.3d at 1456 (explaining that no accident occurs if "the risk of death involved in the conduct at issue" reaches "the level of 'substantial certainty'"); cf. *MAMSIII*, *supra* note 11, 825 A.2d at 1000-01.

33. In 1886, twenty-three years after accident insurance first appeared in the United States, an Illinois Circuit Court surveyed definitions of accidents proposed by prior courts in *Crandal v. Accident Insurance Co.*, 27 F. 40 (C.C.N.D. Ill. 1886), *aff'd*, 120 U.S. 527 (1887). See also *Accident Insurance*, 7 AM. L. REV. 585 (1873) (writing in 1873 that "the first American [accident-insurance] company is only ten years old"). It found that courts deciding cases on foreseeability grounds held unusual, unexpected, unintended, and chance events accidental. The *Crandal* court found that prior courts had held that an "accident [is] . . . [a]n event which, under the circumstances, is unusual and unexpected by the person to whom it happens; the happening of an event without the concurrence of the will of the person by whose agency it was caused," 27 F. at 42 (incorrectly quoting JOHN BOUVIER, 1 A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION 37 (1st ed. 1839)), "any event which takes place without the oversight or expectation of the person acted upon or affected by the event," *id.* (quoting *Accident Insurance*, *supra*, at 587-88 (quoting *Ripley v. Ry. Passengers' Assurance Co.*, 20 F. Cas. 823, 825 (C.C.W.D. Mich. 1870) (No. 11854))), and "any unexpected event which happens as by chance, or which does not take place according to the usual course of things," *id.* (quoting *Accident Insurance*, *supra*, at 588 (quoting *North Am. Life & Accident Ins. Co. v. Burroughs*, 69 Pa. 43, 51 (1871))). Modern courts have observed that the common law went even further, requiring specific intent to hold a death nonaccidental on foreseeability grounds. As the *Parker v. Danaher Corp.* court wrote, "[t]he common law . . . prescrib[es] that these terms should be judged from the viewpoint of the insured," 851 F. Supp. 1287, 1294 (W.D. Ark. 1994) (quoting *Wickman v. Northwestern Nat'l Ins. Co.*, 908 F.2d 1077, 1087 (1st Cir. 1990)) (first alteration in original), which "means that unless [a decedent] 'actually expected to die, essentially that he specifically intended to commit suicide, his death must be considered an accident,'" *id.* (quoting and summarizing the plaintiff's argument).

Although some modern courts have set lower likelihood-of-harm cutoffs for recovery,³⁴ these approaches are best seen as the legacy of an anomalous line of late-nineteenth- and early-twentieth-century cases in which courts manipulated levels of foreseeability so that they could use foreseeability tests to the exclusion of other approaches.³⁵ The better approach is to consider all relevant considerations explicitly and, as is the early and modern trend, to only preclude recovery where injury was an activity's expected result.

Available evidence suggests that laypeople agree with the early and modern trend. As Justice Mosk of the California Supreme Court has observed, "if asked to specify what . . . accidental deaths have in

34. The likelihoods of injury necessary to defeat recovery in jurisdictions that consider only foreseeability of harm have ranged from not "probabl[e]," *Kennedy v. Wash. Nat'l Ins. Co.*, 401 N.W.2d 842, 846 (Wis. Ct. App. 1987), to anything less than "substantial certainty," *Todd II*, *supra* note 11, 47 F.3d at 1456. See also *MAMSI III*, *supra* note 11, 825 A.2d at 1000 (quoting *Cole v. State Farm Mut. Ins. Co.*, 753 A.2d 533, 540 (Md. 2000)) ("unusual"); *Conn. Gen. Life Ins. Co. v. Tommie*, 619 S.W.2d 199, 202 (Tex. App. 1981) (quoting *Freeman v. Crown Life Ins. Co.*, 580 S.W.2d 897, 900 (Tex. Civ. App. 1979)) ("mere . . . gross negligence").

Courts have also used bases other than likelihood of harm to determine foreseeability. See *Santaella v. Metro. Life Ins. Co.*, 123 F.3d 456, 462 (7th Cir. 1997) (quoting *Casey v. Uddeholm Corp.*, 32 F.3d 1094, 1097 (7th Cir. 1994)) ("unintentional"); *Sigler I*, *supra* note 28, 506 F. Supp. 542, 544 (S.D. Iowa 1981) (quoting *Rowe v. United Commercial Travelers' Ass'n*, 172 N.W.2d 454, 458 (Iowa 1919)) (not "apparent"). And levels have varied within individual opinions. See, e.g., *Kennedy*, 401 N.W.2d at 846 (describing the test as not "highly probable" or "inevitable," not "natural and probable," more than "negligent," and not "probabl[e]").

35. This trend likely started with a federal circuit-court case involving a robbery/murder victim, *Ripley v. Railway Passengers' Assurance Co.*, 20 F. Cas. 823 (C.C.W.D. Mich. 1870) (No. 11,854). See *Scales*, *supra* note 1, at 238 (describing *Ripley* as a case in which "the insured was robbed and murdered while traveling"). *Ripley* presented the interesting issue of whether decedents who do not foresee their attack have died accidentally despite the purposeful nature of their assailants' assaults. After all, killers cannot claim that their attacks are accidental because their victims did not foresee the attacks but soldiers can speak of the accidental death of a comrade who unwittingly triggered an enemy landmine. In holding for the plaintiff, the court did not explicitly address the question, but instead folded it into an exclusive foreseeability test that defined accidents as "that which occurs to [decedents] unexpectedly." *Ripley*, 20 F. Cas. at 825.

Subsequently, the likelihood of harm necessary to preclude recovery fell. Courts that followed *Ripley* shared its reliance on the insured's subjective perspective. Because nineteenth-century jurisprudence held people "to intend the natural and probable consequence[s] of [their] deeds," this encouraged these courts to find no accident in cases where insureds suffered unlikely but negligent harms. *Scales*, *supra* note 1, at 242 (quoting *W. Commercial Travelers' Ass'n v. Smith*, 85 F. 401, 405 (8th Cir. 1898)). *Scales* elaborates that, "[t]he idea that an event might be nonaccidental because the insured had been negligent was spurred by courts' reliance on the insured's subjective perspective," *id.* at 245, and that "[e]ven if the insured was not at fault, circumstances preceding death might sufficiently alert him to the likelihood of injury so that it would no longer be entirely 'unforeseen' or 'unexpected.'" *Id.* at 242.

Other early cases followed *Ripley*. See, e.g., *Supreme Council of the Order of Chosen Friends v. Garrigus*, 3 N.E. 818 (Ind. 1885) (pistol shot wound); *Guldenkirch v. United States Mut. Accident Ass'n*, 5 N.Y.S. 428 (N.Y. City Ct. 1889) (same); *Richards v. Travelers' Ins. Co.*, 26 P. 762 (Cal. 1891) (struck by third party); *Fid. & Cas. Co. v. Johnson*, 17 So. 2 (Miss. 1895) (death at the hands of a mob).

common, the layperson . . . would probably . . . describ[e] the deaths . . . as happening by chance, unusual, unforeseen, unanticipated, unexpected, and unintended.”³⁶ Dictionaries concur that accidents indicate harmful events whose outcomes victims neither intend nor expect.³⁷ Similarly, while it would be strange to see the deaths of individuals who point loaded guns at their heads while “entertaining a fanciful expectation that fate would . . . favor them” as accidents, it is normal and natural to deem mountain-climber or deep-sea-diver deaths accidental.³⁸ In fact, insureds likely purchase accident insurance to mitigate the risk of subsequent unexpected — and thus unavoids — contingencies and, as laypeople, thereby reveal their belief that accidents are unforeseen.³⁹ A lay definition finds harms nonaccidental on foreseeability grounds only if they are the expected result of the injury-causing activity.

As the Introduction explains, death is not the expected result of autoerotic asphyxiation.⁴⁰ Absent some other consideration courts should hold such deaths accidental.

2. *Stigma and Morality*

Although many courts in foreseeability-test jurisdictions have claimed that foreseeability operates to the exclusion of other considerations, other courts have observed that morality has affected outcomes throughout accident-insurance law. Justice Mosk of the California Supreme Court has noted that moral considerations have sometimes determined close cases.⁴¹ New Jersey’s high court has observed that idiosyncratic moral intuitions of individual courts in

36. *Weil v. Fed. Kemper Life Assurance Co.*, 866 P.2d 774, 803 (Cal. 1994) (Mosk, J., dissenting); *cf.* *Burr v. Commercial Travelers Mut. Accident Ass’n of Am.*, 67 N.E.2d 248, 251 (N.Y. 1946) (“[T]he average man would . . . say that the term [accident] applied only to an unusual and extraordinary happening; that it must be the result of chance; that the cause must be unanticipated or, if known, the result must be unexpected.”).

37. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 10-11 (Eds. of The Am. Heritage Dictionaries eds., 4th ed. 2000) (defining accident as “[a]n unexpected and undesirable event, especially one resulting in damage or harm”); MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 7 (Frederick C. Mish et al. eds., 10th ed. 1997) (“an unexpected . . . event”); 1 THE OXFORD ENGLISH DICTIONARY, *supra* note 26, at 74 (“[a]nything that happens without foresight or expectation” or “[a]n unfortunate event”); RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 12 (Wendalyn R. Nichols et al. eds., 2nd ed. 2001) (“an undesirable or unfortunate happening that occurs unintentionally” and “any event that happens unexpectedly”).

38. *Wickman*, 908 F.2d at 1087 (describing russian-roulette practitioners).

39. *Weil*, 866 P.2d at 808 (Mosk, J., dissenting) (“[I]nsureds purchase accident coverage in significant part to safeguard themselves or their beneficiaries against the consequences of their own thoughtless, negligent, or even foolhardy acts.”).

40. *See supra* notes 7-11 and accompanying text.

41. *Weil*, 866 P.2d at 804-06 (Mosk, J., dissenting).

individual cases may provide the best guide to how some cases will be decided.⁴² As a result, cases involving similar risks have come out differently and applications of the tests courts purport to apply have varied, giving them little predictive power.⁴³

Despite observing that the stigma that attaches to activities people consider immoral occasionally affects outcomes, courts have not taken a formal approach to delineating how or why. This analytic looseness has led some to analogize the stigma that attaches to autoerotic-asphyxiation practitioners to the stigma that attaches in cases where courts have hindered recovery. A more formal analysis demonstrates that courts have hindered recovery only in cases involving crimes or high-risk acts of bravura.⁴⁴ Autoerotic asphyxiation falls into neither category.

Drug-overdose cases illustrate how courts have made recovery more difficult in cases involving illegal activities. *Santaella v. Metropolitan Life Insurance Co.* featured a decedent who died from an overdose of a prescription drug whose therapeutic dose and fatal dose were sufficiently similar that fatal results were common.⁴⁵ The Seventh Circuit allowed recovery, finding the evidence insufficient for a jury to find “death either ‘highly likely to occur’ . . . or ‘substantially certain to result.’”⁴⁶ One court even granted recovery after a decedent mixed prescription drugs and alcohol into a lethal combination.⁴⁷ Compare *Weil v. Federal Kemper Life Assurance Co.*, where the California

42. *Linden Motor Freight Co. v. Travelers Ins. Co.*, 193 A.2d 217, 223 (N.J. 1963) (What “[t]he broad words ‘accident’ and ‘accidental’ . . . encompass . . . largely depends on the viewpoint of the person whose judgment is to govern.”).

43. *Id.* (“[T]he outcome of cases which one might think factually analogous, as well as the legal reasoning used to support the conclusion, varies not only from state to state but within a state.”); *Weil*, 866 P.2d at 805 (Mosk, J., dissenting) (quoting *Linden Motor Freight Co.*, 193 A.2d at 223) (“Very much seems to depend upon a court’s unexpressed feeling of the fair and reasonable result in the particular factual setting, with made-to-order criteria and language then being used to bring about legal conformance to the conclusion previously reached.”).

