

ARTICLES

LIKE, SHARE, AND REPOST: CONTENT CREATOR COMMODIFICATION

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Abstract

In 1988, the Supreme Court of New Jersey invalidated a paid surrogacy contract on the basis that there are certain things that money cannot buy. The holding reflects one understanding of commodification theory, which argues that putting something up for sale transforms its very nature. Some scholars argue, for example, that we ought not to buy and sell certain things integral to personhood because to do so does violence to ourselves. Digital technology has since enabled commodifications of personhood subtler than paid surrogacy. Companies clamor to pay content creators to showcase their innermost personal lives to strangers online for brand promotions. Worse still, a new type of income-sharing agreement (ISA), unveiled in 2021 by a venture capital firm called Slow Ventures, threatens to exacerbate the commodification of content creators. Individuals signing onto the ISA sell Slow Ventures a share of their annual content creator income for the next thirty years. This Note employs Margaret Radin's theory of commodification and personhood, rather than orthodox "law and economics" frameworks, to assess the risks of this novel ISA. In doing so, this Note also uses empirical analysis of a publicized content creator ISA to demonstrate how the deal can further harm personhood through financial exploitation. Lastly, after observing that content creation blurs the traditional distinction between work and the personal, this Note argues that existing law does too little to mitigate the ISA's potential harms against personhood and explores opportunities for reform.

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Like, Share, and Repost: Content Creator Commodification

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“The most valuable brands of the future are going to be people rather than companies.”

—Sam Lessin, *Equity Financing for Influencers*.¹

INTRODUCTION

Personhood is precious. But thirteen years ago, the Supreme Court invited the Kafkaesque by extending rights inherent to personhood to corporations.² A band of venture capitalists and Silicon Valley entrepreneurs began advancing (mis)conceptions of personhood even further in 2021. Rather than treat companies as people, however, they champion the inverse: a new kind of income-sharing agreement (ISA) that commodifies social media content creators at the expense of their personhood.³

An ISA is a person’s promise to pay a share of their future income to another in exchange for a present payment.⁴ An ISA is not necessarily a bad bargain, given adequate safeguards such as a short agreement period, a repayment maximum, and narrowly defined applicable income. Since the mid-twentieth century, people have used ISAs, more or less successfully, across various contexts: to play high-stakes poker, record albums, play professional sports, and launch start-ups.⁵

¹ Sam Lessin, *Equity Financing for Influencers*, THE INFORMATION (Jan. 26, 2021), <https://www.theinformation.com/articles/equity-financing-for-influencers>.

² See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 475 (2010) (Stevens, J., dissenting) (warning that the rise of corporate personhood may encroach upon the rights traditionally belonging to individuals under the First Amendment).

³ See Jeff Schwartz, *The Corporatization of Personhood*, 2015 U. ILL. L. REV. 1119, 1155 (2015) (flagging corporate personhood and the commodification of persons as related concerns).

⁴ Shu-Yi Oei & Diane Ring, *Human Equity? Regulating the New Income Share Agreements*, 68 VAND. L. REV. 681, 684 (2015) (outlining the basic transaction forming an income-sharing agreement).

⁵ See Milton Friedman & Simon Kuznets, *Income in the Professions and in Other Pursuits*, in INCOME FROM INDEPENDENT PROFESSIONAL PRACTICE, 90 n. 20 (1954). Around the middle of the 20th century, Milton Friedman and Simon Kuznets first proposed income-sharing agreements as a way for aspiring white-collar professionals to pay for education. *Id.* See also Miikka Anttonen, *The Ugly Truth About Staking in Poker*, UPSWING POKER (Oct. 18, 2016), <https://www.upswingpoker.com/staking-truth-stake-makeup/>; Schwartz, *supra* note 3, at 1135 (illustrating additional ISA examples).

However, a widening generational wealth gap, the rise of the creator economy, and an abundance of cash available for private investment created conditions for a new ISA targeting social media influencers.⁶ In 2021, a venture capital firm called Slow Ventures began paying content creators as much as \$5 million in exchange for annual repayments worth up to 10% of their creative and IP income for thirty years.⁷ The key terms of this deal threaten to commodify content creators and deserve the attention of regulators. A content creator is likely better off seeking venture debt.

This article contributes to the ISA literature by assessing a novel topic through an alternative analytical framework. First, the article focuses on the Creator ISA, which substantially differs from previous ISAs. Second, the article applies Margaret J. Radin's theory of commodification, rather than conventional "law and economics" frameworks, to explore whether the Creator ISA is problematic. Third, the article breaks from prior ISA discussions by empirically testing whether the Creator ISA's first publicized contract is financially exploitative. In finding that the Creator ISA is problematically commodifying, this Note helps identify a much-needed boundary in the ISA discourse.

This Note begins with a discussion of previous ISA studies and their respective methodologies in Section I. Next, Section II reviews various ISA models and summarizes their common shortfalls. Having canvassed this background, Section III describes the Creator ISA and its first publicized transaction with content creator Marina Mogilko. Section IV outlines Radin's commodification theory and her analytical approach to identifying improperly commodifying transactions, and Section V applies this framework to articulate concerns with the Creator ISA. Section VI explores the adequacy of possible legal responses through constitutional law, consumer protection law, usury law, and unconscionability doctrine. Section VII suggests potential reform.

⁶ See Reid Cramer et al., *The Emerging Millennial Wealth Gap: Opening Note*, NEW AMERICA, (Oct. 29, 2019) <https://www.newamerica.org/millennials/reports/emerging-millennial-wealth-gap/the-emerging-millennial-wealth-gap-opening-note>; Adobe, *Adobe "Future of Creativity" Study: 165M+ Creators Joined Creator Economy Since 2020*, ADOBE (Aug. 25, 2022), <https://news.adobe.com/news/news-details/2022/Adobe-Future-of-Creativity-Study-165M-Creators-Joined-Creator-Economy-Since-2020/default.aspx>; Amrith Ramkumar & Eliot Brown, *The \$900 Billion Cash Pile Inflating Startup Valuations*, WALL ST. J. (Dec. 27, 2021), <https://www.wsj.com/articles/the-900-billion-cash-pile-inflating-startup-valuations-11640539562>.

⁷ Kia Kokalitcheva, *Content Creators as the New Startups*, AXIOS (Apr. 24, 2021), <https://www.axios.com/2021/04/24/content-creators-financing-investing-startups>.

I. PRIOR ISA STUDIES

Previous studies assessing ISA legality understate the problem of commodification, or the process of transforming something into a commodity for buying and selling.⁸ This Note does not apply the frameworks used by Schwartz, Oei, and Ring for three reasons. First, these authors do not set their analyses within normative premises.⁹ A normative premise can guide an otherwise ambiguous or arbitrary inquiry.¹⁰ However, their arguments omit rationales for regulating ISAs, such as theories of personhood, explicit law and economics claims, or other normative premises. Schwartz, Oei, and Ring ground their analyses

⁸ See *Coyote Publ'g, Inc. v. Miller*, 598 F.3d 592, 603 (9th Circ. 2010) (defining commodification for the purposes of determining the constitutionality of state restrictions on prostitution advertisements in Nevada). Professor Jeff Schwartz takes three steps to analyze the legality of a hypothetical ISA. See Schwartz, *supra* note 3, at 1135-36, 1150-56, 1163. Schwartz first tests whether the Thirteenth Amendment's ban against slavery and indentured servitude apply to ISAs. See *id.* at 1135-36. Finding that ISAs are neither slavery nor indentured servitude, Schwartz then performs a cost-benefit analysis to determine whether ISAs violate public policy, noting commodification as a potential cost. See *id.* at 1150-56. To determine whether ISAs are commodifying, Schwartz considers the length of the ISA, the control given to the ISA provider, and financialization (e.g., whether investors can trade ISA in primary or secondary markets). See *id.* at 1155. Concluding that ISAs are permissible because their benefits outweigh their costs, Schwartz takes a third, albeit implicit, analytical step by identifying securities as the closest analogy to an ISA for the purposes of designing a regulatory response. See *id.* at 1163. Professors Shu-Yi Oei and Diane Ring use a multifactor framework "[to] determin[e] whether a given ISA is most analogous to debt, human ownership, or something else, and correspondingly how it should be regulated" on a case-by-case basis. See Oei and Ring, *supra* note 4, at 687-88. Oei and Ring first refer to a spectrum of transactions that are analogous to an ISA, identifying debt and slavery as extremes. See *id.* at 714-20. Corporate equity, joint ventures, and a category of equity-like transactions are "gray-zone analogies" falling between the analytical extremes of debt and slavery. See *id.* at 720. Ring and Oei then determine whether an ISA resembles debt. See *id.* at 730. They consider the following factors: the intent of the parties, the form of the instrument (e.g., the use of an unconditional promise to pay), whether there is a fixed debt-like interest rate, the ISA's duration, the extent of subordination to creditors' claims, risk allocation, and management of the ISA recipient's choices. See *id.* at 730. If the debt analogy fails, then Ring and Oei examine whether the ISA is similar to slavery or servitude ("human ownership"), evaluating contract duration, the share of income drawn for repayment, control over the recipient's labor, and the breadth of applicable income. See *id.* at 731-32. If an ISA resembles neither debt nor human ownership, then a "gray-zone" transaction is likely the best analogy for identifying regulatory opportunities. See *id.* at 732.

⁹ See Edward E. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1898-1903 (1988) ("Without clearly stated premises ... the scholarship simply swirls around in the intuitionist mélange [and] ... fails to fulfill its unique role in demonstrating how practical effects are linked to policy choices, how those effects relate to each other, or how general policies can be constructed from them").

¹⁰ See *id.* at 1903 (arguing that a normative premise is a "means of structuring the world, and interpreting its otherwise aleatory phenomena").

upon limited lists of factors, which innovation in the ISA market likely renders outdated. Thus, they may incorrectly find that a problematically commodifying ISA is permissible (a false negative).

