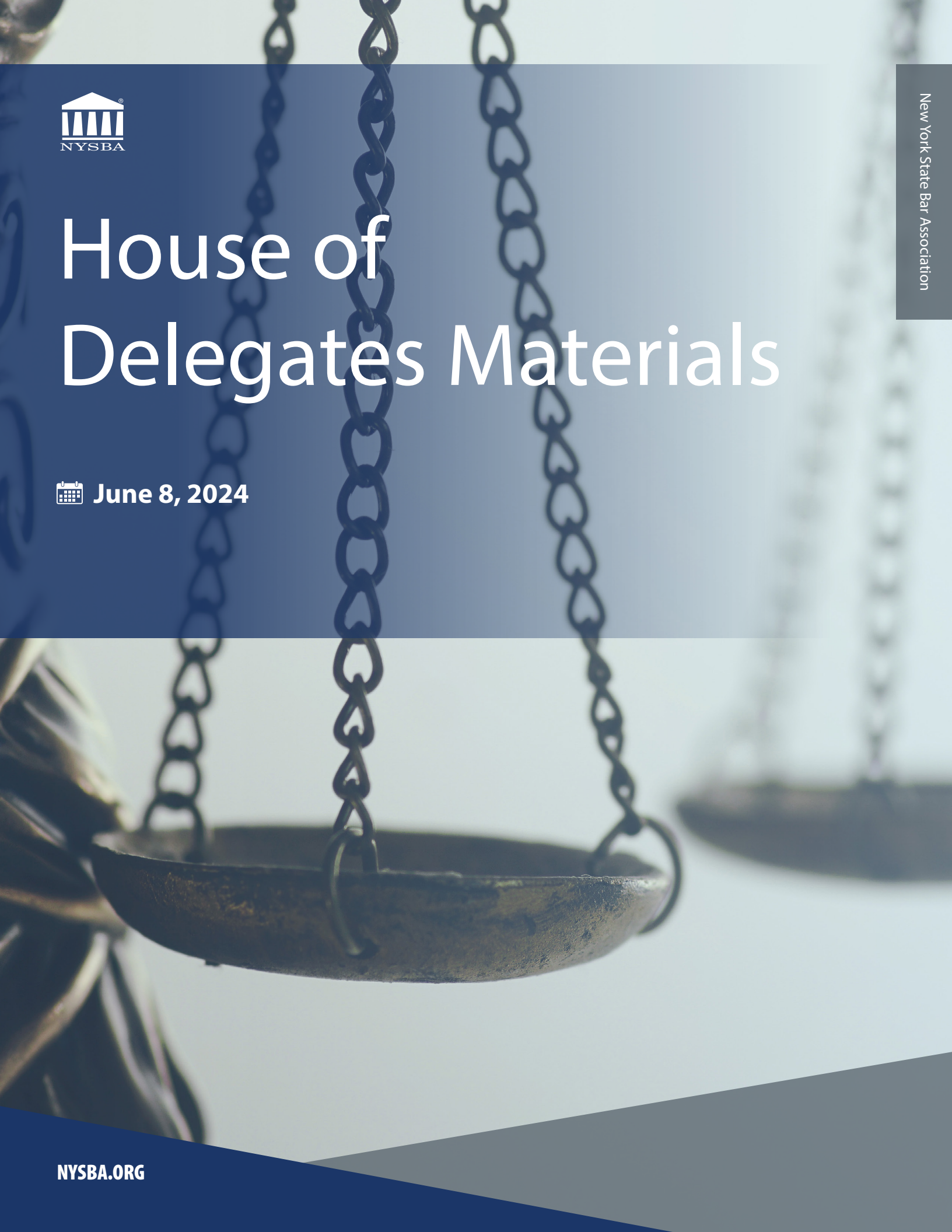


NYSBA

New York State Bar Association

House of Delegates Materials

June 8, 2024

NYSBA.ORG

NEW YORK STATE BAR ASSOCIATION
MEETING OF THE HOUSE OF DELEGATES
1 ELK STREET ALBANY NEW YORK
AND REMOTE MEETING
SATURDAY, JUNE 8, 2024 – 9:00 a.m.

AGENDA

1.	Call to order, Pledge of Allegiance, and welcome of new members – Kathleen Marie Sweet, Esq.	9:00 a.m.
2.	Approval of minutes of April 6, 2024, meeting	9:05 a.m.
3.	Report of Treasurer – Susan L. Harper, Esq.	9:10 a.m.
4.	Report of President – Domenick Napoletano, Esq.	9:25 a.m.
5.	Report of Task Force on Homelessness and the Law – David Woll, Esq.	9:40 a.m.
6.	Report and Recommendations of the Task Force on Emerging Digital Finance and Currency – Jacqueline Drohan, Esq., and Matthew H. Feinberg, Esq.	10:00 a.m.
7.	Report of the Committee on Disability Rights – Guardianship for People with *Developmental Disabilities: Examination and Reform of Surrogate's* Court Procedure Act Article 17-A is a Constitutional Imperative – Jennifer Monthie, Esq.	10:20 a.m.
8.	Report and Recommendations of the New York City Bar Association – Constitutional Cap Proposal - Hon. Andrea Masley and Ignatius Grande, Esq.	10:40 a.m.
9.	Report and Recommendations of Task Force on Treatment of Transgender Youth in Sports - Jacqueline Drohan, Esq.	11:00 a.m.
10.	Report of Committee on Annual Awards – John H. Gross, Esq.	11:20 a.m.
11.	Report of The New York Bar Foundation – Hon. Cheryl Chambers, President	11:30 a.m.
12.	Administrative items – Kathleen Sweet, Esq.	11:45 a.m.
13.	New business	11:50 a.m.
	Adjournment	12:00 p.m.

Date and place of next meeting:
Saturday, October 26, 2024, Remote and Bar Center, Albany, New York

Future Meeting dates:
Saturday, October 26, 2024 – Bar Center (Virtual Option Available)
Friday, January 17, 2025 - New York Hilton Midtown
Saturday, April 5, 2025 – Bar Center (Virtual Option Available)
Saturday, June 7, 2025 - Bar Center (Virtual Option Available)

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #1

REQUESTED ACTION: None, Call to Order, Pledge of Allegiance, and welcome of new members of the House of Delegates.

President-Elect Kathleen Marie Sweet, Esq. will call the meeting to order and lead attendees in the pledge of allegiance.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #2

REQUESTED ACTION: Approval of April 6, 2024, meeting minutes.

President-Elect Kathleen Marie Sweet, Esq. will present the April 6, 2024, meeting minutes and ask if attendees have any corrections or amendments. If there are no corrections, amendments, or objections, the meeting minutes will be accepted as distributed.

NEW YORK BAR ASSOCIATION
MINUTES OF HOUSE OF DELEGATES MEETING
BAR CENTER, ALBANY, NEW YORK
APRIL 6, 2024

PRESENT: Afzali, Ahn, Alcott, Antongiovanni, Arenson, Aufses, Averna, Babbie, Barreiro, Bascoe, Baum, Berlin, Bernstein, Block, Bondar, Bonina, Braverman, Broderick, Brown, Bucki, Buholtz, Burke, Burner, Buzard, Campbell, Carlisle, Carter, Chandrasekhar, Chimeri, Christian, B. Cohen, D. Cohen, O. Cohen, Cohn, Davidoff, de Freitas, Degnan, Dennis-Taylor, Doyle, D'Souza, Dubowski, DuVall, Effman, Eisner, Feal, Fellows, Fennell, Fernandez, Finerty, Finkel, Frenkel, Gerstman, Gilbert, Gilmartin, Glover, Gold, Graber, Grande, Grays, Greenberg, Griesemer, Gutekunst, Gutierrez, Haig, Harper, Heath, Henderson, Hill, Hoffman, Houth, Islam, Jackson, Jacobson, James, Jamieson, Jayne, Jiminez, Loyola, Kamins, Karson, Kelley, Kennedy, Kobak, Koch, Kohlmann, Kretzing, Lamb, LaRose, Lathrop, Lau-Kee, Levin Wallach, Levin, Levy, Lewis, Liebman, Lissauer, Mack, MacLean, Madigan, Malkin, Markowitz, Maroney, Marotta, Martin, Masri, Matos, May, McCann, McCormick, McElwreath, McGinn, McKeegan, McNamara, McPherson, Messina, Meyer, C. Miller, M. Miller, R. Miller, Montagnino, Moretti, Morris, Morrissey, Murphy, Napoletano, Nasser, Nielson, Nimetz, Nowotarski, O'Connor, O'Donnell, A. Palermo, C. Palermo, Pappalardo, Petterchak, Pierson, Quaye, Randall, Reale, Riano, Richter, Riedel, Rosner, Russell, Ryan, Safer, Samuels, Schraver, Schwartz-Wallace, Seiden, Sen, Sharkey, Silkenat, Skidelsky, Soren, Spring, Starkman, Strong, Strenger, J. Sunshine, N. Sunshine, Sweet, Terranova, Treff, Triebwasser, Vaughn, Walsh, Waterman Marshall, Weis, Wesson, Westlake, Willaims, Yeung-Ha, Young, Younger

Mr. Napoletano presided over the meeting as Chair of the House.

1. Call to order, Pledge of Allegiance, and Welcome.

2. Approval of minutes of January 19, 2024, meeting. The minutes of the January 19, 2024, meeting were approved as distributed.

3. Report of Treasurer. NYSBA Treasurer Susan L. Harper, Esq. reported on the association's operating budget through February 29, 2024. The report was received with thanks.

4. Report of President. Mr. Lewis highlighted the items contained in his written report, a copy of which is appended to these minutes.

5. Presentation of 2024 Ruth Bader Ginsburg Memorial Scholarship Award to Kristen Popham of Columbia Law School. Mr. Lewis presented the annual Ruth Bader Ginsburg Memorial Scholarship Award to Kristen Popham, a second-year law student at Columbia Law School, in recognition of her academic achievements and work on behalf of women's and disability rights.

6. Election of Nominating Committee and State Bar Delegates to ABA House of Delegates. Past-President and chair of the Nominating Committee Scott Karson, Esq. presented the election of members of 2024-2025 Nominating Committee and State Bar Delegates to the ABA House of Delegates.

   There being no further nominations, a motion was made and carried to elect the members of the Nominating Committee and State Bar delegates to the ABA House of Delegates.

   There was 1 (one) abstention.

7. Report and Recommendations of the Trusts and Estates Law Section – Proposed Legislation – Becoming a Voluntary Administrator Act. Stacey Woods, Esq., member of the Trust and Estates Law Section presented the Section's legislative proposal supporting the *Becoming a Voluntary Administrator Act*. After discussion, a motion was adopted to approve the report and recommendations.

8. Informational Report of the New York City Bar Association – Constitutional Cap Proposal. The Honorable Andrea Masley, chair of the NYC Bar's Constitutional Cap Subcommittee – a subcommittee of the Council on Judicial Administration – and Laurel Kretzing, Esq. presented the report titled *Repeal the Cap and Do the Math: Why We Need a Modern, Flexible, Evidence-Based Method of Assessing New York's Judicial Needs*. The report was received with thanks.

9. Report and Recommendations of the Strategic Planning Committee. Taa R. Grays, Esq., co-chair of the Strategic Planning Committee, presented the final report and recommendations of the Committee. After discussion, a motion was adopted to approve the report and recommendations.

   There was one (1) abstention.

10. Report and Recommendations of the Task Force on Artificial Intelligence. Vivian Wesson, Esq., chair of the Task Force on Artificial Intelligence presented the Task Force's report and recommendations.

    After discussion, the following friendly amendment was rejected and then a motion was made to amend:

    Page 9, under ***Task Force Recommendations***, *2. Focus on Education:* The Task Force recommends that NYSBA prioritize education ~~over~~ in addition to legislation, focusing on educating judges, lawyers, law students and regulators to understand the technology so that they can apply existing law to regulate it.

    Page 53, last paragraph: ~~Rather than invent new laws to address AI concerns~~ In addition to legislation, the Task Force suggest that we create a comprehensive education plan for judges, lawyers, law students and regulators so they can address the risks associated with AI using existing laws and regulations, such as providing…

The motion to amend passed.

There were three (3) abstentions.

After discussion, a further motion was made to amend:

Page 53, last paragraph: In addition to legislation, if and when determined to be necessary the Task Force suggest that we create a comprehensive education plan for judges, lawyers, law students and regulators so they can address the risks associated with AI using existing laws and regulations, such as providing…

The motion to amend passed.

There was one (1) abstention.

After discussion, the following friendly amendment was made and accepted:

Page 9, under ***Task Force Recommendations****, 3. Identify Risks for New Regulation*: Legislatures and regulators should identify risks associated with the technology that are not addressed by existing laws, which will likely involve extensive hearings and studies involving experts in AI, and as needed adopt regulations and legislation to address those risks.

Page 54, second to last paragraph: Third, the Task Force recommends that legislatures and regulators seek to identify risks associated with the technology that are not addressed by existing law. This may involve extensive hearings, studies involving experts in AI and increased costs. Once such risks are identified, new laws and regulations should be crafted to address those risks.

After discussion, a motion was adopted to approve the report and recommendations as amended.

There was one (1) abstention.

11. Report of the Committee on Membership. Clotelle Drakeford, Esq. and Michelle Wildgrube, Esq., co-chairs of the Committee on Membership, and Pat Stockli, Esq., NYSBA's Senior Director of Attorney Engagement and Retention presented regarding the Association's membership engagement and retention efforts. The report was received with thanks.

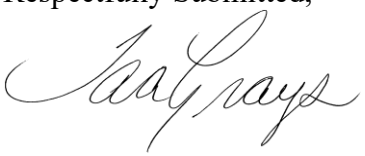
12. Report of The New York Bar Foundation. Carla M. Palumbo, President of The Foundation, and Thomas Kissane of CCS Fundraising, updated the House members on Foundation activities, including the awarding of grants, fellowships, and scholarships. The report was received with thanks.

13. Administrative Items. Mr. Napoletano thanked President Lewis for his leadership during his tenure as President and thanked the retiring members of the Executive Committee and the House for their service. Mr. Napoletano congratulated Kathleen Sweet on being the next President-Elect and officially transferred the gavel to her.

14. New Business. There was no new business.

15. Date and place of next meeting/Adjournment. Mr. Napoletano announced that the next meeting of the House of Delegates will take place on Saturday June 8, 2024. There being no further business to come before the House of Delegates, the meeting was adjourned.

Respectfully Submitted,



Taa R. Grays
Secretary

NEW YORK STATE BAR ASSOCIATION
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Report of President Richard Lewis to the
House of Delegates of the New York State Bar Association
April 6, 2024

Dear Colleagues:

During my term, we have taken significant steps toward addressing the practical concerns of our members and our profession. It has been a collaborative effort made possible by the unmatched professionalism and dedication of my colleagues, many of whom are here today, and for that, I thank you.

Our primary objective has been - as always - to support our members so they are better prepared to perform their jobs in the most efficient manner possible and better serve their clients.

We have been presented with challenges and crises ranging from war to economic distress to the rising tide of cynicism that seems to have engulfed our society. However, we have transformed these challenges into opportunities.

The scope of our efforts is vast and spans many of the issues that confront us every day.

Our task forces on Advancing Diversity, Combating Antisemitism and Anti-Asian Hate, Artificial Intelligence, and Homelessness and the Law have worked tirelessly to develop recommendations that have caught the attention of the legislature and the governor's office.

We have addressed numerous legislative initiatives including the fight for the Right to Counsel for noncitizens. We signed an agreement to work on areas of mutual interest with the Israel Bar Association and have examined the impact of A.I. on our profession and society.

In January, this body approved the report from our Task Force on Combating Antisemitism and Anti-Asian Hate. The task force recommended an update to the Hate Crimes Modernization Act that would expand the list of hate-crime-eligible offenses. The act also calls for an increased emphasis on improving the reporting and prosecution of hate crimes.

Later this morning, Chair Vivian Wesson will present the report from the Task Force on Artificial Intelligence. A.I. tools have developed at a rate unlike any technological breakthrough we have seen in our lifetimes and while they offer us the ability to focus more on creative and practical endeavors, they present a comprehensive set of ethical challenges that we are just beginning to fully comprehend.

Our Task Force on Homelessness and the Law --- chaired by William (Bill) Russell -- is examining how the government can humanely tackle this crisis, which involves more than 74,000 New Yorkers - many of whom are veterans, victims of domestic violence and/or have mental illness. It is also exploring how the justice and

healthcare systems impact the lives of homeless people and is examining the role that the lack of affordable housing and low wages play in homelessness.

I look forward to hearing the task force's report when it is presented in June.

And that is only the beginning.

In February, Executive Director Pam McDevitt, Immediate Past President Sherry Levin Wallach, General Counsel David Miranda and our incoming President-Elect Kathleen Sweet joined me at the ABA Mid-Year Meeting where we successfully presented the findings of our Advancing Diversity report. The ABA followed our lead and adopted the report. The report provides a blueprint for how diversity, equity and inclusion can be protected at universities, law firms, corporations, and the courts.

The support we received at the ABA is indicative of how relevant our Association is to the national conversation.

We also voted to support a resolution at the ABA's Annual Meeting in August that calls for forgiveness of student loans for graduates (of ABA accredited law schools) who commit seven years to working in-person in rural areas, including in Upstate New York.

We have continued to engage our top legislators and members of the judiciary - including Chief Judge Rowan Wilson - about improving the operation of the state's family and housing courts. I recently joined state Sen. Brad Hoylman-Sigal and Assembly Members Charles Levine, Jabari Brisport and Andrew Hevesi at a press conference to call for an increase in funding for the state's family courts. I have also met with Chief Administrative Judge Joseph Zayas about the court rules, training for court employees and e-filing. Domenick and I met with Judge Zayas and Judge St. George recently to discuss Court rules and issues involving Housing Court and Family Court.

We recently succeeded in encouraging the governor to reverse her decision to transfer $100 million from the IOLA Fund to the General Fund. The IOLA Fund is a critical tool for low-income New Yorkers to receive civil legal services - often when they are facing life-altering circumstances such as needing life-saving medical treatment or are trying to recover from seemingly insurmountable debt.

We were also successful in getting the governor to sign into law a bill that allows litigants in a civil case to file affidavits and other sworn documents without getting them notarized.

Our Annual Meeting was extremely successful. We were able to listen to and interact with experts from inside and outside of our organization on matters ranging from the challenges the IRS is facing to the influence of money in college sports to the regulation of short-term rentals.

We were able to recognize many people who are having an enormous impact on our profession including former Secretary of Homeland Security Jeh Johnson who co-chaired our Task Force on Advancing Diversity. He was presented with the Gold Medal at our gala dinner at the Museum of Modern Art.

It is fitting to celebrate our accomplishments.

However, we must always be ready to protect individuals who are most in need of the guaranteed protections our laws afford them.

The governor's plan to remove $234 million from the Indigent Legal Services Fund and transfer $120 million of it into the General Fund is still in play. We have voiced our opposition to this because these funds are earmarked and designed to enhance the quality of the state's public defense system. I recently wrote an op-ed piece in the New York Law Journal on this matter.

The New York State Bar Association will continue to speak out against this transfer while urging that the fund be used only for its intended purpose.

We will also continue to speak clearly on matters that impact the rule of law and our profession internationally.

Last month, we signed an agreement to work on areas of mutual interest with the 80,000-member Israel Bar Association. We forged this critical alliance to elevate our efforts to combat hate crimes and uphold judicial independence. Our agreement to develop joint programming is like previous ones we have signed with bar associations around the world. Each one has amplified our voice and presented us with different views that have made our policy recommendations even more discerning.

I have also met with the president of the Law Society of Hong Kong, representatives from the Georgia Bar Association, a former president of the Rosario Bar Association in Argentina and the President of the Law Society of England and Scotland as well as with law school deans and presidents to strengthen our partnerships.

We have reached out to our members throughout the state. President-Elect Domenick Napoletano and I have gathered with leaders of affinity, local, and national bar associations to discover how we can serve them better and more importantly, to explore how we may strengthen our partnerships and therefore magnify our collective voice.

In addition, we have continued to assert our position that New York's judiciary sets the standard for others throughout the country.

As recently as last week we spoke out about the sanctity of our judiciary and condemned disparagement of our Courts and threats to the safety of Court personnel and their families.

Looking ahead, we will continue to campaign for appropriate fees for 18-B attorneys who were granted a raise to $158 an hour last year. We are aware that the continuing state funding is not guaranteed beyond this year, and we are continuing to advocate that the state ensures renewed funding going forward.

We are also continuing our support for the Right to Counsel for noncitizens who may not understand the grave consequences of representing themselves or pleading guilty. The status quo negatively impacts communities by separating families and disproportionately impacts Black immigrants and others of color who are arrested, convicted, and sentenced more harshly.

When looking ahead, we must also turn our attention to the next generation of leaders to ensure they have a clear understanding of how our democratic processes function.

We are at a crisis point when it comes to civic education and our interest in this matter will not wane.

These are some of the reasons why I am looking forward to our Civics Convocation next month. It will address how we can better instruct our country's youth about how the American government works and the significance of historical events.

As you know, Supreme Court Associate Justice Sonia Sotomayor has graciously agreed to speak and take questions from students. Justice Sotomayor is among the many luminaries who have accepted our invitation to explore the troubling lack of basic knowledge among young people and adults about civics and more importantly about thinking critically.

In addition, Chief Judge Rowan Wilson has kindly agreed to deliver the keynote address.

I want to thank the chairs of our Civics Convocation Task Force: Gail Ehrlich, Jay Worona and Christopher Riano for planning this event and for their work preparing a fact-finding report that will outline how civic education may be improved.

This is my last meeting of the House as President. It has been an honor to serve you. One thing we all understand is that our work is never finished.

The New York State Bar Association is the largest voluntary state bar association in the country. We have an enormous impact on our members because of our selflessness and professionalism. It is imperative that we uphold the high standards we have set for ourselves so that we may continue to ensure that everyone has equal access to the protections our laws provide.

I will confidently hand the gavel to Domenick Napoletano who will take over as President on June 1 knowing that you'll be in good hands under his leadership. As for myself – Domenick – thank you for your collegiality throughout the past year and I look forward to our ongoing work.

I would also like to thank the Executive Committee and the entire House of Delegates for supporting my presidency. And while we have accomplished so much throughout the past year, I appreciate that our continued partnership serving our members and strengthening the legal profession and justice system involves an enduring commitment.

I would like to acknowledge my wife Lori and daughters Emily and Anna for their unwavering support. Especially Lori who endured many long nights when I was away on bar association business, and the even longer nights when she was forced to join me.

Above all, I want to thank the staff. Pam, David, Melissa, Susan, Kathy and so many others who I dealt with daily, including weekends. Without them this Association would not be what it is.

Thank you!

Richard C. Lewis, Esq.
President

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #3

REQUESTED ACTION: None, Report of Treasurer.

Attached are the Operating Budget, Statement of Financial Position, Statements of Activities, Statements of Activities (continued), and Capital Items Approved and Purchased for the period ending April 30, 2024.

The report will be presented by NYSBA Treasurer, Susan L. Harper, Esq.

New York State Bar Association
2024 Operating Budget
For the period ending April 30, 2024

REVENUE

	2024 BUDGET	UNAUDITED 2024 April YTD	% RECEIVED	2023 BUDGET	UNAUDITED 2023 April YTD	% RECEIVED
Membership dues	8,827,780	7,960,075	90%	9,000,000	8,217,807	91%
SECTIONS:						
Section Dues	1,130,965	1,006,375	89%	1,181,350	1,022,355	87%
Section Programs	2,782,065	788,400	28%	2,587,528	895,214	35%
Investment Income	640,000	127,229	20%	494,215	74,952	15%
Advertising	314,500	28,122	9%	319,500	51,397	16%
Continuing legal education program income	2,802,000	1,153,327	41%	2,390,000	1,183,349	50%
USI Affinity	2,000,000	666,667	33%	2,000,000	666,667	33%
Annual Meeting	1,168,800	946,917	81%	895,000	865,602	97%
House of Delegates & Committee	188,000	21,012	11%	36,700	17,656	48%
Royalties	439,500	76,324	17%	308,000	109,899	36%
Reference Books, Formbooks Products	717,800	110,855	15%	1,309,350	96,181	7%
TOTAL REVENUE	**21,011,410**	**12,885,303**	**61%**	**20,521,643**	**13,201,079**	**64%**

EXPENSE

	2024 BUDGET	UNAUDITED 2024 April YTD	% EXPENDED	2023 BUDGET	UNAUDITED 2023 April YTD	% EXPENDED
Salaries and Fringe	8,800,217	2,870,076	33%	8,759,290	2,844,337	32%
BAR CENTER:						
Building Services	342,500	116,121	34%	325,500	99,575	31%
Insurance	222,800	63,878	29%	206,000	69,739	34%
Taxes	93,800	29,944	32%	93,750	27,143	29%
Plant and Equipment	746,000	331,045	44%	791,000	268,260	34%
Administration	571,300	262,305	46%	546,900	249,330	46%
Sections	3,880,930	1,665,876	43%	3,739,828	1,542,738	41%
PUBLICATIONS:						
Reference Materials	137,125	40,489	30%	131,500	47,268	36%
Journal	271,000	68,773	25%	250,300	95,248	38%
Law Digest	52,200	21,700	42%	52,350	18,118	35%
State Bar News	130,900	53,113	41%	122,300	61,970	51%
MEETINGS:						
Annual meeting expense	620,000	729,550	118%	383,100	530,485	138%
House of delegates	344,925	136,073	39%	442,625	169,651	38%
Executive committee	42,350	25,319	60%	44,550	31,280	70%
COMMITTEES AND DEPARTMENTS:						
CLE	421,400	335,848	80%	372,150	201,256	54%
Information Technology	1,912,700	702,432	37%	1,741,700	650,965	37%
Marketing Department	394,500	309,965	79%	483,000	79,257	16%
Membership Department	566,250	191,317	34%	606,000	180,410	30%
Media Department	285,660	99,385	35%	285,750	90,296	32%
All Other Committees and Departments	1,120,375	317,290	28%	1,094,970	310,401	28%
TOTAL EXPENSE	**20,956,932**	**8,370,500**	**40%**	**20,472,563**	**7,567,729**	**37%**
BUDGETED SURPLUS	**54,478**	**4,514,803**		**49,080**	**5,633,350**	

New York State Bar Association
Statement of Financial Position
For the period ending April 30, 2024

ASSETS	UNAUDITED April YTD 2024	UNAUDITED April YTD 2023	UNAUDITED December YTD 2023
Current Assets:			
General Cash and Cash Equivalents	16,795,582	20,739,012	20,726,161
Accounts Receivable	19,767	25,028	28,089
Prepaid Expenses	1,287,820	957,982	1,379,900
Royalties and Admin Fees Receivable	666,666	166,667	604,000
Total Current Assets	18,769,836	21,888,689	22,738,150
Board Designated Accounts:			
Cromwell - Cash and Investments at Market Value	3,140,668	2,892,267	3,112,643
	3,140,668	2,892,267	3,112,643
Replacement Reserve - Equipment	1,129,134	1,118,086	1,129,134
Replacement Reserve - Repairs	802,448	794,735	802,448
Replacement Reserve - Furniture	222,137	220,052	222,137
	2,153,718	2,132,873	2,153,718
Long Term Reserve - Cash and Investments at Market Value	34,052,051	30,383,101	33,322,965
Long Term Reserve - Accrued Interest Receivable	0	0	210,156
	34,052,051	30,383,101	33,533,121
Sections Reserve - Cash and Investments at Market Value	4,026,197	3,932,694	4,051,707
Section - Cash	128,898	374,831	-99,946
	4,155,095	4,307,525	3,951,760
Fixed Assets:			
Building - 1 Elk	3,566,750	3,566,750	3,566,750
Land	283,250	283,250	283,250
Furniture and Fixtures	1,496,199	1,483,275	1,496,199
Building Improvements	1,068,201	905,925	1,054,381
Leasehold Improvements	0	-1	0
Equipment	5,305,554	3,102,281	3,716,037
	11,719,953	9,341,480	10,116,616
Less: Accumulated Depreciation	4,826,450	4,204,267	4,521,250
	6,893,503	5,137,214	5,595,366
Operating Lease Right-of-Use Asset	207,711	103,146	237,574
Finance Lease Right-of-Use Asset	4,372	15,131	6,975
	212,083	118,277	244,549
Total Assets	69,376,955	66,859,946	71,329,308
LIABILITIES AND FUND BALANCES			
Current liabilities:			
Accounts Payable and Other Accrued Expenses	758,785	737,500	949,652
Post Retirement Health Insurance Liability	15,564	18,241	15,564
Deferred Dues	12,100	0	5,955,952
Deferred Grant Revenue	16,758	16,770	17,150
Other Deferred Revenue	652,811	339,961	1,202,582
Payable to TNYBF - Building	3,275,361	3,500,100	3,375,902
Payable to TNYBF	400	400	12,025
Operating Lease Obligation	46,382	95,820	69,165
Finance Lease Obligation	3,904	9,708	5,382
Total current liabilities & Deferred Revenue	4,782,065	4,718,500	11,603,373
Long Term Liabilities:			
LT Operating Lease Obligation	161,329	7,326	168,409
LT Finance Lease Obligation	576	5,539	1,720
Accrued Other Postretirement Benefit Costs	5,310,347	6,334,759	5,310,347
Accrued Defined Contribution Plan Costs	117,495	115,759	335,970
Total Liabilities & Deferred Revenue	10,371,812	11,181,884	17,419,819
Board designated for:			
Cromwell Account	3,140,668	2,892,267	3,112,643
Replacement Reserve Account	2,153,718	2,132,873	2,153,718
Long-Term Reserve Account	28,624,209	23,932,583	27,676,648
Section Accounts	4,155,095	4,307,525	3,951,760
Invested in Fixed Assets (Less capital lease)	6,893,503	5,137,214	5,595,366
Undesignated	14,037,949	17,275,601	11,419,353
Total Net Assets	59,005,143	55,678,063	53,909,488
Total Liabilities and Net Assets	69,376,955	66,859,946	71,329,308

New York State Bar Association
Statement of Activities
For the period ending April 30, 2024

	April YTD 2024	*April YTD 2023*	*December 2023*
REVENUES AND OTHER SUPPORT			
Membership dues	7,960,075	8,217,807	8,721,625
Sections			
Section Dues	1,006,375	1,022,355	1,069,105
Section Programs	788,400	895,214	2,176,070
Continuing legal education program income	1,153,327	1,183,349	2,546,850
Administrative fee and royalty revenue	731,302	773,517	2,371,810
Annual Meeting	946,917	865,602	863,277
Investment Income	342,447	247,078	1,982,840
Reference Books, Formbooks Products	110,855	96,181	327,362
Other Revenue	220,148	221,429	198,835
Total revenue and other support	13,259,847	13,522,532	20,257,775
PROGRAM EXPENSES			
Continuing Legal Education Program Expense	855,915	701,657	1,896,051
Print Shop and Facility Support	180,575	243,499	655,934
Government relations program	69,621	90,586	253,491
Lawyer assistance program	117,149	103,484	68,567
Publications and public relations	238,204	205,632	634,359
Business operations	944,586	838,646	2,728,256
Marketing and membership services	857,480	603,531	1,971,518
Probono program	39,107	37,296	113,332
House of delegates	136,073	169,651	451,759
Executive committee	25,319	31,280	49,097
Other committee	155,887	98,794	253,340
Sections	1,665,876	1,542,738	3,345,121
Newsletters	89,985	77,524	261,953
Reference books and formbooks expense	197,703	208,543	633,482
Publications	143,586	175,336	396,620
Annual meeting expense	729,550	530,485	540,362
Total program expenses	6,446,615	5,658,682	14,253,242
MANAGEMENT AND GENERAL EXPENSES			
Salaries and fringe benefits	955,529	860,058	2,308,065
Pension plan and other employee benefit	108,306	228,294	(585,646)
Equipment costs	251,627	258,519	824,448
Consultant and other fees	254,144	287,371	648,373
Depreciation and amortization	305,200	228,000	674,219
Operating Lease	34,135	33,022	134,143
Other expenses	46,290	12,178	165,275
Total management and general expenses	1,955,232	1,907,442	4,168,877
CHANGES IN NET ASSETS BEFORE INVESTMENT TRANSACTIONS AND OTHER ITEMS	**4,857,999**	**5,956,408**	**1,835,656**
Realized and unrealized gain (loss) on investments	236,920	1,781,914	4,226,400
Realized gain (loss) on sale of equipment	735	-	(93,913)
CHANGES IN NET ASSETS	**5,095,655**	**7,738,322**	**5,968,143**
Net assets, beginning of year	53,909,488	47,941,346	47,941,346
Net assets, end of year	59,005,143	55,679,668	53,909,488

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #4

REQUESTED ACTION: None, Report of President.

Association President Domenick Napoletano, Esq. will advise the Executive Committee with respect to his presidential initiatives, the governance of the Association, and other developments of interest to the members.

A copy of the report is attached here.

NEW YORK STATE BAR ASSOCIATION
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Report of President Domenick Napoletano
to the House of Delegates of the New York State Bar Association
June 8, 2024
Bar Center - Albany, N.Y.

Dear Colleagues:

It is a pleasure to be standing before you today. As some of you may know, I come from a modest background, my parents immigrated to this country from Italy and worked tirelessly to provide me with opportunities they could never have dreamed about - such as leading our association. Their lessons have resonated with me throughout my life, and those will be the values that will guide me throughout my presidency.

My involvement with the New York State Bar Association has been a rewarding journey, and I can't wait for this next year to unfold.

It was a distinct honor to have my lifelong friend and mentor - Retired Presiding Justice Michael Pesce swear me in as the 127th President earlier this week.

I ask all of you to take a moment to acknowledge my predecessor Richard Lewis for his outstanding leadership, guidance and numerous accomplishments throughout the past 12 months. I also want to acknowledge all the past presidents who have inspired and guided me.

Looking ahead - I want to acknowledge the association's incoming leadership team. President-Elect Kathleen Sweet, Secretary Taa Grays, Treasurer Susan Harper, and Richard Lewis, who has now become the Immediate Past President.

And of course - I would like to thank my wife Fran - and my children - Alexis and Nicholas and my grandchildren Sofia and Everret (aka) Gogi. I wouldn't be here without their support.

I view the next 12 months as an opportunity to serve our members with one goal in mind -- making the practice law more efficient for them. I understand that's an ambitious goal and that some of my goals will require more time than my one year in office, but addressing our members' needs will be at the forefront of any initiatives that we tackle.

Let me start off by stating that I have the upmost respect for the New York State Bar Association along with other professional organizations I have been a part of. Our sections and committees are comprised of extraordinarily talented individuals who intuitively understand what issues need

to be addressed in their areas of expertise. I will be asking them during my presidency to develop and put forth legislative proposals for our Executive Committee to vote and pass upon in order to present those same proposals to our State Legislature so that together we can make new law and thereby improve our profession.

But - to go forward - we first must remove the hurdles that impair our ability to perform our jobs efficiently.

One focus of my presidency will be to take a long-overdue look at the Civil Practice Law and Rules and the Criminal Procedure Law to weed out no longer relevant provisions that have been rendered obsolete. Likewise, our jobs as lawyers would be much easier if our judges would all utilize the same Court part rules. I plan to have discussions on this with our Judicial Section Chair - Justice Tanya Kennedy. I will continue this discussion, as well as others, so we may further lay out a blueprint for a resolution.

We as an organization have also developed a good working relationship with Chief Judge Rowan Wilson and am looking forward to bolstering our partnership with him and our State Administrative Judges throughout the next year.

Likewise, it is my goal that we also direct our attention to discrimination that is frequently faced by our member lawyers and for that matter lawyers in general over 50-years-old. I have heard from some members that job prospects for older and experienced lawyers are limited compared to their younger colleagues. Prejudicial language that is written or at least implied in job descriptions and application forms often makes this blatantly evident.

At the opposite end of the spectrum, we need to ensure that our young members have the tools to propel us forward. They define the future of our association. They are the most diverse, tech-savvy, and socially aware generation to ever enter the legal profession. At the same time, they are the most anxious and worried generation to ever pass the bar exam.

Their well-being is a priority for us. The aftereffects of the isolation they endured throughout the pandemic have made them susceptible to higher rates of loneliness, depression, and anxiety. It is imperative that we help them understand how to effectively engage in personal interaction and camaraderie outside of their comfort zones so their critical thinking and advocacy skills may be maximized.

Therefore, it is urgent that the appropriate resources be put in place to prepare newer attorneys to effectively practice in New York State. As you may know, Our Task Force on the New York Bar Examination has recommended restoring a New York practice course that law schools in some cases have either stopped offering altogether or offer it as an elective rather than a required course of study. A mandatory course in New York practice would help ensure that new attorneys are well-versed in our state's laws.

I - along with our leadership team - will continue to advance our ideas to law schools and the Unified Court System on these and other topics - including - how artificial intelligence and other emerging technologies should be taught and implemented in the legal profession.

There is a litany of other matters we need to devote our attention to as well.

Nobody will be surprised to hear that there is a shortage of attorneys throughout New York's rural communities. These communities - which comprise 44 of the state's 62 counties (NYSBA Report and Recommendations of the Task Force for Rural Justice) are further hindered by a lack of broadband access and the greater digital divide.

I commend Gov. Kathy Hochul for establishing the One Billion Dollar Connect ALL initiative. We will continue to monitor its implementation and effectiveness.

On a similar note, it is difficult to comprehend that in an age of self-driving cars and privatized space travel, attorneys in some counties lack the means to file their documents electronically. Every county should allow e-filing and any other smart technology that can increase the courts' efficiency. We have endorsed a bill now pending in the state Legislature that will hopefully make e-filing more readily available statewide.

As for me personally, I have been a member of our association for over 40 years, and I've served on various committees and in many leadership roles - including as some of you know as treasurer. I am forever grateful for the friendships I have formed and the collaborative spirit that has allowed us to accomplish so much. I'm excited that we have new members joining our committees because their diverse backgrounds and insights will help produce fresh ideas that will ultimately strengthen all of us.

Implementing these ideas and addressing the practical issues of our association requires a reimagination of the way we conduct our affairs. To that end, we have implemented a new membership model that will take effect at the beginning of the 2025 membership year. We will eliminate our "a la carte" pricing structure and create more efficient online transactions while expanding our offerings under a single, affordable fee.

Our CLE department's programs and published materials are expertly designed and implemented to uniquely advance practical knowledge and skills in a variety of practice areas. I implore everyone to take advantage of this indispensable programming that is available at your fingertips.

Undoubtedly all this is a tall order. However, I guarantee you I have never shied away from driving success. The value of hard work was instilled in me by my humble parents, who urged me to become the first person in my family to graduate grammar school, never mind law school.

Now - after 43 years as a sole practitioner - I annually juggle hundreds of cases throughout numerous counties, while being asked to appear on complex cases by larger firms, as well. So, I can truly sympathize with the constraints and challenges faced by both the two-thirds of our members who are also single practitioners, and those of large firms. We all share the ever elusive need to reduce the drain on our time so we may be more effective public servants.

I would like to close with these thoughts.

I am thankful for the trust you have placed in me to serve as our association's President. The 126 esteemed individuals who have preceded me in this position have set a very high bar. I undoubtedly will face my share of roadblocks. However, my greatest asset is the collective talent that encompasses our association through the members who I am privileged to call friends. You

have generously lent your support and know-how so that our association can profoundly impact the legal profession for the betterment of our citizens.

For that - I thank you. Please know my door is always open and I look forward to hearing from you.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #5

REQUESTED ACTION: None, as the report of the Task Force on Homelessness and the Law is informational.

In June 2023, President Richard Lewis of the New York State Bar Association (NYSBA) authorized the creation of the Task Force on Homelessness and the Law.

The mission of the Task Force is "to examine the causes and effects of the homelessness crisis including, but not limited to, the ways in which that crisis is affected by the criminal justice and healthcare systems, with focus on legal and policy considerations in New York State. The Task Force will explore ways in which the federal, state, and local governments can take concrete steps to reduce the number of individuals experiencing homelessness and to improve the lives of individuals who continue to experience homelessness."[1]

The full report of the Task Force will be presented at the October 25, 2024, Executive Committee meeting.

David Woll, Esq. will present the report.

[1] www.nysba.org/committees/task-force-on-homelessness-and-the-law

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #6

REQUESTED ACTION: Approval of the report and recommendations of the Task Force on Emerging Digital Currency and Finance.

The Task Force on Emerging Digital Currency and Finance issued an interim report and recommendations which were approved by the House of Delegates in April 2023.

The attached report constitutes the final report of the Task Force and explores how the transition from Web1 and Web2 to Web3 impacts existing legal frameworks and landscapes. The shift to Web3 and the use of blockchain technology presents a unique set of legal challenges and considerations, due to its decentralized nature. For those in the legal community, understanding the intricacies of blockchain technology is essential for navigating the legal landscape of digital assets, smart contracts, and the broader implications for intellectual property, data privacy, and commercial transactions. Furthermore, the shift to Web3 necessitates a reevaluation of current legal frameworks in order to accommodate the decentralized, blockchain-based model of Web3. Therefore, the legal community must consider how legal principles apply in a landscape where transactions and interactions occur across a global, decentralized network, without centralized oversight.

The recommendations of the report fall into the following categories:

A. Creation of an integrated Committee on Technology
B. Dispute resolution and enforcement
C. Use of emerging technologies to enhance member benefits
D. Taxation of digital assets and currencies
E. International cooperation and harmonization
F. Legal recognition of digital titles
G. Exploration of the implementation of the use of blockchain technology in the criminal justice system to enhance efficiency and access to justice
H. Consideration for the use of digital currency in certain aspects of the criminal justice system
I. The importance of cross-jurisdictional cooperation & collaboration
J. Ethical clarity regarding fee arrangement concerning cryptocurrency
K. Engagement in law school education
L. Best practices

The detailed recommendations of the report are included on pages 110-114 of the report.

This report will be presented by Task Force co-chairs Jacqueline Drohan, Esq., and Matthew H. Feinberg, Esq.

- The Tax Section submitted comments which were incorporated into the final version of the report and are attached.

- The Committee on Professional Ethics submitted comments which are attached.

NEW YORK STATE BAR ASSOCIATION

Report and Recommendations of the New York State Bar Association **Task Force on Emerging Digital Finance and Currency**

June 2024

The views expressed in this report are solely those of the task force and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

Report and Recommendations of the New York State Bar Association Task Force on Emerging Digital Finance and Currency

June 2024

Members of the Task Force on Emerging Digital Finance and Currency

Task Force Co-Chairs

Jacqueline Jamin Drohan, Esq.
Matthew H. Feinberg, Esq.
Dana V. Syracuse, Esq.

Carlos Mauricio Mirandola, Esq., Vice Chair

Members

Joshua Lee Boehm, Esq.
Nancy Chanin, Esq.
Howard A. Fischer, Esq.
Felipe Hanszmann, Esq.
Nicholas G. Himonids, Esq.
Julie Houth, Esq.
Luca CM Melchionna, Esq.
Jeffrey D. Neuburger, Esq.
Rory Radding, Esq.
David Reiss, Esq.
David Schechtman, Esq.
Jason Schwartz, Esq.
Pablo Segarra, Esq.
A.F. David Steiner, Esq.
Yamicha Stephenson, Esq.
Margaret Strickler, Esq.
Romero Tapia, Esq.
Robyn T. Williams, Esq.

Advisors

Stephen P. Younger, Esq.

Consultants

Marc Beckman

Student Members

Joseph Bizub
Dina Khedr
Tamara Szulc

Founder, Advisor & Executive Committee Liaison

Sherry Levin Wallach, Esq.

NYSBA Staff Liaison

Hilary Jochmans

Administrative Support

Mx. Moe Whitcomb

Acknowledgements

The Task Force on Digital Finance & Currency would like to express its sincere gratitude to its student members Joe Bizub and Tamara Szulac for their dedication to its mission and work as well as their outstanding editorial assistance.

The work of the Task Force and its multiple continuing legal education programs including the development of Deep Dive into Web3 & the Metaverse, would not have been possible without the support and continued sponsorships from DMA United, DMA United CEO & President Marc Beckman, New York University's School of Professional Studies, NYU SPS Dean Angela Kamath, Crescite, Crescite Co-Founders Eddie Cullen, CEO & Karl P. Kill III, Chairman and Jurat Blockchains.

Finally, the Task Force wishes to thank NYSBA Past President Stephen P. Younger for his support and guidance.

The Report of the Task Force on Digital Finance & Currency

Introduction

Web 3

Web3 stands as a revolutionary milestone in the internet's evolution, transitioning from the centralized frameworks of Web1 and Web2 towards a decentralized architecture. This shift, underpinned by blockchain technology, introduces a new paradigm where decentralized applications (dApps) and smart contracts facilitate a digital experience centered around user empowerment and autonomy.

The journey from Web1 to Web3 encapsulates a remarkable evolution in how content is created, shared, and controlled. Web1, the internet's nascent phase, was primarily read-only, offering static content with limited interaction. Web2 marked a significant leap forward, characterized by social media, e-commerce, and user-generated content, leading to the rise of digital conglomerates that amassed considerable control over data and user interactions.

Web3 emerges as a paradigm shift, emphasizing decentralization and user sovereignty, enabled by blockchain technology. This era challenges the centralized models of Web2, proposing a web where users have unprecedented control over their data, identity, and digital assets. Blockchain's role in this transition is pivotal, providing the infrastructure for secure, transparent, and intermediary-free transactions.

Blockchain: The Catalyst for Decentralization

Blockchain technology is at the heart of Web3, disrupting traditional digital commerce and data management practices. By enabling decentralized transactions, blockchain technology diminishes the need for central authorities or intermediaries, facilitating a transparent and efficient exchange of digital assets. This technology is not limited to cryptocurrencies but extends to a wide range of applications across finance, healthcare, the arts, and more, fostering innovation and new business models.

The decentralized nature of blockchain presents a unique set of legal challenges and considerations. For those in the legal community, understanding the intricacies of blockchain technology is essential for navigating the legal landscape of digital assets, smart contracts, and the broader implications for intellectual property, data privacy, and commercial transactions.

Blockchain technology and digital currencies have captured the imagination of the financial world, as well as many other industries, by offering a new way to conduct transactions and store data securely. At the core of these innovations lies the

blockchain, a decentralized digital ledger that records transactions across many computers so that any involved record cannot be altered retroactively, without the alteration of all subsequent blocks.

Blockchain is essentially a distributed database that maintains a continuously growing list of records, called blocks, which are linked and secured using cryptographic principles. Each block contains a cryptographic hash of the previous block, a timestamp, and transaction data. This design allows for secure and transparent transactions that are resistant to fraud and tampering.

"Blockchain's heart is a peer-to-peer network, instead of a central server. Blockchain's brain is a consensus algorithm that syncs the peer-to-peer network at regular intervals. And Blockchain's lifeblood is an encrypted, linked log of data. Together, these three technologies yield a chronological, immutable ledger that is distributed across many participants. Because a Blockchain does not exist in one place, it offers two distinct advantages over a central server: both broader access and greater security."[1] In sum, blockchain technology is a decentralized ledger that maintains a tamper-proof record of transactions across a network of computers.

Digital currencies, also known as cryptocurrencies, are the most renowned application of blockchain technology. Bitcoin, introduced in 2009, is the first and most well-known cryptocurrency. Unlike traditional currencies, cryptocurrencies are not controlled by any central authority, such as a government or financial institution. Instead, they rely on a decentralized network of computers to manage and record transactions. This ensures that the currency is completely digital, and its creation and transactions are regulated by cryptography.

Implications for Digital Commerce and Data Ownership

The shift to Web3 has profound implications for digital commerce and data ownership, redefining the legal and commercial frameworks that govern digital interactions. In Web3, the ownership of digital assets and personal data shifts towards the user, challenging the traditional models of data control and monetization practiced by centralized platforms.

Since the early 2000s, digital currencies have continued to emerge and businesses supporting and promoting their use have continued to develop. Their rise and increased use worldwide have created a new market and purchase power. As with any currency, digital currencies have become increasingly an avenue for criminal

[1] Paul Embley and Di Graski, "When Might Blockchain Appear in Your Court?" National Center for State Courts, (2018) https://www.ncsc.org/__data/assets/pdf_file/0018/14913/blockchaininthecourts.pdf.

enterprise, but the technology behind them also provides new opportunities for growth, connectivity, and development.

For legal professionals, this shift necessitates a reevaluation of existing legal frameworks to accommodate the decentralized, blockchain-based model of Web3. Issues of jurisdiction, enforceability of smart contracts, intellectual property rights in a decentralized context, and compliance with data protection regulations become increasingly complex.

The decentralization inherent in Web3 raises questions about governance, dispute resolution, and the applicability of traditional legal mechanisms in a distributed digital environment. We in the legal community must consider how legal principles apply in a landscape where transactions and interactions occur across a global, decentralized network without centralized oversight.

New York is a leader for the legal community and emerging technology in the United States. As is reported herein, several of the leading cases and regulatory frameworks are being litigated in New York Courts, by New York agencies and legislators. As such, it is imperative that the New York State Bar Association continue its leadership of the legal community as these technologies continue to evolve and impact the law.

Executive Summary

The NYSBA Task Force on Emerging Digital Finance and Currency ("Task Force") was formed by Immediate NYSBA Past President Sherry Levin Wallach. The mission statement of the Task Force is: "to study and evaluate the legal issues and questions surrounding the expansion and regulation of the digital finance and digital currency industries in New York State. This review may include the development of best practices for attorneys representing clients on matters in these areas and the proposal of law and policy recommendations to the relevant regulatory bodies in this evolving field."

The Task Force issued its interim report and recommendations, which were approved by the House of Delegates in April 2023.[2] The instant report constitutes the Final Report ("Final Report") and recommendations of the Task Force. The Final Report details the regulatory landscape, possible ways to navigate Web3 businesses through a sandbox approach, certain Federal income tax considerations regarding digital assets, intellectual property considerations in Web3, navigating the nexus of criminal justice and emerging technologies, as well as ethics and education.

Blockchain's part in this evolution is pivotal, providing the infrastructure for secure, transparent, and intermediary-free transactions. Blockchain technology is at the heart of Web3, including emerging digital finance and currencies, disturbing customary digital commerce and data management practices. By empowering decentralized transactions, blockchain technology reduces the need for central authorities or intermediaries, facilitating a transparent and efficient exchange of digital assets. This technology is not limited to cryptocurrencies but extends to a wide range of applications across finance, healthcare, the arts, and more, fostering innovation and new business models.

Of critical importance, as discussed in the Final Report, the decentralized nature of blockchain presents a unique set of legal challenges and considerations. For those in the legal community, understanding the intricacies of blockchain technology is essential for navigating the legal landscape of digital assets, consumer protection, smart contracts, and the broader implications for intellectual property, data privacy, and commercial transactions. The shift to Web3 has profound implications for digital commerce and data ownership, redefining the legal and commercial frameworks that govern digital interactions. In Web3, the ownership of digital assets and personal data

[2] https://nysba.org/app/uploads/2022/03/final-no-changes-Task-Force-on-Emerging-Digital-Finance-and-Currency-April-2023-1.pdf

shifts towards the user, challenging the traditional models of data control and monetization practiced by centralized platforms.

For legal professionals, the shift to Web3 requires a re-evaluation of existing legal frameworks to accommodate its decentralized, blockchain-based model, along with digital finance and currencies. This evolution introduces complexities regarding jurisdiction, enforceability of smart contracts, intellectual property rights in a decentralized context, and compliance with data protection regulations become increasingly complex. Moreover, as the Final Report highlights, the decentralization inherent in Web3 raises questions about governance, dispute resolution, and the applicability of traditional legal mechanisms in a distributed digital environment. As emphasized in the Final Report's recommendations, we in the legal community, especially those of us practicing law in New York, must consider how legal principles apply in a landscape where transactions and interactions occur across a global, decentralized network, absent centralized oversight.

This technology and its applications are evolving more rapidly than ever before. As usage increases, the legal profession must continue to address new considerations and issues. These technologies offer opportunities for improved client representation, enhanced data security and sharing, and increased efficiency. Simultaneously, questions and concerns continue to be raised in all aspects of legal practice. Therefore, it is essential to continue educating the legal profession and explore ways to leverage this technology to enhance legal practice and client representation. This report gives an overview of our past progress, our current trajectory, and identifies both opportunities and challenges. The following recommendations aim to guide the legal community on this journey.

Recommendation of the Task Force

A. *Create an Integrated Committee on Technology*:

This committee would combine the Task Force on Emerging Digital Finance & Currency, Committee on Law & Technology, and the Task Force on Artificial Intelligence and create a centralized group to continue to explore and study issues.

B. *Dispute Resolution and Enforcement:*

Developing new legal frameworks and dispute resolution mechanisms that can accommodate the decentralized nature of blockchain transactions is crucial. This might include specialized courts or arbitration panels familiar with blockchain technology and real property law.

C. *Use Emerging Technologies to Enhance Member Benefits:*

Initiate a request for proposals (RFP) from companies or organizations with expertise in emerging technology to integrate these technologies with those currently in use to increase member benefit and support.

D. *Taxation of Digital Assets and Currencies:*

There is significant uncertainty around the tax treatment of digital assets and currencies. The IRS and Treasury should provide clear guidance to achieve consistency among taxpayers.

Article 4: Intellectual Property Considerations in Web3

E. *International Cooperation and Harmonization:*

Given the global nature of Web3, there is a pressing need for international cooperation and harmonization of trademark laws to tackle the challenges associated with branding digital assets. Developing standardized protocols for the registration, recognition, and enforcement of trademarks across borders could help mitigate some of the jurisdictional challenges posed by Web3.

F. Legal Recognition of Digital Titles:

Laws should recognize digital titles and registrations on a blockchain as legally valid and equivalent to traditional paper titles. This involves ensuring that digital records meet all legal requirements for real property transactions, including evidence of ownership, encumbrances, and liens.

Implementing a hybrid system that maintains traditional title registration mechanisms while integrating blockchain technology could offer a transitional solution. This approach would leverage blockchain's efficiency and security while retaining the legal framework's established protections and recognitions.

Article 5: Navigating the Nexus of Emerging Technologies and Criminal Justice: Challenges and Opportunities in the Age of Digital Currencies and Assets

G. *Continue to explore the implementation of the Use of Blockchain Technology in the Criminal Justice System to Enhance Efficiency and Access to Justice:*

Blockchain can be used to provide more secure access and more efficient storage and transfer of data such as for record keeping, maintaining police disciplinary data systems, service of process and to create uniform statewide pre-trial data collection. This will increase the integrity of the system and decrease wrongful convictions and unnecessary or prolonged incarceration.

H. *Consideration Should be Given to the Use of Digital Currency in Certain Aspects of the Criminal Justice System:*

Digital currencies are being used worldwide to bank the unbankable. Further, by their very nature, they provide a secure manner for the transfer of funds while increasing accessibility. We recommend the use of Digital Currency be explored for bail, as a source of currencies for incarcerated people, restitution and for payment of fines and court fees.

I. *Importance of Cross-Jurisdictional Cooperation & Collaboration:*

It is essential that the legal community continue to cooperate and develop cross-border relationships and collaborations to protect the communities and clients as well as provide the best opportunities for weeding out bad actors.

Article 6: Recommendations Ethics & Education

J. *Ethical Clarity Regarding Fee Arrangement Concerning Cryptocurrency:*

To avoid a potential ethical quagmire, when presented with a fee arrangement concerning cryptocurrency, the attorney should review the entire RPC, especially sections 1.5(a) and 1.8(a) to determine applicability and always act cautiously. Furthermore, whether RPC 1.8(a) could be reasonably implicated is immaterial, as any attorney holding cryptocurrency as a type of payment in advance should disclose the possible ethical issues implicated under RPC 1.8(a) in writing and further evaluate whether any other rules might be implicated. Being that an attorney is a fiduciary, the absence of such a writing, in the event there is an unexpected ethical quagmire, could result in an adverse inference regarding the attorney's conduct.

A way to avoid the pitfalls associated with an RPC 1.8(a) dilemma is to liquidate any cryptocurrency into fiat immediately upon receipt of payment. This is likely the more prudent approach to take, especially for an attorney not as familiar with cryptocurrency and until the tech is more universally adopted. Unless an attorney has the means necessary to adhere to the rules, better safe than sorry. Importantly, NYSBA should provide guidance as to whether attorneys can accept crypto as advanced payment for legal services.

K. *Continued Engagement in Law School Education:*

While law schools are increasingly doing their part to attempt to provide law students with opportunities to learn about these emerging technologies at the foundational level, the present bar must stay abreast of the changing technology. NYSBA should continue to engage with these programs.

L. *Best Practices:*

Develop best practices for attorneys engaging in the digital assets & crypto currency space. Attorneys must be diligent in following the guidelines of the commentary to the Code of Ethics and ensure their actions do not violate any cannons or criminal laws. Attorneys must also be diligent in advising their clients on the importance of KYC to prevent unintended consequences.

Article 1: The Regulatory Landscape

SECTION 1: SEC's Approach to Token Classification

The landscape of digital asset regulation in the United States has been significantly shaped by the Securities and Exchange Commission's (SEC) enforcement actions. The decisions from the courts have been one source of guidance. However, the landscape remains uncertain. The SEC's first notable foray into the cryptocurrency space occurred in July 2013 with *SEC v. Shavers*, where the court held that Bitcoin could be considered a form of money, and thus investments denominated in Bitcoin could be considered securities under the *Howey* test.[3]

This set the stage for the SEC's evolving approach to token classification, which became more defined with the release of *The DAO Report* in July 2017. The report marked the first instance where the SEC explicitly categorized a token as a security.[4] The DAO, a Decentralized Autonomous Organization, offered its own tokens for purchase using Ether, with the promise of funding projects and providing returns to token holders. The SEC's application of the *Howey* test to The DAO's offering underscored the agency's view that tokens representing investments in ventures expecting profits from the efforts of others could be considered securities.[5]

The DAO Report laid the groundwork for the SEC's case-by-case approach to evaluating tokens, emphasizing that the determination of whether a token is a security depends on the specific facts and circumstances of each offering.[6] This approach has been reiterated in subsequent enforcement actions and public statements, highlighting the need for a nuanced analysis of token offerings to assess compliance with federal securities laws.

The DAO Report targeted the Decentralized Autonomous Organization (the "DAO"), an organization offering its own tokens for purchase using the Ethereum Blockchain token, Ether. The tokens represented interests in the DAO platform, and its organizers would invest in projects that received a majority vote from DAO token

[3] *SEC v. Shavers*, No. 4:13-CV-416-17 (E.D. Tex. Aug. 6, 2013), adhered to on reconsideration, No. 4:13-CV-416 (E.D. Tex. Aug. 26, 2014).
[4] SEC, Report of Investigation Pursuant to Section 21(A) of the Securities Exchange Act of 1934: The "DAO Report", securities act release no. 81207 (July 25, 2017) (applying the traditional securities *Howey* Test to conclude the DAO Token was a security).
[5] *Id.* at 10.
[6] *See* In the Matter of Munchee Inc., SEC Release No. 33-10445 (Dec. 11, 2017) (cease and desist order); AirFox, Paragon, Crypto Asset Management, TokenLot, and EtherDelta's founder. Division of Corporation Finance, Division of Investment Management, and Division of Trading and Markets. "Statement on Digital Asset Securities Issuance and Trading." Nov. 16, 2018. SEC.

holders. Created by Slock.it, the platform was marketed as a "for-profit entity whose objective was to fund projects in exchange for a return on investment."[7] The DAO, despite a massive fundraise over $150 million was not registered in any sovereign jurisdiction. Nor did the DAO have a board of directors, a CEO, or a management team. The rationale behind the crowdfunding was the creation of new software applications, but before the venture took flight, it was hit with a cyber-attack draining 1/3rd of its funds.

The SEC investigated the DAO in connection with the offering's potential applicability to federal securities laws and whether the tokens constituted securities.[8] Applying the *Howey* test, the SEC focused on the fact that Slock.it used "various promotional materials disseminated by Slock.it and its cofounders informed investors that [t]he DAO was a for-profit entity whose objective was to fund 12 projects in exchange for a return on investment."[9] Additionally, the DAO token satisfied the expectation of profits prong because "the DAO's investors relied on the managerial and entrepreneurial efforts of Slock.it and its co-founders, and the DAO's Curators, to manage the DAO and put forth project proposals that could generate profits for the DAO's investors."[10] Lastly, while DAO token holders had certain voting rights, this did not grant them "control over the enterprise," and thus the fourth prong of the *Howey* test was also satisfied.[11]

Overall, *The DAO Report* stated that U.S. federal securities laws "may apply" to "virtual tokens" and confirmed the analysis would depend on an application of the *Howey* test to the specific "facts and circumstances" of each token sale.[12] Applying this guidance, *The DAO Report* concluded that the DAO token in question constituted a security for at least three reasons: (1) purchasers jointly contributed funds to invest in projects; (2) token holders obtained the right to vote on where to invest; and (3) holders received pro rata dividend payments from each project's profits.[13]

However, while seminal in nature, *The DAO Report* cannot be read to suggest all digital assets are subject to federal securities laws. Rather, the SEC has stated on several occasions that certain tokens, *e.g.*, Bitcoin is not security, but the SEC officials have waivered regarding Ether.[14] *The DAO Report* solidified the notion that the SEC has authority to regulate cryptocurrencies and that each token evaluation is on a case-

[7] *Id.*
[8] *Id.*
[9] *Id.* at 12.
[10] *Id.*
[11] *Id.*
[12] *Id.* at 10.
[13] *Id.* at 17-18.
[14] William Hinman's Statements as the Director of the Division of Corporation Finance SEC. "Digital Asset Transactions: When Howey Met Gary (Plastic)." June 14, 2018. https://www.sec.gov/news/speech/speech-hinman-061418

by-case basis. In other words, no set token standard exists for whether one type of token is or is not a security but applying this precedent to token frameworks provides insight into compliance requirements, if any.

Since the *DAO Report*, the SEC has brought a number of enforcement actions targeting token-based projects. Several were brought by the SEC Cyber Asset and Cyber Unit (CACU), an entity formed to "focus the Enforcement Division's substantial cyber-related expertise on targeting cyber-related misconduct," including "[v]iolations involving distributed ledger technology and initial coin offerings." As the SEC noted in a court filing, certain offerings are effectively "old-fashioned fraud dressed in a new-fashioned label."[15]

Overall, these cases show the SEC's intention to combat fraud and bad actors as applied to cryptocurrencies and token offerings. In fact, the agency issued several alerts to warn potential investors about the risks involved in participating in token offerings (also referred to as Initial Coin Offerings ("ICOs")).[16] Therefore, a specific analysis of the facts of the token is necessary as well as how and when information was presented to those who receive tokens.

The Howey Test

Section 2(a)(1) of the Securities Act of 1933 defines "securities" as: "any note, stock, treasury stock, security future, security-based swap, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement … investment contract … or, in general, any interest or instrument commonly known as a 'security', or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."[17] A broad definition, Section 2(a)(1) carries significant precedent regarding statutory interpretation.

The seminal Supreme Court case for interpreting Section 2(a)(1) is *SEC v. Howey*,[18] which created the test, *i.e.*, the *Howey* test, used to determine whether an

[15] *See e.g.*, *U.S. v. Zaslavskiy*, No. 1:17-cr-00647, slip op., 2018 WL 4346339 (E.D.N.Y. Sept. 11, 2018) (Judge Raymond Dearie of the Eastern District of New York upheld a criminal indictment for securities fraud involving the sales of cryptocurrency tokens in an ICO); *Commodity Futures Trading Commission v. McDonnell*, 287 F. Supp. 3d 213 (E.D.N.Y. 2018) (determining that fraudulent ICOs can be subject to enforcement proceedings under the antifraud provisions of the Commodities Exchange Act).
[16] SEC. "Spotlight on Initial Coin Offerings and Digital Assets." https://www.sec.gov/spotlight-initial-coin-offerings-and-digital-assets
[17] *See* 15 U.S.C. § 77b.
[18] 328 U.S. 293 (1946).

instrument meets the definition of a "security" under the Securities Act.[19] In *Howey*, the Court held that units of a citrus grove, coupled with a contract for serving the grove, was an investment contract.[20] The defendants offered buyers the option of leasing any purchased land back to the defendants, who would then tend to the land, and harvest, pool, and market the citrus.[21] The SEC sued defendants over these transactions, claiming they broke the law by not filing a securities registration statement.[22] The Supreme Court, in issuing its decision finding the defendants' leaseback agreement is a form of security, developed a landmark test for determining whether certain transactions are investment contracts.

The Court in *Howey* specifically defined the term "investment contract" within the definition of a "security," noting it has been used to classify instruments that are of a "more variable character" that may be considered a form of "contract, transaction, or scheme whereby an investor lays out money in a way intended to secure income or profit from its employment."[23] The Supreme Court has recognized lower courts subsequently have required only an expectation of profits from the efforts of others, rather than solely from the efforts of others when determining whether a financial instrument is a security. [24]

The *Howey* test is divided into four prongs:

> An investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person [1] invests his [or her] money in [2] a common enterprise and is led to [3] expect profits [4] solely from the efforts of the promoter or a third party, [excluded factors] it being immaterial whether the

[19] Indeed, the Court has referred to the test established by *Howey* for determining whether an instrument is a security as, "in shorthand form, [embodying] the essential attributes that run through all of the Court's decision defining a security." *See United Housing Found., Inc. v. Forman*, 421 U.S. 837, 852 (1975). However, the Court subsequently emphasized that this statement was meant to apply only in the context of determining whether an instrument is an investment contract. *See Landreth Timber Co. v. Landreth*, 471 U.S. 681, 691 n.5 (1985).
[20] 328 U.S. at 239.
[21] *Id.*
[22] *Id.* at 298.
[23] *Id.* at 239, 298-99. In *Howey*, the Court stated that "[s]uch a definition necessarily underlies" the Court's earlier decision in *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344 (1943). In *Joiner*, the Court held that the offer of oil and gas leaseholders, which would be drilled by the offeror for the buyer, was the offer of a security. In rejecting the claim that these rights were strictly leasehold interests, the Court foreshadowed the later opinion in *Howey*. The Court also has relied on the *Howey* definition of the term "investment contract" in subsequent decisions, such as when it held that a variable annuity contract is a security (*see SEC v. Variable Annuity Life Ins. Co. of America*, 359 U.S. 65, 72 n. 13 (1959)) and when it held that withdrawable capital shares in a state-chartered savings and loan association were securities rather than certificates of deposit (*see Tcherepnin v. Knight*, 389 U.S. 332, 338 (1967). *See also SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202 (1967) (holding that the accumulation portion of a flexible fund variable annuity contract was an investment contract for purposes of the Securities Act).
[24] *Formando.*, 421 U.S. at 852 n.16.

shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.[25]

In order to be considered a security, all four factors must be met. In other words, if an instrument does not satisfy the requirements of the *Howey* test, it is not an investment contract, and thus not a security.

