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The 2020 Brigham Young University Prelaw Review (Journal), continues to demonstrate Brigham Young University’s commitment to excellence in scholarship and student development. Throughout this past year, it has been a privilege to work with ambitious students who want to produce the best possible undergraduate legal journal.

Continuing the vision of the Journal, this year’s staff has worked arduously to present professional and current legal scholarship. As undergraduates, the depth and breadth of the addressed topics required that these students do much more than just edit. The authors and editors researched to find court cases and law review articles to support their arguments. During the year, as new information became available, authors and editors continually updated and refo-cused their arguments to provide timely discussions of the current issues. Consequently, each of these articles reflects the latest deci-sions from the courts and scholarship from the legal community.

The goal is always to produce a reputable legal journal. How-ever, this experience also provides the opportunity for the staff to prepare themselves as members for future professional scholarship and work in the legal field. Each student has become proficient in the Bluebook system of legal citations and all have spent countless hours editing and source checking each other’s legal articles. The students have also learned to analyze pressing issues, incorporate legal citations, and present cogent legal arguments, all while receiv-ing training in journal publishing. These students leave the 2019 edi-tion of this Journal possessing the ability to excel in law and other professional pursuits.

We continue to be grateful for the endowment from the Rawlinson Family Foundation that funds the Journal and the support of Brigham Young University’s resources to create and print this pub-lication. As you read the topics addressed in this Journal, I’m sure that you will agree that this is an impressive work produced by these
BYU undergraduate authors and editors. It continues to be a pleasure to work with such fine individuals and students on a daily basis.

Kris Tina Carlston, JD, MBA
Director—Pre-Professional Advisement Center
Prelaw Advisor
EDITOR IN CHIEF & MANAGING EDITOR’S NOTE

We are both honored and humbled by the privilege to oversee the publication of the 2020 edition of the Brigham Young University Prelaw Review. As new legal issues arise each year, we feel it is essential for students to understand and add their voices to these important issues and debates. We believe the 2020 Prelaw Review staff have met this goal through their hard work and commitment. We feel the innovative claims in each article are capable of enlightening and broadening the reader’s perspective. They add to relevant conversations on legal topics ranging from education to gender reassignment in prison, from labor law to contracts.

Authors and editors for this year’s Prelaw Review were selected in July of 2019. In their applications authors submitted drafts and abstracts with proposed arguments in their relevant areas of research. They were later paired with an editor to assist them in the writing process. Then, with the help of their editors, authors spent the next several months researching, writing, refining arguments. Throughout this process each partnership overcame numerous challenges as their worked to improve their arguments. The result is truly a tribute to their desires and vision.

Each team sought the guidance of legal professionals and professors to better understand and address their topics. We wish to extend our heartfelt thanks to everyone who took the time to help lift this journal to a higher plane of quality. We wish to thank Taylor Peterson and Neal Hillam for their invaluable efforts in bringing this all together as well as the week by week support of editing, reading and revising. We are extremely grateful to Kris Tina Carlston for her time and effort in behalf of this journal as well as her excellent sense of humor. Finally, we wish to thank Laura Bean for formatting each paper prior to publication.
It is with great pleasure we present the 2020 edition of the Brigham Young University Prelaw Review. We wish all those involved the best of luck in their future endeavors and goals.

Holly Castleton    Samuel Gustafson
Editor in Chief    Managing Editor
EVALUATING THE CLASSIFICATION OF GENDER CONFIRMATION SURGERY AS A MEDICAL NECESSITY FOR INMATES

Alexis J. Watson

In 2012, Mason Edmo pleaded guilty to the sexual abuse of a fifteen-year-old boy and was sentenced to ten years in prison. While in prison, Edmo announced that she identified as a female and changed her name to Adree. Edmo went on to request gender confirmation surgery (also known as “sex reassignment surgery”) while still in prison. Initially, Edmo was not granted the surgery by the Idaho Department of Corrections, and went on to self-harm and attempt self-castration twice. In 2017, Edmo filed suit against the Idaho State Department of Corrections (IDOC) and won. The IDOC disagreed with the decision, filing an appeal to the Ninth Circuit Court, but in August of 2019, the appeal was denied and Edmo was granted the surgery in Edmo v. Corizon. This was the first time a circuit court had granted an inmate’s request for gender confirmation surgery.

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1 Alexis is a Sophomore studying Finance and English at Brigham Young University. She would like to recognize and thank Landon Hooley, a student at Brigham Young University studying Political Science, for his diligence and insight as an editor.

2 Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019).

Public response to the *Edmo v. Corizon* decision has been very polarized. Some people are pleased with the decision because they believe the surgery to be a medical necessity, and should be provided to avoid discrimination against transgender individuals. Others disagree, believing that gender confirmation surgery should not be granted to inmates while there are law-abiding citizens who desire the surgery but cannot afford it. Still, others are upset by the decision because they believe the surgery to be beyond the range of care that inmates ought to be provided with, regardless of circumstance.

The surgery was granted to Edmo under the Eighth Amendment, which states that cruel and unusual punishments shall not be inflicted upon prisoners. In the context of prison healthcare, this has been interpreted by the Supreme Court to mean that correctional facilities must provide prisoners with medically necessary healthcare to avoid administering cruel and unusual punishment. For example, if an inmate were to experience severe blood loss without being treated for it, the correctional facility would be in violation of the Eighth Amendment. Although this may seem like a straightforward interpretation of the law, opinions have differed regarding what exactly constitutes a medically necessary procedure. Was the Ninth Circuit Court correct in classifying gender confirmation surgery as a medically necessary procedure in *Edmo v. Corizon*? This question is important because correctly identifying which medical treatments are necessary is key to ensuring that our correctional institutions remain constitutional and free from cruel and unusual punishment.

This paper seeks to answer this question by first examining precedent set by the court regarding medical care for inmates, and second, examining state law that defines a “medically necessary” procedure. A solution will then be proposed as to how correctional

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5 U.S. CONST. amend. VIII, § 1.

institutions and courts might better accommodate transgender inmates while remaining within the bounds of medically necessary care as established by the Eighth Amendment.

I. BACKGROUND

To understand the problems with the Ninth Circuit’s decision in Edmo, it is necessary to understand (a) the experience of inmates with gender dysphoria, (b) the history and current research surrounding gender confirmation surgery, and (c) inmates’ use of the Eighth Amendment to request said surgery.

A. Gender Dysphoria

According to the American Psychological Association (APA), gender dysphoria manifests itself in a variety of ways, and is generally recognized through symptoms of intense discomfort with one’s assigned birth sex and a strong preference for another gender identity. Gender dysphoria affects only a small portion of inmates (the exact number is unknown), as the total number of transgender inmates is estimated to be about 750, and the transgender population of the United States is estimated at only 1 million. However, the minority of inmates that do suffer from gender dysphoria often feel discriminated against by other inmates, prison officials, and medical officials. They may experience psychological turmoil so strong as

7 Diagnostic and Statistical Manual of Mental Disorders 302.6 (5th ed 2013) (DSM-5).
to lead to self-harm, which, in extreme cases, has included attempts at self-castration.11

**B. Gender Confirmation Surgery (GCS)**

Gender confirmation surgery (abbreviated throughout the rest of this paper as GCS) is a cosmetic surgery by which a transgender person’s physical appearance is altered to resemble that of the gender with which they identify. GCS usually requires a combination of several surgical procedures that differ in purpose depending on the desires of the patient and which gender the individual is transitioning to. The APA recognizes GCS as a treatment for gender dysphoria, although very little research exists that evaluates the effects of GCS, especially in the long-term.

Not all inmates who experience gender dysphoria request GCS. The APA recommends a variety of treatment options for gender dysphoria, including access to clothing of the preferred gender, counselling, and/or hormone therapy. Despite the variety of treatment options, some inmates still request GCS after having received these other treatments, believing that GCS is necessary to alleviate significant psychological stress.

**C. Using the Eighth Amendment to Request GCS**

In the past, inmates have requested GCS under the Eighth Amendment, arguing that GCS constitutes a medically necessary treatment, and that by not providing the surgery, prisons administer a form of cruel and unusual punishment. Two circuit court cases, *Gibson v. Collier*12 and *Kosilek v. Spencer*13 ruled against obligating prisons to provide GCS. Until the *Edmo v. Idaho* decision, no inmate had

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12 Gibson v. Collier, 920 F.3d 212 (5th Cir. 2019).

13 Kosilek v. Spencer, 774 F.3d 63 (1st Cir. 2014).
ever been granted GCS on the grounds that the surgery was not considered a medical necessity. In *Edmo v. Corizon*, the surgery was granted on the basis that the correctional facility’s healthcare team acted in deliberate indifference towards Adree Edmo’s suffering and that, for Edmo, GCS was a medically necessary procedure.

This paper argues that a correctional facility’s refusal to grant gender confirmation surgery does not constitute a violation of the Eighth Amendment, and that the Ninth Circuit Court in *Edmo v. Idaho* misapplied the term “medically necessary.” By subjecting inmates to a procedure that is, at this time, not proven to provide long-term benefit, inmates are subject to a form of experimentation, which might be classified as a form of cruel and unusual punishment. However, this paper recognizes that there is an urgent need for reform in the way that the prison system treats individuals with gender dysphoria, consequently proposing that the best way in which to do this is to increase the amount of valid research pertaining to gender confirmation surgery and its long-term effects, so that the surgery might one day be classified as either medically necessary or not medically necessary.

II. Why *Edmo* Got it Wrong

The landmark Supreme Court decision, *Estelle v. Gamble* states that “the Eighth Amendment “proscribes only medical care so unconscionable as to fall below society’s minimum standards of decency.” This means that medically necessary care is medical care which ought to be denied unless denying it is considered below society’s minimum standards of decency. Another Supreme Court decision, *U.S. v. DeCologero*, affirms that adequate medical care for prisoners consists of “services at a level reasonably commensurate with modern medical science and of a quality acceptable within prudent

14 Gutierrez v. Peters, 111 F.3d 1364, 1366 (7th Cir. Ill. 1997).
15 Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019).
professional standards.”17 Thus, medically necessary care is that which, if denied, goes against the standards of healthcare for society as a whole. It is also healthcare which is in accordance with modern medical science and acceptable within prudent professional standards. This precedent creates a high bar for any medical procedure, especially a controversial one such as gender confirmation surgery. According to this precedent, GCS ought to be denied unless denying the surgery is considered below society’s minimum standards of decency. In order to be granted to prisoners, GCS must also be considered modern medical science and acceptable within prudent professional standards. Due to the controversial nature of the procedure, both in public and professional circles, there are serious differences of opinion regarding the authority of the standards by which GCS is evaluated. Fortunately, Idaho State Law offers a definition of “medically necessary” that adheres to the precedent established by the Supreme Court while being somewhat less abstract.

Because Adree Edmo is under Idaho state jurisdiction, and because the prison in which she is being held is covered by an insurance plan, the definition of “medically necessary” as found in the Idaho State Code applies to her situation.18 In the context of correctional facilities, this law tells us that the definition of “medically necessary” provided in the insurance health benefit plan for the prison is the main source of authority when determining if a medical procedure is legal. The Idaho State Correctional Facility has a contract with the private insurance provider Corizon that covers healthcare costs for each inmate. Corizon does not consider GCS to be a medically necessary procedure and thus denied coverage to Edmo.19

Should the State of Idaho then be required to fund GCS because Corizon will not? Idaho State law answers this question by providing its own definition of the term “medically necessary” that applies should the insurance provider fail to provide a definition.20 First, the

17 U.S. v. DeCologero, 821 F.2d 39, 43 (1st Cir. 1987).
18 Idaho Code Ann. § 41-5903 (West).
19 Supra Edmo, 935 F.3d 757 (9th Cir. 2019).
code requires that medical procedures be recommended by a physician or other health care provider and that the procedure meets the subsequent four requirements ((a) through (d)). So, even if a physician recommended GCS for an inmate, under Idaho State Law the procedure must also meet all of the other requirements.

The first of these other requirements (requirement (a)) is that the procedure be in accordance with generally accepted standards of medical practice. The problem comes in determining what exactly those generally accepted standards are and who must accept them. Court opinion on this matter differs throughout the nation. The Ninth Circuit Court of Appeals accepts WPATH’s (World Professional Association for Transgender Health) Standards of Care published in 2011 as their standard of care in Edmo v. Corizon, as do some other courts in cases dealing with transgender healthcare.21 Under the WPATH standards, GCS would be considered medically necessary for Edmo. So, if the court was correct in considering the WPATH standards to be generally accepted standards of medical practice, then the decision in Edmo v. Corizon was correct under requirement (a) of Idaho State Code. But, can WPATH’s standards of care be extended to be considered “generally accepted standards of medical care?” Some courts, like those that denied GCS to inmates, have said that they cannot.22 The Supreme Court has explained that professional judgement, “creates only a “presumption” of correctness; welcome or not, the final responsibility belongs to the courts.”23 By applying WPATH’s standards of care alone to Edmo v. Corizon to determine whether GCS is a medically necessary procedure, the

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22 Gibson v. Collier, 920 F.3d 212, 221 (5th Cir. 2019) (“[T]he WPATH Standards of Care reflect not consensus, but merely one side in a sharply contested medical debate over [GCS].”); Kosilek v. Spencer, 774 F.3d at 76–79 (recounting testimony questioning the WPATH Standards of Care).

23 Cameron v Tomes referencing Youngberg, 457 U. S. Reports 323, 102 S.Ct. 2462.
Ninth Circuit Court erred, as the Supreme Court has determined that medical standards cannot be established by a single professional, group of professionals, or organization, like WPATH. Instead, medical standards must be considered more broadly by courts, “encompassing institutional concerns as well as individual welfare [for] nothing in the Constitution mechanically gives controlling weight to one set of professional judgments.”