Second, Schwartz, Oei, and Ring too narrowly define commodification. Schwartz, Oei, and Ring focus only on an ISA's commercial terms and overlook the critical vector of market rhetoric, which is "the practice of thinking about interactions as if they were sale transactions and ... the use of monetary cost-benefit analysis to judge these interactions."¹¹ Appreciating how an ISA might commodify a recipient requires considering both its contractual terms and how an ISA implicitly invites people to *think*. For example, an ISA might influence a blogger to assign dollar values to the personal activities serving as their content source. Failing to discuss how an ISA might drive market rhetoric ignores a powerful dimension of commodification.

For Schwartz, commodification occurs where an exchange degrades personhood through the process of buying and selling.¹² Slavery is thus objectionable because it degrades and thus commodifies people.¹³ Schwartz weighs the cost of commodification against benefits such as investor returns, filling lending gaps, and managing risk.¹⁴ However, Schwartz neither defines personhood nor explains how commodification degrades personhood.¹⁵ Given the resulting ambiguity, a practitioner following Schwartz' framework is likely to benchmark their analysis against slavery, which is the sole example of a problematic commodification identified by Schwartz. Thus, an ISA must clear a relatively extreme threshold before triggering commodification concerns under Schwartz' analysis. Given that Schwartz does not discuss market rhetoric, a substantial part of commodification, a practitioner is unlikely to ever find a problematic exchange.

Having too narrowly defined commodification, Schwartz then minimizes its analytical weight by treating it as a downside within a cost-benefit analysis, which as a framework generally undervalues non-

¹¹ Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1859 (1987). Market rhetoric matters because "[f]acts are theory-dependent and value-dependent. Theories are formed in words. Fact- and value-commitments are present in the language we use to reason and describe, and they shape our reasoning, and description, and the shape (for us) of reality itself." See MARGARET J. RADIN, *CONTESTED COMMODITIES* 89 (Harv. Univ. Press 1996).

¹² See Schwartz, *supra* note 3, at 1153.

¹³ See *id.* at 1154.

¹⁴ See *id.* at 1150-51.

¹⁵ See *id.* at 1153-55.

monetizable ethical interests, such as personal well-being.¹⁶ Treating commodification as a cost implies that a person could justify an exchange simply because its benefits outweigh any offense to personhood by the slightest degree. Thus, Schwartz' cost-benefit analysis is an inappropriate methodology for evaluating commodification because it undermines personhood, the very thing it claims to protect.

The last consideration against Schwartz' analysis is that he assesses ISAs as a class.¹⁷ Due to the great heterogeneity of ISAs, any discussion of their legality should proceed on something closer to a case-by-case basis.¹⁸ That Schwartz ultimately concludes ISAs do not violate public policy is hardly surprising.

Oei and Ring define commodification by determining "whether ISAs contractually approximate servitude, slavery, or some other type of commodifying or exploitative relationship as a result of the underlying rights and relationships they create."¹⁹ To make this finding, Oei and Ring evaluate whether an ISA resembles human ownership in the form of slavery or indentured servitude on the basis of the ISA's duration, the share of income drawn, the recipient's loss of control, and the type(s) of applicable income.²⁰ Similar to Schwartz' framework, this analysis is likely to result in false negatives because its indicia of commodification remain unexplained and an ISA must clear the extremely high threshold of resembling formal human ownership to become problematic.

Evaluating the Creator ISA deserves a more robust definition of commodification, especially because the work of a content creator extends deeper into the personal realm than do traditional forms of labor associated with income sharing agreements, such as software programming. As put by a twenty-two-year-old influencer: "[t]here's no clear delineation between my work life and my personal life ... [s]ometimes it can be exhausting."²¹ The application of these prior frameworks to the burgeoning digital landscape results in a conceptual

¹⁶ See Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005, 1032 (2000) (arguing that cost-benefit analysis does not offer ethical insight, but instead approximates a net measure of good); Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1584 (2002) (noting the impossibility of using cost-benefit analysis to price the priceless, such as life, health, nature, and the future).

¹⁷ See Schwartz, *supra* note 3, at 1124-35 (identifying several distinct ISA models).

¹⁸ See Oei & Ring, *supra* note 4, at 710-711 (arguing that case-by-case analysis is the preferable approach due to the great heterogeneity amongst ISAs).

¹⁹ See *id.* at 718.

²⁰ See *id.* at 731-32.

²¹ Emma Goldberg, *Burned Out on Your Personal Brand*, N.Y. TIMES (Oct. 21, 2022), <https://www.nytimes.com/2022/10/20/business/influencer-burn-out-jobs.html>.

gap.

In response, this Note evaluates the commodification potential of the Creator ISA with the framework developed by Professor Margaret J. Radin, which centers on a pragmatic definition of personhood based on the normative premise of facilitating human flourishing and its capacity to analyze exchanges across a variety of contexts.²² Radin's framework has gained ground as a methodology for assessing commodification in contexts beyond ISAs, including yoga, cyberspace, high-end art appraisals, male escort services, and family relations.²³

II. PREDECESSORS TO THE CREATOR ISA

Recent history is replete with ISAs for students, musicians, athletes, software programmers, and entrepreneurs. These ISAs demonstrate the importance of protecting recipients with features such as repayment maximums, relatively short-term agreement windows, narrow definitions of applicable income, and relatively low shares of income drawn for repayment.

Yale University provided an ISA-like option for students through its Tuition Postponement Program. Offered between 1971 and 1978, the program enabled Yalies to defer any tuition payment until after graduation, at which point they paid Yale 0.4% of their annual income for every \$1000 they borrowed for thirty-five years or until their class had collectively paid off their debt.²⁴ Design flaws and external events shuttered the program, which suffered a default rate between 15%-20%.²⁵ Students expecting relatively high incomes often chose cheaper conventional loan plans and high-earning graduates often exercised an option to buy their way out of the program for 150% of their principal.²⁶ The expansion of the federal student loan program in the 1970s further

²² See John A. Robertson, *Human Flourishing and Limits on Markets*, 95 MICH. L. REV. 2139, 2141 (1997) (reviewing MARGARET J. RADIN, *CONTESTED COMMODITIES* 89 (Harvard Univ. Press 1996)).

²³ See Marisa Shearer, *Mantras and Monetization: The Commodification of Yoga and Culture*, 21 VA. SPORTS & ENT. L.J. 38, 48 (2022); Miriam A. Cherry, *Cyber Commodification*, 72 MD. L. REV. 381, 446-51 (2013); Benjamin Shmueli, *Commodifying Personal Rights and Trading the Right to Divorce: Damages for Refusal to Divorce and Equalizing the Women's Power to Bargain*, 22 UCLA WOMEN'S L.J. 39, 50-51 (2015).

²⁴ John R. Brooks, *Income-Driven Repayment and the Public Financing of Higher Education*, 104 GEO. L.J. 229, 274 (2016) (describing the transaction involved within the Yale Tuition Postponement Program).

²⁵ See *id.*

²⁶ See Brooks, *supra* note 24, at 275.

drew students away from the Tuition Postponement Program.²⁷ The upside risk facing high-earning graduates undermined Yale's success, as conventional loans were cheaper than paying 2% to 4% of a large income for over thirty years, thus demonstrating the significance of designing an ISA with a tolerable repayment maximum.²⁸

In 2022, Purdue University paused its own ISA program, known as Back a Boiler, after disbursing more than \$21 million to over 1,900 students.²⁹ Unlike Yale and the federal government, Purdue evaluated multiple factors, including a student's academic major, to determine terms such as the share of income for repayment on a case-by-case basis.³⁰ While Purdue marketed Back a Boiler as an alternative to pricier private loans, students have criticized the program for its expensive payments, which often overburdened young professionals' cashflows, and failure to disclose the true cost of the ISA for high-earning participants.³¹

In the music industry, investors paid \$55 million to David Bowie in exchange for repayment of this principal plus a 7.9% interest rate, drawn from the income coming from Bowie's future royalties.³² Although declining of music sales in the early 2000s caused the downgrade of the so-called Bowie Bonds to junk status in 2003, the deal was arguably a boon for Bowie, who reportedly used some of the \$55 million to buy out his former manager's rights to his existing catalogue.³³ Advised by a rock-and-roll investment banker, Bowie successfully liquidated the bonds in 2007.³⁴ While Bowie's deal is technically an asset securitization, the agreement resembled an ISA by exchanging the rights to future earnings for an up-front payment.³⁵

²⁷ See Schwartz, *supra* note 3, at 1126.

²⁸ See Brooks, *supra* note 24, at 275.

²⁹ Josh Moody, *Purdue Backs Off Income-Share Agreements*, INSIDE HIGHER ED (June 22, 2022) <https://www.insidehighered.com/news/2022/06/23/purdue-pauses-new-income-share-agreement-enrollments>.

³⁰ See *id.*; see also *Income by Major*, PURDUE UNIV. BACK A BOILER <https://www.purdue.edu/backaboiler/disclosure/income.html> (last visited Nov. 17, 2022) (demonstrating that a student's academic major is one input into the ISA).

³¹ See Aarthi Swaminathan, *Student loans: Mom Slams Purdue ISA Offering as Son Deals with Nearly \$100,000 in Debt*, YAHOO!FINANCE (Apr. 2, 2022) <https://finance.yahoo.com/news/purdue-income-share-agreement-scrutiny-student-loan-153057798.html>.

³² See Dan McCrum, *A Short History of the Bowie Bond*, FIN. TIMES (Jan. 11, 2016) <https://www.ft.com/content/6b4839dd-0539-34c4-bb1d-oedf95255d72>.

³³ See *id.*; Ed Christman, *The Whole Story Behind David Bowie's \$55 Million Wall Street Trailblaze*, BILLBOARD (Jan. 13, 2016) <https://www.billboard.com/music/music-news/david-bowies-bowie-bonds-55-million-wall-street-prudential-6843009/>.

³⁴ See McCrum, *supra* note 32.

³⁵ See Oei & Ring, *supra* note 4, at 701-02.

