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ARTICLES AND SURVEYS

NOTES AND COMMENTS

HAS THE SEC PERMITTED THE SECURITIES MARKETS TO BECOME BUT ANOTHER FORM OF SPORTS BETTING?

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I. INTRODUCTION

The primary regulator of the securities markets is the Securities and Exchange Commission ("SEC"), a government agency created under former President Franklin D. Roosevelt as part of the New Deal.[1] The Great

1. Andrew Beattie, *The SEC: A Brief History of Regulation*, INVESTOPEDIA (June 25, 2019), http://www.investopedia.com/articles/07/secbeginning.asp; *The Great Depression*, DUCKSTERS: HISTORY, http://www.ducksters.com/history/us_1900s/great_depression.php (last visited May 1, 2020); *What We Do*, U.S. SEC. & EXCHANGE COMMISSION (June 10, 2013), http://www.sec.gov/article/whatwedo.html.

Depression that began in 1929 was in many ways caused by the largely unregulated stock market.[2] The lack of regulation led to great speculation.[3]

Investors were able to borrow money to buy stocks from brokerage firms and banks, and when the market began to decline, many of these investors could not sell their stocks for enough money to pay off their borrowings.[4] Banks and brokerage firms then forced the sale of stock to pay off margins, and this selling pressure further depressed the market.[5] Many accounts were left with deficit balances because of these forced sales.[6] This, in turn, led to the collapse of many banks and brokerage firms and further market declines, which triggered sharp declines in buying power and led to 25% unemployment and the closing of many banks, brokerage firms, and other businesses.[7]

The 1929 crash was not the first failure of the capital markets; the Panics of 1884, 1893, 1896, 1901, 1907, and First World War sell-offs were similarly caused by speculative investors, deceptive stock offerings, and market manipulation.[8] At those times, the Government did not step in.[9] An early part of former President Roosevelt's New Deal was to enact legislation aimed at regulating the securities markets, banks, and brokerage firms in order to prevent future similar debacles.[10]

The first statute enacted as part of the New Deal's regulation of securities was the Securities Act of 1933 (the "'33 Act").[11] That legislation dealt primarily with the issuance of securities to be sold and traded on the stock exchanges of America.[12] The '33 Act sought to address the problem

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2. Beattie, *supra* note 1; *The Great Depression*, *supra* note 1.
3. Beattie, *supra* note 1; *The Great Depression*, *supra* note 1.
4. *See* Beattie, *supra* note 1; *The Great Depression*, *supra* note 1.
5. Steve Coll, *Lessons of the Great Depression*, NEW YORKER (Oct. 11, 2008), http://www.newyorker.com/news/steve-coll/lessons-of-the-great-depression.
6. *See id.*
7. *The Great Depression*, *supra* note 1.
8. Gary Richardson & Tim Sablik, *Banking Panics of the Gilded Age*, FED. RES. HIST. (Dec. 4, 2015), http://www.federalreservehistory.org/essays/banking_panics_of_the_gilded_age; Bryan Taylor, *Desperate Traders Managed to Keep Trading During the World War I Stock Market Shutdown*, BUS. INSIDER (Aug. 1, 2014, 11:15 AM), http://www.businessinsider.com/world-war-i-impact-on-markets-2014-8; *The Great Depression*, *supra* note 1.
9. Richardson & Sablik, *supra* note 8.
10. *See* Beattie, *supra* note 1.
11. *See* Securities Act of 1933, Pub. L. No. 73-22, § 1, 48 Stat. 74, 74 (1933) (codified as amended at 15 U.S.C. §§ 77a–77aa); Beattie, *supra* note 1.
12. Securities Act of 1933 § 2(1).

caused by bogus offerings of stock to the public.[13] Before its enactment, companies with limited or no financial history and limited or no financial information (sometimes called shell corporations) were able to raise money from the public through offerings in companies that were largely fictitious.[14] Stock promotors and manipulators were the only ones to benefit from this activity.[15] The '33 Act recognized these evils and attempted to require that the offering of stocks be used to raise capital for legitimate companies that would promote corporate growth by raising funds for factories, plants, and equipment and impose integrity on these activities.[16] Corporations wishing to sell stocks to the public faced criminal penalties if they issued false or misleading financial information, and the '33 Act required companies to disclose all material information about these companies, good and bad, so investors could understand the businesses and evaluate the risks of investing in them.[17] As we shall see below, this effort has not been fully successful.[18]

The Securities and Exchange Act of 1934 ("'34 Act") was directed at imposing integrity on the stock markets where stocks were publicly traded.[19] At that time, in addition to the New York Stock Exchange ("NYSE"), the nation had other exchanges, including the Boston Stock Exchange, the Philadelphia Stock Exchange, the Cincinnati Stock Exchange, the Chicago Stock Exchange, the Pacific Stock Exchange, and the American Stock Exchange.[20] Beginning in 1939, many lower-priced securities were offered

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13. Will Kenton, *Securities Act of 1933*, INVESTOPEDIA (Aug. 13, 2019), http://www.investopedia.com/terms/s/securitiesact1933.asp; *see also* Securities Act of 1933 § 4.

14. Joshua R. Rosenthal, Note, *Burning Down the House or Simply Rolling the Dice: A Comment on Section 621 of the Dodd-Frank Act and Recommendation for Its Implementation*, 17 FORDHAM J. CORP. & FIN. L., 1263, 1282–83 (2012); William F. Voelker, *The Securities Act of 1933 and Stockholders of Acquired Corporations*, 1965 DUKE L.J. 1, 16 (1965); Kenton, *supra* note 13; *see also* Securities Act of 1933 § 6.

15. *See* Voelker, *supra* note 14, at 4, 16.

16. *See id.*; Securities Act of 1933 § 6.

17. Securities Act of 1933, 15 U.S.C. § 77x (2018); *see also* William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 181–82 (1933).

18. *What is the 1933 Securities Act?*, CORP. FIN. INST., http://www.corporatefinanceinstitute.com/resources/knowledge/trading-investing/1933-securities-act-truth-securities/ (last visited May 1, 2020); *see also* Nancy B. Rapoport, *Enron,* Titanic*, and* The Perfect Storm, 71 FORDHAM L. REV. 1373, 1378–79 (2003); discussion *infra* Part II.

19. Securities Exchange Act of 1934, Pub. L. No. 73–291, § 2, 48 Stat. 881, 881 (1934) (codified as amended at 15 U.S.C. §§ 78a–78qq). The Act has been amended numerous times since 1934. *See* Securities Act of 1934, 15 U.S.C. § 78a (2018).

20. *Regional Stock Exchange*, WIKIPEDIA, http://en.wikipedia.org/wiki/regional_stock_exchange (last visited May 1, 2020).

for sale and sold on markets maintained by the NASD.[21] The number of markets operating in an unregulated environment created many opportunities for swindlers and stock manipulators to profit from manipulative activities and take advantage of stock price disparities between the markets.[22] For example, if one could buy a stock on the Boston Exchange for $10 and at the same time sell it on the Cincinnati Exchange for $10.05, one could turn a tidy profit based simply on market disparity.[23] Reliance on the telegraph and communication delays also created opportunities for manipulation.[24]

The '34 Act imposed significant criminal penalties on publicly traded companies that issued materially false or misleading information.[25] In addition, the '34 Act institutionalized annual and quarterly reporting of financial results audited by independent public accountants.[26] Falsifying revenues, sales, or making wildly optimistic predictions about future results were all prohibited.[27] The '34 Act created the SEC, which was charged with regulating the stock exchanges and security markets and ensuring *market integrity*.[28] The SEC was granted broad powers to oversee and regulate the markets.[29] Former President Roosevelt appointed Joseph P. Kennedy, a well-known stock manipulator, as first Chairman of the SEC, no doubt on the theory that the fox knew all the tricks played in the henhouse and could best devise ways to protect the henhouse from the foxes.[30] Under Kennedy, who was the father of former President John F. Kennedy, the SEC in fact took

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21. *See* Julia Kagan, *National Association of Securities Dealers (NASD)*, INVESTOPEDIA (Mar. 19, 2019), http://www.investopedia.com/terms/n/nasd.asp; *Penny Stock Risk Disclosure Document*, FINRA: RULES & GUIDANCE, http://www.finra.org/rules-guidance/notices/92-42 (last visited May 1, 2020).

22. *See* Securities Exchange Act of 1934 § 2.

23. *See a Look at the Buy Low, Sell High Strategy*, INVESTOPEDIA (June 25, 2019), http://www.investopedia.com/articles/investing/081415/look-buy-low-sell-high-strategy.asp.

24. Tom C.W. Lin, *The New Market Manipulation*, 66 EMORY L.J. 1253, 1258 (2017).

25. Securities Exchange Act of 1934 § 5; *Securities Exchange Act of 1934*, LEGAL INFO. INST. (June 10, 2019), http://www.law.cornell.edu/wex/securities_exchange_act_of_1934.

26. Securities Exchange Act of 1934 §§ 13, 17; *Securities Exchange Act of 1934*, *supra* note 25.

27. *See* Securities Exchange Act of 1934 § 18; *Securities Exchange Act of 1934*, *supra* note 25; *What We Do*, *supra* note 1.

28. Securities Exchange Act of 1934 § 18; *What We Do*, *supra* note 1.

29. Securities Exchange Act of 1934 § 18.

30. *See* Kenneth Durr & Adriana Kinnane, *431 Days: Joseph P. Kennedy and the Creation of the SEC (1934–35)*, SEC. EXCHANGE COMMISSION HIST. SOC'Y (Dec. 1, 2005), http://www.sechistorical.org/museum/galleries/kennedy/.

many steps to impose integrity on the markets.[31] It prohibited banks from lending money to investors for the purchase of stock, thereby protecting the banks and their depositors from the ravages of margin trading and enforced the Glass Steagall Act of 1933, which prohibited banks from acting as broker-dealers.[32] It also imposed a minimum margin on stock purchasers.[33] No longer could an investor or manipulator borrow all of the funds used to buy stocks.[34] Because the investor had to put up a substantial part of the purchase price of a stock with his or her own funds, when a stock or stock market declined, the investor usually had sufficient equity to cover his or her losses and the risk of the broker liquidating accounts to cover margin loans and being left with a deficit was reduced.[35] Likewise, if a stock bought on margin declines, the investor is required to add equity to his account.[36] This helped protect the brokerage firms from losing or becoming undercapitalized due to margin account deficits, protected the public from bank failures caused by market-related recessions, and sharply reduced bank risk and broker-dealer insolvency caused by margin lending to customers or the market decline.[37]

One of the first rules adopted by the SEC was Rule 10b-5, which prohibited the making of materially false statements or the omission of

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31. *See id.*; *What We Do*, *supra* note 1.

32. Securities Exchange Act of 1934, § 7(d) (prohibiting banks from lending money for the purchase of equity securities); Glass Steagall Act of 1933, 12 U.S.C. § 227 (repealed 1999); *see also* Banking Act of 1933, Pub. L. No. 73-66, § 3, 48 Stat. 162, 162 (1933) (codified as amended at 12 U.S.C. § 227); 12 C.F.R. § 220.1–220.19 (2019) (providing further regulations regarding margin lending). Congress also passed the Glass Steagall and Banking Act of 1933, which prohibited banks from engaging in most broker dealer activities. Banking Act of 1933 § 3; Securities Act of 1933, Pub. L. No. 73-22, § 5, 48 Stat. 74, 77–78 (1933) (codified as amended at 15 U.S.C. §§ 77a–77aa); Reem Heakal, *What Was the Glass-Steagall Act?*, INVESTOPEDIA (Feb. 13, 2019), http://www.investopedia.com/articles/03/071603.asp. This bastion of securities regulation was largely rescinded by Congress and approved by former President Clinton in 1999 and has negatively impacted the regulation of securities since that time. Heakal, *supra*. Recent efforts to reimpose Glass Steagall restrictions and regulations have failed. 21st Century Glass-Steagall Act of 2017, S. 881, 115th Cong. § 2 (2017). Senator Elizabeth Warren proposed this bill in 2017. *Id.* § 1.

33. *See* Banking Act of 1933, 12 U.S.C. § 227 (2018); 12 C.F.R. § 220.4. The Act authorized the Federal Reserve (the "Fed") to regulate margin trading and impose minimum margin requirements. *See* 12 C.F.R. § 220.4.

34. *See* 12 U.S.C. § 227; 12 C.F.R. § 220.9; Heakal, *supra* note 32.

35. *See* 12 C.F.R. §§ 220.1, 220.4.

36. *See* 12 C.F.R. § 220.4.

37. *See* 12 C.F.R. §§ 220.1, 220.4 (explaining margin requirements and margin maintenance requirements); Justin Kuepper, *Margin Call Definition*, INVESTOPEDIA (Mar. 18, 2020), http://www.investopedia.com/terms/m/margincall.asp.

material information from statements made in connection with the purchase or sale of securities.[38] Rule 10b-5 became a key component in the arsenal of anti-fraud powers of the SEC.[39] In subsequent years, the courts permitted stockholders to sue companies in which they had invested that disseminated false and misleading information in violation of Rule 10b-5.[40] The legal profession turned this into a class action cottage industry generating large legal fees but often little recovery for investors; however, that is beyond the scope of this Article.[41]

The SEC has filed many enforcement actions and rule amendments in an effort to better protect investors.[42] It required companies to report insider activity in a company stock.[43] If the president of a public company sold (or bought) stock, he (and in the early years, the rare she) had to notify all shareholders.[44] It created new duties on the boards of directors of public companies, as well as voting rules on the election of directors.[45] The later enacted Williams Act added powers to oversee mergers and acquisitions.[46]

In recent years, we have seen evidence that much of the regulatory scheme has failed to create markets that perform with integrity.[47] Wall Street created wealth for its many employees, and great fortunes for its leaders and corporate entrepreneurs, and great risk for the investing public.[48] The crash of October 1987 should have been a wake-up call, but it was not.[49] The

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38. 17 C.F.R. § 240.10b-5 (2019).

39. *See id.*; Securities Exchange Act of 1934, 15 U.S.C. § 78(j) (2018); Lewis D. Solomon & Dan Wilke, *Securities Professionals and Rule 10b-5: Legal Standards, Industry Practices, Preventative Guidelines and Proposals for Reform*, 43 FORDHAM L. REV. 505, 510–13 (1975).

40. *See* Lorenzo v. SEC, 139 S. Ct. 1094, 1103–04 (2019); Janus Capital Grp. v. First Derivative Traders, 564 U.S. 135, 142 (2011); Basic Inc. v. Levinson, 485 U.S. 224, 249 (1988); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730–31 (1975); 17 C.F.R. § 240.10b-5; Note, *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions*, 132 HARV. L. REV. 1067, 1086 (2019).

41. Note, *supra* note 40, at 1067–68.

42. *What We Do*, *supra* note 1.

43. *See* Solomon & Wilke, *supra* note 39, at 509–10.

44. *See What We Do*, *supra* note 1.

45. *See id.*

46. Williams Act of 1968, Pub. L. No. 90-439, §3, 82 Stat. 454, 455–57 (1968) (codified as amended at 15 U.S.C. § 78a).

47. *See* Solomon & Wilke, *supra* note 39, at 513; Luis A. Aguilar, *U.S. Equity Market Structure: Making Our Markets Work Better for Investors*, U.S. SEC. & EXCHANGE COMMISSION (May 11, 2015), http://www.sec.gov/news/statement/us-equity-market-structure.html.

48. *See* Aguilar, *supra* note 47.

49. *See* MARK CARLSON, A BRIEF HISTORY OF THE 1987 STOCK MARKET CRASH WITH A DISCUSSION OF THE FEDERAL RESERVE RESPONSE 2 (2006).

crash of 2000, or the tech bubble, revealed that the markets created bubbles of high-priced tech stocks which had few assets, very low revenues, and no history of profits.[50] Wall Street pushed these stocks on the investing public and helped create the bubble, which burst.[51]

Other regulatory flaws were revealed by the collapse of Enron, a major energy company who, with the aid of its lawyers and accountants, created cooked books and caused the collapse of Enron, then one of the largest corporations in the world.[52] Its accountants, the firm of Arthur Anderson, also had to close its doors.[53] WorldCom also had similar accounting fraud issues.[54] The response was new, and at least in some respects, largely ineffectual laws.[55] Sarbanes Oxley, enacted in 2002, tried to address the Enron problem by increasing corporate duties, requiring the Chief Executive Officer ("CEO") and Chief Financial Officer ("CFO") of public companies to certify to the correctness of financial statements, and increasing the oversight and responsibilities of independent auditors.[56] However, in 2008, another market meltdown led to a significant nationwide recession, a large rise in unemployment, and a steep market decline.[57] This was largely fueled by improper and highly risky loans to home buyers and unethical bank practices.[58] Banks generated large short-term profits from

50. Adam Hayes, *Dotcom Bubble*, INVESTOPEDIA (June 25, 2019), http://www.investopedia.com/terms/d/dotcom-bubble.asp.

51. *Id.*

52. Rapoport, *supra* note 18, at 1374–75; Scott Horsley, *Enron and the Fall of Arthur Andersen*, NPR (May 26, 2006, 4:00 PM), http://www.npr.org/templates/story/story.php?storyid=5435092.

53. Horsley, *supra* note 52.

54. *Id.*; *see also In re* WorldCom, Inc., 263 F. Supp. 2d 745, 751 (S.D.N.Y. 2003).

55. *See* Floyd Norris, *A Crime So Large It Changed the Law*, N.Y. TIMES, July 14, 2005, at C1; Horsley, *supra* note 52.

56. Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, § 802, 116 Stat. 745, 800 (2002); Rosemary Carlson, *The Enron Scandal That Prompted the Sarbanes-Oxley Act*, BALANCE (Nov. 16, 2019), http://www.thebalancesmb.com/sarbanes-oxley-act-and-the-enron-scandal-393497. The Act followed the collapse of Enron and the market crash of 2000, and requires insiders, corporate officers, and directors to promptly report their purchases and sales of securities in the companies for which they serve to the SEC and the public. Sarbanes-Oxley Act § 802; Carlson, *supra*. This followed many years of insider trading cases which had been decided by federal courts, including the Supreme Court of the United States. *See* United States v. O'Hagan, 521 U.S. 642, 646–47 (1997); Dirks v. SEC, 463 U.S. 646, 648 (1983); Chiarella v. United States, 445 U.S. 222, 224 (1980).

57. *See* Veneta Lusk, *The Market Crash of 2008 Explained*, WEALTHSIMPLE (June 5, 2019), http://www.wealthsimple.com/en-us/learn/2008-market-crash.

58. *See id.*

these loans, which led to an artificially inflated stock market.[59] Banks then bundled these precarious loans and traded them among each other and to investors at inflated prices.[60] When the underlying mortgage loans went into default, banks hid this fact from investors and failed to recognize the losses on their balance sheets.[61] Eventually, the loan defaults got way out of hand, and a number of large publicly traded companies that were heavily invested in trading sub-prime mortgage paper were forced out of business, including Bear Stearns and Lehman Brothers, two major brokerage firms, and a number of banks and mortgage financing companies.[62] Congress's answer was to enact the Dodd-Frank Act, which imposed greatly expanded oversight of financial institutions and a whistleblower provision to encourage employees to report corporate misconduct.[63] It also expanded the powers of the SEC and other government financial regulators and created some new oversight agencies.[64] Congress also imposed new financial rules for banks and required stress tests on larger banks to make sure they could survive a financial downturn and were not *too big to fail*.[65]

Since 2008, the market has risen steadily to new heights and no doubt most (but not all) companies are now much more careful, cautious, and adverse to concealing material information from the investing public than was previously the case.[66] In the modern era, many more Americans have placed their financial futures in the hands of Wall Street.[67] Retirement accounts, pension plans, IRAs, and 401(k) plans largely invest in stocks and mutual funds.[68] Thus, the trickle-down effect of prior market crashes and corrections is now magnified by the direct effect of market movements of

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59. *See id.*

60. *See id.*

61. *See id.*

62. Lusk, *supra* note 57; Anthony Randazzo & Carson Young, *What Caused the Meltdown: A Financial Crisis FAQ*, REASON FOUND. (Jan. 25, 2010), http://www.reason.org/faq/what-caused-the-meltdown-a-fin/.

63. Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111–203, §§ 1, 748, 124 Stat. 1376, 1376, 1739 (2010) (codified as amended at 12 U.S.C. §§ 5301–5330).

64. *Id.* § 111.

65. *Id.* § 1.

66. *See* Michael S. Barr, *The Financial Crisis and the Path of Reform*, 29 YALE J. ON REG. 91, 92 (2012).

67. Eric Whiteside, *Where Do Pension Funds Typically Invest?*, INVESTOPEDIA (July 25, 2019), http://www.investopedia.com/articles/credit-loans-mortgages/090116/what-do-pension-funds-typically-invest.asp.

68. *See id.*

investors.[69] In many ways, these investors are not protected by our laws and regulations.[70] They tend to buy high and sell low.[71]

It is the thesis of this Article that, in many ways, the markets still remain at least very underregulated, and the SEC and other oversight agencies have proven to be unwilling and/or unable to focus on the risks facing smaller stock market investors.[72] Moreover, Wall Street has continued to be a casino-like arena, akin to sports betting, rather than a place where companies can raise capital and create equal and fair opportunities for all investors to make money.[73] Buying stock is—despite a plethora of rules, regulations and statutes—a place rife with speculation, conflicts of interest, misconduct, and often has too much resemblance to a casino roulette wheel or craps table or a bet on a racehorse.[74] You pay your money and you take your chance.[75] In too many ways, the fix is in—and certain groups make money at the expense of the average investor.[76] This is not to say that all investors lose money.[77] Those who have bought an S&P index fund and held on during the 2008 recession have fared well, but many of them panic and sell low after a large market correction.[78] However, there are many groups that have much better odds than the general public.[79] Regulation was supposed to prevent that from occurring.[80]

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69. *See* Lin, *supra* note 24, at 1310–11; Kimberly Amadeo, *Stock Market Crash, Its Causes, Effects, and How to Protect Yourself*, BALANCE (Mar. 12, 2020), http://www.thebalance.com/stock-market-crash-examples-causes-impact-3305864.

70. *See* Barr, *supra* note 66, at 110–11.

71. *See* Lin, *supra* note 24, at 1310; discussion *infra* Section II.A.2.

72. *See* Kristin N. Johnson, *Regulating Innovation: High Frequency Trading in Dark Pools*, 42 J. CORP. L. 833, 837–38 (2017); discussion *infra* Section II.A.1.

73. *See* Matt Egan, *Sports Betting vs. the Stock Market*, CNN: BUS. (Aug. 31, 2014, 8:14 AM), http://www.money.cnn.com/2014/08/31/investing/sports-gambling-investing/index.html.

74. *See id.*; Jesse M. Fried, *Informed Trading and False Signaling with Open Market Repurchases*, 93 CAL. L. REV. 1323, 1340–43 (2005).

75. Lin, *supra* note 24, at 1253.

76. *Id.* at 1287.

77. *See id.* at 1313.

78. *See id.* at 1311, 1313.

79. *Id.* at 1265–66.

80. *See* Barr, *supra* note 66, at 92.

II. THE SEC UNDERREGULATES THE STOCK MARKETS AND FAILS TO TAKE NECESSARY STEPS TO PROTECT SMALLER INVESTORS

A. *Underregulation of High-Speed Trading*

1. Failure to Adequately Regulate High Frequency Trading, Alternative Trading Systems, and Dark Pools

Today, almost all trading takes place on the venerable NYSE or on the National Association of Securities Dealers Automated Quotations ("NASDAQ") market. [81] These markets continue to undergo large fluctuations.[82] Each day, television commentators attribute market moves to fears about the Fed, trade tensions and tariffs, inflation or deflation, domestic and international politics, and the like.[83] On a given day, a stock may rise or fall 1% or even 2% or more, even though none of the fundamentals of the company have changed one iota.[84] Markets can, and do, rise and fall by 10% to 20% in very short time periods.[85] This is all due to a lack of effort by the regulators to create a market place that is based on financial performance.[86]

First, high speed or high-frequency trading ("HFT")[87] and off-market trading in dark pools[88] has taken control of the markets and made them

81. Johnson, *supra* note 72, at 839.

82. *See* Lin, *supra* note 24, at 1274–76.

83. *See id.* at 1265.

84. *See id.* at 1261.

85. *See* Rosenthal, *supra* note 14, at 1295. In a single week in February 2020, the markets fell by over 11% in response to the Coronavirus scare, wiping out trillions of investor funds. Michael Corkery, *Wall St. Suffers Its Worst Week Since 2008 as Virus Angst Grows*, N.Y. TIMES, Feb. 29, 2020, at A1.

86. *See* Barr, *supra* note 66, at 97–98.

87. *See* Johnson, *supra* note 72, at 836. Large broker-dealer firms run many of the high-volume dark pools, creating conflict of interest and best execution issues. *Id.* at 866. The broker has an interest in routing orders to its own dark pool, both because it receives execution fees and because it may offer its own trading desk or other favored trader's opportunities to transact with its customer's orders. *Id.* at 868. These interests may conflict with the customer's interest in best execution. *Id.* At least one recent settlement suggests that these conflicts of interest may have led a dark pool operator to put its own interests ahead of its customers. *See* Lin, *supra* note 24, at 1287.

88. Barclays Capital Inc., Securities Act Release No. 10010, Exchange Act Release No. 77001, 113 SEC Docket 1548 (Jan. 31, 2016); Johnson, *supra* note 72, at 837; Lin, *supra* note 24, at 1266. The SEC has filed a few enforcement actions relating to dark pools. *See* Credit Suisse Securities (USA) LLC, Securities Act Release No. 10013, Exchange Act Release No. 77002, 2016 WL 537942 (Jan. 31, 2016); Deutsche Bank Securities Inc., Securities Act Release No. 10272, Exchange Act Release No. 79576, Investment Advisors Act Release No. 4590, 115 SEC 4340 (Dec. 16, 2016).

irrational.[89] HFT accounts for almost half of all the volume of trades in equity securities.[90] The puny regulations directed at hedge funds do not address the fundamental problem of high-speed trading and some of the volatility that it causes.[91] Hedge funds and other large financial companies, institutions, institutional investors, Exchange Traded Funds ("ETFs"), and mutual funds often use technology and high-speed trading to gain advantages in the markets or manipulate the markets.[92] They do not necessarily trade on the NYSE or NASDAQ; rather, they are permitted to trade off-market and take advantage of minuscule price differences to make enormous profits.[93] This trading often occurs on Alternative Trading Systems ("ATS") and not on the NYSE or NASDAQ.[94] These trades, if done in dark pools, often do not have to be reported to the SEC or FINRA at all.[95] Other ATS trades are reported, but only some time after the trade occurs.[96] The rise of HFT, ATS trading, and dark pools is essentially unregulated or underregulated.[97] This trading is extremely complex and presents an ongoing problem that is not being adequately addressed.[98] These types of trades create much volatility and much risk, and it rarely has anything to do with the financial performance of a particular company.[99]

The equity markets tend to move in tandem.[100] On many days, almost all stocks rise or all stocks fall.[101] That is not rational.[102] Although

89. *See* Johnson, *supra* note 72, at 837–38.

90. *See id.*

91. *See* Itzhak Ben-David et al., *Do ETFs Increase Volatility?*, 73 J. FIN. 2471, 2487 (2018); Johnson, *supra* note 72, at 869.

92. *See* Johnson, *supra* note 72, at 835.

93. *Id.* at 861, 869.

94. *Id.* at 837, 861; Chris Brummer, *Disruptive Technology and Securities Regulation*, 84 FORDHAM L. REV. 977, 979, 1007 (2015) (discussing the impact of technology on the trading of securities and the various platforms available for trading). Another factor in high speed trading is *spoofing*, an illegal practice engaged in by some traders involving fictional indications of an interest in buying or selling a security in order to move its price. Matthew Leising, *Spoofing*, WASH. POST (Jan. 29, 2020, 4:44 PM), http://www.washingtonpost.com/business/spoofing/2020/01/29/ab90990c-42e0-11ea-99c7-1dfd4241a2fe_story.html.

95. Johnson, *supra* note 72, at 866–67.

96. *Id.* at 865.

97. *See id.* at 869, 871–72.

98. *Id.* at 868, 871–72.

99. *See id.* at 837, 858; Lin, *supra* note 24, at 1313.

100. *See* Ira Iosebashvili & Amrith Ramkumar, *Risky Assets Move in Tandem, Stoking Fears More Volatility Lies Ahead*, WALL ST. J.: MARKETS (Jan. 23, 2019, 4:18 PM), http://www.wsj.com/articles/risky-assets-move-in-tandem-stoking-fears-more-volatility-lies-ahead-11548248400.

101. *See id.*

we live in a world economy where one company's performance can impact the performance of other companies on any given day, it makes no sense that almost the entire market moves in one direction at the same time.[103]

For instance, the theoretical risk to McDonald's, Walmart, Hershey's Chocolate, or Exxon of a perceived possible decrease in demand for computer chips is greatly and unreasonably impacted by manipulated markets.[104] Does a threatened European Union ("EU") fine of Microsoft really justify a 5% in McDonald's, Walmart, Hershey's Chocolate, or Exxon?[105] While of course there are some stocks that act counter to the direction of the overall market, in fact, they are few and far between.[106] Am I really less likely to buy a Big Mac because of the EU fine of Microsoft, thus reducing the revenues of McDonald's and its stock price?[107] Is Amazon really worth $50 more or $50 less on a given day?[108]

High-speed traders, dark pools, and ATS compromise market efficiency and rationality.[109] Often, that trading produces minuscule profits, but a minuscule profit on five million shares repeated many times over is not minuscule.[110] In the meantime, the public investor is disadvantaged and often frightened.[111] Sometimes, the high-speed traders can manipulate a stock up or down.[112] Short sellers pressure stocks and markets to decline.[113] The markets themselves are now subject to trading through index funds and ETFs, so large institutional traders and others can influence the markets by

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102. *See id.*

103. *See id.*; Akane Otani, *Stocks Are Moving in Tandem: That Can Be Scary*, WALL ST. J.: MARKETS (Feb. 15, 2018, 5:25 PM), http://www.wsj.com/articles/stocks-are-moving-in-tandem-that-can-be-scary-1518720399.

104. *See* Otani, *supra* note 103.

105. *See id.*

106. *See id.*

107. *See* Iosebashvili & Ramkumar, *supra* note 100.

108. *See id.*

109. *See* Johnson, *supra* note 72, at 837–38.

110. Lin, *supra* note 24, at 1288, 1290.

111. *See* Johnson, *supra* note 72, at 858, 860–61; Lin, *supra* note 24, at 1313.

112. *See* Lin, *supra* note 24, at 1287.

113. *See About Short Selling*, FIDELITY, http://www.fidelity.com/learning-center/trading-investing/trading/about-short-selling (last visited May 1, 2020). A short sale involves a sale of stock that one does not own. *Id.* Rather, one borrows shares held by other investors from a brokerage firm and sells them in the market. *Id.* At some point, the short seller must buy back the shares and return them to the broker-dealer. *Id.* If the short seller sells a stock for $10 and buys it back later for $9, he makes a profit of $1 per share (less some cost for borrowing the stock). *See id.* The short seller is betting that the stock or market will go down. *About Short Selling*, *supra* (discussing the role of how short sellers can force a decline in the price of a stock or an entire market).

buying and selling index funds.[114] Their purchases and sales require large additions or deletions in the underlying stocks that compose the index.[115]

There also appears to be a risk that HFT exercises undue influence over the United States Government.[116] In recent years, every time the Fed indicates it may normalize interest rates, the market, i.e. the HFT, sells off and puts pressure on the Fed not to raise rates.[117] It is also likely that political pressure is brought to bear by HFT on issues like tariffs, pharmacy prices, and energy policies.[118] Thus, the HFT, at times, appears to act like, or have the effect of, an invisible Political Action Committee, using its funds and technology to influence policy.[119] HFT no doubt is also used by some ETFs and mutual funds to increase profits.[120] The Wall Street commentators on CNBC and the like rarely speak out against this.[121] Rather, they attempt to show rationality in the process by linking the market moves to *trade uncertainty* or concerns that a Fed rate hike will affect profitability.[122] In fact, HFT is often irrational and simply enables the high frequency traders to make quick profits due to their technological superiority and ability to influence government policies.[123] HFT certainly has elements of a deceptive or manipulative device which the SEC is supposed to regulate, not facilitate.[124] While the SEC fiddles, Wall Street is fueling a fire that can burn millions of investors.[125]

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114. Ben-David et al., *supra* note 91, at 2472 (discussing the impact index funds have on market prices). The SEC could also ban short selling. *About Short Selling*, *supra* note 113.

115. *See* Ben-David et al., *supra* note 91, at 2472.

116. *See* Johnson, *supra* note 72, at 856.

117. *See id.* at 853–54.

118. *See* John Schmoll, *Political Contributions, High Frequency Trading and You*, C. INVESTOR (Oct. 16, 2019), http://www.thecollegeinvestor.com/7582/political-contributions-high-frequency-trading/.

119. *See id.*

120. *See* Johnson, *supra* note 72, at 856.

121. *See id.* at 838.

122. *See* Schmoll, *supra* note 118.

123. *See* Gregory Meyer et al., *How High-Frequency Trading Hit a Speed Bump*, FIN. TIMES (Jan. 1, 2018), http://www.ft.com/content/d81f96ea-d43c-11e7-a303-9060cb1e5f44; Schmoll, *supra* note 118.

124. *See* Johnson, *supra* note 72, at 869; Schmoll, *supra* note 118.

125. *See* Schmoll, *supra* note 118.

2. Steps that the SEC Should Consider in Regulating High Speed Trading and Dark Pools

HFT is not only in itself a destroyer of the integrity of the market, but the SEC has left it largely unregulated.[126] HFT using dark pools and ATS does not take place on the NYSE or the NASDAQ.[127] It takes place in a hidden world of cyberspace and is clothed from public scrutiny.[128] The SEC and FINRA carefully monitor and review trades on the NYSE and NASDAQ.[129] While these visible trades are monitored, the shadowy trades that take place on the cyber street corners, a sort of cyber three-card monte game, are ignored.[130]

The SEC should develop regulations to protect the middle-class investor who relies on market integrity to treat his or her investments fairly and to protect his or her retirement assets and net worth.[131] It is beyond the purview of this Article to propose what those regulations might look like—and changes to any system often have unanticipated consequences—therefore, much thought needs to go into new regulations.[132] However, there are certainly areas that should be considered.* For one, it would appear to make a lot of sense to require all ATS and dark pool trades to be immediately reported to the regulators and markets at the time of execution.[133] This would mean that the market would be aware of these trades and take them into account in pricing a stock.[134] Alternatively, the SEC might consider banning HFT, banning off-market trading on ATS and in dark pools, or requiring all traders, including high frequency traders, to pay a very small *oversight* fee—0.001 cents per share—on all trades in excess of, for example, five thousand shares or $1,000,000 made on a given day in a given stock by a single beneficial owner.[135] This added cost could fund oversight

126. *See* Johnson, *supra* note 72, at 860, 869, 872–73.

127. *See id.* at 864–65; GARY SHORTER & RENA S. MILLER, CONG. RESEARCH SERV. R43739, DARK POOLS IN EQUITY TRADING: POLICY CONCERNS AND RECENT DEVELOPMENTS 5 (2014).

128. SHORTER & MILLER, *supra* note 127, at 1.

129. *See id.* at 9–10, 13.

130. *See id.* at 7–10, 12; Johnson, *supra* note 72, at 867, 870–72.

131. *See* Johnson, *supra* note 72, at 870; Lee Barney, *SEC Faces Its Own Debate on Fiduciary Advice Standards*, PLANADVISER (July 28, 2015), http://www.planadviser.com/sec-faces-its-own-debate-on-fiduciary-advice-standards/.

132. *See* SHORTER & MILLER, *supra* note 127, at 6–9.

133. *See id.* at 9–10.

134. *See id.*

135. *See id.* at 10; Johnson, *supra* note 72, at 872–73; Lin, *supra* note 24, at 1309.

and make HFT less profitable and provide a disincentive to HFT.[136] It might also consider a small charge based on the market value of the trade.[137] For example, a small fee could be assessed on non-regulated mutual funds involving a market value in excess of $500,000 or $1,000,000 made within a five-minute period in a given stock.[138] It could also consider requiring a high frequency trader, and perhaps other investors, to hold a position for twenty-four hours.[139] The law of unexpected consequences requires some study of these issues and solutions, lest the cure be worse than the disease, but the regulatory void needs to be addressed in a swift and forthright manner.[140]

B. *Failure to Regulate Irrational Stock Performance*

1. The SEC Has Permitted Markets to Be Overly Volatile, Creating Additional Risks for Investors

The stock market used to have a rule of thumb.[141] Years ago, most stocks traded at, perhaps, seven times its earnings (if a company earned $10 per share per year, its stock price would normally be around $70).[142] Today, most companies trade at twelve to eighteen times their earnings, but many trade at much higher multiples with little rational economic justification for the price.[143] Many companies that earn no profit at all trade at high prices.[144] Hyped by Wall Street, Beyond Meat, at times, sells for over $200 per share without any earnings or profit and the risk of strong competition from other food producers.[145] Moreover, stocks routinely trade up or down 1% or more

136. *See* SHORTER & MILLER, *supra* note 127, at 9–10; Johnson, *supra* note 72, at 870–73, 884; Lin, *supra* note 24, at 1309.

137. *See* SHORTER & MILLER, *supra* note 127, at 9–10; Johnson, *supra* note 72, at 870–73, 884; Lin, *supra* note 24, at 1309.

138. *See* SHORTER & MILLER, *supra* note 127, at 9–10; Johnson, *supra* note 72, at 870–73, 884; Lin, *supra* note 24, at 1309.

139. *See* SHORTER & MILLER, *supra* note 127, at 9–10; Johnson, *supra* note 72, at 870–73, 884; Lin, *supra* note 24, at 1309.

140. *See* SHORTER & MILLER, *supra* note 127, at 9–10; Johnson, *supra* note 72, at 872–73, 884, 886; Lin, *supra* note 24, at 1309.

141. *See* Aguilar, *supra* note 47.

142. *See id.*; Dana Anspach, *P/E Ratio & How to Use It to Make Smart Investments: How to Interpret the Price to Earnings Ratio*, BALANCE: INVESTING (Nov. 15, 2019), http://www.thebalance.com/normal-pe-ratio-stocks-2388545.

143. *See* SHORTER & MILLER, *supra* note 127, at 3–4; Aguilar, *supra* note 47.

144. *See* Aguilar, *supra* note 47.

145. David Moadel, *Beyond Meat Stock Is Finally Worth A Look After Wild Ride in 2019*, INVESTORPLACE (Jan. 6, 2020, 11:37 AM),

on a given day, and up or down 5% or 10% in a given week.[146] The failure of stocks to trade rationally appears to be related to HFT, ATS, and dark pools—stocks no longer trade based on fundamentals.[147]

2. How Might the SEC Make Stocks More Rational and Less Volatile

Stock prices should be rational.[148] A stock should be priced in such a way that reflects current income, realistic future income, and the rate of return from dividends.[149] If a stock has a dividend that appears to be solid, its dividend yield should not soar to two or three times the yield of a ten-year treasury note when the market sells off.[150] For the stock market not to continue to be a casino, stock prices should be less volatile and more rationally related to the underlying fundamentals of the stock.[151] Some of the matters discussed above explain the lack of correlation at any given time of the actual economic performance of a stock with its stock price.[152]

All public companies are required to report projected earnings and actual earnings.[153] Quarterly financial statements are required to be reported on Form 10-Q and annual financial statements are required to be reported on Form 10-K.[154] Under the current system, companies often give earnings estimates and Wall Street then estimates performance; when earnings and/or revenue exceed or miss expectations, the stock of the company fluctuates up or down significantly.[155] This quarterly reporting leads to surprises and rapid

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http://www.investorplace.com/2020/01/beyond-meat-stock-is-finally-worth-a-look-after-its-wild-ride-in-2019/.

146. *See* Corkery, *supra* note 85; *Earnings Call: A Closer Look at Financial Reports*, HENSSLER FIN. (Sept. 27, 2016), http://www.henssler.com/earnings-call-a-closer-look-at-financial-reports/.

147. *See* Johnson, *supra* note 72, at 836–37, 866, 870.

148. *See id.* at 835–37, 870.

149. *Id.* at 840; Claire Boyte-White, *How Dividends Affect Stock Prices*, INVESTOPEDIA (Dec. 17, 2019), http://www.investopedia.com/articles/investing/091015/how-dividends-affect-stock-prices.asp.

150. *See* Boyte-White, *supra* note 149.

151. *See* Ben-David et al., *supra* note 91, at 2474.

152. *See id.*; Johnson, *supra* note 72, at 835–37, 866, 870; Boyte-White, *supra* note 149; *Earnings Call: A Closer Look at Financial Reports*, *supra* note 146.

153. *See Form 10-K*, U.S. SEC. & EXCHANGE COMMISSION, (June 26, 2009), http://www.sec.gov/fast-answers/answers-form10khtm.html.

154. *See id.*

155. *See* James Chen, *Street Expectation*, INVESTOPEDIA (May 1, 2018), http://www.investopedia.com/terms/s/streetexpectation.asp.

stock movements.[156] Companies certainly know their weekly revenue and costs and should report that within a week or two following the weekly cycle.[157] This way, the market will not be full of unanticipated financial results and surprises and can avoid the fluctuations that result.[158] If the company believes that a weekly result is an aberration, it can state why—for example, a company could state that a train strike delayed deliveries, but that it expects to be able to make up for this shortly after the strike ends.[159] The SEC should consider weekly financial reporting to decrease volatility.[160] It may also reduce class action lawsuits filed against companies by eliminating surprise financial reports.[161]

C. *Corporate Buybacks Are Largely Unregulated*

1. Issues Created by Corporate Buybacks

Corporate buybacks are another major contributor to irrational stock performance.[162] Many of the Fortune 500 companies use their free cash and profits to buy back their own stock in the market place, thereby reducing the number of publicly traded shares and presumably increasing the earnings per outstanding shares.[163] These buybacks can be a windfall for institutional investors and corporate insiders.[164] If the CEO has acquired 0.05% of his or her company's stock through grants of stock or options, a buyback of company stock increases his or her percentage of company ownership and has a significant benefit for him or her.[165] For the ordinary shareholder with 100 shares, or with a two share position through a mutual fund, the increase

156. *Earnings Estimates and Their Impact on Stock Prices*, AM. ASS'N INDIVIDUAL INV., http://www.aaii.com/investing-basics/article/earnings-estimates-and-their-impact-on-stock-prices (last visited May 1, 2020).

