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IN THE TWENTY-FIRST CENTURY

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University of the Pacific Law Review



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Note from the Chief Articles & Symposium Editor

As Chief Articles & Symposium Editor, it is my distinct honor to present the third issue of Volume 53 of the University of the Pacific Law Review! We are pleased to introduce this exciting scholarship with you, and we hope you enjoy the issue.

The first section contains papers developed from presentations at an online panel entitled *Contracts in the Twenty-First Century*. Hosted by the University of the Pacific, McGeorge School of Law, on August 14, 2021, the panel was organized by Professor Michael Malloy, and the presenters explored a spectrum of topics that emphasize the pervasiveness and persistence of contracts in our modern world. Whether it's the imposition of economic sanctions, optimizing contracts for the new economy, or regulating beer distribution and video-game end-user agreements. . . contracts really are everywhere.

The work of our panel authors is paired with Comments by McGeorge students that explore how people's rights are affected in other contexts, including medical malpractice suits, nursing homes, and unionized state workers. Each piece provides a unique perspective and distinct contribution to the understanding of our laws and how they affect people's daily lives.

We are thrilled to share the scholarship of all our authors with you. But before you dive in, I would like to express my sincerest gratitude to the Volume 53 Staff Writers and Primary Editors for their hard work throughout the creation and production of this issue. And, of course, thank you to my fellow Board Members for your collaboration and counsel.

And of course, thank you for reading — enjoy!

Matt Urban Chief Articles & Symposium Editor University of the Pacific Law Review Volume 53 * * *

Note from the Chief Comment Editor

I am honored and delighted to join in presenting the third issue of the *University of the Pacific Law Review*, Volume 53.

Every year, the *University of the Pacific Law Review* provides law review Staff Writers with the opportunity to develop their own convincing Comment on a specific legal topic of their choice. As the Chief Comment Editor, I assist the Staff Writers in developing these Comments and mentor each writer throughout the almost nine-month writing process. From my own personal experience, I know the Staff Writers worked tirelessly—while balancing law school, extracurricular activities, and other personal stressors—to produce the impressive pieces you are about to read. Although this third issue reflects only a subset of the Comments in this Volume, each piece ponders a complicated legal issue that the staff writer meticulously curated and diligently researched.

The first, and arguably the most important, step in the writing process is topic selection. Many Staff Writers start the writing process with only a vague idea of what they want to write about. Throughout this initial phase, the Staff Writers undertake the tremendous task of developing their chosen topic, while simultaneously honing a narrow research question. This process requires extensive research, "preemption" checks, conversations with advisors, and constructive feedback from the editors. However, the buck does not stop there—the Staff Writers also must ensure their topic is novel and one they wish to spend countless hours devoted to. Consequently, the Comments reflect the Staff Writers' unique academic interests and deepest passions.

An additional challenge, unique to the Staff Writers whose Comments are in this Volume, was that these writers had to navigate the writing process from home solely through a computer screen. The pandemic forced the editors to hold meetings online or via telephone, in fact, many Staff Writers never had the occasion to meet their editors in person. Staff Writers conducted all research online without the typical support one would receive from a library visit. Typically, Staff Writers would meet with their editors to discuss their ideas and research in person. Despite the shortcomings of having an atypical law review experience, each staff writer pushed themselves far beyond what they ever thought was possible to produce absolutely brilliant pieces of legal scholarship. Each staff writer should be incredibly proud of their Comment and the mark they are leaving on the *University of the Pacific Law Review*.

In addition to the Staff Writers' hard work, the Board of Editors of Volume 52 dedicated countless hours to the development of these Comments. Specifically, I thank Lauren Hirota, Chief Comment Editor of Volume 52, and her primary editors for overseeing the development of these Comments. Moreover, I thank Thomas Gerhart, Editor-in-Chief of Volume 52, for pushing each staff writer to their fullest potential. Without each of you, these Comments would not be as impressive as they are now.

Finally, I would personally like to thank my parents and grandmother for always believing in me. Without your guidance and support, I would have never had the courage to go to law school and join the law review—let alone apply for a position on the Board of Editors. I also thank my love, Justin Whitman, who constantly encourages me to push the envelope with everything I do and continues to read everything I write. I love you all more than you know!

I hope you all enjoy the issue. Happy reading!

Francesca Torres Chief Comment Editor University of the Pacific Law Review Volume 53 * * *

Symposium – KCON XVI: Contracts in the Twenty-First Century

What in the World (of Warcraft) has the EU Done?: The Influence of EU Regulation in Twenty-First Century Contracting as Partially Explained Through a Videogame Prism

Robert D. Brain*

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^{*} Clinical Professor of Law, LMU Loyola Law School. B.S., Stanford University; M.S., Stanford University; J.D., Berkeley Law. The author is also the co-author of the only videogame casebook in the United States, ASHLEY S. LIPSON & ROBERT D. BRAIN, VIDEOGAME LAW: CASES STATUTES, FORMS, PROBLEMS & MATERIALS (2d ed. 2016) [hereinafter LIPSON & BRAIN]. I would like to acknowledge and thank my very talented and tireless research assistant, Jiasheng Xu, Loyola Law School Class 2023, for her essential assistance in preparing this article. I would also like to thank Professor Michael Malloy of the University of the Pacific, McGeorge School of Law for inviting me to participate in the Symposium and the editors of the *University of the Pacific Law Review* for their helpful assistance and recommendations during the editing process.

"As Europeans, we want to be the global leader of a digital transformation that puts people at its heart. You can count on Europe."

I. INTRODUCTION

Your *Fortnite* game just ended. You finished third; not bad. If you started your circle strafing² a half-second earlier, you might have won. While waiting for the next game to begin, and you are AFK,³ you glance at your phone and find a story about data privacy. That makes you contemplate something you rarely consider—what data does the game developer collect about you? Well, you know it has your name, address, and credit card number, but that's OK—the developer has to have those things to bill you and provide updates and the like, but also has to keep those things private, doesn't it? As you have linked your PS4 to your Facebook account to publish videos of your gameplay and post your high scores, you think maybe the developer has access to your likes, your friends, and maybe their email addresses. But that's not so bad. Those things are (largely) public anyway.

You kind of hope that the developer must keep track of gameplay data, called telemetry, since if no one is getting to Level 389 because "leveling up" from Level 388 is too hard, you want it to fix the problem. But surely the developer aggregates that kind of data, but does not have individual data about you, right?

Hmm. There must be some other articles and stories on this. So, you let the next battle start without you and a few clicks later, you find out that many developers monitor *individual* player metrics and keep track of virtually all of your in-game input—every move of your avatar, every in-game purchase you make, how long you play, the location where you login,⁵ etc. You find reports that some of the bigger game developers collect fifty *terabytes* of data *per day* from its players.⁶ And you find out that there are companies that are developing not just an individualized *player* profile on you, but are generating individual *personality* and *spending* profiles as well.⁷ Also, you discover that this data is not just used in the

^{1.} EU Debates, Digital Assembly 2021: Leading Europe's Digital Decade. Ursula von der Leyen EU Debates!, YOUTUBE (June 1, 2021), https://www.youtube.com/watch?v=Oe7qxIgFWUk (on file with the University of the Pacific Law Review).

^{2.} A move where a constant field of fire is maintained while circling an enemy.

^{3. &}quot;Away from keyboard."

^{4.} ASHLEY S. LIPSON & ROBERT D. BRAIN, VIDEOGAME LAW: CASES STATUTES, FORMS, PROBLEMS & MATERIALS 762 (2d ed. 2016) [hereinafter LIPSON & BRAIN].

^{5.} *Id.* at 761–63.

^{6.} Joe Newman & Joseph Jerome, *Press Start to Track? Privacy and the New Questions Posed by Modern Videogame Technology*, AILPA Q.J. 1, 10 (2014) ("For example, video games made by Electronic Arts produce more than 50 terabytes of player data each day."); *see* Rajet Taneja, *Strata 2013: Rajat Taneja, "Video Games: The Biggest Big Data Challenge,"* YOUTUBE (Feb. 27, 2013), http://www.youtube.com/watch?v=ZK_PXlbvOfM (on file with the *University of the Pacific Law Review*).

^{7.} LIPSON & BRAIN, *supra* note 4, at 760–66; DELTADNA, http://deltadna.com/analytics/ (last visited Dec. 7, 2021) (on file with the *University of the Pacific Law Review*) ("The deltaDNA platform provides all the tools you'll need to perfect each user's gameplay experience. Transform retention, monetization, and engagement KPIs through constant optimization.").

game you are playing, but the developers can share this data with other game developers so your "profile" will follow you across other game environments.⁸

A few more clicks get you to an article by Joe Newman and Joseph Jerome:

In 1996, Richard Bartle proposed that many players could be categorized into a spectrum of four distinct types: achievers, explorers, socializers, and killers. . . . [D]evelopers have expanded upon and actualized many of Bartle's ideas in some notable game releases. For instance, Climax Studios' *Silent Hill: Shattered Memories* attempts to psychologically profile the player as he or she plays, based upon a series of "virtual psychiatric sessions" and other interactions with the game world (for example, the amount of time the player-controlled avatar spends observing sexualized posters and imagery strewn about). The game also features questions designed to resemble a Myers-Briggs psychometric questionnaire, which contributes to the player's in-game psychological profile.

By watching a player's behavior within the game world, developers can also learn a great deal about economic proclivities of that player. Studies have shown that a player's patience or willingness to pay more for convenience may be calculated in the form of an "intertemporal discount factor." Developers can use this calculation to predict a player's valuations in in-game auctions. Although some may reasonably question whether a person's in-game actions are truly indicative of their real-world personalities—many people play video games to role-play as characters wildly dissimilar to themselves—researchers are confident that their

^{8.} A company called Playnomics develops cross-game individualized player profiles. See, e.g., Dean Takahashi, Playnomics Figures Out How Game Players Rate When It Comes to Potential Purchases, VENTUREBEAT (Mar. 1, 2012), https://venturebeat.com/2012/03/01/playnomics-figures-out-how-game-players-rate-when-it-comes-to-potential-purchases-exclusive/ (on file with the University of the Pacific Law Review):

This free scoring system could prove to be extremely valuable to game publishers and developers who want to know which players are the most valuable in terms of their likelihood that they will spend money in a free-to-play game, where users play for free and pay real money for virtual goods.... Playnomics began sharing the scoring system for publishers in November [2011] and it is now scoring more than 20 million monthly active players across dozens of publishers, platforms and portals.... 'You are how you play,' said Chethan Ramachandran, CEO of Playnomics. 'Our predictive scoring system reveals hidden traits about players, and is applicable to both publishers and players of games. Just like a credit score, our scores are portable across games, and predict how a player will perform in any game environment.'

See also Dean Takahashi, Playnomics Game Analytics Rates Players for Potential Purchases, VENTUREBEAT (Mar. 1, 2012), https://venturebeat.com/2012/03/01/playnomics-figures-out-how-game-players-rate-when-it-comes-to-potential-purchases-exclusive/ (on file with the University of the Pacific Law Review).

classification models can cut through to some aspects of the "real" persona provided they have enough data to analyze.⁹

Having come this far, you look to see what kinds of data Google and Facebook are keeping on you. It's even worse. 10

You don't want the game developers and other digital platform providers to collect and share this data. You should be in control over who knows what about you. Someone must be stopping this, right? "Someone" is—but it may not be who you think.

The European Union ("EU") has emerged as the twenty-first century's primary protector of worldwide consumer rights in a very important segment of contracts: business-to-consumer contracts involving multinational corporations ("MNCs") operating in the digital space. Consumers all over the globe are protected by the EU's digital privacy and operational regulation of companies such as Microsoft, Facebook, Apple, Google, Tik-Tok, Hilton, United Airlines, and the largest videogame developers and distributors.

There are many reasons for the international effect of the EU's legislation. For example, some American companies have found modeling their practices to conform to the more transparent and protective data collection requisites of the EU has been good for their businesses. ¹¹ Often the reasons are practical—all things being equal, MNCs want the substance of their agreements to be as standardized as possible across the globe to facilitate their administration, and don't want their data collection, retention, and notice practices to be different in different regions. ¹² As such, contractual provisions in conformity with the region with the strictest regulation become the default standard in many MNC agreements. And the strictest standards are those of the EU.

The reason that the EU promulgates such standards, instead of other countries, is multi-faceted as well. Other countries have demonstrated different priorities in their regulations and have not focused as much on privacy, transparency, and other regulation of digital platforms. But more importantly, regulation of the digital space in favor of the consumer is in the EU's soul. Its fundamental documents emphasize data privacy and consumer protection. For example, Section 16(1) of the Treaty on the Functioning of the European Union ("TFEU") provides, "Everyone has the right to the protection of personal data concerning them." Further, Article 8(1) of the Charter of Fundamental Rights of the European Union

^{9.} Newman & Jerome, supra note 6, at 541-43.

^{10.} See, e.g., Omer Tene, What Google Knows: Privacy and Internet Search Engines, 2008 UTAH L. REV. 1433, 1442–44 (2008); James Grimmelmann, Saving Facebook, 94 IOWA L. REV. 1137, 1150–51 (2008).

^{11.} W. Gregory Voss & Kimberly A. Hauser, *Personal Data and the GDPR: Providing a Competitive Advantage for U.S. Companies*, 56 AM. Bus. L.J. 287, 337–39 (2019).

^{12.} Id. at 334-37.

^{13.} Consolidated Version of the Treaty on European Union art. 16(1), Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU], https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_2&format=PDF (on file with the *University of the Pacific Law Review*).

("Charter") provides that "[e]veryone has the right to the protection of personal data concerning him or her," and Article 7 of the Charter reinforces this right in a broader context by providing "[e]veryone has the right to respect for his or her private and family life, home and communications." In Article 38 of the Charter, the EU further binds itself to a promise that its "policies shall ensure a high degree of consumer protection." 16

Given the sincere and long-standing commitment to pro-consumer data privacy and transparency in digital data handling, it would be saying too much to contend that the EU's data regulations stemmed principally from, videogames. While videogame developers may capture somewhere around 500 terabytes of information daily,¹⁷ that amount of data pales in comparison to the very large online platforms like Google, Apple, and Twitter.¹⁸ As such, it is likely that the EU's regulatory scheme would be similar even without the influence of the videogame industry. However, the EU has long been somewhat wary of videogames and has regulated them before most other countries or regions.¹⁹ As such, while it might not be the driving force behind EU data protection policies, the videogame industry may have had an outsized effect on the EU's desire to regulate digital privacy.

This Article is in four substantive parts. Part II is a primer on the EU—its founding, its members, its institutions, and the legislation by which it regulates. Part III discusses the videogame industry and some of the digital privacy issues raised by gameplay. Part IV discusses the EU's first large foray into the regulation of digital space with massive extra-territorial effects—the General Data Privacy Regulation ("GDPR").²⁰ Part V discusses proposed EU legislation, which, if passed, will help entrench the EU as the dominant regulator of digital data throughout the twenty-first century.

^{14.} Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364) 1 [hereinafter FREU], https://www.europarl.europa.eu/charter/pdf/text_en.pdf (on file with the *University of the Pacific Law Review*). The Charter became binding on the European Union Member States under TFEU art. 6. *See also The Treaty of Lisbon*, EUR. PARLIAMENT, https://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon (last visited December 6, 2021) (on file with the *University of the Pacific Law Review*).

^{15.} FREU art. 7.

^{16.} Id. art. 38.

^{17.} See infra text accompanying notes 72-74.

^{18.} It is difficult to get a firm number of the data processed by these very large online platforms. It was reported in 2008 that Google processed over 20 <u>petabytes</u> of data daily. *Google Processes Over 20 Petabytes of Data Per Day*, NIALL KENNEDY (Jan. 8, 2008), https://www.niallkennedy.com/blog/2008/01/google-mapreduce-stats.html (on file with the *University of the Pacific Law Review*). Surely that number must have increased several orders of magnitude by 2022, and even if Apple, Microsoft and the rest are not quite as large, *id.*, in the aggregate the large online platforms process a lot of daily data. That, of course, does not mean the companies *collect* that much data from their users, but surely their data collection exceeds that of videogame developers.

^{19.} See infra Part III

^{20.} Regulation of the European Parliament and of the Council on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, (EU) 2016/679 of the European Parliament and of the Council of 27 Apr. 2016, 2016 O.J. (L119) 1 (EC), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679 (on file with the *University of the Pacific Law Review*).

II. A PRIMER ON THE EUROPEAN UNION

A. History

After World War II, regional economic development alliances became a trend within Europe as an effort to rebuild Europe's economy and stabilize peace politically. France, Western Germany, Italy, the Netherlands, Belgium and, Luxembourg became the first six founding members of the European Economic Community ("EEC") under the Treaty of Rome. The objectives of the EEC included establishing an internal common market—including allowing the free movement of workers, capital, and services—and eliminating tariffs across Member States. The initial policies proved popular with other European countries, prompting waves of membership applications to join the Community. In 1973, the United Kingdom, Denmark, and Ireland joined the Community, followed by a southern European expansion with Greece joining in 1981 and Portugal and Spain becoming members in 1986.

Later in 1987, the now twelve Member States formalized a more unified political front through the Single European Act.²⁶ Those same nations also eliminated the name EEC and formally became the "European Union" by signing the Treaty on European Union (also known as the Treaty of Maastricht) which became effective in 1993.²⁷ The Treaty of Lisbon later modified and amended the Treaty on European Union²⁸ in important ways, including, as discussed below, a

^{21.} History of the European Union 1945–59, EUR. UNION, https://european-union.europa.eu/principles-countries-history/history-eu/1945-59_en (last visited December 3, 2021) (on file with the University of the Pacific Law Review).

^{22.} Treaty of Rome (EEC), EUR-LEX, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Axy0023 (last visited Dec. 5, 2021). The Treaty of Rome became enforceable on January 1, 1958. For background on the Treaty of Rome and its effect on the European Economic Community, see e.g., Frank Emmert & Sinša Petrović, The Past, Present, And Future of EU Enlargement, 37 FORDHAM INT'L L.J. 1349, 1355 (2014) [hereinafter EU Enlargement].

^{23.} *Treaty of Rome*, *supra* note 22, art. 3; *see also*, *e.g.*, *What Was the Purpose of the Treaty of Rome*, R4DN (Aug. 20, 2020), https://r4dn.com/what-was-the-purpose-of-the-treaty-of-rome/ (on file with the *University of the Pacific Law Review*).

^{24.} EU Enlargement, supra note 22, at 1356.

^{25.} Id. at 1365-1371.

^{26.} Single European Act, June 29, 1987, 1987 O.J. (C169) 1 [hereinafter Single European Act], https://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11986U/TXT&from=EN (on file with the *University of the Pacific Law Review*).

^{27.} Treaty on European Union, July 29, 1992, 1992 O.J. (C191) 1 [hereinafter Treaty on EU], https://eurlex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:11992M/TXT&from=EN (on file with the *University of the Pacific Law Review*); see also Mastricht Treaty, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/economics/maastricht-treaty/ (last visited Dec. 3, 2021) (on file with the *University of the Pacific Law Review*).

^{28.} Treaty of Lisbon, Amending the Treaty on European Union and the Treaty Establishing the European Community," Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon], https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12007L/TXT&from=EN#d1e1515-1-1 (on file with the *University of the Pacific Law Review*).

directive that the EU's external actions reflect the primacy of data protection, which is a core value of the EU and reflected in its pro-consumer regulatory framework.²⁹

Austria, Sweden, and Finland joined the EU in 1995, growing the Union to 15 members. ³⁰ Following the foundation laid in The Treaty on European Union, the EU adopted the Euro as the common currency in the EU, and the Euro appeared first electronically in 1999, and became legal tender in 12 of the 15 countries in 2002. ³¹

On May 1, 2004, 10 new countries—mostly former Soviet bloc nations from Central and Eastern Europe—joined the European Union.³² In 2007, Romania and Bulgaria became members, growing the European Union to 27 Member States.³³ In 2013, Croatia became the 28th country to join the European Union and the Union was then at its largest territorial extent.³⁴

After its Brexit vote, the United Kingdom officially left the European Union on December 31, 2020,³⁵ leaving the EU currently with 27 Member States, a population of approximately 447 million,³⁶ and a GDP of approximately \$13.3 trillion euros.³⁷

B. Structure of the EU Decision-Making Institutions

There are four institutions involved in making EU law: 1) The Council of the European Union; 2) The Commission of the European Communities; 3) The European Parliament or Assembly; and 4) The European Court of Justice. Part Five

- 29. See infra note 158 and text accompanying.
- 30. EU Enlargement, supra note 22, at 1371-73.
- 31. History of Euro, HISTORY OF EURO, http://euro-dollar-currency.com/history_of_euro.htm (last visited Dec. 3, 2021); History of the European Union 2000–2009, EUR. UNION, https://european-union.europa.eu/principles-countries-history/history-eu/2000-09_en (last visited Dec. 3, 2021) (on file with the University of the Pacific Law Review).
- 32. History of the European Union 2000–2009, supra note 31 (noting that the 10 countries are Poland, Hungary, Czech Republic, Slovakia, Slovenia, Estonia, Lithuania, Latvia, Malta and Cyprus).
 - 33 *Id*
- 34. *History of the European Union 2010–2019*, EUR. UNION, https://european-union.europa.eu/principles-countries-history/history-eu/2010-19_en (last visited Dec. 3, 2021) (on file with the *University of the Pacific Law Review*).
- 35. When Did the United Kingdom Leave the European Union?, GOV'T OF THE NETH., https://www.government.nl/topics/brexit/question-and-answer/when-will-the-united-kingdom-leave-the-european-union (last visited Dec. 3, 2021) (on file with the University of the Pacific Law Review).
- 36. European Union: Total Population from 2010 to 2021, STATISTA, https://www.statista.com/statistics/253372/total-population-of-the-european-union-eu/ (last visited Dec. 3, 2021) (on file with the University of the Pacific Law Review); Facts and Figures in the European Union, EUR. UNION, https://european-union.europa.eu/principles-countries-history/key-facts-and-figures/life-eu_en (last visited Dec. 5, 2021) (on file with the University of the Pacific Law Review).
- 37. Gross Domestic Product of the European Union from 2009 to 2020, STATISTA, https://www.statista.com/statistics/279447/gross-domestic-product-gdp-in-the-european-union-eu/ (last visited Dec. 3, 2021) (on file with the University of the Pacific Law Review).

of the Treaty of Rome established these institutions,³⁸ and while there have been operational changes of these bodies in subsequent treaties and legislation, their basic organization and function remains largely the same as when they were established in the Treaty of Rome. Each is briefly described below.

1. The Commission of the European Communities

The "Commission" is the EU's executive body.³⁹ It sits in Brussels and has four major responsibilities: it (1) proposes legislation designed to implement the objectives outlined in EU treaties; (2) manages EU policy and the EU budget; (3) acts as the guardian of the treaties, monitoring compliance with EU law and referring suspected cases of non-compliance to the European Court of Justice; and (4) represents the EU in external trade negotiations.⁴⁰ Each Member State appoints one commissioner.⁴¹ Most significantly, it is the only body that can propose legislation, and such proposed legislation can only become effective when ratified by the Parliament and Council.

2. The Council of the European Union

The "Council" is composed of the head of the government of each Member State and has several ministers, each specializing in a different area.⁴² The purpose of the Council is to coordinate economic policies of Member States and to make decisions on issues within its jurisdiction, which includes approving legislative directives to the Member States and international agreements.⁴³ As such, one of the Council's major roles is to approve, modify, or reject the legislative proposals made by the Commission.

3. The European Parliament

The "Parliament" is the only EU institution whose members are elected by European citizens.⁴⁴ Each Member State elects a different number, based on

^{38.} Treaty of Rome, *supra* note 22, arts. 137–198. *See generally* Jacques Ziller, *Separation of Powers in the European Union's Intertwined System of Government. A Treaty Based Analysis for the Use of Political Scientists and Constitutional Lawyers*, 73 IL POLITICO 133, 145–154 (2008).

^{39.} Roger J. Goebel, Supranational? Federal? Intergovernmental? The Governmental Structure of the European Union After the Treaty of Lisbon, 20 COLUM. J. EUR. L. 77, 87 (2010) [hereinafter Governmental Status]; European Commission, EUR. UNION https://europa.eu/european-union/about-eu/institutions-bodies/european-commission_en (last visited Dec. 3, 2021) (on file with the University of the Pacific Law Review).

^{40.} European Commission, supra note 39.

^{41.} Governmental Status, supra note 39, at 133.

^{42.} *Id.* at 98–109; *The European Council*, EUR. UNION, https://www.consilium.europa.eu/en/european-council (last visited Dec. 3, 2021) (on file with the *University of the Pacific Law Review*).

^{43.} Id.; Governmental Status, supra note 39, at 101.

^{44.} Governmental Status, supra note 39, at 110; About Parliament, Eur. Union,

population.⁴⁵ The Parliament approves the appointment of members of the Commission and has some budgetary control over EU matters⁴⁶ It cannot initiate legislation, but—along with the Council—it votes on, and must ratify, legislation the Commission proposes for that legislation to be effective. There are currently 705 members of Parliament elected in the 27 Member States, and membership in the Parliament has a term of 5 years.

4. The European Court of Justice

The European Court of Justice ("ECJ") functions as the final arbiter of EU law.⁴⁷ Among its duties, it has original jurisdiction to: (1) "review[] the legality of the acts of the institutions of the European Union"; (2) "ensure[] that the Member States comply with obligations under the treaties; and (3) "interpret[] European Union law at the request of the national courts and tribunals."⁴⁸ Each Member State appoints a judge for a renewable term of six years, and the ECJ sometimes sits as a whole, sometimes in groups of fifteen judges, and occasionally in groups of five judges.⁴⁹ National courts are obligated to follow Community laws and the ECJ's decisions.⁵⁰

C. Types of Legislation

At its inception, the EU established four types of legislation that could affect EU Member States. Again, although there has been some tweaking over the years, the original provisions of the Treaty of Rome set forth today's basic legislative scheme. Under the Treaty of Rome, the four principal types of legislation are: 1) Regulations, 2) Directives, 3) Decisions, and 4) Recommendations and Opinions.⁵¹

https://www.europarl.europa.eu/about-parliament/en/powers-and-procedures (last visited Dec. 3, 2021) (on file with the *University of the Pacific Law Review*).

^{45.} Robert Lewis, *European Parliament*, BRITANNICA, https://www.britannica.com/topic/European-Parliament (last visited Dec. 31, 2021) (on file with the *University of the Pacific Law Review*).

^{46.} *Id*

^{47.} Court of Justice of the European Union, EUR. UNION, https://curia.europa.eu/jcms/jcms/j_6/en/ (last visited Dec. 3, 2021) (on file with the University of the Pacific Law Review).

^{48.} General Presentation, CT. OF JUST. OF THE EUR. UNION, https://curia.europa.eu/jcms/jcms/Jo2_6999/en/ (last visited Dec. 31, 2021) (on file with the *University of the Pacific Law Review*).

^{49.} *Id*.

^{50.} Id.

^{51.} Treaty of Rome, *supra* note 22, art. 189. *See generally Types of Legislation*, Eur. UNION, https://europa.eu/european-union/law/legal-acts_en (last visited Dec. 3, 2021) (on file with the *University of the Pacific Law Review*).

1. Regulations

A "Regulation" is the broadest possible legislation for the EU. The Parliament and the Council must both pass a regulation after the Commission has recommended the legislation.⁵² It has general application and is binding in its entirety on, and directly applicable to, all Member States.⁵³

2. Directives

A "Directive" is binding only as to the result to be achieved. The national authorities of each Member State must choose the form and methods to reach that result or goal for its jurisdiction.⁵⁴ As will be further detailed below, a common methodology used in the past several years is for the EU to propose initially a major legislative change via a Directive, and to give Member States several years to pass new laws, or amend existing ones, to carry out the objective. When the Commission decides, however, that the Member States have failed to sufficiently meet the legislation's specified goal after that period, the Commission has two choices. It can bring an "infringement" action against a Member in the European Court of Justice seeking an order of compliance,⁵⁵ or, as has lately occurred in the digital space, it can recommend a broader-reaching Regulation to carry out the goal EU-wide.⁵⁶

3. Decisions

A "Decision" is a limited finding and is binding only upon those to whom it is addressed.⁵⁷ The Commission can authorize decisions through legislation.⁵⁸

4. Recommendations and Opinions

Recommendations and Opinions have no binding force.⁵⁹ The Commission issues Recommendations to get on record a desired goal, e.g., to encourage cross-border cooperation on various issues,⁶⁰ but it has no sanction for failing to meet

- 52. Treaty of Rome, supra note 22, art. 189.
- 53. Id.; Types of Legislation, supra note 51.
- 54. Treaty of Rome, supra note 22, art. 189; Types of Legislation, supra note 51.
- 55. Applying EU Law, EUR. UNION, https://ec.europa.eu/info/law/law-making-process/applying-eu-law_en (last visited Dec. 3, 2021) (on file with the *University of the Pacific Law Review*).
 - 56. Types of Legislation, supra note 51.
 - 57. Treaty of Rome art. 189, supra note 22; Types of Legislation, supra note 51.
- 58. Types of Legislation, supra note 51; see, e.g., Joint Decision of the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy, EUR. UNION, https://eur-lex.europa.eu/legalcontent/EN/TXT/?qid=1441179536456&uri=CELEX:52015JC0032 (last visited Dec. 3, 2021) (on file with the University of the Pacific Law Review).
 - 59. Treaty of Rome, supra note 22, art. 189; Types of Legislation, supra note 51.
 - 60. See, e.g., Promoting the Use of and Sharing Practices on Cross-Border Videoconferencing in the Area

that goal or even many details on how it might achieve the goal. Opinions can be issued by the Commission, the Council, or the Parliament, and are largely commentaries, e.g., a recent Opinion set forth the Commission's view about evaluating proposed legislation from a "specific regional or economic and social viewpoint."

III. SOME INFORMATION ABOUT THE VIDEO GAME INDUSTRY

The videogame industry is HUGE. In 2019, estimated worldwide revenues were over \$120 billion,⁶² far outpacing the global box office for movies (\$42.5 billion)⁶³ and even the biggest U.S. sports leagues like the NFL (\$16 billion).⁶⁴ COVID lockdowns in 2020 hurt other forms of entertainment, but with millions forced to be at home, the videogame industry grew exponentially, with estimated revenues in 2020 of over \$180 billion,⁶⁵ Revenues are expected to exceed \$200 billion in 2023,⁶⁶ and could hit \$300 billion by 2025.⁶⁷

This kind of revenue has made the largest videogame developers and distributors—such as Activision Blizzard, Sony, Nintendo, Electronic Arts, Epic, and Tencent—very wealthy companies.⁶⁸ For example, Activision Blizzard has a

of Justice in the Member States and at EU Level, Eur. UNION, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1441183137539&uri=CELEX:32015H0731%2801%29 (last visited Dec. 3, 2021) (on file with the University of the Pacific Law Review).

^{61.} Types of Legislation, supra note 51.

^{62. 50} Videogame Statistics: 2020/2021 Industry Overview, Demographics and Data Analysis, COMPARECAMP, https://comparecamp.com/video-game-statistics/ (last visited Dec. 4, 2021) (on file with the University of the Pacific Law Review).

^{63.} *Id*.

^{64.} NFL Revenue Drops from \$16 billion in 2019 to \$12 Billion in 2020, NBC NEWS, https://profootballtalk.nbcsports.com/2021/03/11/nfl-revenue-drops-from-16-billion-to-12-billion-in-2020/ (last visited Dec. 4, 2021) (on file with the *University of the Pacific Law Review*).

^{65.} Wallace Witkowski, Videogames are a Bigger Industry than Movies and North American Sports Pandemic, MARKETWATCH Combined. Thanks to the(updated https://www.marketwatch.com/story/videogames-are-a-bigger-industry-than-sports-and-movies-combinedthanks-to-the-pandemic-11608654990 (on file with the University of the Pacific Law Review); Marko Milijic, 45+ Video Game Revenue Statistics: Game On!, SPENDMENOT (last updated Sept. 10, 2021), https://spendmenot.com/blog/video-game-industry-revenue-statistics/ (on file with the University of the Pacific Law Review). If the estimated \$200 million figure was reached in 2020, videogame revenue would exceed that of Microsoft (\$180 billion). J. Clement, Video Game Industry - Statistics and Facts, STATISTA, https://www.statista.com/topics/868/video-games/#dossierKeyfigures (last visited December 4, 2021) (on file with the University of the Pacific Law Review).

^{66.} Tom Wijman, Global Games Market to Generate \$175.8 Billion in 2021; Despite a Slight Decline, the Market Is on Track to Surpass \$200 Billion in 2023, NEWZOO (May 6, 2021), https://newzoo.com/insights/articles/global-games-market-to-generate-175-8-billion-in-2021-despite-a-slight-decline-the-market-is-on-track-to-surpass-200-billion-in-2023/ (on file with the University of the Pacific Law Review).

^{67.} Milijic, supra note 65.

^{68.} The 10 Biggest Video Games Companies in the World 2021, ALL TOP EVERYTHING, https://www.alltopeverything.com/top-10-biggest-video-game-companies/ (last visited Dec. 4, 2021) (on file with the University of the Pacific Law Review).

market capitalization of over \$44.5 billion.⁶⁹ But what drives the revenue, of course, is intense player interest. Current estimates provide there are nearly 2.7 billion global players, equating to about one-third of the world's population.⁷⁰ On average, gamers play about eighty minutes per session of continuous gameplay and play an average of seven hours per week.⁷¹

All that gameplay produces a ton of data. A single large videogame developer receives about fifty terabytes of information per day.⁷² Even if not all developers collect that much, it is not unreasonable to think that, in the aggregate, the videogame industry generates and collects somewhere in the neighborhood of 500+ terabytes of data each day. That is the equivalent of Facebook,⁷³ although it is undoubtedly far less than Microsoft, Google, Apple, and the like.⁷⁴

Understandably, there are both individual and governmental concerns with what developers do with that quantity of data, the transparency of their collection, retention, and sharing practices, and whether and how to control such practices. On an individual user level, contracts between the gamer and the developer generally handle data collection issues. Traditionally, some combination of three separate agreements—each with slightly different functions—regulate the rights, permissions, and obligations of the parties: (1) An "End User License Agreement" (which typically defines the restrictions binding the user from sharing the game and its software with others); (2) a "Terms of Service" or "Terms of Use Agreement," (which generally sets forth a kind of "code of conduct" among players who entered the developer's servers at the same time); and (3) a "Privacy Agreement" (which recites both required and voluntary disclosures as to data mining and security). These agreements are click-through agreements, meaning

^{69.} Summary: Activision Blizzard, Inc., YAHOO, https://finance.yahoo.com/quote/ATVI (last visited Dec. 4, 2021) (on file with the *University of the Pacific Law Review*). In January 2022, Microsoft announced its acquisition of Activision Blizzard for \$68.7 billion in an all cash deal. https://news.microsoft.com/2022/01/18/microsoft-to-acquire-activision-blizzard-to-bring-the-joy-and-community-of-gaming-to-everyone-across-every-device/ (on file with the *University of Pacific Law Review*).

^{70.} Milijic, supra note 65.

^{71.} *Id*.

^{72.} See supra text accompanying note 6. The extent of individualized player data harvested and retained by developers is perhaps surprising. In preparation for this Article, we asked someone who has been a serious World of Warcraft player since 2010 to request the data Blizzard (the developer of World of Warcraft) had collected on him. As described below, Blizzard allowed the player to request this information both before and after the GDPR. In response, he received a .txt document with over 90,000 words in it. Blizzard collected precise login locations, names, personal addresses, chat logs, purchases, in-game progress, online forum posts, phone numbers, account activity, payment records, emails, friends lists, social media accounts, and much more. A few of the pages sent by Blizzard are reproduced in the Appendix.

^{73.} John Constine, How Big is Facebook's Data? 2.5 Billion Pieces of content and 500+ Terabytes Ingested Every Day, TECHCRUNCH, (Aug. 22, 2012), https://techcrunch.com/2012/08/22/how-big-is-facebooks-data-2-5-billion-pieces-of-content-and-500-terabytes-ingested-every-day/ (on file with the University of the Pacific Law Review) ("Facebook revealed some big, big stats on big data to a few reporters at its HQ today, including that its system processes 2.5 billion pieces of content and 500+ terabytes of data each day.").

^{74.} See supra note 18.

^{75.} See generally DAN D. NABEL & BILL CHANG, VIDEO GAME LAW IN A NUTSHELL 319, 355 (2018). Over time, the boundaries between these agreements became less well-defined and it is now typical to have a

they are developer drafted, non-negotiable, and clicking the "I Accept" button or its equivalent signifies player acknowledgement. A recent empirical study showed few users ever bother to read click through agreements,⁷⁶ and of course those players who have not read the agreements do not understand the data policies of the games they play. But without any power to negotiate click-through terms, even an attentive player is at the mercy of the developer's data collection and retention policies governing their gameplay, which may lack transparency and fairness.

Hence, any meaningful regulation regarding data collection, retention, and sharing must come through governmental action. Analysts who study the videogame industry segment the world into five regions: (1) North America; (2) Asia-Pacific; (3) Europe; (4) Latin America; and (5) Middle East and Africa.⁷⁷ Of these, the EU region constitutes a respectable percentage of revenues, but at \$32.6 billion, it is well behind North America (\$44.7 billion) and Asia-Pacific (\$78.4 billion). However, the EU has been in the forefront of privacy and other regulation of MNCs in the digital space.⁷⁸ What the EU has done, and some of the reasons why, are explained in the next sections.

IV. THE GDPR

The EU's GDPR is the Magna Carta of data privacy regulation.⁷⁹ It was passed in 2016 and became effective on May 25, 2018.⁸⁰ It is not an exaggeration to say that it was the most significant data privacy regulation in history. It is 88 pages long, and has 99 Articles, which contain 173 recitals.⁸¹ In the approximately eighteen-month run-up between its passage and its effective date, MNCs across the world evaluated and changed their practices and agreements to comply.⁸² As

single "Unitary Agreement" covering all the topics. LIPSON & BRAIN, supra note 4, at 766-67.

^{76.} See, e.g., Victoria C. Plaut & Robert P. Bartlett, Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements, 36 L. AND HUM. BEHAV. 293, 297 (2012) (concluding that, after empirical studies, "participants reported rarely reading CTAs [Click Through Agreements]").

^{77.} See, e.g., Tom Wijman, Global Game Revenues Up an Extra \$15 Billion This Year as Engagement Skyrockets, NEWZOO (Nov. 4, 2020), https://newzoo.com/insights/articles/game-engagement-during-covid-pandemic-adds-15-billion-to-global-games-market-revenue-forecast/ (on file with the University of the Pacific Law Review).

^{78.} See infra Part V.

^{79.} *See* Commission Regulation 2016/679 of Apr. 27, 2016, on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1, 1 [hereinafter GDPR]; *supra* note 13.

^{80.} GDPR, supra note 79.

^{81.} *Id*

^{82.} To give an idea of the efforts needed and taken to ensure GDPR compliance during this period, a small sample of the consulting firms advertising their services to help companies modify their privacy policies include e.g., Preparing for GDPR? We're Here to Help You Get Ready, CITRIX, https://www.sharefile.com/gdpr (last visited Dec. 5, 2021) (on file with the University of the Pacific Law Review); Preparing for GDPR, TALEND, https://www.talend.com/resources/gdpr/ (last visited Dec. 5, 2021) (on file with the University of the Pacific Law Review); TUC Education, Preparing for GDPR, YOUTUBE (May 21, 2018), https://www.youtube.com/watch?v=Wd2GNBhxhkI (last visited Dec. 5, 2021); Preparing Your Organization for the GDPR: What You Need to Know, OKTA 7, https://www.okta.com/resources/whitepaper/preparing-for-gdpt/

one research group reported, "More research also shows that Fortune 500 companies have spent \$7.8 billion on GDPR up to May 2018, with 40% of them spending more than \$10 million."83

This raised three questions: (1) What exactly does the GDPR regulate?; (2) What are its extra-territorial effects?; and (3) Since MNC digital platforms pose the same risks across the globe, why was it that the EU, and not some other nation, passed such a comprehensive data privacy regulation? Each of these issues is discussed below.

A. What Does the GDPR Regulate?

On an EU level, the statutory precursor to the GDPR was the 1995 EU Data Protection Directive ("Data Directive"),⁸⁴ which, among other things, provided:

Data processing is only lawful "if the data subject has unambiguously given his consent";85

"[E]very data subject [has] the right to . . . confirmation as to whether or not data relating to him are being processed and information at least as to the purposes of the processing"; 86

"[T]he data subject [has] the right . . . to object at any time on compelling legitimate grounds . . . to the processing of data on him", 87 and

(last visited Dec. 5, 2021) (on file with the University of the Pacific Law Review); Hadi Hosn, Do's and Don'ts of GDPR Data Security - A Journey to Compliance and Beyond, SECUREWORKS (June 12, 2017), https://www.secureworks.com/blog/dos-and-donts-of-gdpr-data-security (on file with the University of the Pacific Law Review); Doug Drinkwater, Preparing for GDPR Compliance: Where You Need to Be now and How to Get There, CSO (Oct. 9, 2017), https://www.csoonline.com/article/3230128/preparing-for-gdpr-compliancewhere-you-need-to-be-now-and-how-to-get-there.html (on file with the University of the Pacific Law Review); Progress, You Preparing GDPR?, YOUTUBE (Nov. 2. 2017), Are for https://www.youtube.com/watch?v=MpBi8ZYQ7DU.

- 83. Michael Becker, GDPR Compliance: How It's Affecting U.S. Companies, EMARSYS (Nov. 6, 2018), https://emarsys.com/learn/blog/gdpr-united-states-companies/ (on file with the University of the Pacific Law Review).
- 84. Council Directive 95/46, on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L281) 1, 31 (EC). While the GDPR was the direct descendent of the Data Directive, Professor W. Gregory Voss traces the origins of the Data Directive to German and Swedish data protection laws of the 1970s, and the Secretary's Advisory Committee on Automated Personal Data Systems report, authored by the U.S. Department of Health, Education and Welfare in 1972. W. Gregory Voss, Obstacles to Transatlantic Harmonization of Data Privacy Law in Context, 2019 U. ILL. J. L. TECH. POL'Y 405, 413 (2019); see also GLORIA GONZÁLES FUSTER, THE EMERGENCE OF PERSONAL DATA PROTECTION AS A FUNDAMENTAL RIGHT OF THE EU 33 (2014).
 - 85. Data Directive, supra note 84, art. 7(a).
 - 86. Id. art. 12(a).
 - 87. Id. art. 14(a)

"Member States shall guarantee every data subject . . . [the] rectification, erasure or blocking [of data in certain circumstances]."88

The Member States had twelve years to come into compliance with the Directive.⁸⁹

As a Directive, rather than a Regulation, the Data Directive had neither a sanction for a Member State's failure to amend its internal laws to comply with the Directive's goals, nor a specified sanction for a data collector that failed to guarantee the rights described in the Directive. The Member States moved slowly and inconsistently in implementing the Directive, and the statutes of the relatively few Member States which passed some form of legislation pursuant to the Data Directive were criticized for their ambiguity. As such, the "GDPR was developed primarily in response to frustrations about those inconsistent applications of [the Data Directive] across Europe, and to establish a method of addressing these legal uncertainties."

Even a cursory explanation of the GDPR's coverage is beyond the scope of this Article and certainly the Symposium topic. Besides, well-written and complete summaries of its most important terms already exist. However, as a means of explaining why the EU has had such an outsized effect on global data privacy in twenty-first century contracting, some of the key individual rights protected in the GDPR need to be understood, and they include:

- an individual's right to be informed of what data is collected by each data collector or processor and to be informed where that data goes;⁹²
- the right of individual access to obtain all processed or collected data from those who collected or processed it;⁹³

^{88.} Id. art. 12(c)

^{89.} Id. art. 32.

^{90.} Lindsay A. Seventko, *GDPR: Navigating Compliance as a United States Bank*, 23 N.C. BANKING INST. 201, 203 (2019) (footnote omitted).

^{91.} See, e.g., Meg Leta Jones & Margot E Kaminski, An American's Guide to the GDPR, 98 DENV. L. REV. 93, 93 (2020); GDPR Summary, GDPR SUMMARY, https://www.gdprsummary.com/gdpr-summary/ (last visited Dec. 5, 2021) (on file with the University of the Pacific Law Review); GDPR Summary, SEERS, https://seersco.com/articles/complete-gdpr-summary/ (last visited Dec. 5, 2021) (on file with the University of the Pacific Law Review); Robert Bateman, Articles of the GDPR, TERMSFEED (Jan. 18, 2021), https://www.termsfeed.com/blog/gdpr-articles/ (on file with the University of the Pacific Law Review); Juliana De Groot, What Is the General Data Protection Regulation?: Understanding & Complying with GDPR Requirements, DIGIT. GUARDIAN (Sep. 30, 2020), https://digitalguardian.com/blog/what-gdpr-general-data-protection-regulation-understanding-and-complying-gdpr-data-protection (on file with the University of the Pacific Law Review); Carl Keyser, What Is GDPR and How Does It Affect American Businesses?, SECURITY 7 (Feb. 14, 2018) https://www.security7.net/news/what-is-gdpr-and-how-does-it-affect-americans (on file with the University of the Pacific Law Review).

^{92.} GDPR, supra note 79, arts. 12-14.

^{93.} Id. art. 15.

- the right to rectification, i.e., the right to correct any incorrect data collected or processed on an individual;⁹⁴
- the right to demand erasure of any and all data collected by any data collector or processor, i.e., the right "to be forgotten" by a data collector:⁹⁵
- the right to restrict the sharing of any and all data by a collector or processor in the future;⁹⁶
- the right of an individual to data portability across digital platforms;⁹⁷ and
- the right to object to the collection and retention of particular data by any or all collectors or processors. 98

In addition to granting such individual rights, some of the GDPR's operational restraints imposed on those who collect and process data include:

- new requirements for processing data securely;⁹⁹
- an obligation of prompt notification of security breaches to the relevant Supervisory Authority; 100
- a requirement that each company subject to the GDPR designate a Data Protection Officer for compliance purposes; ¹⁰¹ and
- a requirement that international data transfers either meet the high standards of the GDPR, or otherwise be "approved" by the EU's regulatory bodies. 102

Unlike the Data Directive, the GDPR does have sanctions for violations, and those sanctions are large. Article 83 allows the EU to seek "up to 4% of the total worldwide annual turnover [revenues] of the preceding financial year" against any one company for major infractions. ¹⁰³ The EU has already levied substantial fines for such infractions, including against Amazon (\$877 million), WhatsApp (\$255 million), Google (\$56.6 million), H&M (\$41 million), British Airways (\$26 million), Marriott (\$23.8 million), and Meta (\$19 million). ¹⁰⁴

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94. Id. art. 16.
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^{95.} Id. art. 17.

^{96.} Id. art. 18.

^{97.} Id. art. 20.

^{98.} Id. art. 21.

^{99.} GDPR, supra note 79, art. 21.

^{100.} Id. art. 33

^{101.} Id. art. 37.

^{102.} Id. arts. 44-50.

^{103.} Id. art. 83 § 5.

^{104.} Mark Elias, 22 Biggest GDPR Fines of 2019, 2020, and 2021 (So Far), TESSIAN (Nov. 19, 2021), https://www.tessian.com/blog/biggest-gdpr-fines-2020/(on file with the University of the Pacific Law Review); and see Irish Regulator Fines Facebook for Privacy Law Violations, ASSOCIATED PRESS, (Mar. 15, 2022), https://apnews.com/article/technology-business-europe-data-privacy-ireland-

B. The Extraterritorial Effect of the GDPR

To explain the billions of dollars that have been spent in worldwide compliance with the GDPR, ¹⁰⁵ one need look no farther than its intended scope: "The protection afforded by this Regulation should apply to natural persons, whatever their nationality or place of residence, in relation to the processing of their personal data." ¹⁰⁶ This is breathtaking in both its audacity and the intensity of the EU's desire to bring the world along on its regulatory journey. The breadth of the statute's reach is somewhat tempered by other provisions, such as, "This Regulation does not apply to the processing of personal data in the course of an activity which falls outside the scope of Union law." ¹⁰⁷ But the notion that the GDPR is intended to apply to data collection processes that take place outside the EU could not be clearer:

- (1) This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.
- (2) This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:
 - (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or
 - (b) the monitoring of their behaviour as far as their behaviour takes place within the Union. 108

While the exact reach of the GDPR is even now the subject of some debate, ¹⁰⁹ the following is a fair summary of what has become normative:

[In Recital 14,] the GDPR refers to "natural persons" [whose "personal data" is processed], [a term] that can be interpreted roughly as

ff6595566d1979d486906dabed4e752a (on file with the University of the Pacific Law Review).

^{105.} See Becker, *supra* note 83, at 106 (reporting that almost \$8 billion had been spent by Fortune 500 companies to come into compliance with the GDPR even before it became effective).

^{106.} GDPR, supra note 79, Recital 14.

^{107.} Id. art. 2.2(a).

^{108.} *Id.* art. 3; see also Kristin Kuraishi, Note, From the Golden Gate to London: Bridging the Gap Between Data Privacy and the Right of Publicity, 46 BROOK. J. INT'L L. 733, 755-56 (2021) ("Although the GDPR only regulates EU member states, its effects extend globally since it applies to any company or organization that services anyone in the EU, regardless of where the company physically operates.")

^{109.} GDPR Doesn't Only Protect EU Citizens – Who Does GDPR Affect?, SITEIMPROVE (Aug. 30, 2020), https://siteimprove.com/en/gdpr/who-gdpr-affects-and-whose-data-is-protected/ (on file with the *University of the Pacific Law Review*).

"any human who uses the internet." Obviously the EU's jurisdiction can't include every data subject on Earth, so again, who exactly is covered here? The jurisdiction of the GDPR depends on whether a product or service is delivered in the EU and personal data is processed and/or monitored as a result.

Generally speaking, if the product or service is offered within the EU, then the data processing needs to comply with the GDPR, whether or not the company is physically located there or not. That goes for both physical and online goods, from ordering a pair of sneakers to purchasing movies for streaming.