44. Courts have not precluded recovery in every case where an insured’s injury results from the insured’s criminal act or high-risk act of bravura. *See, e.g.*, *West v. Aetna Life Ins. Co.*, 171 F. Supp. 2d 856 (N.D. Iowa 2001) (granting recovery after the decedent crashed his car while under the influence of alcohol). Rather, courts have appeared to tip the balance against recovery when the insured’s injury resulted from the insured’s illegal act or high-risk act of bravura. *See infra* notes 45-50 and accompanying text (explaining how the accidentalness of drug-overdose deaths can hinge on whether the drugs were illegal or by prescription). This Note does not delineate the mechanics of this tipping in cases involving crimes or high-risk acts of bravura.

45. 123 F.3d 456, 459 (7th Cir. 1997) (quoting R.26, Ex.2 (Zumwalt Dep.)) (“The Medical Examiner concluded . . . ‘propoxyphene has been associated very commonly with accidental drug overdoses because there is a very small margin . . . between a therapeutic dose and a toxic or lethal dose . . .’”).

46. *Id.* at 463; *see also* *Mansbacher v. Prudential Ins. Co. of Am.*, 7 N.E.2d 18 (N.Y. 1937) (veronal overdose).

47. *Metro. Life Ins. Co. v. Main*, 383 F.2d 952, 960 (5th Cir. 1967).

Supreme Court faced a cocaine death in a year when users died 0.0014% of the time they used.⁴⁸ Proceeding in part under a standard that hinged on foreseeability, the court held that “death reasonably could be anticipated.”⁴⁹ Writing in dissent, Justice Mosk convincingly rebutted the majority’s rationales. He reasoned the result could only be reconciled with the majority’s fidelity to holding prescription-drug overdoses nonaccidental if the majority’s repeated references to cocaine’s illegality indicated that the majority had granted illegality a dispositive role.⁵⁰ Stigma alone was not enough: although any of the decedents in these cases could have been subject to stigma, only the one using illegal drugs was also subject to criminal sanction.

Courts have drawn a similar distinction between high-risk acts of bravura and other dangerous activities that provide an experiential benefit beyond, although not necessary exclusive of, the thrill of peril. Self-inflicted gunshot wounds are emblematic. In *Thompson v. Prudential Insurance Co. of America*, the decedent learned to spin the chamber of a gun so its bullets never stopped in the firing position.⁵¹ After showing the results of one spin to a friend, he pulled the trigger without looking at the chamber himself, shooting himself to death.⁵² The Georgia court denied recovery.⁵³ By contrast, in *New York Life*

48. 866 P.2d 774 (Cal. 1994) (describing and deploying a foreseeability standard while also using accidental-means analysis that is discussed *infra* in Part I.B); *id.* at 819 (Mosk, J., dissenting) (discussing risks of cocaine use); *see also* *Gordon v. Metro. Life Ins. Co.*, 260 A.2d 338 (Md. 1970) (heroin fatality).

49. *Weil*, 866 P.2d at 784. The court explained: “It is readily apparent that the risks attending the consumption of such substances are so great that death must be considered a common, natural or substantially likely consequence.” *Id.* at 788.

50. *Id. passim* (Mosk, J., dissenting). For Mosk’s conclusions regarding illegality, *see id.* at 823 (Mosk, J., dissenting) (Although “[t]he majority do not squarely hold that the beneficiaries herein are barred from recovery because Weil’s fatal act was illegal,” they “strongly imply that the fact of its illegality weighs heavily against recovery, because they repeatedly incorporate that fact in their statement of the issues, in their discussion of the authorities, and in their conclusion.”). An early critic agreed with Mosk, claiming that the outcome depended on illegality to the exclusion of foreseeability. Allison L. Hurst, *Voluntary Ingestion of a Known Hazardous and Illegal Substance Does Not Provide a Basis for Coverage Within the Terms of a Life Insurance Policy Affording Coverage for Death by Accidental Means, California Supreme Court Survey*, 22 PEPP. L. REV. 851, 857 (1995) (“The majority based its conclusion on its cursory analysis that cocaine was a known hazardous and illegal substance and that its ingestion would naturally and probably result in death” and “it does not appear that the majority adequately evaluated the risk involved.”).

51. *Thompson v. Prudential Ins. Co. of Am.*, 66 S.E.2d 119, 123 (Ga. Ct. App. 1951). One witness explained how the decedent “could put one bullet in it and spin the cylinder around and make it hit on the bottom.” *Id.* The decedent “did that five or six times that night and the bullet always landed on the bottom” so when he “pulled the trigger . . . the bullet didn’t fire.” *Id.*

52. As the witness recalled, “He . . . handed me the gun to me [sic] and I took it in my hand and looked at it.” *Id.* “I didn’t think anything would happen.” *Id.* “He put the pistol to his own head and pulled the trigger.” *Id.*

53. *Id.* at 123-24. The court in *Thompson* proceeded under an accidental-means framework, an approach to accident-insurance cases discussed *infra* Section I.B. The case

Insurance Co. v. Harrington, the Ninth Circuit faced a decedent with gun expertise who shot himself in the head with a “very reliable” loaded gun which his experience indicated would not fire because it made a sound consistent with its safety being in place.⁵⁴ Finding that the decedent acted on “reasonable supposition” and that his death was “unexpected” “[a]s to him,” the court granted recovery.⁵⁵ The problem is that the *Thompson* decedent acted on a similarly reasonable supposition, making his death fairly improbable and unexpected.

Other cases fit this pattern. Courts have allowed recovery for high-risk recreational pastimes like leaping off dams or social activities like riding drunk and spread-eagle atop a car driven by an intoxicated compatriot.⁵⁶ Risks taken in demonstration of one’s expertise within a socially acceptable pastime — like the gun hobbyist described above — have also counted. By contrast, courts have been unwilling to grant recovery to mere acts of bravura like russian roulette or lying down at night in traffic.⁵⁷

Courts’ tendencies to deny claims in these situations have solid provenances. Cases involving intentional third-party harms and suicides illustrate how criminal activity historically led to denials of recovery. While courts have long held wartime battlefield deaths accidental, barroom brawlers who picked the fight in which they died broke the law and often did not recover.⁵⁸ Similarly, although suicides,

became relevant to determining how high-risk acts of bravura alter the ways courts set the likelihood of harm necessary to preclude recovery when a Wisconsin appellate court in *Kennedy v. Washington National Insurance Co.* explained the outcome in *Thompson*, by reasoning that death from russian roulette was “highly probable or likely.” 401 N.W.2d 842, 845 (Wis. Ct. App. 1987). Distinguishing its autoerotic-asphyxiation decedent from the russian-roulette practitioner in *Thompson*, the court in *Kennedy* granted recovery. *Id.* at 846.

54. *N.Y. Life Ins. Co. v. Harrington*, 299 F.2d 803, 804-805 & n1 (9th Cir. 1962) (“[I]n order to make this sound with a loaded gun without its discharging, the safety would always have to be in the ‘safe’ position just as the sound was made and immediately thereafter.”).

55. *Id.* at 806.

56. *Critchlow III*, *supra* note 25, 378 F.3d 246, 262 (2d Cir. 2004) (explaining that the accident-insurer defendant conceded that “‘extreme-sport’ activities” like “cliff rappelling, rock climbing, and sky-diving” “would not be excluded under the . . . Policy” at issue); *Knight v. Metro. Life Ins. Co.*, 437 P.2d 417 (Ariz. 1968) (holding an experienced diver’s death attempting to dive off the Coolidge Dam accidental); *Ward v. Penn Mut. Life Ins. Co.*, 352 S.W.2d 413 (Mo. Ct. App. 1961) (finding an accident after an intoxicated man riding atop the vehicle his drunken friend drove fell to his death).

57. *See, e.g., Thompson v. Prudential Ins. Co. of Am.*, 66 S.E.2d 119 (Ga. Ct. App. 1951) (russian roulette); *Allred v. Prudential Ins. Co.*, 100 S.E.2d 226 (N.C. 1957) (lying down in traffic).

58. *See, e.g., Runge v. Metro. Life Ins. Co.*, 537 F.2d 1157, 1159 (4th Cir. 1976) (quoting *Smith v. Combined Ins. Co.*, 120 S.E.2d 267, 269 (1961)) (“[W]here the insured culpably provokes the act which causes the injury and death, it is not death by accidental means”); Russell S. Baldwin, Comment, *Insurance — Accidental Means & Accidental Death — Harrell v. Minnesota Mutual Life Insurance: Tennessee’s Emergence From the Serbionian Bog?*, 27 U. MEM. L. REV. 745, 756 (1997); *cf. Scales, supra* note 1, at 238. For an

which are traditionally illegal, have generally been uncovered by accident-insurance policies, insane decedents who kill themselves are both less culpable and have been more likely to recover.⁵⁹ The line of cases involving high-risk acts of bravura in which courts have been reluctant to grant recovery dates to the nineteenth century. In *Pollock v. United States Mutual Accident Association*, a Pennsylvania case, a proprietor offered to treat those in the store to poison.⁶⁰ Although warned that the liquid was lethal, the decedent still believed the substance was harmless, “laughed[,] and . . . drank the balance.”⁶¹ He did not recover.⁶²

Many courts would be uncomfortable with the above analysis. Few courts have explicitly discussed the role stigma should play in accidents, and those that have, have opposed recognizing a stigmatic aspect of accidents on the grounds that contract law is not normative and public policy should not apply.⁶³ These courts have noted that companies voluntarily issue policies covering a range of savory and unsavory activities.⁶⁴ Because insurers can choose what to include and exclude, they take on the precise contractual liability delineated in the policy.⁶⁵ As a result, decedents and their claimants rely on the delineated coverage.⁶⁶ Moreover, hinging accident insurance recovery on norms affects few behaviors.⁶⁷ The only victim in most accident-

early case granting recovery to a war victim, see *State Life Insurance Co. v. Allison*, 269 F. 93 (5th Cir. 1920).

59. *Crandal v. Accident Ins. Co.*, 27 F. 40, 41, 44 (C.C.N.D. Ill. 1886) (explaining its finding of accidentalness: “Crandal, took his own life by hanging, and . . . at the time of the act of self-destruction he was insane.” “[T]he act was no more attributable to his voluntary agency than if, as a sane man . . . the same fatality, without co-operation on his part . . . had overtaken him.”).

60. *Pollock v. United States Mut. Accident Ass’n*, 102 Pa. 230, 232 (1883).

61. *Id.*

62. *Id.* at 233.

63. See, e.g., *Ward v. Penn Mut. Life Ins. Co.*, 352 S.W.2d 413, 423 (Mo. Ct. App. 1961) (“[O]ur question is a legal, not a moral or philosophical, one . . .”); *Weil v. Fed. Kemper Life Assurance Co.*, 866 P.2d 774, 806 (Cal. 1994) (Mosk, J., dissenting) (“[D]isapproval is misplaced here.”).

64. See *Weil*, 866 P.2d at 806 (Mosk, J., dissenting) (“Nor was the company forced to issue the policy . . .”).

65. See, e.g., *Todd I*, *supra* note 7, No. 3:93CV0054-R, 1994 U.S. Dist. LEXIS 21539, at *38 (1994), *modified*, 47 F.3d 1448 (5th Cir. 1995) (“Armed with the knowledge that such activity occurs, insurance companies cannot cry ignorance or morality in hopes of avoiding an ambiguous contract which apparently affords coverage.”).

66. See *Gulf Life Ins. Co. v. Nash*, 97 So. 2d 4, 9 (Fla. 1957) (Drew, J., dissenting) (normative considerations do “violence to the reason for buying accident insurance”).

67. The *Bird v. John Hancock Mutual Life Insurance Co.* court explained, “The possibility that [recovery] will promote evil or . . . depredations on the public because of the comforting reassurance that their beneficiaries will collect the insurance if they are killed in the commission of crime is remote, speculative and theoretical.” 320 S.W.2d 955, 958 (Mo. Ct. App. 1959); see also *Weil*, 866 P.2d at 823 (Mosk, J., dissenting) (“[N]o one, I submit, has

insurance cases is the decedent, and the claimants are generally innocent of whatever misconduct he undertook.⁶⁸

The problem with these arguments is that by opposing the importation of stigmatic considerations into a contract they presume the contract does not contain them. A better approach is to ask whether lay definitions of accident contain stigmatic aspects. If so, the court would not inquire into the presence of stigmas because contract law serves a normative function or because public policy would thereby be served, but strictly as relevant to clarifying the lay definition of accident.