157. *See id.*

158. *See Earnings Call: A Closer Look at Financial Reports*, *supra* note 146; *Earnings Estimates and their Impact on Stock Prices*, *supra* note 156.

159. Chen, *supra* note 155; *Earnings Call: A Closer Look at Financial Reports*, *supra* note 146.

160. *See Earnings Call: A Closer Look at Financial Reports*, *supra* note 146.

161. James Brumley, *Class-Action Suits Shouldn't Stress, or Surprise, Nio Stock Owners*, INVESTORPLACE (Mar. 21, 2019, 10:37 AM), http://www.investorplace.com/2019/03/class-action-suits-shouldnt-stress-or-surprise-the-owners-of-nio-stock/.

162. Fried, *supra* note 74, at 1356.

163. *See id.* at 1362 (discussing corporate buybacks).

164. *See id.* at 1358.

165. *See id.*

is minuscule and provides no meaningful financial gain.[166] Wall Street loves buybacks because they favor the wealthiest.[167] A buyback, unlike a stock dividend, is not double taxed (i.e., the corporation pays a tax on its profit and the shareholder is also taxed on receipt of that profit in the form of a dividend).[168] Buybacks thus increase the national debt and decrease tax revenues from corporate profits.[169]

2. How Could the SEC Better Regulate Stock Buybacks

Funds used for the buyback could be paid as dividends to investors, invested in property, plant, equipment, or research and development to expand the company and provide jobs, or used to reduce corporate debt.[170] Most of our large public corporations carry significant amounts of long-term debt.[171] Yet they do not pay it down when they have accumulated significant cash, but rather use their excess cash to buy back stock.[172] This appears to create a risk of fiscal imprudence and is negative on long-term performance, as the corporation remains liable for interest and principal repayments on its debt.[173] Some of the corporate cash used for buybacks could possibly be paid as a return of capital to all stockholders, which could be treated as tax-free.[174] The SEC should also consider barring stock buybacks.[175] The directors and CEOs who authorize them often have a conflict of interest with smaller shareholders.[176] The SEC also permits many companies to limit the voting rights of their common shareholders, further reducing their influence on buybacks and other reforms that might benefit investors.[177] These

166. *See id.*
167. *See* Fried, *supra* note 74, at 1357–58.
168. *See id.* at 1336–37; Neil H. Buchanan, *Are Taxes on Dividends Really* Double Taxation*, as President Bush Claims? Why the Answer Is No — and Why That Is the Wrong Question to Ask, Anyway*, FINDLAW (Feb. 20, 2003), http://www.supreme.findlaw.com/legal-commentary/are-taxes-on-dividends-really-double-taxation-as-president-bush-claims.html. The taxation of the corporation on its profit and of its investor's dividends paid by the corporation has euphemistically been described as *double taxation*. Buchanan, *supra*.
169. *See* Fried, *supra* note 74, at 1336; Buchanan, *supra* note 168.
170. *See* Fried, *supra* note 74, at 1338, 1385.
171. *Id.*
172. *See id.* at 1329, 1385.
173. *See id.* at 1329, 1347, 1385.
174. *Id.* at 1336–37, 1343.
175. *See* Fried, *supra* note 74, at 1342.
176. *See id.* at 1342–44, 1347.
177. *See* J.B. Maverick, *Class A Shares Vs. Class B Shares: What's the Difference?*, INVESTOPEDIA (Apr. 21, 2019),

directors and officers derive most of the benefit while the corporation and small investors are, in many ways, often disadvantaged by the practice.[178] The buyback often leads to an increase in stock price that is unrelated to the actual objective value of the stock and gives institutional investors the opportunity to show positive results that are overstated.[179] It also creates opportunities for high frequency traders to make quick short-term profits.[180]

D. *Corporate Compensation Is Excessive, Largely Unregulated, and Negatively Impacts Financial Results for Investors*

1. How Does Corporate Compensation Harm Investors

Wall Street over-rewards corporate founders and stock underwriters.[181] A Bill Gates, a Jeff Bezos, or a Steve Jobs certainly should be very generously compensated for their creativity and business acumen.[182]

But should Jeff Bezos have so much wealth that he can get a divorce, give his ex-wife half his Amazon stock, and still be the richest man in the world?[183] Most CEOs have a rather short shelf life, but they often rake in $10, $15, or $20 million a year or more, while the corporations they run often pay workers $7.50 an hour and pay shareholders zero in dividends.[184] Capitalism has many worthy attributes, but the significant under-controlled and underregulated overcompensation of top corporate officials has gotten out of hand.[185] It has grossly overrewarded a few, greatly overvalued many others, and deprived shareholders and workers of their fair share.[186] It also negatively impacts corporate profits, at least to some extent.[187] Moreover, corporations are required to disclose the compensation of only their very top

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http://www.investopedia.com/ask/answers/062215/what-difference-between-class-shares-and-other-common-shares-companys-stock.asp (discussing different classes of common stock with different voting rights).

178. Fried, *supra* note 74, at 1346, 1355–56.

179. *Id.* at 1349, 1351, 1354–55.

180. *See id.* at 1356.

181. *See* Jill Fisch et al., *Is Say on Pay All About Pay? The Impact of Firm Performance*, 8 HARV. BUS. L. REV. 101, 104–05 (2018); Natasha Frost, *Jeff Bezos Just Lost $38 Billion. He's Still the Richest Person in the World*, QUARTZ (July 6, 2019), http://www.qz.com/1659819/jeff-bezos-remain-worlds-richest-man-after-finalizing-divorce/.

182. Fisch et al., *supra* note 181, at 102.

183. *See* Frost, *supra* note 181.

184. Fisch et al., *supra* note 181, at 102; Fried, *supra* note 74, at 1367.

185. *See* Fisch et al., *supra* note 181, at 102 (discussing CEO compensation).

186. *See id.* at 108.

187. *See id.* at 102.

executives.[188] The SEC now gives shareholders some limited opportunity to state whether they feel CEO compensation is fair, but this is non-binding.[189] It also requires some reporting of the ratio of CEO compensation to median compensation of all employees.[190] Many lower level executives are also overrewarded with large six and seven figure earnings which are not disclosed to shareholders.[191] This again reduces corporate profits and creates great wealth inequality.[192]

Despite the anemic SEC efforts to require disclosure of some corporate compensation for high ranking and/or highly paid executives, and its lack of any restrictions on such compensation, the fact is that many corporations richly reward CEOs and other executives year after year, whether profits are up or down.[193] CEO pay has grown exponentially over the last fifty years, while income tax rates have generally declined.[194] Why should a corporation pay its leaders 100, or 200, or 300, or 1000 times more than what it pays to its average worker?[195] Why should a CEO be paid $15 million or $30 million a year, or more, when the average employee makes $50,000 per year?[196] A successful CEO should be able to drive a Mercedes

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188. *See id.* at 105; *SEC Adopts Rule for Pay Ratio Disclosure*, U.S. SEC & EXCHANGE COMMISSION, http://www.sec.gov/news/pressrelease/2015-160.html (last visited May 1, 2020).

189. *See* 17 C.F.R. § 240.14a-21 (2019). The SEC gives shareholders an advisory opportunity to indicate approval or disapproval of CEO compensation. *Id.* However, because it is advisory only, it appears to have little value. Fisch et al., *supra* note 181, at 106.

190. *See* Pay Ratio Disclosure, 80 Fed. Reg. 50104, 16 (Aug. 18, 2015) (to be codified at 17 C.F.R pt. 229, 240, and 249). The SEC also has required disclosure of how CEO compensation compares with the median compensation of all employees, which was adopted to comply with the Dodd-Frank Act. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 953, 124 Stat. 1376, 1904 (2010) (codified as amended at 12 U.S.C. §§ 5301–5641); *Securities Regulation — Dodd-Frank Wall Street Reform and Consumer Protection Act*, 129 HARV. L. REV. 1144, 1144 (2016). The SEC did not develop any findings on how this information would assist investors. *Securities Regulation — Dodd-Frank Wall Street Reform and Consumer Protection Act*, *supra*.

191. *SEC Adopts Rule for Pay Ratio Disclosure*, *supra* note 188.

192. *See* Fisch et al., *supra* note 181, at 108.

193. *See id.* at 106.

194. *See* Diana Hembree, *CEO Pay Skyrockets to 361 Times That of the Average Worker*, FORBES (May 22, 2018, 4:28 PM), http://www.forbes.com/sites/dianahembree/2018/05/22/ceo-pay-skyrockets-to-361-times-that-of-the-average-worker/.

195. *See id.*

196. *See id.* Interestingly, CEO longevity appears to be relatively short. *See CEO Turnover at Record High*, FINANCIAL, http://www.finchannel.com/opinion/analysis-3/77322-ceo-turnover-at-record-high (last visited May 1, 2020). This suggests that many

and own a lovely vacation home if he or she wants to and have meals that cost $500 per person.[197] But are his children, grandchildren, great grandchildren, and their offspring also entitled to live that well, at the expense of the small shareholder?* No wonder the top 1% control so much of the nation's wealth.[198]

2. How Can the SEC Regulate Corporate Compensation to Better Protect Shareholders

Obviously, an effort by the Government to regulate employee compensation will create much controversy and opposition.[199] But the Government does regulate corporate compensation to the extent it imposes a minimum wage.[200] Why is it such a great leap to impose a maximum wage?[201]

Of course, even if someone accepts the premise of a cap on compensation, the question becomes, "how much is the cap and how can it be done?"[202] Several approaches could be considered.[203] A corporation that is paying out compensation that exceeds a certain percentage of revenue could be required to submit the matter to shareholders.* A corporation that desires to pay top officers more than one hundred times the median compensation paid to its workforce could be required to submit this to a shareholder vote.* A corporation that wanted to give its senior officers a raise in any year in which the corporate profit declines from one year to the next could be required to submit that to shareholders.* A study of this and other possible approaches should be undertaken.* The current regulations

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CEOs are not performing at a high level that justifies their extraordinary compensation levels. *Id.*

197. *See* Adam Hartung, *Why CEOs Make So Much Money*, FORBES: LEADERSHIP (June 22, 2015, 5:04 PM), http://www.forbes.com/sites/adamhartung/2015/06/22/why-ceos-make-so-much-money/#1abda7364203.

198. Alexandre Tanzi & Michael Sasso, *Richest 1% of Americans Close to Surpassing Wealth of Middle Class*, BLOOMBERG: ECONOMICS (Nov. 9, 2019, 5:00 AM), http://www.bloomberg.com/news/articles/2019-11-09/one-percenters-close-to-surpassing-wealth-of-u-s-middle-class.

199. Hartung, *supra* note 197.

200. *See* Damon Linker, *Why We Need a Maximum Wage*, WEEK: OPINION (Apr. 22, 2014), http://www.theweek.com/articles/447652/why-need-maximum-wage.

201. *See id.*

202. *See id.*

203. *See id.*

simply do not regulate corporate compensation.[204] These types of corporate regulations might well cause boards of directors to simply stay within the guidelines so as to avoid having to seek shareholder approval of arguably over generous packages.[205]

Senior officer compensation is approved by the board of directors.[206] They, in turn, often rely on *compensation consultants* who compare the compensation of top officers of comparable companies.[207] Successful compensation consultants find ways to justify whatever the CEO can persuade the board is fair compensation.[208] This razzle dazzle also does not regulate corporate compensation.[209] Another truism is that corporate performance is often based on factors that have nothing to do with CEO performance, such as rises or falls in commodity prices, changes in supply and demand in particular products, and the like.[210] As one author has noted,

> [f]actors that have little or nothing to do with the CEO's performance, but that lead to a rise in profits and share prices, can lead to higher CEO pay. For example, a study found that jumps in world oil prices led to large increases in the pay of CEOs at oil companies (Bertrand and Mullainathan 2001). Presumably, the CEOs had nothing to do with the rise in world oil prices, so effectively they got large pay raises as a result of factors that were outside of their control.[211]

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204. 17 C.F.R. § 240.14a-21 (2019); *see also* Fisch et al., *supra* note 181, at 105; *Securities Regulation — Dodd-Frank Wall Street Reform and Consumer Protection Act*, *supra* note 190, at 1144.

205. 17 C.F.R. § 240.14a-21; *see also* Fisch et al., *supra* note 181, at 105; *Securities Regulation — Dodd-Frank Wall Street Reform and Consumer Protection Act*, *supra* note 190, at 1144.

206. Michael J. Segal, *2017 Compensation Committee Guide*, HARV. L. SCH. F. CORP. GOVERNANCE (Mar. 29, 2017), http://www.corpgov.law.harvard.edu/2017/03/29/2017-compensation-committee-guide/.

207. Kevin J. Murphy & Tatiana Sandino, *Executive Pay and* Independent *Compensation Consultants*, 49 J. ACCT. & ECON. 247, 247 (2010); *see also Securities Regulation — Dodd-Frank Wall Street Reform and Consumer Protection Act*, *supra* note 190, at 1144; Kevin J. Murphy & Tatiana Sandino, *Compensation Consultants and the Level, Composition and Complexity of CEO Pay* 1–41, 1 (Harvard Bus. Sch. Accounting & Mgmt. Unit, Working Paper No. 18-027, 2019) (discussing the role of compensation consultants).

208. *See* William K. Sjostrom, Jr., *The Untold Story of Underwriting Compensation Regulation*, 44 U.C. DAVIS L. REV. 625, 642 (2010).

209. *See id.* at 649.

210. *See* BAKER ET AL., ECON. POLICY INST., REINING IN CEO COMPENSATION AND CURBING THE RISE OF INEQUALITY 8 (2019).

211. *Id.* Presumably, with oil prices and oil company profits deeply distressed, the CEOs of these companies are still generously compensated. *Id.*

E. *Public Offerings Often Benefit the Underwriters and Institutional Investors to the Disadvantage of the Issuer and at Times Do Not Benefit the Corporation Issuing the Stock at All*

1. What Is Wrong with the New Issue Market

The original premise of a stock offering was to raise capital for the corporation so it could increase its investment in property, plant and equipment, and research and development.[212] This in turn led to growth in earnings, expansion of markets and innovative products, and profits for investors.[213] However, often ignored is the fact that once a stock is sold to the public, the capital is raised, and the use of proceeds, wise or unwise, is completed.[214] Thereafter, the stock is traded, but the corporation gets little or no direct benefit if the stock goes up and little or no direct detriment if the stock goes down.[215] Rather, the offering price set by the issuer and its underwriters is the price received by the company.[216] If the stock immediately increases dramatically—as in the recent issue of shares by Chewy and Beyond Meat—the company gets no benefit.[217] The initial offering is the price which institutional investors and favored clients of broker-dealers pay.[218] If the stock jumps, they immediately benefit.[219] The average investor has no access to the stock at the initial offering and thus pays a higher price.[220] Of course, the corporate insiders, the underwriters who are often paid in stock, institutional investors, corporate founders, and key officers and directors now have a place to sell their stock at far above what the corporation received for the stock.[221] The average investor jumps in

212. *See* Sjostrom, Jr., *supra* note 208, at 628, 646.
213. *Id.* at 646–47.
214. *Id.* at 628–29.
215. *See id.* at 632.
216. Sean J. Griffith, *Spinning and Underpricing: A Legal and Economic Analysis of the Preferential Allocation of Shares in Initial Public Offerings*, 69 BROOK. L. REV. 583, 642 (2004).
217. *See id.* at 600; Caroline Jansen, *PetSmart Upgraded Thanks in Part to Chewy IPO*, RETAILDIVE (July 16, 2019), http://www.retaildive.com/news/petsmart-upgraded-thanks-in-part-to-chewy-ipo/557990/; Paul R. La Monica, *Beyond Meat Shares Are on a Wild Roller Coaster Ride*, CNN: BUS. (June 18, 2019, 11:51 AM), http://www.cnn.com/2019/06/18/investing/beyond-meat-stock/index.html.
218. *See* Griffith, *supra* note 216, at 585–86; Sjostrom, Jr., *supra* note 208, at 630. For a discussion of how the initial public offering ("IPO") price is determined and how insiders and underwriters advantaged. *See* Griffith, *supra* note 216, at 585–86.
219. *See* Griffith, *supra* note 216, at 601.
220. *Id.*
221. *See id.* at 594; Sjostrom, Jr., *supra* note 208, at 631.

often paying well above the offering price, and often several multiples above the price paid by these insiders.[222] If the insiders choose to hold their stock, they maintain, for all practical purposes, control of the corporate purse strings with access to liquidity.[223] This unique system permits the average public investor to be disadvantaged and perhaps duped.[224] There are many reasons why the system works this way, but by in large the system works this way to benefit the insiders.[225] The SEC looks away while Wall Street, in effect, often rips off the corporation issuing stock and the small investor.* For example, the investment banker reduces its potential liability to purchasers of stock under section 11 of the '33 Act, in the event of a misstatement in the prospectus in that it has no liability so long as the stock does not fall below the initial offering price.[226] Whatever justifications are made for the system, it is a bad system that requires a new look and more regulation.*

Not only do stock markets not raise capital after the IPO, but some companies go public without raising any capital for the corporation.[227] Chewy recently went public and jumped in price immediately, but the funds raised in the IPO went primarily to pay off debt of a major shareholder, PetSmart, and not into the coffers of Chewy.[228] The money was not used to build new distribution centers or better automate deliveries.[229] It was not spent on computers or software.[230] It was not even spent to pay the direct debt obligations of the company.[231] Investment bankers and traders create a mindset divorced from reality.[232] In effect, this kind of IPO is a *scam*.[233] In the Chewy case, the scam was fully disclosed, and therefore passed muster under the '33 Act.[234] There, of course, is the problem.* How could the SEC approve a scam?* Investors who buy shares in the new public company after

222. *See* Griffith, *supra* note 216, at 585–86.
223. *See* Sjostrom, Jr., *supra* note 208, at 633.
224. *See* Griffith, *supra* note 216, at 630.
225. *Id.* at 601; Sjostrom, Jr., *supra* note 208, at 633.
226. *See* Securities Act of 1933, 15 U.S.C. § 77k (2018); Sjostrom, Jr., *supra* note 208 at 633.
227. *See* Jansen, *supra* note 217.
228. *See id.*
229. *See id.*
230. *See id.*
231. *See id.*
232. *See* Griffith, *supra* note 216, at 643–44.
233. *See id.* at 642–43.
234. *See* Securities Act of 1933, 15 U.S.C. § 77d (2018); Lauren Hirsch & Leslie Picker, *Chewy.com, PetSmart's Online Business, Prices IPO at $22 a Share, Above Expected Range*, CNBC (June 14, 2019, 9:17 AM), http://www.cnbc.com/2019/06/13/petsmarts-online-business-chewycom-prices-ipo.html.

the public offering are not raising capital.[235] They are participating in a perpetual poker game where sometimes they win, sometimes they lose, or sometimes they stop playing.[236] An IPO benefits the founders of the company and insiders, who often realize immediate generational wealth (once the lock-up period ends).[237] Those who buy the stock in the market after a company goes public become participants in a perpetual poker game.[238]

Moreover, the sale of shares to the public in an IPO is buried in mystery, despite the one hundred page and longer, single-spaced offering documents that are required to be given to investors.[239] The average investor does not understand how unfair the system is to him or her.[240]

Capitalism is based on the idea that companies can raise money from the public in order to compete in the marketplace.[241] But if the company raises money that does not go to the company, what was the point of the offering?[242] Of course, some money can theoretically be raised after a public offering.[243] A company can sell additional shares and dilute its stock price, but other than that, the price moves on the market do not provide capital.[244] The company can sell debt, but that has to be repaid with interest.[245] But otherwise, the market, with its wild fluctuations, ceases raising working capital for property, plants, equipment, and research and development.[246] It is in many ways, as noted above, a place to make a bet.[247] The SEC has not addressed this aspect of publicly traded stocks.[248]

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235. *See* Griffith, *supra* note 216, at 630–32.

236. *See* Egan, *supra* note 73.

237. Alon Brav & Paul A. Gompers, *The Role of Lockups in Initial Public Offerings*, 16 REV. FIN. STUD. 1, 1 (2003). The lock-up period is intended to prevent insiders from selling their shares at the same time as the IPO and requires them to hold their shares before selling in the public markets for a period of six months. *Id.* at 3. One theory for having a lock-up period is to prevent insiders from dumping their shares into the public markets and perhaps profiting from an overpriced IPO. *Id.* at 4–5. In fact, the lock-up period may benefit insiders if the IPO price is set too low and the stock price rises following the IPO. *Id.*

238. *See* Egan, *supra* note 73.

239. *See* Securities Act of 1933, 15 U.S.C. § 77d-1(b).

240. *See* Brav & Gompers, *supra* note 237, at 5.

241. *See id.* at 23.

242. *See id.* at 26–27.

243. *See id.* at 19.

244. *See id.*; Fried, *supra* note 74, at 1385.

245. *See About Short Selling*, *supra* note 113.

246. *See* Griffith, *supra* note 216, at 635.

247. Brav & Gompers, *supra* note 237, at 18.

248. *See id.* at 27.

The SEC should look at attempts to issue stocks to raise capital and make sure the public investors will have their funds used to benefit the company, and not some other entity, or a private investment firm.[249] The SEC should also take steps to ensure that public companies selling stock obtain the most significant amounts obtainable.[250] The system, however, primarily protects the underwriters and insiders who profit in various ways from having companies issuing stock at too low of a price.[251] Underwriters are often compensated in whole or in part with stock of the issuer; if the underwriter is paid in stock based on the initial offering price and the stock immediately rises when the offering begins, the underwriter's profit is dramatically increased; for example, if the offering is priced at $100 and the underwriter receives ten shares (i.e. $1000) based on this price, if the stock immediately trades at $200, the underwriter can sell its stock and get $2000 rather than the contemplated $1000.[252] Insiders receive shares valued at the offering price, but they are not allowed to sell their shares immediately because the SEC wants to disincentive insiders who price an IPO at too high a price, then sell it in the IPO and see the price drop thereafter, thereby profiting from the overpriced IPO.[253] However, in practice, it is not clear that this is a current risk.[254] Conversely, when an IPO is underpriced, the insider is likely to benefit from a higher price after the lockup period ends.[255] The interests of the actual issuing corporation or the average investor is not a predominant interest.[256]

Additionally, public offerings are subject to what appear to be irrational and perhaps manipulated prices.[257] A company like Beyond Meat might sell its stock at $25 a share, but a few minutes later, the stock price may be $50 a share or more.[258] It may rise to $100 or even $200 in a few days or a few weeks.[259] The company gets its $25.[260] Who gets the rest?[261]

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249. *See id.* at 23.
250. *See id.*
251. Griffith, *supra* note 216, at 592–93.
252. *See id.* at 593–95.
253. *See id.* at 585–86.
254. *See id.* at 587.
255. *See id.* at 589–90.
256. *See* Griffith, *supra* note 216, at 634–35 n.177; Therese H. Maynard, *Spinning in a Hot IPO — Breach of Fiduciary Duty or Business as Usual?*, 43 WM. & MARY L. REV. 2023, 2080–81 (2002).
257. *See* Griffith, *supra* note 216, at 592–93.
258. La Monica, *supra* note 217.
259. *Id.*
260. *See id.*; Griffith, *supra* note 216, at 599–600.
261. *See* Griffith, *supra* note 216, at 599–600; La Monica, *supra* note 217.

Speculative traders, high frequency traders, ATS, dark pool traders, and the insiders and underwriters all have a field day.[262] Institutions that get in at the $25 price make a killing.[263] Usually, relatively few shares are offered to the investing public, and usually these shares go to special customers designated by successful stock brokers.[264] Those who were not able to buy Beyond Meat at its offering price, but did want to own it, paid a tremendous premium.[265] The SEC never seems to look at this.*

How are IPO shares marketed?[266] A sophisticated *road show* goes out and provides institutions, and other broker-dealers, with glowing reports on the prospects of the company.[267] Brokerage firms, especially those who are part of the underwriting group, recommend the security to their investors, big and small.[268] They create the hype that leads to the company getting $25 a share, while the stock trades at twice that—and costs average investors twice as much—in a few minutes.[269]

2. How Can the SEC Better Regulate IPOs

The problem suggests the cure.[270] First, SEC regulations should better protect the issuer.[271] The newly public shares should be sold to investors by the issuer, not by underwriters.[272] This way, the issuer gets more of the money and potentially a much better price.[273] The issuer could be empowered to directly fill orders on purchases of the stock during the first week, two weeks, or month of the offering.[274] Alternatively, for a period of time after the start of the IPO, half the shares bought after the IPO begins could be required to be filled by the issuer, and the other half from the market.[275] If the market price goes up, then the issuer will benefit.[276] The

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262. Johnson, *supra* note 72, at 836–38; *see also* Griffith, *supra* note 216, at 599–600; La Monica, *supra* note 217.
263. *See* La Monica, *supra* note 217.
264. Griffith, *supra* note 216, at 630–31.
265. *See* La Monica, *supra* note 217.
266. *See* Griffith, *supra* note 216, at 585.
267. *Id.* at 613 n.105; *see also* Solomon & Wilke, *supra* note 39, at 516 n.42.
268. Griffith, *supra* note 216, at 619–20; *see also* Solomon & Wilke, *supra* note 39, at 513.
269. *See* Griffith, *supra* note 216, at 619–20; La Monica, *supra* note 217.
270. *See* Aguilar, *supra* note 47.
271. *Id.*
272. *See id.*; Sjostrom, Jr., *supra* note 208, at 641–43.
273. *See* Sjostrom, Jr., *supra* note 208, at 641–43; Aguilar, *supra* note 47.
274. *See* Griffith, *supra* note 216, at 622; Aguilar, *supra* note 47.
275. *See* Griffith, *supra* note 216, at 609–10; Aguilar, *supra* note 47.
276. *See* Griffith, *supra* note 216, at 609–10.

shares purchased by investors can then be traded by them on the market.[277] If the market price rises, the issuer will have an opportunity to sell shares at the higher price, rather than let the insiders benefit from having the inside track if the stock rises precipitously.[278] This type of regulation would certainly disadvantage Wall Street investment firms and cost them a lot in profits, but it would prevent some of the current problems and create a fairer market for all market participants.[279] The SEC should also consider placing limits on what a company that issues stock to the public can do with the money.[280] How much should underwriters receive?[281] How much of the money raised should be available for uses other than corporate expansion?[282] How much IPO money should be available to pay off the debts of the company rather than invest in property, plant, equipment, research and development, and other purposes that could lead to growth?[283] The use of proceeds proposed by the issuer could also be made subject to shareholder approval shortly after the IPO is complete.[284]

Regulations should be enacted that require all IPO funds to go only into the coffers of the company issuing stock.[285] Chewy should get all the proceeds, not some other entity.[286] The SEC should never approve Chewy-type sales and should create regulations preventing this from reoccurring.[287]

The SEC or Congress might consider evaluating a rule that a percentage of short-term IPO profits go back to the issuer.[288] So, if an IPO purchaser sold its shares for a 100% gain within five days of the IPO, perhaps 25% of that gain could be remitted back to the issuer.[289] The SEC could and should better regulate and monitor road shows.[290] Underwriters should be better regulated so that they do not establish new issue prices that are unrealistically low and unfair to the issuer.[291]

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277. *See id.*
278. *See id.*
279. *See id.* at 608–11.
280. Beattie, *supra* note 1; *What We Do*, *supra* note 1.
281. *See* Griffith, *supra* note 216, at 590–92.
282. *See* Hirsch & Picker, *supra* note 234; Jansen, *supra* note 217.
283. *See* Hirsch & Picker, *supra* note 234; Jansen, *supra* note 217.
284. *See* Jansen, *supra* note 217.
285. *See id.*; Hirsch & Picker, *supra* note 234.
286. *See* Hirsch & Picker, *supra* note 234; Jansen, *supra* note 217.
287. *See* Hirsch & Picker, *supra* note 234; Jansen, *supra* note 217.
288. *See* Jansen, *supra* note 217.
289. *See id.*
290. Griffith, *supra* note 216, at 613–15.
291. *Id.*

F. *Online Day Trading Causes Additional Problems to Market Integrity*

1. How Can Online Trading Negatively Impact Investors

Another area that is underregulated, or not regulated, is certain forms of online trading.[292] Online day trading by poorly capitalized and poorly trained individuals is akin to going to the racetrack with a racing form book.[293] Because of the factors creating market volatility, amateur day traders are at great risk, but the SEC has little or no interest in this group.[294] The public is often bombarded by e-trade companies and e-trade *training course* advertisements that suggest that the average investor can become a successful day trader.[295] In one recent television ad, a disgruntled employee who does not get a raise is told not to get mad, but get even, by turning to her online trading account at her office computer to make more money and improve her financial situation.[296] Another commercial highlights that some online firms charge lower interest on margin loans than some larger broker-dealers.[297] This encouragement of online trading is absurd.[298] Many, if not most, inexperienced and amateur day traders are singularly unsuccessful.[299]

The SEC has done little to regulate online trading, despite its many pitfalls.[300] The SEC and FINRA suitability rules state that a broker can only

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292. *See* Rob Daly, *FIMSAC Recommends E-Trading Regulatory Reform*, MARKETS MEDIA (July 17, 2018), http://www.marketsmedia.com/fimsac-recommends-e-trading-regulatory-reform. Online trading involves trading by an investor who opens an account on his or her computer and enters orders without the assistance of a broker. *See* Lisa Smith, *Basics of the Mechanics Behind Electronic Trading*, INVESTOPEDIA (Aug. 14, 2019), http://www.investopedia.com/articles/investing/110713/basics-mechanics-behind-electronic-trading.asp. Many companies, including E-Trade, Vanguard, Fidelity, Schwab, and many full-service broker-dealers offer this product. *See id.* Typically, commissions are a small fraction of the cost of trading with a full-service broker-dealer such as Merrill Lynch or JP Morgan. *See Online Trading*, INVESTOPEDIA ACAD., http://academy.investopedia.com/collections/online-trading (last visited May 1, 2020).

293. *See* Neale Godfrey, *Day Trading: Smart or Stupid?*, FORBES (July 16, 2017 8:44 AM), http://www.forbes.com/sites/nealegodfrey/2017/07/16/day-trading-smart-or-stupid.

294. *See id.*

295. *See* Eillie Anzilotti, *E-Trade's New Ad Campaign Is Everything That's Wrong with Capitalism*, FAST COMPANY (June 20, 2017), http://www.fastcompany.com/40433517/e-trades-new-ad-campaign-is-everything-thats-wrong-with-capitalism.

296. *Id.*

297. *See id.*

298. *See id.*

299. *See* Godfrey, *supra* note 293.

300. *See* Daly, *supra* note 292.

make a recommendation that is *suitable* or appropriate to an investor given his or her financial situation, risk tolerance, age, income, and assets.[301] However, these rules do not apply to online trading because the brokerage firm does not recommend an investment to an online trading account.[302] Thus, day trading is an unregulated poker game full of great risk.[303]

2. The SEC Should Better Regulate Online Trading

The SEC could promulgate rules and regulations to protect some of the public from the risks and evils of online day trading.[304] It could require online non-professional customers to certify to a particular net worth that is not exposed to market risk.[305] This way, smaller, less knowledgeable investors could avoid risking their rainy day funds in online trading.[306] It could require disclosures that online trading involves special risks and greater risk of loss than do non-online brokerage accounts.[307] It could require online orders to have a legend reminding investors that online trades have significant risks and that online investors should not invest more than a small portion of their assets in online trading.[308] It could require all online trades to be placed as *limit orders* so online traders can minimize the risks of being victims to a pump-and-dump or other manipulation or market maker misconduct.[309] Online traders should not be allowed to enter market orders

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301. *2111. Suitability*, FINRA, http://www.finra.org/rules-guidance/rulebooks/finra-rules/2111 (last visited May 1, 2020).

302. *See* Daly, *supra* note 292.

303. *See id.*; Godfrey, *supra* note 293.

304. *Statement on Potentially Unlawful Online Platforms for Trading Digital Assets*, U.S. SEC. & EXCHANGE COMMISSION (Mar. 7, 2018), http://www.sec.gov/news/public-statement/enforcement-tm-statement-potentially-unlawful-online-platforms-trading.

305. *See Guide to Broker-Dealer Registration*, U.S. SEC. & EXCHANGE COMMISSION (Dec. 12, 2016), http://www.sec.gov/reportspubs/investor-publications/divisionsmarketregbdguidehtm.html.

306. *See* Amy Fontinelle, *Safe and Liquid Options to Invest Your Emergency Fund on*, INVESTOPEDIA (Feb. 14, 2019), http://www.investopedia.com/ask/answers/13/safe-liquid-investment-for-emergencies.asp.

307. *See id.*; *Online Trading FAQ*, FINRA, http://www.finra.org/investors/learn-to-invest/advanced-investing/online-trading-faq (last visited May 1, 2020).

308. *See* Fontinelle, *supra* note 306; *Online Trading FAQ*, *supra* note 307; *Tips for Online Investing: What You Need to Know About Trading in Fast-Moving Markets*, U.S. SEC. & EXCHANGE COMMISSION (Aug. 1, 2007), http://www.sec.gov/reportspubs/investor-publications/investorpubsonlinetipshtm.html.

309. *See Tips for Online Investing: What You Need to Know About Trading in Fast-Moving Markets*, *supra* note 308.

when markets are closed.[310] When the market is closed and an order is placed, the stock can open many times higher than an investor might anticipate, especially if a market maker sees the order before the opening.[311] The SEC can also ban margin trading in online accounts or require online investors to have a certain amount of assets in their accounts before they can invest on margin or increase margin requirements for online traders.[312]

G. *Failure to Oversee Corporate Dividend Practices*

1. The SEC Does Not Protect Investors from Companies that Do Not Pay Dividends

Another area that is underregulated lies in the dividend payments made by large corporations.[313] Corporations, no matter how profitable, are not required to issue any dividends.[314] Many of the largest most profitable companies do not do so; although, historically, investors who reinvest dividends in a stock often have ended up with a high-performing asset.[315] Other companies pump up their stock price by paying dividends that may not be sustainable because most of their earnings are depleted by dividend payments.[316] If a company earns $1 per share and pays out a dividend of $0.60 or $0.75 per share, it is likely to have to lower its dividends when its earnings decline.[317] In the meantime, if the $1 per share dividend is paid on a stock selling for $20 per share, the dividend yield is 5% of market value

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310. *See* Brian Beers, *What Is After-Hours Trading and Can You Trade at This Time?*, INVESTOPEDIA (Feb. 1, 2020), http://www.investopedia.com/ask/answers/after-hours-trading-am-i-able-to-trade-at-this-time/.

311. *See id.*

312. *See Online Trading*, *supra* note 307; *Tips for Online Investing: What You Need to Know About Trading in Fast-Moving Markets*, *supra* note 308.

313. *See* Tom Streissguth, *Do Corporate Stockholders Have a Right to Dividends?*, CHRON, http://smallbusiness.chron.com/corporate-stockholders-right-dividends-61653.html (last visited May 1, 2020).

314. *Id.* Directors generally have very broad discretion regarding whether or not the corporation will pay a dividend. *See id.*; MODEL BUS. CORP. ACT § 6.23 (2016). For example, Amazon and Google do not currently pay dividends, although they earn around $50 per share. *See AMZN: Amazon.com, Inc. Common Stock*, NASDAQ, http://www.nasdaq.com/market-activity/stocks/amzn (last visited May 1, 2020).

315. Amy Fontinelle, *Companies That Pay Dividends — and Those That Don't*, INVESTOPEDIA (Oct. 3, 2019), http://www.investopedia.com/ask/answers/12/why-do-some-companies-pay-a-dividend.asp.

316. Boyte-White, *supra* note 149.

317. *See id.*

and many investors, deluded by this high rate of return, believe the stock is safe, when in fact, it may be far from safe.[318]

2. How Can the SEC Facilitate the Payment of Dividends for Investors

The SEC should undertake to study dividends and devise rules to make them more economically efficient and to make the markets more efficient.[319] The purpose of the SEC is to protect shareholders.[320] Assuring them dividends is one way to do that.[321] Financially-realistic dividends help support stock prices and reward investors.[322] Perhaps all companies with earnings should pay dividends to their owners.[323] Perhaps no company should be permitted to pay a dividend that uses up to 50% or 33% or more of its profits to pay them.[324] Perhaps stock buybacks, discussed above, should not be permitted unless the company is also paying a dividend.[325] One way to accomplish these steps would be to require shareholder approval if the corporation wishes to deviate from the guidelines.[326] If the shareholders vote to receive no dividends, that would be their decision.[327] Again, boards of directors would also be more likely to work within a dividend framework to avoid shareholder votes.[328]

H. *The SEC Fails to Protect Investors from Broker-Dealers Who Fail to Pay Settlements and Arbitration Awards*

Investors are inadequately protected from recovering amounts awarded to them in arbitration or in settlements with SEC and FINRA

318. *See id.*
319. *See* Aguilar, *supra* note 47.
320. *What We Do*, *supra* note 1.
321. *See id.*; Boyte-White, *supra* note 149.
322. Boyte-White, *supra* note 149.
323. *See id.*
324. *See* Linker, *supra* note 200.
325. *See id.*; Boyte-White, *supra* note 149.
326. *See* Lucian A. Bebchuk & Robert Jackson, *The Re-Introduction of the Shareholder Protection Act*, HARV. L. SCH. F. CORP. GOVERNANCE (July 14, 2011), http://www.corpgov.law.harvard.edu/2011/07/14/the-re-introduction-of-the-shareholder-protection-act/.
327. *See* Boyte-White, *supra* note 149.
328. *See id.*

registered brokerage firms.[329] Most customer claims against brokerage firms must be filed as arbitrations before FINRA.[330] For example, FINRA has tracked tens of millions of dollars of awards to customers who are never able to collect.[331] While there have been discussions about how to address this issue, nothing effective has been done.[332] For example, FINRA and the SEC continue to permit brokerage firms to be licensed with a minimal net capital that subjects investors to the risk of unpaid arbitration awards.[333] The rules require a minimum net capital of only $250,000 and do not permit debts to exceed net capital by 1500%.[334] FINRA and the SEC could easily impose a significant minimum net capital requirement for all firms, an increased net capital requirement, and decrease the permitted ratio of debt to net capital.[335] Much investor abuse is caused by small undercapitalized firms who operate bucket shops that engage in significant fraudulent activities.[336] Absurdly, the SEC permits firms that cease to be active to maintain no net capital, which also permits firms to avoid paying customer settlements and arbitration awards; thus, FINRA defines an *inactive member* as a "member . . . not subject to a net capital requirement so long as he [or she] is not conducting or engaged in the securities business."[337]

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329. *Statistics on Unpaid Customer Awards in FINRA Arbitration*, FINRA, http://www.finra.org/arbitration-mediation/statistics-unpaid-customer-awards-finra-arbitration (last visited May 1, 2020).

330. *See id.*

331. *Id.* Customers are, in the aggregate, deprived of over $100 million in awards in their favor or in settlements agreed to by a broker-dealer. *See id.* Some of these awards are entered on default when the broker-dealer fails to appear. *See id.* FINRA has no rules that sanction a broker-dealer for failing to appear at an arbitration proceeding. *Statistics on Unpaid Customer Awards in FINRA Arbitration*, *supra* note 329. It would seem to be very feasible to permanently bar a firm and its principals from the securities industry for failing to appear at an arbitration. *See id.*

332. *Id.*

333. *See* FTC Credit Practices Rule, 17 C.F.R. § 240.15c3-1 (2019).

334. *Id.*

335. *See id.*; *What Is the 1933 Securities Act?*, *supra* note 18.

336. *See Stratton Oakmont*, WIKIPEDIA, http://en.wikipedia.org/wiki/Stratton_Oakmont (last visited May 1, 2020).

337. 17 C.F.R. § 240.15c3-1b; FINRA, NET CAPITAL REQUIREMENTS FOR BROKERS OR DEALERS SEA RULE 15C3-1, 2 (2014). If the SEC required a broker-dealer to maintain its net capital for a year or two after it ceased engaging in the securities business, it would provide some protection to customers and avoid bucket shop owners from withdrawing their capital and then starting anew, leaving their customers with little or no chance of obtaining money owed to them. *See* FINRA, *supra*, at 2.

I. *Bitcoin and Other Cryptocurrencies*

1. Bitcoin Is a Totally Unregulated Security

Bitcoin and the like appear to be a widespread and widely accepted Ponzi scheme.[338] These *currencies* are neither backed by the full faith and credit of any country, nor are they backed by gold, silver, or any other precious metal.[339] They are not backed by any currency.[340] They simply circulate as a substitute for currency and on some irrational basis that fluctuates greatly in value.[341] They are also *securities* in every sense of the word.[342]

These *cryptocurrencies* have been widely criticized by many and have led to some increasing demands for regulatory action, but they continue to be popular and unregulated.[343] They are also suspected to be a popular way for money launderers, drug cartels, criminal organizations, tax cheats, and the like to go about their business undetected.[344] While the United States has required a huge expenditure by brokerage firms and banks on Anti-Money Laundering ("AML") regulations and often investigates—and devotes many enforcement efforts to some of the minute regulation violations—AML compliance, cryptocurrency is allowed to circumvent and eviscerate all of the AML compliance efforts.[345] Why they are not regulated is inexplicable.[346] They are *Kryptonite* type investments.[347] One must also

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338. Michael Mendelson, *From Initial Coin Offerings to Security Tokens: A U.S. Federal Securities Law Analysis*, 22 STAN. TECH. L. REV. 52, 54 (2019).

339. *See id.* at 74.

340. *Id.*; *Bitcoin: Is It Only Your Cryptocurrency or Tax Kryptonite?*, GAVRILOV & CO., http://www.gavrilovandco.com/bitcoin-cryptocurrency-tax-kryptonite/ (last visited May 1, 2020).

341. *See* Mendelson, *supra* note 338, at 59.

342. *See id.* at 52, 65, 67; SEC v. W.J. Howey Co., 328 U.S. 293, 297 (1946); *Securities Regulation — Financial Technology — SEC Provides Analytical Tools for Assessing Digital Assets — SEC, Framework for* Investment Contract *Analysis of Digital Assets*, 132 HARV. L. REV. 2418, 2418 (2019) (discussing what the SEC has done regarding cryptocurrency and its limited effort to apply *Howey* to cryptocurrency).