For example, in *International Brotherhood of Teamsters v. Daniel*,[26] the Court held interests in a noncontributory, compulsory pension plan were not investment contracts because there was "no investment" of money and no expectation of profit from a common enterprise.[27] The Court also has held an investment contract is not present "when a purchaser is motivated by a desire to use or consume the item purchased."[28] In *United Housing Found., Inc. v. Forman*, the Court held, among other things, that shares in a nonprofit cooperative housing corporation were not investment contracts because "investors were attracted solely by the prospect of acquiring a place to live, and not by financial returns on their investments."[29]

Considering this precedent, U.S. Courts have interpreted the *Howey* test broadly, *e.g.*, an investment of money may include not only the provision of capital, assets and cash, but also goods, services or a promissory note.[30] Indeed, according to the Supreme Court, the *Howey* test "embodies a flexible rather than a static principle, one capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits."[31]

This consumer protection precedent provides a fact-specific application to ensure any interpretation does not go beyond not only the intended purpose of the *Howey* test but also the statutory language within the Securities Act. Overall, the test eschews classification based on formalities, such as offering stock certificates, or terminology, such as selling "shares" or "stock," in favor of a flexible test based on economic circumstances. As the *Tcherepnin v. Knight* opinion affirms, "in searching for the meaning and scope of the word 'security' . . . form should be disregarded for substance and the emphasis should be on economic reality."[32]

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[25] 328 U.S. 299; *see also SEC v. Edwards*, 540 U.S. 389, 393 (2004) (reaffirming the *Howey* analysis); *see also Forman*, 421 U.S. at 852-53 (The "touchstone" of an investment contract "is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.").
[26] 439 U.S. 551 (1979).
[27] *Id.* at 559-62.
[28] *See Forman*, 421 U.S. at 852-53.
[29] *Id.* at 853.
[30] *Howey*, *supra* note 6, at 299.
[31] *Id.*
[32] *Tcherepnin*, 389 U.S. at 336.

Generating tokens via a blockchain platform can generate a security and be characterized as taking "nominal interests in the physical assets employed in the enterprise."[33] Indeed, cryptocurrency technology has, assuredly, been utilized in certain circumstances as persuasive window-dressing in the marketing of Ponzi schemes, or to use the *Howey* Court's terms, "schemes devised by those who seek the use of the money of others on the promise of profits."[34] This is a reality of the industry, and certain regulatory actions regarding cryptocurrency projects are certainly justified.

However, each case requires a fact-specific application of precedent, and in circumstances where a Foundation sells tokens that contain immediate functionality for an online platform, Courts and administrative agencies would be hard-pressed to determine this type of token constitutes a security.

The general administrative precedent regarding categorizing cryptocurrencies as securities exists,[35] *e.g., The DAO Report*, the majority of interpretative guidance, starts with a determination of whether an investment exists. However, before diving into the administrative application, an understanding regarding traditional cryptocurrency categorization, for which there is scant precedent, in the securities context is not only needed, but at the forefront of the analysis.

SECTION 2: Virtual Currencies Under the U.S. Commodity Exchange Act – Mixed Signals

In October 2019, CFTC Chairman Heath Talbert stated "[i]t is my view as chairman of the CFTC that Ether is a commodity," said CFTC Chairman Heath Tarbert.[36] The Commission's intentions to regulate the sector were shortly followed by its ground-and record-breakingly rapid designation of an ETH-based CBOE exchange tradable futures contract, making ETH futures legal for trading in the US, even by retail investors.[37] Similarly, CFTC this week authorized a crypto trading firm to integrate its issuance, advisory and trading components, another first. His successor*, CFTC* Commissioner Dawn DeBerry Stump, stated as recently as August 2021 that "even if a digital asset is a commodity, it is not regulated by the CFTC. However: The CFTC does regulate derivatives on digital assets, just like it regulates other derivatives."[38]

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[33] *Howey*, *supra* note 6, at 299.
[34] *Id.*
[35] The DAO Report, *supra* note 4.
[36] Paddy Baker, "CFTC Declares Ethereum's Ether a Commodity," Crypto Briefing (Oct. 10, 2019), https://cryptobriefing.com/eth-futures-commodity/.
[37] Cboe Digital, https://www.erisx.com/product/futures/, (last visited Apr. 14, 2024).
[38] Sam Cooling, "CFTC reminds SEC 'We regulate derivatives not digital assets,'" Yahoo! Finance, (Aug. 24, 2021), https://finance.yahoo.com/news/cftc-reminds-sec-regulate-derivatives-123215809.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuYmluZy5jb20v&guce_referrer_sig=AQAAALjBrsXlw_ho4C_LCHiMQkYnb6_0h-

It should be noted that even under the tenure of CFTC Chairman Gensler, the commission largely argued to expand its jurisdiction over the sector, and to limit available exemptions. Subsequently, Gensler, as Chair of the SEC, has overseen that agency's efforts to instead classify most virtual currencies as securities and expand SEC oversight. In both cases, agency guidance has been persistently vague in the view of many legal practitioners.

What makes a Virtual Currency Fully Regulatable by the CFTC?

Two often overlooked but potentially applicable questions of federal law and regulation are: 1. When does a virtual asset constitute an exempt deliverable commodity contact under the U.S. Commodity Exchange Act (CEA), 7 U.S.C. § 2(c)(2)(D)? If it does not so qualify, it may constitute an illegal off-exchange futures contract. 2. When does it constitute a derivative? If the crypto contract constitutes an OTC derivative it is illegal to offer it to U.S. retail investors under the CEA. Even if offered to qualifying Eligible Contract Participants (7 U.S.C. § 1a(18)) the offering company may fall under Swap Dealer and/or Swap Execution Facility registration requirements. Unexpected results may occur here where an offering is an NDF or has optionality features, but also where linked to Smart Contract, or dealt on a platform with "closed system" architecture.

CFTC Jurisdiction

The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act'') amended the Commodity Exchange Act (''CEA'') to, inter alia, add a new subparagraph, section 2(c)(2)(D) of the CEA entitled ''Retail Commodity Transactions.''[39] New section 2(c)(2)(D) makes subject to the CEA any agreement, contract, or transaction in any commodity that is entered into with, or offered to a non-eligible contract participant or non- eligible commercial entity on a leveraged or margined basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty.[40] This section excepts certain transactions from its application. In particular, CEA section 2(c)(2)(D)(ii)(III)(aa) provides exceptions for a contract of sale that results in actual delivery within 28 days or such other longer period as the Commission may determine by rule or regulation.[41]

YsAAK7G0Y9tPUes31UGI6tOnqkP7ifPUc80gugovHIkpxij6jQID0qjmi5QVQN3nv_RQrLfjXgFuUYZJWr7cs4gWsaj_xZegkbFOXSoUidMXdt89Z45j-RQdM6D5FB-e48o2RDDEP7TF5w.

[39] Commodity Futures Trading Commission, "Dodd-Frank Act"

[40] *Id.* https://www.cftc.gov/sites/default/files/idc/groups/public/@swaps/documents/file/hr4173_enrolledbill.pdf

[41] *Id.*

Section 2(c)(2)(D) of the CEA provides the CFTC with direct oversight and authority over "retail commodity transactions" – defined as agreements, contracts or transactions in any commodity that are entered into with or offered to retail market participants on a leveraged or margined basis, or financed by the offeror, the counterparty or a person acting in concert with the offeror or counterparty on a similar basis. Such a transaction is subject to the CEA "as if" it were a commodity future.[42] This statute contains an exception for contracts of sale that result in "actual delivery" within 28 days from the date of the transaction. The Commission by public comment, enforcement posture and civil advocacy has taken the position since 2015 that virtual currencies constitute "commodity transactions" for purposes of the CEA (including section 2(c)(2)(D) thereof).[43]

Prior Commission Interpretations re CEA §2(c)(2)(D)

On December 14, 2011, the Commission proposed an interpretation of CEA section 2(c)(2)(D) and the meaning of "actual delivery" as used therein and solicited public comment.[44] The Commission clarified its interpretation on the basis of these comments by Federal Register Release on August 23, 2013 (the "Clarified Interpretation"). [45] The Clarified Interpretation stated (quoting the original Interpretation) that ''in determining whether actual delivery has occurred within 28 days, the Commission will employ a functional approach and examine how the agreement, contract, or transaction is marketed, managed, and performed, instead of relying solely on language used by the parties in the agreement, contract, or transaction.''[46] It further stated that the Commission would consider as relevant factors "[o]wnership, possession, title, and physical location of the commodity purchased or sold, both before and after execution of the agreement, contract, or transaction; the nature of the relationship between the buyer, seller, and possessor of the commodity purchased or sold; and the manner in which the purchase or sale is recorded and completed."[47] While the "Clarified Interpretation" provided a list of examples which indicated that actual delivery required the transfer of title and possession to the purchaser or the purchaser's depository, it stated that book entries in which a purchase is rolled or offset do not constitute actual delivery.

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[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] https://www.federalregister.gov/documents/2013/08/23/2013-20617/retail-commodity-transactions-under-commodity-exchange-act
[46] *Id.*
[47] *Id.*

March 24, 2020, Final Interpretation

On March 24, 2020, the CFTC issued its final interpretive guidance (the "Final Interpretation") on the meaning of "actual delivery" in the context of § 2(c)(2)(D) retail commodity transactions involving virtual currencies.[48] The Interpretation states that "actual delivery" of retail virtual currency transactions occurs when: 1. a retail person secures: (i) possession and control of the entire quantity of the commodity, whether it was purchased on margin, or using leverage, or any other financing arrangement, and (ii) the ability to use the entire quantity of the commodity freely in commerce (away from any particular execution venue) no later than 28 days from the date of the transaction and at all times thereafter; and 2. the offeror or counterparty seller do not retain any interest in, legal right, or control over any of the commodity purchased on margin, leverage, or other financing arrangement at the expiration of 28 days from the date of the transaction.[49]

While the Final Interpretation was intended by the CFTC to provide greater certainty regarding the scope of the § 2(c)(2)(D) exemption, and contains a number of examples for illustrative purposes, it in fact provided little bright line guidance beyond the CFTC's original public positions and enforcement posture. The Final Interpretation itself notes that CFTC will continue to "employ a functional approach" and "assess all relevant factors that inform an actual determination."[50]

Of equal relevance is CFTC's failure to resolve or address a number of public comments received from industry participants in the Final Interpretation. The proposed "possession and control" and "free use in commerce" requirements might act to wholly vitiate the exception for margined OTC principal-to-principal commodity transactions intended by Congress. If these standards are applied too rigorously, they would preclude any form of hypothecation or enforceable security interest in the assets financed, effectively rendering any form of margin lending or portfolio finance commercially unfeasible and nullifying the effect of 7 USC § 2(c)(2)(D) entirely.[51]

Additionally, the "free use in commerce" requirement raises concerns unique to virtual currencies. Only the most liquid and widely accepted virtual currencies, such as Bitcoin, are significantly, let alone "freely" accepted in commerce. Even with regard to Bitcoin, only the current longest blockchain version of that currency – i.e. that remaining longest chain after any prior forks resulting in the abandonment of shorter blockchains.

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[48] https://www.cftc.gov/PressRoom/PressReleases/8139-20#:~:text=CEA%20section%202(c)

[49] *Id.*

[50] *Id.*

[51] https://www.federalregister.gov/documents/2013/08/23/2013-20617/retail-commodity-transactions-under-commodity-exchange-act

Such a fork event may render a Bitcoin non-acceptable in commerce even after the "actual delivery" took place under § 2(c)(2)(D).[52]

It is important to note that neither the Final Interpretation, nor any reliable public guidance or statement by the CFTC of which we are aware specifically addresses unmargined short selling of BTC or any virtual currency or the lending of virtual currency to retail counterparties for such purpose. CFTC Chairman Heath Tarbert publicly stated that his expectation that "for a period of 90 days, the CFTC will not initiate any enforcement actions relating to the Final Interpretation that "were not plainly evident from prior CFTC guidance, enforcement actions, and case law" in order to"prevent any potential market disruptions associated with efforts to assimilate this guidance."

Virtual Currencies as Potential Derivatives under the CEA

"Swap Agreements" are defined by the Commodity Futures Modernization Act of 2000 (the "CFMA"), now incorporated into the CEA.Crucially, the CFMA strictly limits the definition of Swap Agreements by restricting the categorization to only those contracts traded by "Eligible Contract Participants" ("ECPs"). The term "commodity" is also broadly defined in the CEA and by CFTC to include almost any standardized, fungible contract of sale for future delivery. Further, the CEA specifically defines financial futures and security index futures as "excluded commodities" subject to regulation under the CEA.

Any commodity-based swap where one counterparty to the agreement does not qualify as an ECP would revert to the default classification of a "commodity" contract under the CEA. Both the contracts and the parties to the agreement would be subject to the full penumbra of regulation and enforcement authority under the CEA, and such contracts would be illegal unless the CFTC granted them the status of "Designated Contract Market" and the contracts were listed on a CFTC- recognized futures exchange. Dealing in Swap Agreements also carry significant registration and reporting requirements under Dodd Frank, including potential registration as a Swap Dealer and/or Swap Execution Facility.

With respect to Virtual Currencies (including NDFs), the swap question is complex. The Division has cautioned a number of times that the complexity of a multi-step contractual process "within one transactional counterparty construct" might render a crypto instrument a Swap Agreement and thus regulable under the CEA and effectively legal only for ECP customers. One specific issue the Division raised in this regard is whether the crypto might represent or have elements of a smart contract, i.e.

[52] *Id.*

where contractual terms independent and/or ancillary to the actual transfer of the virtual currency itself are set, executed and/or enforced by technological protocols. Another issue raised in telephonic guidance is whether the requirement that all components of a transaction (coin loan, coin sale, coin buyback and/or repayment) remain within the same "counterparty construct."

History of CFTC Enforcement

While much relevant case law appears to have centered around the Commission's assertion of anti-fraud jurisdiction, certain cases have extended this to issues of jurisdiction under CEA § 2(c)(2)(D).[53]

Bitfinex Order

Bitfinex Order ruled in a 2015 enforcement action that Bitcoin and other virtual currencies are "commodities" under the CEA, the CFTC first applied the concept of "actual delivery" to virtual currencies the 2016 Bitfinex Order.[54] The Commission filed and simultaneously settled charges against BFXNA, Inc., d/b/a Bitfinex (Bitfinex), in connection with Bitfinex's operation of an online virtual currency trading platform (the BitfinexPlatform). Specifically, the Bitfinex Order found that Bitfinex facilitated the execution of illegal, off-exchange commodity transactions in violation of the CEA by "permitting retail and non-retail users to engage in financed virtual currency transactions on the Bitfinex Platform that did not result in actual delivery of the virtual currency within 28 days, and "failing to register the Bitfinex Platform with the CFTC as a DCM and a futures commission merchant (FCM).

Importantly, the CFTC found that, under each of the three different methods that Bitfinex used to hold the financed virtual currency purchased by its users, Bitfinex had not transferred possession and control of the virtual currency to the customer, and that Bitfinex instead had retained some degree of possession and control over the purchased virtual currency by depositing it into wallets controlled by the company.

CFTC v. McDonnell

In *CTFC v. McDonnell,* the CFTC sued Patrick McDonnell and his company Coin Drop Markets alleging defendants "operated a deceptive and fraudulent virtual currency scheme... for purported virtual currency trading advice" and "for virtual currency

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[53] *Id.*

[54] https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enfbfxnaorder060216.pdf

purchases and trading ... and simply misappropriated [investor] funds."[55] The CFTC sought injunctive relief, monetary penalties, and restitution of funds received in violation of the CEA. The case held that "[v]irtual currencies can be regulated by the CFTC as a commodity." However, it also noted that "CFTC does not have regulatory authority over simple quick cash or spot transactions that do not involve fraud or manipulation. . . this boundary has been recognized by the CFTC. It has not attempted to regulate spot trades unless there is evidence of manipulation or fraud," (citing 7 USC § 2(c)(2)(C)(i)(II)(bb)(AA)). Note carefully that this later conclusion in *McDonnell* appears to apply standards not contained in CEA § 2(c)(2)(D), but instead from § 2(c)(2)(C) – a provision limited by its terms to foreign currency transactions.

United States CFTC c. Money Credit Co.

United States CFTC v Monex Credit Co., a 2019 9th Circuit decision dealt with metals rather than virtual currency.[56] It held, inter alia:

- Actual delivery required at least some meaningful degree of possession or control by the customer but not when, as here, metals were in the broker's chosen depository, never exchanged hands, and subject to the broker's exclusive control, and customers had no substantial, non-contingent interests; [emphasis added]
- The actual delivery exception was an affirmative defense that did not bar the CFTC from relief on three counts;
- The CFTC could sue the seller for fraudulently deceptive activity, regardless of whether it was also manipulative, and the CFTC could bring an enforcement action;
- The CFTC's well-pleaded complaint had to be accepted as true, and the case was remanded for further proceedings;
- Reversed district court's granting of motion to dismiss – 9th Cir. instead held that the CFTC stated a claim because the district court had an incorrect understanding of actual delivery;
- "[S]ales where customers obtain meaningful control or possession of commodities, i.e., when actual delivery occurs, do not mimic futures trading and are therefore exempt from registration and related CEA requirements;"
- "'[A]ctual delivery' unambiguously requires the transfer of some degree of possession or control. Other interpretive tools, including the CFTC's guidance, reinforce this conclusion" [emphasis added].

[55] *CFTC v. McDonnell*, 287 F. Supp. 3d 213, 227 (E.D.N.Y. 2018).
[56] *United States CFTC v Monex Credit Co., 2019 U.S. App. LEXIS 22181, No. 18-55815, *16-19 (9th Cir. July 25, 2019)*

Monex seems significant, as it is the latest in a long line of 9th Circuit cases centered around one of the country's largest providers of leveraged metals contracts to the retail market. It is both noteworthy and highly suggestive that the *Monex* standard is markedly less absolute in its requirement for actual delivery than that stated in the earlier interpretations. The phrase "some (meaningful) degree of possession or control" as seen in *Monex,* seems to leave room for a trustee or custodial account control arrangement, making a security interest in the commodity sufficiently enforceable to sustain a commercially reasonable margin or loan or portfolio finance facility. However, this conclusion is inconsistent with the language and illustrative examples provided in the Final Interpretation.

CTFC v. My Big Coin Pay, Inc.

In *CFTC v. My Big Coin Pay, Inc.,* The Commission filed suit against an operator of a virtual currency scheme, and its officers, alleging fraud in the sale of a commodity, in violation of the CEA and CFTC regulation.[57] The operators and officers moved to dismiss. The court held that it would take judicial notice of the fact that other virtual currency futures were traded on the commodity market and that the complaint sufficiently alleged that "My Big Coin" was a commodity contract.

Further CFTC action included an order filing and settling charges against software protocol *bZeroX* and its founders, Tom Bean and Kyle Kistner. They were charged with offering illegal, off-exchange trading of digital assets, registration violations, and neglecting to adopt a customer ID program required by the Bank Secrecy Act compliance program. The CFTC also filed a civil enforcement action charging the *Ooki DAO*, which is the alleged successor to bZeroX, with violating the same laws as bZeroX allegedly violated, seeking, disgorgement, civil monetary penalties, restitution, trading and registration bans and permanent injunctions against further violations.

SECTION 3: Ripple & Terraform: The Evolving Legal Framework for Digital Assets

After years of apprehension from the blockchain and cryptocurrency industries, the U.S. District Court for the Southern District of New York issued an opinion on the cross-motion for summary judgment claims in *SEC v. Ripple Labs, Inc.*[58] In her opinion, District Judge Analisa Torres ruled Ripple's native token, XRP, "is not in and of itself a 'contract, transaction[,] or scheme[.]'"[59] This finding was a major victory for Ripple Labs and the entire cryptocurrency industry, as the fact that XRP was not by itself a security provided a cognizable path forward for digital assets to avoid securities registration

[57] *CFTC v. My Big Coin Pay, Inc.*, 334 F. Supp. 3d 492 (D.Mass. 2018)
[58] Securities and Exchange Commission v. Ripple Labs Inc., No. 20-cv-10832 (S.D.N.Y. July 13, 2023).
[59] *Id.* at 24.

requirements.[60] The judge rejected the SEC's token-as-security claim, which attempted to label XRP as a security in all instances, and instead looked at each form of transaction Ripple Labs made, and reached individual conclusions on whether the transactions violated securities laws.[61] XRP was distinguished multiple times as the "subject of an investment contract" rather than an investment contract itself.[62] This alone was a win for the industry, as the SEC had previously taken the stance that, without conducting individual analyses, most major cryptocurrencies were unregistered securities.[63] In declaring summary judgment against the token-as-security claim, the judge affirmed the prevailing sentiment among industry lawyers that each digital asset requires an individual assessment under the *Howey* test.[64]

The judge delved into each form of transaction, finding that in three of the four instances at issue, Ripple Labs was not required to register its transactions as a security.[65] Most importantly, Ripple's "programmatic sales" (sales of XRP on an exchange through the use of an algorithm) were not securities.[66] The court made much of the fact buyers and sellers were both conducting "blind" purchases where neither party knew the identity of the other. Thus, these sales could not have been made with a reasonable expectation of profit derived from the value of others because buyers were unaware if they were purchasing XRP from Ripple Labs directly.[67] Contributing to this finding, the Court noted less than 1% of global XRP trading was done through Ripple's programmatic sales. Thus, the vast majority of token holders did not make any purchase knowing that their money would be going to support the XRP community and increase the value of XRP.[68] Driving this point home, the court reasoned that a buyer's "speculative motive" is not evidence alone of an investment contract.[69] Therefore, tokens sold on exchanges, particularly in the secondary market, are unlikely to satisfy the third prong of the *Howey* test and thus would avoid securities registration requirements.

The ruling weakened the SEC's assertion that the cryptocurrency industry was a "wild west;" it is hard to believe that "the vast majority" of cryptocurrencies are

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[60] Scott Mascianica et al., *SEC v. Ripple: When a Security Is Not a Security*, HOLLAND & KNIGHT, https://www.hklaw.com/en/insights/publications/2023/07/sec-v-ripple-when-a-security-is-not-a-security (July 20, 2023).
[61] *Ripple Labs* No. 20-cv-10832 at 24.
[62] *Id.*
[63] *Exercise Caution with Crypto Asset Securities: Investor Alert*, SEC, https://www.sec.gov/oiea/investor-alerts-and-bulletins/exercise-caution-crypto-asset-securities-investor-alert (Mar. 23, 2023).
[64] *See* Andrew Bull & Tyler Harttraft, Cryptocurrency and Blockchain Law: SEC's Heightened Enforcement Against Digital Assets, 27 RICH. J.L. & TECH., no. 4, (2021).
[65] *Ripple Labs* at 14-15.
[66] *Ripple Decision Makes Waves Finding Some XRP Sales Not Securities*, BAKERHOSTETLER, https://www.bakerlaw.com/alerts/ripple-decision-makes-waves-finding-some-xrp-sales-not-securities (July 20, 2023).
[67] *Ripple Labs* at 23-24.
[68] BAKERHOSTETLER, *supra note 13.*
[69] *Ripple Labs* at 36.

unregistered securities[70] when the first major court case to address the issue concluded that XRP, a major cryptocurrency, was not in and of itself a security.

However, the ruling was not an unconditional success for Ripple Labs, and the SEC can claim some partial victory on its complaint against Ripple and its path forward against the industry should it decide not to alter course through a settlement or new direction. To start, Judge Torres concluded Ripple's institutional sales of XRP constituted a violation of the Securities Act and left open for a jury to decide whether Ripple's control people aided in those unlawful sales.[71]

Judge Torres' conclusion was based on the *Howey* test. The first prong, investment of money, is satisfied because the Institutional Buyers "provide[d] the capital" for XRP.[72] Because the Institutional Buyers invested money in exchange for XRP, Ripple has no standing to argue this prong.[73]

The second prong of *Howey,* "the existence of a 'common enterprise,'" was satisfied because horizontal commonality existed because Institutional Buyers' investments were pooled together and their ability to profit was tied to Ripple.[74] The Court ruled that Ripple's accountants pooled all the XRP-related proceeds together and used it to fund Ripple's operations.[75] Judge Torres moved to the Institutional Buyers' ability to profit was "tied to Ripple's fortunes and the fortunes of other Institutional Buyers because all Institutional Buyers received the same fungible XRP."[76] Because Ripple used these funds to increase the value of XRP, and all Institutional Buyers profited together when XRP rose, horizontal commonality existed.[77] Thus, the second prong was satisfied.

The third and fourth prongs, whether the economic reality surrounding Ripple's Institutional Sales led the Institutional Buyers to have a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others, were satisfied due to the substantial amount of marketing done by Ripple. Beginning in 2013, Ripple began marketing XRP to investors with statements from Ripple leadership indicating that Ripple will "add… the most value to the protocol."[78] Ripple's "overall messaging" to Institutional Buyers was that XRP was speculative, but could be trusted to increase in

[70] Practicing Law Institute. "The SEC Speaks 2022".
[71] *Ripple Labs* No. 20-cv-10832 at 22.
[72] *Id*. at 16.
[73] *Id*.
[74] *Id*. at 17 (citing *Revak v. SEC Realty Corp*., 18 F.3d 81, 87 (2d Cir. 1994)).
[75] *Id*. at 17.
[76] *Id*. at 17-18.
[77] *Id*. (citing *Telegram*, 448 F. Supp. 3d at 369–70).
[78] *Id*. at 20.

value due to Ripple's efforts.[79] Finally, the Court opined on the fact that Institutional Buyers would not agree to lock-up periods if XRP was "used as a currency or for some other consumptive use."[80] In other words, why would investors freeze their funds if they did not expect a profit at the end of the lock-up? The most logical conclusion is investors would not lock-up their assets for a commodity or currency token. Thus, the Court concluded all four prongs of *Howey* were satisfied. Institutional Sales of XRP were in violation of Section 5 of the Securities Act.[81]

The main take-away from these SEC administrative rulings and judicial precedent is: (1) tokens that satisfy the *Howey* test are securities; (2) each token is evaluated on a case-by-case basis, but this theory has been recently pushed back on by the SEC; (3) utility and the lack of an investment does not absolve tokens from a securities designation; and (4) tokens that instill an expectation of profits due to the efforts of the token issue will almost always result in a securities designation.

New York continues to be the venue for a large amount of other regulatory enforcement litigation arising from crypto, including the recent Terraform Labs matter[82] which recently went to trial where a jury held Terraform Labs, and its founder, liable for "defrauding investors in crypto asset securities."[83]

These enforcement actions are often venued in Federal Court, in New York's Southern District of New York ("SDNY"), as well as criminal matters such as the Mango prosecution arising out of allegations of commodities fraud, commodities market manipulation, and wire fraud in connection with the manipulation on the Mango Markets digital asset exchange.[84] This overlap of enforcement and criminal actions in the SDNY is not limited to the DOJ and SEC. For example, recently KuCoin, a digital asset exchange, was charged by the CFTC with multiple violations of the Commodity Exchange Act (CEA) and CFTC regulations in SDNY.[85] The DOJ also has commenced a criminal action against KuCoin, also pending in the SDNY, with failing to register with the appropriate U.S. government entities and failure to maintain an anti-money laundering database.[86] This report delves deeper into the impact of emerging technologies including digital finance and currency on the criminal justice system.

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[79] *Id*. at 21.
[80] *Id*. at 22.
[81] *Id*.
[82] https://www.sec.gov/files/litigation/complaints/2023/comp-pr2023-32.pdf
[83] https://www.sec.gov/news/statement/grewal-statement-040424
[84] https://www.justice.gov/usao-sdny/pr/man-convicted-110-million-cryptocurrency-scheme; *See*, https://www.sec.gov/news/press-release/2023-13; US. V. Wahi https://www.justice.gov/media/1233526/dl; *See also,* SEC v. Wahi https://www.sec.gov/files/litigation/complaints/2022/comp-pr2022-127.pdf
[85] https://www.cftc.gov/media/10421/enfkucoincomplaint032624%20/download
[86] https://www.justice.gov/media/1345231/dl

To the extent that any of the actions conflict, the Second Circuit and possibly the Supreme Court, will have the final say. Nonetheless, it is evident that crypto related litigation is highly prevalent in New York, both in Federal and New York State Court.[87]

SECTION 4: Binance and the Regulatory Scrutiny of Digital Assets

More recently, the SEC categorized a token as a security in additional actions brought against Binance and Coinbase. Both complaints provide insight into the SEC's considerations for when a token is a security.

In *Binance*, the SEC alleged Binance offered and sold unregistered securities to US customers through its sale of various digital assets, including Binance's native token—BNB—and other major cryptocurrencies.[88] In its complaint, the SEC alleges Binance engaged in the offer and sale of four native unregistered securities: the native Binance token BNB, the stablecoin BUSD, Binance's savings programs Simple Earn and BNB Vault, and its native staking program. In addition, the SEC alleges Binance offered at least ten unregistered securities on its exchange affiliated with other platforms, including major tokens such as SOL, ADA, and ALGO.[89] After its ICO (initial coin offering) of BNB raised roughly $15 million in two weeks in 2017, Binance launched the Binance.com Platform, where customers may engage in spot-trading and OTC trading services for various cryptocurrencies.[90] BNB has been the native token on the Binance platform since its inception, and its value to purchasers derives from its relationship with Binance itself.

According to the SEC, Binance's own representations make it clear BNB is a security. BNB was "offered and sold as a security because Binance touted an investment in BNB as an investment in Binance's efforts to create a successful crypto asset trading platform centered around BNB."[91] The SEC points to the original Binance whitepaper which alluded to BNB as an "exchange token" which the SEC defines as "a crypto asset associated by its issuer with a crypto asset trading platform that the issuer markets as an investment in the success of the platform itself."[92]

Also noted was Binance's pre-ICO "touting" of the potential returns BNB holders could expect due to platform growth.[93] The Binance whitepaper labeled ICO participants

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[87] *See*, People of the State of New York v. Vino Global Limited D/B/A Coinex; https://ag.ny.gov/sites/default/files/memorandum_of_law_in_support_of_petition._nyoag_v._vinogloballtd_dba_coinex.pdf
[88] Complaint, SEC v. Binance Holdings Ltd., No. 1:23-cv-01599 (D.D.C. filed June 5, 2023)
[89] *Id.* at 352.
[90] *Binance Coin (BNB) ICO*, Coincodex (accessed July 14, 2023) https://coincodex.com/ico/binance-coin/.
[91] Complaint, SEC v. Binance Holdings Ltd. at 82.
[92] *Id.*
[93] *Id*. at 289.

as investors, described how the Binance leaders' expertise gives the platform strategic advantages for growth, and how the founding members had experience in the securities industry.[94]

Binance's own words were continually used against them. Next, the SEC turned to Binance's assertion it would manipulate the price of BNB by burning half the total supply of BNB over time by purchasing it with the profits of Binance.[95] By increasing demand by forcibly removing supply, the SEC claimed, "Binance gave BNB investors a reasonable expectation of profits because lower demand tends to increase price, similar to how a stock issuer uses profits to provide dividends to investors or to execute stock buybacks to increase the ownership stake of remaining shareholders."[96] Binance, in the view of the SEC, had tied BNB's success to the Binance platform's success.[97]

Finally, the SEC used former Binance CEO Changpeng Zhao's public claims that through Binance's efforts, BNB's value will continue to rise. In multiple interviews, Zhao told investors, "Binance's efforts to make the Binance.com Platform more profitable will increase BNB's value."[98] The SEC identified dozens of occasions where Zhao or Binance leadership described the work the Binance platform was doing to increase the value of the BNB token.

In general, the SEC had for years been quite clear on one point: each token is evaluated on a case-by-case basis. However, this theory does not line up with the SEC's recent approach against Binance and Coinbase.[99] In *Binance*, the SEC did not limit its hunt to just BNB. As described earlier, the SEC alleges Binance offered at least ten unregistered securities on its exchange that were affiliated with other platforms.[100]

This strategy offers the SEC some advantages. It hypothetically can lose on all its claims against the native BNB, yet still prevail both on the case and its larger movement to regulate the industry. A more concerning issue is the SEC has either forgotten or abandoned its original assertion that the securities designation is a fact-specific test. Both former Chairwomen Mary Jo White, went on to represent Ripple Labs, and the DAO report explained the designation of digital assets as securities required an individual application

[94] *Id*. at 290-91.
[95] *Id*. at 295.
[96] *Id*.
[97] *Id*.
[98] *Id*. at 302.
[99] On June 6th, just a day after filing its complaint against Binance, the SEC sued the largest cryptocurrency exchange in the United States, Coinbase Inc. Coinbase is a publicly traded Foundation operating a cryptocurrency exchange where American customers can purchase and trade many major cryptocurrencies like bitcoin and ether on a secondary market. Much like its lawsuit against Binance, the SEC accuses Coinbase of offering and selling unregistered securities and failing to register its business as an exchange, broker-dealer, and clearing agency. However, it does not allege that Coinbase offers any native unregistered security token like BNB.
[100] *Id*. at 350.

of the *Howey* test for each asset, and decried the notion that digital assets as a concept constituted securities by definition.[101] Instead, the SEC complaint against Binance abandons the individualized framework, resorting to sweeping statements classifying third-party digital assets as securities without more than a few paragraphs of explanation and certainly no independent complaints. Along with practical complications, the SEC has created only more confusion by contradicting its previous stance on the nature and process to evaluate digital assets as securities.

SECTION 5: SEC Approves Spot Bitcoin ETFs

In January 2024, the SEC approved the trading of spot bitcoin exchange-traded funds (ETFs), marking the first occasion such investments have received approval from the regulatory body.[102] The approvals were granted to a range of companies including BlackRock, Fidelity, Grayscale, Bitwise, VanEck, Valkyrie, Invesco, WisdomTree, Franklin Templeton, Hashdex, Ark Invest, and 21Shares. SEC Chairman Gary Gensler clarified, "While we approved the listing and trading of certain spot bitcoin ETP shares today, we did not approve or endorse bitcoin."[103] He went on to state "As I've said in the past, and without prejudging any one crypto asset, the vast majority of crypto assets are investment contracts and subject to the federal securities laws."[104] Gensler made clear his position is that "bitcoin is primarily a speculative, volatile asset that's also used for illicit activity including ransomware, money laundering, sanction evasion, and terrorist financing."[105] These issues are addressed infra in Article 4 of this report.

The journey toward the approval of spot Bitcoin ETFs in the United States has been complex and lengthy. It began in 2013 with a submission from the Winklevoss Bitcoin Trust, which was ultimately declined by the SEC.[106] The SEC consistently rejected numerous applications for spot-based bitcoin ETFs, citing the unregulated nature of bitcoin and the consequent investor risks.

The tide turned when crypto asset manager Grayscale took legal action against the SEC to demand more transparency and a shift in stance.[107] This lawsuit led to a

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[101] *See* Letter from Mary Jo White, *supra* note 8; DAO Report, *supra* note 5.
[102] U.S. Securities and Exchange Commission, Release No. 34-99306 (Jan. 10, 2024) https://www.sec.gov/files/rules/sro/nysearca/2024/34-99306.pdf.
[103] Gary Gensler, "Statement on the Approval of Spot Bitcoin Exchange-Traded Products," (Jan 10, 2024), https://www.sec.gov/news/statement/gensler-statement-spot-bitcoin-011023.
[104] *Id.*
[105] *Id.*
[106] Nathan Reiff, "SEC Rejects Winklevoss Bitcoin ETF Plans," Investopedia, (Jul. 30, 2018), https://www.investopedia.com/news/sec-rejects-winklevoss-bitcoin-etf-plans/.
[107] Grayscale Invs., LLC v. Sec. & Exch. Comm'n, 82 F.4th 1239 (D.C. Cir. 2023) https://www.cadc.uscourts.gov/internet/opinions.nsf/32C91E3A96E9442285258A1A004FD576/$file/22-1142-2014527.pdf

significant development: the U.S. Court of Appeals for the District of Columbia determined that the SEC did not properly justify its decision to reject Grayscale's proposed exchange-trained product (ETP), finding that the SEC's actions were "arbitrary and capricious" in disapproving the proposed Bitcoin ETP.[108] As a result, the court overturned the Grayscale Order and remanded it back to the SEC. Following this, the SEC decided to authorize the trading of spot Bitcoin ETFs as the most logical step forward.[109] This decision came after the appellate court's finding, which challenged the SEC's prior stance and paved the way for the regulatory approval of these financial products.[110]

SECTION 6: Analysis of the Proposed Bill Lummis-Gillibrand Responsible Financial Innovation Act

The Lummis-Gillibrand Responsible Financial Innovation Act represents a significant stride towards the integration of digital assets within the framework of U.S. financial regulations, marking a pivotal moment in the evolution of the Web3 and cryptocurrency landscape.[111] Crafted by Senators Cynthia Lummis and Kirsten Gillibrand, this bipartisan bill seeks to establish a comprehensive regulatory environment for digital assets, addressing crucial aspects of the cryptocurrency ecosystem such as consumer protection, regulatory clarity, and innovation encouragement.[112]

Historical Context and Development:

The emergence of the Act can be traced back to the growing recognition of digital assets and cryptocurrencies as formidable forces in the global financial system. Over the years, the rapid expansion and the increasingly mainstream adoption of these technologies underscored the need for clear regulatory frameworks to safeguard investors, support innovation, and ensure market integrity. In response to these challenges, the Lummis-Gillibrand Act was proposed as a means to bridge the gap between traditional financial regulatory structures and the novel dynamics introduced by digital assets.

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[108] Dechert LLP, "D.C. Circuit Finds SEC Acted "Arbitrarily and Capriciously" in Disapproving Proposed Bitcoin ETP," (Sep. 13, 2023) https://www.dechert.com/knowledge/onpoint/2023/9/d-c--circuit-finds-sec-to-have-acted--arbitrarily-and-capricious.html.

[109] Gensler, *supra* note 74; Shenna Peter, "Thailand's SEC Greenlights Investment From Institutional and Wealthy Individuals in Crypto ETFs," (Mar. 12, 2024) https://www.sec.gov/news/statement/gensler-statement-spot-bitcoin-011023#.ZaSR6EEHGFM.mailto; https://www-coindesk-com.cdn.ampproject.org/c/s/www.coindesk.com/policy/2024/03/12/thailands-sec-greenlights-investment-from-institutional-and-wealthy-individuals-in-crypto-etfs/amp/.

[110] U.S. Securities and Exchange Commission, "SEC Charges 17 Individuals in $300 Million Crypto Asset Ponzi Scheme Targeting the Latino Community," (Mar. 14, 2024) https://www.sec.gov/news/press-release/2024-35.

[111] *See* S. 4356, 117th Cong. (2022).

[112] *See id.*

Key Provisions and Goals:

The Act is designed to bring clarity to the regulatory roles of the SEC and the CFTC concerning digital assets.[113] By delineating the oversight responsibilities between these two regulatory bodies, the Act aims to reduce ambiguity and create a more predictable legal environment for entities operating within the crypto space.

One of the core objectives of the Lummis-Gillibrand Act is to foster an atmosphere conducive to innovation while ensuring robust consumer protections are in place. This includes establishing clear rules around the issuance and trading of digital assets, implementing safeguards against market manipulation, and promoting transparency within the cryptocurrency industry.

Impact and Future Implications:

Should it be enacted, the Lummis-Gillibrand Responsible Financial Innovation Act could serve as a catalyst for significant change within the U.S. and potentially the global digital asset markets. By providing a clear regulatory framework, the Act not only aims to protect consumers and investors but also to solidify the United States' position as a leading hub for cryptocurrency and blockchain innovation. Moreover, by addressing key regulatory uncertainties, this Act could pave the way for more businesses and investors to participate confidently in the digital asset space. As digital assets continue to evolve and reshape the contours of the global financial landscape, legislative efforts like this play a crucial role in shaping the future of finance, ensuring that innovation thrives in a secure, transparent, and regulated environment.

A. Regulatory Clarity and Jurisdiction

Central to the proposed Act is the precise delineation of regulatory duties between the SEC and the CFTC, with the latter being accorded enhanced jurisdiction over cryptocurrencies.[114] This pivotal restructuring is anticipated to bring a new era of regulatory clarity for Web3 businesses, necessitating a keen adherence to CFTC regulations for crypto assets not classified as securities.

One of the main focuses of the proposed Act is to ensure consumer protection and a market integrity authority. This would be accomplished by the inauguration of a dedicated authority to supervise crypto asset intermediaries signals a shift towards more stringent regulatory oversight. This development implies that Web3 businesses, especially those functioning as intermediaries, will be navigating through an augmented

[113] *See id.*
[114] *See id.*

landscape of regulatory demands, potentially influencing their operational methodologies and compliance frameworks.

B. Reconfiguring Business Models

Crypto Asset Intermediaries and Payment Stablecoin Issuers: By imposing rigorous requirements on intermediaries, including mandatory proof of reserve and explicit transaction disclosures, the Act aims to instill a greater degree of transparency and security in consumer assets.[115] This necessitates Web3 entities to potentially recalibrate their business practices to align with these heightened standards.

The Act delineates issuing rights for the payment of stablecoins to depository institutions or their subsidiaries, a move that could dramatically reshape the stablecoin segment of the Web3 market.[116] This regulatory stance may catalyze a reconfiguration of stablecoin issuance, centralizing it within the realm of traditional financial institutions and thereby altering the competitive dynamics within the Web3 ecosystem.

C. Tackling Illicit Finance

Incorporating measures to combat illicit finance, the Act enhances oversight mechanisms, such as the regulation of cryptocurrency ATMs and the formation of the Independent Financial Technology Working Group.[117] Web3 businesses are thus prompted to adopt robust anti-money laundering (AML) and know your customer (KYC) protocols, aligning with the Act's objectives to curb illicit financial activities.

D. Tax Code Modifications

The Act's proposed amendments to the tax treatment of digital asset transactions, including the exclusion of small transactions from taxable events and the application of wash sale rules, present a nuanced impact on Web3 entities and their clientele.[118] These changes could stimulate the everyday use of cryptocurrencies while simultaneously influencing trading behaviors.

The Lummis-Gillibrand Responsible Financial Innovation Act stands as a transformative piece of legislation, poised to redefine the regulatory framework surrounding digital assets and cryptocurrencies. By offering clarity, enhancing consumer protection, and nurturing innovation, the Act sets a foundation for the sustainable growth of the Web3 industry. As these regulations come into effect, Web3 businesses will

[115] *See id.*
[116] *See id.*
[117] *See id.*
[118] *See id.*

encounter both challenges and opportunities, necessitating strategic adaptation to thrive in this evolved digital finance landscape.

Anticipating the Impact of the Lummis-Gillibrand Act

The Lummis-Gillibrand Responsible Financial Innovation Act is poised to significantly shape the future landscape of digital assets and cryptocurrencies in the United States. Through predictive analysis, drawing on expert opinions and the examination of similar legislative frameworks in other jurisdictions, we can anticipate the potential effects of this act on the Web3 ecosystem. If this Act is adopted, it will provide regulatory clarity and market stability, consumer protection and confidence, innovation and sector growth, stablecoin regulation, global regulatory leadership and DeFi and niche sectors.

Much like the positive outcomes observed with Singapore's regulatory framework for digital assets, the Act's clear guidelines could similarly stabilize the U.S. market, attracting more institutional investors and enhancing overall market stability.[119] Sources like the Monetary Authority of Singapore's reports on digital asset regulation could offer comparative insights.[120]

By establishing robust consumer protection mechanisms, the Act aligns with global trends towards safeguarding retail investors in the digital asset space.[121] The European Union's Markets in Crypto-Assets (MiCA) framework serves as a parallel, emphasizing investor protection and operational transparency.[122]

The inclusion of a regulatory sandbox in the Act echoes successful models like the UK's Financial Conduct Authority sandbox, which has been instrumental in fostering fintech innovation. This approach is likely to catalyze new developments in areas such as DeFi and blockchain technology.

The Act's approach to stablecoin issuers may encourage a more consolidated and regulated stablecoin market.[123] Reflecting on the G7's guidelines on digital payments, the Act's emphasis on stability and compliance could lead to a more reliable stablecoin ecosystem.

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[119] *See id.*
[120] https://www.mas.gov.sg/news/media-releases/2023/mas-proposes-framework-for-digital-asset-networks
[121] *See* S. 4356, 117th Cong. (2022).
[122] https://www.esma.europa.eu/esmas-activities/digital-finance-and-innovation/markets-crypto-assets-regulation-mica
[123] *See* S. 4356, 117th Cong. (2022).

The Act could establish the U.S. as a frontrunner in digital asset regulation, setting standards for global regulatory harmonization. The U.S.'s leadership might inspire collaborative efforts towards international regulatory standards, as discussed in forums like the G20 and international fintech symposiums.

The Act's focus on emerging sectors like DeFi could formalize regulatory paths for these innovations, encouraging growth within a structured legal framework. Observations from JPMorgan Chase's and other institutional entities' interest in DeFi could offer comparative analysis on potential outcomes.

In summary, the Lummis-Gillibrand Act could mark a significant evolution in the U.S. digital assets market, balancing innovation with investor protection. Its effects could ripple globally, influencing regulatory approaches and fostering a more stable, innovative, and inclusive digital asset ecosystem.

SECTION 7: New York Department of Financial Services Approach

Over the last 5 years, The NYDFS has entered into consent orders, settled regulatory compliance cases, and filed complaints against Gemini[124] (related to the Gemini Earn program which cost investors more than $3 billion dollars in losses), Genesis Global Trading[125] (for currency and cybersecurity violations), KuCoin[126] (for failure to register within the state as a securities or commodity broker-dealer), CoinEx[127] (for failure to register within the state as a securities or commodity broker-dealer), Coin Café[128] (for usurious fees for storage and access to their wallet storage service), BitPay[129] (for violations of state cybersecurity regulations under NYCRR §§ 500.1 to 500.23), and Binance.US[130] (objecting to an asset purchase agreement from the bankrupt Voyager Digital) among various others.

The NYSDFS in November 2023 issued new guidance on listing and delisting policies for virtual currency.[131] This policy focuses on market stability and retail investor

[124] *In re: Genesis Global Holdco, LLC, et al.*, Case No: 23-10063 (SHL), retrieved from: https://rb.gy/tey85u

[125] *Id.*

[126] *New York v. MEK Global Limited and PHOENIXFIN PTR Ltd., d/b/a KuCoin*, Index No. 450703/2023, retrieved from: https://ag.ny.gov/sites/default/files/settlements-agreements/kucoin-stipulation-and-consent.pdf

[127] *New York v. Vino Global Ltd. d/b/a CoinEx,* Index No. 450502/2023, retrieved from: https://ag.ny.gov/sites/default/files/settlements-agreements/coinex-agreement.pdf

[128] *In re: Investigation by Letitia James A.G. of New York of Coin Café, Inc., d/b/a "coincafe" and "coincafe.com"*, Assurance No 23-027, retrieved from: https://ag.ny.gov/sites/default/files/settlements-agreements/Coin%20Cafe%20AOD.pdf

[129] *In the Matter of BITPAY, INC.*, consent order, retrieved from: https://www.dfs.ny.gov/system/files/documents/2023/03/ea20230316_bitpay.pdf

[130] *In re: Voyager Digital Holdings, Inc., et al.*, Case No. 22-10943-MEW, retrieved from: https://cases.stretto.com/public/x193/11753/PLEADINGS/1175302222380000000157.pdf

[131] Adrienne A. Harris, Superintendent of Financial Services, *Industry Letter*, New York Department of Financial Services (Nov. 15, 2023), retrieved from: https://www.dfs.ny.gov/industry_guidance/industry_letters/il20231115_listing_virtual_currencies

protections, through a ‘slow and steady’ listing and delisting process. This process is akin to skipping a stone rather than just chucking it into the water, to minimize the market level ripples. As well, the NYSDFS Superintendent Adrienne A. Harries stated, “[T]his guidance continues the Department’s commitment to an innovative and data-driven approach to virtual currency oversight, keeping pace with industry developments, . . .”[132]

SECTION 8: VARA's Approach to Crypto Regulation

The Dubai Virtual Asset Regulatory Authority (VARA) was established to provide a comprehensive regulatory framework for Virtual Asset Service Providers (VASPs) in Dubai. This initiative came in response to the growing prominence of virtual assets (such as cryptocurrencies) and the need for robust governance structures to ensure their safe and effective use within the financial ecosystem.

The formation of VARA marks a significant step by Dubai to position itself as a leading global hub for the virtual assets sector. Recognizing the transformative potential of blockchain and other related technologies, Dubai aimed to create a conducive environment for innovation while safeguarding market integrity and protecting investors.[133]

VARA's mandate encompasses a wide range of regulatory and supervisory functions, from licensing VASPs to monitoring their operations, to ensure compliance with established legal and regulatory standards.[134] This involves setting clear guidelines on the operational, technical, and security practices that VASPs must adhere to, promoting transparency and trust in the virtual assets market.

VARA Requirements

VARA mandates that VASPs adhere to stringent company structure and governance standards, as detailed in the Company Rulebook. These standards ensure clear and effective oversight fostering a transparent, secure, and orderly virtual asset market**.**

VARA requires strict adherence to the Company Rulebook, which outlines specific requirements for VASPs concerning company structure, governance, and operational conduct. This includes adherence to additional rule books which address compliance and risk management, technology and information, and market conduct, ensuring a comprehensive regulatory approach.

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[132] *Id.*
[133] *See* Virtual Assets Regulatory Authority, https://www.vara.ae/en/, (last visited Apr. 5, 2024).
[134] *See* Virtual Assets Regulatory Authority, https://rulebooks.vara.ae/rulebook/rulebooks, (last visited Apr. 5, 2024).

The ownership and governance rules require that VASPs must have a clear and transparent structure. These companies must maintain a company structure conducive to effective VARA oversight, ensuring the sound and effective operation of the VASP, including its virtual asset activities.[135] VASPs are required to establish and maintain a legal entity within Dubai, adhering to one of the legal forms approved by a commercial licensing authority in the Emirate. Additionally, they must have a clear chain of ownership, delegated authority, and associated voting powers must be maintained, allowing VARA to easily identify any controlling entities and ultimate beneficial owners (UBOs).[136] VASPs employing complex structures, including trusts, nominee arrangements, or decentralized autonomous organizations (DAOs), must provide detailed information to VARA. This includes the reasons for such structures, the relationship between the VASP and relevant DAOs, and any potential compliance impacts.[137] Lastly, with regard to governance and ownership any material changes to the company structure or adoption of decentralized governance relating to VA activities require VARA's prior written approval.[138] VASPs must submit detailed information on new controlling entities, group entities, and UBOs as requested by VARA, along with compliance with any additional conditions or restrictions imposed by VARA.[139]

The Rulebook specifies the structure and responsibilities of the company board and senior management, emphasizing the need for individuals who meet the "Fit and Proper Persons" criteria.[140] It outlines procedures for their selection, induction, and ongoing assessment to ensure effective governance and compliance.[141]

The VASPs must meet specific paid-up capital requirements, maintain net liquid assets, and secure adequate insurance to mitigate operational and financial risks.[142] These requirements are calibrated based on the scope of VA activities conducted by the VASP.[143]

Comprehensive policies and procedures for risk management must be established, including internal controls, segregation of duties, and conflict of interest management.[144] This framework is designed to safeguard against operational, financial, and compliance risks.[145]

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[135] *See* Virtual Assets Regulatory Authority, *supra* note 93.
[136] *See id.*
[137] *See id.*
[138] *See id.*
[139] *See id.*
[140] *See id.*
[141] *See id.*
[142] *See id.*
[143] *See id.*
[144] *See id.*
[145] *See id.*

By establishing these rules, VARA ensures that measures are put in place to protect client assets, including requirements for maintaining reserve assets and ensuring transparency in transactions with related parties.[146] Guidelines for outsourcing arrangements are enforced to ensure that outsourced services do not compromise the integrity or security of VA operations.[147]

Finally, the Rulebook provides for orderly wind-down procedures to protect stakeholders in the event of a VASP's insolvency or voluntary discontinuation of business, underlining the importance of maintaining a stable and secure virtual asset market.[148]

SECTION 9: Navigating the Future of Digital Asset Regulation

The legal proceedings of *SEC v. Ripple Labs, Inc*. and the SEC's actions against Binance and Coinbase have underscored the complexities and challenges of regulating digital assets in the evolving landscape of Web3 and decentralized technologies. These cases highlight the need for individual assessments under the *Howey* test to determine the status of digital assets and emphasize the importance of nuanced legal evaluations within the digital asset ecosystem. As the digital asset industry continues to grow and diversify, it becomes increasingly clear that a one-size-fits-all approach to regulation is inadequate.

The *Ripple* case, in particular, is a pivotal reference point for understanding the industry's legal and regulatory challenges. It demonstrates the necessity for clear and comprehensive legal frameworks that can adapt to the unique characteristics of digital assets. The case also highlights the importance of collaboration between regulators, industry stakeholders, and legal professionals to ensure that regulations are effective, fair, and conducive to innovation.

As we move forward, the United States and New York must establish a more robust and effective legal and regulatory framework for digital assets. This report recommends enacting clear federal legislation on digital assets, improving regulatory oversight by the SEC, establishing a regulatory sandbox for digital assets, and fostering innovation and collaboration. These recommendations aim to promote innovation while ensuring market integrity and investor protection.

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[146] *See id.*
[147] *See id.*
[148] *See id.*

By addressing digital assets' challenges and opportunities, the United States and New York can position themselves as leaders in the global digital economy. The legal and regulatory framework must evolve to keep pace with technological advancements, ensuring that the potential of digital assets is fully realized while mitigating the risks associated with this new asset class.

Article 2: Navigating the New Web3 Business Frontier through the Sandbox Approach

SECTION 1: From Web1 to Web3: A Digital Evolution

The digital world has undergone a remarkable transformation, starting with Web1's static and solitary pages, advancing through Web2's dynamic social platforms and user-generated content, and arriving at the precipice of Web3. This new phase challenges the centralized control seen in Web2 by championing a decentralized, blockchain-driven architecture. Web3 isn't merely a step forward in technology—it's a redefinition of online interaction, prioritizing user control, data privacy, and direct transactions devoid of intermediaries.

Central to the Web3 revolution is blockchain technology—a decentralized public ledger system that ensures transparency, security, and integrity across a distributed network. Far surpassing its initial association with cryptocurrencies, blockchain's influence extends across industries, from finance to healthcare, by facilitating secure and efficient digital transactions. The intricate nature of blockchain technology beckons legal experts to grapple with its regulatory, intellectual property, and privacy implications, underscoring the need for a comprehensive legal understanding as this technology permeates various sectors.

SECTION 2: The Impact of Decentralization on Business

The emergence of Web3 opens vast avenues for business innovation and growth. Leveraging decentralized technologies, businesses can revolutionize operational efficiency, data accuracy, and consumer engagement. This paradigm shift invites companies to rethink strategies, from product development to customer interaction, in a landscape where transparency and security become distinguishing features.

The leap into the Web3 domain necessitates navigating a fluid regulatory landscape. Initiatives like the Dubai Virtual Asset Regulatory Authority (VARA)[149] and legislative efforts such as the Lummis-Gillibrand Act exemplify the attempts to frame regulation that fosters innovation while ensuring consumer and market protection.[150] These frameworks highlight the importance of aligning business practices with legal standards to harness Web3's potential responsibly.

SECTION 3: Steering Through Legal Complexities

As the Web3 ecosystem expands, businesses face the critical task of understanding the legalities that govern digital assets, smart contracts, and decentralized applications. The advent of regulatory sandboxes exemplifies a forward-thinking approach, offering businesses a controlled setting to experiment with Web3 technologies. This environment not only aids in demystifying legal uncertainties but also sets the stage for informed legislative development.

The transition towards Web3 signifies a pivotal moment in digital history, promising to reshape not just how businesses operate but also how they interact with consumers and navigate legal frameworks. The ongoing evolution of regulations and the proactive role of businesses and legal professionals in engaging with these changes are crucial for ensuring that the leap into Web3 results in a future marked by innovation, compliance, and enhanced consumer trust.

SECTION 4: Key Issues Stemming from Regulatory Uncertainty in the Web3 Space

As the Web3 ecosystem continues to expand, businesses operating within this domain face a significant challenge: regulatory uncertainty. This challenge stems from the rapid evolution of technology outpacing the development of comprehensive regulatory frameworks by governments worldwide. The lack of clarity and consistency in government regulations concerning cryptocurrencies and virtual assets presents a

[149] *See id.*
[150] Kristin Gillibrand, Press Release, July 12, 2023.

multifaceted problem for Web3 businesses, impacting their operational, legal, and strategic planning aspects.

The key issues stemming from this regulatory uncertainty are compliance risks, investor confidence, innovation is stifled and market fragmentation. Without clear regulations, Web3 businesses navigate a precarious landscape where the risk of non-compliance with future regulatory mandates is high. This uncertainty can lead to significant legal and financial repercussions, hindering the ability of these businesses to plan and execute their strategies effectively.

The absence of established regulatory guidelines can erode investor confidence in the Web3 space. Potential investors may be hesitant to engage with businesses in an environment perceived as legally ambiguous, limiting access to capital for startups and established entities alike.

Regulatory uncertainty can stifle innovation. Businesses may be reluctant to explore new opportunities or deploy cutting-edge technologies due to concerns about future legal constraints, thus potentially slowing the growth and maturation of the Web3 ecosystem.

The lack of a unified regulatory approach leads to a fragmented market, where businesses must navigate a patchwork of regional and national regulations. This fragmentation complicates operations for businesses with a global presence, increasing operational complexities and costs.

To address these challenges, it is imperative for regulatory bodies to engage with the Web3 community to develop clear, comprehensive, and adaptive regulatory frameworks. Such collaborative efforts should aim to protect consumers and ensure market integrity while also fostering innovation and growth within the Web3 ecosystem. Establishing a regulatory environment that balances these considerations is crucial for the long-term success and sustainability of businesses operating in the Web3 space.

SECTION 5: The Economic and Innovation Leap: Dubai's Crypto and VARA Success Stories

Dubai's strategic embrace of the digital economy, spearheaded by the Virtual Assets Regulatory Authority (VARA), has established the city and the United Arab Emirates as premier destinations for the burgeoning global crypto and virtual asset industry. This integration has not only positioned Dubai as a hub for innovation and regulatory excellence, but also spurred significant economic growth and attracted leading crypto companies worldwide.

Establishing a Regulatory Framework for Growth and Innovation

VARA's inception under the Virtual Assets Law, tied to the Dubai World Trade Centre Authority, marks a pivotal step in Dubai's commitment to becoming a leading global destination for virtual assets. The authority's creation of a favorable regulatory environment has been key to providing safety, robustness, and attractiveness for virtual asset service providers and investors. This clarity and security in regulation have been fundamental in fostering a thriving ecosystem for virtual assets, drawing in investments and encouraging companies to establish their operations in Dubai.

Success Stories Under VARA's Wing

One of the shining examples of VARA's positive impact is Aquanow, a Canada-based crypto infrastructure provider. Granted a VASP license by VARA, Aquanow has expanded its services to include broker-dealer, lending and borrowing, and management and investment services, thereby positioning Dubai as an integral player in its international strategy. This move underscores Dubai's appeal as a supportive environment for crypto companies seeking clear regulatory landscapes.

Further attesting to Dubai's status as a global crypto hub are companies like Binance, OKX, and Crypto.com, which have secured licenses from VARA, enhancing their operational and regulatory standing. These developments highlight the influx of leading firms to Dubai, attracted by its regulatory framework designed with an eye toward global best practices and local economic development.

Economic Boosts from Crypto and VARA

Dubai's proactive approach, led by VARA, has not only enhanced its regulatory framework but also significantly contributed to the city's economy. The establishment of VARA and the subsequent attraction of crypto businesses have played a crucial role in promoting innovation, investment, and collaboration within the international regulatory landscape. This environment has fostered growth in niche Web3 sectors such as DeFi and the metaverse, aligning with Dubai's broader economic strategies and contributing to the creation of a vibrant virtual asset ecosystem.

Dubai's strategic initiatives have laid the groundwork for a future where digital technologies foster greater transparency, security, and efficiency across all business facets. By blending regulatory foresight with an open invitation to global crypto enterprises, Dubai has not only solidified its position as a leading destination for crypto and virtual asset companies but has also stimulated economic growth, showcasing the city's role as a cornerstone of the digital finance world.

SECTION 6: Future Outlook

A. Navigating Regulatory Challenges

As the digital asset landscape continues to evolve, the New York State Bar Association (NYSBA) and stakeholders within the regulatory and legislative spheres, such as Senator Gillibrand's office, are positioned to play pivotal roles in shaping the future regulatory environment. Emphasizing compliance, fostering innovation, and preparing for future trends are crucial steps in navigating the regulatory challenges ahead.

Regulatory sandboxes, innovative frameworks allowing businesses to test novel products and services in a controlled environment under regulatory supervision, have emerged as a cornerstone in the evolution of digital finance. These testing grounds enable stakeholders to explore the potentials and implications of new technologies like blockchain and cryptocurrencies without the full burden of regulatory compliance that would apply under normal circumstances. This concept, drawing from the iterative testing approach commonly found in the tech industry, provides valuable insights for both regulators and innovators, ensuring that regulatory frameworks can adapt to technological advances while safeguarding consumer interests and maintaining financial stability.

Benefits of Digital Asset Regulation and Sandbox Initiatives

1. **Innovation and Economic Growth**: Regulatory sandboxes and clear digital asset regulations can foster innovation by providing a safe space for testing new products and services. This, in turn, can contribute to economic growth. The U.S. Department of the Treasury and the Office of the Comptroller of the Currency (OCC) have discussed the importance of supporting financial innovation while maintaining safety and soundness in the banking system.
2. **Attracting Investment**: A clear regulatory framework can make a country more attractive to investors interested in digital assets. By providing legal certainty and protections, investments in blockchain and fintech startups are likely to increase.
3. **Consumer Protection**: Regulatory frameworks designed with consumer protection in mind can help safeguard against fraud and misuse of digital assets. The Consumer Financial Protection Bureau (CFPB) often emphasizes the importance of consumer protection in financial innovation.
4. **International Standards and Cooperation**: Efforts towards regulatory harmonization can align with international standards, facilitating global cooperation and reducing cross-border friction. Documents and guidelines from international bodies like the Financial Action Task Force (FATF) often highlight the importance of global cooperation in regulating virtual assets.

Challenges of Digital Asset Regulation and Sandbox Initiatives

1. **Navigating Jurisdictional Complexity**: In the U.S., the dual state and federal regulatory systems add layers of complexity to regulating digital assets. Achieving harmonization between various state laws and federal guidelines poses a significant challenge.
2. **Keeping Pace with Technological Advancements**: Digital asset technologies evolve rapidly, making it difficult for regulations to keep pace. The challenge lies in creating flexible, adaptive regulatory frameworks that can accommodate future technological developments without stifling innovation.
3. **International Regulatory Divergence**: While striving for international cooperation, divergences in regulatory approaches between countries can create challenges for businesses operating globally. Ensuring compliance across different jurisdictions requires significant resources and legal expertise.
4. **Resource Allocation**: Developing and maintaining regulatory sandboxes and comprehensive digital asset regulations require significant resources. Government agencies must allocate sufficient funds and manpower to oversee these initiatives effectively.

In light of the evolving digital asset landscape and the critical role of regulatory frameworks in fostering innovation while ensuring consumer protection and market integrity, the New York State Bar Association (NYSBA) emerges as an instrumental player. Given its positioning within the heart of the financial world in New York, and housing some of the most experienced attorneys in the country, the NYSBA is uniquely equipped to lead initiatives that address the complexities of digital asset regulation. The establishment and refinement of regulatory sandboxes represent a forward-thinking approach to navigate the intricacies of this dynamic sector. These innovative frameworks offer a balanced avenue for testing new technologies under regulatory oversight, providing invaluable insights for both regulators and innovators.

As we stand at the cusp of a new era in financial innovation, it is recommended that the NYSBA take a proactive stance in advocating for the federal government to implement and apply regulatory sandboxes more broadly. Such advocacy could catalyze the adoption of adaptable, informed regulatory practices that are essential for the continued growth and development of the digital asset sector. By leveraging its expertise and influence, the NYSBA can champion the cause of regulatory sandboxes, thereby ensuring that the United States remains at the forefront of financial innovation, consumer protection, and market stability. This leadership role could not only facilitate the creation of a conducive environment for digital assets but also underscore the importance of legal and regulatory preparedness in harnessing the transformative potential of these emerging technologies.

Article 3: U.S. Federal Income Tax Considerations for Digital Assets

While a comprehensive discussion of the U.S. federal income tax treatment of digital assets is outside the scope of this report, this section describes two potential areas where market participants would benefit from guidance.

SECTION 1: Define taxable exchange

More detailed guidance on how to determine whether a digital asset transaction is a taxable exchange would be particularly helpful. In the absence of any such guidance, Congress might consider allowing taxpayers to report their digital asset gains and losses by expanding the applicability of the mark- to-market election under section 475(e)-(f) to "investors" in actively traded virtual currency. Currently, the mark-to-market election applies only to "dealers" and "traders" in virtual currency that is treated as an "actively traded commodity."

Background

The IRS treats virtual currency as property.[151] An exchange of properties generally is taxable only if the properties "differ[] materially either in kind or in extent" within the meaning of Treasury regulations section 1.1001-1(a).[152]

In *Cottage Savings v. The United States*, the Supreme Court determined that properties differ materially either in kind or in extent if they "embody legally distinct entitlements," even if the properties are economically equivalent to each other.[153]

It may sometimes be unclear how to apply *Cottage Savings*' "legally distinct entitlements" test to digital assets.

[151] IRS Notice 2014-21
[152] Treasury regulations Section 1001.
[153] *Cottage Savings v. United States*,499 U.S. 554 (1991).

For example, it is difficult for taxpayers to know whether onchain transactions are taxable events.

In August 2022, Treasury and the IRS issued proposed regulations that, if finalized in their current form, would require "digital asset middlemen" to report "sales" of digital assets on new Form 1099-DA. However, so long as there remain significant questions about what types of onchain transactions are taxable exchanges, market participants may reach conflicting views as to whether they are brokers for that purpose and which transactions (if any) they are required report.

Below we provide examples of several common types of digital asset transactions that may raise these issues.