Athletes have used ISAs to secure de facto salary advances, which serve as a hedge against income losses caused by injury. In 2013, an ISA provider called Fantex Inc. paid \$4 million to professional football player Vernon Davis in exchange for 10% of his future football-related income, including endorsements and licensing.³⁶ To fund the initial upfront payment to an athlete, Fantex solicited an investor to buy a “trading stock” linked to the athlete’s value and performance as a brand.³⁷ Such an investor then owned a tradeable share of Fantex’s portion of an athlete’s income.³⁸ Troublingly, the Fantex ISA required repayments even after the death of the player, as long as the broadly defined “athlete brand” continued to generate income.³⁹

ISA providers have targeted aspiring software programmers. Lambda School, for example, began offering aspiring coders a six-month remote computer science course valued at \$30,000 with an option to make income-based tuition payments after graduation.⁴⁰ Lambda’s ISA required a graduate to pay 17% of their income upon taking a job in the technology sector earning over \$50,000 annually.⁴¹ Graduates had to make payments for twenty-four months after graduation.⁴² As of this writing, multiple graduates have filed arbitration demands and one lawsuit against Lambda for advertising false job placement rates and other deceptive marketing practices.⁴³

Other recent ISA models target a broader market of recipients. A company called Pave, for example, began offering ISAs to a broadly defined category of “high potential individuals” generally seeking to launch businesses, pay off student loans, and finance their education, in 2012.⁴⁴ Pave employed a proprietary model assessing factors such as education, major, and standardized test scores to predict a participant’s expected income and thus price their payment terms on a case-by-case basis.⁴⁵ Participants, known as “Talent,” paid up to 10% of their annual

³⁶ See *id.* at 689.

³⁷ See Schwartz, *supra* note 3, at 1149.

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See Ingrid Lunden, *Three Students Sue Coding Bootcamp Lambda School Alleging False Advertising and Financial Shenanigans*, TECHCRUNCH (May 31, 2021), <https://techcrunch.com/2021/05/13/lambda-school-lawsuits/>.

⁴¹ See Complaint at 5, *Jessica Fuller v. Bloom Institute of Technology*, No. 23-605179 (N.D. Cal. Mar. 16, 2023); Anthony Pellegrino, *Lambda School Review*, TRY EXPONENT BLOG (Jan. 24, 2023), <https://www.tryexponent.com/blog/lambda-school-review>.

⁴² See *id.*

⁴³ See Lambda School, *Cases*, STUDENT DEFENSE, <https://defendstudents.org/cases/lambda-school> (last visited Nov. 16, 2022).

⁴⁴ See Oei & Ring, *supra* note 4, at 692.

⁴⁵ See Schwartz, *supra* note 3, at 1131.

income as reported in their federal tax filing for a ten-year period.⁴⁶ Talent enjoyed some protections, such as a repayment ceiling worth five times the amount raised and waiver of their repayment obligation if their income fell below 150% of the federal poverty line.⁴⁷ For each year that Talent enrolled in school, Pave similarly waived their repayment but added a year to their agreement period.⁴⁸ Pave enabled an average fundraising of \$20,000 per individual Talent.⁴⁹

Recent history thus illustrates the risks inherent within the generic ISA model. As demonstrated by Yale, the lack of repayment maximums can deter potential participants while entrapping high-earning participants with repayments worth many multiples of their initial amount raised, while a lengthy agreement period threatened to further increase the total repayment amount. As seen with graduates from Purdue and Lambda School, even repayments worth single-digit percentages of one's income may overburden a young professional's cashflow, even when drawing only from a narrow category of income (e.g., earnings from a technology job). An ISA's potential pitfalls are plenty.

III. THE CREATOR ISA

Slow Ventures, an early-stage venture capital firm led by investor Sam Lessin, is the ISA vanguard. In 2021, Slow Ventures launched the Creator Fund with \$20 million earmarked for ISAs for social media influencers.⁵⁰ Lessin's investment thesis is that individuals will eclipse companies as brands and thus "[i]nfluencers need to start treating themselves like real businesses and selling equity that represents a share of their complete, worldwide, perpetual earnings."⁵¹

While the terms of a Creator Fund ISA (Creator ISA) depend upon a creator's precise situation, Slow Ventures has publicized the agreement's mechanics and parameters.⁵² First, Slow Ventures incorporates an LLC, into which the creator assigns their creative and IP

⁴⁶ See Oei & Ring, *supra* note 4, at 692.

⁴⁷ See *id.*

⁴⁸ See *id.* at 692-93.

⁴⁹ See *id.*

⁵⁰ See Kokalitcheva, *supra* note 7.

⁵¹ See Lessin, *supra* note 1.

⁵² Zoom Interview with Megan Lightcap, Creator Principal, Slow Ventures (Nov. 21, 2022). According to Lightcap, deals with Creators may vary widely. For example, a creator with many expenses (e.g., retaining staff) may draw their repayment from their net income, rather than gross income. However, creators with leaner cost structures may pay Slow Ventures out of their gross income. See *id.*

income. Slow Ventures then buys an equity stake in the LLC by paying the creator anywhere from \$100,000 to \$5,000,000, which the creator may spend however they like.⁵³ In return, the LLC pays Slow Ventures annual dividends worth up to 10% of the creator's income for thirty-years.⁵⁴ The share of income for repayment equals the investors' equity share in the LLC.⁵⁵

Some terms protect creators. The ISA does not draw from “non-creative” income; that is, if a creator becomes a criminal defense lawyer, there is no obligation to repay that non-creative income, even if they earn nothing else.⁵⁶ Creators making less than a predetermined minimum annual income, usually \$100,000, may skip that year's payment without penalty.⁵⁷ Whether creators pay Slow Ventures a share of their total income or a share of their income above the minimum threshold is negotiable.⁵⁸

Despite these protections, the Creator Fund's distinguishing features are precisely its perils. Slow Ventures claims that the Creator Fund model is superior to prior ISAs on the basis that applicable income is more broadly defined without overburdening a creator and the repayment period is much longer.⁵⁹ When combined with the lack of a maximum repayment, these features position Slow Ventures to capture the tremendous upside of a high-earning creator.⁶⁰ Conversely, however, the lack of a repayment maximum means that a successful content creator may repay Slow Ventures many multiples of the amount raised, making the ISA much more expensive than an alternative loan arrangement. Furthermore, while drawing repayments from a recipient's creative and IP income may appear to protectively limit the ISA's burden on content creators, the true boundaries of the Creator ISA's applicable income are expansive. For example, creative income would include

⁵³ Slow Ventures, *Slow Creator Fund*, CREATOR FUND, <https://creatorfund.co> (last visited Oct. 30, 2022).

⁵⁴ See Slow Ventures, *supra* note 53.

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ Zoom Interview with Lightcap, *supra* note 52.

⁵⁹ See Lessin, *supra* note 1 (“[T]he very important distinction here is that the income share for influencers lasts forever and covers all earnings (not just the income generated by a tech job over a short time period)”).

⁶⁰ See Lessin, *Investing Directly in People Is the Future of VC. Here's How to Do It.*, THE INFORMATION (Nov. 5, 2021) <https://www.theinformation.com/articles/investing-directly-in-people-is-the-future-of-vc-heres-how-to-do-it> (“Just think about buying 5% of Jeff Bezos' or Elon Musk's future earnings back when they were both young pups.”); Peter Coy, *What If You Could Give Start-Up Money to People, Not Companies?*, N.Y. TIMES (Sept. 2, 2022) <https://www.nytimes.com/2022/09/02/opinion/libermans-humanism.html>.

earnings from investments in other creators, selling a Netflix special, or revenue from educational materials related to an influencer's content.⁶¹ Additionally, the ability to waive repayment in a down year without penalty provides little actual relief because the thirty-year agreement essentially spans thirty years the length of one's working career. Additionally, Slow Ventures is ostensibly sourcing deals with content creators projected to have more profitable years than otherwise. The Creator ISA may not prove as creator-friendly as it seems.

In 2021, Slow Ventures signed one of its first ISAs with Marina Mogilko, a social media influencer who primarily generates income from posting YouTube content.⁶² Slow Ventures agreed to pay Mogilko \$1.7 million in exchange for 5% of her creative income for thirty years, plus 5% of any IP-driven income generated even after her death.⁶³ Mogilko intends to use her funding to produce more content without taking as many brand deals, as well as to invest in other creators.⁶⁴

Lessin argues that the Creator ISA benefits both recipients like Mogilko, as well as investors. First and most obviously, the ISA allows Creators to raise more money for themselves because offering a share of all creative and IP income is more enticing to investors than offering a cut from a single project.⁶⁵ Second, the ISA enables creators to staff talented teams around themselves. Third and finally, the ISA fosters deal-making and alignment between funded Creators.⁶⁶ In turn, investors receive an alternative asset with a low-cost structure and a highly flexible future income model; there are many ways for a social media influencer to make money from posting content, which itself is cheap to do.⁶⁷

Slow Ventures and likeminded investors plan more investments in individuals like Mogilko. Lessin envisions listing creators on public markets, implying that some will "IPO themselves."⁶⁸ Other ISA champions more directly call for the financialization of people; for example, serial entrepreneurs Daniil and David Liberman, whose own self-made ISA received funding from Slow Ventures and mirrors the

⁶¹ Slow Ventures, *Marina Mogilko Fireside*, YOUTUBE (May 19, 2021), <https://www.youtube.com/watch?v=xxgU8vFKowY>.

⁶² Maxwell Strachan, *A Former Facebook VP Thinks Investing in Humans Is the Future of VC*, VICE (Nov. 12, 2021), <https://www.vice.com/en/article/7kb9mg/a-former-facebook-vp-thinks-investing-in-humans-is-the-future-of-vc>.

⁶³ *See id.*

⁶⁴ *See* Slow Ventures, *supra* note 61.

⁶⁵ *See* Lessin, *supra* note 1.