343. *See* Mendelson, *supra* note 338, at 54, 59.

344. *See* JAY B. SYKES & NICOLE VANATKO, CONG. RESEARCH SERV., R45664, VIRTUAL CURRENCIES AND MONEY LAUNDERING: LEGAL BACKGROUND, ENFORCEMENT ACTIONS, AND LEGISLATIVE PROPOSALS 1, 6–7, 9–10 (2019) (discussing the use of cryptocurrencies by criminal enterprises).

345. *See id.* at 2, 11. AML regulations are codified in FINRA Rule 3310 and the Bank Secrecy Act. 31 U.S.C. § 5311 (2018); *3310. Anti-Money Laundering Compliance Program*, FINRA, http://www.finra.org/rules-guidance/rulebooks/finra-rules/3110 (last visited May 1, 2020).

346. SYKES & VANATKO, *supra* note 344, at 11–12.

wonder if cryptocurrencies will at some point be accepted as payment for securities trades by some broker-dealers.[348] If this happens, the capital of brokerage firms and the firms' survival will be at great risk.[349]

2. How Can Cryptocurrency Be Regulated

Because sales of cryptocurrency are sales of security, they should be subject to registration under the '33 Act.[350] It is submitted that cryptocurrencies sold to date were sold illegally.[351] In addition, a cryptocurrency sold to the public should be required to be backed by actual assets.[352] Moreover, at some point, if not already, cryptocurrency could be used to make stock market purchases.[353] This will put broker-dealers and contra parties at an enormous risk of failure.[354] A firm that is paid $1,000,000 in cryptocurrency for the delivery of shares of stock to another party rapidly depletes its capital if the cryptocurrency drops 20% in the first minute after the receipt of it.[355] This should not be permitted.[356]

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347. *Bitcoin: Is It Only Your Cryptocurrency or Tax Kryptonite?*, *supra* note 340.

348. *See* Mendelson, *supra* note 338, at 67–68.

349. *Id.* at 52–53.

350. *Id.* at 67; *see also* Securities Act of 1933, 15 U.S.C. § 77e (2018).

351. *See* 15 U.S.C. § 77e(c); Mendelson, *supra* note 338, at 67.

352. *See Asset Backed Cryptocurrency: Let's Talk Real Estate, Oil, Diamonds & More*, CRYPTOSIS (Mar. 14, 2019), http://www.cryptosis.io/asset-backed-cryptocurrency/; Zvi Gabbay, *Asset-Backed Digital Currencies: Advantages and Challenges*, BARNEA: BLOG (July 1, 2018), http://www.barlaw.co.il/blog/technology/asset-backed-digital-currencies-advantages-and-challenges/; *What Are Asset-Backed Cryptocurrencies?*, WORLD CRYPTO INDEX, http://www.worldcryptoindex.com/asset-backed-cryptocurrencies/ (last visited May 1, 2020).

353. *See* Mendelson, *supra* note 338, at 67–68; *Asset Backed Cryptocurrency: Let's Talk Real Estate, Oil, Diamonds & More*, *supra* note 352.

354. *See* Gabbay, *supra* note 352.

355. *See Bitcoin: Is It Only Your Cryptocurrency or Tax Kryptonite?*, *supra* note 340; Paul Vigna & Eun-Young Jeong, *Cryptocurrency Scams Took in More than $4 Billion in 2019*, WALL STEET J.: MARKETS (Feb. 8, 2020, 1:00 PM), http://www.wsj.com/articles/cryptocurrency-scams-took-in-more-than-4-billion-in-2019-11581184800.

356. *See Bitcoin: Is It Only Your Cryptocurrency or Tax Kryptonite?*, *supra* note 340; Vigna & Jeong, *supra* note 355.

III. WHY ARE THE REGULATORS FAILING TO PROVIDE NEEDED OVERSIGHT?

A. *The SEC Revolving Door, Staff Conflicts of Interest, and the Power of Money in Politics*

The fact that the regulators do not address many of the most salient problems of the stock market is due to a number of factors.[357] In large part, the regulators, including the SEC, are not focused on the real problems.[358] They ignore what is happening and what will happen and focus on putting their fingers in the dikes that have sprung a leak.* They do not see the rising river behind the dikes that will soon destroy the markets.*

Why?* One must speculate somewhat on this.* But it seems clear that the regulators focus on the irrelevant because they are encouraged to do so by Wall Street.[359] The SEC has become the gateway to high-paying jobs for its staff.[360] SEC staff members and supervisors almost inevitably leave the SEC to join Wall Street firms or law firms that service Wall Street.[361] The *revolving door* creates a serious risk of potential conflicts of interest.[362] The SEC recognizes the problem and has adopted rules regarding practice before the SEC by former SEC employees, but these rules have little practical effect.[363] FINRA has a revolving door rule, but it is far weaker than the SEC rule.[364]

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357. *See* Norman S. Poser, *Why the SEC Failed: Regulators Against Regulation*, 3 BROOK. J. CORP. FIN. & COM. L. 289, 309–10 (2009).

358. *See id.* at 290.

359. *See* Jason M. Breslow, *Is SEC* Fearful *of Wall Street? Agency Insider Says Yes*, PBS: FRONTLINE (Apr. 8, 2014), http://www.pbs.org/wgbh/frontline/article/is-sec-fearful-of-wall-street-agency-insider-says-yes/; Jeff Stein, *As Bank Profits Soar, Wall Street's Political Spending Hits New High*, WASH. POST: BUS. (Apr. 30, 2019, 8:00 AM), http://www.washingtonpost.com/business/2019/04/30/bank-profits-soar-wall-streets-political-spending-hits-new-high/.

360. *See* Breslow, *supra* note 359.

361. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-654, SECURITIES AND EXCHANGE COMMISSION: EXISTING POST-EMPLOYMENT CONTROLS COULD BE FURTHER STRENGTHENED 1 (2011).

362. *See id.* The phrase, *revolving door* is one used by the SEC. *Id.* at 2 (quoting Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 968, 124 Stat. 1376, 1914 (2010) (codified as amended at 12 U.S.C. §§ 5301–5641)).

363. *See id.* at 1. The SEC revolving door or conflict rule is embodied in 17 C.F.R. § 200.735-8. *See* 17 C.F.R. § 200.735-8 (2019). It permits applications for waivers of the rule. *Id.*; *see also* U.S. SEC. & EXCH. COMM'N, RULES OF PRACTICE AND RULES ON FAIR FUNDS AND DISGORGEMENT PLANS 9–10 (2018). The Dodd Frank Act mandated further review of the SEC revolving door policies. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5346 (2018); U.S. GOV'T ACCOUNTABILITY OFF., *supra*

The SEC often hires bright young lawyers out of law school who often do not know a stock from a bond, and it sends them out on witch hunts, which are pursued in lieu of dealing with the real hardcore issues facing the market.[365] After a few years, the SEC staff member or supervisor trades in his or her badge and switches sides.[366] The new staff knows how their career path is laid out so they continue with witch hunts and ignore the bigger issues.[367] They play nice with former regulators who are now prospective employers.[368] This can be conscious or subconscious, but it is hard to avoid, and may be difficult to detect or quantify.[369] If things work out, the departed staffer, having later given employment to many more staffers, may return to the SEC or FINRA in a more senior role, maybe even a Deputy Commissioner or Commissioner, or head of a department at FINRA.[370] FINRA is a regulatory body overseen by the SEC and handles many enforcement actions in the first instance.[371] Notably, in many cases the SEC and FINRA fail to coordinate their activities and bring their own cases against individuals and broker-dealers for the very same misconduct.[372] This wastes resources and diverts attention from other serious issues.*

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note 361, at 1, 24–25. FINRA rules were strengthened somewhat in late 2018 but are still weaker than the SEC rules. *See* 5 C.F.R. § 2641.201 (2019). Federal conflict laws do not appear to prohibit behind-the-scenes participation in matters before one's former government employer. *See id.*

364. *See 9910. Post-Employment Conflict of Interest Restrictions; Nonpublic Information*, FINRA, http://www.finra.org/rules-guidance/rulebooks/finra-rules/9910 (last visited May 1, 2020). FINRA rules were strengthened somewhat in late 2018 but are still weaker than the SEC rules. *See id.*; 18 U.S.C. § 207 (2018). Notably, federal conflict laws permit behind the scenes participation in matters before one's former government employer. *See* 5 C.F.R. 2641.201.

365. *See* Ed deHaan et al., *The Revolving Door and the SEC's Enforcement Outcomes: Initial Evidence from Civil Litigation*, J. ACCT. & ECON., Nov.–Dec. 2015, at 65, 66; Lanning Taliaferro, *Former Informer Accuses SEC of Fraud, Witch Hunt*, PATCH (July 10, 2017, 12:57 PM), http://www.patch.com/new-york/southeast/putnam-man-still-fighting-sec-over-stock-manipulation-case.

366. *See* 18 U.S.C. § 207.

367. *See* Taliaferro, *supra* note 365.

368. CHING-HUNG CHANG ET AL., REVOLVING-DOOR DIRECTORS AND FINANCIAL OPACITY 2–3 (2018).

369. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 361, at 14.

370. *See Chairman Jay Clayton*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/biography/jay-clayton (last visited May 1, 2020); *FINRA Executives*, FINRA: ABOUT FINRA, http://www.finra.org/about/governance/finra-executives#finance (last visited May 1, 2020).

371. *What We Do*, *supra* note 1.

372. *See* SEC v. Pasternak, 561 F. Supp. 2d 459, 470–71 (D.N.J. 2008); FINRA, DECISION, COMPLAINT NO. CLG050021 (Mar. 3, 2010).

After a few years at the SEC and perhaps at FINRA—which pays much better than the SEC—these positions become a new bigger meal ticket with a larger office and higher compensation at a large brokerage firm, law firm, or public company, where representation before the SEC or FINRA is the basis for success and very lucrative incomes.[373] The reason why the SEC and FINRA are, or at least often appear to be, lax on major financial institutions probably has these conflicts as its root cause, or at least one of its root causes.[374] Senior executives very rarely face criminal prosecutions for shady and often disastrous policies.[375] The staffer who wants to go up the ladder of corporate wrongdoing and go after top executive malfeasance will become a lifetime staffer.*

In the Madoff case, Bernie Madoff, a former NASD chairman, falsely reported to his clients billions in profits that were fictitious.[376] The SEC and FINRA both failed to discover his gross malfeasance, despite several red flags and warnings.[377] Madoff was part of the club, and the examiners sent to check his books and records knew that and were completely lax.[378] A conflict of interest decision involving SEC General Counsel David N. Becker and negligence on the part of several SEC staffers also contributed to the survival of the scheme, but no SEC officials were terminated.[379]

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373. *See SEC Compensation Program*, U.S. SEC. & EXCHANGE COMMISSION: ABOUT, http://www.sec.gov/ohr/sec-compensation (last visited May 1, 2020).

374. *See* David S. Hilzenrath, *Eight SEC Employees Disciplined Over Failures in Madoff Fraud Case; None Are Fired*, WASH. POST: BUS. (Nov. 11, 2011), http://www.washingtonpost.com/business/economy/seven-sec-employees-disciplined-on-failure-to-stop-madoff-fraud/2011/11/10/gIQA3kYYCN_story.html.

375. *See id.*

376. United States v. Madoff, 586 F. Supp. 2d 240, 244 (S.D.N.Y. 2009); *see also* BRIAN ROSS, THE MADOFF CHRONICLES: INSIDE THE SECRET WORLD OF BERNIE AND RUTH 103–04 (2016) (discussing the Madoff case and the failures of the SEC and FINRA to detect the massive Ponzi scheme); *Ex-Nasdaq Chair Arrested for Securities Fraud*, CNN: MONEY (Dec. 12, 2008, 6:22 AM), http://www.money.cnn.com/2008/12/11/markets/madoff_fraud/ (discussing that Madoff was chairman of the NASD). The NASD is now known as FINRA. Kagan, *supra* note 21. As some of the above articles point out, Madoff's CPA firm consisted of a sole practitioner working out of his garage in New Jersey, a red flag to anyone (except, apparently, the SEC and FINRA). *Madoff Accountant Charged with Fraud*, GUARDIAN: NEWS (Mar. 18, 2009, 7:10 PM), http://www.theguardian.com/business/2009/mar/18/madoff-accountant-charged.

377. *See* ROSS, *supra* note 376, at 103–08.

378. *See id.*

379. *See* U.S. SEC. & EXCH. COMM'N, INVESTIGATION OF CONFLICT ARISING FROM FORMER GENERAL COUNSEL'S PARTICIPATION IN MADOFF-RELATED MATTERS 5 (2011) (discussing SEC General Counsel David N. Becker's conflicts regarding Madoff); Hilzenrath, *supra* note 374.

If our policemen were able to leave the force and become bank robbers, and then go back on the force as captains, only to leave to become even bigger bank robbers, most people would cry foul and advocate for change.* While this analogy is likely a gross exaggeration, an SEC commissioner or market regulation supervisor is a prime candidate for General Counsel or Director of Compliance at large financial institutions and for a partnership at a large law firm that pays its partners millions of dollars a year.[380] The staff knows that these ex-SEC officials will be their future employers.[381] It is not a good idea for a career-minded, ambitious SEC staff member to get on the wrong side of his or her future employer.[382] The SEC appears to attempt to protect this career path by—consciously or unconsciously—not taking on issues that are of the most concern to Wall Street, at least not unless a crisis of major consequence requires some window dressing-like action.[383] Criminal actions against corporate leaders who are wrongdoers are very, very rare.[384] So are large fines.[385] While there have been record fines in recent years against a few firms, such as those involved in the subprime mortgage crisis that led to the 2008 recession, these fines are rare and, although they involved some large dollars, are financially manageable by the firms involved.[386] They are hard slaps on the wrist, but that is all they are.[387] Wall Street lawyers are paid up to $1500 an hour or more for their time and earn their money by protecting these corporate leaders.[388]

Historically, the top leaders of the Wall Street club often get a pass from the regulators.[389] No major Wall Street leader was prosecuted for the acts leading up to the 2008 recession and collapse of Lehman and Bear Stearns.[390] Some years earlier, the *Keating Five*, which involved a number of United States Senators, including John McCain, Alan Cranston, and John

380. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 361, at 1.
381. *See id.* at 2.
382. *See id.*
383. *See id.* at 1; Hilzenrath, *supra* note 374.
384. *See* William D. Cohan, *How the Bankers Stayed Out of Jail*, ATLANTIC, Sept. 2015, at 20.
385. *See id.*
386. *Id.*
387. *See id.*
388. Sara Randazzo & Jacqueline Palank, *Legal Fees Cross New Mark: $1,500 an Hour*, WALL STREET J., Feb. 9, 2016, at A1.
389. *See* Joe Pinsker, *Why Aren't Any Bankers in Prison for Causing the Financial Crisis?*, ATLANTIC: BUS. (Aug. 17, 2016), http://www.theatlantic.com/business/archive/2016/08/why-arent-any-bankers-in-prison-for-causing-the-financial-crisis/496232/.
390. *See id.*; Randazzo & Young, *supra* note 62.

Glenn, helped Keating avoid regulation and detection of his fraudulent bank practices and permitted Keating to perpetuate the *Savings and Loan scandal*.[391] Keating sold millions of dollars of non-Federal Deposit Insurance Corporation ("FDIC") certificates of deposit with high-interest coupons to unsuspecting small account holders at his bank.[392] When he could no longer pay the interest, the bank failed and the investors had no FDIC insurance.[393]

Of course, Wall Street is a powerful political lobby and source of campaign funds for many politicians.[394] This also contributes to the ability of Wall Street to avoid regulations that will be detrimental to its financial interests and that negatively impact or weaken it.[395]

B. *The SEC Should Greatly Enhance Its Conflicts Rules with Respect to Its and FINRA's Revolving Door*

Someone who works for the SEC should not be able to change teams at will.[396] It can be argued that the minimal conflict rules of the SEC and FINRA do little or nothing.[397] They allow former staffers to involve themselves in many SEC matters, even if they may be barred for a short period from appearing before the SEC.[398] The SEC should close the revolving door and look harder at regulation.[399] Staffers wanting to leave can seek legal jobs outside of the industry, work on civil securities litigation

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391. MICHAEL BINSTEIN & CHARLES BOWDEN, TRUST ME: CHARLES KEATING AND THE MISSING BILLIONS 47, 389 (1993); *Keating Five*, WIKIPEDIA, http://www.wikipedia.org/wiki/keating_five (last visited May 1, 2020). The *Keating Five* included former Senators John McCain and Alan Cranston. *Keating Five*, *supra*. The *Five* often intervened with government regulators to protect Charles Keating. *Id.*

392. *Id.*; BINSTEIN & BOWDEN, *supra* note 391, at 47, 389.

393. BINSTEIN & BOWDEN, *supra* note 391, at 47, 389; *Keating Five*, *supra* note 391.

394. Stein, *supra* note 359.

395. *See id.* (discussing Wall Street's lobbying expenditures).

396. *9910. Post-Employment Conflict of Interest Restrictions; Nonpublic Information*, *supra* note 364.

397. *See* Bill Singer, *Securities Industry Commentator*, BROKERANDBROKER: WALL STREET LEGAL & REG. FEED (Oct. 25, 2018), http://www.rrbdlaw.com/4252/securities-industry-commentator-by-bill-singer-esq/ (discussing the anti-conflict FINRA rule's filing with the SEC).

398. 18 U.S.C. § 207(a)(2) (2018); 5 C.F.R. § 2641.201(d)(2) (2019); *9910. Post-Employment Conflict of Interest Restrictions; Nonpublic Information*, *supra* note 364.

399. *See* Michael Smallberg, *SEC to Close Revolving Door Loophole*, POGO (Aug. 26, 2013), http://www.pogo.org/analysis/2013/08/sec-to-close-revolving-door-loophole/.

matters, go to other regulators, or teach.[400] They should not be able to take on senior roles in regulated entities or representation of securities firms before regulators for a significant amount of time after they leave—perhaps for seven to ten years.[401]

The current conflict rules prohibit a former SEC staff member or supervisor from *practicing* before the SEC for two years after he or she leaves the SEC.[402] He or she is also not supposed to assist the new employer in SEC matters or share in revenue from cases before the SEC.[403] The rule has glaring loopholes.[404] First, two years is many years too short.* Second, the rule does not prohibit hypotheticals; so if a former SEC official is asked by his or her law partner about how some SEC officials think, or what their view might be of X or Y practices, the former official can offer material assistance in these matters.[405] Moreover, the SEC and its staff know full well that good old Jack is at firm X, will be practicing before the SEC shortly, and will be in a position to offer them employment.[406] FINRA Rule 9910 does not purport to prohibit a former FINRA officer from conferring with his or her law partner about matters pending before FINRA.[407] Conflicts of interest can be very difficult to detect, but they do exist.[408] This Author has never won a case before a judge where his opponent was a former law clerk to that judge.* This is of course a very human and understandable type of occurrence, but it does likely explain some of the SEC's failings.[409]

400. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 361, at 1.

401. *See id.* at 1, 24.

402. 18 U.S.C. § 207(a)(2); 5 C.F.R. § 2641.201(d)(2); 17 C.F.R. § 200.735-8(b)(1) (2019); U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 361, at 2; *9910. Post-Employment Conflict of Interest Restrictions; Nonpublic Information*, *supra* note 364.

403. 5 C.F.R. § 2641.201(a); *see also 9910. Post-Employment Conflict of Interest Restrictions; Nonpublic Information*, *supra* note 364.

404. *See* 17 C.F.R. § 200.735-8; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 361, at 1; Barney, *supra* note 131.

405. *See* 5 C.F.R. § 2641.201(d)(3); 17 C.F.R. § 200.735-8(b)(1); U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 356, at 1; Barney, *supra* note 131.

406. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 361, at 10; Breslow, *supra* note 359.

407. *See 9910. Post-Employment Conflict of Interest Restrictions; Nonpublic Information*, *supra* note 364.

408. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 361, at 4, 12.

409. *Id.* at 1–2, 10.

C. *The SEC Often Decides, or Is Persuaded by Wall Street, to Focus on Less Important Issues, While Ignoring the Big Issues of Today*

The SEC often focuses on non-essential issues.[410] This, of course, pleases broker-dealers, public companies, and their attorneys, and distracts regulators from the systematic problems that plague the securities industry.[411] No doubt, the conflicts of interest discussed above also contribute to the failure to provide regulations in many crucial areas.[412]

While ignoring or underregulating many areas, the SEC has devoted huge resources to somewhat opaque issues.[413] For example, the now on-again/off-again *fiduciary duty rule*, or *best interests rule*, which seeks to declare stock brokers and their firms as fiduciaries to their retirement account customers, has taken up a lot of time, resources, and expenses, and has created a lot of work for the law firms that hire from the federal regulators, even though the Shingle Theory and many court cases have imposed a duty of fair dealing on broker-dealers and investment advisors.[414] Accordingly, the actual need for a *best interests rule* is somewhat questionable, in that existing law appears likely to be adequate to permit the SEC and FINRA to

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410. *See* Breslow, *supra* note 359.

411. Arthur B. Laby, *Fiduciary Obligations of Broker-Dealers and Investment Advisers*, 55 VILL. L. REV. 701, 701–02 (2010).

412. *See id.* at 722; *9910. Post-Employment Conflict of Interest Restrictions; Nonpublic Information*, *supra* note 364; Smallberg, *supra* note 399; *supra* Section III.B.

413. Laby, *supra* note 411, at 722.

414. *Id.* at 716, 722; *see also* 17 C.F.R. § 240.10b-5(2019); Barney, *supra* note 131. Arguments can be made that the broker-dealer does have a duty in most cases to give his customer's interest priority and to disclose all material facts to a client. Securities Act of 1933, 15 U.S.C. § 77 (2018); Roberta S. Karmel, *Is the Shingle Theory Dead?*, 52 WASH. & LEE L. REV. 1271, 1290 (1995); Laby, *supra* note 411, at 703–04. The Shingle Theory is well recognized by the SEC and the courts and imposes a duty of fairness by a broker-dealer holding itself out to the public to handle financial transactions. *See* Hughes v. SEC, 174 F.2d 969, 976–77 (D.C. Cir. 1949) (finding that a broker has a duty of fairness and duty of full disclosure); Norris & Hirshberg, Inc., Exchange Act Release No. 3776, 21 S.E.C. Docket 865 (Jan. 24, 1946). The Shingle Theory and court decisions which rely upon it, in effect, place a fiduciary duty requirement on brokers. *See* Karmel, *supra*, at 1276. If fairness is required, that would appear to require disclosures of self-dealing and of securities purchases that result in greater compensation to the broker. *See* Laby, *supra* note 411, at 711. The Shingle Theory may not translate into a fiduciary duty for all customer transactions, but it appears to apply to situations where the broker is recommending a security. Karmel, *supra*, at 1276. Investment advisor's fiduciary duties have been more readily applied by the courts. *Id.*; *see also* Laby, *supra* note 411, at 711. Registered investment advisors are subject to SEC registration and oversight and have fiduciary obligations to their clients. 15 U.S.C. § 80b-6 (2018); *see also* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 194 (1963); Laby, *supra* note 411, at 716.

take action when broker-dealers favor their own economic interests over those of their clients.[415] Industry opposition to the rule and success in trying to narrow its fiduciary duty is certainly not in the public interest.[416]

The fiduciary duty rule was proposed by the United States Department of Labor ("DOL"), with no apparent coordination with the SEC, again, reflecting political spats and outright inefficiency.[417] Part of the proposed DOL rule would have heavily regulated the sale of brokerage firms' and investment advisors' own products to retirement accounts.[418] The SEC will likely attempt to do the same.[419] After extensive work was done by most broker-dealers preparing for the new regulations, the regulations were found to exceed the scope of authority of the DOL.[420] Although brokerage firms have, for years, been required to avoid the conflicts involved in selling their own products, such as paying brokers additional commissions for selling in-house mutual funds, violations repeatedly reoccur.[421] If the SEC simply enforced its existing rules regarding brokerage firm sales of proprietary products, and if someone would tell it and the DOL to play nicely in the sandbox, the efforts devoted to the fiduciary duty rule could have been avoided and resources devoted to more important matters.[422]

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415. Greg Iacurci, *SEC Sued by Seven States to Kill Reg BI Investment-Advice Rule*, INVESTMENTNEWS (Sept. 10, 2019, 10:27 AM), http://www.investmentnews.com/sec-sued-by-seven-states-to-kill-reg-bi-investment-advice-rule-81261.

416. *Id.* Indeed, the industry has already filed a court action seeking to have the *best interests rule* nullified. *Id.* "The lawsuit — State of New York et al. v. SEC . . . seeks to vacate the final rule, which was issued in June after a 3-1 vote by commissioners, and permanently prevent its implementation, which is scheduled for the end of June 2020." *Id.*; New York v. SEC, No. 19 Civ. 8365, 2019 WL 5203751, at *1 (S.D.N.Y. Sept. 27, 2019). Just as many automakers now embrace car safety, the securities industry might consider embracing, rather than combatting efforts to protect public investors. *See* Opinion, *Aggravating Alerts: Drivers Should Embrace Car Safety Technology*, PITT. POST-GAZETTE, Sept. 26, 2019, at A8; Iacurci, *supra* note 415.

417. *See* Brian Menickella, *The Return of the DOL's Fiduciary Rule*, FORBES (May 29, 2019, 10:40 AM), http://forbes.com/sites/brianmenickella/2019/05/29/the-return-of-the-dols-fiduciary-rule/.

418. *Id.*

419. *See id.*

420. *See* Chamber of Commerce v. U.S. Dep't of Labor, 885 F.3d 360, 387–88, 397 (5th Cir. 2018).

421. *See* Menickella, *supra* note 417. Dean Witter, now part of Morgan Stanley, has repeatedly been investigated for pushing in-house mutual funds and paying incentives to brokers who sell such funds. *See* Morgan Stanley DW, Inc., Securities Act Release No. 8339, Exchange Act Release No. 48789, 81 SEC Docket 1993 (Nov. 17, 2003).

422. *See* Jamie Hopkins, *SEC Brings Increased Confusion for Investors with New* Best Interest *Rule*, FORBES (June 5, 2019, 3:55 PM), http://www.forbes.com/sites/jamiehopkins/2019/06/05/sec-brings-increased-confusion-for-investors-with-new-best-interest-rule/; Menickella, *supra* note 417.

The SEC insists on bringing legal actions against low-level wrong-doers and expending millions of dollars on these cases which are largely non-productive and a diversion from the important issues facing investors.[423] The SEC may have missed Madoff and Enron and the subprime crisis discussed earlier in this Article, but it is happy to go after small firms with issues that should be resolved in a conference room meeting.[424] In SEC Release No. 80360, Matter of the Application of Kimberly Springsteen-Abbott, the SEC reviewed an appeal from a decision by a FINRA hearing panel, as affirmed by the FINRA National Adjudication Committee ("NAC"), which found that Kimberly Springsteen-Abbott, the CEO of a small broker-dealer, Commonwealth Capital, misallocated personal expenses to certain equipment leasing funds.[425] The NAC had affirmed a permanent bar of Springsteen-Abbott.[426] FINRA alleged that some 1840 items of personal expenses, such as personal meals, amounting to possibly $200,000, had been misallocated to the funds she managed over a period of years.[427] Springsteen-Abbott conceded that some charges were made improperly and had reversed many of them, and provided detailed explanations about how the errors had occurred.[428] She had a previously unblemished record and vigorously opposed the effort to impose a permanent bar.[429] The SEC, FINRA, and Springsteen-Abbott's attorneys spent tens of thousands of hours prosecuting and defending the charges involving a very small brokerage firm for allegedly spending relatively few dollars of the funds of investment partnerships it controlled on the CEO's personal expenses.[430] The SEC found that the NAC and FINRA had failed to develop proof regarding most of the 1840 allegedly misallocated charges and remanded for further proceedings.[431] The NAC reaffirmed its decision, and Springsteen-Abbott again appealed to the SEC.[432] Springsteen-Abbot argued, inter alia, that, no

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423. *See Finance Firm Says SEC Is Slander Happy, So It's Suing*, RM WARNER LAW (Oct. 29, 2013), http://www.kellywarnerlaw.com/finance-firm-sec-slander/.

424. *See id.*

425. *See* FINRA, NOTICE, SD-2132 (May 24, 2018); Springsteen-Abbott, Exchange Act Release No. 80360, 2017 WL 1206062, at *1–2 (Mar. 31, 2017).

426. Springsteen-Abbott, Exchange Act Release No. 80360, 2017 WL 1206062, at *2 (Mar. 31, 2017).

427. *Id.*

428. *Id.*

429. *See id.*

430. *See id*. at *2–4.

431. Springsteen-Abbott, Exchange Act Release No. 80360, 2017 WL 1206062, at *4–5 (Mar. 31, 2017). The Author of this Article represented the Respondent during some of her appeal process. *Id.*

432. *Id.* at *5; Springsteen-Abbott, Exchange Act Release No. 87913 (Jan. 8, 2020).

doubt, Goldman Sachs, Merrill Lynch/Bank of America, and JP Morgan engage in widespread use of their shareholders' money for arguably non-business purposes.[433] The SEC recently vacated a $50,000 fine against Springsteen-Abbott, affirmed a finding that she had misallocated some $36,000 in expenses (rather than the $200,000 found by FINRA to have been misallocated), and affirmed her permanent bar from the industry.[434] The years of litigation and expense over a $36,000 dispute that should have been capable of early resolution reflects a waste of resources and SEC bias against smaller firms.[435] The SEC apparently has not chosen to question the millions of dollars spent by publicly-owned broker-dealers on efforts to lobby the SEC for anti-investor regulations.[436] The SEC and FINRA do not appear to have actions pending against these large firms relating to how they spend shareholder funds.[437] Does the SEC care how many limousines are parked outside these firms' headquarters ready to transport senior executives to their homes, or to church, or to family gatherings?* How much is spent on executive dining rooms that often are simply high-priced eating clubs paid for by shareholders?* Do officers ever invite a friend or spouse to dine there?* How often does a spouse accompany an executive, junior, or senior on a business trip or to a conference and have some or all of their expenses covered by the company?* Limos, lavish private rooms, sending representatives (and their spouses) to high-end resorts for *compliance conferences* which involve lavish dinners, golf tournaments and the like, and which are also attended by numerous SEC and FINRA officials, not to mention expense account charges on Scores, a well-known Wall Street Strip Club.* The SEC and FINRA send numerous representatives to securities conferences conducted at high priced resorts.[438] They pay their own way, but

433. Springsteen-Abbott, Exchange Act Release No. 80360, 2017 WL 1206062, at *2 (Mar. 31, 2017); *see also* Stein, *supra* note 359.

434. Springsteen-Abbott, Exchange Act Release No. 87913 (Jan. 8, 2020); *see also* Springsteen-Abbott, Exchange Act Release No. 88156 (Feb. 7, 2020).

435. Blinder, Robinson & Co. v. SEC, 837 F.2d 1099, 1112 (D.C. Cir. 1988). The D.C. Circuit Court of Appeals questioned whether the sanctions imposed showed bias against a new firm. *Id.*

436. *See* Stein, *supra* note 359.

437. *Id.*

438. *See Events*, SIFMA, http://www.sifma.org/events/ (last visited May 1, 2020). The Securities Industry and Financial Markets Association ("SIFMA"), the Public Investors Advocate Bar Association ("PIABA"), Compliance Professionals, and others hold these annual conferences at swanky resorts in Palm Desert, California, Phoenix, Arizona, and Orlando, Boca Raton, and Marco Island, Florida, among other places. *36th Annual RMA Securities Finance & Collateral Management Conference*, RISK MGMT. ASS'N, http://landing.rmahq.org/global/filelib/asl/asl2019_brochure-updated_sponsors2.pdf; Tracy L. Gerber, *2019 SIFMA C&L Annual Seminar*, GREENBERG TRAURIG,

the broker-dealers send hundreds of representatives to these conferences, where the afternoons are left open for golf, tennis, and sightseeing (often charged to the firms and their shareholders).[439] Do the regulators care that the many public shareholders of these companies pay for the broker-dealer employees' airfares, swank resort hotel rooms, fine dining, conference fees, and recreational activities for the over one thousand broker-dealer employees who frequently attend?* The regulators are often heavy-handed with the little guys and gals, and not so heavy-handed with the large firms, which led to "[t]he SEC censur[ing] the NASD and requir[ing] it to consent to a number of reforms, including reforms designed to reduce the influence of members over regulatory and disciplinary matters."[440] In the Springsteen-Abbott case, a matter that likely could have been quickly and inexpensively resolved, became a drain on regulatory resources that did little or nothing to protect investors or markets.[441]

When FINRA went after a former junior staff attorney at a firm for failing to ensure timely filing of certain forms, rather than simply mandating the firm to correct its practices and requiring all those in the chain of overseeing the filing of the form to be more diligent, what was the point?[442] The charges were later dropped.[443]

When the SEC and FINRA both filed identical charges against Knight Securities and some of its senior officials and traders for allegedly overcharging institutional customers for their securities purchases, and spent millions on the case, what was the point?[444] Not only did the SEC and

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http://www.gtlaw.com/en/events/2019/03/2019-sifma-cl-annual-seminar (last visited May 1, 2020); PIABA, http://www.piaba.org (last visited May 1, 2020); *Shadow Financial Showcases ShadowSuite at This Week's SIFMA Operations Conference and Exhibit*, GLOBENEWSWIRE (May 3, 2010, 1:34 PM), http://www.globenewswire.com/news-release/2010/05/03/1225847/0/en/shadow-financial-showcases-shadowsuite-at-this-wee-s-SIFMA-operations-conference-and-exhibit.html; *SIFMA C&L Annual Seminar*, SIFMA, http://www.sifma.org/event/clannual/ (last visited May 1, 2020).

439. *See 36th Annual RMA Securities Finance & Collateral Management Conference*, *supra* note 438; *Events*, *supra* note 438; PIABA, *supra* note 438.

440. *See* Barbara Black, *Punishing Bad Brokers: Self-Regulation and FINRA Sanctions*, 8 BROOK. J. CORP., FIN., & COM. L. 23, 36 (2013); PIABA, *supra* note 438.

441. *See* Springsteen-Abbott, Exchange Act Release No. 80360, 2017 WL 1206062, at *1 (Mar. 31, 2017); FINRA, FINRA 2019 ANNUAL BUDGET SUMMARY 6 (2019).

442. *USA v. Turner et al.*, PACERMONITOR, http://www.pacermonitor.com/public/case/28147106/USA_v_Turner_et_al (last visited May 1, 2020).

443. *Id.* The Author handled this matter for the former broker-dealer staff attorney. *Id.*

444. *See* SEC v. Pasternak, 561 F. Supp. 2d 459, 470–71 (D.N.J. 2008); FINRA, DECISION, COMPLAINT NO. CLG050021 (Mar. 3, 2010).

FINRA lose both cases and waste substantial resources on it, but the alleged victims were among the most sophisticated traders in the world and always had the ability to and, in fact, did analyze their trade executions.[445] In 2007, in *Department of Market Regulation v. John P. Leighton and Kenneth Pasternak*, [446] a FINRA hearing panel concluded that violations had occurred.[447] A year later, the SEC tried the same case in federal court.[448] In *SEC v. Pasternak and John P. Leighton*,[449] a three-week federal trial resulted in a fifty-page opinion which concluded that:

> Throughout the trial, although given ample opportunity, the SEC failed to solidify its theory of the case, or present sufficient evidence to establish any element required by the various statutes it invokes in its Amended Complaint. The Court, therefore, finds in favor of Defendants and against the SEC. Because the Court adjudicates the entirety of the case on its merits, it dismisses as moot Defendants' motions for judgment on partial findings.[450]

Thereafter, the FINRA National Adjudicatory Counsel reversed the FINRA hearing panel decision and found that the evidence did not support a finding of any violations.[451] Here, again, enormous resources were wasted for no purpose.[452] The ineptness of FINRA and the SEC is obvious, the diversion of resources from significant issues apparent, and the political discord between the SEC and FINRA manifest.*

The cases discussed above, and the emphasis given to largely minuscule order reporting violations involving trades and relatively benign violations of AML rules reflect the SEC's lack of focus, waste of resources, and inability to coordinate with FINRA.[453] They create the illusion of robust regulation, but they are really a diversion from robust regulation.[454]

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445. *Pasternak*, 561 F. Supp. 2d at 470–71, 517; FINRA, DECISION, COMPLAINT NO. CLG050021 (Mar. 3, 2010).

446. FINRA, DECISION, COMPLAINT NO. CLG050021 (Mar. 3, 2010).

447. *Id.*

448. *Pasternak*, 561 F. Supp. 2d at 517.

449. 561 F. Supp. 2d 459 (D.N.J. 2008).

450. *Id.* at 517. The Author represented Mr. Leighton in both the FINRA and federal court matters. *Id.* at 465.

451. *Id.* at 509.

452. *See id.* at 517.

453. *See Pasternak*, 561 F. Supp. 2d at 509, 517; FINRA, DECISION, COMPLAINT NO. CLG050021 (Mar. 3, 2010); Letter from Vaishali Shetty, Senior Counsel, FINRA Dep't of Enf't (Apr. 22, 2019) (on file with FINRA). In a letter from Vaishali Shetty, a firm apparently failed to have a review of its AML procedures conducted by a truly *independent* entity. Letter from Vaishali Shetty, *supra*. Although the firm fixed the problem

In *SEC v. Strochak*,[455] the SEC filed a complaint in August 2019, against a former broker who had already been criminally convicted of swindling investors.[456] Was this proceeding at all necessary?* In *In re Joseph J. Fox*,[457] the SEC filed charges in July 2019 against an individual seeking a permanent bar, even though the individual had been permanently barred by FINRA three years earlier.[458] These types of actions divert attention from the issues discussed herein and reflect a waste of resources, poor decision-making, and political infighting, but they do little or nothing to protect the average investor or preserve the integrity of the securities markets.*

IV. CONCLUSION

Many are deluded into believing the stock market is a level playing field where a rational economic system prevails and regulation protects the integrity of the market.[459] As we have seen, this is not quite the case and is likely far from the case.[460] Although regulation has eliminated or tried to eliminate some of the more obvious forms of dishonest and manipulative conduct, such as insider trading, pump and dumps, and blatant falsification of financial reporting, there is still much to do.[461] In fact, even those types of

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after FINRA brought the issue to its attention, FINRA still felt it an appropriate use of resources to negotiate a fine of $5,000. *Id.*

454. *See Pasternak*, 561 F. Supp. 2d at 509; FINRA, DECISION, COMPLAINT NO. CLG050021 (Mar. 3, 2010).

455. No. 9:19-cv-81164-xxxx, 2019 WL 3856007, at *1 (S.D. Fla. Sept. 11, 2019).

456. *See id.*; Bruce Kelly, *Ex-Broker in South Florida Pleads Guilty in Castleberry Financial Fraud Case*, INVESTMENTNEWS (Aug. 19, 2019), http://www.investmentnews.com/ex-broker-in-south-florida-pleads-guilty-in-castleberry-financial-fraud-case-80922.

457. Fox, Exchange Act Release No. 1382 (ALJ July 30, 2019) (initial decision).

458. *Id.* at 3 n.2.

459. *See SEC Enforcement Actions: Insider Trading Cases*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/spotlight/insidertrading/cases.shtml (last visited May 1, 2020); *SEC Obtains Asset Freeze in Microcap Pump and Dump Scheme Targeting Elderly Retail Investors*, U.S. SEC. & EXCHANGE COMMISSION (July 18, 2019), http://www.sec.gov/news/press-release/2019-136.

460. *See SEC Enforcement Actions: Insider Trading Cases*, *supra* note 459; *SEC Obtains Asset Freeze in Microcap Pump and Dump Scheme Targeting Elderly Retail Investors*, *supra* note 459.

461. *See SEC Enforcement Actions: Insider Trading Cases*, *supra* note 459; *SEC Obtains Asset Freeze in Microcap Pump and Dump Scheme Targeting Elderly Retail Investors*, *supra* note 459.

illegal activities continue.[462] Few think of the stock market as a precursor to sports betting.[463] But it is not far enough removed from sports betting.[464] Sports betting is basically rigged; the house wins, no matter what.[465] Wall Street is too close to that model.[466] It is of course a very complex subject, but the SEC does not appear to really focus on many of the significant issues facing stock markets and market integrity and the interests of the middle class or smaller investor.[467] It appears too beholden to the industry to do its regulatory job properly.*

This Article has a broad sweep.[468] Concededly, it may be too broad in some respects.* It is not intended to condemn all members of the Wall Street community.* It is not intended to impugn the integrity of all regulators.* Many staffers are career staffers, and many are very aware of potential conflicts and appearances of conflict, and conduct themselves accordingly.[469] But there is much that needs to be done to better regulate Wall Street that is not being done.[470] Many of the problems require careful study and understanding of the complexities involved when one begins tinkering with aspects of the markets.[471] However, regardless of how one perceives the root causes of some of these regulatory failings, there is a serious failure to look at these problems or come up with possible improvements or solutions.[472] Of course we could just concede that Wall Street is a casino-like business, that the house always wins, and that human greed overcomes integrity.[473] At least then, people could put their money in the bank and sleep well at night—assuming stress tests work and Keatings

462. *See SEC Enforcement Actions: Insider Trading Cases*, *supra* note 459; *SEC Obtains Asset Freeze in Microcap Pump and Dump Scheme Targeting Elderly Retail Investors*, *supra* note 459.

463. *See* Egan, *supra* note 73.

464. *See id.*; Chris Chase, *11 Biggest Scandals in Sports Gambling History*, FOR WIN (May 16, 2018, 7:31 AM), http://ftw.usatoday.com/2018/05/11-biggest-scandals-in-sports-gambling-history.

465. J.B. Maverick, *Why Does the House Always Win? A Look at Casino Profitability*, INVESTOPEDIA (Oct. 28, 2019), http://www.investopedia.com/articles/personal-finance/110415/why-does-house-always-win-look-casino-profitability.asp.

466. *See* Egan, *supra* note 73.

467. *See* Breslow, *supra* note 359.

468. *See supra* Part I.

469. *See* Hilzenrath, *supra* note 374.