Protocol upgrades

In CCA 202316008, which is widely believed by market participants to address Ethereum's "Merge," the IRS cited to *Cottage Savings* in concluding that a taxpayer who held a blockchain's native token did not have a taxable exchange by reason of the blockchain's protocol upgrade from proof of work to proof of stake.

Ethereum's Merge, which consisted of two hardforks executed simultaneously in September 2022, was itself the culmination of a broader protocol upgrade that began at least as early as the Beacon Chain hardfork in December 2020.[154] The Beacon Chain hardfork enabled ETH holders to stake their ETH and begin processing "empty" blocks alongside the proof of work Ethereum chain. The Merge required those staking validators to run software accepting transaction data from Ethereum execution clients while original Ethereum clients turned off their mining, block propagation, and consensus logic. As a result of the Merge, Ethereum validators now use a proof of stake consensus mechanism and Ethereum now burns base transaction fees, resulting in an automated dynamic monetary policy.[155]

Protocol developers, application developers, infrastructure providers, and validators worked together to limit the impact on Ethereum users of the Merge. For example, web3 wallet providers updated their software so that the "ETH" ticker referred to the proof of stake version and "ETHW" referred to the proof of work version, and the Ethereum Foundation, a Swiss nonprofit that owns the Ethereum

[154] It also included the Berlin hardfork in April 2021 and the London hardfork in September 2021.
[155] Very generally, during times of high network throughput, more ETH is burned than minted, reducing aggregate ETH supply, and during times of low network throughput, more ETH is minted than burned, increasing th aggregate ETH supply.

trademark and is dedicated to supporting the Ethereum ecosystem, advocated for the adoption of the proof of stake chain.

Although the Merge represented a significant protocol change that required substantial coordination among diverse market participants to minimize disruption to end- users. CCA 202316008 states that ETH was "unchanged by the protocol change."

The CCA can be read to stand for the proposition that protocol changes, in and of themselves, do not trigger a taxable exchange of the protocol's native token, regardless of how significant those changes are. While that proposition can be justified under *Cottage Savings*' focus on legal entitlements, it is unclear how far the CCA extends. Further, taxpayers generally may not rely on CCAs as precedent.

Because protocol upgrades are a commonplace occurrence in web3, we recommend that the IRS further study and clarify the circumstances (if any) under which a protocol upgrade should constitute a tax event to tokenholders and provide additional guidance.

Noncustodial wrapping

Noncustodial wrapping involves depositing one token (such as ETH) into software in exchange for a 1:1 pegged representation of the same token (such as wETH). Users can wrap or unwrap a token by (1) interacting directly with the wrapping software, (2) exchanging the token for its wrapped counterpart on a decentralized exchange, or (3) engaging a transaction that automatically wraps or unwraps a token within a series of actions.

Noncustodial wrapping is common in web3; as of November 2022, over 7% of all Ethereum transactions, or about 125 million transactions, involved wETH.[156] While there may be rationales to treat noncustodial wrapping transactions as nontaxable, there are no legal authorities directly on point. As mentioned above, *Cottage Savings* treats two properties as materially different in kind or in extent if they have different legal entitlements.

Custodial wrapping

Custodial wrapping involves depositing a token (such as BTC) with a custodian in exchange for the custodian's agreement to mint a new token contractually backed by the custodied token on a different blockchain (such as wBTC on Ethereum). Custodial

[156] See Stephen Tong, Formally Verifying the World's Most Popular Smart Contract (Nov. 18, 2022) ("As of block 15934960 (November 9, 2022), WETH has been in 125,581,756 transactions. This count includes all 'top-level' transactions which call the WETH contract at any point, including via an internal transaction."), https://www.zellic.io/blog/formal-verification-weth/

wrapping requires the assumption of counterparty risk, whereas noncustodial wrapping requires the assumption of software bug and hacking risk. As of March 23, 2024, there were over $10 billion of wBTC in circulation.[157] However, as with noncustodial wrapping, taxpayers do not have any clear guidance or direct authority to look to as to whether a custodial wrapping transaction is a taxable event.

Liquidity provision

Liquidity provision is a foundational component of much of decentralized finance: liquidity providers contribute tokens to automated software, which other users can interact with in various ways (such as engaging in token exchanges or token borrowings), often for a fee. In exchange for their contribution, liquidity providers typically receive either: (1) transferrable "bailment tokens" that represent the deposited tokens, plus fees streamed directly to their wallets; (2) transferrable tokens that can be redeemed for a portion of the assets (including accrued fees) held inside of the software; or (3) the ability to claim their portion of fees, and to remove their liquidity from the software, from time to time.

The U.S. tax treatment of liquidity provision is unclear. Under one approach, a liquidity provider could be treated as engaging directly in the activities of the applicable smart contract. If that approach were adopted, liquidity provision presumably would not be a taxable disposition. Under an alternative approach, the smart contract is deemed to have a tax "personality" separate from the liquidity provider that is not looked through.[158] If that approach were adopted, liquidity provision presumably would be a taxable disposition. It is also possible that different approaches are appropriate or applicable to different liquidity provision arrangements. [159]

Token borrowing

In a decentralized finance borrowing protocol, users who contribute tokens to software can "borrow" other tokens from the software up to a percentage of the value of the tokens they contributed and can reacquire tokens identical to the ones they contributed by replacing the borrowed tokens and paying a time-based usage fee.

The U.S. tax treatment of on-chain token borrowing is unclear. Under one theory, token borrowing is an exchange of one token for another, and therefore is a

[157]https://etherscan.io/token/0x2260fac5e5542a773aa44fbcfedf7c193bc2c599.
[158] See, e.g., Jason Schwartz, Squaring the Circle: Smart Contracts and DAOs as Tax Entities, https://www.friedfrank.com/uploads/siteFiles/Publications/Decentralized%20Autonomous%20Organizations%20_%20Decentralized%20Law.pdf (July 29, 2022) (suggesting some pooled smart contracts might be treated as foreign corporations that are not passive foreign investment companies).
[159] See, e.g., Jason Schwartz, The Latest DeFi Alpha Is Tax-Optimized Staking, https://www.friedfrank.com/uploads/documents/cc68fd4ecd02c64da95a5c0752355f73.pdf (May 25, 2022).

taxable exchange. Under an alternative theory, token borrowing is a deferred exchange of property for identical property and therefore is nontaxable under similar principles to those that led to the enactment of section 1058 of the Internal Revenue Code. It also is possible that some types of token borrowings are taxable exchanges, while others are not. Again, in the absence of clear guidance, taxpayers and their advisors may reach conflicting views.

SECTION 2: Taxation of consensus layer staking

Under current IRS guidance, block rewards rare taxed at their fair market value when a miner or staker has dominion and control over them.[160]

However, there remains significant uncertainty around ancillary questions.

Background on consensus mechanisms

A blockchain is a peer-to-peer network composed of multiple computers (nodes) running open-source software.[161] Although each node acts independently in its own economic interest, the software's incentives are designed so that an information ledger emerges from the nodes' aggregate actions. The incentives are collectively referred to as a "consensus mechanism."

Although each blockchain has its own design, there are broadly two kinds of consensus mechanisms: proof of work and proof of stake.

In a proof of work network, nodes—known as miners in this context—compete to solve a computational puzzle. The first miner to solve the puzzle gets to propose the next block of data for addition to the ledger. If the proposed data block does not contain any transactions that break the network's rules, like "double-spend" transactions or other falsified information, the other nodes validate the "winning" miner's block. In that event, the winning miner receives "block rewards." On the Bitcoin network, block rewards consist of: (1) newly minted BTC and (2) transaction fees. Newly minted BTC currently represents the majority of mining rewards. Transaction fees are fees users are required to pay to include their transactions in a block. If a miner's block is not approved, the miner will not receive any block rewards and, consequently, will be in a

[160] IRS Notice 2014-21 (mining rewards); Revenue Ruling 2023-14 (staking rewards).
[161] Open-source means the software is free to use, modify, and distribute.

net economic loss position after having incurred real-world resources to solve the computational puzzle.

In a proof of stake network, nodes—known as stakers in this context—lock up, or "stake," a material amount of the blockchain's native token in the software they run. The software selects a staker at random to propose a new block of data for inclusion on the ledger. As with proof of work, the other nodes approve the winning staker's block if it does not contain falsified information, and the winning staker receives block rewards. On the Ethereum network, block rewards consist of: (1) newly minted ETH and (2) "priority gas fees." Newly minted ETH represents the majority of staking rewards. Priority gas fees are fees some users pay in excess of a mandatory "base fee" for faster inclusion in a block. (Unlike Bitcoin, Ethereum's software protocol destroys, or "burns," base fees, thereby offsetting the inflationary effects of newly minted ETH.) If a staker's block is not approved (e.g., because the staker submitted falsified data), all or a portion of the staker's ante is devalued, or "burned."

IRS guidance

The IRS concluded in Notice 2014-21 that "when a taxpayer successfully 'mines' virtual currency, the fair market value of the virtual currency as of the date of receipt is includible in gross income." Similarly, in Revenue Ruling 2023-14, the IRS concluded that "[i]f a cash-method taxpayer stakes cryptocurrency native to a proof-of-stake blockchain and receives additional units of cryptocurrency as rewards when validation occurs, the fair market value of the validation rewards received is included in the taxpayer's gross income in the taxable year in which the taxpayer gains dominion and control over the validation rewards."

While Notice 2014-21 and Revenue Ruling 2023-14 provide important guidance, there remain significant uncertainties and such uncertainties could cause potentially inconsistent treatment among taxpayers.

First, the guidance does not provide detailed analysis for the conclusion. As a result, there remains significant confusion in the digital marketplace about whether, for example: (1) non-U.S. persons are subject to U.S. income or withholding tax when they earn block rewards through a U.S. delegate;[162] and (2) block rewards are taxed as

[162] Very generally, non-U.S. persons are subject to U.S. federal income tax on income effectively connected with the conduct of a trade or business within the United States, and are subject to 30% U.S. federal withholding tax (which may be reduced by an applicable income tax treaty) on U.S.-source fixed, determinable, annual, or periodical income that is not effectively connected with the conduct of a trade or business within the United States.

"unrelated business taxable income" to U.S. tax-exempt organizations.[163]

Second, many market participants are small taxpayers who may lack the resources (or for other reasons may not devote significant resources) to engage tax professionals to advise or litigate such issues. Conversely, taxpayers who can and do devote great resources will be better able to make alternative (more taxpayer favorable) positions, including potentially, those contrary to IRS guidance. In *Jarrett v. United States*,[164] for example, a home staker sued the IRS for a refund of the tax he paid on his newly minted block rewards, arguing that the rewards were self-created property instead of property received for services. The IRS contested Jarrett's refund suit, then granted his refund and successfully sued to dismiss the case on mootness grounds (with the result that no precedential decision was reached). Consistent treatment of similarly situated taxpayers is an important objective of the tax rules.

[163] Very generally, U.S. tax-exempt organizations are subject to U.S. federal income tax on unrelated business taxable income.
[164] No. 3:21-CV-00419 (M.D. Tenn. 2021

Article 4: Intellectual Property Considerations in Web3

The migration to Web3 introduces a complex landscape for intellectual property (IP) rights, challenging conventional enforcement mechanisms and necessitating a reevaluation of legal frameworks. This shift is primarily due to the decentralized nature of Web3, where blockchain technology underpins the creation, distribution, and ownership of digital assets.

In Web3, as characterized by its decentralized nature and reliance on blockchain technology, traditional copyright enforcement mechanisms encounter new challenges. The crux of these challenges lies in how digital works—such as art, music, and literature—are managed and transacted on blockchain ledgers. This shift necessitates a reevaluation of conventional copyright concepts, including ownership, distribution, and infringement, within this novel context.

Definition and Overview of NFTs:

Non-Fungible Tokens (NFTs) are unique cryptographic tokens recorded on a blockchain or similar distributed ledger system, providing the owner with rights in or access to one or more assets or entitlements. They offer a way to document ownership and authenticity of digital and physical assets, but also create potential for intellectual property infringement due to their immutable and decentralized nature.

Legal Frameworks and Challenges

Traditional intellectual property laws were not designed with digital assets like NFTs in mind. This means applying these laws can be complex. NFTs essentially represent ownership or proof of authenticity of a digital asset using blockchain technology. The legal challenge is to determine how existing copyright, patent, or trademark laws can govern the ownership, transfer, or licensing of NFTs. These complexities often require rethinking how intellectual property rights are structured in the digital age, considering the decentralized and often international nature of blockchain technology.

SECTION 1: Copyright Considerations in Web3 & for Digital Assets

Under traditional copyright law, copyright is automatically granted to the creator of an original work that is fixed in a tangible medium of expression. This law gives the creator exclusive rights to use, distribute, and reproduce the work, as well as to create derivative works. Enforcement mechanisms typically involve legal action against unauthorized use or distribution, relying on centralized institutions (such as courts and copyright offices) to adjudicate disputes and enforce rights.

NFTs may impact the minting, storage, marketing, and transfer of digital content, implicating copyright law. They offer possibilities for documenting authorship and enabling digital rights management but raise concerns about enforcing copyright in a decentralized environment.

A. Copyright Challenges with Digital Works

In Web3, works are often recorded on a blockchain—a decentralized ledger that eliminates the need for central authorities. While this enhances security and transparency, it also blurs traditional lines of copyright ownership. For instance, a digital artwork tokenized as a Non-Fungible Token (NFT) might be sold or transferred across the globe without easy recourse to centralized copyright registration systems.

Blockchain technology facilitates the easy and rapid distribution of digital works. Once a work is recorded on a blockchain, it can be copied or transferred without degradation of quality, challenging traditional copyright enforcement mechanisms which rely on controlling the distribution of physical copies.

The decentralized nature of Web3 complicates the detection of copyright infringement. Without centralized platforms monitoring copyright compliance, identifying and addressing copyright violations becomes more difficult. The immutable record of blockchain transactions provides a clear history of asset transfers, but it does not automatically police copyright violations.

Utilizing blockchain technology for digital rights management (DRM) allows creators to embed copyright information directly into the digital work or associated NFT. This can include smart contracts that help automate royalty payments or restrict unauthorized distribution. While restricting unauthorized distribution may be true with respect to NFTs (cryptographic tokens), it is not necessarily true of underlying expressive works, which remain as easy to copy as they were in Web2. Automated royalties have all but disappeared because of vexing technological challenges that

would require universal participation by marketplaces to overcome, providing a mechanism for rights enforcement that aligns with Web3's decentralized ethos.

DAOs can offer a community-driven approach to copyright management, where decisions regarding copyright enforcement and dispute resolution are made collectively by stakeholders. This model could facilitate a more adaptable and responsive copyright enforcement mechanism within the Web3 environment.

The global nature of Web3 and blockchain transactions necessitates international legal cooperation to address copyright challenges. One way to address this could be to develop standardized legal frameworks that recognize and enforce copyright across borders in the digital domains. While these same issues exist currently in the Web2 space, the development and increased use of Web3 seem to make them more pronounced and ripe for further consideration.

SECTION 2: Trademark Considerations in Web3 & for Digital Assets

A. Trademarks in Web3

The application of trademarks in Web3 transcends traditional branding paradigms. In this new environment, digital assets themselves can serve as brand identifiers, challenging the conventional application of trademark law.

Trademarks, traditionally understood as symbols, words, or phrases legally registered or established by use as representing a company or product, face new interpretations and challenges in Web3. Here, digital assets—ranging from digital art to virtual goods—can serve not only as commodities but also as identifiers of brand origin, pushing the boundaries of traditional trademark paradigms.

NFTs present new opportunities for brand extension into digital realms and challenges for trademark registration and enforcement. The USPTO report suggests that while NFTs can enhance brand interaction with consumers, they also increase the risk of trademark infringement on NFT marketplaces.[165]

Traditionally, trademark law serves two primary purposes: it protects the brand identity of companies, ensuring that consumers can distinguish between the products of different producers, and it prevents unfair competition by prohibiting other businesses from using similar marks that could confuse consumers. Trademark protection is

[165] https://www.uspto.gov/sites/default/files/documents/Joint-USPTO-USCO-Report-on-NFTs-and-Intellectual-Property.pdf

typically granted to marks used in commerce that are distinctive and non-functional, with rights established through registration with relevant authorities or through actual use in commerce.

B. Trademark Challenges and Adaptations in Web:

In Web3, digital assets like NFTs (Non-Fungible Tokens) and virtual goods become more than just items of trade; they act as brand identifiers. This blurs the lines between product and trademark, as these assets can carry the brand's identity directly within the digital or virtual environment. For example, a unique digital artwork or a specific virtual item might not only be valuable in its own right but also serve to identify its creator or the brand behind it.

The decentralized nature of blockchain and Web3 complicates jurisdictional issues related to trademark protection. Traditionally, trademark rights are territorial, meaning they are protected within the jurisdictions where they are registered or used. However, the global and borderless nature of blockchain technology challenges this principle, as digital assets can be traded and recognized worldwide without clear jurisdictional boundaries.

Enforcing trademark rights in Web3 poses practical challenges. The anonymity of blockchain transactions and the lack of centralized control make it difficult to identify and take action against infringers. Traditional enforcement mechanisms, such as cease and desist letters or litigation, may not be as effective in a decentralized environment where asset holders can be anonymous or spread across multiple jurisdictions.

Given the global nature of Web3, there is a growing need for international cooperation and harmonization of trademark laws to address the challenges of digital asset branding. Developing standardized protocols for the registration, recognition, and enforcement of trademarks across borders could help mitigate some of the jurisdictional challenges posed by Web3.

Legal frameworks may need to evolve to better accommodate the unique aspects of branding in Web3. This could involve rethinking the criteria for what constitutes a trademark, how trademark use is defined in a digital context, and how rights are established and enforced in decentralized networks.

The unique nature of digital assets on blockchain platforms necessitates a rethinking of how trademark law is applied. For instance, the use of a specific digital asset (e.g., a unique piece of digital art or a character in a virtual world) as a brand

identifier may require adaptations in trademark law to address issues of distinctiveness, use in commerce, and potential infringement in a decentralized context.

Leveraging smart contracts can offer new ways to enforce trademark rights in Web3. For instance, smart contracts could be programmed to verify the authenticity of a digital asset or enforce licensing agreements automatically, providing a mechanism for protecting trademarks without the need for centralized enforcement.

SECTION 3: NFTs and their intersection with IP Rights

This area presents a complex legal landscape that necessitates a nuanced understanding of both technological and legal principles. NFTs, which certify the unique ownership of digital assets such as artwork, music, or videos on a blockchain, introduce innovative opportunities for creators to monetize and manage the distribution of their works. The discussion revolves around the use of NFTs for managing and licensing patent rights. Although NFTs can facilitate these processes, there are concerns about the precision and reliability of such records on blockchain technologies.[166] These opportunities are accompanied by intricate legal challenges, especially regarding intellectual property rights.

In March 2024, the United States Patent and Trademark Office released a report on the intersection of intellectual property rights and NFTs.[167] Despite the challenges identified in the report, the office concluded that there is no current need to change IP laws to address the use of NFTs.[168]

A. Ownership vs. Intellectual Property Rights

Owning an NFT does not inherently grant the owner the copyright of the digital asset linked to the NFT. This critical distinction underscores the need for clarity about what rights NFT purchasers are acquiring. While the NFT certifies ownership of a unique digital token, the copyright — the legal right to control the use and distribution of the digital content — may still reside with its original creator or a designated copyright holder.

While purchasing an NFT, buyers often receive limited rights to the digital asset associated with the NFT. It's crucial to understand that the ownership of the NFT does not automatically grant ownership of the copyright or trademark associated with the

[166] *Id.*
[167] *Id* @72.
[168] *Id.*

digital asset itself. For example, buying an NFT of a digital artwork does not typically transfer copyright ownership of the artwork; it merely grants the NFT holder some usage rights, which should be clearly defined in the terms of sale. This distinction needs to be clearly communicated to prevent legal issues surrounding digital rights management.

The trading and monetization of NFTs tethered to digital content without proper authorization can lead to significant copyright infringement issues. Creators and sellers must ensure they have the legal rights to the digital content associated with their NFTs. This includes a clear articulation and agreement on the extent of rights being transferred in an NFT transaction to prevent unauthorized use and distribution of copyrighted digital content.

B. Enforceability and Jurisdictional Challenges.

The decentralized nature of blockchain and the global marketplace for NFT transactions introduce formidable challenges in enforcing intellectual property rights. The traditional legal framework, built around territorial jurisdiction, faces hurdles in addressing infringements that occur in a borderless, decentralized digital space. Determining jurisdiction and applicable law for disputes involving NFTs and associated digital content requires innovative legal approaches and potentially new legal doctrines to address the decentralized operations of blockchain technologies.

Enforcing intellectual property rights in a decentralized platform like blockchain presents unique challenges. Traditional enforcement mechanisms often rely on geographical jurisdictions to tackle infringements, but with blockchain, an infringer can be anywhere in the world, and the data related to the infringement is distributed across a global network of nodes. This dispersal complicates the process of identifying, targeting, and taking legal action against infringers or unauthorized uses of digital assets.

Addressing the legal challenges posed by NFTs and IP rights necessitates the development of clear, comprehensive legal frameworks. These frameworks should outline the rights transferred with NFT sales, including any limitations on the use and distribution of the associated digital content.

Given the global nature of NFT transactions, once again, leading us to recognize the pressing need for international legal cooperation and harmonization of laws governing digital assets and intellectual property rights. This includes agreements on jurisdictional principles and enforcement mechanisms that are adaptable to the decentralized, digital nature of NFTs.

Educating creators, collectors, and legal professionals about the intricacies of NFTs and intellectual property rights is crucial. Increased awareness can help prevent unintentional infringements and promote a more legally compliant ecosystem for NFTs.

SECTION 4: Smart Contracts: Legal Status and Enforceability

Although smart contracts are just code deployed to a blockchain, many people mistakenly assume they are necessarily legally binding agreements. They are sometimes designed to supplement or even replace standard legal contracts, and they have the advantage of being self-executing and self-enforcing, without the need for intermediaries, which theoretically reduces costs, increases speed, and enhances trust in transactions.

A. Legal Challenges

Since many in the legal industry are still learning about smart contracts and understanding them, there are often challenges made to their contractual validity. For a smart contract to memorialize the terms of a legally binding agreement, it must meet the traditional criteria of a contract, including offer, acceptance, consideration, capacity, and intention to create legal relations. The digital nature of smart contracts raises questions about how these elements are verified in a code-based environment.

The decentralized nature of blockchain technology leads to smart contracts that incorporate parties across multiple jurisdictions. Given the decentralized nature of blockchain, determining jurisdiction and the applicable law for disputes arising from smart contracts is challenging. The transnational nature of blockchain networks means a smart contract could be executed across multiple legal jurisdictions, complicating legal enforcement.

The enforceability of smart contracts in court depends on the ability of legal systems to recognize and interpret code as binding agreements. Additionally, the immutability of blockchain means that once a smart contract is executed, it cannot be easily amended or revoked, which may conflict with certain legal principles, such as the right to rescind a contract under specific circumstances.

B. Solutions and Adaptations

Some jurisdictions have begun to adapt their legal frameworks to recognize the validity of smart contracts. For example, amendments to electronic transactions laws in some countries explicitly include smart contracts, acknowledging their ability to carry out transactions and agreements.

Currently, New York has a proposed bill which is still in committee which would require that "[S]ignatures and records secured through blockchain technology and smart contracts. 1. a signature that is secured through blockchain technology is considered to be in an electronic form and to be an electronic signature."[169]

Arizona and Tennessee have both passed a law explicitly approving smart contracts.[170] The Arizona law explains the term smart contract as "an event-driven program, with state, that runs on a distributed, decentralized, shared and replicated ledger and that can take custody over and instruct transfer of assets on that ledger."[171] It defines a signature or contract "that is secured through blockchain technology" is valid, and, indeed, "may not be denied legal effect, validity or enforceability solely because that contract contains a smart contract term."[172] Two other U.S. states have issued laws giving legal recognition to data stored on a blockchain, which may apply also to smart contracts: Nevada, and Vermont[173].

One suggested solution is a hybrid contract that combines traditional written contracts with smart contracts. The written contract outlines the broader terms and legal intentions, [174]while the smart contract executes specific, automatable clauses. This approach can help bridge the gap between legal requirements and technological execution and has been deployed widely in connection with NFT projects.

Another solution that is being explored to address the issues arising with smart contracts are dispute resolution mechanisms. One suggestion is to develop dispute resolution mechanisms, including digital arbitration and mediation, tailored to the digital and decentralized context of smart contracts, is crucial for addressing potential conflicts.

SECTION 5: Development of Trademark/Copyright Infringement Case Law

Hermès Int'l v. Rothchild

The Hermes International v. Rothschild case, otherwise known as the "MetaBirkins" case, illustrates how traditional luxury brands are confronting new digital realities.[175] Hermès sued the creator of MetaBirkins NFTs, which were digital representations of its Birkin bags. Hermès argued that these NFTs infringed upon its

[169] https://www.nysenate.gov/legislation/bills/2021/A3760
[170] H.B. 2417, 53d Leg., 1st. Sess. (Ariz. 2017), https://legiscan.com/TN/text/SB1662/2017
[171] H.B. 2417, 53d Leg., 1st. Sess. (Ariz. 2017).
[172] *Id.*
[173] https://www.leg.state.nv.us/Session/79th2017/BDR/BDR79_59-0158.pdf; https://legislature.vermont.gov/statutes/section/12/081/01913
[174]https://neo-project.github.io/global-blockchain-compliance-hub//united-states-of-america/USA-smart-contracts.html#:~:text=As%20of%20that%20date%2C%20Arizona,contracts:%20Nevada%2C%20and%20Vermont
[175] *Hermès Int'l v. Rothschild,* 2023 U.S. Dist. LEXIS 109010, 2023 WL 4145518, at *7 (S.D.N.Y. June 23, 2023)

trademark rights, demonstrating the tension between established IP laws and new digital formats.

In February 2023, Hermès won the lawsuit. The jury found that the NFTs violated Hermès' trademark rights and awarded the company about $133,000 in damages. The judge also issued a permanent ban on the sale of "MetaBirkins" NFTs, saying that continued sales would cause Hermès irreparable harm.[176]

This against Mason Rothschild, the creator of "MetaBirkins" NFTs established a landmark decision. It set a precedent for how physical product trademarks might be protected when represented digitally.

Nike vs. *StockX* LLC

Nike's lawsuit against StockX underscores the conflict between brand owners and new digital marketplaces.[177] Nike alleged that StockX was misleading consumers into buying counterfeit Nike products at inflated prices. StockX denied the allegations and said that it is committed to ensuring the authenticity of all items sold on its platform. Nike took the position that NFTs are products themselves, while StockX's position was that they are receipts for physical products.

The case adds some clarity to how courts treat NFTs and how far third parties can use established brands' trademarks in their own NFTs.

Miramax vs. Quentin Tarantino

This conflict arose when Tarantino announced plans to issue NFTs based on his film "Pulp Fiction," which Miramax argued would infringe on its copyright rights.[178] The case settled out of court upon undisclosed terms.

The case emphasizes the complexities of copyright ownership and control in the era of digital assets, where original creators and rights holders may have conflicting interests regarding how a work is utilized and monetized in new digital formats.

Yuga Labs, Inc. v. Ripps, et al.

In or about May of 2022, Ryder Ripps and Jeremy Cahen launched the Ryder Ripps Bored Ape Yacht Club (RR/ BAYC) collection, a set of NFTs closely resembling Bored Apes, which Ripps claimed were endorsing Nazi codes and symbols. Later in

[176] *Id.*
[177] *Nike vs. StockX LLC,* 22-CV-00983 (S.D.N.Y.).
[178] *Miramax vs. Quentin Tarantino,* 21-CV-08979 (C.D. Cal.).

2022, Yuga sued Ripps, accusing him and his colleague, of manufacturing and selling fake NFTs that undercut the worth of the original pieces.[179] A United States district court judge ordered Ripps and Cahen to pay Bored Ape Yacht Club creator, Yuga Labs, a total of $1.57 million in disgorgement and damages, including legal fees.[180] The matter is up on appeal.

SECTION 6: Blockchain and Real Property Transactions

Blockchain technology offers a secure, transparent, and efficient method for recording and transferring real property rights. Smart contracts, a feature of blockchain, can automate many aspects of real property transactions, including title transfers, payments, and even compliance with legal requirements. This could significantly reduce the time and cost associated with real estate transactions, while also minimizing the potential for fraud.

A. Legal Challenges

Traditionally, real property titles are recorded in public registries operated by governmental entities, providing a legal record of ownership. Integrating blockchain into this process raises questions about the legal recognition of digital titles and the role of government in verifying and recording property ownership.

While smart contracts can automate transactional elements, their legal status in real estate transactions is not fully established. Issues such as the parties' capacity to contract, the formalities required for real property transactions, and the ability to enforce these agreements in courts remain areas of legal uncertainty.

Again the decentralized nature of smart contracts creates jurisdictional issues and questions. Real property is inherently local, subject to the laws and regulations of the jurisdiction where it is located. However, blockchain operates on a global scale, potentially complicating jurisdictional issues in disputes or when enforcing rights.

B. Legal Framework Adaptations for Smart Contracts

1. Legal Recognition of Digital Titles:

Legislators may need to enact laws that recognize digital titles and registrations on a blockchain as legally valid and equivalent to traditional paper titles. This involves

[179] *Yuga Labs, Inc. v. Ripps, et al.,* CV 22-4355 (C.D. Cal.).
[180] https://storage.courtlistener.com/recap/gov.uscourts.cacd.855658/gov.uscourts.cacd.855658.431.0.pdf.

ensuring that digital records meet all legal requirements for real property transactions, including evidence of ownership, encumbrances, and liens.

2. Hybrid Systems:

Implementing a hybrid system that maintains traditional title registration mechanisms while integrating blockchain technology could offer a transitional solution. This approach would leverage blockchain's efficiency and security while retaining the legal framework's established protections and recognitions.

3. Dispute Resolution and Enforcement:

Developing new legal frameworks and dispute resolution mechanisms that can accommodate the decentralized nature of blockchain transactions is crucial. This might include specialized courts or arbitration panels familiar with blockchain technology and real property law.

Article 5: Navigating the Nexus of Emerging Technologies and Criminal Justice: Challenges and Opportunities in the Age of Digital Currencies and Assets

SECTION 1: Introduction

The decentralized and global nature of digital currency and the increased potential for cross border transactions have inspired the need for regulation, legislation, lawsuits, and prosecutions. Initially, most of these cases focused on identifying where these currencies fit into our current financial and regulatory structure, questions regarding ownership, the legality of their use and if there is a need for a new regulatory framework. It was not until recently that the criminal justice communities began to focus on the fraud, criminal enterprises and abuses of digital currency. The *FTX* case brought with it the mainstream recognition of how digital currencies and finance were being used in illegal manners.

Further, our communities have continued to explore the manners in which these currencies can be used to bank the unbankable and improve access to justice and resources. The opportunities for people to hold digital assets in digital wallets have increased as has their use. The unstable nature of these currencies makes them less accepted in countries with stable economies such as the United States for the time being, while those countries with less stable fintech are increasingly incorporating digital currencies into their banking and financial systems. In New York, while we continue to manage the issues created by digital currency in the courts, our regulatory agencies and legislatures are hard at work to provide sensible and clear guidelines for its use.

The impact of emerging technologies on the criminal justice system is vast. Emerging technologies such as digital currencies and assets, blockchain and Web3 have introduced new tools to facilitate crime including fraud, money laundering and schemes to defraud, they also provide technology that can be used to improve access to justice, the criminal justice system and the courts. These technologies provide new means for accessing and tracking information about cases and individuals, investigating cases and defending them, bail, and the courts.[181] This report will touch on both illicit and productive uses, and show the possibilities for the use of blockchain technology, digital assets and crypto currency in our courts and legal communities.[182]

[181] Embley and Graski, *supra* note 1.
[182] *See id.*

Emerging technologies including Web3, blockchain, cryptocurrency and digital assets, have spurred the development of new avenues for crime and illicit activity. In 2023, $24.2 billion was received by illicit addresses. That same year, crypto crime was 0.34% of total on-chain transaction volume.[183] These numbers include funds sent to addresses that have been identified as illicit and funds stolen in crypto hacks.[184] It must be noted that this percentage dropped from 42% in 2022. Interestingly, these numbers are only 1% of the on-chain crypto activity. There are also crypto scams that take place without a blockchain dimension because they occur off-chain.[185]

New York is also the venue for a large amount of other regulatory enforcement litigation arising from crypto, including the recent *Terraform Labs* matter,[186] which recently went to trial where a jury held Terraform Labs, and its founder, liable for "defrauding investors in crypto asset securities."[187]

These enforcement actions are often venued in Federal Court, in New York's Southern District of New York ("SDNY"), as well as criminal matters such as the Mango prosecution arising out of allegations of commodities fraud, commodities market manipulation, and wire fraud in connection with the manipulation on the Mango Markets digital asset exchange.[188] In addition, many of these actions venued in the SDNY have both enforcement aspects, as well as parallel criminal actions.[189] This overlap of enforcement and criminal actions in the SDNY is not limited to the DOJ and SEC. For example, recently KuCoin, a digital asset exchange, was charged by the CFTC with multiple violations of the Commodity Exchange Act (CEA) and CFTC regulations in SDNY.[190] The DOJ also has commenced a criminal action against KuCoin, also pending in the SDNY, with failing to register with the appropriate U.S. government entities and failure to maintain an anti-money laundering database.[191]

To the extent that any of the actions conflict, the Second Circuit and possibly the Supreme Court, will have the final say. Nonetheless, it is evident that crypto related litigation is highly prevalent in New York, both in Federal and New York State Court.[192]

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[183] The 2024 Crypto Crime Report, Chainalysis, February 2024.

[184] *Id.*

[185] *Id.*

[186] https://www.sec.gov/files/litigation/complaints/2023/comp-pr2023-32.pdf

[187] https://www.sec.gov/news/statement/grewal-statement-040424

[188] https://www.justice.gov/usao-sdny/pr/man-convicted-110-million-cryptocurrency-scheme.

[189] See, https://www.sec.gov/news/press-release/2023-13; US. V. Wahi https://www.justice.gov/media/1233526/dl; SEC v. Wahi https://www.sec.gov/files/litigation/complaints/2022/comp-pr2022-127.pdf

[190] https://www.cftc.gov/media/10421/enfkucoincomplaint032624%20/download

[191] https://www.justice.gov/media/1345231/dl

[192] See, People of the State of New York v. Vino Global Limited D/B/A Coinex,https://ag.ny.gov/sites/default/files/memorandum_of_law_in_support_of_petition._nyoag_v._vinogloballtd_dba_coinex.pdf

In California, there is a website that *attempts* to keep track of the scams and lists out more than 15 ways to perpetrate crypto scams.[193] Additionally, local FBI offices in California warn of such scams.[194] The latest discussion on cryptocurrency scams from the FTC dated May 2022 is outdated[195] and two years is an incredibly long time in the emerging technology space where changes occur at a much faster rate than any past industry.

The assets that comprise the illicit transactions include Stablecoins, Altcoins, ETH (Ethereum), and BTC (Bitcoin). In 2022 and 2023, the majority of the illicit transactions involved stablecoins.[196] These crime categories included Child Sexual Abuse Material (CSAM), darknet market sales, fraud shops, cybercriminal activities, malware, online pharmacies, scams and transactions with sanctioned entities, scams and transactions operating in sanctioned jurisdictions, scams, stolen funds, special measures, and ransomware extortion.[197] While some illicit crypto activity including darknet market sales and ransomware extortion still operate predominantly in Bitcoin, others, such as scamming and transactions associated with sanctioned entities, now are much more common in stablecoins.[198] Scamming and stolen funds/hacking decreased significantly in 2023, but ransomware and darknet market activity increased. However, it is the transactions with sanctioned entities that have driven the large majority of illicit activity in the crypto currency arena.[199]

Investors are told that they can make quick money by investing in cryptocurrencies, and criminals are fast to attack any vulnerabilities of individuals to exploit them. Fraudulent crypto investment schemes aka “pig butchering” have become commonplace garnering billions of dollars from victims. “Pig butchering,” derived from the concept of fattening a hog before slaughter originated in Asia, but then went global during the pandemic and continues to be a global issue.

Clearly, the evolution of technology has profoundly transformed the landscape of criminal justice, introducing both innovative tools for law enforcement and new avenues for criminal activity.[200] Central to this transformation is the rise of digital currencies and

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[193] https://dfpi.ca.gov/crypto-scams/

[194] Federal Bureau of Investigation, San Francisco Media Office, “FBI Warns the Public of Holiday Scam Trends,” (Dec. 13, 2023) https://www.fbi.gov/contact-us/field-offices/sanfrancisco/news/fbi-warns-the-public-of-holiday-scam-trends.

[195] Federal Trade Commission, Consumer Advice, https://consumer.ftc.gov/articles/what-know-about-cryptocurrency-and-scams, (last visited Apr. 12, 2024).

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] Erik Fritzvold, "17 Types of Innovative Police Technology, " https://onlinedegrees.sandiego.edu/10-innovative-police-technologies/ (last visited Apr. 12, 2024).

assets, such as cryptocurrencies, which have posed unique challenges for legal frameworks, law enforcement agencies, and financial regulatory bodies globally.

SECTION 2: Cross-Border Jurisdiction & Collaboration

Cross-border jurisdiction and collaboration have become increasingly important in dealing with cryptocurrency fraud and theft. The decentralized and global nature of digital assets creates many challenges as well. Traditional legal mechanisms often fall short when dealing with anonymous perpetrators and digital assets spread across multiple jurisdictions. However, innovative legal precedents are emerging. In *LCX AG v. John Doe Nos,*[201] the New York Supreme Court allowed for legal documents to be served via NFT airdrops to the wallets involved in a hack. Similarly, the Florida District Court adopted this approach in *Benjamin Arthur Bowen v. Xingzhao Li*[202], authorizing the use of NFT airdrops to serve legal documents to a known fraudster. These cases show how the courts are finding new ways to deal with legal challenges across different jurisdictions by using the same technology upon which digital assets are built. Blockchain technology itself offers unique opportunities for tracking transactions and establishing the provenance of digital assets in ways that were previously impossible, such as the use of NFTs for legal notices.

To address problems with laws across different jurisdictions, we need a comprehensive plan that updates laws, enhances international cooperation, and incorporates new technology into the legal process. In 2021, the DOJ created its National Cryptocurrency Enforcement Team (NCET) tasked "to spearhead complex investigations and prosecution of the criminal misuse of cryptocurrency and to recover illicit proceeds."[203] New York state regulators and federal agencies like the SEC, CFTC, and DOJ through joint task forces and information sharing are creating a unified approach to combat crypto-related crimes. This strategy can streamline investigations, align regulatory efforts, and improve the speed and effectiveness of prosecuting offenders, closing gaps that criminals exploit in the decentralized cryptocurrency market.

Since the foundations of digital currencies often include features such as anonymity and decentralization, which can be exploited for money laundering, fraud, terrorist financing, and other illicit transactions, these collaborations and cross-jurisdiction work is essential. Law enforcement have been working hard to develop

[201] *LCX Ag v. 1.274M U.S. Dollar Coin, No. 154644/2022, 2022 WL 3585277 (N.Y. Sup. Ct. Aug. 21, 2022).*
[202] *Bowen v. Li,* No. 23-CV-20399, 2023 WL 2346292 (S.D. Fla. Mar. 3, 2023).
[203] Brendan J. Harrington et al., *DOJ sharpens its cryptocurrency enforcement focus,* Reuters (Nov. 31, 2021), https://www.reuters.com/legal/transactional/doj-sharpens-its-cryptocurrency-enforcement-focus-2021-11-30/.

specialized knowledge and tools to trace these activities.[204] However, often coordinating cross-border investigations and prosecutions can be a daunting task for authorities.

One of the challenges in cross-jurisdictional collaborations and prosecution is determining the applicable law. The rapid pace of technological change continually alters the cyber-threat landscape. Criminal justice systems struggle to keep legislation and practice in step with technological advancements. Law enforcement must be trained in the collection, preservation, and analysis of digital forensic evidence which requires advanced expertise. The continuous and increasing development of special units within law enforcement agencies for this purpose is proving to be essential in their success in finding and prosecuting bad actors. However, there continues to be significant resource constraints and varying levels of technical capability among agencies tasked with these responsibilities.

Even while facing these challenges, law enforcement has begun to leverage blockchain analysis tools to investigate and map out criminal networks.[205] These tools enable the identification of patterns and ultimately the entities behind illicit transactions. Recent publications highlight successful strategies in combating the operations of Child Sex Abuse Material (CSAM) enterprises.[206] By strengthening international agreements and collaborative efforts, jurisdictions can better combat cyber-enabled financial crimes that exploit digital currencies and assets. Developing comprehensive legal frameworks can provide clear guidelines for the legitimate use of digital assets and effective measures against their misuse. Integrating technology-focused education and training programs within the criminal justice system can help law enforcement to adapt and respond effectively to emerging cyber threats.

Another opportunity not yet being fully embraced is the ability of the courts to use blockchain technology to support their work, securely maintain information, and increase their productivity. In 2018 the National Center for State Courts reported that it was likely that the legal community would see blockchain technology used for court recordkeeping including managing court judgments, warrants, and criminal histories.[207]

SECTION 3: Utilizing Digital Assets for Fraud by Criminal Enterprises

In the ever-evolving landscape of financial technology, cryptocurrencies and Non-Fungible Tokens (NFTs) have emerged as revolutionary instruments of commerce. Alongside their rapid growth and adoption, a parallel and dark narrative unfolds—one

[204] The 2024 Crypto Crime Report, Chainalysis, February 2024.
[205] Chainalysis *supra* note 113.
[206] *Id.*
[207] Embley and Graski, *supra* note 1.

where these digital assets become tools in the arsenal of criminal enterprises.[208] While digital assets offer unprecedented opportunities for economic innovation and freedom, they also open new avenues for fraud and illicit activity.

We need to raise awareness about the use and misuse of emerging technologies as well as educate. Lawyers must remember the ethical challenges and pitfalls that arise when engaging with companies that are using, creating and/or promoting digital currencies and assets.

The rapid evolution and mass adoption of digital currencies create many new challenges and opportunities for legal practitioners. As these financial technologies become increasingly integrated into the global economy, lawyers find themselves navigating a complex landscape shaped by regulatory uncertainties, ethical considerations, and the potential for criminal misuse. Lawyers advising clients in this new and emerging sector must therefore be well versed in Know Your Customer (KYC) and (AML) compliance procedure. The decentralized nature of digital finance and blockchain technology makes it easier than ever to interact with unidentified people or entities. Interacting with unknown customers is a certain path to unintentionally engaging in illicit actions.

KYC regulations are pivotal in the fight against money laundering and terrorism financing. Lawyers working with firms dealing in digital currencies must ensure strict compliance with KYC procedures to verify the identity of their clients and understand the nature of their businesses. This due diligence is essential not only for legal compliance but also for maintaining the integrity of the legal profession and preventing the misuse of digital assets for illicit purposes.

The ethical landscape for lawyers engaging with digital currencies is fraught with potential pitfalls. Unethical behaviors can range from the negligent failure to conduct adequate due diligence to active participation in fraudulent schemes. Lawyers must know that the rules of professional conduct apply and do guide them in these situations, even if they do not specifically use the terms related to the emerging technology space.

Besides ten years in prison, Mark Scott, the lawyer entangled in the

[208] U.S. Department of Justice, Office of Public Affairs, *Justice Department Announces Enforcement Action Charging Six Individuals with Cryptocurrency Fraud Offenses in Cases Involving over $100 Million in Intended Losses,* (Jun. 30, 2022), https://www.justice.gov/opa/pr/justice-department-announces-enforcement-action-charging-six-individuals-cryptocurrency-fraud.

infamous $4 billion Onecoin cryptocurrency fraud had to forfeit to the Southern District of New York a money judgment in the amount of $392,940,000, several bank accounts, a yacht, two Porsche automobiles, and four real-estate properties.[209]

Also, in February 2024, a group of investors embroiled in the FTX mess has filed a lawsuit against Sullivan & Cromwell, accusing it of facilitating the multi-billion dollar fraud in the Southern District of Florida.[210] This case is explored in more depth at the beginning of this report.

The threats posed by the misuse of digital assets are diverse and sophisticated. Much like cash, digital assets can be used by transnational criminal organizations to fuel underground marketplaces for illicit goods, ranging from drugs to illegal weapons. Many criminal enterprises prefer to use cryptocurrencies over fiat currencies to distribute the fruits of their illicit activities due to the perceived anonymity and difficulty in tracing transactions back to their participants. Moreover, digital assets are increasingly utilized to obfuscate the origins of criminally obtained funds, aiding in money laundering, tax evasion, and the evasion of sanctions.

Perhaps most alarmingly, the digital asset space has become fertile ground for fraud schemes directly targeting consumers and investors, including Initial Coin Offering (ICO) ponzi schemes, pig butchering[211] schemes, and rug pulls.[212]

Initial Coin Offering (ICO) Ponzi schemes are fraudulent investment scams promising high returns from digital asset projects, where returns for older investors are paid out from the contributions of new investors, rather than from legitimate business activities.[213]

"Pig butchering" is an internet fraud scheme that primarily targets individuals looking for romantic relationships online. The term is derived from the practice of raising a pig and feeding it until it is ready for slaughter. Similarly, in this scam, the fraudster (also known as the "pig butcher") gains the trust of their victim (the "pig") over a period of time before eventually defrauding them of their money or personal information. The FBI noted in its 2023 Internal Crime Center (IC3) report[214] that “pig butchering” has

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[209] U.S. District Attorney’s Office, Southern District of New York, “Former Law Firm Partner Sentenced To 10 Years In Prison For Laundering $400 Million of OneCoin Fraud Proceeds,” (Jan. 25, 2024) https://www.justice.gov/usao-sdny/pr/former-law-firm-partner-sentenced-10-years-prison-laundering-400-million-onecoin-fraud.
[210] Garrison v. Sullivan & Cromwell, No. 1:24-cv-20630-XXXX (S.D.Fla. 2024).
[211] *See* Lily Hay Newman, *‘Pig Butchering’ Scams Are Now a $3 Billion Threat,* Wired, (Mar. 9, 2023) https://www.wired.com/story/pig-butchering-fbi-ic3-2022-report/.
[212] *See* Andrew Rossow, *Scams Explained: What are Rug Pulls? Are They a Crime?* nftnow.com, (Oct. 28, 2022) https://nftnow.com/guides/scams-explained-what-are-rug-pulls-and-are-they-a-crime/.
[213] U.S. Securities and Exchange Commission, Office of Investor Education and Advocacy, Investor Alert: Ponzi Schemes Using Virtual Currencies, SEC Pub. No. 153 (7/13).
[214] Internet Crime Report 2022, Federal Bureau of Investigation, 2022, https://www.ic3.gov/Media/PDF/AnnualReport/2022_IC3Report.pdf.

overtaken business email compromise (BEC) scams and become the preferred cyber criminal fraud scheme.

In California, there is a website that *attempts* to keep track of the scams and lists out more than 15 ways to perpetrate crypto scams.[215] Additionally, local FBI offices in California warn of such scams.[216] The latest discussion on cryptocurrency scams from the FTC dated May 2022 is outdated,[217] and two years is an incredibly long time in the emerging technology space where changes occur at a much faster rate than in any past industry.

A "Rug Pull" is a deceptive practice in the cryptocurrency space where developers suddenly withdraw all funds from a project and disappear, leaving investors with worthless tokens or digital assets.[218]

Instruments of Deception and Evasion

Blockchain crime is facilitated by several key tools that exploit the inherent features of the technology. Decentralized, un-hosted wallets significantly challenge law enforcement's investigative capabilities, offering criminals a means to operate under the radar. Similarly, certain crypto exchanges and trading platforms lax in enforcing KYC (Know Your Customer) and AML (Anti Money Laundering) regulations, become unwitting accomplices in these schemes. Moreover, phishing attacks and social engineering tactics are rampant, targeting unsuspecting users to siphon off their digital assets. To further complicate matters, crypto mixer and tumbling services can be abused to launder cryptocurrencies, effectively obfuscating the trail of illicit funds.[219]

Dissecting Blockchain Crime

The anatomy of a typical blockchain crime typically follows a three-step process: (1) theft of digital assets, (2) concealment, and (3) launder (or conversion) into fiat currency. This process is facilitated by sophisticated methods such as the use of

[215] California Department of Financial Protection & Innovation, https://dfpi.ca.gov/crypto-scams/, (last visited Apr. 1, 2024).
[216] Federal Bureau of Investigation, "FBI Warns the Public of Holiday Scam Trends", (Dec. 13, 2023), https://www.fbi.gov/contact-us/field-offices/sanfrancisco/news/fbi-warns-the-public-of-holiday-scam-trends.
[217] Federal Trade Commission, "What To Know About Cryptocurrency and Scams," https://consumer.ftc.gov/articles/what-know-about-cryptocurrency-and-scams, (last visited Apr. 1, 2024).
[218] Rosie Perper, *What Is a Rug Pull? How to Protect Yourself From Getting 'Rugged,'* Coindesk, (May 11, 2023), https://www.coindesk.com/learn/what-is-a-rug-pull-how-to-protect-yourself-from-getting-rugged/.
[219] Nikhilesh De, *Crypto Mixers Haven't 'Slowed' DOJ Investigations, Director Says,* Coindesk, (Oct. 11, 2022), https://www.coindesk.com/policy/2022/10/11/crypto-mixers-havent-slowed-doj-investigations-director-says/.

tumblers and mixers, which "tornado" the assets across multiple wallets, making the illicit proceeds difficult to trace and seize.[220]

Notable cases highlight the diverse ways in which blockchain facilitates criminal activity. The infamous Silk Road[221] marketplace illustrated how cryptocurrencies could fuel the sale of illegal goods on an unprecedented scale. The *SamSam ransomware* case[222] and the massive Bitfinex Bitcoin hack[223] demonstrate the critical role of digital assets in ransom and malware schemes, as well as large-scale money laundering. Furthermore, incidents like the Coinbase "insider trading"[224] case and the theft of Seth Green's NFT[225] expose vulnerabilities in trading platforms and the burgeoning NFT market. Each case offers unique insights into the mechanisms of blockchain crime and its far-reaching implications.

Some examples of various fraud schemes include Bitcoin Investment Schemes, Rug Pull Schemes, Pig Butchering Schemes and Romance Schemes.

United States v. Emerson Pires, Flavio Goncalves, and Joshua David Nicholas,[226] offers a classic example of a Bitcoin investment scheme. A global cryptocurrency-based ponzi scheme that generated approximately one hundred million dollars from investors was exposed.[227] EmpiresX, along with the aforementioned, fraudulently promoted itself as a cryptocurrency investment platform and unregistered securities offering. They made numerous misrepresentations regarding a purported proprietary trading bot and fraudulently guaranteed returns to investors and prospective investors in EmpiresX.[228] They then laundered investors' funds through a foreign-based

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[220] *See e.g.* U.S. Dep't of the Treasury, Office of Foreign Assets Control, "U.S. Treasury Sanctions Notorious Virtual Currency Mixer Tornado Cash," (Aug. 8, 2022), https://home.treasury.gov/news/press-releases/jy0916.
[221] United States Attorney's Office, Southern District of New York, "U.S. Attorney Announces Historic $3.36 Billion Cryptocurrency Seizure and Conviction In Connection With Silk Road Dark Web Fraud," (Nov. 7, 2022), https://www.justice.gov/usao-sdny/pr/us-attorney-announces-historic-336-billion-cryptocurrency-seizure-and-conviction.
[222] U.S. Department of Justice, Office of Public Affairs, "Two Iranian Men Indicted for Deploying Ransomware to Extort Hospitals, Municipalities, and Public Institutions, Causing Over $30 Million in Losses," (Nov. 28, 2018) https://www.justice.gov/opa/pr/two-iranian-men-indicted-deploying-ransomware-extort-hospitals-municipalities-and-public.
[223] U.S. Department of Justice, Office of Public Affairs, "Bitfinex Hacker and Wife Plead Guilty to Money Laundering Conspiracy Involving Billions in Cryptocurrency," (Aug. 3, 2023) https://www.justice.gov/opa/pr/bitfinex-hacker-and-wife-plead-guilty-money-laundering-conspiracy-involving-billions.
[224] United States Attorney's Office, Southern District of New York, "Former Coinbase Insider Pleads Guilty In First-Ever Cryptocurrency Insider Trading Case," (Feb. 7, 2023), https://www.justice.gov/usao-sdny/pr/former-coinbase-insider-pleads-guilty-first-ever-cryptocurrency-insider-trading-case.
[225] Eric Mack, *How Scammers Stole Seth Green's Bored Ape Yacht Club NFT and Converted It To Cash,* Forbes, (Jul. 11, 2022), https://www.forbes.com/sites/ericmack/2022/07/11/how-scammers-stole-seth-greens-bored-ape-yacht-club-nft-and-converted-it-to-cash/?sh=156591d61f85.
[226] United States Attorney's Office, Southern District of Florida, "Three Men Charged in $100 Million Cryptocurrency Fraud," (Jun. 30, 2022), https://www.justice.gov/usao-sdfl/pr/three-men-charged-100-million-cryptocurrency-fraud.
[227] *Id.*
[228] *Id.*

cryptocurrency exchange and operated a Ponzi scheme by paying earlier investors with money obtained from later EmpiresX investors.[229]

The facts of The *United States v. Le Ahn Tuan,*[230] display a rug pull scheme. Tuan was involved in the Baller Ape Club, an NFT project that purportedly sold NFTs in the form of various cartoon figures, often depicting apes.[231] The scheme unraveled when they deleted the website, effectively absconding with the investor's money.[232] Tuan and his co-conspirators laundered the stolen funds through "chain-hopping," a method of money laundering in which one type of coin is converted to another. This process involved moving funds across multiple cryptocurrency blockchains and utilizing decentralized cryptocurrency swap services to hide the trail of Baller Ape investors' stolen funds.[233]

The pig butchering scheme exposed in The United *States v. Lu Zhang, Justin Walker and Joseph Wong*,[234] involves three individuals, along with some other co-conspirators, who allegedly defrauded victims of more than $80 million.[235] These scammers targeted victims however they can, be it social media, dating apps, phone calls, phishing, to initiate a relationship.[236] Similar to the romance scheme described below, they built a relationship of trust and then introduced the idea of investing in cryptocurrency for profit.[237] However, once victims began sending money, they were asked for additional funds for fees and further investments, quickly finding themselves unable to retrieve their funds.[238]

In The *United States v. Clinton Chukwudi Uchendu,*[239] Uchendu was found guilty in late March 2024 of participating in a money laundering conspiracy that involved receiving and transmitting funds from victims of romance scams.[240] The conspiracy's objective was accomplished through social manipulators, referred to as "Yahoo Boys," who created fake profiles online, developed relationships with their victims, gained the victim's trust, and then requested money under false pretenses, such as needing money to help a sick child, to assist someone in jail overseas, or being stranded somewhere

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[229] *Id.*
[230] U.S. Dep't of Justice, Office of Public Affairs, *supra* note 131.
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] U.S. Department of Justice, Office of Public Affairs, "Four Individuals Charged for Laundering Millions from Cryptocurrency Investment Scams," (Dec. 14, 2023), https://www.justice.gov/opa/pr/four-individuals-charged-laundering-millions-cryptocurrency-investment-scams.
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] United States Attorney's Office, District of Utah, "Jury Finds Romance Scammer Guilty on All Counts," (Mar. 22, 2024), https://www.justice.gov/usao-ut/pr/jury-finds-romance-scammer-guilty-all-counts.
[240] *Id.*

without access to their bank accounts.[241] Typically operating from Nigeria and pretending to be United States soldiers, international businessmen, or celebrities,[242] the "Yahoo Boys" relied on co-conspirators in the United States, who had US bank accounts to assist them. [243] These individuals referred to as "pickers,"[244] provided accounts to collect funds from the victims and added layers to conceal the source and destination of the funds, thereby avoiding detection by banks[245] As a "picker," Uchendu collected money into bank accounts and then laundered the funds to Nigeria or other destinations.[246]

In response to the escalating use of blockchain crime, government and regulatory bodies have begun to mobilize.[247] The intersection of blockchain technology with criminal enterprises presents a formidable challenge to regulators, law enforcement, and the broader financial community. Understanding the mechanisms of blockchain crime, exemplified through various case studies, is crucial for developing effective strategies to mitigate these risks. As the digital landscape continues to evolve, so too does the responses from governments, regulators, and the crypto community to ensure the integrity and security of the digital economy.

SECTION 4: Criminal Justice Case Law Update

SEC

Recent years have seen major players in the cryptocurrency sector[248], such as Binance, Coinbase, and FTX, face significant legal challenges. These include serious allegations, investigations, and in some cases, complete operational shutdowns. In the absence of direct congressional action, the Securities Exchange Commission has aggressively filled the regulatory void. The SEC's actions have included lawsuits against major exchanges like Ripple, Binance, and Kraken. Amidst these developments, the SEC has also moved forward by approving Spot Bitcoin ETFs.

The *FTX* case is by far the most notable crypto fraud case.[249] In 2017, Sam Bankman-Fried founded his cryptocurrency firm and within just five year, it collapsed.[250]

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[241] *Id.*
[242] *Id.*
[243] *Id.*
[244] *Id.*
[245] *Id.*
[246] *Id.*
[247] U.S. Department of Justice, "The Report of the Attorney General Pursuant to Section 5(b)(iii) Executive Order 14067: The Role of Law Enforcement In Detecting, Investigating, and Prosecuting Criminal Activity Related to Digital Assets," (Sep. 6, 2022) https://www.justice.gov/ag/file/1557146/dl?inline.
[248] U.S. Securities and Exchange Commission, https://www.sec.gov/spotlight/cybersecurity-enforcement-actions, (last visited Apr. 2, 2024).
[249] *U.S. v. Bankman-Fried,* 2023 WL 5394510 (S.D.N.Y. 2024) (superseding indictment).
[250] *Id.*

The narrative is the same as most of these cases:[251] investor funds were diverted for personal use or to cover other expenses.[252]

The SEC alleged that Bankman-Fried had "from the start" improperly diverted assets that customers had deposited with FTX over to Alameda to fund its trading positions and venture investments.[253] That was in addition to what the SEC said were "lavish real estate purchases and large political donations."[254] As the broader crypto market declined in value through 2022, other lenders began to seek repayment from Alameda.[255] Even though FTX had allegedly already given Alameda billions of dollars in customer funds, the SEC contends that Bankman-Fried began to give Alameda even more money to cover those positions.[256] After being found guilty in the Southern District of New York, Bankman-Fried was sentenced to twenty-five years in prison and eleven billion dollars in forfeiture which is the heftiest sentence yet in a cryptocrime matter.[257]

In December 2020, the SEC filed a lawsuit against Ripple Labs Inc., alleging an illegal $1.3 billion securities offering via XRP sales.[258] [259] Recently, a federal judge denied the SEC's appeal request against a decision favoring Ripple, a significant blow to the regulator's crypto market oversight efforts.[260] The SEC aimed to appeal findings on XRP's "programmatic" sales and other uses as payment, but the judge saw no substantial disagreement warranting an appeal. This decision halts further SEC appeals, emphasizing a critical moment in Ripple's legal battle.

Then in June 2023, the SEC charged Binance with multiple violations including artificially inflating trading volumes, misappropriating customer funds, failing to restrict U.S. customers, and misleading investors about market surveillance controls.[261] Additionally, Binance faces charges for unlawfully allowing the trading of unregistered cryptocurrency tokens.[262]

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[251] *Id.*
[252] *Id.*
[253] U.S. Securities and Exchange Commission, "SEC Charges Samuel Bankman-Fried with Defrauding Investors in Crypto Asset Trading Platform FTX," (Dec. 13, 2022), https://www.sec.gov/news/press-release/2022-219.
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id; U.S. v. Bankman-Fried, 2023 WL 5394510 (S.D.N.Y. 2024) (superseding indictment).*
[258] U.S. Securities and Exchange Commission, "SEC Charges Ripple and Two Executives with Conducting $1.3 Billion Unregistered Securities Offering," (Dec. 22, 2020), https://www.sec.gov/news/press-release/2020-338; *Securities and Exchange Commission v. Ripple Labs*, No. 1:20-cv-10832, (S.D.N.Y. 2020), https://www.sec.gov/files/litigation/complaints/2020/comp-pr2020-338.pdf.
[259] https://www.sec.gov/files/litigation/complaints/2020/comp-pr2020-338.pdf
[260] Jonathan Stempel, "US SEC cannot appeal Ripple Labs decision, judge rules," Reuters (Oct. 4, 2023), https://www.reuters.com/legal/us-sec-cannot-appeal-ripple-labs-decision-judge-rules-2023-10-04/.
[261] *Securities and Exchange Commission v. Binance Holding Limited*, No. 1:23-cv-01599, (D.D.C. 2023), https://www.sec.gov/files/litigation/complaints/2023/comp-pr2023-101.pdf.
[262] U.S. Securities and Exchange Commission, "SEC Files 13 Charges Against Binance Entities and Founder Changpeng Zhao, (Jun. 5, 2023), https://www.sec.gov/news/press-release/2023-101.

Following these charges, Binance CEO Changpeng Zhao admitted to a felony for his failure to prevent money laundering on the platform, resulting in his resignation. [263] The Cayman Islands-based company also acknowledged failures in complying with the Bank Secrecy Act and sanctions programs, particularly in reporting suspicious transactions.

As a result, the U.S. Treasury has subjected Binance to five years of monitoring and stringent compliance requirements to ensure the firm completely exits the U.S. market. Binance agreed to a $4.3 billion settlement with the Department of Justice and the Commodity Futures Trading Commission over breaches related to illicit finance.[264] This agreement is part of a broader settlement which U.S. Attorney General Merrick Garland noted as one of the largest corporate fines in U.S. history.[265]

Further, two Binance employees, American Tigran Gambaryan and Nadeem Anjarwalla, a UK citizen, have been detained in Nigeria, without charges since February 26, 2024.

The SEC charged Kraken in November 2023, by filing charges against Payward Inc. and Payward Ventures Inc., which is collectively known as Kraken, for operating as an unregistered securities exchange, broker, dealer, and clearing agency.[266][267] Earlier, in February 2023, Kraken had agreed to stop offering or selling securities through its crypto asset staking services and programs and consented to pay a $30 million civil penalty.[268]

Supporting Kraken, the Chamber of Digital Commerce submitted an amicus brief, highlighting concerns over the SEC's regulatory reach and calling for clearer regulations in the cryptocurrency sector.[269]

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[263] United States District Attorney's Office, Office of Public Affairs, "Binance and CEO Plead Guilty to Federal Charges in $4B Resolution," (Nov. 21, 2023) https://www.justice.gov/opa/pr/binance-and-ceo-plead-guilty-federal-charges-4b-resolution.

[264] Hannah Lang and Chris Prentice, *Binance, SEC face off over regulator's crypto oversight,* Reuters, (Jan. 22, 2024), https://www.reuters.com/legal/binance-kicks-off-oral-arguments-push-end-sec-lawsuit-2024-01-22/.

[265] United States District Attorney's Office, Office of Public Affairs, *supra* note 186.

[266] *Securities and Exchange Commission v. Payward, Inc.,* No. 3:23-cv-06003, (N.D.C.A. 2023), https://www.sec.gov/files/litigation/complaints/2023/comp-pr2023-237.pdf; U.S. Securities and Exchange Commission, "SEC Charges Kraken for Operating as an Unregistered Securities Exchange, Broker, Dealer, and Clearing Agency," (Nov. 20, 2023), https://www.sec.gov/news/press-release/2023-237.

[267] https://www.sec.gov/news/press-release/2023-237

[268] U.S. Securities and Exchange Commission, "Kraken to Discontinue Unregistered Offer and Sale of Crypto Asset Staking-As-A-Service Program and Pay $30 Million to Settle SEC Charges," (Feb 9, 2023), https://www.sec.gov/news/press-release/2023-25.

[269] *Securities and Exchange Commission v. Payward, Inc.,* No. 3:23-cv-06003-WHO, (N.D.C.A. 2024), https://digitalchamber.wpenginepowered.com/wp-content/uploads/2024/02/2024-02-27-Administrative-Motion-dckt-40_2.pdf.

U.S. Department of Justice's Role in Combating CryptoCrime

In 2021, Krstijan Krstic was charged with conspiracy to commit securities fraud, conspiracy to commit wire fraud, and conspiracy to commit money laundering in a cryptocurrency scheme in which he solicited U.S. investors using fraudulent online investment platforms.[270]

The indictment against Kristin is an example of the seriousness being attributed to the cryptocurrency schemes by the IRS Criminal Investigation and the federal law enforcement community.[271] This case is still pending in the Eastern District of New York,[272] and the SEC has also filed a case against him.[273]

In 2022, the Department of Justice announced the release of a comprehensive report and the establishment of a nationwide Digital Asset Coordinator (DAC) Network.[274] These initiatives are in response to the President's Executive Order on Ensuring Responsible Development of Digital Assets, emphasizing the department's commitment to curbing the illicit use of digital technologies that threaten the American public's security and financial stability. Attorney General Merrick B. Garland underscored the necessity of collaborative efforts across government agencies to mitigate crimes facilitated by digital assets while promoting responsible innovation and maintaining national security. The report highlights the criminal misuse of digital technologies and outlines regulatory and legislative recommendations to enhance law enforcement capabilities in this domain.

As a result of the DOJ's increased focus on cryptocurrency crime, a number of recent high-profile prosecutions have followed.

On Jan. 31, 2023, DeMarr, 55, of Santa Ana, California, the former Director of North American Operations for Start Options and B2G, was sentenced to five years in prison for his role in the scheme.[275] His indictment said that the proceeds from the

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[270] U.S. Department of Justice, Office of Public Affairs, "Leader of $70 M Cryptocurrency and Binary Options Fraud Schemes Extradited to U.S.," (Nov. 3, 2023), https://www.justice.gov/opa/pr/leader-70m-cryptocurrency-and-binary-options-fraud-schemes-extradited-us.

[271] United States District Attorney's Office, Eastern District of New York, "Founder of International Cryptocurrency Companies Indicted in Multi-Million Dollar Securities Fraud Scheme," (Feb. 23, 2021), https://www.justice.gov/usao-edny/pr/founder-international-cryptocurrency-companies-indicted-multi-million-dollar-securities.