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ *See* Slow Ventures, *supra* note 61.

structure of the Creator ISA, solicit investors for Humansim Fund I, which is an index fund composed of creators holding ISA agreements like Mogilko's.⁶⁹ Part of the Human 500 pitch is that a human is more resilient than a company during an economic downturn.⁷⁰

Lessin and the Libermans want to bring more than just creators to investors. The Libermans, observing the alienation of younger generations, tweeted: "Today capital is extremely inaccessible for the younger generation, available in the most unpleasant form – debt. With high APR. And in case of student loans not dischargeable in bankruptcy. Equity investment is a better tool."⁷¹ The Libermans hope that ISAs will "formulate a new asset class in human potential - a new way to empower people."⁷² They aspire to make their model "accessible for everybody, not only founders...everyone who understands that tapping into their future might provide them the capital necessary to move faster and generate better results, remove barriers...and take more risk."⁷³

Similarly, Lessin sees ISAs not only as a new alternative asset opportunity for investors and a fundraising tool for creators, but as a "weird form of private [universal basic income] linked to individual ability."⁷⁴ Thus, Creator ISA proponents aspire to launch a new asset class in the guise of a social movement. Given its distinctions from prior ISAs and such expansive ambitions, the Creator ISA deserves serious scrutiny.

IV. COMMODIFICATION

"There are, in a civilized society, some things that money cannot buy."⁷⁵ Lawmakers and courts prohibit and limit certain exchanges, such as the sale of organs, because they are inappropriately commodifying.⁷⁶ The ethics of other transactions, such as prostitution, commercial

⁶⁹ See *Founder FAQ*, HUMANISM, <https://public.humanism.is/faq> (last visited Jan. 5, 2025).

⁷⁰ See *id.*

⁷¹ Daniil and David Liberman (@DaLiberman), TWITTER (Aug. 24, 2022, 2:46 PM), <https://twitter.com/daliberman/status/1562511601562841088?s=46&t=Gjk-G8KrETMB9laDfDrP8g>.

⁷² Daniil and David Liberman (@DaLiberman), TWITTER (July 25, 2022, 4:06 PM), <https://twitter.com/daliberman/status/1551660291242409984?s=46&t=Gjk-G8KrETMB9laDfDrP8g>.

⁷³ Slow Ventures, *The Libermans Co Fireside*, YOUTUBE (May 12, 2021), <https://www.youtube.com/watch?v=VtbgHOEmbX4>.

⁷⁴ *Id.*

⁷⁵ *In re Baby M*, 109 N.J. 396, 440, 537 A.2d 1227, 1249-50 (1988).

⁷⁶ See 42 U.S.C. § 274e (2011) (prohibiting the buying and selling of human organs).

surrogacy, and even yoga classes, are not always so clear.⁷⁷

In her seminal 1996 book, Margaret Jane Radin describes commodification and the problems it creates.⁷⁸ First, Radin defines commodification as an exchange of something for money occurring alongside market rhetoric, which is the conceptualization of the exchanged thing as a fungible, commensurable object that a sum of money can fully replace.⁷⁹ Fungibility means that the object is separable and freely interchangeable with other objects.⁸⁰ A commensurable object is one that an exchange can fully account for because one or more other objects provide equivalent value.⁸¹

As noted by Schwartz, the commodification of personhood is problematic.⁸² Radin explains why by defining personhood as the amalgamation of conditions that enable human flourishing.⁸³ Drawing from Martha Nussbaum's Aristotelian essentialism, Radin identifies the ability "to live one's own life in one's very own surroundings and context" as the basic requirement for living a good life.⁸⁴ To live this kind of life, a person needs identity (individuation and separation from other people), contextuality (the ability to make and break attachments to people and things outside the self), and freedom (the ability to "change things for oneself").⁸⁵

Commodification degrades personhood and stymies human flourishing because, where commodification is complete, market rhetoric becomes a contagious, and ultimately controlling, worldview. Exceptionally pernicious exchanges commodify not only the directly exchanged objects, but also spark a domino effect in which market rhetoric envelopes related objects beyond the initial transaction.⁸⁶

⁷⁷ See *Coyote Pub., Inc. v. Miller*, 598 F.3d 592, 604 (9th Cir. 2010) (acknowledging Nevada's substantial interest in restricting the commodification of sex through prostitution statutes); John Lawrence Hill, *Exploitation*, 79 CORNELL L. REV. 631, 654 (1994) (finding that baby-selling is "illegal in every state"); Cal. Pen. Code § 273 (outlawing commercial adoption); Marisa Shearer, *Mantras and Monetization: The Commodification of Yoga and Culture*, 21 VA. SPORTS & ENT. L.J. 38, 74 (2022) (discussing the commodification of yoga).

⁷⁸ See RADIN, *CONTESTED COMMODITIES*, *supra* note 11 at 11.

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ See *id.* at 118-19.

⁸² See Schwartz, *supra* note 3, at 1122-23.

⁸³ See Radin, *supra* note 78, at 2 ("Theories of personhood should not be too far divorced from the realities of needs, capacities, and circumstances that shape personal development in practice...personhood theory should pay attention to resources, distributional principles, institutional structures, and the facts of personality that make a good human life possible.").

⁸⁴ See *id.* at 76.

⁸⁵ See *id.* at 76-77.

⁸⁶ See Radin, *Market-Inalienability*, *supra* note 11, at 1912-13.

For example, an open market for adoption would directly commodify people's reproductive capacities and infants.⁸⁷ Such a market would then readily commodify the anticipated features of the exchanged babies, such as personal and physical characteristics, as well as tempt individuals outside the market to subconsciously count the monetary value of any child.⁸⁸ Because the act of buying and selling is thought-shaping, à la market rhetoric, the exchange of one object influences the conception of similar or related things; or, as put by Radin, "commodification for some [can] mean[] commodification for all."⁸⁹

Market rhetoric harms personhood in three ways. First, an individual's identity becomes an inventory of things for sale, rather than a constellation of personal characteristics and lived experiences.⁹⁰ The result is a slippery slope that may lead to the commodification of a whole person or, in other words, something akin to slavery.⁹¹ Second, market rhetoric overtakes one's contextuality as market forces subsume all relationships outside the self.⁹² Third, market rhetoric drives a person to change their lives not for self-actualization, but to optimize market value, thus overshadowing one's freedom by framing decisions in money terms.⁹³ More subtly, because interior thoughts and external facts construct each other, market rhetoric precludes thinking about anything in terms that might prioritize human flourishing and thus invites the domino effect.⁹⁴

Identity, contextuality, and freedom interact. More of one may heighten another and vice versa. For example, greater freedom may allow a person to try something new, befriend a stranger, or explore an unfamiliar place. Such experiences may bring an unknown personal attribute into view. In this way, greater freedom may enrich contextuality, which in turn may transform identity. The inverse is

⁸⁷ See *id.* at 1925.

⁸⁸ See *id.* at 1925-26.

⁸⁹ See *id.* at 1917.

⁹⁰ See Georg Lukács, *Reification and the Consciousness of the Proletariat* in HISTORY AND CLASS CONSCIOUSNESS 91 (trans. Rodney Livingstone 1971).

⁹¹ See Radin, CONTESTED COMMODITIES, *supra* note 11, at 88.

⁹² See KARL MARX, 87-88 CAPITAL: A CRITIQUE OF POLITICAL ECONOMY. VOLUME I: THE PROCESS OF CAPITALIST PRODUCTION (Charles H. Kerr and Company, 1867) ("It is, however, just this ultimate money form of the world of commodities that actually conceals, instead of disclosing, the social character of private labour, and the social relations between the individual producers").

⁹³ See Radin, CONTESTED COMMODITIES, *supra* note 11, at 81.

⁹⁴ See Radin, *Market-Inalienability*, *supra* note 11, at 1882 ("Facts are theory-dependent and value-dependent. Theories are formed in words. Fact- and value-commitments are present in the language that we use to reason and describe, and they shape our reasoning, our description, and the shape (for us) of reality itself").

unfortunately possible in various iterations: less freedom may diminish one's contextuality and identity.

If an exchange commodifies something attached to personhood, either directly or through the domino effect, then there is good reason to prohibit that exchange.⁹⁵ In many contexts, however, prohibition may encroach upon the personhood of one of the potential parties to the exchange by curtailing their freedom and depriving them of the exchange's benefits.⁹⁶ For example, prohibiting sex work restricts a sex worker's right to work.⁹⁷ Total prohibition may insult personhood to the same extent as complete commodification.

Where prohibition is problematic, a regime of incomplete commodification can protect personhood.⁹⁸ For example, regulation of residential tenancies renders rental housing incompletely commodified by helping individuals access safe housing, thus enabling those individuals to individuate themselves and their identity in their own space and attach their lives to a home.⁹⁹ Similarly, labor law often safeguards personhood in the workplace.¹⁰⁰ Thus, regulation can create exchanges that recognize and safeguard personhood to some extent.

V. CONTENT CREATORS

"When your lifestyle is your brand, the line between work and life get blurred."
—Darian Woods, *The Dark Side of the Influencer Industry*¹⁰¹

Over two million people are full-time content creators; over forty-five million more are part-time.¹⁰² In general, a content creator posts images or videos to a particular audience on platforms such as Instagram, TikTok, YouTube, Facebook, Twitch, and Twitter.¹⁰³ Recognizing that content creators shape consumer behavior amongst their audiences,

⁹⁵ See *id.* at 1897–98.

⁹⁶ See *id.* at 1910–1911.

⁹⁷ See Global Network of Sex Work Projects, *Consensus Statement on Sex Work, Human Rights, and the Law* 16-25 (Dec. 16, 2013), <https://perma.cc/4M3N-UPDL>.

⁹⁸ See Radin, *Market-Inalienability*, *supra* note 11 at 1917–21.

⁹⁹ See *id.* at 1920.

¹⁰⁰ See *id.* at 1920–21.