470. *See id.*; Barr, *supra* note 66, at 119.

471. *See* Barr, *supra* note 66, at 103.

472. *See id.*; Brummer, *supra* note 94; Hilzenrath, *supra* note 374; Stein, *supra* note 359.

473. *See* Egan, *supra* note 73; *Keating Five*, *supra* note 391; Maverick, *supra* note 465.

are kept out of the banking business.* If they want to play the game, at least they would be informed about the playing field.[474] However, more focused and robust regulation appears to be more in the public interest than permitting Wall Street to become, or continue to be, another form of sports betting.[475]

474. *See* Maverick, *supra* note 465; Stein, *supra* note 359.

475. *See* Lynn A. Stout, *Are Stock Markets Costly Casinos? Disagreement, Market Failure, and Securities Regulation*, 81 VA. L. REV. 613, 615, 617–20, 696, 710–712 (1995); Egan, *supra* note 73; Stein, *supra* note 359.

IS THE RISING TREND OF VOTER RESTORATION LEADING TO PERMANENT DISENFRANCHISEMENT OF FELONS? FLORIDA JOINS THE VOTER RESTORATION TREND

CAROL GONZALEZ*

I. INTRODUCTION

The United States leads the world in incarceration rates.[1] About two million people were incarcerated or under supervision in the year of 1980.[2]

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This number has dramatically increased in recent years to over seven million people.[3] Of these citizens, those convicted of a felony will face restrictions on their right to vote.[4] As a result of mass incarceration, disenfranchisement rates have also dramatically increased throughout the years.[5] In 1976, 1.17 million individuals were disenfranchised; this number increased to over 5.85 million in 2010.[6] This increase in disenfranchisement is disturbing because these individuals are unable to participate and be part of our democracy, undermining our political process.[7]

The majority of these individuals have completed their sentences.[8] As of 2016, 6.1 million people were estimated to be affected by felony disenfranchisement laws.[9] Only twenty-three percent of these people were incarcerated.[10] This means that over seventy-seven percent of the disenfranchised population have served their time, completed their sentences, and are reintegrated in their communities.[11] This amounts to almost three million ex-felons that have completed their sentences, but continue to be disenfranchised.[12]

Since its inception, disenfranchisement laws have existed in the United States.[13] By the time the Constitution was ratified, twenty-nine states had enacted disenfranchisement laws.[14] These laws were based on the theory that a social contract exists between the government and its citizens, meaning that "those convicted of a crime had violated social norms, and, therefore, had proven themselves unfit to participate in the political process."[15]

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1. ACLU ET AL., DEMOCRACY IMPRISONED: A REVIEW OF THE PREVALENCE AND IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2013).
2. *Id.*
3. *Id.*
4. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT 1 (2014).
5. *See id.*; ACLU ET AL., *supra* note 1, at 1.
6. ACLU ET AL., *supra* note 1, at 1.
7. *Id.*
8. CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016 6 (2016).
9. *Id.*
10. *Id.*
11. *Id.*
12. ACLU ET AL., *supra* note 1, at 4.
13. *Id.* at 2.
14. *Id.*
15. *Id.*

After the Civil War and Reconstruction, Southern states began to expand their disenfranchisement laws.[16] The purpose behind this was to include crimes known to be "disproportionately committed by African Americans," such as burglary, theft, and arson.[17] Lawmakers intended to "circumvent the requirements of the Fifteenth Amendment," which extended the vote to African American males.[18] There are a few justifications behind felony disenfranchisement laws.[19] The most relied on are: Maintaining "the purity of the ballot box" and preventing the perversion of the political process.[20] Felony disenfranchisement laws have been routinely upheld by courts across the nation under the reasoning that these laws are not focused on punishing the individual as a result of their offense, but, instead, they focus on regulating the franchise and the election process.[21]

A trend to allow ex-felons to regain the right to vote has risen in the past few decades.[22] However, these laws vary greatly and change constantly.[23] Specifically, laws vary from "uninterrupted right to vote to lifetime disenfranchisement, despite completion of one's full sentence."[24] Many new voter restoration laws are conditional upon repayment of carceral debt, requiring ex-felons to satisfy all of their carceral debt before regaining the right to vote.[25] This debt can amount to hundreds of thousands of dollars for some and includes many fees not related to the offense itself.[26] Instead, much of this debt is composed of the state's operating costs.[27]

Repayment laws have routinely been upheld across the nation because they are analyzed under a rational basis standard of review.[28] More specifically, courts conclude that repayment bills are rationally related to a legitimate state interest.[29] However, these laws disproportionally affect the poor since only those who have the means to satisfy their carceral debt can

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16. *Id.*; Reuven (Ruvi) Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B.U. INT'L L.J. 197, 217–18 (2011).
17. ACLU ET AL., *supra* note 1, at 2; Ziegler, *supra* note 16, at 217.
18. ACLU ET AL., *supra* note 1, at 2; *see also* U.S. CONST. amend. XV, § 1.
19. *See* ACLU ET AL., *supra* note 1, at 2.
20. *Id.*
21. *Id.* at 2–3.
22. *Id.* at 3–4.
23. *Id.* at 4.
24. ACLU ET AL., *supra* note 1, at 4.
25. Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 387 (2012).
26. *Id.* at 381 n.178, 387.
27. *Id.* at 349.
28. *Id.* at 389–90.
29. *Id.* at 389.

regain the right to vote, rendering those who are unable to pay off their debt permanently disenfranchised.[30]

Additionally, disenfranchisement laws have a disproportionate effect on the African American population.[31] As a result, voting rights advocates and political scientists have begun to question the true purpose behind disenfranchisement laws.[32] In fact, many argue that disenfranchisement laws are but the last set of laws restricting the African American vote not prohibited by the Voting Rights Act of 1965 (the "Act").[33]

Recently, Florida joined the voter restoration movement with the passage of Amendment IV in the 2018 election.[34] The Amendment would restore voting rights for felons in the State who had completed all terms of their sentences, with the exception of those convicted of murder or sexual offenses.[35] As a result, over 1.4 million Floridians were estimated to regain the right to vote.[36] However, Florida legislators passed a repayment bill in order to continue to regulate the voting franchise.[37] The bill requires Florida residents convicted of a felony to satisfy the debt incurred during their sentence before regaining the right to vote.[38] The new law will permanently disenfranchise poor people, a vast majority of which are African Americans.[39]

First, this Comment will analyze the history of felony disenfranchisement and the early origins of disenfranchisement, followed by

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30. Cammett, *supra* note 25, at 389, 398.

31. UGGEN ET AL., *supra* note 8, at 3.

32. Tara A. Jackson, *Dilution of the Black Vote: Revisiting the Oppressive Methods of Voting Rights Restoration for Ex-Felons*, 7 U. MIAMI RACE & SOC. JUST. L. REV. 297, 302–03 (2017).

33. *Id.* at 303–04; Voting Rights Act of 1965, Pub. L. No. 89–110, § 2, 79 Stat. 437, 437 (1965) (codified as amended at 52 U.S.C. § 10301).

34. FLA. CONST. art. VI, § 4, *amended by* FLA. CONST. amend. IV; German Lopez, *Florida Votes to Restore Ex-Felon Voting Rights with Amendment 4*, VOX: POL. & POL'Y (Nov. 7, 2018, 1:15 PM), http://www.vox.com/policy-and-politics/2018/11/6/18052374/florida-amendment-4-felon-voting-rights-results.

35. FLA. CONST. art. VI, § 4, *amended by* FLA. CONST. amend. IV; Lopez, *supra* note 34.

36. P.R. Lockhart, *A Controversial Florida Law Stops Some Former Felons from Voting. A Judge Just Blocked Part of It*, VOX: POL. & POL'Y (Oct. 19, 2019, 2:53 PM), http://www.vox.com/policy-and-politics/2019/7/2/20677955/amendment-4-florida-felon-voting-rights-injunction-lawsuits-fines-fees.

37. *Id.*; *see also* Fla. CS for SB 7066, at 1 (2019).

38. Fla. CS. for SB 7066, at 28; Lockhart, *supra* note 36.

39. Lockhart, *supra* note 36.

the evolvement of disenfranchisement in the United States.[40] Then, the Comment will address disenfranchisement today.[41] Specifically, it will address how many people face disenfranchisement in the United States as a result of overly restrictive laws.[42] Next, it will discuss the rising trend of voter restoration and the variety of laws across the states.[43] After analyzing the different voter restoration laws, this Comment will discuss repayment bills, focusing on the racial and economic disparities of these laws.[44] However, this Comment will mainly focus on Florida's Amendment IV, the newly passed repayment bill, and the consequences of the bill for Floridians.[45] Finally, this Comment will address possible solutions and recommendations to solve the problem of disenfranchisement and repayment bills, for instance, analyzing these laws under a higher level of scrutiny and automatic restoration.[46]

II. THE HISTORY OF FELONY DISENFRANCHISEMENT

A. *Early Origins*

Disenfranchisement is not a modern concept, as most of our voting laws derive from European history.[47] In Ancient Greece, depending on the crime, individuals would be stripped of their civil rights, including the right to vote.[48] In Ancient Rome, a person found infamous could lose their ability to run for office or to vote.[49] During the Renaissance period, individuals who were categorized as *outlaws* would lose all of their civil rights.[50] Lastly,

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40. *See* Alec C. Ewald, Civil Death*: The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059–1066 (2002); discussion *infra* Part II.

41. *See* Martha Guarnieri, *Civil Rebirth: Making the Case for Automatic Ex-Felon Voter Restoration*, 89 TEMP. L. REV. 451, 454 (2017); discussion *infra* Part II.

42. Guarnieri, *supra* note 41, at 454.

43. *See* MORGAN MCLEOD, THE SENTENCING PROJECT, EXPANDING THE VOTE: TWO DECADES OF FELONY DISENFRANCHISEMENT REFORM 3 (2018); discussion *infra* Part III.

44. *See* Cammett, *supra* note 25, at 387; Jackson, *supra* note 32, at 298; discussion *infra* Part IV.

45. *See* FLA. CONST. art. VI, § 4, *amended by* FLA. CONST. amend. IV; Fla. CS. for SB 7066, at 1 (2019); Lopez, *supra* note 34; discussion *infra* Part V.

46. *See* Cammett, *supra* note 25, at 401; Lockhart, *supra* note 36; discussion *infra* Part VI.

47. Ewald, *supra* note 40, at 1059.

48. *Id.* at 1059–60.

49. *Id.* at 1060.

50. *Id.*

in England, citizens convicted of a felony or treason were faced with *civil death*.[51] The concept of *civil death* refers to losing all civil rights and land.[52]

These early forms of disenfranchisement were justified under the social contract theory.[53] The social contract theory is the theory that a contract exists between the government and its citizens.[54] Essentially, according to this theory, the government offers protection and the citizens, in turn, follow the government's rules.[55] Thus, if a citizen violates the rules, he or she surrenders the right to participate in the rule-making process.[56]

B. *Early American History*

With colonization, the British brought with them many of these laws, which varied depending on the form of crime committed.[57] Originally, crimes subject to disenfranchisement were crimes related to voting or conduct considered an "egregious violation[] of the moral code."[58] This differs from disenfranchisement laws today.[59] Today, disenfranchisement is based on the status of being a felon, rather than on the type of crime committed.[60]

After the ratification of the United States Constitution, voting rights became an issue left to the states.[61] As a result, many states adopted laws similar to what was already in place.[62] During this time, only "white, male property owners, over the age of [twenty-one]" had the right to vote.[63] Thus, only few could actually vote.[64] Disenfranchisement laws applied only to them because those outside of this category had no right to vote to begin with.[65] In addition, early constitutions required a showing of good character in order to be able to vote.[66] As a result, those citizens who had a criminal record could not vote, since they could not show good character because of

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51. *Id.*
52. Ewald, *supra* note 40, at 1060.
53. Guarnieri, *supra* note 41, at 457.
54. *Id.*
55. *Id.*
56. *Id.*
57. Cammett, *supra* note 25, at 358.
58. Ewald, *supra* note 40, at 1062.
59. *Id.*
60. *Id.* at 1062, 1078.
61. Guarnieri, *supra* note 41, at 457.
62. *Id.*
63. Cammett, *supra* note 25, at 359.
64. *Id.*
65. *Id.*
66. Ewald, *supra* note 40, at 1063.

their records.[67] Between 1776 and 1821, eleven states prohibited criminals from voting.[68]

C. *Civil War and Reconstruction*

Before the Civil War, "women, men without extended residency, blacks, soldiers, students, the institutionalized mentally ill, and criminals" did not have the right to vote.[69] Today, the institutionalized mentally ill and criminals continue to face restrictions on their right to vote.[70] This reflects how American views have evolved and expanded throughout history.[71]

African Americans had the right to vote in only six states in 1860.[72] They were barred from voting in almost every state where criminals were denied the right to vote.[73] African Americans could not vote because of their race.[74] Thus, discrimination was not the original intent of felony disenfranchisement.[75] However, following the passage of the Reconstruction Amendments, nearly every Southern state amended their disenfranchisement laws.[76] The laws were expanded to include less serious crimes such as *burglary, theft, and arson*.[77] The intent behind this was to prevent African Americans from voting.[78] Thus, felony disenfranchisement began to be used as a tool post-Reconstruction to suppress the votes of the African American population.[79]

During the Jim Crow Era, disenfranchisement laws restricted those who were convicted of crimes.[80] These crimes were those believed to be

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67. *Id.*
68. *Id.*
69. *Id.* at 1064.
70. *Id.*
71. Ewald, *supra* note 40, at 1064.
72. *Id.*
73. *Id.* at 1064–65.
74. *Id.* at 1065.
75. *Id.*
76. Ewald, *supra* note 40, at 1065; *see also* U.S. CONST. amend XIII § 1; U.S. CONST. amend. XIV § 1; U.S. CONST. amend XV § 1.
77. Ziegler, *supra* note 16, at 217.
78. *Id.*; *see also* ACLU ET AL., *supra* note 1, at 2.
79. Cammett, *supra* note 25, at 361.
80. Lauren Latterell Powell, *Concealed Motives: Rethinking Fourteenth Amendment and Voting Rights Challenges to Felon Disenfranchisement*, 22 MICH. J. RACE & L. 383, 388 (2017).

committed by African Americans.[81] They included "thievery, adultery, arson, wife-beating, housebreaking, and attempted rape."[82]

The Fourteenth Amendment was the first way in which felons were able to challenge felony disenfranchisement laws.[83] They would argue that these laws violated the Equal Protection Clause of the Fourteenth Amendment.[84] Specifically, under the Equal Protection Clause, "no [s]tate shall . . . deny to any person within its jurisdiction the equal protection of the laws."[85] Equal Protection cases are based on the issue of "whether the 'government's classification is justified by a sufficient government purpose.'"[86]

Even though the original purpose of the Equal Protection Clause was to free and protect the African American population, the Fourteenth Amendment had the opposite effect and has strengthened modern disenfranchisement laws.[87] In 1974, the Supreme Court of the United States upheld a state disenfranchisement law in *Richardson v. Ramirez*.[88]

In *Richardson*, three California men convicted of felonies completed their sentences.[89] However, when they attempted to vote in three different counties, they were denied because of their criminal records.[90] At the time, the California Constitution denied ex-felons the right to vote.[91] The California men argued that this law violated the Equal Protection Clause.[92] They argued that, under strict scrutiny, which the Supreme Court of the United States had subjected voting violations in the past, only a compelling government interest can justify a denial of voting rights.[93] The California Supreme Court agreed and declared the disenfranchisement law

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81. *Id.*

82. *Id.* (quoting Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Act: A New Strategy*,103 YALE L.J. 537, 541 (1993)).

83. William Walton Liles, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future*, 58 ALA. L. REV. 615, 618 (2007); *see also* U.S. CONST. amend. XIV, § 1.

84. Liles, *supra* note 83, at 618; *see also* U.S. CONST. amend. XIV, § 1.

85. U.S. CONST. amend. XIV, § 1.

86. Liles, *supra* note 83, at 618 (quoting ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.1.2, at 669 (3d ed. 2006)).

87. Ewald, *supra* note 40, at 1065–66; *see also* U.S. CONST. amend. XIV, § 1.

88. 418 U.S. 24 (1974); Ewald, *supra* note 40, at 1066.

89. *Richardson*, 418 U.S. at 26.

90. *Id.* at 31–32.

91. *Id.* at 27.

92. *Id.* at 33.

93. *Id.*

unconstitutional.[94] However, the Supreme Court of the United States overturned the California decision.[95]

The Supreme Court of the United States found that the California Supreme Court had failed to consider section 2 of the Fourteenth Amendment.[96] Under section 2 of the Fourteenth Amendment, "any state which disenfranchises adult males . . . will face proportionate reduction in its congressional representation."[97] The Court held that the language in section 2 "obviated any need to justify disenfranchisement laws with a compelling state interest."[98]

Previously, the Supreme Court of the United States had established that the right to vote was a fundamental right.[99] Thus, any restrictions were subject to strict scrutiny.[100] However, in *Richardson*, the Supreme Court of the United States established a dangerous precedent.[101] When the Supreme Court of the United States upheld California's disenfranchisement law, it essentially held that felons lost their fundamental right to vote when they committed their offenses.[102] The Supreme Court of the United States reasoned that the language in section 2 distinguished felony disenfranchisement laws from other restrictions on the right to vote, which had previously been subject to strict scrutiny.[103] Following the precedent set forth in *Richardson*, very few felony disenfranchisement laws have been deemed unconstitutional.[104]

D. *The Voting Rights Act of 1965*

In 1965, Congress passed the Voting Rights Act.[105] The purpose of the Act was to correct the ineffectiveness of the post-Reconstruction Amendments in enfranchising the African American population.[106] The Act

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94. *Richardson*, 418 U.S. at 27; Ewald, *supra* note 40, at 1067–68.
95. *Richardson*, 418 U.S. at 56.
96. *See id.* at 54, 56.
97. Ewald, *supra* note 40, at 1068; *see also* U.S. CONST. amend. XIV, § 2.
98. Ewald, *supra* note 40, at 1068; *see also* U.S. CONST. amend. XIV, § 2.
99. Ewald, *supra* note 40, at 1067–68.
100. *See id.*
101. *See id.* at 1071–72; *Richardson*, 418 U.S. at 53–54, 56.
102. *See Richardson*, 418 U.S. at 53–54, 56.
103. *Id.* at 54.
104. Liles, *supra* note 83, at 624; *see also Richardson*, 418 U.S. at 56.
105. Voting Rights Act of 1965, Pub. L. No. 89–110, § 2, 79 Stat. 437, 437 (1965) (codified as amended at 52 U.S.C. § 10301); George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 851, 859 (2005).
106. Brooks, *supra* note 105, at 859; *see also* Voting Rights Act of 1965 § 2.

prohibited discriminatory voting practices such as literacy tests.[107] Under section 2 of the Voting Rights Act, any "voting qualifications or prerequisite to voting or standard, practice, or procedure . . . imposed or applied . . . to den[y] or abridge[] . . . the right of any citizen of the United States to vote on account of race or color" were prohibited.[108]

The Act had great success in outlawing discriminatory laws and extending the right to vote to many African-Americans.[109] Further, the Act created a second avenue for felons to challenge felony disenfranchisement laws.[110] These types of cases have yet to make it to the Supreme Court of the United States.[111] However, the lower courts have analyzed the issue and reached contradicting decisions in the ability to challenge disenfranchisement laws under section 2 of the Act.[112]

Wesley v. Collins[113] was one of the first cases to use the Act as an avenue to challenge felony disenfranchisement laws.[114] In *Wesley*, the plaintiff sued Tennessee on the grounds that the state's disenfranchisement law was unconstitutional.[115] The plaintiff argued that the law violated section 2 of the Act by denying him the right to vote on the basis of race.[116] The United States Court of Appeals for the Sixth Circuit held that Tennessee's disenfranchisement law was constitutional.[117] However, it recognized valid the ability to sue under section 2 in felony disenfranchisement cases.[118] Accordingly, *Wesley* set the precedent for challenges to disenfranchisement laws under the Act.[119]

In turn, the United States Court of Appeals for the Second Circuit held that the Act did not apply to felony disenfranchisement laws.[120] Specifically, the court found that Congress had not explicitly stated that the

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107. Voting Rights Act of 1965 § 2; *see also* 52 U.S.C. § 10301 (2018) (originally enacted as Voting Rights Act of 1965, Pub. L. No. 89–110, § 2, 79 Stat. 437, 437).

108. 52 U.S.C. § 10301 (2018) (originally enacted as Voting Rights Act of 1965, Pub. L. No. 89–110, § 2, 79 Stat. 437, 437); Voting Rights Act of 1965 § 2.

109. *See* Brooks, *supra* note 105, at 860.

110. Liles, *supra* note 83, at 624.

111. *Id.*

112. *Id.* at 625–27.

113. 791 F.2d 1255, 1255 (6th Cir. 1986).

114. *Id.*; Liles, *supra* note 83, at 625.

115. *Wesley*, 791 F.2d at 1257; *see also* Liles, *supra* note 83, at 625.

116. Liles, *supra* note 83, at 625.

117. *Wesley*, 791 F.2d at 1262.

118. Liles, *supra* note 83, at 625.

119. *Id.*; *see also Wesley*, 791 F.2d at 1262.

120. Baker v. Pataki, 85 F.3d 919, 922 (2d Cir. 1996) (per curiam); Liles, *supra* note 83, at 625–26.

Act applied to disenfranchisement laws.[121] Without such explicit intention, the court reasoned the Act did not apply unless specifically dictated by Congress.[122]

However, the United States Court of Appeals for the Ninth Circuit held that felony disenfranchisement laws can be challenged under section two of the Voting Rights Act if evidence is presented showing that African Americans were disproportionally denied the right to vote as a result of the state's felony disenfranchisement laws.[123] The United States Court of Appeals for the Ninth Circuit reasoned that discrimination on the basis of race is a relevant factor courts may consider in determining the constitutionality of a disenfranchisement law.[124]

E. *Felony Disenfranchisement Today*

More than 6.8 million felons are *under correctional control* in the United States.[125] This includes: "[P]robationers, parolees, prisoners, and prison inmates."[126] In 2016, around 5.85 million citizens were barred from voting as a result of having a felony conviction.[127] Seventy-five percent of these citizens were not incarcerated, but are on probation, parole, or have completed their sentences.[128] In 2014, four states barred the vote at all stages of a felony conviction, even after completing the sentence.[129]

In recent years, many states have changed their felon disenfranchisement policies.[130] However, felony disenfranchisement continues to have a significant impact on African Americans.[131] While felony disenfranchisement laws may not be facially discriminatory, these felony disenfranchisement laws disproportionally affect African Americans.[132] The War on Drugs and other policies have resulted in mass incarceration.[133] As a result, there has been an increase of 1.17 million in

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121. *Baker*, 85 F.3d at 922; Liles, *supra* note 83, at 626.
122. *Baker*, 85 F.3d at 922; Liles, *supra* note 83, at 626.
123. Farrakhan v. Washington, 338 F.3d 1009, 1011–12 (9th Cir. 2003); Liles, *supra* note 83, at 626.
124. *Farrakhan*, 338 F.3d at 1015; Liles, *supra* note 83, at 626.
125. Guarnieri, *supra* note 41, at 454.
126. *Id.*
127. *Id.*
128. *See id.*
129. THE SENTENCING PROJECT, *supra* note 4, at 1.
130. *See id.*
131. *Id.*
132. *Id.*
133. Powell, *supra* note 80, at 388.

1976 to 6.1 million in 2016 in the number of disenfranchised individuals.[134] This has led to a disproportionate number of African Americans incarcerated.[135] One out of every five black adults is disenfranchised in the states of Florida, Kentucky, and Virginia as a result of a felony conviction.[136]

III. THE RISING TREND OF VOTER RESTORATION

Disenfranchisement policies are part of the process outside of the criminal sentence.[137] As a result, they operate hidden from the public as a form of *invisible punishment*.[138] Disenfranchisement laws are one of the harshest punishments imposed by our American society.[139] The disenfranchised have no political power.[140] They have no say in the policymaking that will govern them later on and which laws they have to abide by.[141] As a result of the effects of disenfranchisement laws, more states have enacted laws to restore voting rights.[142]

The process of restoring voting rights is known as re-enfranchisement.[143] Re-enfranchisement laws vary greatly from state to state.[144] This has created confusion regarding the different processes surrounding re-enfranchisement laws.[145] Currently, restoration of voting rights for felons is regulated in every state except for Maine and Vermont.[146] These two states allow felons to vote even while serving their sentences in prison.[147]

In recent years, many states have expanded their felony disenfranchisement laws to allow more ex-felons to regain their right to vote.[148] Since 1997, twenty-three states have repealed or amended their lifetime disenfranchisement laws.[149] Additionally, seven states have

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134. *Id.*
135. Guarnieri, *supra* note 41, at 454.
136. *Id.* at 455.
137. Cammett, *supra* note 25, at 370.
138. *Id.* at 371.
139. McLaughlin v. City of Canton, 947 F. Supp. 954, 971 (S.D. Miss. 1995).
140. *Id.*
141. *Id.*
142. Cammett, *supra* note 25, at 375.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 375–76.
147. Cammett, *supra* note 25, at 375.
148. MCLEOD, *supra* note 43, at 3.
149. *Id.*

expanded voting rights from previous lifetime disenfranchisement laws.[150] Six states have eased the restoration process for felons, allowing those under community supervision to regain the right to vote.[151] Finally, seventeen states have eased their restoration processes to allow voting restoration after sentence completion.[152]

Restrictions of voting rights vary among the states, from the type of crime committed, the criminal history, to how long it has been since completing the sentence.[153] For instance, Alabama disenfranchises those convicted of crimes of moral turpitude.[154] Another example is Mississippi, where twenty-one offenses can result in disenfranchisement.[155] Finally, in Tennessee, crimes of "murder, treason, rape, voter fraud, [or] sexual offenses" result in disenfranchisement.[156]

Many states have recently passed legislation to amend or reform their disenfranchisement laws.[157] For instance, Delaware passed an amendment repealing their disenfranchisement law, which required a five-year waiting period after sentence completion.[158] Another example is California; the state stopped litigation over policies that barred low-level felony offenders from having a right to vote.[159] Another instance was Wyoming, which allowed first-time offenders convicted of a non-violent offense to regain their right to vote.[160]

While some states have loosened their disenfranchisement laws, other states have taken the opposite approach to felony disenfranchisement.[161] In eight states, felons face lifetime disenfranchisement unless they go through "individual application, review,

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150. *Id.*
151. *Id.*
152. *Id.*
153. Guarnieri, *supra* note 41, at 468; *see also* MCLEOD, *supra* note 43, at 3.
154. Guarnieri, *supra* note 41, at 468.
155. *Id.*
156. *Id.*; *Voting Rights Restoration Efforts in Tennessee*, BRENNAN CTR. FOR JUST.: OUR WORK (Feb. 9, 2018), http://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-tennessee.
157. Guarnieri, *supra* note 41, at 468.
158. *Voting Rights Restoration Efforts in Delaware*, BRENNAN CTR. FOR JUST.: OUR WORK (Feb. 12, 2018), http://www.brennancenter.org/analysis/voting-rights-restoration-efforts-delaware.
159. Guarnieri, *supra* note 41, at 469; *Voting Rights Restored for 60,000 Low-Level Offenders*, SAN JOSE INSIDE: NEWS (Aug. 12, 2015), http://www.sanjoseinside.com/2015/08/12/voting-rights-restored-for-60000-low-level-offenders.
160. Guarnieri, *supra* note 41, at 469.
161. *Id.* at 468.

and approval" of their cases.[162] This process can be lengthy, confusing, and include a clemency board.[163] Other states require payment of fines accrued during the completion of a criminal sentence before restoring a felon's right to vote.[164]

These procedures are constantly changing, creating confusion and instability.[165] As a result, many individuals do not know their status or whether they can vote.[166] Further, individuals who have completed their sentences may not be given documentation to show that they have completed their parole requirement.[167] This makes it difficult when they have to show proof of completion in order to have their voting rights restored—even though they may be eligible to vote.[168] These financial payment requirements serve as another barrier keeping many ex-felons from being able to regain their voting rights.[169]

IV. CONSEQUENCES OF REPAYMENT BILLS IN RESTITUTION LAWS

A. *Repayment of Fees for Restitution*

Debt associated with or incurred during incarceration is known as *carceral debt*.[170] Carceral debt includes not only restitution, court costs, and other fees directly related to the criminal conviction, but also debt incurred during or as a result of the incarceration itself.[171] Fines are court-ordered penalties and form part of the individual's sentence.[172] Generally, fines are a monetary penalty and are set as a form of punishment depending on the severity of the crime committed.[173] Restitution is a form of payment, ordered by the court, which the individual sentenced must pay to the victim for financial losses incurred as a result of the offense.[174]

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162. *Id.* at 469–70.
163. *Id.* at 470.
164. *Id.*
165. Guarnieri, *supra* note 41, at 470.
166. *Id.*
167. *Id.*
168. *Id.*
169. *See id.*
170. Cammett, *supra* note 25, at 378.
171. *Id.*
172. *Id.*
173. *Id.* at 378–79.
174. *Id.* at 379.

Another type of court ordered payments are *public cost recovery fees*.[175] These fees reflect the effort of the state governments to charge prisoners the costs of the states' deficit.[176] These fees differ from other court ordered legal financial obligations ("LFOs").[177] Fines and restitution are intended to punish the defendant and aid the victim, respectively.[178] However, public cost recovery fees are solely intended to serve as profit for the state's economy.[179]

Recently, the Brennan Center for Justice performed a study showing that "[c]ash-strapped states have increasingly turned to user fees to fund their criminal justice systems, as well as to provide general budgetary support."[180] Offenders are charged for everything, including probation supervision, jail stays, and a required public defender.[181] Generally, defendants are part of a class that is unable to pay this massive debt as a result of being underemployed and poor.[182] After their release, their chances for employment decrease even more, rendering them helpless when attempting to pay back these debts, which are constantly increasing as a result of interest rates, payment plan fees, and collection agency fees.[183] Many states make carceral debt a condition of the individual's parole, probation, or any other correctional supervision they may be on.[184]

Recently, many states have been making their re-enfranchisement laws conditional on the payment of their carceral debt.[185] Appellate courts, in both the federal and state court systems, have upheld laws conditioning payment of carceral debt on felony re-enfranchisement.[186]

In 2000, the United States Court of Appeals for the Fourth Circuit upheld Virginia's re-enfranchisement law.[187] The law required convicted felons to pay a ten-dollar fee to begin the process of having their voting

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175. Cammett, *supra* note 25, at 379.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. Cammett, *supra* note 25, at 379 (quoting ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 4 (2010)).
181. Cammett, *supra* note 25, at 379.
182. *Id.* at 380.
183. *Id.*
184. *Id.* at 387.
185. *Id.*
186. Cammett, *supra* note 25, at 387.
187. *Id.* at 388; Howard v. Gilmore, No. 99–2285, 2000 WL 203984, at *2 (4th Cir. Feb. 23, 2000) (per curiam).

rights restored.[188] The decision set the precedent that laws that make repayment a condition for restitution of voting rights are constitutional.[189]

In 2007, the Washington Supreme Court upheld a statute that made re-enfranchisement dependent on payment of all LFOs.[190] The court found that LFOs are a continuing part of a felon's completion of their criminal sentence.[191] As a result, once their criminal sentences are restored by repayment, then the offender should have their voting rights restored.[192] Ignoring the argument that the repayment of LFOs served as an unconstitutional poll tax, the court went on to reason that convicted felons do not have a fundamental right to vote, and only a rational basis analysis is required in laws restricting a felon's right to vote.[193] The court found that "the [s]tate clearly has an interest in ensuring that felons complete all of the terms of their sentence, and there is no requirement that the [s]tate restore voting rights to felons until they do so."[194]

Additionally, the Washington Supreme Court also analyzed the issue of discrimination against poor felons unable to satisfy their LFOs.[195] Regarding this issue, the court reasoned that, while low income felons may be disproportionally affected by these laws, this factor alone does not constitute a violation of the Equal Protection Clause of the Fourteenth Amendment.[196]

Similarly, the United States Court of Appeals for the Ninth Circuit upheld an Arizona law automatically restoring voting rights to first time felony offenders that fully complete their sentences and pay their carceral debt in full.[197] The court applied the rational basis test and concluded that payment of carceral debt was part of completing a sentence.[198]

Overall, the courts that have considered the constitutionality of repayment laws have concluded that these laws are constitutional and subject only to a rational basis review.[199] These courts have reasoned that an individual's inability to pay cannot be the sole basis to deem these laws

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188. *Howard*, 2000 WL 203984, at *2.
189. *Id.*; Cammett, *supra* note 25, at 388.
190. Madison v. State, 163 P.3d 757, 761 (Wash. 2007).
191. *Id.* at 771.
192. *Id.*
193. *Id.* at 770–71.
194. *Id.* at 772.
195. *Madison*, 163 P.3d at 769.
196. *Id.*
197. Cammett, *supra* note 25, at 390; *see also* Harvey v. Brewer, 605 F.3d 1067, 1079 (9th Cir. 2010).
198. Cammett, *supra* note 25, at 390; *see also Harvey*, 605 F.3d at 1079.
199. Cammett, *supra* note 25, at 390–91.

unconstitutional.[200] As a result, a lot of ex-felons who have completed their sentences and served their time continue to be disenfranchised.[201]

B. *Racial Disparity*

Disenfranchisement laws have a clear and disparate impact on minorities, specifically African Americans.[202] Today, African Americans make up thirteen percent of the population.[203] However, African Americans make up "[forty] percent of the prison population."[204] Additionally, one in every thirteen African Americans across the nation is disenfranchised—this is a 7.7% rate.[205] This is four times higher than the non-African American community, which is disenfranchised at a rate of 1.8%.[206] In Florida, Kentucky, and Virginia, the rate is even higher.[207] At least one in every five African Americans is disenfranchised in these states, at a rate of over twenty percent.[208] More than forty percent of these individuals have served their time and completed their sentences.[209]

The right to vote is regarded as a fundamental right.[210] The African American population has *fought, bled, and died* to have this right and finally have a say in the political process.[211] Throughout history, the black vote has been suppressed through laws designed to disproportionally affect the African American population.[212]

Since the beginning, the right to vote was a privilege reserved for few—generally, white men over the age of twenty-one who owned property.[213] Finally, in 1869, the African American male population gained the right to vote, as a result of the Fifteenth Amendment guaranteeing the right to vote to all male citizens regardless of "race, color, or previous condition of servitude."[214] However, in the years to follow, the states began

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200. *Id.*
201. *Id.* at 391.
202. Jackson, *supra* note 32, at 302–03.
203. Cammett, *supra* note 25, at 365.
204. *Id.*
205. ACLU ET AL., *supra* note 1, at 2.
206. *Id.*; THE SENTENCING PROJECT, *supra* note 4, at 1.
207. ACLU ET AL., *supra* note 1, at 2.
208. *Id.*
209. *Id.*
210. Jackson, *supra* note 32, at 298.
211. *Id.*
212. *Id.* at 299.
213. *Id.*
214. *Id.*

to pass legislation with the sole purpose of suppressing the African American right to vote.[215] These laws are commonly known today as poll taxes, grandfather clauses, and literacy tests.[216]

The Voting Rights Act of 1965 was the result of a peaceful march for voting rights met with violence.[217] The Act prohibited any law that denied the right to vote based on race.[218] The Act has evolved with the passage of each amendment with the purpose to end each and every one of these unjust laws which disproportionally impact the black vote.[219] As a result, more modern laws suppressing the black vote, such as disenfranchisement laws, are much more facially neutral than they once were.[220] However, felony disenfranchisement is a clear example that the black vote continues to be massively suppressed.[221]

Many of the laws prohibited by the Act have similarities to the current disenfranchisement laws.[222] For instance, literacy tests were initially interpreted as race neutral laws, much like disenfranchisement laws are interpreted today.[223] However, literacy tests were abolished because, in practice, the laws had a disparate impact on the African American vote.[224] Today, felony disenfranchisement laws have two major similarities with literacy tests.[225] First, both depend on racial discrimination to have a disproportionate effect on the African American vote.[226] Second, this racial discrimination serves to exclude African Americans from voting.[227]

Another example are similarities between poll taxes and disenfranchisement and re-enfranchisement laws that make repayment of carceral debt a requirement for voting restoration.[228] The purpose of poll taxes was to suppress black voters.[229] Initially, like literacy tests and disenfranchisement laws, it was viewed as racially neutral.[230] However, in

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215. Jackson, *supra* note 32, at 299.
216. *Id.*
217. *Id.* at 300.
218. *Id.*
219. *Id.* at 300–01; *see also* 52 U.S.C. § 10301 (2018) (originally enacted as Voting Rights Act of 1965, Pub. L. No. 89–110, § 2, 79 Stat. 437, 437).
220. Jackson, *supra* note 32, at 302.
221. *Id.*
222. *Id.* at 302–03; *see also* 52 U.S.C. § 10301.
223. Jackson, *supra* note 32, at 303.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. Jackson, *supra* note 32, at 303.
229. *Id.*
230. *Id.*

practice, black voters were disproportionally affected by this law because they could not afford to pay the taxes in order to vote.[231] As a result, most African Americans were barred from the ballot box because of their inability to pay the taxes.[232] Felony disenfranchisement and re-enfranchisement laws that require repayment are similar because they affect a large number of the African American population who are unable to pay these growing carceral debts.[233]

In 2012, more African Americans were "in the grip of the criminal-justice system—in prison, on probation, or on parole—than were in slavery."[234] In 2014, black males were more likely to be in prison than non-African Americans.[235] Black males were in prison at a rate of 3.8 to 10.5 times higher than the white male population, and 1.4 to 3.1 times higher than the Hispanic male population.[236]

Hispanics, although not facing as high incarceration rates as the African American population, also face more likelihood of being disenfranchised than the non-Hispanic population.[237] The likelihood of incarceration for Hispanic men is 2.4 times greater than for non-Hispanic men and 1.5 times greater for Hispanic women than non-Hispanic women.[238] If this trend continues, seventeen percent of Hispanic men will be incarcerated in their lifetime in comparison to six percent of non-Hispanic white men.[239]

These numbers clearly show that disenfranchisement laws, even though facially neutral, have a disproportionate effect on minorities—specifically African Americans.[240] The African American population has fought for their voting rights for centuries and continues to fight for them.[241] However, they still meet restrictions specifically designed to suppress the African American community.[242]

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231. *Id.*
232. *Id.*
233. Jackson, *supra* note 32, at 303.
234. *Id.* at 302.
235. *Id.*
236. *Id.*
237. ACLU ET AL., *supra* note 1, at 2.
238. *Id.*
239. *Id.*
240. Cammett, *supra* note 25, at 365.
241. *Id.* at 364.
242. *Id.* at 364–65.

C. *Economic Disparity*

African Americans, along with other minorities, are overrepresented among the poor.[243] More than eighty percent of prisoners qualify for indigent services.[244] As a result, the poor are disproportionally represented among people in the criminal justice system.[245] Generally, people in the criminal justice system tend to be poor, underemployed, uneducated, and from disadvantage communities, where crime and incarceration have higher rates.[246] The chances of improving after imprisonment are even slimmer, since class mobility is even harder after a felony conviction.[247]

As a result, in the case of re-enfranchisement laws—which require the repayment of carceral debt to regain the right to vote after a felony conviction—a court may conclude that the state's interest in these laws are not legitimate nor rational.[248] While the courts allow great deference to states under the rational basis test, it is not so that every legislation subject to the rational basis test must be deemed constitutional.[249]

Justice Sandra Day O'Connor noted that "[p]erhaps withholding voting rights from those who are truly unable to pay their criminal fines due to indigency would not pass this rational basis test."[250] Justice O'Connor questioned whether laws that prevent low income felons from voting were truly legitimate.[251] Generally, felons are not only politically powerless but also indigent.[252] Consequentially, regaining their voting rights ultimately becomes impossible if they are required to pay their carceral debt before being able to vote.[253]

While the states may have legitimate reasons why repayment laws should survive a rational basis analysis, there are several reasons that make these laws irrational for low income ex-felons.[254] First, these laws provide no incentives for ex-felons.[255] If ex-felons are unable to pay their carceral

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243. *See Disturbing Racial Wealth Gap*, ECON. POL'Y INST., http://www.epi.org/news/disturbing-racial-wealth-gap/ (last visited May 1, 2020).
244. Cammett, *supra* note 25, at 369.
245. *Id.*
246. *Id.* at 370.
247. *Id.*
248. *See id.* at 398.
249. *See* Cammett, *supra* note 25, at 389.
250. Harvey v. Brewer, 605 F.3d 1067, 1080 (9th Cir. 2010).
251. Cammett, *supra* note 25, at 398.
252. *Id.*
253. *See id.* at 399–400.
254. *Id.* at 398–99.
255. *Id.*

debt, there is no incentive to make these payments a condition for the restoration of voting rights.[256] The right for felons to vote should not be conditional on the repayment of carceral debt because ex-felons will continue to carry this debt after serving their time and completing their sentences.[257]

Further, the state can achieve the legitimate end of collecting these debts through other methods.[258] The Supreme Court of the United States has concluded that a person's ability to pay should be considered in determining whether re-arrest as a result of non-payment is appropriate.[259] Thus, if an ex-felon has the ability to pay his or hers carceral debt, and is willingly failing to pay it, this person will likely be re-arrested.[260] Consequently, not only are re-enfranchisement laws that require repayment of carceral debt irrational because an indigent ex-felon simply cannot pay their carceral debt, they also do not accomplish the legitimate state purpose they are set out to accomplish.[261]

Another reason that these laws are irrational for low income felons is that carceral debt in the aggregate can be massive.[262] As a result, ex-felons become permanently disenfranchised because they will never be able to completely pay off this debt.[263] Accordingly, re-enfranchisement laws that require repayment are dangerous because they essentially end the rising trend of voter restoration, since a majority of ex-felons are permanently disenfranchised as a result of the repayment requirement.[264]

Repayment laws undermine another equally important state purpose to the collection of debt: The reintegration and rehabilitation process for ex-felons.[265] For ex-felons to successfully reintegrate back into society after completing their sentences, they need to be part of the society.[266] This becomes even more difficult with restrictions on voting rights such as repayment laws.[267] Furthermore, there is a strong relationship between crime and voting, which shows that "[t]hose who vote are less likely to be arrested

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256. Cammett, *supra* note 25, at 398–99.
257. *Id.* at 399.
258. *Id.* at 382–83.
259. *Id.* at 399.
260. *Id.*
261. Cammett, *supra* note 25, at 399–400.
262. *Id.* at 399.
263. *Id.* at 399–400
264. *Id.* at 400.
265. *Id.*
266. Cammett, *supra* note 25, at 400.
267. *See id.*

and incarcerated, and less likely to report committing a range of property and violent offenses."[268]

V. FLORIDA'S VOTING RIGHTS RESTORATION LAWS

A. *History of Felony Disenfranchisement in Florida*

Under the Florida Constitution, a person convicted of a felony could not "vote, serve on a jury, or hold public office until [his or her] civil rights [were] restored."[269] In 2007, Florida amended its voting rights restoration laws to approve automatic reinstatement for offenders convicted of non-violent crimes.[270] However, this changed when Governor Rick Scott, along with three other government officials, as members of the Executive Clemency Board, rescinded the amended restoration proceedings.[271]

The Clemency Board consisted of the Governor and his cabinet and convened four times a year.[272] The Clemency Board heard issues in relation to clemency, pardon, and restoration of civil rights.[273] Under Governor Rick Scott's reforms, Rules Nine and Ten went into effect creating two categories of ex-felons.[274] Ex-felons affected by Rule Nine, were offenders of less serious crimes and had a five-year waiting period after completion of their sentences to be eligible for a hearing in front of the Clemency Board.[275] Offenders of more serious crimes had a seven-year waiting period after completion of their sentences.[276] At the hearing, ex-felons had five minutes to present their case and answer questions from the Board and to pay their outstanding restitution fees.[277]

The hearings proved to be extremely unsuccessful.[278] Governor Bush approved one fifth of over 300,000 applications for restoration of

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268. *Id.* (quoting JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY vii (2006)).