[272] *Id.*

[273] *United States District Attorney's Office, Northern District of Texas, "United States v. Kristijan Krstic, Et Al.", (last visited Apr. 2, 2024), https://www.justice.gov/usao-ndtx/united-states-v-kristijan-krstic-et-al.*

[274] United States Department of Justice, Office of Public Affairs, "Justice Department Announces Report on Digital Assets and Launches Nationwide Network," (Sep. 16, 2022), https://www.justice.gov/opa/pr/justice-department-announces-report-digital-assets-and-launches-nationwide-network.

[275] *United States District Attorney's Office, Eastern District of New York, "U.S. Promoter of Foreign Cryptocurrency Companies Sentenced to 60 Months in Prison for His Role in Multi-Million Dollar Securities Fraud Scheme," (Jan. 31, 2023), https://www.justice.gov/usao-edny/pr/us-promoter-foreign-cryptocurrency-companies-sentenced-60-months-prison-his-role-multi.*

scheme were used for lavish things for himself including the purchase of a Porsche, jewelry, and the remodeling of his home in California.[276]

In May 2023, former OpenSea employee, Nathaniel Chastain, was found guilty after trial for his role in an NFT "insider trading" wire fraud and money laundering prosecution.[277]

In July 2023, Alexander Mashinsky, founder and CEO of Celsius Network (Celsius), has been charged with orchestrating a fraudulent scheme to deceive customers about the true state of the company's affairs. Furthermore, he's alleged to have inflated the price of Celsius's native token, CEL.[278]

In November 2023, former founder of FTX, Sam Bankman Fried, was convicted of two counts of wire fraud conspiracy, two counts of wire fraud, and one count of conspiracy to commit money laundering.[279] That same year, Binance's founder and chief executive officer (CEO), Changpeng Zhao, pleaded guilty to failing to maintain an effective anti-money laundering (AML) program, in violation of the Bank Secrecy Act (BSA) and resigned as CEO of Binance.[280]

In December 2023, Russian national Anatoly Legkodymov, pled guilty in a federal court in Brooklyn to operating a money transmitting business in connection with Bitzlato Ltd., a crypto exchange.[281]

In yet another similar case, "IcomTech" and "Forcount" were both alleged cryptocurrency mining and trading companies that promised to earn investors profits in exchange for their purchase of purported cryptocurrency-related investment products.[282]

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[276] *Id.*
[277] U.S. District Attorney's Office, Southern District of New York, "Statement of U.S. Attorney Damian Williams On The Conviction of Nathaniel Chastain" (May 3,, 2023) https://www.justice.gov/usao-sdny/pr/statement-us-attorney-damian-williams-conviction-nathaniel-chastain.
[278] U.S. Attorney's Office, Southern District of New York, "Celsius Founder and Former Chief Executive Officer Charged In Connection With Multibillion-Dollar Fraud And Market Manipulation Schemes," (Jul. 13, 2023) https://www.justice.gov/usao-sdny/pr/celsius-founder-and-former-chief-revenue-officer-charged-connection-multibillion#:~:text=Today%20I%20am%20announcing%20the,a%20scheme%20with%20Celsius%27s%20Chief.
[279] U.S. District Attorney's Office, Southern District of New York, "Statement of U.S. Attorney Damian Williams On The Conviction of Samuel Bankman-Fried" (Nov. 2, 2023) https://www.justice.gov/usao-sdny/pr/statement-us-attorney-damian-williams-conviction-samuel-bankman-fried.
[280] United States Department of Justice, Office of Public Affairs, "Binance and CEO Plead Guilty to Federal Charges in $4B Resolution," (Nov. 21, 2023) https://www.justice.gov/opa/pr/binance-and-ceo-plead-guilty-federal-charges-4b-resolution.
[281] U.S. Attorney's Office, Eastern District of New York, "Founder And Majority Owner of Cryptocurrency Exchange Pleads Guilty to Unlicensed Money Transmitting," (Dec. 6, 2023) https://www.justice.gov/usao-edny/pr/founder-and-majority-owner-cryptocurrency-exchange-pleads-guilty-unlicensed-money.
[282] *United States District Attorney's Office, Southern District of New York, "U.S. Attorney Announces Fraud and Money Laundering Charges Against The Founders and Promoters of Two Cryptocurrency Ponzi Schemes," (Dec. 14, 2022), https://www.justice.gov/usao-sdny/pr/us-attorney-announces-fraud-and-money-laundering-charges-against-founders-and-promoters.*

But, once again the money was diverted to the co-conspirators. They were prosecuted by the U.S. Attorney Damian Williams in an effort to send a message to all cryptocurrency scammers that they will be prosecuted for such illicit actions. The prosecution displays a collaboration between federal, state, and international law enforcement."[283] "IcomTech" and "Forcount" were found guilty March 15, 2024, on one count of conspiracy to commit wire fraud and are awaiting sentencing later this year.

In February 2024, Letitcia James, the Attorney General of New York filed an amended complaint against Gemini Trust Company (Gemini), Genesis and DCG for misleading investors about an investment program called Gemini Earn causing over $3 billion in losses.[284]

In March 2024, Roman Sterlingov, a 33-year-old Swedish-Russian national, was convicted by the Department of Justice (DOJ) of laundering $336 million through Bitcoin Fog, a bitcoin mixing service aimed at obscuring the origins of cryptocurrency transactions.[285]

The founders of KuCoin, Chun Gan and Ke Tang were indicted in the Southern District of New York in March 2024.[286] Since its founding in the fall of 2017, KuCoin has become one of the largest global cryptocurrency exchange platforms.[287] They were charged with Conspiracy to Violate the Bank Secrecy Act and Conspiracy to Operate an Unlicensed Money Transmitting Business and also Operation of an Unlicensed Money Transmitting Business and Violation of the Bank Secrecy Act.[288] It is alleged that they willfully failed to maintain an adequate AML program and thus allegedly allowed billions of dollars in illicit funds to be laundered.[289] This interestingly has had an effect on investment and pig butchering scams as those scammers have been unable to access some of their funds on KuCoin.[290]

Child Sexual Abuse Material Scams

Unfortunately, in the last few years, CSAM (child sexual abuse material) scams have expanded and become more difficult to detect by using digital currency and

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[283] *Id.*
[284] *The People Of The State Of New York v. Gemini Trust Company, LLC et al., 0452784/2023, https://ag.ny.gov/sites/default/files/2024-02/genesis-amended-complaint.pdf*.
[285] U.S. District Attorney's Office, District of Columbia, "Jury Finds Russian-Swedish Operator of 'Bitcoin Fog' Guilty of Running the Darknet Cryptocurrency Mixer" (Mar. 12, 2024) https://www.justice.gov/usao-dc/pr/jury-finds-russian-swedish-operator-bitcoin-fog-guilty-running-darknet-cryptocurrency.
[286] United States Attorney's Office, Southern District of New York, "Prominant Global Cryptocurrency Exchange KuCoin and Two Of Its Founderrs Criminally Charged With Bank Secrecy Act and Unlicensed Money Transmission Offenses," (Mar. 26, 2024) https://www.justice.gov/usao-sdny/pr/prominent-global-cryptocurrency-exchange-kucoin-and-two-its-founders-criminally.
[287] *Id.*
[288] *Id.*
[289] *Id.*
[290] *Id.*

blockchain. There is an increase in websites that use crypto currency to sell child abuse material.[291] These currencies include Bitcoin, Ethereum, Dogecoin, Litecoin and Solana.[292] Payments can be made for specific pieces of material or for subscriptions. The Internet Watch Foundation (IWF) has dedicated its work to tracking and identifying bad actors and websites related to CSAM. In 2022, in response to an increase in reports of websites containing crypto information and requests for information from law enforcement, the crypto unit was developed. The IWF works to identify and remove the bad content from the networks, while also assisting law enforcement by providing alerts and access to the data and information it collects. A recent and ongoing collaboration between New York City, South Carolina, Jacksonville Florida and the Philippines resulted in multijurisdictional prosecutions of members of a CSAM scheme in the Philippines. The case is still ongoing.

SECTION 5: Congress's Role in the Pursuit of Bad Actors

The SEC maintains that the majority of cryptocurrency assets qualify as "investment contracts" under the Securities Act of 1933, thereby falling within its regulatory scope. However, the approach of classifying digital assets as securities and the subsequent regulation by the SEC has faced backlash within the crypto industry and from other regulatory bodies, arguing that the SEC's application of the criteria from the landmark SEC v. W.J. Howey Co case is misapplied.[293]

The U.S. Supreme Court's "Howey test," which was established in 1946 and has long been a key means for classifying securities and determining whether an asset constitutes an investment contract.[294] For decades, U.S. courts have applied the test in discerning the line between securities and non-investments; however, the adaptability of the "Howey test" and similar legal standards has been scrutinized in its application to cryptocurrencies.

Under Howey and subsequent case law, an "investment contract" exists when there is: (1) the investment of money, (2) in a common enterprise, (3) with a reasonable expectation of profits, (4) to be derived from the efforts of others.[295] The four-part Howey test was intended to apply to any contract, scheme, or transaction, regardless of

[291] The International Centre for Missing & Exploited Children and Standard Chartered, "Cryptocurrency and the Trade of Online Child Sexual Abuse Material," (Feb. 2021), https://cdn.icmec.org/wp-content/uploads/2021/03/Cryptocurrency-and-the-Trade-of-Online-Child-Sexual-Abuse-Material_03.17.21-publish-1.pdf.
[292] Chainalysis *supra* note 113.
[293] John Deaton, "SEC Crypto Litigation Ventures Into Dangerous Legal Territory," Bloomberg, (May 2, 2023), https://news.bloomberglaw.com/us-law-week/sec-crypto-litigation-ventures-into-dangerous-legal-territory.
[294] *SEC v. W.J. Howey Co*., 328 U.S. 293 (1946).
[295] *Id*. *See also United Housing Found., Inc. v. Forman*, 421 U.S. 837 (1975); *Tcherepnin v. Knight*, 389 U.S. 332 (1967); *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344 (1943).

whether it has any of the characteristics of typical securities.[296] Additional guidance from the Securities and Exchange Commission has suggested additional relevant considerations in applying the Howey test to digital assets.[297]

Some Congressional members have criticized the SEC's actions on crypto, suggesting that the agency should obtain Congressional approval before targeting alleged wrongdoers. They argue that cryptocurrencies should be treated more like commodities, placing them under the Commodity Futures Trading Commission's (CFTC) purview. [298]

Moreover, the SEC's stance on crypto assets diverges from the interpretations of other agencies. For instance, the CFTC identifies certain crypto assets like Bitcoin, Ether, and Litecoin as commodities.[299] The Internal Revenue Service (IRS) treats digital assets as property,[300] while the Financial Crimes Enforcement Network (FinCEN) categorizes it as a virtual currency. [301] Additionally, former SEC Chair Jay Clayton has stated that crypto assets designed as alternatives to sovereign currencies should not be regarded as securities, aligning his perspective more closely with other agencies rather than the SEC's current stance.[302]

The variance in regulatory interpretation of digital assets underscore the difficulty in establishing clear oversight in the absence of a robust regulatory framework. As a result, federal agencies have navigated this landscape through their rulemaking processes. However, these agency-determined jurisdictions over digital assets might face critical examination under the major questions doctrine by courts. Historically, the U.S. Supreme Court has shown deference to agency rules, but recent decisions

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[296] Under the *Howey* test, "form [is] disregarded for substance and the emphasis [is] on economic reality." *Id*. at 298. The Court further explained that that the term security "embodies a flexible rather than a static principle" in order to meet the "variable schemes devised by those who seek the use of the money of others on the promise of profits." *Id*. at 299.

[297] Securities and Exchange Commission, https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets, (last visited Apr. 2, 2024).

[298] Fatima Hussein and Ken Sweet, "Regulators and law enforcement crack down on crypto's bad actors. Congress has yet to take action," Associated Press, (Nov. 22, 2023), https://apnews.com/article/binance-crypto-ftx-defi-blockchain-969377e746bbd1538ab5cbc988a490e4.

[299] Stephen M. Humenik, et al., Client Alert, "CFTC and SEC Perspectives On Cryptocurrency and Digital Assetes–Volume I: A Jurisdictional Overview," (May 6, 2022), https://www.klgates.com/CFTC-and-SEC-Perspectives-on-Cryptocurrency-and-Digital-Assets-Volume-I-A-Jurisdictional-Overview-5-6-2022.

[300] Internal Revenue Service, *Internal Revenue Bulletin: 2014-16*, (Apr. 14, 2014), https://www.irs.gov/businesses/small-businesses-self-employed/digital-assets#:~:text=IRS%20Notice%202014%2D21%20%E2%80%93%20guides,to%20transactions%20using%20virtual%20currency.

[301] Financial Crimes Enforcement Network, "FinCEN Proposes New Regulation to Enhance Transparency in Convertible Virtual Currency Mixing and Combat Terrorist Financing," (Oct. 19, 2023), https://www.fincen.gov/news/news-releases/fincen-proposes-new-regulation-enhance-transparency-convertible-virtual-currency.

[302] Roger E. Baron et al., "Are cryptocurrencies securities? The SEC is answering the question," Reuters, (Mar 21, 2022), https://www.reuters.com/legal/transactional/are-cryptocurrencies-securities-sec-is-answering-question-2022-03-21/.

demonstrate a shift, particularly when an agency asserts significant regulatory authority over important economic and political matters without clear precedent. This is pertinent to the SEC classifying most crypto assets as "investment contracts," thus placing them under their jurisdiction. This move could be interpreted as the agency asserting substantial regulatory power over the cryptocurrency market. The SEC's use of the "Howey Test" for determining whether crypto assets are securities could invoke the major questions doctrine. This expansive interpretation has paralleled other regulatory scenarios that have prompted the Supreme Court to apply the major questions doctrine.[303]

To address the regulatory ambiguity and jurisdictional disputes, proposed legislation should aim to define clearly which agencies are responsible for regulating different aspects of the industry. This includes establishing more objective criteria for when and how crypto assets should move between regulatory regimes.

Current State of Crypto Regulation in the US Congress

The regulation of crypto assets is increasingly being recognized as a matter of significant political importance. Over fifty bills and resolutions concerning digital asset regulation have been introduced in Congress.[304] Moreover, there is a notable bipartisan consensus in the US Congress focused on addressing crypto crime.[305] Lawmakers across party lines are collaborating to pass legislation targeting the illegal activities connected to digital assets.[306]

SECTION 6: Legislative Initiatives to Combat Illicit Actors

Digital Asset Anti-Money Laundering Act/DAAMA

The Digital Asset Anti-Money Laundering Act, initially presented at the end of 2022 and reintroduced in 2023 by a bipartisan group of U.S. Senators, aims to align the cryptocurrency sector with the existing anti-money laundering regulations of the traditional financial system.[307] This Act seeks to extend the requirements of the Bank

[303] Daniel Kuhn, "Why Binance, Coinbase, Ripple, and Other Crypto Firms Cite the 'Major Questions' Doctrine During Legal Imbroglios," Coindesk, (Oct 17, 2023), https://www.coindesk.com/consensus-magazine/2023/10/17/why-binance-coinbase-ripple-and-other-crypto-firms-cite-the-major-questions-doctrine-during-legal-imbroglios/.
[304] Jason Brett, "Congress Has Introduced 50 Digital Assets Bills Impacting Regulation, Blockchain, and CBDC Policy," Forbes (May 19, 2022), https://www.forbes.com/sites/jasonbrett/2022/05/19/congress-has-introduced-50-digital-asset-bills-impacting-regulation-blockchain-and-cbdc-policy/?sh=4321c7564e3f.
[305] Allyson Versprille, "Fighting Crypto Crime Is One Thing Both US Political Parties Agree On," Bloomberg, (Feb. 13, 2024), https://www.bloomberg.com/news/newsletters/2024-02-13/fighting-crypto-crime-is-one-thing-both-us-political-parties-agree-on?embedded-checkout=true.
[306] *Id.*
[307] S. 2669, 118th Cong. (2023-2024).

Secrecy Act (BSA), including Know-Your-Customer (KYC) protocols, to various participants including wallet providers, miners, and validators. The goal of the 2023 Act is to ensure that these "crypto participants" adhere to the same regulatory standards as traditional financial institutions. If the bill passes, these entities will be required to submit reports for transactions exceeding $10,000 and disclose any suspicious activities that might indicate money laundering or tax evasion.[308] Furthermore, the bill stipulates that any U.S. resident holding over $10,000 in cryptocurrency in foreign accounts must report these holdings to the FinCEN.

Terrorist Financing Prevention Act of 2023

Introduced by a bipartisan team of U.S. Senators, this legislation aims to extend sanctions to foreign organizations that support US-designated terrorist groups, including through cryptocurrency transactions.[309] This act is intended to block Foreign Terrorist Organizations and their financial supporters, who utilize digital assets, from accessing the U.S. financial system. The act enforces sanctions and stringent regulations to deter such activities.

Responsible Financial Innovation Act

Also, introduced by a bipartisan team of Senators, Kristan Gillabrand and Cynthia Lummis continue to work as a team to regulate the US Crypto Industry. The first version of this bill was introduced in June 2023 and the most recent version of the bill was introduced at the beginning of 2024. The 2024 Bill is known as the “Lummis-Gillabrand Responsible Financial Innovation Act.”[310] After the fall of FTX and other big litigations, their newest version puts a focus on consumer protection. The first section of the proposed bill is titled “Putting Consumer Protection First.”[311] The bill has eight additional substantive sections which include handling of illicit finance, commodities regulation, securities regulation, “Customer Protection and Market Integrity Authority”, taxation, interagency coordination, and “Equipping Agencies to Protect Consumers and Promote Responsible Innovation.”[312] Certain parts of the parts of the Bill tend to be getting the most attention including requiring companies to segregate client assets and impose third party custody requirement, requiring companies to show that their reserves can cover customer balance, its creation of new advertising standards for marketing cryptocurrency, and defining “decentralized crypto asset exchange” for the first time. By requiring mandatory registration with the Commodities Futures Trading Commission

[308] Casey Wagner, “Dueling crypto anti-money laundering bills face off in the Senate,” Blockworks, (Aug 7, 2023), https://blockworks.co/news/dueling-crypto-anti-money-laundering-bills.
[309] S. 3441, 118th Cong. (2023-2024).
[310] S. 4356, 117th Cong. (2021-2022).
[311] *Id.*
[312] *Id.*

(CFTC) for crypto asset exchanges, it would give the CFTC primacy over the Securities and Exchange Commission (SEC) when it comes to the crypto spot market. Algorithmic stablecoins would be regulated by the CFTC. If the Bill passes, it will require that payment stablecoins can only be issued by a bank or credit union.

Currently, the Lummis-Gillabrand Bill has not been adopted. However, it seems to have a promising future. Representative French Hill, vice chair of the House Financial Services Committee and chair of the Subcommittee on Digital Assets stated:

> "I am glad to see Senators Lummis and Gillibrand reintroduce their bipartisan legislation to establish a regulatory framework for digital assets. Their work demonstrates that protecting consumers, providing legal clarity, and spurring innovation was never a partisan effort. I look forward to our continued work with our Senate colleagues on common sense legislation."

The ongoing debate that seems to be delaying much of this regulation is whether the Federal Government should be the primary regulatory body for crypto and digital asset regulation or of there should be some combination with state officials. Similar issue exists between the SEC and CFTC. As it currently stands, it appears that the two bills that seem to be moving in the House are a Stablecoin Bill and the Market Structure Bill. From the Senate the Lummis-Gillabrand Bill is certainly sparking discussion.[313]

Committee Actions in the House

The House Financial Services Committee recently made a decisive move by voting to advance a resolution aimed at rejecting the Securities and Exchange Commission's Staff Accounting Bulletin 121 (SAB 121).[314] This guidance has sparked controversy for mandating that financial institutions include customers' cryptocurrency assets in their balance sheets.

In addition, the committee voted unanimously to advance the Combating Money Laundering in Cyber Crime Act.[315] This act aims to bolster the US Secret Service's authority over criminal activity involving digital assets.[316]

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[313] Kristin Gillibrand, Press Release, July 12, 2023.
[314] Nikhilesh De and Jesse Hamilton, "U.S. House Panel Votes to Disapprove of Controversial SEC Custody Guidance," Coindesk, (Feb. 29, 2024), https://www.coindesk.com/policy/2024/02/29/us-house-panel-seems-poised-to-disapprove-of-controversial-sec-custody-guidance/.
[315] H.R. 7156, 118th Cong. (2023-2024).
[316] Sarah Wynn, "House Finance Committee votes to move forward with measure to overturn SEC's custody bulletin," The Block, (Feb. 29, 2024), https://www.theblock.co/post/280000/house-finance-committee-votes-to-move-forward-with-measure-to-overturn-secs-custody-bulletin.

Despite these initiatives and ongoing discussions, Congress has not yet enacted specific measures to regulate crimes involving cryptocurrencies.[317] Lawmakers are grappling with the task of defining cryptocurrencies while actively pursuing legislative measures to enhance AML standards, combat crypto crime, and safeguard national security The bipartisan support and ongoing efforts reflect a shared commitment to addressing the challenges posed by illicit activities involving digital assets.

SECTION 7: Use of Blockchain To Assist the Criminal Justice System

Blockchain technology can be used to maintain court records and criminal history databases. Since blockchain is an immutable ledger that offers greater security and broader access, it is a better and more accurate resource than a central server. It is more secure and accurate when managing court judgements, record keeping, criminal histories and pending matters. There also exists great opportunities to use blockchain technology to reduce mass incarceration.[318] Blockchain can be used for record keeping, maintaining police disciplinary data systems, and to create uniform statewide pre-trial data collection.[319]

The increased focus on wrongful convictions in the United States combine with its incredibly high incarceration rate in the world. In 2022, the United States housed almost two million prisoners[320] which was twenty percent of the global prison population.[321] Incarcerated people often "lose" their court and legal documents and/or do not have access to them. Further, there is more and more focus on transparency of information. New York's discovery laws mandate the release of disciplinary information of law enforcement as part of the discovery process in all criminal cases.[322]

The evaluation of technology has allowed the storage of almost all discovery digitally. Furthermore, discovery in New York's criminal justice system and many other states is transferred between law enforcement, legal entities and attorneys electronically with it being stored digitally. Blockchain technology has the ability to provide secure storage of discovery, court files, legal files and police records. By using blockchain technology in this manner, our courts, attorneys, law enforcement and other agencies can provide the ability to securely share information. Blockchain offers "real-time

[317] Sam Brown and Erika Kelton, "We need new laws to combat crypto crimes," The Hill, (Aug. 22, 2023), https://thehill.com/opinion/technology/4163374-we-need-new-laws-to-combat-crypto-crimes/.
[318] Maria Rojas, "Modernizing Justice: Implementing Blockchain Technology Into the Criminal Justice System to Reduce Mass Incarceration," 47 Vill. L. Rev. 200 (2023), https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=2450&context=lr/.
[319] *Id.*
[320] *See* ACLU, "Mass Incarceration," http://www.aclu.org/issues/smart-justice/mass-incarceration (last visited Apr. 12, 2024)(identifying constitutional violations v. Constitutionality of new legislation or regulations.
[321] Rojas, *supra* note 241.
[322] N.Y. Crim. Proc. Law § 245.

immutable record-keeping".[323] Its decentralized nature allows it to connect through algorithms amongst a network of connected computers. Use of this technology will decrease the expense of cloud storage large amounts of data in multiple locations and provide ease of access while significantly reducing the need to transfer large volumes of data. It would also reduce the amount of time needed to manually maintain data. For example, "participants in the disposition of those criminal charges - including prosecutors, courts and criminal-history repositories - would update the single [b]lockchain records with the action [taken]."[324] Blockchain technology offers broader access with greater security.

Blockchain technology also has promising implications for promoting personal finance skills and enhancing cryptocurrency knowledge among prisoners, in turn, facilitating their re-entry into the increasingly tech-driven workforce following their release. For example, a cryptocurrency called CellBlocks is working to digitize major prison economies to make inmate financial transactions safer, more reliable, transparent, and consistent. If implemented successfully, CellBlocks would be the world's first decentralized cryptocurrency to penetrate the United States carceral system. This technology would not only enable inmates to exchange money without the risk of violence, exorbitant fees, or theft by prison administrators, but also, it would keep an immutable blockchain network record of every transaction circulating in the prison system, thereby reducing the risk of corruption or fiscal impropriety. Projects like CellBlocks serve as a promising avenue to expand inmate financial literacy and acquisition of crypto/blockchain skills to promote successful reintegration into society after serving their sentence."[325]

This promise does not come with concern–in particular concerns over the potential security hazards of giving prisoners internet access to access cryptocurrency and blockchain resources.[326] This concern, however, has not stopped other countries from giving their incarcerated individuals real-time access to the Internet–seemingly without compromising public safety.[327] For example, Belgium has made the platform "Prison Cloud" available–which provides incarcerated people with limited and monitored internet access to content including games, books, and legal materials.[328] Similarly, Finland and Denmark provide inmates with limited internet access through their open

[323] Embley and Graski, *supra* note 1.
[324] *Id.* at 30.
[325] Sophia Scott, "Blockchain Behind Bars: The Case for Cryptocurrency in Criminal Justice," Harvard Technology Review, (Aug. 28, 2021) https://harvardtechnologyreview.com/2021/08/28/blockchain-behind-bars-the-case-for-cryptocurrency-in-criminal-justice-2/.
[326] *Id.*
[327] *Id.*
[328] *Id.*

prisons (jails with minimal security), which have some of the world's lowest recidivism rates.[329]

Use of Digital Currency for Bail

Blockchain technology and digital currency have introduced novel possibilities in various sectors, and the realm of criminal justice, including bail procedures, is no exception. The traditional bail system often involves large sums of money, intermediaries, and can be riddled with inefficiencies and corruption. The integration of blockchain and digital currency proposes a system that could be more transparent, secure, and efficient.

The use of crypto and blockchain extends beyond law enforcement and is also utilized as a tool for advocating social change for marginalized communities historically disadvantaged by the criminal justice system.[330] For instance, over 70% of Americans in local jails are awaiting trial and presumed innocent but are detained due to the bail system.[331] This system requires defendants to pay a judge-determined fee to await trial outside jail. Those unable to afford bail remain incarcerated, allowing wealthier individuals to avoid jail time for the same alleged crimes that lower-income individuals face.[332]

The deep-rooted racial wealth gap in the United States, stemming from centuries of systemic oppression and discrimination, exacerbates disparities in the bail system, leading to disproportionately higher incarceration rates among people of color.[333] In response to this issue, Bail Bloc was established. This initiative encourages users to download the Bail Bloc app, allowing them to contribute their computer's spare processing power to mine the cryptocurrency Monero.[334] The mined Monero is then converted to U.S. dollars on a monthly basis, with all proceeds donated to non-governmental organizations that support bail funds within the National Bail Fund Network.[335] This innovative approach provides a means to financially assist individuals who cannot afford their bail fees, ultimately working to address the inequities in the bail system.[336]

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[329] *Id.*
[330] *Id.*
[331] *Id.*
[332] *Id.*
[333] *Id.*
[334] *Id.*
[335] *Id.*
[336] *Id.*

When applied to bail transactions, blockchain could have the following potential advantages:

Using blockchain as part of the bail system could make for a transparent system and allow real-time monitoring of bail payments. This may allow those monitoring the system to catch any mundane errors currently made when paperwork is not sent in a timely manner. [337]

Due to the cryptographic nature of blockchain, its immutability offers an added level of security against retroactive changing of records. This security, in turn, can also defend against fraud and verify bail money is properly used.

Digital currencies will lower the barrier to posting bail–giving people easier access to their assets to post bail in addition to the process of actually posting bail. Additionally, this is beneficial to those who do not have access to traditional financial services, such as those in custody. As a result, transaction fees associated with bail payments may be significantly decreased through bypassing the traditional banking system and decrease the time of custody attributed to slow transaction times.

For international defendants, the benefits are even more significant. Cross-border payment is generally a transaction that requires time. Digital currencies can simplify the bail process across borders by avoiding currency exchange issues. A blockchain bail system may allow law enforcement to track the origin of bail proceeds–ensuring they are not coming from a criminal enterprise.[338]

When analyzing the use of digital currencies for bail, we must also consider the challenges that must be addressed:

The value of many digital currencies can be highly volatile. A bail amount set at the time of the hearing could fluctuate by the time it's paid, creating complications. Many jurisdictions, including New York, have yet to establish clear legal frameworks for accepting digital currency for government-related payments, including bail. While blockchain provides enhanced security, digital wallets and exchanges have been vulnerable to hacks and theft, which could pose risks for bail transactions.

Thus, the use of blockchain technology and digital currency in the context of bail has the potential to transform the way criminal justice systems operate by offering transparency, security, and efficiency. As with any emerging technology, there are

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[338] https://balboabailbonds.com/blog/bitcoin-for-bail-bonds/

hurdles to overcome, particularly in regulation and adoption. However, with proper implementation and safeguards, blockchain and digital currency could markedly improve the bail process.[339]

SECTION 8: Money Laundering

Money laundering as discussed below can occur in traditional financial systems or it now occurs in more sophisticated laundering through the blockchain. Today, crypto criminals will utilize bridges and mixers to help facilitate the movement of illicit funds. Crypto mixers, also known as crypto tumblers, are services that offer enhanced transactional privacy by mixing coins from different sources after a transaction. In addition, a blockchain bridge connects two separate blockchain networks. The primary purpose of these bridges is to facilitate the transfer of tokens and data from one blockchain to another. The emergence of smart contract-enabled bridges could also enhance the automation and security of asset transfers.

Traditional Mechanisms, Cryptocurrency Challenges, and Regulatory Evolution

Money laundering is a financial crime that generally stems from the movement of ill-gotten gains associated with other criminal offenses, such as wire fraud. This association primarily exists because money laundering involves making illegally obtained proceeds (i.e., "dirty money") appear legal ("clean"). Understanding this relationship requires dissecting how money laundering is not a standalone offense but is deeply tied to the initial crimes generating illicit proceeds.

The Connection Between Money Laundering, Theft Crimes, and Wire Fraud Generation of Illicit Proceeds

Theft crimes, including wire fraud, are primary sources of illicit proceeds subject to money laundering. Wire fraud, under 18 U.S.C. § 1343, involves using electronic communications to execute a scheme to defraud or obtain money under false pretenses. The proceeds from such crimes often need to be laundered to enter the financial system without raising suspicion.

Layering through Money Laundering

Once the proceeds are obtained through crimes like wire fraud, money launderers use various methods to conceal the funds' origin, ownership, and control.

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[339] *Id.*

Title 18 U.S.C. §§ 1956 and 1957 outline the legal framework for combating money laundering, focusing on the concealment of proceeds from a specified unlawful activity.

Integration into the Financial System

The ultimate goal of money laundering is to reintegrate the laundered money into the economy, making it appear as legitimate income. This process often involves sophisticated financial maneuvers, including using financial institutions to facilitate the movement of criminally derived property.

The Role of Cryptocurrency and Blockchain in Money Laundering:

Although money laundering crimes are overwhelmingly facilitated by the movement of cash, cryptocurrency and blockchain technologies, the decentralized nature of digital currencies have introduced new dimensions to money laundering, complicating efforts to trace and combat these crimes.

In today's global financial landscape, combating money laundering and ensuring customer due diligence are critical priorities for regulatory bodies and financial institutions. For member firms operating within the securities industry, the Financial Industry Regulatory Authority (FINRA) has established stringent guidelines to address these concerns. One of the key regulations is FINRA Rule 3310[340], which focuses on anti-money laundering (AML) and know your customer (KYC) compliance.

The BSA[341], officially known as the Currency and Foreign Transactions Reporting Act, was enacted by the United States Congress in 1970 as the first significant legislation to combat money laundering. The Act was designed to deter criminal activity by requiring financial institutions to maintain records of cash purchases and report certain transactions.

In 2013, the Financial Crimes Enforcement Network (FinCEN), a bureau of the U.S. Treasury, declared that "administrators or exchangers" of virtual currency qualify as money services businesses (MSBs) under the BSA and FinCEN regulations. According to FinCEN's guidance document, an "exchanger" is defined as a person or entity engaged as a business in the exchange of virtual currency for real currency, funds, or other virtual currency. An "administrator" is a person or entity engaged as a business in issuing a virtual currency and who has the authority to redeem such currency.[342]

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[340] FINRA Rule 3310 (effective May 11, 2018).
[341] Office of the Comptroller of the Currency, “Bank Secrecy Act,” https://www.occ.treas.gov/topics/supervision-and-examination/bsa/index-bsa.html (last visited Apr. 12, 2024).
[342] Financial Crimes Enforcement Network, Guidance on Application of FinCEN’s Regulations to Persons Administering Exchanging, or Using Virtual Currencies, FIN-2013-G001 (2013).

The BSA requires all MSBs, including those that exchange or transmit virtual currencies, to register with FinCEN. This requirement extends to any "person or entity engaged as a business in the exchange of virtual currency for real currency, funds, or other virtual currency." This means that cryptocurrency intermediaries, such as exchanges and wallet providers, are subject to the same regulatory requirements as traditional financial institutions.

An administrator or exchanger that (1) accepts and transmits a convertible virtual currency or (2) buys or sells convertible virtual currency for any reason is a money transmitter under FinCEN's regulations, unless a limitation to or exemption from the definition applies to the person. FinCEN's regulations define the term "money transmitter" as a person that provides money transmission services, or any other person engaged in the transfer of funds. The term "money transmission services" means "the acceptance of currency, funds, or other value that substitutes for currency from one person *and* the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means."[343]

In 2020, FinCEN further clarified that the anti-money laundering (AML) requirements placed on other MSBs also applied to "decentralized finance" (DeFi). DeFi refers to blockchain-based finance that removes central authorities like banks and exchanges. Despite the decentralized nature of DeFi, there is a growing movement among U.S. government regulatory bodies to seek stricter BSA, AML and KYC compliance.[344]

Section 80603, of the 2021 Infrastructure Investment and Jobs Act[345] expands the definition of a digital asset broker. Due to the significant impact that this legislation would have on the digital asset sector, implementation has been delayed in order to afford the IRS and U.S. Treasury sufficient time to come up with compliance and enforcement strategies.[346] Once finalized, Section 80603 will require digital asset brokers to impose strict KYC and IRS reporting requirements for digital asset transfers.

Anonymity and Global Reach

Much like cash, cryptocurrencies offer a level of anonymity that makes them an attractive option for laundering the proceeds of criminal conduct. Critics argue that the pseudonymous nature of crypto makes it an appealing vehicle for money laundering

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[343] *Id.*
[344] United States Department of Treasury, "Illicit Finance Risk Assessment of Decentralized Finance," (Apr. 2023), https://home.treasury.gov/system/files/136/DeFi-Risk-Full-Review.pdf.
[345] H.R. 3684, 117th Cong. (2021).
[346] Infrastructure Investment and Jobs Act of 2021, Pub. L. No. 117–58, §80603 (2021), https://www.irs.gov/pub/irs-drop/a-23-02.pdf.

because it frustrates law enforcement's ability to track the movement of illicit funds. However, these critics often fail to acknowledge that the fully transparent nature of blockchain ledgers also affords criminal investigators an invaluable tool for tracking the movement of illicit funds.

Decentralization

The decentralized nature of blockchain technology presents challenges for regulatory and law enforcement agencies because traditional financial monitoring systems are ill-suited to keep up with the speed and ease with which crypto moves between parties. In response to these challenges, some lawmakers argue that existing anti-money laundering (AML) laws need to be expanded to apply to cryptocurrency transactions. The existing AML procedures for tracking and identifying parties in traditional financial transactions do not mesh well with the decentralized ethos of crypto. Until legislatures come up with practical rules for monitoring and tracking crypto transactions, we will remain stuck in a climate of enforcement and regulatory uncertainty that threatens the continued growth of the decentralized finance (DeFi) sector in the United States.

Money Laundering and Cryptocurrency and Blockchain Technologies

Title 18 U.S.C. §§ 1956 and 1957 define and penalize various forms of money laundering conduct relating to both the domestic and international movement of illicit funds affecting interstate commerce in the United States.[347] Title 18 U.S.C. § 1957 focuses on transactions involving criminally derived property over $10,000, emphasizing the involvement of financial institutions in facilitating the movement of property with knowledge that it was the fruit of criminal conduct.

Title 18 U.S.C. § 1956 primarily focuses on the laundering of monetary instruments and engages with a broader scope of money laundering activities than § 1957. It criminalizes the conduct of financial transactions with proceeds generated from specified unlawful activities, with the intent to promote the carrying on of specified unlawful activity[348]; conceal or disguise the nature, location, source ownership, or control of the proceed of a specified unlawful activity[349]; avoid transaction reporting requirements under state and federal law[350]; international laundering of monetary

[347] 18 U.S.C. §§ 1956, 1957 (2024).
[348] This includes any financial transaction that uses proceeds from unlawful activities to further or support those or other unlawful activities.
[349] This clause targets efforts to make illicit gains appear legitimate, addressing the core of what many consider traditional money laundering.
[350] This is aimed at those who structure transactions in a manner that evades the detection mechanisms established by regulatory authorities, such as breaking up large amounts of money into smaller, less suspicious amounts (often referred to as "smurfing").

instruments[351]; and engaging in transactions involving property derived form unlawful activities[352].

Furthermore, § 1956 also includes provisions for sting operations, allowing for undercover law enforcement actions to catch money launderers in the act, and it introduces severe penalties for violations, including substantial fines and imprisonment.

SECTION 9: Racketeer Influenced and Corrupt Organizations Act's (RICO) Application to Digital Currency

The Racketeer Influenced and Corrupt Organizations Act (RICO) was initially introduced by Congress "to deal with organized crime and the Mafia," and to create "new criminal penalties and civil actions against individuals engaging in certain criminal activities related to an enterprise."[353] The statute addresses two main concerns today: "(1) the infiltration or control of an enterprise by criminals and (2) the operation of an enterprise for a criminal purpose."[354] "[A]lmost fifty years after RICO's passage, criminals are turning to the internet and cryptocurrencies to establish a new frontier for organized crime."[355] "[C]riminals continue to use cryptocurrencies to mask their identities in modern digital twists on classic organized crimes, including money laundering, drug sales, and extortion."[356] RICO is likely broad enough to cover digital currency.

A few cases, both criminal and civil, "have attempted prosecution of cryptocurrency criminals under RICO. In 2017, a grand jury indicted Alexandre Cazes under RICO for his leadership of a criminal enterprise overseeing a massive illegal online marketplace, ten times larger than Silk Road. However, the prosecution ended after Cazes committed suicide. In late 2018, Michael Terpin, a cryptocurrency investor, used RICO to sue a hacker for illegally accessing his phone account and subsequently stealing over twenty-three million dollars in cryptocurrency. Both cases used the operation subsection of the statute."[357]

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[351] Section1956 also specifically addresses the transfer of funds internationally with the intent to promote specified unlawful activities or to conceal the proceeds of such activities.
[352] It includes transactions involving the proceeds from criminal activities without the requirement that the transaction aim to conceal those proceeds, merely that the transaction involves significant amounts of money derived from criminal conduct.
[353] Andrew Robert Klimek, *Reinvesting in RICO with Cryptocurrencies: Using Cryptocurrency Networks to Prove RICO's Enterprise Requirement*, 77 Wash. & Lee L. Rev. 509 (2020). Available at: https://scholarlycommons.law.wlu.edu/wlulr/vol77/iss1/9
[354] *Id*.
[355] *Id.*
[356] *Id.*
[357] *Id.*

> "In light of the broad applicability of RICO, the DOJ created requirements for authorizing the use of RICO that limit its use. Any prosecution of cryptocurrency criminals must satisfy these requirements:
>
> [A] government attorney should seek approval for a RICO charge only if one or more of the following requirements is present:
>
> 1. RICO is necessary to ensure that the indictment adequately reflects the nature and extent of the criminal conduct involved in a way that prosecution only on the underlying charges would not;
>
> 2. A RICO prosecution would provide the basis for an appropriate sentence under all the circumstances of the case in a way that prosecution only on the underlying charges would not;
>
> 3. A RICO charge could combine related offenses which would otherwise have to be prosecuted separately in different jurisdictions;
>
> 4. RICO is necessary for a successful prosecution of the government's case against the defendant or a codefendant;
>
> 5. Use of RICO would provide a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct;
>
> 6. The case consists of violations of State law, but local law enforcement officials are unlikely or unable to successfully prosecute the case, in which the federal government has a significant interest;
>
> 7. The case consists of violations of State law, but involves prosecution of significant or government individuals, which may pose special problems for the local prosecutor."[358]

These factors help to ensure that RICO is only used when necessary.[359] However, these requirements for the use of RICO in criminal prosecutions create a barrier for civil complainants using cryptocurrencies to support their RICO cases. Civil RICO plaintiffs in a majority of circuits must allege that they suffered an 'investment injury' resulting from the investment or use of the proceeds in the enterprise to establish standing.[360] The fluctuating cryptocurrency markets make it difficult for plaintiffs to show the

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[358] *Id.*
[359] *Id; See,* U.S. Dep't of Justice, Justice Manual § 9-110.310 (2020).
[360] *Id.*

connection between a criminal's use of a cryptocurrency and "an injury that is concrete and particularized enough to allow standing."[361]

Due to the incredibly broad nature of the RICO statute. "Perhaps the true question of whether to employ RICO should be based on whether a particular case reflects Congress's original concern with organized crime."[362] "RICO can be put to good use to protect the cryptocurrency industry when someone engages in an organized and systematic criminal effort to abuse and infiltrate a cryptocurrency network."[363]

Conclusion

Is there a need for new Criminal Statutes to combat these new technologies? In a nutshell, no. Criminals will always evolve along with the new technologies. Currently, there are plenty of statutes to enforce against these cases: Violation of the Bank Secrecy Act, Wire, Bank and Mail Fraud, the money laundering statutes, 18 U.S.C. §§ 1956 and 1957, terrorism laws, prohibition of unlicensed money transmitting businesses, etc.

Emerging technologies and digital currencies bring forth a complex array of issues for the criminal justice system. These technologies offer both new methods for criminals to carry out their activities and innovative tools for legal systems to respond to such challenges. Meeting these challenges requires a dynamic, multifaceted approach that balances the privacy rights of individuals with the imperatives of law enforcement. It also necessitates international collaboration, an adaptable legal framework, and a commitment to continuously develop the forensic and investigative capabilities of criminal justice professionals. Only through such an approach can society hope to stay ahead of criminals who seek to exploit these new technologies for illicit purposes.

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[361] *Id.*
[362] *Id.*
[363] *Id.*

Article 6: Ethics/Education

SECTION 1: Attorneys Receiving Advanced Fees in Cryptocurrency

Initially, it should be noted that all lawyers are mandated to keep abreast of changes in technology. RPC 1.1 comment [8] states,

> [t]o maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.[364]

With the rise in popularity of various cryptocurrencies and NFTs, it appears that state and local bar associations have been repeatedly asked to opine as to whether it is permissible for attorneys to accept cryptocurrencies as a form of payment for legal services provided. Based on the holdings of these advisory opinions, accepting cryptocurrency is generally permissible as long as the New York State Rules of Professional Conduct ("RPC") are not violated. However, when accepting cryptocurrency for advanced payment, RPC1.8 (a) and RPC 1.5 (a) are especially important and involve additional layers of complexity, as accepting advanced payment might be viewed as entering into a business relationship with a client.

Changes in how attorneys accept payment are not a new issue. As ethics opinions from the NYSBA have stated, lawyers may allow their clients to pay for legal services by credit card provided:

> (i) the amount of the legal fee is reasonable; (ii) the lawyer complies with the duty to protect the confidentiality of client information; (iii) the lawyer does not allow the credit card company to compromise the lawyer's independent professional judgment on behalf of the client; (iv) the lawyer notifies the client before the charges are billed to the credit card and offers the client the opportunity to question any billing errors; and (v) in the event of any dispute regarding the lawyer's fee, the lawyer attempts to resolve all disputes amicably and promptly and, if applicable, complies with the

[364] N.Y. Rules of Prof'l Conduct R.1.1 cmt. 8 (2017).

fee dispute resolution program set forth in 22 N.Y.C.R.R. Part 137.[365]

In May 2023, the American Bar Association issued guidance regarding advanced payments for legal fees, not limited to digital assets, when it released a Formal Opinion dated May 3, 2023, titled Fees Paid in Advance for Contemplated Services.[366]

Initially the May 3, 2023, opinion explains that advanced fees and retainers are two different methods of payment.[367] While for the purposes of the article the terms "advanced fee" and "retainer" are used interchangeably, the May 2023 Formal Opinion seeks to distinguish the two by stating that a retainer should not be construed as a "payment for the performance of services, but rather is compensation for the lawyer's promise of availability … (and) is not an advance deposit against future legal services."[368]

These differences should be further investigated if attorneys enter into such agreements. Lawyers must understand when the fee becomes the property of the lawyer and when the fee is earned, including transactions involving cryptocurrency. One important aspect to keep in mind is that lawyers must not commingle a lawyer's earned funds with advance deposits. While not in the context of legal representation, the conviction of Sam Bankman-Fried, the founder of the now defunct crypto exchange FTX Trading Ltd., commonly known as FTX, commingled customers' cryptocurrency leading to trouble.

SECTION 2: Applicable Ethical Rules

Generally, according to Part 1200 of the New York State Rules of Professional Conduct, payments in cryptocurrency and NFTs can implicate various ethical rules. However, the payment of lawyer fees via cryptocurrency primarily seems to invoke two particular ethical obligations. Initially, under RPC 1.5(a), there is a prohibition against charging unreasonable fees.[369] Next, and far more nuanced, the acceptance of digital assets as payment may also implicate RPC 1.8(a), which governs the rules pertaining to the improper conflicts of interest that can arise when an attorney enters into a business transaction with a client.[370]

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[365] New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 1258 (2023)(citing N.Y. State 1050 ¶5 (2015)); *See also* New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 1248 (2022)(It has been recognized for nearly a half century that lawyers may accept credit card payments for legal services. In N.Y. State 362 (1974), we concluded: "The use of credit cards to pay for legal fees is an innovation which should not be discouraged where the participating lawyer complies with the appropriate safeguards . . . [because] it fills a need for a segment of the public that conceivably might not otherwise have access to legal services." Among the necessary safeguards are the protection of clients' confidential information).

[366] A.B.A. Formal Op. 505 (2023).

[367] *Id.*

[368] *Id.*

[369] N.Y. Rules of Prof'l Conduct R.1.5(a) (2017).

[370] N.Y. Rules of Prof'l Conduct R.1.8(a) (2017).

According to RPC 1.5(a) “Fees and Division of Fees,” a fee is considered excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive.[371] The factors to be considered in determining whether a fee is excessive include: the time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed by the client or by circumstances; the nature and length of the professional relationship with the client; the experience, reputation and ability of the lawyer or lawyers performing the services; and whether the fee is fixed or contingent.[372]

In short, under RPC 1.5, a fee cannot be excessive or unlawful.

Furthermore, Rule 1.8(a), “Current Clients: Specific Conflict of Interest Rules,” states:

> A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:
>
> (1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.[373]

In sum and substance, according to RPC 1.8(a), if the agreement between the client and the attorney is a business transaction, the attorney has to follow additional steps to ensure compliance with the rules.

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[371] N.Y. Rules of Prof’l Conduct R.1.5(a) (2017).

[372] *Id.*

[373] N.Y. Rules of Prof’l Conduct R.1.8(a) (2017).

SECTION 3: Ethics Opinions

In 2017, Nebraska's Lawyer's Advisory Committee issued Opinion No. 17-03, allowing payment in digital currencies but noting that bitcoin is "not actual currency" so it cannot be deposited into a client trust account.[374] Nebraska's treatment of cryptocurrency as property rather than currency remains a common treatment by bar associations across the country. While this opened the door to applying a "barter currency" analysis as outlined in Connecticut's Informal Opinion 15-04 (exploring a modern barter exchange membership), later opinions have followed Nebraska's approach.[375]

In 2019, the New York City Bar Association ("NYCBA") issued an opinion addressing the question of whether these ethics rules might come into play if, and when, cryptocurrency is used to pay attorney fees.[376] As per the NYCBA opinion,

> [t]he threshold question under Rule 1.8(a) is whether a lawyer and client (or prospective client) are entering into a (i) 'business transaction;' (ii) where the lawyer and the client have differing interests; and (iii) the client expects the lawyer to exercise professional judgment on the client's behalf in the transaction. If so, the lawyer must meet the procedural requirements in the rule.[377]

This is an extremely fact-specific analysis that must be conducted on a case-by-case basis, which emphasizes the complexities and complications that can arise when holding cryptocurrency as a form of advanced payment.

The NYCBA further notes that cryptocurrency is currently treated more like property as opposed to currency. Just as a lawyer and client would be required to negotiate over several deal-points in an agreement for the lawyer to accept some other form of nonmonetary property (e.g. "a piece of land, a painting or a vehicle") in exchange for legal services – which is clearly indicative of a business transaction subject to Rule 1.8(a) – they would be mandated to negotiate to resolve the questions arising from a cryptocurrency transaction.[378]

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[374] Neb. Lawyers Advisory Committee Formal Op. 17-03 (2017).
[375] Ct. Bar Ass'n Informal Opinion 15-04 (2015).
[376] N.Y. City Bar Ass'n Formal Op. 2019-5 (2019).

[377] *Id.*
[378] *Id.*

If RPC 1.8(a) is triggered, it imposes various requirements before the lawyer can enter into the transaction.[379] The fee must be reasonable in light of the totality of the circumstances. Importantly, according to the NYCBA's opinion, just because a fee is neither excessive nor illegal does not necessarily mean that it is fair and reasonable because Rule 1.8(a) imposes a more demanding standard. Next, the requirement is whether the lawyer has disclosed the terms of the transaction to the client in a manner that can be "reasonably understood" by the client, which will obviously depend on the complexity of the transaction and sophistication of the client. As such, counsel must be very careful when drafting this disclosure and not necessarily rely on standard form language used in other matters.[380]

An ethics opinion from February 2, 2022, which was adopted on September 19, 2022, by Virginia's Supreme Court and authored by the Virginia Bar Association, states that a client's payment of an advance fee using cryptocurrency has the material elements of a business transaction with the client, subject to the requirements of Rule 1.8(a).[381]

Importantly, the D.C. Bar Association stated that Rule 1.8(a), and similar to Rule 1.5(a), requires a lawyer to adequately disclose the terms and implications of the fee arrangement, which must be reasonable. In addition, a lawyer who enters into a business relationship with a client must provide the client with written disclosure of the terms of the agreement, and a reasonable opportunity to confer with independent counsel, and must acquire from the client written, informed consent to the agreement.[382] Furthermore, Rule 1.8(a) adds an independent ethical responsibility to ensure that the fee arrangement is not only reasonable, but also fair to the client.[383]

The Virginia Bar Association, citing to the D.C. Bar Association's suggestions, provides illustrative examples of useful language and topics to include in the disclosure to the client, namely:

> a lawyer accepting cryptocurrency should consider including a clear explanation of how the client will be billed (i.e., in dollars or cryptocurrency); whether and how frequently cryptocurrency held by the lawyer will be calculated in dollars, or otherwise trued-up or adjusted for accounting purposes and whether, upon that accounting, market increases and decreases in the value of the cryptocurrency triggers obligations by either party; how responsibility for payment of cryptocurrency transfer fees (if any) will be allocated; which

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[379] *Id.*
[380] *Id.*
[381] Virginia Bar Ass'n, Op. 1898 (2022); *see also* North Carolina Bar Ass'n, Formal Op. 5 (2019); District of Columbia Bar Ass'n, Op. 378 (2020); N.Y. City Bar Ass'n Formal Op. 2019-5 (2019).
[382] District of Columbia Bar Ass'n, Op. 378 (2020).
[383] *Id.*

> cryptocurrency exchange platform will be utilized to determine the value of cryptocurrency upon receipt and, in the case of advance fees, as the representation proceeds (i.e., as fees are earned) and upon its termination; and who will be responsible if cryptocurrency accepted by the lawyer in settlement of the client's claims loses value and cannot satisfy third party liens.[384]

Echoing similar concerns, the Maryland Bar Association held that a lawyer may accept cryptocurrency as payment as long as it complies with the Maryland Attorneys' Rules of Professional Conduct ("MARPC"). Given the nature of cryptocurrency and its attendant inability to be deposited into an Attorney Trust Account, the opinion highlights that alternative fee arrangements involving the receipt of fees paid in cryptocurrency raise a host of potential ethical considerations. Any attorney considering such an arrangement must comply with the entirety of the MARPC.[385]

The Maryland Committee on Ethics further emphasized that just as an attorney might be disciplined for depositing a client's retainer paid in fiat currency into their personal account, which is an example of commingling as discussed above, or the firm's operating account, an attorney who accepts a cryptocurrency retainer could be subject to discipline for succumbing to a phishing attack, for losing access to the digital wallet holding the funds, or mistakenly sending funds to be disbursed back to the client to the wrong address.[386] Because the cryptocurrency industry is mostly unregulated, uninsured, anonymous, and irreversible, it is particularly important for lawyers to appropriately safeguard the cryptocurrency retainer against theft, loss or mishandling, or other similar risks.[387]

As referenced above, the theory behind alternative payment options for attorneys is far from novel. It is very similar to a situation where a party wishes to pay for legal services by tendering stock (which could fluctuate in value over time). One solution might be for the parties to agree that the amount being tendered for advance payment would be calculated as of the time the payment is made, in which case there would be a sharing of potential risk. If the crypto is not liquidated upon payment and goes down in value, the attorney would lose out versus receiving a sum which turns out to be in excess of the expected payment. That might be an irreconcilable conflict of interest and is just one example of how such an arrangement can be problematic.

As mentioned above, while this article specifically discusses RPC 1.5 (a) and 1.8(a), other possible ethical issues highlighted by the NYCBA's ethical opinion in a footnote which might be triggered by accepting cryptocurrency as payment might

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[384] Virginia Bar Association, Op. 1898 (2022).
[385] Maryland State Bar Ass'n Committee on Ethics, Op. 2022-01 (2022).

[386] *Id.*
[387] *Id*.

include: "(1) whether, and how, a lawyer may properly hold cryptocurrency in trust either for the client or for the benefit of third parties (see Rule 1.15); (2) whether the lawyer has the proper cybersecurity protections and technology controls to maintain cryptocurrency and safeguard against outside attacks (see Rule 1.1); and (3) whether the lawyer and the client have complied with all state and federal laws related to cryptocurrency including, but not limited to applicable criminal laws regulating securities and anti-money laundering laws (see Rules 1.2(d); 8.4(a))."[388]

SECTION 4: Other Ethical Issues

Recently, a former partner at U.S. law firm Locke Lord was sentenced to 10 years in prison for his role in a nearly $400 million fraudulent cryptocurrency scheme, according to Manhattan federal prosecutors. The attorney was found guilty of conspiracy to commit money laundering and conspiracy to commit bank fraud in November 2019, stemming from his role in the OneCoin cryptocurrency fraud.[389]

While this matter involved crypto, attorneys breaking the law and laundering money is nothing new. It merely emphasizes the need to recognize that attorneys will face ethical dilemmas when practicing law, and thus, the bar needs to be prepared.

SECTION 5: Digital Finance and Currency Legal Education in New York State

New York law schools have started taking steps to educate their students about the emerging legal landscape of cryptocurrency and distributed ledger technology ("DLT"):

- *Cornell* has offered "Starting a Crypto Fintech: Legal Roadmap and Case Studies;" "Advanced Writing: Fintech, Alternative Finance and Digital Assets du Jour;" "Crypto Assets and Web3;" and "NFTs: Legal and Business Considerations."[390]
- *Cornell Tech* offers a Master of Laws (LLM) in Law, Technology, and Entrepreneurship.[391]
- *Hofstra* offers "Global Fintech Law and Policy," which provides a "general overview of the evolving payments industry and how the regulators had been responding to it around the world"[392]

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[388] N.Y. City Bar Ass'n Formal Op. 2019-5 (2019).

[389] U.S. District Attorney's Office, Southern District of New York, "Former Law Firm Partner Sentenced To 10 Years In Prison For Laundering $400 Million of OneCoin Fraud Proceeds," (Jan. 25, 2024) https://www.justice.gov/usao-sdny/pr/former-law-firm-partner-sentenced-10-years-prison-laundering-400-million-onecoin-fraud.

[390] CORNELL LAW SCHOOL, https://support.law.cornell.edu/Students/forms/Concentration_Option.cfm, (last visited Feb. 15, 2024).

[391] CORNELL TECH, https://tech.cornell.edu/programs/masters-programs/master-of-laws-llm/, (last visited Feb. 16, 2024).

[392] MAURICE A. DEANE SCHOOL OF LAW AT HOFSTRA UNIVERSITY, https://bulletin.hofstra.edu/content.php?catoid=115&navoid=17317, (last visited Feb 15, 2024).

- *Pace* offers "Advanced Corporate Seminar: Regulation of Crypto," which "provides an overview of the various regulations that apply to the issuance and trading of cryptocurrency and other digital assets."[393]
- *Touro* offers "Fintech Law" which "explore[s] the impact of technology on legal issues in the financial services industry including topics such as regulatory issues in high-speed trading, the evolving use of block-chain technology in financial services, issues relating to cryptocurrency and non-fungible tokens (NFTs), initial coin offerings (ICO's), cybersecurity and data privacy issues, and the potential impact of artificial intelligence based systems on legal issues, such as property rights and tort liability."[394]

Law school clinics and centers educate students and the bar in this space as well:

- *Brooklyn Law's* Brooklyn Law Incubator & Policy Clinic ("BLIP") functions as a modern technology-oriented law firm where students are trained to represent emerging technology and Internet companies in addition to being at the "forefront of tech-related policy issues and advocate on behalf of causes and businesses in various legislative, regulatory, and judicial arenas."[395]
- *New York Law School's* Innovation Center for Law and Technology hosted "A Taste of Web3: Building Workshop," where participants learned how to build their own DAOs and websites that run on blockchain.[396]

New York law schools have had various publications and events related to crypto and DLT:

- *Brooklyn* has hosted a CLE called "Fintech and the Law: Power, Policy and Politics – Perspectives and Present Predictions on the Future of Crypto and Blockchain," which included a discussion on "pending legislative, regulatory, judicial, legal and policy issues governing blockchain, cryptocurrency, and other digital assets" and a keynote address from SEC Commissioner Jaime Lizárranga.[397] Brooklyn will also be hosting an event in April 2024 called "Reimagining the Future of FinTech Law and Policy," which will include a keynote and panel discussion with SEC Commissioner Hester M. Pierce.[398]
- *Cardozo's* Heyman Center on Corporate Governance held an event on "FTX and the Future of Crypto," which addressed "cryptocurrency exchanges, the issues

[393] ELISABETH HAUB SCHOOL OF LAW AT PACE UNIVERSITY, https://law.pace.edu/courses/advanced-corporate-seminar-regulation-crypto, (last visited Feb 15, 2024).
[394] TOURO UNIVERSITY JACOB D. FUCHSBERG LAW CENTER, https://www.tourolaw.edu/academics/coursedetails/668, (last visited Feb 15, 2024).
[395] BROOKLYN LAW SCHOOL, https://www.brooklaw.edu/Academics/Clinics%20and%20Externships/In-House%20Clinics/BLIP, (last visited Feb 15, 2024).
[396] NEW YORK LAW SCHOOL, https://www.nyls.edu/events/a-taste-of-web3-building-workshop/, (last visited Feb 15, 2024).
[397] BROOKLYN LAW SCHOOL, https://www.brooklaw.edu/News%20and%20Events/Events/2022/2022_11_16, (last visited Feb. 16, 2024).
[398] BROOKLYN LAW SCHOOL, https://www.brooklaw.edu/News-and-Events/Events/2024/2024_04_05, (last visited Feb. 16, 2024).

faced by FTX, why it collapsed, how bankruptcy will play out, and whether its executives face any legal liability."[399]

- *Columbia's* Blue Sky Blog has published various posts addressing emerging issues and developments in crypto "from academics, practitioners, industry professionals, and others."[400]
- *Touro* held a panel "Crypto is King," which addressed crypto law and job opportunities.[401]

Universities are already creating non-legal or legal adjacent courses and program offerings, showing an overall interest by students and universities in the topic:

- *Cornell's* SC Johnson College of Business offers an online course called "Trends in Fintech," which allows "participants analyze five major financial vertical markets in the fintech sector: robo-advising, peer-to-peer lending, insurance tech, currency and payment tech, and digital banking."[402]
- *Cornell's* SC Johnson College of Business also offers a two year MBA FinTech intensive, which "provides hands-on learning in the emerging financial technology sector."[403]
- *Fordham's* Gabelli School of Business offers a FinTech concentration.[404]
- *NYU* offers opportunities through its Emerging Technologies Collaborative, which is a cross-industry initiative designed to "lead in the convergence of the physical, digital, and virtual worlds impacting today's global industries, professions, [and] communities."[405] The collaborative hosts the podcast "Some Future Day," which "evaluates technology at the intersection of culture and law."[406] NYU Stern School of Business also offers a Master of Science in FinTech.[407]
- *St. John's* Peter J. Tobin College of Business offers a minor in Financial Technology (FinTech).[408]

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[399] Heyman Center on Corporate Governance, "FTX and the Future of Crypto" (2022). *Event Invitations 2022*. 2. https://larc.cardozo.yu.edu/event-invitations-2022/2.

[400] COLUMBIA LAW SCHOOL, https://clsbluesky.law.columbia.edu/about-us/, (last visited Feb 15, 2024); *see also* COLUMBIA LAW SCHOOL, https://www.law.columbia.edu/search/content?keys=fintech+crypto#gsc.tab=0&gsc.q=fintech%20crypto&gsc.sort=, (last visited Feb 15, 2024).

[401] TOURO UNIVERSITY JACOB D. FUCHSBERG LAW CENTER, https://www.tourolaw.edu/AboutTouroLaw/Events/8561, (last visited Feb 15, 2024).

[402] CORNELL SC JOHNSON COLLEGE OF BUSINESS, https://ecornell.cornell.edu/courses/financial-management/trends-in-fintech/, (last visited Feb. 16, 2024).

[403] CORNELL SC JOHNSON COLLEGE OF BUSINESS, https://www.johnson.cornell.edu/programs/full-time-mba/two-year-mba/curriculum/intensives/fintech-intensive/, (last visited Feb. 16, 2024).

[404] FORDHAM GABELLI SCHOOL OF BUSINESS, https://bulletin.fordham.edu/gabelli-graduate/mba/concentrations/fintech/, (last visited Feb. 15, 2024).

[405] NEW YORK UNIVERSITY SCHOOL OF PROFESSIONAL STUDIES, https://www.sps.nyu.edu/homepage/emerging-technologies-collaborative.html, (last visited Feb. 15, 2024).

[406] NEW YORK UNIVERSITY SCHOOL OF PROFESSIONAL STUDIES, https://www.sps.nyu.edu/homepage/metaverse/metaverse-podcasts/some-future-day.html, (last visited Feb. 15, 2024).

[407] NEW YORK UNIVERSITY LEONARD N. STERN SCHOOL OF BUSINESS, https://www.stern.nyu.edu/programs-admissions/masters-programs/ms-fintech, (last visited Feb. 16, 2024).

[408] ST. JOHN'S UNIVERSITY PETER J. TOBIN COLLEGE OF BUSINESS, https://www.stjohns.edu/academics/programs/minor-financial-technology-fintech, (last visited Feb 15, 2024).

Article 7: Final Recommendations of the Report

Recommendation of the Task Force

A. *Create an Integrated Committee on Technology*:

This committee would combine the Task Force on Emerging Digital Finance & Currency, Committee on Law & Technology, and the Task Force on Artificial Intelligence and create a centralized group to continue to explore and study issues including but limited to:

- Continue to explore the way digital rights law interacts with Blockchain technology.
- Legal Adaptation and International Cooperation: The global nature of Web3 and blockchain transactions necessitates international legal cooperation to address copyright challenges. Developing standardized legal frameworks that recognize and enforce copyright across borders in the digital domain is essential for effective copyright protection in Web3.
- Legal Recognition of Digital Titles: Further study is needed to determine if laws should be enacted that recognize digital titles and registrations on a blockchain as legally valid and equivalent to traditional paper titles. This involves ensuring that digital records meet all legal requirements for real property transactions, including evidence of ownership, encumbrances, and liens. The idea of Implementing a hybrid system that maintains traditional title registration mechanisms while integrating blockchain technology should be evaluated as it may offer a transitional solution. This approach would leverage blockchain's efficiency and security while retaining the legal framework's established protections and recognitions.
- The question regarding the need for new Criminal Statutes to combat these new technologies remains open. This topic should continue to be explored. Illicit actors will always evolve along with the new technologies. These are new tools to accomplish existing crimes and similar outcomes. However, currently, there appears to be a sufficient number of statutes to enforce against the cases that are arising.
- IOLA Account Use by Attorneys: Attorneys are being presented with the opportunity to receive crypto funds for payment of services or to be held on behalf of clients. However, without crypto being recognized as a currency or bankable, it creates issues as to what mechanism they can use to hold these funds or even if the funds can be held as crypto to the fluctuating nature of the asset. Further study and analysis must be given to this issue.

- Currently, the USPTO and USCO have concluded that there is no need for changes to the trademark and copyright laws. However, this issue needs to continue to be studied. The unique nature of digital assets on blockchain platforms necessitates a rethinking of how trademark law is applied. For instance, the use of a specific digital asset (e.g., a unique piece of digital art or a character in a virtual world) as a brand identifier may require adaptations in trademark law to address issues of distinctiveness, use in commerce, and potential infringement in a decentralized context.

B. *Dispute Resolution and Enforcement:*

Developing new legal frameworks and dispute resolution mechanisms that can accommodate the decentralized nature of blockchain transactions is crucial. This might include specialized courts or arbitration panels familiar with blockchain technology and real property law.

C. *Use Emerging Technologies to Enhance Member Benefits:*

Initiate a request for proposals (RFP) from companies or organizations with expertise in emerging technology to integrate these technologies with those currently in use to increase member benefit and support.

D. *Taxation of Digital Assets and Currencies:*

There is significant uncertainty around tax treatment of digital assets and currencies. The IRS and Treasury should provide clear guidance to achieve consistency among taxpayers.

Article 4: Intellectual Property Considerations in Web3

E. *International Cooperation and Harmonization:*

Given the global nature of Web3, there is a growing need for international cooperation and harmonization of trademark laws to tackle the challenges associated with branding digital assets. Developing standardized protocols for the registration, recognition, and enforcement of trademarks across borders could help mitigate some of the jurisdictional challenges posed by Web3.

F. Legal Recognition of Digital Titles:

Laws should recognize digital titles and registrations on a blockchain as legally valid and equivalent to traditional paper titles. This involves ensuring that digital records meet all legal requirements for real property transactions, including evidence of

ownership, encumbrances, and liens.