What evidence there is indicates laypeople believe stigmas constitute one aspect of a definition of accident, but have difficulty articulating what that aspect is. In everyday speech, for instance, it is common and natural to speak of an accident's victim, but awkward and incongruous to suggest that such a victim could also be culpable or despised. *Merriam-Webster's Collegiate Dictionary* defines an accident as "an unexpected happening causing loss or injury which is not due to any fault or misconduct on the part of the person injured" or "an unfortunate event resulting esp[ecially] from carelessness or ignorance" and without reference to blame.⁶⁹ When courts have implicitly allowed moral judgment to color their decisions without explicitly explaining why, they too have indicated stigma's ill-defined role.

By only hindering recovery in cases involving crimes and high-risk acts of bravura, courts choose a heartland of normative transgressions to which most laypeople will attach considerable stigmas and transform it into the kind of bright-line rule courts can apply quickly and consistently. There are good reasons to believe that most people condemn crimes and high-risk acts of bravura. By criminalizing activities, the state, on behalf of U.S. society as a whole, stigmatizes

ever been 'encouraged' to engage in the recreational use of cocaine because he believes the beneficiaries of an insurance policy on his life will be paid more money if he accidentally overdoses and dies."); Scales, *supra* note 1, at 302 ("Explicitly stating the 'stupidity penalty' will likely keep few insureds off the thunderbolt.").

68. See *Weil*, 866 P.2d at 805 (Mosk, J., dissenting) (in "the insurance context . . . no one suffers physical harm but the actor"); Hurst, *supra* note 50, at 858 ("Unlike tort and criminal law, it is not the insured who benefits from illegal actions, but the innocent beneficiary.").

69. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 37, at 7; see also THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 37, at 10-11 (defining accident as "[a]n unexpected and undesirable event" and not as a blameless one); 1 THE OXFORD ENGLISH DICTIONARY, *supra* note 26, at 74 (defining accident as "[a]nything that happens without foresight or expectation; an unusual event, which proceeds from some unknown cause, or is an unusual effect of a known cause; a casualty, a contingency" and not as requiring blamelessness); RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY, *supra* note 37, at 12 (defining accident as both "an undesirable or unfortunate happening" and "Law. such a happening resulting in injury that is in no way the fault of the injured person for which compensation or indemnity is legally sought").

and condemns them.⁷⁰ It thus predefines the transgressions as outweighing their mitigating components. No such definitive condemnation reaches decedents who mix high doses of prescription drugs with alcohol. High-risk acts of bravura represent stigmatized activities with no mitigating component. As one court reviewing denials of recovery in cases of russian roulette explained, such “bizarre” acts show “reckless abandon” and are “courting death.”⁷¹ The implication is that the act is not only dangerous and widely stigmatized, but also has no redeeming traits.

Moreover, it makes sense that courts do not further expand the range of stigma cases in which they hinder recovery. Although courts often talk about single, consensus lay definitions of words, a more realistic model recognizes that various laypeople define words differently. This diversity could be expansive in cases involving stigma because different individuals will attach stigmas to different activities, and in varied degrees. It would be untenable for courts to sort through this large, shifting, and complex array of moral and social judgments case by case.

It is now possible to evaluate the way courts have treated the stigma that attaches to acts of autoerotic asphyxiation. Many courts have raised it in dicta, comparing the practice to a crime or high-risk act of bravura. They have thereby analogized autoerotic-asphyxiation cases to the stigma cases in which they have hindered recovery. While such comparisons have some initial appeal, a more formal approach reveals that autoerotic asphyxiation is neither a crime nor a high-risk act of bravura, and consequently should not face the less forgiving standards courts reserve for those cases.

Courts deciding autoerotic-asphyxiation cases have usually observed or described the practice’s stigmatized aspects.⁷² The federal

70. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 571, 575-76 (2003) (describing how “the majority . . . use[s] the power of the State to enforce [their] views on the whole society through operation of the criminal law,” highlighting “[t]he stigma . . . criminal statute[s] impose[.]” and what “a criminal offense . . . imports for the dignity of the person charged,” and “underscor[ing] the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition”).

71. *Kennedy v. Wash. Nat’l Ins. Co.*, 401 N.W.2d 842, 845 (Wis. Ct. App. 1987).

72. Compare *infra* notes 73-84 (including cases that raise stigma) and accompanying text, with *supra* notes 11, 24-25, and *infra* notes 118-119, 123-125 (listing all published autoerotic-asphyxiation accident-insurance cases besides *International Underwriters, Inc. v. Home Insurance Co.*, 500 F. Supp. 637 (E.D. Va. 1980)). In denying recovery, courts hint that they are considering factors other than likelihood of harm by describing the injury’s foreseeability in terms of immediacy and tangibility as well as probability. See *Cronin v. Zurich Am. Ins. Co.*, 189 F. Supp. 2d 29, 37 (S.D.N.Y. 2002) (describing “an imminent danger that consciousness will be lost and death will result”); *id.* (“One who purposefully creates the conditions of risk foresees the logical consequence of risk, and has to assume that he may not be able to manage those conditions so as to eliminate the risk he has created.”); *Sigler I, supra* note 28, 506 F. Supp. 542, 544 (S.D. Iowa 1981), *aff’d*, 663 F.2d 49 (8th Cir. 1981) (“[A] reasonable person would comprehend and foresee that placing a noose around

district court in *Todd v. AIG Life Insurance Co.*, for instance, opened its opinion with a discussion of the difficulties posed by the “prejudice, disgust and curiosity” with which most people view autoerotic asphyxiation and frankly acknowledged that it found the practice unsettling.⁷³ These reactions, it explained, led to “inflammatory rhetoric” and made it difficult to understand the prevalence or dangers of the practice.⁷⁴ Less sympathetic courts have unnecessarily rehashed tawdry evidence of death-scene cross-dressing, pornography, and sexual deviance; more circumspect ones have described the practice as unusual, bizarre, a mental illness, and foolish, or have called the results awry, unfortunate, and tragic.⁷⁵

his neck and subsequently hanging himself with the noose for the purpose of inducing asphyxia could result in his death.”).

73. *Todd I*, *supra* note 7, No. 3:93CV0054-R, 1994 U.S. Dist. LEXIS 21539 (N.D. Tex. 1994), at *1, *modified*, 47 F.3d 1448 (5th Cir. 1995) (“prejudice, disgust and curiosity”); *id.* at *38 (“It is very difficult to understand or appreciate how any individual could put themselves at great risk to engage in autoerotic acts.”).

74. *Id.* at *1, *20-*21 & n.23. The court elaborated: “The greatest barrier to any real body of knowledge on the subject is the stigma which accompanies such a death.” *Id.* at *20. Because “people were ashamed . . . of the connotations of sexual abnormality,” “most relatives ‘preferred not to have [their relative’s death] known to be an autoerotic death’” and “[m]any went to lengths to disguise any telltale signs,’ so as to prevent detection.” *Id.* at *21 (quoting Dr. William Enos, former medical examiner for the state of Virginia, quoted in Seigenthaler, *supra* note 7, at 7). Thus, “in many cases, the researchers believe, these deaths are mislabeled suicide, sometimes after horrified parents have removed all evidence of the sexual nature of their child’s death.” *Id.* at *21 n.23 (quoting Jane E. Brody, *Autoerotic Death of Youths Causes Widening Concern*, N.Y. TIMES, Mar. 27, 1984, at C1).

75. See *Runge v. Metro. Life Ins. Co.*, 537 F.2d 1157, 1158 (4th Cir. 1976) (quoting the trial court) (describing autoerotic asphyxiation as “unusual” and “very bizarre”); *MAMSI III*, *supra* note 11, 825 A.2d 995, 996 (Md. 2003) (describing same “as a mental disorder falling into the category of ‘Sexual Masochism’”); *Parker v. Danaher Corp.*, 851 F. Supp. 1287, 1295 (W.D. Ark. 1994) (quoting *Conn. Gen. Life Ins. Co. v. Tommie*, 619 S.W.2d 199, 202 (Tex. App. 1981)) (describing same as “foolish”); *Am. Bankers Ins. Co. v. Gilberts*, 181 F.3d 931, 932 (8th Cir. 1999) (footnote omitted) (finding “autoerotic asphyxia gone awry”); *Todd II*, *supra* note 11, 47 F.3d 1448, 1450 (5th Cir. 1995) (seeing an “unfortunate death”); *Critchlow II*, *supra* note 9, 340 F.3d 130, 131 (2d Cir. 2003) (“[A] postmortem photograph taken by the police [is] a tragic depiction that speaks for itself.”), *vacated and rev’d*, 378 F.3d 246 (2d Cir. 2004); *Bennett v. Am. Int’l Life Assurance Co.*, 956 F. Supp. 201, 203 (N.D.N.Y. 1997) (cross-dressing); *Parker*, 851 F. Supp. at 1289 (same); *Tommie*, 619 S.W.2d at 201 (same); *Kennedy v. Wash. Nat’l Ins. Co.*, 401 N.W.2d 842, 844 (Wis. Ct. App. 1987) (pornography); *Fawcett v. Metro. Life Ins. Co.*, No. C-3-97-540, 2000 U.S. Dist. LEXIS 10061, at *4 (S.D. Ohio June 28, 2000) (same); *MAMSI III*, *supra* note 11, 825 A.2d 995, 997 (same); *Hamilton v. AIG Life Ins. Co.*, 182 F. Supp. 2d 39, 41-42 (D.D.C. 2002) (bondage paraphernalia); *Loneragan v. Reliance Std. Life Ins. Co.*, No. CV-96-11832-PBS, 1997 U.S. Dist. LEXIS 24075, at *5 (D. Mass. May 29, 1997) (noting that investigators “also discovered in Mr. Loneragan’s house forty-three video tapes involving sadomasochism and other items associated with sadomasochistic practices”); *cf. Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1124 (9th Cir. 2002) (explaining that decedent’s wife “told officers that she knew of her husband’s sexual devices but thought he had quit using them”); *Cronin v. Zurich Am. Ins. Co.*, 189 F. Supp. 2d 29, 32 (S.D.N.Y. 2002) (describing how the police found a decedent “hanging naked in a sitting position, his buttocks suspended approximately 10 centimeters above the floor”).

In elucidating arguments denying recovery, courts have rhetorically linked autoerotic asphyxiation to images of criminality and violent bravura.⁷⁶ Some have overtly connected crime and autoerotic asphyxiation by arguing that the decedent's temporary loss of oxygen was due to an intentional action and is thus similar to strangulation by an attacker.⁷⁷ In *Runge v. Metropolitan Life Insurance Co.*, the Fourth Circuit drew an analogy between the autoerotic-asphyxiation decedent before it and victims who provoke the attacks that kill them when it denied the former recovery under the standard courts use in cases involving the latter.⁷⁸

In the autoerotic-asphyxiation case of *Kennedy v. Washington National Insurance Co.*, a Wisconsin appellate court presented one form that an analogy between autoerotic asphyxiation and high-risk acts of bravura can take.⁷⁹ Discussing russian roulette, it wrote, "reckless abandon and exposure to a known and obvious danger cannot be said to have been accidental" and therefore, "[o]ne engaging in such a bizarre act as Russian Roulette knows that he is courting death or severe injury, and will be held to have intended such obvious and well known results if he is killed or injured."⁸⁰ While the court ultimately granted recovery by distinguishing russian roulette and autoerotic asphyxiation,⁸¹ its reasoning reveals why it raised the comparison and how a less sympathetic court might use it to deny recovery. The words and phrases that the court used to describe the risky and irredeemable aspects of russian roulette — reckless abandon, danger, bizarre and courting death — can also be applied to autoerotic asphyxiation. One could use the analogy to characterize autoerotic asphyxiation as a large risk undertaken for its own sake, and thus deny recovery.