WPATH classifies GCS as an “effective and medically necessary procedure,” yet it makes this conclusion based upon retrospective observational studies consisting of mostly self-reported patient data that cannot be used to determine cause and effect. Additionally, the WPATH Standards reference several studies that show a decline in patient well-being and say regarding these studies: “These findings do emphasize the need to have good long-term psychological and psychiatric care available for this population. More studies are needed that focus on the outcomes of current assessment and treatment approaches for gender dysphoria.” WPATH acknowledges the need for a broader consideration of GCS than they provide by emphasizing the need for good long-term care for post-GCS patients and calling for more studies on the effects of GCS. By calling for more studies, WPATH highlights the uncertainty of their previous research and draws skepticism toward their claim that GCS is “undeniably beneficial.”

Requirement (b) of the Idaho State Code states that a medically necessary procedure must be “Clinically appropriate, in terms of type, frequency, extent, site and duration, and considered effective for the covered person’s illness, injury or disease.” Once again, the question must be asked: by who must the procedure be deemed appropriate? As discussed previously, the standards by which a procedure is deemed appropriate cannot be determined by the WPATH

24 Id.
26 Id. at 107.
alone. Thus, whether or not GCS meets requirement (b) depends on the standards referred to in requirement (a).

Requirement (c) of the Idaho State Code states that a medically necessary procedure must be, “Not primarily for the convenience of the covered person, physician or other health care provider.” Of all the requirements, this requirement is the one that GCS is most likely to meet in the case of severe gender dysphoria. As in the case of Adree Edmo, the effects of her severe gender dysphoria resulted in dangerous behavior such as attempted self-castration. Because of this, we know that some type of treatment is not only convenient, but potentially life-saving for people like Adree Edmo. However, the question remains as to whether or not that treatment should be GCS.

GCS also fails requirement (d) in the Idaho State Code. Requirement (d) states that a medically necessary procedure must not be “more costly than an alternative service or sequence of services or supply, and at least as likely to produce equivalent therapeutic or diagnostic results as to the diagnosis or treatment of the covered person’s illness, injury or disease.”27 The more common treatment for individuals with gender dysphoria is hormone therapy, which is much less costly than GCS. Hormone therapy alone costs anywhere from $300 to $2400 per year. The additional cost of GCS “can range from about $15,000 for just reconstruction of the genitals to about $25,000 for operations on the genitals and chest to $50,000 or more for procedures that include operations to make facial features more masculine or feminine.”28 And, this cost does not include the cost of the additional post-GCS medical care that will be required for the rest of the patient’s life in order to detect and prevent complications that often arise as a result of the surgery.29

27 Idaho Code Ann. § 41-5903 (West).
28 Sex Reassignment Surgery Cost, COST HELPER HEALTH, HTTPS://HEALTH.COSTHELPER.COM/SEX-REASSIGNMENT-SURGERY.HTML.
Yet, according to the Idaho code, GCS could still be considered medically necessary even though it is more costly, as long as it has been proven to produce better therapeutic or diagnostic results.\textsuperscript{30} However, GCS has \textit{not} been proven to produce better results than hormone therapy alone. Although WPATH, as mentioned earlier, has claimed that GCS in conjunction with hormone therapy can be more effective at treating gender dysphoria for some individuals,\textsuperscript{31} this claim is itself weak because it is based mostly upon self-reported patient surveys.\textsuperscript{32} And, as established earlier in this paper, the standards of WPATH alone are not enough to determine whether GCS is a medically necessary procedure and ought to be proscribed under the Eighth Amendment. There is the possibility that GCS does indeed produce better results than hormone therapy alone, but there is also the possibility that GCS could be less beneficial in the long-run than hormone therapy alone. Because of the higher cost and this uncertainty regarding the long-term effects of GCS, the surgery fails to meet requirement (d) of the Idaho State Code.

As mentioned previously, WPATH’s claim that GCS may be the most effective form of treatment for certain individuals is weak because this claim is based mostly upon self-reported patient surveys. Self-reported patient surveys have considerably less validity than concrete, empirical research due to inaccuracies that arise as a result of response bias,\textsuperscript{33} which is the tendency for individuals to respond inaccurately or falsely to questions.\textsuperscript{34} When responding to self-reported surveys, individuals tend to inflate well-being, which

\begin{itemize}
  \item \textsuperscript{30} Idaho Code Ann. § 41-5903 (West).
  \item \textsuperscript{31} \textsc{World Professional Association for Transgender Health, Standards of Care for the Health of Transsexual, Transgender, and Gender Non-Conforming People} 8 (7\textsuperscript{th} ed., 2012).
  \item \textsuperscript{32} Id. at 107.
  \item \textsuperscript{33} Robert Rosenman, \textit{Measuring bias in self-reported data}, 2 \textsc{Int’l J. of Behav. & Healthcare Res.} 320-322 (2011).
\end{itemize}
means that those who have received GCS are likely to self-report that they are doing better than they actually are.\(^{35}\)

Unfortunately, there remains a dearth of information on the subject of GCS. The most recent empirical study on the long-term effects of GCS took place in 2011 in Sweden.\(^{36}\) This study concluded that “Persons with transsexualism, after sex reassignment, have considerably higher risks for mortality, suicidal behaviour, and psychiatric morbidity than the general population.” While this conclusion may seem to place GCS in an especially bad light, it compared people who received the surgery with the general population, which is not the most appropriate control group. What would have been preferable would have been a comparison to individuals who had in the past experienced severe gender dysphoria, but who had not received GCS and instead opted for another type of treatment or no treatment at all. This would help determine whether GCS causes increased mortality or whether mortality is increased for transsexuals regardless of the type of procedure or lack thereof. As this study does not do this, it can only be considered partially valid like the self-reported surveys used by WPATH, and thus GCS cannot be deemed not medically necessary according to this study.

Because the research surrounding the long-term effects of GCS is so unreliable and conflicting, it is not surprising that the medical community has had a difficult time coming to a consensus on whether GCS is the most effective form of treatment for certain individuals with gender dysphoria. The research that WPATH references supports GCS as being the most effective treatment, while other research, like the Swedish study, seems to support the opposite conclusion. As established earlier in the paper, this lack of consensus means that GCS cannot at present be considered a medically necessary procedure, and thus should not have been granted in \textit{Edmo v. Idaho}.  


This conclusion does not change the fact that there are transgender inmates who suffer from severe gender dysphoria and desperately need the most effective form of treatment available. Consequently, this paper proposes further study of the long-term effects of GCS, as an increased amount of reliable research will help establish consensus in the medical community by determining whether or not GCS can be classified as the most effective form of treatment for severe gender dysphoria. By doing this, courts will know what forms of treatment can be considered medically necessary and thus constitutional to grant to inmates.

III. CORRECTING *EDMO*: WORKING TOWARDS A MEDICAL CONSENSUS

How exactly might increasing the amount of valid research aid in deciding cases like *Edmo v. Corizon*? Suppose that, five years down the road, three studies were produced that objectively measured the long-term effects of GCS. And then, suppose that these studies indicated that GCS was a more effective treatment in the long-run for individuals with gender dysphoria than hormone therapy alone, or any other known treatment. In that case, the efficacy of GCS has been strengthened and Edmo has a stronger case for being granted the surgery. However, the increased amount of studies may not indicate that GCS is more beneficial in the long-term than other treatments. If they conclude the opposite, Edmo would not be granted the surgery because it could not be considered “medically necessary” under Idaho State Law or precedent. In this case, the increased research is especially beneficial because it would be preventing unnecessary suffering in the long-term on the part of inmates.

The greatest legal consequence of providing a potentially unnecessary surgery is a violation of the Eighth Amendment. In *Gibson v. Collier*, Judge Ho highlighted this when he said, “it cannot be cruel and unusual to deny treatment that no other prison has ever provided—to the contrary, it would only be unusual if a prison decided not to deny such treatment.”

By granting Edmo GCS, the Ninth

37 *Gibson v. Collier*, 920 F.3d 212 (5th Cir. 2019).
Circuit Court is not preventing cruel and unusual punishment, but is in fact providing it in the form of allowing an inmate to voluntarily subject themselves to an unproven treatment that might even be considered a form of experimentation.

Going forward, the questions to ask are (a) who will conduct the additional research? (b) How will the research be funded? And, (c) what should be done in the meantime to reduce the suffering of inmates experiencing gender dysphoria?

A. Who will conduct the research?

Due to the controversial nature of the matter, research will need to be conducted by an objective organization, or organizations, that have less bias in their research methods and purposes. Thus, medical centers that specialize in treatment for transgender individuals should not conduct the studies, as they would have economic incentive to produce studies that point to the conclusion that GCS is medically necessary. On the other hand, organizations that are traditionally against the surgery should also not oversee the research. For other unproven treatments, the best organization to conduct research may be the government, but due to the political nature of GCS, the government may or may not be objective in their research depending upon who is in power, and thus should not be charged with the research.

In the past, non-profit research organizations have been used by the government, corporations, and other private entities to provide non-biased research on important issues. Such non-profit organizations include “RAND Corporation,” “RTI International,” and the “Howard Hughes Medical Institute.” Because these organizations have no profit incentive, they would likely be able to provide research on the long-term effects of GCS that is objective.

B. How will the research be funded?

Funding for GCS is another area of controversy that must be addressed. A large portion of the public feels that it is a misuse of
tax dollars. Although researching GCS is not equivalent to providing the surgery, providing funding for research through taxation is likely to be controversial due to differing religious, moral, and cultural beliefs throughout the nation.

Despite the controversy, allocating tax dollars away from another area may be the best way to fund additional research because, in the long run, it will reduce the cost of treating gender dysphoria by reducing costs associated with court proceedings. Additionally, tax dollars will not be spent on treatments that are more costly, but less effective, because the new research will have provided more knowledge and consensus on whether GCS is the most effective way to treat severe gender dysphoria.

C. What should be done in the meantime?

Because prisons house inmates based on their biological sex, a prisoner that is dressing and/or acting in opposition to their biological sex is likely to experience both physical and psychological abuse at the hands of other prisoners. This abuse may exacerbate a transgender prisoner’s gender dysphoria, which is why it is so important to reach a consensus regarding the most effective way to treat gender dysphoria among inmates. However, research takes time, which means that consensus is not likely to be reached in the near future. Because of this, prisons should be doing what they can to prevent the abuse of transgender inmates in the interim.

In Kosilek v. Spencer, the court debates the merits of assigning the transgender inmate to either isolated housing or women’s housing to avoid continued abuse, although there are drawbacks to both options. Isolated housing is not a good long-term solution

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due to the psychological damage it may impose, and women’s hous-
ing (or housing based on the gender with which the inmate iden-
tifies) is not ideal because it may cause safety concerns regarding
other inmates. Because of this, prisons ought to house transgender
inmates on a case-by-case basis according to the characteristics of
the individual and the unique dynamic within each facility. Some
transgender inmates may pose too great of a risk to be housed with
other inmates of the gender with which they identify. Or, the other
inmates within the facility may be too hostile toward the transgen-
der inmate. It follows that housing transgender inmates on a case-
by-case basis will allow the prison to determine the best possible
housing arrangement for the circumstances, so that the unnecessary
suffering of these individuals might be minimalized.

IV. Conclusion

Gender confirmation surgery should not currently be classified as
a “medically necessary” procedure because it does not fulfill all
requirements set forth by Idaho State code and precedent cases such
as Estelle v. Gamble and U.S. v. DeCologero. GCS is (a) not gener-
ally accepted by society as the most effective method of treatment,
and is (b) more costly than other methods of treatment proven to
be equally effective. Because GCS cannot be classified as a medi-
cally necessary procedure, courts violate the Eighth Amendment by
granting the surgery to an inmate.

The best way to reduce unnecessary suffering among inmates
experiencing gender dysphoria is to determine whether GCS is or
is not medically necessary. Currently, opinions on the matter dif-
fer greatly due to the lack of research. Thus, randomized controlled
research on the long-term effects of GCS should be conducted so that
the public and medical community may know more fully whether or
not GCS is the most effective method of treatment for certain individu-
als suffering from gender dysphoria. The surgery can then be classi-
ified under Idaho State Law and Supreme Court precedent. Following
appropriate classification, courts and correctional facilities will be

39 Kosilek v. Spencer, 774 F.3d 63 38, 6, 11 (1st Cir. 2014).
able to provide transgender inmates with the safest and most effective care while remaining constitutional under the Eighth Amendment. This will help to reduce unnecessary suffering caused by healthcare-related discrimination towards transgender inmates within correctional facilities. Simultaneously, this solution will reduce the burden on tax payers as resources will be used for only those procedures that have been proven to be medically necessary.
In 2017, a mock slave auction was held in a 5th grade classroom at South Orange Elementary School in New Jersey, which included the ‘sale’ of a black child by white students. A few weeks after this incident, students from another elementary school in the same district made posters advertising the sale of African American slaves, which were displayed in school hallways. Wisconsin 4th graders in 2018 were given a homework assignment which asked them to explain “three good reasons for slavery.” Members of the Texas Board of Education stood by their social studies curriculum which minimized

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the role of slavery in the Civil War and did not make mention of the Klu Klux Klan. This final incident occurred in 2015, which commemorates 150 years since the ratification of the 13th amendment. It is evident that the passage of time has not brought a unified stance in the world of education on how slavery is best taught.

There are no federally mandated curricula on slavery education, and state mandated curricula are uncommon. Consequentially, students across the United States learn about slavery in diverse, and at times inadequate, ways. Often provided few guidelines, teachers decide curriculum and assignments that they deem most appropriate. This contributes to giving K-12 students lessons, activities or homework assignments that can subtly or overtly discriminate based on race. Administrators and teachers in every American classroom make choices about the textbooks they buy, the homework assignments they give and the facets of slavery that they focus on. By doing so, they must choose to subscribe to a particular narrative about the history of slavery. States can assist teachers in this difficult task by creating both code and curriculum that will best serve students and educators.

Considering that Title VI of the Civil Rights Act (CRA) of 1964 prohibits discrimination based on race, color, or national origin in programs or activities receiving federal financial assistance, it is in states’ best interest to create airtight educational code that ensures compliance with Title VI. By doing so, states can protect against potential discrimination stemming from selective curriculum, textbook inaccuracy, variable teaching, and administrative practices. These legal changes will give students, parents, teachers, and school districts the tools they need to prevent potential litigation.