Let's take a more concrete example:

It might be obvious that an EU resident who orders a product from an online store based in Denmark would be protected under GDPR rules. But suppose an American business traveler in Denmark places the same order? The processing of personal data is still undertaken by a company established in the EU, and the processing is in this case also regulated by the GDPR, though he might have a product delivered in the US. ¹¹⁰

Some MNCs have decided to withdraw from offerings in the EU. In the right industry, that is possible. For example, some U.S.-based media companies, like the *Los Angeles Times*, have decided the loss in revenues from not allowing its website to be accessed in the EU was less burdensome than bringing its data collection policies into GDPR compliance.¹¹¹

But "giving up" on the EU is not practical for retailers like Amazon, or worldwide providers of services like Marriott and British Airlines. These companies could, of course, try to segregate their "EU data" and create riders to their terms of service agreements that only apply if the transaction triggers the GDPR. But this is both expensive, 112 and it may not be technically possible. 113 And

Some firms also might respond by simply blocking access to their websites in the European Union. This strategy has been adopted by a number of American news outlets such as the *Los Angeles Times*, the *New York Daily News*, and the *Chicago Tribune*. If you were to click on the *Los Angeles Times* website, for example, while in Europe, you would see this message:

Unfortunately, our website is currently unavailable in most European countries. We are engaged on the issue and committed to looking at options that support our full range of digital offerings to the EU market. We continue to identify technical compliance solutions that will provide all readers with our award-winning journalism.

^{110.} Id.

^{111.} See, e.g., Voss & Hauser, supra note 11, at 330–331.

^{112.} See, e.g., Nigel Corey, Cross-Border Data Flows: Where Are the Barriers, and What Do They Cost?, ITIF (May 1, 2017), https://itif.org/publications/2017/05/01/cross-border-data-flows-where-are-barriers-and-what-do-they-cost (last visited Dec. 5, 2021) (on file with the University of the Pacific Law Review).

^{113.} See Greg Sparrow, The GDPR's Impact on American Retailers, CORP. COMPLIANCE INSIGHTS (Apr. 25, 2018), https://www.corporatecomplianceinsights.com/gdprs-impact-american-retailers/ (on file with the

even if it is doable, for most MNC's it is certainly not desirable. Gaming companies want to aggregate data to evaluate the telemetry of their games, including data from players in the EU. Even if they could, they don't want to have to treat a player's data one way when the player logs in from the U.S., and another way when the same player takes a vacation in France and spends an hour in the airport playing the game. International sellers want to track demand and shipments all around the world, and they need to aggregate the data to monitor and respond to changing environments efficiently. Companies like Fed Ex and Amazon want to centralize data organization, and not be subject to different rules in different sectors, e.g., when there is a data breach. Airlines do not want to keep different records and be subject to different regulations depending on the country where their passenger books a flight. Banks want to have centralized systems and practices. And on and on. As such, MNCs have changed their agreements worldwide to comply with the GDPR. For example, shortly after the GDPR became effective, Microsoft announced it would provide "GDPR rights" to all its customers worldwide. 114 There are indications that other companies, like Whole Foods¹¹⁵ IBM, ¹¹⁶ Apple, and Twitter ¹¹⁷ have also changed their agreements to be GDPR compliant. Studies show that companies in Canada, ¹¹⁸ Australia, ¹¹⁹ Peru, Israel, Mexico, Kazakhstan, Singapore, and Ukraine¹²⁰ have all examined how to amend their policies and agreements to become GDPR compliant.

Another, somewhat unappreciated, example of the GDPR's extra-territorial effect comes from those countries who are at least contemplating using the GDPR as the basis for enacting their own data privacy laws. These include Argentina,

University of the Pacific Law Review) (explaining that with centralization of servers on which world-wide data is collected and aggregated, having different privacy rules governing their collection and treatment might not be possible).

^{114.} Julie Brill, Microsoft's Commitment to GDPR, Privacy and Putting Customers in Control of Their Own Data, MICROSOFT (May 21, 2018), https://blogs.microsoft.com/on-the-issues/2018/05/21/microsofts-commitment-to-gdpr-privacy-and-putting-customers-in-control-of-their-own-data/ (last visited Dec. 7, 2021) (on file with the University of the Pacific Law Review); see also Voss & Hauser, supra note 11, at 335–36.

^{115.} Sparrow, supra note 113.

^{116.} Alap Shaw, What Is GDPR, Which Companies Are Talking About It and Why?, FORBES (May 24, 2018), https://www.forbes.com/sites/alapshah/2018/05/24/what-is-gdpr-which-companies-are-talking-about-it-and-why/?sh=5831f7187976 (on file with the University of the Pacific Law Review).

^{117.} Kristin Kuraishi, Note, From the Golden Gate to London: Bridging the Gap Between Data Privacy and the Right of Publicity, 46 BROOK. J. INT'L L. 733, 763 (2021) ("many larger multinational companies, like Microsoft, Apple, and Twitter, have extended some of the [GDPR's] regulations' requirements worldwide")

^{118.} Ludovic Rembert, *The GDPR and What It Means for Canada*, PRIV. CAN. (last updated Aug. 12, 2021), https://privacycanada.net/gdpr-pipeda-guide/ (on file with the *University of the Pacific Law Review*).

^{119.} DVM Law Team, An Explanation of GDPR for Australian Businesses, MUMBRELLA (May 19, 2018), https://mumbrella.com.au/an-explanation-of-gdpr-for-australian-businesses-520284 (on file with the *University of the Pacific Law Review*).

^{120.} The Impact of the GDPR Outside the EU, IUS LABORIS (Sept. 17, 2019), https://iuslaboris.com/insights/the-impact-of-the-gdpr-outside-the-eu/ (on file with the University of the Pacific Law Review).

Bahrain, Brazil, Mexico, and Panama. ¹²¹ Hence, it may be soon impossible for any MNC which deals in digital data to avoid becoming GDPR compliant.

One example of how the GDPR has affected contracts in the United States stems from cross-border data transfers, e.g., when Blizzard or Google, etc., collect data within the EU and then transfer that data to servers outside the EU for analysis, storage, and possible sharing. The GDPR by its own terms applies to any data transfer within the European Economic Area. Any data transfer outside of the European Economic Area is permitted only when an "international organization in question ensures an adequate level of protection." In 2000, the United States Commerce Department and the EU reached agreement on a set of data protection protocols for data transfer to the United States from the EU that each side believed were compliant with the Data Directive, This was known as the "Safe Harbor Program." Under it, a company wanting to transfer data from the EU to the U.S. could amend its form agreements and then self-certify it complied with the Safe Harbor Program; if it did so, no fines or rights of actions from any individual in the EU or its Member States would accrue under the Data Directive. 125

But the GDPR had more stringent requirements than those found in the Data Directive, and in a case styled *Schrems I*, the European Court of Justice deemed the protections of the Safe Harbor Program inadequate under GDPR in a case regarding Facebook's transfer of personal data from the EU to the U.S. regarding Mr. Schrems.¹²⁶

The EU (plus Switzerland) and the U.S. Commerce Department went back to the drawing board and reached another agreement that both sides believed met the GDPR's "adequacy" standards. This second set of agreed protocols was known as the U.S. Privacy Shield Program. ¹²⁷ Once again Mr. Schrems was not satisfied that the EU/U.S. agreement provided him with all the protections of the GDPR, and he was again proven correct in *Schrems II*, issued in 2020. ¹²⁸

^{121.} Id.

^{122.} Rules on International Data Transfers, EUR. COMM'N, (last visited Dec. 5, 2021) (on file with the University of the Pacific Law Review). The European Economic Area includes all EU countries, plus Iceland, Liechtenstein, and Norway. Id.

^{123.} GDPR, supra note 79, art. 45 § 1.

^{124.} See generally Commission Decision 2000/5, 2000 O.J. (L 215) 7 (EC); see also Safe Harbor Privacy Principles, U.S. DEP'T. OF COM., https://2016.export.gov/safeharbor/eu/eg_main_018475.asp (last visited Dec. 5, 2021) (on file with the *University of the Pacific Law Review*).

^{125.} Id.

^{126.} Case C-362/14, Schrems v. Data Prot. Comm'r, 2015.

^{127.} Privacy Shield Overview, INT'L TRADE ADMIN., https://www.privacyshield.gov/Program-Overview (last visited Dec. 5, 2021) (on file with the *University of the Pacific Law Review*); see also, e.g., Adjusting to the Effects of Schrems II on International Data Transfers: Is Your U.S. Company Compliant?, ASS'N OF CORP. COUNS. (Nov. 18, 2021), https://www.acc.com/resource-library/adjusting-effects-schrems-ii-international-data-transfers-your-us-company (on file with the *University of the Pacific Law Review*).

^{128.} Case C-311/18, Schrems v. Facebook Ireland Ltd., 2020. A few months later the Federal Data Protection Commissioner of Switzerland similarly declared the Privacy Shield framework inadequate to protect the data privacy of Swiss citizens. FDPIC Considers CH-U.S. Privacy Shield Does Not Provide Adequate Level

Realizing the need to have legal data transfer protocols for data collected in, and exported from, the European Economic Area, the Commission issued a set of "Standard Contractual Clauses" in June 2021, which it believed satisfies the GDPR. It has encouraged these provisions to be substituted for existing clauses in all relevant agreements by any company which transfers data from the European Economic Area. Whether the Standard Contractual Clauses will satisfy Mr. Schrems and the European Court of Justice is unknown as of this writing, but companies that transfer data outside of the European Economic Zone would be taking a risk not to insert them in lieu of their present agreements, again showing the extraterritorial reach of the GDPR and the effect of EU regulation on modern contracting in the digital space.

Another real-world example of a company changing its customer agreement in light of the GDPR comes from the privacy policies of Activision Blizzard, the developer of *World of Warcraft*. Blizzard has traditionally been transparent and consumer-friendly with regard to the data it collects, so not that much tinkering was necessary for it to become GDPR compliant. But even so, a comparison of its 2014 North American Privacy Policy with its players to its 2021 version reveals some GDPR-inspired differences. 131

The font is larger in the 2021 agreement¹³² and the language is simpler. The 2014 Agreement refers to the Safe Harbor protections¹³³ for cross-border data transfers whereas the 2021 Agreement has a separate paragraph alerting "visitors from outside the United States" that data it collects elsewhere may be transferred to Blizzard's U.S.-based servers.¹³⁴ Blizzard's role as the "Data Controller" is spelled out in the newer agreement. Consistent with the GDPR's requirement that

of Data Protection, THE FED. COUNCIL, https://www.edoeb.admin.ch/edoeb/en/home/latest-news/media/medienmitteilungen.msg-id-80318.html (last visited Dec. 5, 2021) (on file with the *University of the Pacific Law Review*).

^{129.} Commission Implementing Decision 2021/914, 2021 O.J. (L 199) 1, 31 (EC); Commission Implementing Decision (EU) 2021/914, EUR-LEX, https://eur-lex.europa.eu/eli/dec_impl/2021/914/oj?uri=CELEX%3A32021D0914&locale=en (last visited Jan. 30, 2022) (on file with the University of the Pacific Law Review); see also, e.g., Phillip Lee, The Updated Standard Contractual Clauses—A New Hope?, IAPP (June 7, 2021), https://iapp.org/news/a/the-updated-standard-contractual-clauses-a-new-hope/ (last visited Dec. 5, 2021) (on file with the University of the Pacific Law Review).

^{130.} See, e.g., The Season of Mastery Is Now Live!, WORLD OF WARCRAFT, https://worldofwarcraft.com/en-us/ (last visited Dec. 5, 2021) (on file with the University of the Pacific Law Review).

^{131.} Compare Blizzard Entertainment Online Privacy Policy, BLIZZARD ENT. (last updated Mar. 25, 2011), https://web.archive.org/web/20140301181153/http://us.blizzard.com/en-us/company/about/privacy.html [hereinafter 2011 Agreement] (on file with the University of the Pacific Law Review), with Blizzard Entertainment Online Privacy Policy, BLIZZARD ENT. (last updated Jan. 20, 2021), https://web.archive.org/web/20210122135203/https://www.blizzard.com/en-us/legal/51952c9b-bfd5-4790-a2ef-a1c8e912adaf/blizzard-entertainment-online-privacy-policy [hereinafter 2021 Agreement) (on file with the University of the Pacific Law Review).

^{132.} The 2021 Agreement prints out onto thirteen pages; the 2014 Agreement is only five pages long.

^{133.} See supra note 124 and text accompanying.

^{134. 2011} Agreement; 2021 Agreement.

an individual has the right to know who has access to collected data, ¹³⁵ the 2021 agreement has a specific statement that "Blizzard will share your information with third persons only in the ways described in this Privacy policy," that was not in the 2014 Agreement. Both Agreements have rectification and deletion clauses, providing a way for the user to correct or instruct Blizzard to delete personal information it is not required to keep as a matter of law, but the 2021 Agreement has a specific opt-out clause relating to data sharing: "If at any time you wish to opt out of having your personal information shared with third parties . . . [y]ou may contact is at DPO@blizzard.com." Because Blizzard was already transparent about its data collection and sharing practices, the listed changes are not numerous, but the fact that the GDPR caused changes to the *North American* Privacy Policy of Blizzard illustrates the reach of the EU regulation.

C. Why the EU?

Knowing what the GDPR has done still leaves the question of why is it that the EU has launched this global data processing revolution, and not some other country. Going back to viewing the question through the videogame prism, certainly any nation where videogames are popular could have passed regulations that would have affected the industry as a whole, and likely would have changed data collection practices world-wide. But the other "big players" in the videogame sphere simply have chosen not to do so.

This is not to say they do not regulate videogames. But their concern has not been on data privacy and transparency. For example, China regulates the videogame industry quite severely, but its focus has been on gameplay itself, not data collection. The China State Administration of Press and Publication ("SAPP") has prohibited pooling blood or dead bodies to be shown in any videogame accessed from Chinese servers. ¹³⁶ China also passed what is known in videogame circles as a "Cinderella Law," which bans Chinese minors from playing any online games between midnight and 8 a.m., and restricts their play to no more than ninety minutes on weekdays and three hours on weekends and holidays. ¹³⁷ Developers, of course, follow these mandates when players login from China, ¹³⁸ but the mandates have no extra-territorial effects and only affect Chinese gameplay.

^{135.} GDPR, supra note 79, arts. 10-12.

^{136.} Ali Jones, *Virtual Corpses and Blood Puddles are Now Banned in China*, PC GAMES (Apr. 23, 2019), https://www.pcgamesn.com/china-game-approval (on file with the *University of the Pacific Law Review*).

^{137.} Video Game Addiction: China Imposes Gaming Curfew for Minors, BBC" (Nov. 6, 2019), https://www.bbc.com/news/world-asia-50315960 (on file with the University of the Pacific Law Review).

^{138.} See generally Brenda Goh & Samuel Shen, Tencent Vows fresh Gaming Curbs after 'Spiritual Opium' Attack Zaps \$60 Billion, REUTERS (Aug. 3, 2021) https://www.reuters.com/technology/tencent-falls-after-chinamedia-calls-online-gaming-spiritual-opium-2021-08-03/ (on file with the University of the Pacific Law Review).

South Korea is another country where video gameplay is popular.¹³⁹ Like China, its legislative actions show more of a concern with videogame addiction, especially in minors, than data privacy. For example, it has also established a Cinderella Law restricting minors' access to videogames after midnight.¹⁴⁰

The United States could also pass data privacy legislation that would have global reach,¹⁴¹ at least for those developers who favor a consistent cross-border privacy policy, but it also has not done so. The closest the U.S. has come nationally is the Children's Online Privacy Protection Act ("COPPA"),¹⁴² which regulates the collection and dissemination of certain personal identifying information ("PII") from children under the age of 13.¹⁴³ While certainly a step toward privacy

139. Total revenue from South Korea videogame industry was 17.1 trillion won in 2020 (approximately \$14.2 billion) Size of the Gaming Market in South Korea From 2006 to 2022 (in Trillion South Korean Won), STATISTA, https://www.statista.com/statistics/825058/south-korea-gaming-industry-size/ (last visited Dec. 5, 2021) (on file with the University of the Pacific Law Review), making South Korea the second largest market for videogames on Asia and fourth in the world. South Korea Games Market 2018, NEWZOO (July 27, 2018), https://newzoo.com/insights/infographics/south-korea-games-market-2018/ (on file with the University of the Pacific Law Review).

140. Jiyeon Lee, South Korea Pulls Plug on Late-Night Adolescent Online Gamers, CNN (Nov. 22, 2011, 2:26 AM), https://www.cnn.com/2011/11/22/world/asia/south-korea-gaming/index.html. (on file with the University of the Pacific Law Review). Interestingly, some developers have chosen not to even take the risk of violating the law, and require proof that a player is 19 years old or older before allowing access to their games. See, e.g., Robert Koumarelas, How a South Korean Law Made Minecraft an Adults-Only Game, CBR (July 8, 2021), https://www.cbr.com/minecraft-adults-only-south-korea-cinderella-law/ (on file with the University of the Pacific Law Review).

141. Videogame revenue in the U.S. is estimated to be \$36 billion in 2020. J. Clement, *Leading Gaming Markets Worldwide* 2020 by Revenue, STATISTA (Feb. 28, 2022) https://www.statista.com/statistics/308454/gaming-revenue-countries/ (on file with the *University of the Pacific Law Review*).

- 142. 15 U.S.C. § 6502(g).
- 143. Dan Nabel and Bill Chang explain COPPA's basic provisions as follows:

COPPA defines "children" as anyone under the age of 13 and PII as:.... individually identifiable information about an individual collected online, including—

- (1) a first and last name;
- (2) a home or other physical address including street name and name of a city or town;
- (3) an email address;
- (4) a telephone number;
- (5) a Social Security number;
- (6) any other identifier that the [Federal Trade] Commission determines permits the physical or online contacting of a specific individual; or
- (7) information concerning the child or the parents of that child that the website 341 collects online from the child and combines with an identifier described in this paragraph.

If a video game company's practices fall under COPPA, the company must then do several very specific things:

- (a) Provide notice on its website or service (i.e., a privacy policy) of what information it collects from children, how it uses that information, and its disclosure practices for such information;
 - (b) Obtain "verifiable parental consent" before collecting, using or disclosing the information;
- (c) Provide parents with a reasonable means of reviewing the PII collected from a child and to refuse to permit further use or maintenance of that PII;

regulation, COPPA is limited in its scope and does not purport to regulate disclosures and give substantive rights to adults as is in the GDPR. ¹⁴⁴ It may be that because privacy regulation, along with other tort concepts, are traditionally left to the states, ¹⁴⁵ any broad-scale data and privacy regulation are more likely to be left to state law in the United States legal system. ¹⁴⁶ Professor Voss has another view, blaming the lack of national data privacy regulation by the United States

16 C.F.R. § 312.3.

DAN D. NABEL & BILL CHANG, VIDEO GAME LAW IN A NUTSHELL 340-41 (West Academic 2018).

144. More broadly, the United States does protect data privacy in various patchwork and individual contexts, such as medical records under the Health Information and Portability Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 29 & 42 U.S.C. (2012)), or student records under the Family Educational Rights and Privacy Act ("FERPA") 20 U.S.C. 1232g (2012). But there is no comprehensive regulatory scheme to protect data privacy across all sectors as is true for the GDPR. *See, e.g,* Voss & Hauser, *supra* note 11, at 301 ("[T]here is no federal legal requirement in the United States for Internet service providers (ISPs) to maintain privacy policies that inform users how their information will be used."

And while some have declared the Federal Trade Commission as the "primary regulator of information privacy" in the United States, see CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY xiii (2016), the FTC's actions have fallen short on comprehensive data regulation, at least as compared to the GDPR:

The United States has no *de jure* independent data privacy authority, in the same sense as the European Union. The *de facto* data privacy authority—the Federal Trade Commission (FTC)—suffers from many handicaps in its action. The FTC was not charged with the enforcement of privacy but was given the role of fighting unfair and deceptive trade practices, which might include failure to comply with privacy policies when they are supplied by companies. Furthermore, the FTC has limited jurisdiction and does not cover, for example, sectors such as transportation, insurance, banking, and telecommunications. Added to this limited jurisdiction is the fact that the FTC cannot "engage in broad rulemaking for privacy," although under some statutes such as COPPA it may have some rulemaking power. Moreover, whatever power the FTC has, it has not used to its full extent.

FTC enforcement cases have mainly resulted in consent agreements, while the effectiveness of such agreements, which are memorialized by the FTC in consent orders, have come under question and their oversight by the FTC have even been described as "box-checking exercises."

Voss, *supra* note 85, at 424 (footnotes omitted).

⁽d) Not condition a child's participation in the game on the child disclosing more PII than is reasonable [sic] necessary to participate in the game;

⁽e) Establish and maintain reasonable procedures to protect the confidentiality, security and integrity of the PII collected from children.

^{145.} See, e.g., Introduction to Tort Law, CONG. RSCH. SERV. (Aug. 13, 2019, https://crsreports.congress.gov/product/pdf/IF/IF11291 (on file with the University of the Pacific Law Review) ("[T]ort law has primarily been a matter of state rather than federal law.").

^{146.} In 2018, California did in fact, pass a broad-ranging data privacy laws when it enacted the California Consumer Privacy Act ("CCPA") which became effective in 2020. CAL. CIV. CODE § 1798 (West 2022). The CCPA was passed after the GDPR and there is considerable overlap in their provisions. Andy Patrizio, *When No One was Looking, California Passed Its Own GDPR*, NETWORKWORLD (July 5, 2018), https://www.networkworld.com/article/3286611/while-no-one-was-looking-california-passed-its-own-gdpr.html (on file with the *University of the Pacific Law Review*).

along the lines of the GDPR on neoliberalism, lobbying of technology firms, and constitutional differences between the U.S. and western European countries.¹⁴⁷

As such, it was up to the EU to fill in the void on data privacy. But it would be inaccurate to say that the EU was "forced" to take up such regulation. Rather, the EU embraced it—for several reasons.

First, the EU has long been concerned about videogame regulation. As far back as 2005, the Parliament and Council had passed a Decision promoting safer use of the Internet. And in 2008, the Commission issued a communication to the Parliament and Council, among others, on the protection of consumers, in particular minors, in respect of the use of videogames, which it called on the Member States to recognize that video games have become a front rank medium and directed them to ensure . . . effective, proportionate measures for the protection of minors should apply . . . Such regulation comes in light of the EU's recognition of the high percentage of children who play videogames. As of 2018, it is estimated that 84% of EU children aged 11–14 played videogames, and 76% if those aged 6–10 were regular gamers.

But the primary reason that the GDPR was almost destined to come from the EU is that consumer protection and data privacy is in its DNA. "In the EU, data protection is a fundamental right anchored in interests of dignity, personality, and self-determination." ¹⁵² From early times, members of the EU have pronounced privacy protection as one of its most important goals. As far back as 1950, when now-members of the EU passed the European Convention for the Protection of Human Rights ("ECPHR"), they declared, "Everyone has the right to respect for his private and family life, his home and his correspondence." ¹⁵³ While digital privacy, of course, was not a preeminent issue in 1950, that provision gives broad respect and protection to private information generally. ¹⁵⁴ The concern about digital privacy was again manifested in the 2000 Charter, where the EU declared:

¹⁴⁷ Voss, supra note 84, at 405.

^{148.} European Parliament and of the Council Decision 854/2000, 2005 O.J.

^{149.} Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, at 2, COM (2008) 207 final (Apr. 22, 2008), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0207 (on file with the University of the Pacific Law Review).

^{150.} Id. at 9.

^{151.} See Oleg Nesterenko, EU Video Games Industry: 2018 Stats, GAME WORLD OBSERVER (Aug. 26, 2019), https://gameworldobserver.com/2019/08/26/eu-video-games-industry-2018-stats (on file with the University of the Pacific Law Review) (defining regular gamers as individuals who play more than one hour of video games per week).

^{152.} Paul M. Schwartz & Karl-Nikolaus Peifer, *Transatlantic Privacy Law*, 106 Geo. L. Rev. 115, 123 (2017).

^{153.} European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5, art. 8 § 1; 213 U.N.T.S. 221, https://www.echr.coe.int/Documents/Convention_ENG.pdf (on file with the *University of the Pacific Law Review*).

^{154.} See, e.g., European Court of Human Rights, Guide on Article 8 of the European Convention on Human Rights: Right to Respect for Private and Family Life, Home and Correspondence, https://www.echr.coe.int/documents/guide_art_8_eng.pdf (on file with the *University of the Pacific Law Review*).

Everyone has the right to the protection of personal data concerning him or her. [¶] Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 155

In addition, the Charter also affirmed its commitment to pro-consumer initiatives in the EU, providing, "Union policies shall ensure a high level of consumer protection," and the Charter became binding on the Member States by means of the TFEU. Unlike the U.S. Bill of Rights, the Charter contains many positive rights, not just negative restrictions on the government, and thus it is only natural that legislation to enforce those positive rights would be forthcoming.

The EU also has at its core the idea that its values shall be reflected externally. In the Treaty of Lisbon, the EU committed itself to idea of exporting its values externally "The Union shall respect the principles and pursue [its] objectives . . . in the development . . . of the different areas of the Union's external action[s] . . ." and it reaffirmed that those policies and objectives included data protection, "the Council shall adopt a decision laying down the rules relating to the protection of individuals with regard to the processing of personal data . . ." As such, an extraterritorial data protection law was inevitable.

V. WHAT MORE IS COMING?

The EU's regulation of digital data is not going to stop at the GDPR. Already proposed are two major digital initiatives, and the one which has gotten the most press—the Digital Services Act ("DSA")—will be discussed in this section. ¹⁶⁰ The

- 155. Charter of Fundamental Rights, supra note 14.
- 156. See generally id.
- 157. See supra note 14; EAN-CLAUDE PIRIS, THE LISBON TREATY 146 (2010).
- 158. Meg Leta Jones & Margot E Kaminski, *An American's Guide to the GDPR*, 98 DENVER L. REV. 93, 100 (2020) ("While the U.S. Bill of Rights is a list of restrictions on the government based on individual protections, the 2000 Charter of Fundamental Rights of the European Union (the Charter) includes a list of rights to services provided by the state—that is, positive rights, not just negative rights.").
 - 159. Treaty of Lisbon, supra note 28, arts. 10(a)(3), 25a.
- 160. Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and Amending Directive 2000/31/EC, at 1, COM (2020) 825 final (Dec. 15, 2020) [hereinafter DSA].

The other major digital regulation proposed by the EU Commission is the Digital Markets Act, COM/2020/842 ("DMA"). The DMA is focused more on anticompetitive practices of large platforms like Google and Amazon than the DSA. For example, it would, e.g., prohibit Amazon from listing Amazon Basics products before other products, regulate data portability between such large platforms, and increase reporting requirements for certain mergers between and acquisitions by, these platforms.

See, e.g., Jennifer Huddleston, *The Digital Markets Act: A Primer*, AM. ACTION FORUM (Apr. 7, 2021), https://www.americanactionforum.org/insight/the-digital-markets-act-a-primer/ (on file with the *University of the Pacific Law Review*).

Commission recommended passage of the DSA in its report in December 2020, and the Parliament and Commission will likely vote on it sometime in 2022. Like the GDPR, the DSA would replace a Directive, in this case the e-Commerce Directive passed in 2000. The DSA would both modernize and greatly expand the e-Commerce Directive, as explained by the Commission in the recitals to the DSA:

Since the adoption of . . . the []"e-Commerce Directive"[], new and innovative information society (digital) services have emerged, changing the daily lives of Union citizens and shaping and transforming how they communicate, connect, consume and do business. Those services have contributed deeply to societal and economic transformations in the Union and across the world. At the same time, the use of those services has also become the source of new risks and challenges, both for society as a whole and individuals using such services. ¹⁶²

The DSA is in keeping with President von der Leyen's vision of a "digital transformation" of Europe by 2030 and is quite ambitious in its goals and aggressive in its scope. 163 The DSA applies to pretty much any enterprise that is involved in data production, transmission, or collection, or what the Act calls any entity involved in "online intermediary services." However, the obligations proposed by the Act differ, depending on the size and function of the regulated enterprise. Those who are "mere conduits" or who temporarily cache information have the least obligations, while large platforms, such as Google, Apple, Facebook and the like are subject to more stringent requirements. 166 More specifically:

All entities subject to the DSA must "act responsibly" in enforcing any restrictions imposed on the use of their services, including applying any algorithms that would deny access to the services and in removing content. ¹⁶⁷ The algorithms would be accessible to the EU regulators who audit compliance. ¹⁶⁸

Those platforms which also host content must, in addition to the above, have transparent and understandable "user friendly" procedures for removing content, including an appeals process, and must provide a "statement of reasoning" when

^{161.} Council Directive 2000/31, 2000 O.J. (L 178) 43 (EC).

^{162.} DSA, supra note 160, § 1.

^{163.} Address of EU President Ursula von der Leyen, *supra* note 2, and see the quotation from that address which preceded the Introduction, *id.*

^{164.} Briefing on Digital Services Act, EUR. PARLIAMENT 1, 5 (Mar. 2021), https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689357/EPRS_BRI(2021)689357_EN.pdf, [hereinafter "Briefing"] (on file with the *University of the Pacific Law Review*).

^{165.} Id. at 5.

^{166.} Id. at 5, 7.

^{167.} Id. at 6; DSA, supra note 160, art. 12.

^{168.} DSA, supra note 160, art. 12.

content is removed or access to it is disabled.¹⁶⁹ Further, there is a "know your business customer" requirement, along with an obligation to report any suspicion of criminal offenses.¹⁷⁰ These platforms must also provide meaningful information as to why a particular user has received a targeted ad.¹⁷¹

Finally, very large online platforms (hereafter "VLOPs"), defined as those "online platforms which provide their services to a number of average monthly active recipients of the service in the Union equal to or higher than 45 million," have very stringent requirements. In addition to being subject to the requirement stated above, VLOPs will have to do a periodic assessment of: 1) potential misuse of their services, such as child pornography and the sale of counterfeit goods; 2) the impact of their policies on human rights such as freedom of expression, as expressed in any algorithmic programs for censoring content or otherwise; and 3) the intentional manipulation of their services via fake accounts and false information. In addition, they will be required to have a repository of publicly available information on any advertising displayed, including the entity on whose behalf the advertising is made and the total number of recipients of those ads. ¹⁷³ Sanctions for the intentional or negligent violation of the DSA by VLOPS are "fines not exceeding 6% of its total turnover [worldwide revenues]." ¹⁷⁴

Like the GDPR, the DSA will have a global impact. Indeed, most of the VLOPs are American-based, and the obligations to have their content algorithms audited, takedown procures inspected, and advertising practices publicly displayed could seriously change the way these companies do business. ¹⁷⁵ But it is yet another example illustrating the Eu's outsized influence in regulating multinational corporations in the digital space, and the influence of the EU in that area in twenty-first century contracting.

^{169.} Briefing, *supra* note 164, at 6; DSA, *supra* note 160, arts. 14–17.

^{170.} Briefing, supra note 164, at 7; DSA, supra note 160, arts 21-22.

^{171.} Briefing, supra note 164, at 7, DSA, supra note 160 arts. 23–24.

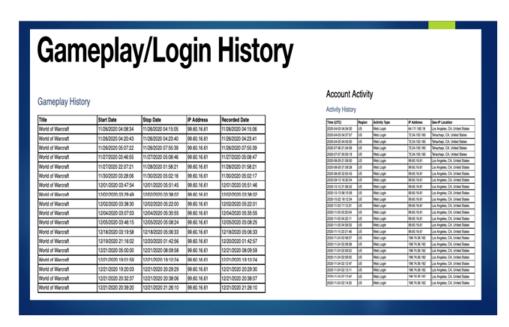
^{172.} DSA, *supra* note 160, art. 25. Apple, Alphabet, Facebook, YouTube, Amazon, Twitter, and TikTok would likely be VLOP under this definition. *EU Countries Agree on Common Stance on New Rules for US Tech Giants*, IRISH TIMES, (Nov. 25, 2011), https://www.irishtimes.com/business/technology/eu-countries-agree-on-common-stance-on-new-rules-for-us-tech-giants-1.4738810 (on file with the *University of the Pacific Law Review*); *How the EU's Sweeping New Regulations Against Big Tech Could Have an Impact Beyond Europe*, TIME (updated Dec. 30, 2020, 9:13 AM), https://time.com/5921760/europe-digital-services-act-big-tech/ (on file with the *University of the Pacific Law Review*).

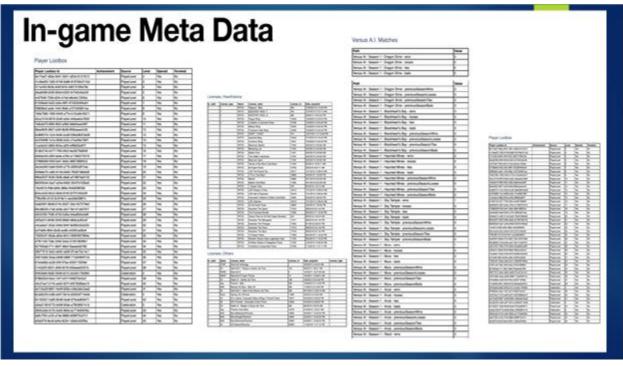
^{173.} Briefing, supra note 164, at 7; DSA, supra note 160, arts. 26–33.

^{174.} DSA, supra note 160, art. 59.

^{175.} See, e.g., Michael Birnbaum, E.U. Proposes Sweeping New Rules for Online Business that Could Force Fundamental Changes for Digital Giants, WASH. POST (Dec. 15, 2020), https://www.washingtonpost.com/world/europe/eu-tech-google-amazon-facebook/2020/12/15/fb0321d6-3e4c-11eb-b58b-1623f6267960_story.html (on file with the University of the Pacific Law Review) ("The European Union on Tuesday unveiled sweeping new rules for online businesses that could force fundamental changes in the business practices of digital giants such as Google, Facebook, Apple and Amazon. The new rules would overhaul the basic legal framework through which companies conduct their digital business...").

APPENDIX: EXAMPLES OF DATA COLLECTED BY VIDEOGAME DEVELOPERS





* * *

Reimagining Power Imbalance in California's Beer Distribution Laws

by Daniel J. Croxall*

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I. Introduction

Beer distribution is a tricky business for both the distributor and the beer manufacturer. It is even more tricky for the manufacturer when that brewer is a "craft" brewer who holds little-to-no market power and thus commands little-to-no attention from distributors. Distributors make their money on volume. And when the scales of beer production are put into perspective, most craft breweries are but a blip on a distributor's radar screen. The result is that the craft brewer is at a major disadvantage in terms of attention from the distributor and therefore shelf space placement and tap handle allocation. The market is getting extremely difficult for small craft brewers for several reasons, not the least of which is a set

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^{1.} The Brewer's Association defines a craft brewer as follows: (1) Small: "Annual production of 6 million barrels of beer or less (approximately 3% of U.S. annual sales). Beer production is attributed to the rules of alternating proprietorships:" (2) Independent: "Less than 25[%] of the craft brewery is owned or controlled (or equivalent economic interest) by an alcohol industry member that is not itself a craft brewer." (3) Brewer: "Has a TTB Brewer's Notice and makes beer." *See Craft Brewers Definition*, BREWERS ASS'N, https://www.brewersassociation.org/statistics/craft-brewer-defined/ (last visited Mar. 5, 2022) (on file with the *University of the Pacific Law Review*). For the purposes of this article, "Big Beer" also means beer distributors who distribute primarily or solely distribute macro beer products. To put this into perspective, the vast majority of craft breweries produce less than 5,000 barrels of beer annually. *See Number of Brewers by Production Size – CY 2016*, U.S. DEP'T OF THE TREASURY: ALCOHOL & TOBACCO TAX & TRADE BUREAU (Mar. 31, 2021), https://www.ttb.gov/images/pdfs/statistics/production_size/2020_brew_prod_size_ttb_gov.pdf (on file with the *University of the Pacific Law Review*).

^{2.} See id.

of laws found in the California Business and Professions Code that are designed to "protect" distributors from an alleged power imbalance that arguably once existed that benefitted brewers to the detriment of distributors.³ That power imbalance, if it ever existed, does not exist today.

The time has come for the California Legislature to reimagine its beer distribution laws. They needlessly protect the middle tier of the alcohol market, distributors, to the severe economic disadvantage of the first tier, manufacturers. While money obviously speaks in the halls of the Legislature, elected officials should look at the larger picture. They need to realize the economic benefits of the craft brewing industry in terms of taxes and jobs, and thus the Legislature can and should revise California's distribution law before the craft brewing industry becomes yet another economic extinction. That is not an exaggeration.

A. The Three-Tier System and Current Law

Almost every state and the US federal government adopted versions of what is known as "the three-tier system" to minimize formerly rampant unfair business practices in the alcoholic beverage market that were very common prior to Prohibition and to ostensibly promote temperance among American drinkers.⁵ Under the three-tier system, manufacturers (known as tier one), wholesalers (known as tier two), and retailers (known as tier three) cannot perform the privileges of the other tiers, and they are prohibited from exerting any undue influence over members of the other tiers.⁶ Stated differently, the main ideas behind the three-tier system were that a manufacturer cannot distribute or sell beverages for retail, a distributor cannot manufacture or sell for retail, and a retailer cannot manufacture or distribute alcoholic beverages.⁷

Maintaining distance between the tiers is intended to prohibit retail outlets from favoring to large manufacturing interests through undue pressure and influence at the expense of smaller market competitors. The three-tier system is supposed to protect consumers from being inundated with only one company's products or having their choices limited because the retailer owes the distributor or manufacturer loyalty, while simultaneously minimizing aggressive marketing

^{3.} See Cal. Bus. & Prof. Code §§ 25000.1–25000.9 (West 2022).

^{4.} For example, as of July 2021, California alone had 1100 craft breweries within its borders that provided over sixty-five thousand jobs with a total economic impact in our state of \$9.66 billion. *Craft Beer Statistics*, CAL. CRAFT BREWERS ASS'N, https://californiacraftbeer.com/ca-craft-beer/craft-beer-statistics/ (last visited Mar. 9, 2022) (on file with the *University of the Pacific Law Review*).

^{5.} See, e.g., Mo. Broadcasters Ass'n v. Schmitt, 946 F.3d 453 (8th Cir. 2020); Retail Digit. Network v. Prieto, 861 F.3d 839, 843 (9th Cir. 2017); Actmedia, Inc. v. Stroh, 830 F.2d 957, 958 (9th Cir. 1986).

^{6.} See Prieto, 861 F.3d at 850-51.

^{7.} See Schmitt, 946 F.3d at 456.

^{8.} Prieto, 861 F.3d at 850-51.

techniques that large manufacturers are known to employ, furthering states' interests in promoting temperance.⁹

With respect to beer specifically, the situation is more acute than with other alcoholic beverages. Independent craft beer has been a major financial challenge for large corporate manufacturers who have in turn placed increased pressure of distributors to focus their sales attention on the larger brands instead of smaller craft breweries. ¹⁰ More specifically, independent craft beer has taken a large chunk of the overall U.S. beer market from Big Beer in a short period of time, and Big Beer exerts its significant influence over distributors to help quell the tide. ¹¹ To illustrate, we can look to the relatively recent proliferation of breweries springing up and taking market share from many of the bigger names often associated with beer. ¹² Brands such as Budweiser, Coors, and Miller have seen their collective dominance reduced as competition increases and consumer trends shift. ¹³

Following Prohibition, a multitude of breweries began to fill the vacuum left by the failed constitutional amendment. However, diversity in the marketplace dwindled. Consolidation of manufacturers is obvious when looking at market shares from 1947—when the top ten producers controlled 19% of the beer market—to 1978—when the same metric ballooned to 92.3%. ¹⁴ By 1979, a total of 44 companies produced beer throughout the nation, with ten of those companies controlling over 90% of the market; in short, a handful of breweries dominated essentially the entire market. ¹⁵ Indeed that is why distributors lobbied to have the laws changed to give them legislative protections from manufacturers.

Interest in producing beer on a smaller scale began to reemerge following the passage of H.R. 1337, which legalized the home production of a small amount of beer or wine for personal consumption. ¹⁶ Starting in 1980, the tides began to change, setting the foundations for the real growth of craft beer. For the next two decades, hundreds of breweries opened across the country; however, in 2000, three

^{9.} Stroh, 830 F.2d at 960.

^{10.} See Craft Beer vs. Big Beer, CRAFT BEV. CONSULTANTS, https://craftbeverageconsultants.com/2015/01/craft-beer-vs-big-beer/ (last visited Mar. 9, 2022) (on file with the University of the Pacific Law Review) (defining Big Beer to include large corporate brewers and their "subcompanies").

^{11.} National Beer Sales & Production Data, BREWERS ASS'N, https://www.brewersassociation.org/statistics-and-data/national-beer-stats/ (last visited Dec. 15, 2020) (on file with the University of the Pacific Law Review).

^{12.} Beer Volume Declines Continue, Despite Gains in Craft and Imported Brews, PR NEWSWIRE (Oct. 10, 2018, 6:00 AM), https://www.prnewswire.com/news-releases/beer-volume-declines-continue-despite-gains-in-craft-and-imported-brews-300727917.html (on file with the *University of the Pacific Law Review*).

^{13.} Saabira Chaudhuri, *Budweiser Brewer Shares Dive as It Loses More U.S. Market Share*, WALL ST. J. (Feb. 27, 2020 at 6:34 AM), https://www.wsj.com/articles/budweiser-brewer-takes-profit-hit-loses-more-u-s-market-share-11582793027.

^{14.} Douglas F. Greer, *The Causes of Concentration in the Brewing Industry*, 21 Q. REV. OF ECON. & BUS. 87, 88–89 (1981).

^{15.} Douglas F. Greer, *Beer: Causes of Structural Change*, in INDUSTRY STUDIES 28, 32 tbl.2.1 (Larry Duetsch, ed., 1998).

^{16.} H.R. Res. 1337, 95th Cong. § 2(B)(1)(e) (1978) (enacted).

firms still controlled 81% of the market.¹⁷ While the growing number of breweries did not impact the major players for the first twenty years, that would change beginning in 2000. By 2014, craft beer had ballooned to include 3,418 breweries who collectively enjoyed 19.3 domestic market share.¹⁸ This number has continued to grow year over year, and while its growth has slowed, craft beer continues to eat away at Big Beer's dominance. Even while the United States sees an overall decline in the consumption of beer, craft and independent breweries continue to make incremental gains on the market leaders.¹⁹ By 2019, there were over 8,000 craft and independent brewers that account for over 25% of the 116-billion-dollar market.²⁰

II. CURRENT LAW AND JUSTIFICATIONS

A. The State of the Law Today

Current law heavily favors the second tier (distributors) over the first tier (manufacturers) and specifically puts small craft breweries in an economically untenable position.²¹ Through powerful lobbies such as the National Beer Wholesalers Association ("NBWA") and others, distributors have been able to carve out legislative benefits that drastically shift the power balance between them and manufacturers in the distributor's favor.²²

In California, contracts between manufacturers and distributors do not operate as ordinary business contracts. Instead, they more closely resemble franchise agreements.²³ California has specifically enacted several laws that favor distributors. Perhaps the most important legislative gift that the wholesaler's lobby has given to the wholesalers in California is exclusivity within a given territory.²⁴ Essentially, this means that only one distributor can sell, transfer, and deliver a manufacturer's beer in a specific territory.²⁵ To be precise, California Business and

^{17.} Martin Stack, *A Concise History of America's Brewing Industry*, ECON. HIST. ASS'N (July 3, 2004), https://eh.net/encyclopedia/a-concise-history-of-americas-brewing-industry/ (observing America's largest brewers produced—in millions of barrels—Anheuser-Busch: 99.2, Miller: 39.8, Coors: 22.7; with Total Domestic Sales of 199.4 million barrels).

^{18. 2014} Craft Beer Data Infographic, BREWERS ASS'N, (Mar. 16, 2015), https://www.brewersassociation.org/association-news/2014-craft-beer-data-infographic/ (on file with the University of the Pacific Law Review).

^{19.} National Beer Sales & Production Data, supra note 11.

^{20.} Id.

^{21.} See Cal. Bus. & Prof. Code §§ 25000.1–25000.9 (West 2022).

^{22.} Daniel Croxall, *It's Time to Reimagine Craft Beer Distribution Contracts*, CRAFT BEER LAW PROF (Sept. 23, 2021), https://www.craftbeerprofessor.com/2021/09/its-time-to-reimagine-craft-beer-distribution-contracts/ (on file with the *University of the Pacific Law Review*).

^{23.} See generally Daniel Croxall, Independent Craft Breweries Struggle Under Distribution Laws that Create a Power Imbalance in Favor of Wholesalers, 402 Wm. & MARY L. Rev. 418 (2021).

^{24.} See CAL. Bus. & Prof. Code § 25000.5 (West 2022) ("Beer manufacturers; designation of territorial limits; conditions for sale of any given brand").

^{25.} Id. (declaring that beer manufacturers "shall designate territorial limits in the state within which the

Professions Code states that a distributor cannot distribute beer in any given territory of the state unless "[t]he wholesaler has first entered into a written agreement with the manufacturer of that brand, which sets forth the territorial limits within which the brand shall be distributed *by the wholesaler*." In practice, this means that a manufacturer cannot simply take her business elsewhere if the wholesaler is doing a poor job. Instead, the manufacturer is essentially stuck with one wholesaler per territory. Exclusivity can thus be extremely detrimental to a manufacturer.

One might just assume that if a wholesaler is doing a sub-par job in a given territory, the manufacturer could just terminate the contract and hire another distributor. That is not the case. The wholesaler's lobby has ensured that terminating a distribution agreement is next to impossible for a manufacturer. Specifically, California Business and Professions Code section 25000.7 codifies that a manufacturer cannot terminate a contract without liability for the main reason a manufacturer would want to—poor performance. Section 25000.7 states as follows:

Notwithstanding the provisions of any agreement for the sale and distribution of beer between a beer manufacturer and a beer wholesaler, no sale or distribution agreement shall be terminated solely for a beer wholesaler's failure to meet a sales goal or quota that is not commercially reasonable under the prevailing market conditions.³⁰

Lack of sales is obviously the key reason that a manufacturer would want to terminate a distributor contract. In practice, this means that a manufacturer will almost certainly be liable for terminating a distribution contract.³¹ It is quite easy for a distributor to make an argument that the manufacturer's expectations were not "commercially reasonable." And keeping in mind that most craft breweries operate on extremely tight budgets and margins because they are very small,³² craft breweries cannot afford to litigate these matters, especially in the face of potential damages at the end of the tunnel.

brands of beer manufactured by [the manufacturer] may be sold by wholesalers of beer to customers").

^{26.} Id. at § 25000.5(b)(1) (emphasis added).

^{27.} See id. Manufacturers and wholesalers are free to determine a "territory" for themselves. Most often, in the author's experience, counties are designated as territories for these purposes.

^{28.} See CAL. BUS. & PROF. CODE § 25000.7 (West 2022) ("Agreements for sale or distribution of beer; failure to meet sales goal or quota; termination of agreement prohibited").

^{29.} Id.

^{30.} Id. (emphasis added).

^{31.} See, e.g., Mission Bev. Co. v. Pabst Brewing Co., 15 Cal. App. 5th 686, 699 (2d Dist. 2017).

^{32.} See Number of Brewers by Production Size – CY 2020, U.S. DEP'T OF THE TREASURY: ALCOHOL & TOBACCO TAX & TRADE BUREAU (Mar. 31, 2021), https://www.ttb.gov/images/pdfs/statistics/production_size/2020_brew_prod_size_ttb_gov.pdf (on file with the University of the Pacific Law Review) (reporting that most brewers produce less than 1,000 barrels per year).

There are several other legislative gifts that the distributor's lobby has obtained for distributors at the expense of manufacturers.³³ But the two described above are perhaps the most onerous on craft brewers because of the expense and the risk of litigation. For most craft breweries, attempting to terminate a distribution contract would be a "bet-the-company" scenario that is unlikely to resolve in the breweries' favor—a risk that small breweries cannot afford to take.

B. Alleged Justifications for Legislative Gifts to Distributors

The legislative history surrounding the passage of statutes adjusting the power balance in the beer market in favor of distributors reveals several interesting, but not surprising things. As one might expect, industry supporters of these bills include the usual suspects—distributors themselves and big companies who stood to benefit from increased distributor power over manufacturers.³⁴ That's not surprising. But the justifications provided in the legislative history are surprising when viewed against today's marketplace. In short, the justifications fail and literally no longer make sense.

First, a review of the legislative history behind the relevant statutes, ³⁵ shows that it was a very limited and very special interest that supported the bills designed to tip the scales away from manufacturers. ³⁶ Specifically, the primary supporter of these bills was the California Beer and Beverage Distributors ("CBBD")—a non-profit trade association representing distributors and related groups. ³⁷ The CBBD appears relatively innocuous, but it is an advocacy group with constituents. ³⁸ Perhaps quite predictably, other supporters of the Senate bill included Coors Brewing Company, Miller Brewing Company, and Anheuser Busch. ³⁹ One might wonder why a large manufacturer would support such a bill. The answer is because it helps them garner power in the market. Specifically, large manufacturers like

^{33.} For example, distributors can sell distribution rights to other distributors, and the manufacturer cannot object unless it is commercially reasonable to do so. *E.g.*, CAL. BUS. & PROF. CODE § 25000.9 (West 2022) ("Any beer manufacturer who unreasonably withholds consent or unreasonably denies approval of a sale, transfer, or assignment of any ownership interest in a beer wholesaler's business with respect to that manufacturer's brand or brands, shall be liable in damages to the beer wholesaler. Recoverable damages under this section shall not exceed the compensatory damages sustained by the wholesaler and the wholesaler's costs of suit. The fair market value of the beer wholesaler's business shall include, but is not limited to, its goodwill, if any.").

^{34.} See ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 1957, at 4 (Aug. 21, 2000) (listing Anheuser-Busch Companies, Inc. and Coors Brewing Company as supporters).

^{35.} CAL. BUS. & PROF. CODE §§ 25000.3—25000.9 (West 2022).

^{36.} ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 1957, at 2 (Aug. 21, 2000).

^{37.} See generally About CBBD, CAL. BEER & BEV. DISTR, https://www.cbbd.com/CBBD/Get_to_Know_CBBD/About%20CBBD/CBBD/About_CBBD.aspx (last visited Mar. 5, 2022) (on file with the *University of the Pacific Law Review*).

^{38.} Id.

^{39.} ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF SB 1957, at 4 (Aug. 21, 2000).

AB-InBev and Coors have their own distribution arms.⁴⁰ Thus, not allowing small manufacturers to terminate contracts for poor performance helps larger manufacturing and distribution entities maintain their market positions. In addition, because wholesalers make their money on volume, high volume manufacturers will naturally garner the favor of distributors over smaller manufacturers who produce less volume.

The August 18, 2000 Bill Analysis from the Assembly Committee on Governmental Organization sets for the alleged justification for changing the law to favor distributors. The Committee's analysis states as follows: "According to the California Beer and Beverage Distributors, the primary supporter of this legislation, the purpose of this bill is to help restore balance in the relationship between beer manufacturers and distributors/wholesalers." ⁴¹ Moreover, the same analysis states that "[r]ecent market developments have seen beer manufacturers grow larger through consolidation and globalization, while beer wholesalers have generally retained their same marketing territories and have not enjoyed parallel growth."⁴² Perhaps the most telling part of all of this is when the Bill Analysis cuts to the chase and states the real reason behind the legislative gift: "Beer wholesalers are dependent for their livelihood on retaining the distribution rights to the major brands in their portfolio."43 There it is. That's the point. Distributors do not make their primary income form craft brewers. Therefore, naturally, their attention and loyalty will be with the larger manufacturers. Small breweries are left to pick up the scraps. As described below, the foundational justifications for government intervention into the market and handing distributors a power boost simply does not exist in today's market. Indeed, the market conditions are now precisely opposite than those the bill sponsors introduced for Senate Bill 1957 (2000).