76. For example, the court in *MAMSI III* focused on the violence and risk inherent in the practice when it described:

a yellow 1/4" synthetic rope attached to the loop binding the hands with a quick release knot secured by a wooden clothes pin. This rope was attached to a pulley to the above-mentioned leather belt around the neck . . . tension [was] applied to the neck loops and wrists. The legs were tied at the level of the malleoli [ankle bones] with four loops of 1/4" cotton rope tied between the legs, with transverse loops forming a Figure "8" knot . . .

MAMSI III, *supra* note 11, 825 A.2d at 997 n.1 (quoting The Report of the Post Mortem Examination, dated 11 October 2000) (final alteration and final omission in original).

77. See *Critchlow I*, *supra* note 5, 198 F. Supp. 2d 318, 323 (W.D.N.Y. 2002) ("decedent intentionally constricted his windpipe"), *aff'd*, 340 F.3d 130 (2d Cir. 2003), *vacated and rev'd*, 378 F.3d 246 (2d Cir. 2004); *Sims v. Monumental Gen. Ins. Co.*, 960 F.2d 478, 480 (5th Cir. 1992) [hereinafter *Sims II*] ("If . . . a robber had partially strangled [the decedent], we would have no trouble holding . . . the robber . . . criminally liable.").

78. 537 F.2d 1157, 1159 (4th Cir. 1976).

79. 401 N.W.2d 842 (Wis. Ct. App. 1987).

80. *Id.* at 845.

81. *Id.*

Courts have implicitly reinforced and rehearsed arguments linking autoerotic asphyxiation to crimes and high-risk acts of bravura through voyeuristic descriptions of unsavory scenes of death. Some have luridly detailed evidence of transvestitism, bondage or masochism paraphernalia, and pornographic materials at the scene of death.⁸² Others have labeled the cause of death an intentional act of hanging and describe instruments used to temporarily restrict oxygen flow to the brain as weapons.⁸³ This violent imagery and cataloging of unsavory and marginal sexual accoutrements both links autoerotic asphyxiation to murder rhetorically and deprecates its benefits or importance for practitioners.⁸⁴

82. Speaking of cross-dressing in *Connecticut General Life Insurance Co. v. Tommie*, the court noted that the decedent had “dressed himself in [his wife’s] wig, bra, nightie and panties.” 619 S.W.2d 199, 201 (Tex. App. 1981); *see also* *Bennett v. Am. Int’l Life Assurance Co.*, 956 F. Supp. 201, 203 (N.D.N.Y. 1997) (“[The decedent] was clad in blue and brown pantyhose; . . . [a] brown stocking covered his head”); *Parker v. Danaer Corp.*, 851 F. Supp. 1287, 1289 (W.D. Ark. 1994) (quoting a police department report) (“The deceased had what appeared to be two soft balls inserted up his shirt around the breast area indicating the appearance of female breast (sic).” (“(sic)” in original)). The court in *Loneragan v. Reliance Standard Life Insurance Co.* observed that the decedent had forty-three video tapes involving sadomasochism and other items associated with sadomasochistic practices in his house. No. CV-96-11832-PBS, 1997 U.S. Dist. LEXIS 24075, at *5 (D. Mass. May 29, 1997); *see also* *Todd II*, *supra* note 11, 47 F.3d 1448, 1450 (5th Cir. 1995) (“[The decedent] was lying on his bed with a studded dog collar around his neck; the collar, in turn, was attached to two leather leashes”); *Hamilton v. AIG Life Ins. Co.*, 182 F. Supp. 2d 39, 41-42 (D.D.C. 2002) (decedent had a “bondage collar around his neck . . . [was] naked, except for a pair of wool socks, and was kneeling in front of mirrors with a pair of combat boots in front of him”). In *Kennedy v. Washington National Insurance Co.* the court recalled that “[v]arious pictures of the lower portion of animals and nude males were displayed on a wall near the shower.” 401 N.W.2d at 845; *see also* *MAMSI III*, *supra* note 11, 825 A.2d 995, 997 (Md. 2003) (quoting The Report of the Post Mortem Examination, dated 11 October 2000) (“The wall opposite the body was covered ‘with a large amount of centerfold pictures of naked females.’”).

83. In *International Underwriters, Inc. v. Home Insurance Co.*, the court described a “hangmen’s noose.” 662 F.2d 1084, 1085 (4th Cir. 1981); *see also* *Fawcett v. Metro. Life Ins. Co.*, 2000 U.S. Dist. LEXIS 10061, at *4 (S.D. Ohio June 28, 2000) (“After making a noose from a towel and attaching it to a rope, he tied the other end of the rope to a closet rod and placed the towel around his neck”); *Runge v. Metro. Life Ins. Co.*, 537 F.2d 1157, 1158 (4th Cir. 1976) (quoting the trial court) (“The decedent had tied the electrical extension cord [and] . . . placed the noose formed . . . around his neck”); *Bennett*, 956 F. Supp. at 203 (“[A] plastic bag covered the [decedent’s] head, and a green tie was loosely looped around his head with a slip knot.”). A decedent “hanging by his neck, suspended from a luggage strap looped to a hook on the bathroom door” appeared in *Cronin v. Zurich American Insurance Co.*, 189 F. Supp. 2d 29, 31 (S.D.N.Y. 2002); *see also* *Sigler II*, *supra* note 12, 663 F.2d 49, 49 n.2 (8th Cir. 1981).

84. In describing autoerotic-asphyxiation-death scenes in ways that stress images of criminality and depravity, courts have reflected both the secondary sources available on the topic and the images that death scene photographs would depict. The few hits that searches on ProQuest, J-Stor and WorldCat produce, for instance, either link autoerotic asphyxiation to criminal activity or sexual dysfunction. *See, e.g.*, *Todd McCarthy, Ken Park*, VARIETY, Sept. 9-15, 2002, at 33 (describing KEN PARK (Cinea/Kees Kasander 2002)) (“The picture begins with the title character blowing his brains out one sunny day at a park. Then there’s . . . the autoerotic asphyxiation freak who masturbates in loving close-up before stabbing his grandparents to death in their bed”); *Robert Harris, Major’s School for*

But autoerotic asphyxiation is neither a crime nor an act of bravura, and courts' comparisons thereto thus fall short. Autoerotic asphyxiation and criminal battery may both involve nooses, physiological effects (such as the deprivation of oxygen), scenes of death, and individuals who engage in other, related marginal activities. But only criminal battery, and not autoerotic asphyxiation, violates another person's bodily integrity against her will or is against the law.⁸⁵

High-risk acts of bravura like russian roulette also differ from autoerotic asphyxiation. Courts disapprove of high-risk acts of bravura because they weigh an elevated probability of harm against the cheap thrill of demonstrating one's risk tolerance in front of others.⁸⁶ By contrast, similarly risky activities that combine social displays of risk tolerance with other, more acceptable activities, such as recreation, socializing, or a hobby, have provided a basis for recovery. Because autoerotic asphyxiation is by definition performed alone, practitioners do not undertake the concomitant risk for social display.⁸⁷ Rather, the risk forms a component of a sexual practice common to a variety of cultures and historical moments.⁸⁸

Scandal, VANITY FAIR, Apr. 1994, at 134 (describing the negative impact of autoerotic-asphyxiation scandals, among others, on John Major's Conservative Party); *Autoerotic Asphyxiation: Still a Mysterious Practice*, MEDICAL POST, Feb. 18, 1992, at 40. Psychological publications often also characterize autoerotic asphyxiation as a form of sexual masochism or dysfunction. See, e.g., AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 6, § 302.83 (describing autoerotic asphyxiation as a form of sexual masochism). More common appear to be articles in forensic journals. See Craig M. Cooley, *Autoerotic Deaths: Historical Perspectives and Investigative Consideration*, 2 J. BEHAV. PROFILING (2001) (reviewing numerous such sources), <http://www.law-forensic.com/autoerotic.htm>; Andrew P. Jenkins, Ph.D., CHES, EMT, *When Self-Pleasuring Becomes Self-Destruction: Autoerotic Asphyxiation Paraphilia*, 3 INT'L ELECTRONIC J. HEALTH EDUC. 208, 214-15 (2000), at <http://www.aahperd.org/iejhe/archive/jenkins.pdf> (same). Police photographs of autoerotic-asphyxiation-death scenes further strengthen the link between such acts and criminality or depravity. See, e.g., Andrew P. Jenkins, Ph.D., CHES, EMT, *Autoerotic Asphyxia Paraphilia Presentation on Powerpoint* (unpublished PowerPoint presentation), at <http://www.cwu.edu/~jenkins/AEA.htm> (last visited Dec. 14, 2003).

85. For a more in-depth discussion, see *infra* Part II.

86. See *supra* note 71 and accompanying text.

87. See, e.g., *Critchlow II*, *supra* note 9, 340 F.3d 130, 132 (2d Cir. 2003) (“[The decedent] retired to his locked bedroom in his parents’ empty house, disrobed completely and attached an intricate, home-made harness consisting of ropes, weights, and counter-weights leading to a noose around his neck.”), *vacated and rev’d*, 378 F.3d 246 (2d Cir. 2004).

88. The *Todd I* court presented a rare opinion discussing its roots and spread: “[T]he practice may date as far back as 1000 A.D. with the Ancient Mayans” and “autoerotic activity is a relatively common practice among Eskimos and Far Eastern couples.” *Supra* note 7, No. 3:93CV0054-R, 1994 U.S. Dist. LEXIS 21539, at *22 (N.D. Tex. Mar. 24, 1994), *modified*, 47 F.3d 1448 (5th Cir. 1995). Cummings et al. also summarize instances of autoerotic asphyxiation in various cultures:

Inuit children have been known to play a sexual game where they strangle each other; it is also said to be a frequent sexual practice among Asians to grasp the partner's throat in a strangling manner. The practice has also been described in the Yaghans of South America, the Celts, and the Shoshone-Bannock Indians.

The Supreme Court has suggested the value of such individual sexual practices. In a series of cases culminating in *Lawrence v. Texas*, it has indicated that many forms of sexual activity fall within the fundamental right to privacy protected under the Fourteenth Amendment to the United States Constitution.⁸⁹ Although the Court has not held that autoerotic activities fall within the scope of this fundamental right to privacy, they have indicated the importance of sexual expression to individuals' dignity, autonomy, and identity.⁹⁰

Supra note 8 (citations omitted). They also review its history in the West, observing that "English brothels reportedly experimented with the act of hanging as a cure for impotence in the 1600's," that "[i]n the late 1700's a Czechoslovakian musician . . . often requested prostitutes to hang him, sometimes for up to five minutes," that "[r]eports of autoerotic fatalities began to appear in the medical literature around 1856," and that "[t]he Marquis de Sade described in great detail the act of sexual asphyxiation in the book 'Justine.'" *Id.*

89. *Lawrence v. Texas*, 539 U.S. 558, 574, 562, 567 (2003) (protecting adult consensual sexual intimacy while explaining "that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" and that "[i]n our tradition the State is not omnipresent in the home," "the most private of places"); *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992) (upholding the right to choose by explaining "that for two decades . . . people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (contraceptives for unmarried couples); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraceptives for married couples).