In this paper, we will briefly overview the history of federally mandated educational code and the means used to teach slavery, including curriculum, classroom activities, and textbooks. We will

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6 Michael S. Williamson, Texas officials: Schools should teach that slavery was ‘side issue’ to Civil War, The Washington Post (July 5, 2015) https://www.washingtonpost.com/local/education/150-years-later-schools-are-still-a-battlefield-for-interpreting-civil-war/2015/07/05/e8fbd57e-2001-11e5-bf41-c23f5d3face1_story.html.

discuss examples of state code failure resulting in race-related discrimination in the American education system. Next, we will review the merits and pitfalls of California state code. Finally, legal solutions involving the implementation of California state code in other states will be outlined.

I. BACKGROUND

The Tenth Amendment of the Constitution asserts that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁸ Historically, this has always included education. While the Department of Education (DOE) has existed since 1867, it was only in 1980 that Congress established the Department as a Cabinet level agency. The DOE contributes roughly eight percent of national school funding, the rest being provided by the states themselves. Because schools are primarily funded on a state-level and it has always been within states’ power to create school curricula, it follows that many feel that federal interference is neither wanted nor warranted. This is in part, according to Historian of Education Diane Ravitch, “because of justifiable fear that a federal agency might threaten to cut off federal funding to states that refuse to accept its mandates.”⁹ Federalism is also a partisan-issue so while some presidents in the past have attempted to create federal educational requirements, all have failed to do so. Therefore, while some may argue that this issue of slavery education and anti-discriminatory educational code should be addressed on a federal level, it simply is not feasible at this point in time.

The Southern outcry against desegregation under *Brown vs Board of Education* was in part due to a perceived encroachment of the federal government on states’ rights to make legislation regarding

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¹⁸ U.S. CONST. amend. X.

schools. Not surprisingly, federalism of schools or school districts continues to be a hot button topic. This in part explains why the DOE, arguably, has always been a popular political punching bag for Republican politicians who disagree with federalism. Kosar claims that “President Andrew Johnson” who signed the Department of Education Act in 1867, did so reluctantly, “after he had been assured it was harmless. It was a meek agency.”\(^{10}\) In an article for The Conversation, Ph.D. student Dustin Hornbreck explains that “Ronald Reagan advocated to dismantle the department [DOE] while campaigning for his presidency.”\(^{11}\) The 1996 Republican platform was also in favor of eliminating the department saying; “the federal government,” it stated, “has no constitutional authority to be involved in school curricula or to control jobs in the marketplace. This is why we will abolish the Department of Education.”\(^{12}\)

Last March, Trump attempted to cut the DOE’s budget by 8.5 million dollars, demonstrating that even now the department’s political popularity has not improved. Trump is quoted as saying “a lot of people believe the Department of Education should just be eliminated. Get rid of it. If we don’t eliminate it completely, we certainly need to cut its power and reach.”\(^{13}\) The DOE is hotly contested as overstepping state devolved powers. As mentioned previously, if a federal approach to standardized education requirements were possible, it could remedy the problems outlined. However, since the power to change educational standards lies with state governments, state code is the obvious choice for making lasting change. Addition-


ally, because the DOE seems to be in constant peril of being dismantled, it is not feasible for the Department to enforce such legislation.

To demonstrate how federalism in education relates to discrimination, we must revisit the historic Brown v. Board of Education case. This demonstrated to the American public that racial unity and integration is a priority in the refinement of our legal system. This case arose out of a desire for the integration of public schools, due to the evidently poorer quality of education offered at African American scholastic institutions. In his opinion statement of the aforementioned case, Justice Warren stated that the Post-Civil War Amendments (13th through 15th inclusive) intended to remove “all legal distinctions among ‘all persons born or naturalized in the United States.’.” Title VI works to uphold the egalitarian goal of the Post-Civil War Amendments by protecting all citizens against discrimination. In schools, there must be state code in place to protect students against discrimination.

Title VI was enacted as part of the landmark Civil Rights Act of 1964. It prohibits discrimination on the basis of race, color, and national origin in programs or activities receiving federal financial assistance. President John F. Kennedy said in 1963, “Simple justice requires that public funds, to which all taxpayers of all races [colors, and national origins] contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial [color or national origin] discrimination.” Today, Title VI protects students K-12 in public schools from a myriad of things, including racial harassment, school segregation, and denial of language services to English learners.

Federal funding, as regulated by the DOE and Title VI, work together on a state level to protect against the aforementioned discrimination. The mission statement of the DOE is “to promote student

17 The Department of Justice, Title VI of the Civil Rights Act of 1964 (2017), https://www.justice.gov/crt/fcs/TitleVI.
achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.” To receive funding, schools must also strive for “equal access.” If a recipient of federal assistance is found to have discriminated and voluntary compliance cannot be achieved, the federal agency providing the assistance should either initiate fund termination proceedings or refer the matter to the Department of Justice for appropriate legal action. Aggrieved individuals may file administrative complaints with the federal agency that provides funds to a recipient, in this case, the DOE, or the individuals may file suit for appropriate relief in federal court. Title VI itself prohibits intentional discrimination. It must be acknowledged that even with every law in place to prevent discrimination, there will always be ignorance on the part of teachers, administrators and governing officials. This does not mean these laws are unnecessary, but rather some may still be unaware of what Title VI actually means. The Office for Civil Rights in the DOE is responsible for enforcing Title VI as it applies to programs and activities funded by federal funds.

Educational institutions receive federal funding; however, state codes and curriculum are determined autonomously state by state. Individual teachers each approach state-mandated curricula by creating lesson plans; however, admittedly with their own biases. Additionally, racial discrimination among students is an ongoing problem, which can exacerbate insensitive teaching practices. Colleges have Title IX to protect students from racial discrimination, but K-12 schools depend on both the DOE to enforce Title VI and state legislators to enforce individual state codes.


19 Monteiro v. Tempe Union High Sch. Dist. 158 F.3d 1022, 97-15511 (9th Cir. 1998).
II. PROOF OF CLAIM

A. Curriculum

Teaching Hard History, a chapter of the Southern Poverty Law Center (SPLC), states that “most students leave high school without an adequate understanding of the role slavery played in the development of the United States—or how its legacies still influence us today.”20 According to the SPLC, 8% of high school seniors surveyed identified slavery as the primary cause of the Civil War.21 Additionally, two-thirds of students surveyed do not know that slavery did not end until a constitutional amendment was ratified, and less than 1 in 4 students can properly identify the slavery-supportive provisions in the original Constitution. Not only do the students lack basic knowledge about slavery, the Constitution and the Civil War, but 40% of teachers believe that their state provides “insufficient support for teaching about slavery.”22 Student knowledge can in part be attributed to a lack of state-mandated resources for slavery education in public schools.

Curriculum that covers the breadth and depth of American history is necessary in order to adequately inform students. Slavery is directly addressed in history, government, and geography classes; however, racial and historical bias must be controlled for in all classrooms. The economic and literary history of the United States were also impacted by the plantation system.23 For example, an economics teacher might acknowledge the implications of slavery in a capitalist system, as seen in 18th century America. Classrooms of all subjects

20 Kate Shuster, Teaching Hard History, Southern Poverty Law Center, 2018.
21 Id. at 9.
22 Id. at 10.
should be sensitive to the impact that curriculum choices have on the holistic student understanding of slavery and historic race relations.

In *Grimes By & Through Grimes v. Sobol*, several New Yorker parents and teachers came forward seeking a curriculum that more fully recognizes the contributions of Africans and African Americans. The plaintiffs explained that they sought legal redress because “they have no place else to go where they can find relief... [N]early everyone else who can bring about change in the education system is worried about a job or a vote.”24 They allege that the New York curriculum as it stood had “a disparate impact on African Americans’ self-esteem and ability to learn.”25 This is claimed based on the alleged discriminatory nature of the curriculum as outlined by Title VI. Instead, the plaintiffs sought a revised curriculum to be produced by the defendants that outlined historically accurate contributions of African Americans and other people of color. The defendants maintained the claim that the state statutes relied upon by the plaintiffs we not grounds for legal recompense, and that the claims did not meet the standard for Title VI violation. This defense was upheld by the courts, and the claims were dismissed. It is clear that when state educational code does not provide a vehicle by which students, parents, and educators can seek reform and retribution for discrimination within the education system, the federal system is often insufficient to provide same due to the high standard of discrimination as defined by Title VI. While states should implement airtight educational code based on the existence of this discrepancy alone, the potential for removal of federal funding if a case were to show violation of Title VI should also motive states to bridge this gap.

*Acosta v. Huppenthal* also demonstrates this chasm between inadequate state educational code and the reach of federal power.26

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25 See *Grimes By & Through Grimes v. Sobol*, 832 F. 3d.

In this Arizona case, plaintiffs brought forth action against several state officials, seeking to challenge the constitutionality of a state statute that limits the school districts’ race-related curricula. Their motion was denied, with one exception. In the judicial opinion, the judge states,

“The Court’s rulings stem in large part from the considerable deference that federal courts owe to the State’s authority to regulate public school education. The Court recognizes that, in certain instances, Defendants’ actions may be seen as evincing a misunderstanding of the purpose and value of ethnic studies courses. Equally problematic is evidence suggesting an insensitivity to the challenges faced by minority communities in the United States. Nevertheless, these concerns do not meet the high threshold needed to establish a constitutional violation, with one exception. Instead, they are issues that must be left to the State of Arizona and its citizens to address through the democratic process.”

The court is clearly of the opinion that protecting against discrimination in the classroom, and thus upholding Title VI, falls into state jurisdiction. It is in the state’s interest to implement code that will close the gap identified in the judicial opinion, which is that the challenges faced by minority communities must be extremely severe in order to meet the federal bar of constitutional violation. State code must protect against discrimination that does not reach this standard, but nonetheless injures minority groups. Furthermore, it is in the state’s best interest to protect against all discrimination that may violate Title VI in order to maintain their federal funding based on same.

B. Classroom Activities

The idea that racial tensions persist in American schools today is supported by many events in the last decade. A racial slur is spray painted in a middle-school Wisconsin bathroom, parents in Minnesota

27 Arizona Revised Statute § 15–112.
28 See Monteiro v. Tempe Union High Sch. Dist., 158 F.3d.
sue a lily-white school district for not protecting their children from racism.  

Consider the previously cited instances of attempt at teaching slavery gone awry, including the mock slave auction and the classroom assignment to identify “three good reasons for slavery.” Title VI protects all Americans from racial discrimination. However, the scope and specificity of this protection is limited, and may not be prosecutable in the case of discriminatory classroom activities or homework assignments. Thus, the onus to provide specific protection from racial discrimination in classroom activities falls on the state.

In the case of *Monteiro v. Tempe Union High Sch. Dist.* in Tempe, Arizona, the parents of an African American student filed suit on her behalf against the school district. They claimed that they had violated the student’s rights under the Equal Protection Clause and Title VI by requiring reading materials that contained the repeated use of racially derogatory terminology. The literature in question included “The Adventures of Huckleberry Finn” by Mark Twain and “A Rose for Emily” by William Faulkner; both works frequent

Stephanie Fryer, *Police investigating racist slur found on bathroom at Mayville Middle School*, Channel 3000, May 17 2000; Dara Sharif, *Parents Sue Minnesota School District Saying It Did Nothing to Protect Their Kids From Rampant Racism*, The Root, April 5 2019.


*See Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d.

*Id.*
the use of the term ‘n*gger.’ According to the American Library Association, “The Adventures of Huckleberry Finn” is both one of the nation’s most beloved and most banned books. Kathy Monteiro, the mother of the plaintiff, argued that not only were these works adjunct to Freshman English curriculum, but that the exclusion of any literature using derogatory language that was aimed at races other than African Americans demonstrated racial bias. Monteiro expressed allegations of psychological distress and a hostile racial environment as a direct result of classroom readings and discussions of said literature. This included the loss of educational opportunities, as the only alternative to studying the literature was to be absent from class. In concurrence with the study of the literature, Monteiro alleged that use of this derogatory term in the school increased dramatically. She claimed that instance of verbal discrimination and derogatory graffiti increased after her daughter’s class studied these literary works. She also claimed that the school board was made aware of these discriminatory instances; however, no action was taken. On the basis of threat to the First Amendment, the courts reserved the school board’s right to select reading materials. However, the second claim that the school district failed to adequately address this racial harassment under Title VI was upheld. The first claim, which sought a mandate for curriculum sensitive to some classic literature’s potential to be racially discriminatory, was dismissed because Arizona state code did not outline provisions to explicitly uphold Title VI in the classroom, while protecting the state’s right to curriculum choice in education.

33 Id.; Mark Twain, Adventures of Huckleberry Finn (SDE Classics 2019) (1884); William Faulkner, A Rose for Emily and Other Stories (Random House 2012) (1930).


35 See Monteiro v. Tempe Union High Sch. Dist., 158 F.3d.
C. Textbooks

A textbook used by a Texas public charter school chain in the 2000s taught: “While there were cruel masters who maimed or even killed their slaves (although killing and maiming were against the law in every state), there were also kind and generous owners ... Many [enslaved people] may not have even been terribly unhappy with their lot, for they knew no other.”36 The Southern Poverty Law Center reports that fifty-eight percent of teachers find their textbooks inadequate.37 Hevin Robertson reviewed three textbooks, one each from McGraw-Hill, McDougal Littell (owned by Houghton Mifflin Company), and Prentice Hall (owned by Pearson Plc.). These textbook companies are the largest academic publishers in the United States. The Prentice Hall textbook claims that “during the 1780s, Thomas Jefferson, James Madison, and George Washington hoped that slavery would gradually fade away” while not acknowledging that all three owned slaves, neither providing a historical basis for this claim. McDougal Littell calls slaves “workers” in their textbook and McGraw-Hill calls them “planters.” These instances point towards a larger problem; considering that historical biases exist in textbooks, how could this not permeate in classrooms?38

Textbook content can be addressed in state code. California educational code states, “the state board and any governing board shall not adopt any textbooks or other instructional materials for use in the public schools that contain any matter reflecting adversely upon persons on the basis of race or ethnicity, gender, religion, disability, nationality, or sexual orientation, or because of a characteristic listed

36 Annabelle Timsit & Annalisa Merelli, For 10 years, students in Texas have used a history textbook that says not all slaves were unhappy, QUARTZ, May 11 2018.