III. CONSOLIDATION: AN UNANTICIPATED SCENARIO

The laws favoring distributors described above have gone too far. Indeed, the perceived power imbalance that once arguably existed remains no more. Instead, the power dynamics of the alcoholic beverage industry—most acutely perhaps in beer—has been flipped on its head. Distributors who once might have claimed that manufacturers (i.e., brewers) have an unfair advantage in the market over distributors simply cannot make that argument any longer.⁴⁴ The conditions of the

^{40.} Anheuser-Busch Wholesaler Locator, ANHEUSER-BUSCH, https://www.abwholesaler.com/common/wholesaler-locator/ (last visited Mar. 5, 2022) (on file with the University of the Pacific Law Review); COORS DISTRIB. CO., https://www.cdccoors.com (last visited Mar. 5, 2022) (on file with the University of the Pacific Law Review).

⁴¹. Assembly Committee on Governmental Organization, Committee Analysis of SB 1957, at 2 (Aug. 21,2000).

^{42.} Id.

^{43.} *Id.* at 2–3.

^{44.} See Kate Bernot, Stuck in the Middle with Who?, Pt. 2 – What California's Distribution Consolidation Could Mean for Breweries, GOOD BEER HUNTING (Mar. 5, 2020),

alcoholic beverage market have changed so dramatically that the very foundation of the laws giving artificially benefiting distributors cannot be sustained.

The primary reason for the changed circumstances in the market can be boiled down to one word: consolidation. As noted above, distributors used to claim that they need legislative contractual protections, much like those of franchisees, because the multitude of manufacturers left distributors at the mercy of manufacturer's whims. Over the last five years, and over the last year in particular, the distribution arm of the three-tier system, has been trending towards a duopoly. In fact, where California used to have many distributors throughout the state willing and able to distribute beer, two companies now essentially dominate the market. Those companies are AB-InBev's distribution arm and Reyes Beverage Group. The fear is that one or two companies—Reyes and AB InBev—will have an outsized influence on which beers the majority drinkers see in coolers. That's already true; the question is whether it is illegal. Antitrust issues aside, the root of this problem stems from the outdated and unfair laws giving distributors insurmountable power over the breweries in their portfolios.

Kate Bernot, one of the beer industry's recognized industry experts, provides some essential background to this issue. "Distributor consolidation in California accelerated in 2020, capping a two-year stretch in which Reyes Beverage Group acquired 10 wholesalers up and down the state." While a company acquiring *ten* competitors in a year might seem glaring, when put into context, the point is even more stark. "Through four significant acquisitions last year, Reyes added 12.65 million case equivalents in California—nearly as much Coors Banquet as was sold *in the entire U.S. in 2019*." If one stops to think about that statistic, it becomes quite clear where the power lies in the distribution arm of the industry. In 2020 alone, "Reyes wholesalers were selling 1.6 times as much beer in California as AB-InBev-aligned (ABI) distributors, controlling 43% of all beer sold in the state, per Beer Marketer's Insights." In 2021, that number is almost 50% of all the beer sold in the state.

https://www.goodbeerhunting.com/sightlines/3/5/what-californias-distribution-consolidation-could-mean-for-breweries (on file with the *University of the Pacific Law Review*).

- 47. Id.
- 48. *Id*.
- 49. Id.
- 50. *Id*.
- 51. *Id*.
- 52. Bernot, supra note 46.
- 53. Tom McCormick, Consolidation in California Leads to Wholesaler Association Split, PRO BREWERY

 $^{45. \ \}textit{See} \ \textit{ASSEMBLY} \ \textit{Committee} \ on \ \textit{Governmental Organization}, \ \textit{Committee} \ \textit{Analysis} \ of \ \textit{SB} \ 1957, \ \textit{at} \ 4 \ (\textit{Aug.} \ 21, 2000).$

^{46.} See Kate Bernot, Golden Opportunity — California Tensions over Consolidation, Stay-At-Home Orders, Cannabis Provide National Case Studies, GOOD BEER HUNTING (Jan. 19, 2021), https://www.goodbeerhunting.com/sightlines/2021/1/19/california-tensions-over-consolidation-covid-cannabis (on file with the University of the Pacific Law Review).

AB-InBev, another huge player in the distribution market, is a bit handcuffed in the distribution tier. "Antitrust laws [mean]that AB InBev can wholly own only 5% of its distribution; Reyes doesn't have such a limitation." ⁵⁴

This consolidation creates market accessibility problems for the state's roughly 1,100 craft breweries.⁵⁵ As a member of the California Family Beer Distributors, a small distributor trade and lobbying group, put it, "Our businesses came together out of rising concerns around monopolistic business practices, such as forced consolidation, decreased access to market for craft brewers and loss of local jobs at large."⁵⁶ Because distributors, especially large distributors, earn their profits on volume not quality,⁵⁷ continued consolidation means that small breweries will have an increasingly hard time getting the attention of their distributors. Frankly, big distributors "regard (small brewers) as a pain in the ass."⁵⁸ Moreover, "Critics of distributor consolidation say Reyes' seemingly inexorable momentum and growth are slowly giving it control of the majority of shelves—and with it, control of drinkers' access to choice, and outsized influence in setting shelf resets."⁵⁹ It is perhaps commonsense or even human nature that a business is going to favor higher earners over lesser ones.

All this consolidation thus undercuts the alleged justifications for giving distributors statutory power over their manufacturing partners. More specifically, the argument that manufacturers have an unfair power position over distributors is simply false because

consolidation within the distribution industry arguably is having an even greater effect on beer drinking in the United States. The country has far more breweries than ever before—8,800, up from about 1,800 in 2010, a stunning fivefold increase in just over a decade—but most craft beer is limited to the region where it's brewed.⁶⁰

⁽Jan 19, 2021), https://www.probrewer.com/beverage-industry-news/distribution-and-retail/consolidation-in-calif-leads-to-wholesaler-association-split/ (on file with the *University of the Pacific Law Review*).

^{54.} Bernot, supra note 44.

^{55.} See Craft Beer Statistics, supra note 4 (noting that California has more craft breweries than any other state).

^{56.} California's Family-Owned Beer Distributors Launch New Association, CAL. FAM. BEER DISTRIBS. (Dec. 7, 2020), https://californiafamilybeerdistributors.com/news/californias-family-owned-beer-distributors-launch-new-association (on file with the *University of the Pacific Law Review*).

^{57.} Chris McClellan, *Mounting Pressure*, BREW ENTHUSIAST (June 23, 2018), https://www.thebrewenthusiast.com/blog/2018/6/19/mountingpressure (on file with the *University of the Pacific Law Review*)

^{58.} Chuck McFadden, *Beer Battle Brewing over Distribution*, CAPITOL WEEKLY (Jan. 25, 2021), https://capitolweekly.net/beer-battle-brewing-over-distribution/ (on file with the *University of the Pacific Law Review*).

^{59.} Bernot, supra note 46.

^{60.} Matt Krupnick, *There Are Nearly 9,000 Craft Breweries in the US – But Big Beer Dominates*, GUARDIAN (Oct 21, 2021, 6:00 AM), https://www.theguardian.com/environment/2021/oct/21/craft-breweries-face-big-obstacles (on file with the *University of the Pacific Law Review*).

This is thus the inverse of the justification the distributors provided the legislature when seeking California's current favorable laws. There can be no legitimate complaining that manufacturers wield an unfair bargaining position in this environment.

IV. WHAT CALIFORNIA SHOULD DO

The time has come for California to recognize that market conditions have been turned on their head since the passage of these pro-distributor laws. In fact, several states have recognized the economic reality and have changed their law to provide more equal bargaining power between distributors and manufacturers. Perhaps more than any other, Vermont has recently led the way in terms of fixing any overcorrections that no longer make sense. California should follow Vermont's footsteps and undue the harm that its legislative gifts are inflicting upon small craft brewers.

In 2019, Vermont passed a law aimed at re-leveling the power dynamics between distributors and wholesalers. 63 Essentially, Vermont changed its law to eliminate a distributor's unilateral transfer protections described above. That is, Vermont decided it was imprudent to allow distributors to simply sell their distribution rights to another distributor despite a manufacturer's views. Vermont Statutes Annotated, Title 7, section 707 ("Section 707") essentially gives a manufacturer a procedure to object to a distributor's attempt to sell the distribution rights where one did not exist before.⁶⁴ Section 707 requires the distributor to provide notice to the manufacturer that, among other things, outlines the "qualifications of the proposed transferee which, in the opinion of the wholesale dealer, make the proposed transferee competent to operate the franchise."65 In addition, in the event the manufacturer does not wish the proposed new distributor to distribute its beer, Section 707 provides the manufacturer with the ability to "petition the Superior Court for a hearing no later than 60 days prior to the date of the proposed sale or transfer. The petition shall clearly state the . . . manufacturer's reasons for resisting the proposed sale or transfer."66 This represents a marked return to equilibrium from what wholesalers have been able to achieve in terms of legislative gifts throughout the country.

Vermont did so for the reasons mentioned above—namely, the justification for favoring distributors legislatively no longer makes any sense. Specifically, the legislative history reveals that the Vermont Legislature passed Section 707 to address the power imbalance that it had created in years passed that favored

^{61.} See, e.g., Vt. Stat. Ann. tit. 7 § 707 (West 2022).

^{62.} See id.

^{63.} See id.

^{64.} Id.

^{65.} Id.

^{66.} Id.

distributors.⁶⁷ First, the legislature recognized that Vermont's pro-distributor laws "were enacted in 1976 when there were 103 breweries nationally, with five dominant national brewers, compared to roughly 5,000 distributors throughout the United States When Vermont's franchise laws were enacted, they protected the public welfare by *correcting an imbalance in the economic and bargaining power* between large national brewers and wineries and smaller local wholesale distributors in order to promote fair business relations."⁶⁸

Vermont, however, wisely also recognized that times have changed and are essentially opposite from the market conditions in 1976.⁶⁹ "In the decades since then [1976], the numbers of breweries and wineries compared with wholesalers have nearly reversed."⁷⁰ Further, with respect to consolidation, the Legislature noted that, "Each of the three largest Vermont beer wholesalers serves the entire State and represents hundreds of beer brands."⁷¹

As argued above, the power imbalance that once might have existed in favor of manufacturers and thus resulted in the legislative power structure favoring distributors is no more. The Vermont Legislature expressly recognized that,

The significant imbalance in economic and bargaining power that the franchise laws were adopted to address is absent from the dynamics between wholesale distributors and the many small and regional craft brewers and vinous beverage producers that have entered the marketplace. Therefore, the policy reasons that supported adoption of the franchise laws do not apply to a growing segment of smaller brewers and vinous beverage producers that wish to sell their products in Vermont.⁷² Accordingly, Vermont passed Section 707 to restore balance in the manufacturer and distributor relationship. If Vermont can see that distributors have been handed free power over craft brewers, California should be able to do the same. As Vermont has recognized and other states should, such legislation has outlived its alleged usefulness and must be fixed if craft breweries are to survive.

V. CONCLUSION

The market just isn't what it used to be. The dramatic increase of craft breweries over the last decade juxtaposed with the increased consolidation and reduction in distributors have flipped the power dynamic on its head. Unlike in the

^{67.} See H. 710, 2018 Leg., 2017-2018 (Vt. 2018) https://legislature.vermont.gov/Documents/2018/Docs/BILLS/H-0710/H-0710%20As%20Introduced.pdf (on file with the *University of the Pacific Law Review*).

^{68.} Id. (emphasis added).

^{69.} *Id*.

^{70.} Id.

^{71.} *Id*.

^{72.} Id.

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1970s, distributors now wield all the power in the beer market while craft brewers have next to none. Accordingly, the time has come to abandon legislative gifts that distributors typically enjoy, such as transfer protections, termination protections, and exclusivity to promote a healthy market where craft brewers do not have to beg and plead for shelf placement. Unless states change their schema, craft brewers will not survive the great distributor consolidation of the early 2020s.

Contracting in the New Economy: What is New? Why the Need to Change? And a Suggested Approach for Creating Strategic Contracts

Kate Vitasek* and David Frydlinger**

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I. THE NEW ECONOMY: WHAT IS REALLY NEW?

The term "the New Economy" was popularized in a 1983 cover article in *Time*, titled "The New Economy," which described the transition from heavy industry to a new technology-based economy. Over twenty years later, the term the New Economy is still used to describe new business trends and evolutions impacting how organizations do business.

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^{1.} Charles P. Alexander, *The New Economy*, TIME (May 30, 1983), http://content.time.com/time/subscriber/article/0,33009,926013,00.html (on file with the *University of the Pacific Law Review*).

So just what has changed that calls for contracting professionals to rethink their strategic contracts?

For starters, today's markets are more *global*. In the past, markets were smaller and more confined by national boundaries. Globalization has torn down these boundaries.² While national market segmentations still exist, today's markets are generally geographically much more diverse than in the past. The World Bank created the trade openness index—an economic metric calculated as the ratio of a country's total trade (the sum of exports plus imports) to the country's gross domestic product—across various countries. To put it into perspective, U.S. trade grew from \$1.85 trillion in 2010 to \$2.38 trillion in 2019. The data reports exponential trade growth across most countries.³

Today's trade markets are also more *outsourced*. The shift to outsourcing got a boost in 1989 when management guru Peter Drucker eloquently argued in his Wall Street Journal article that organizations should "Sell the Mailroom." A year later, Prahalad and Hamel argued that corporations should focus on their core competencies in a highly influential *Harvard Business Review* article. CEOs around the world began to mandate, "do what we do best and outsource the rest."

The result? Outsourcing exploded. By 2020 the global business process outsourcing market size was valued at \$232.32 billion, and it is expected to register a compound annual growth rate (CAGR) of 8.5% from 2021 to 2028. Today's organizations have a virtual network of suppliers and business partners around the globe that manage critical functions such as manufacturing, distribution, IT, facilities management, finance, HR, and more.

While outsourcing is growing, how organizations are outsourcing is also changing. Companies are shifting to strategic—not just tactical—outsourcing. The energy conglomerate BP and the Swedish Telco Telia offer good examples of this evolution in practice. In 2018, BP had outsourced its facilities management operations to six different regional suppliers. Five of the contracts were structured as approved provider models using a transactional contract, and one supplier

^{2.} See generally Thomas Friedman, The World is Flat (1st ed. 2005).

^{3.} See Esteban Ortiz-Ospina & Diana Beltekian, Trade and Globalization, OUR WORLD IN DATA, https://ourworldindata.org/trade-and-globalization#trade-around-the-world-today (last visited Jan. 21, 2022) (on file with the University of the Pacific Law Review) (referencing chart entitled "[v]alue of exported of goods and services, 1960 to 2020").

^{4.} Peter F. Drucker, *Sell the Mailroom*, WALL St. J., (July 25, 1989), http://www.wsj.com/articles/SB113202230063197204 (on file with the *University of the Pacific Law Review*).

^{5.} See C.K. Prahalad & Gary Hamel, The Core Competencies of the Corporation, HARV. BUS. REV., May–June 1990, at 79, reprinted in C.K. Prahalad & Gary Hamel, The Core Competence of the Corporation, HARV. BUS. REV. (2003),

 $https://edisciplinas.usp.br/pluginfile.php/5245277/mod_folder/content/0/The%20core%20competente_Prahalad %20and%20Hamel%201990.pdf?forcedownload=1 (on file with the \textit{University of the Pacific Law Review)}.$

^{6.} Business Process Outsourcing Market Size, Share & Trends Analysis Report by Service Type (Customer Services, Finance & Accounting), By End-use (IT & Telecommunication, BFSI), By Region, And Segment Forecasts, 2021–2028, GRAND VIEW RSCH., https://www.grandviewresearch.com/industry-analysis/business-process-outsourcing-bpo-market (last visited Jan. 21, 2022) (on file with the University of the Pacific Law Review).

operated under a Performance-Based Agreement. In 2020 BP signed a highly strategic Vested Outsourcing agreement with JLL to be their global strategic partner. Their goal? Rather than simply perform out-tasked services, JLL would invest to help BP transform their corporate real estate and workplace operations services. Under the outcome-based agreement, the parties jointly identified six Desired Outcomes—including one goal where the parties would invest in sustainability initiatives to help BP achieve a net-zero carbon footprint by 2050.

Like BP, Telia also shifted from an approved provider model to a strategic Vested Agreement with Veolia. Under the agreement Veolia and Telia agreed on five Desired Outcomes with the goal to collaboratively transform Telia's network facilities and maintenance operations.⁸

Organizations' supply chains are also more *complex*. The last century's mass-market economy depicted by Henry Ford's proclamation, "My customer can have a car painted any color he wants so long as it is black," is no longer viable. *The* customer no longer exists. Rather, today's market economy includes many customers with different tastes that change in unpredictable ways. Companies like Nike are responding with programs such as the 'Nike By You' program, which allows customers to customize their shoes. Other companies have made entire businesses out of serving the 'long tail' of customer demand.

Consumer and businesses markets are *faster paced* than ever before. The speed of the market—and market changes—is astonishing. New products and services can become obsolete in a matter of months. For instance, Samsung released 56 new models in 2014, which is 3–5 models each month. And Apple has long been known for introducing a new iPhone approximately every year.

Innovation is also expected in business-to-business relationships. While innovation has always been important, innovation is now an imperative, requiring that organizations be flexible and responsive to change. For example, P&G and its strategic facilities and real estate management service provider JLL, go so far as to have an innovation metric to measure the effectiveness of how they come up

^{7.} Joanne Bestall, *BP and JLL Sign Multi-Year Vested Workplace Evolution Agreement*, JLL (Nov. 23, 2020), https://www.us.jll.com/en/newsroom/bp-and-jll-sign-multiyear-vested-workplace-evolution-agreement (on file with the *University of the Pacific Law Review*); EP Business in Hospitality, *Why Vested? in Discussion with BP and JLL*, YOUTUBE (Aug. 18, 2021), https://www.youtube.com/watch?v=ClO9cjK_D7g&t=5s.

^{8.} Kate Vitasek & William DiBenedetto, *Telia and Veolia: From Supplier to Strategic Partner*, UNIV. OF TENN., (2018), https://www.vestedway.com/wp-content/uploads/2018/10/Telia-Veolia-case-study-Sept-29-2018.pdf (on file with the *University of the Pacific Law Review*).

^{9.} HENRY FORD, MY LIFE AND WORK 72 (1922).

^{10.} Nike by You, NIKE, https://www.nike.com/nike-by-you (last visited Jan. 21, 2022) (on file with the University of the Pacific Law Review).

^{11.} Chris Anderson, The Long Trial: Why the Future of Business is Selling Less of More, 24 (2006).

^{12.} Why Does Apple Launch a New iPhone Model Every Year?, QUORA, https://www.quora.com/Whydoes-Apple-launch-a-new-iPhone-model-every-year (last visited Jan. 21, 2022) (on file with the *University of the Pacific Law Review*).

with and adopt new ideas.¹³ One of their successes? Increasing speed to market in how they managed acquisition integration by 50%.¹⁴

Finally, markets are more *volatile and uncertain*. For many organizations, the "business as usual" sentiment has shifted to "business happens." The popular press is littered with the supply chain crisis of the day. Many factors contribute to supply chain volatility, including: increased customer choices, product customization, rapid technological improvements, labor and equipment shortages, slow digital transformation, maintaining traditional inventories, and a lack of reliable data and insights. The COVID-19 pandemic exacerbated those longstanding issues and uncertainties for organizations' supply chains. ¹⁵ More than ever there is a need for agile and flexible supply chains.

II. WHY THE NEED FOR CHANGE?

Today's contracts—especially purchasing/supply contracts—have not evolved with the pace of the business changes noted in Part I. While there are many factors contributing to this gap, this paper addresses three factors that contracting professionals should challenge as they contract in the New Economy. These are:

- Power-based procurement and contracting approaches promote adversarial business relationships instead of fostering collaborative working relationships
- Transactional contracts create inherent perverse incentives that promote "silo-thinking" instead of cross-organizational collaboration
- The concept of "standard contract templates"—while driving efficiency in the contracting phase—can lead to contracts that are not fit for purpose

Each of these is explored below.

^{13.} Innovation in Outsourcing: The Case of the Procter & Gamble Company, IAOP (2014), https://www.iaop.org/Download/Download.aspx?ID=2407 (on file with the University of the Pacific Law Review).

^{14.} *Id.*; Kate Vitasek, et al., *How P&G and JLL Transformed Corporate Real Estate*, UNIV. OF TENN. 1, 3 (2012), https://www.vestedway.com/wp-content/uploads/2012/09/PG-Case-Study.pdf (on file with the *University of the Pacific Law Review*).

^{15.} See Sean Ashcroft, Pandemic: Will Volatility Be 'Normal' for Supply Chains?, SUPPLY CHAIN (Nov. 24, 2021), https://supplychaindigital.com/supply-chain-risk-management/pandemic-will-volatility-be-new-normal-supply-chains (on file with the University of the Pacific Law Review); see also Emma Cosgrove, Demand Volatility Is the Supply Chain Disruptor of 2020, SUPPLY CHAIN DIVE (Oct. 30, 2020), https://www.supplychaindive.com/news/coronavirus-demand-supply-chain-disruptor-2020/587782/ (on file with the University of the Pacific Law Review).

A. Power-Based Approaches Promote Adversarial vs Collaborative Business Relationships

Sun Tzu wrote his classic treatise *The Art of War* over 2,000 years ago. The book offers observations about politics, psychology, and economics that remain relevant and part of today's lexicon. Sun Tzu suggests that winning comes from power-based behaviors—being ruthless, manipulative, and determined to win at any cost.

Power-based management techniques received a boost in the 1980s when Harvard Business School's Michael Porter best-selling book *Competitive Strategy: Techniques for Analyzing Industries and Competitors* hit the bookstores. ¹⁶ Porter wrote about the enterprise as if it were a combat unit on a battlefield forged by five market forces: the threat of rivalry among existing firms, the threat of new entrants, the threat of substitute products or services, the buyer's bargaining power, and the supplier's bargaining power. ¹⁷ Two of Porter's "Five Forces" for creating a competitive advantage were about using power.

Power-based approaches were even popularized in pop culture with movies such as the 1987 blockbuster Wall Street. The movie The Art of War is the contemporary corporate raider's Bible. Using power-based approaches soon worked their way into boardrooms and trickled down to procurement practices especially for large business enterprises. Take, for example, the Kraljic Matrix, which McKinsey consultant Peter Kraljic introduced in a classic 1983 Harvard Business Review article, "Purchasing Must Become Supply Management." ¹⁸ Kraljic suggested buyers categorize purchases across two dimensions, profit impact and risk. To help organizations simplify the approach, Kraljic devised a simple quadrant "matrix" that became an instant hit. Once the spend categories were classified into the matrix, Kraljic suggested a buying organization's next step was to "weigh the bargaining power of its suppliers against its own strength as a customer." Based on an organization's power relative to its supplier, he noted, there are three primary purchasing strategies: exploit (with buyer dominance), balance (with a balanced relationship), and diversify (with supplier dominance). Kraljic suggested an "exploit" strategy was the preferred approach, encouraging buying organizations to use their power to get the best price and terms from their suppliers. If an organization did not have power over its suppliers, he suggested techniques to help them increase their power. Many consider the Kraljic matrix and tactics to be the 'gold standard' for how to manage suppliers, and the concept is still taught in the majority of procurement textbooks around the world.

^{16.} See generally Michael E. Porter, Competitive Strategy: Techniques for Analyzing Industries and Competitors (1980).

^{17.} *Id.* at 3–4.

^{18.} Peter Kraljic, *Purchasing Must Become Supply Management*, HARV. BUS. REV., https://hbr.org/1983/09/purchasing-must-become-supply-management (last visited Jan. 28, 2022) (on file with the *University of the Pacific Law Review*).

^{19.} Id.

Power-based approaches also worked their way into contracting practices. Organizations—fearing what economists call the hold-up problem—use a protectionist approach to prevent their contracting counterpart from abusing its power. Ocntracting parties may employ a range of tactics such as: contracting with multiple suppliers, forcing suppliers to lock in prices, using termination for convenience clauses, or including a "scope sweeper" clause obligating suppliers to cover activities that might arise after the initial contracting phase. Some companies go so far as to install a "shadow organization" to micromanage their suppliers. In the process of the process of

Hart's early research predicted that in response to the combined problems of hold-ups and incomplete contracts, companies are likely to make distorted investments that produce poor outcomes. Companies see increased costs when using multiple suppliers or operating a shadow organization to micromanage an untrusted supplier.²²

B. Transactional contracts create inherent perverse incentives

Transactional contracts are the mainstay for supply contracts. Contracting parties negotiate the details of the "'transaction" such as scope and price and document their agreement in the contract. This "buy-sell" mindset underpins not only the relationship—but also the contract structure and economic model. For example, a transaction-based economic model pays a supplier for every transaction (e.g., per hour, per unit, per mile, per shipment, per call). The problem? The more transactions, the more money the supplier makes, which is often in direct conflict with the buyer's goals to reduce costs. The result? A never-ending battle over price with one party winning at the other party's expense.

Transaction-based contracts also promote silo-thinking instead of crossorganization collaboration. For example, a traditional transaction-based contract creates an inherent perverse incentive for the supplier to *not* reduce the number of non-value-added transactions because a reduction in the number of transactions results in lower revenue. University of Tennessee researchers coined this perverse incentive the "Activity Trap." The book, *Vested Outsourcing: Five Rules that*

^{20.} See Oliver D. Hart, Hold-Up, Asset Ownership, and Reference Points, Q.J. ECON. 267, 267–268 (2009). Companies have conventionally used contracts as protection against the possibility that one party will abuse its power to extract benefits at the expense of the other—for example, by unilaterally raising or lowering prices, changing delivery dates, or requiring more onerous employment terms. Economists call this the "hold-up" problem: the fear that one party will be held up by the other. The fact that virtually all contracts contain gaps, omissions, and ambiguities—despite companies' best efforts to anticipate every scenario— only exacerbates hold-up behavior.

 $^{21.\;}$ Kate Vitasek, et al., Vested Outsourcing: Five Rules That Will Transform Outsourcing 3 (2010).

^{22.} David Frydlinger & Oliver Hart, Overcoming Contractual Incompleteness: The Role of Guiding Principles 22, 26 (Harv. Univ., Working Paper, 2019).

^{23.} VITASEK, supra note 21, at 30.

Will Transform Outsourcing provides excellent examples of the Activity Trap and how it creates disincentives for suppliers to drive down transactions.²⁴

Even if the supplier's profit is a fixed amount, the typical organization will have a disincentive to invest in process efficiencies to drive costs down for their client. For example, consider a supplier with a fixed price "managed service" contract where a supplier makes a fixed "management fee" of \$7,000 per month to provide a variety of cleaning and maintenance services to their client. In theory, suppliers operating under a fixed price are inherently incentivized to keep their costs below the price quoted (e.g., \$7000 a month) because higher costs lead to lower profits. However, in practice, managed service agreements often cause their own set of perverse incentives because they almost always force the supplier to be rigid on the scope to preserve their profit margin; anytime the supplier does work that is not in the fixed scope of work the supplier must absorb the costs which in turn erodes their profit. Buyers and suppliers find themselves in a never-ending "scope creep" battle. To prevent this, buying organizations will try to negotiate a "scope sweeper" clause.²⁵

Regardless of a cost-plus or fixed price transactional agreement, the buyer versus supplier mindset ultimately pits the buyer and supplier on opposite sides of the table, both when negotiating the contract and post-contract signing. A win for the buyer is a loss for the supplier, and vice-versa.

"Standard Contract Templates", while driving efficiency in the contracting phase, can create contracts that are not fit for purpose. Many organizations have been relying more on more on "standard contract templates." Organizations such as Thomson Reuters encourage organizations to use standard contract templates:

Having a trusted market-leading standard document, skeleton argument or legal contract template which you can call on at any moment allows your team to increase agility and efficiency when dealing with various stakeholders of a transaction. Meticulously reviewed and updated by our team of over 300 UK based ex-practitioners, Thomson Reuters suite of document templates, contract templates and agreement templates are constantly maintained at a best-of-class standard.²⁷

^{24.} See id. For example, the book illustrates how a logistics service provider who was paid for every pallet stored opted to continue to charge the client for excess inventory (123 years' worth) rather than suggest the product be written off as obsolete.

^{25.} Jim Steinberg & Meredith Francis, *Defining the Solution in Technology Contracts*, LAW.COM (Mar. 20, 2015), https://www.law.com/dailyreportonline/almID/1202721200591/?slreturn=20211110151656 (on file with the *University of the Pacific Law Review*).

^{26.} See Contract Templates and Agreements (From 25,000 Sales Documents), SIGNWELL, https://www.signwell.com/contracts/ (last visited Jan. 28, 2022) (on file with the University of the Pacific Law Review).

^{27.} Contract Templates and Standard Documents, THOMSON REUTERS, https://legalsolutions.thomsonreuters.co.uk/en/explore/document-management/contract-templates-standard-documents.html (last visited Jan. 28, 2022) (on file with the *University of the Pacific Law Review*).

Unfortunately, using standard contract templates may not be fit for the purpose and could even create perverse incentives. Take, for example, a simple sixty-day termination for convenience clause put in an outsourcing contract. A business group had outsourced to an outsourcing firm in the hope of driving efficiencies and continuous improvement initiatives. As part of the "deal," the supplier would invest in continuous improvement initiatives. The standard termination of convenience clause was not fit for purpose because it had a perverse incentive for the supplier to not invest in the much-needed continuous improvement initiatives. One CFO of a Fortune 100 supplier explained the logic:

A 60-day termination for convenience translates to a 60-day contract.... It would be against our fiduciary responsibility to our shareholders to invest in any program for a client with a 60-day termination clause that required longer than two months to generate a return.... Buyers are crazy to expect us to invest in innovation if they do the math.²⁸

Another good example is a standard payment term policy (e.g., 60-, 90-, or even 120-day payments terms). Many large corporations have mandated longer payment terms when doing contract renewals. A *New York Times* article cites large organizations such as Proctor&Gamble and Mondelez International are getting on board with the new "best practice" extending payment terms to 75 and even 120 days, respectively.²⁹ These new "policies" are finding their way into standard contract templates during contract renewals. This simple shift in two numbers in a standard contract template can have significant long-term negative impacts on both the buying and supplier organizations. While there is an immediate benefit of improved working capital for the buying organization (as pointed out in the *New York Times* article), the impact on suppliers can be severe as suppliers find their working capital being stretched thin. In fact, APQC—a leading benchmarking organization for Fortune 500 organizations—recently published two reports about how standardized "one-size-fits-all" contracting approaches are pushing suppliers, especially smaller suppliers, away.³⁰

Julian Nyarko, assistant professor at Stanford Law School, has researched an interesting concept he calls contract "stickiness" in contract templates. His findings? Once a contract's terms or covenants are written into a contract it "only

^{28.} David Frydlinger, Oliver Hart, & Kate Vitasek, A New Approach to Contracts: How to Build Better Long-Term Strategic Partnerships, HARV. BUS. REV. (Sept.-Oct. 2019), https://hbr.org/2019/09/a-new-approach-to-contracts (on file with the University of the Pacific Law Review).

^{29.} Stephanie Strom, *Giant Food Companies Pay Later, Squeezing Their Suppliers*, N.Y. TIMES (Apr. 6, 2015), https://www.nytimes.com/2015/04/07/business/big-companies-pay-later-squeezing-their-suppliers.html (on file with the *University of the Pacific Law Review*).

^{30.} Marisa Brown, *Small Suppliers Face Pain. From Changing Requirements*, APQC BLOG (Sept. 20, 2021), https://www.apqc.org/blog/small-suppliers-face-pain-changing-requirements (on file with the *University of the Pacific Law Review*); *Burdensome Contracts are Pushing Service Providers Away*, APQC (Sept. 15, 2021), https://www.apqc.org/resource-library/resource-listing/burdensome-contracts-are-pushing-service-providers-away (on file with the *University of the Pacific Law Review*).

rarely" gets changed or improved—hence the concept that contract terms are sticky.³¹ Nyarko argues that economic and legal theory assumes that "sophisticated" parties will routinely write agreements that optimize their joint expertise or "surplus." But Nyarko's research found that theoretical good practice does not make it into real practice. Rather, people tend to use the same clauses over and over again, even if they don't make sense for a particular agreement. Why? The stickiness comes from over-reliance on templates and whether a contract includes a forum selection clause driven by the template used in the first draft. Nyarko found a "distinct apathy" among transactional lawyers that perpetuates contractual gaps and that "sticky" drafting practices characterize the most fundamental aspects of commercial transactions across a wide range of contexts. Nyarko's research illustrates the danger inherent in relying too much on contract templates.

III. A NEW APPROACH TO CONTRACTING

In a *Harvard Business Review* article published in 2019, Swedish lawyer David Frydlinger, economist theorist and Nobel Laureate Oliver Hart, and business school researcher and educator/consultant Kate Vitasek asserted that there is a potential "New Approach to Contracting" whereby contracting parties should shift to a more collaborative spirit for contracting.³² But what are these other approaches? Contracting in the New Economy means looking at contracts from a different lens in both how organizations procure goods and services and how they contract for those goods and services.

A. Sourcing as a Continuum

For centuries organizations have thought of procurement as a "make vs. buy" decision. This is especially true as organizations explored outsourcing. Many falsely assume if they "buy," they should use competitive "market" forces to ensure they are getting the best deal. In doing so, the default approach is to use a transaction-based model. This works well for simple transactions with abundant supply and low complexity where the "market" can correct itself. The logic is simple: "if a supplier does not perform, just rebid the work."³³

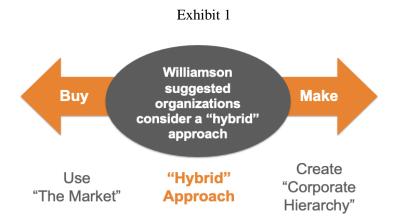
However, as organizations have outsourced more complex goods and services, this logic no longer works. All too often buyers become co-dependent on suppliers, switching costs are high, and suppliers have a "locked-in" position.

^{31.} Julian Nyarko, Stickiness and Incomplete Contracts, 88 U. CHI. L. REV. 1, 23-29 (2021).

^{32.} Frydlinger, et al., note 28.

^{33.} See Bonnie Keith, Kate Vitasek, Karl Manrodt, & Jeanne Kling, Strategic Sourcing in the New Economy 52–57 (2016); see also Kate Vitasek, Bonnie Keith, Karl Manrodt, & Jeanne Kling, Unpacking Sourcing Business Models, Univ. Tenn. 6 (2016), https://www.vestedway.com/wpcontent/uploads/2019/12/Unpacking-Sourcing-Business-Models-1.pdf (on file with the University of the Pacific Law Review).

Dr. Oliver E. Williamson—professor of economics at the University of California, Berkeley—has challenged the concept that sourcing is a "make vs. buy" decision with his work in Transaction Cost Economics.³⁴ Williamson received the Nobel Prize for his work in 2009. One of the key lessons of Williamson's theory is that organizations should view sourcing as a continuum rather than a simple market-based make vs. buy decision. Perhaps the best way to think of Williamson's work is to consider (**Figure 1** below) free-market forces on one side and what Williamson refers to as "corporate hierarchies" on the other. In the middle, Williamson advocated that organizations should use a "hybrid" approach for complex contracts.



Organizations that procure goods or services typically use what Williamson calls the "market" to buy goods and services. The market uses the conventional free-market economy to determine how organizations will do business, including establishing a price. The assumption is that free-market forces incentivize suppliers to compete on low cost and high service. This approach also features an absence of dependency: if buyers or suppliers are not happy, they can switch at any time with relative ease.³⁵ Governance of the supply base is typically accomplished by switching suppliers or customers when a better opportunity comes along. As a result, the market approach relies purely on classical contract law and requires little administrative control.³⁶

^{34.} Oliver E. Williamson, *Outsourcing: Transaction Cost Economics and Supply Chain Management*, J. SUPPLY CHAIN MGMT. 5–16 (2008).

^{35.} See id. at 8 ("[T]he market-mode features high-powered incentives, little administrative control and a legal-rules contract law regime, which combination is well suited to implement autonomous adaptations.").

^{36.} The legal scholar Ian R. Macneil was instrumental in developing a wider view of the contract, known as relational contract theory. He said that most contracts are ill-equipped to address the reality of business needs. In Ian R. Macneil, Contracts: Instruments for Social Cooperation East Africa (1968), Macneil wrote, "Somewhere along the line of increasing duration and complexity [the contract] escapes the traditional legal model." He argued that contracts are rooted in the classical approach to contract law and thus crafted to address transactions and legal protections such as pricing and price changes, service levels, limitation of liability,

The big advantage of using the market lies in its simplicity. The market mode enables a competitive process to determine whether an organization is getting a good transaction price. The heart of the market mode is a transactional business model. Competitive bidding processes establish market prices for everything from a per-unit price for a spare part, to a price per call for technical support, to a price per pallet stored in a warehouse, and even price per hour for a janitor to clean a building.

The downside to the market mode is that it often assumes that the purchase is somewhat standardized and therefore available from a variety of suppliers. Consequently, suppliers often "compete" into contracts that pose unnecessary risks. For example, Williamson points out that service providers might have "specialized investments" that can easily expose the business to significant loss if the contract fails and for which no safeguards have been provided.³⁷

Innovation is one form of specialized investment that creates value, such as asset-specific product and process improvements designed to create competitive advantages for the buyer. As suppliers put effort into and make specialized investments to support process and product improvements and innovation, they look at risk versus reward. Often, they raise prices to reflect their increased level of risk. However, buyers still want reduced prices as well as the benefits of investments in efficiency and innovation. Buyers and suppliers often find themselves in a "give and take" as a normal part of market-based negotiations with suppliers seeking to develop contractual safeguards.

Williamson's research shows that using the market for more complex contracts drives up transaction costs.³⁹ He argues that more complex contracts should use what he calls a "hybrid" approach with a conscious decision to build more trusting and secure supplier relationships. The goal should be to drive out opportunism and inject efficiencies in the buyer-supplier relationship.

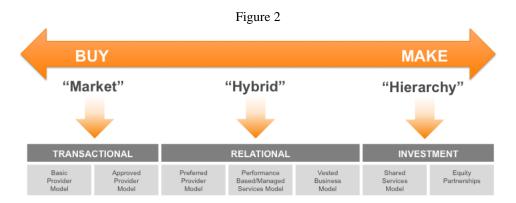
University of Tennessee researchers questioned how organizations could apply Williamson's lessons. Their work led to the book *Strategic Sourcing in the New Economy: Harnessing the Potential of Sourcing Business Models in Modern Procurement.*⁴⁰ The book outlines an approach researchers termed "Sourcing Business Model Theory." Organizations such as the Sourcing Industry Group and NEVI (the Dutch Association for Purchasing Management) have embraced the more collaborative and modern approach of Sourcing Business Model Theory and are embedding it into their practitioner certification programs.⁴¹ Sourcing Business

indemnification and liquidated damages. He said business-to-business contracts should be "instruments for social cooperation."

- 37. Williamson, supra note 34, at 9.
- 38. *Id*.
- 39. Id. at 12-13.
- 40. BONNIE KEITH ET AL., STRATEGIC SOURCING IN THE NEW ECONOMY (2016).

^{41.} Certified Sourcing Professional, SOURCING INDUS. GRP., https://sig.org/sig-university/certified-sourcing-professional (last visited Feb. 27, 2022) (on file with the University of the Pacific Law Review); Sourcing Business Models, NEVI, https://nevi.nl/en/inkoopthemas/strategische-inkoop/sourcing-business-models (last

Model Theory aligns seven sourcing business models to Williamson's continuum (see Figure 2).



Strategic Sourcing profiles a simple-to-use "business model mapping" toolkit that procurement professionals can use to determine the most appropriate sourcing business model.⁴²

Each of the sourcing business models is profiled briefly below.

1. Basic provider

A basic provider model uses a transaction-based model, meaning it typically has a set price for individual products and services for which there is a wide range of standard market options. These products or services are usually readily available, with little differentiation in what is offered.

A basic provider model should be used to buy low-cost, standardized goods and services in a market where there are many suppliers and switching suppliers has little or no impact on the business. The buyer-supplier relationship is based largely on a performance review against set criteria. For example, did the supplier work the hours claimed? Did the goods received meet the agreed upon quantity, cost, and delivery times? Many organizations do not have contracts for basic providers and simply choose to use a purchase order requisition to trigger a transaction signal that the buying company agrees to buy preset quantities of goods or tasks (e.g., widgets or hours). Many organizations use frequent competitive bidding (often with pre-established electronic auction calendar events) and automated purchasing catalogue functionality to "buy" from basic providers. Some organizations even use purchase cards (a corporate credit card) for these types of simple purchases.

visited Feb. 27, 2022) (on file with the University of the Pacific Law Review).

^{42.} The University of Tennessee has made the Business Model Mapping toolkit an open-source resource. *Vested's Open Source Toolkit*, UNIV. OF TENN., www.vestedway.com/tools (last visited Jan. 22, 2022) (on file with the *University of the Pacific Law Review*).

2. Approved Provider Transaction Model

An approved provider model also uses a transaction-based model, but in this example, goods and services are purchased from prequalified suppliers that meet specific performance or other selection criteria. Frequently an organization has a limited number of preapproved suppliers for various spend categories from which buyers or business units can choose. Multiple suppliers mean costs are competitive, and one firm can easily be replaced with another if the supplier fails to meet performance standards.

An approved provider is identified as a prequalified option in the pool of basic providers. Approved providers fulfill preconditions for specified service through a set of criteria or previous experience with performance reliability. To reach approved status, suppliers frequently offer some level of differentiation from other transactional suppliers and provide a cost or efficiency advantage for the buyer. The differentiation could come in the form of geographical location advantage, a cost or quality advantage, or a minority-owned business and is ultimately "approved" to meet an organization's social responsibility goals.

To create a seamless and readily accessible supply chain, many organizations develop lists of approved providers. The advantages are many. For example, a preapproved list saves time when seeking particular goods and services. The approval process ensures parity between bidding, qualified suppliers. As an organization selects its approved provider list, it molds the required qualifications to its unique business objectives and strategy. Procurement professionals typically use their organization's approved provider list as regularly solicited sources of supply when bidding is conducted. An approved provider may or may not operate under a master agreement, which is an overarching contract with the buying organization. Approved providers may or may not also have volume thresholds to be in an "approved" status. In addition, approved providers might participate in supplier management reviews.

3. Preferred Provider Model

Like the basic and approved provider models, a preferred provider model uses a transaction-based economic model. A critical difference between a preferred provider and the other transaction-based models is that the buyer has chosen to move to a more strategic relational model. Thus, contracts with specifically chosen suppliers assume a more collaborative relationship. Repeat business and longer-term and/or renewable contracts are the norm.

Similar to an approved provider model, buyers seek to do business with preferred providers to streamline their buying processes. Buying organizations typically will enter into multi-year contracts using master agreements to conduct repeat business efficiently. Preferred providers are still engaged in transaction-based economic models. However, the nature and efficiencies of how the organizations work together go beyond a simple purchase order and begin to

consider how a supplier can provide value-added services.

A preferred provider is a prequalified supplier. Often, they have unique differentiators—offering value-added services and/or demonstrating acceptable performance levels. For example, a preferred provider may have a superior software system that interfaces with an organization's own system. Sometimes a preferred provider is chosen because of its high-quality workforce and difficult-to-duplicate expertise. Typical conditions for supplier down-selection of a preferred provider are:

- Previous experience;
- Supplier performance rating (if the buying organization has a rating system);
- Previous contract compliance performance;
- Evidence of an external certification (e.g., ISO certification);
- Additional contributions to control costs, such as inventory management, training resources, and aligned geographical positioning.

It is common for preferred providers to work under a master agreement and/or use blanket purchase orders and rate cards that make conducting repeat business easy. For example, a labor-staffing firm may have a rate card that lists the hourly rate set for various staffing needs. The buying organization can easily request staffing support from the preferred provider using the predetermined blanket purchase orders and rate cards.

4. Performance-Based/Managed Services Model

A performance-based model is generally a formal, longer-term supplier agreement that combines a relational contracting model with an output-based economic model. A performance-based model drives supplier accountability for output-based service-level agreements (SLAs) and/or cost reduction targets. A performance-based agreement typically creates incentives (or penalties) for hitting (or missing) performance targets.

Sourcing decisions are based not only on a supplier's ability to provide a good or service at a competitive cost but also on its ability to drive improvements based on its core competencies. Performance-based agreements shift thinking away from activities to predefined *outputs* or events. Some organizations call the results outcomes. However, it is important to understand that a performance-based agreement should hold a supplier accountable only for what is under its control. For that reason, in performance-based models, the word *outcome* usually means a supplier's "output." An output is a well-defined and easily measured event or a deliverable typically finite in nature.

Some service industries are seeing an evolution in managed services agreements. Managed services agreements are a form of a performance-based

agreement. An example is where a supplier has a fixed fee with a pre-agreed price reduction target (e.g., a 3% year-over-year price decrease). The assumption is that the supplier will invest in productivity enhancements to drive efficiencies and improved performance. These guaranteed savings are often called a "glidepath" because there is an annual price reduction over time.

Performance-based agreements require a higher level of collaboration than preferred provider contracts because there is a higher degree of integration between a supplier and a buying organization. In addition, buyers need to apply more formalized supplier relationship management efforts to review performance against objectives and specify the incentive or service credit (also referred to as a malice payment or penalty) payments embedded in the contracts. ⁴³

5. Vested Sourcing Business Model

A Vested model is a hybrid relationship that combines an outcome-based economic model with a relational contracting model, incorporating the Nobel Prize-winning concepts of behavioral economics and shared value principles. Using these concepts, companies enter into highly collaborative arrangements designed to create and share value for buyers and suppliers above and beyond the conventional buy-sell economics of a transaction-based agreement. In short, the parties are equally committed (Vested) to each other's success.⁴⁴

Vested Outsourcing ("Vested" for short) is a highly collaborative Sourcing Business Model where both the buying organization and the supplier have an economic interest in each other's success. A good example is Microsoft and Accenture's multi-year agreement, in which Microsoft challenged Accenture to transform Microsoft's back-office finance operation processes. The agreement is structured so the more successful Accenture is at achieving Microsoft's goals, the more successful Accenture itself becomes.⁴⁵

The Vested business model was popularized when University of Tennessee researchers coined the term after studying highly successful buyer-supplier

^{43.} Supplier Relationship Management (SRM) is becoming a popular management technique for working with suppliers in a more strategic way. A Google search will reveal hundreds of articles and entries about SRM. See, e.g., Diann Daniel & Mary K. Pratt, Supplier Relationship Management (SRM), TECHTARGET, https://searcherp.techtarget.com/definition/supplier-relationship-management-SRM (last updated Nov. 2020) (on file with the University of the Pacific Law Review) (defining SRM as "the systematic approach to evaluating vendors that supply goods, materials and services to an organization, determining each supplier's contribution to success and developing strategies to improve their performance").

^{44.} See Kate Vitasek, Jane K. Winn, & Toni E. Nickel, The Vested Way: A Model of Formal Relational Contracts, 52 U. PAC. L. REV. 125, 136–37 (2020).

^{45.} See generally Vested for Success: Microsoft/Accenture One Finance, Kate Vitasek, Karl Manrodt & Srini Krishna, Univ. of Tenn., (Case Study, 2013), https://www.vestedway.com/wpcontent/uploads/2012/09/Microsoft.pdf; see also Kate Vitasek, Karl Manrodt, & Jeanne Kling, Vested: How P&G, McDonald's, and Microsoft Are Redefining Winning in Business Relationships 89–117 (2012).

relationships such as Microsoft and Accenture. A Vested business model is best used when an organization has transformational and/or innovation objectives it cannot achieve by itself or by using conventional transactional sourcing business models (Basic Provider, Approved Provider, Preferred Provider) or a Performance-Based agreement.

6. Shared Services Model

Organizations that struggle to meet complex business requirements with a supplier can always invest in developing capabilities themselves (or insource). One approach is to create an internal shared service organization (SSO) to centralize and standardize operations that improve operational efficiencies. A shared services model is typically an internal organization based on an arms-length outsourcing arrangement. Using this approach, processes are often centralized in an SSO that charges business units or users for their services.⁴⁷ In some instances, SSOs are formed externally to the company (such as a subsidiary).

SSOs typically act like outsourced suppliers, performing services and then "charging" their internal customers on a per-transaction or actual cost basis. SSOs generally mirror conventional preferred provider models.⁴⁸ The main difference is that the SSO is an internal supplier rather than an external supplier.

Organizations can use a shared services model for a variety of functional services, such as human resources (HR), finance operations, or administrative services (such as claims processing in health care). For example, large organizations may centralize HR administration into an SSO to provide benefits management to their employees and even external clients. Small enterprises can benefit from a shared services model by joining forces to create specialized service centers that economically provide a functional service to each of the smaller firms.

7. Equity Partnerships

An equity partnership creates a legally binding entity. Equity partnerships can take different legal forms, such as buying a supplier (an acquisition), creating a subsidiary, equity-sharing joint ventures, or entering into cooperative (co-op) arrangements. Equity partnerships are best used when an organization does not have adequate internal capabilities and does not want to outsource. For example, some organizations decide they do not have internal capabilities and do not want to invest in a Shared Services organization. In these cases, organizations may opt

^{46.} See generally Kate Vitasek, Mike Ledyard, & Karl Manrodt, Vested Outsourcing: Five Rules That Will Transform Outsourcing (2nd ed. 2013).

^{47.} SSOs can also be "center led," meaning resources may not physically be centralized.

^{48.} Companies can structure SSOs with highly collaborative Vested philosophies; however, most companies structure SSOs as conventional preferred provider transactional models that are arm's length in nature.

to develop an equity partnership—such as a joint venture or another legal form—to acquire mission-critical goods and services.