269. Jackson, *supra* note 32, at 306; *see also* FLA. CONST. art. VI, § 4, *amended by* FLA. CONST. amend. IV.

270. Cammett, *supra* note 25, at 376.

271. *Id.*

272. Guarnieri, *supra* note 41, at 471.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. Guarnieri, *supra* note 41, at 471.

278. *Id.*

voting rights during his time in office.[279] The Governor has the ultimate decision to determine whether an application should be approved.[280]

"If the governor recommends clemency, and if a majority of the cabinet members agree, and they almost always do, the ex-offender's civil rights are restored. If the governor feels otherwise, the petitioner returns home without the full privileges of citizenship."[281]

The voting restoration procedures in Florida had a disparate impact on the African American population.[282] In 2008, more than one hundred thousand ex-felons would have been able to vote in the 2008 election.[283] A majority of these ex-felons were African Americans.[284]

Florida has disenfranchised more potential voters than any other state in the nation.[285] As of 2010, Florida had disenfranchised 1,541,602 citizens as a result of a felony conviction; more than 10% of Florida's population and more than 20% of the African American population.[286] Today, nearly half of the disenfranchised ex-felons in the United States live in Florida.[287] These numbers particularly affect the African American population since they form part of over half of the state's prison population, but only 15% of the overall state's population.[288]

B. *Amendment IV and The New Repayment Bill*

Amendment IV was passed as part of the 2018 Florida elections.[289] The Amendment would restore voting rights for anyone in the State convicted of a felony who had completed all terms of their felony sentences, except for those convicted of murder or sexual offenses.[290] About 1.5 million Floridians were estimated to regain their right to vote as a result of

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279. *Id.*
280. *Id.*
281. *Id.*; *see also* FLA. COMM'N ON OFFENDER REVIEW, RULES OF EXECUTIVE CLEMENCY 4–5 (2011).
282. *See* Cammett, *supra* note 25, at 376.
283. *Id.*
284. *Id.*
285. ACLU ET AL., *supra* note 1, at 6.
286. *Id.*
287. UGGEN ET AL., *supra* note 8, at 3.
288. Jackson, *supra* note 32, at 306.
289. FLA. CONST. art. VI, § 4, *amended by* FLA. CONST. amend IV; Lopez, *supra* note 34.
290. Lopez, *supra* note 34; *see also* FLA. CONST. art. VI, § 4, *amended by* FLA. CONST. amend. IV.

the passage of Amendment IV.[291] The Amendment went into effect in January 2019.[292]

Following the passage of Amendment IV, Florida's legislators argued that the Amendment was vague and needed clarification.[293] The legislature followed by introducing measures to limit how many ex-felons would automatically have their voting rights restored.[294] They passed Senate Bill 7066 and Governor Ron DeSantis signed it.[295] This bill includes a requirement in which Florida residents convicted of a felony have to pay all LFOs before regaining the right to vote.[296] Legislators, in support of the bill, argued that all LFOs imposed by a judge are part of their sentences and therefore need to be paid before restitution of the right to vote.[297]

Generally, judges convert LFOs into a lien, turning the criminal debt into a civil debt.[298] The new bill states that LFOs must be paid, even if converted into civil debt, before restitution of voting rights.[299] Exceptions to full payment of LFOs before restoration include: A judge waiving the lien or converting it into community service, or if the victim dismisses restitution payments.[300]

Requiring payment of LFOs before restoration of voting rights means that Florida residents now have to pay hundreds of millions of dollars in LFOs before being able to vote.[301] For instance, in Miami-Dade County, from the year 2000 to today, there are over $278 million dollars in

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291. Lopez, *supra* note 34; *see also* FLA. CONST. art. VI, § 4, *amended by* FLA. CONST. amend. IV.

292. P.R. Lockhart, *Florida Legislature Approves Bill Requiring Former Felons to Pay Fines and Fees Before Voting*, VOX: POL & POL'Y (May 3, 2019, 5:30 PM), http://www.vox.com/policy-and-politics/2019/5/3/18528564/amendment-4-florida-felon-voting-rights-fees; *see also* FLA. CONST. art. VI, § 4, *amended by* FLA. CONST. amend. IV.

293. FLA. CONST. art. VI, § 4, *amended by* FLA. CONST. amend. IV; Lockhart, *supra* note 36.

294. Lockhart, *supra* note 36.

295. FLA. STAT. § 98.0751 (2019); Fla. CS for SB 7066, at 1 (2019); Lockhart, *supra* note 36.

296. FLA. STAT. § 98.0751 (2019); Fla. CS for SB 7066, at 28; *see also* Lockhart, *supra* note 36.

297. Lockhart, *supra* note 292.

298. *Disenfranchisement News: Florida Lawmakers Pass New* Poll Tax *for Voting Rights Restoration*, SENT'G PROJECT (May 20, 2019), http://www.sentencingproject.org/news/disenfranchisement-news-florida-lawmakers-pass-new-poll-tax-voting-rights-restoration/.

299. *Id.*

300. *Id.*

301. Daniel Rivero, *Felons Might Have to Pay Hundreds of Millions Before Being Able to Vote in Florida*, WLRN (Jan. 20, 2019), http://www.wlrn.org/post/felons-might-have-pay-hundreds-millions-being-able-vote-florida.

outstanding LFOs related to ex-felons.[302] In Palm Beach County, there are over $195.8 million dollars in outstanding LFOs related to ex-felons.[303] Additionally, over one billion dollars in LFOs were issued between 2013 and 2018.[304] In those five years, only nineteen percent of this outstanding debt was paid per year.[305] Moreover, the outstanding carceral debt can be sent to collection agencies, which are allowed to increase the amount an ex-felon may owe by forty percent.[306] Furthermore, eighty-three percent of LFOs in this five year period were labeled *minimal collections expectations*.[307] This means that the courts know that this debt is unlikely to ever be satisfied because most of these ex-felons are unable to make the payments.[308]

Since the 1990s, Florida legislators have passed laws creating more than twenty categories of LFOs for different criminal offenses.[309] These fines serve as penalties for the crimes committed, separated from court costs and restitution fees.[310] Concurrently, legislators have passed laws eliminating exceptions for felons unable to satisfy their LFOs.[311]

Mandatory fines are attached to every offense, "from money laundering to driving under the influence, writing graffiti, and soliciting prostitution."[312] For example, a conviction of drug trafficking is attached to a "mandatory fine of $25,000 to $500,000 per count."[313] This leads to most ex-felons facing an insurmountable amount of debt upon completion of their sentences, and yet another barrier before regaining their right to vote.[314]

C. *Consequences of the New Bill*

Florida's new law will permanently disenfranchise poor people, a vast majority of which are African Americans.[315] These individuals will be denied the rights that were overwhelmingly voted for by the people in

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302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. Rivero, *supra* note 301.
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.*
311. Rivero, *supra* note 301.
312. *Id.*
313. *Id.*
314. *See id.*
315. *Disenfranchisement News: Florida Lawmakers Pass New* Poll Tax *for Voting Rights Restoration*, *supra* note 298.

Amendment IV.[316] "[M]ore than half a million people" have been affected by the passage of this bill.[317] It will take years for these people to pay off their outstanding LFOs in order to regain the right to vote.[318]

Generally, these individuals make $15,000 less than the average voting population.[319] This creates a substantial barrier in voting rights restoration because the majority of these individuals will be unable to pay their outstanding LFOs.[320] Those who never pay their outstanding LFOs in full *will be permanently disenfranchised*.[321] Legislators claim that the bill was necessary for clarification.[322] However, the bill does not address many issues, which will create more confusion than automatic restoration would have.[323]

Florida already has a very complex system for dealing with repayment of LFOs.[324] As a result, the restoration of voting rights continues to be complicated and discriminatory.[325] There is no single entity in place to track LFOs, and it will be very expensive to create such a system.[326] Further, the process of petitioning a judge to convert outstanding LFOs into community service was not laid out in the bill.[327] As a result, many things are unclear; for instance, whether a lawyer will be needed to petition the judge in order to get the LFOs turned into community service.[328] Most courts in Florida do not have programs where LFOs are converted into community service; therefore, it is unclear whether these programs will be put in place.[329] Further, it is unclear how individuals will know the total amount of LFOs they need to pay before regaining their right to vote, or how election officials will know who is able to register.[330]

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316. Lockhart, *supra* note 36; *see also* FLA. CONST. art. VI, § 4, *amended by* FLA. CONST. amend. IV.

317. Lockhart, *supra* note 36.

318. *Id.*

319. *Disenfranchisement News: Florida Lawmakers Pass New* Poll Tax *for Voting Rights Restoration*, *supra* note 298.

320. Lockhart, *supra* note 36.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Disenfranchisement News: Florida Lawmakers Pass New* Poll Tax *for Voting Rights Restoration*, *supra* note 298.

325. *Id.*

326. *Id.*

327. *Id.*

328. Lockhart, *supra* note 36.

329. *Id.*

330. *Id.*

The current system creates a cycle of debt for ex-felons attempting to reintegrate into society.[331] The incarcerated population is often unable to pay these fees.[332] In enacting this bill, the legislators and the governor have failed to consider the effects of this insurmountable debt on those convicted of crimes who are attempting to re-enter society.[333] Currently, the exemption for carceral debt continues to lessen, and the fees and fines continue to increase in the State.[334] Florida has clearly failed to consider inability to pay in imposing LFOs as a condition of regaining the right to vote.[335]

Further, the Florida legislation ignored the outstanding support of Amendment IV across party lines by passing this bill.[336] This undermines the democratic process, which should ultimately rest on the will of the people.[337] Many voting rights advocates are equating this bill to a poll tax because the majority of individuals with a felony conviction are disproportionately members of the African American population and more likely to be poor.[338] As a result, the bill has a discriminatory effect on African Americans, similar to the poll taxes.[339]

Several voting rights groups have filed lawsuits questioning the constitutionality of the new bill: First, the American Civil Liberties Union ("ACLU of Florida") and other civil rights groups have joined together in a lawsuit; second, Kelvin Jones, a black ex-felon who owes more than $50,000 in LFOs and is unable to pay them; third, the Campaign Legal Center; and fourth, the Southern Poverty Law Center.[340] The first three suits have been consolidated together and will be in front of United States District Court Judge Mark Walker as one case.[341] The four lawsuits make the same basic claim, questioning the constitutionality of the bill and its effects of disenfranchising poor people and people of color convicted of a felony, and, as a result, denying the rights granted to these people under the passage of Amendment IV.[342]

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331. *Id.*
332. *Id.*
333. Lockhart, *supra* note 36.
334. *Id.*
335. *Id.*
336. *Id.*
337. *Id.*
338. Lockhart, *supra* note 36.
339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.*

VI. POSSIBLE SOLUTIONS AND RECOMMENDATIONS

It is clear that there is a relationship between race, class, and disenfranchisement.[343] Conditioning voter restoration on full payment of carceral debt could lead to a crisis where millions of people, the majority of which are likely African Americans, will be permanently disenfranchised because they are unable to pay their carceral debt.[344] The African American population is more likely to live in poverty and is more likely to be in the criminal system throughout their lifetime.[345]

The relationship between race, class, and disenfranchisement could lead to a higher level of scrutiny because disenfranchisement disproportionately affecting African Americans does not satisfy a legitimate state interest.[346] As Erwin Chemerinsky and Mario L. Barnes explained, "[o]ne should need no other basis to call for closer scrutiny than the obvious truth that poverty takes on the character of a stigmatizing identity category. This stigma alone is powerful but also interacts in myriad and complex ways with race—a classification that receives strict scrutiny."[347]

The disproportionate effect that disenfranchisement laws, specifically the rising trend of repayment laws, have on African Americans creates an additional burden on a community that has faced and is currently facing so many other social hurdles and disproportionalities.[348] Analyzing these laws under a heightened level of scrutiny will show that these laws do not achieve a government interest, in addition to the irrationality of requiring someone who does not have the ability to pay, to pay for their carceral debt before regaining their right to vote.[349]

In addition to using a higher level of scrutiny to interpret voter restoration laws and felony disenfranchisement laws, automatic restoration could also be a possible solution to the felony disenfranchisement problem.[350] Automatic restoration eliminates the confusion and burdens that are set with overly restrictive restoration bills.[351] These laws are constantly changing, vary from state to state, and create a lack of knowledge not only

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343. Cammett, *supra* note 25, at 401.
344. *Id.*
345. *Id.*
346. *Id.*
347. Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, L. & CONTEMP. PROBS., Fall 2009, at 109, 119.
348. *See* Cammett, *supra* note 25, at 401.
349. *See id.*
350. *See id.*; Guarnieri, *supra* note 41, at 482.
351. *See* Guarnieri, *supra* note 41, at 482.

among ex-felons but among election officials as well.[352] For instance, as discussed above, the new repayment bill in Florida will create confusion because there is no one system in place in charge of managing carceral debt.[353] Thus, it will be hard to regulate who is eligible to vote, or who has satisfied their payments.[354] Further, there is no system in place in Florida for judges to deal with the influx of people who will petition to have their carceral debt turned into community service.[355] Automatic restoration would eliminate all the hurdles and confusion that arise from the passing of this repayment bill.[356]

Automatic restoration would also save time and resources spent in creating the systems necessary to appropriately implement these laws.[357] Confusing and difficult to implement restoration procedures create unnecessary expenses in "coordinat[ing] complicated data matches, administer[ing] convoluted eligibility requirements . . . [and] sort[ing] through thousands of restoration applications."[358] In addition to resources spent on informing and educating public officials of the new regulations in place, automatic restoration would eliminate all these hurdles and save states thousands of dollars spent on all these resources.[359] This was exactly the purpose the Fourth Amendment was set out to accomplish in Florida before the repayment bill was passed.[360]

Additionally, automatic restoration "aligns with the spirit of the Fourteenth Amendment."[361] Repayment bills and overly restrictive restoration laws disproportionally bar the poor and as a result impact minorities from regaining the right to vote.[362] This should not be permissible today.[363] Restrictive restoration laws threaten the American principles behind the democratic process because they exclude a massive population

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352. *See id.*
353. *See* Lockhart, *supra* note 36.
354. *See id.*
355. *Id.*
356. *See id.*
357. Guarnieri, *supra* note 41, at 483.
358. ERIKA WOOD & RACHEL BLOOM, AM. CIVIL LIBERTIES UNION & BRENNAN CTR. FOR JUSTICE, DE FACTO DISENFRANCHISEMENT 9 (2008).
359. *See* Guarnieri, *supra* note 41, at 483.
360. *See* FLA. CONST. art. VI, § 4, *amended by* FLA. CONST. amend. IV; Lopez, *supra* note 34.
361. Guarnieri, *supra* note 41, at 484; *see also* U.S. CONST. amend XIV, § 1.
362. Guarnieri, *supra* note 41, at 483–84.
363. *Id.* at 484.

from the political process.[364] Automatic restoration of voting rights is efficient, unbiased, and "the most constitutionally sound option."[365]

VII. CONCLUSION

The right to vote is a fundamental right.[366] It allows citizens to play a role in the political process.[367] "It gives each person a voice, a choice, and a sense of belonging."[368] For the African American population, it is a right they have fought and died for.[369] As Dr. Martin Luther King explained, "[w]ith it, the Negro can eventually vote out of office public officials who bar the doorway to decent housing, public safety, jobs, and decent integrated education . . . to do this the vote is essential."[370]

Felony disenfranchisement laws after an individual has completed their sentences serves only as over-punishment that disproportionally affects the African American population.[371] Repayment bills specifically affect the poor population, a majority of which are African Americans.[372] Not allowing ex-felons to vote and restricting them from regaining their right to vote after serving their time exacerbates inequality, and shows them that they are not welcomed back to reintegrate into their community.[373] As a result, disenfranchisement laws move our society away from the reintegration and rehabilitation purposes of a criminal system and sentence.[374] "Any threat to achieving true equality is really a threat to the entire democracy . . . ."[375] Thus, automatic restoration of voting rights is necessary to ensure that we continue to protect the democratic process.[376] It is not a true democracy when millions of citizens cannot vote, but yet have to abide by the same laws as those who do have a say in the political process.[377]

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364. *Id.* at 485.
365. *Id.*
366. Jackson, *supra* note 32, at 321.
367. *Id.*
368. *Id.*
369. *Id.*
370. Martin Luther King Jr., *Civil Rights No. 1 — The Right to Vote*, N.Y. TIMES, Mar. 14, 1965, at SM26–27.
371. Jackson, *supra* note 32, at 322.
372. *See* Cammett, *supra* note 25, at 398, 401.
373. Jackson, *supra* note 32, at 322.
374. *See id.* at 321–22.
375. *Id.* at 322.
376. *Id.*
377. *See id.* at 321.

WHAT YOU RHYME COULD BE USED AGAINST YOU: A CALL FOR REVIEW OF THE TRUE THREAT STANDARD

ZACHARY STONER*

I. INTRODUCTION

Imagine you are a young aspiring rapper who has written a hip-hop song describing your frustrations with local law enforcement.[1] Now, imagine that song you wrote down is being used against you in a criminal proceeding as proof of a violation of a federal law.[2] Jamal Knox found himself in a similar situation in 2012 when he produced and posted a hip-hop music video and was subsequently charged with sending terroristic threats and witness intimidation under Pennsylvania state law.[3] The case became an

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1. *See* Commonwealth v. Knox, 190 A.3d 1146, 1149 (Pa. 2018), cert. denied, 139 S. Ct. 1547 (2019).
2. *See id.* at 1150.
3. *Id.* at 1148–49.

issue over whether the First Amendment protects hip-hop songs that contain true threats and describe violence against named law enforcement officers.[4]

The Supreme Court of the United States has defined true threats as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[5] Besides this definition, the precedent surrounding true threats has been very unclear and lacking any kind of guidance to the lower courts.[6] The Supreme Court of the United States has failed to identify any kind of bright-line rule or test for true threats and circuit courts across America each use their own tests when looking at true threats.[7] This lack of uniformity across the circuits has created inconsistent outcomes and denied First Amendment protections to speech that was deserving of protection.[8] The Supreme Court of the United States had another chance to clarify the widely applied yet misunderstood true threat precedent and failed to do so when they denied certiorari to Jamal Knox this year.[9]

In 2012, Jamal Knox was pulled over by Officer Kosko for a routine traffic stop.[10] During the traffic stop, Knox tried to escape in his vehicle.[11] He crashed his car and was apprehended after trying to escape on foot.[12] When law enforcement searched Knox's car, they found heroin, a large sum of money, and a stolen firearm.[13] While Knox was waiting for trial for these charges, he wrote a song titled *F—k the Police*, which was then posted online.[14] The song contained violent lyrics describing Knox's hatred for the Pittsburgh Police Department and his desire to murder the officers connected

4. *Id.* at 1148; *see also* U.S. CONST. amend. I.

5. Virginia v. Black, 538 U.S. 343, 359 (2003).

6. *See* Elonis v. United States, 135 S. Ct. 2001, 2013 (2015); Clay Calvert et al., *Rap Music and the True Threats Quagmire: When Does One Man's Lyric Become Another's Crime?*, 38 COLUM. J.L. & ARTS 1, 9 (2014).

7. *See Elonis*, 135 S. Ct. at 2018; Calvert et al., *supra* note 6, at 9–10; Lyrissa Barnett Lidsky & Linda Riedemann Norbut, *#I U: Considering the Context of Online Threats*, 106 CALIF. L. REV. 1885, 1898 (2018).

8. *See* U.S. CONST. amend. I; Calvert et al., *supra* note 6, at 9.

9. Knox v. Pennsylvania, 139 S. Ct. 1547, 1547 (2019); Ariane de Vogue, *Supreme Court Declines to Take up First Amendment Case Brought by Rap Artist*, CNN: POL. (Apr. 15, 2019, 11:17 AM), http://www.cnn.com/2019/04/15/politics/supreme-court-jamal-knox-first-amendment/index.html.

10. Commonwealth v. Knox, 190 A.3d 1146, 1148 (Pa. 2018), *cert. denied*, 139 S. Ct. 1547 (2019).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 1149.

to his arrest.[15] Knox was then charged with witness intimidation and sending terroristic threats.[16]

At trial, the government's basis for these charges stemmed from Knox's song which, unbeknownst to him, was posted online by a different person.[17] The court rejected Knox's First Amendment argument, finding it was not protected speech because the lyrics indicated Knox specifically intended to intimidate the officers and "obstruct the administration of criminal justice."[18] On appeal, the conviction was upheld, but the intermediate court failed to properly address the First Amendment issue and a subsequent appeal to the Pennsylvania Supreme Court followed.[19]

The Pennsylvania Supreme Court upheld Knox's conviction, reasoning that naming specific police officers who were meant to testify against him indicated the song was more than just a fantastical form of artistic self-expression.[20] The threatening and realistic nature of the lyrics took a song that normally would be considered free speech and turned it into an unprotected threat against two police officers.[21] The court stated they did not wish to insulate true threats that take the forms of song lyrics from prosecution simply because they appear in a song.[22]

Hip-hop comes from very humble beginnings.[23] Music that started out as party music transformed into a powerful platform for people to voice their opinions and spread their messages on a national scale.[24] As hip-hop has continued to grow in popularity, the platform rappers use has also grown in size to a now global level.[25] Since the late 1980s, hip-hop and politics have not been far removed from each other.[26] From *F*ck tha Police* to the

15. *Knox*, 190 A.3d at 1149.
16. *Id.* at 1150.
17. *Id.* at 1151.
18. *Id.*; *see also* U.S. CONST. amend. I.
19. *Knox*, 190 A.3d at 1152; *see also* U.S. CONST. amend. I.
20. *Knox*, 190 A.3d at 1160–61.
21. *See id.*
22. *Id.*
23. Brief for Michael Render ("Killer Mike") et al. as Amici Curiae Supporting Petitioner at 7, Knox v. Pennsylvania, 139 S. Ct. (2019) (No. 18–949); *see also* Calvert et al., *supra* note 6, at 16.
24. Brief for Michael Render ("Killer Mike") et al. as Amici Curiae Supporting Petitioner, *supra* note 23, at 8.
25. *Id.*; Calvert et al., *supra* note 6, at 16.
26. *See* Brief for Michael Render ("Killer Mike") et al. as Amici Curiae Supporting Petitioner, *supra* note 23, at 8.

Black Lives Matter movement, hip-hop has been full of protest anthems that shock and appall many who do not agree with the music's message.[27]

Jamal Knox's case is another example of hip-hop lyrics being used as evidence in a criminal proceeding against its author.[28] One of the issues surrounding the use of hip-hop lyrics as evidence in a court is that the criminal justice system does not treat lyrics as an art form, but instead as statements of truth and guilt.[29] Hip-hop and poetry share some common ground because they both take advantage of literary devices such as similes, metaphors, hyperboles, and tales of fantasy.[30] However, hip-hop is not given the benefit of the doubt like poetry when it comes to depictions of crime and guilt.[31] Courts are not willing to inform juries about what makes hip-hop the complex art form that is on par with poetry because it is simply viewed as inferior.[32] Hip-hop is surrounded by stigma and bias, conjuring negative connotations by those who are not familiar with the genre.[33] Tests show that those unfamiliar audiences assume that hip-hop is more violent than any other genre and therefore people who consume or produce hip-hop are violent individuals.[34] These negative biases can unfairly prejudice a trial against a hip-hop artist defendant.[35] The criminal justice system's treatment of hip-hop needs an overhaul to ensure that defendants receive a fair trial separate from biased courts of public opinion.[36] This Comment will first cover the history of the true threats doctrine and the seminal cases that created the foundation for the modern interpretation of the true threats doctrine.[37] It will also analyze the problems the Supreme Court of the United States has created for the lower courts by not creating a clear test or

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27. *See id.*; Andrea L. Dennis, *Black Contemporary Social Movements, Resource Mobilization, and Black Musical Activism*, L. & CONTEMP. PROBS. 2016, at 29, 47, 50–51.

28. Commonwealth v. Knox, 190 A.3d 1146, 1150–51 (Pa. 2018), *cert. denied*, 139 S. Ct. 1547 (2019).

29. Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 12–13 (2007).

30. *See id*. at 20–23.

31. *See id*. at 12–13.

32. *See id*. at 13–14.

33. Adam Dunbar et al., *The Threatening Nature of* Rap *Music*, 22 PSYCHOL., PUB. POL'Y, & L. 280, 280 (2016).

34. *Id.* at 282.

35. *See id.* at 288.

36. *See* Dennis, *supra* note 29, at 40.

37. *See* Elonis v. United States, 135 S. Ct. 2001, 2008 (2015); Virginia v. Black, 538 U.S. 343, 351 (2003); Watts v. United States, 394 U.S. 705, 707–08 (1969) (per curiam); Matt Kass, Elonis v. United States*: At the Crossroads of First Amendment and Criminal Jurisprudence in the Digital Age*, 43 RUTGERS COMPUTER & TECH. L.J. 110, 115 (2017); discussion *infra* Part II.

precedent courts should use when analyzing the statutes that involve prosecuting true threats.[38] Then, this Comment will discuss the history of hip-hop songs and its use as evidence in criminal proceedings against the defendant.[39] This section will present the argument for why hip-hop needs to be treated as an art form in the criminal justice system and why an overhaul for how it is presented to factfinders is needed.[40] The main focus of this Comment is to present a test for the true threats doctrine that will provide a balance between protecting the First Amendment rights of the speaker and protecting the victim from future harm.[41] The goal is to create a test that will cover every statute that involves a true threat while also ensuring hip-hop is treated as an art form and not just a laundry list of confessions.[42] At the end of the day, people should be able to speak, create, or rhyme what they want without the fear of being prosecuted for it.[43]

II. THE TRUE THREAT DOCTRINE: A HISTORY OF CONFUSION AND AMBIGUITY

The First Amendment exception of true threats originated in the Supreme Court of the United States' case *Watts v. United States*.[44] The true threat exception applies to statements that convey harm to the recipient or statements that strike fear into the recipient.[45] When a true threat has been conveyed, the speaker of the threat can then be prosecuted under a relevant state or federal law.[46] The problem with the current state of the true threat analysis is that the Supreme Court of the United States has failed to accurately create a way to measure and scrutinize true threats.[47] Cases

38. Megan Chester, *Lost in Translation: The Case for the Addition of a Directness Test in Online True Threat Analysis*, 23 COMMLAW CONSPECTUS: J. COMM. L. & POL'Y 395, 425 (2015); Kass, *supra* note 37, at 130; *see also* discussion *infra* Part II.

39. Dennis, *supra* note 29, at 5–6; Donald F. Tibbs & Shelly Chauncey, *From Slavery to Hip-Hop: Punishing Black Speech and What's* Unconstitutional *About Prosecuting Young Black Men Through Art*, 52 WASH. U. J.L. & POL'Y 33, 46–49 (2016); *see also* discussion *infra* Part III.

40. *See* Dennis, *supra* note 29, at 20–23.

41. Alison J. Best, Elonis v. United States*: The Need to Uphold Individual Rights to Free Speech While Protecting Victims of Online True Threats*, 75 MD. L. REV. 1127, 1157–58 (2016); *see also* U.S. CONST. amend. I; discussion *infra* Part IV.

42. *See* Best, *supra* note 41, at 1151–56, 1158.

43. *See* Dennis, *supra* note 29, at 40.

44. *See* U.S. CONST. amend. I; 394 U.S. 705, 708 (1969) (per curiam).

45. Virginia v. Black, 538 U.S. 343, 359–60 (2003).

46. Elonis v. United States, 135 S. Ct. 2001, 2004 (2015); *Watts*, 394 U.S. at 705; Commonwealth v. Knox, 190 A.3d 1146, 1150 (Pa. 2018), *cert. denied*, 139 S. Ct. 1547 (2019).

47. Kass, *supra* note 37, at 130; *see also* Chester, *supra* note 38, at 395, 401.

surrounding true threats have been vague or narrowly tailored to the relevant statute, instead of broad statements qualifying exceptions to the First Amendment.[48] This has led to confusion among the lower circuit courts as to whether they should treat true threats as general or specific intent crimes.[49] As communication between people has become easier with growth of the internet and social media use, threats have become easier to spread and harder to distinguish from mere expression.[50] A bright-line test is needed to ensure First Amendment rights are protected across the jurisdictions and court decisions are uniform under the true threat exception.[51] Unfortunately, after fifty years of precedent surrounding the true threat doctrine, not much has actually been clarified.[52]

The First Amendment establishes that Congress shall make no law that abridges the freedom of speech of United States citizens.[53] The Supreme Court of the United States has long held that the First Amendment protects speech that takes the form of symbols, expressions, and words.[54] Since the Bill of Rights and the First Amendment's adoption, there have been limitations placed on what is considered to be free speech.[55] The Supreme Court of the United States has proscribed limitations on free speech as far back as 1919.[56] In *Schenck v. United States*,[57] Justice Oliver Wendell Holmes wrote "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[58] Justice Holmes' famous quote demonstrates that the First Amendment does not contain absolute protections to all speech and that certain forms of speech could fall outside the scope of the protections guaranteed by the First Amendment depending on where the expression takes place and how it is communicated.[59] *Schenck* would establish what was known as the *clear and*

48. *See* U.S. CONST. amend. I; *Elonis*, 135 S. Ct. at 2004; *Black*, 538 U.S. at 348; *Watts*, 394 U.S. at 707; Chester, *supra* note 38, at 411.

49. Calvert et al., *supra* note 6, at 9–10; *see* Mary Margaret Roark, Elonis v. United States*: The Doctrine of True Threats: Protecting Our Ever-Shrinking First Amendment Rights in the New Era of Communication*, 15 PITT. J. TECH. L. & POL'Y 197, 206 (2015).

50. Lidsky & Norbut, *supra* note 7, at 1902.

51. Roark, *supra* note 49, at 210; *see also* U.S. CONST. amend. I.

52. *See Elonis*, 135 S. Ct. at 2013.

53. U.S. CONST. amend. I.

54. Virginia v. Black, 538 U.S. 343, 358 (2003); *see also* U.S. CONST. amend. I.

55. *See* U.S. CONST. amends. I–X; Watts v. United States, 394 U.S. 705, 707 (1969) (per curiam); Schenck v. United States, 249 U.S. 47, 52 (1919).

56. *Schenck*, 249 U.S. at 52.

57. 249 U.S. 47 (1919).

58. *Id.* at 52.

59. *See id.*; U.S. CONST. amend. I.

present danger test.[60] This test would become the standard for analyzing certain forms of dangerous speech that fell outside of the scope of the First Amendment until 1969 when the Supreme Court of the United States would coin the term *true threat* for certain kinds of unprotected speech.[61] By creating the true threat exception, the Court sought to identify certain forms of speech as true threats and distinguish them from constitutionally protected expression.[62]

A. *The True Threat Doctrine and the Supreme Court's Lack of Guidance*

The true threat doctrine arose in response to a climate of political and social unrest in 1960s America.[63] Americans were loudly voicing their dissatisfaction with the Vietnam War, racial segregation and civil rights, and with the state of American politics.[64] On August 27, 1966, a young man by the name of Robert Watts announced his dissatisfaction with President Lyndon B. Johnson and the Vietnam War at a protest rally.[65] There, Watts proclaimed: "If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J."[66] Even though Watts' comment was met with laughter, he was charged with and subsequently found guilty of violating a federal law that prohibited a person from "knowingly and willfully threatening the President" of the United States.[67] Watts appealed and eventually came before the Supreme Court of the United States.[68] The Court reversed the lower courts' decisions ruling that *political hyperbole*, even if violent, does not automatically indicate a serious intent to commit violent acts.[69] In its decision, the Court identified a new exception to free speech known as *true threats*.[70] Unfortunately, the *Watts* Court did not offer any insight into true threats besides stating context and that the reaction of listeners should be considered.[71] In making its decision, the Court wanted to ensure "that debate on public issues should be uninhibited, robust, and wide-open, and that it

60. *See Schenck*, 249 U.S. at 52.
61. *See* U.S. CONST. amend. I; Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam); *Schenck*, 249 U.S. at 52.
62. *Watts*, 394 U.S. at 707.
63. *See id.* at 706.
64. *See id.* at 705–06.
65. *Id.*
66. *Id.* at 706.
67. *Watts*, 394 U.S. at 706.
68. *Id.*
69. *Id.* at 708.
70. *Id.*
71. *Id.*

may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[72] The Court was trying to ensure that this restriction placed on free speech was not overly broad and did not include all harsh or crude political discourse.[73]

Watts would become the seminal case for determining what kind of speech was considered to be a true threat.[74] The decision has been criticized by scholars for not giving any guidance to the lower courts on how to handle true threat cases and for providing barely any information on what is considered to be a true threat.[75] The Court chose to deliver a per curiam decision and therefore failed to provide the guidance lower courts needed to properly decide their own true threat cases.[76] The only thing the Court guaranteed was that political hyperboles, like the one spoken by Watts, are a form of protected speech.[77] In place of a test, the Court did give some factors that can be used to determine if the speech is a true threat, such as: (1) the words in full context; (2) reaction of the listeners; and (3) if the threat is expressly conditioned upon future events happening.[78] Although the Court did mention the possibility of analyzing the subjective intent of the listener in *Watts*, ultimately, the Court appeared to favor the use of an objective analysis when deciding future true threat cases.[79] However, the Court never explicitly stated whether a subjective or objective test should be used when analyzing true threats.[80] For the next thirty years, the federal and state courts would apply the objective factors when analyzing First Amendment protections and true threats.[81] It would not be until 2003 when the Supreme Court of the United States would again be faced with the opportunity to review true threats and provide further insight and analysis into the exception.[82]

With its decision in *Virginia v. Black*,[83] the Supreme Court of the United States provided a definition of true threats and more relevant information about what a *true threat* is.[84] In *Black*, the Supreme Court of the United States agreed to hear the case of two men who were found guilty of

72. *Watts*, 394 U.S. at 708.
73. *See id.*
74. Calvert et al., *supra* note 6, at 7; *see also Watts*, 394 U.S. at 708.
75. Calvert et al., *supra* note 6, at 7–8.
76. *Id.* at 8; *see also Watts*, 394 U.S. at 705, 708.
77. *See Watts*, 394 U.S. at 708.
78. *Id.*
79. *See id.* at 707–08.
80. *See id.*
81. Calvert et al., *supra* note 6, at 8; *see also* U.S. CONST. amend I.
82. Virginia v. Black, 538 U.S. 343, 358–60 (2003).
83. 538 U.S. 343 (2003).
84. *Id.* at 359–60.

violating a Virginia statute that outlawed burning crosses.[85] The statute made it illegal for anyone to burn a cross "with the intent of intimidating any person or group of persons."[86] The Court accepted certiorari to determine if burning crosses fell under the true threat exception.[87] In her opinion, Justice O'Connor described true threats as speech that "encompass those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or group of individuals."[88] The Court further held the speaker "need not actually intend to carry out the threat [and] a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'"[89] The Court seemed to agree that true threats should be identified through the use of objective factors alone, disregarding the subjective intent of the speaker.[90] However, confusion emerges in reading Justice O'Connor's true threat definition which appears to indicate a focus on subjective intent.[91] The opinion qualifies that the speaker must intend to communicate a threat or intend to threaten the listener when the threat is spoken.[92] In *Black*, the Court could have provided a concrete analysis for true threats, but instead further fueled the ambiguous and inconsistent application of the doctrine by lower courts left to their own interpretations.[93]

The *Black* decision did little to help the already muddied and confusing precedent surrounding the true threat doctrine.[94] The Court focused on Virginia's statute as it related to the facts of the case and forewent the opportunity to make a larger decision based on the First Amendment protections to freedom of expression.[95] Due to the lack of a direct answer regarding true threats, some circuits have chosen to adopt a subjective analysis, some have maintained an objective analysis, and others have created a hybrid objective and subjective analysis to determine the

85. *Id.* at 347–48.

86. *Id.* at 348; VA. CODE ANN. § 18.2-423, *declared unconstitutional by* Elliot v. Commonwealth, 593 S.E.2d 263, 236, 270 (Va. 2004).

87. *See Black*, 538 U.S. at 347–48.

88. *Id.* at 359.

89. *Id.* at 359–60; R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

90. *Black*, 538 U.S. at 359.

91. *Id.*

92. *Id.*

93. *See id.* at 367; Lidsky & Norbut, *supra* note 7, at 1896–97.

94. *See Black*, 538 U.S. at 367; Lidsky & Norbut, *supra* note 7, at 1896–97.

95. *Black*, 538 U.S. at 347–48; *see also* U.S. CONST. amend. I; VA. CODE ANN. § 18.2-423, *declared unconstitutional by* Elliot v. Commonwealth, 593 S.E.2d 263, 270 (Va. 2004).

nature of the speech in question.[96] The difference between a subjective and objective analysis completely alters the charged offense from either being reviewed as a specific intent crime or a general intent crime.[97] A general intent requirement punishes the speaker for uttering words that a reasonable person would think are a threat, and a specific intent requirement would seek an analysis into what the defendant actually meant.[98] In 2015, the Court again failed to set a uniform standard for true threats, but this time the crime involved true threats over social media.[99]

In response to his wife leaving him, Anthony Douglas Elonis adopted the pseudonym of *Tone Dougie* and took to Facebook to vent his anger in the form of violent, graphic lyrics.[100] Elonis would provide a disclaimer with the lyrics stating they were fictitious and a form of therapy to help him cope with the pain of his separation.[101] After posting a photograph of himself threatening a coworker with a knife at a Halloween party with the caption *I wish*, Elonis was fired from his job.[102] Following his unemployment, Elonis' lyrics became more aggressive and violent.[103] Elonis, posing as *Tone Dougie*, posted lyrics online such as "I have sinister plans for all my friends and must have taken home a couple. Y'all think it's too dark and foggy to secure your facility from a man as mad as me? . . . Whoever thought the Halloween Haunt could be so f***in' scary?"[104] Elonis continued to post threatening messages about his wife, eventually driving her to seek a protective order from a court because she feared her life was in danger.[105] Elonis caught the attention of the Federal Bureau of Investigation ("FBI") after posting "I'm checking out and making a name for myself.

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96. Calvert et al., *supra* note 6, at 9–10; *see also* United States v. Heineman, 767 F.3d 970, 975 (10th Cir. 2014); United States v. Bagdasarian, 652 F.3d 1113, 1118 (9th Cir. 2011).

97. David Barney, Note, Elonis v. United States*: Why the Supreme Court Punted on Free Speech*, 44 PEPP. L. REV. 1, 5 (2016).

98. Calvert et al., *supra* note 6, at 9.

99. *See* Elonis v. United States, 135 S. Ct. 2001, 2005, 2013 (2015).

100. *Id.* at 2005–06.

101. *Id.* at 2005.

102. *Id.*

103. *Id.*

104. *Elonis*, 135 S. Ct. at 2005.

105. *Id.* at 2006. The post that led to the wife seeking a protective order involved Elonis quoting a comedy sketch about how it is illegal for him to say that he wants to kill his wife. *Id.* at 2005–06. The post escalated to Elonis stating it is incredibly illegal for him to say that she should be killed by a mortar launcher through the roof because it is the best line of sight. *Id.* at 2005. Elonis then posted an illustrated diagram of his wife's house. *Id.* at 2006. After the protective order was issued, he made another post stating the order will not stop a bullet and that he will use explosives to kill the police department and sheriffs. *Elonis*, 135 S. Ct. at 2006.

Enough [sic] elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined."[106] After being interviewed by FBI agents, Elonis then posted on Facebook lyrics titled *Little Agent Lady*, which depicted Elonis slitting an agent's throat then blowing himself up when law enforcement attempted to arrest him.[107] Elonis was arrested shortly after making these comments and indicted by a grand jury on five counts of violating 18 U.S.C. § 875(c).[108]

At trial, Elonis sought to have the charges dismissed by applying the Supreme Court of the United States' decision in *Black*.[109] Counsel argued that the Government needed to establish that Elonis had the subjective intent to intimidate the victims under 18 U.S.C. § 875(c).[110] If Elonis lacked the intent to intimidate or threaten the victims at the time he made the threats, then his messages could not be considered true threats and the First Amendment would protect his speech as artistic expression that took the form of violent hip-hop lyrics.[111] The trial court denied the motion and the State presented evidence that established an objective reasonable person would understand Elonis' statements as threats.[112] The jury found Elonis guilty on all counts and his convictions were upheld on appeal.[113] In June of 2014, Elonis was given one last chance to be heard when his writ of certiorari was granted by the Supreme Court of the United States.[114]

The main issue before the Court was whether 18 U.S.C. § 875(c) required a level of mens rea for the threat to be prosecutable.[115] Pursuant to the plain language of the statute, the Court decided Congress intended to not identify a particular mental state required to convict a defendant under the statute.[116] The Court reasoned that the transmission of threatening communication is only wrongful when the speaker intends to be

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106. *Id.*

107. *Id.* at 2006–07.