37 Kate Shuster, Teaching Hard History, SOUTHERN POVERTY LAW CENTER, 2018 at 9.

in Section 220.” The specificity of this code also protects future K-12 students by preventing state and governing boards from adopting discriminatory textbooks. In this way, the California state code protect students from possible changing ideology in the future or differing political climates by defining what human characteristics are protected.

III. California State Code

Many states adopt Title VI into their own state codes and statutes to be the primary enforcers of this legislation. Federal funding is at risk for non-compliance and it is in a state’s best interest to make very specific educational codes to prevent racial discrimination, segregation or faculty misconduct. For example, Arkansas outlines that:

“It shall be unlawful for any member of the board of directors, administrator, or employee of a public school to knowingly authorize the participation of students in an event or activity held at a location where some students would be excluded or not given equal treatment because of the student’s race, national origin, or ethnic background.”

This code outlines that even extracurricular activities cannot have discrimination. While Title VI is broader in its legal implications of discrimination, occasionally states will use a more specific code, to ensure compliance. The clearer a code can be, the more legal protection against discrimination for students, and hopefully, the more likely a state’s schools are to continue to receive federal assistance.

California is a great example of a state who leaves no stone unturned when it comes to protecting K-12 students from racial discrimination. For example, in California’s state code it expresses that

“it is the policy of the State of California to afford all persons in public schools, regardless of their disability, gender, gender identity, gender expression, nationality, race or

39 EDC § 51501.
ethnicity, religion, sexual orientation, or any other characteristic that is contained in the definition of hate crimes set forth in Section 422.55 of the Penal Code, including immigration status, equal rights, and opportunities in the educational institutions of the state. The purpose of this chapter is to prohibit acts that are contrary to that policy and to provide remedies therefor.\textsuperscript{41}

This law goes into even more detail of what happens when this code is broken, how to rectify and prevent further discrimination. While other states have similar codes to this, California specifically addresses the classroom and classroom activities in code, “a teacher shall not give instruction and a school district shall not sponsor any activity that promotes a discriminatory bias on the basis of race or ethnicity, gender, religion, disability, nationality, or sexual orientation, or because of a characteristic listed in Section 220.”\textsuperscript{42}

Again, teachers are fallible humans who often might not even be aware of discriminatory actions. Yet, it is still vital that states mandate through educational codes what exactly students are protected from so that individual school districts and schools must comply. The more specific a code— the more protected a student.

Some may argue that California is also not immune from instances of discrimination in the classroom. Only last December in Palmdale, California did students report a teacher for saying Mexicans should “go back to their country” and we should “bring back slavery.”\textsuperscript{43} However, Palmdale Assistant Superintendent put the teacher on leave saying “regardless of whether it was a joke or not, comments are comments, and racial comments are unacceptable in any way, shape or form” and he is well within California state educational code to fire this teacher for misconduct. While state code

\textsuperscript{41} California Code, Education Code - EDC § 200.

\textsuperscript{42} California Code, Education Code - EDC § 51500.

may not prevent further incidents, it does create the ability for legal recourse for when these incidents occur.

IV. CONCLUSION

States have a legal obligation to write and enforce educational codes that protect students from racial discrimination in the classroom. As society progresses and previously unheard history is made increasingly available to all, schools will need to update both code and curriculum. If states choose to ignore this issue because it is politicized or for any other reason, they will then be vulnerable to future litigation. By adopting the specific educational codes of California, states and school districts will leave little for the imagination when it comes to curricula, classroom conduct, and textbooks. While acknowledging that teachers are individuals who will continue to make mistakes, it is still important for state legislators to protect students as much as they can.
In July 1997, Kenneth Foster was indicted on capital murder charges and sentenced to death even though he had only committed robbery. On August 14, 1996, Kenneth Foster and his friends, Mauriceo Brown, DeWayne Dillard, and Julius Steen, rented a car and drove to downtown San Antonio, Texas. Later that night, Brown suggested that the men rob a few people in order to make up for the money they had lost while partying. After their second robbery that evening, Foster did not want to continue breaking the law, according to Dillard’s courtroom testimony four years later. Dismissing his request, the four persisted in their crime and began to follow a car they believed was headed towards a party. When a woman—later identified as Mary Patrick—stepped out of her car, Brown approached her, asking for her number. Shortly after Brown exited the car, Foster heard gunshots. Confused and scared, he drove away quickly. Foster soon learned that Brown had shot and killed Patrick’s boyfriend, Michael LaHood Jr. Within the hour, police arrested Foster, Dillard, Steen, and Brown.

Although Steen bargained a plea deal in exchange for a life sentence and Dillard was never tried for this crime, Foster was tried for.
murder alongside Brown, the man who actually pulled the trigger. And, prosecutors sought the death penalty for both men. According to a unique Texas statute, the Law of Parties, the jury did not have to find that Foster had participated or even had any intention to kill or harm LaHood; the jurors simply needed to conclude that Foster may have been aware that Brown’s action would result in murder. In the end, the jury found Foster guilty of capital murder under the terms of the Law of Parties and claimed that Foster should have been able to predict that Brown would shoot and kill LaHood.4 The life of an individual—criminal or not—is not an arbitrary matter, yet Foster’s case is just one of many unsettling examples of capriciously prescribing the death penalty and further illustrates why lawmakers should revisit the death penalty as a fair punishment.

The Cruel and Unusual Punishments Clause, which simply states that “cruel and unusual punishments [shall not be] afflicted,” is the most debated aspect of the Eighth Amendment, and perhaps one of the most controversial parts of the Constitution.5 As our society grows and progresses, lawmakers must consistently reevaluate the standard by which we allow our government to punish those who break the law. In Trop v. Dulles (1958), the Supreme Court established the precedent that “evolving standards of decency,” must be considered in jurisprudence related to the Eighth Amendment.6 In other words, for a punishment to not be considered “cruel and unusual,” it must coincide with contemporary societal conventions of morality, which frequently evolve. This standard has since been employed in a variety of Supreme Court decisions dealing with the Eighth Amendment, beginning with Robinson v. California (1962), which ruled that it is “cruel and unusual” to imprison people for narcotic addictions. “Evolving standards of decency” has been an especially decisive factor in cases regarding capital punishment, creating a non-static standard that can vary with the composition of who sits on the bench.

5 U.S. Const. amend. VIII.
This paper explores how the main purposes of punishment are retribution, deterrence, and rehabilitation. Using these lenses, the paper explains how the high cost of the death penalty, racial and socioeconomic biases in the judicial system, and psychological impacts on death row prisoners contribute to why the Supreme Court should halt the prescription of the death penalty according to modern “standards of decency.”

I. BACKGROUND

In the phrase “cruel and unusual,” one way to define a “cruel” punishment is one motivated by cruel intent. However, a magnified look at Parliamentary debates and early American case law reveals that the Founding Fathers would have interpreted “cruel” as being an unjust punishment, regardless of intention.7 “Unusual,” on the other hand is more ambiguous and has largely been ignored by the Supreme Court. However, legal scholars generally agree that “unusual” modifies “cruel”; thus, an “usual punishment” is not considered cruel if it was the norm in previous related decisions.8

Despite this interpretation, in Trop v. Dulles, the Supreme Court established a non-static view of “cruel,” meaning punishments previously deemed “usual” can be abolished. In this case, the Court analyzed how Albert Trop, an Army private that deserted his post in Morocco during World War II, was unable to receive a passport because he had lost his citizenship under the Nationality Act of 1940. The Court’s question was whether taking away Trop’s citizenship was cruel and unusual according to the Eighth Amendment. In the majority opinion, Justice Warren rules in favor of Trop, acknowledging that the Court never had a good chance to define “cruel and unusual punishments.” He argues that “the basic concept underlying the Eighth Amendment is the dignity of man” and that “the Amendment must draw its meaning from the evolving standards of

8 John F. Stinneford, Death, Desuetude, and Original Meaning, 56 Wm. & Mary L. Rev. 559, 613 (2014).
decency that mark the progress of a maturing society.”9 The term “evolving standards of decency” remains in play today as the norm for determining whether a punishment is “cruel and unusual.”

The principle of “evolving standards of decency” did not intersect with capital punishment until Furman v. Georgia. In this case, the Supreme Court debated if it was constitutional, under the Eighth and Fourteenth Amendments, to have a jury decide if a defendant should receive the death penalty.10 In a 5-4 decision, the Court ruled that the death penalty, as practiced at the time, qualified as a cruel and unusual punishment. However, each justice in the majority decision wrote a separate opinion, with three claiming that inherent racial bias in death penalty sentencing was itself cruel and unusual, while two justices argued that the death penalty in general violates the Eighth Amendment.

In response, many states adopted a bifurcated trial approach—where the court first holds proceedings to determine the defendant’s guilt, and afterwards carries out an additional trial to determine the punishment based on other factors. This practice was upheld in Gregg v. Georgia (1976), which allowed states to reincorporate capital punishment if they used bifurcated trials and created objective guidelines to limit capital punishment sentencing.11 The Gregg decision claims that the death penalty is aligned with “evolving standards of decency,” arguing that “legislative measures adopted by the people’s chosen representatives weigh heavily in ascertaining contemporary standards of decency.” In other words, because states such as Georgia legislated new processes for implementing capital punishment after Furman, it must have been in the public’s interest to maintain the death penalty and, therefore, does not violate the standards of decency currently held by the public.

Since the Gregg decision, the Supreme Court has revised the death penalty according to the “evolving standards of decency” precedent several times. They have determined that it is cruel and

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unusual to execute rapists\textsuperscript{12}, child rapists\textsuperscript{13}, minors\textsuperscript{14}, and the mentally disabled\textsuperscript{15}. Twenty-one states have abolished the death penalty and four have placed moratoria as of 2020. To this day, the death penalty remains an open topic for Supreme Court interpretation.

II. Retributivism and Deterrence

In \textit{Harmelin v. Michigan} (1991), the Supreme Court highlighted that for a punishment to not be considered “cruel and unusual,” it should follow at least one of three criteria: rehabilitation, retribution, or deterrence.\textsuperscript{16} Rehabilitation refers to a punishment’s capability to change a convicted criminal. In the \textit{Harmelin} majority opinion, Justice Scalia highlights that the death penalty is unique in that it rejects rehabilitation of the convict as a purpose of criminal justice, given that a death row prisoner never returns to society. Thus, the justification for capital punishment balances on retributivism and deterrence. Retributivism refers to a punishment’s ability to bring justice to the victims, while deterrence is the idea that the punishment will prevent future crime.

In the \textit{Gregg} decision, Justice Stewart acknowledged that retribution is not “the dominant objective of criminal law,” but claims that “the instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society.

\begin{itemize}
\item \textsuperscript{12} Coker v. Georgia, 433 U.S. 584, 586-622 (1977) (determined that capital punishment is a “grossly disproportionate” punishment for rape).
\item \textsuperscript{13} Kennedy v. Louisiana, 554 U.S. 407 (2008) (ruled that the death penalty is cruel and unusual for a rape of a child that doesn’t result in death).
\item \textsuperscript{14} Roper v. Simmons, 543 U.S. 551 (2005) (barred the death penalty for minors).
\item \textsuperscript{15} Atkins v. Virginia, 536 U.S. 304 (2002) (determined that the execution of mentally disabled criminals is cruel and unusual).
\item \textsuperscript{16} Harmelin v. Michigan, 501 U.S. 957, 989 (1991) (This case did not have to do with the death penalty, but rather entailed a life sentence without parole for drug possession. The precedent that was set, however, is applicable to all 8th amend. jurisprudence).
\end{itemize}
governed by law.”17 His idea is that the death penalty provides retribution for both a victim of capital crime’s family and the community, given that it permanently removes the most heinous criminals from society. However, this factor loses credibility when the docket includes cases such as Kennedy v. Louisiana where a man was convicted for raping his eight-year-old stepdaughter. The court ruled that a “national consensus,” or data that represents society’s evolving standards of decency, agreed that it is a disproportionate punishment “no matter how young the child, no matter how many times the child is raped, no matter how many children the perpetrator rapes, no matter how sadistic the crime, no matter how much physical or psychological trauma is inflicted, and no matter how heinous the perpetrator’s prior criminal record may be.”18 With this decision the Court essentially claims that no harm, other than the loss of human life, is sufficient to require capital punishment. This, however, is not reconciled with the doctrine of retribution for the victim and their family. A rape victim must overcome monumental trauma, which can be compounded by the knowledge that the offender is still alive. Additionally, the convicted rapist is not punished in the same manner, or anywhere close in gravity to the act they committed. Thus, the Court’s interpretation of contemporary law is not to administer an equally retributive sentence to the crime committed, nor is it to execute the most odious criminals, but rather to remove them from society to establish order and justice. In order to be consistent under the 14th Amendment, the Supreme Court should ensure the equal protection of all convicted criminals, even murderers.19

Furthermore, retribution through the death penalty represents a great cost to society that perhaps outweighs its aggregate desire for vengeance. The standard supplement for capital sentences is life in prison without parole. It is estimated that in Florida, the true cost of each execution is $3.2 million, which is approximately six times more expensive than keeping a convict imprisoned for life without

17 Gregg, 428 U.S. at 183 (Stewart, J. majority opinion).
18 Kennedy, 554 U.S. at Justice Alito dissenting opinion.
19 See U.S. Const. amend. XIV sec. 1.
 parole. Similar numbers are seen in Texas and other states that prescribe capital punishment. A study in California found that, since the Gregg decision in 1976, Californian taxpayers have spent more than $5 billion or about $184 million per year, on death row inmates. Of the $5 billion, only $1 billion constitutes the cost of incarceration. This means that, had the inmates been sentenced to life without parole, the financial burden would have been about one-fifth of the cost incurred on Californians. In fact, researchers found that a death row inmate costs about $1.12 million more, on average, than prisoners serving a life sentence when totaling the cost of trials, appeals, incarceration, and execution. In addition, the California inmates (of whom only 13 were executed) still would have been isolated from their communities. The counterargument to this data is that the high cost of capital punishment comes from frivolous habeas corpus appeals. But, there is already a precedent in place to discern between superfluous and constitution-based petitions through Title I of the Antiterrorism and Effective Death Penalty Act of 1996, which prohibits prisoners who have already sought habeas relief from filing a subsequent appeal without approval from an appellate panel. Also, the appeals process is necessary to ensure due process and prevent unjust execution. Researchers at Stanford University estimated that, in spite of the possibility to appeal, about 1 in every 25 inmates that are executed is innocent. Thus, retribution by means of the death penalty is not beneficial for society because of the high cost it imposes, despite the fact that the alternative, life imprisonment, imposes a substantially smaller cost.