Equity partnerships, by definition, bring costs "in-house" and create a fixed cost burden. As a result, equity partnerships often conflict with the desires of many organizations to create more variable and flexible cost structures on their balance sheet.⁴⁹

8. Different Models, Different Systems

It is important for organizations to select the most appropriate Sourcing Business Model for their situation. Think of a Sourcing Business Model as a "system," as each is purpose-built to optimize the business needs given critical operating factors. The book *Strategic Sourcing in the New Economy: Harnessing the Potential of Sourcing Business Models in Modern Procurement* details each of the seven Sourcing Business Models and shares insights into how to strategically source and architect each model.⁵⁰

^{49.} See Williamson *supra* note 34, at 5. Williamson argues that a corporate hierarchy provides low incentives, high administrative costs, and a legal system that is "deferential to the management." *Id.* at 8. Because of these bureaucratic costs, Williamson says that "the internal organization is usually thought of as the organization of last resort." *Id.* at 9. In other words, if at all possible, companies should outsource noncore services."

^{50.} See generally Bonnie Keith, Kate Vitasek, Karl Manrodt, & Jeanne Kling, Strategic Sourcing in the New Economy (2016).

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Figure 3 below provides a "cheat sheet" into how each Sourcing Business Models should be structured.

		TRANSACTION	NAL (MARKET)		RELATIONAL (HYBRID)		INVESTMENT (HIERARCHY)
		BASIC PROVIDER	APPROVED PROVIDER	PREFERRED PROVIDER	PERFORMANCE- BASED/MANAGED SERVICES	VESTED	INVESTMENT (EQUITY PARTNER/ SHARED SERVICES)
BUS	INESS MODEL						
	Economic Model	Transaction Based (per Transaction, Hour or Unit)	Transaction Based (per Transaction, Hour or Unit)	Transaction Based (per activity, hour or unit)	Output Based	Outcome Based	Transactional, Output or Outcome Based
	Relationship Model	Transactional/ no relationship	Transactional/ Supplier Vetted on "Approved" List	Relational Contract— Emerging Collaboration	Relational Contract— Collaborative	Relational Contract— Highly Collaborative	Investment Based
		Supply at Lowest Cost	Recurring Commodities at Fair or Lowest Costs	Value Added Capabilities at Best Value	Performance to SLA— Process Efficiencies	Shared Vision, Desired Outcomes & Value Creation	Sustainable Value
sco	PE OF WORK						
	Statement of Work Objectives	"Who" and/or "How"	"Who" and/or "How"	"Who" and/or "How" with Jointly Defined "How"	"What" Limited Emphasis on "How"	"What"	"What if", "What for" and "When"
PER	FORMANCE MAI	NAGEMENT					
	erformance Focus	Simple Three Way Accounting Match	PO Requirements	Activity Based Service Level Agreements	Output Based Service Level Agreements	Strategic Desired Outcomes	P&L Based Measures
	erformance Measures	Right Quantity, Right Price, Damage Free	Basic Provider Metrics + Increased Quality Emphasis	Operational + Customer Satisfaction	Operational + Relational (Values & Behaviors)	Operational + Transformational + Relational System Wide KPIs	Joint Measures of Success
PRIC	CING						
	ricing Model Incentives	Fixed Price/Typically No Incentives/Volume Rebates	Fixed Price/Low No Incentives/Volume Rebates	Fixed Price/Low Incentives/Volume Rebates	Price with Incentives and/or Penalties	Pricing Model with Value Based Incentives	P&L Based Equity Sharing
GOV	ERNANCE						
	elationship lanagement	Delivery & Pricing Validation (Three Way PO Match)	Some Performance & Pricing Oversight	Limited Supplier Relationship Management	Oversight Emphasis: Supplier Relationship Management	Insight Emphasis: Strategic Relationship Management	Shared Control and Management
	Improve, Transform, & Innovate	None/Market Driven	Limited/Market Driven	Beginning to Focus on Incremental Improvement	Supplier Driven to Meet SLAs/Price Glide Path	Joint & Proactive Transformation Management	Core Innovation Capabilities
		One Way/Limited Commitment to Buy	One Way/Termination for Cause & Convenience	One Way/Termination for Cause & Convenience	Perf Based Termination for Cause w/Safeguards	Joint Exit Management Plan	Divestiture
	Compliance & Special Concerns	Compliance Driven/ Survey Based	Typically Compliance Driven/ Survey Based	Typically Market Based/Minimum Audit Requirements	Corporate Based Audit Requirements	Outcome Based Joint Requirements	Investment Based Joint Requirements

Once organizations determine the most appropriate sourcing model for their strategic buyer-supplier relationships, the next step is to incorporate those learnings into the contract.

B. Contracting as a Continuum

As procurement organizations look to different approaches for more strategic contracts, contracting professionals must keep pace. David Frydlinger, Oliver Hart, and Kate Vitasek, in their *Harvard Business Review* article, advise the best way for organizations to contract for strategic relationships in the New Economy is using formal relational contracts. Their rationale?

"Traditional purchasing contracts don't work in complex strategic relationships where the parties are highly dependent on each other, future events can't be predicted, and flexibility and trust are required. Instead of promoting the partnership-like relationships needed to cope with uncertainty, conventional contracts undermine them. The Cause? Companies have traditionally used contracts as protection against the possibility that one party will abuse its power to extract benefits at the expense of the other. This adversarial mindset creates a downward spiral of negative tit-for-tat behaviors. The Solution? A formal relational contract lays a foundation of trust, specifies mutual goals, and establishes governance structures to keep the parties' expectations and interests aligned over time." 51

Frydlinger and Vitasek took the concepts of a formal relational contract introduced in the *Harvard Business Review* article and expanded on it in their book, *Contracting in the New Economy: Using Relational Contracts to Boost Trust and Collaboration in Strategic Business Relationships.*⁵² The book advises that organizations must harness the power of strong, collaborative strategic alliances through formal relational contracts. The parties in a relational contract should jointly embrace the fact that business is risky. Rather than striving to shift risk, contracting parties should seek to create more value with a strong foundation of transparency and trust by formally incorporating guiding principles and proven relational governance mechanisms designed to keep the parties in continual alignment when "business happens." The premise? Working together to mitigate risk is much better than merely shifting risk to the weaker party and places the relationship on a strong foundation for the long term.

Reviewing the sourcing continuum (see Figure 2), we see where the relational contract continuum intersects with sourcing models.



^{51.} Frydlinger, Hart, & Vitasek, supra note 28.

^{52.} DAVID FRYDLINGER, KATE VITASEK, JIM BERGMAN, & TIM CUMMINS, CONTRACTING IN THE NEW ECONOMY: USING RELATIONAL CONTRACTS TO BOOST TRUST AND COLLABORATION IN STRATEGIC BUSINESS RELATIONSHIPS (2021).

C. The Case for the Formal Relational Contract

It is common for complex "transactions" to be hundreds of pages long. We have seen one government supplier contract eight and one-half feet tall when printed on standard-sized paper! Many argue they need to hammer out every detail in black and white because they do not trust their partner. Consider the fact that today's business partners are no longer your neighbor; they are frequently an organization based halfway around the world, with a significantly different culture.

But is it realistic to believe organizations can address every commercial scenario in a contract? The concept of complete contracts is one many scholars have studied over the years—including Nobel laureates Oliver Williamson and Oliver Hart. In the words of Oliver Williamson, "All complex contracts will be incomplete there will be gaps, errors, omissions and the like." Both Olivers strongly advocate that chasing the perfect contract is a fool's errand. Why? We live in a dynamic world. Writing a contract for a dynamic and complex relationship "today" will often not help us "tomorrow." Simply put, business happens. Things change, including the underlying deal covered by the contract.

Oliver Hart's work pointed out how contracts can create a hold-up problem.⁵⁴ In 2008, Hart revisited his work on contracts with economic theorist John Moore.⁵⁵ They realized that—equally important to the hold-up problem—organizations suffer from a post-contract signing problem they coined *shading*. Shading is a retaliatory behavior in which one party stops cooperating, ceases to be proactive, or makes countermoves. Shading happens when a party is not getting the outcome it expects from the deal and feels the other party is to blame or has not acted reasonably to mitigate the losses. The aggrieved party often cuts back on performance in subtle ways, sometimes even unconsciously, to compensate for the perceived imbalance between the parties.

Shading often launches a negative cycle of tit-for-tat behaviors where the parties pursue power-play games during a contract—often rationalizing their behavior in the quest to earn what they view is a fair outcome. Shading behavior creates distrust and adversarial relationships—something neither contracting party wants.

^{53.} Williamson, *supra* note 34, at 5–16.

^{54.} See generally Hart, supra note 20 at 267, 267–268.

^{55.} See generally Oliver Hart & John Moore, Contracts as Reference Points, 123 Q.J. ECON. 1 (Feb. 2008), https://scholar.harvard.edu/files/hart/files/contractsasreferencepointsqje.pdf (on file with the University of the Pacific Law Review).

Author Steven M.R. Covey, Jr. suggests distrust in relationships results in seven "taxes." 56

- 1. Redundancy is unnecessary duplication. It stems from the mindset that people cannot be trusted unless they are closely watched.
- 2. Bureaucracy is when too many rules and regulations are in place or when too many people have to "sign off" on something.
- 3. Politics is when one uses a misaligned "strategy to gain power." Too much time is spent interpreting other people's motives and trying to read hidden agendas.
- 4. Disengagement is when people are still getting paid even though they "clocked out" years ago. They will put in the minimal effort required to get their paycheck.
- 5. Turnover results when the best performers in an organization leave an organization, pursuing jobs where they are seen as trusted and a contributor adding value.
- 6. Churn is the effort and costs associated with constantly having to find new "customers, suppliers, distributors, and investors" because there is a lack of loyalty.
- 7. "Fraud is flat-out dishonesty." Fraud is a circular tax; when companies tighten the reins to prevent fraud, they reduce their fraud-related losses, but they inevitably see an increase in the other six areas.

Today there is an increasing volume of writing and a growing body of case law on relational contracts. Over the decades legal, economic, and social science research have all provided the foundational underpinnings that point us to defining what a relational contract is—or at least should be.⁵⁷

D. The Contracting Continuum

The best way to understand a relational contract is to compare it to the dominant contract model we call the *transactional* contract. **Figure 4** provides the comparison along five dimensions, showing the distinct differences between a relational contract and a transactional contract, while at the same time showing these two contract forms exist on a continuum.

 $^{56.\;}$ Stephen M. R. Covey, The Speed of Trust: The One Thing That Changes Everything 250–54 (2006).

^{57.} See generally FRYDLINGER, VITASEK, BERGMAN, & CUMMINS, supra note 52. The book includes a comprehensive review of research supporting relational contracting. Part II of the book includes 4 chapters that provides detail about the various legal, social science, economic, and psychology research supporting relational contracts. Part V provides an in-depth review of case law pertaining to relational contracts.

RELATIONAL TRANSACTIONAL CONTRACT RELATIONAL CONTRACT **DIMENSION** The commercial transactions FOCUS The commercial relationship RELATIONSHIP Arms-length relationship Partnership SOCIAL Disconnected from Mutually discovered and agreed social norms are explicitly included social norms as contractual obligations Risk mitigation by use of Risk mitigation and avoidance PRIMARY RISK market power and by creation of continuous state power alignment of interest **MITIGATION MECHANISMS PLANNING** Aims for completeness, i.e. tries to Accepts that complete planning is not have contract clauses covering possible and aims to create a fair and flexible framework for managing all future events of change and uncertainty the relationship

Figure 4: Comparison of Contracting Models

A brief overview of each dimension follows.

1. Focus on the "Deal," Not the "Relationship"

The focus of contracting tends to be "this deal," "this time," and under "this set of business and legal terms." Negotiators and lawyers think, "Get a signature, and you are done." It is a done deal, and the deal is the deal. A transactional contract follows this logic. Let's look at a typical press release for a big "deal." The parties project success at signing, saying that company x has contracted with supplier y in a seven-year contract worth z million dollars. This assumes the parties know all the transactions that will be carried out at the date of the press release. A complex future is viewed as one big deal.

A dynamic business environment often makes it impossible to publish such a press release with a realistic claim for accuracy. In most complex customer-supplier relationships, the parties know that—in reality—the "deal" must change over time because of changing demand, market circumstances, etc. Well-crafted, transactional contracts deal with this through a formal contract change control process. But as most contract managers know, post-signing contract negotiations can be tedious and costly exercises, often involving intense discussions about whether the change request should lead to additional compensation or not, and, if yes, how much.

Those exercises generate transaction costs for which there can be only one name: waste. The cause of this waste is not how the change control clauses are written. The problem lies instead in the focus. Simply put, the parties persist in

focusing on the deal at the time of signing, even though they know that "this deal" will become irrelevant. Without a change of focus, this waste is unavoidable.

2. Arm's Length Relationships

A transactional contract establishes an arm's length relationship. It is generally designed to limit commitment and to gain as much control over the other party's actions as possible, while losing as little control as possible. A key goal in an arm's length relationship is not to get too "cozy," especially if you are the buyer. The conventional logic is that becoming too dependent on the other party is considered risky and that buying organizations should avoid "lock-in."

To prevent too much dependency, organizations often use commercial terms to prevent "lock-in." For example, termination for convenience clauses combined with comprehensive exit management obligations creates powerful tools that customers can use to control suppliers. Another example is intellectual property rights clauses where the customer acquires a right to ideas and supplier-created innovations. The goal is to ensure the strings between the parties remain unattached.

As a general rule, buyers have more power than suppliers, at least up through the point of signing the contract. And typically, the more powerful the organization, the more one-sided the clauses. As shown previously, the 1980s ushered in popular approaches for improving an organization's power, such as Porter's Five Forces and the Kraljic Matrix.

In the New Economy, conventional approaches for using one's power causes a dilemma. Power-based strategies do not work in today's networks because enterprises depend on their network of customers, suppliers, and business partners to succeed. Arm's length relationships simply are not enough—especially for more strategic and complex deals with a great deal of dependency. Successful organizations are abandoning the arm's length mentality, choosing instead to create highly collaborative strategic relationships with increased interdependence that are purpose-built to create a win-win competitive advantage with their strategic business partners. Professor Jeffrey Dyer and Harbir Singh are pioneering research in this area. They coined the term *relational rents* to refer to the abovenormal returns generated by two or more companies using each other's knowledge and resources in unique ways that others cannot copy.⁵⁸ In an arm's length relationship, nothing unique can be created. Relational rents can *only* be generated through investments in relationship-specific assets, substantial knowledge exchange and combining of complementary resources.

Making the shift means today's contracts require far more thought and versatility in how the relationship is contractually structured and managed; it also demands a conscious departure from the one-size-fits-all mentality prevalent in

^{58.} Jeffrey H. Dyer & Harbir Singh, *The Relational View: Cooperative Strategy and Sources of Interorganizational Competitive Advantage*, 23 ACAD. MGMT. REV. 660, 660–679 (1998).

many organizations. Simply put, the strategic contract you structure with Strategic Supplier #1 is highly likely to be unique from the strategic contract that's structured with Strategic Supplier #2.

And above all, creating strategic relationships requires abandoning the ambition to keep all commercial relations at an arm's length' distance. You cannot generate relational rents through increased dependency and pooling of resources while simultaneously remaining completely detached and independent. The transactional contract with its arm's length character will fail to enable your strategic relationship to blossom and create the desired competitive advantage.

3. Disconnect from Social Norms

"It's not personal, it's just business." This is the mentality of the transactional contract. This mentality also means it is acceptable to violate fundamental social norms in pursuing a "good deal." In fact, opportunistic behavior is not only allowed, but expected as part of the "negotiation game." Millions of books have been written on how to play the game. We are taught to justify going against the social norms of *reciprocity* and *equity* when you have power and can shift risk to the other party. Negotiation courses teach us we are still being *honest* when we withhold information if the other party does not ask for it—even if it may disadvantage or could financially hurt the other party. Of course, the easiest way to justify one's opportunistic behavior is to say "sorry, it's not personal, it's just business."

In reality, violating social norms often generates risk instead of mitigating risks. Why? Because it is safe to assume the other party will try to create strategies to improve their position. Unfortunately, protection often means a lack of openness and transparency, withholding data or information, and placing limits on communication. This mindset is not evil but one of human nature based on *opportunism*. After all, if there is a conflict of interest and the risk is significant, it is rational to think that both parties will try to act in accordance with their *own* interest, while not considering the other party's interests.

Psychological research supports this "tit for tat" behavior, showing that while humans are opportunistic, they have a strong sense of fairness or, in the terminology of behavioral economics, *bounded self-interest*. Most people want to treat others fairly and also want to be treated fairly. However, this also means that people are willing to punish unfair behavior, i.e., behavior in breach of social norms. ⁶¹

^{59.} See, e.g., CHARLES KARRASS, THE NEGOTIATING GAME passim (1992) where the author has taught thousands of individuals to play the "negotiations game" to tilt the deal in their favor.

^{60.} Cass R. Sunstein, Christine Jolls, & Richard H. Thaler, A Behavioral Approach to Law and Economics, 50 STAN. L. REV. 1471, 1479 (1998).

^{61.} Id. at 1492.

The simple fact is that violating social norms makes the situation worse—not better. It prevents and distorts the conversations needed in any healthy relationship. It limits areas of discovery and stifles the very ideas that should lie at the heart of any long-term, productive agreement. Violating social norms by one party simply leads to a reaction (often a negative and opportunistic reaction) by the other party. And this results in unnecessary transaction costs and relationship "taxes," as explained previously.

Economists, such as Oliver Williamson, have shown how contractual, legal, and social norms interact to guide the behavior of individuals and enterprises in all commercial relationships. ⁶² The findings are clear: in more complex commercial relationships, inefficiencies and transaction costs are generated when contractual norms conflict with the social norms that always exist in commercial relationships to a larger or lesser extent.

We are convinced much of the value leakage in contractual relations is because transactional contracts have a "disconnect" from social norms. The more one-sided and power-based the contractual obligations, the more an individual is triggered by human nature with a strong sense of fairness to create a counter-reaction. Simply put, conventional transactional contracts create a disconnect from social norms, resulting in consequences rather than preventing them.

4. Risk Mitigation Through Market Power and State Power

As the saying goes, "buyer beware." We've been taught to do business at our own risk and not expect others to look out for us. It's our fault if we have not taken enough precautions to avoid being taken advantage of. Organizations use contracts to mitigate any potential risk that might arise. Conventional wisdom teaches us to use one's power to shift risk to the other party. While the other party might accept the risks, it rarely does so willingly. The reality is the more one party seeks to shift risk, the more the other party seeks creative strategies to mitigate their risk or shift the risk back.

In a transactional contract, there are two main mechanisms to deal with the risks of opportunistic behavior. The first one is market power; the second is state power. In combination, they give the impression of doing a good job in risk management. In reality, neither power-based mechanism does a good job. Let's explore why each fall short.

We'll look at market power first. By *market power*, we simply mean the power to leave the relationship and contract with another player in the market or the ability to impose onerous terms on the counterparty, with few obligations of your own. The power to leave is most effectively ensured by a termination for convenience clause, which grants a right to terminate the contract whether or not a breach has occurred.

^{62.} See, e.g., Oliver E. Williamson, The New Institutional Economics: Taking Stock, Looking Ahead, 38 J. ECON. LITERATURE 595 passim (2000).

Mitigating risk through market power has serious downsides—not least of which is that it rarely works. In many commercial relationships, the costs of switching a supplier or losing a customer can be very high. Additionally, having such provisions often leads the counterparty to restrict their investment in the relationship. Consider, for example, whether a supplier forced into a corner will willingly provide assets or staff with invaluable knowledge and experience about the customer and its operations.

Market power has its place when there are many suppliers with low or no dependency and switching costs are low (in essence, you are buying a true commodity). But in situations of greater dependency, or where there is potential for differentiated value, using market power in forming the agreement will invariably undermine potential results.

What about *state power*? By state power, we mean the ability to legally enforce contractual obligations. Contractual obligations backed up by state power appear to be a great tool for risk mitigation. After all, the entire idea of a contract assumes a possibility for enforcement.

We argue that the state power mechanism for mitigating the risks of opportunism has serious downsides. Why? The court system is not 100% effective, and a contract breach will not automatically lead to enforcement. Besides, it is often very costly to go to court. For this reason, most parties choose to settle out of court to avoid astronomical legal bills and the potential damage to their reputation. World Commerce & Contracting (WCC, formerly the International Association for Contract and Commercial Management) research supports this assumption, showing that while 30% of negotiated contracts encounter a substantial disagreement between the parties at some point during their execution, only 0.007% end with litigation or arbitration. Even though most contracts rely on an implicit assumption of the effectiveness of the court system, state power is not used as a viable option.

In summary, the risk-mitigating mechanisms of the transactional contract—market power and state power—create an illusion of safety; in reality, they can be weak in managing known risk and largely ineffective in dealing with unknown or unanticipated risks.

5. Complete Planning

A contract is first and foremost an economic instrument to support the realization of business plans. Whether one is trying to build a house or a railroad, to execute a marketing campaign, or to ensure access to information technology, all require many activities from the parties in a contract. The goal of the contract is to ensure that the plans are realized. Conventionally, this is done by allocating

^{63.} MAXIMIZING ROI FROM EFFECTIVE CONTRACT MANAGEMENT – VALUE LEAKAGE REPORT, WORLD. COM. AND CONTRACTING, (Mar. 2015), https://www2.iaccm.com/resources/?id=8484 (on file with the *University of the Pacific Law Review*).

control over the activities through contractual obligations. For example, the buyer would create a prescriptive statement of work or service description of the activities to be performed.

The problem is, again, there is a tendency for opportunism. What if we have missed something when making a plan? What if we realize, after signing the contract, that building the railroad requires some additional work we forgot to include in the specification? Will not the other party take advantage of the situation? Most likely yes, especially if the prior negotiation was focused on minimizing price and maximizing supplier risk. But rather than recognizing these recurrent symptoms and learning from experience, many buyers react by becoming even more demanding in their negotiations. The result? The never-ending quest to make the contract more "complete" so the supplier cannot 'take advantage' in the post-award phase.⁶⁴

These attitudes and behaviors are driven by the incorrect belief (historically peddled by consultants and advisory firms) that power rests with the buyer until contract signature and moves to the supplier once the deal is signed. This philosophy views trading relationships in the context of battlegrounds and as a war of attrition. To maintain control, the plan must be complete and written down in the signed contract.

Complete planning is the attitude of the transactional, adversarial contract. But just as with risk mitigation and disconnection from social norms, achieving a complete plan in a complex environment is based upon a costly illusion. Indeed, 2016 Nobel prize winner Oliver Hart has shown most contracts are incomplete. ⁶⁵ As we have written, today's business environment is complex, fast-moving, and unpredictable. Supply and demand change quickly. Market threats come from all angles, ranging from new competitors, customer hypes, disrupting technology, regulation, and unpredictable events such as dramatic oil price fluctuations. Essentially, we are dealing with a growing volume of the unknown or the unknowable. Relationships must be designed not to eliminate these realities, but to cope with them. The transactional contract has no mechanisms for achieving the much-needed flexibility and collaboration demanded by today's environment.

The fact is complete planning becomes significantly more challenging in the New Economy. An irony about complete planning is that psychological research has revealed we never were good planners to start with.⁶⁶ To borrow terminology from behavioral economics, we suffer from *bounded rationality* because we don't have enough time to gather all relevant information, and our brains cannot deal with all of the data. The conclusion? It has always been impossible for a transactional contract to live up to the ambition of complete planning.

^{64.} While we use examples of buyers using the power, suppliers may also have a dominant role and use/abuse their power.

^{65.} Frydlinger & Hart, supra note 22, at 3.

^{66.} DANIEL KAHNEMAN, THINKING, FAST AND SLOW passim (2011).

E. Five Steps for Creating a Relational Contract

Contracting in the New Economy details five steps for creating a formal relational contract, summarized below:

- Step 1 Lay the foundation for the partnership by focusing on the commercial relationship instead of the commercial transaction (or "deal").
- Step 2 Promote a "partnership" versus an arms-length relationship by co-creating a shared vision and strategic objectives for the relationship.
- Step 3 Adopt guiding principles for the partnership by mutually agreeing on social norms (or guiding principles) that will be explicitly included in the contract.
- Step 4 Align interests and expectations on the specific deal points that represent the core business and commercial aspects of the contract.
- Step 5 Stay aligned by developing and following a governance structure specifically designed to manage change and uncertainty, with the goal to stay continually aligned.

An excellent example of how the five steps work in practice to create a formal relational contract is Vancouver Island Health Authority (Island Health) and South Island Hospitalists (South Island). These organizations are a partnership of administrators and doctors who work together to provide inpatient care for patients with the most complex medical issues in British Columbia. The entities explored relational contracting in 2016, two years after their conventional contract had expired and countless hours of contentious negotiations had failed to replace it. They embarked on a journey to put the five steps into practice.⁶⁷

Step 1: Lay the Foundation. The primary goal of Step 1 is to establish a partnership mentality. Both parties must make a conscious effort to create an environment of trust— one in which they are transparent about their high-level aspirations, specific goals, and concerns. And if their previous contracting process led to distrust and a vicious cycle of shading, they should reflect on how and why that happened.

At Island Health and South Island, the parties tossed out the old contract and chartered a team of twelve administrators and twelve hospitalists to design a formal relational contract. Each individual worked with a counterpart from the other organization to establish connections in key areas. For example, Spencer Cleave, a hospitalist from South Island, and Kim Kerrone, Island Health's vice president

^{67.} The following case study is an excerpt from Frydlinger, Hart, & Vitasek, *supra* note 28, at 122–125. The full-length case study is profiled in the book FRYDLINGER, VITASEK, BERGMAN, & CUMMINS, *supra* note 52.

for finance, legal, and risk, led a small group that focused on rethinking the conventional fee-for-billable-service-hour payment structure.

"We were no longer interested in just developing a contract," recalled Jean Maskey, a hospitalist at South Island who co-headed the contracting team, "but in building excellent relationships at multiple levels that would allow all of us to be leaders in Canadian health care, whether as administrators or hospitalists."

Step 2: Co-create a shared vision and objectives. To keep expectations aligned in a complex and changing environment, both parties—not just the one with greater power—need to explain their vision and goals for the relationship.

The Island Health and South Island team held a three-day off-site to craft their vision: "Together, we are a team that celebrates and advances excellence in care for our patients and ourselves through shared responsibility, collaborative innovation, mutual understanding, and the courage to act, in a safe and supportive environment." They further established a set of four desired outcomes that flowed from the shared vision:

- Excellence in patient care (develop a formal and robust quality structure).
- A sustainable and resilient hospitalist service (strengthen recruitment, mentorship, and retention processes; create an efficient and flexible hospitalist scheduling model; clearly define hospitalist services and workload; develop stronger interdepartmental working relationships; and train and develop current and future hospitalist leaders).
- A strong partnership (continue to build a healthy relationship between Island Health and South Island).
- A best-value hospitalist service (proactively manage the budget, optimize billing, review workload, and increase operational efficiencies).

In a subsequent workshop, the team delved deeper, crafting four high-level desired outcomes, seven goals, and twenty-two tactical and measurable objectives. One objective, for example, called for improving physicians' billing to the provincial Medical Services Plan (MSP) for cost recovery for the hospitalist fees. The parties created a joint project collaboratively working with billing support and IT technologists to develop an electronic billing program to maximize billing submissions, ultimately improving cost recovery from 87% to 100%.

Step 3: Adopt guiding principles. Value-eroding friction and shading occur because one or both parties feel unfairly treated. This risk is highest when there are many unknowns about what will occur after the contract is signed. In Step 3, parties commit to six guiding principles that contractually prohibit opportunistic tit-for-tat moves.

The six principles—reciprocity, autonomy, honesty, loyalty, equity, and integrity—form the basis for all contracts using the Vested methodology and provide a framework for resolving potential misalignments when unforeseen circumstances occur.

Island Health and South Island formally embedded their interpretations of the principles in the preamble of their contract. Each was crafted to establish a new norm for the partnership. Under "reciprocity," for example, they highlighted the need to "conduct ourselves in the spirit of achieving mutual benefit and understanding." Under "equity," they acknowledged the unavoidable imbalances that arise in contracts: "We are committed to fairness, which does not always mean equality. We will make decisions based on a balanced assessment of needs, risks, and resources."

Again, it's important to note these guiding principles have teeth. Although the contractual language may be vague, courts are obligated to interpret it should there be a dispute. Indeed, the Canadian Supreme Court recently took up a case in which a franchisee alleged that it was not being treated fairly by the franchise owner. And therein lies the beauty of the formal relational contract. Few companies will want to risk an expensive court case for breaching the guiding principles; the contract becomes a deterrent against counterproductive behavior.

Step 4: Align expectations and interests. Having set the foundation for the relationship in the first three steps, parties hammer out the terms of "the deal"—for example, responsibilities, pricing, and metrics. It is crucial that all terms and conditions of the formal relational contract are aligned with the guiding principles. With the right mindset, developing the contract becomes a joint problem-solving exercise rather than an adversarial contest.

Consider how the Island Health administrators and South Island hospitalists tackled pricing, which had always been their sticking point. Historically, the two parties had operated under a shroud of opaqueness. For example, Island Health never shared the budget with the hospitalists. And South Island's less-than-optimal reporting processes meant inevitable bickering over billable hours.

Kim Kerrone of Island Health described how using formal relational contracting practices broke the impasse. "We consciously approached the economics of the relationship with full transparency and a problem-solving mentality instead of a negotiations mentality," she told us. "We put everything on the table, and we challenged the contracting team to figure out ways to work with the money we've got."

The parties ultimately came up with an alternative to the standard fee-for-billable-hours method. They designed a hybrid pricing model with a combination of fixed and variable rates, coupled with incentives to improve efficiencies. The model also gave the hospitalists autonomy in scheduling. The team realized: who better to optimize the scheduling for superior patient care than the doctors on the front lines? Under the new pricing model, when the inpatient population is low, the hospitalists can opt to take time off and save Island Health money. When the

population is high, they manage their hours in a way that's within the budget and optimizes patient care. South Island has the opportunity to earn incentives if they improve efficiency and billing, which they can invest in research and quality-of-care initiatives they are passionate about. Both parties felt the new model was a win-win solution, which would have been unachievable under previous contracts.

Step 5: Stay aligned. In this step, contracting parties go beyond crafting the terms of the agreement and establish governance mechanisms that are formally embedded in the contract. Island Health and South Island created four joint governance teams chartered to "live into" the relational contract:

- *The relationship team* focuses on monitoring the health of the relationship.
- The excellence team focuses on quality control, transformational initiatives, continuous improvement, and prioritization and tracking of innovation ideas.
- *The sustainability team* focuses on workload, scheduling, recruiting, and retention.
- *The best value team* focuses on finance, billing, workload optimization, and operational efficiencies.

Each team meets at regular intervals to review progress against the shared vision, goals, outcomes, and measures.

The contract also specifies a second governance mechanism—a "two in a box" communication approach in which an administrator is teamed with a hospitalist for each of the four governance teams. "The approach encourages trust and honesty between the two sides," said Ken Smith, a hospitalist at South Island. "Before, we had no one to speak with [if concerns arose]. Now I have someone I know fairly well at a high level in administration. If I need to make an urgent decision or have a difficult issue that can't wait for the next formal meeting, I can phone my two-in-a-box partner and ask to meet." Such pairings are also highly encouraged outside the governance teams to strengthen the relationship and build trust between parties at all levels.

Kim Kerrone and Jean Maskey both say formal relational contracting was "transformational" for their respective organizations. Some of the results include:

Relationship Health: Surveys measuring the relationship health, conducted before and after the parties deployed relational contracting, revealed the number of people who expressed a positive attitude toward the relationship increased by 84% in just two years. Administrators and hospitalists, who had called their relationship "broken," "dysfunctional," and "distrustful," now describe it as "collaborative," "trusting," and "supportive."

Financial Benefits: Kim Kerrone states, ["f] or the first time, the administration and our doctors are innovating together to drive efficiencies and optimize for patient care with our limited budget. We not only came in under budget, but we

also increased our revenue by improving our MSP billing process. And in a publicly funded health care environment, that is exactly what we need to be focusing on."

Managing Scope Creep: The governance structure also helped the parties surmount the tricky problem of scope creep. While the contract was being developed, in 2016 and 2017, Canada passed a law legalizing medical assistance in dying. At the time, there were too many unknowns about how it would be implemented to address the issue formally. So, the sustainability team came up with a pilot project to address how to fairly add the additional scope of work and a new role for health care providers to the hospitalists' schedule and pricing model. Gone were the battles of "not in scope"; instead, there was a spirit of "how can we accommodate this new reality given our statement of intent?"

Promoting Innovation: The contract also promotes collaborative work on innovative approaches. When the COVID-19 pandemic hit in March 2020, the Island Health system suddenly faced a dramatic change in its patient mix. The impact on the budget and workload was drastic. The parties collaborated to quickly implement a new scheduling process to better balance workload. In addition, they deployed a new "Hospitalists at Home" program, which entailed the hospitalists seeing patients in their homes.

IV. CONCLUSION

Getting contracts right can create millions—if not billions—of dollars of value. But getting them wrong can cost millions of dollars when the parties become misaligned. Even if the misalignment does not end in a lawsuit, there is wasted time, energy, and hard costs associated with the friction caused by opportunistic hold-up behavior and shading.

Contracting in the New Economy requires organizations to rethink both their procurement and contracting practices to incorporate proven collaborative relational constructs that encourage—and even contractually commit—the parties to work together to mitigate risks and continually align interests in a fair and balanced manner. This means challenging the often-adversarial mindset and practices that come with transactional contracts and contract templates. It also means having an open mind to incorporate guiding principles and relational governance mechanisms into the contracts. This will result in a a formal relational contract built to help keep the contracting partners in continual alignment as "business happens."

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Contracts and Economic Sanctions*

Michael P. Malloy**

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The use of economic sanctions—governmental restrictions on the economic activity of other nations, their officials, and often their general population¹—appears to be a prevalent feature of contemporary international politics.² Unavoidably, sanctions may also have a significant effect on a party's rights and obligations. This article argues that a contracting party, particularly when operating in a transnational context, cannot rest upon the assumption that the imposition of sanctions is an extraordinary and unusual event that is unlikely to have an impact upon the party's rights and obligations.

Part I offers some historical context for the dramatic changes in economic sanctions practice in the contemporary business environment.³ Part II considers the prevalence of economic sanctions programs in the current transnational business sector and argues that this feature requires attention in the negotiation and formation of contracts, particularly in light of the heightened risks that may be associated with transnational transactions. Part III considers whether traditional contract doctrines like impracticability might offer any solace to parties involved in transnational business and argues that the obvious prevalence of sanctions in international law and policy may limit the utility of such doctrines. As a result,

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^{1.} This may be a useful working definition of what is meant by the term *economic sanctions*, but in fact there is considerable disagreement as to the scope of the term. "[I]n common parlance the term 'sanction' has a variety of connotations, and even within the context of international law, the term does not have an intuitive or immutable meaning." MICHAEL P. MALLOY, UNITED STATES ECONOMIC SANCTIONS: THEORY AND PRACTICE 6 (2001) (footnotes omitted).

^{2.} For example, in the first six months of the Biden presidency, the Administration issued eight proclamations or executive orders initiating, amending, or expanding economic sanctions with respect to four broad international situations and four target nations. *See* Table, Part II *infra* (identifying recent presidential actions).

^{3.} Because the KCon presentation occurred in mid-2021, this article does not include specific treatment of the latest U.S. economic sanctions imposed on Russia in response to the invasion of Ukraine. *But see* Table, *infra*, n.5 (citing recent U.S. sanctions imposed in response to Russian invasion of Ukraine).

Part IV concludes by urging a proactive approach to the management of risks associated with economic sanctions.

I. HISTORICAL CONTEXT

While economic sanctions may seem a very modern device responsive to an intensely transnational environment, in fact their use has deep classical roots. The earliest documented example of economic sanctions may be the Megarian import embargo imposed by Pericles in 432 B.C., one of the events prompting the Peloponnesian War.⁴ In our own legal tradition, economic sanctions have common law roots in the United States⁵ and Britain,⁶ and trading with a declared enemy state or its nationals was prohibited. Indeed, even private commercial interaction with nationals of declared enemies was traditionally viewed as treason.⁷

In modern U.S. practice, economic sanctions are almost exclusively a matter of legislative authority and prohibition, both in times of war and during periods of declared national emergency. The first modern statute in this regard was section 5(b) of the Trading With the Enemy Act (TWEA).⁸ This statute was intended to authorize the president to impose sanctions on enemy nations, their allies, and their nationals in wartime⁹ and, beginning in 1933, during wartime or a declared national emergency.¹⁰

Since 1977, the use of the TWEA has once again been limited exclusively to wartime. ¹¹ For situations that may be critical but without a formal declaration of war—an increasingly common situation in the post-World War II period—new

^{4.} See THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR 65 (Richard Crawley trans., 2008) ("There were many who came forward and made their several accusations; among them the Megarians, in a long list of grievances, called special attention to the fact of their exclusion from the ports of the Athenian empire and the market of Athens, in defiance of the treaty."); see also Charles Fornara, Plutarch and the Megarian Decree, in STUDIES IN THE GREEK HISTORIANS 213–228 (Donald Kagan ed., 1975) (discussing Megarian embargo).

^{5.} See, e.g., Trading with the Enemy: Legislative and Executive Documents Concerning Regulation of International Transactions in Time of Declared National Emergency Before the Subcomm. on Int'l Trade & Com. of the H. Comm. on Int'l Relations, 94th Cong. 2d Sess. 45–47 (1976) (discussing cases; reproducing remarks of Rep. Montague during House debate on original Trading with the Enemy Act of 1917).

^{6.} See id. at 45–46 (discussing British cases); see also 1 WILLIAM BLACKSTONE, COMMENTARIES 260–261, 372–373 (discussing effect of war on foreign merchants and enemy aliens); 2 WILLIAM BLACKSTONE, COMMENTARIES 401 (discussing effect of state of enmity on property of enemy aliens).

^{7.} See 4 WILLIAM BLACKSTONE, COMMENTARIES 82 (discussing aid and comfort to king's enemies as form of treason).

^{8. 50} U.S.C. § 4305(b) (originally 50 App. U.S.C. § 5(b)). For discussion of the TWEA and its economic sanctions authority, see MICHAEL P. MALLOY, UNITED STATES ECONOMIC SANCTIONS: THEORY AND PRACTICE 150–62 (2001).

^{9.} Trading with the Enemy Act, ch. 106, 40 Stat. 411 (1917) (codified at 50 App. U.S.C. §§ 1–44) (current version at 50 U.S.C. § 4301).

^{10.} Trading with the Enemy Act, ch. 1, § 2, 48 Stat. 1 (1933) (codified at 50 App. U.S.C. § 5) (current version at 50 U.S.C. § 4305).

^{11.} Trading with the Enemy Act Amendments of 1977, Pub. L. No. 95-223, Title I, §§ 101–103, 91 Stat. 1625, 1626 (1977). On the legislative history of the TWEA, see MALLOY, *supra* note 1, at 151–157.

statutory authority was created for economic sanctions, the International Emergency Economic Powers Act ("IEEPA").¹²

Completing the range of basic sanctions authority in U.S. statutory law, we have section 5 of the United Nations Participation Act of 1945, which provides explicitly for presidential sanctions declared to carry out responsibilities as a member state of the United Nations with respect to mandatory measures imposed by the U.N. Security Council under Article 41 of the U.N. Charter. However, invocation of Article 41 by the Security Council was a relatively dormant power until the beginning of the present century. In any event, this economic sanctions authority does not preempt individual state action not inconsistent with mandatory measures that the Security Council might adopt, if any. 14

It would seem, then, that the statutory framework for sanctions assumes that declared war, or something in the nature of an "unusual and extraordinary threat," is the basis for the use of economic sanctions. ¹⁵ Yet in recent times, sanctions have become something approaching a common feature of U.S. international economic policy, ¹⁶ affecting nations, their nationals, and related persons across all continents except, arguably, Antarctica. ¹⁷ Hence, the likely impact and effects of economic sanctions may be relatively more "foreseeable" today than they might have been a century ago, when the imposition of sanctions would have been a genuinely unusual or extraordinary event.

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

^{12.} Trading with the Enemy Act Amendments of 1977, Pub. L. No. 95-223, Title II, §§ 201–208, 91 Stat. 1625 at 1626–1628. On the legislative history of the IEEPA, see MALLOY, *supra* note 1, at 172–176.

^{13. 22} U.S.C. § 287c.; U.N. Charter art. 41, which provides:

^{14.} Cf. U.N. Charter art. 51 (referring to "the inherent right of individual or collective self-defence").

^{15. 50} U.S.C. § 1701(a).

^{16.} See, e.g., Sanctions Programs and Country Information, U.S. DEP'T TREASURY, https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information (last visited Jan. 22, 2022) (on file with the *University of the Pacific Law Review*) (listing 36 sanctions programs administered by the Treasury Department's Office of Foreign Assets Control ("OFAC")).

^{17.} *Cf. Sanctions List Search*, OFF. FOREIGN ASSETS CONTROL, https://sanctionssearch.ofac.treas.gov/ (last visited Jan. 22, 2022) (on file with the *University of the Pacific Law Review*) (providing search device identifying persons subject to economic sanctions based on, *inter alia*, location).

II. PREVALENCE OF CONTEMPORARY ECONOMIC SANCTIONS

There is such a wide array of sanctions in place—unilateral and multilateral,¹⁸ trade and financial,¹⁹ direct and indirect²⁰—that sanctions are now almost a defining characteristic of contemporary international relations.²¹ As a result, it would be misleading to view economic sanctions as "unusual" or "emergency," rather than a commonplace feature of contracting in the transnational market.²² The potential impact of economic sanctions is therefore an increasingly pervasive risk factor in transnational contracting, as should be evident from the Table, *infra*, which identifies sanctions-related actions undertaken by the current U.S. Administration in its first six months.

The prominence of this risk factor has emerged from three distinct features of contemporary transnational practice. First, whatever their actual effectiveness, since the end of the Cold War, there has been a resurgence of U.N. mandatory sanctions practice under Article 41 of the U.N. Charter.²³

One might assume that if the United States has designated a country as [a state sponsor of terrorism] and has imposed sanctions, then it has isolated that country because U.S. companies may not conduct business in the embargoed nation, and U.S. investors may not invest in companies that conduct business there.

The legal situation is more complex. U.S. sanctions may not apply to non-U.S. companies that sell securities in the United States or to non-U.S. subsidiaries of U.S. companies. Although U.S. companies cannot do business in most countries subject to U.S. sanctions, if a foreign country opts not to impose sanctions, then its companies may lawfully conduct business there. This creates an opportunity for regulatory arbitrage.

^{18.} Compare, e.g., Exec. Order No. 13,466, 73 C.F.R. 36,787 (2008) (invoking IEEPA against North Korean nuclear program), with Exec. Order No. 13,551, 75 C.F.R. 53,837 (2010) (invoking IEEPA and UNPA, in light of S.C. Res. 1718 (Oct. 14, 2006), https://www.un.org/securitycouncil/s/res/1718-%282006%29 and S.C. Res. 1874 (June 12, 2009), https://www.un.org/securitycouncil/s/res/1874-%282009%29.

^{19.} *Compare*, e.g., 31 C.F.R. §§ 510.205–510.206 (prohibiting importation from and exportation to North Korea) *with* 31 C.F.R. § 525.201 (blocking property of specified persons related to military coup in Myanmar).

^{20.} See, e.g., 31 C.F.R. § 510.205(a) (prohibiting importation of goods "directly or indirectly . . . from North Korea"); see also United States v. Broverman, 180 F. Supp. 631, 636 (S.D.N.Y. 1959) (holding that importation prohibition applied where target country had indirect interest in foreign trade in its goods, not necessarily a present interest).

^{21.} See Margaret Doxey, Reflections on the Sanctions Decade and Beyond, 64 INT'L J. 539, 539 (2009) ("In the second half of the 20th century, continuing into the 21st, unilateral, regional and, in the post-Cold War period, United Nations sanctions have been extensively used.").

^{22.} See, e.g., Amy Deen Westbrook, What's in Your Portfolio?: U.S. Investors Are Unknowingly Financing State Sponsors of Terrorism, 59 DEPAUL L. REV 1151, 1152–1153 (2010):

^{23.} See Kimberly Ann Elliott, Assessing UN Sanctions After the Cold War, 65 INT'L J. 85, 95 (2009–10) (noting that, after the Iraq invasion of Kuwait, "the UN security council was more vigorous in its responses").

Table. Recent	t Presidential A	ction concernir	Table. Recent Presidential Action concerning Economic Sanctions	
Presidential Action	Citation 86 Fed. Reg.	Date	Subject	Substantive Statutory Authority
Proclamation 10142	7225	Jan. 20, 2021	Termination of Emergency with Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction	National Emergencies Act (NEA)¹
Proclamation 10143	7467	Jan. 25, 2021	Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease 2019	Immigration and Nationality Act, §§ 212(f), 215(a)²
Executive Order 14014	9429	Feb. 10, 2021	Blocking Property with Respect to the Situation in Burma	INA § 212(f) International Emergency Economic Powers Act (IEEPA)³
E.O. 14022	17895	April 1, 2021	Termination of Emergency with Respect to the International Criminal Court	INA, IEEPA
150 U.S.C. §§ 28 U.S.C. §§ 1 350 U.S.C. §§	¹ 50 U.S.C. §§ 1601 et seq. ² 8 U.S.C. §§ 1182(f), 1185(a). ³ 50 U.S.C. §§ 1701 et seq.	(a).		

INA, IEEPA	IEEPA	INA, IEEPA	IEEPA	⁴ This executive order was primarily in response to Russian interference with the 2020 U.S. elections through "efforts to undermine the conduct of free and fair democratic elections and democratic institutions in the United States and its allies and partners; to foster and use transnational corruption to influence foreign governments; to pursue extraterritorial activities targeting dissidents or journalists; to undermine security in countries and regions important to United States national security." Ex. Order No. 14024, 86 Fed. Reg. 20,249, 20,249 (2021). It would be followed later in 2021 and the following year by new executive orders imposing sanctions in response to the extended invasion of Ukraine by Russia. See, e.g., Ex. Order No. 14065, 87 Fed. Reg. 10,293 (Feb. 21, 2022) (blocking property of certain persons and prohibiting transactions with respect to continued Russian invasion of Ukraine); Ex. Order No. 14066, 87 Fed. Reg. 13,625 (Mar. 8, 2022) (prohibiting certain imports and new investments in response to Russian invasion of Ukraine; expanding scope of national emergency declared in Ex. Order No. 14024); Ex. Order No. 14068, 87 Fed. Reg. 14,381 (Mar. 11, 2022) (prohibiting certain imports, and new investment with respect to continued Russian aggression).
Blocking Property with Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation ⁴	Addressing the Threat from Securities Investments that Finance Certain Companies of the People's Republic of China	Blocking Property and Suspending Entry Into the United States of Certain Persons Contributing to the Destabilizing Situation in the Western Balkans	Protecting Americans' Sensitive Data From Foreign Adversaries	sponse to Russian interference with the ratic elections and democratic institution ber-enabled activities against the Uniter foreign governments; to pursue extrained regions important to United States refollowed later in 2021 and the followin of Ukraine by Russia. See, e.g., Ex. Or and prohibiting transactions with respect 8, 2022) (prohibiting certain imports ar il emergency declared in Ex. Order No. rts, exports, and new investment with re
April 15, 2021	June 3, 2021	June 8, 2021	June 9, 2021	was primarily in re- ee and fair democ cilitate malicious cy ption to influence curity in countries a 2021). It would be extended invasion of certain persons of 1. Reg. 13,625 (Mar ng scope of nationa
20249	30145	31079	31423	ecutive order vecutive order of the nagage in and fast shadonal corrustational corrustation of the secondary of the exponse to the ocking property 14066, 87 Fectivatine; expandit 11, 2022) (prof.
E.O. 14024	E.O. 14032	E.O. 14033	E.O. 14034	4 This ex undermine th partners; to e and use tran journalists; to Fed. Reg. 20 sanctions in r 21, 2022) (blc Ex. Order No invasion of UII

Before 1990, U.N. sanctions practice was limited and ineffective, a fact that U.N. trade sanctions against the break-away Southern Rhodesian regime in the 1960s illustrated. In response to the Iraq invasion of Kuwait in 1990, however, U.N. mandatory sanctions effectively isolated occupied Kuwait as well as the Iraqi Government, as a prelude to the first Gulf War. The apparent success of this program led to frequent and pervasive application of mandatory sanctions as the primary U.N. Security Council response to many crises since then. The result of this trend is that there is now a formidable array of sanctions programs in which implementation is mandatory for all U.N. member states, actively monitored by the Security Council through sanctions committees. Consequently, moving contract activities off-shore—a typical maneuver in many pre-1990 sanctions programs, including the Southern Rhodesian sanctions—was no longer an easy and viable option.

Of course, many states, and principally the United States, have continued to promulgate unilateral sanctions programs, often paralleling multilateral sanctions, and these programs have benefited from the newly pervasive incidence of sanctions as a risk factor in transnational contract practices. Hence, the former dissonance of the policy objectives of U.S. economic sanctions and the prevailing attitudes of U.S. trading partners, which often blunted the effectiveness of those sanctions,²⁹ is not necessarily as significant a factor in more complex relationships between multilaterally mandated sanctions and unilateral but parallel sanctions programs.

Second, the impact of economic sanctions as a risk factor in transnational contracting is also affected by the emergence of "smart sanctions" strategies in the design of sanctions programs. Contemporary sanctions are often more carefully targeted, and include specific and distinct sanctions against intermediaries³⁰—for example, business brokers, freight forwarders, purchasing agents, banks, and other financial intermediaries—which has the effect of shifting direct and indirect costs

^{24.} MALLOY, supra note 1, at 87-90.

^{25.} *Id.* at 113–118.

^{26.} Elliott, *supra* note 23, at 97 (providing table illustrating the growth of U.N. sanctions programs from Cold War period through 2010). *Cf.* MALLOY, *supra* note 1, at 35 and Figure 2.1 (noting "marked increase in the rate at which sanctions programs have been initiated" and illustrating history of U.S. sanctions, including multilateral sanctions, in the Twentieth Century).

^{27.} See generally Joanna Wechsler, The Evolution of Security Council Innovations in Sanctions, 65 INT'L J. 31–43 (2009–10) (providing thorough analysis of development of Security Council practice).

^{28.} See Eighth Report of the Security Council Committee, U.N. Doc. S/11927/Add. 1 (1976); see also MALLOY, supra note 1, at 89 (noting that compliance with U.N. Rhodesian sanctions "was a continuing source of concern").

^{29.} See, e.g., Jason Collins Weida, Reaching Multinational Corporations: A New Model for Drafting Effective Economic Sanctions, 30 VT. L. REV. 303, 347 (2006) (arguing that assertion of U.S. authority over foreign subsidiaries of U.S. firms "is unlikely to succeed in all, or perhaps even most, situations that call for the application of an economic sanction").