90. *Lawrence*, 539 U.S. 558 (2003) (citing other relevant cases). In striking Texas's criminalization of same-sex sexual conduct, the Court quoted *Planned Parenthood* on the connection between certain sexual activities and self determination:

These [are] matters[] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence of meaning, of the universe, and of the mystery of human life. Beliefs about these matters . . . define the attributes of personhood

Id. at 574 (quoting *Planned Parenthood*, 505 U.S. at 851). The Court was somewhat unclear as to whether all sexual activity or only interpersonal sexual activity fell within the above reasoning. In some places it focused on the interrelationships and social identities produced by homosexual sexual activity by noting the role sexuality can play as "one element in a personal bond that is more enduring," *id.* at 567, that certain "sexual practices [are] common to a homosexual lifestyle," *id.* at 578, and that statutes condemning such activities "seek to control a personal relationship," *id.* at 558. But the Court also spoke to sexual activity more broadly, identifying, "the most private human conduct [as] sexual behavior." *Id.*; see also *id.* at 590 (Scalia, J., dissenting) (arguing that the majority's reasoning appears to extend similar protections to masturbation); Gary D. Allison, *Sanctioning Sodomy: The Supreme Court Liberates Gay Sex and Limits State Power to Vindicate the Moral Sentiments of the People*, 39 TULSA L. REV. 95, 148 (2003) ("It is . . . quite predictable that bans on masturbation will soon fall."); Dana Neacsu, *Tempest in a Teacup or the Mystique of Sexual Legal Discourse*, 38 GONZ. L. REV. 601, 603 (2002) (claiming commentators have already shown that masturbation is a constitutionally protected activity). More frequently, the Court simultaneously referred to sexual behavior and interpersonal relations as "sexual intimacy," "consensual sexual intimacy," and "intimate sexual conduct." *Lawrence*, 539 U.S. at 564, 566. In so doing, it suggested that both sexual activity and social relations drive self-determination, and that when they intersect in a private setting like the home they fall within the "right to liberty under the Due Process Clause." *Id.* at 578; cf. Arthur S. Leonard, *Lawrence v. Texas and the New Law of Gay Rights*, 30 OHIO N.U. L. REV. 189, 208 (2004) (suggesting that masturbation may be encompassed by the majority's reasoning); Jami

Practitioners echo such sentiments, valuing the activity highly enough to undertake its associated risks. Thus, like a high-risk recreation activity, and unlike a mere act of bravura, practitioners of autoerotic asphyxiation do not expose themselves to risk merely for its own sake.⁹¹ Rather, they pursue a form of pleasure and identity with socially beneficial aspects. Analogy to bravura fails. Because autoerotic asphyxiation is neither a crime nor a high-risk act of bravura, and because death is not the expected result of the practice, courts should grant recovery in autoerotic-asphyxiation cases.

B. *Accidental-Means Analysis Does Not Provide a Viable Alternative Analysis*

A minority of jurisdictions decide accident-insurance cases under an approach that differs from those proposed and discussed above: “accidental-means analysis.”⁹² This once-dominant approach distinguishes insurance policies covering “accidental deaths” and those covering “death by accidental means.”⁹³ Reasoning that “accidental”

Weinstein & Toby DeMarco, *Challenging Dissent: The Ontology and Logic of Lawrence v. Texas*, 10 CARDOZO WOMEN'S L.J. 423, 437-440 & n.62 (2004) (same); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 965 (2004) (arguing that masturbation laws seem likely to fall, but acknowledging the possibility of an injury-to-actor argument).

91. See *supra* note 5. *But cf.* Bennett v. Am. Int'l Life Assurance Co., 956 F. Supp. 201, 211 (N.D.N.Y. 1997) (“[T]he pursuit of a practice bordering on a *near fatal* outcome is a significant part of the pleasure and gratification associated with the act.” (quoting Miskin Aff. ¶ 4)).

92. Compare Weil v. Fed. Kemper Life Assurance Co., 866 P.2d 774, 781 (Cal. 1994) (citing 3 HARNETT & LESNICK, THE LAW OF LIFE AND HEALTH INSURANCE § 7.03[1], at 7-24 to 7-29 (1992)) (“[A]s of 1992, 22 jurisdictions, including California, expressly recognized the distinction between ‘accidental means’ and ‘accidental death’”) with Weil, 866 P.2d at 798 (Mosk, J., dissenting) (raising questions as to the majority’s total without challenging its general thrust) and Scales, *supra* note 1, 262-63, 266 (claiming that foreseeability tests constitute the majority rule).

93. Scales, *supra* note 1, at 234 (explaining that in accident-insurance policies, the phrasing: “‘external, violent and accidental means[.]’ . . . was practically universal by 1925, and [that] few cases are found during this period involving policies departing from this language” (quoting CORNELIUS, *supra* note 1, at ii)); *id.* at 262-63 (stating that accidental-means analysis was widely, if unevenly, applied during the interwar period). Many jurisdictions combine foreseeability analysis and accidental-means analysis under the single heading of accidental means. See, e.g., Fawcett v. Metro. Life Ins. Co., No. C-3-97-540, 2000 U.S. Dist. LEXIS 10061, at *10 (S.D. Ohio June 28, 2000) (quoting Linden Motor Freight Co. v. Travelers Ins. Co., 40 N.J. 511, 515 (1963)) (“[C]ourts interpreting accidental means provisions have allowed recovery for conduct entirely voluntary and intentional ‘if, in the act which precedes the injury, something unforeseen, unexpected or unusual occurs which produces the injury.’”). For example, in defending its continued application of accidental-means analysis, the California Supreme Court observed that “a number of California decisions have focused particularly upon whether the insured’s voluntary act itself is such that its common, natural, or probable consequence would be to visit injury or death upon the insured.” Weil, 866 P.2d at 779, 783 (“[T]he approach . . . is to consider the probability of the result in deciding whether the voluntary action of the insured preceding the injury can

modifies “means,” these courts have required that the accidental aspect of a death also be its means.⁹⁴ By then conflating means and cause, they have turned the inquiry away from whether the result — injury or death — was accidental and toward whether some action prior to the result was accidentally undertaken.⁹⁵ To distinguish, courts have reasoned that mishaps or involuntary, unintentional actions that

constitute ‘accidental means.’”). This Note addresses courts that purport to look to foreseeability *supra* Section I.A.

94. *See, e.g.*, *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491, 496 (1934) (“The stipulated payments are to be made only if the bodily injury, though unforeseen, is effected by means which are external and accidental.”). The argument rests on the intuition that fidelity to contracts’ language mandates the approach. Because some, but not all, accident-insurance policies limit coverage to only injuries caused by accidental means, one can read the difference as a distinction for which the parties have contracted and to which courts should give effect. *See, e.g.*, *Weil*, 866 P.2d at 779 (“A differentiation is made . . . between the result to the insured and the means which is the operative cause in producing this result.”).

The argument, however, contains a flaw: different words need not have different meanings. As noted in the Introduction, courts generally insist that they give terms their lay meanings. Here, it seems unlikely that laypeople would distinguish between accidental means and accidental results. In *Nash* the court noted that the distinction between accidental means and results is sufficiently elusive that “even the most learned judge or lawyer, in attempting to understand and comprehend the niceties of the distinction, is left in a state of bewilderment and confusion.” 97 So. 2d 4, 10 (Fla. 1957); *see also, e.g.*, *Bennett v. Am. Int’l Life Assurance Co.*, 956 F. Supp. 201, 206 (N.D.N.Y. 1997) (“The fine distinction between ‘accidental death’ and ‘death from accidental means’ would certainly never occur to an ordinary policy holder.” (quoting 10 COUCH ON INSURANCE 2d § 41:31 (1982))). It is also a distinction few insureds would expect to find in an accident-insurance policy. *See, e.g.*, *Knight v. Metro. Life Ins. Co.*, 437 P.2d 416, 420 (“One paying the premium for a policy which insures against ‘death by accidental means’ intends to provide benefits to his family or named beneficiary in the event he should suffer death *caused by accident* as opposed to death caused by other means, such as suicide, murder, disease or natural death.”).

The reasonableness of the insured’s confusion is compounded by the fact that many potential insureds do not read their own, often long and complex policies, Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 840 (1990), much less those of their competitors. Thomas Corcoran, a Principal at Towers Perrin, explains that few potential insureds read competing policies before making a decision. Interview with Thomas Corcoran, Principal, Towers Perrin, Centerville, Mass. (Aug. 27, 2003).

Vindicating insured confusion also makes sense in this context because, as the drafters of accident-insurance policies, insurers have the ability to frame their contracts in clear, comprehensible terms. *See Knight*, 437 P.2d at 420 (“Insurance companies are the drafters of the policies they sell and if they want to exclude against reckless and foolhardy acts . . . they have it in their power to make such exclusions.”).

95. The court in *Ward v. Penn Mutual Life Insurance Co.*, 352 S.W.2d 413, 420 (Mo. Ct. App. 1961), illustrated the conflation of means and cause: “[I]t is necessary to bear in mind that ‘means,’ as used in policy provisions such as those under consideration, is equivalent to ‘cause’” In reasserting its fidelity to accidental-means jurisprudence, the California Supreme Court showed how this conflation deemphasizes results when it reasoned that such policies “preclude coverage for voluntary and intentional conduct that results in unintended death.” *Weil*, 866 P.2d at 780; *see also* *Gordon v. Metro. Life Ins. Co.*, 260 A.2d 338, 339 (Md. 1970) (“[A] means is not made accidental . . . merely because death results unexpectedly.”). The distinction generally reframes the inquiry as a search for an accident that precedes injury. *See, e.g.*, *Olson v. Am. Bankers Ins. Co.*, 35 Cal. Rptr. 2d 897, 899 (Cal. Ct. App. 1994) (“[T]here must be some element of unexpectedness in the preceding act or occurrence which leads to the injury or death.”); *cf.* *Scales, supra* note 1, at 234 (“[U]npleasant results stemming from nonaccidental means [a]re not covered.”).

lead to unforeseen deaths and injuries — like stumbling while descending from a platform — qualify, but voluntary actions that turn out badly — like russian roulette — do not.⁹⁶

This approach does not represent a viable alternative to the approach this Note advocates because the distinction proponents of accidental-means analysis have favored cannot be made.⁹⁷ Accidental-means analysis has proven unworkable and has been inconsistently applied.⁹⁸ In some cases courts have been unable to locate the line between means and results, and where courts have applied the test, they have produced obscurely argued and conflicting opinions.⁹⁹ Future courts have received little principled precedent from which to reason.¹⁰⁰

The distinction between an accidental result and cause is false. In a strict sense, most, if not all, accidents include nonaccidental causes. To

96. The *Laney v. Continental Insurance Co.* court provided an example in its summary of Georgia law: “Where an unusual or unexpected result occurs, by reason of the doing of an intentional act, with no mischance, slip or mishap occurring in doing the act itself, the ensuing injury or death is not caused by accidental means.” 757 F.2d 1190, 1191 (11th Cir. 1985) (quoting *Jackson v. Nat’l Life & Accident Ins. Co.*, 202 S.E.2d 711, 712 (Ga. Ct. App. 1973)) (citations omitted). It also wrote that “for an injury to result from accidental means, it must be the unexpected result of an unforeseen or unexpected act which was involuntarily and unintentionally done.” *Id.* (quoting *Johnson v. Nat’l Life & Accident Ins. Co.*, 90 S.E.2d 36, 37 (Ga. Ct. App. 1955)). Professor Scales describes this as a “distinction between when someone . . . has *done* something incorrectly, which may seem accidental, and when something unpleasant has merely *happened* to the insured.” Scales, *supra* note 1, at 208. While this standard for policies requiring “accidental means” tends to narrow coverage, courts that utilize it generally become lenient in the face of accident-insurance policies that do not specifically mandate such means. *See, e.g., Olson*, 35 Cal. Rptr. 2d at 899 (quoting *Weil*, 866 P.2d at 774) (citations omitted in original) (summarizing California jurisprudence to the effect that “policies requiring only that there be proof of accidental death have been construed broadly, “such that the injury or death is likely to be covered unless the insured virtually intended his injury or death”). For examples, see *United States Mutual Accident Association v. Barry*, 131 U.S. 100 (1889), where the insured stumbled while descending from a platform, and *Thompson v. Prudential Insurance Co. of America*, 66 S.E.2d 119 (Ga. Ct. App. 1951), a russian-roulette case.

97. *Gulf Life Ins. Co. v. Nash*, 97 So. 2d 4, 10 (Fla. 1957) (Drew, J., dissenting) (calling the distinction between accidental means and results “a distinction without a difference”).