The remaining justification for the death penalty, deterrence, lacks supporting evidence to prove that the threat and likelihood of capital punishment does in fact deter individuals from committing such crimes. In Gregg, Justice Marshall dissents that: “it is generally agreed between the retentionists and abolitionists, whatever their opinions about the validity of comparative studies of deterrence, that the data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime.”25 Even though this argument was made in 1976, it holds true today that there exists no evidence to prove that capital punishment has any influence to stop someone from committing murder. The deterrence argument ignores two facts about capital crimes. The first is that a long prison sentence, whether for life or shorter, is not a desirable outcome and for some people is worse than execution. Second, due to the arbitrariness of capital sentencing and relative rarity of executions, many criminals find it unlikely that they will be executed. Furthermore, data analyses prove that the death penalty has no influence on the crime rate. Researchers at Stanford looked at statistics from Hong Kong, which abolished the death penalty in the 1990s, and Singapore, which increased the use of capital punishment around the same time. They found no statistically significant differences in crime rate initially or over a 20-year period.26 Then, they conducted the same research in Maine, Massachusetts, and Rhode Island, which eliminated the death penalty for all crimes in the 1980s. Murder rates per capita have remained relatively stagnant in all 3 states. After, they looked at homicide rates per capita and executions per capita by region to see if there was a correlation between the two factors. According to the data, the South executes people 11 times more frequently than the rest of the country yet has maintained a murder rate of 6.8 murders per 100,000 people compared to the 4.9 national average. These numbers reveal that there is no evidence to support capital punishment as a deterrent for murder. Even for premeditated

25 Gregg, 428 U.S. at 233 (Marshall, T. dissenting).
homicides, life imprisonment is an undesirable outcome and therefore disincentivizes potential killers.

Additionally, there is more evidence to support a brutalization effect, which denotes a correlation between the death penalty and an increase in murder rates. A criminology study found that after every execution in New York, there were two additional homicides committed in the following month, and one additional homicide two months after. Although this report uses older data and a specific region, it is one of the most reliable studies due to its comprehensive approach of including myriad other potential factors in the data set. Also, the data does not seem contrived when compared to similar trends that occur following publicized suicides or mass murders. A more recent report found that one execution per year in a state leads to a significant increase in capital crimes. The data illustrates that the likelihood that deterrence occurs increases as the number of executions increases. The study concludes that it would take around nine executions per year for a state to have a potential deterrent effect and that only six states (South Carolina, Florida, Texas, Georgia, Delaware, and Nevada) show evidence of possibly having a deterrent effect. In the other twenty-one states that have executed prisoners since the Gregg decision, there is evidence of either no impact or a brutalization effect, where the normalization of killing vis a vis the death penalty leads to more violent crime. Thus, in order to potentially reach a deterrent effect, states would have to impose a death penalty quota, an idea that is objectively unconstitutional according to the guidelines of Gregg.

The death penalty fails to manifest its purported duties of retribution and deterrence. Additionally, executing inmates in a safe, constitutional manner is about six times the cost of housing a prisoner for life. Thus, the question should be reframed from whether it


29 *Gregg*, 428 U.S. at 189 (Stewart, P. majority opinion).
is just to kill capital criminals to whether the supposed justifications for the death penalty are met in accordance with modern standards of decency.

III. RACIAL AND SOCIOECONOMIC DISCRIMINATION

Historically, the prescription of the death penalty has conveyed an innate tendency to discriminate against racial and socioeconomic minorities. This was the topic of debate in *McCleskey v. Kemp* (1987), when the petitioner attempted to use a study that showed black defendants were more likely to be sentenced with execution than any other ethnic group, and were even more likely to receive the death penalty when the victim was white. The Supreme Court ruled that statistical evidence was not enough to prove intended racial prejudice, and was thus invalid. However, this issue has become increasingly gray, given that most Americans would avoid showing signs of racism, making it difficult to confirm intentional racial bias with today’s standards of decency. Additionally, there are many safeguards to prevent racism within the judicial system. For one, if a juror is thought to hold racial biases against a defendant, the defense attorney can propose that they be excluded from the jury. Also, once a juror votes to execute a criminal, they are required to sign a document claiming that race, color, and other factors did not influence their decision. But, as racism has become rightfully taboo, very few people consider themselves racist, whether they discriminate or not.

A study conducted at the University of Denver proved that Colorado, which is generally viewed as a progressive state, assigned the

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death penalty in a discriminatory fashion. Prosecutors in the state boasted that they only attempted to charge 4% of 1st degree murderers with capital punishment, arguing that this was evidence of their judicial cautiousness. However, researchers found that minorities committed 66% of murders from 1999-2010, yet 91% of capital murder defendants were minorities. This data is much too statistically significant to represent a colorblind system. Unfortunately, these numbers are not an anomaly, but are the norm in other states. Therefore, in spite of current safeguards, there is still significant evidence of racial disparity in capital punishment sentencing, regardless of whether courts carry out discrimination on purpose or not. Instead of accepting racial discrimination as an unfortunate reality, the system should be fixed. Eliminating capital punishment outright would assure that neither a disproportionate number of minorities or the majority population are killed.

Furthermore, the system disfavors the lower class, who cannot afford to pay for adequate defense attorneys. Public defenders receive a set salary and do not get paid for working overtime. In Harris County, Texas, which executes more people alone than any state except Texas, public defenders submitted briefs full of “gibberish, unintelligible arguments, flawed grammar, and even a complaint that [they] would run out of paper.” In addition, there were three cases in which the defense attorney fell asleep during the trial and in all three situations, the defendant was later executed. Approximately ninety percent of people on death row could not afford an attorney of their choice. This is not to say that wealthier people shouldn’t have the right to pay for better defense, but that someone’s right to live or die should not balance on their material resources.


Another important factor that is considered in this argument is the evolution of psychological and mental standards in the United States. For prisoners sentenced to death row, they may experience “Death Row Phenomenon,” which refers to the “destructive consequences of long-term solitary confinement” that come from the constant feeling of awaiting one’s death. These conditions can eventually augment to “Death Row Syndrome” which is classified as a “severe psychological illness.” Solitary confinement generally isolates inmates for 23 hours every day, an environment that provokes psychosis, delusions, paranoia, and self-harming behavior.

Although neither Death Row Syndrome nor Death Row Phenomenon has been formally recognized by the American Psychiatric Association, Death Row Syndrome gained recognition internationally in 1989. In the extradition proceedings of Jens Soering—a German citizen arrested in England for committing murder in the United States and fleeing to Europe—he argued that if England were to send him back to the United States, he would be forced into inhumane and degrading treatment—the death penalty. Because of the inhumane treatment of prisoners on death row, Soering’s defense argued that extradition would be a violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; the European Court of Human Rights agreed. The Court elucidated the following: “the condemned prisoner has to endure for many years the conditions on death row and the anguish and mountain tension of living in the ever-present shadow of death.” Therefore, the Court determined that extraditing Soering back to the United States would violate the protections set forth against “inhuman or degrading treatment or punishment.” Although Soering was extradited to the United States, he was sent back on the grounds that he would not receive the death penalty. This case is important because it highlights that England, a western, civilized country similar

to the United States, was compelled to intervene in United States proceedings because of the inhumane circumstances of death row. Although the European Court of Human Rights arbitrated this decision, it should serve as an example to the United States for modern “standards of decency” related to punishment in the Western world.

V. CONCLUSION

Opposition to capital punishment is not revolutionary or new. Cesare di Beccaria first expressed aversion to the death penalty in 1764, claiming “laws designed to temper human conduct should not embrace a savage example which is all the more baneful when the legally sanctioned death is inflicted deliberately and ceremoniously. To me it is an absurdity that the law which expresses the common will and detests and punishes homicide should itself commit one.”36 The United States is the only developed western democracy that practices capital punishment. The only countries that execute more people are China, Iran, Saudi Arabia, Iraq, Pakistan, Egypt, and Somalia—all countries with which the United States is rarely aligned ideologically.37 The 142 nations that have abolished the death penalty in law or practice don’t condone murder or sympathize with murderers, rather they have chosen more humane routes to address capital crime.

The death penalty is not rehabilitative, retributive, or deterring, which are the three requisite standards for a punishment to not be considered cruel and unusual. Capital punishment is not intended to rehabilitate simply because the criminal is executed. It does not serve as just retribution because there is no other crime for which the perpetrator receives a punishment proportionate to their offense. There is no evidence that the death penalty prevents future crime in the way it is currently administered, and some evidence indicates that it even galvanizes violent crime.

36 Cesare Beccaria, On Crimes and Punishment (1764).
Furthermore, capital punishment does not adhere to current standards of decency due to its capricious administration and harmful effect on American minority groups. The original issue with the death penalty in *Furman v. Georgia* (1972) was that its arbitrary use often marginalized minority groups. Despite revisions from *Gregg* (1976), evidence continues to show that minorities are much more likely to be executed, especially if the victim is white. Beyond this, once a prisoner awaits murder on death row, they endure solitary confinement accompanied by high levels of stress and uncertainty that cause permanent medical disorders. According to contemporary western standards of decency, capital punishment should be considered “cruel and unusual.”
Underlying Racism within the Opioid Epidemic

Hannah Wilson

Within the past century, the United States attempted different legal avenues to address drug abuse. Some of these efforts made access to drugs punishable and illegal. Others encouraged research to look at underlying issues of drug abuse and implement those findings. Within the past fifty years, these laws tended to treat drug addicts as criminals instead of as persons suffering from a health crisis. According to the FBI and Uniform Crime Reports, from the 1980’s to the 2000’s, drug arrests rose by 1.5 million per year, while drug usage rates stayed the same. The severe increase in the criminalization and incarceration surrounding drug exploited underprivileged minorities, specifically persons of color. Lawsuits and lobbying brought attention to these injustices. However, a heavy bias in drug-related crime still persists. The penalization of drug crime historically has been a vehicle for implicit and explicit racism.

In the past three years, significant attention has been given to opioid abuse branding it as the “Opioid Crisis” or “Opioid Epidemic”. To address the opioid crisis, an Executive Order 13784 was implemented by the Trump Administration. This order brought the Department of Justice, the Office of National Drug Control Policy, and the Department of Health and Human Services together

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to address the opioid epidemic. Executive Order 13784 increased penalties against illicit-drug users, and measures to provide rehabilitative support to the opioid user, but failed to provide the same resources for all drug users. The order does not address the same protection nor medical support that is long overdue for all illicit drug abuse. As opioid prevalence increased significantly in white communities, usage stayed at low levels within communities of color; therefore, Order 13784 had a predominantly white audience. The order provides funding, legislation, and protections for opioid users. In contrast, a criminalizing approach in addressing marijuana, crack/cocaine, and other drug-related crimes has been largely associated with communities of color. Emphasizing healthy opioid recovery has led to an institutionalized bias, and implicit racism. I request an expansion of the public health approach including research, rehabilitative services, and furthered legislation to support the aforementioned order and include all illicit drugs, not just opioids.

This article establishes the history and relevance of the relationship between racism and drug crime, and explores this recent association in relation to Executive Order 13784 and the opioid epidemic. Then, it will walk through suggested legislative expansions to approach all drug addictions as a public health issue, instead of a criminal justice issue.

I. BACKGROUND

A. Racial Implications of the War on Drugs

President Nixon declared the War on Drugs in the 1970’s. With this movement, incarceration rates have grown over 500%. Different approaches to address illegal drugs included drug courts and rehabilitation treatment. Despite these efforts, alternatives to incarceration


5 Lauren Carrol, How the War on Drugs Affected Incarceration Rates (Politifact, 2016).
were, and continue to be, limited and when available, weak. As a result, mass incarceration spurred other social problems such as latent discrimination against those of lower socioeconomic status, racial minorities, and other societal minorities, particularly blacks. This article will look solely at the racism resulting from this mass incarceration in relation to non-violent drug crimes.

During the war on drugs, the nature of the Rockefeller Laws in New York City revealed existing racism within the criminal justice system. These laws included minimum sentencing starting at 15 years in prison for two ounces of marijuana. Shortly after New York passed this legislation, Michigan followed and mandatory minimum sentences became widespread for non-violent drug crime throughout the US. After these laws were passed, 90% of drug felons in prison were black and Hispanic. These laws were initiated by politicians who wanted to appear hard on crime, and may not have been intentionally mandated with a racist agenda. However, they heavily/dispersorportionately impacted minorities who were the main users of these drugs. In 2009 this implicit racism in the Rockefeller laws was exploited. The laws became recognized as “new Jim Crow laws” and were changed.