^{30.} See, e.g., Ex. Order No. 13,224, § 1(d)(i), 66 Fed. Reg. 49,079, 49,080 (2001) (blocking property and prohibiting transactions with, *inter alia*, persons who "provide financial, material, or technological support for, or financial or other services to or in support of" terrorist acts or persons designated as terrorists).

of sanctions avoidance and evasion to indirect and secondary contracting parties that would not otherwise be viewed traditionally as sanctions targets.³¹ This has led to a significantly increased focus on prohibitions against money laundering and against the provision of resources to primary targets. However, "smart sanctions" also raise critical concerns about their conformity with significant legal norms like respect for human rights, including the right to privacy.³²

Third, the impact of sanctions as a risk factor in transnational contracting is also shaped by the availability of licensing within sanctions programs. The existence of authority for a participating U.N. member state to license transactions otherwise affected by a sanctions program, subject to oversight by a U.N. sanctions committee, actually increases the compliance and enforcement impact of sanctions programs. If a licensing process is potentially available, this imposes greater accountability for transnational contract parties.

III. SANCTIONS AND TRADITIONAL CONTRACT DOCTRINE

If a particular contract is prohibited by pertinent economic sanctions, the provisions of the implementing regulations typically will declare the transaction void.³³ However, intervening sanctions may affect existing contracts, or they may have an indirect effect on the contract because of the collateral interest of a sanctions target. One might argue that contract doctrines like impossibility, impracticability, and frustration would ameliorate the impact of sanctions in this regard. Unfortunately, the interaction of these doctrines with current practices in transnational business may complicate the analysis. Under Restatement (Second) of Contracts § 261, for example, a party to a contract indirectly impacted by sanctions might claim that performance has been rendered "impracticable," thus discharging the party's duty to perform. However, to apply to this situation, § 261 requires the occurrence of an event 'after a contract is made' that occurs "without

Any transfer after the effective date [of the regulations] that is in violation of any provision of this part or of any regulation, order, directive, ruling, instruction, or license issued pursuant to this part, and that involves any property or interests in property blocked pursuant to § 510.201 is null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power, or privilege with respect to such property or interests in property.

^{31.} See generally Michael P. Malloy, Unfunding Terror – Perspectives on Unfunding Terror, 17 Transnat'l Law. 97 (2004) (discussing attention to access to financial resources as a feature of modern sanction, rather than a focus on the primary targets themselves).

^{32.} See, e.g., Carla L. Reyes, WTO-Compliant Protection of Fundamental Rights: Lessons from the EU Privacy Directive, 12 Melb. J. of Int'l L. 141 (2011), https://law.unimelb.edu.au/_data/assets/pdf_file/0010/1686934/Reyes.pdf (considering ways to protect fundamental rights through domestic regulation of trade in services); Maya Lukić, The Security Council's Targeted Sanctions in the Light of Recent Developments Occurring in the EU Context, LVII Annals of the Faculty of Law in Belgrade — Belgrade Law Review 239 (2009), reprinted in 2 Michael P. Malloy (ed.), Economic Sanctions Anthology 594 (2015) (discussing right to privacy and the application of targeted sanctions).

^{33.} See, e.g., 31 C.F.R. § 510.202(a), which provides:

[the party's] fault." The pervasiveness of a wide array of sanctions programs challenges both of these premises. The sanctions may already be in place, and in the typical sanctions program the party bears the burden of demonstrating that it did not know, nor had reason to suspect, that the subject transaction was prohibited or restricted. As the official commentary to Restatement (2d) of Contracts § 261 observes.

If the event that prevents the obligor's performance is caused by the obligee, it will ordinarily amount to a breach by the latter. If the event is due to the fault of the obligor himself, this [§ 261] does not apply. As used here "fault" may include not only "willful" wrongs, but such other types of conduct as that amounting to breach of contract or to negligence.³⁵

Of course, this dilemma exists quite aside from any administrative or criminal consequences that might be visited on the parties by a sanctions-enforcing state. Goods or services that are the subject of the contract may also be susceptible to being "blocked" or "frozen" by the enforcing state.³⁶ The same problem would

(Emphasis added.) Significantly, Note 1 to § 510.202(d) advises that "[t]he filing of a report in accordance with the provisions of paragraph (d)(3) of this section shall not be deemed evidence that the terms of paragraphs (d)(1) and (2) of this section have been satisfied." Proof of the person's lack of knowledge or reason to know that the transaction was in violation of the sanctions presumably must be derived from objective "facts and circumstance known or available to" the person, not a post facto realization.

^{34.} See, e.g., 31 C.F.R. § 510.202(d), which provides, with respect to a transactions involving an interest of North Korea or a designated person:

⁽d) Transfers of property that otherwise would be null and void or unenforceable by virtue of the provisions of this section shall not be deemed to be null and void or unenforceable as to any person with whom such property is or was held or maintained (and as to such person only) in cases in which such person is able to establish to the satisfaction of OFAC each of the following:

⁽¹⁾ Such transfer did not represent a willful violation of the provisions of this part by the person with whom such property is or was held or maintained (and as to such person only);

⁽²⁾ The person with whom such property is or was held or maintained did not have reasonable cause to know or suspect, in view of all the facts and circumstances known or available to such person, that such transfer required a license or authorization issued pursuant to this part and was not so licensed or authorized, or, if a license or authorization did purport to cover the transfer, that such license or authorization had been obtained by misrepresentation of a third party or withholding of material facts or was otherwise fraudulently obtained; and

⁽³⁾ The person with whom such property is or was held or maintained filed with OFAC a report setting forth in full the circumstances relating to such transfer promptly upon discovery that:

⁽i) Such transfer was in violation of the provisions of this part or any regulation, ruling, instruction, license, or other directive or authorization issued pursuant to this part;

⁽ii) Such transfer was not licensed or authorized by OFAC; or

⁽iii) If a license did purport to cover the transfer, such license had been obtained by misrepresentation of a third party or withholding of material facts or was otherwise fraudulently obtained.

^{35.} RESTATEMENT (SECOND) OF CONTRACTS § 261, comment d (Am. L. INST. 1981).

^{36.} *Cf.* 31 C.F.R. § 510.101(a)(1)–(2):

exist for a contract party who attempted to invoke the doctrine of discharge by a supervening frustration under Restatement (2d) of Contracts § 265. This may be a particular concern for indirect or intermediary parties, a point that is demonstrated by Illustration 5 under § 265:

A contracts to sell and B to buy a machine, to be delivered to B in the United States. B, as A knows, intends to export the machine to a particular country for resale. Before delivery to B, a government regulation prohibits export of the machine to that country. B refuses to take or pay for the machine. If B can reasonably make other disposition of the machine, even though at some loss, his principal purpose of putting the machine to commercial use is not substantially frustrated. B's duty to take and pay for the machine is not discharged, and B is liable to A for breach of contract.³⁷

Furthermore, given the typical licensing regime that is included in sanctions programs, 'impracticability' may be even less apparent in a particular contracting situation. As comment d to § 261 goes on to note, "impracticability' means more than 'impracticality.' A mere change in the degree of difficulty or expense unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover." One might argue, of course, that if performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, then the regulation or order is "an event the non-occurrence of which was a basic assumption on which the contract was made," according to Restatement (2d) of Contracts § 264. However, comment a to § 264 undercuts this argument, because

[w]ith the trend toward greater governmental regulation . . . , parties are increasingly aware of such risks, and a party may undertake a duty that is not discharged by such supervening governmental actions, as where governmental approval is required for his performance and he assumes the risk that approval will be denied. Such an agreement is usually interpreted as one to pay damages if performance is prevented rather than one to render a performance in violation of law. 40

⁽a)(1) All property and interests in property that are in the United States, that come within the United States, or that are or come within the possession or control of any U.S. person of the Government of North Korea or the Workers' Party of Korea are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

⁽²⁾ All property and interests in property of North Korea or a North Korean national that were blocked pursuant to the Trading With the Enemy Act as of June 16, 2000 and remained blocked on June 26, 2008, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

^{37.} RESTATEMENT (SECOND) OF CONTRACTS § 261, Illus. 5 (Am. L. INST. 1981).

^{38.} RESTATEMENT (SECOND) OF CONTRACTS § 261, comment d (Am. L. INST. 1981).

^{39.} RESTATEMENT (SECOND) OF CONTRACTS § 264 (AM. L. INST. 1981).

^{40.} RESTATEMENT (SECOND) OF CONTRACTS § 264, comment a (AM. L. INST. 1981).

This problem is underscored by Restatement (2d) of Contracts § 266, dealing with existing impracticability or frustration. In a situation where, at the time of contracting, the party's performance is impracticable without his fault, "no duty to render that performance arises," but only if this fact is one which it had "no reason to know," ⁴¹ which may be a difficult argument to make in an environment of pervasive sanctions programs.

IV. CONCLUSION

These considerations suggest the need for caution and active monitoring of contract activity in the transnational market. It is extremely disingenuous to assume that one can casually rely on traditional doctrines of impossibility, impracticability, and frustration in transnational commerce. Unfocused reliance on these doctrines can result in a bitter lesson in the modern environment of transnational contract practice. Alive to the possible impact of modern economic sanctions practice, one should consider whether distribution of the potential risk of intervening sanctions should be explicitly negotiated at the time of contracting.

^{41.} RESTATEMENT (SECOND) OF CONTRACTS § 266 (AM. L. INST. 1981).

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Give Me a Fighting Chance: Why California Should Adopt the Lost Chance Doctrine

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I Ivenopuemov

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I. INTRODUCTION

Sixty-eight-year-old Nita Bird had stage 3C ovarian cancer. When her physician diagnosed her, she had a 35% chance of survival. After Ms. Bird underwent various surgeries, her physician Dr. Eisenkop incorrectly reported that Ms. Bird no longer had cancer and cleared her to stop undergoing chemotherapy. A year later, another surgery revealed that Ms. Bird still had extensive cancer in most of her intestines. She died shortly thereafter. To make matters worse, her family could not recover any monetary compensation for the physician's misdiagnosis.

To recover in a medical malpractice action, a plaintiff must demonstrate—by a preponderance of the evidence—that the defendant's negligence caused his or her injury. Causation plays a critical role in negligence lawsuits. Many factors—such as a physician's misdiagnosis, complicated surgeries, "a patient's genetic predisposition, unhealthy lifestyle choices," or other health issues—can cause a plaintiff's injury. Thus, it is a challenge to demonstrate a physician's negligence caused the plaintiff's injury. The causation problem becomes even more difficult when the plaintiff's chance of recovery is 50% or less before the physician's negligence. 11

California courts follow the traditional rule that does not allow a plaintiff to proceed in a lawsuit if the plaintiff's chance of survival was 50% or less before a misdiagnosis. A plaintiff in that situation cannot receive monetary compensation in a personal injury case, even if the physician was at fault. California embraces the traditional system; it does not address this causation issue. Furthermore, California requires a patient to have over a 50% survival rate before a physician's

- 1. Bird v. Saenz, 86 Cal. App. 4th 167, 173 (2001).
- 2. *Id.* at 172–73 (2001); *see Stages of Ovarian Cancer*, OVARIAN CANCER RES. ALL., https://ocrahope.org/patients/about-ovarian-cancer/staging/#stage-3-ovarian-cancer (last visited Jan. 1, 2021) (defining stage 3C ovarian cancer as "cancer [that] spread to the peritoneum and the cancer in the peritoneum is larger than 2 centimeters and/or cancer has spread to lymph nodes in the abdomen").
 - 3. Bird v. Saenz, 86 Cal. App. 4th at 171.
 - 4. Id. at 172.
 - 5. *Id*.
 - 6. *Id.* at 178.
- 7. Frederickson, Mazeika & Grant, LLP, Lost Chance Doctrine, FMG BLOG, https://fmglegal.com/business-litigation/lost-chance-doctrine/ (last visited Aug. 27, 2020) (on file with the University of the Pacific Law Review); see also LAWRENCE C. LEVINE, QUICK REVIEW OF TORTS 7, 92 (West Academic Publishing, 5th ed. 2014) (defining proximate cause as the element that limits liability if an outcome that is wholly unforeseeable of defendant's negligence occurs).
 - 8. *Id*.
 - 9. *Id*.
 - 10. Id.
 - 11. Frederickson, Mazeika & Grant, supra note 7.
 - 12. Id.
 - 13. Id.
 - 14. *Id*.

negligence to seek compensatory damages for a medical malpractice lawsuit.¹⁵ Hence, a patient with a 50.1% survival rate may have a claim in court, but a patient with a 50% survival rate does not.¹⁶ California's adherence to the traditional rule of causation is restrictive and insufficient in comparison to other states' causation problem solutions in medical malpractice cases.¹⁷

Other states have implemented the Lost Chance Doctrine ¹⁸ to address the causation problem. ¹⁹ This doctrine allows a plaintiff to have a triable case despite having a chance of survival at or below 50% before the physician's negligence. ²⁰

This Comment recommends that the California Legislature adopt the Lost Chance Doctrine for patients with 50% or lower to recover damages when a physician's negligence lowered their chance of survival. Part II provides background on medical malpractice cases and the elements a plaintiff must prove to prevail in court. Part III explores the various approaches of the Lost Chance Doctrine. Part IV discusses California cases that have impacted the Lost Chance Doctrine. Part V argues why California should adopt the Lost Chance Doctrine to address the injustice that plaintiffs with a 50% survival rate or less face in medical malpractice cases. Part VI proposes a model rule that the California Legislature may use to implement the doctrine.

II. MEDICAL MALPRACTICE

Some states have adopted the Lost Chance Doctrine for two reasons.²⁷ First, the doctrine allows plaintiffs to overcome the difficulty of proving causation in medical malpractice.²⁸ Second, the Lost Chance Doctrine addresses the injustice that a patient with a 50% or less survival rate faces when a physician's negligence lowered their chance of survival.²⁹ Even plaintiffs who have over a 50% chance of

- 15. *Id*.
- 16. Frederickson, Mazeika & Grant, supra note 7.
- 17. Barry F. Rosen, *The Lost Chance Doctrine*, GORDON FEINBLATT LLC BLOG (Mar. 20, 2012), https://www.gfrlaw.com/what-we-do/insights/lost-chance-doctrine (on file with the *University of the Pacific Law Review*).
- 18. Scholars frequently name the doctrine Lost Chance Doctrine and Loss of Chance interchangeably. Both forms are correct and refer to the same doctrine.
 - 19. Frederickson, Mazeika & Grant, supra note 7.
 - 20. Id.
 - 21. Infra Part VII.
 - 22. Infra Part II.
 - 23. Infra Part III.
 - 24. Infra Part IV.
 - 25. Infra Part V.
 - 26. Infra Part VI.
- 27. Margaret T. Mangan, Comment, *The Loss of Chance Doctrine: A Small Price to Pay for Human Life*, 42 S.D. L. REV. 279, 285 (1997) (discussing the importance of the Lost Chance Doctrine).
 - 28. Id.
 - 29. Id.

survival face an uphill battle to prove all six elements of a medical malpractice case. 30

Section A addresses the duty, standard of care, and breach of duty requirements a patient must prove in a medical malpractice case.³¹ Section B addresses the causation element and why it is hard for plaintiffs to satisfy the causation element.³² Section C discusses how a plaintiff must link the injury to the physician's negligence to recover damages.³³

A. Duty, Standard of Care, and Breach of Duty Elements

In a medical malpractice negligence claim, the duty element requires a legal affiliation between the parties.³⁴ A plaintiff meets this element if the law requires the defendant to act or not act in a certain way toward the plaintiff.³⁵ Duty is seldom an issue where the defendant acts in a fashion that injures a plaintiff.³⁶ In most—if not all—Loss of Chance claims, the healthcare professional owes a duty of care to their patient.³⁷ Additionally, more than one physician may have a duty to the patient if multiple physicians failed to diagnose the patient properly.³⁸

The plaintiff must also demonstrate the physician breached his or her duty of care.³⁹ In a negligence lawsuit, the court usually measures the defendant's actions against the actions of a theoretical reasonable prudent person acting under the same or similar circumstances.⁴⁰ However, the law imposes a higher standard of care for physicians and other medical professionals in a medical malpractice lawsuit.⁴¹ Nevertheless, the law does permit the medical industry to set its own reasonable care standard.⁴² A plaintiff must show the physician did not follow the relevant

- 31. Infra Section II.A.
- 32. Infra Section II.B; see Mangan, supra note 27 at 284-85.
- 33. Infra Section II.C.
- 34. Levine, *supra* note 7 at 43–44.
- 35. *Id*.
- 36. Id. at 43
- 37. Benjamin Lajoie, Reopening the Discussion of the Loss of Opportunity Doctrine in New Hampshire: A Look at Decisions Made in Light of Current Times, 13 U.N.H. L. REV. 99, 111 (2015).
- 38. See id. at 111–12 ("[T]he Massachusetts Supreme Court found the radiologist and internal medicine physician jointly and severally liable for the plaintiff's loss of chance of survival when both physicians negligently failed to provide the other with patient information that would have led to an earlier diagnosis of breast cancer."); see also Summers v. Tice, 33 Cal. 2d 80, 84, 88 (1948) (holding that under the doctrine of alternative liability, two independent tortfeasors may be held liable if it is impossible to know which individual caused the plaintiff's injury, and thus, the burden of proof will shift to the defendants to either absolve themselves of liability or apportion the damages between them).
- 39. Gerald Michaud & Mark Hutton, *Medical Tort Law: The Emergence of a Specialty Standard of Care*, 16 TULSA L. REV. 720, 722 (1981).
 - 40. Id. at 721.
- 41. See id. at 722 ("In a medical negligence case, however, the question of whether the defendant acted in conformity with the common practice within his profession is the essence of the suit.").
 - 42. See id. ("As part of his prima facie case, a malpractice plaintiff must affirmatively prove that the

^{30.} See id. ("some courts recognize injury resulting from medical malpractice as not only a physical harm, but also the loss of an opportunity of avoiding that harm.").

standard of medical care that physicians normally exercise when treating a patient.⁴³ In medical malpractice suits, common breaches of that standard occur when a physician makes a careless decision, misdiagnoses the patient, or postpones a diagnosis or treatment.⁴⁴

B. The Cause in Fact and Proximate Cause Elements

Once the plaintiff satisfies the elements of duty and a physician's breach of the standard of care, the plaintiff must prove the defendant's negligence was the cause in fact and proximate cause of the plaintiff's harm. However, proximate cause is not a key issue if a plaintiff meets the causation element. To establish causation, a plaintiff must satisfy the traditional "but-for" test. Under this test, the plaintiff must show that their injury would not have occurred but for the physician's negligence. This test is difficult to prove when a patient already has a survival rate of 50% or less. Under the ultimate harm of death, even without a physician's negligence. In these jurisdictions, the causation element focuses on whether the physician's conduct ultimately caused the injury—not the lost opportunity of a better medical outcome. Thus, under the traditional approach, some physicians can escape liability for their negligent actions.

However, the Lost Chance Doctrine enables some plaintiffs to recover something.⁵³ Under this doctrine, the causation element does not emphasize the ultimate injury; rather, it focuses on whether the physician's negligence caused reduced the patient's chance for a better medical outcome.⁵⁴ The plaintiff must prove the physician's negligence caused the injury by a preponderance of the evidence.⁵⁵ This

relevant recognized standards of medical care exercised by other physicians were not followed in the treatment of the plaintiff.").

- 43. Id.
- 44. Lajoie, supra note 37 at 112.
- 45. See Levine, supra note 7 at 88–89 (listing causation and proximate cause as two separate elements under tort law).
- 46. For the purpose of this Comment, the focus is on causation since at this point the case's requirement a plaintiff with less than a 50% survival rate cannot go further in the lawsuit. Levine, *supra* note 7.
 - 47. Id. at 89.
 - 48. Id. at 88–89.
 - 49. Id. at 92.
 - 50. Lajoie, supra note 37 at 114.
 - 51. Id.
- 52. Steven R. Koch, Whose Loss is It Anyway Effects of the Lost-Chance Doctrine on Civil Litigation and Medical Malpractice Insurance, 88 N.C. L. REV. 595, 605 (2010).
- 53. Lajoie, *supra* note 37 at 114; *see* Koch, *supra* note 52 at 605 (explaining the Lost Chance Doctrine proportional approach where "a plaintiff with a [40%] chance of recovery who, because of the defendant doctor's negligent act, had her chance of recovery reduced to only [10%], could collect [30%] . . . of her total damages from the defendant doctor").
 - 54. Lajoie, supra note 37 at 114.
 - 55. Id.

injury is not a traditional, physical injury; rather, it is the diminished chance of a more promising outcome.⁵⁶ If the plaintiff can meet the loss of chance standard, then they may recover for the injury.⁵⁷

C. Damages

In every negligence action, the plaintiff must prove actual damages.⁵⁸ Courts that have adopted the Lost Chance Doctrine will hold or imply that loss of chance itself constitutes a damage.⁵⁹ Specific losses—such as loss of consortium, income, life expectancy, and enjoyment of life—may also suffice as damages.⁶⁰ Once the plaintiff satisfies this element, the defendant is liable for the percentage reduction of the patient's chance of survival.⁶¹ However, this is easier said than done.⁶² There is no uniform standard of how juries compute damages in loss of chance claims in the United States.⁶³ Certain courts may reduce monetary compensation for damages to mirror the percentage reduction in a patient's chance for recovery.⁶⁴ Another court has held that a patient could recover the full damages amount.⁶⁵

III. LOST CHANCE DOCTRINE

The Lost Chance Doctrine is a departure from traditional legal principles that usually demand an injured plaintiff to prove a probability of harm.⁶⁶ Normally, a plaintiff must establish that the wrongdoer's negligence caused, more likely than not, their injury.⁶⁷ However, some jurisdictions and state legislatures decided the traditional rule was too restrictive and adopted the Lost Chance Doctrine.⁶⁸ Under

- 56. Id.
- 57. Id.
- 58. Levine, supra note 7 at 100.
- 59. Starkey v. St. Rita's Med. Ctr., 117 Ohio App. 3d 164, 173 (1997).
- 60. *Id.*; see Loss of Consortium: More than Sexual Pleasures, HG.ORG, https://www.hg.org/legal-articles/loss-of-consortium-more-than-sexual-pleasures-23278 (defining loss of consortium as "the inability of one's spouse to have a normal marital relationship, or in many cases, loss of sexual pleasure").
 - 61. Lajoie, supra note 37 at 103.
- 62. See generally Martin J. McMahon, Annotation, Medical Malpractice: Measure and Elements of Damages in Actions Based on Loss of Chance, 81 A.L.R. 485 (Mar. 15, 2021).
 - 63. *Id*
- 64. See Delaney v. Cade, 873 P.2d 175, 178, 183 (Kan. 1994) (holding that the plaintiff cannot recover the full amount of their damages, but rather the court must limit or reduce the monetary compensation based on the amount of chance that the plaintiff lost); Fennell v. Southern Maryland Hosp. Ctr., Inc., 580 A.2d 206, 208 (Md. 1990)
- 65. See Hope v. Seahorse, Inc., 651 F. Supp. 976, 991–92 (S.D. Tex. 1986) (ruling it was proper for damages to reflect a full 10 years' life expectancy, though the patient only a 60% to 80% chance of living those 10 years, if the physician was not negligent in diagnosing or treating the patient correctly. would have diagnosed they had been diagnosed and treated correctly).
 - 66. Rosen, supra note 17.
 - 67. *Id*.
- 68. See Mo. REV. STAT. § 537.021 (West 2022) (allowing for court appointment of a plaintiff ad litem, on behalf of an original plaintiff who already died, for lost chance causes of action); see also Wollen v. DePaul

this doctrine, if the injured party shows that their physician disadvantaged them of a significant chance of avoiding harm, then they establish adequate evidence of causation.⁶⁹

The traditional all-or-nothing approach to causation "fails to recognize the common-sense proposition that a person's loss of chance to survive or recover *does* injure a person." Jurisdictions adopting the doctrine deem "the lost chance of a better outcome—not the final harm itself—to be the compensable damage." Jurisdictions that lower the standard to meet the causation element to make things fairer for plaintiffs are nothing new in the torts system. Jurisdictions have adopted the Lost Chance Doctrine in various forms. Nevertheless, states did not accept the doctrine collectively. Section A discusses the Pure Form approach. Subsection B deliberates the Substantial Chance approach. Subsection C discusses the State of Washington's Lost Chance Doctrine.

A. Pure Form Approach: The Relaxed Causation Standard

The Pure Form approach permits a patient plaintiff to recover monetary compensation for any chance of recovery equal to or less than 50%, thereby relaxing

Health Center, 828 S.W.2d 681, 687 (Mo. 1992) (holding the plaintiff had an action for lost chance of recovery in Missouri); see Dickhoff v. Green, 836 N.W.2d 321, 324 (Minn. 2013) (holding Minnesota law permits recovery for loss of chance in a medical malpractice action); Rosen, supra note 17; see Charles A. Jones, et al., The "Loss of Chance" Doctrine in Medical Malpractice Cases, TROUTMAN PEPPER (Mar. 13, 2013), https://www.troutman.com/insights/the-loss-of-chance-doctrine-in-medical-malpractice-cases.html (on file with the University of the Pacific Law Review) (listing the twenty-two states and the District of Columbia—Arizona, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, South Dakota, Virginia, Washington, West Virginia, Wisconsin, and Wyoming—that adopted the doctrine and highlighting the states and highlighting eight states, such as Florida, Idaho, Maryland, Mississippi, New Hampshire, Tennessee, Texas, South Carolina and Vermont—who have clearly rejected the Lost Chance Doctrine).

- 69. Rosen, supra note 17.
- 70. See John Curran, Loss of Chance Doctrine in Medical Malpractice Cases, 87 N.Y. St. B.A. J. 31, 31 (2015) ("Wrongful death actions are typical applications of the LOC doctrine upon allegations that negligence "hastened" or "speeded up" the death or deprived the decedent of a chance of survival. There has been substantial debate outside New York about whether the doctrine is compatible with state wrongful death statutes.").
 - 71. Rosen, supra note 17.
- 72. See Zuchowics v. United States, 140 F.3d 381, 388 n.6 (2nd Cir. 1998) ("In the last [50] years the strictness of the requirement that the plaintiff show that without defendant's act or omission the accident would not have occurred has been mitigated in several types of cases.... [T]he modern trend is to place the burden on the defendants to disprove causation."); see also Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 774 (1970) (shifting the burden of proof to the defendants to prove that their violation was not a cause of the plaintiff's deaths; in the absence of such proof, defendants' causation of such death is established as a matter of law); see Summers v. Tice, 33 Cal. 2d at 84 (holding that under the doctrine of alternative liability, two independent tortfeasors may be held liable if it is impossible to know which individual caused the plaintiff's injury, and thus, the burden of proof will shift to the defendants to either absolve themselves of liability or apportion the damages between them).
 - 73. Rosen, supra note 17.
 - 74. Id.
 - 75. Infra Section III.A.
 - 76. Infra Section III.B.
 - 77. Infra Section III.C.

the traditional standard.⁷⁸ For the case to go to trial, a plaintiff must simply show that the physician's negligence deprived the plaintiff of some chance of a greater recovery.⁷⁹ To illustrate, a patient who had a 40% chance of recovery before a physician's negligence, which then sank to 30%, has a claim for the 10% reduction.⁸⁰ This approach makes the Lost Chance Doctrine more plaintiff-friendly because it allows a plaintiff to recover at least a portion of their injury rather than nothing under California's traditional approach.⁸¹ In total, twenty-two states have embraced this doctrine, while sixteen states did not.⁸² Although Ms. Bird's family presented sufficient evidence to produce a triable lawsuit according to the presiding court, the court denied their claim because California has not adopted the Lost Chance Doctrine.⁸³ Therefore, plaintiffs like Ms. Bird—or their surviving families—cannot recover in a wrongful death claim when the patient's chance of survival is equal to or less than 50%.⁸⁴

Critics of the Pure Form approach argue it would adversely change the United States health care system.⁸⁵ They believe physicians would modify the nature and degree of their care due to the fear of potential lawsuits.⁸⁶

B. Substantial Chance Approach

Some jurisdictions have adopted the Substantial Chance approach.⁸⁷ The main principle of this approach is that the loss of a chance is a single legal claim.⁸⁸ This approach views a compensable injury as the weakened or destroyed chance for a better medical outcome rather than the final harm to the patient.⁸⁹ Here, a plaintiff may recover even if the probability of an enhanced medical outcome was less than 50%.⁹⁰ However, a plaintiff must establish the causal link between the lost opportunity and a physician's negligence, not between the negligence and the patient's physical harm.⁹¹

This approach is an adaptation of the Pure Form approach, but it has an additional requirement. 92 A plaintiff must also demonstrate the physician's negligence

^{78.} Brie D. Wallace, Poor Policy Stunts Tennessee Tort Law Again: The Need for Tennessee's Adoption of the Loss of Chance Doctrine in Medical Malpractice Litigation, 40 U. MEM. L. REV. 215, 227–28 (2009).

^{79.} Id.

^{80.} Frederickson, Mazeika & Grant, LLP, supra note 7.

^{81.} *Id*.

^{82.} *Id*.

^{83.} Bird, 86 Cal. App. 4th at 177-78.

^{84.} Id. at 176-79.

^{85.} Wallace, supra note at 228.

^{86.} Id.

^{87.} *Id*.

^{88.} Id.

^{89.} *Id.* at 228–29 (2009).

^{90.} Wallace, supra note at 229.

^{91.} Id.

^{92.} *Id*.

decreased a "substantial possibility" of a more promising outcome if the physician gave an appropriate treatment.⁹³ Some jurisdictions, however, will limit recovery based on a percentage threshold.⁹⁴ To illustrate, a state may only allow plaintiffs with more than a 10% chance of survival to file suit under the doctrine.⁹⁵

Opponents of substantial chance argue that its application is too difficult.⁹⁶ In their view, juries cannot understand or compute the percentages involved in medical malpractice lawsuits.⁹⁷ Further, critics argue that juries might resolve cases in a varying fashion due to the arbitrary system of statistical calculation.⁹⁸

C. Washington's Lost Chance Doctrine

The Washington State Supreme Court first acknowledged the Lost Chance Doctrine in *Herskovits v. Group Health Cooperative of Puget Sound*, which considered the state's wrongful death statute. ⁹⁹ The Court eventually extended the doctrine to situations where plaintiffs were still alive but suffered from a decrease in their chance to survive, as seen in *Mohr v. Grantham*. ¹⁰⁰ The Washington Legislature codified the *Mohr* decision in its medical malpractice statute. ¹⁰¹ Washington's medical malpractice specifies the following:

The following shall be necessary elements of proof that injury resulted from the failure of the health care provider to follow the accepted standard of care:

(1) The health care provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances;

^{93.} Id.

^{94.} See id. ("A second interpretation is that the loss of a substantial chance includes a loss of a chance between [50%] or less to "anything greater than [5%].").

^{95.} Wallace, supra note at 229.

^{96.} Id. at 232.

^{97.} *Id*.

^{98.} Id.

^{99.} See Herskovits v. Grp. Health Coop., 664 P.2d 474, 479 (Wash. 1983) (overturned a summary judgment for the defendant and restored the plaintiff's cause of action, ruling that plaintiff did not have to show that the decedent's survival rate was 51%, and the evidence of a decreased chance of survival was satisfactory for jury determination of proximate cause); Matthew Wurdeman, Comment, Loss-Of-Chance Doctrine in Washington: From Herskovitz to Mohr and the Need for Clarification, 89 WASH. L. REV. 603, 614 (2014).

^{100.} See Wurdeman, supra note 99 at 603 (arguing for concrete solutions to establish "a coherent and equitable doctrine that will allow plaintiffs to recover for loss of chance without creating incentives for unfair manipulation of common law tort standards in Washington").

^{101.} Id. at 628.

(2) Such failure was a proximate cause of the injury complained of. 102

IV. CALIFORNIA CASES THAT IMPACT THE LOST CHANCE DOCTRINE

While a significant number of states have adopted the Lost Chance Doctrine, California has neither adopted nor fully rejected it. ¹⁰³ Instead, courts permit recovery only where a medical professional's negligence was a substantial factor in causing a patient's injury. ¹⁰⁴ There are two leading cases regarding the doctrine. ¹⁰⁵ Section A discusses the case *Bromme v. Pavitt*, where a patient's husband was unable to prevail in a wrongful death action. ¹⁰⁶ Section B examines *Bird v. Saenz*, where the plaintiffs could not proceed because they failed to prove the causation element despite providing evidence of the physician's negligence. ¹⁰⁷

A. Bromme v. Pavitt (1992)

Charles Bromme, the husband of a deceased colon cancer patient, sued the wife's physician for wrongful death.¹⁰⁸ He claimed the physician negligently failed to identify the cancer despite the decedent telling him about the abdominal pain twice and requesting a diagnosis.¹⁰⁹ Unfortunately, the physician discovered the colon cancer one year too late.¹¹⁰ The California Appellate Court partially ruled in favor of the defendant physician by finding that the parties were only allowed to challenge any negligence claims that occurred after 1981.¹¹¹ The court's decision hurt the patient's case by barring recovery because the wife's chance of survival was less than 50% in 1981.¹¹² By comparison, in 1980, when the decedent first complained of the abdominal pain, her chance of survival was as high as 75%.¹¹³

Nonetheless, the court held that "California does not recognize a cause of action for wrongful death based on medical negligence where the decedent did not have a greater than [50%] chance of survival had the defendant properly diagnosed and treated the condition."¹¹⁴

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102. WASH. REV. CODE § 7.70.040 (West 2022).
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^{103.} Frederickson, Mazeika & Grant, supra note 7.

^{104.} See id. (explaining that a plaintiff may only recover when their chance of survival before the physician's negligence was over 50% and therefore, meeting the substantial factor criteria).

^{105.} Id.

^{106.} Infra Section V.A.

^{107.} Infra Section V.B.

^{108.} Bromme v. Pavitt, 5 Cal. App. 4th 1487, 1492 (1992).

^{109.} Id.

^{110.} *Id*.

^{111.} See id. at 1504 ("[U]ncontradicted evidence established that Bromme's chance of surviving the cancer after June 1981 was less than 50 percent even if defendant had not been negligent, i.e., that it was not medically probable defendant's alleged negligence after June 1981 was a substantial factor in causing Bromme's death.").

^{112.} *Id*.

^{113.} Bromme, 5 Cal. App. 4th at 1495.

^{114.} See id. at 1504-05 (leaving the option for the California Legislature to adopt the Lost Chance of

B. Bird v. Saenz (2001)

Decedent Nita Bird underwent several surgeries when in the defendant physician's care. The defendant then misdiagnosed her, stating that no residual cancer remained after a surgery. Ms. Bird had a 35% chance of survival at the time the physician found the cancer. The physician failed to insert a port-a-cath during a subsequent procedure. The oversight caused Ms. Bird to have additional health issues—such as kidney failure, adult respiratory distress syndrome, midbrain infarcts, and skin sloughing. Complications from the procedure greatly delayed the physicians from providing the second course of chemotherapeutic agents. Consequently, Ms. Bird's body became resistant to those medications, and she eventually died from the cancer.

The plaintiffs, Ms. Bird's daughters, sued under a wrongful death claim for medical malpractice. The trial court granted summary adjudication and ruled in favor for the defendant physician in the pre-trial stage. The plaintiffs appealed the decision. The appeals court reversed and remanded the case to the trial court because the California Supreme Court had not addressed the issue of the Lost Chance Doctrine. The trial court reasoned there was sufficient evidence for a triable case, and it ruled in favor of the defendant because California had not adopted the doctrine.

Doctrine).

^{115.} Bird, 28 Cal. 4th at 912-13.

^{116.} Id. at 912; Frederickson, Mazeika & Grant, supra note 7.

^{117.} Bird, 28 Cal. 4th at 912.

^{118.} See Bird, 86 Cal. App. 4th at 174 ("Plaintiffs argued in their opposition that the complications arising out of the port-a-cath procedure—including the extreme trauma of opening Bird's chest for emergency surgery, adult respiratory distress syndrome, and kidney failure—were substantial factors contributing to Bird's death."); see also Port-A-Cath, FREE DICTIONARY, https://medical-dictionary.thefreedictionary.com/Port-A-Cath (last visited Mar. 4, 2022) (on file with the *University of the Pacific Law Review*) (defining a port-a-catch as a "device that provides long-term IV access for administering TPN . . . drugs [and] high-dose chemotherapy.").

^{119.} Bird, Cal. App. 4th at 172.

^{120.} Id.

^{121.} *Id*.

^{122.} Bird v. Saenz, 28 Cal. 4th 910, 912 (2002); Frederickson, Mazeika & Grant, LLP, supra note 7.

^{123.} See Bird, 86 Cal. App. 4th at 170, 174 (2001) ("[T]he median five-year survival rate for the type of cancer that Bird had, stage IIIC ovarian cancer, is 35 percent; thus, the care and treatment rendered by defendants in connection with the port-a-cath procedure and/or the medical complications following it, and/or the three-month delay in administering chemotherapy, did not cause Bird's cancer to progress from probably curable (i.e., 51 percent chance of five-year survival), to probably incurable (i.e., less than 51 percent chance of five-year survival)"); Frederickson, Mazeika & Grant, LLP, supra note 7.

^{124.} Bird, 28 Cal. 4th at 912; Frederickson, Mazeika & Grant, LLP, supra note 7.

^{125.} Bird, 86 Cal. App. 4th at 184; Frederickson, Mazeika & Grant, supra note 7.

^{126.} Frederickson, Mazeika & Grant, supra note 7.

V. CALL TO ADOPT THE LOST CHANCE DOCTRINE IN CALIFORNIA

The traditional standard that California currently applies "draws arbitrary lines to determine who is and who is not owed compensation, regardless of one's ability to prove negligence on the part of his physician." Currently, California courts permit a plaintiff with a 55% chance of survival to reach a jury—even if the physician's negligence only cost them 5% of their chance. It is no contrast, when a physician's negligence reduces a plaintiff's chance of survival from 48% to 2%, the court cannot allow the case to go forward. Section A highlights the reasons why California should adopt the Lost Chance Doctrine. Section B disproves the myth of claimants flooding the courts once the state adopts the doctrine. Section C discusses the Lost Chance Doctrine as an evolving area of the law.

A. Valuing Chances and Increasing Accountability

Lawmakers and courts in various states developed the Lost Chance Doctrine for two leading reasons. One reason comes from the difficulty of demonstrating the causation element in medical malpractice lawsuits. The second reason is the overall injustice that occurs when a medical professional's negligence considerably decreases a patient's chance of recovery, but the professional refuses to compensate the patient. Relaxing the causation element will correct an apparent wrongness to plaintiffs who could prove the possibility that the physician's negligence "caused the injury but could not prove the probability of causation." The doctrine allows some form of recovery when medical malpractice negatively impacted a patient's life. The

The Lost Chance Doctrine's relaxation of the causation element does not relieve a plaintiff from proving that damages occurred under a traditional standard of proof.¹³⁸ The lost chance of survival or reduction of a better medical outcome qualifies merely as a damage—an element—for an actionable tort.¹³⁹ Classifying

^{127.} Chris M. Warzecha, *The Loss of Chance in Arkansas and the Door Left Open: Revisiting Holt ex rel.* Holt v. Wagner, 63 ARK. L. REV. 785, 800 (2010).

^{128.} See Frederickson, Mazeika & Grant, LLP, supra note 7 (highlighting that California requires that a plaintiff must have a 50% or more chance of survival before a physician's negligence occurred).

^{129.} Id.

^{130.} Infra Section VII.A.

^{131.} Infra Section VII.B.

^{132.} Infra Section VII.C.

^{133.} Mangan, supra note 27 at 285.

^{134.} Id.

^{135.} Id.

^{136.} See id. at 285 (quoting Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397, 408 n.1 (Tex. 1993) (Hightower, J., dissenting)).

^{137.} Id.

^{138.} David A. Fischer, Tort Recovery for Loss of Chance, 36 WAKE FOREST L. REV. 605, 618 (1997).

^{139.} Id. at 617-18.

a lost chance of preventing harm as a damage—or acquiring a better outcome—relieves a plaintiff's burden of showing the harm or lost benefit that occurred. ¹⁴⁰ Nonetheless, the classification maintains the condition that a plaintiff must verify damages by the traditional standard of proof. ¹⁴¹

If a jurisdiction rejects the doctrine, then it allows medical professionals' immunity from claims for the grossest malpractice if a patient's chance of survival was less than 50%. 142 Rejecting the doctrine "undermines the deterrence and loss allocation functions of tort law . . . thereby negating the whole purpose of tort law." 143 Although a medical professional's negligence may not be the fundamental source of the patient's illness or death, in several situations, the physician's negligence "causes statistically demonstrable losses." 144 Further, because of a physician's negligence, a person will never know if they would have recovered without the medical malpractice. 145 A patient's unawareness gives medical professionals the "benefit of an uncertainty created by their own negligence." 146 Nevertheless, "fundamental fairness dictates that the cost of that uncertainty should be imposed on the tortfeasor rather than on its victim." 147

California must hold negligent medical professionals liable for a patient's loss of survival or reduction of a better medical outcome. By adopting the Lost Chance Doctrine, California can prevent—or reduce the likelihood of—physicians evading accountability for their part in a patient's death. Many critics argue that such an accountability places a burden on the healthcare system. However, courts must not reduce the worth of human life as a consequence of these potential burdens placed upon the healthcare system.

The doctrine offers an equitable recovery method because courts would allocate monetary compensations in proportion to the patient's lost chance. ¹⁵² A person should recover for any loss of a better medical outcome, irrespective of how small the decreased percentage is. ¹⁵³ California should accept the Lost Chance Doctrine because the chance of survival of its citizens has tremendous value. ¹⁵⁴ This

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140. Id. at 618.

141. Id.

142. Mangan, supra note 27 at 285.

143. Id.

144. Id.

145. Id.

146. Id.

147. Mangan, supra note 27 at 285.

148. Id. at 298.

149. Id. at 285.

150. Id. at 298.

151. Id. at 285.

152. Mangan, supra note 27 at 304.

153. Id.
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154. *Id.* at 285; see Fischer, supra note at 618 ("A major rationale for loss of a chance where plaintiff cannot prove traditional damage is that the chance of obtaining a benefit or avoiding a harm has value in itself that is entitled to legal protection.").

argument is founded on the idea that individuals willfully pay to pursue a contract case or property case with a 50% or less chance of winning. In several cases, this "value is reflected in an actual market; a lawsuit with a 50% [or less] chance of success has real settlement value, and land with a chance of rezoning will have a higher market value than land without a chance. In Nonetheless, the identical principle applies here, although there is no tangible market. Courts accepting the concept that chances have value ought to logically allow a claim for lessening of chance, in addition to destruction of chance.

B. Myth of Flooding the Courts and Increased Costs for the State if California Adopts the Doctrine of Lost Chances

The Lost Chance Doctrine has caused tension among those with opposing social values.¹⁵⁹ The doctrine's purpose is to compensate individuals who already had a reduced chance of living before the medical negligence.¹⁶⁰ Society attributes value to life, and the doctrine reflects that communal importance.¹⁶¹ Opponents of the Lost Chance Doctrine are concerned it may incite litigation based on speculation and probability calculations regarding alternate care methods that might have allowed better health outcomes.¹⁶² Further, these critics often argue that plaintiff-friendly doctrines would open up the floodgates for future tort litigation.¹⁶³ In their view, the Lost Chance Doctrine will allow more plaintiffs to win their medical malpractice cases with the lenient standard of the causation element.¹⁶⁴

This argument fails to consider that causation is just one of six elements that a plaintiff must meet for a court to rule in their favor. Neither factual nor statistical data support the critics' view, and therefore it is not a compelling argument. How highlight the notion that such opponents overemphasize consequences of states adopting the Lost Chance Doctrine, the Massachusetts Supreme Court stated:

^{155.} Fischer, supra note at 618.

^{156.} Id

^{157.} See id. ("The same principle applies even though there is no actual market . . . courts recognizing the theory that chances have value should logically grant a cause of action for reduction of chance as well as destruction of chance.").

^{158.} Id.

^{159.} B. Sonny Bal & Lawrence H. Brenner, *Medicolegal Sidebar: The Law and Social Values: Loss of Chance*, CLINICAL ORTHOPEDICS AND RELATED RES. (Aug. 7, 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4160481/ (on file with the *University of the Pacific Law Review*).

^{160.} *Id*.

^{161.} Id.

^{162.} Id.

^{163.} George J. Zilich, Cutting Through the Confusion of the Loss-Of-Chance Doctrine Under Ohio Law: A New Cause of Action or a New Standard of Causation, 51 CLEV. ST. L. REV. 673, 699 (2003).

^{164.} Id.

^{165.} Id.

^{166.} See Koch, supra note at 621 (highlighting states that did adopt the Lost Chance Doctrine and showing that there were no significant increases after their adoption of the doctrine).

We are unmoved by the defendants' argument that the ramifications of adoption of loss of chance are immense across all areas of tort. We emphasize that our decision today is limited to loss of chance in medical malpractice actions. Such cases are particularly well suited to application of the loss of chance doctrine . . . First, as we noted above, reliable expert evidence establishing loss of chance is more likely to be available in a medical malpractice case than in some other domains of tort law. Second, medical negligence that harms the patient's chances of a more favorable outcome contravenes the expectation at the heart of the doctor-patient relationship that the physician will take every reasonable measure to obtain an optimal outcome for the patient . . . Third, it is not uncommon for patients to have a less than even chance of survival or of achieving a better outcome when they present themselves for diagnosis, so the shortcomings of the all or nothing rule are particularly widespread. Finally, failure to recognize loss of chance in medical malpractice actions forces the party who is the least capable of preventing the harm to bear the consequences of the more capable party's negligence. 167

Additionally, the vast majority of medical malpractice patients never pursue their claims in reality. This trend may seem counterintuitive considering there are more medical malpractice deaths per year than car accidents. Medical professionals and society do not bear medical malpractice costs, but rather the malpractice victims do. Tort policies of deterrence, fairness, victim compensation and loss spreading would seem to favor recovery, even when the harm is a lost or lessened chance of survival.

Opponents claim that the operational, legal, and court costs to litigants and society will exceed the total damages in countless lawsuits. This argument does not consider the economic reality that potential plaintiffs face. Attorneys may be unwilling undertake loss of chance cases on a contingency grounds because courts are likely to reduce monetary compensations to reflect the reduction in a plaintiff's chance of survival. Additionally, plaintiffs will have to pay for expert testimony to prove the elements of causation and the standard of care. The economic truth is that plaintiffs and attorneys will decline to take financial risks with Lost Chance Doctrine cases when possible monetary compensations are not

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167. Matsuyama v. Birnbaum, 890 N.E. 2d 819, 834-35 (Mass. 2008).
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^{168.} Zilich, supra note 164 at 700.

^{169.} Id.

^{170.} Id.

^{171.} Id.

^{172.} *Id*.

^{173.} Zilich, supra note 164 at 700.

^{174.} *Id*.

^{175.} Id.

significant.¹⁷⁶ Therefore, California's adoption of the doctrine would not intensify its courts' docket congestion.¹⁷⁷

C. An Evolving Doctrine

The Lost Chance Doctrine is a difficult and evolving area of the law.¹⁷⁸ Enhanced medical statistics and public sentiment may alter the perception of the doctrine.¹⁷⁹ Expanding statistical data—particularly in oncology and sociopolitical approaches—forming an advancement in the doctrine's approaches.¹⁸⁰ Because of new developments and approaches, a trend toward jurisdictions acknowledging any form of the loss of chance of survival as a tort claim is likely to resume.¹⁸¹ "Medical research information has improved partially because of the focus on evidence-based medicine."¹⁸² Experts can corroborate the chance of survival with a "reasonable degree of medical certainty."¹⁸³ Probabilities are objectively and confidently voiced in oncology and may continue extend to other specialties.¹⁸⁴

A physician who reduces a patient's percentage and chance of survival deprives that "individual "of something of value," for which the patient [deserves monetary compensation] as a matter of 'fairness." While the medical industry opposes the Loss of Chance Doctrine, the industry is not immune from it. A plaintiff may only apply the doctrine when a physician's negligence actually occurred. The doctrine provides adequate safeguards for physicians because a patient may not win a case simply because the physician made an incorrect diagnosis. Providing the physician did not act in a grossly negligent manner or did not deviate from the industry's standard of care, no liability will occur. Any worries or difficulties which the doctrine may cause in the medical industry are immaterial when paralleled to the significance of human life.

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176. Id.
177. Id.
178. Lee J. Johnson, State Laws on Loss of Chance of Survival Continue to Evolve, MED. ECON. (Jan. 9,
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^{178.} Lee J. Johnson, *State Laws on Loss of Chance of Survival Continue to Evolve*, MED. ECON. (Jan. 9, 2013), https://www.medicaleconomics.com/view/state-laws-loss-chance-survival-continue-evolve (on file with the *University of the Pacific Law Review*).

^{179.} *Id.*180. *Id.*181. *Id.*182. *Id.*183. Johnson, *supra* note 170.
184. *Id.*185. *Id.*186. Mangan, *supra* note 27 at 325.
187. *Id.*

^{189.} See id. at 325–26 (discussing the importance of the Lost Chance Doctrine).

^{190.} Id.

VI. MODEL RULE

Various state courts fail to pay attention to the Loss of Chance Doctrine because it has a limited role within the legal system overall. ¹⁹¹ Civil litigation encompasses approximately 17% of the cases that state courts review on a national scale, with a greater percentage comprising criminal cases. ¹⁹² In contrast, medical malpractice litigations comprise only 3% of all civil cases. ¹⁹³ Although critics give disproportionate attention to medical malpractice cases compared to other cases—the share of medical malpractice cases is small. ¹⁹⁴ Correspondingly, there is no significant difference in the amount of medical malpractice litigation when comparing states that have adopted the doctrine to those that have not. ¹⁹⁵

Enhanced medical statistical data and growing public sentiments may lead California to revisit the Lost Chance Doctrine either through legal proceedings or the Legislature. But since medical malpractice cases account only for 3% of civil cases, it may be better to address the doctrine within the lawmaking body of a state. Therefore, the California Legislature should adopt this Model Rule based on Michigan Code:

- (1) In an action alleging malpractice, the plaintiff has the burden of proving that at the time of the alleged malpractice:
 - (a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.¹⁹⁸
 - (b) The defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate plaintiff of the defendant failing to provide that standard, the plaintiff suffered an injury.¹⁹⁹
- (2) In an action alleging medical malpractice, the plaintiff has the burden

^{191.} Koch, supra note 52 at 632, 636.

^{192.} Id. at 636.

^{193.} *Id*.

^{194.} Id.

^{195.} *Id.* at 621.

^{196.} Johnson, supra note 179.

^{197.} Koch, supra note 52 at 605.

^{198.} MICH. COMP. LAWS ANN. § 600.2912a (West 2022) (this language was adopted from Michigan's Loss of Chance statute).