¹⁰¹ The Indicator from Planet Money, *Transcript: The Dark Side of the Influencer Industry*, NPR (Apr. 27, 2023) <https://www.npr.org/transcripts/1170524093>.

¹⁰² See Yuanling Yuan & Josh Constine, *SignalFire's Creator Economy Market Map*, SIGNALFIRE BLOG (Nov. 29, 2020) <https://signalfire.com/creator-economy/>.

¹⁰³ See Werner Geysler, *What Is an Influencer? Social Media Influencers Defined*, INFLUENCER MKTG. HUB (Mar. 24, 2023) <https://influencermarketinghub.com/what-is-an-influencer/>; Werner Geysler, *The State of Influencer Marketing 2023*, INFLUENCER MKTG. HUB (Feb. 7, 2023), <https://influencermarketinghub.com/influencer-marketing-benchmark-report/>.

companies have earmarked tens of billions of dollars in marketing budgets to pay content creators to promote their brands.¹⁰⁴

Brand deals, in which a company pays for the promotion of a good or service via social media post, are the largest income source for content creators.¹⁰⁵ In 2019, a content creator could demand a rate of \$100 for every 10,000 followers when making a sponsored post.¹⁰⁶ In a 2022 survey of 2,000 full- and part-time content creators, over half annually earned less than \$10,000; roughly 25% earned between \$10,000 and \$50,000; approximately 11% earned between \$50,000 and \$100,000; nearly 9% earned between \$100,000 and \$1,000,000; and 1.4% earned over \$1,000,000.¹⁰⁷

Audiences flock to content creators because social media feels relatable and intimate; a post is a window into a content creator's life.¹⁰⁸ On October 22, 2021, a TikTok content creator under the account titled "jessandskyler" posted a video in which they described their six-year span of mental health challenges and recommended that their followers find their next therapist through BetterHelp, an online counseling service.¹⁰⁹ In effect, BetterHelp paid "jessandskyler" to disclose their innermost life to over 600,000 Internet strangers. The brand deal raises questions about how companies might value other similarly personal content. One can imagine "jessandskyler" taking inventory of their trauma, symptoms, self-reflection processes, or even discussions with their therapist. Once a person's thoughts, feelings, and bodies are for sale, what is left?

In this way, there is a near-limitless aperture through which content creators can unwittingly commodify their personhood. As a result, many content creators find themselves far from flourishing, citing mental health concerns and even depression.¹¹⁰ A 2022 survey of

¹⁰⁴ See Geysler, *The State of Influencer Marketing*, *supra* note 103 (estimating that the influencer marketing industry will reach \$21.1 billion in 2023).

¹⁰⁵ See *id.*

¹⁰⁶ See Cara Kelly, *Fyre Festival to Fashion week, How Do Instagram Influencers Make So Much Money?*, USA TODAY (Feb. 12, 2019), <https://www.usatoday.com/story/news/investigations/2019/02/12/instagram-youtube-influencer-rates-fyre-festival-fashion-week-money-rich-branding-ads-girls/2787560002/>.

¹⁰⁷ See *Creator Earnings Report 2022*, NEOREACH 7 (2022), <https://neoreach.com/quarterly-reports/creator-earnings/>.

¹⁰⁸ See Monique Groen, *Swipe Up to Subscribe: The Law and Social Media Influencers*, 21 TEX. REV. ENT. & SPORTS L. 113, 115–16 (2020).

¹⁰⁹ See Jess & Skyler (@jessandskyler), TIKTOK (Oct. 22, 2021), <https://www.tiktok.com/@jessandskyler/video/7022062191691992326>.

¹¹⁰ See Taylor Lorenz, *Young Content Creators Are Burning Out and Breaking Down*, N.Y. TIMES (updated June 17, 2021), <https://www.nytimes.com/2021/06/08/style/creator-burnout-social-media.html202120212021>.

full-time content creators found that 63% of respondents experience “burnout” and attribute this experience to: pressure to post content everywhere (over 45% of “burned-out” respondents), not being able to mentally disengage (nearly 40%), the emotional labor of being a personal brand (nearly 40%), comparison culture (over 30%), and feeling alone (about 25%).¹¹¹

These findings demonstrate the many ways in which content creator commodification occurs. The pressure to post personal content for brand deals amplifies market rhetoric as a variable in a content creator’s most intimate decisions, souring any sense of freedom. Content creators may increasingly view their identity not as a depiction of self, but as a personal brand. Creators using their personal lives as a stage for brand promotions may associate monetary value to the people and places around them, as well as to their own passions, projects, and possessions. Giving market rhetoric total reach into one’s life is the hazard of content creation. One former Instagram influencer recently reported, “When you’re an influencer, then you have chains on...you can change [your] niche, but you’re still going to be performing your life for content.”¹¹²

The Creator ISA exacerbates content creator commodification. Slow Ventures pays a content creator in exchange for a future share of their creative and IP income. In other words, the Creator ISA is an exchange wrapped around a series of commodifying exchanges expected to occur in the future. Each potential social media post becomes doubly commodifying as both an immediate income source as well as a driver of ISA valuation and repayment. The ISA’s implicit obligation to generate income heightens the expectation to solicit brand deals and other influencer work, doubling down on the existing pressures on a content creator’s identity, contextuality, and freedom. Worse still, the Creator ISA applies this additional pressure not only to a creator’s next post, but to all potential content they may produce during the thirty-year contract term.

The Creator ISA contains substantial potential to spark a domino effect of commodification. Plans exist to expand the Creator ISA to

¹¹¹ *State of the Creator Economy 2022*, CONVERTKIT, [https://convertkit.com/reports/creator-economy-2022?utm_source=convertkit&utm_medium=blog&utm_campaign=sotce_2022%20\(last%20visited%20November%2010,%202022](https://convertkit.com/reports/creator-economy-2022?utm_source=convertkit&utm_medium=blog&utm_campaign=sotce_2022%20(last%20visited%20November%2010,%202022) (last visited Nov. 10, 2022).

¹¹² Mattie Kahn, *Is There Life After Influencing?*, N.Y. TIMES (Apr. 11, 2023), <https://www.nytimes.com/2023/04/11/style/lee-tilghman-influencer.html?smid=fb-nytimes&smtyp=cur&fbclid=IwAR1vjxOdoV1Eq6iSQbJM476G53f8oX8oM5yK3L7CVycORk8zPv65cBmrZ24>.

individuals earning income from activities other than content creation.¹¹³ Additionally, proponents of ISAs beyond Slow Ventures have apparently already launched an index fund, which invests in individuals via ISAs.¹¹⁴ These developments will likely advance a domino effect in two directions, as new kinds of individuals are commodified and where securitization adds successive layers of commodification. The likely result is greater pressure for creators and others to seamlessly view themselves as tradeable commodities rather than people. Additionally, securitization of the Creator ISA may limit a content creator's ability to modify the contract, introducing potential negative spillover effects.¹¹⁵

The Creator ISA also harms personhood through financial exploitation, which limits one's freedom. As discussed in Subsection C, Slow Ventures expects Mogilko to repay over \$201 million over thirty years in exchange for her \$1.7 million one-time payment. Such a substantial loss of Mogilko's income curbs her practical autonomy. Large repayments foreclose choices made possible only with that lost income, thus further paring down any freedom that Mogilko preserves from the reach of market rhetoric. For content creators just clearing the Creator ISA's minimum income threshold, a substantial cumulative repayment may meaningfully curtail their freedom.

Mogilko, the first Creator ISA recipient, recently eclipsed nine years as a content creator.¹¹⁶ She counts her largest audience of ten million subscribers on YouTube, where she primarily posts videos about learning American English and living in the United States. In addition, Mogilko posts shorter videos to over three million followers on TikTok and a mix of video and photos to roughly one million followers on Instagram. Mogilko's shorter videos attract millions of viewers, win her brand deals, and convert some individuals into paying subscribers to her YouTube channel.¹¹⁷

Mogilko's posts often feature vignettes from her personal life. In a 2022 TikTok post, apparently an exposé on the high cost of childbirth in

¹¹³ See *Invest in People*, *supra* note 69.

¹¹⁴ See Humanism, *Founder FAQ* (last updated Jan. 14, 2023), <https://public.humanism.is/faq>.

¹¹⁵ See Anna Gelpern & Adam J. Levitin, *Rewriting Frankenstein Contracts: Workout Prohibitions in Residential Mortgage-Backed Securities*, 82 S. CAL. L. REV. 1075, 1122-23 (2009) (arguing that mortgage securitization locks parties into a "precommitted resolution framework, or contract rigidity...transform[ing] consumer debt into business debt...[and] impart[ing] elements of contractual bankruptcy to relationships that it was never meant to cover").

¹¹⁶ See Slow Ventures, *A Year(ish) Retro with Our First Creator: Marina Mogilko*, YOUTUBE (Sept. 7, 2022), <https://www.youtube.com/watch?v=a1ssLSCcVxI>.

¹¹⁷ See Marina Mogilko (@linguamarina), TIKTOK (Apr. 25, 2023), <https://www.tiktok.com/t/ZT81XjoUF/>.

Californian hospitals, Mogilko beckons, “Let me show you the experience first,” before presenting scenes from the birth of her second child, including the beginning of her labor at home, driving with her partner to the hospital, embracing her newborn in the delivery room, and her family’s hospital discharge.¹¹⁸ The TikTok generated over thirty-four million views and nearly five million likes.¹¹⁹ Mogilko’s personal life drives her content, which in turn she commodifies in exchange for income from brands, subscribers, and the Creator ISA.

Prohibiting the Creator ISA, however, is too heavy-handed a response. Not all content creators might have access to venture debt, which is arguably the closest alternative funding source. Typically utilized by startups and early-stage companies, venture debt provides recipients with capital to fund capital expenses or extend a cash runway to achieve a major milestone (e.g., landing a Netflix deal) in exchange for quarterly cash interest payments.¹²⁰ Venture debt interest rates usually equal the prime rate plus a spread of 6 to 10%.¹²¹ Thus, forbidding exchanges like the Creator ISA may cause further harm to content creators. Instead, limits on some of the commodifying aspects of the Creator ISA may better protect content creators.¹²² Existing law may provide some of these limits, but reform is likely necessary to achieve a sufficient state of incomplete commodification.