Meanwhile, significant racial biases surfaced in the sentence incongruencies between crimes involving cocaine vs coke. Starting in 1986, the sentences for five grams of crack and for 500 grams of powder cocaine were the same. This came to be known as the 100:1 crack/powder cocaine disparity. Chemically, the two drugs are almost identical. The largest difference comes as a result of the production of the drugs; crack cocaine is significantly cheaper than

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8 Gabriel Sayegh, Background on New York’s Draconian Rockefeller Drug Laws (Drug Policy Alliance NY).
powder cocaine. As a result, socioeconomic and racial disparities exist amongst users of the two drugs. Black communities commonly used crack cocaine and white upper class communities to use powder cocaine. The steep difference in usage did not decrease until 2010 when the disparity of reduced from 100:1 to 18:1. A study done by Drug Alcohol Depend, found that blacks were at an increased risk for being users of crack, and for being arrested for drug use when compared with whites using either crack or powder cocaine.9 In the study they found that high socioeconomic status and being white were inversely correlated with prison time.10 Whites tended to be users of powder cocaine, not crack cocaine, and were significantly less likely to be arrested for their drug use. As almost 25% of blacks within the US live under the poverty line, socioeconomic differences are inseparable from racial differences. Given this history, racism has deep roots in the relationship of incarceration and drug laws during the War on Drugs.

B. Brief History of the Opioid Epidemic

Physicians began prescribing opioids as pain medication in the early twentieth century. It wasn’t until the late 1990s and early 2000s when prescribing opioids for pain became the norm. Hospitals and pharmaceutical companies heavily backed this movement. The addictive nature of the drugs was often masked and health care providers and patients alike were misled in their understanding of the drugs. Opioid addiction grew rampantly, sparking growth of illicit opioid distribution. Quickly, the US realized the vast spread of this epidemic which has continued through today. A recent study revealed as many as two million Americans are patients of opioid dependency.11 In

9 Joseph J. Palamar, Shelby Davies, and Michael Weitzman POWDER COCAINE AND CRACK USE IN THE UNITED STATES: AN EXAMINATION OF RISK FOR ARREST AND SOCIOECONOMIC DISPARITIES IN USE (https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4533860/).

10 Id. p 16.

2017, opioids accounted for over half of the deaths due to drug overdoses.\textsuperscript{12} This issue plagued both the Obama and the Trump presidential administrations.

In recent years, the opioid epidemic worsened and brought attention to the futile efforts of the war on drugs. In 2017, the Trump Administration issued the Executive Order 13784 declaring a public health emergency to address “the scourge of drug abuse, addiction, and overdose”\textsuperscript{13} In this order, the opioid crisis was declared and a commission was established to research and make recommendations to lighten the societal burden of “drug addiction, and the opioid crisis.”\textsuperscript{14} In the two years after this order was made, recommendations regarding the opioid epidemic were implemented and funding was provided. Public health initiatives to assist opioid users in recovery continue to grow, resulting in a lessened criminalization of opioid user abuse.

\textbf{C. The Executive Order 1378—Shifting the Lens}

On March 29, 2017, the Trump Administration published Executive Order 13784,\textsuperscript{15} The order created a commission to research drug addiction and the opioid crisis with regards to healthcare, education, addiction prevention and treatment, overdose prevention, and overdose reversal.\textsuperscript{16} It was also established in the order that the committee make recommendations for improving all these areas.\textsuperscript{17} Funding was also granted for the research and implementation of the research findings.\textsuperscript{18} The order established preliminary research to be completed in six months after the publishing of the order. In October

\begin{itemize}
\item \textsuperscript{12} \textit{Id}.
\item \textsuperscript{13} Exec. Order No. 13784, C. F. R. (2017).
\item \textsuperscript{14} \textit{Id}.
\item \textsuperscript{15} Exec. Order No. 13784, C. F. R. (2017).
\item \textsuperscript{16} Exec. Order No. 13784, C. F. R. § 2, 3, 4 (2017).
\item \textsuperscript{17} Exec. Order No. 13784, C. F. R. § 4. (2017).
\item \textsuperscript{18} Exec. Order No. 13784, C. F. R. § 5, 6 (2017).
\end{itemize}
2017, President Trump declared the opioid crisis a “public health emergency”.\(^{19}\)

As established, drug offenses were historically painted as a criminal offense and directly treated in an aggressive manner as evident in the branding of the “War on Drugs”. This legislation rebrands the formerly called “War on Drugs”, to an “epidemic” when pertaining to opioid specific drugs. Now, instead of a criminal crisis, opioid overuse is a public health crisis. Addressing drug problems through a health lens is a more appropriate way to handle the situation. While black drug crime continues to exceed white drug crime, white drug related offenses resulting in incarceration grew 27% between the years of 2009 to 2016.\(^ {20}\) However, the time and way this new approach has been implemented holds elements of racism. Political motive sparked from the public investment to assist addicted individuals to recover, rather than treating them as an enemy of war. Implicit racism exists within the very inspiration behind this call to action; when the majority of the affected community was white, public health efforts were introduced for the first time.

\textit{D. Addressing the Issue}

When compared to the response to other drug epidemics, the public health response to the opioid crisis betrays incongruencies pertaining to racial bias. To combat this, I suggest additional legislation should be written to accompany Executive Order 13784 that (i) promotes research opportunities for all drugs, and (ii) provides healthcare for drug addiction recovery and rehabilitate for all addicts of illicit drugs.

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\(^{19}\) On Thursday October 26, 2017 President Trump officially declared the opioid crisis a “public health emergency.” President Trump said from the White House that “This epidemic is a national health emergency.”

II. PRESENCE OF PUBLIC HEALTH VS. INCARCERATION

A. Opioids and all Illicit Drugs Alike

Order 13784 explicitly stipulates resources are needed to fight all drugs, not just the opioid epidemic. The executive order consistently uses the phrase “drug addiction and the opioid crisis”, implying that actions should not be limited to the opioid epidemic and should address all drug addictions. Efforts in response to the law should be consistent in making room for research, education, and other public health measures relating to drug addictions and the opioid crisis. Thus far, efforts to decriminalize drugs have mainly focused on the opioid epidemic.\(^1\) The Department of Justice addressed other illicit drugs with increased criminal penalties.\(^2\)

Different legal ramifications for different drugs are expected. For example, within the past decade states have explored varying approaches for recreational marijuana usage. Marijuana has a history of being used equally in communities of color and white communities, but only criminalized in communities of color. States are responding to this incongruency by decriminalizing recreational use of marijuana. We do not expect to see the same approach with drugs such as hypnotic depressants, heavy hallucinogens, or instantly addictive substances. Not all drugs have equal effects on the user, and reciprocally should not all bare the exact same legal ramifications. However, the attitude in which we approach all illegal drugs ought to be the same. The wording in this order however, consistently includes all drug addictions and does not specify action to be only applied to a certain type of drug.\(^3\) As the order calls, effort to

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increase funding and rehabilitative treatment for all drug addictions should increase, not opioids alone.

The steep increase in opioid usage and overdoses warranted political attention and legislation that was specific to opioid related drugs. Although this order is reactionary to the opioid crisis and could have been opioid specific legislation, it is not. Instead, the order makes broad statements consistently referring to, “drug addiction and the opioid crisis”.24 This is acceptable because the order is not about punishment or sentencing of drug abusers. It attempts to preemptively avoiding other drug crises by making available the public health resources that would be allocated to the opioid epidemic. This long overdue approach to drug addictions is a step in the right direction. It does not, however, address the historic drug problem in association with race, or provide the necessary explicit allocation of resources to do so. Additionally, there still exists a bias of resources towards opioids in funding regarding treatment, recovery, and prevention. In Table 1, programs that are funded as a result of this order are categorized.

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24 Id.
As observed, significantly more money was allocated for only opioids in treatment and recovery programs, and less for other drugs. On the other hand, more finances are allocated to other drugs for Criminal Justice and Law enforcement, fueling the criminalization of these drugs. 41.6% of the Criminal Justice and Law enforcement funds allocated for opioids and other drugs are for the Office of National Drug Control Policy—High Intensity Drug Trafficking Areas (HIDTA).\footnote{Id.} HIDTA’s first area of focus for drug trafficking is the southern border.\footnote{High Intensity Drug Trafficking Areas (HIDTA) Program White House at 4 (2017) https://www.whitehouse.gov/wp-content/uploads/2017/11/ONDCP_High-Intensity-Drug-Trafficking-Areas.pdf.} Most opioids sold in the United States are produced by American Companies and are not being trafficked across any national borders.\footnote{Id.} This furthers racial implications encouraging the incarceration of nonwhites for non-opioid drug crimes. The funds designated to treatment and recovery favor opioids, while the efforts that further the incarceration of drug crimes are focused on non-opioid drugs, (and are accompanied with an additional association of racial bias.) Again, this synchronizes with the consistent trend of

<table>
<thead>
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<th>Category of Program</th>
<th>Funding for Opioids Only (in dollars)</th>
<th>Funding for Opioids and Other Drugs (in dollars)</th>
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<tbody>
<tr>
<td>Treatment and Recovery</td>
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<td>932,542,000</td>
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<tr>
<td>Prevention</td>
<td>1,990,130,600</td>
<td>470,998,000</td>
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<td>Criminal Justice and Law Enforcement</td>
<td>93,839,383</td>
<td>1,249,800,000</td>
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<tr>
<td>Research (2018 only)</td>
<td>—</td>
<td>500,000,000</td>
</tr>
<tr>
<td>Mixed Efforts</td>
<td>130,000,000</td>
<td>2,881,206,400</td>
</tr>
</tbody>
</table>

\emph{Table 1. Federal Opioid and Drug Appropriation in 2017 and 2018.}\footnote{Id.} All costs recorded in USD.
racial association that has existed since the 1970’s; decriminalizing white drug use while further criminalizing colored drug use.

B. Nature of Executive Orders

Although the nature of the legitimate legal authority of executive orders has been disputed, the practice has existed since George Washington. Throughout the history of the country, these executive orders have been canonized as law if they are deemed constitutional and unrevoked. If the order is not constitutional, the Supreme Court, Congress, and future presidents have the authority to revoke the order. This happened five times during Harry Truman’s presidency, more than any president. The most famous of which occurred during the steel strike of 1952 when Truman issued executive order 10340 seizing control of the American steel industry.\(^{28}\) In the Youngstown Sheet and Tube Co. v. Sawyer, the Supreme Court overruled Truman’s order and reprivatized the steel industry.\(^{29}\) The opportunity to revoke a presidential executive order still exists today. The Supreme Court overrode President Trump’s executive order that banned citizens of seven Muslim countries from entering the United States on January 28, 2017.

Speaking in general terms, presuming the order is constitutional, it becomes the President’s responsibility to oversee the implementation of the order. This is rarely an issue as written by the presidential cabinet, it is in his or her best interest to carry out the order. In 1948, Truman’s executive order 9981 states that “there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin.”\(^{30}\) This order has been executed and enforced by the executive branch and treated as law since. Article II of the Constitution establishes the executive branch to bear the responsibility to “take Care that the Laws

29 Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case), 343 U.S. 579 (1952).
be faithfully executed.” 31 Truman’s executive order 9981 is a prime example of this responsibility because it has been cited and upheld by the executive branch up through today.

These cases are unrelated to the Executive Order 13784, rather, they prove the power of an executive order. This form of legislation is one of the strongest manifestations of executive power. Order 13784 went without opposition from the Supreme Court or Congress. The Trump Administration is therefore bound by this unrevoked executive order. Because the of the inclusion of all drug addictions with the opioid crisis in the wording of the law, the Trump Administration is expected to see the fulfillment of both parts of the order. Meaning, it is the President’s responsibility to establish policies supporting those addicted to opioids and other drugs alike.

C. Opioids: the White Drug

Opioid addictions often start as a medically prescribed pain killer. Painkillers are shown to be more commonly prescribed to white patients than to people of color for a variety of reasons. 32 While these reasons provide insight to underlying implicit racial bias, for the scope of this paper, it is only required to establish that opioids are in fact more common among white low-income areas. Overdose

31 U. S. Const. art. II.

32 Joseph Friedmen, Assessment of Racial/Ethnic and Income Disparities in the Prescription of Opioids and Other Controlled Medications in California, April 2019 at 473 (“One foundational study showed that Hispanic patients were 2 times less likely to receive analgesics following long bone fractures than white patients, after accounting for other factors. Similar discrepancies in pain medication prescribing were found for black patients relative to white patients. Recent studies have found that health care professionals often underestimate the pain of black patients when compared with white patients and that such racial/ethnic biases in the detection of pain are seen among health care professionals who report no explicit racial/ethnic biases.”)
deaths in 2017 grew to 47600 making up 67.8% of all drug overdose deaths.\textsuperscript{33} Eighty percent of those opioid users were white.\textsuperscript{34}

Leading up to 2017, there were three times more white opioid users than black opioid users in prison (24% of white prisoners are opioid users while only 7.9% of blacks are opioid users).\textsuperscript{35} However, blacks are still convicted for drug charges six times more than whites.\textsuperscript{36} The opioid users are in the minority of those in prison for drug use. Rehabilitative and decriminalization efforts associated with this order are primarily helping the minority. Focusing the implementation of the order on decriminalizing opioid abuse continued the racist tendencies within drug law. Criminalizing the broader drug use has been an easy way to allow implicit racism to seep into the US Justice system. Implicit racism has come as a result of increased attention to opioid recovery, but a limited health approach to addressing marijuana, crack/cocaine, and other drug crimes.

Between the overdoses and the increase in white drug incarceration rates, the epidemic was a political wakeup call. The Trump Administration’s response is inseparably connected with the political demographics of his supporters at the time. Many voters who most supported Trump were hit by the opioid epidemic the hardest. For example, in West Virginia in 2017 there were over 81 opioid prescriptions for every 100 people.\textsuperscript{37} In the 2016 election, West Virginia had the highest support for Trump with 67.9% of the vote in his

\textsuperscript{33} Opioid Overdose Deaths by Race/Ethnicity, KAISER FAM. FOUND., https://www.kff.org/other/state-indicator/opioid-overdose-deaths-by-raceethnicity/?currentTimeframe=3&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D.

\textsuperscript{34} Id.