^{199.} Id.

of proving that he or she suffered an injury caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff can recover for loss of an opportunity to survive or an opportunity to achieve a better medical outcome even when the opportunity was equal or less than 50%.²⁰⁰

If California enacted this Model Rule—thus adopting the Lost Chance Doctrine—it would leave the judiciary with discretion to adopt either the pure form or substantial approach.²⁰¹ These divergent approaches would result in different outcomes in legal proceedings.²⁰² If the Legislature does not adopt a specific approach, then lower courts in California may apply the doctrine inconsistently.²⁰³ Under the pure form approach, a patient who had a 40% chance of recovery before a physician's negligence, which then sank to 30%, would have a claim for the 10% reduction.²⁰⁴ This approach makes the Lost Chance Doctrine more plaintiff-friendly because it allows a plaintiff to recover at least a portion of their injury rather than nothing under California's traditional approach.²⁰⁵

While the substantial chance approach is similar to the pure form approach in calculating compensation percentages, it does add an additional requirement. ²⁰⁶ States that have adopted the substantial chance approach only allow plaintiffs with more than a 10% chance of survival to file suit under the doctrine. ²⁰⁷ This approach may exclude plaintiffs and may not be suitable for what the Model Rule is trying to accomplish. ²⁰⁸ Legislators should consider adding language to implement the pure form approach so that all plaintiffs who faced harm by their physicians can at least meet the causation requirement. ²⁰⁹ This way each plaintiff has a fighting chance to get their day in court. ²¹⁰

VII. CONCLUSION

The Lost Chance Doctrine changes the out-of-date preponderance of the evidence standard, modifies a plaintiff's burden of proof, and allows a liability

^{200.} See id. (the language was altered to allow plaintiffs to recover even with a 50% or less chance of survival).

^{201.} Supra Part III.

^{202.} Supra Section III.A.-B.

^{203.} Id.

^{204.} Frederickson, Mazeika & Grant, supra note 7.

^{205.} Id.

^{206.} Wallace, supra note 78 at 229.

^{207.} Id.

^{208.} MICH. COMP. LAWS ANN. § 600.2912a (West 2022).

^{209.} Supra Section III.A.

^{210.} Michael A. Zeytoonian, *Getting Your Day in Court – What Does It Really Mean? And How Can We Get it for You?*, MEDIATE.COM (Mar. 2016), https://www.mediate.com/articles/ZeytoonianMbl20160329.cfm (on file with the *University of the Pacific Law Review*).

expansion of medical malpractice claims.²¹¹ Various state courts and state legislations have decided the traditional rule is too limiting and therefore embraced the Lost Chance Doctrine.²¹² Under this traditional rule, a plaintiff patient with a 50% or less chance of survival before a physician's negligence cannot recover for any wrongs committed against them.²¹³ However, at the same time, a patient with a 50.1% chance of survival before a physician's negligence may prevail in court to recover some monetary compensation.²¹⁴ Jurisdictions implementing doctrines to allow plaintiffs to satisfy the causation element more fairly is nothing new within the torts system.²¹⁵ California's traditional rule of "all-or-nothing" is arbitrary and leads to horrible results.²¹⁶ This long-standing standard is inescapably unfair because it only allows certain plaintiffs to successfully file suit."²¹⁷ The remaining plaintiffs will not only suffer from their ailments but also the physician's negligent acts.²¹⁸

The relaxing of the causation element will provide relief for plaintiffs who can prove that the medical malpractice instigated the injury but cannot meet the causation standard under the traditional approach.²¹⁹ The doctrine allows some form of recovery when medical malpractice negatively impacted a patient's life.²²⁰

The doctrine's relaxation of the causation element does not relieve a plaintiff from proving that damages occurred under a traditional standard of proof.²²¹ They still must meet all six elements in a medical malpractice case to win their case—still shielding physicians from fraudulent claims.²²² However, if California adopts

^{211.} Johnson, supra note 179.

^{212.} See Mo. REV. STAT. § 537.021 (West 2022) (allowing for court appointment of a plaintiff ad litem, on behalf of an original plaintiff who already died, for lost chance causes of action); see also Wollen, 828 S.W.2d at 685–86 (holding the plaintiff had an action for lost chance of recovery in Missouri); see Dickhoff, 836 N.W.2d at 324 (holding Minnesota law permits recovery for loss of chance in a medical malpractice action); Rosen, supra note 17; see Jones, supra note 68.

^{213.} *Bird*, 28 Cal. 4th at 912; *see* Frederickson, Mazeika & Grant, *supra* note 7 (explaining California's traditional standard rule in medical malpractice cases).

^{214.} Id.

^{215.} Zuchowics, 140 F.3d at 388; see Haft, 3 Cal. 3d at 774 (shifting the burden of proof to the defendants to prove that their violation was not a cause of the plaintiff's deaths; in the absence of such proof, defendants' causation of such death is established as a matter of law); see Summers v. Tice, 33 Cal. 2d 80, 84 (1948) (holding that under the doctrine of alternative liability, two independent tortfeasors may be held liable if it is impossible to know which individual caused the plaintiff's injury, and thus, the burden of proof will shift to the defendants to either absolve themselves of liability or apportion the damages between them).

^{216.} *Bird*, 28 Cal. 4th at 912; *see* Frederickson, Mazeika & Grant, *supra* note 7 (explaining California's traditional standard rule in medical malpractice cases).

^{217.} Zilich, supra note 164.

^{218.} Bird, 28 Cal. At 912; Frederickson, Mazeika & Grant, supra note 7.

^{219.} See Mangan, supra note 27 at 285 (quoting the dissent of Texas' supreme court case Kramer v. Lewisville Memorial Hospital).

^{220.} Id. at 304.

^{221.} Fischer, supra note 138 at 618.

^{222.} Id.

the proposed Model Rule, then plaintiffs like Ms. Bird may recover for the negligent acts of their physicians. ²²³

The Lost Chance Doctrine offers adequate protections for physicians because a patient may not prevail in a medical malpractice case merely because the physician made an improper diagnosis. ²²⁴ As long as the physician is not grossly negligent or did not diverge from the profession's standard of care, no liability will occur. ²²⁵ Any uncertainties or complications that the doctrine may cause in the medical industry are immaterial when paralleled to the significance of human life. ²²⁶

^{223.} See Bird, 86 Cal. App. 4th at 178 n.3 (holding that Ms. Bird's family may not recover because her pre-existing condition with less than a 50% chance of survival disqualified her to prevail in a medical malpractice claim)

^{224.} See Mangan, supra note 27 at 325 (discussing the importance of the Lost Chance Doctrine).

^{225.} Id. 325-26.

^{226.} Id.

Hit 'em Where It Hurts—Their Pocketbooks: Why the California Legislature Must Amend the Law to Protect Nursing Home Residents' Rights

Francesca Torres*

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^{*} J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2022; B.A. in Political Science and Criminal Justice, California State University, Chico, 2019. First, I would like to thank Professor Brown for sparking my interest in elder law and teaching me the foundational principles necessary to write this Comment. I would also like to thank the Law Review staff for their attention to detail throughout the writing and editing process. Special thanks to Thomas Gerhart for his impeccable editing skills, and always pushing me to be a better writer. Thank you to my family, Justin Whitman, and Luna for their constant love, support, and encouragement. Lastly, I dedicate this article to my mom who has devoted her entire career to serving the elderly and educating the next generation of compassionate medical professionals. From a young age, she taught me that with hard work and kindness anything is possible. Mom, thank you for being my biggest supporter and inspiration; without you, I would not be the person I am today.

I. INTRODUCTION

In January 2018, Monterey Palms nursing home staff notified the wife of an elderly resident that an employee had sexually exploited her husband. The staff informed the wife that the employee recorded the incident in a Snapchat video. In the video, the employee exposed the elderly resident's genital area. At the conclusion of the video, three employees stood around the elderly resident laughing at his nude body. The employee then shared the video with her friends. The nursing home resident suffered from various ailments, including dementia and an anxiety disorder.

Sadly, similar heinous behavior occurs daily in nursing homes, and the insignificant fines the health department levies against complicit nursing homes suggests that government leadership tolerates this behavior. The California Department of Health and Human Services fined the Monterey Palms nursing home \$2,000—"a slap on the wrist"—for violating the elderly resident's right to privacy. In contrast, the elderly resident received no monetary compensation for the gross exploitation of his rights.

In California, the Patient's Bill of Rights guarantees a nursing home resident certain fundamental rights. ¹⁰ These rights include the right "to be free from mental

- 3. *Id*.
- 4. *Id*.
- 5. *Id*.

^{1.} See Monterey Palms Operating Co., LP, Citation No. 25-2945-0014196-S (Cal. Dep't of Pub. Health & Hum. Serv. Agency Aug. 17, 2018) (Section 1424 Notice) (on file with the *University of the Pacific Law Review*) (citing Monterey Palms Health Care Center for various violations relating to a nursing home resident's right to be free from abuse, neglect, and exploitation).

^{2.} See id. (defining "Snap Chat" as "an image messaging and multimedia mobile application used for creating messages referred to as 'snaps' [consisting of a photo or a short video of up to 10 seconds]").

^{6.} See id. explaining that the nursing home resident "was admitted to the facility on January 25, 2017, with diagnoses that included dementia (memory loss), diabetes mellitus (high blood sugar), hypertension (elevated blood pressure), and anxiety disorder").

^{7.} See Linda K. Chen, Eradicating Elder Abuse in California Nursing Homes, 52 SANTA CLARA L. REV. 213, 215–16 (2012) (detailing the number of elder abuse and neglect cases in the nation to be "between 500,000 and five million individuals each year" and over 132,000 in California alone).

^{8.} Monterey Palms Operating Co., LP, Citation No. 25-2945-0014196-S (Cal. Dep't of Pub. Health & Hum. Serv. Agency Aug. 17, 2018) (Section 1424 Notice) (on file with the *University of the Pacific Law Review*); see, e.g., CAL. CODE REGS. tit. 22, § 72527(a)(12) (West 2022) (explaining that nursing home residents retain the right "to be treated with consideration, respect and full recognition of dignity and individuality, including privacy in treatment and in care of personal needs.").

^{9.} See Monterey Palms Operating Co., LP, Citation No. 25-2945-0014196-S (Cal. Dep't of Pub. Health & Hum. Serv. Agency Aug. 17, 2018) (Section 1424 Notice) (on file with the *University of the Pacific Law Review*) (alluding to a police report and the possibility of criminal charges for the gross violation of the elderly man's dignity on top of the \$2,000 fine).

^{10.} See Cal. Health & Safety Code § 1599 (West 2022) ("It is the intent of the Legislature in enacting this chapter to expressly set forth fundamental human rights which all patients shall be entitled to."); Cal. Health & Safety Code § 1599.1 (West 2022) (detailing the statutory version of the Patient's Bill of Rights); see also Cal. Code Regs. tit. 22, § 72527 (West 2022) (detailing the regulatory version of the Patient's Bill of Rights); Residents' Rights, Cal. Advocs. For Nursing Home Reform, http://canhr.org/factsheets/resrights_fs/html/fs_resrights.htm (last modified May 11, 2021) (on file with the

and physical abuse" and the right "to be free from discrimination." The California Legislature enacted legislation in 1982 that enabled private enforcement of the Patient's Bill of Rights. That statute allows for monetary damages up to \$500 and a possible injunction against the nursing home for future violations. Prior to the 1982 legislation, the existing regulatory scheme inadequately enforced residents' rights, leaving residents unprotected and vulnerable to abuse. 14

Despite this new avenue for enforcement, very few nursing home residents recover damages under the statute.¹⁵ Nursing home residents are likely unsuccessful because the statute fails to specify whether the \$500 damages cap applies to the whole lawsuit or to each violation.¹⁶ However, a recent California Supreme Court case—*Jarman v. HCR ManorCare, Inc.*—resolved the ambiguity by interpreting the statute to cap the damages at \$500 per lawsuit.¹⁷ In short, the Court's decision allows nursing homes to commit numerous violations against a nursing home resident and incur only a \$500 penalty for the whole lawsuit.¹⁸

The California Supreme Court did not effectuate the will of the Legislature—protect nursing home residents' rights—in *Jarman v. HCR ManorCare, Inc.* ¹⁹ The Court's interpretation restricts the monetary remedy available to nursing home residents and effectively immunizes nursing homes from significant liability. ²⁰ The California Legislature should override the Court's perversion of the statute by amending the law to permit a "penalty per violation" approach. ²¹

University of the Pacific Law Review) (explaining that the Patient's Bill of Rights guarantees nursing home residents' certain rights under state and federal law); see generally infra Section II.C (explaining the Patient's Bill of Rights in detail).

- 11. CAL. CODE REGS. tit. 22, § 72527 (West 2022).
- 12. CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022).
- 13. CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022).
- 14. *See* Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, AARP Foundation, Center for Medicare Advocacy, Consumer Attorneys of California, Justice in Aging, the Long Term Care Community Coalition, and the National Consumer Voice for Quality Long-Term Care in Support of Plaintiff/Appellant at 11, Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375 (2020) (No. S241431) (explaining the need for the statute).
- 15. CALIFORNIA ADVOCATES FOR NURSING HOME REFORM, MUCH ADO ABOUT NOTHING: DEBUNKING THE MYTH OF FREQUENT AND FRIVOLOUS ELDER ABUSE LAWSUITS AGAINST CALIFORNIA'S NURSING HOMES 8 (2003), http://www.canhr.org/reports/2003/CANHR_Litigation_Report.pdf (on file with the *University of the Pacific Law Review*).
- 16. *Id.*; see also Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 379 (2020) (addressing the question of "whether the monetary cap of \$500 is the limit in each action or instead applies to each violation committed").
 - 17. Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 379 (2020).
 - 18. Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 379 (2020).
- 19. See Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 379 (2020) (interpreting the statute according to an incorrect purpose); Maura Dolan, California's Top Court Caps Penalties on Nursing Homes to \$500 for Certain Lawsuits, L.A. TIMES (Aug. 17, 2020, 5:40 PM), https://www.latimes.com/california/story/2020-08-17/nursing-homes-suits-damages-cap (on file with the University of the Pacific Law Review) (explaining that the intended goal of the statute was to deter and vindicate violations of nursing home residents' rights).
 - 20. Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 379 (2020).
- 21. *See* Dolan, *supra* note 19 (explaining how the California Advocates for Nursing Home Reform plan to urge the Legislature to rewrite the law, especially in light on the coronavirus pandemic).

Amending the statute would not only provide clarity, but it would open the door to a long-overdue discussion regarding the protections for California's growing elderly population.²² Part II of this Comment provides a general overview of the evolution of nursing home reform and the specific rights and remedies available to residents.²³ Part III discusses the limited case law relating exclusively to the damages cap, including *Jarman*.²⁴ Part IV considers the need to clarify the statute.²⁵ Part V proposes two viable statutory amendments.²⁶

II. THE LAWS GOVERNING NURSING HOMES

Nursing homes have a long and complicated history in the United States.²⁷ State and federal legislatures passed the laws that govern nursing homes several decades ago.²⁸ Today, nursing home advocates—such as California Advocates for Nursing Home Reform—lobby for nursing home residents' rights.²⁹ Section A explores the evolution of nursing homes and their quality of care in the United States and more specifically, in California.³⁰ Section B explores California nursing homes today and the looming Silver Tsunami.³¹ Section C outlines the Long-Term Care Act and how it aids with nursing home violations.³² Section D details the Patient's Bill of Rights action.³³ Section E explains California Health and Safety Code section 1430(b) for enacting it.³⁴

- 22. See id. (explaining how nursing home residents need more protection now than ever before).
- 23. See infra Part II.
- 24. See infra Part III.
- 25. See infra Part IV.
- 26. See infra Part V.
- 27. See David A. Bohm, Striving for Quality Care in America's Nursing Homes: Tracing the History of Nursing Homes and Noting the Effect of Recent Federal Government Initiatives to Ensure Quality Care in the Nursing Home Setting, 4 DEPAUL J. HEALTH CARE L. 317, 324–35 (2001) (describing the history of nursing homes from the eighteenth century to modern day).
- 28. Sari Harrar, et al., 10 Steps to Reform and Improve Nursing Homes, AARP (Jan. 13, 2021), https://www.aarp.org/caregiving/health/info-2021/steps-to-improve-nursing-homes.html (on file with the University of the Pacific Law Review).
- 29. See About CANHR, CANHR, http://www.canhr.org/about/index.html (last updated Sept. 20, 2019) (on file with the University of the Pacific Law Review) ("Since 1983, California Advocates for Nursing Home Reform (CANHR), a statewide nonprofit 501(c)(3) advocacy organization, has been dedicated to improving the choices, care and quality of life for California's long term care consumers.").
 - 30. See infra Section II.A.
 - 31. See infra Section II.C.
 - 32. See infra Section II.C.
 - 33. See infra Section II.D.
- 34. See CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022) (authorizing a private right of action for Patient's Bill of Rights violations); see infra Section II.E.

A. Evolution of Nursing Homes and the Search for Good Quality of Care

The nursing home and long-term care industry uses terminology that can easily confuse people who are not familiar with the industry or the healthcare landscape.³⁵ For example, people often use the terms "skilled nursing facility," "rehabilitation center," and "convalescent hospital" interchangeably with "nursing home." However, California's Health and Safety Code defines and subcategorizes the various "health facilities" available to those persons in need of medical care. California statutory law specifically defines the common nursing home as a "skilled nursing facility." Typically, a skilled nursing facility provides 24-hour care, which includes: skilled nursing; physician care; and dietary, pharmaceutical, and activity services.³⁹

California nursing homes are highly regulated facilities, subject to both state and federal mandates.⁴⁰ These mandates govern all aspects of nursing home care and facility operations.⁴¹ The California Department of Public Health's Licensing and Certification Division conducts yearly inspections of all licensed nursing homes in California.⁴² Additionally, Medi-Cal and Medicare-certified facilities must meet more stringent requirements.⁴³

Before the highly regulated, modern nursing home existed, families cared for their elderly family members; if someone did not have a family, the community shared caring responsibilities.⁴⁴ It was not until the early nineteenth century that the United States implemented social policies creating the first institutionalized centers for the poor, called "almshouses" or "poor houses."⁴⁵ Originally, these institutionalized centers housed only the poor, but by the late nineteenth century, they mainly housed elderly individuals.⁴⁶ Even though elderly individuals now had

^{35.} See Facts and Statistics, CAL. ASS'N OF HEALTH FACILITIES, (last updated Mar. 2021), https://www.cahf.org/About/Consumer-Help/Facts-and-Statistics (on file with the *University of the Pacific Law Review*) (explaining the terminology associated with nursing homes).

^{36.} *Id*.

^{37.} See CAL. HEALTH & SAFETY CODE § 1250 (West 2022) (defining a "health facility" as "a facility, place, or building that is organized, maintained, and operated for the diagnosis, care, prevention, and treatment of human illness, physical or mental, including convalescence and rehabilitation and including care during and after pregnancy, or for any one or more of these purposes, for one or more persons, to which the persons are admitted for a 24-hour stay or longer").

^{38.} See id. (defining a "skilled nursing facility" as "a health facility that provides skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis").

^{39.} Chen, *supra* note 7, at 220.

^{40.} Facts and Statistics, supra note 35.

^{41.} *Id*.

^{42.} Id.

^{43.} Id.

^{44.} *See* Bohm, *supra* note 27, at 324–25 (explaining the history of nursing homes, specifically the transformation from the original "poor relief centers" to the modern "highly sophisticated business industry").

^{45.} Id. at 325-26.

^{46.} Id. at 327-28.

an institutionalized center to live—with little government intervention—the quality of care in these facilities was undesirable.⁴⁷

The Social Security Act changed the landscape of nursing homes and unintentionally created the modern nursing home.⁴⁸ The original legislators disliked the terrible living conditions in public institutions; therefore, the Social Security Act prohibited payments to residents living in public homes.⁴⁹ In turn, private nursing homes thrived while their quality of care remained poor.⁵⁰ Shortly thereafter, the United States Congress created Medicare and Medicaid programs and made additional changes to the statutory scheme in hopes of regulating the nursing home industry.⁵¹ Despite these changes, no clear federal guidelines for quality of care in nursing homes existed.⁵²

Soon the public became aware of the insufficient nursing home care, forcing the federal government to become more involved in regulating nursing homes.⁵³ In response to the growing public concern, the United States Congress passed the Omnibus Reconciliation Act of 1987 ("OBRA 87").⁵⁴ The law transformed the nursing home industry by reforming standards for nursing homes that received funding from Medicare and Medicaid programs.⁵⁵ OBRA 87 also encouraged facilities to comply with the new standards by rebuilding the enforcement mechanisms for sanctions to include new civil monetary penalties.⁵⁶ Almost simultaneously, states attempted to devise statutory schemes to increase the quality of care in nursing homes.⁵⁷ California's Legislature significantly increased the quality of care in nursing homes by enacting new legislation.⁵⁸

- 47. Id. at 328-29.
- 48. See COMMITTEE ON NURSING HOME REG. INST. OF MED., IMPROVING THE QUALITY OF CARE IN NURSING HOMES 238 (National Academies Press 1986) (explaining how the Social Security Act of 1935 prohibited the payment of federal funds to residents living in public institutions "[b]ecause the drafters of the legislation opposed the use of the public poorhouse to care for the poor elderly"); id. at 329.
- 49. See Bohm, supra note 27, at 329 ("Quality care did not persist in these newly emerging alternatives to public nursing institutions and almshouses.").
- 50. See COMMITTEE ON NURSING HOME REG., supra note 48 (explaining how the act prohibited payments to public nursing homes and only private institutions received funds).
- 51. See id. ("The 1950 legislation also required that participating states establish programs for licensing nursing homes, but it did not specify what the standards or enforcement procedures should be."); Bohm, *supra* note 27, at 330–31.
 - 52. Bohm, *supra* note 27, at 331.
 - 53. Id.
 - 54. *Id*.
 - 55. Id.
- 56. See id. at 332 (explaining how legislators thought the civil penalties would serve as a financial incentive to stay compliant; however, "nursing homes began a 'yo-yo pattern of compliance' whereby facilities would avoid the penalties if the violations were corrected within a designated time period.").
- 57. See, e.g., Long Term Care, Health, Safety, and Security Act of 1973 (Long Term Care Act), CAL. HEALTH & SAFETY CODE §§ 1417–1439.8 (West 2022) (detailing the statutory scheme known as the Long Term Care Act).
- 58. See, e.g., CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022) (authorizing a private right of action for Patient's Bill of Rights violations); see Bohm, supra note 27, at 329 (describing the "rise of the modern nursing home").

B. California Nursing Homes Today

Today, there are approximately 1,230 licensed nursing homes in California that care for more than 400,000 Californians yearly.⁵⁹ As the last generation of baby boomers ages into retirement, experts project the number of nursing home residents will increase.⁶⁰ Experts coined this substantial elderly population growth the "Silver Tsunami," which affects every state in the country.⁶¹

Nevertheless, California faces the most substantial elderly population growth. Experts project that "by 2030 more than 9 million Californians will be over the age of 65", which is 3 million more than today. For comparison, 20% of Californians will be elderly—a higher percentage than currently living in the "retirement state" of Florida. Florida.

As the elderly population continues to expand, California's need for nursing home care will increase. ⁶⁵ Unfortunately, California is ill-prepared for the Silver Tsunami. ⁶⁶ The biggest problems facing California are: physician shortages in primary, geriatrics, and palliative care; need for family caregivers; and fragmentation of long-term care services. ⁶⁷ Experts state California needs approximately 9,000 additional primary care physicians to meet demand caused by the Silver Tsunami. ⁶⁸ Additionally, state agencies—specializing in long-term care support and services—need more funding to organize the fragmented long-term care industry. ⁶⁹

^{59.} Facts and Statistics, supra note 35.

^{60.} Matt Levin, For Aging California, Is the Future Florida?, CAL. MATTERS (updated June 23, 2020), https://calmatters.org/economy/2019/04/aging-california-future-is-florida/ (on file with the *University of the Pacific Law Review*).

^{61.} *Id.*; see Alissa Sauer, *The Silver Tsunami and Senior Living*, SENIOR LIVING BLOG (Dec. 26, 2018, 5:59 AM), https://www.leisurecare.com/resources/silver-tsunami-senior-living/print/ (on file with the *University of the Pacific Law Review*) ("'The Silver Tsunami' is a metaphor used to describe the expected increase in the senior population.").

^{62.} See CAL. WELF. & INST. CODE § 15610.27 (West 2022) (defining elder as "any person residing in this state, 65 years of age or older"); Chen, supra note 7, at 217.

^{63.} Levin, supra note 60.

^{64.} Id.

^{65.} Chen, *supra* note 7, at 217–18.

^{66.} See Levin, supra note 60 (citing Nancy McPherson, head of the California chapter of the American Association of Retired Persons, who believes California is not prepared for the Silver Tsunami); see also Mila Jasper & Phillio Reese, A Silver Wave? California Braces for Elderly Boom that Could Overburden State, SACRAMENTO BEE (June 14, 2019),

https://www.sacbee.com/news/california/article231449458.html#storylink=cpy (on file with the *University of the Pacific Law Review*) ("The gap between the supply of seniors and the demand for services is likely to widen as the state's population grows and ages, and historically vulnerable populations—rural, inner city and low-income people—will be hit the hardest.")

^{67.} See Jasper & Reese, supra note 66 (explaining palliative care as long-term hospice care for persons with severe health problems, which a care team manages for extended periods).

^{68.} Id.

^{69.} Id.

In 2019, California Governor Gavin Newsom issued an Executive Order—a "Master Plan for Aging"—affirming the need for elder care reform.⁷⁰ California lawmakers released the "Master Plan" in early 2021; however, lawmakers must do more than plan for the future of California's aging population.⁷¹ The Legislature must continue its work and take action to properly care for California's aging population, specifically nursing home residents.⁷²

C. The Long Term Care Act

The Long Term Care, Health, Safety, and Security Act of 1973 ("Long Term Care Act") is a comprehensive statutory scheme regulating the standard of care in skilled nursing homes. Similar to OBRA 87, the Long Term Care Act established a citation system, an inspection and reporting system, and a provisional licensing mechanism. It charged the California Department of Public Health with administering and supervising these services. System health care facilities provide the highest level of care possible a public policy objective. The Legislature found that conducting inspections—carried out through a state-based compliance survey—was the most effective method of furthering the intended public policy objective. During these compliance surveys, officials from the California Department of Public Health visit the nursing home to inspect the building and investigate complaints.

^{70.} Cal. Exec. Order No. N-14-19, https://www.gov.ca.gov/wp-content/uploads/2019/06/6.10.19-Master-Plan-for-Aging-EO.pdf (June 10, 2019) (on file with the *University of the Pacific Law Review*).

^{71.} CAL. DEP'T OF AGING, CALIFORNIA'S MASTER PLAN FOR AGING (Jan. 2021), https://www.aging.ca.gov/download.ashx?lE0rcNUV0zZe1bBmXluFyg%3d%3d (on file with the *University of the Pacific Law Review*); *Jasper & Reese, supra* note 66 ("With the aging boom already here, elected officials in California have started to address the problem. For many, the question is whether it will be enough.").

^{72.} See Levin, supra note 60 (explaining how California's "current patchwork of programs to provide senior services—especially long term health care—is routinely criticized as underfunded, fragmented, and difficult to navigate").

^{73.} Long Term Care, Health, Safety, and Security Act of 1973 (Long Term Care Act), CAL. HEALTH & SAFETY CODE §§ 1417–1439.8 (West 2022); Kizer v. County of San Mateo, 53 Cal. 3d 139, 143 (1991).

^{74.} See Cal. Health & Safety Code § 1417.1 (West 2022):

It is the intent of the Legislature in enacting this chapter to establish (1) a citation system for the imposition of prompt and effective civil sanctions against long-term health care facilities in violation of the laws and regulations of this state, and the federal laws and regulations as applicable to nursing facilities as defined in subdivision (k) of Section 1250, relating to patient care; (2) an inspection and reporting system to ensure that long-term health care facilities are in compliance with state statutes and regulations pertaining to patient care; and (3) a provisional licensing mechanism to ensure that full-term licenses are issued only to those long-term health care facilities that meet state standards relating to patient care.

^{75.} Id. §§ 1421, 1423; Kizer v. County of San Mateo, 53 Cal. 3d 139, 142 (1991).

^{76.} Id. § 1422(a).

^{77.} Id.

^{78.} See Health Facilities Inspection Division, CNTY. OF L.A. PUB. HEALTH, http://publichealth.lacounty.gov/hfd/ (last visited Jan. 5, 2020) (on file with the *University of the Pacific Law Review*) (discussing the licensing and survey process for skilled nursing facilities and other health facilities).

Upon issuing a citation, the California Department of Public Health classifies the type of citation "according to the nature of the violation" and issues civil penalties accordingly. Class "A" violations present an imminent danger or substantial probability for "death or serious physical harm to patients or residents of the long-term health care facility. These violations become Class "AA" violations when the action is the "direct proximate cause" of a patient's death. Actions that "have a direct or immediate relationship to the health, safety, or security of long-term health care facility patients or residents" are Class "B" violations. Class "C" violations relate to skilled nursing facility operation and maintenance, which contain "only a minimal relationship to the health, safety, and security" of the residents.

The survey inspection and citation process outlined in the Long Term Care Act operates "to encourage compliance with state mandated standards for patient care and to deter conduct that may endanger the well-being of patients." Essentially, the process punishes nursing homes by "naming and shaming" violating facilities. Although fines and shame serve as deterrents for some facilities, the Long Term Care Act is "nonetheless remedial and its central focus is 'preventive."

D. Patient's Bill of Rights

In addition to the Long Term Care Act, the Patient's Bill of Rights entitles nursing home residents to basic "fundamental human rights." Amongst these rights are the rights "[t]o be free from discrimination . . . and mental and physical abuse." A resident also retains the right to all information regarding their stay at the facility. This information includes the facility's rules governing patient conduct, any additional services provided at the facility, and his or her health status. Additionally, nursing home residents have the right to refuse—or consent—to any medical treatment prescribed to them.

- 79. CAL. HEALTH & SAFETY CODE § 1424 (West 2022).
- 80. Id. § 1424(d).
- 81. Id. § 1424(c).
- 82. Id. § 1424(e).
- 83. CAL. CODE REGS, tit. 22, § 72701(a)(4) (West 2022).
- 84. Kizer v. County of San Mateo, 53 Cal. 3d 139, 150 (1991).
- 85. State Dept. of Pub. Health v. Superior Ct., 60 Cal. 4th 940, 950 (2015).
- 86. Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 383 (2020).
- 87. See Cal. Health & Safety Code § 1599 (West 2022) ("It is the intent of the Legislature in enacting this chapter to expressly set forth fundamental human rights which all patients shall be entitled to"); Cal. Health & Safety Code § 1599.1 (West 2022) (detailing the statutory version of the Patient's Bill of Rights); see also Cal. Code Regs. tit. 22, § 72527 (West 2022) (detailing the regulatory version of the Patient's Bill of Rights).
 - 88. Cal. Code Regs. tit. 22, §§ 72527(a)(8), (10) (West 2022).
 - 89. Id. §§ 72527(a)(1)-(3).
 - 90. Id. §§ 72527(a)(1)–(3).
 - 91. *Id.* §§ 72527(a)(4)–(5).

The Patient's Bill of Rights extends to other basic rights, such as the right to "receive personal mail unopened" and "reasonable access" to telephones. Nursing home residents also retain the right to have visitors and meet with other residents for social, religious, or community activities. The rights mentioned are not exhaustive; in fact, the Patient's Bill of Rights guarantees many more basic human rights to nursing home residents. Together these rights protect nursing home residents—a highly vulnerable group—from physical, mental, and emotional abuse. In the patient's Bill of Rights guarantees many more basic human rights to nursing home residents.

When the Legislature originally enacted the Patient's Bill of Rights, the law lacked a method for private enforcement. Because nursing home residents lacked a method for private enforcement, residents had to rely on state surveyors or private tort actions to vindicate their rights. The private right of action authorizes a private plaintiff—rather than the government or a public agency—to bring an action against a defendant for specifically violating the statute. By asserting a private right of action, a nursing home resident may recover damages not available to them through government enforcement or in a private tort claim. Fortunately in 1982, the Legislature enacted legislation to combat this enforcement issue.

E. Health and Safety Code § 1430(b)

In response to the growing concern that nursing home residents' rights were not sufficiently protected by existing mechanisms, the California Legislature enacted section 1430(b).¹⁰¹ This legislation equipped nursing home residents with

- 92. CAL. CODE REGS. tit. 22, §§ 72527(a)(14), (22) (West 2022).
- 93. Id. § 72527(a)(15) (West 2022).
- 94. See Cal. Health & Safety Code § 1599 (West 2022) ("It is the intent of the Legislature in enacting this chapter to expressly set forth fundamental human rights which all patients shall be entitled to.").
- 95. See id. § 1599.1 (explaining that the Patient's Bill of Rights are written policies that nursing home staff shall make available to all residents to ensure the rights are obeyed).
 - 96. Cal. Ass'n of Health Facilities v. Dept. of Health Servs., 16 Cal. 4th 284, 302 (1997).
- 97. See id. (explaining the difference between a private right of action and the administrative enforcement conducted through the state compliance survey and citation procedure); see also Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, supra note 14, at 11, ("The need for section 1430(b) arose because the mechanisms that then existed to ensure that residents actually received the protections in the Patient's Bill of Rights, enforcement by State regulators and private tort litigation, were insufficient to protect these rights.").
- 98. Ira S. Slavit, *Establishing a Private Right of Action in Personal Injury Cases*, N.Y. L.J. (Apr. 2, 2020, 11:30 AM), https://www.law.com/newyorklawjournal/2020/04/07/establishing-a-private-right-of-action-in-personal-injury-cases/ (on file with the *University of the Pacific Law Review*).
 - 99. Id.
- 100. See, e.g., CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022) (authorizing private enforcement of the Patient's Bill of Rights); see Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, supra note 14, at 11 (explaining the need for Health and Safety Code § 1430(b)).
- 101. CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022); see also see also Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, supra note 14, at 11 (explaining that the existing mechanisms for enforcement of the Patient's Bill of Rights "were insufficient to protect" nursing home residents' rights).

a private right of action to enforce the Patient's Bill of Rights. ¹⁰² Because of this statute, nursing home residents no longer needed to rely on the state's slow regulatory process to enforce their basic rights. ¹⁰³ Even the California Supreme Court noted that a private lawsuit under the statute "bears more than a passing resemblance" to a private lawsuit for a civil rights violation. ¹⁰⁴ Although residents' rights are not constitutional rights per se, the California Supreme Court's words illustrate the gravity of the private right of action and importance of residents' rights. ¹⁰⁵

III. JUDICIAL REVIEW

The statute states that the "licensee shall be liable for up to five hundred dollars (\$500), and for costs and attorney fees, and may be enjoined from permitting the violation to continue." However, the Legislature did not specify whether the \$500 damages award applies to each right violated or the cause of action as a whole. To illustrate, imagine a scenario where a nursing home violated a resident's rights 382 times. The resident would receive up to \$191,000 if a court interpreted the statute to impose a \$500 penalty for each violation rather than \$500 for the whole lawsuit. 109

In 2004, the Legislature broadened the statute to include private enforcement for violations of any state or federal law. This amendment did little to clarify the statute's damages provision or solve the conundrum when applying the statute.

The recent California Supreme Court case—Jarman v. HCR ManorCare, Inc—reconciled the ambiguity by interpreting the statute to cap the damages at

^{102.} CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022).

^{103.} See Cal. Ass'n of Health Facilities v. Dept. of Health Servs., 16 Cal. 4th 284, 302 (1997) (explaining the difference between a private right of action and the administrative enforcement conducted through the state compliance survey and citation procedure); see also Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, supra note 14, at 11 ("The need for section 1430(b) arose because the mechanisms that then existed to ensure that residents actually received the protections in the Patient's Bill of Rights, enforcement by State regulators and private tort litigation, were insufficient to protect these rights.").

^{104.} See Cal. Ass'n of Health Facilities v. Dept. of Health Servs., 16 Cal. 4th 284, 302 (1997) (explaining the resemblance between a lawsuit under section 1430(b) versus a civil rights lawsuit under the federal Civil Rights Act of 1871).

^{105.} Id.

^{106.} CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022).

^{107.} Id. § 1430(b).

^{108.} See Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 380 (2020) (explaining the facts of the case, including the 382 violations).

^{109.} See id. ("On June 15, 2011, the jury awarded Jarman \$100,000 in damages and \$95,500 in statutory damages, i.e., \$250 for each of the 382 violations.").

^{110.} See CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022) (amended 2004) (adding the phrase "any other right provided for by federal or state law or regulation").

^{111.} See CAL. ADVOCS. FOR NURSING HOME REFORM, CALIFORNIA'S BROKEN LONG TERM CARE SYSTEM 9 (2018), http://canhr.org/publications/newsletters/Advocate/FrontArticle/adv_2018Q4.htm (on file with the University of the Pacific Law Review) (highlighting the small amount of lawsuits that have been filed since the California Legislature enacted the statute).

\$500 per lawsuit. However, the California Supreme Court failed to effectuate the enacting Legislature's intent when interpreting the statute. Section A explains how courts generally interpret statutes when the statutory language is ambiguous. Section B compares and contrasts the lower court case law regarding the statute's \$500 damages provision. Section C provides an overview of the California Supreme Court's decision in *Jarman*. Section D analyses the California Supreme Court's interpretation in light of the statute's purpose.

A. How Courts Interpret Statutes Generally

Courts must resolve questions of statutory interpretation when there are at least two competing interpretations.¹¹⁸ To ascertain what a statute means and how to apply it, judges scrutinize the statute utilizing established principles of statutory construction.¹¹⁹

First, courts examine the ordinary, plain, or commonsense meaning of the statute. 120 Courts start with the ordinary meaning because judges presume the Legislature uses words according to their common meaning. 121 Judges generally use dictionary definitions to decipher the common meaning of the word at issue in the statute. 122 If a statute is clear and unambiguous, courts generally must defer to its ordinary meaning unless doing so would result in absurd consequences. 123 On the other hand, if the statute is ambiguous—meaning the language permits more than one interpretation—courts may consider other aids. 124 These aids include the statute's purpose, legislative history, and public policy. 125

^{112.} Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 379 (2020).

^{113.} See id. (interpreting the statute according to an incorrect purpose); Dolan, *supra* note 19 (explaining that the intended goal of the statute was to deter and vindicate violations of nursing home residents' rights).

^{114.} See infra Section III.A.

^{115.} See infra Section III.B.

^{116.} See infra Section III.C.

^{117.} See infra Section III.D.

^{118.} Application to Submit Amicus Curiae Brief and Amicus Curiae Brief of California Advocates for Nursing Home Reform, Inc. (CANHR) in Support of Appellant Janice Jarman at 7, Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375 (2020) (No. S241431).

^{119.} See Coal. of Concerned Cmtys., Inc. v. City of Los Angeles, 34 Cal. 4th 733, 737 (2004) (explaining the fundamentals rules of statutory construction); see also Chris Micheli, Statutory Construction Guidelines for Bill Drafting in California, 52 U. PAC. L. REV. 457, 461 (2021) ("The canons, or principles, of statutory interpretation are presumptions used by American judges to assist them when interpreting statutes.").

^{120.} Coal. of Concerned Cmtys., Inc. v. City of Los Angeles, 34 Cal. 4th 733, 737 (2004).

^{121.} Micheli, *supra* note 119, at 462.

^{122.} Id.

^{123.} See Coal. of Concerned Cmtys., Inc. v. City of Los Angeles, 34 Cal. 4th 733, 737 (2004) ("If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend.").

^{124.} Id.

^{125.} Id.

Prior to the *Jarman* decision, there were two competing interpretations of section 1430(b). The first interpretation allowed nursing home residents to recover \$500 for each resident rights violation. He second only allowed nursing home residents to recover \$500 per lawsuit. Although every court interpreting section 1430(b) used the same principles of statutory construction, courts' decisions were inconsistent until the California Supreme Court weighed in. Lego.

B. Case Law Leading Up to the California Supreme Court's Decision in Jarman

In 2010, nursing home resident advocates achieved a monumental victory when Humboldt County released an order upholding a jury verdict assessing damages at \$500 per violation.¹³⁰ The trial court judge found that the matter involved "important rights" and the "litigation conferred significant benefits" upon the plaintiffs.¹³¹ However, the excitement was short-lived when California's Second District Court of Appeal released two verdicts holding that the penalty for resident rights violations was \$500 per lawsuit.¹³²

In the first case, *Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLC*, the Court of Appeal reversed a trial court's decision awarding damages of \$500 per violation. While living in a nursing home, a seventy-nine-year-old resident fell nine times, the last of which resulted in brain surgery for a subdural hematoma. The jury established that inadequate staffing led to nursing home staff's negligent supervision of the resident. The jury then found 14 statutory violations and the trial court judge awarded \$500 per violation for a total of \$7,000.

^{126.} See Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 379 (2020) ("The question we address is whether the monetary cap of \$500 is the limit in each action or instead applies to each violation committed.")

^{127.} See, e.g., Jarman v. HCR ManorCare, Inc., 9 Cal. App. 5th 807, 827 (2017) (holding that Jarman may recover up to \$500 per cause of action); Order on Motion for Award of Attorneys' Fees, Costs and Service Payments, Lavender v. Skilled Healthcare Group, Inc., (No. DR060264) (Humboldt Co. Sup. Ct 2010) (holding for a penalty per violation approach).

^{128.} Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 379 (2020).

^{129.} See id., 393 (reversing the Court of Appeal's judgment finding that section 1430(b) allows for a \$500 penalty per violation).

^{130.} Order on Motion for Award of Attorneys' Fees, Costs and Service Payments, Lavender v. Skilled Healthcare Group, Inc., (No. DR060264) (Humboldt Co. Sup. Ct 2010).

^{131.} *Id.*; *see* Jury Verdict Form, Lavender v. Skilled Healthcare Group, Inc. (No. DR060264) (Humboldt Co. Sup. Ct 2010) (detailing the jury's verdict and assessment of damages).

^{132.} See Nevarrez v. San Marino Skilled Nursing and Wellness Centre, 221 Cal. App. 4th 102, 137 (Cal. Ct. App. 2013) (holding that the penalty is \$500 per lawsuit regardless of the number of residents' right violations); see also Lemaire v. Covenant Care Cal., LLC, 234 Cal. App. 4th 860, 868 (2015) ("Consequently, where the statutory damage award exceeds the \$500 limit, as here, the damage award must be reversed.").

^{133.} Nevarrez v. San Marino Skilled Nursing and Wellness Centre, 221 Cal. App. 4th 102, 110 (2013).

^{134.} See Id. at 110–11 (explaining that after brain surgery, the nursing home readmitted the elderly man and he fell two more times).

^{135.} Id. at 111.

^{136.} Id.

On appeal, the Second District Court held that the statute's \$500 damages provision applied per lawsuit. The court looked to the statute's language, statutory scheme, legislative history, and 'purpose. First, the court reasoned with statute's plain language and would not assume the Legislature intended to include the absent phrase "per violation." Next, the court analyzed the statutory scheme and established that—when the Legislature enacted the statute—administrative penalties included the phrase "for each and every violation." The court inferred that the absence of the phrase in the statute means the Legislature intentionally omitted the phrase.

Although both parties submitted legislative materials, the court found the materials unhelpful and devoid of any clear intent to apply the "per violation" approach. The resident then argued that the statute's literal construction leads to an absurd result, frustrating the Long Term Care Act's purpose—to protect residents' health and safety. Ather, the court found the statute's purpose was to "encourage regulatory compliance" of the Long Term Care Act and to "prevent injury from occurring." The court reasoned that not all rights included in the Patient's Bill of Rights assure the health and safety of nursing home residents.

Finally, the court mentioned that the statute includes an injunctive remedy for wide-spread violations. The injunctive remedy also entitles the prevailing party to attorney fees. The court specifically stated that the attorney fees provision may generate substantial awards for residents, irrespective of the amount the resident actually recovers. The Second District Court of Appeal concluded that the \$500 damages provision applied per lawsuit, not per violation.

Two years later, the Second District Court of Appeal reversed yet another trial court decision, *Lemaire v. Covenant Care California, LLC*, which substantively

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137. Id. at 137.
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¹³⁸ Id at 128-37

^{139.} See Nevarrez, 221 Cal. App. 4th at 130 (citing the "general rule" of statutory construction does not permit the court "to conform to an assumed intention which does not appear from its language.").

^{140.} Id. at 132.

^{141.} *Id*.

^{142.} Id. at 132-33.

^{143.} *Id.* at 135.

^{144.} Id.

^{145.} Nevarrez, 221 Cal. App. 4th at 135

^{146.} *Id*.

^{147.} See id. (highlighting that "the prevailing party is entitled to attorney fees, which, depending on the case, may far exceed the amount paid to the plaintiff.").

^{148.} *Id*.

^{149.} Id. at 137 (2013).

relied on *Nevarrez*. ¹⁵⁰ The court once again held that the damages provision applied per lawsuit, not per violation. ¹⁵¹

Despite the outcomes in *Nevarrez* and *Lemaire*, advocates were still hopeful that the California Supreme Court would uphold the Fourth District Court of Appeal's decision in *Jarman*.¹⁵² The case involved a 91-year-old man who entered a skilled nursing facility for rehabilitation following hip surgery.¹⁵³ During the elderly man's stay, nursing staff left him in soiled diapers, ignored call lights, and caused him other severe forms of neglect.¹⁵⁴ Nursing home staff violated the resident's rights a total of 382 times.¹⁵⁵ The most severe and lasting ailments were significant skin excoriation and bedsores that took over a year to heal.¹⁵⁶

Following the trial court's judgment against the nursing home for \$500 per violation, the nursing home appealed to the Fourth District Court.¹⁵⁷ The nursing home argued that the statute allows only one award of statutory damages not to exceed \$500 for the whole lawsuit.¹⁵⁸ The Fourth District Court rejected the nursing home's argument and affirmed the trial court's judgment of \$500 per violation.¹⁵⁹

First, the court explained that *Nevarrez* is inconsistent with the statute's goal—protecting nursing home residents—because the holding fails to provide residents with a meaningful remedy. Neverraz reasoned that the injunctive remedy provides residents with the ability to earn substantial attorney fees. 161 The Fourth District Court rejected the argument in *Neverraz* by arguing that an injunction

^{150.} See Lemaire v. Covenant Care Cal., LLC, 234 Cal. App. 4th 860, 866–69 (2015) (quoting Nevarrez v. San Marino Skilled Nursing and Wellness Centre, 221 Cal. App. 4th 102, 135 (2013)) ("But Nevarrez said, '[T]he argument that the \$500 statutory maximum must be applied on a 'per violation' basis in order to make private enforcement feasible does not withstand scrutiny."").

^{151.} See id. at 868 (2015) ("Consequently, where the statutory damage award exceeds the \$500 limit, as here, the damage award must be reversed.").

^{152.} See Dolan, supra note 19 (citing staff attorney for California Advocates for Nursing Home Reform, Anthony M. Chicotel, who called the decision "extremely disappointing).

^{153.} Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 379 (2020).

^{154.} *Id*.

^{155.} Id.

^{156.} *Id.* at 380; *see* Julia Benedetti, *Description of Skin Lesions*, MERCK MANUAL (Feb. 2019), https://www.merckmanuals.com/professional/dermatologic-disorders/approach-to-the-dermatologic-patient/description-of-skin-lesions ("An excoriation is a linear erosion caused by scratching, rubbing, or picking.").

^{157.} See Jarman v. HCR ManorCare, Inc., 9 Cal. App. 5th 807, 810–11 (2017) (explaining that both parties appealed the trial court's judgment on different grounds).

^{158.} Id. at 810-11.

^{159.} Id. at 831-32.

^{160.} See id. at 823 ("A statute which offers the opportunity to file a lawsuit for a maximum recovery of \$500—no matter how many wrongs are proved—would be a remedy suitable only for those who like litigating far more than they like money.").

^{161.} Jarman v. HCR ManorCare, Inc., 9 Cal. App. 5th 807, 823 (2017); *see also* Nevarrez v. San Marino Skilled Nursing and Wellness Centre, 221 Cal. App. 4th 102, 135 (2013) (discussing how the injunctive remedy provides the prevailing party with attorney fees).

requires a resident to prove likelihood of future harm. ¹⁶² This requirement forces residents to remain in the facility that harmed them in the first place. ¹⁶³

Next, the court highlighted that a third option exists beyond the existing "per violation" or "per lawsuit" approaches—a "per cause of action" approach. ¹⁶⁴ The court discussed *Miller v. Collectors Universe, Inc.*, which involved a statute similar to the statute at issue in *Jarman*. ¹⁶⁵ The statute in *Miller* provides plaintiffs with a private right of action when a person knowingly misappropriates the plaintiff's "name, voice, signature, photograph, or likeness" without consent. ¹⁶⁶ The statute authorizes an award of up to \$750. ¹⁶⁷ In *Miller*, the plaintiff proved that the defendant used his signature 14,060 times, and argued that the 14,060 unauthorized signatures required statutory damages for each use. ¹⁶⁸ The court in *Miller*, held that the primary rights theory entitled the plaintiff to only one award of statutory damages. ¹⁶⁹ The primary rights theory essentially determines and consolidates identical causes of action. ¹⁷⁰

The court in *Nevarrez* briefly discussed the primary rights theory.¹⁷¹ However, the court rejected the theory because the statute in *Jarman* only supplements government enforcement and does not convey a substantive right.¹⁷² The Fourth District Court of Appeal then used the primary rights theory to debunk the

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162. Jarman v. HCR ManorCare, Inc., 9 Cal. App. 5th 807, 823 (2017).
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166. See Cal. Civ. Code § 3344(a) (West 2022):
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Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. BIn addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs.

Miller v. Collectors Universe, Inc., 159 Cal. App. 4th 988, 991 (2008); Jarman v. HCR ManorCare, Inc., 9 Cal. App. 5th 807, 824 (2017).

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167. CAL. CIV. CODE § 3344(a) (West 2022).
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^{163.} Id.

^{164.} Id. at 824.

^{165.} CAL. CIV. CODE § 3344(a) (West 2022); Miller v. Collectors Universe, Inc., 159 Cal. App. 4th 988, 991 (2008); Jarman v. HCR ManorCare, Inc., 9 Cal. App. 5th 807, 824 (2017).

^{168.} Miller v. Collectors Universe, Inc., 159 Cal. App. 4th 988, 991 (2008).

^{169.} Id. at 1008.

^{170.} Id. at 1005.

^{171.} Jarman v. HCR ManorCare, Inc., 9 Cal. App. 5th 807, 827 (2017).