VI. LEGAL CHALLENGES TO THE CREATOR ISA

The Creator ISA carries the potential to harm personhood through market rhetoric—which infringes one’s identity, contextuality, and freedom—as well as through financial exploitation, which narrows the range of possible choices for a content creator making substantial repayments. The law, however, offers limited protection for content creators. The Thirteenth Amendment guards only against slavery and indentured servitude, which are problems of a different order than the Creator ISA. Consumer protection law currently focuses on ISAs targeting students.

¹¹⁸ Marina Mogilko (@linguamarina), TIKTOK (Mar. 12, 2022), <https://www.tiktok.com/@linguamarina/video/7074324320360598830?lang=en>.

¹¹⁹ *See id.*

¹²⁰ Kyle Peterdy, *Venture Debt*, CORP. FIN. INST., <https://corporatefinanceinstitute.com/resources/capital-markets/venture-debt/> (last visited Mar. 21, 2023).

¹²¹ Lori Ioannou, *Startups Turn to Venture Debt to Turbocharge Growth*, U.S. CHAMBER OF COM. (Jan. 18, 2023), <https://www.uschamber.com/co/good-company/launch-pad/startups-turn-to-venture-debt-for-growth>.

¹²² *See Radin, Market-Inalienability, supra* note 11 at 1921–22 (proposing partial decriminalization of prostitution in a way to protect the personhood of sex workers).

Thin hope exists where legislatures and courts might view the Creator ISA as a loan and thus subject to usury law and the unconscionability doctrine. However, the availability of an usury defense against collection varies by state and often does not apply to instruments like the Creator ISA. Additionally, raising an unconscionability defense against collection requires the resources and willpower to litigate, as well as the ability to clear a relatively high substantive threshold. Reform is necessary to better protect personhood.

A. Constitutionality

Popular discourse frequently frames ISAs as a form of indentured servitude or even slavery, raising the question of whether constitutional law prohibits ISAs.¹²³ Scholars assessing the legality of ISAs typically draw upon the Thirteenth Amendment's provisions against slavery and indentured servitude, as well as the Anti-Peonage Act. Considered against these laws, however, the Creator ISA appears constitutional.¹²⁴

The Thirteenth Amendment provides that “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”¹²⁵ The Supreme Court exactingly describes slavery as the “institution of African slavery as it had existed in the United States at the time of the Civil War.”¹²⁶ In this light, testing the Creator ISA against the Thirteenth Amendment's slavery prohibition is absurd. To consider whether a contract in which a consenting party agrees to pay a venture capital firm 10% of their income for thirty-years is similar to slavery disparages the experiences of those who suffered the institution of African slavery. The Creator ISA falls far short of amounting to slavery even if one callously defines slavery as ceding 100% of one's income to another.¹²⁷

Nor does the Creator ISA resemble indentured servitude, which the Supreme Court defines as “a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical

¹²³ See Andrew Ross Sorkin, *No Tuition, but You Pay a Percentage of Your Income*, N.Y. TIMES (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/business/dealbook/education-student-loans-lambda-schools.html> (“Critics of such programs have argued they are a form of indentured servitude”); Milton Friedman, *The Role of Government in Education in ECONOMICS AND THE PUBLIC INTEREST* 123, 138 (Robert A. Solo ed., 1955) (“...they are economically equivalent...to partial slavery”).

¹²⁴ See Schwartz, *supra* note 3, at 1119; Oei & Ring, *supra* note 4, at 681.

¹²⁵ U.S. Const. amend. XIII, § 1.

¹²⁶ U.S. v. Kozminski, 487 U.S. 931, 942 (1988).

¹²⁷ See Schwartz, *supra* note 3, at 1135.

restraint or physical injury, or by the use or threat of coercion through law or the legal process.”¹²⁸ *Slow Ventures* does not compel a content creator to work; in fact, a creator could choose not to work at all.¹²⁹ The firm does not ensure specific performance with physical force or legal coercion and courts finding breach of contract could only award money damages rather than levy criminal sanctions.¹³⁰

The Thirteenth Amendment also authorizes federal legislation consistent with its prohibitions against slavery and indentured servitude.¹³¹ Invoking this power, Congress passed the Anti-Peonage Act in 1867 to end peonage, the practice of forcing a person to serve a master in repayment of a debt.¹³² Similarly to indentured servitude, peonage involves the compulsion of performance by law or force.¹³³ Given that breach of the Creator ISA is not criminalized, peonage does not accurately describe the Creator ISA. In summary, the Thirteenth Amendment does not provide any actionable limits on the Creator ISA.

B. Consumer Protection

While *Slow Ventures* calls the Creator ISA an equity investment, a recent Consumer Financial Protection Bureau (CFPB) consent order against a student-facing ISA provider for students suggests that regulators may view the Creator ISA as a loan subject to consumer protection law.¹³⁴ In September 2021, the CFPB concluded an investigation of Better Future Forward (BFF) and several associated companies collaborating to issue ISAs to students seeking funding for postsecondary education.¹³⁵ The CFPB’s investigation found that BFF falsely represented that its ISAs were not loans, thus engaging in deceptive practices in violation of the Consumer Financial Protection Act of 2010 (CFPA), as well as that BFF failed to give certain required consumer disclosures and imposed prepayment penalties in violation of

¹²⁸ Kozminski, 487 U.S. at 952.

¹²⁹ See *Slow Creator Fund*, *supra* note 53 (“The creator always has a right-of-first refusal on transactions. If the creator decides to walk away from their creative career and stops generating creative income, that is their decision”).

¹³⁰ See Schwartz, *supra* note 3, at 1137 n. 140.

¹³¹ See U.S. Const. amend. XIII, § 2.

¹³² See 18 U.S.C. § 1581; *Clyatt v. United States*, 197 U.S. 207, 215 (1905) (interpreting the Anti-Peonage Act).

¹³³ See *Clyatt*, 197 U.S. at 216.

¹³⁴ See Press Release, Consent Order Against Better Future Forward, Inc., CONSUMER FIN. PROT. BUREAU (Sept. 7, 2021), <https://www.consumerfinance.gov/enforcement/actions/better-future-forward-inc/>.

¹³⁵ See *id.*

the Truth in Lending Act, Regulation Z, and the CFPA.¹³⁶ The CFPB ordered BFF to “cease [its] misrepresentations, provide consumers with required disclosures, and reform contracts to eliminate prepayment penalties.”¹³⁷

The CFPB determined that the BFF ISA is credit because it gives an individual the right “to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment for such purchase.”¹³⁸ Second, the CFPB found that BFF engaged in deceptive practices by repeatedly describing their product as something other than a loan in violation of the CFPA.¹³⁹ Third, BFF failed to provide disclosures required by consumer loans in violation of Regulation Z.¹⁴⁰ Because BFF offers its ISA to consumers expressly to pay for postsecondary education expenses, it also failed to disclose student loan bankruptcy information in further violation of Regulation Z.¹⁴¹ Lastly, the CFPB found that BFF imposed an illegal prepayment penalty by requiring individuals to pay a “Total Payment Cap” equal to the amount funded multiplied by 1.1, plus an interest rate called a “growth component.”¹⁴² According to the consent order, “if a student paid off the ISA earlier than the regularly scheduled payment obligations would, the student would potentially pay more than the amount funded plus the growth component” in violation of TILA.¹⁴³

Regulators may consider making similar determinations against the Creator Fund because the two ISA models are substantially similar. Like the Creator ISA, the BFF ISA pays a recipient a sum of money to finance their expenses.¹⁴⁴ In return, the BFF recipient repays a percentage of their income until they have reached their “Total Payment Cap” or until the term of the ISA has expired, whichever occurs first.¹⁴⁵ Both are loans because they defer payment of a debt, as defined by the Dodd-Frank Wall Street Reform and Consumer Protection Act.¹⁴⁶

¹³⁶ *See id.*

¹³⁷ *See id.*

¹³⁸ *See* Better Future Forward, Inc., 2021-CFPB-0005 at 8 (2021) (quoting 12 U.S.C. § 5481(7)).

¹³⁹ *See id.* at 8–10.

¹⁴⁰ *See id.* at 11. BFF failed to disclose the amount financed, the finance charge, and the annual percentage rate. *Id.*

¹⁴¹ *See id.* at 12.

¹⁴² *See id.* at 12–13. BFF required individuals to either pay the sum of their amount funded multiplied by 1.1, plus a growth component of either 4.5% or 7% per year, or make payments for the full duration of the 12-to-20-year agreement. *Id.* at 7–8.

¹⁴³ *See id.* at 12–13.

¹⁴⁴ *See id.* at 7.

¹⁴⁵ *See id.* The “Total Repayment Cap” is effectively a repayment maximum and distinguishes the BFF model from that of the Creator Fund, which lacks any mechanism to prevent recipients from making excessive payments.

¹⁴⁶ *See* 12 U.S.C. § 5481(7).

Furthermore, both create “the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment” and thus count as credit under TILA.¹⁴⁷

While the BFF consent order suggests that the CFPB may treat the Creator ISA as a loan due to its functional equivalence, there is less certainty as to whether the CFPB would apply the consumer protections of the CFPA, as well as the student-oriented rules of Regulation Z and TILA, against the creator-focused ISA. The CFPA and Regulation Z’s disclosure rules extend to persons and entities offering or providing any financial product or service for use by consumers for personal, family, or household purposes.¹⁴⁸ While the Creator ISA does not restrict creator spending, the money is meant for investment in business growth.¹⁴⁹ This purview is broad enough to allow Mogilko to hire a Parisian stylist.¹⁵⁰ However, the distinctions between business and personal spending break down for a content creator earning income by posting about their personal life.¹⁵¹ A person could use ISA funding for spending traditionally categorized as personal and thus technically covered by consumer credit rules.