108. *Id.* at 2007; *see also* 18 U.S.C. § 875(c) (2018). 18 U.S.C. § 875(c) states: "Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 875(c).

109. *Elonis*, 135 S. Ct. at 2016; Virginia v. Black, 538 U.S. 343, 367 (2003); Chester, *supra* note 38, at 411.

110. *Black*, 538 U.S. at 347–348; *see also* 18 U.S.C. § 875(c); *Elonis*, 135 S. Ct. at 2017; Chester, *supra* note 38, at 411.

111. *Elonis*, 135 S. Ct. at 2016; Chester, *supra* note 38, at 411; *see also* U.S. CONST. amend. I.

112. *Elonis*, 135 S. Ct. at 2007; Chester, *supra* note 38, at 411.

113. *Elonis*, 135 S. Ct. at 2007; Chester, *supra* note 38, at 411–12.

114. *Elonis*, 135 S. Ct. at 2001.

115. *See id.* at 2004; 18 U.S.C. § 875(c).

116. *Elonis*, 135 S. Ct. at 2008; *see also* 18 U.S.C. § 875(c).

threatening.[117] The perspective of the recipient is not in-and-of-itself enough to qualify as a true threat.[118] Therefore, any mental state requirement would have to apply to whether the speaker knew the communication contained a threat.[119] Justice Roberts pointed out that Elonis was convicted on an objective reasonable person standard and such standard essentially reduces the culpability of the crime to negligence.[120] Negligence is proven from an objective analysis, but the Court found this standard to be insufficient.[121] Essentially, in *Elonis*, the Court acknowledged the validity of a hybrid test, weighing both objective and subjective factors to determine a true threat.[122] However, the Court again refused to tackle this matter head-on, and did not discuss the ongoing First Amendment concerns effecting lower court rulings and subsequent inconsistent precedents surrounding the true threats doctrine.[123] Ultimately, the Court overturned Elonis' conviction holding that criminal liability for a federal crime should not entirely rest on the results of the defendant's actions without taking a look at the mental state of the defendant.[124] The Court chose not to discuss the First Amendment issues related to Elonis' threats, nor whether a recklessness standard would have been satisfactory to convict Elonis.[125]

Leading up to the announcement of the Court's decision in *Elonis*, there was much hope that the Court would finally clarify much of the confusion regarding true threats amongst the circuits.[126] Unfortunately, the Supreme Court of the United States failed to shed any kind of additional light on the true threat exceptions beyond 18 U.S.C. § 875(c).[127] The majority opinion is mostly scrutinized for its failure to address any of Elonis' First Amendment arguments.[128] Both the concurring opinion, written by Justice Alito, and the dissenting opinion by Justice Thomas agree the Court could have addressed these issues.[129] Justice Alito opens his concurring opinion stating the *Elonis* decision will only cause *confusion and serious*

117. *Elonis*, 135 S. Ct. at 2009.
118. *See id.* at 2011.
119. *See id.*
120. *Id.*
121. *Id.* at 2011–12.
122. *Elonis*, 135 S. Ct. at 2011.
123. U.S. CONST. amend. I; Barney, *supra* note 97, at 2.
124. *Elonis*, 135 S. Ct. at 2012.
125. *See id.* at 2013; U.S. CONST. amend. I.
126. Barney, *supra* note 97, at 2; Lidsky & Norbut, *supra* note 7, at 1898; *see also Elonis*, 135 S. Ct at 2013.
127. Lidsky & Norbut, *supra* note 7, at 1898; *see also* 18 U.S.C. § 875(c) (2018).
128. U.S. CONST. amend. I; *Elonis*, 135 S. Ct. at 2004; Barney, *supra* note 97, at 11.
129. *Elonis*, 135 S. Ct. at 2013.

problems.[130] According to Alito, the Court only gave a partial answer to the mens rea question and left the lower courts still in a state of ambiguity.[131] The Court declined to state whether the jury needed to find the intent to convey a true threat or if a higher standard than negligence—such as recklessness—would satisfy 18 U.S.C. § 875(c), thus leaving federal and state courts in the same place they were post *Black*.[132] In his dissent, Justice Thomas begins by stating the Court accepted certiorari on *Elonis* to help clear up the confusion among the circuit courts about whether true threat crimes require specific or general intent, and the majority failed to clarify anything.[133] Justice Thomas chose to address Elonis' First Amendment arguments in his opinion and argued the threats were not protected speech and that the Court's precedent does not indicate a subjective intent is required for a true threat to rise to the level of criminal.[134] Even though *Elonis* failed to reach these expectations, it still strengthened First Amendment rights and reaffirmed the idea that even the most violent or distasteful speech can still be protected under the First Amendment.[135]

B. *The Lower Court's Struggle with Uniformity*

Since the 1969 *Watts* decision, the Supreme Court of the United States has rejected every opportunity to define or instruct the lower courts on how to analyze a true threat.[136] As a result, lower district courts have had to interpret true threat cases themselves, applying analysis and tests as they saw fit without uniform instruction or guidance from above.[137] Nine out of the eleven federal circuits have chosen to follow the objective test alluded to in *Watts*; however, not all of those circuits apply a uniform objective test.[138] Some courts instead choose to follow a subjective standard and create even more of a divide amongst the lower courts.[139] With *Black* as the basis for their decision, the subjective intent circuits believe a true threat has to be a

130. *Id.*
131. *Id.* at 2014.
132. *See id.*; 18 U.S.C. § 875(c); Virginia v. Black, 538 U.S. 343, 347 (2003).
133. *Elonis*, 135 S. Ct. at 2018.
134. *Id.*; U.S. CONST. amend. I.
135. Barney, *supra* note 97, at 14; *see also* U.S. CONST. amend. I; *Elonis*, 135 S. Ct. at 2017.
136. *See* Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam); Barney, *supra* note 97, at 4.
137. Barney, *supra* note 97, at 2; Calvert et al., *supra* note 6, at 9–10.
138. Calvert et al., *supra* note 6, at 10; *see also Watts*, 394 U.S. at 708.
139. United States v. Doggart, No. 1:15-cr-39, 2017 WL 2416920, at *8 (E.D. Tenn. June 2, 2017).

specific intent crime in order to protect the sanctity of the First Amendment.[140]

1. The Subjective Intent Analysis

The Ninth and Tenth Circuits are considered the pioneers in adopting the true threat subjective intent analysis.[141] In 2005, the Ninth Circuit Court of Appeals decided in *United States v. Cassel*,[142] that an analysis of the subjective intent of the speaker was required in order to convict the defendant and find his or her speech not protected by the First Amendment.[143] *Cassel* revolved around the defendant's threat to a potential purchaser of government owned land.[144] When someone attempted to purchase a neighboring lot to his house, Cassel told the purchasers that if they tried to build anything on that land, *it would definitely burn* and if they left anything on the land it would be stolen or vandalized.[145] The potential purchasers instead bought a different lot because of Cassel's threats and the Government brought charges against Cassel for impeding with the sale of federal land.[146] Cassel was found guilty on all counts and he appealed the decision on the grounds that his speech was unconstitutionally limited by federal law.[147] The Court referenced its true threat caselaw in order to determine whether Cassel's speech was protected or not.[148] In its previous decisions, the Court adhered to the objective standard, but it had not done a true threat analysis since the Supreme Court of the United States' decision in *Black*.[149] When analyzing the Court's opinion in *Black*, the Ninth Circuit focused on the definition of true threat the Court provided.[150] Ultimately, the Ninth Circuit chose to adopt a subjective analysis because they read *Black* as stating only intentional threats are punishable and that the definition itself requires the speaker to intend to threaten the victim.[151] When the subjective test was applied to Cassel's argument, the Court found the jury at trial was

140. Virginia v. Black, 538 U.S. 343, 367–68 (2003); *see also* U.S. CONST. amend. I; Calvert et al., *supra* note 6, at 10.

141. United States v. Cassel, 408 F.3d 622, 634 (9th Cir. 2005); United States v. Heineman, 767 F.3d 970, 975, 981–82 (10th Cir. 2014).

142. 408 F.3d 622 (9th Cir. 2005).

143. *Id.* at 631; *see also* U.S. CONST. amend. I.

144. *Cassel*, 408 F.3d at 625.

145. *Id.*

146. *Id.*

147. *Id.* at 625–26.

148. *See id.* at 628.

149. *Cassel*, 408 F.3d at 630–31; Virginia v. Black, 538 U.S. 343, 359 (2003).

150. *Cassel*, 408 F.3d at 631; *see also Black*, 538 U.S. at 359.

151. *Cassel*, 408 F.3d at 631; *see also Black*, 538 U.S. at 359.

not given a proper instruction with regards to a required mens rea element of 18 U.S.C. § 1860 of the charged statute and his conviction had to be overturned.[152]

The Ninth Circuit's true threat caselaw would have an influence on the Tenth Circuit's true threat analysis in *United States v. Heineman*.[153] The defendant in *Heineman* violated 18 U.S.C. § 875(c) when he sent out three emails containing white supremacist ideology.[154] The emails did not actually contain any threats, but the email recipients became fearful of potential harm, and Heineman was subsequently arrested and charged with sending a threat interstate.[155] At trial, the defendant failed to convince the court that a conviction under the disputed statute required the government to prove he subjectively intended for the email to be considered a threat.[156] Heineman was found guilty by the trial court and he subsequently appealed the decision believing the trial court erred when it stated a subjective intent analysis was not necessary.[157]

Much like the court in *Cassel*, the Tenth Circuit turned to the Supreme Court's decision in *Black* to reach a decision.[158] In its analysis, the Tenth Circuit held that *Black* clearly proscribes a subjective analysis when interpreting true threats because of the language used in the Court's definition of a true threat.[159] According to the court, the words "mean to communicate a serious expression of an intent," indicates the speaker wants the recipient of the threat to understand that the speaker intends to act violently.[160] The Tenth Circuit Court of Appeals reversed the trial court's decision finding that, pursuant to a subjective analysis, Heineman did not have the requisite intent for his messages to be considered true threats.[161]

To make matters more confusing, courts within the same circuit vary their objective and subjective analyses as applied to statutes identifying true threats.[162] For example, in *United States v. Doggart*,[163] the defendant was charged with two counts of violating 18 U.S.C. § 844(e) which makes it

152. *Cassel*, 408 F.3d at 638; *see also* 18 U.S.C. § 1860 (2018).
153. 767 F.3d 970 (10th Cir. 2014).
154. *Id.* at 971–72; *see also* 18 U.S.C. § 875(c) (2018).
155. *Heineman*, 767 F.3d at 971–72.
156. *Id.* at 972.
157. *Id.* at 972–73.
158. *Id.* at 975; *see also* Virginia v. Black, 538 U.S. 343, 359 (2003).
159. *Heineman*, 767 F.3d at 978; *see also Black*, 538 U.S. at 359.
160. *Heineman*, 767 F.3d at 978; *see also Black*, 538 U.S. at 359.
161. *Heineman*, 767 F.3d at 982.
162. *See* United States v. Houston, 683 F. App'x 434, 438 (6th Cir. 2017); United States v. Alkhabaz, 104 F.3d 1492, 1496 (6th Cir. 1997); United States v. Doggart, No. 1:15-cr-39, 2017 WL 2416920, at *8 (E.D. Tenn. June 2, 2017).
163. No. 1:15-cr-39, 2017 WL 2416920 (E.D. Tenn. June 2, 2017).

illegal for anyone to make a threat in interstate commerce.[164] The defendant was found guilty at trial and appealed, believing the Government had failed to establish the necessary elements of the statute.[165] In its analysis, the Eastern District of Tennessee defined a *true threat* as "'a serious expression of an intention to inflict bodily harm' and is 'conveyed for the purpose of furthering some goal through the use of intimidation.'"[166] This definition differs from the Supreme Court of the United States' definition in *Black* because it adds an element of specific intent to further a goal through intimidation.[167] The court held that the defendant's words did not constitute a true threat because there was no evidence that established Doggart intended for his words to intimidate anyone or that he intended to further a goal.[168] During its opinion, the Eastern District of Tennessee drew parallels between Doggart's case and *United States v. Houston*,[169] another true threat case from the Sixth Circuit.[170] These two cases demonstrate that the lower courts do not know how to properly address the mens rea of true threat crimes because similar statutes call for different types of analysis within the same district.[171]

2. The Objective Intent Analysis

The majority of federal and state courts across the country apply an objective standard when determining true threat cases.[172] When courts conduct an objective analysis of language that is alleged to be a true threat, they either use the reasonable speaker or reasonable recipient test.[173] When analyzing true threat cases, these courts tend to use *Black* as their basis, but focus on a different part of the opinion.[174] Specifically, that "the speaker

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164. *Id.* at *8; 18 U.S.C. § 844(e) (2018).

165. *Doggart*, 2017 WL 2416920, at *4.

166. *Id.* at *8 (quoting United States v. Houston, 683 F. App'x 434, 438 (6th Cir. 2017)).

167. *Id.*; *see also* Virginia v. Black, 538 U.S. 343, 359–60 (2003).

168. *Doggart*, 2017 WL 2416920, at *9.

169. 683 F. App'x 434 (6th Cir. 2017).

170. *Id.*; *Doggart*, 2017 WL 2416920, at *8. Here, the Eastern District of Tennessee took note of the fact an objective analysis was upheld in *Houston*, and distinguished *Doggart* from it. *Doggart*, 2017 WL 2416920, at *8.

171. *See Doggart*, 2017 WL 2416920, at *9; *Houston*, 683 F. App'x at 439.

172. Roark, *supra* note 49, at 197.

173. *Id.* at 207–09. The reasonable recipient test holds that a communication is considered a true threat when a reasonable recipient who is familiar with the context of the message perceives it as a threat. Calvert et al., *supra* note 6, at 9–10. The reasonable speaker test holds a statement is a true threat if the speaker could foresee the transmission being interpreted as a threat of violence. *Id.* at 22.

174. *See* Virginia v. Black, 538 U.S. 343, 343 (2003); Roark, *supra* note 49, at 206.

need not actually intend to carry out the threat."[175] Courts here have deduced the defendant need only intend to communicate the threat to establish a conviction, and does not require the defendant intend the statement to be actually threatening.[176] According to these courts, *Black* gave no indication that the true threat test should switch to a specific intent analysis; therefore, the lower courts are still free to choose to use an objective general intent test in true threat cases.[177]

In the case of *United States v. Haddad*,[178] from the Northern District of Illinois, the defendant appealed his conviction of sending threatening communications.[179] The defendant, using *Black* as the basis of his argument, believed the statute he was charged under was overbroad and prohibited the spread of constitutionally protected speech.[180] The defendant specifically argued that the statute needed a specific intent requirement.[181] The goal of "a prohibition on true threats [is to] 'protect individuals from the fear of violence' and 'from the disruption that fear engenders.'"[182] Referring to *Black*, the court rejected the defendant's argument and upheld an objective general intent test because it was the best way for courts to regulate true threats.[183] According to the Northern District of Illinois, if true threats inflict injury as soon as they are spoken, then the objective test ensures defendants are punished for speaking such threats because the threats themselves are the social harm.[184]

Not every circuit that has adopted an objective test standard for true threats is entirely confident that objectivity is the answer for analyzing true threats.[185] For instance, although the Sixth Circuit has adopted an objective analysis of true threats by applying a reasonable person standard, the court could not help but admit "that subjective intent is part and parcel of the meaning of a communicated threat to injure another."[186] Essentially, the court is saying that subjective intent is as much of a factor as objective intent when looking at true threats.[187] Unfortunately, the Sixth Circuit in *United*

175. Roark, *supra* note 49, at 199.
176. *Id.* at 206.
177. *Id.* at 206–07, 209.
178. No. 09-CR-115, 2014 WL 1493152, at *1 (N.D. Ill. Apr. 16, 2014).
179. *Id.* at *1.
180. *Id.* at *2.
181. *Id.*
182. *Id.* (quoting Virginia v. Black, 538 U.S. 343, 360 (2003)).
183. *Haddad*, 2014 WL 1493152, at *3.
184. *See id.*
185. *See* United States v. Jeffries, 692 F.3d 473, 479 (6th Cir. 2012).
186. *Id.* at 484.
187. *See id.* at 480.

States v. Jeffries[188] did not switch to a subjective standard due to a lack of clear direction as to why the change was needed.[189] The Seventh Circuit has also questioned the use of an objective test in favor of a subjective one.[190] Although the Seventh Circuit in *United States v. Parr*[191] decided the case on other grounds, the majority admitted "[i]t is more likely, however, that an entirely objective definition is no longer tenable."[192] Even though these circuits have not adopted a subjective analysis, admitting that the subjective analysis is tenable or possible furthers the argument that a uniform test needs to be established by the Supreme Court of the United States.[193]

The precedent surrounding the First Amendment exception of true threats is not clear, and the Supreme Court of the United States has failed to offer any sort of guidance into navigating this area of law.[194] There needs to be a uniform approach instructing the courts when to apply the true threat exception to an individual's inalienable right of free speech.[195] If the Court intends to deny a citizen of their First Amendment protections, the test to justify this act must be widely utilized and strongly supported.[196] As it currently stands, an individual's constitutional rights may be denied for expressing him or herself in the wrong district.[197]

III. HIP-HOP AND THE CRIMINAL JUSTICE SYSTEM

What makes the confusion surrounding the true threat exception so deplorable is that without a proper test to regulate its application, a defendant can be convicted based on a jury's taste, bias, and popular opinion.[198] A jury instructed to consider a reasonable person standard when determining whether a Facebook post, message, or song qualifies as a true threat might be swayed by bias to the art form, rather than objective interpretation of the speech.[199] Without a firm grasp on how to translate speech through the lens of the true threat doctrine, music and lyrics, one of the oldest forms of personal expression, stands to suffer the plight of an undirected legal

188. 692 F.3d 473, 473 (6th Cir. 2012).
189. *See id.* at 480–81.
190. United States v. Parr, 545 F.3d 491, 500 (7th Cir. 2008).
191. 595 F.3d 491 (7th Cir. 2008).
192. *Id.* at 500.
193. *See* Chester, *supra* note 38, at 425–26.
194. U.S. CONST. amend. I; Elonis v. United States, 135 S. Ct. 2001, 2012 (2015); *see also* Calvert et al., *supra* note 6, at 9.
195. Kass, *supra* note 37, at 121.
196. *Id.*; *see also* U.S. CONST. amend. I.
197. *See Kass*, *supra* note 37 at 121.
198. *See* Dennis, *supra* note 29, at 40.
199. *See* Dunbar et al., *supra* note 33, at 289; Dennis, *supra* note 29, at 29.

system.[200] Specifically, rap and hip-hop have taken the brunt of the limelight in recent decades, often associated with violent, threatening content, which further stigmatizes its artists as violent and threatening people.[201] Courts have freely used song lyrics as evidence in criminal cases, alluding to intent or serving as confessions.[202] As a mainstream platform for airing frustrations and venting about social and political struggles, such as the Black Lives Matter Movement, hip-hop is notorious for violent themes, often encapsulating anti-law enforcement and anti-establishment rhetoric.[203] However, without a decision from the Supreme Court of the United States drawing a clear line between artistic expression and prosecutable offensive language, the true threat exception actually poses a bigger threat to hip-hop artists simply exercising their right of expression.[204]

A. *A History of Hip-Hop*

Hip-hop grew up in the 1970s on the streets of South Bronx, New York City.[205] At the time, South Bronx was in a state of extreme poverty.[206] The *landscape mirrored hopelessness* and the neighborhood was defined by abandoned buildings, drugs, and gang violence.[207] It was from this environment that hip-hop emerged as a means of communication between rival gangs.[208] Hip-hop crews formed and congregated, slowly developing a culture that replaced rampant violence with rap battles and dance-offs.[209]

Hip-hop began to see mainstream success when the Sugarhill Gang released *Rapper's Delight* in 1979.[210] According to journalist Kiah Fields, *Rapper's Delight* suddenly changed the public perception that hip-hop was just an *urban taboo* and made hip-hop more accessible to the public, something that could be enjoyed by everyone.[211] At this point in its

200. *See* Dennis, *supra* note 27, at 40.
201. *See* Calvert et al., *supra* note 6, at 17; Dennis, *supra* note 29, at 30 n.180.
202. Dennis, *supra* note 27, at 48.
203. *See* Calvert et al., *supra* note 6, at 26; N.W.A., F*CK THA POLICE (Ruthless Records 1988).
204. *See* Dennis, *supra* note 27, at 40; Calvert et al., *supra* note 6, at 26.
205. Tibbs & Chauncey, *supra* note 39, at 46.
206. Brief for Michael Render ("Killer Mike") et al. as Amici Curiae Supporting Petitioner, *supra* note 23, at 7.
207. *Id.*
208. *See id.* at 7–8.
209. *Id.* at 8.
210. Tibbs & Chauncey, *supra* note 39, at 47; SUGARHILL GANG, RAPPER'S DELIGHT (Sugarhill Records 1979).
211. Kiah Fields, *Today in History: Sugar Hill Gang Releases* Rapper's Delight *37 Years Ago*, SOURCE (Sept. 16, 2016), http://www.thesource.com/2016/09/16/today-

evolution, the hip-hop hitting the mainstream was described as party music, intended to be something to dance to.[212] However, the party music that started as gang-generated rhymes about violence and struggle in the South Bronx would see a reversion in the 1980s when hip-hop artists again started to use their microphones as a platform to voice their views on social and political issues, particularly as it related to being black in America.[213] For example, in 1982, Grandmaster Flash and the Furious Five released *The Message* which painted a graphic picture of living in a crime ridden, poverty-stricken neighborhood with "[b]roken glass everywhere, [p]eople pissing on the stairs; you know they just don't care."[214] Throughout the 1980s, many rappers embraced the opportunity hip-hop provided to broadcast their frustrations with society through music and lyrics.[215] In 1989, the hip-hop group N.W.A. broadcast the iconic three-word phrase that would start a movement and become a battle cry for a generation of young, black Americans turning to hip-hop to tell their story and vent their struggle.[216]

N.W.A.'s *F*ck tha Police* became the anthem for young African Americans who lived in urban communities where overmilitarized police departments were becoming increasingly more hostile with the citizens.[217] N.W.A.'s 1988 album *Straight Outta Compton*, responded to this uptick in police-related violence and in so doing, helped popularize a much more harsh and aggressive form of hip-hop known as *gangsta rap*.[218] This new subgenre of hip-hop featured loud, aggressive instrumentals and brutally graphic lyrics to describe the violent and vicious events happening in these neighborhoods.[219] As America waged its war on drugs, many impoverished

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in-hip-hop-history-sugar-hill-gang-releases-rappers-delight-37-years-ago; SUGARHILL GANG, *supra* note 210.

212. Brief for Michael Render ("Killer Mike") et al. as Amici Curiae Supporting Petitioner, *supra* note 23, at 8.

213. *Id.*

214. *See* GRANDMASTER FLASH & THE FURIOUS FIVE, THE MESSAGE (Sugar Hill Records 1982); *Grandmaster Flash and the Furious Five Lyrics*, AZLYRICS, http://www.azlyrics.com/lyrics/grandmasterflashandthefuriousfive/themessage.html (last visited May 1, 2020).

215. Brief for Michael Render ("Killer Mike") et al. as Amici Curiae Supporting Petitioner, *supra* note 23, at 8.

216. *See* Tibbs & Chauncey, *supra* note 39, at 48; *F*ck Tha Police Lyrics*, LYRICS DEPOT, http://www.lyricsdepot.com/n-w-a/fuck-tha-police.html (last visited May 1, 2020).

217. Brief for Michael Render ("Killer Mike") et al. as Amici Curiae Supporting Petitioner, *supra* note 23, at 8–9; *F*ck Tha Police*, *supra* note 216.

218. *Id.*; Tibbs & Chauncey, *supra* note 39, at 48; N.W.A., STRAIGHT OUTTA COMPTON (Ruthless Records 1988).

219. *See* Brief for Michael Render ("Killer Mike") et al. as Amici Curiae Supporting Petitioner, *supra* note 23, at 8, 17.

communities were targeted by police departments and incarceration rates reached record numbers.[220] In Los Angeles specifically, many minorities were victims of police brutality, harassed by law enforcement, and arrested as a part of the city's anti-drug and gang efforts.[221] N.W.A.'s *F*ck tha Police* depicts the struggles of many Americans with police officers.[222] The song unified its audience through their shared experiences and granted them a sense of resolution by illustrating a role reversal that exacts revenge on an abusive white police officer.[223] The sentiment fueled a new era of anti-police themed hip-hop, much to the displeasure of law enforcement.[224] Soon, other groups emerged on the scene spitting anti-cop rhetoric and addressing social unrest by lyrically promoting police-violence.[225] Rapper Ice-T released the song *Cop Killer* in 1992, where he describes using a sawed-off shotgun to *dust some cops off*.[226]

Thirty years ago, *Straight Outta Compton* brought hip-hop to a new plane, using the medium to respond to growing police-violence and social unrest with aggressive lyrics and violent messaging.[227] In that time, hip-hop and rap music have become a wide-reaching method of communicating social and political discourse, particularly those issues promulgated by the Black Lives Matter movement.[228]

The Black Lives Matter movement arose in the aftermath of George Zimmerman's not-guilty verdict for the murder of Trayvon Martin in 2013.[229] In response, civil rights activist and future founder of the Black Lives Matter organization, Alicia Garza, began posting various messages on social media about her disappointment and frustration with the Zimmerman verdict.[230] Garza's friend and fellow activist, Patrisse Cullors, replied to Garza's post using the hashtag *#BLACKLIVESMATTER*.[231] This post would

220. *Id.* at 9.
221. *Id.*
222. *See id.* at 10–11; N.W.A., *supra* note 203.
223. Brief for Michael Render ("Killer Mike") et al. as Amici Curiae Supporting Petitioner, *supra* note 23, at 10–11; *F*ck Tha Police*, *supra* note 216; N.W.A., *supra* note 203.
224. *See* Brief for Michael Render ("Killer Mike") et al. as Amici Curiae supporting Petitioner, *supra* note 23, at 11.
225. *See* Tibbs & Chauncey, *supra* note 39, at 48–49.
226. BODY COUNT, COP KILLER (Sire Records 1992).
227. Brief for Michael Render ("Killer Mike") et al. as Amici Curiae Supporting Petitioner, *supra* note 23, at 9–10; Tibbs & Chauncey, *supra* note 39, at 48.
228. *See* Dennis, *supra* note 27, at 49; Garrett Chase, *The Early History of the Black Lives Matter Movement, and the Implications Thereof*, 18 NEV. L.J. 1091, 1096 (2018).
229. Chase, *supra* note 228, at 1096.
230. *Id.* at 1095–96.
231. *Id.* at 1096.

become the first official use of the phrase *Black Lives Matter* and the start of a nationwide movement for civil rights awareness.[232]

The Black Lives Matter Movement would again unite the following summer in protest over the deaths of Eric Garner and Michael Brown Jr.[233] Garner died in July 2014 as a result of a chokehold, and Brown Jr. was fatally shot by a police officer in Ferguson, Missouri the next month.[234] Both men were African American and unarmed, and both police officers were white and would serve no jail time for the deaths.[235] Supporters of the Black Lives Matter Movement came together at rallies to protest the lack of justice for the families of Garner and Brown Jr.[236] As the Black Lives Matter Movement grew in strength and numbers, so did its presence in the hip-hop community.[237] In 2014, Killer Mike and rapper El-P released the song *Early*, which depicts many of the struggles African Americans face with local law enforcement.[238] In the song, Killer Mike is pulled over and wrongfully searched, frisked, and arrested as a result of racial profiling from the arresting officer.[239] Killer Mike is not the only rapper to speak out against the injustices of law enforcement and the criminal justice system.[240] In the song *What's Free*, from his 2018 album *Championships*, rapper Meek Mill discusses his issues with the criminal justice system stemming from his wrongful imprisonment due to an alleged probation violation.[241]

Jamal Knox is not a famous rapper, but his songs echo the same sentiment as Killer Mike, Meek Mill, and thousands of others.[242] However, even in a genre as popular as hip-hop, with themes and messaging prominent throughout the artform as a whole, prosecutors were still able to circumvent Jamal Knox's First Amendment right to freedom of expression, and utilize his lyrics as evidence against him.[243]

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232. *Id.*

233. *Id.* at 1100.

234. Chase, *supra* note 228, at 1099–1100.

235. *Id.*

236. *Id.* at 1100–01.

237. *See* Dennis, *supra* note 27, at 49.

238. *See* RUN THE JEWELS, EARLY (Mass Appeal Records 2014); *Run the Jewels Lyrics*, AZLYRICS, http://www.azlyrics.com/lyrics/runthejewels/early.html (last visited May 1, 2020).

239. *See* RUN THE JEWELS, *supra* note 238; *Run the Jewels Lyrics*, *supra* note 238.

240. *See* Dennis, *supra* note 27, at 50.

241. MEEK MILL, WHAT'S FREE (Atlantic Records 2018); *Meek Mill Lyrics*, AZLYRICS, http://www.azlyrics.com/lyrics/meekmill/whatsfree.html (last visited May 1, 2020).

242. *See* Commonwealth v. Knox, 190 A.3d 1146, 1149 (Pa. 2018), *cert. denied*, 139 S. Ct. 1547 (2019); *Meek Mill*, *supra* note 241; RUN THE JEWELS, *supra* note 238.

243. *See Knox*, 190 A.3d at 1158; Dennis, *supra* note 29, at 2.

B. *The Inherent Prejudice of Lyrics as Evidence*

The First Amendment protects an individual's right to express himself or herself, and the true threat doctrine determines when that right should be excepted.[244] The theory of the true threat doctrine is that some speech actually poses dangerous consequences and is therefore a crime.[245] However, the line distinguishing between mere words and actual threats is more gray than clear, and as a result, there is no real protection.[246] To prove a true threat exists, the government can source a defendant's creative artistic expression and present it to the jury as evidence of a larger crime.[247]

Over the last three decades, the government has effectively used an artist's musical lyrics as evidence against him or her at trial.[248] Since the decision in *United States v. Foster*[249] in 1991, prosecutors have argued to admit lyrics penned by the defendant to prove various aspects of criminal conduct.[250] Courts have consistently permitted the use of lyrics in criminal cases so long as they comply with jurisdictional regulations pertaining to the rules of evidence.[251] Lyrics have been used to establish knowledge of the crime, premeditation, motive, and even to establish intent in murder cases.[252] The defense often challenges the admittance of the lyrics as evidence, objecting on a basis of relevance, improper character evidence, and challenging the prejudicial nature of the lyrics.[253] The lyrics emulate statements made outside of the trial, and in the case of hip-hop and rap songs, often convey an impression that colors the defendant without being

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244. *See* U.S. CONST. amend. I; Virginia v. Black, 538 U.S. 343, 359 (2003); Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam).

245. *Black*, 538 U.S. at 359.

246. *See* Lidsky & Norbut, *supra* note 7, at 1889–90.

247. *See* Elonis v. United States, 135 S. Ct. 2001, 2006–07 (2015); *Knox*, 190 A.3d at 1149.

248. *See* United States v. Foster, 939 F.2d 445, 456 (7th Cir. 1991). At trial, the government presented lyrics describing drug dealing that were penned by the defendant. *Id.* On appeal, the defendant challenged the admissibility of the lyrics claiming that the trial court erred in allowing them to be presented at trial. *Id.* at 455. The court upheld the trial court's admission of the lyrics because the lyrics were not used to show that the defendant intended to commit the crime, but were instead allowed under Federal Rules of Evidence 404(a) to show that the defendant was familiar with drug dealing and had knowledge of narcotics trafficking. *Id.* at 456.

249. 939 F.2d 445 (7th Cir. 1991).

250. Dennis, *supra* note 29, at 5–6.

251. *See* State v. Skinner, 95 A.3d 236, 251 (N.J. 2014), *cert. denied*, 184 A.3d 101 (N.J. 2018) (holding that the trial court erred in admitting lyrics penned by the defendant because they were prejudicial and held little probative value); Dennis, *supra* note 29, at 8.

252. *See* Greene v. Commonwealth, 197 S.W.3d 76, 87 (Ky. 2006); Dennis, *supra* note 27, at 48.

253. Dennis, *supra* note 29, at 8–9.

relevant to the charges he's facing.[254] As held by the New Jersey Supreme Court in *State v. Skinner*,[255] there needs to be a strong nexus between the content of the lyrics and the facts of the crime charged.[256] Without that strong nexus, the lyrics lack any sort of relevancy and can end up being prejudicial based off its content.[257]

Besides the literal content of these lyrics, rap and hip-hop songs carry with them an intangible stigma that can bias a jury beyond the court's control.[258] This genre is not for everybody and furthermore, people who are not fans tend to inject negative preconceived notions on rap, hip-hop music, and it's artists.[259] The general impression is that rap music is inherently violent, threatening, vulgar, and immoral, and those artists who create it are similarly characterized and a danger to society.[260] The media and overall marketing of this music perpetuates the brand of violence and grit, so much so that many commonly regard rap fans as being more belligerent than fans of heavy metal.[261] From its inception, hip-hop has given a platform to artists who rap about hate, fear, aggression, and struggle, and over the decades, a persona has solidified around those who create that type of music.[262] Now, in a court of law, that persona is inherently prejudicial, applying heavy bias to the facts of a criminal case.[263]

The University of California, Irvine conducted a study to examine just how prominent the bias against rap music was amongst the general population.[264] Participants in the study were given a set of violent lyrics and separated into two groups.[265] One group was told the lyrics were from a rap song, and the second group was told the lyrics were from a country song.[266] The first round of testing found that "those who were told the lyrics were from a rap song perceived them to be [much] more negative" and agreed the song should be heavily regulated.[267] The group that examined the country song found it benign and safe for the airways.[268] A second study with

254. *Id.* at 12–13.
255. 95 A.3d 236 (N.J. 2014).
256. *Id.* at 252.
257. *See id.*
258. Dunbar et al., *supra* note 33, at 288–89.
259. *Id.* at 280.
260. *Id.*
261. *Id.*
262. *See* Brief for Michael Render ("Killer Mike") et al. as Amici Curiae Supporting Petitioner, *supra* note 23, at 8.
263. *See* Dunbar et al., *supra* note 33, at 289.
264. *Id.* at 281.
265. *Id.*
266. *Id.*
267. *Id.* at 286.
268. *See* Dunbar et al., *supra* note 33, at 285.

different participants and song lyrics yielded the same result as the first experiment.[269] The researchers concluded that there was a clear inherent bias against rap and hip-hop songs, which seems to suggest that a jury would struggle with impartiality in determining whether a lyric signified a true threat.[270]

The bias against the genre itself extends beyond the simple opinion that rap and hip-hop are violent expressions created by violent people.[271] According to Andrea Dennis, when the courts admit rap and hip-hop lyrics as evidence, they tend to disregard them as art.[272] In her article, Dennis elaborates that hip-hop lyrics are a part of a complex form of expression that needs a complex analysis to fully understand.[273] Courts treat the analysis of hip-hop lyrics as common knowledge, assuming the plain language used is facially simplistic, and they thus refuse to examine these lyrics as the intricate and poetic expressions they are.[274] By plucking a few choice lines from a rap or hip-hop song and parading them at face-value before an already biased jury, the state can paint a true threat out of thin air and convict a defendant from what should be protected expression.[275]

IV. DETERMINING THE CORRECT TEST

One of the problems with the current true threat analysis is that there is no test that can be applied to each of the criminal statutes that involve true threats.[276] For example, the Ninth Circuit chose to use a subjective analysis when looking at 18 U.S.C. § 1860, but deferred to a combination of a subjective and objective analysis when looking at a violation of 18 U.S.C. § 879(a)(3).[277] The different tests applied to various statutes is most likely a consequence of the fact that the statutes lack consistent terminology.[278] For example, the *Elonis* court stated a negligence standard would not be enough to convict under 18 U.S.C. § 875(c), but 18 U.S.C. § 871(a) plainly states

269. *Id.* at 285–86.
270. *Id.* at 289.
271. *See id.* at 280–81, 289.
272. Dennis, *supra* note 29, at 13.
273. *Id.*
274. *Id.*
275. Calvert et al., *supra* note 6, at 12–13.
276. *See* United States v. Heineman, 767 F.3d 970, 979 (10th Cir. 2014); United States v. Cassel, 408 F.3d 622, 634 (9th Cir. 2005); United States v. Doggart, No. 1:15-cr-39, 2017 WL 2416920, at *8 (E.D. Tenn. June 2, 2017).
277. United States v. Bagdasarian, 652 F.3d 1113, 1118 (9th Cir. 2011); *Cassel*, 408 F.3d at 634; *see also* 18 U.S.C. § 879(a) (2018); 18 U.S.C. § 1860 (2018).
278. *See* Kass, *supra* note 37, at 130.

that the required mens rea is *knowingly and willfully*.[279] Therefore, it would appear that a proper test for true threats would need to be able to cover a standard that is above negligence.[280]

As mentioned before, the objective intent test revolves around analyzing how a reasonable person would interpret the words that were communicated.[281] When an objective test is used, the speaker's freedom of speech is limited by the possibility the statement can be misinterpreted as a threat.[282] Punishing a criminal without a look into whether the defendant had a guilty mind at the time of committing a crime, appears to go against the purpose of the criminal justice system.[283] As the Supreme Court of the United States stated in *Morissette v. United States*,[284] the requirement of a mens rea separates those who are morally innocent and those who are morally guilty in mind.[285] Therefore, the goal of requiring a mens rea for crimes is to ensure that those who intend and choose to commit morally blameworthy acts are punished for doing so, instead of innocent people.[286]

The objective analysis used by many circuits treats the morally blameworthy act as just communicating the threat instead of considering if the communication was meant as a threat.[287] An issue can arise when this test is compared with the retributive and utilitarian philosophies of punishment.[288] The retributive philosophy revolves around punishing those who chose to commit an evil act.[289] With that in mind, it would appear that a retributivist would have trouble punishing a rapper who is on trial for threatening police officers with his lyrics when he did not intend for the lyrics to be threatening.[290] Punishing the defendant would not satisfy a retributivist because the defendant did not know he committed an evil act.[291] The same can be said when this is analyzed under the utilitarian philosophy.[292] People who subscribe to the utilitarian school of thought believe that punishment should teach a lesson to the offender or others in the

279. 18 U.S.C. § 875(c) (2018); Elonis v. United States, 135 S. Ct. 2001, 2011 (2015); *see also* 18 U.S.C. § 871(a) (2018).
280. *See Elonis*, 135 S. Ct. at 2015.
281. Calvert et al., *supra* note 6, at 9.
282. Roark, *supra* note 49, at 210.
283. *See* Stephen F. Smith, Innocence *and the Guilty Mind*, 69 HASTINGS L.J. 1609, 1617 (2018).
284. 342 U.S. 246 (1952).
285. Morissette v. United States, 342 U.S. 246, 251–52 (1952).
286. *See id.* at 251–52, 256.
287. *See* Calvert et al., *supra* note 6, at 9.
288. *See* Smith, *supra* note 283, at 1618.
289. *See id.* at 1633.
290. *See id.*
291. *See id.*
292. *See id.*

community.[293] These lessons are taught through the ideas of general and specific deterrence, incapacitation, and rehabilitation.[294] Punishing someone for releasing what are considered to be threatening lyrics can comply with general deterrence because the goal of general deterrence is to dissuade the public at large from committing a certain crime.[295] Therefore, witnessing someone go to federal prison for threatening lyrics should stop others from releasing threatening lyrics.[296] The issue arises with specific deterrence because how can the convicted rapper be deterred from committing a future crime when he or she does not believe their lyrics were threatening enough to be a crime.[297] Therefore, a purely objective test can create issues regarding the goals of punishment, but that does not mean objectivity is without its benefits.[298]

A benefit of allowing some objectivity in a true threat analysis examines if a reasonable listener, recipient, speaker, or person would understand the speech as a threat.[299] Clay Calvert points out that the objective standard forces juries to understand the context the statement was made under in order to determine if a reasonable person would understand the statements as a threat.[300] Calvert then presents the hypothetical that a police officer who is on a gang task force and has familiarity of the slang and terminology of hip-hop lyrics should be held to a higher standard than an ordinary person.[301] For the sake of providing greater protections to free speech and the First Amendment, the hypothetical police officer's knowledge should be considered because it can help determine how reasonable the officer's reaction was to the threatening words.[302] In an objective jurisdiction, courts should still offer background evidence to those who are not familiar with hip-hop to help them have a better understanding of the genre and set aside any negative biases they might have.[303] If courts are going to allow lyrics as evidence, then there should be some kind of instruction that explains hip-hop is a complex literary genre which contains literary devices such as hyperboles, metaphors, and fantastical tales that do

293. Smith, *supra* note 283, at 1618.
294. *Id.*
295. *See id.*
296. *See* Mirko Bagaric, *From Arbitrariness to Coherency in Sentencing: Reducing the Rate of Imprisonment and Crime While Saving Billions of Taxpayer Dollars*, 19 MICH. J. RACE & L. 349, 375 (2014).
297. *See id.* at 377.
298. *See* Smith, *supra* note 283, at 1671.
299. Calvert et al., *supra* note 6, at 23.
300. *Id.*
301. *Id.*
302. *Id.*; *see also* U.S. CONST. amend I.
303. Calvert et al., *supra* note 6, at 23.

not necessarily reflect on the author's views, actions, or intentions.[304] Any kind of background information or instruction regarding hip-hop can help a jury determine whether or not the language used in the lyrics can be reasonably interpreted as a threat.[305]

Besides using the lyrics themselves as a basis for analysis in an objective test, courts should consider the source of where the threats were made, and any other context that can be used.[306] Context is important to the true threat analysis because it has been a part of precedent since *Watts*.[307] In *Watts*, the Supreme Court of the United States reasoned that the defendant's speech was not a threat because the statement was made at a youth rally and the comment was met with laughter after it was spoken.[308] Therefore, the Court has always intended for the context of the comment and the reaction of the audience to play a role in the true threat analysis.[309] In the last five years, two prominent true threat cases arose from the defendants posting violent song lyrics on social media platforms.[310] With the continuing popularity of social media, it is becoming more and more apparent that the Supreme Court of the United States needs to address threats that are communicated over social media.[311] Through social media, communication has become much easier and more informal.[312] As one author stated, "town criers are no longer constrained by the volume of their voice."[313] This informal and often anonymous speech has allowed many people to spread hateful and threatening messages across the globe.[314] When analyzing social media posts, Megan Chester has suggested courts should take note of the context where the post was made.[315] For example, a post that is able to be seen by everyone in the public, such as a status post, should be treated the same way as someone yelling into a large crowd with a microphone.[316] A message that is more private, such as a direct message to one person, should be analyzed as if a reasonable person who received the message would feasibly perceive

304. Dennis, *supra* note 29, at 22, 26–27.
305. *Id.*
306. *See* Chester, *supra* note 38, at 414.
307. Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam).
308. *Id.* at 705–08.
309. *See id.*
310. Elonis v. United States, 135 S. Ct. 2001, 2004–05 (2015); Commonwealth v. Knox, 190 A.3d 1146, 1149 (Pa. 2018), *cert. denied*, 139 S. Ct. 1547 (2019).
311. *See* Chester, *supra* note 38, at 413.
312. Lidsky & Norbut, *supra* note 7, at 1903.
313. Scott Hammack, *The Internet Loophole: Why Threatening Speech Online Requires a Modification of the Courts' Approach to True Threats and Incitement*, 36 COLUM. J.L. & SOC. PROBS. 65, 81 (2002).
314. Lidsky & Norbut, *supra* note 7, at 1903–04.
315. Chester, *supra* note 38, at 413.
316. *Id.* at 415.

the communication as a threat.[317] Ultimately, there needs to be an objective part of a true threat analysis because it would allow the jury to consider prudent contextual background information about the possible threatening speech.[318]

Courts and supporters of the subjective test strongly believe that a subjective intent test will restore the broad protections of the First Amendment and may undo the damage an objective analysis has done to free speech.[319] The benefit of the subjective intent approach is that greater protections to free speech would be given because the Government would have to prove beyond a reasonable doubt that the speaker intended the message or communication to be a threat.[320] A subjective intent analysis is not a hard burden to meet.[321] Courts that use a subjective analysis, and therefore require specific intent, do not actually try to analyze the thoughts of the defendant.[322] Instead, courts will look to the words of the threat themselves and determine if those words indicate the specific intent of communicating a threat.[323] This issue has arisen because the Supreme Court of the United States has simply chosen not to address a required mens rea for true threats.[324] A subjective intent requirement would prevent any kind of miscommunication that could arise between the speaker and the recipient or anyone who overhears the threat because the defendant's true intention behind the message would need to be analyzed.[325] Under the subjective analysis, the speaker's conviction and future would no longer be left up to how the recipient interprets what could be considered constitutionally protected speech.[326]

An inclusion or adoption of a subjective analysis will create consistency with how the Supreme Court of the United States has interpreted other forms of unprotected speech, such as incitement.[327] In the same year as the Supreme Court of the United States decided *Watts v. United States*, the

317. *Id.* at 416–17.
318. *Id.* at 425.
319. Roark, *supra* note 49, at 197–98.
320. Calvert et al., *supra* note 6, at 25.
321. Roark, *supra* note 49, at 219.
322. United States v. Bagdasarian, 652 F.3d 1113, 1122 (9th Cir. 2011).
323. *See id.*; Commonwealth v. Knox, 190 A.3d 1146, 1158 (Pa. 2018), *cert. denied*, 139 S. Ct. 1547 (2019).
324. *See* Elonis v. United States, 135 S. Ct. 2001, 2015 (2015) (Alito, J., concurring); *Bagdasarian*, 652 F.3d at 1122.
325. *See Elonis*, 135 S. Ct. at 2015; *Bagdasarian*, 652 F.3d at 1122.
326. Roark, *supra* note 49, at 214–15.
327. Calvert et al., *supra* note 6, at 25.