98. As Justice Cardozo wrote, accidental-means analysis “will plunge this branch of the law into a Serbonian Bog.” *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491, 499 (1934) (Cardozo, J., dissenting) (“The proposed distinction will not survive . . . application . . .”).

99. *See Nash*, 97 So. 2d at 8 (Drew, J., dissenting) (“This line of cases has created a morass of decisions which have become shrouded in a semantic and polemical maze . . .”); *Gordon*, 260 A.2d at 340 (affirming accidental-means analysis while admitting that “[p]erhaps in some cases there is no way to distinguish”).

100. *See Nash*, 97 So. 2d at 8 (Drew, J., dissenting) (describing available precedents as “almost a wilderness of cases in which varying facts and situations have been applied to varying principles” (quoting *McCullough v. Liberty Life Ins. Co.*, 264 P. 65, 67 (Kan. 1928))). Nonetheless, some courts have claimed that continued application of the test indicates that history has proven the distinction’s feasibility. *See Gordon*, 260 A.2d at 341 (“[T]he distinction between accidental means and accidental results has been recognized and applied.”); *Equitable Life Assurance Soc’y v. Hemenover*, 67 P.2d 80, 82 (Colo. 1937) (“Respectable authority thus appears on both sides of this question.”).

the extent that a result is unforeseen and unintended, it must result from an activity not undertaken as desired.¹⁰¹ Consider a patient who takes an antibiotic to which she subsequently discovers she is allergic. If the accident is not in the taking of the pill, it is as if the accident lies in the pill itself. This artificially inserts an alien, intervening cause.¹⁰² In any event, most would deem the allergic reaction an accident.

The same point can be made by observing that while causes and results may differ as a general matter, it is meaningless to speak of both accidental causes and accidental results. By definition, accidents are unintentional.¹⁰³ In every case, events must go awry and injury must follow. Deciding how to characterize this stream of events — whether to include the intermediate divergence into the prior action or the subsequent result — is mere framing.

A few examples will illustrate. In *Linden Motor Freight Co. v. Travelers Insurance Co.*, the decedent avoided a collision with another fire truck by jerking the steering wheel, thereby causing a strain that killed him almost immediately.¹⁰⁴ The New Jersey court described this as a “spontaneous reaction,” implicitly involuntary and thus covered.¹⁰⁵ But one might also say that the decedent appeared to drive as intended, and was in fact able to quite agilely avoid an accident. By framing it this way, the near accident becomes the unexpected result of the voluntary act of driving and the jerk and resultant death merely extensions thereof.

This problem even appears in the doctrine’s foundational cases. The Supreme Court first promoted accidental-means analysis in *United States Mutual Accident Association v. Barry*, a nineteenth-century case involving a man who jumped from a platform to the ground and subsequently discovered he had injured himself.¹⁰⁶ The court presumed the decedent intended to land safely and thus viewed his injury as evidence of a mishap.¹⁰⁷ One is left to wonder whether the man’s stumble was not the unexpected result of his voluntary and mishap-free decision to jump off the platform. Not only was this question not taken up in the Supreme Court’s next major case on the subject — *Landress v. Phoenix Mutual Life Insurance Co.* — but the

101. See *Landress*, 291 U.S. at 501 (1934) (Cardozo, J., dissenting) (“The process of causation was unbroken from exposure up to death.”); *id.* (Cardozo, J., dissenting) (“There was an accident throughout, or there was no accident at all.”).

102. See *id.* at 501 (Cardozo, J., dissenting) (“If there was no accident in the means, there was none in the result, for the two were inseparable.”).

103. See *supra* note 16 and accompanying text. But see Scales, *supra* note 1, at 208 (“[T]he logical space between ‘means’ and ‘results’ may be reasonably clear. . .”).

104. *Linden Motor Freight Co.*, 193 A.2d 217, 230 (N.J. 1963).

105. *Id.*

106. *Barry*, 131 U.S. 100, 121 (1889).

107. *Id.*

court also cited the *Barry* decision as a model in reaffirming accidental-means analysis.¹⁰⁸

In a series of cases, courts applying accidental-means analysis have come to opposite conclusions on similar facts. Each collapses into framing questions. Consider gunshot wounds. In *Oldring v. Metropolitan Life Insurance Co.*, the decedent incorrectly believed that he had emptied his gun of its shells, pointed it at his head and pulled the trigger.¹⁰⁹ Later investigations revealed that a single shell had stuck in the gun's chamber.¹¹⁰ Observing that the decedent was knowledgeable about guns and did not anticipate the possibility of a shell remaining in the chamber, the court found the means accidental.¹¹¹ By contrast, recall *Thompson v. Prudential Insurance Co. of America*, a case involving a man who learned to spin a gun's chamber so the bullet lodged inside never stopped in the firing position, and then shot himself to death after one bad spin.¹¹² The court held that the means were not accidental, reasoning that spinning the chamber and pulling the trigger were voluntary actions and that only the bullet's resultant position in the firing position was accidental.¹¹³ The distinction depends on how the court framed the causal chain of events. In *Oldring*, one could argue that the decedent voluntarily closed the chamber, pointed the gun at himself, and pulled the trigger. Those actions occurred without mishap; only the subsequent result was unexpected. A more sympathetic *Thompson* court might have reasoned that the decedent attempted to spin the chamber of his gun to cause the bullet to land in a certain position. Because of a mishap, the spin did not go as usual, providing the means for the subsequent result.

Fatal overdoses provide another illustration. *Weil v. Federal Kemper Life Assurance Co.* involved a cocaine death.¹¹⁴ Reasoning

108. *Landress*, 291 U.S. 491, 497 (1934) (summarizing *Barry*, 131 U.S. 100 (1889)) ("There was evidence . . . that the insured alighted in a manner not intended, causing a jar or shock of unexpected severity."). Note both that this analysis no longer controls in the federal context, *see supra* note 32 and accompanying text, and that many insurance cases arise under state rather than federal law, *cf.* note 30 (discussing ERISA's effect on expanding federal jurisdiction over insurance cases).

109. *Oldring*, 492 F. Supp. 994, 996 (D.N.J. 1980).

110. *Id.*

111. The court mentioned that the decedent "was both knowledgeable about [the use of guns] and accustomed to handling them," and "had qualified as a sharpshooter." *Id.* As a result "the decedent's failure to completely empty the weapon of shells before 'playing' with it, i.e., the presence of a shell which was stuck in the gun's chamber, was an unexpected occurrence" and thus accidental. *Id.* at 998.

112. *Thompson*, 66 S.E.2d 119 (Ga. Ct. App. 1951); *see also supra* notes 51-55 and accompanying text (discussing the case further).

113. *Thompson*, 66 S.E.2d at 124 ("The most that can be said . . . is that he hoped the cartridge would not stop in the firing position when his turn to pull the trigger came.").

114. *Weil*, 866 P.2d 774, 777 (Cal. 1994).

both that the decedent voluntarily undertook to use cocaine and assume its associated risks, and that there was no “slip, mishap, or mischance” prior to the result, the California Supreme Court held that the means were not accidental.¹¹⁵ Compare *Metropolitan Life Insurance Co. v. Main*, however, where the Fifth Circuit reasoned that because a decedent had not intentionally and voluntarily set out to kill himself, his fatal overdose of prescription drugs and alcohol constituted accidental means.¹¹⁶ The different outcomes were possible because the court could position the doses’ lethality either as causes — “took more than he wanted” — or as results — “didn’t expect it would kill him.”¹¹⁷

Unsurprisingly, similar problems have arisen in autoerotic-asphyxiation cases. Courts using accidental-means analysis have so far denied recovery, reasoning that the decedents intentionally and voluntarily engaged in the activity — strangulation — that killed them and, as a result, assumed the concomitant risks.¹¹⁸ But they could just as easily have located the risks in the results and described the key action as failing to reinstate oxygen flow to the brain rather than initially cutting it off. Within this alternate framing, decedents who failed to release the pressure on their necks before collapse or constructed mechanical-safety systems that malfunctioned, would have suffered mishaps whose subsequent results were deaths.¹¹⁹

115. *Id.* at 784. Arguing along similar lines, the court in *Laney v. Continental Insurance Co.* noted that its decedent “intentionally and voluntarily drank the alcohol that caused his death” and that no “mischance, slip or mishap occurred during his consumption of the whiskey and beer [that killed him by overdose] to cause him to consume more than he intended.” *Laney*, 757 F.2d 1190, 1192 (11th Cir. 1985). Deploying accidental-means language, it concluded, “Although the result of his drinking [death] was unexpected, the act of drinking was intentional.” *Id.*; see also *Gordon v. Metro. Life Ins. Co.*, 260 A.2d 338, 340 (Md. 1970) (“[W]ith the use of [the] illegal drug [heroin] without medical authorization or supervision, a drug with well known potential for injury, we are hard pressed to say that a great amount of risk was not assumed, or was unforeseeable.”).

116. *Main*, 383 F.2d 952, 960 (5th Cir. 1967) (“Main did not intend to take four times as many Medomin tablets as Dr. Crouch had prescribed” and “[a]t the time he took such additional tablets, his judgment, his memory, and his awareness of the lapse of time were all impaired by the alcohol he had drunk [that] evening.”).

117. *Cf. Mansbacher v. Prudential Ins. Co.*, 7 N.E.2d 18, 20 (N.Y. 1937) (“He took too much veronal; it was a mistake, a misstep, an unexpected effect from the use of his prescribed medicine.”).

118. See *MAMSI III*, *supra* note 11, 825 A.2d 995, 999 (Md. 2003) (Because “the insured intended to cut off his air supply” and “[t]he cutting off of the air supply caused his death,” “[h]e intended the act that resulted in his death.” (quoting *MAMSI Life & Health Ins. Co. v. Callaway*, Circuit Court for Wicomico County, No. 22-C-00-001273 (2001), *vacated*, *MAMSI II*, *supra* note 11, 806 A.2d 274 (Md. Ct. App. 2002), *vacated*, *MAMSI III*, *supra* note 11, 825 A.2d 995 (Md. 2003))); *Runge v. Metro. Life Ins. Co.*, 537 F.2d 1157, 1159 (4th Cir. 1976) (“Runge, Jr., did not die as a result of ‘accidental means’... Death, under these circumstances, was a natural and foreseeable, though unintended, consequence of Runge’s activity.”).

119. For an example of a failure to release pressure see *Connecticut General Life Insurance Co. v. Tommie*, 619 S.W.2d 199, 201 (Tex. Civ. App. 1981), explaining that “[t]he

Because accidental-means analysis cannot provide determinate grounds for determining accidentalness, it does not represent a viable alternative to the approach delineated in Section I.A. Courts ought to hold autoerotic-asphyxiation deaths accidental.

II. THE EFFECT OF INTENTIONALLY SELF-INFLICTED INJURY EXCLUSION CLAUSES

Part I claims autoerotic-asphyxiation deaths are accidents within the meaning of accident-insurance policies. This Part turns to exclusion clauses. "Virtually all accident policies exclude deaths resulting from 'intentionally self-inflicted injury,'" which are the only exclusion clauses courts have used to deny recovery in cases of autoerotic asphyxiation.¹²⁰ This Part argues that these exclusion clauses should not apply to autoerotic-asphyxiation deaths.

Exclusion clauses differentiate instances where insureds intentionally injure themselves but then unintentionally incur a further harm from other types of accidents. The Ohio federal district court in *Fawcett v. Metropolitan Life Insurance Co.* related a lucid example:

An insured might so wish to avoid continuing on his job that he plans to shoot himself in the foot, thus intending to render himself unable to work, but yet alive. . . . However, upon successfully shooting himself in the foot, the injured loses consciousness due to the extreme pain and the gruesome sight of his damaged appendage. Unfortunately, no one hears the shot, and no one returns home to the home to discover the insured until many hours have passed, during which time the insured has bled to death [T]he insured may not have committed suicide, but his death

exercise rope was equipped with pulleys so that with his left foot he could increase or decrease the pressure of the rope around his neck." See also *Int'l Underwriters, Inc. v. Home Ins. Co.*, 662 F.2d 1084, 1085 (4th Cir. 1981) (describing a failed "pulley system . . . designed . . . to protect [the decedent] from asphyxiation if he lost consciousness").