There is a similar gap between the Creator Fund and the student-minded protections of Regulation Z and TILA, which cover loans “extended to a consumer expressly, in whole or in part, for postsecondary educational expenses.”¹⁵² While the Creator ISA does not explicitly market an educational purpose, its terms do not prohibit a creator from using part of their funds to pay for schooling.¹⁵³ Additionally, given that the proliferation of students that are content creators, there is potential

¹⁴⁷ See 15 U.S.C. § 1602(f).

¹⁴⁸ See 12 USC § 5481(5-6) (defining covered person under the Wall Street Reform and Consumer Protection Act); 12 CFR § 1026.2(a)(11-12) (defining consumer).

¹⁴⁹ See Slow Ventures, *supra* note 53 (“The Slow Ventures Creator Fund is designed specifically to invest capital in individuals to help them build their brands & create more long-term value”).

¹⁵⁰ See Nathan Heller, *Is Selling Shares in Yourself the Way of the Future?*, THE NEW YORKER, <https://www.newyorker.com/magazine/2022/08/01/is-selling-shares-in-yourself-the-way-of-the-future> (July 25, 2022).

¹⁵¹ See David Schwab, *Why Lifestyle Influencers Are the Next ‘It’ Endorser*, FORBES (May 11, 2016) <https://www.forbes.com/sites/davidschwab/2016/05/11/why-lifestyle-influencers-are-the-next-it-endorser/?sh=730d6de6524f>; <https://www.trendio.io/blog/lifestyle-influencer> (“Basically, they are simply documenting their daily lives”).

¹⁵² See 12 CFR § 1026.46(b)(5) (setting out the student loan provisions and defining education loans for TILA and Regulation Z).

¹⁵³ See Slow Ventures, *supra* note 53 (“The money can be used for anything that the creator wants”).

for overlap between educational expenses and business expenses.¹⁵⁴ Blurred distinctions between spending for creative, consumer, and educational purposes suggest that regulators could treat the Creator ISA as a loan for consumers and students and thus subject to the CFPA, Regulation Z, and TILA.

If the CFPB applies the CFPA, Regulation Z, and TILA against the Creator ISA, then Slow Ventures is likely in violation of consumer protection law. Similarly to BFF, Slow Ventures describes its ISA with terms materially different from the word “loan,” such as “seed capital” and an “investment.”¹⁵⁵ While Slow Ventures has yet to publicize a sample ISA contract, its press releases, social media posts, and other related statements do not call the product a loan. As indicated by the BFF consent order, this implies that Slow Ventures’ representations produce the net impression that its ISA is not a loan and thus does not create debt, which is likely to mislead consumers and thus constitute a deceptive practice violative of the CFPA.¹⁵⁶

If the CFPB applies Regulation Z against Slow Ventures, then the Creator ISA fails to give legally required disclosures about its products, such as the amount financed, the finance charge, and the annual percentage rate.¹⁵⁷ While the full extent of Slow Ventures’ disclosures is unknown because there are no publicized sample Creator ISA contracts, there is nothing to suggest that Slow Ventures provides all disclosures required by Regulation Z. Slow Ventures implies that creators understand the ISA’s operation because the firm discloses a “mini-model” of the deal.¹⁵⁸ But Slow Ventures’ public description of the ISA as an investment or seed capital raises a reasonable doubt as to whether the underlying contract provides a creator with the Regulation Z’s loan-specific disclosures.

Ultimately, a CPF consent order could analogize the Creator ISA to the BFF ISA and similarly categorize it as a loan.¹⁵⁹ If the CFPB declares that the Creator ISA is a loan and that Slow Ventures fits the

¹⁵⁴ See Lindsay McKenzie, *Big Influencers on Campus*, INSIDE HIGHER ED (Dec. 4, 2019), <https://www.insidehighered.com/news/2019/12/05/working-student-social-media-influencers>.

¹⁵⁵ See Slow Ventures, *supra* note 53; Better Future Forward, Inc., *supra* note 138, at 8-10.

¹⁵⁶ *Id.* at 9-10.

¹⁵⁷ See 12 C.F.R. § 1026.18(b), (d), (e).

¹⁵⁸ See Mogilko, *supra* note 61.

¹⁵⁹ See Oei & Ring, *supra* note 4, at 710-11. One way to ideate a regulatory approach in a developing sector is to identify transactions that are both comparable to a specific ISA model and face existing regulation. The rationale is that the government should regulate similar economic activities in the same way. Failing to do so may introduce market distortions and incentivize regulatory shopping. See *id.*

definition of a covered financial institution as defined in the CFPB's proposed small business lending rule amending Regulation B, regulators can then require the firm to "compile, maintain, and submit...certain data on applications for credit for women-owned, minority-owned, and small businesses."¹⁶⁰ Next, regulators may appreciate that the amorphous economic character of the content creator justifies the further classification of the Creator ISA as a consumer loan, thus requiring Slow Ventures to both represent the agreement as a loan and to issue Regulation Z's consumer disclosures.¹⁶¹ These measures alone may better inform individuals of the ISA's inherent repayment risks, thus enabling more even-handed negotiations and ultimately provide content creators with more information and control while negotiating with ISA providers, such as Slow Ventures.

Thus, the application of consumer protection law may force Slow Ventures to more accurately describe the Creator ISA as a loan. However, while better disclosure may dissuade some individuals from entering into the Creator ISA, consumer protection law does not appear to limit the deal's inherently commodifying features.

C. Usury Claims and Unconscionability Defenses

While consumer protection law may not directly limit the commodification potential of the Creator ISA, treating an ISA like a loan implies that a content creator's repayments represent an interest payment subject to usury law and unconscionability doctrine. Significantly, the lack of a repayment maximum in the Creator ISA means that a content creator may make an excessively high interest payment, far beyond what they may have repaid for a loan. A disgruntled creator may seek restitution, damages or challenge the enforceability of their exorbitantly expensive ISA through usury and unconscionability claims.¹⁶²

In many jurisdictions, state law provides a cause of action for usury, which is the practice of lending at an unreasonably high interest

¹⁶⁰ See Small Business Lending Data Collection Under the Equal Credit Opportunity Act (Regulation B), 86 Fed. Reg. 193 (proposed Oct. 8, 2021) at 56540.

¹⁶¹ While a Creator ISA participant technically could use their funds for educational expenses, it is unlikely in practice that Slow Ventures would enter into an agreement with an individual considering the funds for that purpose. Thus, the application of student loan disclosure rules to the Creator ISA is not a priority.

¹⁶² See Del. Code Ann. tit. 6, § 2304 (2021) (identifying restitution and damages as appropriate remedies where a court finds usurious practices); *De La Torre v. CashCall, Inc.*, 422 P.3d 1004, 1021 (Cal. 2018) (setting forth restitution or injunctive relief as appropriate remedies for successful unconscionability claims).

rate.¹⁶³ In Delaware, Slow Ventures' place of incorporation, there is a usury defense to collection where a borrower in an express contract pays more than 5% above the Federal Reserve discount rate.¹⁶⁴ But the defense is narrow, applying only to loans less than or equal to \$100,000 and secured by a mortgage.¹⁶⁵ Furthermore, to facilitate payments between Slow Ventures and a content creator, the Creator ISA requires an LLC, to which Delaware does not extend the usury defense.¹⁶⁶ Unless there is controlling and applicable usury law in the domicile of a creator's interposed LLC, someone like Mogilko is likely unable to make an usury claim against the Creator ISA due to their "loan" surpassing the statutory maximum, the lack of mortgage securitization, and the interposition of an LLC.¹⁶⁷

However, a creator may refuse to make repayments on the basis that the Creator ISA is unenforceable due to its unconscionably high de facto interest rate. Several courts, including the Court of Chancery of Delaware, have found excessively high interest rates sufficiently unconscionable to invalidate certain loans and to impose lower rates.¹⁶⁸ But a high interest rate alone does not automatically enable an unconscionability defense.¹⁶⁹ Invalidating a loan due to a high interest rate requires a fact-intensive demonstration of substantive and procedural unconscionability.¹⁷⁰

Substantive unconscionability exists where a contract's results are overwhelmingly harsh or one-sided, while procedural unconscionability involves oppression or surprise.¹⁷¹ An evaluation of substantive unconscionability may consider an excessive price, the denial of basic

¹⁶³ See *Bisno v. Kahn*, 225 Cal. App. 4th 1087, 1097 (170 Cal. Rptr. 3d, 2014), as modified on denial of reh'g (May 23, 2014).

¹⁶⁴ See Del. Code Ann. tit. 6, § 2301(a) (2016).

¹⁶⁵ See *id.* at § 2301(c).

¹⁶⁶ See Del. Code Ann. tit. 6, § 2306 (2017).

¹⁶⁷ Several states have usury laws that cover commercial loans, but these laws typically only apply to smaller loans.

¹⁶⁸ See *State ex rel. King v. B & B Inv. Grp., Inc.*, 329 P.3d 658, 674 (N.M. 2014) (finding signature loans with interest rates of 1,147.14% to 1,500% unconscionable); *James v. Nat'l Fin., LLC*, 132 A.3d 799, 816-21 (Del. Ch. 2016) (finding a one-year non-amortizing, unsecured cash advance of \$200 with APR of 838.45% was unconscionable); *Citibank (S.D.), N.A. v. DeCristoforo*, No. 0902536C, 2011 WL 1020497, 5 (Mass. Super. Jan. 4, 2011), (declaring *sua sponte* that a credit card agreement with a 55% interest rate is unconscionable), *vacated* *Citibank (S.D.), N.A. v. DeCristoforo*, 83 Mass. App. Ct. 1131, 987 N.E.2d 619 (2013); *De La Torre*, 422 P.3d at 1020 (holding that a high interest rate can render a contract unconscionable); *In re Donohue, Bankr. N.D. Cal.*, No. 19-41271 CN at 3 (Jan. 27, 2020) (holding that a credit loan agreement with a 240% interest rate was unconscionable).