\textsuperscript{36} Id.

favor. This state is particularly white with a 92.1% non-Hispanic white population as recorded in the 2019 census. West Virginia and other predominantly white states who were hit hard by the opioid crisis became the face of the epidemic. The Trump Administration had significant political incentive to please these white low-income communities by providing this legislation.

Comparatively, the crack cocaine epidemic was also addressed by appealing to the white population. The imbalance in sentencing cocaine and coke heavily biased wealthier white communities who at the time bore significant political power. The 1980 crack cocaine crisis primarily involved black communities and persons, while the opioid epidemic is identified as mostly affecting white communities. Crack users of the 1980’s, predominantly black, bore the weight of excessive incarceration, mandatory minimum sentencing, and outright racism. Opioid users, predominantly white, are unmistakably being provided furthered care and attention from the state to protect and secure their health without the cost of incarceration. The opioid epidemic is the first significant drug crisis that is aimed primarily to influence white communities in the U.S. Correlatedly, it is the first time the law has reflected protection for drug users, and yet it is rooted in white privilege.

Action to address the incarceration of opioid users came about because the opioid epidemic is associated with white populations. As

42  Hansen & Netherland Editorial, Is the Prescription Opioid Epidemic a White Problem?, 106 AM. J. PUB. HEALTH 2128 (this order “institut[es] voluntary take-back programs for unused medication and disseminat[es] the opioid overdose reversal medication naloxone, while passing Good Samaritan laws to protect those calling for emergency assistance during an overdose from drug charges.”)
prevalence rates of drug addictions increase within black communities, similar legal ramifications do not occur. This begs the question, that had the opioid epidemic been branded as an issue in black communities, would it have received the same amount of productive attention, or would it have resulted in furthered incarceration?

D. Combating Institutionalizing the Bias of Race

As shown in the Table 1 above, Executive Order 13784 called for a large increase in funding towards addressing the opioid crisis and an future improvement in addressing non-opioid drug crises. However, because all non-opioid drugs are allocated finances in conjunction with opioid crisis budget, there is no ensured budget for any non-opioid drug within this order. Research, prevention, treatment and recovery, and criminal justice improvement measures are only explicitly provided for opioid related services. Additionally, these funds exacerbate the difference between races incarcerated for drug crimes due to the difference in drug use between races. The funding’s heavy favor here adds an economic bias in addition to the legal bias already established. Together, this order institutionalizes racism.

Furthered legislation can help to address this. Because so many efforts have already been made for the opioid crisis, expanding the research, education, and other public health measures will require less funding than they initially did. This legislation needs to support research, rehabilitation and reassimilation. Secondly, room within Medicare should be created for those struggling with drug addictions to be able to get medical help to address the addiction. Looking through the lens of a public health crisis will allow a perspective shift to occur for all drugs, and one day the association between racist tendencies and drug law can be eradicated.

III. CONCLUSION

The opioid crisis is associated with a white demographic. I argue that because of this association, there has been more funding, legislation, and political power to provide aid to the epidemic. After a closer look at the Executive Order 13784, the inequality in treating different drug
types is correlated with the inequality in treating different races. To avoid furthered racist associations with this law, measures to combat this racism should be taken. I propose legislation to be written that establishes healthcare provisions and legal protections for all drug users without regard to the type of drug. Additionally, healthcare and addiction recovery for all drug users should be prioritized over incarceration. While previous drug epidemics in communities of color and low socioeconomic status, have resulted in furthered incarceration, stigma in the media, etc., this epidemic can set a standard of public health for all future drug addiction crises. By providing services and support to all suffering from drug abuse without reference to the drug or race of the users, the following three effects are expected to be seen on society. First, a legally supported priority on health, accounting for confounding differences in demographics, resulting in a healthier society. Secondly, those who are incarcerated will have more access to aid resulting in reduced recidivism and bettered reassimilation coming out of prison or jail. Third, there will be less implicit racism in the law, and potential future racist drug associations that have been rampant in the past can be avoided. We have the potential to create a society that encourages growth, change, and improvement rather than facilitating recidivism, racism and increased incarceration.
Since its founding, people all over the world have looked towards America as a land of opportunity. Immigrants viewed it as a place for fresh starts, new beginnings, and equal chances. However, for centuries, concrete and subtle barriers have slowed the opportunity for progress for those who are not in the majority. Throughout America’s beginnings, lawmakers legalized segregation and discrimination throughout the country multiple times. The Chinese Exclusion Act prevented Asian Americans from immigrating to the United States to pursue opportunities. Jim Crow laws enforced racial segregation and ensured that though African Americans were no longer enslaved, they did not have all the same rights as other citizens. Historically, these discriminatory systems prevented individuals from improving their own lives and contributing to wider society. In response to these systems, advocates fought to create laws and regulations that would even the playing field. The Voting Rights Act, the

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Fair Housing Act, and Title VII of the Civil Rights Act, amongst others, struck down some of the societal barriers to educational and career success.

As America continues to become more diverse, it has become increasingly difficult for policymakers to determine who needs help overcoming the barriers placed in their way because of things out of their control, such as race, gender, sexuality etc. Within the larger Asian American community, specifically, members of subgroups such as Cambodians, Laotians, and Burmese, struggle to find footing in this country, as many of their mass migrations have taken place later than those of other, more-established races. They lack the foundation within the United States that many of their Asian American counterparts have. By comparing them to the more settled Eastern Asians, policymakers set these Asian Americans up for failure in their education and careers. Members of the aforementioned subcommunities who have more recently immigrated to the United States face struggles more similar to African American and Hispanic communities than to the larger Asian American community. For instance, for every dollar the average white man makes, an Asian Indian woman makes $1.21, but a Burmese woman makes $.50. This disparity is one example among many which shows that lumping together all groups of Asians within America presents a problem.

This paper will focus on federal laws regarding the use of race in college admissions. We suggest that in order for all Asian Americans to reap the rewards of race-conscious admissions policies without injuring other minority groups, such laws need to be revised to include language that is more inclusive of all groups and subgroups of Asian Americans, regardless of socioeconomic status, racial history, or any other factors. By legally requiring states to incorporate the use of Asian American subcategories in higher education

admissions and disaggregating data within Asian American statistics, state legislatures and voters will be able to make more educated decisions about how their state approaches diversity in higher education. By separating the Asian American subgroups, the revised laws would achieve greater diversity within higher education.

By calling for more inclusive language in higher education admissions to be required by law, students can better identify themselves and universities can gain a better understanding of how diverse these students’ backgrounds actually are. The main way to accomplish this is by including more Asian American subgroups in the application process. First, we will explore the historical contexts of Affirmative Action and the model minority myth. Next, we will discuss the current state of Asian Americans in higher education. Finally, we will propose a solution which involves disaggregating data, and then we will conclude by discussing the implications of such a proposition.

Many members of the Asian American community struggle to fight the stereotypes associated with the model minority myth. The model minority myth portrays all Asian Americans as members of a hardworking, intelligent group that represent what all minority communities should aspire to. While this may appear flattering, underlying this myth is a belief that all Asian Americans fit this mold and any who fall short are living below the expectation of what an Asian American “should” be.

I. BACKGROUND

Every major case involving Affirmative Action has included mention of the Equal Protection Clause of the 14th Amendment, as those who feel they have been discriminated against argue that their rights have been infringed because of their race. Initially, schools struggled with knowing how best to implement the policy of Affirmative Action, and so many used quotas to fill the spots in their programs with a diverse blend of students. However, in California v Bakke (1978) the court held that using race to fill quotas was considered
unconstitutional. The justices did rule that race could be used in admissions, if its use met the standard of strict scrutiny by serving a compelling governmental interest and being narrowly tailored to achieving that interest. Later, in *Grutter v Bollinger* (2003) the Supreme Court reaffirmed that Affirmative Action itself was constitutional and that using race as a factor among many was allowed in order to offer schools the greatest diversity possible. Affirmative Action was again upheld in *Fisher v University of Texas* (2016) wherein a young white woman who claimed to have been discriminated against lost her case. Like in the two aforementioned cases, the Court held that the use of race in admissions was not in violation of the Equal Protection Clause. In another related case, *Schuette v. Coalition to Defend Affirmative Action* (2014), the Supreme Court held with the state of Michigan’s voters in saying that amendments to a state’s constitution that prohibit race- and sex- based admissions are not in violation of the Equal Protection Clause. These cases demonstrate that America is still learning how to deal with the ramifications surrounding laws regarding race.

Though the Supreme Court has continued to uphold the use of Affirmative Action, multiple states have followed Michigan’s lead in attempting to ban its use in college admissions. Texas’ vote to ban Affirmative Action was overruled by the Supreme Court in *Grutter v Bollinger* in 2003. However Affirmative Action has been successfully banned in California in 1996, Washington in 1998, Florida in 1999, Michigan in 2006, Nebraska in 2008, Arizona in 2010, New Hampshire in 2012, and Oklahoma in 2012. Most recently, the aforementioned 2014 Supreme Court ruling reaffirmed that it is up to voters, and not the legislature, to make decisions about whether

to allow Affirmative Action in a specific state. Because it has been banned by various states, but still upheld federally, we are interested in exploring what methods besides traditional Affirmative Action policies states can use to achieve the goal of a diverse student body. The ruling in Schuette is a reminder that it is important for voters to be informed so that they can make judicious decisions regarding the use of race in college admissions.

II. CURRENT SITUATION

Amongst Japanese Americans 25 years and older, 46.8% hold a bachelor’s degree, while only 5.3% have not graduated from high school. 53.2% of Korean Americans have attained a bachelor’s degree or higher, while 7.8% do not hold a high school degree. There is more disparity amongst Chinese Americans, but still 52% hold a bachelor’s degree or higher and all but 18.4% have a high school degree. These numbers reflect some truth to the “model minority” myth, as it shows the Asian American propensity to succeed in higher education. According to The National Center of Economic Studies, of all Asian Americans, 50.2% have a bachelor’s degree or higher, while only 31.4% of Caucasian Americans hold a bachelor’s degree or higher. This shows the incredible amount of success that Asian Americans as a broad category tend to have in education. However, as has been evidenced, this is especially strong amongst Eastern Asian Americans, especially the Japanese, Chinese, and Koreans. The statistics for Southeast and Southern Asian American groups is not as favorable.

The data that distinguishes between ethnic subgroups suggests that the educational achievements of many Southern and Southeast Asian American subgroups align more with African Americans and Latinos, groups typically thought of as underachieving academically. The percentage of Southeast Asian Americans who have not graduated high school is 26.5%. This figure lies right in between the

percentage of Blacks and Latinos, which are 14.6% and 33% respectively. Multiple Asian Americans groups have even lower rates of high school graduation, with 55.1% of Bhutanese and 47.5% of Burmese lacking a high school degree. Additionally, although 28.6% of Southeast Asians hold a bachelor’s degree or higher, which is more than Blacks (at 20.9%) and Latinos (at 15.3%), their attainment still lags far behind the statistic of 53.6% for all Asian Americans. Looking closely at the statistics reveals that certain subgroups, such as the Bhutanese and Cambodians are less likely to attain a bachelor’s than even Blacks and Latinos. The members of these subgroups with such degrees lies at 10.2% and 16.4%, respectively. This data clearly reveals that in terms of educational attainment, many Asian American subgroups line up more with minority groups such as Blacks and Latinos; they should therefore be afforded the same opportunities as the members in these groups.

These various statistics demonstrate that we should not view Asian Americans with a one-size-fits-all perspective. Grouping Southern and Southeastern Asians with Eastern Asians creates inequality within the group. If anything, Eastern Asians have educational attainment statistics that currently rank them closer to white Americans, if not outperforming them, while Southern and Southeastern Asians are performing more closely to African Americans and Latinx Americans. As Grutter v. Bollinger has affirmed, using race as a factor in admissions is allowed in order to increase diversity within schools. However, though legal segregation is no longer allowed, social segregation is still prevalent across America. Since Brown v. Board of Education, America has still fought against its segregated schools. Legally requiring the implementation of more subgroups in the admissions process will allow schools to get a more holistic view of their students, and the Asian American students are a great place to start because of their exceptional differences from top to bottom.

The University of California (UC) System has begun efforts to find a policy other than Affirmative Action to achieve diversity in public education and give opportunities to a wider range of Asian Americans. This began in 2010, over a decade after the state banned Affirmative Action. It has allowed for a more complete view of students and how their educational achievements may be tied to the challenges they had to overcome to accomplish what they have. These changes have been lauded throughout the Asian American and Pacific Islander community and have provided much needed change in California. A CARE report suggested that disaggregated data helped the UC system in crucial ways: understanding which student populations are underrepresented on campus, using resources efficiently, and justifying funding for various programs and services. Some states, like Massachusetts, have also drafted bills that emphasize greater disaggregation of data from data-collecting state agencies. The proposed Massachusetts bill focused on data collected by any agencies related to the state, urging for them to classify Asian Americans and Pacific Islanders according to census categories. It also attempted to ensure that “the...” Though the bill ultimately failed, it provides a template for how lawmakers can address disparities within the Asian American community.

This paper argues that legal requirements to collect disaggregated data are permissible under the Equal Protection Clause and should be implemented nationwide, on a state level, and modeled after the UC system while also being tailored to the specific needs of different localities. This will not require race-based admissions but will simply provide schools and voters a better understanding of their student body. As Schuette v. Coalition to Defend Affirmative Action showed, states have the right to decide how they approach

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16 iCount: A Data Quality Movement for Asian Americans and Pacific Islanders, The Racialized Experience of Asian American and Pacific Islander Students: An Examination of Campus Racial Climate at the University of California, Los Angeles.

race-based admissions. This legal requirement will give states the information that they need to approach such admissions within their state.

Knowing specific details about the race of applicants and college students will not change necessarily change the outcome for each applicant. However, in states that do support Affirmative Action policies, it will give admissions offices the knowledge they need to create a diverse incoming student body. If all public universities are required to provide options to allow potential students to more accurately identify themselves, they will be able to create a space where students are judged fairly. Southern Asians and Southeastern Asians will be compared to each other, instead of being held to the higher standard that Eastern Asians are setting. If these changes can be implemented, Asian Americans will be treated in a way more representative of their demographic. Truer diversity will be achieved.