Court also decided another First Amendment case, *Brandenburg v. Ohio*.[328] In *Brandenburg*, the defendant violated an Ohio statute that criminalized advocating "crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform."[329] The defendant, a member of the Ku Klux Klan, spoke at a Klan rally where he stated that the Klan needed to take revenge on the Government for suppressing the white man by marching towards Congress.[330] The Supreme Court of the United States accepted certiorari to determine if the speech by the defendant was protected speech.[331] In its analysis, the Court held the defendant's conviction could not be upheld because the indictment did not properly define what incitement was.[332] The Court also held that the speech must be "directed to inciting or producing imminent lawless action and [be] likely to incite or produce such action."[333] This ruling by the Court indicates that for incitement to not be considered protected speech, there must be a subjective element of intent present.[334] The main similarity between the Court's analysis in both cases is the discussion of a subjective intent for true threats and incitement.[335] However, the Court in *Brandenburg* focused more on subjective intent, holding that speech alone is not enough for incitement, and that there must be an intent for the speech to cause lawless action.[336] Therefore, an application of *Brandenburg*'s stronger subjective intent analysis would allow for greater protection to First Amendment rights of those suspected of communicating true threats because they cannot be punished for sharing their thoughts or expressions without a criminally wrongful intent behind them.[337] The adoption of a subjective intent allows for the defendant to present his or her side of the story and fight for his or her right to free speech.[338]

To ensure the rapper's or artist's right of expression remains intact and that the target of the purported threats is protected from any kind of harm, a mixed objective and subjective analysis should be adopted to analyze

328. Brandenburg v. Ohio, 395 U.S. 444 (1969); Watts v. United States, 394 U.S. 705 (1969) (per curiam).
329. *Brandenburg*, 395 U.S. at 444–45.
330. *Id.* at 446.
331. *Id.* at 445.
332. *See id.* at 448–49.
333. *Id.* at 447.
334. *See Brandenburg*, 395 U.S. at 448.
335. *See id.* at 447; Watts v. United States, 394 U.S. 705, 707 (1969) (per curium).
336. *Brandenburg*, 395 U.S. at 447–48.
337. *See id.* at 447; U.S. CONST. amend I.
338. *See* Kass, *supra* note 37, at 121–22.

true threats.[339] The benefit of the objective standard is that it would allow for juries to take in context a threat in its entirety, and view the totality of the circumstances when looking at the threat.[340] Then, the subjective analysis is used after the objective evidence has been considered, and factfinders will look at the lyrics and determine if the lyrics themselves satisfies the objective analysis, or if they go outside of the scope of the contextual information provided.[341] The subjective intent prong provides an additional layer of protection to the speaker because the message itself must also be intended to be a threat.[342] Specific intent under a subjective analysis will fit with the schools of punishment because it ensures that a guilty mind is being punished for communicating a threat.[343] The goal with a two-prong test is to protect both the freedom of artistic expression and the victims of true threats.[344] Hip-hop may appear on its face to be violent, vulgar, and lacking in social value; however, the content is not so far from Edgar Allan Poe describing a dead body beneath his floorboards, or Bob Marley shooting a sheriff.[345] By creating a two-prong test, a defendant is afforded the ability to speak his or her mind and be free from worry of someone misinterpreting his or her art as a threat of harm.[346]

A proposal for a mixed test is not a novel idea as the Ninth Circuit has adopted the use of a hybrid test consisting of an objective prong and subjective prong for true threats.[347] In *United States v. Bagdasarian*,[348] the defendant posted racially charged threatening messages about killing then Presidential nominee Barack Obama.[349] Specifically, the defendant called Barack Obama a racial slur and said the Presidential nominee was going to have a fifty caliber bullet through his head soon.[350] Similar to this Comment's proposed test, the court in *Bagdasarian* stated the objective test to look at the totality of the circumstances and that the factfinder must "look[] at the entire factual context of [the] statements including: [T]he surrounding events, the listeners' reaction, and whether the words are

339. *See* Best, *supra* note 41, at 1157–58.
340. *See* Kass, *supra* note 37, at 118.
341. *See* Best, *supra* note 41, at 1155–56.
342. Roark, *supra* note 49, at 214.
343. *See* Smith, *supra* note 283, at 1618.
344. Best, *supra* note 41, at 1157–58.
345. State v. Skinner, 95 A.3d 236, 251 (N.J. 2014), *cert. denied*, 184 A.3d 101 (N.J. 2018).
346. Best, *supra* note 41, at 1157–58.
347. United States v. Bagdasarian, 652 F.3d 1113, 1118 (9th Cir. 2011).
348. 652 F.3d 1113 (9th Cir. 2011).
349. *Id.* at 1115.
350. *Id.*

conditional."[351] When looking at all the evidence presented, such as the defendant's username, the fact the message was made anonymously, the place where the comment was posted, and the fact the defendant owned a fifty caliber rifle, the court ultimately held a reasonable person would not have taken the defendant's comments as a threat.[352] Because Bagdasarian's comments did not reflect any kind of immediate action and did not fall under the definition of a threat, there was no indication that the Defendant subjectively intended to kill former President Obama.[353] Based on the court's opinion, it appears the subjective analysis does not actually inquire into the defendant's actual thoughts, but instead looks to the words themselves to see if they reflect a subjective intent to communicate a threat.[354]

A test that utilizes both schools of thought with regard to true threats will help create uniformity across true threat statutes because the specific intent requirement covers the *knowingly and willfully* mens rea of some true threat statutes.[355] According to the Model Penal Code, the mens rea of *knowingly* is satisfied when the defendant "is aware that his conduct is of that nature" or to cause such a result and if "he is aware that it is practically certain that his conduct will cause such result."[356] Therefore, specific intent goes beyond the requirement of *knowing* because it shows the defendant was more than practically certain the lyrics or communication would cause the victim to be threatened and indicates a specific desire for the victim to feel threatened.[357] Using both subjective and objective standards also parallels the Supreme Court's decision in *Elonis* because the conviction was not solely based on a reasonable person standard, but instead is based on meeting an objective reasonable person standard and showing there was an intent for the lyrics to be threatening in nature.[358]

In *Knox*, the Pennsylvania Supreme Court made a step towards protecting First Amendment rights with true threats in that the court did apply a subjective and objective test to determine if Knox's lyrics were protected speech.[359] The court decided its pure objective test was no longer feasible for prosecuting true threats and adopted a test that looks at the intent

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351. *Id.* at 1119 (quoting United States v. Gordon, 974 F.2d 1110, 1117 (9th Cir. 1992)).

352. *Id.*

353. *Bagdasarian*, 652 F.3d at 1122.

354. *See id.*

355. *See* Kass, *supra* note 37, at 126.

356. MODEL PENAL CODE § 2.02(b) (AM. LAW INST., 1962).

357. *See id.*

358. *See* Elonis v. United States, 135 S. Ct. 2001, 2012 (2015).

359. Commonwealth v. Knox, 190 A.3d 1146, 1158–59 (Pa. 2018), *cert denied*, 139 S. Ct. 1547 (2019).

of the speaker and the context surrounding the speech.[360] However, when examining the totality of the circumstances surrounding Knox's song, the court failed to properly analyze the lyrics within the scope of the genre of hip-hop.[361] As indicated before, hip-hop is an artistic genre that makes use of literary devices such as similes, metaphors, hyperboles, and rhyme schemes.[362] When analyzing Knox's lyrics, the court took the words at their face value and failed to look at anything but the lyrics and the listeners' reactions to them.[363] This type of analysis does not adequately represent the totality of the circumstances test.[364] The court's analysis ended up unbalanced, with the objective analysis playing a substantial role and the subjective analysis being almost an afterthought.[365] The court's closing statement is indicative of not understanding the use of a totality of the circumstances test.[366] The court closes by stating "we would in effect be interpreting the Constitution to provide blanket protection for threats, however severe, so long as they are expressed within that musical style."[367] A test that uses the totality of the circumstances would require an individual to look into the unique facts of each case before making a decision; therefore, a decision in favor of Knox would not be granting immunity to the whole genre of hip-hop, but instead, only apply to these specific facts.[368] Knox was not asking for immunity to a whole genre when he stated his lyrics were protected under the First Amendment, he just wanted rap to be treated as art and not a confession or as evidence of a crime.[369]

However, under the proposed test in this Comment, Knox's speech would still be considered a true threat because the personal content goes beyond the scope of literary devices used in hip-hop and indicates a subjective intent to cause harm to the threatened victims.[370] Even though Knox may have been venting frustrations through his lyrics, the lyrics

360. *Id.*

361. Recent Case, *First Amendment — True Threat Doctrine — Pennsylvania Supreme Court Finds Rap Song a True Threat.* — Commonwealth v. Knox, 190 A.3d 1146 (Pa. 2018), 132 HARV. L. REV. 1558, 1562 (2019).

362. *See* Calvert et al., *supra* note 6, at 4–5.

363. Recent Case, *First Amendment — True Threat Doctrine — Pennsylvania Supreme Court Finds Rap Song a True Threat.* — Commonwealth v. Knox, 190 A.3d 1146 (Pa. 2018), *supra* note 361, at 1562.

364. *See id.*

365. *See id.* at 1565; *Knox*, 190 A.3d at 1160.

366. *See Knox*, 190 A.3d at 1161.

367. *Id.*

368. *See id.* at 1165–66.

369. Recent Case, *First Amendment — True Threat Doctrine — Pennsylvania Supreme Court Finds Rap Song a True Threat.* — Commonwealth v. Knox, 190 A.3d 1146 (Pa. 2018), *supra* note 361, at 1565.

370. *See Knox*, 190 A.3d at 1160.

crossed a line when they specifically named police officers and threatened them personally.[371] N.W.A. and Ice-T, in their anti-cop songs, did not state their desire to harm specific members of the LAPD; they instead chose to generalize their frustrations with law enforcement.[372] In his song, Knox does make use of hyperboles and similes, like when he says "I got artillery to shake the mother [f*ckin] streets" and "I keep a forty on my waist, that'll wet you like a mop."[373] The problem arises when those lyrics name the specific names of police officers and list the way Knox allegedly planned on killing them.[374] Hip-hop lyrics should be protected under the First Amendment, but there is a line that was crossed here when Knox named specific people, the time when they leave work, and stated how he would attack them.[375] Even though personalization of lyrics is not a deciding factor of whether a message or song contains a threat, it deserves to be addressed in an analysis of a true threat.[376]

Therefore, the best way to ensure the rights of the speaker and the rights of the recipient are equally upheld is to create a two-prong test that requires an analysis into the specific intent of the speaker and an examination of any relevant factors related to the threat and its context.[377]

V. CONCLUSION

As indicated in this Comment, there has been little to no guidance for courts to follow when determining what is a true threat.[378] This has led to a clash and divide amongst the circuits when analyzing true threats.[379] The requirement for a uniform test goes beyond the application to the genre of hip-hop.[380] In a time when people have access to a plethora of outlets where they can voice their opinion and post it on a global scale for anyone to see, a test is needed to measure threatening speech.[381] Without the guidance of a uniform test or rule, there is a high possibility that many people who are

371. *Id.*
372. N.W.A., *supra* note 203; BODY COUNT, *supra* note 226.
373. *Knox*, 190 A.3d at 1149–50.
374. *Id.* at 1149.
375. *See id.* at 1160; U.S. CONST. amend I.
376. *See id.* at 1150–61; Elonis v. United States, 135 S. Ct. 2001, 2007 (2015); Recent Case, *First Amendment — True Threat Doctrine — Pennsylvania Supreme Court Finds Rap Song a True Threat.* — Commonwealth v. Knox, 190 A.3d 1146 (Pa. 2018), *supra* note 361, at 1564.
377. *See* Best, *supra* note 41, at 1157–58.
378. *See* Barney, *supra* note 97, at 2; Calvert et al., *supra* note 6, at 13.
379. Barney, *supra* note 97, at 2.
380. *See* Chester, *supra* note 38, at 413.
381. *See id.*

acting within their First Amendment rights are going to be prosecuted for speech that was intended as therapeutic or artistic.[382] Punishing a defendant who did not have a guilty mind when making the supposed threat does not advance any theory or goal of the criminal justice system and merely punishes innocent people for voicing their opinion.[383]

382. *See* Roark, *supra* note 49, at 220; U.S. CONST. amend I.
383. *See* Smith, *supra* note 283, at 1618.

A BIRD, LIME, SKIP, AND A JUMP TOWARDS E-SCOOTER REGULATION

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I. INTRODUCTION

"It had to happen sooner or later—someone has died riding an electric scooter on a busy Fort Lauderdale road," so began a recent article in the Sun-Sentinel.[1] This exact sentiment has been echoed across the country as thousands of dock-less electronic scooters ("e-scooters") have been introduced into more than one hundred cities worldwide.[2] A rough count of reports from the Associated Press indicate at least eleven electronic scooter riders have died in the United States since 2018.[3] Further, an investigation by Consumer Reports found "at least 1,500 [e-scooter] riders [have] been injured since e-scooters were introduced in late 2017" by the company Bird (the most popular ride-sharing electronic scooter company).[4] Despite safety concerns, e-scooters have become immensely popular with consumers.[5] According to a study by the National Association of City Transportation Officials ("NACTO"), riders took 38.5 million trips on shared scooters in 2018.[6]

Proponents of ride-sharing e-scooters argue that they are cheap, clean, and efficient alternative methods of transportation.[7] Many cities in the United States have inadequate public transportation systems and roadways clogged with cars.[8] E-scooters offer a viable alternative means of transportation for short trips (the average e-scooter trip is shorter than 1.5 miles according to the NACTO) and some argue this makes them ideal *first/last mile* solutions.[9] Of course, many riders also simply use e-scooters because they are fun.[10]

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1. Linda Trischitta, *Scooter Rider Dies in Crash with Car on Busy Road*, SUN SENTINEL, Apr. 13, 2019, at A1.

2. NAT'L ASS'N OF CITY TRANSP. OFFICIALS, SHARED MICROMOBILITY IN THE U.S.: 2018 5 (2019).

3. Cathy Bussewitz & Amanda Morris, *Boom in Electric Scooters Leads to More Injuries, Fatalities*, ASSOCIATED PRESS (June 6, 2019), http://www.apnews.com/33f376b91e5945efbcbb2c460b1d0dcc.

4. Ryan Felton, *8 Deaths Now Tied to E-Scooters*, CONSUMER REP. (June 3, 2019), http://www.consumerreports.org/product-safety/deaths-tied-to-e-scooters/; *The Scooter Scourge*, WEEK (Feb. 24, 2019), http://www.theweek.com/articles/824992/scooter-scourge.

5. NAT'L ASS'N OF CITY TRANSP. OFFICIALS, *supra* note 2, at 4; *see also* Felton, *supra* note 4.

6. NAT'L ASS'N OF CITY TRANSP. OFFICIALS, *supra* note 2, at 4.

7. Levi Tillemann & Lassor Feasley, *Let's Count the Ways E-Scooters Could Save the City*, WIRED: TRANSP. (Dec. 7, 2018, 7:00 AM), http://www.wired.com/story/e-scooter-micromobility-infographics-cost-emissions/.

8. *See id.*

9. NAT'L ASS'N OF CITY TRANSP. OFFICIALS, *supra* note 2, at 11; *E-Scooters Could Be a Last-Mile Solution for Everyone*, INST. FOR TRANSP. & DEV. POL'Y (Dec. 14, 2018), http://www.itdp.org/2018/12/14/e-scooters-last-mile-solution/.

10. NAT'L ASS'N OF CITY TRANSP. OFFICIALS, *supra* note 2, at 9.

Opponents of ride-sharing e-scooters contend that they are dangerous to both riders and pedestrians, arguing that e-scooter companies do not properly train and monitor riders.[11] People frequently ride without helmets—a Centers for Disease Control and Prevention ("CDC") study found that less than one percent of injured riders wore them.[12] Also, the minimum age requirement is easily circumvented by underage riders using their parent's information.[13] Additionally, cities have been frustrated by the "act first, ask for forgiveness later" approach e-scooters companies have taken to introducing their services to cities.[14] Cities like Denver and Minneapolis had e-scooters pop up in their cities essentially overnight before potential regulations could be discussed and implemented.[15]

This Comment will examine the history of the sharing economy and what led to the current e-scooter revolution.[16] Particular focus will be placed on car-sharing, ride-sharing, and early forms of micromobility.[17] It will examine the development of each of these sectors, discuss policy issues that were faced, and how e-scooter companies and local governments can learn from the past.[18] The primary focus of this Comment, after providing

11. *See* AUSTIN PUB. HEALTH, DOCKLESS ELECTRIC SCOOTER-RELATED INJURIES STUDY 11 (2019); John Benson, *Don't Go There, Seattle: Electric Scooters Tied to Injuries, Fatalities*, SEATTLE TIMES: OPINION (June 28, 2019, 12:52 PM), http://www.seattletimes.com/opinion/dont-go-there-seattle-electric-scooters-tied-to-injuries-fatalities/. While seventy percent of injured scooter riders reported they had received training on scooter use, sixty percent of injured riders were only trained via the scooter companies' mobile app. AUSTIN PUB. HEALTH, *supra*. The report concluded that more substantial training may be necessary. *Id.* at 11.

12. *Id.* at 6.

13. Will Kubzansky, *The Secret Life of Teen Scooter Outlaws*, VERGE: FEATURES (Sept. 23, 2018, 12:00 PM), http://www.theverge.com/2018/9/23/17882996/teens-electric-scooter-age-requirement-bird-lime.

14. Paul DeMaio, *Bike-Sharing: History, Impacts, Models of Provision, and Future*, J. PUB. TRANSP., Dec. 2009, at 41, 47; Chaney Skilling, *Electric-Scooter Sharing Company Bird Lands in Denver but City Puts up Stop Sign*, DENVER POST: BUS. (June 1, 2018, 6:44 PM), http://www.denverpost.com/2018/06/01/denver-electric-scooters-bird-lime/.

15. DeMaio, *supra* note 14, at 47.

16. *See* Sarah Cannon & Lawrence H. Summers, *How Uber and the Sharing Economy Can Win over Regulators*, HARV. BUS. REV. (Oct. 13, 2014), http://www.hbr.org/2014/10/how-uber-and-the-sharing-economy-can-win-over-regulators/; discussion *infra* Part II.

17. *See* Sarah Seright, *Sharing Economy Pioneers: 15 Companies Disrupting Industries Left and Right*, NEIGHBOR (Oct. 1, 2018), http://www.neighbor.com/storage-blogsharing-economy-pioneers; discussion *infra* Section II.C.

18. *See* Daniel E. Rauch & David Schleicher, *Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy*, 76 OHIO ST. L.J. 901, 903 (2015); discussion *infra* Sections II.B.1–3.

background information, will be dockless electric scooters.[19] First, there will be analysis weighing the positive and negative effects e-scooters have on society.[20] Then, a discussion on how cities should regulate e-scooter companies, not to control them, but instead use them as a tool to achieve the city's transportation goals.[21]

II. HOW THE SHARING ECONOMY LED TO THE E-SCOOTER REVOLUTION

In the last decade or so, the *sharing economy* has given birth to new firms and businesses with massive valuations and impact.[22] Ridesourcing firms founded in the last decade (Uber and Lyft) are now multi-national corporations worth billions of dollars.[23] Car-sharing firms like Zipcar and car2go have seen their memberships balloon from 52,347 in 2004, to over a million in 2015.[24] Generally speaking, sharing firms exist in one of two primary forms: They either own capital or services that are rented out to consumers on a short-term basis ("asset hubs") or they create peer-to-peer networks that connect providers and users for exchanges of goods and services on a short-term basis ("peer-to-peer networks").[25]

A. *Background on the Sharing Economy*

The modern sharing economy emerged from the collision of several consumer trends and widespread technological changes.[26] The consumer trends include a growing sense of environmental consciousness among consumers who see borrowing or reusing goods as more sustainable than

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19. *See* DeMaio, *supra* note 14, at 42; Adeyemi Ajao, *Electric Scooters and Micro-Mobility: Here's Everything You Need to Know*, FORBES (Feb. 1, 2019, 9:16 AM), http://www.forbes.com/sites/adeyemiajao/2019/02/01/everything-you-want-to-know-about-scooters-and-micro-mobility/; discussion *infra* Parts II–V.

20. *See* DeMaio, *supra* note 14, at 42, 49–50; Ajao, *supra* note 19; discussion *infra* Part III.

21. *See* RASHEQ ZARIF ET AL., SMALL IS BEAUTIFUL: MAKING MICROMOBILITY WORK FOR CITIZENS, CITIES, AND SERVICE PROVIDERS, 9–10 (2019); discussion *infra* Part IV.

22. *See* Cannon & Summers, *supra* note 16. Noting the ten billion-dollar valuations of sharing firms like Airbnb and Uber. *Id.*

23. *See From Zero to Seventy (Billion); Uber*, ECONOMIST, Sept. 3, 2016, at 17, 17–18.

24. Joseph P. Schwieterman & Mollie Pelon, *First Zipcar, Now Uber: Legal and Policy Issues Facing the Expanding* Shared Mobility *Sector in U.S. Cities*, 4 BELMONT L. REV. 109, 109–10 (2017).

25. Rauch & Schleicher, *supra* note 18, at 903.

26. *Id.* at 910.

buying new ones.[27] As people move to cities and urbanization increases, consumers gain greater access to sharing and renting opportunities.[28] Additionally, the Great Recession created a thrifty consumer and a new interest in renting over owning goods.[29] Further, the recession led to unemployment and underemployment, creating a workforce ready and willing to take on side gigs like driving for Uber.[30]

Beyond just the change in consumer habits, the most important development in creating the modern sharing economy has been the development and implementation of new technology.[31] Smartphones have become ubiquitous in American society and are now used by a majority of Americans.[32] The omnipresence of smartphones allows users to access web or application-based sharing services anywhere.[33] Further, widespread GPS tracking of both consumers and goods leads to an enhanced customer experience—Lyft drivers know where to pick you up—and greater security for sharing firms—protects their capital from being lost or stolen by consumers.[34] And digital rating systems have allowed consumers and providers alike to create a form of trust that lends credibility to transactions.[35]

In the aggregate, these changes have led to the modern sharing economy.[36] New sharing firms have grown in size dramatically, and many

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27. *Id.*

28. Fleura Bardhi & Giana M. Eckhardt, *Access-Based Consumption: The Case of Car Sharing*, 39 J. CONSUMER RES. 881, 884 (2012).

29. *See* David Brooks, *The Evolution of Trust*, INT'L N.Y. TIMES, July 2, 2014, at 9, (discussing the cultural effect of the Great Recession on consumer behavior); Rauch & Schleicher, *supra* note 18, at 910.

30. Rauch & Schleicher, *supra* note 18, at 910.

31. *Id.*

32. *See* Aaron Smith, *Smartphone Ownership 2013*, PEW RES. CTR.: INTERNET & TECH. (June 5, 2013), http://www.pewinternet.org/2013/06/05/smartphone-ownership-2013/.

33. Rauch & Schleicher, *supra* note 18, at 910.

34. *Id.* at 910–11; *see also* Sue Carlton, *Can't We at Least Do Scooters, People?*, TAMPA BAY TIMES: OPINION (June 1, 2019), http://www.tampabay.com/opinion/columns/cant-we-at-least-do-scooters-people-20190601/ (discussing a failed attempt to bring bike-sharing to Tampa before GPS, "twenty years ago, Tampa tried an early form of bike-sharing by placing bicycles recovered by police and spray-painted bright orange around town so anyone could grab one . . . and then leave them for the next guy . . . [w]ithin weeks, more than [fifty] bikes vanished"); Tina Rosenberg, *It's Not Just Nice to Share, It's the Future*, N.Y. TIMES: OPINIONATOR (June 5, 2013, 9:00 AM), http://opinionator.blogs.nytimes.com/2013/06/05/its-not-just-nice-to-share-its-the-future/.

35. Rauch & Schleicher, *supra* note 18, at 911. As an example of these rating systems building trust, "if a Lyft driver has 800 *five star* reviews, a rider may be willing [to] board her car even if she lacks classic indicia of trustworthiness, like a business license." *Id.*

36. *Id.*

now rival their more traditional competitors in size.[37] Projections of Uber's valuation suggest that the ride-sharing company's market cap could double the likes of traditional car companies like General Motors or Ford.[38] And the sharing economy shows no indication of slowing down with startups in every industry imaginable.[39] The wide breadth of sharing firms has a common idea at its core, "a stark reduction in transaction costs that allows for radically disaggregated consumption. The sharing economy allows users to buy, sell, or donate ever-smaller units of goods, services, or experiences."[40]

B. *The Primary Systems of the Sharing Economy*

While the types of businesses within the sharing economy encompass all varieties of industries, two primary business models have emerged: Peer-to-peer networks and asset hubs (or the business to consumer model).[41]

1. Peer-to-Peer Networks

The peer-to-peer network business model uses an internet-based platform to connect would-be providers with would-be consumers within a *membership community*.[42] This model was pioneered by eBay, which provided a platform for buyers and sellers to interact and incorporated a rating system (connected to each user) that lent credibility to the transactions.[43] The businesses that operate these platforms do not themselves possess any capital assets but, instead, connect people with assets or services.[44] Among the networks concerned with assets, Turo allows people to rent their vehicles to those seeking short vehicle rentals.[45] Airbnb

37. *See id.*

38. Kate Rooney, *Uber's Eye-Popping $120 Billion Valuation Would Make It Worth More than Nvidia, 3M and PayPal*, CNBC (Mar. 15, 2019, 3:12 PM), http://www.cnbc.com/2019/03/15/ubers-eye-popping-valuation-worth-more-than-nvidia-and-paypal.html (stating that Uber could be worth as much as $120 billion while General Motors is worth $53.8 billion and Ford is worth $33.4 billion).

39. *See* DOGVACAY, http://www.dogvacay.com (last visited May 1, 2020). The *Airbnb* of dog kennels. *Id.* CAVIAR, http://www.trycaviar.com/about-us (last visited May 1, 2020). The *Uber* of caviar delivery. *Id.* SQUARETRADE, http://www.squaretrade.com/go/ (last visited May 1, 2020). The *Uber* of smartphone screen repairs. *Id.*

40. Rauch & Schleicher, *supra* note 18, at 912.

41. *Id.* at 913; Schwieterman & Pelon, *supra* note 24, at 111–12.

42. Schwieterman & Pelon, *supra* note 24, at 111.

43. *Id.* at 111–12.

44. Rauch & Schleicher, *supra* note 18, at 915.

45. *See* TURO, http://www.turo.com (last visited May 1, 2020). Allows vehicle owners to maximize their vehicles utility by renting them out when they would

connects the owners of vacant homes or rooms with those looking for short term rentals.[46] The peer-to-peer networks that offer services are among the biggest names in the sharing economy.[47] The two largest, Uber and Lyft, connect drivers and potential passengers, circumventing the traditional taxi service.[48] And in the very literal sense of service-oriented peer-to-peer networks, TaskRabbit connects people offering services (like installing shelving or picking up groceries) with potential employers.[49] Sharing firms using the peer-to-peer model avoid the expense of buying and maintaining capital (Uber does not have to buy or maintain their own vehicles) which makes expansion easier.[50]

2. Asset Hubs

The other primary structure for the sharing economy is the asset hub, where a single company provides both the communication platform and the physical assets that consumers seek.[51] Firms like car2go and Zipcar own a fleet of vehicles and allow drivers to rent them on an hourly or daily basis.[52] The newest major player among asset hub firms provide dockless scooter rentals.[53] There are also asset hubs that are not-for-profit.[54] These primarily consist of bike-sharing programs like London's Santander Cycle or Washington D.C.'s Capital Bikeshare.[55] In these cases public-private partnerships (or governments directly) own fleets of bicycles that are rented

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otherwise remain stagnant. *Id.* Also provides consumers an alternative to purchasing a vehicle of their own. *Id.*

46. *See What Is Airbnb and How Does It Work?*, AIRBNB, http://www.airbnb.com/help/article/2503/what-is-airbnb-and-how-does-it-work (last visited May 1, 2020).

47. Rauch & Schleicher, *supra* note 18, at 915.

48. *See* LYFT, http://www.lyft.com (last visited May 1, 2020); *Sign Up to Ride*, LYFT: RIDER, http://www.lyft.com/rider (last visited May 1, 2020); UBER, http://www.uber.com (last visited May 1, 2020); *What We Offer*, UBER, http://www.uber.com/us/en/about/uber-offerings/ (last visited May 1, 2020).

49. *About Us*, TASKRABBIT, http://www.taskrabbit.com/about (last visited May 1, 2020).

50. Schwieterman & Pelon, *supra* note 24, at 112.

51. *Id.*; Rauch & Schleicher, *supra* note 18, at 913.

52. Rauch & Schleicher, *supra* note 18, at 913.

53. *See* BIRD, http://www.bird.co (last visited May 1, 2020); LIME, http://www.li.me/en-US/home (last visited May 1, 2020); *Introducing JUMP Scooters*, UBER, http://www.uber.com/ride/scooters (last visited May 1, 2020). Announcing Uber's entry into the world of dockless scooters. *Id.*

54. Rauch & Schleicher, *supra* note 18, at 913.

55. *Id.*; *see also Santander Cycles*, TRANSPORT FOR LONDON, http://www.tfl.gov.uk/modes/cycling/santander-cycles (last visited May 1, 2020); CAPITAL BIKESHARE, http://www.capitalbikeshare.com (last visited May 1, 2020).

out by the hour.[56] It could be argued that asset hub sharing firms are not all that different from their more-traditional counterparts and that would not be entirely wrong but what sets them apart is the levels of disaggregation now possible.[57] Before constant GPS tracking, remote locking, and instant app-based online reservations and payment, it was not possible to rent cars or bikes from unmanned automated terminals, much less would it have been possible to rent free-roaming dockless scooters.[58]

C. *Transportation-Based Sharing Services*

While the sharing economy has evolved to encompass all manner of goods and services, many of the largest sharing firms have aimed at disrupting our traditional notions of transportation.[59] This Section will focus on three types of services offered by sharing firms within the transportation sector.[60] First, car-sharing, firms that rent out fleets of vehicles or provide a platform for people to rent out their private vehicles.[61] Second, transportation networks, companies that provide a platform to connect drivers with potential passengers.[62] Finally, micromobility services, firms that provide users with smaller vehicles primarily used for short trips (i.e., bike-shares and dockless e-scooters).[63]

1. Car-Sharing

Car-sharing can be viewed as the sharing economy's take on the car rental; however, car-sharing firms often allow people to rent vehicles for periods as short as minutes or hours, instead of entire days.[64] While generally similar to conventional car renting, car-sharing firms differ in several aspects.[65] Many car-sharing companies employ a membership-based

56. Rauch & Schleicher, *supra* note 18, at 913.
57. *Id.* at 913–14.
58. *Id.*; *see also How to Bird*, BIRD: RIDE, http://www.bird.co/how/ (last visited May 1, 2020).
59. Seright, *supra* note 17 (discussing sharing firms in various industries including Rover, a pet care-share community; JustPark, a parking space-sharing company; Lending Club, a peer-to-peer lending firm; Postmates, a peer-to-peer food delivery company; and CrowdMed, a healthcare sourcing app); *see also* Rooney, *supra* note 38.
60. Seright, *supra* note 17; *see* discussion *infra* Sections II.C.1–3.
61. Schwieterman & Pelon, *supra* note 24, at 112.
62. *Id.* at 120.
63. *Id.* at 128.
64. *Id.* at 112.
65. *Id.*

model, that includes an annual fee and insurance coverage.[66] Rentals are only available to members, renters do not enter into a new contract at each use, fuel costs are included in the rates, car-sharing is not limited by office hours, and renters can access vehicles without human assistance.[67] Car-sharing firms employ both asset hub and peer-to-peer network business models.[68]

a. *Asset Hub Car-Sharing*

While less formalized, car-sharing has existed in some form for about a half-century.[69] The roots of the modern car-sharing firms, however, can be traced to Portland, Oregon in the 1990s with Car-Sharing Portland in 1998.[70] This early American car-sharing firm mimicked the car-sharing firms of Europe and Canada.[71] It employed a neighborhood model with pods of cars in densely populated areas and Portland's urban downtown area.[72] The success of Portland's car-sharing system inspired other local governments to promote car-sharing, leading to pod locations at government buildings, airports, and universities.[73] These early car-sharing ventures heavily emphasized their value to the community and were rewarded with grants and friendly negotiating positions with local governments.[74]

Today, the car-sharing sector is dominated by a few major players.[75] In particular, the success of car-sharing firms utilizing asset hub business models has led to traditional companies moving into the sector.[76] The largest firm of this type, Zipcar, was acquired by Avis Budget Group in 2013.[77] The

66. Schwieterman & Pelon, *supra* note 24, at 112; *see also* CAR2GO, http://www.car2go.com/US/en/ (last visited May 1, 2020); *Pricing*, ZIPCAR: PRICING, http://www.zipcar.com/pricing (last visited May 1, 2020).

67. Schwieterman & Pelon, *supra* note 24, at 112; *How Does Carsharing Work?*, ZIPCAR: HOW IT WORKS, http://www.zipcar.com/how-it-works (last visited May 1, 2020). Demonstrates how members book Zipcar's vehicles directly through their mobile app or website, and how reserved vehicles are unlocked via membership card or mobile app. *Id.*

68. Rauch & Schleicher, *supra* note 18, at 913–16.

69. Schwieterman & Pelon, *supra* note 24, at 113.

70. *Id.*

71. *Id.*

72. ALICE BIESCZAT & JOSEPH SCHWIETERMAN, ARE TAXES ON CARSHARING TOO HIGH?: A REVIEW OF PUBLIC BENEFITS AND TAX BURDEN OF AN EXPANDING TRANSPORTATION SECTOR 4 (2011).

73. Schwieterman & Pelon, *supra* note 24, at 113.

74. *Id.*

75. *Id.*

76. *See id.* at 113–15.

77. Schwieterman & Pelon, *supra* note 24, at 113–14; Press Release, Avis Budget Grp., Avis Budget Group Completes Acquisition of Zipcar (Mar. 14, 2013) (on file with author).

rental car giant Enterprise now has the second largest car-sharing network in Enterprise CarShare.[78] "[T]he largest car-sharing company in the world," and third largest in the United States, is car2go.[79] Car2go is a subsidiary of Daimler AG, the parent company of Mercedes.[80] The expansion of Daimler's car2go, and the potential of autonomous cars in the future, has caused many other major car brands to jump into the car-sharing market.[81]

Car-sharing firms have been linked to environmental, economic, and social benefits, particularly to the reduction of the social costs of private vehicle operation (air pollution, car accidents, and congestion).[82] Naysayers have argued that providing cheap, easy access to private vehicles will further encourage America's vehicle dependent culture, however, research indicates car-sharing leads to active lifestyles with more walking and biking.[83] Users of car-sharing programs have also been shown to use public transit at similar or higher rates than those who do not.[84] Additionally, some research points to car-sharing's potential to create more open space in urban areas and improve public safety by decreasing the amount of land used for parking.[85]

Asset hub-based car-sharing firms have not been met without controversy.[86] Among the most common complaints concern cities allocating parking spaces or public space for car-sharing firms.[87] Some

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78. Schwieterman & Pelon, *supra* note 24, at 114; *Our Story: How It Began*, ENTERPRISE CARSHARE, http://www.enterprisecarshare.com/us/en/our-story.html (last visited May 1, 2020). This discusses Enterprise CarShare's growth and aggressive expansion via the acquisition of local competing car-share companies like Philadelphia's PhillyCarShare, Chicago's IGO CarSharing, Denver's Occasional Car, Toronto's AutoShare, and the United Kingdom's City Car Club. *Id.*

79. Schwieterman & Pelon, *supra* note 24, at 115.

80. *Id.*; *see also Get in and Drive Off. Free-Floating Carsharing with Car2go*, DAIMLER, http://www.daimler.com/products/services/mobility-services/car2go (last visited May 1, 2020); Ronan Glon, *So, Who Made My Car?: A Comprehensive Guide to Today's Car Conglomerates*, DIGITAL TRENDS (Aug. 8, 2019, 3:32 AM), http://www.digitaltrends.com/cars/car-breakdown-car-conglomerates/.

81. Schwieterman & Pelon, *supra* note 24, at 115 (noting that Audi, BMW, Ford, and General Motors have all followed Daimler's lead and have invested in American car-sharing brands, and also noting BMW's experimentations with complex par per minute pricing that factors in time spent driving or parked).

82. *Id.* at 116–17; *see also* ADAM MILLARD-BALL ET AL., TRANSIT COOP. RESEARCH PROGRAM, CAR-SHARING: WHERE AND HOW IT SUCCEEDS 3–4 (2005).

83. Schwieterman & Pelon, *supra* note 24, at 117.

84. *Id.* (expanding on this phenomenon, "those sharing cars . . . make decisions differently than those who have large *sunk* investments in a private vehicle. Since they pay for every trip, they use buses and trains more regularly than vehicle owners . . .").

85. *Id.*

86. Rauch & Schleicher, *supra* note 18, at 914.

87. Karen Klinger, *City Plan to Allow Residential Zipcar Parking Sparks Controversy*, CAMBRIDGE COMMUNITY TELEVISION (May 21, 2009), http://www.cctvcambridge.org/node/18076; *SFMTA Board Expands Locations for Car Share*

existing businesses have also claimed to be undermined by asset hub firms and the public subsidies they receive.[88] Car-sharing firms have made an effort to avoid the ire of regulators and provide insurance coverage for drivers, baked into membership and rental rates.[89] However, the industry has drawn some criticism that the policy limits of these insurance plans may be insufficient in catastrophic accidents.[90]

b. *Peer-to-Peer Network Car-Sharing*

The initial wave of car-sharing came in the form of asset hubs that followed the same general principles of conventional car rental: Acquire a fleet of vehicles, rent them out to customers, and repeat.[91] In the past few years, a new form of car-sharing has grown rapidly: Peer-to-peer car-sharing.[92] The two largest firms in this field, Turo and Getaround, provide a network that connects private vehicle owners to customers looking to rent vehicles.[93] Turo tends to target tourists and local weekend drivers, while Getaround aims to provide an alternative to vehicle ownership for urban users.[94] To date, Turo has raised over $470 million and boasts ten million

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Vehicles, S.F. EXAMINER (June 26, 2014, 12:00 AM), http://archives.sfexaminer.com/sanfrancisco/sfmta-board-expands-locations-for-car-share-vehicles/Content?oid=2832120.