¹⁶⁹ See *De La Torre*, 422 P.3d at 1019.

¹⁷⁰ See *id.* at 1014.

¹⁷¹ See *id.*

rights and remedies, penalty clauses, the placement of disadvantageous clauses in fine print, adverse provisions that are confusingly phrased, and an overall imbalance in the obligations and rights imposed by the agreement.¹⁷² Inequality of bargaining power, exploitation, boiler plate language from a drafter in a stronger economic position, take-it-or-leave-it logic, and the circumstances surrounding the execution of the loan (e.g., commercial setting, purpose, and actual effect) may justify a finding of procedural unconscionability.¹⁷³ A greater showing of one kind of unconscionability may mitigate shortcomings in the other.¹⁷⁴

The Mogilko deal illustrates the potential unconscionability of the Creator ISA. The ISA's differentiators—primarily, the lack of a repayment cap and the long agreement period of thirty years—position Mogilko to make extraordinarily large repayments to Slow Ventures, giving rise to one-sided results and a strong showing of substantive unconscionability. Slow Ventures has publicized several of the assumptions behind the Mogilko deal, enabling an estimation of the ISA's expected outcomes.¹⁷⁵

Before Mogilko entered into her agreement with Slow Ventures, she apparently annually earned 25% year-over-year in Scenario B, and 50% year-over-year in Scenario C—and assigned each a percentage likelihood.¹⁷⁶ Mogilko's historical year-over-year income growth of 200% since monetization provided a basis for the scenarios' estimated income growth rates.¹⁷⁷ If Mogilko earns income only from content creation, and starts repaying Slow Ventures once she clears \$100,000 in annual income, then Slow Ventures almost expects Mogilko to repay as much as \$201 million over thirty years, as demonstrated by Scenario B in Table 1.

¹⁷² See James, 132 A.3d at 815-16.

¹⁷³ See *id.* at 826.

¹⁷⁴ See De La Torre, 422 P.3d at 1004.

¹⁷⁵ See Slow Ventures, *supra* note 61.

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

Table 1

THE MECHANICS OF MOGILKO'S CREATOR ISA¹⁷⁸

| Assumptions | Slow Venture's Scenarios | | |
|--|--------------------------|--------|-----------|
| | A | B | C |
| Starting income (millions of dollars) | 1.00 | 1.00 | 1.00 |
| Principal (millions of dollars) | 1.70 | 1.70 | 1.70 |
| Share of income for repayment (%) | 5 | 5 | 5 |
| Term (years) | 30 | 30 | 30 |
| Year-over-year income growth (%) | 5 | 25 | 50 |
| Scenario likelihood (%) | 40 | 55 | 5 |
| Total repayment (millions of dollars) | 3.34 | 201.55 | 28,762.36 |
| Interest payment (millions of dollars) | 1.64 | 199.85 | 28,760.66 |
| Annual simple interest rate (%) | 3 | 392 | 56,393 |

In Scenario B in Table 1, the equivalent annual simple interest rate of a \$201 million repayment spread over thirty years with a \$1.7 million principal is 392%. Taken literally, Slow Ventures' scenarios suggest that Mogilko should plan to repay over \$200 million for a \$1.7 million loan. Such massively one-sided results are grounds for substantive

¹⁷⁸ Dollar figures are represented in millions. Public information about Mogilko's ISA enables the calculation of the simple annual interest rate that she will effectively pay. See Mogilko, *supra* note 61. A simple annual interest rate is equal to the interest payment first divided by the number of annual payments, and then divided by the principal.

Mogilko's interest payment is equal to her total repayment minus the Slow Ventures' \$1,700,000 payment, which serves as the de factor loan principal. Her total repayment is the sum of her 30 annual repayments, each worth 5% of her annual income for a given year. Her annual income for any given year is equal to her prior year income multiplied by the sum of 1 plus that scenario's assumed year-over-year income growth rate, less \$100,000 (the minimum income threshold for repayment). Thus, in year two of Scenario A (which assumes year-over-year income growth of 5%), Mogilko's projected income is \$1,102,500 and her repayment is \$50,125. In Scenario A, the sum of Mogilko's total repayment is \$3,338,039. Subtracting the \$1,700,000 principal from the total repayment gives an interest payment of \$1,638,039. Dividing the \$1,638,039 interest payment by 30 (the number of payment periods) equals \$54,601.31. Dividing this figure by the \$1,700,000 principal gives a simple annual interest rate of 3% for Scenario A. This article repeats these steps to determine Mogilko's effective simple annual interest rate in Scenario B and C, which assume year-over-year growth rates of 25% and 50%, respectively.

unconscionability.¹⁷⁹

Venture debt, which Lessin himself identifies as an alternative to the Creator ISA, typically charges a maximum annual interest rate of 18.5% for monthly repayments lasting up to five years.¹⁸⁰ The most expensive venture debt available would amount to a total repayment of around \$2.62 million, or the equivalent of 4% year-over-year income growth for Mogilko under the Creator ISA. Slow Ventures all but expects a far greater repayment than \$2.62 million, thus making Mogilko's ISA much more expensive than the closest alternative.

Given the nonpublic nature of the negotiations and subsequent contract between Slow Ventures and Mogilko, there is less information supporting a demonstration of procedural unconscionability. However, a court may allow discovery as to whether there is unequal bargaining power between a single content creator and a venture capital firm with investments in more than five hundred companies. Even if there is thin initial evidence of procedural unconscionability, a court may find the showing of substantive unconscionability strong enough for a creator to survive summary judgment.¹⁸¹ In summary, content creators are unlikely to find safeguards in usury laws but may find some protection by raising the unconscionability defense if sued for breach of contract. However, such relief may arrive too late to meaningfully mitigate commodification.

VII. REFORM

Reform is often justified in nascent economic contexts, especially in the digital age.¹⁸² While ISAs are decades old, their application to content creators raises serious and novel commodification concerns. Yet existing law is unlikely to provide sufficient protection for personhood. The Thirteenth Amendment and the Anti-Peonage Act offer no meaningful limits. Activation of consumer protection law requires the

¹⁷⁹ See James, 132 A.3d at 816 (“[e]ven defenders of fringe credit have recognized that ‘[a]t first glance, it would seem irrational for any consumer to borrow money at an interest rate exceeding 400% under any circumstance.’”) (quoting Edward C. Lawrence & Gregory Elliehausen, *A Comparative Analysis of Payday Loan Customers*, 26 CONTEMP. ECON. POL’Y 299, 299 n.1 (2008)).

¹⁸⁰ See Slow Ventures, *supra* note 61; *When Is Venture Debt Good for Your Business?*, Silicon Valley Bank, <https://www.svb.com/startup-insights/venture-debt/when-is-venture-debt-right-for-your-business> (last visited Nov. 29, 2022).

¹⁸¹ See De La Torre, 422 P.3d at 1022.

¹⁸² See *FTC to Crack Down on Companies Taking Advantage of Gig Workers*, FED. TRADE COMM’N (Sept. 15, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/09/ftc-crack-down-companies-taking-advantage-gig-workers> (announcing Federal Trade Commission enforcement priorities for protecting consumers working in the gig economy).

CFPB's recognition that the Creator ISA is a loan. Even then, consumer protection law would appear to merely mandate certain consumer loan disclosures. Additionally, usury claims are beyond reach in Slow Ventures' Delaware domicile and many other states. The only discernable limit appears to come from the unconscionability defense, which requires a content creator to have the capacity to litigate, as well as a court to treat the Creator ISA as a loan. Thus, current law does not constrain any of the Creator ISA's key commodifying terms. Thus, reform is necessary to create a state of incomplete commodification.

Narrowing the terms of the Creator ISA appears the simplest way to temper some of the key commodification concerns. Such measures could include capping a content creator's repayment, shortening the contract duration, and more precisely defining applicable income. Under these limits, there is less for a content creator to sell to Slow Ventures through the Creator ISA. In the near-term, the CFPB could implement these initial reforms by classifying the Creator ISA as a consumer loan more squarely subject to state usury law. State legislators could indirectly create a repayment cap by enacting a ceiling on interest rates for ISA-like instruments in state usury law, potentially in reference to interest rates in venture debt and other comparable alternatives. If regulators classify the Creator ISA as a loan, then they may order Slow Ventures to reset the terms of each ISA deal in accordance with usury law and to comply with interest rate maximums in future deals.¹⁸³

The heart of the problem, however, is that digital technology allows individuals to sell their time and selves in ways that obscure the distinction between work and personal activity at the cost of personhood. More fundamental reforms might aim to professionalize content creation by mandating companies to hire content creators as part- or full-time employees shielded by labor law, rather than as contract employees.¹⁸⁴ Professionalization of the creator workforce may also invite content creators to better delineate their personal lives from their labor, thus counteracting the creep of market rhetoric. Regulation may cause content creation to lose some appeal—for example, the ability to work anywhere, anytime—but such structure would likely better protect the personhood of many content creators while allowing them to continue posting.

¹⁸³ See Better Future Forward, Inc., *supra* note 138, at 19 (ordering the reformation of the BFF ISA contract to more fairly cap loan repayments by recalculating each contract's Total Repayment Cap).

¹⁸⁴ See Jennifer Sherer & Margaret Poydock, *Flexible Work without Exploitation*, ECON. POL'Y INST. at 21-24 (Feb. 23, 2023), <https://www.epi.org/publication/state-misclassification-of-workers/>.

CONCLUSION

The norms governing the nascent creator economy are yet emerging. Existing law inadequately protects personhood against the Creator ISA and others like it, but reforms drawing from existing legal frameworks can facilitate incomplete commodification in the near-term and make an immediate difference for many content creators currently reporting burnout. Of course, such reforms cure neither the underlying conditions contributing to a generation's digital hustle to make a living nor investors' desire to invent new markets. But, for now, these initial measures may better balance the scales towards personhood in a jurisprudence built for property rights.