Implementing a hybrid system that maintains traditional title registration mechanisms while integrating blockchain technology could offer a transitional solution. This approach would leverage blockchain's efficiency and security while retaining the legal framework's established protections and recognitions.

Article 5: Navigating the Nexus of Emerging Technologies and Criminal Justice: Challenges and Opportunities in the Age of Digital Currencies and Assets

G. *Continue to explore the implementation of the Use of Blockchain Technology in the Criminal Justice System to Enhance Efficiency and Access to Justice:*

Blockchain can be used to provide more secure access and more efficient storage and transfer of data such as for record keeping, maintaining police disciplinary data systems, service of process and to create uniform statewide pre-trial data collection. This will increase the integrity of the system and decrease wrongful convictions and unnecessary or prolonged incarceration.

H. *Consideration Should be Given to the Use of Digital Currency in Certain Aspects of the Criminal Justice System:*

Digital currencies are being used worldwide to bank the unbankable. Further, by their very nature, they provide a secure manner for the transfer of funds while

increasing accessibility. We recommend the use of Digital Currency be explored for bail, as a source of currencies for incarcerated people, restitution and for payment of fines and court fees.

I. *Importance of Cross Jurisdictional Cooperation & Collaboration:*

It is essential that the legal community continue to cooperate and develop cross-border relationships and collaborations to protect the communities and clients as well as provide the best opportunities for weeding out bad actors.

Article 6: Recommendations Ethics & Education

J. *Ethical Clarity Regarding Fee Arrangement Concerning Cryptocurrency:*

To avoid a potential ethical quagmire, when presented with a fee arrangement concerning cryptocurrency, the attorney should review the entire RPC, especially sections 1.5(a) and 1.8(a) to determine applicability and always act cautiously. Furthermore, whether RPC 1.8(a) could be reasonably implicated is immaterial, as any attorney holding cryptocurrency as a type of payment in advance should disclose the possible ethical issues implicated under RPC 1.8(a) in writing and further evaluate whether any other rules might be implicated. Being that an attorney is a fiduciary, the absence of such a writing, in the event there is an unexpected ethical quagmire, could result in an adverse inference regarding the attorney's conduct.

A way to avoid the pitfalls associated with an RPC 1.8(a) dilemma is to liquidate any cryptocurrency into fiat immediately upon receipt of payment. This is likely the more prudent approach to take, especially for an attorney not as familiar with cryptocurrency and until the technology is more universally adopted. Unless an attorney has the means necessary to adhere to the rules, better safe than sorry. Importantly, NYSBA should provide guidance as to whether attorneys can accept crypto as advanced payment for legal services.

K. *Continued Engagement in Law School Education:*

While law schools are increasingly doing their part to attempt to provide law students with opportunities to learn about these emerging technologies at the foundational level, the present bar must stay abreast of the changing technology. NYSBA should continue to engage with these programs.

L. *Best Practices:*

Develop best practices for attorneys engaging in the digital Assets & Crypto currency space. Attorneys must be diligent in following the guidelines of the

commentary to the Code of Ethics and ensure their actions do not violate any cannons or criminal laws. Attorneys must also be diligent in advising their clients on the importance of KYC to prevent unintended consequences.

Conclusion

Web3 represents a transformative shift toward decentralization and user empowerment, fundamentally propelled by blockchain technology. This new era challenges the centralized tenets of Web2, advocating for a digital realm where individuals exert unparalleled control over their data, identity, and assets. At the heart of this transformation is blockchain, which provides the critical infrastructure for secure, transparent, and intermediary-free interactions.

The migration to Web3 heralds significant implications for digital commerce and the management of data ownership, necessitating a redefinition of the legal and commercial frameworks that underpin digital engagements. In the Web3 environment, ownership of digital assets and personal data reverts to the individual, posing a direct challenge to the centralized data control and monetization models of established platforms.

Since the turn of the millennium, the ascent of digital currencies and the ecosystems supporting them have carved out new markets and forms of purchasing power. While these currencies have occasionally been co-opted for criminal activities, they also offer unprecedented opportunities for economic expansion, enhanced connectivity, and societal advancement.

For legal professionals, the rise of Web3 demands a thorough reevaluation of current legal norms to accommodate the decentralized, blockchain-based landscape. This includes grappling with complex issues such as jurisdiction, the enforceability of smart contracts, intellectual property rights in decentralized networks, and adherence to evolving data protection standards.

Additionally, the inherent decentralization of Web3 introduces novel challenges in governance, dispute resolution, and the application of traditional legal mechanisms within a dispersed digital framework. As legal practitioners, it is imperative that we explore how established legal principles adapt to a realm where transactions and interactions span a global, decentralized network devoid of centralized supervision.

This report aims to initiate a discussion on these pivotal issues, considering their implications for client representation, legislative and regulatory adaptation, and the integration of these emerging technologies within the practice of law and judicial processes. As we continue to navigate this uncharted territory, our understanding and responses must evolve to effectively address the unique challenges and opportunities presented by Web3.

The recommendations contained herein aim to establish policy of the New York State Bar Association consistent with its mission and to ensure that it remains the

leading voice of the New York legal community. With their adoption, the New York State Bar Associations (NYSBA) will be well positioned to be an integral part of shaping the future by being engaged in policy, regulatory and legislative developments.

Building upon the foundational shifts introduced by Web3, the New York State Bar Association plays a crucial role in continuously educating legal practitioners about these emerging technologies. As legal frameworks evolve in response to decentralization and blockchain technology, NYSBA is well-positioned to lead educational initiatives that ensure lawyers are proficient in this new legal landscape. This includes offering targeted training sessions, workshops, and CLE courses that address specific aspects of blockchain technology, digital currencies, and their implications for law practice.

Moreover, NYSBA has the opportunity to actively shape the discourse by taking well-informed positions on key issues affecting the legal community within the Web3 space. By advocating for sensible policies and regulations that protect user sovereignty while ensuring compliance and consumer protection, NYSBA can influence the development of laws that are both fair and forward-looking.

Recognizing that the transition to Web3 presents ongoing challenges and opportunities, NYSBA must establish a dedicated committee to address these issues specifically. This committee would monitor the evolving digital landscape, propose updates to legal practices as necessary, and serve as a bridge between technological innovators and the legal community. Its work would be critical in ensuring that legal practitioners remain at the forefront of technological advancements, ready to address new legal questions and advocate for regulatory approaches that protect both practitioners and the public.

Creating such a committee underscores the recognition that the work in adapting to Web3 is incomplete and will require sustained effort. As blockchain technology permeates various sectors, the legal implications will expand and deepen. A dedicated NYSBA committee would keep legal professionals informed and prepared and ensure they remain influential participants in shaping the future legal landscape around these transformative technologies.

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COMMITTEE ON PROFESSIONAL ETHICS

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May 23, 2024

Via email to jdrohan@dlkny.com and matt.feinberg@yahoo.com

Jacqueline Drohan and Matthew Feinberg, Co-Chairs of the Task Force on Emerging Digital Finance and Currency

Dear Jacqueline and Matthew:

I provide comments on behalf of the New York State Bar Association Professional Ethics Committee. The Report and Recommendations of the Task Force on Emerging Digital Finance and Currency was distributed to our Committee. In light of our Committee's charter, we focused solely on the sections that deal with the New York Rules of Professional Conduct. We offer the following comments:

In Article 6, the report raises three ethical issues: (1) whether an advance payment of fees in cryptocurrency must be placed in the attorney's trust account, (2) whether a payment in crypto might be deemed a business transaction with a client subject to Rule 1.8(a), and (3) whether a payment in cryptocurrency might be deemed to be an excessive fee if the value of the crypto increases.

Advance Payment of Fees

With regard to advance payment of fees, the report cites ABA 505 (2023), Nebraska Opinion 17-03 and Maryland Opinion 2022-01, all of which identify as a problem the inability to custodize cryptocurrency in an attorney trust account. The ethical rules in these jurisdictions differ from those in New York. The general rule in New York is set forth in Rule 1.5, Cmt. [4]: "A lawyer may require advance payment of a fee, but is obliged to return any unearned portion."

This rule has been explained in several opinions issued by our Committee, issued under both the Former Code of Professional Responsibility and the current Rules.

In N.Y. State 983 (2013), we opined that a lawyer may retain the unearned portion of a prior retainer on conclusion of a matter, at the client's request, as advance payment of fees for future legal services and that such advance payment may be treated as client-owned funds depending on what is agreed with client. We noted that under our opinions, the parties may choose one of two options. One option is to treat advance payment of legal fees as *client funds*, in which case the lawyer must deposit the advance payment into an escrow/trust account. Alternatively, the

parties may agree to treat advance payment of fees as the *lawyer's own*. Under this second option, the lawyer may use the money as the lawyer chooses (except that the lawyer may not deposit it in a client trust account), subject only to the requirement that any unearned fee paid in advance be promptly refunded to the client upon termination of the employment.

In N.Y. State 816 (2007), we observed that a lawyer may ethically accept an advance payment retainer, place such funds in the lawyer's own account, and retain any interest earned.

In N.Y. State 570 (1985), we observed that fees paid to a lawyer in advance of services rendered are not necessarily client funds and need not be deposited in a client trust account. Therefore, any interest earned on these fee advances may be retained by the lawyer. However, the lawyer is obliged to return any portion of the fee advance that is not earned during the representation. "Absent an agreement to treat an advance fee payment as client property, it would be inappropriate for the lawyer to deposit advance fees in a client trust account, as this would constitute commingling." In other words, the default position in New York is that advance payment fees are treated as the lawyer's property and thus, absent agreement otherwise with the client (to treat such funds as the client's funds), ***should not be placed in an attorney trust account***. It follows that New York does not require or even permit an advance payment in cryptocurrency to be placed into an attorney trust account unless the client requires it.

<u>Accepting property in payment of legal fees, including the issue of excessive fees</u>

This topic is covered in Rule 1.5, Cmt [4]: "A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). A fee paid in property instead of money may, however, be subject to the requirements of Rule 1.8(a), because such fees often have the essential qualities of a business transaction with the client."

Whether property used to pay legal fees may be deemed excessive is discussed in Rule 1.8, Cmt. [4F]:

> [4F] A lawyer must also consider whether accepting securities in a client corporation as payment for legal services constitutes charging or collecting an unreasonable or excessive fee in violation of Rule 1.5. Determining whether a fee accepted in the form of securities is unreasonable or excessive requires a determination of the value of the securities at the time the agreement is reached and may require the lawyer to engage the services of an investment professional to appraise the value of the securities to be given. The lawyer and client can then make their own advised decisions as to whether the securities-for-fees exchange results in a reasonable fee.

This Committee has issued opinions on accepting an interest in property in payment of legal fees, especially in the context of payment in stock. In the following opinions, we analyzed the practice as a business transaction with a client.

In N.Y. State 990 (2013), we held that a lawyer may accept stock in Client B as all or part of the fee in the matter as long as the lawyer determines that the fee is not excessive for the work performed by the lawyer, the terms of the transaction are fair and reasonable to Client B, Client B is advised in writing of the desirability of seeking the advice of independent legal counsel and is given a reasonable chance to do so, and Client B signs a writing that describes the transaction and the lawyer's role in the deal, including whether the lawyer is acting for the client in the acquisition of the stock.

In N.Y. State 913 (2012), we found that a lawyer may accept an equity interest in a client if the lawyer complies with Rule 1.8(a) governing business transactions with clients and the acceptance does not otherwise create a conflict for the lawyer or result in an excessive fee. We concluded that Rule 1.8(a) applies to negotiation of a fee in which a lawyer is to receive an equity interest in a client or the client's company. Comment [4C] accompanying Rule 1.8(a) says in relevant part: "This Rule also does not apply to ordinary fee arrangements between client and lawyer reached at the inception of the client-lawyer relationship, which are governed by Rule 1.5. The requirements of the Rule ordinarily must be met, however, when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of the lawyer's fee."

Recommendations

Article 6 of the Report, on page 114, recommends that the Association provide guidance as to whether attorneys can accept crypto as advanced payment for legal services. Our Committee does not issue many *sua sponte* opinions because we believe our opinions are most useful when informed by facts presented by a specific inquirer asking about the inquirer's own proposed conduct. Among the benefits of having a specific inquirer, we can dialogue with such inquirer in order to clarify facts and motivations. We expect that relevant inquiries will provide us with the opportunity to provide guidance in this evolving area and look forward to offering guidance where we can.

Sincerely,

Brenda Dorsett, Esq.
Chair

Tax Section Comments [5/8/24]

Report and Recommendations of the New York State Bar Association Task Force on Emerging Digital Finance and Currency

June 2024

The Report of the Task Force on Digital Finance & Currency

Executive Summary

The NYSBA Task Force on Emerging Digital Finance and Currency ("Task Force") was formed by Immediate NYSBA Past President Sherry Levin Wallach. The mission statement of the Task Force is: "to study and evaluate the legal issues and questions surrounding the expansion and regulation of the digital finance and digital currency industries in New York State. This review may include the development of best practices for attorneys representing clients on matters in these areas and the proposal of law and policy recommendations to the relevant regulatory bodies in this evolving field."

The Task Force issued its interim report and recommendations, which were approved by the House of Delegates in April 2023.[2] The instant report constitutes the Final Report ("Final Report") and recommendations of the Task Force. The Final Report details the regulatory landscape, possible ways to navigate Web3 businesses through a sandbox approach, **certain** Federal ~~**Income Tax**~~**income tax** considerations regarding digital assets, intellectual property considerations in Web3, navigating the nexus of criminal justice and emerging technologies, as well as ethics and education.

Blockchain's part in this evolution is pivotal, providing the infrastructure for secure, transparent, and intermediary-free transactions. Blockchain technology is at the heart of Web3, including emerging digital finance and currencies, disturbing customary digital commerce and data management practices. By empowering decentralized transactions, blockchain technology reduces the need for central authorities or intermediaries, facilitating a transparent and efficient exchange of digital assets. This technology is not limited to cryptocurrencies but extends to a wide range of applications across finance, healthcare, the arts, and more, fostering innovation and new business models.

Of critical importance, as discussed in the Final Report, the decentralized nature of blockchain presents a unique set of legal challenges and considerations. For those in the legal community, understanding the intricacies of blockchain technology is essential for navigating the legal landscape of digital assets, consumer protection, smart contracts, and the broader implications for intellectual property, data privacy, and commercial transactions. The shift to Web3 has profound implications for digital commerce and data ownership, redefining the legal and commercial frameworks that govern digital interactions. In Web3, the ownership of digital assets and personal data

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https://nysba.org/app/uploads/2022/03/final-no-changes-Task-Force-on-Emerging-Digital-Finance-and-Currency-April-2023-1.pdf

C. *Use Emerging Technologies to Enhance Member Benefits:*

Initiate a request for proposals (RFP) from companies or organizations with expertise in emerging technology to integrate these technologies with those currently in use to increase member benefit and support.

Articles 1, 2 & 3: Recommendations Regulatory Landscape

D. *Enact Clear Federal Legislation on Digital Assets:*

Congress should ~~**prioritize the enactment of**~~**enact** clear, comprehensive federal legislation that specifically addresses the classification, ~~**taxation,**~~ and regulatory oversight of digital assets. This legislation should provide a definitive framework for determining when a digital asset is considered a security, commodity, or a new, distinct asset class. Additionally, the legislation should address the use of digital assets in various sectors, including finance, healthcare, and supply chain management.

E. *Improve and Enhance Appropriate Regulatory Frameworks and Oversight:*

To address the regulatory ambiguity and jurisdictional disputes, proposed legislation should aim to clearly define which agencies are responsible for regulating different aspects of the industry. This includes establishing more objective criteria for when and how crypto assets should move between regulatory regimes. By its nature, this is a global financial service. We need national oversight with state licensing like the rest of the financial and insurance industry.

F. *Establish a Regulatory Sandbox for Digital Assets:*

Regulatory sandboxes are innovative frameworks allowing businesses to test novel products and services in a controlled environment under regulatory supervision. This concept, drawing from the iterative testing approach commonly used in the tech industry, offers valuable insights for both regulators and innovators. It ensures that regulatory frameworks can adapt to technological advances while safeguarding consumer interests and maintaining financial stability.

The United States Federal and State governments should create a regulatory sandbox that allows companies to develop and test innovative digital asset products and services within a safe harbor, under the guidance and supervision of regulators. The sandbox would offer a period of regulatory relief, during which companies can receive input from regulators on the development and alignment of their business models with legal and regulatory requirements.

G. *Foster Innovation and Collaboration:*

Advocate for regulatory bodies to foster innovation in the digital asset space by establishing appropriate regulatory sandboxes or pilot programs. These initiatives should allow for experimentation with digital asset technologies under a relaxed

regulatory framework, subject to oversight and review. Promote collaboration between regulators, academia, and the private sector to research and develop best practices for the use and regulation of digital assets. Additionally, support educational initiatives to enhance the understanding of digital assets and blockchain technology among regulators, law enforcement, and the general public.

H. *Taxation of Digital Assets and Currencies:*

~~**The IRS has not provided taxpayers with sufficient opportunities to engage discussions on the appropriate treatment of block rewards. As a result, there remains significant uncertainty around ancillary questions. We recommend that NYSBA advocate for clear guidelines and rules regarding the taxation of digital assets and currencies.**~~

There is significant uncertainty around the tax treatment of digital assets and currencies. The IRS and Treasury should provide clear guidance to achieve consistency among taxpayers.

Article 4: Intellectual Property Considerations in Web3

I. *International Cooperation and Harmonization:*

Given the global nature of Web3, there is a pressing need for international cooperation and harmonization of trademark laws to tackle the challenges associated with branding digital assets. Developing standardized protocols for the registration, recognition, and enforcement of trademarks across borders could help mitigate some of the jurisdictional challenges posed by Web3.

J. Legal Recognition of Digital Titles:

Laws should recognize digital titles and registrations on a blockchain as legally valid and equivalent to traditional paper titles. This involves ensuring that digital records meet all legal requirements for real property transactions, including evidence of ownership, encumbrances, and liens.

Implementing a hybrid system that maintains traditional title registration mechanisms while integrating blockchain technology could offer a transitional solution. This approach would leverage blockchain's efficiency and security while retaining the legal framework's established protections and recognitions.

Article 5: Navigating the Nexus of Emerging Technologies and Criminal Justice: Challenges and Opportunities in the Age of Digital Currencies and Assets

K. *Continue to explore the implementation of the Use of Blockchain Technology in the Criminal Justice System to Enhance Efficiency and Access to Justice:*

Article 3: U.S. Federal Income Tax Considerations for Digital Assets

While a comprehensive discussion of the U.S. federal income tax treatment of digital assets is outside the scope of this report, this section describes two potential ~~"low-hanging fruits" for improving current U.S. tax policy~~ areas where market participants would benefit from guidance.

SECTION 1: ~~Define taxable~~Taxable exchange

~~We recommend prioritizing~~More detailed guidance on how to determine whether a digital asset transaction is a taxable exchange would be particularly helpful. In the absence of any such guidance, Congress might consider ~~providing~~allowing taxpayers ~~with the option to achieve greater certainty on reporting~~to report their digital asset gains and losses by expanding the applicability of the mark- to-market election under section 475(e)-(f) to "investors" in actively traded virtual currency. Currently, the mark-to-market election applies only to "dealers" and "traders" in virtual currency that is treated as an "actively traded commodity."

Background

The IRS treats virtual currency as property.[157] An exchange of properties generally is taxable only if the properties "differ[] materially either in kind or in extent" within the meaning of Treasury regulations section 1.1001-1(a).[158]

In *Cottage Savings v. The United States*, the Supreme Court determined that properties differ materially either in kind or in extent if they "embody legally distinct entitlements," even if the properties are economically equivalent to each other.[159]

It ~~is not at all clear~~may sometimes be unclear how to apply *Cottage Savings*' "legally distinct entitlements" test to digital assets~~, because digital assets often bear no legal entitlements at all. As a result~~. For example, it ~~often~~ is difficult for taxpayers to ~~determine~~know whether onchain transactions are taxable events.

~~Moreover, in~~In August 2022, Treasury and the IRS issued proposed regulations that, if finalized in their current form, would require "digital asset middlemen" to report "sales" of digital assets on new Form 1099-DA. ~~While a discussion of the proposed regulations is beyond the scope of this report, we are concerned that~~However, so long as there remain significant questions about what types of onchain transactions are taxable

exchanges, market participants ~~are likely to~~may reach conflicting views as to whether they are brokers for that purpose and which transactions (if any) they are required report.

Below we provide examples of several common types of digital asset transactions that ~~might or might not be taxable exchanges~~may raise these issues.

Protocol upgrades

In CCA 202316008, which is widely ~~understood~~believed by market participants to address Ethereum's "Merge," the IRS cited to *Cottage Savings* in concluding that a taxpayer who held a blockchain's native token did not have a taxable exchange by reason of the blockchain's protocol upgrade from proof of work to proof of stake.

Ethereum's Merge, which consisted of ~~who~~two hardforks executed simultaneously in September 2022, was itself the culmination of a broader protocol upgrade that began at least as early as the Beacon Chain hardfork in December 2020.[160] The Beacon Chain hardfork enabled ETH holders to stake their ETH and begin processing "empty" blocks alongside the proof of work Ethereum chain. The Merge required those staking validators to run software accepting transaction data from Ethereum execution clients while original Ethereum clients turned off their mining, block propagation, and consensus logic. As a result of the Merge, Ethereum validators now use a proof of stake consensus mechanism and Ethereum now burns base transaction fees, resulting in an automated dynamic monetary policy.[161]

Protocol developers, application developers, infrastructure providers, and validators worked together to ~~ensure that~~limit the impact on Ethereum users ~~did not feel the effects~~ of the Merge. For example, web3 wallet providers updated their software so that the "ETH" ticker referred to the proof of stake version and "ETHW" referred to the proof of work version, and the Ethereum Foundation, a Swiss nonprofit that owns the Ethereum trademark and is dedicated to supporting the Ethereum ecosystem, advocated for the adoption of the proof of stake chain.

~~In short,~~Although the Merge represented a significant protocol change that required ~~massive~~substantial coordination among diverse market participants to minimize disruption to end- users~~. Nevertheless~~, CCA 202316008 ~~observes (without explanation)~~states that ETH was "unchanged by the protocol change."

The CCA ~~appears~~can be read to stand for the proposition that protocol changes, in and of themselves, do not trigger a taxable exchange of the protocol's native token, regardless

It also included the Berlin hardfork in April 2021 and the London hardfork in September 2021.

Very generally, during times of high network throughput, more ETH is burned than minted, reducing aggregate ETH supply, and during times of low network throughput, more ETH is minted than burned, increasing ~~th~~the aggregate ETH supply.

of how significant those changes are. While that proposition ~~seems reasonable in light of~~**can be justified under** *Cottage Savings*' focus on legal entitlements, **it is unclear how far the CCA extends. Further,** taxpayers generally may not rely on CCAs as precedent ~~and it is unclear to us how far the CCA extends~~.

Because protocol upgrades are a commonplace occurrence in web3, we ~~urge~~**recommend that** the IRS ~~to~~ further study and clarify the circumstances (if any) under which a protocol upgrade should constitute a tax event to tokenholders **and provide additional guidance**.

Noncustodial wrapping

Noncustodial wrapping involves depositing one token (such as ETH) into software in exchange for a 1:1 pegged representation of the same token (such as wETH). Users can wrap or unwrap a token by (1) interacting directly with the wrapping software, (2) exchanging the token for its wrapped counterpart on a decentralized exchange, or (3) engaging a transaction that automatically wraps or unwraps a token within a series of actions.

Noncustodial wrapping is ~~very~~ common in web3; as of November 2022, over 7% of all Ethereum transactions, or about 125 million transactions, involved wETH.[162] While ~~most tax practitioners believe~~**there may be rationales to treat** noncustodial wrapping transactions ~~are~~**as** nontaxable, there are no legal authorities directly on point. As mentioned above, *Cottage Savings* treats two properties as materially different in kind or in extent if they have different legal entitlements~~, and most tokens do not have any legal entitlements~~.

Custodial wrapping

Custodial wrapping involves depositing a token (such as BTC) with a custodian in exchange for the custodian's agreement to mint a new token contractually backed by the custodied token on a different blockchain (such as wBTC on Ethereum). Custodial wrapping requires the assumption of counterparty risk, whereas noncustodial wrapping requires the assumption of software bug and hacking risk. As of March 23, 2024, there were over $10 billion of wBTC in circulation.[163] However, as with noncustodial wrapping, taxpayers do not have any clear guidance **or direct authority to look to** as to whether a custodial wrapping transaction is a taxable event.

See Stephen Tong, Formally Verifying the World's Most Popular Smart Contract (Nov. 18, 2022) ("As of block

Liquidity provision

Liquidity provision is a foundational component of much of decentralized finance: liquidity providers contribute tokens to automated software, which other users can interact with in various ways (such as engaging in token exchanges or token borrowings), often for a fee. In exchange for their contribution, liquidity providers typically receive either: (1) transferrable "bailment tokens" that represent the deposited tokens, plus fees streamed directly to their wallets; (2) transferrable tokens that can be redeemed for a portion of the assets (including accrued fees) held inside of the software; or (3) the ability to claim their portion of fees, and to remove their liquidity from the software, from time to time.

The U.S. tax treatment of liquidity provision is ~~unknown~~**unclear**. Under one approach, a liquidity provider ~~is~~**could be** treated as engaging directly in the activities of the applicable smart contract. If that approach were adopted, liquidity provision presumably would not be a taxable disposition. Under an alternative approach, the smart contract is deemed to ~~be~~**behave** a tax "~~person"~~**personality" separate from the liquidity provider** that is not looked through.[164] If that approach were adopted, liquidity provision presumably would be a taxable disposition. It is also possible that ~~some~~**different approaches are appropriate or applicable to different** liquidity provision arrangements ~~are looked through and others are not~~.[165]

Token borrowing

In a decentralized finance borrowing protocol, users who contribute tokens to software can "borrow" other tokens from the software up to a percentage of the value of the tokens they contributed, and can reacquire tokens identical to the ones they contributed by replacing the borrowed tokens and paying a time-based usage fee.

The U.S. tax treatment of on-chain token borrowing is ~~unknown~~**unclear**. Under one theory, token borrowing is an exchange of one token for another, and therefore is a taxable exchange. Under an alternative theory, token borrowing is a deferred exchange of property for identical property and therefore is nontaxable under ~~the same~~**similar** principles **to those** that led to the enactment of section 1058 **of the Internal Revenue Code**. It also is possible that some types of token borrowings are taxable exchanges, while others are not. Again, in the absence of clear guidance, ~~it is highly likely that~~ taxpayers and their advisors ~~will~~**may** reach conflicting views.

See, e.g., Jason Schwartz, Squaring the Circle: Smart Contracts and DAOs as Tax Entities, https://www.friedfrank.com/uploads/siteFiles/Publications/Decentralized%20Autonomous%20Organizations%20_%20

SECTION 2: ~~Provide more comprehensive guidance on the taxation~~Taxation of consensus layer staking

Under current IRS guidance, block ~~rewards~~ rewards are taxed at their fair market value when a miner or staker has dominion and control over them.[166]

~~A discussion of whether the IRS's position on block rewards represents an appropriate interpretation of the law is outside of the scope of this report. Here we instead express concern that the IRS has not given taxpayers sufficient opportunity to engage with it on determining the proper treatment of block rewards and, as a result, there remains significant uncertainty around ancillary questions.~~

However, there remains significant uncertainty around ancillary questions.

Background on consensus mechanisms

A blockchain is a peer-to-peer network composed of multiple computers (nodes) running open-source software.[167] Although each node acts independently in its own economic interest, the software's incentives are designed so that an information ledger emerges from the nodes' aggregate actions. The incentives are collectively referred to as a "consensus mechanism."

Although each blockchain has its own design, there are broadly two kinds of consensus mechanisms: proof of work and proof of stake.

In a proof of work network, nodes—known as miners in this context—compete to solve a computational puzzle. The first miner to solve the puzzle gets to propose the next block of data for addition to the ledger. If the proposed data block does not contain any transactions that break the network's rules, like "double-spend" transactions or other falsified information, the other nodes validate the "winning" miner's block. In that event, the winning miner receives "block rewards." On the Bitcoin network, block rewards consist of: (1) newly minted BTC and (2) transaction fees. Newly minted BTC currently represents the majority of mining rewards. Transaction fees are fees users are required to pay to include their transactions in a block. If a miner's block is not approved, the miner will not receive any block rewards and, consequently, will be in a net economic loss position after having incurred real-world resources to solve the computational puzzle.

In a proof of stake network, nodes—known as stakers in this context—lock up, or "stake," a material amount of the blockchain's native token in the software they run. The software selects a staker at random to propose a new block of data for inclusion on the ledger. As with proof of work, the other nodes approve the winning staker's block if it

does not contain falsified information, and the winning staker receives block rewards. On the Ethereum network, block rewards consist of: (1) newly minted ETH and (2) "priority gas fees." Newly minted ETH represents the majority of staking rewards. Priority gas fees are fees some users pay in excess of a mandatory "base fee" for faster inclusion in a block. (Unlike Bitcoin, Ethereum's software protocol destroys, or "burns," base fees, thereby offsetting the inflationary effects of newly minted ETH.) If a staker's block is not approved (e.g., because the staker submitted falsified data), all or a portion of the staker's ante is devalued, or "burned."

IRS guidance

The IRS concluded in Notice 2014-21 that "when a taxpayer successfully 'mines' virtual currency, the fair market value of the virtual currency as of the date of receipt is includible in gross income." Similarly, in Revenue Ruling 2023-14, the IRS ~~held~~**concluded** that "[i]f a cash-method taxpayer stakes cryptocurrency native to a proof-of-stake blockchain and receives additional units of cryptocurrency as rewards when validation occurs, the fair market value of the validation rewards received is included in the taxpayer's gross income in the taxable year in which the taxpayer gains dominion and control over the validation rewards."

~~***Problems with IRS guidance***~~

While Notice 2014-21 and Revenue Ruling 2023-14 ~~**reflect the IRS's views, they are not binding on taxpayers. There are two overarching problems with the IRS's approach of describing the treatment of block rewards through nonbinding guidance.**~~**provide important guidance, there remain significant uncertainties and such uncertainties could cause potentially inconsistent treatment among taxpayers.**

First, the guidance does not provide ~~**sufficient**~~**detailed** analysis for ~~**tax practitioners to assess the IRS' position on its legal merits or to reach conclusions on ancillary matters**~~**the conclusion**. As a result, there remains significant confusion ~~**by taxpayers and practitioners**~~**in the digital marketplace** about whether**, for example**: (1) non-U.S. persons are subject to U.S. income or withholding tax when they earn block rewards through a U.S. delegate;[168] and (2) block rewards are taxed as "unrelated business taxable income" to U.S. tax-exempt organizations.[169] ~~**A regulatory project involving notice and comment would have given taxpayers an opportunity to ask these questions and the IRS an opportunity to respond.**~~

Second, ~~**making tax policy through nonbinding administrative guidance rewards taxpayers with sufficient resources to take an alternative position**~~**many market participants are small taxpayers who may lack the resources (or for other**

reasons may not devote significant resources) to engage tax professionals to advise or litigate such issues. Conversely, taxpayers who can and do devote greater resources will be better able to take alternative (more taxpayer favorable) positions, including, potentially, those contrary to IRS guidance. In *Jarrett v. United*

Very generally, non-U.S. persons are subject to U.S. federal income tax on income effectively connected with the conduct of a trade or business within the United States, and are subject to 30% U.S. federal withholding tax (which may be reduced by an applicable income tax treaty) on U.S.-source fixed, determinable, annual, or periodical income that is not effectively connected with the conduct of a trade or business within the United States. Very generally, U.S. tax-exempt organizations are subject to U.S. federal income tax on unrelated business taxable income.

States,[170] **for example,** a home staker sued the IRS for a refund of the tax he paid on his newly minted block rewards, arguing that the rewards were self-created property instead of property received for services. The IRS contested Jarrett's refund suit, then granted his refund and successfully sued to dismiss the case on mootness grounds~~.~~ ~~**The taxpayer's experience in *Jarrett* illustrates that there are currently two tax regimes for consensus- layer stacking: one for taxpayers who can afford to sue the IRS for a refund each year, and one for taxpayers who cannot.**~~ **(with the result that no precedential decision was reached). Consistent treatment of similarly situated taxpayers is an important objective of the tax rules.**

- Currently, the USPTO and USCO have concluded that there is no need for changes to the trademark and copyright laws. However, this issue needs to continue to be studied. The unique nature of digital assets on blockchain platforms necessitates a rethinking of how trademark law is applied. For instance, the use of a specific digital asset (e.g., a unique piece of digital art or a character in a virtual world) as a brand identifier may require adaptations in trademark law to address issues of distinctiveness, use in commerce, and potential infringement in a decentralized context.

B. *Dispute Resolution and Enforcement:*

Developing new legal frameworks and dispute resolution mechanisms that can accommodate the decentralized nature of blockchain transactions is crucial. This might include specialized courts or arbitration panels familiar with blockchain technology and real property law.

C. *Use Emerging Technologies to Enhance Member Benefits:*

Initiate a request for proposals (RFP) from companies or organizations with expertise in emerging technology to integrate these technologies with those currently in use to increase member benefit and support.

ARTICLES 1, 2 & 3: Recommendations Regulatory Landscape

D. *Enact Clear Federal Legislation on Digital Assets:*

Congress should prioritize the enactment of clear, comprehensive federal legislation that specifically addresses the classification, ~~**taxation,**~~ and regulatory oversight of digital assets. This legislation should provide a definitive framework for determining when a digital asset is considered a security, commodity, or a new, distinct asset class. Additionally, the legislation should address the use of digital assets in various sectors, including finance, healthcare, and supply chain management.

E. *Improve and Enhance Appropriate Regulatory Frameworks and Oversight:*

To address the regulatory ambiguity and jurisdictional disputes, proposed legislation should aim to clearly define which agencies are responsible for regulating different aspects of the industry. This includes establishing more objective criteria for when and how crypto assets should move between regulatory regimes. By its nature, this is a global financial service. We need national oversight with state licensing like the rest of the financial and insurance industry.

Regulatory bodies should enhance its regulatory oversight of digital assets by:

- Developing a specialized division within the SEC dedicated to digital assets and blockchain technology. This division would be responsible for providing guidance, overseeing compliance, and enforcing regulations specific to digital assets.
- Collaborating with other regulatory agencies, such as the Commodity Futures Trading Commission (CFTC) and the Financial Crimes Enforcement Network (FinCEN), to ensure a coordinated and comprehensive regulatory approach.
- Review the applicability of the Howey Test and support statutory revisions to provide a clear framework.
- Creating a Clear Registration Scheme which would allow for Establishing counter parties, intermediaries, and exchanges.

F. *Establish a Regulatory Sandbox for Digital Assets:*

Regulatory sandboxes are innovative frameworks allowing businesses to test novel products and services in a controlled environment under regulatory supervision. This concept, drawing from the iterative testing approach commonly found in the tech industry, offers valuable insights for both regulators and innovators. It ensures that regulatory frameworks can adapt to technological advances while safeguarding consumer interests and maintaining financial stability.

The United States Federal and State Governments should create a regulatory sandbox that allows companies to develop and test innovative digital asset products and services within a safe harbor, under the guidance and supervision of regulators. The sandbox would offer a period of regulatory relief, during which companies can receive input from regulators on the development and alignment of their business models with legal and regulatory requirements.

G. *Foster Innovation and Collaboration:*

Advocate for regulatory bodies to foster innovation in the digital asset space by:

- Establishing appropriate regulatory sandboxes or pilot programs that allow for experimentation with digital asset technologies under a relaxed regulatory framework, subject to oversight and review.
- Promoting collaboration between regulators, academia, and the private sector to research and develop best practices for the use and regulation of digital assets.
- Supporting educational initiatives to enhance the understanding of digital assets and blockchain technology among regulators, law enforcement, and the general public.

H. *Taxation of Digital Assets and Currencies:*

There is significant uncertainty around tax treatment of digital assets and currencies. The IRS and Treasury should provide clear guidance to achieve consistency among taxpayers.

~~**The IRS has not provided taxpayers with sufficient opportunities to engage in discussions on the appropriate treatment of block rewards. As a result, there**~~

~~remains significant uncertainty around ancillary questions. We recommend that NYSBA~~

~~advocate for clear guidelines and rules regarding the taxation of digital assets and currencies.~~

Article 4: Intellectual Property Considerations in Web3

I. *International Cooperation and Harmonization:*

Given the global nature of Web3, there is a growing need for international cooperation and harmonization of trademark laws to tackle the challenges associated with branding digital assets. Developing standardized protocols for the registration, recognition, and enforcement of trademarks across borders could help mitigate some of the jurisdictional challenges posed by Web3.

J. Legal Recognition of Digital Titles:

Laws should recognize digital titles and registrations on a blockchain as legally valid and equivalent to traditional paper titles. This involves ensuring that digital records meet all legal requirements for real property transactions, including evidence of ownership, encumbrances, and liens.

Implementing a hybrid system that maintains traditional title registration mechanisms while integrating blockchain technology could offer a transitional solution. This approach would leverage blockchain's efficiency and security while retaining the legal framework's established protections and recognitions.

Article 5: Navigating the Nexus of Emerging Technologies and Criminal Justice: Challenges and Opportunities in the Age of Digital Currencies and Assets

K. *Continue to explore the implementation of the Use of Blockchain Technology in the Criminal Justice System to Enhance Efficiency and Access to Justice:*

Blockchain can be used to provide more secure access and more efficient storage and transfer of data such as for record keeping, maintaining police disciplinary data systems, service of process and to create uniform statewide pre-trial data collection. This will increase the integrity of the system and decrease wrongful convictions and unnecessary or prolonged incarceration.

L. *Consideration Should be Given to the Use of Digital Currency in Certain Aspects of the Criminal Justice System:*

Digital currencies are being used worldwide to bank the unbankable. Further, by their very nature, they provide a secure manner for the transfer of funds while

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #7

REQUESTED ACTION: None, as the Report of the Committee in Disability Rights is informational.

Jennifer Monthie, Esq. will present the informational Report of the Committee on Disability Rights – *Guardianship for People with Developmental Disabilities: Examination and Reform of Surrogate's Court Procedure Act 17-A is a Constitutional Imperative*. This report examines article 17-A of the Surrogate's Court Procedure Act (SCPA), which is a discrete guardianship statute for people with developmental disabilities.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #8

REQUESTED ACTION: Approval of the New York City Bar Association's Report *Repeal the Cap and Do the Math: Why We Need a Modern, Flexible, Evidence-Based Method of Assessing New York's Judicial Needs*.

This report was previously presented to the Executive Committee on April 5, 2024.

The New York City Bar Association ("City Bar") proposes amending the New York State Constitution to eliminate the population-based formula that allots up to one elected Supreme Court Judge to a certain number of people, a provision of Article VI of the Constitution since 1846. The City Bar Report is consistent with prior New York State Bar Association policy (*Report and Recommendations Concerning Whether New Yorkers Should Approve the 2017 Ballot Question Calling for a Constitutional Convention* approved by the House of Delegates on June 17, 2017. The Report can be found at https://nysba.org/app/uploads/2020/02/June-2017-NYS-Constitution-Final-Report-1.pdf).

Summary of Recommendations:

1. A Constitutional Amendment to Eliminate the Cap: The Report recommends the constitutional cap on the number of elected Supreme Court Justices be eliminated. The Report proposes that the constitution be modified to remove the cap in its entirety and add language that requires the Legislature to consider whether to change the number of Supreme Court justices in any judicial district at least once every ten years.

2. Enabling Legislation: The Legislature must codify a mandatory regular systematic assessment of the courts' specific needs as many other states and the federal courts have done. The Report recommends such an evaluation should be informed by the cost of conducting the evaluation, which the federal courts and many states perform in-house, and other states perform using outside experts such as the National Center for State Courts.

3. Annual Reporting: The Chief Administrative Judge is currently required to keep data that would enable the Legislature to perform its regular and systematic assessment. This annual report would inform the Legislature in carrying out its constitutional duty to set the number of judicial seats in each court, giving the court responsibility to initially identify the need to change the number of judicial seats.

4. Establish Assessment Methodology: The Legislature must adopt a system for assessing the judicial needs of all courts, taking into account not only population (which is the only factor currently listed in our constitution) but also translating the various caseloads, civil, and criminal, complexity of cases, out-of-court time for preparation and writing decisions, and extra time for unrepresented litigants, into a number representing the total number of judges that will be necessary at a given time to fulfill all judicial obligations.

5. Transparency: Information on such newly adopted systems should be published.

6. Immediate Interim Measures: In the interim, less time-consuming statutory changes are immediately available.

This report will be presented by Hon. Andrea Masley and Ignatius Grande, Esq.

The report has been endorsed by:

- New York State Bar Association Commercial and Federal Litigation Section (Anne B. Sekel, Chair).
- New York County Lawyers Association (Adrienne Koch, President).
- Acting Supreme Court Judges Association (Gerry Lebovits, President)

NEW YORK STATE BAR ASSOCIATION

Report of the New York City Bar Association - Constitutional Cap Proposal

June 2024

The views expressed in this report are solely those of the Committee and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

COVER NOTE

On September 8, 2023, the New York City Bar Association published a report entitled *REPEAL THE CAP AND DO THE MATH: WHY WE NEED A MODERN, FLEXIBLE, EVIDENCE-BASED METHOD OF ASSESSING NEW YORK'S JUDICIAL NEEDS* (the "Report").[1]

On December 6, 2023, the New York State Bar Association Commercial and Federal Litigation Section (Anne B. Sekel, Chair) endorsed the Report.

On January 8, 2024, the New York County Lawyers Association (Adrienne Koch, President) endorsed the Report.

On January 9, 2024, Governor Hochul expressed her support for repealing the constitutional cap on Supreme Court Justices.

On January 10, 2024, the Acting Supreme Court Judges Association (Gerry Lebovits, President) endorsed the Report.

Additionally, the Fund for Modern Courts supports repealing the constitutional cap on Supreme Court Justices and utilizing a "more modern and progressive approach to providing appropriate judicial resources" whereby the Unified Court System would "study and develop a system of analyzing the actual work-load of the courts with the goal of apportioning state judicial resources in a less arbitrary way than the antiquated system established in New York State Constitution."[2]

The New York State Bar Association's Committee on the State Constitution (Christopher Bopst, Chair) has agreed to consider endorsing the Report at its next meeting.

The New York City Bar Association respectfully requests that the New York State Bar Association's House of Delegates endorse the Report and treat this issue as a legislative priority for the 2024 legislative session.

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[1] https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/constitutional-cap-on-judges. The Report is also attached and fully incorporated herein.

[2] https://moderncourts.org/programs-advocacy/judicial-article-of-nys-constitution/resources-constitutional-limit-number-justices-supreme-court/

TITLE PAGE

REPEAL THE CAP AND DO THE MATH: WHY WE NEED A MODERN, FLEXIBLE, EVIDENCE-BASED METHOD OF ASSESSING NEW YORK'S JUDICIAL NEEDS

NEW YORK CITY BAR ASSOCIATION
Council on Judicial Administration (Fran Hoffinger, Chair)
Subcommittee on the Constitutional Cap (Hon. Andrea Masley, Chair and Presenter)

LISTING OF MEMBER PAGE(S)

On September 8, 2023, the New York City Bar Association published a report entitled *REPEAL THE CAP AND DO THE MATH: WHY WE NEED A MODERN, FLEXIBLE, EVIDENCE-BASED METHOD OF ASSESSING NEW YORK'S JUDICIAL NEEDS* (the "Report").

Lead Committee:
Council on Judicial Administration, Fran Hoffinger, Chair

Constitutional Cap Sub-Committee Members: Robert Calinoff; Maria Park; Hon. Steven L. Barrett; David H. Sculnick; James P. Chou; Steven B. Shapiro; Michael Graff; Hon. Philip Straniere; Hon. Andrea Masley (Subcommittee Chair); Raymond Vanderberg; Robert C. Newman; Daniel Wiig

The report was supported by the following City Bar committees: Alternative Dispute Resolution Committee (Philip Goldstein, Chair); Civil Court Committee (Sidney Cherubin, Chair); Criminal Courts Committee (Carola Beeney and Anna G. Cominsky, Co-Chairs); State Courts of Superior Jurisdiction Committee (Amy Carlin, Chair)

The Report is also endorsed by:

New York State Bar Association Commercial and Federal Litigation Section (Anne B. Sekel, Chair).

New York County Lawyers Association (Adrienne Koch, President).

Acting Supreme Court Judges Association (Gerry Lebovits, President).

ACKNOWLEDGMENTS PAGE(S)

The City Bar's Constitutional Cap Sub-Committee began under the leadership of Council on Judicial Administration (CJA) Chair Steve Kayman. Hon. Carolyn E. Demarest and Michael Regan also chaired the CJA during the work of the Sub-Committee. The City Bar wishes to thank the City Bar's Librarian Richard Tuske and Administrative Assistant Dionie Kuprel. The Committee is most grateful to the following for sharing their expertise, advice, and/or data: Hon. Shahabuddeen Ally, Alex D. Corey, Esq., Prof. Peter J. Galie, Jonathan Goeringer, Esq., Gloria Smyth-Gottinger, Betty Hooks, Hon. Roslynn R. Mauskopf, Karen Milton, Esq., Prof. Dan Rabinowitz, Joan Vermeulen, Esq., and Hon. John Zhou Wang. The Report would not have been completed without the assistance of student interns Liam Clayton, Emily Friedman, Max Gerozissis, Fiona Lam, Samil Levin, Andrew Lymm, Max Sano, Sarah Shamoon, and Kristen Sheehan. The City Bar thanks editors Juanita Bright, Esq., Jamie N. Caponera, Esq., Hannah E. Reisinger, Esq, and Maria Reyes Vargas, Esq. Claudia Blanchard of Calinoff & Katz LLP provided Word expertise without which we would not have finished the Report.

Acknowledgement and thanks are extended to those who took the time to review, discuss and ultimately endorse the Report: the New York State Bar Association Commercial and Federal Litigation Section (Anne B. Sekel, Chair); the Board of the New York County Lawyers Association (Adrienne Koch, President); and the Acting Supreme Court Judges Association (Gerry Lebovits, President).

INTRODUCTION

The effective and efficient administration of justice in the State of New York's Unified Court System requires adequate judicial resources to serve the needs of litigants that appear before those courts. Such resources include: a robust judiciary consisting of qualified jurists committed to the rule of law, adequate staffing of judicial and administrative clerks, personnel necessary to carry out the courts' functions, and basic supplies to operate the courts' facilities. While a wide array of factors play into the sufficiency of the courts' resources and ability to serve the people, including budgetary constraints, political will, and the need for legislative action, at a fundamental level, the number of judges and the means by which New York State determines that figure is a major consideration—*i.e.*, is the current calculation method yielding a sufficient number of judges necessary to provide litigants the quality of justice they deserve and to handle the court's ever-expanding caseload in a state that has increasingly become the world's forum of choice for complex commercial litigation? As discussed below, this question is particularly important with respect to the New York State Supreme Court, (collectively, the "Court" or the "Supreme Court"), not only by reason of its status as New York's trial court of general jurisdiction, but because the existing means by which the Supreme Court bench is populated impacts the number of judges and the administration of justice in other courts within the Unified Court System, including what are often called the "People's Courts"—the Family Court, Civil Court and local criminal courts.

In New York, the state constitution (the "Constitution") prescribes the number of judges for the Supreme Court. New York State is divided into thirteen judicial districts; each county within New York City is a single district, and the remaining districts contain multiple counties. Since 1846, Article VI of the Constitution has provided for a population-based formula allotting up to one elected Supreme Court judge—known as a "justice"—to a certain number of people. Since 1963, the formula has been one justice for every 50,000 people in the state, calculated by district. Based on data from the 2020 United States Census reflecting a population of 20.2 million, the New York State Legislature may authorize the Court to have up to 401 elected justices throughout the state. Currently, the Legislature has authorized only 364 elected justices to sit on the New York State Supreme Court bench—a number that more closely corresponds to the state's population in 1999: 18.2 million people.

This reduced number of judges, however, is confounding, since every indication is that the constitutional formula has proven woefully inadequate and outdated. Indeed, while the Supreme Court bench has 364 *elected* justices,[3] in reality, it is populated by an *additional* 317 judges– a number that has gone as high as 396 in 2012. These are judges that OCA has transferred from lower and other courts pursuant to constitutional provisions authorizing these appointments on a "temporary and emergency" basis. Thus, the number of acting justices is almost the same as the number of elected Supreme Court Justices and has often *exceeded* the number of elected Justices since 2008. Moreover, the designation of these "acting" justices has been anything but temporary,

[3] This number will increase by 3 in 2024 following the enactment of Senate Bill 7534, Chp. 749, which was signed into law by Governor Hochul on December 22, 2023.

and once so designated, it is rare, if ever, that an acting justice is returned to his or her original judicial office.

This practice of increasing the aggregate number of justices through the *ad hoc* appointment of judges from other courts puts squarely into question the efficacy of the constitutional formula and demonstrates that, at a minimum, the state needs a significant number of additional authorized Supreme Court justice seats. It also raises at least two concerns: (1) the depletion of resources from the other courts from which acting Supreme Court justices are drawn has a ripple effect, and ultimately impairs the administration of justice for litigants in those other courts; and (2) the current practice of *ad hoc* appointments—originally intended to serve as a provisional stopgap—has become a *de facto* permanent solution for what is effectively a perpetual emergency and runs afoul of both the original intent of the constitutional provision vesting OCA with this authority, as well as the constitutional provision granting citizens the right to choose, by election, those jurists who sit in the Supreme Court.

Unanimously, the participants in the courts—judges, litigants, and practitioners—have long voiced concerns with the ever-increasing and crushing dockets in the Supreme Court and the lower and other courts, and the resulting impact on the pace at which cases move through the judicial system. The situation has become even more critical in light of the impact of the COVID pandemic's economic fallout on the courts—specifically, a $300 million cut to the judiciary budget, which resulted in OCA's decision to (1) effectively terminate 46 certificated judges across the state in one fell swoop[4] and (2) reduce other resources and personnel, including the elimination of judicial hearing officers ("JHO") and certain law clerks. These cuts in judicial resources promise to tax an already over-burdened judiciary beset with backlogs[5] preceding COVID, such as long waits for decisions on motions or trial dates when both parties are ready.

The City Bar proposes eliminating the population-based cap in light of, among other things, (1) the over 300 acting Supreme Court judges assigned to supplement the 364 elected Supreme Court justices since 2008, (2) increasing caseloads, (3) frustration with the slow disposition of cases, (4) more than 60 Supreme Court justices routinely certificated as needed and qualified to serve up to three additional two year terms after turning 70 years of age, and (5) the decreasing number of jury trials in all courts because of the paucity of available judges. The City Bar also offers a practical alternative to determine the appropriate number of Supreme Court justices and judges based on meaningful metrics: the weighted caseload analysis. The Report reaches these recommendations based on (1) an analysis of the existing constitutional and statutory structure of

[4] Since the termination of these certificated judges in October 2020, twenty have been reinstated to the bench.

[5] "Backlog is a term reserved for a court's older cases. A standard definition of backlog involves cases that are pending beyond a certain time frame. For courts that have adopted time standards, backlogs are identified as the share of cases exceeding time standards (e.g., cases more than 365 days old)." National Center for State Courts, Trends in State Courts 2022, at 95, https://www.ncsc.org/__data/assets/pdf_file/0024/80358/Trends-2022.pdf. For the purposes of this report, a "backlog" occurs when more cases are filed in a certain period than are disposed during that period, which can be quantified as a "clearance rate." *Id*. at 94. Another helpful measure is the time to disposition measured from filing to resolution. *Id*. Likewise, the age of a pending case is a helpful measure of the days since filing, but that too is not what we mean in this report when we use the term "backlog." *Id.*

the courts and administration of the courts and (2) consideration of the Legislature's duty to authorize all judicial seats and its obligation to apportion those seats to achieve justice for all. It also draws on the methods of determining the number of judges utilized by the federal courts and 49 other states. The Report is organized in six parts:

First, the Report provides an overview of the relevant courts in the state's byzantine and often bewildering Unified Court System. A basic understanding of these various courts and how the number of jurists for such courts is determined is a requisite underpinning of the Report's analysis. Indeed, such analysis includes an assessment of the impact on these other courts' resources resulting from the transfers from lower courts to supplement the number of constitutionally elected justices. The analysis also addresses how the appointment of justices to the Supreme Court's four Appellate Divisions affects the Court's trial court bench and creation of new "temporary" seats when the Presiding Justice declares to the governor that the Department is "unable to dispose of its business within a reasonable time."

Second, the Report then discusses the historical origins of the constitutional formula for determining the number of Supreme Court justices—the primary subject of this Report's evaluation—and lays the groundwork for the City Bar's rejection of the formula's relevance and effectiveness today. The Report also examines the existing but unused constitutional provisions that contemplate mechanisms for the Legislature to revisit the existing methodology in recognition of the notion that the calculus should evolve and adapt to society's changing needs.

Third, the Report proceeds to assess the current burden on the Supreme Court, the significant increases in the number of cases filed in the court over the years, and the factors that have led to this drastic expansion. This part of the Report also discusses how the increasing burden on the Supreme Court bench is compounded by constitutional provisions and practices that affect the number of justices, such as the appointment of judges to the Appellate Divisions of the Supreme Court from the pool of elected Supreme Court justices in the trial courts, the mandatory retirement age, and the certification of judges. As part of this discussion, the Report also touches upon various reasons why the caseload of all courts within the Unified Court System has dramatically increased.

Fourth, the Report then examines the measures that OCA has implemented to address the need for additional justices by reassigning judges from other courts, including a discussion of the statutory basis for such action. The Report also examines the historical use of these makeshift measures, which were apparently necessitated by Legislative inaction in not authorizing the maximum number of Supreme Court seats to the cap and raises questions as to whether the current utilization of these temporary measures is in the best interests of justice and New York's citizens.

Fifth, the Report then proceeds to analyze the adverse impact of these emergency measures on the other courts from which OCA has drawn acting justices. Based on anecdotal

evidence and some publicly available data, the Report concludes that the lower and other courts, such as the New York City Civil Court, are unfairly deprived of much-needed judges to preside over cases, which ultimately inures to the detriment of the litigants in those courts.

Sixth, and finally, the Report explores possible solutions by first comparing practices in 49 state courts and the federal courts, examining the methods that these jurisdictions and systems use to set the number of judges within their respective judicial systems, and then offering non-constitutional and constitutional-based proposals.

I. EXECUTIVE SUMMARY

In sum, the Report examines and addresses the need for the New York State Legislature (the "Legislature") to provide the People of the State of New York with a sufficient number of judges to do justice.[6] Throughout its history, New York State has struggled with an insufficient number of judicial seats necessitating stopgap measures that have only resulted in a complicated, overworked, and confusing court system that fails to provide justice to all. The dire need for additional judges overall is a function of the chronic failure to provide adequate judicial resources to New York's Unified Court System. And while the reasons underlying such failure are manifold and multilayered, on a fundamental level, the lack of judicial resources stems largely from the constitutionally prescribed method by which the New York State Legislature determines the number of justices that can be elected to the state's trial court of general jurisdiction—the New York State Supreme Court. Since enacted in 1846, and as amended in 1961, Article 6 of the New York State Constitution, has set the number of Supreme Court seats—which are elected positions—for geographically-defined areas known as judicial districts by using a solely population-based ratio—i.e., one justice per 50,000 people. The effect of such a formula is to cap the number of legislatively authorized Supreme Court seats within each judicial district, leaving the Legislature powerless to authorize additional seats to meet the growing and particular needs of the courts in such districts. Thus, the purely population-based "constitutional cap" has proven over-simplistic, outdated, and unworkable. Even worse, it has created a ripple effect that has impacted the entire New York Court system. Specifically, to address the lack of resources at the Supreme Court level, the Office of Court Administration has long resorted to adopting makeshift measures that involve designating judges from other courts to sit on the Supreme Court on an "acting" basis. Not only has this "robbing Peter to pay Paul" approach depleted these other courts of judicial resources, it has created a *de facto* permanent and large class of "Acting Supreme Court Justices," sitting in a court other than the one to which they were either elected by the people or appointed by the relevant appointing authority.

[6] The Report does not address court merger about which much has been written. *See* New York City Bar, *2020 New York State Legislative Agenda*, (January 7, 2022), https://www.nycbar.org/issue-policy/issue/new-york-state-2022-legislative-agenda (listing "Simplify New York State's Courts through restructuring" as a topic). Nor does the Report address whether judges should be elected or appointed or both.

In this era of metrics, the people of New York State are entitled to a modern, flexible, evidence-based method of assessing the state's judicial needs, as is the case in many other states and the federal judiciary. To that end, **the Report makes the following recommendations** which should be enacted and implemented for the proper and adequate administration of justice in New York State's courts.

- First, A Constitutional Amendment to Eliminate the Cap: It is undisputed that the constitutional cap on the number of elected Supreme Court Justices must be eliminated. The Report thus proposes that the constitution be modified to remove the cap in its entirety, and add language that requires the Legislature to consider whether to change the number of Supreme Court justices in any judicial district at least once every ten years. The Report's comparison to 49 other states and the federal courts shows that such analysis is performed even more regularly including once a year or biannually.

- Second, Enabling Legislation: The Legislature must codify a mandatory regular systematic assessment of the courts' specific needs as many other states and the federal courts have done. The constitutional obligation for the Legislature to evaluate judicial districts—and implicitly the number of judges—at least every ten years when there is a new census, has been consistently breached, with the Legislature increasing the number of judges only on an ad hoc basis. The City Bar does not recommend how often such an evaluation must be performed in New York State, as such a decision should be informed by the cost of conducting the evaluation, which the federal courts and many states perform in-house, and other states perform using outside experts such as the National Center for State Courts.

- Third, Annual Reporting: The Chief Administrative Judge is currently required to keep data that would enable the Legislature to perform its regular and systematic assessment, and he thus has a significant role in this process. His statutory responsibility to annually evaluate the adequacy of current court resources and issue an annual report should include a directive to analyze the number of judges in each court and request changes when appropriate. Requesting changes in the number of judges is not currently required and has not been the practice. This annual report would inform the Legislature in carrying out its constitutional duty to set the number of judicial seats in each court, giving the court responsibility to initially identify the need to change the number of judicial seats.

- Fourth, Establish Assessment Methodology: The Legislature must adopt a system for assessing the judicial needs of all courts, taking into account not only population (which is the only factor currently listed in our constitution) but also translating the various caseloads, civil, and criminal, complexity of cases, out-of-court time for preparation and writing decisions, and extra time for unrepresented litigants, into a number representing the total number of judges that will be necessary at a given time to fulfill all judicial obligations. The City Bar's review of the procedures for

determining the right number of judges in 49 states and the federal judiciary is attached.

- Fifth, Transparency: Information on such newly-adopted systems should be published. Most states use a "weighted caseload analysis," which includes counting the number of cases filed and disposed, as well as the time from filing to disposition, or "clearance rate," and assigning weights to each type of case based on complexity and other resources available to courts e.g., nonjudicial staff. The people of New York State have the right to know the time it takes to resolve criminal cases, small claims cases, Family Court cases and others, as well as their legislators' positions on what are acceptable clearance rates in those courts.

Sixth, Immediate Interim Measures: In the interim, less time-consuming statutory changes are immediately available. For example, since the number of judges in courts other than the Supreme Court is not subject to a constitutional cap, the Legislature could immediately assess the judicial needs in those courts with support from appropriate professionals, and change the number accordingly.

II. BACKGROUND

See above.

III. ANALYSIS AND PRESENTATION OF RECOMMENDATIONS

The recommendations are listed above and appear in full at pp. 56 – 60 of the Report. The first one – repealing the constitutional cap – requires a constitutional amendment. If the Legislature passes legislation that repeals the cap in the 2024 session, then the same bill must pass the Legislature in the 2025/26 session before being placed on the ballot for voters' approval.

The remaining recommendations are also directed at the Legislature and do not require a constitutional amendment. These recommendations urge the Legislature to codify a mandatory regular systematic assessment of the courts' specific judicial needs; to require annual reporting from the Chief Administrative Judge that includes an analysis of the number of judges in each court and a request for changes when appropriate; to adopt a system for assessing the judicial needs of all courts, taking into account not only population (which is the only factor currently listed in our constitution) but also translating the various caseloads, civil, and criminal, complexity of cases, out-of-court time for preparation and writing decisions, and extra time for unrepresented litigants, into a number representing the total number of judges that will be necessary at a given time to fulfill all judicial obligations; to transparently publish such newly-adopted systems and analyses; and to, in the interim, concerning courts not subject to a constitutional cap, continually assess the judicial needs in those courts and change the number accordingly.

Legislative advocacy is anticipated this session, beginning with support for A.5366 (Bores)/S.5414 (Hoylman-Sigal), a CONCURRENT RESOLUTION OF THE SENATE AND ASSEMBLY proposing amendments to article 6 of the constitution, in relation to the number of supreme court

justices in any judicial district. This bill would repeal the cap. In addition to endorsing the Report, the City Bar recommends that the New York State Bar Association support A.5366/S.5414.

IV. CONCLUSION

In the almost 60 years since 1962, when the constitutional formula changed to one judge per 50,000 people and the creation of the civil and criminal lower courts, there has been no change in the calculus of Supreme Court justices. Despite the constitutional obligation to reconsider the need for more justices every ten years based upon newly collected census data, the failure to increase the number of Supreme Court positions in light of the significant interim population growth has forced OCA to implement ad hoc mechanisms in order to provide the jurists needed to actually carry out the critical obligations of the third branch of government. Based on the assignment of at least 300 such acting justices for over ten years, the time has come to lift the cap and begin calculating the number of judges in all of New York's courts using actual data and modern methods of evaluation.

We urge the New York State Bar Association to endorse the Report and all recommendations contained therein and to support A.5366/S.5414 so that, in the first instance, the constitutional cap on judges can be repealed. The Report's remaining legislative recommendations are likewise critical so that a reliable and effective process for assessing judicial needs in Supreme Court is in place once the cap is lifted.

GLOSSARY / INDEX

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COUNCIL ON JUDICIAL ADMINISTRATION

REPEAL THE CAP AND DO THE MATH: WHY WE NEED A MODERN, FLEXIBLE, EVIDENCE-BASED METHOD OF ASSESSING NEW YORK'S JUDICIAL NEEDS

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
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REPEAL THE CAP AND DO THE MATH:
WHY WE NEED A MODERN, FLEXIBLE, EVIDENCE-BASED METHOD OF ASSESSING NEW YORK'S JUDICIAL NEEDS

EXECUTIVE SUMMARY

This report (the "Report") examines and addresses the need for the New York State Legislature (the "Legislature") to provide the People of the State of New York with a sufficient number of judges to do justice.[1] Throughout its history, New York State has struggled with an insufficient number of judicial seats necessitating stopgap measures that have only resulted in a complicated, overworked, and confusing court system that fails to provide justice to all. The dire need for additional judges overall is a function of the chronic failure to provide adequate judicial resources to New York's Unified Court System. And while the reasons underlying such failure are manifold and multilayered, on a fundamental level, the lack of judicial resources stems largely from the constitutionally prescribed method by which the New York State Legislature determines the number of justices that can be elected to the state's trial court of general jurisdiction—the New York State Supreme Court. Since enacted in 1846, and as amended in 1961, Article 6 of the New York State Constitution, has set the number of Supreme Court seats—which are elected positions—for geographically-defined areas known as judicial districts by using a solely population-based ratio—i.e., one justice per 50,000 people. The effect of such a formula is to cap the number of legislatively authorized Supreme Court seats within each judicial district, leaving the Legislature powerless to authorize additional seats to meet the growing and particular needs of the courts in such districts. Thus, the purely population-based "constitutional cap" has proven over-simplistic, outdated, and unworkable. Even worse, it has created a ripple effect that has impacted the entire New York Court system. Specifically, to address the lack of resources at the Supreme Court level, the Office of Court Administration has long resorted to adopting makeshift measures that involve designating judges from other courts to sit on the Supreme Court on an "acting" basis. Not only has this "robbing Peter to pay Paul" approach depleted these other courts of judicial resources, it has created a *de facto* permanent and large class of "Acting Supreme Court Justices," sitting in a court other than the one to which they were either elected by the people or appointed by the relevant appointing authority.

In this era of metrics, the people of New York State are entitled to a modern, flexible, evidence-based method of assessing the state's judicial needs, as is the case in many other states and the federal judiciary. To that end, the Report makes the following recommendations which

[1] This Report will not address court merger about which much has been written. *See* New York City Bar, *2020 New York State Legislative Agenda*, (January 7, 2022), https://www.nycbar.org/issue-policy/issue/new-york-state-2022-legislative-agenda (All websites last accessed on August 3, 2023). (listing "Simplify New York State's Courts through restructuring" as a topic). Nor does the report address whether judges should be elected or appointed or both.

should be enacted and implemented for the proper and adequate administration of justice in New York State's courts.

- First, A Constitutional Amendment to Eliminate the Cap: It is undisputed that the constitutional cap on the number of elected Supreme Court Justices must be eliminated. The Report thus proposes that the constitution be modified to remove the cap in its entirety, and add language that requires the Legislature to consider whether to change the number of Supreme Court justices in any judicial district at least once every ten years. The Report's comparison to 49 other states and the federal courts shows that such analysis is performed even more regularly including once a year or biannually.

- Second, Enabling Legislation: The Legislature must codify a mandatory regular systematic assessment of the courts' specific needs as many other states and the federal courts have done. The constitutional obligation for the Legislature to evaluate judicial districts—and implicitly the number of judges—at least every ten years when there is a new census, has been consistently breached, with the Legislature increasing the number of judges only on an ad hoc basis. The Council does not recommend how often such an evaluation must be performed in New York State, as such a decision should be informed by the cost of conducting the evaluation, which the federal courts and many states perform in-house, and other states perform using outside experts such as the National Center for State Courts.

- Third, Annual Reporting: The Chief Administrative Judge is currently required to keep data that would enable the Legislature to perform its regular and systematic assessment, and he thus has a significant role in this process. His statutory responsibility to annually evaluate the adequacy of current court resources and issue an annual report should include a directive to analyze the number of judges in each court and request changes when appropriate. Requesting changes in the number of judges is not currently required and has not been the practice. This annual report would inform the Legislature in carrying out its constitutional duty to set the number of judicial seats in each court, giving the court responsibility to initially identify the need to change the number of judicial seats.