^{172.} Id.

remaining arguments in the *Nevarrez* opinion.¹⁷³ Finally, the court held that the statute applies "per cause of action" and the 382 violations may establish 382 separate causes of action.¹⁷⁴

Although the primary rights theory may provide an alternative to the "per violation" and "per lawsuit" approaches, this Comment does not explore the theory. The Rather, this Comment argues that the California Supreme Court incorrectly interpreted the statute's purpose. The Provided Head of the Statute's purpose.

C. The California Supreme Court Ends the Confusion

In August 2020, the California Supreme Court put an end to the split of authority regarding the statute by interpreting the law to limit the \$500 damages provision to each lawsuit.¹⁷⁷ The Court examined the statutory scheme, legislative history, and various policy arguments.¹⁷⁸

Similar to *Nevarrez*, the Court determined that the Legislature enacted the statute as an enforcement mechanism for violations "not directly related to patient health and safety." The Court's interpretation supports the idea that the statute supplements government enforcement for Long Term Care Act violations. ¹⁸⁰

The Court then compared the section at issue—1430(b)—with section 1430(a), which specifically authorized a civil penalty "on account of the violation or violations." Section 1430(b) does not include a measurement like the

^{173.} Id. at 826-27.

^{174.} See id. at 827–28 (quoting Denham v. Super. Ct., 2 Cal.3d 557, 564 (1970) ("But here again, Manor Care has offered no analysis of the facts underlying the violations found by the jury and has made no arguments as to how many primary rights were affected. Instead, it simply acknowledged that 'none' of the violations found by the jury 'was identified in the special verdict.' For all we know, the 382 violations found by the jury reflect circumstances establishing 382 separate causes of action; and in the absence of an affirmative showing to the contrary, we are obligated to presume they do.").

^{175.} See id. at 827-28 (2017) (providing an argument for the primary rights theory).

^{176.} See infra Section III.D (arguing that the California Supreme Court's interpretation of the statute does not portray the will of the Legislature).

^{177.} See Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 393 (2020) (reversing the Court of Appeal's judgment finding that section 1430(b) allows for a \$500 penalty per violation); Dolan, *supra* note 19.

^{178.} Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 385-392 (2020).

^{179.} *Id.* at 385; *see also* Nevarrez v. San Marino Skilled Nursing and Wellness Centre, 221 Cal. App. 4th 102, 135 (2013) ("But to the extent respondent and the AARP amici curiae proceed on the assumption that section 1430, subdivision (b) aims solely or largely to protect the health and safety of nursing home residents, they are incorrect since, as we explained, some patients' rights violations are not related to health and safety.").

^{180.} Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 385 (2020); see supra Section II.B. (discussing governmental enforcement of the Long Term Care Act through class violations and fines).

^{181.} See CAL. HEALTH & SAFETY CODE § 1430(a) (West 2022) ("(a) Except where the state department has taken action and the violations have been corrected to its satisfaction, a licensee who commits a class 'A' or 'B' violation may be enjoined from permitting the violation to continue or may be sued for civil

damages within a court of competent jurisdiction. An action for injunction or civil damages, or both, may be prosecuted by the Attorney General in the name of the people of the State of California upon his or her own complaint or upon the complaint of a board, officer, person, corporation, or association, or by a person acting for the interests of itself, its members, or the general public. The amount of civil damages that may be recovered in an action brought pursuant to this section may not exceed the maximum amount of civil penalties that could be

preceding section.¹⁸² Like *Nevarrez*, the Court inferred that the difference in language suggests the Legislature did not wish to administer damages per violation.¹⁸³ Moreover, the Court explained that many of the rights protected by the statute overlap.¹⁸⁴ According to the Court, this overlap makes it difficult for judges to determine what is a "separate and distinct" violation for calculating damages.¹⁸⁵

Next, the court addressed the statute's legislative history by discussing previous drafts. ¹⁸⁶ The court highlighted that the Legislature reviewed three drafts of the bill before settling on the statute's current language. ¹⁸⁷ After reviewing the previous drafts, the supreme court concluded that the Legislature likely did not intend a per violation approach. ¹⁸⁸ The court also mentioned that the Legislature failed to clarify the language in its 2004 amendment, and therefore, likely did not wish to award \$500 per violation. ¹⁸⁹

Finally, the California Supreme Court reviewed various public policy arguments. Phe nursing home resident argued that an interpretation limiting damages to \$500 per lawsuit renders the statute "toothless." However, the Court rejected that argument and reasoned that the law provides other reasons for nursing homes to refrain from violating residents' rights. Phe Court stated that the statute deters nursing homes from violating resident's rights by providing the resident with the ability to pursue an injunction, attorney fees, and costs. Purther, the Court concluded that the Legislature did not intend for the statute to serve as an "exclusive or primary" enforcement mechanism for nursing home residents. The court mentioned that tort law provides remedies to individuals seeking monetary compensation for wrongdoing.

The California Supreme Court reversed the Fourth District Court of Appeal's judgment by interpreting the statute to award only \$500 in damages per lawsuit. 196

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assessed on account of the violation or violations."); Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 385 (2020). 182. Id. § 1430(b); Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 385 (2020).
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184. Id. at 386–87.
185. Id.
186. Id. at 387–89.
187. Id. at 387–88.
188. Id.
189. Jarman, 9 Cal. App. 5th at 389–90.
190. Id. at 390.
191. Id.
192. Id.
193. Id.
194. Id.
195. Jarman, 9 Cal. App. 5th at 391.
196. Id. at 392–93.
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^{183.} See Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 387 (2020) (citing the rule of statutory construction, which states "[w]hen one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning.")

This long-awaited decision disappointed nursing home residents and their advocates, yet pleased for-profit nursing homes. ¹⁹⁷ The Court concluded by highlighting that nursing home residents "comprise a particularly vulnerable segment of our population" deserving the highest protections against abuse and substandard care. ¹⁹⁸ However, the Court declined to interpret the statute to provide nursing home residents with necessary protections against abuse and substandard care. ¹⁹⁹

D. The California Supreme Court Interpreted the Statute Incorrectly

According to ordinary principles of statutory construction, a court must interpret a statute in light of the Legislature's intent and purpose when enacting the statute. The purpose of section 1430(b) was to protect nursing home residents' rights by creating a private enforcement mechanism. When enacting the law, the Legislature intended the statute to function primarily as a deterrent to increased instances of substandard care in nursing homes. Description

However, the California Supreme Court—along with the Second District Court of Appeal—did not articulate the statute's purpose in this manner.²⁰³ California's highest court found that the Legislature enacted the statute as an "enforcement mechanism for violations that were not directly related to patient health and safety" as covered by the Long Term Care Act.²⁰⁴ Although this iteration correctly places the statute as a supplement to the classification process of the Long Term Care Act, it fails to recognize the provision's primary purpose.²⁰⁵

The statute's purpose was to deter violations of the Patient's Bill of Rights and other provisions of the Long Term Care Act—both intended to protect nursing home residents.²⁰⁶ Any other reading of the statute's purpose deprives nursing home residents from properly vindicating their rights.²⁰⁷ Moreover, California legislators specifically stated the original bill's primary purpose was "to protect

^{197.} Dolan, supra note 19.

^{198.} Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 392 (2020).

^{99.} *Id*.

^{200.} See Coal. of Concerned Cmtys., Inc. v. City of Los Angeles, 34 Cal. 4th 733, 737 (2004) ("Our fundamental task in interpreting a statute is to determine the Legislature's intent so as to effectuate the law's purpose.").

^{201.} Dolan, supra note 19.

^{202.} Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 407–08 (2020) (Cuéllar, J., dissenting).

^{203.} *Id.* at 385; Nevarrez v. San Marino Skilled Nursing and Wellness Centre, 221 Cal. App. 4th 102, 135 (2013).

^{204.} Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 385 (2020).

^{205.} SENATE COMMITTEE ON THE JUDICIARY, COMMITTEE ANALYSIS OF SB 1930, at 2 (Apr. 26, 1982); Dolan, *supra* note 19.

^{206.} Cal. Health & Safety Code \$ 1430(b) (West 2022); Senate Committee on the Judiciary, Committee Analysis of SB 1930, at 2 (Apr. 26, 1982).

^{207.} See CAL. ADVOCS. FOR NURSING HOME REFORM, *supra* note 15, at 8 (explaining how the "limited remedies for residents' rights violations leave most nursing home residents with no legal recourse at all.").

and ensure the rights of people residing in nursing homes."²⁰⁸ This iteration of the statute's purpose contradicts the California Supreme Court's interpretation.²⁰⁹

Respectfully, the California Supreme Court did not accurately portray the statute's intended purpose in its opinion.²¹⁰ It is true that the statute supplements the classification process of the Long Term Care Act; however, the Long Term Care Act only allows the California Department of Public Health to collect fines.²¹¹ These fines do not protect nursing home residents, nor do the fines adequately compensate a resident when a nursing home violates their rights.²¹² The dissent properly interpreted the statute's intended purpose and stated that the legal system recognizes that "the threat of monetary penalties or damages can prevent wrongdoing."²¹³

Penalizing nursing homes only \$500 for any number of violations does not serve the intended goal of the statute.²¹⁴ Interpreting the statute as \$500 per lawsuit immunizes nursing homes and encourages more reprehensible conduct.²¹⁵ Rather, a per-violation approach to damages preserves the statute's purpose, guarantees victims' rights, and deters nursing homes from improper conduct.²¹⁶

Additionally, limiting damages to \$500 per lawsuit is impractical when the cost to file a lawsuit in California is \$450.²¹⁷ It requires time, money, and effort to file a lawsuit, and some lawsuits take years to dispose of.²¹⁸ For instance, the original jury released its verdict in *Jarman* on June 15, 2011—over 9 years before the case reached the California Supreme Court.²¹⁹ It seems counterintuitive to file a lawsuit for \$450 and then after 9 years receive only \$500 in damages.²²⁰

^{208.} SENATE COMMITTEE ON THE JUDICIARY, COMMITTEE ANALYSIS OF SB 1930, at 2 (Apr. 26, 1982).

^{209.} *Compare* Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 385 (2020) (stating that the Legislature enacted the statute as "enforcement mechanism for violations that were not directly related to patient health and safety"), *with* SENATE COMMITTEE ON THE JUDICIARY, COMMITTEE ANALYSIS OF SB 1930, at 2 (Apr. 26, 1982) ("The purpose of this bill is to protect and ensure the rights of people residing in nursing homes.").

^{210.} *Compare* Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 385 (2020) (stating that the Legislature enacted the statute as "enforcement mechanism for violations that were not directly related to patient health and safety"), *with* SENATE COMMITTEE ON THE JUDICIARY, *supra* note 209, at 2 (Apr. 26, 1982) ("The purpose of this bill is to protect and ensure the rights of people residing in nursing homes.").

^{211.} See CAL. HEALTH & SAFETY CODE § 1417.2 (West 2022) ("moneys collected as a result of state and federal civil penalties imposed under this chapter or federal law shall be deposited into accounts that are hereby established in the Special Deposit Fund").

^{212.} See id. § 1417.2 (discussing how the government uses the fine monies collect, none of which provide direct monetary relief to victims).

^{213.} Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 400 (2020) (Cuéllar, J., dissenting).

^{214.} Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, *supra* note 14, at 10.

^{215.} Id. at 13, Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375 (2020) (No. S241431).

^{216.} Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, *supra* note 14, at 13–14, Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375 (2020) (No. S241431).

^{217.} Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, *supra* note 14, at 18.

^{218.} Id.

^{219.} Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 380 (2020).

^{220.} Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, supra note 14,

The dissent in *Jarman* stated that the decision renders the law "toothless" or ineffectual.²²¹ However, the majority argued that nursing home residents have other remedies available to them, such as an injunction against future conduct.²²² The California Supreme Court's argument belittles and further alienates an already vulnerable population by limiting the remedies available to nursing home residents to vindicate their rights.²²³

When nursing home residents file a lawsuit, they are already at a disadvantage because they live in the facility they wish to sue. ²²⁴ Although there are laws against retaliation, many residents fear that filing a lawsuit may lead to eviction and possible homelessness. ²²⁵ Most nursing home residents have very little money and few possessions, and many individuals do not have families. ²²⁶ For individuals without families or friends to advocate for them, their resident rights serve as a safeguard against nursing home abuse. ²²⁷

Moreover, injunctions only stop further violations and do not provide any monetary relief for prior violations.²²⁸ The Legislature intended the statute to function with both remedies, not just the injunction.²²⁹

IV. THE NEED FOR AN AMENDMENT

The decision in *Jarman* does not mean defeat.²³⁰ The California Supreme Court insinuated that advocates for nursing home residents should lobby the legislature to amend the statute to align with the intent of the legislature.²³¹ This means advocates for nursing home residents must lobby a different branch of the

at 18, Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375 (2020) (No. S241431).

^{221.} Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 400–01 (2020) (Cuéllar, J., dissenting); see *Toothless*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/toothless (last visited March 5, 2021) (on file with the *University of the Pacific Law Review*) (defining "toothless" as "lacking in means of enforcement or coercion: ineffectual").

^{222.} Id. at 390.

^{223.} See id. at 400–01 (Cuéllar, J., dissenting) ("It makes little difference that the majority leaves a few teeth awkwardly hanging in the mouth after pulling most of them out, as availability of injunctive relief and attorney fees are plainly insufficient to fulfill the statute's purpose to deter and remedy violations of nursing home patients' rights.").

^{224.} CAL. ADVOCS. supra note 111.

^{225.} See id. ("residents who are illegally evicted, denied phone calls or visitors or subjected to humiliation by being paraded naked through the facility, are denied any relief.").

^{226.} Id.; Jasper & Reese, supra note 66

^{227.} See CAL. ADVOCS. supra note 111 (discussing how limiting damage will not stop abuse and neglect in nursing homes); Jasper & Reese, supra note 66.

^{228.} CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022).

^{229.} Id.

^{230.} See Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 392 (2020) (explaining the court's decision to the legislature).

^{231.} See id. ("Undoubtedly, nursing care patients comprise a particularly vulnerable segment of our population and deserve the highest protections against any abuse and substandard care. That said, we cannot and must not legislate by grafting onto section 1430(b) a remedy that the Legislature has chosen not to include.").

government—the California Legislature—for relief.²³² Section A explains how judicial precedent only allows the California Legislature to amend the statute.²³³ Section B explores how public policy supports amending the statute.²³⁴

A. Why Lobbying the Legislature is the Only Way to Change the Law

When a court interprets a statute—such as in *Jarman*—that interpretation becomes "precedent" to which all lower courts must follow.²³⁵ Courts strictly adhere to the doctrine of "stare decisis," a Latin term stating that later courts should not overrule judicial precedent.²³⁶ The doctrine creates consistency within the court system and provides society with a guideline on how courts interpret and apply a particular law.²³⁷

It is often difficult to overrule judicial precedent because the doctrine of stare decisis requires some special "overriding consideration" before a court overrules a previous decision.²³⁸ Therefore, courts frequently rely on Congress to amend a statute when it disagrees with the court's interpretation.²³⁹ For these reasons, both the majority and the dissent in *Jarman*—either directly or impliedly—suggested that the California Legislature should amend the statute.²⁴⁰

B. Public Policy Supports an Amendment

Good public policy supports amending the statute to serve the nursing home population.²⁴¹ The current statute only serves the nursing home industry and does

- 233. See infra Section IV.A.
- 234. See infra Section IV.B.
- 235. Micheli, supra note 119, at 461.
- 236. Micheli, *supra* note 119, at 466.
- 237. Micheli, *supra* note 119, at 466.

^{232.} See id. (explaining how the courts only job is to interpret law, while the legislature's job is to create the law).

^{238.} See Neal v. United States, 516 U.S. 284, 295 (1996) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 173) (explaining one overriding consideration "when the intervening development of the law has 'removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies."); Micheli, *supra* note 119, at 466.

^{239.} See Neal v. United States, 516 U.S. 284, 295 (1996) (quoting Illinois Brick Co. v. Illinois, 431 U.S. 720, 736) ("One reason that we give great weight to stare decisis in the area of statutory construction is that 'Congress is free to change this Court's interpretation of its legislation."").

^{240.} See Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 392 (2020) ("Undoubtedly, nursing care patients comprise a particularly vulnerable segment of our population and deserve the highest protections against any abuse and substandard care. That said, we cannot and must not legislate by grafting onto section 1430(b) a remedy that the Legislature has chosen not to include."); see also Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 408 (2020) (Cuéllar, J., dissenting) ("That the majority has chosen to reject this reading may prompt the Legislature to repair the scheme and restore its more robust deterrent effect—along with, perhaps, greater clarity about defining violations when certain rights appear to overlap.").

^{241.} See CAL. ADVOCS. FOR NURSING HOME REFORM, supra note 15, at 27 (recommending that the Legislature increase the damages provision to help residents "who are illegally evicted, denied phone calls or visitors or subject to humiliation by being paraded naked through the facility").

little to protect the individuals who nursing homes care for. ²⁴² Subsection 1 explores how the *Jarman* decision may lead to poorer quality of care in nursing homes. ²⁴³ Subsection 2 quickly addresses how the penalty per lawsuit approach decreases judicial efficiency. ²⁴⁴

1. The Jarman Decision Leads to Poorer Quality of Care

Following the decision in *Nevarrez*, the amount of resident rights complaints spiked because the case's holding essentially condoned substandard care.²⁴⁵ Additionally, nursing homes started making \$500 settlement offers.²⁴⁶ By extending these offers, nursing homes used section 1430(b)—a statute supposedly protecting nursing home residents' rights—as a weapon when residents sued to enforce their rights.²⁴⁷ This conduct is contrary to the statute's purpose and sweeps substandard care under the rug.²⁴⁸ The intended goal of the statute was to increase quality of care and accountability for nursing homes, not immunize nursing homes from liability and worsen quality of care.²⁴⁹

In recent years, the for-profit nursing home industry and its lobbyists pushed to decrease liability or create immunity for inadequate care.²⁵⁰ Although there are laws protecting nursing home residents, many facilities choose to pay fines instead of fixing the problem—substandard care—because paying is more cost effective.²⁵¹ As the trend toward immunizing nursing homes progresses, it is important to remember why the law regulates nursing homes—to protect a highly vulnerable population against abuse and neglect.²⁵²

The majority of nursing homes that are party to elder abuse lawsuits often dispense significantly poorer care.²⁵³ For example, residents file roughly half of elder abuse lawsuits against only 10% of skilled nursing facilities.²⁵⁴ Many facilities within the 10% have extreme histories of abuse and neglect violations

^{242.} See CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022) (stating residents in either skilled nursing facilities or intermediate are facilities can bring a lawsuit).

^{243.} Infra Subsection IV.B.1.

^{244.} Infra Subsection IV.B.2.

^{245.} See Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, supra note 14, at 13 ("The total number of complaints rose 54% from just four years ago.").

^{246.} Id.

^{247.} Id.

^{248.} Application for Leave to File Amici Curiae Brief and Amici Curiae Brief of AARP, *supra* note 14, at 13–14.

^{249.} Id.

^{250.} Samuel Brooks, et al., *States Move to Shield LTC Facilities from Civil Liability*, ABA, https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-41/vol-41—issue-no-6—july-august-2020-/states-move-to-shield-ltc-facilities-from-liability/ (last visited Jan. 5, 2021) (on file with the *University of the Pacific Law Review*).

^{251.} Id.

^{252.} Id.

^{253.} CAL. ADVOCS. FOR NURSING HOME REFORM, supra note 15, at 18.

^{254.} Id. at 19.

and receive almost 200% more resident complaints.²⁵⁵ The Patient's Bill of Rights protects nursing home residents against elder abuse, neglect, and other reprehensible conduct.²⁵⁶ Therefore, elder abuse statistics provide insight into the quality of care in nursing homes.²⁵⁷ Based upon these statistics, fines and other deterrence mechanisms—such as the \$500 penalty per lawsuit—do not effectively prevent nursing homes from violating residents' rights.²⁵⁸ To successfully deter nursing homes from such violations requires the law to hit them where it hurts—their pocketbooks.²⁵⁹

2. The Jarman Decision Decreases Judicial Efficiency

The *Jarman* decision held that the \$500 damages provision applied per lawsuit; however, this approach is problematic for the judicial system as a whole. Residents with multiple claims must choose between consolidating their claims into one lawsuit for judicial efficiency and receive only \$500 in damages, or file multiple lawsuits. This outcome not only discourages residents from filing lawsuits, it incentivizes lawyers to file separate lawsuits to receive the maximum amount in damages for their clients. If lawyers utilize this practice to achieve justice for their clients, judicial efficiency decreases and court costs rise. If a separate lawsuits to receive the maximum amount in damages for their clients.

It is true that claim and issue preclusion—along with other procedural methods—may block lawyers' attempts to file multiple separate lawsuits.²⁶⁴ However, a court must still hold a judicial proceeding to determine whether to

^{255.} Id.

^{256.} See CAL. HEALTH & SAFETY CODE § 1599.1 (West 2022) (detailing the statutory version of the Patient's Bill of Rights); see also CAL. CODE REGS. tit. 22, § 72527 (West 2022) (detailing the regulatory version of the Patient's Bill of Rights).

^{257.} See CAL. HEALTH & SAFETY CODE § 1599 (West 2022) ("It is the intent of the Legislature in enacting this chapter to expressly set forth fundamental human rights which all patients shall be entitled to"); CAL. HEALTH & SAFETY CODE § 1599.1 (West 2021) (detailing the statutory version of the Patient's Bill of Rights); see also CAL. CODE REGS. tit. 22, § 72527 (West 2022) (detailing the regulatory version of the Patient's Bill of Rights); Residents' Rights, supra note 10 (explaining that the Patient's Bill of Rights guarantees nursing home residents' certain rights under state and federal law). See generally supra Section II.C (explaining the Patient's Bill of Rights in detail).

^{258.} CAL. ADVOCS. FOR NURSING HOME REFORM, MUCH ADO ABOUT NOTHING: DEBUNKING THE MYTH OF FREQUENT AND FRIVOLOUS ELDER ABUSE LAWSUITS AGAINST CALIFORNIA'S NURSING HOMES 19 (2003), http://www.canhr.org/reports/2003/CANHR_Litigation_Report.pdf (on file with the *University of the Pacific Law Review*).

^{259.} See CAL. ADVOCS. FOR NURSING HOME REFORM, MUCH ADO ABOUT NOTHING: DEBUNKING THE MYTH OF FREQUENT AND FRIVOLOUS ELDER ABUSE LAWSUITS AGAINST CALIFORNIA'S NURSING HOMES 18 (2003), http://www.canhr.org/reports/2003/CANHR_Litigation_Report.pdf (on file with the *University of the Pacific Law Review*) (citing statistics where nursing homes receive fines yet continue to dispense poor quality of care).

^{260.} Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 379 (2020).

^{261.} Id. at 392.

^{262.} Id. at 407 (Cuéllar, J., dissenting).

^{263.} Id. at 399 (Cuéllar, J., dissenting).

^{264.} Id. at 407 (Cuéllar, J., dissenting).

dismiss the separate law suits. 265 Those decisions also take time and court resources. 266

V. WHAT THE CALIFORNIA LEGISLATURE SHOULD DO

The California Legislature should amend section 1430(b) to properly execute the statute's intended goal—to protect nursing home residents' basic human rights. For example, the Legislature could simply add the language "per violation" to the current statute. Alternatively, the Legislature could completely amend the statute to further protect nursing home residents' rights in light of the recent trend toward limiting nursing home liability.

One such example, discussed by the dissent in *Jarman*, is to tie the statutory penalty to the "number" of violations or "severity" of a violation.²⁷⁰ Although this proposed method requires the Legislature to develop yet another statutory scheme, it would properly effectuate the enacting Legislature's purpose.²⁷¹ Amendments like this one are not unprecedented; the Legislature added similar statutory penalties to other enforcement schemes like the unfair competition law and the false advertising law.²⁷²

To illustrate how an amendment would work in practice, imagine that the elderly nursing home resident mentioned in the introduction sued the nursing home using the statute.²⁷³ The California Department of Health issued a Class "B" violation because the actions had a "direct or immediate relationship to the health, safety, or security" of the resident.²⁷⁴ The California Department of Public Health

^{265.} Id. (Cuéllar, J., dissenting)

^{266.} Jarman, 9 Cal. App. 5th at 399 (Cuéllar, J., dissenting).

^{267.} See Dolan, supra note 19. (explaining how the California Advocates for Nursing Home Reform plan to urge the Legislature to rewrite the law, especially in light on the coronavirus pandemic).

^{268.} See, e.g., CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022) (adding the language "per violation" would properly effectuate the statute's goal).

^{269.} See Brooks, et al., supra note 250 (speaking to the need for lawmakers to reject the trend towards limiting liability of nursing homes).

^{270.} Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 401 (2020) (Cuéllar, J., dissenting).

^{271.} See id. (Cuéllar, J., dissenting) ("Given the purpose of this statute to allow vulnerable nursing home residents to better protect their own rights, the natural conclusion is that the Legislature intended the \$500 penalty to serve as an additional deterrent to wrongdoing.").

^{272.} See id. (Cuéllar, J., dissenting) ("The Legislature has similarly added statutory penalties to other enforcement schemes like the false advertising law and unfair competition law where it finds that 'the injunctive remedy was . . . an ineffective deterrent against violations.").

^{273.} See Monterey Palms Operating Co., LP, Citation No. 25-2945-0014196-S (Cal Dep't of Pub. Health & Hum. Serv. Agency Aug. 17, 2018) (Section 1424 Notice) (on file with the *University of the Pacific Law Review*) (citing Monterey Palms Health Care Center for various violations relating to a nursing home resident's right to be free from abuse, neglect, and exploitation); see supra Part I (explaining the scenario where nursing home staff sexually exploited the elderly nursing home resident via Snapchat video).

^{274.} CAL. HEALTH & SAFETY CODE § 1424(e) (West 2022); see Monterey Palms Operating Co., LP, Citation No. 25-2945-0014196-S (Cal Dep't of Pub. Health & Hum. Serv. Agency Aug. 17, 2018) (Section 1424 Notice) (on file with the *University of the Pacific Law Review*) (citing Monterey Palms Health Care Center for a Class B violation); see generally supra Part II.B (discussing the Long Term Care Act and class violations).

fined the nursing home \$2,000 for the violation payable to California, not the resident.²⁷⁵ The citation did not specify how many times the nursing home violated the elderly resident's rights, but assume the nursing home violated at least three of the resident's rights.²⁷⁶

Under the current statute, the resident would only receive \$500 for the whole lawsuit, including all three resident rights violations.²⁷⁷ This would leave the elderly resident likely worse off than before they filed the lawsuit due to litigation costs and attorney fees.²⁷⁸ Although the resident could file a claim for damages, they would still need to convince an attorney to take his case and pay costs out-of-pocket.²⁷⁹ Many nursing home residents do not have the ability to pay attorney fees and costs, let alone possess the means to find an attorney to litigate their claims.²⁸⁰

If the Legislature amended the statute to issue a penalty per violation, the elderly resident would receive at least \$1,500 for the lawsuit.²⁸¹ The resident could receive more if the Legislature enacted an approach that assesses the number and severity of each violation.²⁸² For example, when a court finds the injunctive remedy ineffective as a deterrent against violations, the false advertising law allows civil penalties up to \$2,500 for each violation.²⁸³ The false advertising law assesses the amount of the civil penalty by considering the relevant circumstances, including the nature and seriousness, the number of violations, and willfulness.²⁸⁴ If the Legislature amends section 1430(b) to permit an approach that assesses the relevant circumstances of each violation, it could use the false advertising law as

^{275.} CAL. HEALTH & SAFETY CODE § 1417.2 (West 2022); Monterey Palms Operating Co., LP, Citation No. 25-2945-0014196-S (Cal Dep't of Pub. Health & Hum. Serv. Agency Aug. 17, 2018) (Section 1424 Notice) (on file with the *University of the Pacific Law Review*).

^{276.} See Monterey Palms Operating Co., LP, Citation No. 25-2945-0014196-S (Cal Dep't of Pub. Health & Hum. Serv. Agency Aug. 17, 2018) (Section 1424 Notice) (on file with the *University of the Pacific Law Review*) (omitting the number of times the nursing home committed violations).

^{277.} CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022); Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 392 (2020).

^{278.} See Jarman v. HCR ManorCare, Inc., 9 Cal. App. 5th 807, 823 (2017) ("A statute which offers the opportunity to file a lawsuit for a maximum recovery of \$500—no matter how many wrongs are proved—would be a remedy suitable only for those who like litigating far more than they like money.")

^{279.} Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 391 (2020) (explaining the tort law remedy); Finding a Lawyer, CAL. CTS., https://www.courts.ca.gov/selfhelp-findlawyer.htm?rdeLocaleAttr=en (last visited Jan. 30, 2022) (on file with the University of the Pacific Law Review).

^{280.} See CAL. ADVOCS. FOR NURSING HOME REFORM, supra note 15, at 27 (explaining how residents who are illegally evicted, denied phone calls, and visitors are denied relief because they cannot find counsel).

^{281.} See Jarman v. HCR ManorCare, Inc., 9 Cal. App. 5th 807, 827 (2017) (holding that the statute's damages provision applied per cause of action).

^{282.} Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 401 (2020) (Cuéllar, J., dissenting).

^{283.} CAL. Bus. & Prof. Code § 17536 (West 2022); People v. Superior Ct. (Olson) 96 Cal. App. 3d 181, 191 (1979) (citing University of the Pacific; McGeorge School of Law, *Consumer Protection Review of Selected 1972 California Legislation*, 4 PAC. L. J. 335, 342 (1973)).

^{284.} See CAL. BUS. & PROF. CODE § 17536 (West 2022) (explaining the relevant circumstances the court may consider, including "the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.").

a guide.²⁸⁵ An approach that considers the relevant circumstances allows the court to tailor the amount of damages fairly and appropriately.²⁸⁶

For the elderly resident in the introduction, a court—applying an amended statute—would likely consider how the employee not only videotaped the resident but shared it with friends.²⁸⁷ That gross invasion may convince a court to increase the damages allotted to the resident.²⁸⁸ The court may also consider that the elderly resident suffered from various ailments, including dementia and an anxiety disorder, as opposed to an individual recovering from shoulder surgery.²⁸⁹ Ultimately, the court has discretion over the monetary damages in an approach that considers the relevant circumstances.²⁹⁰

Now, the California Legislature must amend the law to reflect an approach that provides nursing home residents with a meaningful remedy.²⁹¹

VI. CONCLUSION

Before *Jarman*, there were two competing interpretations of the damages provision in section 1430(b).²⁹² The first interpretation authorized nursing home residents to recover \$500 for each resident rights violation.²⁹³ While the second only granted residents \$500 per lawsuit.²⁹⁴ Only one interpretation of the law serves nursing home residents' justice by punishing and discouraging improper behavior and properly compensating the victim.²⁹⁵ The accuracy of this

^{285.} See id. § 17536 (West 2022) (explaining how to assess damages for each violation according to the relevant circumstances).

^{286.} *Compare* CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022) (allowing a \$500 penalty per law suit), *with* Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 401 (2020) (Cuéllar, J., dissenting) (discussing a possible amendment which assess the number and severity of the violations).

^{287.} See Monterey Palms Operating Co., LP, Citation No. 25-2945-0014196-S (Cal. Dep't of Pub. Health & Hum. Serv. Agency Aug. 17, 2018) (Section 1424 Notice) (on file with the *University of the Pacific Law Review*) (describing how a CNA shared a video of a resident over Snapchat).

^{288.} Id

^{289.} See id. (explaining that the nursing home resident "was admitted to the facility on January 25, 2017, with diagnoses that included dementia (memory loss), diabetes mellitus (high blood sugar), hypertension (elevated blood pressure), and anxiety disorder")).

^{290.} See CAL. BUS. & PROF. CODE § 17536 (West 2022) (explaining how to the court shall consider various relevant circumstances to determine the damages award).

^{291.} *Compare* CAL. HEALTH & SAFETY CODE § 1430(b) (West 2022) (allowing a \$500 penalty per violation), *with* Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 401 (2020) (Cuéllar, J., dissenting) (discussing a possible amendment which assess the number and severity of the violations).

^{292.} See, e.g., Jarman v. HCR ManorCare, Inc., 9 Cal. App. 5th 807, 827 (2017) (holding for the \$500 per cause of action approach); Order on Motion for Award of Attorneys' Fees, Costs and Service Payments, Lavender v. Skilled Healthcare Group, Inc. (No. DR060264) (Humboldt Co. Sup. Ct 2010) (holding for a penalty per violation approach).

^{293.} Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 379 (2020).

^{294.} Id

^{295.} See id.at 392 (concluding that the court cannot provide a remedy that the Legislature did not include, and the current remedy under section 1430(b) is that a facility is liable for up to \$500).

interpretation was ever-present in the case involving nursing staff who videotaped an elderly resident's nude body and posted it to Snapchat.²⁹⁶

When the California Supreme Court issued its opinion in *Jarman*, it resolved the statutory ambiguity by interpreting the law to cap damages at \$500 per lawsuit.²⁹⁷ However, the California Supreme Court's interpretation undermines the statute's purpose.²⁹⁸ Furthermore, the decision allows nursing homes to commit countless violations and pay only \$500 in damages.²⁹⁹ This precedent limits the monetary remedies available to residents and immunizes nursing homes from significant liability under the statute.³⁰⁰

The only option available to properly effectuate the statute's purpose is to amend the statute.³⁰¹ The Legislature may amend the statute by simply clarifying the language or completely reforming the private enforcement mechanism.³⁰² In light of the growing trend toward immunizing nursing homes and the looming Silver Tsunami, there is no better time for the California Legislature to amend the statute.³⁰³ By amending the statue, the California Legislature will not only restore the enacting legislature's intent but reaffirm its commitment to the aging population.³⁰⁴

^{296.} See Monterey Palms Operating Co., LP, Citation No. 25-2945-0014196-S (Cal. Dep't of Pub. Health & Hum. Serv. Agency Aug. 17, 2018) (Section 1424 Notice) (on file with the *University of the Pacific Law Review*) (citing Monterey Palms Health Care Center for various violations relating to a nursing home resident's right to be free from abuse, neglect, and exploitation); see supra Part I (explaining the scenario where nursing home staff sexually exploited the elderly nursing home resident via Snapchat video); see also supra Part V (analyzing how the case would have been decided under the current and a proposed amended statute).

^{297.} Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 379 (2020).

^{298.} See id. (interpreting the statute according an incorrect purpose); Dolan, *supra* note 19 (explaining that the intended goal of the statute was to deter and vindicate violations of nursing home residents' rights).

^{299.} See Jarman v. HCR ManorCare, Inc., 10 Cal. 5th 375, 379 (2020) (interpreting the statute according to ordinary principles of statutory construction).

^{300.} See id. (holding that "the monetary cap of \$500 under the Long-Term Care Act applied to each action, rather than each violation committed").

^{301.} Dolan, supra note 19.

^{302.} See generally supra Part V (discussing the possible methods available to amend the statute).

^{303.} See Brooks, et al., supra note 250 (discussing the trend toward immunizing for-profit nursing homes); Levin, supra note 60 (explaining the effect the Silver Tsunami will likely have on California).

^{304.} See Cal. Exec. Order No. N-14-19, https://www.gov.ca.gov/wp-content/uploads/2019/06/6.10.19-Master-Plan-for-Aging-EO.pdf (June 10, 2019) (on file with the *University of the Pacific Law Review*) (explaining California's commitment to aid the growing Silver Tsunami); see also CAL. DEP'T OF AGING, supra note 71 (discussing California's plan to help the aging population); Jasper & Reese, supra note 66 (questioning whether California's "Master Plan for Aging" will be enough to help the aging population).

Jade Wolansky*

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I. Introduction

In January 2020, Mike Yestramski, president of the Washington Federation of State Employees, testified about his doxing experience at a committee hearing for Washington state's H.B. 1888. Mr. Yestramski, a social worker, stated: "a parent of a patient became very upset with us" and "began threatening both myself and my family." Mr. Yestramski continued, "she went online and put our full names, our pictures" and "our date of birth." He stated that the patient's mother posted comments online urging her followers to visit him at work. In his testimony, Mr. Yestramski encouraged the Washington State Legislature to pass H.B. 1888. He said: "I don't think that is something, as an employer, you should make easier to have that information."

In 2018, the Supreme Court held in *Janus v. AFSCME* that public workers could opt-out of mandatory union dues. Since *Janus*, third-party organizations are increasingly submitting public record requests and suing government agencies to obtain public employee information. *Janus* opened the floodgates to public

- 2. HB 1888 State Gov't & Tribal Relations Hearing, supra note 1.
- 3. *Id*.
- 4. *Id*.
- 5. *Id*.
- 6. *Id*.
- 7. Janus v. AFSCME, 138 S. Ct. 2448, 2459 (2018).

^{1.} HB 1888, 66th Leg., Reg. Sess. (Wash. 2020) (showing that HB 1888 would exempt from public disclosure certain public employee data, including full birth date and payroll deductions); Protecting Employee Information from Public Disclosure: Hearing on HB 1888 Before the H. State Gov't & Tribal Relations Comm., 2020 Leg., 66th Sess. (Wash. 2020) [hereinafter HB 1888 State Gov't & Tribal Relations Hearing] (testimony of Mike Yestramski, President of the Wash. Fed'n of State Emps.); *see Dox*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/dox (last visited Feb. 12, 2022) (defining doxing as the practice of publicly identifying an individual or publishing an individual's private information as a form of punishment or revenge).

^{8.} Compare Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate at 1–2, Freedom Found. v. Cal. Dep't of Hum. Res., No. 34-2020-00278646 (showing that the Freedom Foundation recently sued the California Department of Human Resources for denying their public information request in May 2020), and Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate at 1–2, Freedom Found. v. San Bernardino County, No. CIVDS2014702 (2020) (establishing that the Freedom Foundation also sued San Bernardino County for denying their public information request in July 2020), with WPEA v. Freedom Found., No. 95262-1, slip. op. at 28 (Wash. 2019) (determining that the Freedom Foundation won their public records lawsuit for public employee information in Washington state), and Opinion and Order on Motions for Summary Judgment at 4, City of Portland v. Evergreen Freedom Found., No. 17CV47002 (dismissing the City of Portland's lawsuit to block the Freedom Foundation Launches New Campaign as Expansion Continues, FREEDOM FOUND. (Apr. 8, 2020), https://www.freedomfoundation.com/labor/freedom-

information requests and lawsuits by anti-union organizations that want to contact public employees to cancel their union dues.⁹

The Freedom Foundation, a conservative think tank, is leading this information request campaign in western states with a specific focus on Washington, Oregon, and California. It targets these states because they have some of the highest public union membership in the country. In The Freedom Foundation's goal is to contact union members at their homes and workplaces to discourage employees from paying union dues. Ultimately, the Freedom Foundation wants to reduce the bargaining power and political influence of public-sector unions.

Government agencies should be committed to public transparency.¹⁴ However, these agencies should not release public employees' personal information irresponsibly because that puts employee safety and privacy at risk.¹⁵ The Washington state Legislature passed H.B. 1888 to protect public employee

foundation-launches-new-campaign-as-expansion-continues/ (on file with the *University of the Pacific Law Review*) (indicating that the Freedom Foundation has focused on suing unions in Western states since the *Janus v. AFSCME* decision).

- 9. See Press Release, Freedom Found., The Butterfly Effect of Janus v. AFCSME on Two-Year Anniversary Offers California Hope Amid the Chaos (July 9, 2020) (on file with the University of the Pacific Law Review) (explaining that the Freedom Foundation submitted over 450 public record requests to collect information on unionized public employees in California); Joseph O'Sullivan, Washington Supreme Court Says State Employee Birth Dates Are Public Record, SEATTLE TIMES (Oct. 24, 2019, 7:28 PM), https://www.seattletimes.com/seattle-news/politics/washington-supreme-court-upholds-public-records-law-in-case-that-pitted-public-unions-and-a-conservative-group/ (on file with the University of the Pacific Law Review) ("The conservative Freedom Foundation has used public-records requests to obtain personal information about union members. The organization then uses that information to contact members and tell them they're not obligated to pay union dues.").
- 10. See Bloomberg, Group Funded by Conservative Billionaires Launches Anti-Union Campaign Following Supreme Court Ruling, L.A. TIMES (June 28, 2018), https://www.latimes.com/business/la-fi-freedom-foundation-20180628-story.html (on file with the University of the Pacific Law Review) (reporting that the Freedom Foundation receives funding from several conservative groups, including the Sarah Scaife Foundation, Donors Trust, Richard and Helen DeVos Foundation, and the State Policy Network); Freedom Foundation, FREEDOM FOUND., https://www.freedomfoundation.com/ (last visited Mar. 20, 2022) (on file with the University of the Pacific Law Review) (stating that the Freedom Foundation has offices in Washington, Oregon, Ohio, Pennsylvania, and California).
- 11. See News Release, U.S. BUREAU OF LAB. STATS. (Jan. 20, 2022), https://www.bls.gov/news.release/pdf/union2.pdf (on file with the *University of the Pacific Law Review*) (reporting 15.9% of workers in California, 19% of workers in Washington, and 17.8% of workers in Oregon were union members in 2021: the national average is 10.3%).
- 12. See Bloomberg, Group Funded by Conservative Billionaires Launches Anti-Union Campaign Following Supreme Court Ruling, supra note 10 (describing how the Freedom Foundation intends to contact public workers to drop their membership after the Janus v. AFSCME case).
- 13. See Press Release, Freedom Found., The Butterfly Effect of Janus v. AFCSME on Two-Year Anniversary Offers California Hope Amid the Chaos, supra note 9 (expressing the Freedom Foundation's goal to reduce union influence in politics and policy).
- 14. See Claudia Polsky, Open Records, Shuttered Labs: Ending Political Harassment of Public University Researchers, 66 UCLA L. REV., 208, 220 (2019) (explaining that FOIA and state public records laws were enacted because of public suspicion after Watergate). See generally OPEN RECORDS LAWS: A STATE BY STATE REPORT, NATIONAL ASSOCIATION OF COUNTIES (2010) (listing each of the 50 states' public records law).
 - 15. HB 1888 State Gov't & Tribal Relations Hearing, supra note 1.

information from public disclosure.¹⁶ Oregon attempted to pass enhanced protections for employee data through H.B. 2016.¹⁷ California should follow Oregon or Washington and amend its laws to protect public employees information against third-party organizations, such as the Freedom Foundation.¹⁸ California law already safeguards some public employee personal information.¹⁹ However, the state must be proactive and amend its Government Code to enhance those protections.²⁰

This Comment argues that California needs to amend its privacy laws to adequately protect public employees and their personal information.²¹ Part II provides an overview of labor law and unions.²² Part III discusses public records requests, legislation, and lawsuits in Washington, Oregon, and California.²³ Part IV argues protecting public employees is critical for California.²⁴ Part V explains how the proposed amendment can strengthen public employees' privacy rights in public records lawsuits.²⁵ Part VI proposes amendments to California's privacy laws for public employees.²⁶

II. THE CURRENT STATE OF PUBLIC UNIONS

Labor unions have been a driving force for higher wages and workplace benefits in the United States. Through the collective bargaining process, workers have won workplace protections still in effect today. ²⁷ Section A discusses the

^{16.} *See* HB 1888, *supra* note 1. (showing HB 1888 exempts from public disclosure certain personal data, including full birth date and identification of payroll deductions).

^{17.} See HB 2016, 80th Leg. Assemb., Reg. Sess. (Or. 2019) (as introduced Mar. 11, 2019, but not enacted) (indicating Oregon's proposed law would create an unfair labor practice for disclosing public employee information to groups other than the employee's union).

^{18.} See HB 1888, supra note 1 (using Washington's HB 1888 as an example of legislation to enhance protections for California workers); HB 2016, supra note 17 (using Oregon's legislation as another example California can use to create new laws that protect the privacy of California workers); Telephone Interview with Kerianne Steele, Shareholder, Weinberg, Roger & Rosenfeld (Dec. 15, 2020) (notes on file with the University of the Pacific Law Review) (suggesting California amend Government Code section 6254.3). See generally Freedom Foundation, supra note 10 (describing the Freedom Foundation's goals).

^{19.} See CAL. GOV'T CODE § 6254.3 (West 2022) (showing California already exempts from public disclosure a public employee's birth date, home addresses, home telephone numbers, personal cell phone numbers, and personal email).

^{20.} See Telephone Interview with Kerianne Steele, supra note 18.

^{21.} Compare Telephone Interview with Kerianne Steele, supra note 18, and Press Release, Freedom Found., The Butterfly Effect of Janus v. AFCSME on Two-Year Anniversary Offers California Hope Amid the Chaos, supra note 9.

^{22.} Infra Part II.

^{23.} Infra Part III.

^{24.} Infra Part IV.

^{25.} Infra Part V.

^{26.} Infra Part VI.

^{27.} See id. (showing labor unions pressured Congress to pass the Fair Labor Standards Act, which established the 8-hour workday and 40-hour workweek).

National Labor Relations Act ("NLRA"), which codified the right of workers to join a union and engage in collective bargaining. ²⁸ Section B explains the impact of the *Janus v. AFSCME* decision on labor unions today. ²⁹

A. The National Labor Relations Act, Labor Unions and Collective Bargaining

If a majority of employees in a workplace vote to form a union, then a union can represent them to negotiate the conditions of employment with an employer.³⁰ This process, known as "collective bargaining," equalizes the inherent negotiating power imbalance between employees and employers.³¹ At the height of the labor movement in 1954, 28.3% of public and private workers nationwide were union members.³² However, since then, union membership has significantly declined.³³ In 2021, approximately 10.3% of public and private workers were unionized.³⁴ The Taft–Hartley Act of 1947 outlawed "closed shops," which meant workers did not have to join the union to retain their job.³⁵ The Taft–Hartley Act created the free rider problem because employees who were not paying union membership dues would still benefit from union-negotiated wages and benefits.³⁶

- 28. Infra Section II.A.
- 29. Infra Section II.B.
- 30. National Labor Relations Act, 29 U.S.C.A. §§ 151–69 (West, Westlaw Edge through Pub. L.116-259); Francis J. Mootz III, Leticia M. Saucedo, & Michael P. Maslanka, Learning Employment Law 29 (2019).
- 31. MOOTZ III, SAUCEDO, & MASLANKA, *supra* note 30; *see Collective Bargaining*, AFL-CIO, https://aflcio.org/what-unions-do/empower-workers/collective-bargaining (last visited Jan. 10, 2021) (on file with the *University of the Pacific Law Review*) ("Collective bargaining is the process in which working people, through their unions, negotiate contracts with their employers to determine their terms of employment, including pay, benefits, hours, leave, job health and safety policies, ways to balance work and family, and more.").
 - 32. MOOTZ III, SAUCEDO, & MASLANKA, supra note 31, at 30.
- 33. MOOTZ III, SAUCEDO, & MASLANKA, supra note 31, at 30. Compare Quoctrung Bui, 50 Years Of Shrinking Union Membership, in One Map, NPR (Feb. 23, 2015), https://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-parametershi map (on file with the University of the Pacific Law Review) (showing 33% of workers in California, 44.5% of workers in Washington, and 38.9% of workers in Oregon were union members in 1964), with News Release, supra note 11 (indicating 15.9% of workers in California, 19% of workers in Washington, and 17.8% of workers in Oregon were union members in 2021).
 - 34. Id.
- 35. Taft-Hartley Act, 29 U.S.C. §§ 141–197 (West, Westlaw Edge through Pub. L.116-259); *see Closed Shop*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/closed%20shop (last visited Feb. 12, 2022) ("[A]n establishment in which the employer by agreement hires only union members in good standing.").
- 36. Taft-Hartley Act, 29 U.S.C. §§ 141–197, *supra* note 36; *see* MOOTZ III, SAUCEDO, & MASLANKA, *supra* note 31, at 30 (describing that the Taft-Hartley Act created a free rider problem by outlawing closed shops through state-by-state legislation, whereas the *Janus v. AFCSME* decision outlawed *closed shops* nationwide, allowing free riders to become problem for unions in every state).

B. Union Membership, Janus v. AFSCME, and the Free Rider Problem

Although union membership has declined overall, the public sector has retained somewhat strong union membership.³⁷ In 2017, unions represented 34.4% of public employees nationwide.³⁸ The Civil Rights movement led to changes in labor law and an upsurge in public sector union membership.³⁹ In contrast, union membership in the private sector declined due to multiple factors.⁴⁰ Unionized companies were increasingly competing with foreign manufacturers that could provide cheaper non-unionized labor.⁴¹ However, President Ronald Reagan's challenge against the air traffic controller's strike in 1981 was a pivotal moment for both private and public unions.⁴² When the Professional Air Traffic Controllers Organization union members refused to come to work within 48 hours, President Regan promptly fired over 11,000 air traffic controllers.⁴³ Afterwards, private sector employers quickly adopted President Reagan's hardline tactics to discourage union membership.⁴⁴

Today, public sector union membership is at risk of further decline due to the 2018 *Janus* decision.⁴⁵ In *Janus*, the Supreme Court overturned forty years of precedent that the Court established in *Abood v. Detroit Board of Education*.⁴⁶

^{37.} MOOTZ III, SAUCEDO, & MASLANKA, supra note 31, at 30; Quentin Fottrell, Labor Union Membership Has the Biggest Impact on Public-Sector Workers, MARKETWATCH (Dec. 7, 2018, 9:43 AM), https://www.marketwatch.com/story/labor-union-membership-has-a-much-bigger-impact-on-public-than-private-workers-2018-12-04 (on file with the University of the Pacific Law Review) ("Historically, union jobs were concentrated among low-skilled men in private sector industries With the steady decline in private sector unionization and rising influence in the public sector, half of unionized workers are now in the public sector.").

^{38.} MOOTZ III, SAUCEDO, & MASLANKA, supra note 31, at 30; see Julia Wolfe & John Schmitt, A Profile of Union Workers in State and Local Government Key Facts About the Sector for Followers of Janus v. AFSCME Council 31, ECON. POL'Y INST., https://www.epi.org/publication/a-profile-of-union-workers-in-state-and-local-government-key-facts-about-the-sector-for-followers-of-janus-v-afscme-council-31/ (on file with the University of the Pacific Law Review) (showing that unions represented 61.2% of California, 57.3% of Oregon, and 60.1.% of Washington state and local government workers in 2017).

^{39.} Melvin W. Reder, *The Rise and Fall of Unions: The Public Sector and the Private*, 2 J. ECON. PERSPS., 89, 104 (1998).

^{40.} See Caleb Crain, State of the Unions – What Happened to America's Labor Movement?, NEW YORKER (Aug. 19, 2019), https://www.newyorker.com/magazine/2019/08/26/state-of-the-unions (on file with the University of the Pacific Law Review) (explaining that a combination of political animosity and changes in the American economy led to the decline in private sector unions).

^{41.} *Id*.