120. Scales, *supra* note 1, at 294. While the language of these clauses may vary, it has rarely affected courts' reasoning. Compare, e.g., *Tommie*, 619 S.W.2d at 201 ("The policy specifically excludes from coverage any loss which results directly or indirectly from ' . . . suicide or intentionally self-inflicted injury, '" (first alteration in original)), with *Sigler I*, *supra* note 28, 506 F. Supp. 542, 543-44 (S.D. Iowa 1981), *aff'd*, 663 F.2d 49 (8th Cir. 1981) ("RISKS NOT ASSUMED: . . . (f) intentionally, self-inflicted injury of any kind, while sane or insane."). For a case where the language did control, see *American Bankers Insurance Co. v. Gilberts*, 181 F.3d 931, 933 (8th Cir. 1999), explaining that under a "bodily injury" exclusion clause "we cannot say . . . that a reasonable insured would find that a temporary decrease in the oxygen level in the brain, of itself, is a bodily injury in the ordinary sense of the term." See also *Sims II*, *supra* note 77, 960 F.2d 478, 480 (5th Cir. 1992) (The "policy excludes 'any loss resulting directly or indirectly, wholly or partly from'" intentionally self-inflicted injury and "[h]is death 'resulted directly or indirectly, wholly or partly from' that intentionally self-inflicted injury.").

was certainly caused “wholly or partly, directly or indirectly, by . . . [an] intentionally self-inflicted injury”¹²¹

While this exclusion can, as in the case of autoerotic asphyxiation, raise difficult questions concerning the definition of an injury and the necessary link between cause and effect to trigger the policy, no danger exists that every accidental result will be traced to an intentionally self-inflicted injury.¹²²

To date, courts have split over the applicability of these exclusion clauses in cases of autoerotic-asphyxiation deaths. These disagreements center on whether aspects of nonfatal autoerotic asphyxia — that is, partial strangulation — cause injury and, to a lesser extent, the relationship between an injury and death necessary to trigger the clause. Many courts have held that “the death was barred from recovery because of a clause in the insured’s policy excluding coverage from ‘intentionally, self-inflicted injury of any kind.’”¹²³ Others have reached the opposite conclusion.¹²⁴ Still others have upheld insurer determinations denying compensation under specific policy language triggering deferential arbitrary-and-capricious standards of review of insurer determinations.¹²⁵

121. *Fawcett*, No. C-3-97-540, 2000 U.S. Dist. LEXIS 10061, at *18-19 (S.D. Ohio June 28, 2000) (quoting *Shepherd v. Metro. Life Ins. Co.*, 1995 U.S. Dist. LEXIS 22203, at *14 (S.D. Ohio Mar. 9, 1995)).

122. For example, when someone crashes his car accidentally the cause may be distraction or poor skills, but it is not the intentional self-infliction of a prior injury.

Not all commentators find this approach convincing. *See Scales, supra* note 1, at 294. To the extent that this analysis is not convincing and one believes no intentionally self-inflicted injury can be accidental, this Part’s analysis would become moot and its conclusion that recovery should be granted in cases of autoerotic-asphyxiation deaths would automatically follow. *But see Parker v. Danaher Corp.*, 851 F. Supp. 1287, 1295 (W.D. Ark. 1994) (concluding an autoerotic-asphyxiation death “constituted an accident,” but “hasten[ing] to say that we are not faced in this case with an exclusionary clause for injury resulting . . . from an intentionally self-inflicted injury”).

123. *Sigler II, supra* note 12, 663 F.2d 49, 49 (8th Cir. 1981) (quoting *Sigler I, supra* note 28, 506 F. Supp. 542, 545 (S.D. Iowa 1981), *aff’d*, 663 F.2d 49 (8th Cir. 1981)); *see also Critchlow II, supra* note 9, 340 F.3d 130 (2d Cir. 2003), *vacated and rev’d*, 378 F.3d 246 (2d Cir. 2004); *Sims II, supra* note 77, 960 F.2d 478 (5th Cir. 1992); *Cronin v. Zurich Am. Ins. Co.*, 189 F. Supp. 2d 29 (S.D.N.Y. 2002); *Lonergan v. Reliance Std. Life Ins. Co.*, No. CA-96-11832-PBS, 1997 U.S. Dist. LEXIS 24075 (D.Mass. May 29, 1997); *MAMSI III, supra* note 11, 825 A.2d 995 (Md. 2003).

124. *Critchlow III, supra* note 25, 378 F.3d 246 (2d Cir. 2004); *Travis v. Veterans Life Ins. Co.*, 60 Fed. Appx. 707 (9th Cir. 2003); *Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121 (9th Cir. 2002); *Am. Bankers Ins. Co. v. Gilberts*, 181 F.3d 931 (8th Cir. 1999); *Conn. Gen. Life Ins. Co. v. Tommie*, 619 S.W.2d 199 (Tex. Civ. App. 1981).

125. *Hamilton v. AIG Life Ins. Co.*, 182 F. Supp. 2d 39 (D.D.C. 2002); *Fawcett*, 2000 U.S. Dist. LEXIS 10061 (S.D. Ohio 2000). These arguments proceed by taking the short leap from observing that defining injury is difficult to concluding that no definition would be arbitrary and capricious. The problem is that difficult and rational do not so easily map. As this Part argues, although determining whether autoerotic-asphyxiation deaths trigger intentionally self-inflicted-injury exclusions can be difficult, the only rational outcome is to allow recovery. To decide otherwise without further justification would indeed be arbitrary and capricious.

In determining whether partial strangulation causes an injury that precedes and results in death, one must categorize the physical effects that accompany successful incidents of autoerotic asphyxiation.¹²⁶ Many courts have portrayed them as aberrant, arguing that the body's and brain's compositions and functions are altered for the worse, and concluding that partial strangulation injures. This Part disagrees by exposing such arguments' rhetorical underpinnings and explaining that the harms they purport to identify are better characterized as differences. Because successful autoerotic asphyxiation involves no permanent harms, no physical injuries, and no loss of autonomy, this Part concludes it neither constitutes an injury nor triggers the exclusion.

The changes in the blood's composition and tissue damage that accompany successful acts of autoerotic asphyxiation are one candidate for an injury that results from the practice.¹²⁷ To the credit of proexclusion courts, few have seriously made this argument. Temporary and unnoticed alterations in blood composition hardly appear to constitute an injury and, as one court explained, "[t]he loss of a few cells could easily be so minimal that it would not rise to the level of a bodily injury as the average insured would understand the term."¹²⁸ To hold otherwise would be to characterize the impact and holding of breath that accompany diving into a swimming pool as injuries.

The stronger and more popular pro-injury argument focuses on the alterations in brain functionality that accompany partial strangulation. The argument observes "a reduction of the supply of oxygen to the brain in order to produce a state of hypercapnia [or increased carbon dioxide in the blood]."¹²⁹ This hypercapnia produces "physiological

126. Because decedents do not attempt to commit suicide, the death cannot constitute the intentional injury. See *supra* notes 5-11 and accompanying text.

While this Note argues that autoerotic asphyxiation causes no physical changes that both constitute injuries and result in death, one can identify certain injuries that play no causal role in death that sometimes accompany autoerotic asphyxiation. Bruising is an example. When bruising occurs in a lethal episode of autoerotic asphyxiation, an intentionally self-inflicted injury precedes death. But these events do not trigger the exclusion. Because no causal connection exists between the bruise and the death, the death does not result from the bruise. See *supra* notes 120-122 and accompanying text. Because such injuries cannot trigger the clause, this Note limits its focus *infra* to physical changes that result from oxygen deprivation, for this is the aspect of autoerotic asphyxiation that can both cause death and impede practitioners' ability to interrupt the lethal process once underway.

127. See, e.g., *Sims II*, *supra* note 77, 960 F.2d at 480 ("[T]he type of strangulation desired by Mr. Brumfield damages tissues in the neck . . ."); *Cronin*, 189 F. Supp. 2d at 38 (Asphyxia "result[s] in hypoxia (decreased oxygen in the blood) and hypercapnia (increased carbon dioxide in the blood).").

128. *Gilberts*, 181 F.3d at 933.

129. *Tommie*, 619 S.W.2d at 203.

effect[s],”¹³⁰ including reduced brain activity, “loss of coordination and self-control,” impairment of “the higher cerebral functions of thought, consciousness and awareness,” “lightheadedness, . . . and the inability to appreciate the hazard of the situation.”¹³¹ These effects are “abnormal”¹³² and, as framed, appear to be both “clearly harmful”¹³³ and “a ‘hurt’ to [practitioners’] physical and mental being.”¹³⁴ This “‘hurt’ or ‘harm’ is an injury”¹³⁵ and so “an injury within the meaning of the exclusion occurred.”¹³⁶ The argument works in part by conflating harmless effects like lightheadedness with more serious ones like reduced brain activity into a generic laundry list of symptoms that add up to an injury.¹³⁷ But it also works by identifying a series of significant alterations to brain function.

To see the weaknesses in the above argument, first note that it transforms neutral effects into symptoms by using large words to medicalize unremarkable changes.¹³⁸ One could just as easily shift the paradigm to one of difference and observe that asphyxia has some pleasurable aspects and produces some changes in brain function.¹³⁹ Because some altered mental states are for the better, and most cannot be characterized with a single broad stroke, the question becomes whether the loss of brain function that accompanies asphyxia

130. *Crutchlow II*, *supra* note 9, 340 F.3d 130, 132 (2d Cir. 2003), *vacated and rev'd*, 378 F.3d 246 (2d Cir. 2004).

131. *Cronin*, 189 F. Supp. 2d at 38 (quoting *Reay Aff.* ¶ 5).

132. *Id.* at 40.

133. *Sims v. Monumental Gen. Life Ins. Co.*, 778 F. Supp. 325, 328 (E.D. La. 1991), *aff'd*, 960 F.2d 478 (5th Cir. 1992) [hereinafter *Sims I*].

134. *Cronin*, 189 F. Supp. 2d at 40.

135. *Id.*

136. *Crutchlow II*, *supra* note 9, 340 F.3d 130, 132 (2d Cir. 2003), *vacated and rev'd*, 378 F.3d 246 (2d Cir. 2004).

137. *See Crutchlow III*, *supra* note 25, 378 F.3d 246, 253 (2d Cir. 2004) (citing expert opinions analogizing lightheadedness to changes in body temperature and blood pressure that do not form injuries).

138. Courts advocating recovery disrupt this process by pointing out its perverse results and giving medical vocabulary mundane definitions. *See, e.g., Crutchlow II*, *supra* note 9, 340 F.3d at 138 (“Under that formulation, many activities and exercises would constitute ‘injury’ such as to relieve the insurer of the obligation to pay for far less exotic accidents.”); *Todd II*, *supra* note 11, 47 F.3d 1448, 1453 (5th Cir. 1995) (“[A]sphyxia, a word denoting a shortage of oxygen reaching the brain or other bodily tissue.”).