- Fourth, Establish Assessment Methodology: The Legislature must adopt a system for assessing the judicial needs of all courts, taking into account not only population (which is the only factor currently listed in our constitution) but also translating the various caseloads, civil, and criminal, complexity of cases, out-of-court time for preparation and writing decisions, and extra time for unrepresented litigants, into a number representing the total number of judges that will be

necessary at a given time to fulfill all judicial obligations. The Council's review of the procedures for determining the right number of judges in 49 states and the federal judiciary is attached.

- Fifth, Transparency: Information on such newly-adopted systems should be published. Most states use a "weighted caseload analysis," which includes counting the number of cases filed and disposed, as well as the time from filing to disposition, or "clearance rate," and assigning weights to each type of case based on complexity and other resources available to courts e.g., nonjudicial staff. The people of New York State have the right to know the time it takes to resolve criminal cases, small claims cases, Family Court cases and others, as well as their legislators' positions on what are acceptable clearance rates in those courts.

- Sixth, Immediate Interim Measures: In the interim, less time-consuming statutory changes are immediately available. For example, since the number of judges in courts other than the Supreme Court is not subject to a constitutional cap, the Legislature could immediately assess the judicial needs in those courts with support from appropriate professionals, and change the number accordingly.

INTRODUCTION

The effective and efficient administration of justice in the State of New York's Unified Court System requires adequate judicial resources to serve the needs of litigants that appear before those courts. Such resources include: a robust judiciary consisting of qualified jurists committed to the rule of law, adequate staffing of judicial and administrative clerks, personnel necessary to carry out the courts' functions, and basic supplies to operate the courts' facilities. While a wide array of factors play into the sufficiency of the courts' resources and ability to serve the people, including budgetary constraints, political will, and the need for legislative action, at a fundamental level, the number of judges and the means by which New York State determines that figure is a major consideration—*i.e.*, is the current calculation method yielding a sufficient number of judges necessary to provide litigants the quality of justice they deserve and to handle the court's ever-expanding caseload in a state that has increasingly become the world's forum of choice for complex commercial litigation? As discussed below, this question is particularly important with respect to the New York State Supreme Court, (collectively, the "Court" or the "Supreme Court"), not only by reason of its status as New York's trial court of general jurisdiction, but because the existing means by which the Supreme Court bench is populated impacts the number of judges and the administration of justice in other courts within the Unified Court System, including what are often called the "People's Courts"—the Family Court, Civil Court and local criminal courts.

In New York, the state constitution (the "Constitution") prescribes the number of judges for the Supreme Court. New York State is divided into thirteen judicial districts; each county within New York City is a single district, and the remaining districts contain multiple counties. Since 1846, Article VI of the Constitution has provided for a population-based formula allotting up to one elected Supreme Court judge—known as a "justice"—to a certain number of people. Since 1963, the formula has been one justice for every 50,000 people in the state, calculated by district. Based on data from the 2020 United States Census reflecting a population of 20.2 million, the New York State Legislature may authorize the Court to have up to 401 elected justices throughout the state. Currently, the Legislature has authorized only 364 elected justices to sit on the New York State Supreme Court bench—a number that more closely corresponds to the state's population in 1999: 18.2 million people.

This reduced number of judges, however, is confounding, since every indication is that the constitutional formula has proven woefully inadequate and outdated. Indeed, while the Supreme Court bench has 364 *elected* justices,[2] in reality, it is populated by an *additional* 317 judges– a number that has gone as high as 396 in 2012. These are judges that OCA has transferred from lower and other courts pursuant to constitutional provisions authorizing these appointments on a "temporary and emergency" basis. Thus, the number of acting justices is almost the same as the number of elected Supreme Court Justices and has often *exceeded* the number of elected Justices since 2008. Moreover, the designation of these "acting" justices has been anything but temporary, and once so designated, it is rare, if ever, that an acting justice is returned to his or her original judicial office.

This practice of increasing the aggregate number of justices through the *ad hoc* appointment of judges from other courts puts squarely into question the efficacy of the constitutional formula and demonstrates that, at a minimum, the state needs a significant number of additional authorized Supreme Court justice seats. It also raises at least two concerns: (1) the depletion of resources from the other courts from which acting Supreme Court justices are drawn has a ripple effect, and ultimately impairs the administration of justice for litigants in those other courts; and (2) the current practice of *ad hoc* appointments—originally intended to serve as a provisional stopgap—has become a *de facto* permanent solution for what is effectively a perpetual emergency and runs afoul of both the original intent of the constitutional provision vesting OCA with this authority, as well as the constitutional provision granting citizens the right to choose, by election, those jurists who sit in the Supreme Court.

Unanimously, the participants in the courts—judges, litigants, and practitioners—have long voiced concerns with the ever-increasing and crushing dockets in the Supreme Court and the lower and other courts, and the resulting impact on the pace at which cases move through the judicial system. The situation has become even more critical in light of the impact of the COVID pandemic's economic fallout on the courts—specifically, a $300 million cut to the

[2] This number will increase by 3 as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

judiciary budget, which resulted in OCA's decision to (1) effectively terminate 46 certificated judges across the state in one fell swoop[3] and (2) reduce other resources and personnel, including the elimination of judicial hearing officers ("JHO") and certain law clerks. These cuts in judicial resources promise to tax an already over-burdened judiciary beset with backlogs[4] preceding COVID, such as long waits for decisions on motions or trial dates when both parties are ready.

The Council proposes eliminating the population-based cap in light of, among other things, (1) the over 300 acting Supreme Court judges assigned to supplement the 364 elected Supreme Court justices since 2008, (2) increasing caseloads, (3) frustration with the slow disposition of cases, (4) more than 60 Supreme Court justices routinely certificated as needed and qualified to serve up to three additional two year terms after turning 70 years of age, and (5) the decreasing number of jury trials in all courts because of the paucity of available judges. The Council also offers a practical alternative to determine the appropriate number of Supreme Court justices and judges based on meaningful metrics: the weighted caseload analysis. The Report reaches these recommendations based on (1) an analysis of the existing constitutional and statutory structure of the courts and administration of the courts and (2) consideration of the Legislature's duty to authorize all judicial seats and its obligation to apportion those seats to achieve justice for all. It also draws on the methods of determining the number of judges utilized by the federal courts and 49 other states. The Report is organized in six parts:

> First, the Report provides an overview of the relevant courts in the state's byzantine and often bewildering Unified Court System. A basic understanding of these various courts and how the number of jurists for such courts is determined is a requisite underpinning of the Report's analysis. Indeed, such analysis includes an assessment of the impact on these other courts' resources resulting from the transfers from lower courts to supplement the number of constitutionally elected justices. The analysis also addresses how the appointment of justices to the Supreme Court's four Appellate Divisions affects the Court's trial court bench and creation of new "temporary" seats when the Presiding Justice declares to the governor that the Department is "unable to dispose of its business within a reasonable time."

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[3] Since the termination of these certificated judges in October 2020, twenty have been reinstated to the bench.

[4] "Backlog is a term reserved for a court's older cases. A standard definition of backlog involves cases that are pending beyond a certain time frame. For courts that have adopted time standards, backlogs are identified as the share of cases exceeding time standards (e.g., cases more than 365 days old)." National Center for State Courts, Trends in State Courts 2022, at 95, https://www.ncsc.org/__data/assets/pdf_file/0024/80358/Trends-2022.pdf. For the purposes of this report, a "backlog" occurs when more cases are filed in a certain period than are disposed during that period, which can be quantified as a "clearance rate." *Id*. at 94. Another helpful measure is the time to disposition measured from filing to resolution. *Id.* Likewise, the age of a pending case is a helpful measure of the days since filing, but that too is not what we mean in this report when we use the term "backlog." *Id.*

Second, the Report then discusses the historical origins of the constitutional formula for determining the number of Supreme Court justices—the primary subject of this Report's evaluation—and lays the groundwork for the Council's rejection of the formula's relevance and effectiveness today. The Report also examines the existing but unused constitutional provisions that contemplate mechanisms for the Legislature to revisit the existing methodology in recognition of the notion that the calculus should evolve and adapt to society's changing needs.

Third, the Report proceeds to assess the current burden on the Supreme Court, the significant increases in the number of cases filed in the court over the years, and the factors that have led to this drastic expansion. This part of the Report also discusses how the increasing burden on the Supreme Court bench is compounded by constitutional provisions and practices that affect the number of justices, such as the appointment of judges to the Appellate Divisions of the Supreme Court from the pool of elected Supreme Court justices in the trial courts, the mandatory retirement age, and the certification of judges. As part of this discussion, the Report also touches upon various reasons why the caseload of all courts within the Unified Court System has dramatically increased.

Fourth, the Report then examines the measures that OCA has implemented to address the need for additional justices by reassigning judges from other courts, including a discussion of the statutory basis for such action. The Report also examines the historical use of these makeshift measures, which were apparently necessitated by Legislative inaction in not authorizing the maximum number of Supreme Court seats to the cap and raises questions as to whether the current utilization of these temporary measures is in the best interests of justice and New York's citizens.

Fifth, the Report then proceeds to analyze the adverse impact of these emergency measures on the other courts from which OCA has drawn acting justices. Based on anecdotal evidence and some publicly available data, the Report concludes that the lower and other courts, such as the New York City Civil Court, are unfairly deprived of much-needed judges to preside over cases, which ultimately inures to the detriment of the litigants in those courts.

Sixth, and finally, the Report explores possible solutions by first comparing practices in 49 state courts and the federal courts, examining the methods that these jurisdictions and systems use to set the number of judges within their respective judicial systems, and then offering non-constitutional and constitutional-based proposals.

PART I: THE CURRENT LANDSCAPE OF NEW YORK'S UNIFIED COURT SYSTEM

The New York State Constitution provides that "there shall be a unified court system" that consists of the Courts of Appeals, the Supreme Court including the Appellate Divisions of

the Supreme Court, the Court of Claims, the County Court, the Surrogate's Court, the Family Court, the courts of civil and criminal jurisdiction of the City for New York, and such other courts that the Legislature decides.[5] New York State's Constitution thus prescribes a multilayered judicial structure, which over time has evolved into a byzantine system that is incomprehensible to most practitioners. The following passage illustrates the point markedly:

> "On the trial court side, we have eleven separate courts including a court of general civil and criminal jurisdiction, courts of limited civil and general criminal jurisdiction, courts of special jurisdiction, a court of limited civil jurisdiction only, a court of limited criminal jurisdiction only, and courts of both limited civil and limited criminal jurisdiction. Some of these courts sit across that state, some sit only in New York City, some sit only outside New York City; some sit only on Long Island; some exercise all the jurisdiction they are granted; some exercise only a portion of their jurisdiction. Most of these courts exercise only trial jurisdiction; some, however, exercise both trial and appellate jurisdiction. Some of the judges of these courts are elected; some are appointed. And of those that are appointed, some are appointed by the governor, some by the mayor of the municipality in which they serve, and some by a city's common council. Some judges serve fourteen-year terms; some ten-year terms; some nine-year terms; some six-year terms; and some four-year terms. Some judges never sit on the court for which they are chosen; some are chosen to sit in two or three courts at once. In some courts, court parts are not even presided over by judges but, instead, by quasi-judicial hearing officers."[6]

Accordingly, to evaluate the adequacy and allocation of judicial resources, a basic understanding of New York's complex judicial system and how judges are assigned to the various courts in keeping with the constitution is essential.[7]

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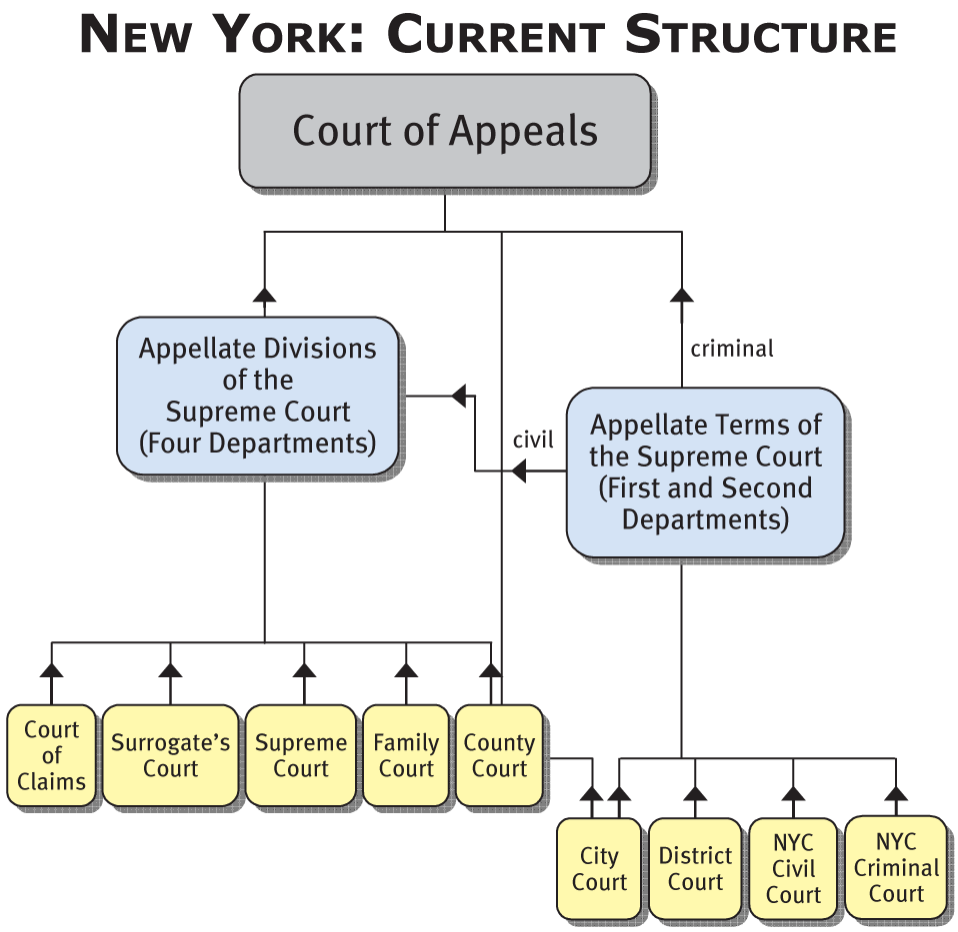
[5] N.Y. Const. Art. VI, §1.

[6] L. Daniel Feldman and Marc C. Bloustein, New York State's Unified Court System 81, New York's Broken Constitution: The Governance Crisis and The Path to Renewed Greatness (Peter J. Galie, Christopher Bopst & Gerald Benjamin eds., 2016).

[7] See Exhibit 2 for the statutory source of each judicial seat.

The following diagram illustrates the structure of the courts described above:[8]



A. Courts with Jurisdiction Across All of New York[9]

1. The Court of Appeals of the State of New York. The Court of Appeals sits at the apex of the Unified Court System, serving as New York State's highest and last court of resort. The Court of Appeals' jurisdiction is generally limited to the review of questions of law.[10] Composed of the Chief Judge and six Associate Judges, each appointed to a 14-year

[8] The Fund for Modern Courts, *Structure of the Courts* (2022), https://moderncourts.org/programs-advocacy/judicial-article-of-nys-constitution/structure-of-the-courts/. (Also appears as Exhibit 1).

[9] N.Y. Const. Art. VI, § 1; N.Y. Jud. Law §2, "Courts of Record".

[10] N.Y. Const. Art. VI, § 3(a).

term,[11] the highest court may seek to increase its composition on a temporary basis by way of a request to the governor certifying the need and gubernatorial designation.[12]

2. The Supreme Court. Bearing a name that confusingly suggests that it is the state's court of last resort, the Supreme Court is New York's trial court of general jurisdiction in law and equity.[13] Under the constitution, the judges sitting on this court are known as "Justices" and are elected to 14-year terms[14] from one of 13 judicial districts.[15] A Supreme Court Justice may serve until December 31 of the year in which he or she reaches age 70, and may thereafter perform duties as a Supreme Court Justice if OCA certifies that the Justice's services are necessary to expedite the business of the Court, and that he or she is physically and mentally competent to fully perform the duties of such office.[16] Certification is valid for a two-year term and may be extended for up to two additional two-year terms,[17] but in no event beyond December 31 in the year in which he or she reaches age 76.[18] In addition to OCA's certification process, judges seeking to continue performing judicial functions in New York City after reaching 70 years of age appear before the New York City Bar Association's Judiciary

[11] N.Y. Const. Art. VI, § 2(a).

[12] N.Y. Const. Art. VI, § 2(b) ("Whenever and as often as the court of appeals shall certify to the governor that the court is unable, by reason of the accumulation of causes pending therein, to hear and dispose of the same with reasonable speed, the governor shall designate such number of justices of the Supreme Court as may be so certified to be necessary, but not more than four, to serve as associate judges to the court of appeals.").

[13] N.Y. Const. Art. VI, § 7(a).

[14] The fourteen-year term was the result of a compromise in 1867 where the debate was between lifetime tenure, allowing judges to devote themselves to their work, and a fixed term. Looking Back on a Glorious Past 1691-1991, NYS Bar Association Journal citing Judge Francis Bergan, The History of the New York Court of Appeals, 1847-1932 (Columbia University Press, 1985). The fourteen-year term was selected based on "the statistical average of the actual number of years that had been served by federal judges and others who had life tenure." *Id*.

[15] N.Y. Const. Art. VI, § 6(c).

[16] N.Y. Const. Art. VI, § 25(b).

[17] In light of COVID and alleged budget cuts, however, 46 certifications were denied. *See* Heather Yakin, *To meet budget cut goals, New York courts won't extend terms for senior judges*, Record Online (Oct. 7, 2020), https://www.recordonline.com/story/news/2020/10/02/state-courts-wont-extend-terms-this-year-for-judges-over-age-70/5870683002/; Ryan Tarinelli, *'Teetering on the Edge of Total Dysfunction': Older Judges Being Forced From Bench Sue NY Court Officials, Warn of Chaos*, Law.com (Nov. 5, 2020), https://www.law.com/newyorklawjournal/2020/11/05/older-judges-being-forced-from-bench-sue-ny-court-officials/?slreturn=20201103170944.

[18] N.Y. Const. Art. VI, § 25(b).

Committee.[19] Currently, there are 364 judicial seats authorized by the Legislature for election,[20] while the constitutional cap allows for 401 judicial seats. Certificated judges are not counted toward the cap.

3. The Supreme Court, Appellate Division. Technically a part of the Supreme Court, the Appellate Divisions hear appeals from judgments or orders from the Supreme Court,[21] Surrogate's Court,[22] Appellate Term of the Supreme Court,[23] Family Court,[24] Court of Claims,[25] and County Courts.[26] While it is an intermediate court between the Supreme Court and the Court of Appeals, as a practical matter, the Appellate Divisions are the last court of resort for the vast majority of cases, as leave is required for appeals to proceed to the Court of Appeals, with limited exceptions.[27] The four Appellate Divisions hear cases from specified geographic districts in the state.[28] The constitution sets the number of Appellate Division judges—also known as justices—who are appointed by the governor and selected from among the elected Supreme Court justices.[29] Thus, to fill a constitutional seat on the Appellate Division, the judge first must be an elected Supreme Court justice.[30] Acting justices, who are designated and note elected to the Supreme Court do not qualify. The constitution also permits temporary assignments and appointments of justices to the Appellate Division among the departments by agreement of the presiding justices of the four departments, initiated by the presiding justice of the department in need.[31] These "temporary" judges must also first be elected as Supreme Court justices. In 2020, prior to COVID, there were four presiding justices, 20 justices authorized by the constitution, 30

[19] See e.g., letter from Chief Administrative Judge Marks, July 12, 2021, inviting views on 18 Judges from The First and Second Departments who applied for certification to begin in 2022. The American Lawyer, New Crop of Older New York Judges seeking approval to stay on bench (July 19, 2021). For a description of the process, see Facing the Future at 70, Judge Wonders if Certification is an Option, NYLJ, April 14, 2003.

[20] N.Y. Jud. Law §140-a. See Exhibit 12 for changes to N.Y. Jud. Law §140-a. This number will increase to 367 as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[21] N.Y. CPLR 5701 (1999).

[22] N.Y. SCPA § 2701(1) (1967).

[23] N.Y. CPLR 5703 (1963).

[24] N.Y. Family Ct. Act § 1111 (1969).

[25] N.Y. Ct. Cl. Act § 24 (1979).

[26] N.Y. CPLR 5701 (1999).

[27] Thomas R. Newman et. al., *Clerk's Annual Report for the Court of Appeals*, New York Law Journal, Law.com (May 3, 2022), https://www.law.com/newyorklawjournal/2022/05/03/clerks-annual-report-for-the-court-of-appeals/.

[28] For a map of the four Appellate Divisions, see Exhibit 3.

[29] N.Y. Const. Art. VI, § 5; N.Y. Family Ct. Act § 1111; N.Y. CPLR Art. 57; N.Y. Ct. Cl. Act § 24.

[30] N.Y. Const. Art. VI, §§ 4(b), (c).

[31] N.Y. Const. Art. VI, § 4(g).

"temporary" justices[32] and seven certified justices,[33] for a total of 61.[34] As Supreme Court justices, 54 of the 61 Appellate Division justices are part of the 364 judicial seats authorized by the Legislature; the seven certificated justices do not count towards the constitutional cap.

4. The Supreme Court, Appellate Terms. The Appellate Terms are part of the Supreme Court and hear appeals from lower courts. Sitting only in the First[35] and Second Departments,[36] the Appellate Terms in New York City hear appeals from New York City Civil Court and convictions in New York City Criminal Court.[37] The First Department's Appellate Term covers New York and Bronx Counties.[38] Each of the two Appellate Terms in the Second Department is composed of not less than three but not more than five elected Supreme Court justices and each of the two Appellate Terms has a presiding justice.[39] Currently, each Appellate Term consists of four Supreme Court justices and a presiding justice.[40] "The Appellate Terms in the Second Department are comprised of two separate courts . . . One court serves the 2nd, 11th and 13th Judicial Districts (Kings, Queens and Richmond Counties), and the other the 9th and 10th Judicial Districts (Nassau, Suffolk, Westchester, Rockland, Orange, Putnam and Dutchess Counties)."[41] "In the Second Department, the Appellate Terms also have jurisdiction over appeals from civil and criminal cases originating in District, City, Town and Village Courts, as well as non-felony appeals from the County Court."[42] All of the Appellate Term judges are designated by the Chief Administrator of the Courts with the approval of the presiding justice of the appropriate Appellate Division.[43] In addition to their appellate duties, each Appellate Term

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[32] N.Y. Const. Art. VI, § 4(e) provides that: "In case any appellate division shall certify to the governor that one or more additional justices are needed for the speedy disposition of the business before it, the governor may designate an additional justice or additional justices; but when the need for such additional justice or justices shall no longer exist, the appellate division shall so certify to the governor, and thereupon service under such designation or designations shall cease."

[33] N.Y. Const. Art. VI, § 25(b) allows elected judges who reach 70 years of age to apply to the Administrative Board to be certificated for two more years of additional service up to a total of 6 years. "[T]he services of such judge or justice [must be] necessary to expedite the business of the court and [] he or she is mentally and physically able and competent to perform the full duties of such office." *Id.*

[34] *See* Exhibit 5, NYS Unified Court System 2022 Judicial Positions of Total Number of Judges.

[35] 22 NYCRR § 640.1.

[36] 22 NYCRR § 730.1.

[37] N.Y. Const. Art. VI, §§ 8(a), (d).

[38] N.Y. Const. Art. VI, § 4(a).

[39] N.Y. Const. Art. VI, § 8(a).

[40] New York State Unified Court System, *Lower Appellate Courts: First Judicial Department Appellate Term, Supreme Court* (Aug. 17, 2020), https://www.nycourts.gov/courts/appterm_1st.shtml.

[41] Supreme Court of the State of New York Appellate Term, Second Judicial Department, *About the Court: An Overview of the Appellate Terms*, https://www.nycourts.gov/courts/ad2/appellateterm_aboutthecourt.shtml.

[42] New York State Unified Court System, *Lower Appellate Courts* (June 9, 2014), https://www.nycourts.gov/courts/lowerappeals.shtml.

[43] *Id.*

judge continues to preside over a Supreme Court part. As Supreme Court justices, the Appellate Term justices' seats are part of the 364 judicial seats authorized by the Legislature, except for the presiding justice in the ninth and tenth judicial district who is certificated.

5. The Family Court of the State of New York. The Family Court is a specialized court that handles issues such as child abuse and neglect, adoption, child custody and visitation, domestic violence, juvenile delinquency, paternity, and child support.[44] It is a statewide court from which appeals go to the Appellate Division.[45] Within New York City, the Family Court has concurrent jurisdiction with the New York Criminal Court for family offenses.[46] Each county in the state must have at least one Family Court judge.[47] As of January 2023, the Family Court Act authorizes 150 Family Court judges statewide,[48] of which 60 judges are in New York City.[49] Family Court judges outside of New York City are elected to ten-year terms.[50] Family Court judges in New York City are appointed by the mayor of New York City for ten-year terms.[51] In 2022, 57 appointed Family Court judges sat in New York City Family Court[52] with the remaining three Family Court judges assigned to other courts.[53] In New York City, elected Civil Court judges have occasionally been temporarily assigned to Family Court as acting Family Court judges.[54] Some judges from other courts have also volunteered to assist during COVID.[55] In 2021, certificated judges were assigned to Family Court as well.[56] Family Court judges are assisted by JHOs and nonjudicial officials such as child support magistrates who have at times outnumbered the judges.

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[44] N.Y. Const. Art. VI, §§ 7(a), 13(b), 13(c).

[45] N.Y. Family Ct. Act § 1111; N.Y. Const. Art. VI, § 4.

[46] N.Y. Const. Art. VI, § 15(c).

[47] N.Y. Const. Art. VI, § 13(a).

[48] This number will increase by 13 as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[49] N.Y. Family Ct. Act §§121, 131. This number will increase to 63 as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[50] N.Y. Const. Art. VI, § 13(a).

[51] *Id.*

[52] NYS Unified Court System 2022 Judicial Positions. *See* Exhibit 5.

[53] *Id.*

[54] The Family Court Judicial Appointment and Assignment Process, (Dec. 2020) https://s3.amazonaws.com/documents.nycbar.org/files/2020790-FamilyCourtJudicialAppointmentProcess.pdf.

[55] Thirty-five judges from other courts volunteered for Family Court. New York County Lawyer's Association, *Message from Chief Judge Janet DiFiore* (Dec. 28, 2020), https://www.nycourts.gov/whatsnew/pdf/December28-CJ-Message.pdf.

[56] Ryan Tarinelli, n*early 20 older judges return after having been ousted from the bench*, New York Law Journal (June 18, 2021), https://www.law.com/newyorklawjournal/2021/06/18/nearly-20-older-judges-return-after-having-been-ousted-from-the-bench/.

> "Reading Section 121 [of the Family Court Act], an attorney, a party, or a member of the general public, i.e., any individual who is not experienced in Family Court practice, would assume that the court is served exclusively by the specified number of judges. However, as an integral part of the Unified Court system with flexible assignment and transfer policies, the judge presiding in a Family Court part may well be an individual other than one of the 56 Section 121 judges. Further, "Raise the Age" legislation has established "Adolescent Offender" parts which are endowed with Family Court authority, but may or may not be assigned a Section 121 judge. Last, for many years there has been a proliferation of support magistrates and referees, non-judicial adjudicatory officials who exercise Family Court jurisdiction (see the Original Commentary at pp. 57-58). Reality has superseded Section 121."[57]

There is no constitutional cap on the number of Family Court judges; the New York State Legislature determines the number of seats.[58] But there is no regular assessment of the number of judges necessary to meet the demands of the Family Court and its litigants. Like the Supreme Court, the Legislature arbitrarily changes the number of Family Court judges. Until 2022's increase of seven Family Court judges, the last increase occurred in 2014,[59] following the advocacy of the New York State Coalition for More Family Court Judges, a group of over 100 organizations.[60] Twenty-five new judicial seats were created in 2014.[61] Before that, the Family Court saw no increases in the number of its judges for 24 years.[62]

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[57] Merril Sobie, Supp. Practice Commentaries, McKinney's Cons Law of NY Family Court Act § 121 (2019). "As of 2003, for example, the New York City Family Court employed a complement of 72 non-judge adjudicating officials, compared to 47 judges. …The case migration to non-judge officials has also eroded Article One and Article Two's [of the Family court Act] significance; the carefully constructed statutory provisions governing judges, including qualifications, election or appointment procedures, and the authority to issue process do not apply to referees or support magistrates." Merril Sobie, Practice Commentaries, McKinney's Cons Law of NY Family Court Act § 121.

[58] N.Y. Const. Art. VI, § 13(a).

[59] Merril Sobie, Supp. Practice Commentaries, McKinney's Cons Law of NY Family Court Act § 121 (2014).

[60] For list of 100 members of the New York State Coalition for More Family Court Judges, *see* https://moderncourts.org/programs-advocacy/access-to-justice/family-court-reform/.

[61] *State to Strengthen Family Court Bench*, NIAGARA GAZETTE (June 20, 2014), https://www.niagara-gazette.com/news/local_news/courts-state-to-strengthen-family-court-bench/article_cae6bd35-06d1-52be-addc-0c5613653ec9.html.

[62] Merril Sobie, Supp. Practice Commentaries, McKinney's Cons Law of NY Family Court Act § 121 (2014).

In 2022, 446,022 new petitions were filed in Family Court while there were 441,038 dispositions,[63] which compares to 578,346 filings and 570,826 dispositions in 2019.[64] While the number of filings and dispositions may be down, the continuing unaddressed need persists. In his 2020 report to the Chief Judge, Jeh Johnson, criticized the "demeaning cattle-call culture" of the Family Court, and other courts, and "dehumanizing effect it has on litigants, and the disparate impact of all this on people of color," caused by the "under-resourced, over-burdened court system."[65] As a result of backlogs after the pandemic, trials are scheduled eight months after the scheduling date compared to a four month delay before the pandemic.[66] "And for the court users themselves, the delay in case resolution could mean a parent is unable to see their children for an extended period of time or a child's future remains uncertain."[67] Sadly, "litigants in Family Court feel so disheartened by persistent delays that they eventually fail to appear at all."[68] Accordingly, "increasing the number of Family Court judges will address unconscionable delays in resolving cases, avoiding longer periods of stay in foster care for children, longer periods of uncertainty in custody cases, longer time for resolution of juvenile delinquency cases, longer periods of anxiety for domestic violence victims, and protracted periods of the stress, instability and trauma implicit in the cases heard in Family Court."[69]

6. Surrogate's Court of the State of New York. Each county within the state has a Surrogate's Court, which handles all probate and estate proceedings.[70] Each Surrogate's Court has one judge—referred to as a "surrogate"—except for New York and Kings Counties, which each has two surrogates.[71] In some counties, a judge may discharge the duties of surrogate, county court, and family court.[72] Surrogates are elected to ten-year terms, except those in the

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[63] 2022 Annual Report New York Unified Court System, https://www.nycourts.gov/legacyPDFS/22_UCS-Annual_Report.pdf, at 66.

[64] 2019 Annual Report New York Unified Court System, https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf, at 40.

[65] Johnson, Jeh, Oct. 1, 2020, Special Advisor Equal Justice Report at 54, https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf.

[66] Kaye, Jacob, Queens has Fewest Family Court Judges per capita-a New Bill Could Change That, Queens Daily Eagle May 24, 2023. https://queenseagle.com/all/2023/5/24/queens-has-fewest-family-court-judges-per-capita-a-new-bill-could-change-that.

[67] *Id.*

[68] Johnson, Jeh, Oct. 1, 2020, Special Advisor Equal Justice Report at 56, https://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf.

[69] Franklin H. Williams Judicial Commission of the New York State Court Report on New York City Family Courts, December 19, 2022, at 8. https://www.nycourts.gov/LegacyPDFS/IP/ethnic-fairness/pdfs/FHW%20-%20Report%20on%20the%20NYC%20Family%20Courts%20-%20Final%20Report.pdf.

[70] N.Y. SCPA § 201(3) (1980).

[71] N.Y. Const. Art. VI, § 12(a); N.Y. Jud Law § 179.

[72] "The Legislature may at any time provide that outside the city of New York the same person may act and discharge the duties of county judge and surrogate or of judge of the family court and

five counties within New York City where the term is 14 years.[73] There is no cap on the number of Surrogate's Court judges. The New York State Legislature determines the number of seats.[74] There are 32 elected surrogate judges plus 50 additional judges with multi-court assignments which include sitting part-time in Surrogate's Court.[75] 15 Acting Supreme Court Justices come from Surrogate's Court.[76] Surrogate's Court decisions are appealed to the Supreme Court, Appellate Division.[77] In 2022, 146,396 cases were filed in Surrogate's Court with 114,394 dispositions as compared to 141,237 filings and 117,976 dispositions in 2019.[78]

7. The New York State Court of Claims. The Court of Claims' stated function is to adjudicate civil lawsuits in nonjury trials against the State of New York, as well as certain quasi-governmental authorities.[79] The governor appoints Court of Claims judges with the advice and consent of the Senate.[80] The constitution authorizes eight Court of Claims judges but the number may be increased without limitation by the Legislature and reduced to no less than six.[81] At present, 86 Court of Claims judgeships with nine-year terms have been authorized and the judges appointed pursuant to the Court of Claims Act.[82] But only 15 judges of the 86 actually hear cases against New York State in the Court of claims on a full time basis and 8 on a part-time basis.[83] The additional 59 judges appointed to the Court of Claims have been designated as acting Supreme Court justices to sit in Supreme Court, 32 of which sit in New York City.[84] In 2022, 1,251 claims were filed against the state and 1,403 claims were resolved.[85] Court of Claims decisions are appealed to the Supreme Court, Appellate Division.[86]

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surrogate, or of county judge and judge of the family court, or of all three positions in any county." (N.Y. Const. Art. VI, § 14.

[73] N.Y. Const. Art. VI, § 12(c).

[74] N.Y. Const. Art. VI, § 12(a).

[75] See NYS Unified Court System 2022 Judicial Positions, Exhibit 5.

[76] See Detailed Acting Supreme Court Judges and their Statutory Count, Exhibit 8.

[77] N.Y. SCPA § 2701. *See* map of courts, Exhibit 3.

[78] 2022 Annual Report New York Unified Court System at 66, https://www.nycourts.gov/legacyPDFS/22_UCS-Annual_Report.pdf; 2019 Annual Report New York at 40, https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf.

[79] N.Y. Const. Art. VI, § 9.

[80] *Id.*

[81] *Id.*

[82] N.Y. Ct. Cl. Act § 2.

[83] Irene Sazzone, Court of Claims Clerk, interview May 5, 2023. See Exhibit 5.

[84] *See* Exhibit 5, NYS Unified Court System 2022 Judicial Positions of total number of judges in 2022.

[85] 2022 Annual Report New York Unified Court System at 65.

[86] N.Y. Ct. Cl. Act § 24.

B. Courts Limited to New York City Jurisdiction

1. New York City Civil Court. Established in 1962 by amendment to the constitution,[87] the New York City Civil Court hears legal claims for damages up to $50,000.[88] Civil Court judges also hear small claims matters limited by a damages cap of $10,000,[89] Each borough (county) within New York City has a Civil Court, but it is considered a single citywide court.[90] Judges are elected for ten-year terms.[91] The Civil Court Act authorizes 131 judgeships for the Civil Court,[92] but only 120 seats[93] have actually been funded.[94] The other 11 slots are authorized by the 1982 Session laws, chapter 500, but were never filled.[95] Appeals go to the New York State Supreme Court, Appellate Term.[96] In 2022, of 120 elected Civil Court judges, 48 are sitting in Civil Court,[97] the remaining 30 are assigned to NYC Criminal Court or Family Court,[98] and 42 were designated as Acting Supreme Court Justices and reassigned to hear Supreme Court cases.[99] There is no constitutional cap on the number of Civil Court judges. The Legislature determines the number of seats.[100] Because the New York Constitution does not allow for Civil Court judges to be certificated, they must retire at age 70, even if they have been serving as Acting Supreme Court Justices. In 2022, 347,295 new cases[101] were filed in Civil Court, not including Housing Court, with 202,403 dispositions compared to 244,235 filings and 184,059 dispositions in 2019.[102]

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[87] *Cox v Katz*, 30 A.D.2d 432, 433-35 (1st Dep't 1968) (The court held that neither § 1 nor the equal protection rights of the voters were violated by 1968 N.Y. Laws ch. 987. The court also ruled that that there was no constitutional requirement that judges be allocated solely on the basis of population), *aff'd* 22 N.Y.2d 969 (1968), *cert denied* 394 U.S. 919 (1969).

[88] N.Y. Const. Art. VI, § 15(b); N.Y. NYC Civil Ct. Act § 202 (1984). The jurisdictional amount was $25,000 until 2021, when New Yorkers voted to increase it to $50,000.

[89] N.Y. NYC Civil Ct. Act § 1801 (2022). The housing part, where Housing Court judges decide residential landlord-tenant disputes, is a component of the NYC Civil Court. N.Y. NYC Civil Ct. Act § 110 (2022).

[90] N.Y. Const. Art. VI, § 15(a).

[91] *Id.*

[92] N.Y. NYC Civil Ct. Act § 102-a(1).

[93] This number will increase to 2 judges as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[94] See NYS Unified Court System 2022 Judicial Positions Chart, Exhibit 5.

[95] New York State Unified Court System 29th Annual Report:2006 at 2 n. d.

[96] N.Y. Const. Art. VI, § 8(a), (d).

[97] New York State Unified Court System, *Judges of the Civil Court of the City of New York*, https://nycourts.gov/courts/nyc/civil/profiles.shtml.

[98] www.nycourts.gov/courts/nyc/civil/judges.shtml

[99] Acting Supreme Court Justices and their Statutory Court 2007 to 2022, Exhibit 8.

[100] N.Y. NYC Civil Ct. Act § 102 (1963).

[101] Cases include civil cases, small claims and commercial claims, not housing claims.

[102] 2022 Annual Report New York Unified Court System at 67, https://www.nycourts.gov/legacyPDFS/22_UCS-Annual_Report.pdf. 2019 Annual Report New York Unified Court System at 41 https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf.

2. New York City Housing Court. The Housing Court, a component of the Civil Court, was created in 1972 by amendment of the New York City Civil Court Act.[103] "The Housing Court handles almost all the residential landlord-tenant cases in New York City, including eviction cases filed by landlords, repair cases filed by tenants and by the City of New York, illegal lockout cases filed by tenants, and cases complaining of harassment."[104] Housing Court judges are appointed by the Deputy Chief Administrative Judge for five-year terms.[105] Fifty judges serve[106] in New York City Housing Court.[107] Appeals are heard by the Appellate Term of either the First or Second Department.[108] There is no cap on the number of Housing Court judges.[109] In 2022, the Housing Court received 126,498 new cases and disposed of 79,425 cases compared to 193,523 filings and 221,534 dispositions in 2019.[110]

3. The New York City Criminal Court. Created in 1962, the Criminal Court handles misdemeanors and lesser offenses, and conducts arraignments and preliminary hearings in felony cases.[111] The court includes an arraignment part, an all-purpose part, a felony waiver part, a trial part, a problem-solving court, and a summons part.[112] The New York City Criminal

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[103] N.Y. NYC Civil Ct. Act § 110. The Housing Court began with 16 hearing officers (later reclassified as judges) with three-year terms assigned to four boroughs, excluding Richmond. Dennis E. Milton, *Comment: The New York City Housing Part: New Remedy for an Old Dilemma*, 3 FORDHAM URB. L.J. 267 (1975). In 1997, there were 35 Housing Court Judges. Chief Justice Judith S. Kaye and Chief Administrative Judge Jonathan Lippman, *Housing Court Program: Breaking Ground*, 1 (Sept. 1997), https://nycourts.gov/COURTS/nyc/housing/pdfs/housing_initiative97.pdf.

[104] New York City Housing Court at nycourts.gov, Welcome. https://www.nycourts.gov/COURTS/nyc/housing/welcome.shtml.

[105] See N.Y.S. Unified Court System 2022 Judicial Positions Chart, Exhibit 5.

[106] N.Y. NYC Civil Ct. Act § 110(i) authorizes the court but does not state the number of seats.

[107] New York State Unified Court System, *Housing Court Judges* (May 13, 2022), https://www.nycourts.gov/courts/nyc/housing/judges.shtml. In its January 2018 report to Chief Judge DiFiore, the Special Commission on the Future of the New York City Housing Court, recommended increasing the number of judges by at least 10, in addition to providing each Housing Court judge with two law clerks. Special Commission on the Future of the New York City Housing Court, *Report to the Chief Judge*, 22 (Jan. 2018), http://ww2.nycourts.gov/sites/default/files/document/files/2018-06/housingreport2018_0.pdf. With the 50 Housing Court Judges handling a "surreal" 7,000 cases per judge per year, this increase is "not simply requested but mandated." *Id.*

[108] N.Y. NYC Civil Ct. Act § 1701 (1963).

[109] N.Y. NYC Civil Ct. Act § 110(f).

[110] 2022 Annual Report New York Unified Court System at 67, https://www.nycourts.gov/legacyPDFS/22_UCS-Annual_Report.pdf. 2019 Annual Report New York Unified Court System at 41, https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf.

[111] N.Y. Const. Art. VI, § 15(c); N.Y. NYC Crim. Ct. Act § 31 (1996).

[112] Chief Justice Judith S. Kaye and Chief Administrative Judge Jonathan Lippman, *The New York State Courts: An Introductory Guide*, 4 (2000), https://web.archive.org/web/20160304023432/http://nycourts.gov/reports/ctstrct99.pdf.

Court Act authorizes the Mayor of the City of New York to appoint 107 judges,[113] each serving a ten-year term.[114]

As of 2022, 38 judges sit in Criminal Court, while sixty-nine are assigned to the Supreme Court as Acting Supreme Court Justices.[115] Meanwhile, Civil Court judges are routinely assigned to Criminal Court. JHOs, who are retired judges appointed by the Chief Administrative Judge, preside over summons parts.[116] In 2022, 195,620 cases were filed,[117] and 210,026 cases were disposed compared to 278,928 filed in 2019 and 303,44 disposed.[118] Appeals go to the Supreme Court, Appellate Term.[119]

C. Courts of Limited Jurisdiction Outside New York City

1. District Courts. The county District Court is the Long Island analog to the New York City Civil Court. It is a trial court of limited jurisdiction serving Nassau County and the five western towns in Suffolk County.[120] This court has jurisdiction over civil matters seeking monetary damages up to $15,000, small claims matters seeking damages up to $5,000, and landlord-tenant cases.[121] The court's criminal jurisdiction includes misdemeanors and preliminary jurisdiction over felonies.[122] District Court judges are elected to six year terms.[123] Fifty judicial seats are presently authorized.[124] The Legislature creates the districts where there must be at least one judge per district.[125] The seats are apportioned according to population and judicial business.[126] District Court decisions are appealed to the Appellate Term.[127]

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[113] This number will increase by two judges as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[114] N.Y. NYC Crim. Ct. Act § 20 (1982). The court began with 78 judges to which 29 judges were added.

[115] *See* Exhibit 5 *infra*, NYS Unified Court System 2022 Judicial Positions Chart and Exhibit 6 Sunburst chart of allocation of all Supreme Court Judges.

[116] N.Y. Jud. § 851 (1983). However, JHOs are not mentioned in the current 2023 budget.

[117] Cases include arrests and summons cases, not traffic and parking tickets.

[118] 2022 Annual Report New York Unified Court System at 67, https://www.nycourts.gov/legacyPDFS/22_UCS-Annual_Report.pdf. 2019 Annual Report New York Unified Court System at 41, https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf.

[119] N.Y. Const. Art. VI, § 8(a), (d).

[120] N.Y. Const. Art. VI, § 16(a).

[121] N.Y. Const. Art. VI, § 16(d); NY Uniform District Court Act §201.

[122] New York State Unified Court System, *10th JD – Nassau County: District Court*, https://ww2.nycourts.gov/COURTS/10JD/nassau/district.shtml.

[123] N.Y. Const. Art. VI, § 16(h); NY Uniform District Court Act §103(b).

[124] See Exhibit 5, NYS Unified Court System 2022 Judicial Positions Chart.

[125] N.Y. Const. Art. VI, § 16(e)(f).

[126] N.Y. Const. Art. VI, § 16(g).

[127] N.Y. Const. Art. VI, § 8(e).

2. The County Court. The County Court is a court of general jurisdiction outside of New York City,[128] vested with unlimited criminal jurisdiction and civil jurisdiction where the amount in controversy is no more than $25,000.[129] County Court judges are elected to ten-year terms.[130] Of the 128 authorized County Court judges[131] 55 also serve as Family Court and Surrogate's Court judges.[132] County Court decisions are appealed to the Appellate Division.[133] The County Courts in the Third and Fourth Departments (although primarily trial courts) hear appeals from cases originating in the city, town and village courts.[134] The Legislature determines the number of seats.[135]

3. Town and Village Courts. (Known collectively as the "Justice Courts") are local courts that handle traffic tickets, criminal matters, small claims matters, and local code violations.[136] Town justices are elected to four year terms.[137] Justices in these courts are not required to be lawyers, and indeed, the majority are not.[138] Within the 56 counties of New York State, excluding New York City, there are 1,270 town and village courts with 2,200 justices.[139] There is no cap on the number of judges for the Justice Courts; the number is set by the local community.[140] Two or more towns within a county, however, may combine resources to share a town and village judge after conducting a study and a public hearing.[141] Appeals are heard by the County Courts and the Appellate Terms.[142]

4. Quasi-Judicial Officers. The courts are assisted by quasi-judicial officers, including referees, JHOs, magistrates in Family Court only, and discovery masters. Quasi-judicial officers are part of the fabric of the courts. For example, courts have been referring

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[128] N.Y. Const. Art. VI, § 10.

[129] N.Y. Const. Art. VI, § 11(a).

[130] N.Y. Const. Art. VI, § 10(b).

[131] NYS Unified Court System 2022 Judicial Positions Chart, Exhibit 5.

[132] "The Legislature may at any time provide that outside the city of New York the same person may act and discharge the duties of county judge and surrogate or of judge of the family court and surrogate, or of county judge and judge of the family court, or of all three positions in any county." N.Y. Const. Art. VI, § 14.

[133] N.Y. CPLR 5701 (1999); NY Const. Art. VI, § 5.

[134] N.Y. Const. Art. VI, § 17.

[135] Judiciary Law § 182 was last increased by 1 judicial seat in 2019 and 2 added seats in 2005.

[136] New York State Unified Court System, *Town & Village Courts: Overview* (May 5, 2022), https://www.nycourts.gov/courts/townandvillage/.

[137] N.Y. Const. Art. VI, § 17(d).

[138] *People v. Skrynski*, 42 N.Y.2d 218, 221 (1977).

[139] N.Y. Const. Art. VI, § 17; New York State Unified Court System, *Town & Village Courts: Introduction* (May 6, 2022), https://www.nycourts.gov/courts/townandvillage/introduction.shtml.

[140] N.Y. CLS Vill. § 3-301(2)(a) (2016).

[141] N.Y. CLS UJCA § 106-b (2018).

[142] N.Y. Const. Art. VI, § 8(e).

long-form accountings to referees even before the adoption of the 1777 Constitution.[143] Now, courts refer certain designated matters on consent of the parties, and sometimes without it, to referees pursuant to CPLR 4317.[144] For example, some referees hold hearings on issues clearly delineated by a judge such as legal fees, mediation of cases, and supervision of discovery. Since 1983, Judiciary Law §850 *et seq*. has provided for the designation and compensation of judicial hearing officers who must be former judges[145] and who are paid a modest per diem.[146] The Chief Administrative Judge appoints JHOs, who have the physical and mental capacity to perform, when their services are necessary.[147] Procedurally, in regard to civil actions, various sections of the CPLR were amended to incorporate JHOs in all of the provisions relating to referees.[148] JHOs, however, are traditionally cut from the budget during a financial crises. In the 2011 budget crunch, JHOs were quickly cut from the budget.[149] More recently, during COVID when JHOs were eliminated and a hiring freeze decreased the number of law clerks who had regularly conducted discovery conferences and moved cases through discovery, retired attorneys volunteered to help the courts address discovery delays.[150]

Under CPLR 3104, the parties may agree to the appointment of a special referee who is an attorney and agree to share the fees that the special referee charges.[151]

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[143] N.Y. CPLR 4317 (2006). McKinney's Legislative Studies and Reports at 534.

[144] "(a) Upon consent of the parties. The parties may stipulate that any issue shall be determined by a referee. Upon the filing of the stipulation with the clerk, the clerk shall forthwith enter an order referring the issue for trial to the referee named therein. Where the stipulation does not name a referee, the court shall designate a referee. Leave of court and designation by it of the referee is required for references in matrimonial actions; actions against a corporation to obtain a dissolution, to appoint a receiver of its property, or to distribute its property, unless such action is brought by the attorney-general; or actions where a defendant is an infant.
(b) Without consent of the parties. On motion of any party or on its own initiative, the court may order a reference to determine a cause of action or an issue where the trial will require the examination of a long account, including actions to foreclose mechanic's liens; or to determine an issue of damages separately triable and not requiring a trial by jury; or where otherwise authorized by law." *Id*.

[145] N.Y. Jud. §§ 851, 852 (1983).

[146] *Id*.; See John Caher, *Volunteer JHOs Refuse to Abandon Court System*, NYLJ (Online) December 1, 2011. https://www.law.com/newyorklawjournal/almID/1202533977804/

[147] N.Y. Jud. §§ 851, 852 (1983).

[148] S*ee* N.Y. CPLR 105, 3104, 4301, 4312, 4313, 4315, 4321, 7804. (*See, Lipton v. Lipton*, 128 Misc. 2d 528, 530 (N.Y. Sup. Ct. 1985), *affd.* 119 A.D.2d 809, 501 N.Y.S.2d 437 (1986)). For a history of JHOs, see *Schanback v Schanback*, 130 A.D.2d 332 (2d Dep't 1987).

[149] Joel Stashenko, With Budget in Flux, Administrators Put the Brakes on Use of JHOs, March 16, 2011, https://www.law.com/newyorklawjournal/almID/1202486286989/; CA Joel Stashenko, Welcomes as Volunteers JHOs Cut in Budget Crunch, April 26, 2011, https://www.law.com/newyorklawjournal/almID/1202491460597/.

[150] Grant, Jason, Citing Budget Cuts, Justice Denies Request for Judicial Hearing Officer for Discovery, NYLJ, Oct. 9, 2020.

[151] S*ee* N.Y. CPLR 3104(b) (1983).

New York Court Rule § 202.14 allows judges to appoint attorneys, known as "special masters," to supervise discovery.[152]

D. Administration of the Courts

Divided into four broad geographic departments and 13 smaller judicial districts, the Unified Court System is administered by a combination of stakeholders.

First and foremost, "[t]he chief judge of the court of appeals shall be the chief judge of the state of New York and shall be the chief judicial officer of the unified court system."[153] The Chief Judge carries out this function with the assistance of the Chief Administrative Judge, who is appointed by the Administrative Board of the Courts and charged with oversight of the Office of Court Administration (OCA).[154] Consisting of the Chief Judge and the presiding justices of the four Appellate Divisions, [155] the Administrative Board serves an advice and consent role with respect to the Chief Administrative Judge's establishment of statewide administrative standards, policies, and rules regulating practice and procedure in the courts.[156]

OCA is responsible for all of the non-substantive functions of the court system. Created in 1955 by the Legislature, OCA represented a major step towards statewide management of court operations.[157] Its operational divisions include Division of Administrative Services, Division of Professional and Court Services, Division of Human Resources, Division of Technology, Division of Financial Management, Counsel's Office, Court Facilities Unit, Offices of Court Research, Office of Public Affairs, Office of Public Information, Office of Workforce Diversity, Office of Inspector General, Internal Audit Services and Department of Public

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[152] 22 NYCRR § 202.14 (1988).

[153] N.Y. Const. Art. VI, § 28.

[154] *Id.*; N.Y. Jud. § 213 (1978).

[155] N.Y. Const. Art. VI, § 28(a).

[156] N.Y. Jud. § 213. N.Y. Jud. §§ 214 and 214-a also provide for the Judicial Conference of the State of New York, which has responsibility for surveying current administrative practices in the courts, compiling statistics and proposing legislation and regulations. Judiciary Law § 214 mandates both the composition and selection of the Judicial Conference, which consists of representative judges of the various courts within the Unified Court System with two-year terms and *ex officio* members, which include Legislators from the Senate and Assembly Judiciary and Codes Committees. Although the Judicial Conference was continued in 1978, the year that § 213 was enacted, the Judicial Conference was effectively replaced by OCA with the Administrative Board of the Judicial Conference continuing. Compare to state courts and federal courts which are governed by such judicial conferences. See 49-State Survey, Appendix, e.g. Alaska, California, Georgia, Kansas, Louisiana, Minnesota, Montana, New Hampshire, Texas and Utah. Illinois recently reinstated its Judicial Conference. *Id*. The Council notes the Judicial Conference is an existing structure that could be redeployed to conduct the weighted caseload analysis recommended here. See Exhibits 10a and 10b for California's 2020 biannual assessment of its judicial needs.

[157] Joseph W. Bellacosa, *Judicial Administration – Spell it O-C-A NOT O-R-C-A*, 58 N.Y.S. Bar J. 6 (1986).

Safety.[158] The Chief Administrative Judge has a long list of tasks, including issuing an annual report with statistics.[159] Generally, he or she must "(j) Collect, compile and publish statistics and other data with respect to the unified court system and submit annually, on or before the [15th] day of March, to the [L]egislature and the governor a report of his or her activities and the state of the unified court system during the preceding year."[160] Specifically, he or she must:

> "(u-1) Compile and publish data on misdemeanor offenses in all courts, disaggregated by county, including the following information:
>
> (i) the aggregate number of misdemeanors charged, by indictment or the filing of a misdemeanor complaint or information;
>
> (ii) the offense charged;
>
> (iii) the race, ethnicity, age, and sex of the individual charged;
>
> (iv) whether the individual was issued a summons or appearance ticket, was subject to custodial arrest, and/or was held prior to arraignment as a result of the alleged misdemeanor;
>
> (v) the precinct or location where the alleged misdemeanor occurred;
>
> (vi) the disposition, including, as the case may be, dismissal, acquittal, adjournment in contemplation of dismissal, plea, conviction, or other disposition;
>
> (vii) in the case of dismissal, the reasons therefor; and
>
> (viii) the sentence imposed, if any, including fines, fees, and surcharges."[161]
>
> and
>
> "(v-1) Compile and publish data on violations, to the greatest extent practicable, in all courts, disaggregated by county, including the following information:
>
> (i) the aggregate number of violations charged by the filing of an information;
>
> (ii) the violation charged;

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[158] New York State Unified Court System, *Administrative Structure of the New York State Unified Court System* as of July 2022. The chart is available from the drafting committee.

[159] N.Y. Jud. § 212(1)(j) (2021).

[160] *Id.*

[161] N.Y. Jud. § 212(u-1).

(iii) the race, ethnicity, age, and sex of the individual charged;

(iv) whether the individual was issued a summons or appearance ticket, was subject to custodial arrest, and/or was held prior to arraignment as a result of the alleged violation;

(v) the precinct or location where the alleged violation occurred;

(vi) the disposition, including, as the case may be, dismissal, acquittal, conviction, or other disposition;

(vii) in the case of dismissal, the reasons therefor; and

(viii) the sentence imposed, if any, including fines, fees, and surcharges."[162]

And all of this information must be publicly available on the court's website.[163]

PART II: ORIGINS OF THE CONSTITUTIONAL CAP FOR SUPREME COURT JUSTICES: A BRIEF HISTORY

The struggle to determine and secure the appropriate number of Supreme Court Justices necessary to properly meet the needs of the state's expanding population dates back to at least the 1820s and 1830s at a time when New York City and State experienced tremendous population and commercial growth. By then, the need for greater elasticity to meet the demand for judicial resources among a growing population was widely recognized. Indeed, the judicial system in place in 1820 was "framed" on the basis of a population of 1,372,812, which had doubled by 1845 to 2,604,495, the last census.[164] Likewise, the wealth of the state had grown even more than the population, unavoidably causing more disputes and controversies among "an active, energetic and prosperous population."[165] The Supreme Court (known at that time as the Supreme Court of Judicature), however, "[was] insufficient in the number of its judges to dispose of the great mass of business to be done in it . . . its calendars [were] so [burdened] and

[162] N.Y. Jud. § 212(v-1).

[163] N.Y. Jud. § 212(w-1). "The OCA-STAT Act Dashboard aggregates the case-level data in the OCA-STAT Act Extract into dynamic tables and graphs. Both the extract and dashboard contain information on cases arraigned from the beginning of November 2020, refreshed monthly to add cases from the previous month and to update information from months prior. For example, the extract posted in December will include arraignments through November 30th of that year." New York State Unified Court System, *OCA-STAT Act Report* (2020), http://ww2.nycourts.gov/oca-stat-act-31371.

[164] Charles H. Ruggles, Chairman of the Judicial System Committee, Debates and Proceedings in the New York State Convention for the Revision of the Constitution 371 (1846) (Reporters: S. Croswell and R. Sutton).

[165] *Id.*

surcharged with business that suitors and counsel, after travelling great distances to arrive at the court, [were] frequently compelled to wait in vain for the opportunity to be heard."[166]

The widespread dissatisfaction with the court system was one of the principal reasons that New York's citizens called for a Constitutional Convention of 1846, which resulted in the significant overhaul and reform of the judiciary.[167] Of particular significance, the 1846 Constitution was the first time that the state was divided into judicial districts, and that constitution provided the first formula for the appointment of justices with a cap based on the population to provide for a sufficient number of justices while, at the same time, preclude the legislative urge to create too many judicial seats at low salaries—a practice that had become prevalent under the prior 1820 judicial structure.[168]

The specific constitutional cap adopted was "one judge to every 72,347 inhabitants," calculated per district.[169] But the proposed system contemplated future expansion: "The system proposed, is, however, capable of expansion without further constitutional provision. This may be done by adding to the number of districts after the state census of 1855; or by the establishment of superior courts if the Supreme Courts should be found overcharged with business."[170]

Indeed, the population-based mechanism for calculating the maximum number of allowable Supreme Court justices has evolved over time. In 1905, the ratio was 1:80,000, or a fraction over 40,000,[171] and in 1925, it dropped to 1:60,000, or a fraction over 35,000.[172] It was not until 1963, that the current formula of 1:50,000, or a fraction over 30,000 was established.[173]

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[166] *Id.*

[167] *Id.*

[168] N.Y. Const. Art. VI, § 4.

[169] Charles H. Ruggles, Chairman of the Judicial System Committee, Debates and Proceedings in the New York State Convention for the Revision of the Constitution 373 (1846) (Reporters: S. Croswell and R. Sutton).

[170] *Id.*, at 373-374.

[171] Charles Z. Lincoln, The Constitutional History of New York from the Beginning of the Colonial Period to the Year 1905: Showing the Origin, Development, and Judicial Construction of the Constitution 524 (Vol. 3 1905). This can be found at: https://nysl.ptfs.com/#!/s?a=c&detached=1&docid=88515.

[172] James C. Cahill, Basil Jones & Austin B. Griffin, Cahill's Consolidated Laws of New York: Being the Consolidated Laws of 1909, as Amended to July 1, 1930, Officially Certified by the Secretary of State and Entitled to be Read in Evidence (Vol. 2 1930). On November 3, 1925, the popular vote on the ballot imitative was 1,090,632 for the amendment of Article 6 (relating to organization of state judicial system) and 711,018 against. https://history.nycourts.gov/wp-content/uploads/2019/01/Publications_Votes-Cast-Conventions-Amendments-compressed.pdf.

[173] N.Y. Const. Art. VI, § 6. The Nov. 7, 1961 ballot proposal amended the Constitution by repealing article 6 as of Sept. 1, 1962 and replacing it with a new article 6 (providing for reorganization of the state court system). https://history.nycourts.gov/wp-content/uploads/2019/01/Publications_Votes-Cast-Conventions-Amendments-compressed.pdf.

The current version of Article VI, Section 6(d), of the New York State Constitution was adopted in 1963 and reads as follows:

> [The Legislature] may increase the number of justices of the supreme court in any judicial district, except that the number in any district shall not be increased to exceed one justice for fifty thousand, or fraction over thirty thousand, of the population thereof as shown by the last federal census or state enumeration. The Legislature may decrease the number of justices of the supreme court in any judicial district, except that the number in any district shall not be less than the number of justices of the supreme court authorized by law on the effective date of this article.

Section 6(b) of Article VI provides a mechanism for reapportioning Supreme Court justices, providing that: "[o]nce every ten years the Legislature may increase or decrease the number of judicial districts or alter the composition of judicial districts and thereupon re-apportion the justices to be thereafter elected in the judicial districts so altered. Each judicial district shall be bounded by county lines." The adoption of the cap in 1963, however, has done little to alleviate the growing demands on the Court. When the 50,000-person formula went into effect, the population in New York State was 18.2 million making the cap 364 justices.

The number of justices finally hit the 1963 census population cap in 2022.

Meanwhile, New York courts processed fewer than one million new cases annually in the 1950s.[174] That number exploded in the 1970s to several million per year. Currently, over 3 million new cases are filed in New York trial courts each year.[175] Yet, the number of elected justices authorized by the Legislature has not significantly changed since 1990, despite numerous efforts at reform.[176]

As early as 1967, only four years after the 50,000-formula was adopted, the Temporary State Commission on the Constitutional Convention argued for the necessity of more elected justices to the Supreme Court and decried the inaction of the Legislature to increase the number of justices by stating the following:

> From 1905 to 1967, the number [of Supreme Court justices] has been increased from 76 to 199 – 27 of whom sit only as Appellate Division justices, leaving 172 to serve in the Supreme Court itself. In those years, the New York State population increased from about 6,500,000 to

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[174] L. Danial Feldman and Marc C. Bloustein, New York State's Unified Court System, New York's Broken Constitution: The Governance Crisis and the Path to Renewed Greatness 85 (Peter J. Galie, Christopher Bopst & Gerald Benjamin eds., 2016).

[175] New York State Unified Court System, *2021 Annual Report* 59 (2021), https://www.nycourts.gov/legacyPDFS/21_UCS-Annual_Report.pdf for 5-year comparison and pie chart showing filings by case type.

[176] See Exhibit 12 for changes to N.Y. Jud. Law 140-a.

> 18,000,000 persons. During the same period, the number of cases noticed for trial in the Supreme Court and the number of dispositions substantially increased.
>
> Relying on this record, proponents of change assert that additional Supreme Court justices are clearly required and that reasons not having to do with the appropriate administration of justice in New York State have been responsible for the Legislature not authorizing the increase. Some accordingly propose that the [c]onstitution either specify a minimum number of Supreme Court justices, in addition to those now serving, or contain a formula for mandatory increases to reflect increases in population, increases in the interval from note of issue to trial or some other index reflecting the level of judicial business in a judicial department or in the court system itself. [177]

In 1967, because the New York State Constitution did not adequately address the needs of Supreme Court justices in the state, two lawsuits filed in federal court sought a declaration that the Legislature rectify delays caused by the shortages of judges on the trial level.[178] The federal courts dismissed both actions because they lacked jurisdiction to hear the matters and observed that the problem should be resolved by the Legislature or an upcoming Constitutional Convention pursuant to the New York Constitution.[179]

Currently, 12 of 13 judicial districts are below the maximum number of elected Supreme Court justices, which they are allowed under the constitution.[180] Indeed, the only judicial district that has the requisite number of justices based on the 1:50,000-ratio is the First Judicial District (New York County) which exceeds the Constitutional Cap by four judges. The number of elected justices in every other judicial district is under the 2020 cap.

Richmond County, which became its own judicial district in 2007, illustrates the underrepresentation poignantly. At the time the Thirteenth Judicial District was created for only Richmond County, an inadequate number of Supreme Court justices were assigned to it. As of 2007, it was estimated that the population of Richmond County was 470,728.[181] Thus, applying the constitutional formula to the county's population, Richmond County should have been assigned nine Supreme Court justices. Instead, only three elected justices were authorized for the new district.[182] Currently, there are seven judicial seats allocated to Richmond County which

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[177] Temporary State Commission on the Constitutional Convention, The Judiciary, March 31, 1967, at 155.

[178] *See New York State Asso. of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967) (sought to compel court reapportionment designed to eliminate court delay in the Supreme and lower courts under 14th Amendment); *Kail v. Rockefeller*, 275 F. Supp. 937 (E.D.N.Y. 1967).

[179] *Id.*

[180] See Exhibit 4 for comparison of number of justices allowed under 2020 census and actual number. See Exhibit 13 for bar chart showing number of acting judges as percent of total.

[181] Richmond County, New York (NY), City-Data.com, www.city-data.com/county/Richmond_County-NY.html.

[182] N.Y. Jud. Law § 140-a.

will increase to 9 in 2023.[183] Based on the 2020 Census, however, there should be ten elected Supreme Court justices.[184]

Currently, Judiciary Law §140-a authorizes 364 statewide elected judicial seats for the Supreme Court.[185] Using the 2020 census numbers, the New York Constitution's cap, however, allows for 401 seats. As set forth below, the 364 authorized seats are woefully inadequate to meet the demands placed on the Court, and legislative inaction has necessitated workarounds to meet such demands. While these workarounds are provided for by the constitution on a temporary basis, they are anything but temporary, demonstrating the dire need.

PART III: FACTORS AFFECTING THE CURRENT BURDEN ON THE SUPREME COURT

The challenge New York courts face in handling a caseload with over 3 million new matters annually on average[186] is further complicated by unequal distribution of judicial resources within the current framework. One poignant illustration of this problem occurred in the 9th judicial district.[187] "According to state court system figures for 2018, Orange County had 18.4% of the district population, 19.9% of the new Supreme Court case filings and 12.5% of the Justices. The numbers work out to 456 cases per justice in Westchester County (for 19 justices), to 752.4 per justice in Orange County, and more than 1,000 each in Rockland and Dutchess." [188] What is most telling about this situation is how it reflects upon the efficacy of the New York Constitution's intent to have one judge per 50,000 New York citizens. Currently, Westchester County has one justice per 55,803 people, Putnam has one justice per 32,556 people, while

[183] *Id*. See Exhibit 4 for comparison of number of justices allowed under 2020 census and actual number.

[184] See Exhibit 4 for comparison of number of justices allowed under 2020 census and actual number.

[185] This number will increase by three judges as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[186] For five-year comparison of new filings in trial courts, see New York State Unified Court system, *Annual Report of the Chief Administrator of the Courts for 2021,* at 59, https://www.nycourts.gov/legacyPDFS/21_UCS-Annual_Report.pdf.