88. Rauch & Schleicher, *supra* note 18, at 914.

89. *Frequently Asked Questions*, CAR2GO, http://www.car2go.com/US/en/faq/ (last visited May 1, 2020); *see also Insurance Coverage*, ZIPCAR, http://support.zipcar.com/hc/en-us/articles/220433387-Insurance-Coverage- (last visited May 1, 2020).

90. Ron Lieber, *Consider Worst Case with Zipcar*, N.Y. TIMES, Apr. 23, 2011, at B1 [hereinafter Lieber, *Consider Worst Case with Zipcar*]; Ron Lieber, *Zipcar's Liability Insurance: Is It Adequate?*, N.Y. TIMES (Apr. 22, 2011, 4:11 PM), http://bucks.blogs.nytimes.com/2011/04/22/zipcars-liability-insurance-is-it-adequate/ [hereinafter Lieber, *Zipcar's Liability Insurance: Is it Adequate?*]; Felix Salmon, *How Comprehensive Is Zipcar's Insurance?*, REUTERS (June 15, 2010), http://blogs.reuters.com/felix-salmon/2010/06/15/how-comprehensive-is-zipcars-insurance/.

91. *See* Schwieterman & Pelon, *supra* note 24, at 112–14.

92. *Id.* at 116.

93. *See How Getaround Works*, GETAROUND, http://www.getaround.com/tour (last visited May 1, 2020); *How Turo Works*, TURO, http://www.turo.com/en-us/how-turo-works (last visited May 1, 2020).

94. Tomio Geron, *Getaround, Turo Take Different Car-Rental Routes*, WALL STREET J. (July 8, 2019, 5:30 AM), http://www.wsj.com/articles/getaround-turo-take-different-car-rental-routes-11562578205 (discussing not only the difference in target audience between Turo and Getaround, "[i]t's like comparing Hertz and Zipcar," but also the varied expansion strategies of the two companies).

members on its platform.[95] Getaround is no small fish itself, having raised $410 million and counts Toyota Motor Corporation among its investors.[96]

The average price of a new car is over $37,000 and transportation costs are the second-highest expenditure for the average American.[97] Yet, the average car is only used for one hour a day, sitting idle for the other twenty-three.[98] Car-sharing peer-to-peer networks provide a platform for people to rent out cars that would otherwise sit idle, thereby maximizing their utility.[99] And on the flip side, rather than owning a vehicle and leaving it unused for most of the day, consumers can instead rent one when they need to.[100] "In sum, . . . goods and people can be employed more intensively than before, making already existing products and service providers more valuable."[101]

Car-sharing firms, in general, maintain that they are essentially just car rental companies and not a service.[102] This strategy has enabled car-sharing firms to sidestep some of the most pressing issues facing the ride-sharing market.[103] However, peer-to-peer car-sharing is not free from pressing legal questions.[104] Among them are unresolved insurance issues stemming from the legal liability of driving another person's private vehicle.[105] This problem has even caused some firms to leave the New York market.[106] There is also research indicating that car-sharing platforms face

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95. Annie Palmer, *IAC Invests $250 Million in Car-Sharing Company Turo*, CNBC: TECH (July 17, 2019, 8:31 AM), http://www.cnbc.com/2019/07/17/iac-invests-250-million-in-car-sharing-company-turo.html.

96. Geron, *supra* note 94 (discussing Getaround's plans to expand into the European market).

97. John M. Vincent, *How Much Should You Spend on a Car?*, U.S. NEWS & WORLD REP. (Mar. 6, 2019), http://cars.usnews.com/cars-trucks/how-much-should-you-spend-on-a-car (stating the average price of a used car is over $20,000). In 2018, the average vehicle costs $9,761 a year to own and operate, putting transportation between housing, $20,091, and food $7,923 as second largest way Americans spend their money. BUREAU OF LABOR STATISTICS, CONSUMER EXPENDITURES — 2018 5 (2019); *see also* Lisa Smith, *The True Cost of Owning a Car*, INVESTOPEDIA (Jan. 31, 2020), http://www.investopedia.com/articles/pf/08/cost-car-ownership.asp.

98. Rauch & Schleicher, *supra* note 18, at 917.

99. *See id.*

100. *See id.*

101. *Id.*

102. *See* Schwieterman & Pelon, *supra* note 24, at 118.

103. *Id.*; *see also* discussion *supra* Section II.B.2 (discussing the battle of Uber and Lyft drivers to be recognized not as independent contractors, but instead employees, entitled to the protections and benefits enjoyed by traditional employees).

104. Schwieterman & Pelon, *supra* note 24, at 118.

105. *Id.*

106. *Id.*; *see also* Colleen Taylor, *Car-Sharing Startup RelayRides Hit with $200K Fine from New York State for Insurance Violations*, TECHCRUNCH (Mar. 10, 2014, 4:14

higher tax rates than the rest of the sharing economy, and growth of the car-sharing sector has stalled as a result.[107]

2. Ride-Sharing

The major ride-sharing firms primarily employ peer-to-peer models.[108] Ride-sharing companies, or *transportation network companies*, operate digital networks that connect potential drivers with potential passengers.[109] The largest firms in this space, Uber and Lyft, dominate the market.[110] In a sense, ride-sharing companies resemble high-tech app-based taxicab systems.[111]

The general idea of ride-sharing is not a new concept; ride-sharing has existed in various forms for years.[112] Jitneys, or share taxis, have provided semi-fixed route service that can change based on customer requests, since at least 1914.[113] Airport and hotel shuttles are similarly likely to alter their routes based on customer request.[114] And of course, many would claim that ride-sharing apps like Uber and Lyft are no different from traditional cabs.[115]

Today's ride-sharing sector began in earnest in 2010, when Uber arrived in many United States markets.[116] Uber has expanded dramatically and is now valued at over $70 billion.[117] The company now offers a variety

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PM), http://www.techcrunch.com/2014/03/10/car-sharing-startup-relayrides-hit-with-200k-fine-from-new-york-state-for-insurance-violations/.

107. Schwieterman & Pelon, *supra* note 24, at 118–20.

108. *See* Rauch & Schleicher, *supra* note 18, at 915.

109. Schwieterman & Pelon, *supra* note 24, at 120.

110. Kathryn Gessner, *Uber Vs. Lyft: Who's Tops in the Battle of U.S. Rideshare Companies*, SECOND MEASURE (Aug. 21, 2019), http://blog.secondmeasure.com/datapoints/rideshare-industry-overview/. Uber takes in 71.1% of all ride-share spending in the United States, meanwhile Lyft is responsible for 27.2%. *Id.* Only 1.7% of ride-share spending goes to other ride-sharing companies, like Sidecar. *Id.*

111. Schwieterman & Pelon, *supra* note 24, at 121.

112. *Id.*

113. *Id.*; Matthew Mitchell & Michael Farren, *Op-Ed: If You Like Uber, You Would've Loved the Yesteryear's Jitney*, L.A. TIMES: OPINION (July 12, 2014, 5:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-mitchell-jitneys-uber-ride-share-20140713-story.html.

114. Schwieterman & Pelon, *supra* note 24, at 121.

115. Brian Fung, *E.U. Court Adviser Delivers Opinion Against Uber*, WASH. POST, May 12, 2017, at A13.

116. *The History of Uber*, UBER: NEWSROOM, http://www.uber.com/newsroom/history/ (last visited May 1, 2020). The Uber app was initially launched in 2009, but the first Uber ride was taken July 5th, 2010. *Id.*

117. Evie Liu, *Uber, Lyft, and Beyond Meat Stocks Will Join the Russell 1000 Next Week. Don't Expect Prices to Move Much*, BARRON'S (June 28, 2019, 11:36 AM),

of ride-sharing services to accommodate all manner of clientele.[118] Lyft has followed a similar path.[119] Like Uber, Lyft started in San Francisco and has expanded rapidly, both domestically and abroad.[120] Lyft also offers a variety of services, from the economical Lyft Share to their luxury black car service, Lyft Lux Black.[121] Both firms have also experimented with versions of their service tailored for commuters or carpooling.[122]

Research indicates that consumers who use shared-use modes of transportation, like ride-sharing, are more likely to use public transportation than their non-sharing counterparts.[123] Frequent ride-share users tend to own fewer cars and rely on a variety of different modes of transportation, adapting as needed.[124] People who regularly use several shared transit modes "own half as many household cars as [those] who use public transit alone."[125] In comparison to taxi customers, ride-sharers are younger, own fewer cars, and are more likely to travel with other people.[126]

Just like car-sharing has allowed for more intensive use of otherwise unused vehicles, ride-sharing apps also allow more intensive use of human capital.[127] Peer-to-peer ride-sharing firms, "serve [a] *two-sided* market[]: [T]heir users include both market-buyers and market-sellers."[128] Two-sided sharing platforms can create a producer and consumer surplus because they allow "existing assets to be traded in new ways."[129] Many people own

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http://www.barrons.com/articles/uber-lyft-beyond-meat-stocks-will-join-the-russell-1000-next-week-51561736049.

118. *See What We Offer*, UBER, http://www.uber.com/us/en/about/uber-offerings/ (last visited May 1, 2020). Uber's ride-sharing options include: Pool, UberX, UberXL, Lux, and Lux SUV. *Ride*, UBER: OUR PRODUCTS, http://www.uber.com/us/en/ride/ (last visited May 1, 2020).

119. *See* Schwieterman & Pelon, *supra* note 24, at 122.

120. *Id.*

121. *Sign up to Ride*, LYFT: RIDER, http://www.lyft.com/rider#options (last visited May 1, 2020); *see also* Schwieterman & Pelon, *supra* note 24, at 122.

122. Schwieterman & Pelon, *supra* note 24, at 123.

123. *See* SHARED-USE MOBILITY CTR., SHARED MOBILITY AND THE TRANSFORMATION OF PUBLIC TRANSIT, 6 (2016). The research was conducted in partnership with the American Public Transit Association, with survey information from over 4,500 shared mobility users from across the United States. *Id.*

124. *Id.* at 3–4.

125. *Id.*

126. Schwieterman & Pelon, *supra* note 24, at 125.

127. *See* Rauch & Schleicher, *supra* note 18, at 917.

128. *Id.* In Uber's case, riders are the market-buyers and drivers are the market-sellers. *Id.*; *see also* David S. Evans & Richard Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, 3 COMPETITION POL'Y INT'L 151, 154 (2007).

129. Rauch & Schleicher, *supra* note 18, at 918.

vehicles but previously were unable to capitalize on them.[130] Now those vehicle owners can sell their driving services and offset the costs of ownership.[131] Firms utilizing two-sided platforms can also engage in seemingly anti-competitive actions, that may be beneficial to society.[132] Ride-sharing firms' dependence on *gig* workers is pitched as a positive but has led to many of the legal questions facing this sector.[133]

The rise of the non-professional, or gig, workers for peer-to-peer car-sharing firms has caused tension with existing professional employees in the industry, and tension between the ride-sharing firms and their own drivers.[134] The taxi industry has been vocal in their malcontent for ride-sharing firms.[135] They argue that they have an unfair competitive advantage due to the relative lack of regulation imposed on ride-sharing.[136] As the industry has matured, new regulations have been imposed on ride-sharing firms in attempts to resolve disputes over unfair competition.[137] Some municipalities have struck deals with sharing companies, allowing them to continue or resume operations in return for new tax payments.[138] In Colorado and Washington D.C., Uber has been required to conduct more extensive background checks on their drivers, and buy additional insurance coverage.[139] New York City has enacted regulations that create a pay standard for drivers and have

130. *Id.*

131. *Id.*

132. *See id.* As an example, ride-sharing firms can manipulate prices for one side of the market to attract people towards the other. *Id.* It is common among ride-sharing firms to charge cut rate fares when first entering a market to attract new customers. Rauch & Schleicher, *supra* note 18, at 918. Likewise, ride-sharing firms will also hike fares during times of heightened demand in hopes of attracting extra drivers. *Id.* at 908.

133. *See Become a Driver*, LYFT: DRIVER, http://www.lyft.com/driver (last visited May 1, 2020); *Drive*, UBER: OUR PRODUCTS, http://www.uber.com/us/en/drive/ (last visited May 1, 2020). Lyft sells potential drivers on being their own boss, getting reliable earnings, and maintaining a flexible schedule. *Become a Driver*, *supra*. Uber's pitch to drivers *set your own hours*, *get paid fast*, and *earn on your terms*. *Id.*; Sara Ashley O'Brien, *Why Uber and Lyft Drivers Are Striking*, CNN: BUS. (May 8, 2019), http://www.cnn.com/2019/05/07/tech/uber-driver-strike-ipo/index.html; Lauren Feiner, *Uber Drivers Will go on Strike over Pay and Benefits Ahead of the Company's $90 Billion IPO*, CNBC: TECH (May 8, 2019, 12:36 PM), http://www.cnbc.com/2019/05/07/uber-lyft-drivers-to-go-on-strike-over-low-wages-and-benefits.html.

134. *See* Rauch & Schleicher, *supra* note 18, at 922; Feiner, *supra* note 133.

135. Andrea Peterson, *What It Looks Like When Taxi Drivers Protest Uber and Lyft in D.C.*, WASH. POST (Oct. 28, 2014), http://www.washingtonpost.com/news/the-switch/wp/2014/10/28/what-it-looks-like-when-taxi-drivers-protest-uber-and-lyft-in-d-c/.

136. *Id.*

137. *See* Rauch & Schleicher, *supra* note 18, at 922–23.

138. *Id.* at 923.

139. *Id.*

capped the number of ride-sharing vehicles allowed in the city.[140] Some cities have taken a sterner approach, temporarily or permanently banning certain ride-sharing services.[141]

Ride-sharing firms have also been heavily criticized for how they treat their *employees*.[142] The service providers on apps like Uber and Lyft "are not full-time [salaried] employees and lack benefits" traditional to full-time employment—health insurance, paid sick leave, and retirement plans.[143] The question of how ride-sharing drivers should be classified has been a long-running discussion that has been subject to both contentious litigation and political debate.[144] Wages for drivers can also be lower than what some marketing materials might suggest.[145] Ride-sharing firms dispute these claims and argue that their workers make more than similar employees at more traditional firms.[146] Further, they provide an opportunity for their workers to earn a "supplementary income that would otherwise be unavailable" to them.[147]

3. Micromobility

The history of shared micromobility began in 1965 when the first bike-share program was introduced in Amsterdam.[148] In this program,

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140. James Parrott & Michael Reich, *How City Regulations Are Making Uber and Lyft Better*, N.Y. DAILY NEWS (July 23, 2019, 8:00 AM), http://www.nydailynews.com/opinion/ny-oped-how-city-regulations-are-making-uber-and-lyft-better-20190723-lquix3t4b5gbdh3vlqlwhtj4nm-story.html.

141. *Uber Launches in Hamburg, Now Live in Six German Cities*, REUTERS (July 16, 2019, 6:13 PM), http://www.reuters.com/article/us-uber-germany/uber-launches-in-hamburg-now-live-in-six-german-cities-idUSKCN1UB2SD (discussing Uber being forced out of, and now reentering German markets with new regulations); Natasha Lomas, *Uber Driven Out of Barcelona Again*, TECHCRUNCH (Jan. 31, 2019, 5:37 AM), http://www.techcrunch.com/2019/01/31/uber-driven-out-of-barcelona-again/; *see also Uber Drivers in Denmark Must Pay Fine for Every Ride, Supreme Court Rules*, REUTERS (Sept. 13, 2018, 7:00 AM), http://www.reuters.com/article/us-uber-denmark/uber-drivers-in-denmark-must-pay-fine-for-every-ride-supreme-court-rules-idUSKCN1LT1M7.

142. *See* Feiner, *supra* note 133.

143. Rauch & Schleicher, *supra* note 18, at 925.

144. *See* Andrew J. Hawkins, *Uber Settles Driver Classification Lawsuit for $20 Million*, VERGE (Mar. 12, 2019, 11:59 AM), http://www.theverge.com/2019/3/12/18261755/uber-driver-classification-lawsuit-settlement-20-million.

145. *See* Michael Sainato, *'I Made $3.75 an Hour': Lyft and Uber Drivers Push to Unionize for Better Pay*, GUARDIAN (Mar. 22, 2019, 2:00 PM), http://www.theguardian.com/us-news/2019/mar/22/uber-lyft-ipo-drivers-unionize-low-pay-expenses.

146. Rauch & Schleicher, *supra* note 18, at 925.

147. *Id.*

148. DeMaio, *supra* note 14, at 42.

unwanted bikes were painted white, and simply left out for public use.[149] The program fell apart quickly as bikes were stolen, damaged, and thrown into canals.[150] The next major attempt at bike-sharing was in Copenhagen in 1995.[151] Bikes were dispensed from a station, and while free, required a coin deposit that was returned when the bike was returned.[152] The Copenhagen system still suffered from theft and bike damage because of the anonymity of the users.[153] In the late 1990s and early 2000s new bike-share programs in England and France that tracked who checked out bikes were implemented.[154] Paris' bike-share, Vélib', has been particularly successful with fifty million trips in its first two years.[155] Today it has a fleet of over fourteen-thousand bikes.[156] Now with GPS tracking, remote locking, online payment, and the ubiquity of smartphones, bike-shares can be dockless.[157] In 2018, e-scooters and dockless bikes usage overtook station based bike-share usage.[158]

III. PROS AND CONS OF E-SCOOTERS

Micromobility may trace its roots to bike-share programs in the twentieth century, but the sector has exploded since 2018 with the emergence of shared dockless e-scooters and bikes.[159] The sharing firms that pioneered the e-scooter, Bird and Lime, have reached billion-dollar valuations faster than any other United States' companies.[160] Thousands of e-scooters belonging to these two companies can be found in over one hundred cities worldwide.[161] With the massive rise in micromobility and huge valuations of e-scooter companies, it begs the question: What exactly are we talking

149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. DeMaio, *supra* note 14, at 42.
154. *Id.* at 42–43.
155. *Id.* at 45.
156. Feargus O'Sullivan, *The Great Parisian Bikeshare Meltdown*, CITYLAB (May 8, 2018), http://www.citylab.com/transportation/2018/05/the-paris-bikeshare-is-now-free-but-thats-because-its-broken/559913/.
157. NAT'L ASS'N OF CITY TRANSP. OFFICIALS, *supra* note 2, at 4.
158. *Id.* at 5.
159. Ajao, *supra* note 19.
160. *Id.*
161. Joshua Brustein et al., *Why E-Scooters Are on the Rise, Along with Injuries*, BLOOMBERG (July 20, 2019, 12:00 AM), http://www.bloomberg.com/news/articles/2019-07-20/why-e-scooters-are-on-the-rise-along-with-injuries-quicktake.

about?[162] The best "way to think about what micromobility is and can be is in relation to existing infrastructure: Micromobility constitutes forms of transport that can occupy space alongside bicycles."[163] E-scooters in particular, are electric-powered scooters that are rented for short one-way trips.[164] Users begin rental by unlocking them through the companies' smartphone app.[165] To end a trip, users simply park the scooter on the sidewalk, preferably out of the way of pedestrian traffic.[166] On average, e-scooters have a maximum speed of fifteen miles per hour.[167]

A. *Benefits of E-Scooters and Micromobility*

Since 2018, e-scooters have popped up quickly, sometimes overnight, in cities across the country.[168] The young industry still has plenty of issues that need to be addressed, but e-scooters also have the potential to positively affect cities.[169] Early studies indicate that e-scooters could reduce traffic congestion and act as a *first/last mile* solution, reduce air pollution, and provide a transportation alternative for underserved low-income areas.[170]

1. E-Scooters as a *First/Last Mile* Solution

As cities and urban areas continue to experience rapid population growth, the strain placed on existing transportation networks will continue to grow.[171] Over half the world population lives in urbanized areas, and current trends could see two-thirds of the world's population living in cities by 2050.[172] Some projections show that the demand for urban passenger-miles

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162. *See* Ajao, *supra* note 19.

163. ZARIF ET AL., *supra* note 21, at 2.

164. PORTLAND BUREAU OF TRANSP., 2018 E-SCOOTER FINDINGS REPORT 8 (2018).

165. *Id.*; *Electric Scooter Sharing*, LIME, http://www.li.me/electric-scooter (last visited May 1, 2020).

166. PORTLAND BUREAU OF TRANSP., *supra* note 164, at 8.

167. Ethan May, *Here's Everything You Need to Know About Bird and Lime Electric Scooters*, INDIANAPOLIS STAR (Apr. 11, 2019, 11:21 AM) http://www.indystar.com/story/news/2018/06/21/bird-electric-scooters-rental-costs-hours-charging-locations/720893002/.

168. Skilling, *supra* note 14.

169. *See* Ajao, *supra* note 19.

170. PORTLAND BUREAU OF TRANSP., *supra* note 164, at 11; ZARIF ET AL., *supra* note 21, at 3.

171. ZARIF ET AL., *supra* note 21, at 3.

172. WORLD URBANIZATION PROSPECTS: THE 2014 REVISION, UNITED NATIONS 7 (2015).

could just about double between 2015 and 2050.[173] Moving forward, mass transit (trains, buses, etc.) will continue to be the most efficient method to transport great numbers of people over large distances, but getting people to and from public transit remains a challenge in many cities.[174] Travelers left without convenient and affordable ways to reach public transit are more likely to use inefficient private vehicles, the source of much congestion and air pollution in urban areas.[175]

Areas where demand for transit is high but access is low have been dubbed *transit deserts*.[176] People who depend on public transit, yet live in transit deserts, may be forced to forgo certain job opportunities, preventative medical care, and access to healthy food.[177] E-scooters, and micromobility in general, offer a potential solution to address the *first/last mile* problem and effectively shrink transit deserts.[178] A Chinese dockless bike-sharing program, Mobike, claims to have doubled access to health care, jobs, and education by targeting areas presently underserved by public transit.[179] About half of the trips using bike-share programs in China are part of multimodal journeys that include public transit.[180] This resembles the behavior of American travelers that make use of sharing services.[181] Users without the sunk cost investments of private vehicles are more flexible and willing to use a range of transportation services that fit their needs.[182]

Micromobility and e-scooters may have even greater potential as a partial replacement for other transit options.[183] Each year more than half of the car trips taken in the United States are less than five miles long.[184] These short-distance car trips are ripe to be replaced with alternative modes of transportation, like e-scooters and dockless bikes.[185] The average trip made

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173. ZARIF ET AL., *supra* note 21, at 3.

174. *Id.*

175. *Id.* at 3, 8.

176. Junfeng Jiao & Nicole McGrath, *In the US, Transit Deserts Are Making It Hard for People to Find Jobs and Stay Healthy*, CITYMETRIC (Sept. 4, 2017), http://www.citymetric.com/transport/us-transit-deserts-are-making-it-hard-people-find-jobs-and-stay-healthy-3291.

177. *Id.*

178. ZARIF ET AL., *supra* note 21, at 3–4.

179. *Id.* at 4.

180. *See* Xiaomei Tan & Yin Dafei, *Bike-Sharing Data and Cities: Lessons from China's Experience*, GLOBAL ENV'T FACILITY (Jan. 17, 2018), http://www.thegef.org/blog/bike-sharing-data-and-cities-lessons-china-experience.

181. Schwieterman & Pelon, *supra* note 24, at 117.

182. *Id.*

183. ZARIF ET AL., *supra* note 21, at 8.

184. *Id.* at 4; *see also Frequently Used National Statistics: Vehicle Trips*, NAT'L HOUSEHOLD TRAVEL SURV. (2017), https://nhts.ornl.gov/verhicle-trips.

185. ZARIF ET AL., *supra* note 21, at 2.

on e-scooters and bike-share is between 1.2 and 2.5 miles.[186] Portland's study of their e-scooter pilot program found that thirty-four percent of residents and forty-eight percent of visitors would have used a car if a scooter had not been available.[187] Additionally, six percent of Portlanders reported getting rid of their personal vehicle because of e-scooters and another sixteen percent considered it.[188] Other areas where short trips abound, like university campuses and military bases, are also ripe for micromobility solutions.[189]

2. E-Scooters as Transportation for Underserved Areas

As private and shared mobility services have expanded quickly, many cities are concerned that traditionally underserved, low-income areas are not given equal access to new transportation modes.[190] Station-based bike-sharing systems have been criticized for disproportionately concentrating stations in wealthier communities, limiting accessibility in low-income and minority neighborhoods.[191] Survey data suggests that public support for micromobility and e-scooters is highest among lower-income groups.[192] Because there is minimal infrastructure required for e-scooters, cities may look to micromobility as a means to improve access to transportation for all.[193] In Portland, the city required that e-scooter companies provide a set minimum number of scooters to lower-income areas (East Portland) that had been historically underserved by the transportation system.[194] Portland also required a lower price be charged for e-scooter usage in East Portland.[195] The city found that the scooters were used regularly and riders in East Portland took sixty percent longer trips than riders in central Portland.[196] Similar to other polling data, Portland found that its lower-income residents were strongly in favor of e-scooters.[197]

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186. NAT'L ASS'N OF CITY TRANSP. OFFICIALS, *supra* note 2, at 11.
187. PORTLAND BUREAU OF TRANSP., *supra* note 164, at 20.
188. *Id.*
189. ZARIF ET AL., *supra* note 21, at 4.
190. POPULUS, THE MICRO-MOBILITY REVOLUTION: THE INTRODUCTION AND ADOPTION OF ELECTRIC SCOOTERS IN THE UNITED STATES 15 (2018).
191. *Id.*
192. *Id.*
193. *Id.*
194. PORTLAND BUREAU OF TRANSP., *supra* note 164, at 26. The study did note that despite the requirement to deploy at least 100 scooters in East Portland each day, only one of three companies complied. *Id.* at 7. On average, 243 scooters were deployed to East Portland. *Id.* at 26.
195. *See id.* at 7.
196. *See id.* at 26.
197. PORTLAND BUREAU OF TRANSP., *supra* note 164, at 25.

B. *Issues Facing E-Scooters*

While e-scooters may have tremendous potential to affect positive change in the world, they have also caused their share of controversy.[198] E-scooter companies have barged into cities and employed tried and true tactics common among tech startups but grating on local governments.[199] E-scooter riders have been injured, and hospitals have reported spikes in scooter-related injuries.[200] Both pedestrians and vehicles have had their space intruded by e-scooters.[201]

1. E-Scooters Employ the *Playbook*

Around the country, cities were caught flat-footed by the sudden deployment of scooter fleets within their limits.[202] Seemingly overnight, an entirely new form of transportation arrived in their towns and governments were forced to react quickly.[203] Some local governments responded by simply banning scooters instead of grappling with ubiquitous ride-hailing and the ensuing congestion and competition with public transit.[204]

Scooter companies are currently executing a familiar *playbook* that has been employed by sharing firms in many industries.[205] The goal of the playbook is to bend or manipulate local politics to their advantage.[206] The playbook is emblematic of Silicon Valley and Mark Zuckerberg's motto, "[m]ove fast and break things."[207] Step one is to quickly enter markets and develop customer bases before waiting around for regulatory approval.[208] Next, if and when regulators begin to crack down on them, sharing firms argue that they are not actually doing anything, but they are instead simply a network that connects third parties.[209] This can force cities to enforce regulations against their own individual citizens, a politically dangerous gambit.[210] Finally, sharing firms weaponize their large, loyal customer

198. *See* Rauch & Schleicher, *supra* note 18, at 914–16.
199. *See id.* at 927–28.
200. *See* PORTLAND BUREAU OF TRANSP., *supra* note 164, at 22.
201. *See id.* at 24–25; ZARIF ET AL., *supra* note 21, at 7.
202. ZARIF ET AL., *supra* note 21, at 6.
203. *Id.*
204. *Id.*
205. Rauch & Schleicher, *supra* note 18, at 927.
206. *Id.*
207. Hemant Taneja, *The Era of "Move Fast and Break Things" Is Over*, HARV. BUS. REV. (Jan. 22, 2019), http://www.hbr.org/2019/01/the-era-of-move-fast-and-break-things-is-over.
208. Rauch & Schleicher, *supra* note 18, at 927.
209. *Id.*
210. *Id.* at 928.

bases, bombarding politicians via social media and other protests.[211] What sharing firms lack in history and hardened organization they make up for in technological and media savvy.[212] When the playbook is used effectively, sharing firms, like e-scooters, become too big to ban before regulators can act.[213]

2. Safety Concerns

The safety of both e-scooter riders and others has been of paramount concern in many cities, it is also the issue that garners the most media attention.[214] Hospitals have reported dramatic spikes in scooter-related injuries and Portland found that scooter-related injury emergency room visits accounted for about five percent of total crash injury visits.[215] Further, in sixteen percent of reported injuries, there was evidence of alcohol use.[216] Data also suggests that despite warnings from e-scooter companies, riders are not wearing helmets.[217] Portland found that ninety percent of riders did not wear helmets and Austin found that less than one percent of injured riders wore helmets.[218] The study conducted by the City of Austin and the CDC concluded that there should be an increase in educational messaging emphasizing safety and helmet use.[219] The report also found that most riders' only training on e-scooter usage was provided by the app.[220] More substantial training was recommended going forward.[221] E-scooter companies are addressing some of the safety concerns and will be introducing new scooter models with sturdier chassis and larger wheels capable of handling uneven pavement.[222]

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211. *Id.*
212. *Id.*
213. Rauch & Schleicher, *supra* note 18, at 928.
214. *See* Benson, *supra* note 11; Brustein et al., *supra* note 161; Bussewitz & Morris, *supra* note 3; Felton, *supra* note 4; Trischitta, *supra* note 1.
215. PORTLAND BUREAU OF TRANSP., *supra* note 164, at 22. It should be noted that a spike in scooter related injuries should be expected to a certain degree, simply because of the dramatic increase in scooter use since 2018. *Id.*
216. PORTLAND BUREAU OF TRANSP., *supra* note 164, at 22.
217. AUSTIN PUB. HEALTH, *supra* note 11, at 11; *see also* PORTLAND BUREAU OF TRANSP., *supra* note 164, at 22, 25, 29.
218. PORTLAND BUREAU OF TRANSP., *supra* note 164, at 25; AUSTIN PUB. HEALTH, *supra* note 11, at 11.
219. AUSTIN PUB. HEALTH, *supra* note 11, at 12.
220. *Id.* at 11.
221. *See id.* at 12.
222. ZARIF ET AL., *supra* note 21, at 8.

3. Impact on Pedestrians and Vehicles

Many of the complaints about e-scooters from both cities and their citizens stem from scooters' usage of public spaces.[223] In particular, there is concern among pedestrians about e-scooter usage on sidewalks.[224] It varies from city to city as to whether or not it is legal to ride on sidewalks, but unprotected pedestrians sharing space with vehicles that can travel fifteen miles per hour is naturally concerning.[225] Interestingly, pedestrians are not the only ones that dislike e-scooters presence on sidewalks.[226] Scooter riders themselves strongly prefer riding in bike lanes over sidewalks, and generally avoid sidewalks unless the alternative is a major roadway without a bike lane.[227]

In a way, e-scooters are exposing an infrastructure limitation that has existed in the United States for decades.[228] Many United States cities have prioritized automobiles over any other mode of transportation, which has left micromobility users with a dearth of options.[229] Expecting unprotected scooter riders to use streets without bike lanes and cohabit the same space as cars seems more likely to cause serious injury than sidewalk riding.[230] However, the future of safe e-scooter use depends on infrastructure being built with all forms of micromobility in mind.[231]

IV. REGULATION OF E-SCOOTERS

Going forward, if e-scooters are to be used safely and effectively, cities must implement regulations, and e-scooter companies must abide by them.[232] Regulators must avoid the temptation to simply try and control e-scooter companies and instead work collaboratively.[233] Cities should require that e-scooter companies share data and then use that data to properly tailor

223. *Id.* at 7.
224. *See* PORTLAND BUREAU OF TRANSP., *supra* note 164, at 24.
225. ZARIF ET AL., *supra* note 21, at 7.
226. *See* PORTLAND BUREAU OF TRANSP., *supra* note 164, at 24.
227. *Id.*
228. ZARIF ET AL., *supra* note 21, at 7.
229. *Id.*
230. *Id.*
231. *Id.* at 2.
232. *See* SCOTT CORWIN ET AL., TOWARD A MOBILITY OPERATING SYSTEM: ESTABLISHING A LINGUA FRANCA FOR URBAN TRANSPORTATION, 7 (2019).
233. Katie Pyzyk, *Lime, Spin Enter Data-Sharing Agreement with Los Angeles*, SMART CITIES DIVE (Nov. 12, 2018), http://www.smartcitiesdive.com/news/lime-spin-enter-data-sharing-agreement-with-los-angeles/541927/.

regulations.[234] Finally, cities should take time to experiment with their regulations and use outcome-based regulations when possible.[235]

A. *Cities Must Be Collaborative*

Few would dispute that e-scooter companies may have acted too boldly when they stormed into cities without warning in 2018.[236] It would also not be surprising if politicians and regulators were decidedly miffed at these brash new startups and saw regulations as a means to control the scourge of e-scooters.[237] However, city officials should resist the urge to unilaterally regulate scooters to death and instead recognize the potential of e-scooters.[238] If deployed properly, e-scooters could reduce urban congestion, lower emissions, and cure uneven access to public transit.[239]

The influx of e-scooters and dockless bikes represents an opportunity to build a policy framework that can accommodate new mobility devices that are introduced in the future.[240] Cities could begin to integrate future policy decisions with information generated by digital mobility platforms that can improve transportation systems.[241] By developing a collaborative relationship with sharing firms today, cities will be able to more readily handle future mobility options like autonomous vehicles.[242] Both governments and service providers must remain open to collaboration and cognizant of the struggles faced by their counterparts.[243] One area ripe for cooperation is data sharing between e-scooter companies and cities.[244]

B. *Data Sharing*

One of the primary concerns city lawmakers have about e-scooters is how, when, and where e-scooters are deployed.[245] A mutually beneficial

234. *See id.*; ZARIF ET AL., *supra* note 21, at 8–10.
235. *See* PORTLAND BUREAU OF TRANSP., *supra* note 164, at 5, 33; ZARIF ET AL., *supra* note 21, at 8, 10.
236. *See* Johana Bhuiyan, *The Bare-Knuckle Tactics Uber Used to Get Its Way with Regulators Are Not Going to Work for Scooter Startups*, VOX: RECODE (Aug. 30, 2018, 6:00 AM), http://www.vox.com/2018/8/30/17690056/scooters-bird-lime-san-francisco-santa-monica-permits-uber-lyft.
237. *See The Scooter Scourge*, *supra* note 4.
238. *See* ZARIF ET AL., *supra* note 21, at 10.
239. *See* Tillemann & Feasley, *supra* note 7.
240. ZARIF ET AL., *supra* note 21, at 2.
241. *See* CORWIN ET AL., *supra* note 232, at 7.
242. ZARIF ET AL., *supra* note 21, at 8–9.
243. *Id.*
244. *See* Pyzyk, *supra* note 233.
245. ZARIF ET AL., *supra* note 21, at 8.

solution to this problem could be the standardization and sharing of data between scooter companies and cities.[246] If e-scooters are to be fully woven into cities' transportation networks, it will be crucial for city leaders to have accurate up-to-date information about how scooters are being deployed and utilized.[247] To that end, the city of Los Angeles has developed and published an application programming interface ("API") that enables cities to take in and analyze e-scooter data in real time.[248] The cities of Portland, Austin, and Santa Monica have implemented this powerful tool to gain a more complete understanding of how e-scooters are being used.[249] E-scooter companies have also shown a willingness to share data with cities.[250] Going forward, cities should make data sharing a precondition for micromobility firms to enter their market.[251]

C. *Potential Methods of Regulation*

Many cities have already enacted regulations that cap scooter fleet sizes and limit where scooters can travel.[252] However, there are other forms of regulation that might better serve their citizens that politicians should consider.[253]

1. Portland Regulatory Sandbox

Instead of jumping headlong into permanent regulation, cities should be prepared to be adaptive.[254] The cities of Portland and Tampa's first forays into scooter regulation have been through pilot programs.[255] These programs allow cities the opportunity to test multiple regulatory solutions at different times in different areas.[256] Cities can work directly with e-scooter companies

246. *See id.*
247. *See id.*
248. *Mobility Data Specification*, GITHUB, http://www.github.com/CityOfLosAngeles/mobility-data-specification (last visited May 1, 2020).
249. *See id.*; PORTLAND BUREAU OF TRANSP., *supra* note 164, at 17.
250. ZARIF ET AL., *supra* note 21, at 8–9.
251. *Id.* at 8–10.
252. *Cities Struggle with Dockless Bikes, Scooters*, TAMPA BAY TIMES: NEWS (Aug. 4, 2018), http://www.tampabay.com/news/Cities-struggle-with-dockless-bikes-scooters_170619700.
253. *See id.*
254. *See* ZARIF ET AL., *supra* note 21, at 10.
255. PORTLAND BUREAU OF TRANSP., *supra* note 164, at 10; *Shared Electric Scooter Pilot Program*, CITY OF TAMPA, http://www.tampagov.net/tss-transportation/programs/shared-electric-scooter-pilot-program (last visited May 1, 2020).
256. *See* ZARIF ET AL., *supra* note 21, at 9–10.

to implement things like variable rental fees (by area), rules for e-scooter parking, and incentive structures.[257] Portland's 2018 pilot program only lasted for four months, allowing city officials to test their initial regulatory ideas and properly recalibrate their efforts when implementing more long term plans.[258] Los Angeles has engaged in a similar plan, putting their current regulations in place for a year, with the express intent of giving "transportation officials time to tinker with the policies before lawmakers approve a permanent plan."[259]

2. Outcome-Based Regulations

When crafting regulations, politicians should work with the mindset of how can we use e-scooters to help our city, instead of how can we take control over e-scooter use in our city?[260] Cities should implement outcome-based regulation, with performance-based criteria for e-scooter companies.[261] First, cities must establish goals they want to accomplish with their transportation system.[262] Then articulate those goals to service providers and design regulations to help reach those goals.[263] For example, in Portland's pilot program, each scooter company was capped at a fleet of 683 scooters.[264] Portland also attempted to implement a requirement that 100 scooters were deployed in East Portland (a low-income area, lacking in public transit) each day.[265] Only one of the three scooter companies complied with the East Portland fleet requirement.[266] A possible solution would be for Portland to offer higher fleet caps to firms that demonstrate they are willing and able to meet the East Portland fleet requirement and lower fleet caps for those that cannot.[267]

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257. *Id.* at 10.

258. PORTLAND BUREAU OF TRANSP., *supra* note 164, at 6, 33. Portland intends to refocus their "efforts on improving equitable access across the city and ensuring safe and legal riding and parking." *Id.* at 7.

259. Laura J. Nelson, *L.A. Gives Scooter Plan Test Run*, L.A. TIMES, Sept. 5, 2018, at A1.

260. *See* ZARIF ET AL., *supra* note 21, at 3, 6, 10.

261. *Id.* at 10.

262. *See* PORTLAND BUREAU OF TRANSP., *supra* note 164, at 5. Portland's clearly defined goals are: "1. Reduce traffic congestion by shifting trips away from private motor vehicle use, 2. Prevent fatalities and serious injuries on Portland streets, 3. Expand access to opportunities for underserved Portlanders, and 4. Reduce air pollution, including climate pollution". *Id.*

263. ZARIF ET AL., *supra* note 21, at 10.

264. PORTLAND BUREAU OF TRANSP., *supra* note 164, at 10.

265. *Id.* at 7.

266. *Id.* at 28–29.

267. *See id.*; ZARIF ET AL., *supra* note 21, at 6.

V. CONCLUSION

A decade ago, the sharing economy essentially did not exist.[268] Today, it is a significant part of our world, comprised of multiple billion dollar companies and hundreds of fledgling startups bent on disrupting new industries.[269] There have been a series of mobility-oriented sharing firms that have entered our cities.[270] Car-sharing, ride-sharing, and micromobility have all shown great potential to positively affect society.[271] However, none of these technologies are without controversy.[272] Well thought-out policy and regulation will be critical as shared mobility becomes interwoven with modern urban transportation networks.[273]

Now, there is a new player in the world of shared mobility, dockless e-scooters and bikes.[274] Thousands of e-scooters can be found in over 100 cities worldwide.[275] This young industry could be used as a real tool for cities, as e-scooters have the potential to positively affect cities.[276] E-scooters could be used to reduce traffic congestion and act as a *first/last mile* solution, reduce air pollution, and provide transportation alternative for underserved low-income areas.[277]

While e-scooters may have tremendous potential to effect positive change in the world, they have all caused their share of controversy.[278] E-scooter companies have barged into cities and employed tried and true tactics common among tech startups but grating on local governments.[279] E-scooter users have been injured, while hospitals have reported spikes in scooter-related injuries.[280] Both pedestrians and vehicles have had their space intruded by e-scooters.[281]

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268. *See* ZARIF ET AL., *supra* note 21, at 2.
269. *See* Cannon & Summers, *supra* note 16.
270. *Id.*
271. Rauch & Schleicher, *supra* note 18, at 916–19.
272. *See* Trischitta, *supra* note 1; ZARIF ET AL., *supra* note 22, at 9; Bussewitz & Morris, *supra* note 3; Felton, *supra* note 4; Benson, *supra* note 11; Brustein et al., *supra* note 161.
273. *See* ZARIF ET AL., *supra* note 21, at 7; PORTLAND BUREAU OF TRANSP., *supra* note 164, at 5; Bhuiyan, *supra* note 236.
274. *See* Brustein et al., *supra* note 161.
275. *Id.*
276. *See* ZARIF ET AL., *supra* note 21, at 4.
277. PORTLAND BUREAU OF TRANSP., *supra* note 114, at 11.
278. *See* PORTLAND BUREAU OF TRANSP., *supra* note 164, at 22; ZARIF ET AL., *supra* note 21, at 7–8.
279. Rauch & Schleicher, *supra* note 18, at 927; *see also* Skilling, *supra* note 14.
280. *See* PORTLAND BUREAU OF TRANSP., *supra* note 164, at 22.
281. *See* ZARIF ET AL., *supra* note 21, at 7–9.

If e-scooters are to be used safely and effectively, cities must implement regulations, and e-scooter companies must abide by them.[282] Regulators must avoid the temptation to simply try and control e-scooter companies and instead work collaboratively.[283] Cities should require that e-scooter companies share data and then use that data to properly tailor regulations.[284] Finally, cities should take time to experiment with their regulations and use outcome-based regulations when possible.[285]

282. *See id.*
283. *See id.*
284. *See id.*
285. *See id.*


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