139. Following this line, one court suggested asphyxia is harmless and enjoyable because “a state of hypercapnia simply alters the amount of oxygen in the brain, thus heightening or intensifying certain body sensations.” *Conn. Gen. Life Ins. Co. v. Tommie*, 619 S.W.2d 199 (Tex. Civ. App. 1981); *see also Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1129 (9th Cir. 2002) (Autoerotic asphyxia causes “temporary deprivation of oxygen, a euphoric lightheadedness . . . , and an intensified sexual experience.”). Another noted no evidence “that the procedure involves pain of any kind.” *Am. Bankers Ins. Co. v. Gilberts*, 181 F.3d 931, 933 (8th Cir. 1999).

constitutes an injury.¹⁴⁰ Its effects are short-lived, so the loss of brain function is a temporary side effect of a pleasurable experience. The experience can thus be analogized to use of sleeping pills or “a swimmer holding his or her breath while under water.”¹⁴¹ Most laypeople would identify neither case as illustrating an intentionally self-inflicted injury to oneself, and absent someone specifically framing the problem in terms of loss of brain activity, most would not define such temporary effects as injuries.¹⁴²

This analogical reasoning has sat uneasily with some courts. As one put it: “Any definition of ‘injury’ that excludes strangulation — whether fatal or not — is simply unreasonable.”¹⁴³ Rather than clinically describing asphyxiation’s effects on the brain, these courts have focused on the intuition that strangulation constitutes “a wrong to the integrity of [one’s] own body.”¹⁴⁴ A number have buttressed and elucidated this claim by analogizing autoerotic asphyxiation to battery: “If . . . a robber had partially strangled him, we would have no trouble holding that Mr. Brumfield had been injured and that the robber

140. It is worth noting that in its strong form, the above argument is fragile. As one court points out, “That decedent had engaged in this very activity on prior occasions without apparently serious or permanent adverse consequences does not mean that the activity did not injure him. . . .” *Critchlow II*, *supra* note 9, 340 F.3d at 132-33. And to the extent that the argument depends on the absence of pain or the actual lack of any permanent damage at all, insurance companies could counter with evidence that placing sufficient pressure on one’s neck to cut the flow of oxygen to one’s brain is often both painful and a cause of minor tissue damage. These rebuttals, however, do little to counter the weaker intuition of the argument: the decedent intentionally engaged in asphyxia because he thought he would enjoy it and, most likely, did not think it would harm him. In this sense, the decedent might analogize his change in mental state to anti-depressants by claiming both are for the better.

141. *MAMSI III*, *supra* note 11, 825 A.2d 995, 1007 (Md. 2003) (summarizing *MAMSI II*, *supra* note 11, 806 A.2d 274 (Md. App. 2002), *vacated*, *MAMSI III*, *supra* note 11, 825 A.2d 995 (Md. 2003)). For a discussion of the rapidity and completeness of the return to normalcy following successful incidents of autoerotic asphyxiation, see *Padfield*: “[The decedent’s] oxygen level would then have been restored [had he survived] . . . and he would have returned home uninjured.” *Padfield*, 290 F.3d at 1129; *see also Critchlow II*, *supra* note 9, 340 F.3d 130 (2d Cir. 2003), (Kearse, J., dissenting) (Asphyxia has “no serious or lasting adverse impact on one’s health.”), *vacated and rev’d*, 378 F.3d 246 (2d Cir. 2004); *Gilberts*, 181 F.3d at 933 (“There was essentially no evidence advanced for purposes of summary judgment . . . that an individual’s body is any different after the performance of partial asphyxia in this manner than it was before . . .”).

142. *Critchlow III*, *supra* note 25, 378 F.3d at 262 (reasoning that the “nonserious, temporary changes in condition” that accompany partial strangulation “are not what persons of reasonable or average intelligence and experience would ordinarily understand to be meant by ‘injuries’”).

143. *Critchlow I*, *supra* note 5, 198 F. Supp. 2d 318, 327 (W.D.N.Y. 2002), *aff’d*, 340 F.3d 130 (2d Cir. 2003), *vacated and rev’d*, 378 F.3d 246 (2d Cir. 2004).

144. *Cronin v. Zurich Am. Ins. Co.*, 189 F. Supp. 2d 29, 39 (S.D.N.Y. 2002) (quoting OXFORD ENGLISH DICTIONARY ONLINE, at <http://www.oed.com> (last visited Feb. 12, 2002)) (“A reasonably intelligent person would conclude that the ‘purposely self-inflicted injury exclusion’ applies to situations where the policyholder causes a wrong to the integrity of his own body to cause himself ‘suffering or mischief willfully and unjustly inflicted.’”).

should be held criminally liable.”¹⁴⁵ Such analogies suggests a parallel between an individual disrupting the flow of oxygen to his own brain and a third party doing it, note that the latter is clearly injurious, and conclude that all partial strangulation interrupts the normal operation of one’s body and thereby violates its integrity.

Although the fact that courts have often described death scenes in autoerotic-asphyxiation cases with language evocative of homicide reports strengthens the metaphor between fatal autoerotic asphyxiation and murder, the comparison also gives away the game.¹⁴⁶ The problem with any argument focusing on the wrongs partial strangulation causes to the integrity of one’s body is that it conflates the word’s technical and popular definitions. While strangulation can describe depriving oneself oxygen, it generally pertains to violent, third-party batteries. The analogy works not by showing two examples of asphyxiation, but by attaching to autoerotic asphyxiation the violent loss of autonomy people associate with criminal or tortious batteries.¹⁴⁷

An illustration may help. Imagine a series of situations where a person exercises varying degrees of control over her temporary deprivation of oxygen: holding one’s breath underwater, a child being dunked underwater while horseplaying in a pool, and a would-be robber strangling his victim into submission. It hardly seems like an injury or a violation of one’s body’s integrity to swim a distance in a pool. While we might see a stronger case where one child dunks another, it still feels weak. But by the time we imagine a person facing a would-be robber who is strangling her into submission, the case for injury has become strong.

To distinguish the underwater swimmer and strangling robber, compare the mental states of the asphyxiated individuals. The swimmer alters her body chemistry and function voluntarily. She expects to surface and return to normal and does not perceive herself as causing her body any harm. But the victim of a strangling robber does not voluntarily deprive herself of oxygen. She does not know whether she will survive and perceives the third party as causing her harm. The injury inheres in the loss of autonomy, the apparent danger, its potential permanence, the resultant psychological injury, and the actor’s malignant intent. Understood this way, the analogy

145. *Sims II*, *supra* note 77, 960 F.2d 478, 480 (5th Cir. 1992); *see also Crutchlow I*, *supra* note 5, 198 F. Supp. 2d at 324-25; *Sims I*, *supra* note 133, 778 F. Supp. 325, 328 (E.D. La. 1991), *aff’d*, 960 F.2d 478 (5th Cir. 1992); *Sigler I*, *supra* note 28, 506 F. Supp. 542, 545 (S.D. Iowa 1981), *aff’d*, 663 F.2d 49 (8th Cir. 1981).

146. *See, e.g., Bennett v. Am. Int’l Life Assurance Co.*, 956 F. Supp. 201, 203 (N.D.N.Y. 1997) (“[A] plastic bag covered the [head], and a green tie was loosely looped around his head with a slip knot.”).

147. For further discussion of linguistic links between autoerotic asphyxiation and criminal activity as well as the links’ analytic weakness, *see supra* notes 76-78, 82-85 and accompanying text.

underscores the absence of injury in successful acts of autoerotic asphyxia.

Where adopted, the “reasonable-expectations doctrine” may mandate the same result.¹⁴⁸ This doctrine grew out of the traditional interpretational canon that ambiguous terms should be construed against their drafters.¹⁴⁹ Rather than look solely to a contract’s language, however, the doctrine asks whether the signatories who did not draft the contract would reasonably expect a potential result.¹⁵⁰ If not, the doctrine disfavors that outcome.¹⁵¹

When people who engage in autoerotic asphyxiation purchase accident insurance they can reasonably expect that the practice will be covered.¹⁵² Practitioners experience autoerotic asphyxiation as pleasurable, intend to cause themselves no harm, and often do not cause any harm to themselves.¹⁵³ Although courts appear capable of combining the physical and mental effects of partial strangulation to create the impression of injury, autoerotic-asphyxiation practitioners would likely disagree and find the extension of the clause to their activities both unreasonable and unfair.¹⁵⁴ Moreover, most insureds do not read the difficult-to-understand contracts of adhesion that their policies constitute, and instead depend on insurers’ good faith when they assent to whatever particular exclusions apply.¹⁵⁵ Although insurers are aware of the practice and could easily insert a separate

148. For a summary of jurisdictions accepting and rejecting the reasonable-expectations doctrine, see, for example, Henderson, *supra* note 94, at 823, 828, 834-35.

149. This principle, known as *contra proferentem*, is embodied in § 206 of the *Restatement (Second) of Contracts*: “In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.” RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

150. For a clear and insightful review of the modern manifestations of the reasonable-expectations doctrine, see Mark C. Rahdert, *Reasonable Expectations Revisited*, 5 CONN. INS. L.J. 107 (1998). Some courts that purport to adopt reasonable-expectations doctrine apply it identically to *contra proferentem*. Henderson, *supra* note 94, at 826. This Note excludes these jurisdictions from its discussion of reasonable-expectations doctrine because the purpose of this discussion is to elucidate the additional support the doctrine provides.

151. Rahdert, *supra* note 150.

152. See *supra* note 94.

153. See *supra* notes 5, 139, 141-142 and accompanying text.

154. Difficulties in identifying autoerotic-asphyxiation practitioners make any statements about their opinions speculative. See *supra* note 8 and accompanying text.

155. See, e.g., *Burr v. Commercial Travelers Mut. Accident Ass’n*, 67 N.E.2d 248, 251 (N.Y. 1946) (discussing difficulties in formulating a written definition of accident); RESTATEMENT (SECOND) OF CONTRACTS § 211 comment b (1981) (“Customers do not in fact ordinarily understand or even read the standard terms. They trust to the good faith of the party using the form. . . .”); cf. Henderson, *supra* note 94, at 838 (“Insurance contracts are generally contracts of adhesion . . .”).

clause excluding autoerotic-asphyxiation deaths, they do not.¹⁵⁶ As a result, various formulations of the still-developing reasonable-expectations doctrine could require courts in those jurisdictions that have adopted it to negate the clause's application to autoerotic-asphyxiation deaths.¹⁵⁷

Intentionally self-inflicted injury exclusions should not apply in cases of autoerotic-asphyxiation deaths. While in some cases decedents die as a result of the effects of asphyxia overwhelming the mental awareness, decisionmaking abilities, and motor skills they depend on to survive, they do not intentionally inflict this or any other injury on themselves. Rather, practitioners of autoerotic asphyxiation temporarily alter their mental state for pleasure. Despite the associations with third-party strangulation that courts attach to self-induced asphyxia, it does not result in a loss of autonomy. The physical changes to one's mental state it causes parallel those most laypeople would label noninjurious.¹⁵⁸ Claimants should recover.

CONCLUSION

This Note has argued that courts facing the most common accident-insurance policies ought to grant recovery in cases of deaths arising from autoerotic asphyxiation. By approaching the problem formally, Part I demonstrated that autoerotic-asphyxiation deaths constitute accidents under viable approaches to the issue. Part II turned to exclusions, observing that intentionally self-inflicted injury

156. See E-mail from Thomas Corcoran, Principal, Towers Perrin to author (Jan. 3, 2005, 03:51 PM EST) (on file with author).

157. Because autoerotic-asphyxiation practitioners would likely find the application of these clauses to their practices unfair and unreasonable, they would run afoul of the *Restatement (Second) of Contracts*, which refuses to enforce any term that an insurer had "reason to believe [an insured] would not [assent to] if he knew that the writing contained [that] particular term." RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981); see also Henderson, *supra* note 94, at 825 ("The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." (quoting Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970))). To the extent that autoerotic-asphyxiation practitioners do not intend to kill themselves and hope to receive pleasure rather than injury from their activities, some courts would be "willing to ignore *clear policy language*" on grounds of "situational unfairness," where standard-form insurance policies result in unfair coverage restrictions when applied to a unique policyholder." David J. Seno, *The Doctrine of Reasonable Expectations in Insurance Law: What to Expect in Wisconsin*, 85 MARQ. L. REV. 859, 867-68 (2002); cf. Rahdert, *supra* note 150, at 127 ("Most . . . of the arguments advanced by . . . proponents of the doctrine . . . have focused principally on this aspect of the reasonable expectations idea.").

158. To the extent that viable parallel alternative arguments exist, the interpretive canon of *contra proferentem* and its requirement that language susceptible to multiple meanings be resolved against the drafters of contracts (here insurers) mandates the same result. See *supra* note 149.

clauses are the most common relevant clauses and explaining that because autoerotic asphyxiation is not injurious it does not trigger them. As a result, absent exceptional and additional exclusions, claimants on the accident-insurance policies of autoerotic-asphyxiation decedents should recover.