[187] The ninth judicial district, which presently has 33 elected Supreme Court judges, is comprised of Dutchess, Orange, Putnam, Rockland and Westchester counties. (See Exhibit 3 for a map of judicial districts.) https://iapps.courts.state.ny.us/judicialdirectory/Bio?judge_id=J/29DKCbsRMt464/bnx7tw%3D%3D. This number will increase to 34 judges as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

[188] Heather Yakin, *Local District Supreme Court Imbalance Concerns Lawyers*, Times Herald-Record (Middleton) (September 23, 2019).

Rockland County has only one justice per 112,000 people.[189] Population and caseloads, however, are not the only factors affecting the administration of justice.

A. Special Factors that Influence the Number of Available Trial Judges

A number of factors unique to New York's court system affect the allocation of judges to trial courts.

1. Assignment of Justices to the Appellate Courts

The appointment of Appellate Division judges contributes to the long-term and short-term shortage of trial court judges in the Supreme Court. As noted above, the Appellate Division is a part of the Supreme Court, and under Article VI, section 4 of the constitution, the judges who populate the Appellate Divisions must first be elected Supreme Court justices—*i.e.*, elected trial court judges sitting in Supreme Court. Acting Supreme Court justices designated to serve on the Supreme Court bench are not eligible to serve on the Appellate Divisions because they were not elected to the Supreme Court. Thus, when a Supreme Court trial judge is assigned to the Appellate Division to fill a vacancy, the number of elected Supreme Court justices presiding in the trial courts necessarily decreases on a 1:1 basis, temporarily. Though temporary, this movement of judges can be devastating to the trial court if several trial judges are appointed to a particular Appellate Division simultaneously—a scenario which occurred in New York County in 2017 when the governor appointed four Supreme Court trial judges to the Appellate Division, First Department.[190] The process that occurs to fill the void when a trial level judge is appointed to the Appellate Division is to assign the trial court cases handled by the newly appointed Appellate Division judge to the remaining trial judges who may be either elected Justices or acting justices. Alternatively, a new acting justice may be transferred from a lower court to take the caseload.

When an appellate justice retires, resigns, or turns 70 and remains as a certified judge, the change creates a new Supreme Court vacancy, which will be filled at the next election. The justice elected to that vacant seat will go to the trial court, not one of the Appellate Divisions.

An additional eight judges in the Appellate Divisions are certificated judges over 70 years of age as of 2022.[191]

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[189] US Census as of April 1, 2020, Census.gov, http://ww2.nycourts.gov/courts/9jd/landing-courts.shtml.

[190] In July 2017, the governor appointed four trial judges from Supreme Court, N.Y. County, Civil, to the Appellate Division. David B. Saxe, *End of Summer at the First Department*, N.Y.L.J., at 6 (Aug. 30, 2017).

[191] See 2022 Judicial Positions, Exhibit 5. This number will increase by 3 as of January 2024 assuming Senate Bill 7534 (2023 Sess.) is signed into law by the governor.

A further problem arises from the constitutional provision under which each Appellate Division presiding justice may certify to the governor that more judges "are needed for speedy disposition of the business before it."[192] And upon request by the presiding justice of each Appellate Division, the governor "may also . . . make temporary designations" of Appellate Division justices "in case of the absence or inability to act of any justice in such appellate division, for service only during such absence or inability to act."[193] Indeed, even though the constitution authorizes only a total of 23 justices in the four Appellate Division departments,[194] 31 additional elected Supreme Court justices are serving in the Appellate Divisions as "temporary emergency" judges.[195]

Such temporary designations have effectively become permanent seats, with no provision for election of a new Supreme Court justice to fill the resulting void in the trial court. Our Proposal #2 (at p. 62, *infra*) would address this problem by providing that when a presiding justice of a particular Appellate Division expresses such a serious need, which is anything but temporary, it would create a Supreme Court vacancy to be filled at the next election. Such an increase in the number of Supreme Court seats would be permissible if the cap on the number of Supreme Court judges is removed.

Similarly, the appointment of Appellate Term justices who assume their appellate duties while maintaining a trial court docket necessarily reduces the amount of time they have to devote to their trial level work. In 2022, seventeen judges were assigned to the Appellate Terms plus two additional certificated judges.[196]

2. Mandatory Retirement Age

New York State's mandatory retirement age for judges and the practice of certificating judges who reach mandatory retirement also impact the availability of trial judges. The mandatory retirement age for judges in New York is 70.[197] Judges retire from the court to which

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[192] N.Y. Const. Art. VI, §4e. Likewise, "when the need for such additional justice or justices shall no longer exist, the appellate division shall so certify to the governor." *Id*.

[193] N.Y. Const. Art. VI, §4(d).

[194] N.Y. Const. Art. VI, §4(b).

[195] First Department – 17 justices. *See* New York State Unified Court System, *Justices of the Court, First Department*, http://www.nycourts.gov/courts/AD1/justicesofthecourt/index.shtml.

Second Department – 21 justices. *See* Supreme Court of the State of New York Appellate Division, *Justices of the Court, Second Judicial Department*, http://www.nycourts.gov/courts/ad2/justices.shtml.

Third Department – 11 justices. *See The Members of the Court*, http://www.nycourts.gov/ad3/Justices.html.

Fourth Department – 11 justices. *See* Supreme Court of the State of New York, *Justices of the Court, Fourth Judicial Department*, http://www.nycourts.gov/courts/ad4/Court/Judges.html.

[196] See 2022 Judicial Positions, Exhibit 5.

[197] N.Y. Const. Art. VI, §25(b).

they are elected or appointed—not from the Supreme Court to which they are assigned as acting justices. In theory, every retirement, which occurs on or before December 31st of the year in which the retiring justice reaches 70, creates a vacancy. So that there is no gap between the retiring elected justice's term and an incoming justice's term, the vacancy is typically filled in the election cycle of the year the retiring justice turns 70. In the case of a retiring appointed judge in a lower or other court, the appointing authority has the responsibility to fill the vacancy at some point after the retiring judge steps down, with the timing of such appointment entirely within the discretion of the appointing authority. Thus, in theory, there should be no net loss in the number of constitutionally-elected or appointed judges from any particular court or within any particular jurisdiction brought about by the retirement of a sitting judge, although in the case of a vacant appointed seat, the appointing authority could conceivably leave the seat vacant indefinitely.[198] If a judge who reaches 70 decides to apply for certification and is so certificated, the court enjoys the benefit of an additional judge since his or her seat is also filled by election.

3. Certification

The constitution includes an exception to the mandatory retirement age which allows for the certification of elected Supreme Court justices who have reached 70 years of age where it is "necessary to expedite the business of the court and [the retiring justices are] mentally and physically able and competent to perform the full duties of such office."[199] Under this exception, Court of Appeals judges may conceivably continue to serve in the Supreme Court as certificated justices.[200] The certification is valid for two years and may be extended for "additional terms of two years" "until the last day of December in the year in which [the Justice] reaches the age of seventy-six."[201] Notably, certification increases the number of sitting Supreme Court justices beyond that expressly authorized by the Legislature. In other words, certificated judges do no take up a constitutional Supreme Court seat, which as noted above, is filled through the usual political and elective process, and are not taking up a position limited by the Constitutional Cap or the number of seats that the Legislature has decided to authorize. Thus, the practice of certificating judges has been a valuable means of helping to alleviate the shortage of

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[198] Corinne Ramey, *Court Official Blast Mayor de Blasio for Delays on Judges*, Wall St. J. (Jan. 2, 2019); Corinne Ramey, *New York City Council Members Criticize Mayor for Delayed Court Appointments*, Wall St. J. (April 17, 2017); Rebecca Davis et. al., *Cuomo Appoints 10 Appeals-Court Justices Amid Criticism of Delays*, Wall St. J. (Feb. 18, 2016).

[199] N.Y. Const. Art. VI, § 25(b); David Saxe, Chief Judge's inquiry into dissents intrudes on Judicial Independence, N.Y.L.J. (Online) (January 23, 2019); Deposition of Lippman ordered in suit against OCA over Certification, N.Y.L.J. (Online) (January 24, 2007).

[200] N.Y. Const. Art. VI, § 25(b); Joel Stashenko, Pigott seeks return to trial-level work after retirement, N.Y.L.J. (October 26, 2016) at 1, col. 5; see also Timothy P. Murphy, Judge Pigott returns to trial bench after Illustrious Appellate Career, New York State Bar Association Leaveworthy, Vol. VI No. 1 (2017).

[201] *Id.*

constitutionally-elected and appointed judges.[202] In 2019, 71 certificated justices were in Supreme Court, Appellate Divisions, and administrative posts while the number of certificated judges in 2022 dropped to 46 with 37 certificated judges in Supreme Court, eight in the Appellate Divisions and one in administration.[203]

The significance of certification as a stopgap measure has become all the more evident with OCA's decision not to re-certificate some 46 judges in response to a possible $300 million cut to the 2021 judiciary budget because of the COVID pandemic's economic fallout.[204] This created significant consternation in the legal community about the chaos that would ensue if the certificated judges at issue were effectively terminated, as OCA would be required to re-assign some 21,000 cases to an already over-taxed judiciary.[205] On December 31, 2020, the New York State Supreme Court ruled that OCA's decision to decline the application of 46 Supreme Court justices to serve as certificated judges for the years 2021-2022 was "annulled as arbitrary and capricious."[206] But that decision was reversed.[207] In the meantime, by agreement 20 of those 46

[202] In 2017, 39 of 43 applicants were approved for certification. Joel Stashenko, *Productivity of Judges Weighed in Extending Judicial Terms,* N.Y.L.J. (Online) (December 2, 2016). In 2016, 42 judges applied for two-year terms. Joel Stashenko, *42 Judges Seek Terms Beyond Mandatory Retirement Age*, N.Y.L.J. (August 15, 2016). In 2015, 34 judges were approved to begin two-year term, totaling 70 judges serving. Joel Stashenko, *Judges Serve Past Retirement Age*, N.Y.L.J. (Online) (January 16, 2015); John Caher, *40 Judges Certificated by Administrative Board*, N.Y.L.J. 1, col. 2 (December 24, 2013); Leigh Jones, *Facing the Future At 70, Judge Wonders if Certification Is an Option,* N.Y.L.J. (Online) (April 14, 2003). In 1997, thirty-one judges were approved for certification. *Certification Issued to 31 Judges*, N.Y.L.J. 30 (September 2, 1997). Clearly, the courts depend on these experienced judges to supplement the deficiency and the continued availability of these judges is presumed.

[203] *See* NYS Unified Court System 2022 Judicial Positions Chart, Exhibit 5.

[204] *Pocket Change? Noncertification of Older Judges Barely Makes Dent in Resolving Budget Cut,* N.Y.L.J. (Online) (March 4, 2021); Hon. Carmen Valesquez et.al., *Coverage of Judge Recertification Issue Missed Key Points; Letters to the Editor*, N.Y.L.J. 6, col. 4 (January 5, 2022); Summons and Complaint, NYSCEF 1, *Gesmer et al v. The Administrative Board of the New York State Unified Court System et al*, (N.Y. Sup. Ct., Suffolk County, Index No. 616980/2020); Petition, NYSCEF 1; *Supreme Court Justices Association of the City of New York, Inc. et al v. The Administrative Board of the New York State Unified Court System et al* (N.Y. Sup. Ct., Suffolk County, Index No. 618314/2020).

[205] *Hon. Ellen Gesmer et al v. The Administrative Board of the New York State Unified Court System et al*, No. 616980/2020 (N.Y. Sup. Ct. Suffolk Cnty) NYSCEF 1, Petition and Complaint.

[206] *Id*., NYSCEF 127, Decision. Supreme Court Judges Association of the State of New York v. Administrative Board of New York State Unified Court System, Index No. 618314/2020, Suffolk County, NYSCEF Doc. No. 1 (Petition) ¶44].

[207] *Gesmer v Admin. Bd. of New York State Unified Ct. Sys.*, 194 A.D.3d 180 (N.Y. App. Div. 2021).

judges returned to the bench.[208] The ousted judges' litigation against the Chief Judge was ultimately dismissed in the New York State Court of Appeals as moot.[209]

4. Unexpected Vacancies

In addition to the judges who retire at 70, sometimes there are unexpected circumstances that create vacancies, such as deaths, retirements before age 70, or election of a Civil Court judge to a Supreme Court seat, leaving a vacant Civil Court seat that cannot be filled by way of election until the following election cycle. When such unexpected vacancies arise, there is no guarantee that they will be filled within reasonable time.[210] In the case of unexpected vacancies of elected judicial seats, the vacancies are filled in the next election cycle. In the interim, an appointing authority typically fills the seat with a temporary appointment—in the case of the Supreme Court, the governor; in the case of the Civil Court, the Mayor.[211] In the case of appointed seats, vacancies are filled by the regular appointing authority at a time of its choosing, or in the case of the Court of Appeals[212] by the statutory deadline[213] (e.g., the Court of Appeals, Court of Claims, Family Court, Criminal Court). Delays, however, by the governor or a Mayor in filling judicial vacancies has a profound impact on the courts.

5. Legislative Changes that Impact the Trial Courts

New legislation can result in a sudden and dramatic increase in new types of matters that are assigned judges without a corresponding increase in the number of judges to handle the expanded workload. Such legislation includes laws that (i) establish new procedures that increase the requirements for access to the courts and utilization of court resources, or (ii) define additional new substantive provisions that necessarily broaden judicial responsibilities. Examples include:

- The increase to the jurisdictional limit of the New York City Civil Court from $25,000 to $50,000 without increasing the number of judges;[214]

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[208] Ryan Tarinelli, *Nearly 20 Older Judges Return After Having Been Ousted from the Bench*, N.Y.L.J. (June 18, 2021).

[209] *Gesmer v. Admin. Bd. of New York State Unified Ct. Sys.*, 37 N.Y.3d 1103 (N.Y. App. Div. 2021).

[210] N.Y. Const. Art. VI, § 21; *see* Andrew Denney, *DeBlasio Counsel Sees Difficulty in Filling Vacant Civil Court Seats*, N.Y.L.J. (April 17, 2017).

[211] N.Y. Const. Art. VI, § 21.

[212] N.Y. Const. Art. VI, § 2.

[213] N.Y. Jud. Law §68.

[214] Jane Wester, Voters Approve Raised Cap for New York City Civil Court Claims, But Lawyers Warn More Judges Will Be Needed, N.Y.L.J. 1, col. 3 (November 4, 2021). https://www.law.com/newyorklawjournal/2021/11/03/voters-approve-raised-cap-for-nyc-civil-court-claims-but-lawyers-warn-more-judges-will-be-needed/.

- The passage of an important law guaranteeing the right to a jury trial for persons accused of B misdemeanors in NYC, a right long enjoyed by defendants outside NYC.[215] The immediate effect of this will be to discourage prosecutors from "reducing" A misdemeanor charges to B misdemeanor charges for the purpose of eliminating the jury trial right, as prosecutors have been doing for years. This could result in more jury trials, which would require more judicial resources;

- The 2019 enactment of the Child Victim Act changing the statute of limitations for such crimes from 23 to 55 for sex abuse they experienced prior to age 18.[216] During the two-year window, over 9,000 cases were filed.[217] There was no increase in the number of judges to manage these new cases;

- The Legislature's decision in 2015 to confer jurisdiction over spousal support matters on the Family Court. But in doing so, the Legislature did not allocate funds or other resources for training, additional personnel, and changes in the computer system and forms;[218]

- The creation in 2017 of youth courts in connection with the "Raise the Age" legislation, which radically altered the treatment of youths charged with adult crimes, taking Supreme Court and Family Court judges out of their regular assignments and making them dedicated youth part judges;[219]

- The number and variety of Penal Law offenses has grown exponentially in recent years. Such offenses include highly complex crimes, such as

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[215] 2021 N.Y. Laws, ch. 806 (amending N.Y. CRIM PROC. § 340.40) to provide the right to a jury trial to all defendants accused of misdemeanors. This right had previously applied everywhere except for persons charged with Class B misdemeanors in New York City Criminal Court. The majority of all persons charged with misdemeanors statewide are charged in NYC Criminal Court. Prior to passage of this law, prosecutors routinely reduced A misdemeanor charges to B misdemeanor "attempts" effectively preventing the defendant from demanding a jury trial.

[216] NY State Courts Prepared for Flood of Lawsuits Under New Child Victims Act, Officials Say, N.Y.L.J. (Online) (August 13, 2019). https://www.law.com/newyorklawjournal/2019/08/13/ny-state-courts-prepared-for-flood-of-lawsuits-under-new-child-victims-act-officials-say/.

[217] Bob Dylan Accused of Sexually Abusing 12-Year-Old in Lawsuit Filed as Child Victims Act Expires, N.Y.L.J. (Online) (August 16, 2021). https://www.law.com/newyorklawjournal/2021/08/16/bob-dylan-accused-of-sexually-abusing-12-year-old-in-lawsuit-filed-as-child-victims-act-expires/.

[218] *See* FAM. CT. ACT § 412 (amended by 2015 N.Y. Laws, ch. 2659, § 7).

[219] 2017 N.Y. Laws c. 59 (enacting Crim. Proc. Law § 722).

enterprise corruption, and new areas of concern, such as domestic violence offenses and crimes involving the exploitation of children;[220]

- The expected increase in nonpayment proceedings as public entitlements were reduced under the Federal Welfare Reform Bill. Meanwhile, the State Rent Regulation Act of 1997 added to Housing Court workloads by requiring Housing Court judges to hold immediate hearings when a tenant requested a second adjournment to establish certain defenses or pay a rent deposit;[221]

- The sentencing restructuring provisions during the 1990s, whereby state prison sentences for violent offenders were converted to determinate sentences while indeterminate sentencing was retained in other contexts, leading to complicated sentencing rules and a general increase in incarceratory sentences across the board;[222]

- The adoption of new provisions relating to sex offenders, creating additional, judicial obligations in dealing with such cases, e.g., SORA hearings;[223]

- The assignment of Supreme Court and Criminal Term judges to preside over Mental Health Law Article 10 jury trials, which take precedence over other trial schedules of such judges;[224]

- The establishment and growth of various specialty courts, *e.g.*, the Commercial Division of the Supreme Court, presided over by judges selected from Supreme Court trial parts. In part, the creation of this new division was necessitated when in 1984, the Legislature enacted General Obligations Law §5-1402, pursuant to which New York courts would hear contract cases arising from forum selection or choice of law provisions in matters over $1 million;[225] and

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[220] *See, e.g.*, 1986 N.Y. Laws, ch. 516 (enterprise corruption); 2012 N.Y. Laws, ch. 491 (aggravated domestic violence); 2018 N.Y. Laws, ch. 189 (sex trafficking of a child).

[221] Chief Judge Judith Kaye and Chief Administrative Judge Jonathan Lippman, Housing Court Program, Breaking New Ground, September 1997, at 2. Housing Court Program, September 1997.pdf (nycourts.gov).

[222] 1995 N.Y. Laws, ch. 3.

[223] 1995 N.Y. Laws, ch. 192, and subsequent amendments.

[224] 2007 N.Y. Laws 2007, ch, 7, § 2; N.Y. Mental Hyg. § 10.01.

[225] New York State Unified Court System, *Commercial Division – NY Supreme Court, History*, http://ww2.nycourts.gov/courts/comdiv/history.shtml.

- Recent changes in bail and discovery statutes, increasing the number of fact-finding proceedings that judges are required to conduct, and explanations they are required to give, in the course of processing criminal cases.[226]

In every instance noted, legislatively created demands on the judiciary to accommodate the additional responsibilities spawned by the new law, or to redirect judicial resources by designating judges to handle the new matters exclusively, were not accompanied by a corresponding addition of authorized judges for the affected courts.[227] This invariably left fewer judges available to conduct the regular business of the court, or led to a dramatic increase in each judge's caseload. That this incipient depletion of judicial resources has occurred with some regularity over the years and has established a new permanence illustrates that the issue is not trivial.

6. Societal Changes that Affect the Number of Cases Filed

The population-based formula overlooks other factors that impact the number of cases filed. For example, since the population formula was initiated in 1846, the number of business corporations, not-for-profit corporations, limited liability companies, general partnerships, limited partnerships, and sole proprietorships registered with the State of New York have exploded. These entities file cases in our courts but are overlooked by the formula. Likewise, the formula overlooks venue provisions. For example, due to a venue statute which allows divorce filings without a nexus to the county, Manhattan is the divorce capital of New York, but the number of divorce filings is completely untethered from the population resident in the county.[228]

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[226] 2019 N.Y. Laws, ch. 59.

[227] There has been one notable exception where a sudden increase in cases before the Supreme Court by reason of new legislation was accompanied by a corresponding increase in judicial resources in recognition of the need for additional judges to deal with the additional work—specifically, the creation of a new category of Court of Claims judges with a separate and unique jurisdiction to meet the anticipated flood of felony cases in the Supreme Court, due to the passage of the Rockefeller Drug Laws in 1973. *See, Taylor v Sise*, 33 NY2d 357 (1974). This corresponding creation of additional judges to meet a specific new challenge attributable to new legislation addressed immediately and effectively the need for increased judicial resources and continues to stand as a model for appropriate legislative action in coordination with a legislatively created infusion of new cases.

[228] *Castaneda v. Castaneda*, 36 Misc.3d 504 (N.Y. Sup. Ct. 2012) (Hon. Matthew Cooper's plea for the Legislature to intervene by requiring divorces to be filed in counties where at least one party resides). "Practitioners have experienced increasing delays. In Manhattan, the time from filing of final uncontested divorce papers to obtaining a judgment of divorce has apparently grown from a few months to a year or more. In Brooklyn, the time to obtain an uncontested divorce judgment has increased to about 10 months." New York City Bar Association, Council on Judicial Administration, Written

7. Legislative Inaction

As illustrated in Exhibit 12, Changes to Judiciary Law §140-a, the Legislature sporadically evaluates the number of Supreme Court justices and increases the number of seats. Legislative inaction despite Article VI, Section 6(b), which provides that the Legislature "may" change the judicial districts and thus reapportion the justices within them, is not new.[229] Likewise the Legislature "may" change the number of Supreme Court justices anytime, up to the population cap of 50,000/1.[230] In 1967, the Temporary State Commission on the Constitutional Convention proposed mandatory increases in the number of judges when population increased or a formula linked to "the level of judicial business" such as the interval between the filing of the note of issue and trial.[231] Such inaction affects other courts without caps too. Family Court went without an increase in the number of judges for 24 years all while the population and number of cases was exploding resulting in a crisis.[232] Likewise, no additional Criminal Court judgeships have been created in the last 34 years, in spite of significant workload increases.[233]

PART IV: MAKESHIFT MEASURES NECESSARY TO ADDRESS JUDICIAL SHORTAGES

A. Appointment of Acting Supreme Court Justices

To address the burden on the Supreme Court, OCA has used its authority to implement makeshift measures that, while well-intended, serve only as a stopgap and do not ultimately resolve the shortage of judges in the Unified State Court System. [234] One such measure is the

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Testimony in Support of the Judiciary's 2023-24 Budget Request (Feb. 2023). https://s3.amazonaws.com/documents.nycbar.org/files/20221136_Judiciary2023-24BudgetRequest.pdf. "Anecdotal evidence also suggests that the handling of divorce matters in Supreme Court is extremely backed up in New York City. We understand that, with respect to matters where final divorce papers are e-filed in New York County, the time to issue a judgment of divorce has grown from three or four months to a year or more. The divorce matter backlogs in Queens and Kings Counties are apparently equally severe." New York City Bar Association, Council on Judicial Administration, Report in Support of the Judiciary's 2023-24 Budget Request (Feb. 2023). https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/2022-2023-judiciary-budget. (Jan. 2022).

[229] New York Temporary Commission on the Constitutional Convention, The Judiciary, at 155 (March 31, 1967).

[230] N.Y. Const. Art. VI, § 6(d).

[231] *Id*. at 155-156.

[232] See Part I (A)(5) Family Court of the State of New York; Part V (C) Impact on Family Court.

[233] New York City Criminal Court Act §20. See Part I (B)(3) Criminal Court; Part V(B) Impact on Criminal Court.

[234] Special Commission on the Future of the New York State Courts, *A Court System for the Future: The Promise of Court Restructuring in New York State*, at 24 (February 2007). See this report for

certification of judges, which, as discussed above, has some benefits, but is ultimately unreliable and potentially counterproductive, as it appears to have created a disincentive for the Legislature to authorize much needed additional Supreme Court seats. Nowhere, however, is the adverse impact of OCA's makeshift measures more evident than in its practice of reassigning judges from lower and other courts to the Supreme Court.

Part 33 of the Chief Judge's rules confers on OCA the authority to make temporary assignment of judges and justices pursuant to Article VI, § 26 of the New York State Constitution.[235] The acting judges have the same jurisdiction as the judges of the court to which they are assigned.[236] OCA has utilized this authority to appoint Acting Supreme Court justices from a pool of judges ***not*** elected to serve on the Supreme Court bench.[237] As discussed below, this stopgap measure of designating lower court judges to the state's constitutional trial court of general jurisdiction has become an established and routine practice, such that it would simply be erroneous to characterize such designations as temporary. In fact, they are anything but temporary, and as a result, have led to an adverse impact on the courts to which these Acting Supreme Court justices were originally elected or appointed, as the case may be.

1. From the Lower Courts

Perhaps the largest pool from which OCA selects judges to serve as acting Supreme Court justices are the lower courts, such as the New York City Civil Court and Criminal Court. Since 2007, the number of acting Supreme Court judges from Civil Court has ranged from 34 to 67 while 60 to 86 Criminal Court judges have been assigned as Acting Supreme Court justices.[238] In 2022, 42 Acting Supreme Court justices came from New York City Civil Courts, while 69 came from New York City Criminal Courts.[239] "While temporarily assigned pursuant to the provisions of this section, any judge or justice shall have the powers, duties and

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a thorough review of past proposals, calls for reform and other administrative initiatives by OCA. [https://ww2.nycourts.gov/sites/default/files/document/files/2018-05/courtsys-4future_2007.pdf].

[235] Temporary assignment of lower court judges preceded the Constitutional change in 1977 creating OCA and allowing for the temporary assignment of judges. See *Morgenthau v Cooke*, 56 NY2d 24 note 3 (1982)(NY County District Attorney challenged OCA's plan to institute a rotation system of temporary assignments of lower court judges to Supreme Court as acting Supreme Court judges).

[236] *See People v. Harris*, 177 Misc.2d 154 (N.Y. Sup. Ct., Kings Cty 1998) (capital criminal defendant lacks standing to challenge the practice of assigning Judges of the Court of Claims and the New York City Civil and Criminal Courts to serve as Acting Supreme Court Justices based upon alleged violations of Voting Rights Act § 2, 42 USC § 1973); *People v. Scully*, 110 A.D.2d 733 (2d Dept 1985)(See cases collected therein); *People v. Campos*, 239 A.D.2d 185 (1st Dept 1997) ("defendant's conviction may not be invalidated on the basis of any alleged illegality in the assignment of a Judge of the Criminal Court to preside over defendant's trial as an acting justice of the Supreme Court").

[237] N.Y. Const. Art. VI, § 26, "Temporary assignments of judges and justices." (adopted Nov. 7, 1961.)

[238] For a detailed list of each acting judge and their source court, see Exhibit 8.

[239] Id.

jurisdiction of a judge or justice of the court to which assigned."[240] These temporary assignments are "made by the chief administrator of the courts."[241] The only limit on the number of acting justices that OCA may elevate to the Supreme Court is the size of the pool of lower court judges and legislative will as exemplified by the Court's budget. Further, while the constitutional provision that OCA relies on to designate acting justices expressly provides that the positions are temporary, the appointments are anything but provisional. Indeed, there are many lower court judges who have been serving as acting Supreme Court justices and carrying out the duties of a duly elected Supreme Court justice for more than a decade. The entrenched and longstanding practice has become the norm, and in some counties, a rite of passage for lower court judges before they can realistically be elected to an authorized Supreme Court seat.

The end result is that this practice perpetuates the shortage of judges rather than remedies it. Indeed, as further discussed below, the designation of an acting Supreme Court justice unavoidably and necessarily creates vacancies in lower or other courts of limited jurisdiction, while ostensibly obviating the need to create more authorized seats at the Supreme Court level. Even worse, to deal with the vacancies created by this practice, OCA often reassigns judges between the lower courts. For example, Civil Court judges have been assigned to sit in Criminal Court or Family Court, further depleting the Civil Court's resources.[242] Meanwhile, the Legislature increased the jurisdictional amount in NYC Civil Court to $50,000.

2. From the Court of Claims

In the absence of legislative action to create more authorized Supreme Court seats when needed, the governor has, at times, undertaken the task of ameliorating shortages through the appointment of Court of Claims judges, whom OCA immediately[243] appoints as acting Supreme Court justices—a position whose role is very different from that of a Court of Claims judge. [244]

The Court of Claims was established in 1950 in order to form a judicial body that presides over cases where New York State is a named party.[245] As noted above, however, in 1973, an increase in drug-related cases prompted the need for more judges at the Supreme Court

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[240] N.Y. Const. Art. VI, § 26(k).

[241] N.Y. Const. Art. VI, § 26(i).

[242] City Bar Association Family Court Judicial Appointment & Assignment Process Work Group, *The Family Court Judicial Appointment & Assignment Process*, December 2020. "A recurring problem is the assignment of judges to Family Court from other courts on short-term appointments." Jane Wester, *Gaps in Family Court Compromise Justice for New York Families and Children, City Bar Report Finds*, N.Y.L.J. (Online) (March 10, 2021), https://www.law.com/newyorklawjournal/2021/03/10/gaps-in-family-court-compromise-justice-for-new-york-families-and-children-city-bar-report-finds/.

[243] Irene Sazzone, Court of Claims Clerk, interview May 5, 2023

[244] N.Y. Const. Art. VI, § 9. Section 9 of the Court of Claims Act outlines what kinds of cases are to be heard by the judges who are appointed by the governor to the Court of Claims Court.

[245] N.Y. Const. Art. VI, § 23.

level to handle criminal cases. OCA designated Court of Claims judges as acting Supreme Court justices, and the Court of Claims judges were authorized to try felony cases.[246] In response, the Court of Claims Act was amended, and five judges were added to address this need.[247] Since then, the Court of Claims Act has been amended an additional eight times, most times in order to add judges who preside over both criminal and civil cases in which the state is *not* a named party.[248] The New York Bill Jacket associated with the most recent amendment in 2005 stated, "Currently, there are insufficient numbers of judges to handle the growing case load in certain parts of the State . . . This bill would help to alleviate this problem and make the Unified Court System more efficient."[249] In 2022, 1,251 claims were filed in the Court of Claims, while 1,403 claims were decided.[250] Of the 86 authorized Court of Claims judges, 15 hear claims against the state full-time and eight judges are 'hybrid," meaning they hear such claims and have other assignments.[251] The remaining 59 judges are assigned primarily to Supreme Court, Criminal Term, as well as the Commercial Division of the Supreme Court.[252]

As of the date of this Report, the number of acting Supreme Court justices stands at 317.[253] Of the 627 (310 elected plus 317 acting) judges presiding over and adjudicating Supreme Court cases statewide,[254] the percentage serving as acting Supreme Court justices is 50%. Without these acting justices, the Supreme Court would itself be incapable of handling its caseload in a timely manner. Even with this significant addition of acting justices, felony cases pending in Supreme Court, Criminal Term in New York City face significant delays.[255] Indeed, the average number of days between indictment and disposition (pleas, convictions, acquittals,

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[246] In *Taylor v. Sise*, 33 N.Y.2d 57 (N.Y. 1974), the Court of Appeals held that judges appointed to the Court of Claims by the governor could preside over criminal cases as Acting Supreme Court Justices as long as they were appointed by the governor and designated by the Appellate Division.

[247] Francis X. Clines, *Changes Expected in Plan on Judges*, N.Y. Times, May 14, 1973 http://www.nytimes.com/1973/05/14/archives/change-expected-in-plan-on-judges-rockefeller-reported-ready-to-ask.html?_r=0.

[248] N.Y. CT. CL. ACT § 2; 1982 N.Y. Laws, ch. 500, § 5, ch. 501, § 1; 1986 N.Y. Laws, ch. 906, § 1; 1990 N.Y. Laws, ch. 209, § 3; 1991 N.Y. Laws, ch. 195, § 1; 1992 N.Y. Laws, ch. 68, § 1; 1996 N.Y. Laws, ch. 731, §§ 1-3; 2005 N.Y. Laws, ch. 240, § 1.

[249] 2005 S.B. 5924, ch. 240.

[250] 2022 Annual Report of the Unified Court System at 65, https://www.nycourts.gov/legacyPDFS/22_UCS-Annual_Report.pdf.

[251] Irene Sazzone, Court of Claims Clerk interview May 5, 2023.

[252] *Id.*

[253] See Summary Acting Justices of the Supreme Court Analysis, Exhibit 7.

[254] See Table by Judicial District: Number of Actual Judicial Seats Compared to Cap, Exhibit 4. See Exhibit 13 for bar chart showing number of acting judges as percent of total.

[255] Brian Lee, *New York's Pending Court Caseload Has Increased 15% From Pre-Pandemic Numbers*, NYLJ, July 22, 2022, at 1; George Joseph, Crisis at Rikers: How Case Delays Are Locking Up More and More People for Years Without Trial, Gothamist (November 23, 2021).

and dismissals) for felonies in New York City rose from 293 to 316 days between 2014 and 2019.[256] And the pandemic only made matters worse.[257]

PART V: ADVERSE IMPACT OF MAKESHIFT MEASURES ON JUSTICE

Upstreaming lower court judges to the Supreme Court has left the lower courts from which these judges are selected hampered in their ability to efficiently and properly administer justice. In addition to inordinate delays in judicial proceedings, trials have become an endangered species nationally.[258] To be sure, there are few trials in the Civil Court of the City of New York, the Criminal Court, or Surrogate's Court.[259] This necessarily deprives litigants of their day in court.

The lower courts have traditionally been the incubator of trial lawyers. Without the emergence of a well-trained cadre of young trial lawyers, the profession, and ultimately litigants seeking justice through the courts, end up paying the price. Below, this Report examines in more detail the impact that shuffling judges between the various courts has had on the lower courts.

A. Impact on Civil Court

The re-designation of judges from the lower courts to the Supreme Court has deprived those lower courts of vital judicial resources, leading to serious, negative consequences to the administration of justice in those jurisdictions. The New York City Civil Court Act authorizes 131 judges in Civil Court, but only 120 judicial seats have been allocated among the five boroughs.[260] Again, as of 2022, there were 47 of 120 judges sitting in Civil Court; 31 judges

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[256] Joanna Weill, et. al., *Felony Case Delay in New York City, Lessons from a Pilot Project in Brooklyn*, Center for Court Innovation (March 2021), https://www.courtinnovation.org/sites/default/files/media/document/2021/Case_Delay_Policy_Brief_3.29.2021.pdf.

[257] Alan Feuer et. al., N.Y.'s *Legal Limbo: Pandemic Creates Backlog of 39,200 Criminal Cases*, The New York Times, June 22, 2020, https://www.nytimes.com/2020/06/22/nyregion/coronavirus-new-york-courts.html.

[258] Stephen Susman, *Jury Trials, Though in Decline, Are Well Worth Preserving*, LAW 360 (April 23, 2019); *see also* NYU School of Law, *Civil Jury Project*, https://civiljuryproject.law.nyu.edu/#:~:text=The%20Civil%20Jury%20Project%20at%20NYU%20School%20of%20Law%20examines,system%20and%20society%20more%20broadly.

[259] See Exhibit 14, Chart of Jury Trials Commenced 2019 to 2022.

[260] N.Y. Civil Ct. Act § 102-a (1), (2) (Consol. 2021).

sitting in New York City Criminal Court and Family Court; and 42 judges transferred to Supreme Court as Acting Judges.[261]

In addition to appointing Criminal Court judges and Family Court judges in New York City, the Mayor is required to fill any vacancy that occurs in Civil Court before the end of the term[262]. Mayors, however, have experienced difficulty in filling those seats.[263]

Council Member Rory Lancman, who led oversight hearings in early 2016 on the delays in the City's criminal courts, told *The New York Times* that about half of the judges appointed by the Mayor to Criminal Court have been transferred to hear felony cases in Supreme Court.[264] According to the Council Member Lancman, to then fill some of the shortages in Criminal Court, about two dozen Civil Court judges were transferred to Criminal Court.[265] Indeed, today 73 Civil Court judges are assigned to other courts. [266]

There are numerous examples of how the reassignment of Civil Court judges to the Supreme Court or to the Criminal Court has had severe and negative consequences to litigants who appear in Civil Court. In New York City Civil Court, New York County, there has been a drastic drop in the number of jury trials conducted. In 2013, 151 jury trials commenced, but in 2014, only one jury trial commenced, and in 2015 and 2022, two jury trials commenced.[267] By contrast, in that same period, 942 non-jury trials commenced in the Civil Court in 2013 and 5 non-jury trials in 2022. [268] But these decreases in jury trials began long before COVID. While there are a variety of factors contributing to these dramatic decreases in jury trials, the

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[261] New York State Unified Court System, *Judges of the Civil Court of the City of New York*, https://nycourts.gov/courts/nyc/civil/profiles.shtml. See Sunburst chart, Exhibit 6 and Detailed Source of Actings SCJs, Exhibit 8.

[262] N.Y. Civil Ct. Act, Law § 102-a (3) (Consol. 2021).

[263] *See* Corinne Ramey, *Court Officials Blast Mayor De Blasio For Delays On Judges*, Wall St. J. (January 2, 2019), https://www.wsj.com/articles/court-officials-blast-mayor-de-blasio-for-delays-on-judges-11546465712; Reuven Blau, *Blaz Judged Deficient On Appointees*, Daily News (New York) (January 2, 2019); Andrew Denney, *De Blasio Counsel Sees Difficulty In Filling Vacant Civil Court Seats*, N.Y.L.J. (April 14, 2017).

[264] Benjamin Weiser et. al., *Delays in Bronx Courts Violate Defendants' Rights. Lawsuit Says*, N.Y. Times, at A19, col. 2 (May 11, 2016). https://www.nytimes.com/2016/05/11/nyregion/chronic-bronx-court-delays-deny-defendants-due-process-suit-says.html.

[265] *Id*.

[266] https://www.nycourts.gov/COURTS/nyc/civil/profiles.shtml.

[267] NYS Unified Court System, Division of Technology and the Office of Court Research UCS 175 Local Civil Dump Report - Full Year 2013-2015 and 2022. (Report available from Drafting committee).

[268] *Id.* Exhibit 14, OCA Jury Trial chart. See also footnote 258, supra regarding Steven Susman's work on declining jury trials.

reassignment of Civil Court judges, decreasing the number of judges available to preside over jury trials, appears to be a strong possibility.

Non-jury trials are impacted too. Indeed, as of January 2016, there were no trials scheduled in the New York City Civil Court's Commercial Landlord Tenant Part, New York, that are presided over by Civil Court judges, [269] because of the lack of judges.[270] In 2022, there were 24 non-jury trials in that part in New York County, but in prior years, there had been over 150 non-jury trials per year.[271]

In its 2016 budget letter, the City Bar also stated that because of a shortage of judges in the no-fault part of Civil Court in New York County, there was a delay of one year for pre-trial conferences.[272] Eight years later, in 2023, a no-fault practitioner with over 35,000 pending no-fault cases in New York City at one time reported that "we have transitioned almost 98% to arbitration over the past 5 or more years . . . our presence in the City Civil Courts are limited at this point…Essentially – we don't look to the courts to timely adjudicate cases."[273] In 2023, there is reportedly no delay in no-fault parts, but the reason that the backlog receded appears to be that the cases moved to arbitration when judges were not available to hear the cases.[274]

Likewise, in a December 22, 2015 article, Leonard Levenson, Esq., used one of his cases to underscore the need for more judges and court parts in Civil Court in Kings County.[275] He reported that in a simple personal injury case, his opposing counsel had requested three adjournments to provide discovery.[276] Although Levenson was disturbed that the adjournments were granted with no inquiry as to their necessity, he was equally perturbed with the length of each adjournment, which was two or three months long, simply because there was a lack of available judges.[277]

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[269] These cases are not handled in Housing Court.

[270] New York City Bar, *Report in Support of the Judiciary's 2016-2017 Budget Request*, 4, https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-in-support-of-the-judiciarys-2016-2017-budget-request.

[271] NYS Unified Court System, Division of Technology and the Office of Court Research UCS 175 Local Civil Dump Report - Full Year 2013-2015 and 2022. (Report is avaible from drafters of the report).

[272] *Id.*

[273] May 2023 interview of Civil Courts Committee members by Steve Shapiro of the Drafting Committee.

[274] *Id.*

[275] Leonard Levenson, *Justice Denied When Court Calendars are Unmanageable*, N.Y.L.J. (December 22, 2015).

[276] *Id.*

[277] *Id.*

Long before COVID-19, the Chair of the City Bar's Civil Courts Committee stated that Civil Court is a "frustrating place to practice" because growing calendars result in excessive delays.[278] Even when a judge had signed an Order to Show Cause, intended to expedite proceedings, many weeks would pass by before the Court heard the matter. She reported that in 2018, more than 100,000 consumer-related cases were filed in the Civil Court, a marked increase over the preceding year.[279] In 2022, the Consumer Credit Part is back to its pre-Covid delays.[280] Where consumers filed answers in 2020, preliminary conferences in their consumer credit cases are scheduled in 2023.[281] The New York City Housing Court, a branch of the Civil Court, is particularly under-resourced, as an expansion of tenants' right to counsel leads to more trials and the need for judges to conduct them.[282]

B. Impact on Criminal Court

The reassignment of the lower court judges has had a similar negative impact on the New York City Criminal Court, where misdemeanor cases are heard.[283] In a lawsuit filed in federal court in 2016, *Trowbridge v. Cuomo*, No. 16 CV 3455, the plaintiffs alleged that the delays in misdemeanor cases in the Bronx were "caused by a shortage of judges, court officers and court reporters that keep trial parts idle and locked."[284] One of the solutions the plaintiffs sought in the lawsuit was "allocating more judges and court staff."[285]

This situation has not been ameliorated. According to OCA's 2019 NYC Criminal Court Caseload Activity Report, there were 394 trials conducted citywide in Criminal Court (excluding summons parts) of which 207 were jury trials, out of 183,572 cases altogether that were disposed of in the All-Purpose Parts (cases that survived arraignment) in the Criminal Court. More recently, of cases that were resolved in 2022, there were only 115 trials, compared to 33,383

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[278] Interview with Shanna Tallarico, 2019 Chair, NYC Bar Association Civil Court Committee and Supervising Attorney Consumer Protection Unit at the New York Legal Assistance Group (May 31, 2019).

[279] *Id.*

[280] May 22, 2023 interview with ABCNY Civil Court Committee member.

[281] *Id.*

[282] Interview with Shanna Tallarico, footnote 278, supra; Will Drickey, *NYC Evictions Down Thanks to Legal Aid Program for Tenants*, Metro - New York (February 4, 2019). See also State of New York City Housing Court, Report of the New York City Bar Association Housing Court Committee, April 2019, https://s3.amazonaws.com/documents.nycbar.org/files/2019506-State_of_Housing_Court.pdf (calling for more judges, court attorneys, clerks, translators and guardians ad litem).

[283] Misdemeanors are criminal cases "for which a sentence to a term of imprisonment in excess of fifteen days may be imposed, but for which a sentence to a term of imprisonment in excess of one year cannot be imposed." N.Y. Penal Law § 10.00(4) (Consol. 2021).

[284] Benjamin Weiser and James C. McKinley, Jr., *Delays in Bronx Courts Violate Defendants' Rights. Lawsuit Says*, N.Y. Times, at A19, col.2 (May 11, 2016).

[285] *Id.*

guilty pleas and 86,372 dismissals.[286] Although it is difficult to know for certain whether non-trial dispositions of cases are attributable to the lack of judges or trial-ready courtrooms,[287] the percentage of tried cases revealed by these statistics is nonetheless an infinitesimal number relative to the total number of cases disposed. Indeed, the 2022 figure is one-tenth of one percent.[288]

Another disturbing statistic that reports reveal relates to the "mean age at disposition" of cases that were tried. It took far longer to get a trial in recent years than it did in 1994. In 2017, in the Bronx, the wait was 437 days for a bench trial and 777 days for a jury trial.[289] In the first four months of 2022, when courts had fully re-opened, the median time from arraignment to verdict for cases tried in the Bronx was 548 days.[290] The citywide median was not much better—469 days from arraignment to verdict (not distinguishing between bench and jury trials).[291] In

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[286] NYS Unified Court System, NYC Criminal Court Executive Summary, 2022 Term Trends, dated 1/11/23. 2020 and 2021 figures are not reported here because the relevant statistics for both years were heavily influenced by COVID-related closures and delays, that began in March 2020 and continued into 2021, especially with respect to trials. Jaclyn Cangro, Courts Facing Lengthy Case Backlogs Amid Ongoing Covid-19 Restrictions, https://spectrumlocalnews.com/nys/central-ny/news/2021/06/29/faced-with-restrictions--county-courts-deal-with-backlogs; Alan Feuer, et. al., N.*Y.'s Legal Limbo: Pandemic Creates Backlog of 39,200 Criminal Cases*, The New York Times (June 22, 2020).

[287] Of course, cases in Criminal Court are resolved for many reasons, such as that prosecutors are persuaded to offer a plea to a lesser charge, the evidence in the case does not support a criminal conviction for the crime that was initially charged, or the prosecutors are not ready for trial within the statutory period. However, when an overly lenient plea offer is made because the court lacks resources to try the case, or an innocent person is pressured into pleading guilty because it simply takes too long to get a trial, the public interest is disserved.

[288] It should be recognized, however, that nationwide, there has been a decrease of jury trials in the civil context. *See* NYU School of Law, *Civil Jury Project*, https://civiljuryproject.law.nyu.edu/#:~:text=The%20Civil%20Jury%20Project%20at%20NYU%20School%20of%20Law%20examines,system%20and%20society%20more%20broadly ("The Seventh Amendment to the US Constitution and provisions of most state constitutions guarantee citizens the right of trial by jury in common-law civil cases. But it is beyond dispute that the civil jury trial is a vanishing feature of the American legal landscape. In 1962, juries resolved 5.5 percent of federal civil cases; since 2005, the rate has been below one percent. In 1997, there were 3,369 civil jury trials in Texas state courts; in 2012, even as the number of lawsuits had risen substantially, there were fewer than 1,200. Similar trends are evident in states across the nation").

[289] In 2019, the average wait from arraignment to verdict in the Bronx, not specifying jury or bench, was 506 days. New York City Criminal Court Caseload Activity Report, "Annual Trends," January 18, 2022.

[290] NYS Unified Court System, Division of Technology and Court Research, NYC Criminal Court Caseload Activity Report, dated 5/5/23.

[291] Id. In 2019, the average citywide wait was 383 days, again not distinguishing jury from bench

1994, the citywide wait for a bench trial was 176 days and for a jury trial was 237 days, less than a year.[292] This change was gradual. In 1999, the average number of days for a bench trial citywide was 293 days and 352 days for a jury trial.[293] Five years later, in 2004, the average wait for a bench trial citywide was 309 days, but in the Bronx, it was 445 days.[294] For a jury trial, it took 320 days citywide and 501 days in the Bronx.[295]

There has been a reported increase in delays in Supreme Court, Criminal Term as well. In 2012, in Brooklyn, the average length of time it took for a criminal case to conclude—from arraignment on an indictment to the disposition was 243 days.[296] In 2021, as the courts were recovering from COVID shutdowns, the median time, across New York City, from arraignment on an indictment to final disposition was 620 days.[297] While parties' reactions to delays can vary, the tragic consequences of excessive and wasteful delays on victims have been well documented, [298] and delays likewise have a severe impact on individuals who are incarcerated pending trial, notwithstanding their presumption of innocence.

A further set of troubling statistics reflect the rapidly increasing average number of cases calendared per day in the All Purpose Parts in Criminal Court. In 2017, Staten Island had 134 cases calendared per day.[299] Although this number was an outlier compared to the other counties, which had a range between 70 and 93 cases calendared per day, even these daily caseloads, which have been consistent over the past decade,[300] are extremely high. It is nearly impossible for a judge to hear and consider difficult contested issues, which include change of bail applications and applications to modify orders of protection, in more than a small handful of daily cases, when confronted with such a workload. In addition, Criminal Court judges have

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trials. New York City Criminal Court Caseload Activity Report, "Annual Trends," dated January 18, 2022.

[292] New York State Unified Court System, *2014 Annual Report of the New York City Criminal Court*, at 27.

[293] *Id*.

[294] *Id*.

[295] *Id*.

[296] Stephanie Clifford, *For Victims, an Overloaded Court System Brings Pain and Delays*, N.Y. Times (Jan. 31, 2016), https://www.nytimes.com/2016/02/01/nyregion/for-victims-an-overloaded-court-system-brings-pain-and-delays.html.

[297] NYS Division of Criminal Justice Services, Criminal Case Processing Report, Criminal Justice Case Processing: New York State Report, dated June 2022, Table 8.

[298]William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. TIMES (Apr. 13, 2013). https://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html.

[299] 2017 Criminal Court of the City of New York annual Report 40, https://www.nycourts.gov/LegacyPDFs/COURTS/nyc/criminal/2017-Annual-Report.pdf

[300] *Id*.

motions and other written applications that must be read and decided that require their time outside of the courtroom.

These challenges facing the Criminal Court were highlighted in the above-referenced City Council oversight hearing held on February 29, 2016. The Queens District Attorney's Office testified that in 2015, out of more than 8,000 pending cases in Queens Criminal Court, only nine misdemeanor jury trials and 30 bench trials were held.[301] According to the Queens District Attorney's Office, during an approximate eight-month period preceding the hearing, 332 trials were adjourned[302] because there was "no jury trial part at all."[303] Similar testimony was offered by the Staten Island District Attorney's office which lamented that while the DA was grateful for a new courthouse and additional judge, there was no new staff to support the changes.[304] The Bronx Defenders testified to 33 adjournments because there were no judges available for the trial.[305] After hearing this testimony, Council Member Lancman, who presided, determined that "a shortage of judges, court officers and courtrooms were the major reasons for the backlogs."[306]

As noted, a major factor underlying the Criminal Court's inability to timely try cases is that the court lacks enough sitting judges. The OCA's 2017 Criminal Court Report states that there were 76 judges sitting in Criminal Court (at least at some point during the year), and only 33 of them (excluding supervising judges) were appointed Criminal Court judges.[307] The remainder were Civil Court judges reassigned to Criminal Court or Acting Supreme Court justices (some of whom had originally been appointed to lower Criminal Court).[308]

This contrasts with a total of 107 Criminal Court judges authorized by statute, presumably based on the formula in section 20 of the New York City Criminal Court Act, which authorizes the number of judges sitting in the predecessor local courts in 1962, plus 29 more authorized as of 1982. No additional Criminal Court judgeships have been created in the last 34 years, despite significant workload increases. The full complement of authorized Criminal Court judges is not sitting in that court, however, because many Criminal Court judges have been assigned to other courts.

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[301] New York City Council Committee on Courts and Legal Services (Feb. 29, 2016) Deputy Executive Assistant District Attorney Laura M. Henigman, of Queens County District Attorney's Office), at Hearing Transcript at 35-36. http://legistar.council.nyc.gov/DepartmentDetail.aspx?ID=27452&GUID=319891B8-7F93-4063-AA20-FE0D9C62D2B0&Search=.

[302] *Id*. at 37:1-17.

[303] *Id*. at 35:20-21.

[304] *Id*. at 47:5-48:11.

[305] *Id*. at 69:15-23.

[306] *Id*.

[307] OCA's 2017 Criminal Court of the City of New York Annual Report at 6.

[308] *Id*.

C. Impact on Family Court

Family Court judges have also been assigned to sit in Supreme Court as "temporary" acting justices. Some have presided in the Supreme Court for years. Because of the huge caseloads in the chronically under resourced Family Court, the loss of even one judge to the Supreme Court has a significant impact on the overall ability of the Court to manage its caseload in optimal fashion.[309] OCA makes some effort to ameliorate the consequences of the loss of Family Court judges by assigning jurists from other courts (generally Civil or Criminal) to sit in Family Court on a temporary basis, but this practice has proven problematic.[310] As noted above, the practice necessarily depletes the other courts of valuable and much needed jurists. Moreover, concerns have been raised about delays in the replacement of judges from other courts whose temporary assignment to the Family Court have ended; use of judges who have no prior Family Court experience and have not been adequately trained in Family Court practice; and short-term appointments resulting in significant caseloads left uncovered, leading to exceptionally lengthy adjournments.[311] Indeed, cases in the Family Court can drag on for years, allowing, for example, child neglect cases which are commenced when the child is an infant to be concluded when the child is well into his or her school age years.[312] It can be hard to square this practice with the public policy mission of acting in the "best interests" of the child.

D. Resources for Acting Supreme Court Justices

Even though acting justices enjoy the powers and privileges of fully elected Supreme Court justices, they do not have access to all the same staffing resources. For example, under the

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[309] The Council acknowledges that some Family Court judges have been appointed as Acting Supreme Court Justices to sit in the Integrated Domestic Violence parts which are hybrid courts which hear related Family Court, matrimonial and criminal cases. See https://ww2.nycourts.gov/Courts/8jd/idv.shtml. Currently, two Family Court judges and one Criminal court judge sit in an IDV part in New York City. Appointments to an IDV Part do not take these judges from Family Court as much as give them the jurisdiction to hear the related matrimonial and felony cases.

[310] City Bar Association Family Court Judicial Appointment & Assignment Process Work Group, The Family Court Judicial Appointment & Assignment Process, December 2020; Jane Wester, Gaps in Family Court Compromise Justice for New York Families and Children, City Bar Report Finds, N.Y.L.J. (Online) (March 10, 2021). https://www.nycbar.org/media-listing/media/detail/gaps-in-family-court-compromise-justice-for-new-york-families-and-children-city-bar-report-finds-new-york-law-journal.

[311] *Id.*

[312] Robert Z. Dobrish *Solving the Hearing Problems in Custody Litigation*, N.Y.L.J. (December 28, 2021); Chris Bragg, *Falling Through Cracks in The System*, The Times-Union (May 25, 2020). https://www.timesunion.com/local/article/Falling-through-cracks-in-the-system-15292710.php. "A practitioner reports that in Kings County, a first appearance in May 2023 was scheduled for a modification of child support petition filed in September 2022. This level of delay in NYC child support cases is not atypical." New York City Bar Association, Council on Judicial Administration, Written Testimony in Support of the Judiciary's 2023-24 Budget Request (Feb. 2023). https://s3.amazonaws.com/documents.nycbar.org/files/20221136_Judiciary2023-24BudgetRequest.pdf.

constitution, every elected Supreme Court justice is not only assigned a law clerk, but is entitled to a confidential secretary, who performs administrative tasks.[313] An acting Supreme Court justice, however, is assigned a law clerk but not a confidential secretary.[314] Thus, while acting Supreme Court justices have the same caseload as elected justices, and sometimes more, they enjoy half the staff, which can adversely impact their productivity.

Additionally, many acting Supreme Court justices continue to be responsible for work in the lower courts on top of their Supreme Court duties. Each acting Supreme Court justice who was appointed from Civil Court or Criminal Court must handle weekend and holiday arraignment shifts in Criminal Court.[315] This assignment, which is not required of elected Supreme Court justices, imposes the obligation for acting Supreme Court justices to arraign criminal defendants between five to ten times a year.[316] Some cite to the assignment of acting justices with little to no criminal experience to criminal arraignments as yet another example of the negative consequences of the acting justice stopgaps.

At bottom, the current constitutional apportionment of Supreme Court justices is woefully inadequate to meet the Supreme Court's, and ultimately the public's need for more judicial resources. An observation made in 1904, in the Report of the Commission on Laws Delays, is particularly applicable today, over 100 years later: "The remedies adopted by the Constitutional Convention for the relief of large cities of the State have obviously proven totally inadequate to meet the exigencies of the situation and other and different remedies must be sought."[317] This Report will now address potential solutions to New York's justice shortfall crisis.

PART VI: SOLUTIONS TO NEW YORK STATE'S JUDICIAL SHORTFALL CRISIS

A. How New York's Formula Compares to Other Jurisdictions

In developing proposals to address the shortfall of judges, the methods that 49 other states use to determine the number of judicial seats for their respective trial courts of general jurisdiction were first surveyed. The method utilized to set the number of judges in the federal

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[313] N.Y. JUD. LAW §272.

[314] N.Y. JUD. LAW §36.

[315] Arraignments are the first-time criminal defendants appear before a judge and where they learn for the first time what the criminal charges are that have been filed against them. N.Y. CRIM. PROC. § 170.10(2). A number of criminal defendants plead guilty at the Criminal Court arraignment, and it is also the first time that bail is set if required. *Id.* at §§ 170.10(7); 530.20.

[316] See arraignment schedule on file with the City Bar CJA Subcommittee.

[317] Report of the Committee on Laws Delays, N.Y. S. Doc., Vol 9 at 22, (127th Sess. 1904).

courts as also examined. [This goes to who is signing and which names are listed. We can discuss. We want the report to be considered a City Bar report overall.]

1. State Courts

In all but four states, the responsibility of fixing the number of judicial seats is discretionary and falls entirely on the state Legislature, which uses either an ad hoc approach or a methodical evaluation of a variety of metrics, depending on the state.[318] Similar to New York, some states, such as Arizona (1 judge/ 30,000 people), Illinois (Cook County), Iowa (associate judges within districts), Nevada (family court if district population is over 100,000), Oklahoma (adds a Special Judge for every additional 50,000), West Virginia (in 2022, one magistrate court judges per 15,500) use population to set the number of some judges.[319] Our research found 27 states have used the weighted caseload analysis on a recently or on a regular basis[320] and Illinois is in the process of joining that list.[321] Some states use commissions consisting of a variety of participants appointed by a variety of principals.[322] In some states, the judiciary submits a request to change the number of judicial seats with its proposed budget. (*See e.g.*, Hawaii and Colorado). Some commissions are created by statute (Arkansas, Nebraska) while others are created by the judiciary (California, Florida, Georgia).[323] Sometimes these commissions collect and evaluate the data, or they are assisted by professionals such as the National Center for State Courts ("NCSC") to crunch the numbers provided by the court system. NCSC has been assisting courts to compile caseload statistics since 1975.[324] Indeed, the NCSC has worked with 35 states, territories, or subsets thereof, such as counties or particular courts, and five international

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[318] In North Dakota, the Supreme Court is empowered to create a Court of Appeals, while the courts in Ohio, Oklahoma, and South Dakota are involved in determining the number of judges. *See* Appendix, 49-State Survey. See also Exhibit 15, NCSC chart comparing the number of judges in 50 states.

[319] *See* Appendix, 49-State Survey.

[320] Alabama, California, Florida, Georgia, Indiana, Iowa, Kentucky, Michigan, Montana, Nebraska, Minnesota, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, North Dakota, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin, Wyoming. *See* Appendix, 49-State Survey. See Exhibits 10a and 10b for California's 2020 biannual assessment of its judicial needs.

[321] *See* 49-State Survey, Appendix.

[322] States include Alabama, Arkansas, California, Florida, Georgia, Nebraska, Virginia, and Texas. *See* Appendix, 49-State Survey. In Tennessee, the Comptroller conducts the weighted caseload study, while in Utah, the Legislature Auditor General conducts the study. *Id.* See Exhibits 10a and 10b for California's 2020 biannual assessment of its judicial needs.

[323] *See* 49-State Survey, Appendix.

[324] Court Statistics Project, Guide to Statistical Reporting, https://www.courtstatistics.org/pub-and-def-second-row-cards/guide-to-statistical-reporting.

studies[325] to evaluate their data collection and calculate the right number of judges.[326] The NCSC's "The State Court Guide to Statistical Reporting: Standardized Reporting Framework for State Court Caseload Statistics Designed to Promote Comparisons among State Courts," assists courts by standardizing the collection of data allowing for comparisons across courts, specialties, and states. NCSC publishes statistics for 50 states.[327]

Many states use the "weighted caseload" model created by the NCSC in 1975.[328] The weighted caseload calculates judicial need based on total judicial workload. "The weighted case load formula consists of three critical elements: (1) case filing, or the number of cases of each type opened each year; (2) case weights which represent the average amount of judicial time required to handle cases of each type over the life of the case; and (3) the judge year value, or the amount of time each judge has available for case related work in one year."[329] For example, Indiana has been using the "weighted caseload" system since 1996, but it began in 1993 with a two-year study.[330]

> "The basic premise of a caseload assessment system is that all case types are not equal and each case type requires a different amount of time to complete from initial filing up through the final disposition of the case. To establish the "weight" each case type should be given, it first must be determined the average amount of time in minutes each case type takes to complete. During the most recent weighted caseload assessment study, thirty-nine case categories were examined."[331]

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[325] The World Bank studied the lessons learned from the 40-year history of weighted case analysis, and identified limitations and good practices in an effort to help policy makers decide whether and when to engage in a weighted case analysis. Case-Weighting Analyses as a Tool to Promote Judicial Efficiency: Lessons, Substitutes and Guidance (December 2017) https://documents1.worldbank.org/curated/en/529071513145311747/pdf/Case-weighting-analyses-as-a-tool-to-promote-judicial-efficiency-lessons-substitutes-and-guidance.pdf.

[326] November 16, 2021, interview of Suzanne Tallarico, Principal Court Management Consultant, Court Consulting Services, NCSC.

[327] NCSC Court Statistics Project, https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat.

[328] *Id.*

[329] Matthew Kleiman, et. al., *Workload Assessment: A Data-driven Management Tool for the Judicial Branch*, National Center for State Courts at 243 (2013), https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/2088/.

[330] *Weighted Caseload Measures and the Quarterly Case Status Report*, IN.GOV, https://www.in.gov/courts/iocs/files/pubs-trial-court-weighed-caseload.pdf.

[331] *Id.*

Another factor relevant to the evaluation is "clearance rates," which is the number of disposed cases as a percentage of the incoming cases.[332] Case counts are an important factor in this evaluation, but weighting the cases is imperative. "While case counts alone have a role in determining the demands placed on state judicial systems, they are silent about the resources needed to process the vast array of cases differently. That is, raw, unadjusted case filing numbers offer only minimal guidance regarding the amount of work generated by those case filings."[333] Indiana's July 1, 2021, report details the process it follows.[334]

As Indiana illustrates, there is an expense to initiating the process and implementing it. Accordingly, some states evaluate the need to change the number of judges biannually, (California, Hawaii, and Kansas)[335] while other states conduct such an evaluation every year (e.g., Alabama, Arkansas, Georgia, Idaho, Missouri, Nebraska, New Hampshire, Tennessee, Utah, West Virginia), every four years and at no other time (Iowa), every eight years (Kentucky), twice a year (Indiana) or every ten years (Mississippi). In 1998, the U. S. Department of Justice Office of Justice Program recommended that Florida adopt a weighted caseload system which was estimated to cost $52,000 per year every four years to update weights.[336]

Whether it is a commission, the judiciary, or the Legislature, relevant factors and metrics analyzed are wide ranging and, in some cases, specific to the unique needs of the jurisdiction. They include, among other things: population by district or circuits using latest U.S. census; judicial duties; specialized courts; number of civil, criminal, and domestic cases in each circuit; caseload by geographic area; court's data collected and averaged over three years; workload estimate from the average amount of time of bench and off-bench work required to resolve a case; ranking based on need; weighted case load studies; new case filings by case type; case weights which represent the average amount of judge or judicial officer time required to handle the case by type of case; and the amount of time each judge or judicial officer has available for case-related work per year.

Some unique provisions in the following states are worth highlighting:

> In Missouri**,** the relevant statute mandates the creation of an additional circuit judge position where, for three consecutive years, the annual judicial performance report indicates the need for two or more full-time judicial positions in any judicial circuit.[337] Because, however, the mandate

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[332] National Center for State Courts, *CourTools, Trial Court Performance Measures*, https://www.courtools.org/__data/assets/pdf_file/0012/7320/courtools-measure-2-clearance-rates.pdf.

[333] *Id.*

[334] See Exhibit 9.

[335] *Id.* See Exhibits 10a and 10b for California's 2020 biannual assessment of its judicial needs.

[336] Weighted Caseload Methods of Assessing Judicial Workload and Certifying the Need for Additional Judges, https://www.ojp.gov/ncjrs/virtual-library/abstracts/weighted-caseload-methods-assessing-judicial-workload-and.

[337] Mo. Rev. Stat. § 478.330 (2018).

is subject to appropriations made for that purpose, the Legislature ultimately retains the authority to create the position since it has the power to fund the new judgeship or not.[338]

North Dakota uses a two-year rolling average.[339]

In Florida, the constitution requires the state's Supreme Court to establish uniform criteria for determining the lower courts' need for additional judges. If the Supreme Court finds that a need exists, the Florida Constitution mandates that it certify to the Legislature its findings and recommendations to address such needs. At the Legislature's next regular session, it must consider the findings and recommendations, and may either reject the recommendations or by law implement the recommendations in whole or in part. The Legislature is permitted to create more judicial offices than the Supreme Court recommends and may also decrease the number of judicial offices by a greater number than recommended only if two-thirds of the membership of both houses of the Legislature finds that such a change is warranted.[340]

In Delaware, the governor has the authority to appoint judges *ad litem*.[341] For example, when Supreme Court judges disqualified themselves from the highest court, the governor appointed temporary judges to hear the appeal.[342]

In Indiana, the Legislature fixes the number of judges, but the constitution also commands the state's chief justice to regularly report to the Legislature. The Office of Judicial Administration ("OJA"), a department of the judiciary, assists the chief judge in meeting this requirement by collecting and compiling statistical data and other information on the Indiana court's work and publishing reports on the nature and volume of judicial work performed by the courts one to two times per year. The OJA uses a weighted caseload measurement system to establish an objective and uniform method for comparing trial court caseloads across the state. The OJA accomplishes this by dividing collected data into three categories: need, have, and utilization and ranking the categories county by county.[343]

In Texas, the Legislature must reapportion judicial districts at least every 10 years, but if the Legislature fails to do so, "the Judicial Districts Board shall convene not later than the first Monday of June of the third year following the year in which the federal decennial census is taken to make a statewide reapportionment of the districts. The Judicial Districts Board shall

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[338] *See* 49-State Survey, Appendix.
[339] *See* 49-State Survey, Appendix.
[340] Fla. Const. Art V, §9.
[341] *See* 49-State Survey, Appendix.
[342] *Nellius v. Stiftel*, 402 A.2d 359 (Del 1978). The Rule of Necessity would prevent any recusals that would leave litigants without a judge. Thomas McKevit, *The Rule of Necessity: Is Judicial NonDisqualification Really Necessary?* Hofstra Law Review 818, Vol 24 (1996).
[343] *See* 49-State Survey, Appendix.

complete its work on the reapportionment and file its order with the secretary of state not later than August 31 of the same year."[344] The Legislature must approve the order.[345]

The following states have implemented measures similar to those that New York has adopted to address shortages of judges:

Like New York, the New Hampshire Supreme Court, the highest court, may certify to the governor the need to convert a part-time judgeship into a full-time position.[346]

Like New York and federal courts, the Legislature in Georgia has authorized the court and the governor to call upon senior judges after their retirement to supplement the permanent judges.[347]

As noted above, the system of raising lower court judges to the state's constitutional trial court of general jurisdiction is not unique to New York, but the scale and longevity of such appointments is unique. While Illinois has a similar procedure, it is limited to authorizing Associate judges, who tend to hear misdemeanor criminal cases and any civil cases, to hear felony cases.[348] Also like New York's Chief Administrative Judge, the Illinois Judicial Conference reports to the Legislature annually on the state of the judiciary and proposes improvements, but they are not required to address a change in the number of judges.