^{42.} See When Reagan Broke the Unions, NPR, https://www.npr.org/transcripts/788002965 (Dec. 18, 2019) (on file with the University of the Pacific Law Review) ("What had happened in that moment of the strike was that Reagan flipped the narrative on strikebreaking. Strikers were no longer the sympathetic ones. Now they were selfish lawbreakers screwing over regular Americans He was able to convince a good chunk of the American public that strikebreaking was, in fact, something patriotic. And at the time, America seemed to be on his side.").

^{43.} *Id*.

^{44.} Id.

^{45.} See Janus v. AFSCME, 138 S. Ct. at 2459 (allowing public employees to opt-out of union membership).

^{46.} Id. at 2486 (citing Abood v. Detroit Board of Education, 431 U.S. 209 (1977)).

Abood required all public employees, including non-union members to pay a percentage of union dues—known as "fair share fees." Evidence from right-to-work states estimated that anywhere between 20% to 71% of public-sector workers would withdraw their union membership if given the choice. Such a dramatic drop in union membership would weaken a union's ability to negotiate effectively or even cause the end of public-sector unionism.

As more public employees opt-out of union membership, a free rider problem arises. ⁵⁰ A union's legal duty to fairly represent all employees creates an incentive for individuals to cancel their membership. ⁵¹ Despite their non-member status, free riders receive union-negotiated benefits, including higher wages and better working conditions, without paying a monthly union fee. ⁵² As the number of free riders increase, another problem arises: as more employees cancel their union membership, unions have less bargaining power to negotiate with employers for employee benefits. ⁵³ The worse wages and conditions become, the more employees become dissatisfied with their union representation and cancel their membership. ⁵⁴

C. The Union Difference

Unions still play a critical role in improving workers' rights and benefits.⁵⁵ On average, a unionized worker earns 11.2% more in wages than a non-unionized peer with similar education, occupation, and experience.⁵⁶ A unionized worker is

- 47. Abood v. Detroit Bd. of Educ., 431 U.S. 209, 262-63 (1977).
- 48. Aaron Tang, Life After Janus, 119 COLUMB. L. REV. 677, 679-80 (2019).
- 49. *Id.* ("The range of possible outcomes is thus vast: from the weakening of union influence to the end of public-sector unionism as we know it.").
- 50. See Free Ride, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/free%20ride (last visited Feb. 12, 2022) (defining a free ride as "a benefit obtained at another's expense or without the usual cost or effort"); MOOTZ III, SAUCEDO, & MASLANKA, *supra* note 31, at 31 (explaining that the cyclical free rider problem occurs when more union members drop their dues and as a result, unions have fewer financial resources to negotiate with employers).
- 51. See Aaron Tang, *supra* note 49, at 688–89 (asserting that a union's duty of fair and exclusive representation creates "an 'incentive' for employees 'to become "free riders" who 'refuse to contribute," but still retain the benefits of a unionized workplace).
- 52. Catherine L. Fisk & Martin H. Malin, *After* Janus, 107 CALIF. L. REV. 1821, 1821 (2019) ("'If the members of a large group rationally seek to maximize their personal welfare, they will not act to advance their common or group objectives' absent either compulsion or incentives that will benefit the members apart from the group benefits As a result, large groups will not form effective organizations and all will be worse off.").
- 53. See MOOTZ III, SAUCEDO, & MASLANKA, supra note 31, at 31 (explaining that fewer dues-paying members will cause unions to have the fewer financial resources to negotiate with employers); Aaron Tang, supra note 49, at 689 n.56 ("Put another way, the collective action problem is that if enough employees do not pay dues, there will be no union-wage premium or other union negotiated benefit to 'free ride' on at all.").
- 54. Elise Gould & Will Kimball, "Right-to-Work" States Still Have Lower Wages, ECON. POL'Y INST., (Apr. 22, 2015), https://www.epi.org/publication/right-to-work-states-have-lower-wages/ (on file with the University of the Pacific Law Review) (asserting right to work states are associated with lower wages).
- 55. JOSH BIVENS, ET AL., ECON. POL'Y INST., *How Today's Unions Help Working People* 7 (Aug. 24, 2017), https://files.epi.org/pdf/133275.pdf (on file with the *University of the Pacific Law Review*).
 - 56. Press Release, Econ. Pol'y Inst., Union Workers Are Paid 11.2% More and Have Greater Access to

also more likely to have employer-provided health insurance.⁵⁷ Critically, unions have also served as an important vehicle to desegregate the workforce, particularly for women of color.⁵⁸ Although unions were historically divided by race and occupation, unions integrated the workforce by providing job opportunities for African Americans fleeing the Jim Crow South.⁵⁹ African Americans are heavily represented in public-sector union jobs.⁶⁰ Nearly 20% of African American adults work in government positions.⁶¹ Union members are more likely to engage in political activity.⁶² Despite declining union membership, unions still play a pivotal role in improving wages, enacting working protections, and diversifying the workplace.⁶³

III. PUBLIC RECORDS LAWS AND LAWSUITS IN WASHINGTON, OREGON, AND CALIFORNIA

Since the *Janus* case, the Freedom Foundation has filed public information requests targeting Washington, Oregon, and California.⁶⁴ In response, these states proposed legislation to enhance protections for public employee personal information.⁶⁵ Section A summarizes the Washington Supreme Court decision in *Washington Public Employees Association v. Freedom Foundation* and Washington's rationale for enacting H.B. 1888.⁶⁶ Section B describes the Freedom Foundation's recent public information requests in Oregon and H.B. 2016's proposed language.⁶⁷ Section C discusses the California Public Records Act ("CPRA") and the Freedom Foundation's recent lawsuits against California Human Resources ("CalHR") and San Bernardino County.⁶⁸

Health Insurance and Paid Sick Days than Their Nonunion Counterparts (Aug. 25, 2020) (on file with the *University of the Pacific Law Review*).

- 57. *Id*.
- 58. P.R. Lockhart, *The Supreme Court Just Hit Public Unions Hard. Workers of Color Have the Most to Lose*, Vox (June 27, 2018), https://www.vox.com/policy-and-politics/2018/2/26/17053328/janus-afscmedecision-supreme-court-unions-minorities (on file with the *University of the Pacific Law Review*).
 - 59. Id.
 - 60. Id.
 - 61. *Id*.
- 62. Jasmine Kerrissey & Evan Schofer, *Union Membership and Political Participation in the United States*, 91 Soc. FORCES, no. 3, 895, 895 (Mar. 2013).
- 63. P.R. Lockhart, *supra* note 59 (arguing unions play a significant role in making wages and benefits more equal across racial and gender lines).
- 64. Freedom Foundation, supra note 10 (showing that the Freedom Foundation has offices in Washington, Oregon, Ohio, Pennsylvania, and California); Press Release, Freedom Found., The Butterfly Effect of Janus v. AFCSME on Two-Year Anniversary Offers California Hope Amid the Chaos, supra note 9.
 - 65. HB 1888, supra note 1; HB 2016, supra note 17.
 - 66. Infra Section IV.A.
 - 67. Infra Section IV.B.
 - 68. Infra Section IV.C.

A. WPEA v. Freedom Foundation and H.B. 1888: Protecting Employee Information From Public Disclosure

The Freedom Foundation began its quest for public employee information in Washington.⁶⁹ In 2016, the Freedom Foundation requested records for union-represented employees—including employees' full names, birth dates, and work email addresses—from several Washington governmental agencies.⁷⁰ The agencies agreed to disclose full names, birth dates, and emails.⁷¹ Afterwards, the Washington Public Employees Association ("WPEA") sued the State of Washington and the Freedom Foundation for disclosing the emails.⁷² The Washington Supreme Court held that names and birth dates are disclosable because that information was not explicitly exempt under Washington's Public Records Act.⁷³ The court explained that the Legislature would need to pass a law if it wanted to create an exemption for Washington state public employee names and birth dates.⁷⁴

In response to *WPEA v. Freedom Foundation*, the Washington State Legislature passed H.B. 1888.⁷⁵ H.B. 1888 exempted day and month of birth from public disclosure under the Washington Public Records Act.⁷⁶ In addition, H.B. 1888 exempted payroll deductions.⁷⁷ The legislation also exempted photographs from general public records requests.⁷⁸ In addition, an employee may try to prevent the release of their information.⁷⁹

^{69.} See Adam Ashton & West Venteicher, Want Out of Your Union? Conservative Groups Are Recruiting California Public Workers for Lawsuits, SACRAMENTO BEE (March 26, 2019), https://www.sacbee.com/article228392109.html (on file with the University of the Pacific Law Review) (reporting that the Freedom Foundation began its efforts to sue labor unions in Washington and later expanded to California).

^{70.} WPEA v. Freedom Found., supra note 8, at 3.

⁷¹ *Id*

^{72.} See id. (indicating that the Freedom Foundation argued that they did not violate privacy rights because an individual's voter name, birth date, and residential address are already publicly available from the Washington Secretary of State).

^{73.} Id. at 28.

^{74.} See id. at 8 ("[W]e cannot judicially expand the PRA's narrow exemptions beyond the boundaries set by the legislature, lest we step beyond our interpretive role and risk disrupting the balance of public policies the PRA reflects.").

^{75.} HB 1888, supra note 1.

^{76.} See id. (showing HB 1888 created an exception for journalists, who may have access to a public employee's full birth date and photographs).

^{77.} HB 1888, *supra* note 1. *See generally* Aaron Tang, *supra* note 49, at 698 ("[M]any government employers deduct union fee payments directly out of worker paychecks.").

^{78.} *See* HB 1888, *supra* note 1. (noting that although HB 1888 exempts photographs from the Washington Public Records Act, the legislation created a photograph exception for public records requests from newspapers and media).

^{79.} See HB 1888, supra note 1 ("That the employee may seek to enjoin release of the records under RCW 42.56.540.").

B. Recent Public Information Requests in Oregon and H.B. 2016

In 2017, the Freedom Foundation filed a lawsuit against the City of Portland to obtain public employee names for a union decertification campaign. 80 Decertification campaigns remove an employee's union as their bargaining representative. 81 The Multnomah County District Attorney ordered the names released. 82 In response, the City of Portland filed a lawsuit challenging the District Attorney's order. 83 In 2018, the judge dismissed the lawsuit and ordered the City of Portland to release the names. 84

In 2018, the Oregon Department of Administrative Services ("DAS") released large employee information databases twice.⁸⁵ The databases included employees' names, months, years of birth, and demographic information.⁸⁶ That same year, the Freedom Foundation requested homecare workers' birth dates from the Oregon Department of Human Services ("DHS").⁸⁷ DHS denied the request, and Oregon Attorney General Ellen F. Rosenblum affirmed DHS's decision.⁸⁸ Rosenblum argued that the Freedom Foundation should not have access to dates of birth to ascertain employees' home addresses.⁸⁹ She asserted that employees dates of birth are exempt under Oregon's public records law.⁹⁰ Rosenblum was concerned public information requestors could potentially misuse large datasets, which would leave employees vulnerable.⁹¹ She compared the public record requests to the Cambridge Analytica incident, where a data consulting firm improperly obtained tens of millions of Facebook user information to sell voter profiles for the presidential

- 86. Id.
- 87. Id.
- 88. Id.
- 89. Id.
- 90. *Id*.

^{80.} See Complaint – (Declaratory and Injunctive Relief) at 2, Freedom Found. v. City of Portland, No. 17CV47399 (2017) (suing the City of Portland for employee information); Decertification Election, NAT'L LAB. REL. BD., https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/employees/decertification-election (last visited Jan. 10, 2021) (on file with the University of the Pacific Law Review) ("Under certain circumstances, [members] can vote out or "decertify" [their] union, or replace it with a different union.").

^{81.} Decertification Election, supra note 81.

^{82.} Letter from Rod Underhill, Dist. Att'y, Multnomah County, Oregon, to Ben Straka, Freedom Found. and Heidi Brown, Senior Deputy City Att'y, Portland, Or. (Oct. 13, 2017) (notes on file with the *University of the Pacific Law Review*).

^{83.} Press Release, Freedom Found., Judge Dismisses Portland's Lawsuit Against Freedom Foundation (Apr. 2018) (on file with the *University of the Pacific Law Review*).

^{84.} See Opinion and Order on Motions for Summary Judgment, City of Portland v. Evergreen Freedom Found., supra note 8.

^{85.} Letter from Nik Blosser, Chief of Staff, Off. of Governor Kate Brown, to Kate Coba, Dir., Dep't of Admin. Serv. (June 20, 2018) (notes on file with the *University of the Pacific Law Review*).

^{91.} See id. (arguing third-party requestors could misuse large datasets and put public employees at risk for identity theft and harassment).

election in 2016.⁹² The firm created a third-party application on Facebook that collected information from individual users and their Facebook friends.⁹³

Subsequently, the Oregon Legislative Assembly proposed H.B. 2016, which would have created a new unfair labor practice. Specifically, H.B. 2016 would have charged Oregon agencies with an unfair labor practice if they disclosed an employee's personal information to any entity other than the employee's union. Newspapers and the Freedom Foundation opposed the unfair labor practice provisions that would have enhanced protections for employees' personal data. Ultimately, this provision of H.B. 2016 failed.

C. Public Records Laws and Recent Information Requests in California

The California state government employs approximately 234,000 workers. At the local level, county governments employ approximately 388,000 public employees. Since the *Janus* decision, union membership in California has decreased. Third-party organizations, including the Freedom Foundation, are using public records requests to undermine union membership. Part 1 discusses the Freedom Foundation's recent public records requests in California. Part 2 reviews the CPRA and the types of public employee information the Act

^{92.} Sam Meredith, Facebook-Cambridge Analytica: A Timeline of the Data Hijacking Scandal, CNBC (updated Apr. 10, 2018, 9:51 AM), https://www.cnbc.com/2018/04/10/facebook-cambridge-analytica-a-timeline-of-the-data-hijacking-scandal.html (on file with the *University of the Pacific Law Review*).

^{93.} Id.

^{94.} HB 2016, *supra* note 17; *see Legal Definition of Unfair Labor Practice*, MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/unfair%20labor%20practice (last visited Feb. 24, 2022) (defining an unfair labor practice as "any of various acts by an employer or labor organization that violate a right or protection under applicable labor laws").

^{95.} See HB 2016, supra note 17 ("It is an unfair labor practice for a public employer to do any of the following . . . [p]rovide to any private entity, other than the exclusive representative, any portion of personally identifiable information about the public employees within a bargaining unit that is exempt from disclosure, including but not limited to the following: (A) Home addresses or other personal mailing addresses; (B) Telephone numbers; (C) Electronic mail addresses; (D) Dates of birth; (E) Categories of employees within a bargaining unit, including an employee's membership status with the labor organization.").

^{96.} Ted Sickinger, *Pro-Public Employee Union Bill Sails Through the Oregon Senate*, OREGONIAN (June 7, 2019) https://www.oregonlive.com/news/2019/06/pro-public-employee-union-bill-sails-through-the-oregon-senate.html (on file with the *University of the Pacific Law Review*); HB 2016 *supra* note 17.

^{97.} HB 2016, supra note 17.

^{98.} State Employee Demographics, CAL. STATE CONTROLLER, https://sco.ca.gov/ppsd_empinfo_demo.html (last visited Mar. 20, 2022) (on file with the *University of the Pacific Law Review*).

^{99.} Government Compensation in California, BETTY T. YEE CALIFORNIA STATE CONTROLLER (last updated Mar. 18, 2022) (on file with the *University of the Pacific Law Review*) (showing that California had 387,906 county employees in 2020).

^{100.} See News Release, supra note 11 (reporting that union membership in California decreased from 15.9% in 2021, down from 16.2% in 2021).

^{101.} Press Release, Freedom Found., Complaint Alleges State HR Office Declined Information Requests to Shield Unions (May 12, 2020) (on file with the *University of the Pacific Law Review*).

^{102.} Infra Subsection III.C.1.

exempts. 103 Subsection 3 examines disclosable public employee information under the CPRA. 104

1. The Freedom Foundation Sues the California Department of Human Resources and San Bernardino County

In January 2020, the Freedom Foundation submitted a public records request to CalHR for public employee information. The Freedom Foundation requested the total number of state employees for each month of 2018 and 2019. In addition, the Freedom Foundation sought specific data pertaining to each of the state's twenty-one bargaining units. Preedom Foundation wanted the name of the union representing each bargaining unit. They also requested the total number of represented employees who had union membership payroll deductions and the total amount of union dues. CalHR refused the request arguing that the records sought were exempt from disclosure because they pertained to collective bargaining.

Subsequently, the Freedom Foundation made a second request to CalHR that sought disaggregated information for every public employee. ¹¹¹ The Freedom Foundation requested each employee's full name, month and year of birth, job classification, employee identification number, hire date, salary, and full-time equivalent ("FTE") status. ¹¹² In addition, the Freedom Foundation requested public employees' work emails, work addresses, and bargaining unit numbers. ¹¹³ CalHR

^{103.} Infra Subsection III.C.2.

^{104.} Infra Subsection III.C.3.

^{105.} Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate, Freedom Found. v. Cal. Dep't of Hum. Res., *supra* note 8, at 4–6.; *see Bargaining / Contracts*, CAL. HUM. RES. (updated May 16, 2016), https://www.calhr.ca.gov/state-hr-professionals/pages/bargaining-contracts.aspx (on file with the *University of the Pacific Law Review*) (explaining that unions negotiate the California Department of Human Resources over working conditions and wages).

^{106.} Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate, Freedom Found. v. Cal. Dep't of Hum. Res., *supra* note 8, at 4.

^{107.} Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate, Freedom Found. v. Cal. Dep't of Hum. Res., *supra* note 8, at 4. *See generally Bargaining Units*, CAL. HUM. RES., https://www.calhr.ca.gov/state-hr-professionals/Pages/bargaining-units.aspx (last updated Feb. 28, 2017) (on file with the *University of the Pacific Law Review*) (describing California state government's 21 bargaining units); *Bargaining / Contracts, supra* note 106 (explaining that California state public employees "are divided into 21 bargaining units" and that "[e]ach bargaining unit is represented by a union; in some cases the same union represents multiple units.").

^{108.} Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate, Freedom Found. v. Cal. Dep't of Hum. Res., *supra* note 8, at 4.

^{109.} Id. at 5.

^{110.} Id.

^{111.} Id. at 5-6.

^{112.} Id.

^{113.} Id.

again refused the public records request.¹¹⁴ The Freedom Foundation sued and demanded CalHR to show cause why it could not disclose the requested information.¹¹⁵ CalHR denied the second request based on the same reasoning and asserted the denial was justified because CalHR did not own the records the Freedom Foundation requested.¹¹⁶ In response, the Freedom Foundation replied, "[i]t doesn't matter whether HR owns the records in dispute. They have to disclose anything 'prepared, owned, used or retained by it.'"¹¹⁷

In March 2020, the Freedom Foundation submitted a separate request for public employee information to San Bernardino County. After San Bernardino County refused to disclose public employee contact information, the Freedom Foundation sued the county. The county argued the information fell under the public-interest exemption. San Bernardino County explained that its refusal was based on the possibility that disclosure could put worker safety at risk. The Freedom Foundation countered that the information it requested was already publicly available and was not exempt because it did not include "personnel, medical, or private" employee files.

2. Non-Disclosable Information Under the California Public Records Act

Under the CPRA, a public record is any agency "writing" that is "prepared, owned, used, or retained" to conduct the public's business. ¹²³ The CPRA includes a presumption in favor of public access. ¹²⁴ However, it contains approximately seventy-six disclosure exemptions. ¹²⁵ An agency opposing disclosure has the

- 114. Id. at 6.
- 115. Id. at 6-7.
- 116. *Id.* at 6.
- 117. Press Release, Freedom Found., Complaint Alleges State HR Office Declined Information Requests to Shield Unions, *supra* note 102.
- 118. Complaint for Declaratory and Injunctive Relief and Verified Petition for Writ of Mandate, Freedom Found. v. San Bernardino County, supra note 8, at 4.
- 119. *Id.* at 1–2 (establishing that the Freedom Foundation also sued San Bernardino County for denying their public information request in July 2020).
 - 120. Id. at 2.
 - 121. Id. at 6.
 - 122. Id. at 9.
- 123. California Public Records Act, CAL. GOV'T CODE §§ 6250–6270.7 (West 2022); see CAL. GOV'T CODE § 6252(e) (West 2022) ("[P]ublic records includes any 'writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.").
- 124. See generally Maria Shanle, ABC's of Privacy and Public Records, UC MERCED OFF. OF LEGAL AFFS.

 (June 2009), https://legalaffairs.ucmerced.edu/sites/legalaffairs.ucmerced.edu/files/documents/abcs_of_privacy_public_recor

nttps://legalaffairs.ucmerced.edu/sites/legalaffairs.ucmerced.edu/files/documents/abcs_of_privacy_public_records_by_m._shanle.pdf (on file with the *University of the Pacific Law Review*) (providing overview of California's public records law).

125. The People's Business, A Guide to the California Public Records Act, LEAGUE OF CAL. CITIES 1, 6 (Apr. 2017), https://www.calcities.org/docs/default-source/advocacy/the-people's-business-2017.pdf?sfvrsn=6671a8ea_1 (on file with the University of the Pacific Law Review).

burden of proving an exemption applies.¹²⁶ The exemptions reflect two recurring government interests: protecting employee privacy rights and the need for government efficiency and effectiveness.¹²⁷

The CPRA lists explicit exemptions that protect public employee data.¹²⁸ Specifically, California exempts birth dates, home addresses, home telephone numbers, personal cell phone numbers, and personal emails from CPRA disclosure.¹²⁹ In addition, California law states the government cannot disclose "personnel, medical, or similar files" because such disclosure is an unwarranted invasion of personal privacy.¹³⁰ Most importantly, the CPRA contains a broad catch-all exemption.¹³¹ A government agency may prevent disclosures if it can demonstrate that "the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure."¹³²

Further, the CPRA exempts information covered by the Ralph C. Dills Act and the Meyers-Milias-Brown Act. ¹³³ The Dills Act, also known as the State Employer-Employee Relations Act of 1978, established collective bargaining for California state government employees. ¹³⁴ The Meyers-Milias-Brown Act of 1968 established collective bargaining for California's municipal, county, and local special district employers. ¹³⁵ If the data does not already exist in the requesting party's requested format, the California agency does not need to collect information for a public records request. ¹³⁶ However, agencies must disclose information from an existing database if the information contained in the database does not fall under an exemption. ¹³⁷

^{126.} Alexandra B. Andreen, Comment, *The Cost of Sunshine the Threat of Public Employee Privacy*, 18 CHAP. L. REV. 869, 875 (2015).

^{127.} The People's Business, supra note 126, at 6.

^{128.} See CAL. GOV'T CODE § 6254.3, supra note 19.

^{129.} *Id*.

^{130.} See id. (indicating that the CPRA does not require the disclosure of any of the following records . . . "personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy").

^{131.} Alexandra B. Andreen, *supra* note 127, at 874; CAL. GOV'T CODE § 6255 (West 2022).

^{132.} CAL. GOV'T CODE § 6255 (West 2022).

^{133.} Meyers-Milias-Brown Act of 1968, CAL. GOV'T CODE §§ 3500–3511 (West 2022); State Employer-Employee Relations Act of 1978, CAL. GOV'T CODE §§ 3512–3524 (West 2022); see CAL. GOV'T CODE § 6254(p)(1) (West 2022) (indicating that the CPRA exempts from disclosure information "that reveal[s] a state agency's deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategy, or that provide instruction, advice, or training to employees who do not have full collective bargaining and representation rights under these chapters.").

^{134.} Laws and Regulations, CAL. PUB. EMP. RELS. BD., https://perb.ca.gov/laws-and-regulations/ (last visited Jan. 10, 2021) (on file with the *University of the Pacific Law Review*).

^{135.} Laws and Regulations, CAL. PUB. EMP. RELS. BD., https://perb.ca.gov/laws-and-regulations/ (last visited Jan. 10, 2021) (on file with the *University of the Pacific Law Review*).

^{136.} See Sanders v. State Bar of Cal., 58 Cal. 4th 300, 305, 327 (Cal. 2013) (determining that the State Bar of California did not have to disclose bar passage rates and demographic statistics because the agency did not need to create a new record).

^{137.} Maria Shanle, supra note 25.

3. Non-Exempt Information Under the California Public Records Act

Under the CPRA, agencies must disclose some information about public employees.¹³⁸ For example, a government agency must disclose information relating to public employee salaries.¹³⁹ In *IFTPE*, *Local 21 v. Superior Court of Alameda County*, the court determined that the public's interest in salary information outweighed individual privacy interests of public workers.¹⁴⁰ Third parties can also request work phone numbers and work email addresses.¹⁴¹

IV. SAFETY AND PUBLIC POLICY CONCERNS FOR DISCLOSING PUBLIC EMPLOYEE INFORMATION

The public should have a right to government transparency. ¹⁴² However, revealing vast databases of public employee information can put public employees at risk for harassment and retaliation. ¹⁴³ If California discloses public employee information without weighing the privacy interests of public workers, serious safety and public policy concerns arise. ¹⁴⁴ Section A compares the CPRA's original purpose and the Freedom Foundation's current use of public records requests. ¹⁴⁵ Section B discusses the potential misuse of personal information in the digital age. ¹⁴⁶ Section C asserts California should adopt enhanced privacy legislation to hire and maintain a competitive public employee workforce. ¹⁴⁷

A. Distorting the Purpose of the California Public Records Act

Legislators enacted the CPRA, the state equivalent of the Freedom of Information Act ("FOIA"), in 1968 with the purpose to ensure government accountability.¹⁴⁸ After the Watergate scandal, the public pressured governments to pass a government transparency law.¹⁴⁹ The California Legislature passed the CPRA with the purpose of "increasing freedom of information" and " to give

^{138.} CAL. GOV'T CODE §§ 6250-6270.7 (West 2022).

^{139.} IFTPE, Local 21 v. Superior Ct. of Alameda Cnty., 42 Cal. 4th 319, 327 (Cal. 2007); The People's Business, supra note 126, at 49.

^{140.} IFTPE, Local 21, 42 Cal. 4th at 327.

^{141.} The People's Business, supra note 126, at 68; see CAL. GOV'T CODE § 6252(e) (West 2022).

^{142.} See Claudia Polsky, supra note 14 (explaining that FOIA and state public records laws were enacted because of public suspicion after Watergate).

^{143.} See Anna Maria Barry-Jester, supra note 168 (describing Ms. Hall's and Dr. Newel's fear of violence and harassment).

^{144.} Infra Section V.A.-V.C.

^{145.} Infra Section V.A.

^{146.} Infra Section V.B.

^{147.} Infra Section V.C.

^{148.} Alexandra B. Andreen, supra note 127, at 873–74.

^{149.} See Claudia Polsky, supra note 14 (explaining that FOIA and state public records laws were enacted because of public suspicion after Watergate).

public access to information in possession of public agencies."¹⁵⁰ The CPRA specifically states: "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."¹⁵¹

Underlying public records laws is the public's right to monitor government expenditures to prevent corruption and fraud. For example, newspapers exposed government misappropriation of finances during the Hurricane Katrina and Rita relief efforts. In California, public records requests can expose agency inefficiencies or abuses. 154

In contrast, the Freedom Foundation's purpose for submitting public requests is vastly different from the original purpose of the CPRA. The Freedom Foundation seeks to persuade public employees to drop their membership dues and ultimately reduce a union's bargaining strength and political influence. Although the public should have a right to government transparency, revealing personal public employee data is unnecessary to meet that goal. The Freedom Foundation seeks to persuade public employee data is unnecessary to meet that goal.

B. The Weaponization of Personal Information in the Digital Age

Generous public records requests containing personal information potentially place California's state public employees at a higher risk for harassment and identity theft.¹⁵⁸ Data is the new gold for cybercriminals.¹⁵⁹

Oregon government officials emphasized the risk of data leaks when the Freedom Foundation submitted an information request for public employee information. Oregon Attorney General Rosenblum stated that potential misuse

^{150.} Alexandra B. Andreen, *supra* note 127, at 874; *see* L.A. Police Dep't v. Superior Ct., 135 Cal. Rptr. 575, 579 (Ct. App. 1977) (stating the government's commitment to public access to public records).

^{151.} CAL. GOV'T CODE § 6250 (West 2021).

^{152.} Claudia Polsky, supra note 14, at 222 (2019).

^{153.} Id.

^{154.} See id. at 227 (2019) (discussing California's collection agencies that victimized low-income residents).

^{155.} See Press Release, Freedom Found., The Butterfly Effect of Janus v. AFCSME on Two-Year Anniversary Offers California Hope Amid the Chaos, supra note 9 (indicating the Freedom Foundation's goal to reduce union influence in politics and policy).

^{156.} Id.

^{157.} *Compare* Claudia Polsky, *supra* note 14 (explaining that FOIA and state public records laws were enacted because of public suspicion after Watergate), *and* Press Release, Freedom Found., The Butterfly Effect of *Janus v. AFCSME* on Two-Year Anniversary Offers California Hope Amid the Chaos, *supra* note 9 (stating the Freedom Foundation's goal to reduce union influence in politics and policy).

^{158.} Compare HB 1888 State Gov't & Tribal Relations Hearing, supra note 1, with Letter from Nik Blosser, supra note 86.

^{159.} See Renee Johnson, 3 Biggest Data Breaches of the 21st Century per Number of Records, THE TECH REP. (May 24, 2021), https://techreport.com/cybersecurity/3474218/top-three-data-breaches/ (on file with the University of the Pacific Law Review) (explaining cybercriminals exploit databases that contain sensitive information, such as names, email addresses, phone numbers, for financial gain).

^{160.} Letter from Nik Blosser, supra note 86.

of large datasets could leave employees vulnerable to identity theft. ¹⁶¹ A data breach occurs when an unauthorized person or entity obtains confidential, sensitive, or protected information. ¹⁶² In the Cambridge Analytica incident, the firm improperly harvested information on as many as 87 million Facebook users to create voter profiles for the 2016 presidential election. ¹⁶³ Third parties submitting public records requests in California seeking large datasets with personal information can jeopardize public workers' safety due to the risk of data leaks. ¹⁶⁴

In California, public health officials exemplify why the government should enhance protections for public workers. Armed and angry protestors, frustrated with stay-at-home orders, are doxing and harassing public health officials during the COVID-19 pandemic. Health Director Mimi Hall, a public health official for Santa Cruz County, fearfully leaves her workplace to her home. Anonymous individuals send Dr. Gail Newel, a Santa Cruz public health official, violent and threatening warnings. She received messages stating: "Look out; we're coming for you" and letters stating her address and the names of her children. To protect public health officials like Dr. Newel, California public health officials are now eligible to participate in a program to keep their home addresses confidential. Although California law already protects home addresses from public records requests, the state needs to expand privacy protections for public employees. The state provides third-party requesters, such as the Freedom Foundation, with large datasets with personal information on thousands of public workers, the state is exposing these workers.

^{161.} Id.

^{162.} *How Data Breaches Happen*, KASPERSKY, https://www.kaspersky.com/resource-center/definitions/data-breach (accessed June 9, 2021) (on file with the *University of the Pacific Law Review*).

^{163.} Sam Meredith, supra note 93.

^{164.} See Letter from Nik Blosser, supra note 86 (indicating concern that large public records requests containing public employee personal information creates a risk of identity theft).

^{165.} Michelle M. Mello, Jeremy A. Greene, & Joshua M. Sharfstein, *Attacks on Public Health Officials During COVID-19*, JAMA NETWORK (Aug. 5, 2020), https://jamanetwork.com/journals/jama/fullarticle/2769291 (on file with the *University of the Pacific Law Review*).

^{166.} Id.

^{167.} Anna Maria Barry-Jester, 'We're Coming for You': For Public Health Officials, a Year of Threats and Menace, KAISER HEALTH FOUND. (Apr. 25, 2021) https://khn.org/news/article/public-health-officials-year-of-threats-menace-santa-cruz-california/ (on file with the University of the Pacific Law Review).

^{168.} *Id*.

^{169.} Id.

^{170.} Cal. Executive Order N-80-20, *available at* https://www.gov.ca.gov/wpcontent/uploads/2020/09/9.23.20-EO-N-80-20-COVID-19-signed.pdf (Sept. 23, 2020) (on file with the *University of the Pacific Law Review*).

^{171.} CAL. GOV'T CODE § 6254.3 (West 2022).

^{172.} See Letter from Nik Blosser, supra note 86 (indicating concern that large public records requests containing public employee personal information creates a risk of identity theft).

Third-party organizations, such as the Freedom Foundation, seek union membership data to persuade employees to cancel their membership dues. ¹⁷³ Their goal is to reduce the bargaining power and political influence of unions. ¹⁷⁴ Data breaches containing union membership information not only contain critical identifying data, but also place employees at risk of workplace harassment. ¹⁷⁵ Since unions serve as intermediaries for workplace disputes and negotiate working conditions, an employee's union membership status can subject the individual to discrimination and retaliation. ¹⁷⁶

C. Retaining and Attracting New Hires to Maintain California's Public Employee Workforce

California should adequately protect the privacy interests of public workers to hire and retain a strong government workforce. ¹⁷⁷ If California fails to protect the privacy interests of its employees by providing massive datasets containing private information, current and future employees may be discouraged from state service. ¹⁷⁸ In 2020, California had approximately 31,000 state employee vacancies. ¹⁷⁹ Unionized workplaces reduce workplace disputes by creating established grievance and negotiating procedures. ¹⁸⁰ For many California public employees, a frequent draw to join public service is the stability, retirement, and

^{173.} Press Release, Freedom Found., The Butterfly Effect of *Janus v. AFCSME* on Two-Year Anniversary Offers California Hope Amid the Chaos, *supra* note 9 (showing the Freedom Foundation's goal to reduce union influence in politics and policy).

^{174.} Id.

^{175.} *Compare* Letter from Nik Blosser, *supra* note 86 (expressing concern that large public records requests containing public employee personal information creates a risk of identity theft), *with* State of California Decision of the Public Employment Relations Board at 4, SEIU Local 721 v. County of San Bernardino, PERB Decision No. 2556-M (2018) (serving as an example of workplace harassment due to union participation).

^{176.} See SEIU Local 721 v. County of San Bernardino, PERB Decision No. 2556-M (Cal. Pub. EmpEm p't Rel. Bd. 2018) (describing an incident where a county manager photographed employees when they met with their union representatives).

^{177.} See generally West Venteicher, With 31,000 Job Openings, California Government Ramps Up Recruitment in Tight Labor Market, SACRAMENTO BEE (Feb. 5, 2020), https://www.sacbee.com/news/politics-government/the-state-worker/article239972258.html (on file with the University of the Pacific Law Review) (reporting on state government efforts to keep up in a competitive labor market).

^{178.} Interview with Thomas A. Gerhart, Editor-in-Chief, Univ. of the Pac., Univ. of the Pac. L. Rev. and Recs. Manager, Cal. High-Speed Rail Auth. (Oct. 15, 2020).

^{179.} See West Venteicher, supra note 178 (indicating that a CalHR representative stated: "[t]he public sector definitely has a workforce recruiting issue in the long run...").

^{180.} See Blaine Donais, Why Professional Unions Make Good Conflict Management Partners, https://www.mediate.com/articles/donaisB1.cfm, MEDIATE.COM (June 2006) (on file with the University of the Pacific Law Review) (listing the benefits of a unionized work environment: "[a] relatively well developed system for conflict management . . . unionization.").

health benefits that their unions negotiated. ¹⁸¹ As more public workers retire, California must take measures to attract qualified public employees. ¹⁸²

V. THE FREEDOM FOUNDATION'S LITIGATION STRATEGY AND THE CURRENT STATUS OF ITS LAWSUITS IN CALIFORNIA

A core focus for the Freedom Foundation's strategy is litigation. ¹⁸³ The Freedom Foundation and other anti-union organizations take advantage of the time and resource disparity to pursue costly and time-intensive lawsuits. ¹⁸⁴ While unions are preoccupied with negotiating contracts and governments managing state affairs, the Freedom Foundation has staff and resources entirely dedicated to reducing the bargaining and political power of unions. ¹⁸⁵

Washington and Oregon are examples of the Freedom Foundation's litigation strategy. ¹⁸⁶ In both states, the Freedom Foundation sued local governments for public employee information. ¹⁸⁷ In Washington and Oregon, the Freedom Foundation prevailed in court. ¹⁸⁸ However, public employees in Washington retaliated by passing H.B. 1888 and Oregon attempted to pass H.B. 2016. ¹⁸⁹ California currently faces a similar dilemma because the Freedom Foundation has filed lawsuits against CalHR and San Bernardino County for public employee information. ¹⁹⁰

- 181. West Venteicher, supra note 178.
- 182. *Id*
- 183. See Jason Dudash, supra note 8 (explaining that the Freedom Foundation has focused on suing unions in Western states since the Janus v. AFSCME decision); Press Release, Freedom Found., The Butterfly Effect of Janus v. AFCSME on Two-Year Anniversary Offers California Hope Amid the Chaos, supra note 9 (explaining that the Freedom Foundation submitted over 450 public record requests to collect information on unionized public employees in California).
- 184. Press Release, Freedom Found., The Butterfly Effect of *Janus v. AFCSME* on Two-Year Anniversary Offers California Hope Amid the Chaos (July 9, 2020), *supra* note 9.
- 185. Compare Join Our Team, FREEDOM FOUND., https://lp.freedomfoundation.com/join-our-team (last visited Mar. 20, 2022) (on file with the *University of the Pacific Law Review*) (showing that the Freedom Foundation has 60 staff members dedicated to reducing the strength of unions), and Press Release, Freedom Found., The Butterfly Effect of Janus v. AFCSME on Two-Year Anniversary Offers California Hope Amid the Chaos, supra note 9.
- 186. See WPEA v. Freedom Found., slip op. at 28 (showing that the Freedom Foundation sued Washington for public employee information); Complaint (Declaratory and Injunctive Relief), Freedom Found. v. City of Portland, supra note 81.
- 187. See WPEA v. Freedom Found., slip op. at 28 (showing that the Freedom Foundation sued for public employee data); Opinion and Order on Motions for Summary Judgment, *supra* note 8, Freedom Found. v. City of Portland, (showing that the Freedom Foundation sued the City of Portland for public employee information).
- 188. See WPEA v. Freedom Found., slip op. at 28 (concluding that the Freedom Foundation has access to Washington public employee information); Opinion and Order on Motions for Summary Judgment, City of Portland v. Evergreen Freedom Found., supra note 8 (dismissing the City of Portland's lawsuit to prevent the Freedom Foundation's access to city public employee information).
- 189. See HB 1888, supra note 1 (proposing new protections for public employees in Washington); HB 2016, supra note 17 (attempting to create a new unfair labor practice to protect public employee information in Oregon).
 - 190. See Complaint, Freedom Found. v. Cal. Dep't Hum. Res., supra note 8, at 1-2 (showing that the

In the CalHR lawsuit, the Freedom Foundation filed a motion for judgement on the pleadings and a petition for a writ of mandate. ¹⁹¹ The Sacramento Superior Court tentatively granted the motion on October 8, 2021 and will hear the petition on April 8, 2022. ¹⁹² In the San Bernardino County lawsuit, the San Bernardino Superior Court denied the Freedom Foundation's motion for judgement on the pleadings and scheduled the trial date for May 9, 2022. ¹⁹³ An amendment to Government Code § 6254.3 or the Ralph C. Dills and Meyers-Milias-Brown Act can enhance protections for employees' privacy rights and help prevent costly and time-consuming lawsuits over employee personal information. ¹⁹⁴

VI. LEGISLATIVE SOLUTIONS FOR CALIFORNIA

California needs to take a proactive approach to enhancing privacy rights for its state employees by amending its Government Code. Massive datasets threaten the privacy and safety of public employees due to the risk of data leaks. California should model legislation after Oregon's H.B. 2016 and Washington's H.B. 1888 to enhance privacy protections. 197

Freedom Foundation recently sued the California Department of Human Resources for denying their public information request in May 2020); Complaint, *Freedom Found. v. San Bernadino*, *supra* note 8, at 1–2 (establishing that the Freedom Foundation also sued San Bernardino County for denying their public information request in July 2020).

- 191. Notice of Motion and Motion Judgment on the Pleadings, Memorandum of Points and Authorities, at 1, Freedom Foundation v. Cal. Dep't of Human Res., No. 34-2020-00278646 (2020); Notice of Final Hearing on Petition for Writ of Mandate and Opening Brief in Support of Same, at 1, Freedom Foundation v. Cal. Dep't of Human Res., No. 34-2020-00278646 (2020).
- 192. See Tentative Ruling (Motion for Judgement on the Pleadings), at 8, Freedom Foundation v. Cal. Dep't of Human Res., No. 34-2020-00278646 (2020) (indicating the Sacramento Superior Court ruled tentatively in favor of the Freedom Foundation on October 8, 2021); Declaration of Melissa Russell in Support of Defendant's Opposition to Complaint for Declaratory Relief and Verified Petition for Writ of Mandate, at 1, Freedom Foundation v. Cal. Dep't of Human Res., No. 34-2020-00278646 (2020) (showing that the Sacramento Superior court will adjudicate the writ of mandate on April 8, 2022).
- 193. See Notice of Ruling Re: Plaintiff's Motion for Judgement on the Pleadings, at 1, Freedom Found. v. San Bernardino County, No. CIVDS2014702 (2020) (denying the Freedom Foundation's motion for judgement on the pleadings); Initial Trial Setting Conference Order, at 1, Freedom Found. v. San Bernardino County, No. CIVDS2014702 (2020) (setting trial date for May 9, 2022).
- 194. See Complaint, Freedom Found. v. Cal. Dep't Hum. Res., supra note 8 (showing that the Freedom Foundation sued the California Department of Human Resources for public employee data); Complaint, Freedom Found. v. San Bernadino, supra note 8 (establishing that the Freedom Foundation also sued San Bernadino County for public employee information); CAL. GOV'T CODE § 6254.3 (West 2022); Meyers-Milias-Brown Act of 1968, CAL. GOV'T CODE §§ 3500–3511, supra note 134; State Employer-Employee Relations Act of 1978, CAL. GOV'T CODE §§ 3512–3524 (West 2022).
 - 195. See CAL. GOV'T CODE § 6254.3 (West 2022).
- 196. See HB 1888 State Gov't & Tribal Relations Hearing, supra note 1. (recounting his doxing experience); Letter from Nik Blosser, supra note 86 (explaining the concern that large public records requests containing public employee personal information would place a large number of employees at risk of identity theft); Anna Maria Barry-Jester, supra note 168 (describing Ms. Hall's and Dr. Newel's fear that their personal information will expose them to violence and harassment).
 - 197. See HB 1888, supra note 1 (proposing new protections for public employees in Washington); HB

California can learn from Oregon's H.B. 2016 to create an unfair labor practice for disclosing identifiable employee personal information to third-party organizations. An unfair labor practice allows a union to sue an employer for labor law violations. Oregon's H.B. 2016 proposed creating an unfair labor practice when a public employer provides to any private entity, other than an employee's union representative, any identifiable information that is exempt. Oregon's H.B. 2016 wanted to exempt sensitive information, such as bargaining unit and union membership data. If California created a new unfair labor practice, unions can attempt to hold California government employers liable for disclosing identifiable public employee personal information. Specifically, California should create a new unfair labor practice by amending the Ralph C. Dills Act and the Meyers-Milias-Brown Act. California should expand the data privacy rights of public employees by amending the Ralph C. Dills Act and the Meyers-Milias-Brown Act. Act. 2016

Alternatively, California can model an amendment to its Government Code based on Washington state's H.B. 1888 to protect public employee information. H.B. 1888 serves as an example of legislation that specifically protects public employee information pertaining to an employee's union membership status by protecting information relating to payroll deductions and photographs. 207

2016, *supra* note 17 (attempting to create a new unfair labor practice to safeguard public employee information in Oregon).

198. See HB 2016, supra note 17 (proposing the following language: "It is an unfair labor practice for a public employer to do any of the following ... [p]rovide to any private entity, other than the exclusive representative, any portion of personally identifiable information about the public employees within a bargaining unit that is exempt from disclosure, including but not limited to the following: (A) Home addresses or other personal mailing addresses; (B) Telephone numbers; (C) Electronic mail addresses; (D) Dates of birth; Categories of employees within a bargaining unit, including an employee's membership status with the labor organization.").

199. See Unfair Labor Practice (ULPs), CORNELL L. SCH. LEGAL INFO. INST., (last visited Mar. 20, 202), https://www.law.cornell.edu/wex/unfair_labor_practices_(ulps) (on file with the University of the Pacific Law Review) ("When an employer interferes with employee rights to organize, form, join, or assist a labor organization, the employer has violated the [National Labor Relations Act].").

- 200. HB 2016, supra note 17.
- 201. Id

202. See HB 2016, supra note 17 (attempting to create a new unfair labor practice); PERB Functions, CAL. PUB. EMP. REL. BD., https://perb.ca.gov/about/perb-functions/ (last visited Apr. 25, 2021) (on file with the University of the Pacific Law Review) (stating PERB is responsible for adjudicating unfair labor practice charges against employers).

203. Meyers-Milias-Brown Act of 1968, CAL. GOV'T CODE §§ 3500–3511 (West 2022); State Employer-Employee Relations Act of 1978, CAL. GOV'T CODE §§ 3512–3524 (West 2022).

204. CAL. GOV'T CODE § 6253.2(d) (West 2022) ("This section does not alter the rights of parties under the Meyers-Milias-Brown Act (Chapter 10 (commencing with Section 3500) of Division 4) or any other labor relations law.").

205. See Meyers-Milias-Brown Act of 1968, Cal. Gov't Code \$\$ 3500–3511 (West 2022); State Employer-Employee Relations Act of 1978, Cal. Gov't Code \$\$ 3512–3524 (West 2022).

206. See HB 1888, supra note 1 (providing an example of legislation California can use to pass new laws that enhance privacy protections for California public workers).

207. HB 1888, supra note 1.

California can also enhance its privacy protections for public workers by amending Government Code § 6254.3. Currently, Government Code § 6254.3 already safeguards home addresses, home telephone numbers, personal cell phone numbers, and birth dates. The California Legislature should strengthen Government Code § 6254.3 by adding language that protects work location addresses, bargaining unit assignments, payroll deductions, dates of hire, and photographs. All of the control of the c

Work location addresses are particularly important because public employees can be harassed at their workplace.²¹¹ As demonstrated by Mr. Yestramski's testimony in support of H.B. 1888, Ms. Hall's fear of harassment at her workplace, and Dr. Newel's doxing experience, work location is critical information that the state should safeguard.²¹²

In addition, protecting bargaining unit assignments, payroll deductions, and dates of hire will prevent third-party groups from obtaining critical identifying information. ²¹³ If large datasets containing public employee union information was leaked in a data breach, these employees are at risk of workplace harassment and retaliation. ²¹⁴

California should learn from Washington's H.B. 1888 and extend the amendment to photographs to prevent potential misuse from public records requests.²¹⁵ Photographs are critical because they link a public employee's physical appearance to their personal information.²¹⁶

^{208.} CAL. GOV'T CODE § 6254.3 (West 2022).

^{209.} Id.

^{210.} Id.

^{211.} Compare HB 1888 State Gov't & Tribal Relations Hearing, supra note 1 (explaining his doxing experience), with Anna Maria Barry-Jester, supra note 168 (describing Ms. Hall's and Dr. Newel's fear of harassment).

^{212.} Compare HB 1888 State Gov't & Tribal Relations Hearing, supra note 1 (showing why Mr. Yestramski strongly supported protecting his personal information from public records requests), with Anna Maria Barry-Jester, supra note 168 (describing Ms. Hall and Dr. Newel's concern about their personal information).

^{213.} See Aaron Tang, supra note 49, at 698 ("[M]any government employers deduct union fee payments directly out of worker paychecks.").

^{214.} *Compare* Letter from Nik Blosser, *supra* note 86 (explaining his concern with public records requests with critical identifying information), *with SEIU Local 721 v. County of San Bernardino*, PERB Decision No. 2556-M (Cal. Pub. Emp't Rel. Bd. 2018) (serving as an example of workplace harassment due to union participation).

^{215.} See HB 1888, supra note 1 (exempting photographs from public records requests in Washington).

^{216.} See generally Dr. Sarah Monazam Erfani, Blocking AI to Keep Your Personal Data Your Own, UNIV. OF MELBOURNE (June 10, 2021), https://pursuit.unimelb.edu.au/articles/blocking-ai-to-keep-your-personal-data-your-own (on file with the *University of the Pacific Law Review*) (explaining why photographs constitute critical data that unauthorized entities can harvest and exploit).

VII. CONCLUSION

Employees who choose public service should not be required to sacrifice their right to privacy and safety. Since *Janus v. AFSCME*, anti-union organizations such as the Freedom Foundation are increasingly seeking personal information datasets from Washington, Oregon, and California. California agencies sharing vast datasets of information to third parties create an unreasonable risk for data leaks. In the digital age, third-party organizations can weaponize personal information. California should learn from Oregon's H.B. 2016 and Washington's H.B. 1888 to amend its Government Code. In doing so, California will enhance the privacy of state public employees by safeguarding their personal information. California can avoid costly lawsuits seeking to obtain personal information with more powerful legislation that protects the privacy of public workers.

^{217.} See Anna Maria Barry-Jester, supra note 168. (explaining Ms. Hall's and Dr. Newel's fear of violence and harassment).

^{218.} See generally Jason Dudash, supra note 8 (showing that the Freedom Foundation has focused on suing unions in Western states since the Janus v. AFSCME decision); Press Release, Freedom Found., The Butterfly Effect of Janus v. AFCSME on Two-Year Anniversary Offers California Hope Amid the Chaos (July 9, 2020), supra note 9.

^{219.} See Letter from Nik Blosser, supra note 86 (explaining the risks associated with disclosing large datasets).

^{220.} See id. (asserting large datasets disclosures threaten the safety of public employees).

^{221.} Compare HB 1888, supra note 1, and HB 2016, supra note 17, with CAL. GOV'T CODE § 6254.3 (West 2022), and Meyers-Milias-Brown Act of 1968, CAL. GOV'T CODE §§ 3500–3511 (West 2022), and State Employer-Employee Relations Act of 1978, CAL. GOV'T CODE §§ 3512–3524 (West 2022).

^{222.} See Letter from Nik Blosser, supra note 86 (arguing why large datasets disclosures threaten the safety of public employees); HB 1888 State Gov't & Tribal Relations Hearing, supra note 1 (testifying about his experience when a patient's family member doxed him).

^{223.} See Complaint, Freedom Found. v. Cal. Dep't Hum. Res., supra note 8 (showing that the Freedom Foundation sued the California Department of Human Resources for public employee data); Complaint, Freedom Found. v. San Bernardino County, supra note 8, at 1–2 (establishing that the Freedom Foundation also sued San Bernardino County for public employee information); CAL. GOV'T CODE § 6254.3 (West 2022).