In 2022, NCSC issued recommendations for using the weighted caseload analysis including lessons from the pandemic.[349] For example, courts should track hybrid, remote and in-person proceedings and regularly assess backlogs.[350]

2. The Federal Courts

The number of circuit and district judges in the federal system is set by statute—28 USC § 41 for circuit courts and 28 USC §§ 132, 133 for district courts—and Congress also sets out which states shall be divided into individual districts and in which states the district is comprised—*e.g.*, New York, Connecticut, and Vermont.[351] An Act of Congress created the federal courts specifying the number of judges appointed to that court and from time-to-time,

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[344] Tex. Const. Art. 5, § 7a(e).
[345] Tex. Const. Art. 5, § 7a(h).
[346] NH Rev. Stat Stat. 490-F:7.
[347] GA Code § 15-1-9.2 (2020).
[348] *Id. See also* Illinois, 49-State Survey, Appendix.
[349] Recommendations for Using Weighted Caseload Models in the Pandemic, March 31, 2022, https://www.ncsc.org/__data/assets/pdf_file/0034/75589/Recommendations-for-WCL-in-Pandemic.pdf.
[350] *Id.*
[351] 28 U.S.C. §41

additional Acts of Congress have added new judgeships to specific courts, the last judgeship bill passing Congress in 2002 preceded by a bill in 1990.[352]

Every two years, the Administrative Office of the United States Courts surveys each circuit and district court regarding the need for new judgeships.[353] The request for new judgeships is based on a national caseload threshold determined by the Judicial Conference of the United States ("JCUS") through the JCUS Committee on Judicial Resources (the "JRC").[354] A request for new judgeships must be approved by the court's board of judges (all the active judges and those senior judges involved in court governance), the circuit judicial council, the JRC Subcommittee on Statistics, the full JRC and then the full JCUS. The JCUS then transmits this request to Congress.[355]

Congress determines the numbers of judgeships based on statistical data from the Administrative Office of the U.S. Courts (the "Administrative Office").[356] The Administrative Office's professional staff uses algorithms to convert raw caseload data into weighted cases, which are the basis for determining whether a court is entitled to additional judgeships.[357] Each Circuit has a representative to the JRC.

In March 2017, based on the Administrative Office's latest survey, the JCUS recommended that Congress create five new judgeships in one court of appeals and 52 new judgeships in 23 district courts.[358] The JCUS also recommended that Congress convert eight existing temporary judgeships to permanent status. Since Congress enacted the last comprehensive bill for the U.S. courts of appeals and district courts, the number of cases filed in those courts grew by 40 percent and 38 percent, respectively.[359]

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[352] In 1990, Congress increased the number of Article III judges by 85 which was an 11% increase. Jud. Conf. of the U.S.: Hearing before Subcomm. On Bankr. and the Cts. Of the Comm. on the Jud., 113 Cong. (September 10, 2013) (Statement of Hon. Timothy M. Tymkovich, Chair, Comm. on Jud. Res.)

[353] United States Courts, *Federal Court Finder*, https://www.uscourts.gov/federal-court-finder/search.

[354] Statement of Hon. Timothy M. Tymkovich, *supra* 352.

[355] *Id.*

[356] *Id.*

[357] *Id.*

[358] *Id.*

[359] Chief Judge Lawrence Stengel, Judge Roslynn Mauskopf, and Judge Dana Sabraw testified at a Congressional hearing on "Examining the Need for New Federal Judges" on June 21, 2018. https://www.uscourts.gov/news/2018/06/21/courts-need-new-judgeships-judicial-conference-tells-congress.

Federal judges may take senior status when their years of service and age add up to 80.[360] Unless their workload is decreased, Senior Judges continue to be allocated chambers, administrative support and law clerks equal to the resources allocated to active judges.[361]

3. The Contrast to New York: Key Takeaways

The above nationwide state survey and brief examination of the federal court system led to the sobering conclusion that most other states and the federal system are far more advanced and methodical in their approaches to assessing the adequacy of judicial resources. While other states are largely data driven and staying atop current trends, New York State employs an ad hoc, speculative approach devoid of any meaningful reliance on facts—instead continuing to rely on an outdated constitutional cap based on population alone to determine the number of judges for the Supreme Court. Moreover, unlike New York, most of the approaches surveyed include a mandatory component—constitutionally by statute or otherwise—for the relevant authority or body to evaluate the need for additional judges and make recommendations, as necessary.

By contrast, while New York State's Chief Administrative Judge has the duty to keep and report data for the Unified Court System under the Judiciary Law, it merely has the option to request a change in the number of judges as needed.[362] The Chief Administrative Judge does **not** have the duty to request a change in the number of judges. Based on New York State's experience to date, without a mandate requiring the Chief Administrative Judge to evaluate and make a recommendation to change the number of judges, as needed, it is unlikely that any such request for additional judges will ever be made. Indeed, the Subcommittee has been unable to locate any such request, except for the Family Court crisis in 2007[363] and the Franklin H. William Commission in 2022.[364]

Regardless of the reason, the City Bar believes the time is right to add this important duty to Judiciary Law—specifically, section 212. Whether the courts are now performing at their

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[360] 28 U.S.C. § 371 (c); Hon. Frederic Block, *Senior Status: An Active Senior Judge Corrects Some Common Misunderstandings*, Cornel Law Rev. 533 (March 2007) https://core.ac.uk/download/pdf/73974972.pdf.

[361] *Id.* 539-540.

[362] N.Y. Jud. Law § 212.

[363] "According to court statistics, Family Court filings have grown to 700,000 annually, an increase of 90 percent over the past 30 years. But no new Family Court judges have been added statewide since one was created in Orange County in 2005." *OCA Proposes Allocation of New Family Court Judges*, N.Y.L.J. (May 16, 2014). In 2007, Chief Judge Kaye requested 39 new Family Court Judges. *Id.* It was not until 2014, however, that 25 new Family Court seats were created statewide. *Cuomo Signs Bill for New Family Court Judgeships*, N.Y.L.J. (June 27, 2014).

[364] Franklin H. Williams Judicial Commission of the New York State Court Report on New York City Family Courts at 6 and 28, https://www.nycourts.gov/LegacyPDFS/IP/ethnic-fairness/pdfs/FHW%20-%20Report%20on%20the%20NYC%20Family%20Courts%20-%20Final%20Report.pdf.

peak efficiency should be based on science, not speculation. Further, an independent professional analysis—in-house or by NCSC—that is reported to the Legislature and the public makes the process of changing the number of judges transparent.[365] Such a report would include statistics on the length of time that the courts are taking to resolve various types of cases. For example, the report would make it possible for the Legislature and the public to compare how long it takes to resolve a custody dispute in Family Court as opposed to the matrimonial part in Supreme Court, and it would be for the Legislature to decide whether delays, if any, are tolerable or not.

Accordingly, as part of the proposals discussed more fully below, the Council recommends that Judiciary Law § 212 be amended to require the Chief Administrative Judge to (1) annually assess the need to change the number of judges to ensure the efficient resolution of all cases filed in New York using a weighted caseload analysis; (2) report the needed changes to the number of judges in any court; and (3) make a request to the Legislature for such change, as needed.

B. The Path to A Better System

1. Guiding Principles

The Council concludes each court should have the right number of judges to perform its duties and provide justice to the people of New York. An excess of judges in any court or county obviously constitutes a waste of state resources, but there must be an adequate number of judges to provide civil litigants with access to the court and to assure that all parties in criminal cases are able to pursue justice in the courts. Achieving this goal will take time and professional analysis of the statistics. Once this task is performed, it is up to the Legislature under the constitution to create more judicial seats, or not. Whether there will be a budgetary impact depends on the recommendations adopted, how they are implemented, and when (e.g., staggered implementation).[366] In the judgment of the Council, the present allocation of judges, particularly of Supreme Court judges, in the various counties of the state is the result of an idiosyncratic and woefully inadequate patchwork of appointments that are not based on data or modern methods of evaluation.

Temporary measures should be temporary. As the 49-state survey illustrates, many states have temporary measures to address emergencies or societal changes that impact the courts. The Council appreciates the constitutional provision for acting Supreme Court justices to be moved

[365] Both the Legislature and the OCA may have such expertise. *See* New York Legislative Task Force on Demographic Research and Reapportionment., https://www.latfor.state.ny.us/; OCA's Division of Technology, https://ww2.nycourts.gov/Admin/supportunits.shtml#su4.

[366] *Cuomo Signs Bill for New Family Court Judgeships*, N.Y.L.J. (June 27, 2014); *see also*, *New York State Association of Trial Lawyers v. Rockefeller*; *Kail v. Rockefeller, et. al*, 275 F. Supp. 937 (E.D.N.Y. 1967).

from time to time to address a temporary need. But appointing over 300 acting justices each year for over 13 years proves that there is a dire need; it is not a passing or temporary need. Indeed, the use of acting justices has flooded the Court to the point that there have been more acting justices than there are constitutional justices throughout the state, to the detriment of lower courts. The use of the acting justice approach to address temporary needs has effectively created disparities in the availability of resources between acting justices and their colleagues who are constitutionally-elected justices—thus creating two disparate levels of judges in the same court.

The Council cannot determine the financial impact of these proposals. Therefore, this Report does not include a fiscal impact analysis. Rather, once the data is collected and organized either by OCA, the Legislature, or professionals, it will be up to the Legislature to determine how many judges are needed in each judicial district and each court. Such evaluations can be done at once or on a staggered basis by court or judicial district, with the attendant fiscal impact flowing from these processes. With these guiding principles in mind, our recommendations are five-fold.

First, the constitutional cap should be eliminated. Such a change to the constitution will take time to effectuate, as the Legislature will have to vote in favor of the change in two separate Legislatures before the measure goes to the New York electorate on a ballot.

Second, the Legislature must codify a regular systematic assessment of the courts' specific needs as many other states and the federal courts have done. The constitutional obligation for the Legislature to evaluate judicial districts—and implicitly the number of judges—at least every ten years when there is a new census, has been consistently breached, with the Legislature increasing the number of judges only on an ad hoc basis. Other state legislatures are required to regularly evaluate the number of judges and courts needs annually, biannually, or using a formula. The Council does not recommend how often such an evaluation must be performed in New York State, as such a decision should be informed by the cost of conducting the evaluation, which the federal courts and many states perform in-house, and other states perform using outside experts such as the National Center for State Courts. The Council, however, finds that performing such an evaluation every ten years, if at all, is insufficient. The Council's proposed statutory language appears in §V1(B)(2) (Proposal 1(C)).

Third, the Chief Administrative Judge plays a role in this process and should be tasked with the responsibility to evaluate the adequacy of current judicial resources and issue a report to the Legislature setting forth her findings and recommendations, so that the Legislature may carry out its function. The Chief Administrative Judge is currently required to keep data that would enable the Legislature to perform its regular and systematic assessment, and she thus has a significant role in this process.[367] His statutory responsibility to annually evaluate the adequacy of current court resources and issue an annual report should include a directive to analyze the

[367] The Chief Administrative Judge is Hon. Joseph Zayas

number of judges in each court and request changes when appropriate; this is not currently on the list of items to be reported. This annual report would inform the Legislature in carrying out its constitutional duty to set the number of judicial seats in each court, giving the court responsibility to initially identify the need to change the number of judicial seats. The Council's proposed statutory language appears in § V1(B)(2) (Proposal 1(D)).

Fourth, the evaluation must be performed regularly with OCA providing the data and initial recommendation and the Legislature performing its duty to regularly evaluate the number of judges and change the number accordingly. The Legislature should adopt a formula for assessing these needs, which takes into account not only population, but also translating the various caseloads, civil, and criminal, complexity of cases, out of court time for preparation and writing decisions, and extra time for unrepresented litigants into a number representing the total judges that will be necessary at a given time to fulfill all judicial obligations—until modified upon subsequent review based on new information. Such an analysis would also take into consideration the availability of nonjudicial resources such as ADR, JHOs, special referees, and magistrates. Any determination increasing or decreasing the number of judges in any particular court or in any particular department will necessitate a correlative change in support resources, such as court personnel, courtrooms, and the like.

Fifth, there must be transparency. The results of any assessment should be published so that the public has information as to the time it takes to resolve criminal cases, small claims cases, Family Court cases, and other matters. Most states use a "weighted caseload analysis," which includes counting the number of cases filed and disposed, as well as the time from filing to disposition, or "clearance rate," and assigning weights to each type of case based on complexity and other resources available to courts e.g., nonjudicial staff. The people of New York State have the right to know the time it takes to resolve criminal cases, small claims cases, Family Court cases and others, as well as their legislators' positions on what are acceptable clearance rates in those courts.

2. Proposed Solutions

PROPOSAL #1

The constitutional cap on the number of Supreme Court justices should be eliminated and the Legislature should be required to devise a new method to analyze and respond to the judiciary's needs.

Specifically:

A) (The following language in Article VI, Section 6(d) of the N.Y. Constitution should be deleted:

The Legislature may increase the number of justices of the Supreme Court in any judicial district, except that the number in any district shall not be increased to exceed one justice for fifty thousand, or fraction over thirty thousand, of the population thereof as shown by the last federal census or state enumeration. The Legislature may decrease the number of justices of the Supreme Court in any judicial district, except that the number in any district shall not be less than the number of justices of the Supreme Court authorized by law on the effective date of this article.

B) Article VI, section 6 (b) of the constitution should be rewritten as follows (new language
in red):

At least once every ten years, the Legislature shall consider whether to increase or decrease the number of judicial districts or alter the composition of judicial districts and thereupon re-apportion the justices to be thereafter elected in the judicial districts so altered, provided that each judicial district shall be bounded by county lines. The Legislature shall also, at least once every ten years, consider whether to increase or decrease the number of justices of the Supreme Court in any judicial district, except that the number in any district shall not be less than the number of justices of the Supreme Court authorized by law on the effective date of this subdivision as amended.

(These amendments would have to be approved by the current Legislature and the Legislature elected in 2023, and then submitted to the voters for ratification.)

C) A new section of the Judiciary Law should be enacted, to read in substance:

"In exercising its powers pursuant to Article VI, subd. (6)(b) of the constitution, the Legislature shall seek to ensure that each district and court therein shall have sufficient numbers of justices to perform its functions in a thorough and efficient manner, considering the number of cases filed in each court, the complexity of such cases, the extent of delays in the disposition of cases in each court, and any other factors used by recognized national or state authorities who study the proper allocation of judicial resources."

D) A new subdivision should be added to Section 212 of the Judiciary Law, "Functions of the chief administrator of the courts," directing the chief administrator to compile data to assist the Legislature in performing its functions under [the new section of the Judiciary Law, above] and to provide such data, and analyses thereof, with a specific request to change the number of judges in each court, in such manner as the Legislature may direct.

PROPOSAL #2

The constitution should be amended so that the case-handling capacity of the Supreme Court shall not be diminished by the appointment of Supreme Court justices to any appellate division.

Specifically:

Article VI, section 4(e) of the constitution shall be amended to read (new language in red):

In case any appellate division shall certify to the governor that one or more additional justices are needed for the speedy disposition of the business before it, the governor may designate an additional justice or additional justices; but when the need for such additional justice or justices shall no longer exist, the appellate division shall so certify to the governor, and thereupon service under such designation or designations shall cease. Designation of an additional justice pursuant to this subdivision shall be deemed to create a vacancy in the Supreme Court position previously held by said justice. Said vacancy shall be filled pursuant to Section 21(a) of this Article.

(Notes: this amendment would have to be enacted simultaneously with the other proposed amendment. Otherwise, implementation of this amendment may conflict with the cap on the number of Supreme Court justices.

This amendment would not preclude other changes regarding the composition of the appellate divisions that the Council, or the Legislature, may wish to adopt.

3. Immediate Interim Measures

In the interim, less time-consuming statutory changes are immediately available. Unlike the New York Supreme Court, the number of judges in the lower civil and criminal courts is not subject to a constitutional cap on the number of judges. For example, the shortage of Criminal and Civil Court judges created by the transfer of acting justices may be addressed by the legislative authorization of additional judges to the citywide courts. Since the number of judges in courts other than the Supreme Court is not subject to a constitutional cap, the Legislature could immediately assess the judicial needs in those courts and change the number accordingly. But any such change must be based on actual data and modern methods of evaluation. Indeed, the weighted caseload analysis could be performed and implemented in Housing Court immediately without any statutory change. The evaluation of whether the number of judges in the lower courts and calculation of weighted caseloads need not await a constitutional or legislative change. Rather, all that is needed is the raw data and the skills to evaluate it. The calculation of case weights, however, requires cooperation of court participants to determine the time it takes to perform certain tasks.

CONCLUSION

In the almost 60 years since 1962, when the constitutional formula changed to one judge per 50,000 people and the creation of the civil and criminal lower courts, there has been no change in the calculus of Supreme Court justices. Despite the constitutional obligation to reconsider the need for more justices every ten years based upon newly collected census data, the failure to increase the number of Supreme Court positions in light of the significant interim population growth has forced OCA to implement *ad hoc* mechanisms in order to provide the jurists needed to actually carry out the critical obligations of the third branch of government. Based on the assignment of at least 300 such acting justices for over ten years, the time has come to lift the cap and begin calculating the number of judges in all of New York's courts using actual data and modern methods of evaluation.

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Civil Court Committee, Sidney Cherubin, Chair
Criminal Courts Committee, Carola Beeney and Anna G. Cominsky, Co-Chairs
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[368] The sub-committee began under the leadership of CJA Chair Steve Kayman. Hon. Carolyn E. Demarest and Michael Regan also chaired the CJA during the work of the sub-committee.

[369] The Committee wishes to thank the City Bar's Librarian Richard Tuske and Administrative Assistant Dionie Kuprel. The Committee is most grateful to the following for sharing their expertise, advice, and/or data: Hon. Shahabuddeen Ally, Alex D. Corey, Esq., Prof. Peter J. Galie, Jonathan Goeringer, Esq., Gloria Smyth-Gottinger, Betty Hooks, Hon. Roslynn R. Mauskopf, Karen Milton, Esq., Prof. Dan Rabinowitz, Joan Vermeulen, Esq., and Hon. John Zhou Wang. This report would not have been completed without the assistance of our student interns: Liam Clayton, Emily Friedman, Max Gerozissis, Fiona Lam, Samil Levin, Andrew Lymm (creator of Exhibit 6), Max Sano, Sarah Shamoon, and Kristen Sheehan. We thank our editors: Juanita Bright, Esq., Jamie N. Caponera, Esq., Hannah E. Reisinger, Esq, and Maria Reyes Vargas, Esq.

[370] Claudia Blanchard of Calinoff & Katz LLP provided Word expertise without which we would not have finished the report.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #9

REQUESTED ACTION: Approval of the report and recommendations of the Task Force on the Treatment of Transgender Youth in Sports.

The Task Force requests that NYSBA adopt the following resolutions:

Be it

RESOLVED, that the New York State Bar Association opposes and urges the repeal and/or judicial invalidation of all discriminatory legislation and regulation targeting transgender, non-binary and intersex youth and infringing their equal right to unrestricted participation in school sports programs appropriate to the gender in which they live, in full equality and on the same terms with students assigned such gender at birth.

Without limitation of the foregoing, NYSBA views state laws and regulations that ban students from playing sports according to their gender identity as representative of such discriminatory measures.

RESOLVED, and also without imitation of the foregoing, that the New York State Bar Association opposes the following federal legislative initiatives: **US HR298, US HR518, US SB200,** and **US SB613**.

The report will be presented by Task Force co-chair Jacqueline Drohan, Esq.

Michael May, Esq., in his capacity as a member of the Executive Committee (Vice-President of the Sixth Judicial District) submitted comments which are attached.

NEW YORK STATE BAR ASSOCIATION

Report and Recommendations of the New York State Bar Association **Task Force on the Treatment of Transgender Youth in Sports**

June 2024

The views expressed in this report are solely those of the task force and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

Report and Recommendations of the New York State Bar Association Task Force on the Treatment of Transgender Youth in Sports

June 2024

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Acknowledgments

Highest thanks go to prior NYSBA President T. Andrew Brown, as well as Executive Director Pam McDevitt, without whom the Task Force would not exist.

This report – like the work of the Task Force as a whole – was a collaboration. Due to the unprecedented flux in legal and political focus on the issues presented over the past three years, the report could not have been brought to completion without lively debate, numerous interim publications, public explanation, membership educational forums, and CLE events, in addition to early, interim, and late-stage research and drafting.

There are too many deserving people to acknowledge individually, but special thanks go to Sasha Buchert of Lambda Law, Professor Erin Buzuvis of Western New England School of Law, Jill Pilgrim, Esq., and my Co-Chair M. Lettie Dickerson, Esq., who was so instrumental in getting us out of the penalty box and "into the net."

It has been a privilege working with all of you!

Jackie Drohan, Co-Chair

Introduction

The NYSBA Transgender Youth in Sports Task Force was formed by NYSBA President T. Andrew Brown in 2020 and furthered by the unerring support of Executive Director Pam McDevitt and Past Presidents Sherry Levin and Richard Lewis. Members of the Task Force include prominent legal scholars, public officials, and advocates, as well as NYSBA member participants with direct experience in coaching, athletics and sports medicine, drawn from across the state.

In addition to advocating directly with the House of Delegates on adjacent issues, the Task Force has sponsored and organized several educational and thought leadership panels, including one of two keynote panels presented at the 2022 Presidential Summit.

The Association has and continues to support its LGBTQ+ members with educational programming, active visibility at the section level and, most importantly, legislative, and judicial advocacy. In addition to its support of trans kids in empaneling and highlighting this Task Force, the Association has taken public positions in support of H.R. 5 – the Equality Act – which would explicitly extend the ban contained in Title IX of the Civil Rights Act of 1964 to discrimination based on sexual orientation or gender identity and clarify the alignment of federal law with the position of the U.S. Supreme Court in *Bostock v. Clayton County, GA.* NYSBA has also filed amicus briefs in critical LGBTQ+ rights cases such as *Fulton v. City of Philadelphia*[1] and *303 Creative*.[2] The Task Force believes that adoption of the recommendations put forward in this report would be wholly consistent with NYSBA's historical posture and the spirit of the majority of its membership.

Legislation seeking to prohibit transgender youth from participating in athletics must be placed into the proper context. This context is one in which transgender youth have increasingly been placed in the crosshairs of policymakers across the country who are using transgender youth as a political wedge issue.[3]

This report focuses on the risks to kids. Sports have been found to be formative in protecting mental, emotional, and physical health, and children in the K-12 setting are at a critical age when a denial of access can have grave consequences. The issue of scope of participation by transgender adult athletes at the competitive level in national and international sports is not

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[1] Jacqueline J. Drohan et al., *Fulton v. City of Philadelphia: What It Really Means*, NYS Bar Assoc., July 9, 2021, https://nysba.org/fulton-v-city-of-philadelphia-what-it-really-means/.

[2] Susan DeSantis, *New York State Bar Association Argues in U.S. Supreme Court Amicus Brief That No One Should be Discriminated Against in Public Accommodations*, NYS Bar Assoc., Aug. 22, 2022, https://nysba.org/new-york-state-bar-association-argues-in-u-s-supreme-court-amicus-brief-that-no-one-should-be-discriminated-against-in-public-accommodations/.

[3] *See* Jeremy W. Peters, *A Conservative Push to Make Trans Kids and School Sports the Next Battleground in the Culture War*, New York Times, Nov. 3, 2019, https://www.nytimes.com/2019/11/03/us/politics/kentucky-transgender-school-sports.html; *see also Obsessed: House Republicans' Relentless Attacks Against the LGBTQI+ Community in 2023*, Congressional Equality Caucus, Feb. 2024, at 5, https://equality.house.gov/sites/evo-subsites/equality.house.gov/files/evo-media-document/CEC-Report---Obsessed-compressed.pdf.

addressed in this report or its recommendations. While this committee broadly supports a nondiscriminatory "room for inclusion" approach subject to a level playing field, as assessed with statistical rigor, for all competitive adult athletes, our instant recommendations are centered on the scholastic sports setting, with its attendant goals of education, socialization, and childhood well-being.

That said, the Task Force does note that under a strict population percentage analysis, transgender people are significantly *underrepresented* in sports, professional or amateur.[4] Nonetheless, longstanding rules have existed under the International Olympic Committee framework, for example, allowing room for inclusion of transgender, non-binary and intersex athletes under rigid medical and performance standards and, under recent revisions, with a closer look on an event-by-event and case-by-case basis.[5] While transgender athletes have been allowed to participate in Olympic events since 2004, not a single transgender person assigned male at birth has ever obtained a medal at the Olympics in a female category, despite transgender people comprising approximately 1.4% of the U.S. population.[6] Indeed, no transperson even reached the Olympic trial level until 2020 – Chris Mosier (a trans*man* competing in the *men's division*).[7] Only two transgender women, Lia Thomas and CeCe Telfer, have ever obtained NCAA titles, despite the multitude of events that are held each year. NCAA has allowed open participation of transgender athletes since 2011; however, subsequent to Thomas's win, NCAA now will defer to each sport's governing body, and the swimming governing body, FINA, has effectively banned transgender women from future participation.[8]

Turning to the report's central issue of scholastic sports, it is notable that not a single state law was passed restricting the rights of transgender youth before 2020.[9] However, the legislative focus has exploded in the last five years, going from a relatively small number of such bills in 2017 to well over two hundred bills in 2023–2024.[10] In addition to bills seeking to exclude trans youth from participating in sports, there are bills seeking to ban them from best practices medical

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[4] *2020 LGBTQ+ Youth Outness & Sports Participation Statistics*, The Trevor Report, June 23, 2020, https://www.thetrevorproject.org/research-briefs/lgbtq-youth-sports-participation.

[5] *Fairness, Inclusion and Non-Discrimination in Olympic Sport*, Int'l Olympic Committee, https://olympics.com/ioc/human-rights/fairness-inclusion-nondiscrimination (last visited Feb. 23, 2024).

[6] Jody L. Herman et al., *How Many Adults and Youth Identify as Transgender in the United States?*, UCLA School of Law Williams Inst., June 2022, https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states.

[7] Ken Stone, *Making Transgender History in Santee: Chris Mosier at Olympic Trials 50K Walk*, Times of San Diego, Jan. 31, 2020, https://timesofsandiego.com/sports/2020/01/31/making-transgender-history-in-santee-chris-mosier-at-olympic-trials-50k-walk/.

[8] Jeré Longman, *Sport Is Again Divided Over Inclusiveness and a Level Playing Field*, New York Times, Jun.23, 2022, https://www.nytimes.com/2022/06/22/sports/olympics/transgender-athletes-fina.html; Erin Buzuvis, *What's Wrong with the NCAA's New Transgender Athlete Policy?*, 29 Wm. & Mary J. Race, Gender, & Soc. Just. 155 (2022), https://scholarship.law.wm.edu/wmjowl/vol29/iss1/5/.

[9] *LGBTQ Youth: Bans on Transgender Youth Participation in Sports*, Movement Advancement Project, at 3, Jan. 23, 2024, https://www.lgbtmap.org/img/maps/citations-sports-participation-bans.pdf.

[10] *Tracking the Rise of Anti-Trans Bills in the U.S.*, Trans Legislation Tracker, https://translegislation.com/learn (last visited Feb. 23, 2024); *2023 Anti-Trans Legislation*, Trans Legislation Tracker, https://translegislation.com/bills/2023 (last visited Feb. 23, 2024). No state had passed a law addressing athletics before 2020.

care,[11] bills seeking to deny their use of single-sex restrooms,[12] and bills seeking to prohibit them from changing their identity documents.[13] In addition to bills targeting transgender youth on the state level, there have also been attempts to roll back protections for transgender athletes on the federal level.[14] As President Biden underscored in his 2022 State of the Union address, "[t]he onslaught of State laws targeting transgender Americans and their families is WRONG."[15]

Among the numerous federal legislative initiatives introduced in the past three years seeking to restrict the rights of LGBTQ+ persons generally, bills most squarely targeting youth sports participation include (with links to full text)[16]: US HR298, US HR518, US SB200, US SB613.

While none of these have thus far passed and would likely be vetoed by the current president, efforts have been much more successful at the state level. ***There are now 25 states that have enacted laws or regulations excluding transgender students from participation in athletics***.[17]

[11] *E.g.*, S.B. 1045, Leg., Reg. Sess. (Al. 2022); *see, e.g.*, *AMA Strengthens Its Policy on Protecting Access to Gender-Affirming Care*, Endocrine Society, Jun. 12, 2023, https://www.endocrine.org/news-and-advocacy/news-room/2023/ama-gender-affirming-care.

[12] *E.g.*, H.B. 322, Leg. Reg. Sess. (Al. 2022).

[13] *E.g.*, S.B. 1100, Leg. Reg. Sess. (Ok. 2022).

[14] Alabama Senator Tommy Tuberville recently introduced an amendment to COVID-19 relief legislation seeking to deny funding to schools that allow transgender students to participate in athletics in accordance with their gender identity. The amendment failed by two votes. *See* S.Amdt.1386 to H.R. 1319 (American Rescue Plan Act), Mar. 6, 2021, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=117&session=1&vote=00097 (the vote summary was 49 YEAs, 50 NAYs and 1 Not Voting).

[15] 168 Cong. Rec. S895 (2022) (Statement of Pres. Joseph Biden), https://www.congress.gov/117/crec/2022/03/01/168/37/CREC-2022-03-01.pdf.

[16] *Bans on Transgender Youth Participation in Sports*, Movement Advancement Project, https://www.mapresearch.org/equality-maps/youth/sports_participation_bans (last visited Feb. 23, 2024).

[17] *See, e.g.*, H.B. 391, 2021 Leg., Reg. Sess. (AL 2021); S.B. 450, 2021 93rd Gen. Assemb., Reg. Sess. (AR 2021); S.B. 2536, 2021 Reg. Sess. (MS 2021); S.B. 1028, 2021 Reg. Sess. (FL 2021); H.B. 500 (ID 2020); H.F. 2416 (IA 2022); H.B. 112 Leg., Reg. Sess. (MT 2021); S.B. 46 Leg., Reg. Sess. (SD 2022); H.B. 25, 2021., Special Sess. 2021 (TX 2021); S.B.228, 2021 Gen. Assemb. (TN 2021); H.B. 3293, 2021 Leg., Reg. Sess. (WV 2021). *See also LGBTQ Youth: Bans on Transgender Youth Participation in Sports,* Movement Advancement Project, at 3, Jan. 23, 2024, https://www.lgbtmap.org/img/maps/citations-sports-participation-bans.pdf.

Summary Tables

Table 1: Summary and Legislation/Regulations

Category	Count	List	Bill Link	Year
States with laws that ban transgender students from playing sports according to their gender identity	24 states	Alabama	HB391 (K-12) HB261 (college)	2021 2023
		Arizona	SB1165	2022
		Arkansas	HB1570/SB354	2021
		Florida	S1028	2021
		Idaho	HB500	2020
		Indiana	HB1041	2022
		Iowa	HF2416	2022
		Kansas	HB2238	2023
		Kentucky	SB83	2022
		Louisiana	SB44	2022
		Mississippi	SB2536	2021
		Montana	HB112	2021
		Missouri	SB39	2023
		North Carolina	H574	2023
		North Dakota	HB1249 (K-12) HB1489 (college)	2023
		Ohio	HB68	2024
		Oklahoma	SB2	2022
		South Carolina	H4608	2022
		South Dakota	SB46	2022
		Tennessee	HB3 (5-12) HB2316 (college)	2021 2022
		Texas	HB25 (K-12) SB15 (college)	2021 2023
		Utah	HB11	2022
		West Virginia	HB3293	2021
		Wyoming	SF133	2023
States with regulations that ban transgender students from playing sports according to their gender identity	1 state	Alaska	4 AAC 06.115(b)(5)(D)	2023
States with no ban	25 states, D.C., + 5 territories	All others		

While several of these laws codifying discrimination have been challenged in federal and state court, leading to at least four injunctions,[18] many of the laws have not been challenged and will continue to exclude transgender youth until challenged or repealed. A soon-to-be-published study of a wide population of transgender and non-binary persons determined, to a very high level of statistical significance ($p<.0001$), that as early as 2015 "[t]he more trans-conservative the state where someone lived is, the greater the likelihood that [they] had thought about dying by

[18] *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020); *B. P. J. v. W. Va. State Bd. of Educ.*, No. 2:21-CV-00316, 2021 WL 3081883 (S.D.W. Va. Jul. 21, 2021); *Barrett v. State*, No. DV-21-581B (Mont. 18th Jud. Dist. Sept. 14, 2022); *Roe v. Utah High School Activities Ass'n*, Case No. 220903262, 2022 WL 3907182 (Utah Dist. Ct. Third Dist. Aug. 19, 2022).

suicide." [19] The risk of this impact is manifestly greater upon children, and gender non-conforming children in particular, already at high risk of suicidal ideation and attempts across all states.[20] In 2023, 41% of LGBTQ young people seriously considered attempting suicide in the past year – including half of transgender and nonbinary young people.[21] In addition to suicidal ideation, significantly high levels of psychological distress, directly linked to trans-conservative policy measures, were also found.[22] Excluding transgender youth from participation in athletics are examples of such trans-conservative policy measures leading to these severe, adverse impacts on young people's health.

[19] Hugh Klein & Thomas A. Washington, *Living in a Trans-Conservative Versus a Trans-Liberal State and its Relationship to Anti-Transgender Experiences, Psychological Distress, and Suicidal Ideation in a Large National Sample of Transgender Adults*, Political Psychology (2024).

[20] *2023 U.S. National Survey on the Mental Health of LGBTQ Young People*, The Trevor Project (2023), https://www.thetrevorproject.org/survey-2023/assets/static/05_TREVOR05_2023survey.pdf.

[21] *Id.* at 5.

[22] *Id.* at 13.

Executive Summary

The Task Force has found overwhelming evidence that sports participation plays a unique and universally positive role in protecting mental, emotional, and physical health, and children in the K-12 setting are at a critical age when a denial of access to that resource can have grave consequences. Nonetheless, Transgender, nonbinary, intersex, and other gender non-conforming youth, within the startlingly short period of only five years, have become a political wedge issue for state and national policymakers across the country and the target of over two hundred recent state and federal bills seeking to exclude them from participating in school sports programs. These kids are historically more likely to experience bullying, social isolation, and self-harm than to participate in athletics, yet ironically most benefit from the social and developmental resources that school sports represent.

As several courts have pointed out, these legislative efforts are a solution in search of a problem. Transgender kids make up a tiny fraction of the national student body, and those seeking to play sports are of small fraction of that fraction. Many of the legislative sponsors of the discriminatory bills and orders are themselves unable to name a single trans athlete in their jurisdiction or a single example of the "harm" they are seeking to rectify. The Task Force has found no credible evidence that participation of trans kids has caused either unfairness or harm, and the report cites significant evidence to the contrary.

The report urges the HOD to adopt resolutions:

1. principally opposing legislation and policy—including initiatives in our own state—designed to target transgender youth by prohibiting or impeding their full participation in school sports programs aligned with their gender and gender expression; and
2. specifically opposing enumerated pending federal legislation that would have such discriminatory effect.

The Task Force believes that adoption of the recommendations and resolutions urged in this report would be:

- consistent with NYSBA's historical posture;
- an important way for the legal community in New York to signal opposition to harmful attempts by state and federal policy makers to enshrine discrimination;
- an opportunity to help protect a vulnerable population.

Background

New York State

New York has strong protections for transgender kids participating in K-12 athletics, which have been in place since at least 2015. The New York State Public High School Athletic Association (NYSPHSAA) allows transgender students to participate in accordance with their gender identity.[23] New York Attorney General Letitia James has led a coalition of states in advocating for transgender youth participation in sports on several occasions, from participating in amicus briefs to commenting on rulemaking at the federal level.[24]

Even in New York, however, the rights of transgender kids to participate in sports are not immune from being leveraged for political purposes. In February 2024, Nassau County Executive Bruce Blakeman announced a county executive order banning transgender athletes from competing in women's and girls' sports at their facilities.[25] The move has been roundly criticized by Governor Kathy Hochul, is the subject of court challenges by the NYAG as both unfair and contrary to state law, and is widely expected to be overturned.[26] The ACLU has also brought suit in Federal court,[27] arguing that the policy violates New York's Human Rights Law and Civil Rights Law, which explicitly prohibit discrimination based on gender identity following passage of New York's Gender Expression Non-Discrimination Act (GENDA). The Community Education Council District 2, the largest school board district in Manhattan, recently also voted 8 to 3 in favor of a resolution that could potentially lead to transgender athletes being barred from participating in girls' sports.[28]

Widespread Opposition to the Legislation

Legislation seeking to exclude transgender athletes from participating is widely opposed by the public. A recent survey shows that over 70% of Americans oppose bills restricting transgender

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[23] *NYSPHSAA Rules and Regulations*, New York State Public High School Athletic Assoc., at 51, https://nysphsaa.org/documents/2023/8/21//NYSPHSAA_Handbook_082123.pdf (last visited Feb. 23, 2024).

[24] *Brief of Amici Curiae States of New York, Hawai'i, California, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia in Support of Appellants*, B. P. J. v. W. Va. State Bd. of Educ., No. 2:21-CV-00316, 2021 WL 3081883 (S.D.W. Va. Jul. 21, 2021), https://ag.ny.gov/sites/default/files/amicus-curiae/B.P.J.%20v.%20West%20Virginia%20State%20Bd.%20of%20Educ.%20%284th%20Cir.%29%20Br.%20for%20Amici%20States%20in%20support%20of%20appellant.pdf; Letter from New York Attorney General Leticia James et al. to U.S. Department of Education Secretary Miguel Cardona, May 15, 2023, https://ag.ny.gov/sites/default/files/letters/Title%20IX%20-%20%20Athletics%20NPRM%20Comments.pdf.

[25] Executive Order 2-2024, https://www.nassaucountyny.gov/DocumentCenter/View/43897/EXEC-ORDER-2-24?bidId=.

[26] Tim Balk, *In Court Papers, NY AG's Office Says Nassau County's Trans Sports Ban Is Illegal*, MSN, March 25, 2024, https://www.msn.com/en-us/news/us/in-court-papers-ny-ags-office-says-nassau-county-s-trans-sports-ban-is-illegal/ar-BB1kwfwk.

[27] *NYCLU Sues Nassau County for Discriminatory Anti-Trans Sports Ban*, NYCLU, https://www.nyclu.org/press-release/nyclu-sues-nassau-county-discriminatory-anti-trans-sports-ban.

[28] Daniel Walker, *NY School Board Approves Potential Ban on Transgender Athletes*, MSN, April 18, 2024, https://www.msn.com/en-us/news/us/ny-school-board-approves-potential-ban-on-transgender-athletes/ss-AA1neCwB.

participation in athletics in accordance with their gender identity.[29] Prominent women athletes, including Billie Jean King, Megan Rapinoe, Candace Parker and many others, have also opposed such exclusionary legislation.[30] In addition, a large number of businesses, including Apple, Amazon, Dell Technologies, Google, Verizon and many others, have joined a statement opposing legislation that targets transgender youth.[31]

Leading health care organizations, including the American Academy of Pediatrics, the American Medical Association, the American Psychiatric Association, the Endocrine Society and others, have also opposed efforts to ban transgender high school students' participation in sports in accordance with their gender identity.[32] In an amicus brief opposing a similar law passed in Idaho, the organizations clarified for the court that excluding transgender people from participating in athletics "frustrates the treatment of gender dysphoria" and "exacerbates the severe consequences of living with the stigma of being transgender."[33] The brief acknowledges the wide ranging and long lasting physical and mental-health consequences of depriving students of the ability to participate in sports, including key academic and physical skill sets needed to respond to the demands of adolescent and adult challenges, development of social identity and skills needed to survive and thrive in society, and improvements in overall physical and mental health.[34]

Transgender students already face alarmingly high rates of bullying, discrimination and associated disparate educational outcomes. According to one report, over 75% of transgender students reported being verbally harassed or physically or sexually assaulted.[35] Almost 25% of transgender students report being physically attacked because they are transgender.[36] And almost 20% of transgender students have left school because of the mistreatment they experienced.[37] As reported by the 2023 NYS Department of Labor TGNCNB Employment Report, based on

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[29] *See* Danielle Kurtzleben, *Republicans and Democrats Largely Oppose Transgender Sports Legislation, Poll Shows*, NPR, April 16, 2021, https://www.npr.org/2021/04/16/987765777/republicans-and-democrats-largely-oppose-transgender-sports-legislation-poll-sho.

[30] *Brief of Amici Curiae 176 Athletes in Women's Sports, The Women's Sports Foundation, and Athlete Ally in Support of Plaintiffs-Appellees and Affirmance*, *Hecox v. Little*, Nos. 20-35813, 20-35815 (9th Cir. Dec. 21, 2020), https://legacy.lambdalegal.org/sites/default/files/legal-docs/downloads/athletes_in_womens_sports_amicus_brief_hecox_v._little.pdf.

[31] *Business Statement on Anti-LGBTQ State Legislation*, Freedom For All Americans, https://freedomforallamericans.org/business-statement-on-anti-lgbtq-state-legislation (last updated Apr. 27, 2021).

[32] *Brief of Amici Curiae American Academy of Pediatrics, American Medical Association, American Medical Women's Association, and Seven Additional Health Care Organizations in support of Defendants-appellees and Affirmance*, Soule v. Conn. Ass'n of Schl., No.3:20-cv-00201 (2d Cir.), https://www.jenner.com/a/web/md1DSSR182Yw8aJbiBLTge/4k1XkW/Soule%20v%20Conn%20amicus%20brief.pdf.

[33] *Brief of Amici Curiae American Academy of Pediatrics, American Medical Association, American Psychiatric Association, and 10 additional health care organizations in support of Appellees*, Hecox v. Little, Nos. 20-35813, 20-35815 (9th Cir.), https://www.wiley.law/assets/htmldocuments/Hecox-Medical-Amicus-Filed.pdf.

[34] *Id*. at 26–29.

[35] Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality (2016), https://transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf.

[36] *Id*.

[37] *Id*.

BRFSS data, 33.1% of transgender respondents in New York had not completed high school, versus 12.3% of cisgender respondents.[38] The Centers for Disease Control recently issued a report showing that transgender students experience higher rates of violence and substance use and are at great risk of suicide.[39] According to the 2019 Youth Risk Behavior State and Local Survey, almost 50% of transgender youth reported suicidal ideation.[40] These disparities are much higher for transgender youth of color who are at the highest risk of attempting suicide.[41] On the other hand, where there are inclusive policies in place, transgender students are less likely to experience bullying and harassment and are more likely to stay in school.[42]

Legislation that excludes transgender students from participation in sports painfully singles them out from their peers, making them a target for further bullying and discrimination. This isolation will exacerbate the mistreatment and bullying that transgender youth already experience in school environments. Transgender youth often feel a sense of betrayal by the very administrative and governmental actors that, in many cases, formerly represented their last refuge for the social abuses of which they are often victim.[43] Such mistreatment leads to transgender students experiencing significant psychological distress and missing school leading to long term negative consequences. Mistreatment in schools is associated with higher suicide rates, homelessness, and serious psychological distress.[44] In short, transgender students need more, not fewer, protections. Legislation that aims to and/or actually does exclude transgender youth from participating in athletics is unequivocally harmful to these already vulnerable young people and almost ensures further marginalization of this population.

Hypothetical Fears About Transgender Participation Versus Reality

Concerns regarding transgender students' participation in sports in accordance with their gender identity tend to assume that transgender girls, assigned male at birth, are categorically bigger and stronger than cisgender girls, and that under this assumption transgender girls either have an unfair competition advantage and/or that they will harm cisgender girls in competition. There is no evidence to support these assumptions.[45]

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[38] *2023 TGNCNB Employment Report*, New York State Department of Labor, at 28, https://dol.ny.gov/system/files/documents/2024/01/tgncnb-report-pdf-version-1.pdf (last visited Feb. 23, 2024).

[39] Michelle Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students – 19 States and Large Urban School Districts*, 68 Morbidity and Mortality Weekly Report 67–71, Jan. 25, 2019, https://www.cdc.gov/mmwr/volumes/68/wr/mm6803a3.htm.

[40] *Adolescent and School Health, Youth Risk Behavior Survey Datasets and Documentation*, Center for Disease Control and Prevention, https://www.cdc.gov/healthyyouth/data/yrbs/data.htm (last visited Feb. 23, 2024).

[41] *Research Brief: Suicide Attempts Among LGBTQ Youth of Color* The Trevor Project, Nov. 26, 2019, https://www.thetrevorproject.org/2019/11/26/research-brief-suicide-attempts-among-lgbtq-youth-of-color/; *see also 2023 U.S. National Survey on the Mental Health of LGBTQ Young People*, The Trevor Project (2023), at 7, https://www.thetrevorproject.org/survey-2023/assets/static/05_TREVOR05_2023survey.pdf.

[42] Joseph G. Kosciw et al., *The 2019 National School Climate Survey*, GLSEN (2020), https://www.glsen.org/sites/default/files/2020-10/NSCS19-Full-Report_2.pdf; Telmo Fernandes, Beatriz Alves & Jorge Gato, *Between Resilience and Agency: A Systematic Review of Protective Factors and Positive Experiences of LGBTQ+ Students*, 11 Healthcare 2098, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10379181/.

[43] *Id.*

[44] *Id.*

[45] *Id.*

Focusing on the "differences" between cisgender boys and cisgender girls and using it to justify hypothetical fears about including trans athletes fails to address or account for the actual experience of tens of thousands of transgender athletes who have been eligible to participate in accordance with their gender identity in middle school and high school athletics (for decades, in some cases) without displacing or dominating women's athletics.[46] There has been no deluge of transgender athletes winning competitions. There is no evidence to suggest bias or unfairness towards cisgender athletes. In fact, participation among non-transgender girls has risen in those places where there are inclusive policies.[47] Simply put, the reality of inclusive policies belies the fearmongering speculation about the hypothetical dangers of inclusivity.

More important, such categorical conclusions are premised on cumulative research that compares cisgender girls and cisgender boys. It does not compare transgender athletes and non-transgender athletes. Such research studies fail to account for or address the fact that research is not based on "transgender girls," who are not simply "biological boys."[48] It remains an open question to what degree there are biological underpinnings to gender identity and to what degree socialization factors to the differences in performance among genders. The justification for such "proactive" legislation is almost always based on hypothetical and speculative conclusions.

Proponents of exclusionary legislation typically refer to transgender girls as "biological males" and sidestep the transgender experience entirely, omitting the word "transgender" from proposed laws and amicus briefs.[49] Transgender people exist; gender identity oftentimes arises either early in childhood or in adolescence,[50] and a failure to allow transgender people opportunities to live in accordance with their gender identity has widespread negative consequences for their lives, which has been documented in hundreds of studies.[51] Conversion efforts, or efforts to make transgender people not transgender, have never been effective and have caused great harm to the

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[46] *Brief of Amici Curiae American Academy of Pediatrics, American Medical Association, American Medical Women's Association, and Seven Additional Health Care Organizations in support of Defendants-appellees and Affirmance*, Soule v. Conn. Ass'n of Schl., No.3:20-cv-00201 (2d Cir.), at 5, https://www.jenner.com/a/web/md1DSSR182Yw8aJbiBLTge/4k1XkW/Soule%20v%20Conn%20amicus%20brief.pdf (indicating that approximately 300,000 high school students are transgender, using a 1.8 percentage point from the CDC).

[47] Shoshana K. Goldberg, *Fair Play; The Importance of Sports Participation for Transgender Youth*, Center for American Progress, Feb. 8, 2021, at Fig. 6, https://www.americanprogress.org/issues/lgbtq-rights/reports/2021/02/08/495502/fair-play/.

[48] Joanna Harper, *Transgender Athletes and International Sports Policy*, 85 Law and Contemporary Problems 151, at 159–160 (2022), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5035&context=lcp.

[49] Orion Rummler & Kate Sosin, *The Word Missing From the Vast Majority of Anti-Trans Legislation? Transgender*, The 19th, Nov. 12, 2021, https://19thnews.org/2021/11/state-legislation-transgender.

[50] *Brief of Amici Curiae American Academy of Pediatrics, American Medical Association, American Medical Women's Association, and Seven Additional Health Care Organizations in support of Defendants-appellees and Affirmance*, Soule v. Conn. Ass'n of Schl., No.3:20-cv-00201 (2d Cir.), at 14, https://www.jenner.com/a/web/md1DSSR182Yw8aJbiBLTge/4k1XkW/Soule%20v%20Conn%20amicus%20brief.pdf.

[51] *AMA Strengthens Its Policy on Protecting Access to Gender-Affirming Care*, Endocrine Society, June 12, 2023, https://www.endocrine.org/news-and-advocacy/news-room/2023/ama-gender-affirming-care.

transgender people who were subjected to such treatment.[52] Conversation therapy – a widely discredited practice – is largely acknowledged not only to undermine individual health, but also to have a degrading and adverse effect on public health generally.

Sponsors of legislation seeking to ban transgender students from participating in accordance with their gender identity are often unable to identify a single example of a transgender athlete in their own state, much less a trans athlete who is winning championships or taking opportunities from cisgender athletes. For example, when pressed to name a single transgender athlete before signing a bill excluding all transgender athletes, West Virginia Governor could not provide a single example.[53] Likewise, Nassau County Executive Bruce Blakeman was unable, when questioned at the press conference announcing the recent anti-trans executive action, to cite a single instance in Nassau County of the type of "bullying" the order was allegedly designed to prevent.[54]

Inevitably, bill sponsors waive off the need to demonstrate a problem before advancing legislation that will restrict the rights of thousands of transgender youth by conceding that while they might not be aware of any current transgender athletes, the legislation is needed to be "proactive." Pointing to the one or two examples where transgender athletes have successfully competed and ignoring the thousands where they have not successfully competed is unfair and sends the terrible message to transgender athletes that if allowed to participate, they must not be successful.

The Benefits of Participation and the Harms of Exclusion

There are innumerable benefits that flow from participation in athletics that transgender youth would be denied under this legislation. For example, athletics provides a unique context for student athletes to develop meaningful relationships with other athletes. In the process of driving toward a shared objection, athletes often create life-long connections.[55] Athletes spend countless hours practicing and performing and share intense experiences that lead to meaningful and

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[52] *Brief of Amici Curiae American Academy of Pediatrics, American Medical Association, American Medical Women's Association, and Seven Additional Health Care Organizations in support of Defendants-appellees and Affirmance*, Soule v. Conn. Ass'n of Schl., No.3:20-cv-00201(2d Cir.), at 9, https://www.jenner.com/a/web/md1DSSR182Yw8aJbiBLTge/4k1XkW/Soule%20v%20Conn%20amicus%20brief.pdf.

[53] When pressed by MSNBC anchor Stephanie Ruhle to provide an example of a trans child "trying to gain an unfair competitive advantage" at a school in the state, Justice, a Republican, said he couldn't.
"I don't have that experience exactly to myself right now," Justice said. When she pressed him harder, he said, "I can't really tell you one, but I can tell you this, Stephanie: I'm a coach. I coach a girls' basketball team, and I can tell you that we all know what an absolute advantage boys would have playing against girls."
https://www.nbcnews.com/feature/nbc-out/w-va-governor-unable-cite-one-example-justify-trans-athlete-n1266014

[54] Greg Cergol, *Long Island County Bans Transgender Athletes From Competing With Girls*, NBC News, Feb. 22, 2024, https://www.nbcnewyork.com/news/local/long-island-county-bans-transgender-athletes-from-competing-with-girls-at-sports-facilities/5161307/.

[55] *See, e.g.*, Kelly Troutman & Mikaela Dufur, *From High School Jocks to College Grads: Assessing the Long-Term Effects of High School Sport Participation on Females' Educational Attainment*, 38 Youth & Society 443 (2007), https://doi.org/10.1177/0044118X06290651; Angela Lumpkin & Judy Favor, *Comparing the Academic Performance of High School Athletes and Non-Athletes in Kansas in 2008-2009*, 4 J. of Sport Admin & Supervision 41 (2012), http://hdl.handle.net/2027/spo.6776111.0004.108.

lasting bonds.[56] This is especially true for diverse athletes, who quickly learn they are often accepted and celebrated and valued for their contributions and for their diversity, which leads to increased confidence and self-acceptance.[57]

There are many long-term *positive* consequences stemming from participation in athletics. For example, students who participate in athletics experience higher academic achievement than students who do not participate. Athletic programs often require a minimum grade point average to participate, and many teams stipulate that academic achievement is as important as athletic achievement.[58] Furthermore, participation in sports provides a healthy coping mechanism for academic and other school-related stress, anxiety, and depression.[59] In addition, there are extensive psychological benefits that flow from participation generally. Through athletics, students learn how to regulate their emotional responses to stress and anxiety, and participation often leads to significant growth and personal development that accrues to them throughout their lives.[60]

Students who participate in sports report fewer physical and mental health issues than students who do not participate.[61] Participation is linked directly to lowered feelings of hopelessness and suicidality, which is especially critical for transgender youth, who already experience a high risk for suicide and other life-threatening behaviors.[62] Transgender athletes report a much higher

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[56] Leanne Findlay & Robert Coplan, *Come Out and Play: Shyness in Childhood and the Benefits of Organized Sports Participation*, 40 Canadian Journal of Behavioural Science/Revue Canadienne des Sciences du Comportement 153 (2008), https://doi.org/10.1037/0008-400X.40.3.153.

[57] *See* Andrew Soundy, et al., *Psychosocial Consequences of Sports Participation for Individuals with Severe Mental Illness: A Metasynthesis Review*, 8 Adv. Psychiatry 1 (2015), https://downloads.hindawi.com/archive/2015/261642.pdf ; Sara Pedersen & Edward Seidman, *Team Sports Achievement and Self-Esteem Development Among Urban Adolescent Girls*, 28 Psychology of Women Quarterly 419 (2004), HTTPS://DOI.ORG/10.1111/J.1471-6402.2004.00158.X.

[58] Susan Rankin, *The Influence of Climate on the Academic and Athletic Success of Student-Athletes: Results from a Multi-Institutional National Study*, 87 Journal of Higher Education 5 (2016).

[59] *See* Erin Boone & Bonnie Leadbeater, *Game On: Diminishing Risks for Depressive Symptoms in Early Adolescence Through Positive Involvement in Team Sports*, 16 J. Res Adolesc. 79, 79 (2006), https://doi.org/10.1111/j.1532-7795.2006.00122.x; Susan Gore, et al., *Sports Involvement as Protection Against Depressed Mood*, 11 J. Res Adolesc. 119, 128 (2001), https://doi.org/10.1111/1532-7795.00006; Annemarie Dimech & Roland Seiler, *Extra-Curricular Sport Participation: A Potential Buffer Against Social Anxiety Symptoms in Primary School Children*, 12 Psychol Sport Exercise 347 (2011), https://doi.org/10.1016/j.psychsport.2011.03.007.

[60] David Hansen, et al., *What Adolescents Learn in Organized Youth Activities: A Survey of Self-Reported Developmental Experiences*, 13 J. Res Adolesc. 25, 47 (2003), https://doi.org/10.1111/1532-7795.1301006 ; *see also* Findlay & Coplan, *supra* note 54; *see also* Sarah Donaldson & Kevin Ronan, *The Effects of Sports Participation on Young Adolescents' Emotional Well-Being*, 41 Adolescence 369, 369–389 (2006), http://www-personal.umich.edu/~cyiu/psych%20458/out.pdf.

[61] Hans Steiner, et al., *Adolescents and Sports: Risk Or Benefit?*, 39 Clinical Pediatrics 161, 161–166 (2000), https://doi.org/10.1177/000992280003900304.

[62] Lindsay Taliaferro, et al., *High School Youth and Suicide Risk: Exploring Protection Afforded Through Physical Activity and Sport Participation*, 78 J. of Sch. Health 545, 545–553, (2008), https://doi.org/10.1111/j.1746-1561.2008.00342.x; *see, e.g.*, Erin Buzuvis, *Transgender Student-Athletes and Sex Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 Seton Hall J. Sports & Ent. L. 1, 48 (2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1646059.

level of mental health and are much less likely to experience anxiety and stress then transgender people who do not participate.[63]

Yet another benefit of participation is the access to mentorship from coaches and support staff. Students learn respect for mentorship in sports and academics skills and internalize the lessons learned, such as hard work, discipline, stick-to-itiveness and teamwork, that benefit participants their entire lives.[64] Participation in athletics leads to a wide range of physiological benefits, including beneficial improvements in blood pressure, oxygen consumption and increased muscle strength. Student participation in sports often leads to continued participation in athleticism as an adult, which leads to a reduction in the morbidity and mortality of many diseases.[65]

Lastly, students who are excluded from participation in sports will likely turn to dysfunctional coping mechanisms to deal with stress, anxiety and depression and to manage feelings of shame and stigma.[66] Such exclusion during such a critical phase of life where life-long habits are developed leads to long term negative outcomes, and these social, physical and emotional harms lead to significant and lasting impact on the lives of transgender youth.

In February 2021, the National Coalition for Women and Girls in Education issued an updated statement supporting transgender and nonbinary students' full and equal participation in all education programs and activities, including sports.[67] The American Psychological Association (APA) last year also weighed in with unprecedented support for the inclusion of transgender students in athletics. Extending on its 2020 resolution,[68] the APA's extensive report updates and extends on a large body of prior research, finding "no evidence to support claims that allowing transgender student athletes to play on the team that fits their gender identity would affect the fairness of the sport or competition."[69]

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[63] Goldberg, *supra* note 45.

[64] Nicholas Holt, et al., *Benefits and Challenges Associated with Sport Participation by Children and Parents from Low-Income Families*, 12 Psychol. Sport Exercise 490, 490–99 (2011), https://doi.org/10.1016/j.psychsport.2011.05.007.

[65] Christer Malm, et al., *Physical Activity and Sports—Real Health Benefits: A Review with Insight into the Public Health of Sweden*, 7 Sports 1, 13-14 (2019), https://doi.org/10.3390/sports7050127.

[66] *See* Francisco J. Lopez Villalba, et al., *Relationship Between Sport and Physical Activity and Alcohol Consumption Among Adolescent Students in Murcia (Spain)*, 114 Arch. Argent. Pediatr. 101, 101–06 (2016), https://www.sap.org.ar/docs/publicaciones/archivosarg/2016/v114n2a03e.pdf.

[67] *NCWGE Supports Transgender and Nonbinary Students' Full and Equal Participation in All Education Programs and Activities*, NCWGE, Feb. 12, 2021, https://www.ncwge.org/activities.html.

[68] *APA Resolution on Supporting Sexual/Gender Diverse Children and Adolescents in Schools*, American Psych. Assoc., Feb. 2020, https://www.apa.org/about/policy/resolution-supporting-gender-diverse-children.pdf.

[69] *Transgender Exclusion in Sports: Suggested Discussion Points With Resources to Oppose Transgender Exclusion Bills*, American Psych. Assoc., https://www.apa.org/topics/lgbtq/transgender-exclusion-sports (last updated Dec. 2023).

Conclusion and Recommendation

The NYSBA Task Force recommends adoption of the resolutions appended hereto, opposing legislation and policy designed to target transgender youth by prohibiting or impeding their full participation in school sports programs aligned with their gender and gender expression. This resolution is an important way for the legal community in New York to signal opposition to the harmful attempts by state and federal policy makers to enshrine discrimination. It is further an opportunity to help protect a vulnerable population that is a target of legislative assaults that continue to grow each legislative session.

Proposed Resolution

Be it

RESOLVED, that the New York State Bar Association opposes and urges the repeal and/or judicial invalidation of all discriminatory legislation and regulation targeting transgender, non-binary and intersex youth and infringing their equal right to unrestricted participation in school sports programs appropriate to the gender in which they live, in full equality and on the same terms with students assigned such gender at birth.

Without limitation of the foregoing, NYSBA views the following state laws and regulations that ban students from playing sports according to their gender identity as representative of such discriminatory measures:

Alabama	HB391 (K-12) HB261 (college)	2021 2023
Arizona	SB1165	2022
Arkansas	HB1570/SB354	2021
Florida	S1028	2021
Idaho	HB500	2020
Indiana	HB1041	2022
Iowa	HF2416	2022
Kansas	HB2238	2023
Kentucky	SB83	2022
Louisiana	SB44	2022
Mississippi	SB2536	2021
Montana	HB112	2021
Missouri	SB39	2023
North Carolina	H574	2023
North Dakota	HB1249 (K-12) HB1489 (college)	2023
Ohio	HB68	2024
Oklahoma	SB2	2022
South Carolina	H4608	2022
South Dakota	SB46	2022
Tennessee	HB3 (5-12) HB2316 (college)	2021 2022
Texas	HB25 (K-12) SB15 (college)	2021 2023
Utah	HB11	2022
West Virginia	HB3293	2021
Wyoming	SF133	2023
Alaska	4 AAC 06.115(b)(5)(D)	2023

RESOLVED, and also without limitation of the foregoing, that the New York State Bar Association opposes the following federal legislative initiatives: **US HR298, US HR518, US SB200, and US SB613.**

From:	Michael R. May
To:	reportsgroup
Subject:	comments regarding Report and Recommendations of NYSBA Task Force on the Treatment of Transgender Youth in Sports
Date:	Thursday, May 16, 2024 1:48:00 PM
Attachments:	image001.png

I submit these comments as a member of the NYSBA Executive Committee (Vice-President of the Sixth Judicial District) regarding the Report and Recommendations of the Task Force on the Treatment of Transgender Youth in Sports (the "Report").

I recognize the hard work and dedication that went into the creation of the report. I am concerned, however, that the viewpoint of those opposed to the recommendations are not addressed in the report and some of the assertions are frankly irrational thereby making the report easily dismissed as disingenuous. In particular....

1. Throughout the report, there are references to laws or proposals that, according to the report, are "excluding transgender youth from participation in athletics." (see report pages 5,7,8,10 and 11). Although I realize exclusion from participation in a sport that fits an individual's gender identity may be considered exclusion from sports in the mind of that individual, it is clear that a blanket exclusion from sports is not involved. Participation in sports based on the gender assigned at birth or specifically organized for transgender athletes are not impacted by the laws or proposals mentioned.
2. The Introduction (page 4) states that the recommendations are centered on the scholastic sports setting. The report should clarify whether that means only sports through 12th grade, and, if so, expressly state that Intercollegiate athletics are not dealt with by the report.
3. There are several assertions in the report that defy logic, science and observation:
   One is set forth at page 8 as follows: "The Task Force has found no credible evidence that participation of trans kids has caused either unfairness or harm..."
   Another is at page 11 where the report dismisses concerns that transgender students' participation in sports in accordance with their gender identity tend to assume that transgender girls, assigned male at birth, are categorically bigger and stronger than cisgender girls, and that under this assumption transgender girls either have an unfair competition advantage and/or that they will harm cisgender girls in competition. There is no evidence to support these assumptions."
   I can accept a report that acknowledges that transgender girls assigned male at birth will in many cases be larger, with more muscle mass, than girls assigned female at birth and thus will have a competitive advantage but that the overall benefit to society justifies permitting them to participate as the gender with which they identify. But to claim no such advantage occurs makes the entire report easily dismissed as a one-sided, illogical effort.
4. Unless I somehow missed it, it appears that the report recommends no restrictions on transgender athletes participating in the sport appropriate to the gender with which they identify regardless of their testosterone levels or any other hormone levels or treatment. If so, a 12th grade athlete assigned male at birth and identifying as a transgender girl must be allowed to participate in girls' sports without any school oversight or knowledge of that athlete's medical situation. This position suggests that there is absolutely no reason for high

schools to have boys' track and field separate from girls' track and field, boys' basketball separate from girls' basketball etc. I have personally seen a boy playing on a girl's volleyball team at the JV level and he dominated the court. That is fine as the teams knew the girl's team could have a boy and it was after all at the JV level. If it is a sport that does not favor taller, faster, and stronger athletes, or if it is decided that society will benefit from permitting boys and girls to compete together in the same sport, then we should support such an effort. But to deny the existence of clearly observable competition advantages makes the report easily dismissed.

Thank you for considering my comments. I fully support laws that prohibit discrimination against transgender people regardless of their age. As the athlete advances to higher levels of sport, however, the science of hormones, muscle mass, and sheer size, make it obvious that fairness is a serious issue and the integrity of girls' sports is harmed absent reasonable restrictions.

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Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #10

REQUESTED ACTION: None, as the report of the Committee on Annual Awards is informational.

John H. Gross, chair of the Committee on Annual Awards, will report to the House on preparations for the 2025 Gala Dinner.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #11

REQUESTED ACTION: None, as the report of The New York Bar Foundation is informational.

Hon. Cheryl Chambers, president of The New York Bar Foundation, will update the House on the ongoing work and mission of The Foundation.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #12

REQUESTED ACTION: One item of administrative business.

The Bylaws (IX.1.B) require the House to ratify appointments to the Finance Committee after confirmation by the Executive Committee. President Domenick Napoletano has appointed Robert T. Schofield, IV, Esq. and has reappointed Hon. Cheryl Chambers as members, each to serve a two-year term.

The report will be presented by President-Elect Kathleen Marie Sweet, chair of the House of Delegates.

Staff Memorandum

HOUSE OF DELEGATES
Agenda Item #13

REQUESTED ACTION: New Business.

President-Elect Kathleen Marie Sweet, Esq. will ask for any new items that need to be discussed.