Currently, in the UC System, an important statistic that they track is the presence of underrepresented minorities (URM’s) in their schools. The UC System identifies a URM as “A student who self-identifies as African American, Hispanic/Latino(a), or American Indian.”18 Asian-Americans are not on this list. Because they are not, the outreach programs that the UC system uses to increase their diversity are less likely to reach the Southern and Southeastern Asian communities. If data were to be disaggregated, then members of Asian American subgroups that are less common at the school can be brought to light and seen as URM’s as well. On a national level, this could be implemented on a state-by-state basis, so that local voters, lawmakers, and admissions officers can have a more accurate picture of which groups may be underrepresented in their schools relative to their applicants. Requiring greater disaggregation by law simply provides transparency from students to schools, and vice versa, so that everyone can have an equal chance to receive an education.

In response to the changes made in the UC System and the proposed bill in Massachusetts, there has been backlash, as some com-

munities have felt that such laws and regulations are racist or overstep their bounds.\textsuperscript{19} However, Eastern Asians are often the ones who lead these arguments. These are the people who have a voice in the Asian American community. These are the groups that would not be hurt if data aggregation stayed as it was. The groups that get lost in that shuffle are those who, should the current systems stay as they are, do not have a voice and cannot be heard or seen. If racial data in college admissions were to be disaggregated, these underrepresented communities would legally be given representation and would be able to stand for themselves as their own demographic. This would achieve truer diversity, because we would learn more about the needs and performance of underrepresented communities rather than having students from the same few countries be over-represented.

This plan will impact many within the United States. Two of the groups that need to be considered more specifically are Eastern Asian Americans, as well as the group of historically underprivileged minorities, specifically African American and Latinx Americans. Under our proposed plan, Eastern Asians would be represented in their own race category. Though some may think that this will create greater competition within this group and make entering higher education even harder, because of the ruling in \textit{California v. Bakke}, quotas are no longer allowed in university admissions. So, because universities cannot use race as a determinative factor, it would simply be used as information that provides universities with the best idea of who a student is. Race should not define a person in their entirety. However, the more specific students can be in identifying themselves, the more accurately they are able to represent how they have been influenced by their ethnicity. For any student, this proposal allows a more complete version of themselves to be on display for the schools to which they apply for. Allowing students to identify themselves as Southern and Southeastern Asian will open the doors for those minority groups that are facing systemic, socio-

economic, and legal barriers that hinder their ability to succeed in higher education.

This holds true for members of the African American and Latinx communities as well. We recognize that this proposal may create more competition for African Americans and Latinx students, many of whom already face difficulties with discrimination and the poverty cycle that make success hard to achieve. It may seem that adding more applicants with systemic challenges because of their race to the applicant pool may make it increasingly difficult for students from marginalized backgrounds to compete in higher education, as there would be more students to compete with. However, we would argue that legally compelling schools to implement these subgroups on application materials will highlight the difficulties that students face when trying to get to college in many communities. Having more students with economic difficulties who aren’t grouped in with the “Asian American” group but can self-identify as Southeastern Asians or as Southern Asians will help universities better understand the demographics of prospective classes. Universities will be able to be better see where changes need to be made within both their specific schools and within higher education generally.

Some worry generally regarding Affirmative Action. They fear that if students have not been able to succeed in high school or in standardized tests, they certainly will not be able to succeed once they get to a university. However, this is not what we are arguing against. Though it is certainly an important and pressing subject, this paper is not meant to prove that underprivileged students can accomplish great things and succeed in school. That is what policies allowing race to be considered as one factor in holistic admissions is for. It is designed to bring justice for all. This paper argues that for justice to be granted, subgroups must be in place to help universities to see more clearly who these students are. When they are seen not just as test scores but as people who have overcome great, systemic barriers that have sought to halt their progression at every turn because of their situation, they can be treated fairly and exit from the shadows cast by those who may have not faced similar, even relatable challenges. Whether not they can succeed is not necessarily up to the system, but it is not the duty of a system to determine who has an
opportunity to succeed and who does not. By legally mandating this disaggregation, we provide a way to find out whether different groups can succeed. Society can never move forward unless we first learn where we truly are, and to do this we need to clearly define people’s needs which are invariably linked to their identity. By disaggregating data, students will be able to clearly explain who they are and will be able to then truly represent themselves and their ethnicity.

The future of Affirmative Action is uncertain, and therefore we look towards state level rather than federal level initiatives to increase diversity. Like in the UC system, states can and should find methods to increase diversity even if they have race-neutral admissions programs.20 If race was completely removed from the admissions process, there would be disastrous effects on Southern and Southeastern Asian Americans. As we have proved, their current educational achievements already lag far behind their ethnic counterparts. They face various social, economic, and cultural barriers that frequently hinder them from achieving their entire educational potential. They need more, rather than less, legal recourse that would help them. All Asian Americans need greater opportunities to succeed without being tied down by the model minority myth. True diversity will not be achieved unless educational achievements increase across the board. As a country, we need to make legal modifications to the way race is currently addressed in university admissions to ensure that the needs of all Asian Americans are addressed under the law.

IV. Conclusion

As we have shown, Affirmative Action in its present form does not achieve its stated purpose of “attaining a diverse student body.” The way it is currently applied prevents many Asian Americans from being represented on college campus and limits diversity to a select group of high achieving, more historically privileged Asian Americans. We have proposed that encouraging individual states to include disaggregated data in the college admissions process will

be one step forward in beginning to address this problem. It better follows the Equal Protection Clause of the fourteenth amendment and thereby allows applicants to be given a fair chance to admission. There are many benefits that will come with adjusting its implementation so that it helps those it is supposed to. Changing the way that it is applied will help more Southern and Southeastern Asian Americans succeed in higher education, which in turn will help raise the educational standards across the entire country. The college admissions process will be more just to both applicants and schools because more accurate information will be used. There will be greater diversity within higher education because ethnic groups will not be viewed as monoliths and stereotypes. This is one advantageous course of action that will open the door for other forms of legal recourse to help all Asian Americans succeed in academia, the workplace, and every other area of life.
ALIMONY: 
THE TAXING ECONOMIC IMPLICATIONS OF DIVORCE

Amaia M. Kennedy¹ and Jared Mason²

In 2017 alone, over 750,000 American couples chose to divorce³. Nationally, fifty percent of marriages end in divorce, with each of these marriages lasting eight years, on average⁴. Put another way, a divorce occurs every 13 seconds⁵, and each of those divorces is expensive, with an average cost of approximately $15,000 per person⁶. Expenses usually include a divorce attorney and court fees but can also include tax advisors, child custody evaluators⁷, private

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investigators, fees for serving subpoenas, an accountant, as well as the costs of finding separate living arrangements\textsuperscript{8}. With a median American household income of just over $60,000, a divorce would cost a couple (and their children) almost half of their yearly income, on average, a significant challenge as both individuals look to move on from the failed relationship. Although already difficult for couples who can afford divorce, the repercussions can be truly debilitating for those who earn significantly less than the median, as the proportional cost of divorce would be much higher, and the resources available more limited.

After 1960, the divorce rate in America more than doubled over the course of just two decades, increasing from 9.2 divorces per 1,000 married women to 22.6 divorces per 1,000 married women\textsuperscript{9}. American culture has kept up with the increase in divorce rate; divorce has moved from the edges of society toward the center, becoming increasingly more common in America.

When a couple chooses to divorce or change their marital status to “legal separation”, alimony may be awarded based on a mutual agreement between the divorcing spouses. However, if a mutual agreement cannot be reached, a decision may be made by the judge assigned to the case\textsuperscript{10}. Alimony is separate from the division of marital property and is different from child support, legally. Additionally, alimony within each divorce is considered on a case-by-case basis\textsuperscript{11}. In terms of tax treatment, the Internal Revenue Service (IRS) states, “Amounts paid to a spouse or former spouse under a divorce or separation instrument (including a divorce decree, a separate maintenance

\textsuperscript{8}HUFFPOST, Divorce Is Expensive (Can You Really Afford It)?, Life (Feb. 23, 2020), https://www.huffpost.com/entry/divorce-is-expensive-can-_b_11595584.


\textsuperscript{11}Id.
decree or a written separation agreement) may be alimony for federal tax purposes.” Although legal separation and divorce share many similarities under the law, for the purposes of this article, we will focus only on alimony as it relates to divorce.

Spousal support, spousal maintenance, and alimony are often used synonymously, but spousal support and spousal maintenance must meet certain requirements in order to qualify as alimony. For tax purposes, the IRS imposes six qualifications for a payment to be considered alimony: (1) former-spouses must not file a joint income tax return; (2) payments must be made in cash (including checks or money orders), and exchanges of items or assets cannot be considered alimony; (3) the payment must be to or for a former-spouse made under a divorce; (4) former-spouses must not be living together; (5) the agreement must state that payments end after the death of the receiver; and (6) the payment is not treated as child support or a property settlement.

The tax treatment of alimony changed when the President of the United States signed The Tax Cuts and Jobs Act (TCJA) into law on December 22, 2017. The TCJA was focused on tax reform and made many changes to federal tax codes. One of the changes causes divorcees to pay more in tax, making divorce and life after divorce more difficult and expensive. These changes are neglectful of the purpose of alimony—to level the economic playing field by limiting any unfair economic effects of divorce (by providing supplemental income for the lower-income-earning spouse).

Using previous and existing federal codes, in this article we examine the law in relation to divorce and tax law surrounding alimony.

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13 Id.


We argue for the removal of the 2018 revisions to the tax code (in relation to the treatment of alimony) and a reversion to the previous principles, as the imposed changes do not fulfill the intended purposes of alimony. The proceeding sections will do the following: first, provide a detailed explanation of the TCJA changes in relation to the treatment of alimony; second, address their negative impact on divorcing Americans; and third, outline a viable solution.

In section one, we will define alimony-related terminology that we will use in this article and provide a recent history of alimony. In section two, we will discuss the changes to alimony-related tax, and thoroughly explore the impact these changes have in the United States. In section three, we will outline a three-pillared solution and give our reasoning for proposed changes.

I. Background

Alimony provides an income, after the marriage is dissolved, to the lower-wage-earning or non-wage-earning spouse\(^\text{16}\). Alimony is justified by the cohesive and sacrificial nature inherent in a marriage: spouses may specialize, choosing to forego certain economic benefits or opportunities in order to better the couple as a unit. For example, if a spouse chooses not to pursue a career and instead support the family at home—so that the other spouse can focus more on securing economic benefits—alimony ensures that his or her contributions and sacrifice are not lost in the divorce, and any potential economic disadvantages of such choices made to benefit both partners are mitigated. In this article, we will refer to the spouse who makes alimony payments as the payer and refer to the spouse who receives alimony payments as the receiver.

Each state considers each of the many influencing factors differently when determining how much alimony should be awarded and for how long, but there are common factors: the recipient’s needs, the payer’s ability to pay, the length of the marriage, the couples’

previous lifestyle, and the age and health of each spouse\textsuperscript{17}. Alimony cannot be assumed; just because one spouse makes less than another, it does not guarantee any alimony. It is granted depending on the individual circumstances of the divorcing couple. Any former agreements between spouses may not be legally binding and may not be applicable in future negotiations regarding the terms of any awarded alimony\textsuperscript{18}. Similarly, if one spouse receives support at the time of the divorce, they are not guaranteed continued support after the marriage through alimony. Certain circumstances can end alimony, including but not limited to death, remarriage, a change in the recipient’s financial status, or a change in the payer’s financial status\textsuperscript{19}. Although states weigh factors differently, federal tax statutes are consistent; all alimony, regardless of the state it was ordered in, is treated the same.

\textit{A. Pre-TCJA Tax Code Explanation}

Prior to January 2019, Sections 62, 71, and 215 of The Internal Revenue Service’s Internal Revenue Code allowed deductions for alimony payers, and tax on those payments were paid by the receivers. Section 215 outlined deductions relating specifically to alimony, and stated that for payers, “there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual’s taxable year”\textsuperscript{20}. Section 62, titled “Adjusted


Gross Income Defined”, outlined allowable deductions to adjusted gross income and referenced Section 215 directly in subsection (a) paragraph (10): “Alimony. —The deduction allowed by section 215” 21. This deduction was allowable for all payers, but not for receivers. Section 71, titled “Alimony And Separate Maintenance Payments”, outlined who held the burden of tax for alimony payments. It stated “Gross income includes amounts received as alimony or separate maintenance payments” 22.

To understand the significance of the deductions outlined in Section 62, it is necessary to understand the process of calculating taxable income. Taxpayers (1) determine their gross income, (2) calculate their adjusted gross income, and (3) subtract tax deductions 23. In the second step, “above-the-line” deductions can apply to gross income, reducing adjusted gross income. After adjusted gross income is determined, other “below-the-line” deductions can be applied. Thus, adjusted gross income is the symbolic “line”. Section 62 outlines above-the-line deductions, and because Section 62 referenced Section 215, alimony was considered an above-the-line deduction. Step three allows taxpayers to apply one of two deduction options: an Itemized deduction or the Standard deduction. Itemized deductions are outlined in Section 63 (outlined in Section 63 of IRC 24). Generally, taxpayers should choose to take the Itemized deduction if their individual deductions exceed the Standard deduction 25. The “standard deduction is a specific dollar amount that reduces the amount

24 63 I.R.C. § 63a- 63g (2018).
of income on which you’re taxed\textsuperscript{26}. The TCJA increased the Standard deduction from $6,500 to $12,000 for individuals. However, because alimony was considered an above-the-line deduction, it was irrelevant whether you chose to itemize or take the Standard deduction; you were always entitled to a deduction if you were making alimony payment (as they are defined by the IRS).

In short, the Internal Revenue Code made clear that payers were entitled to a deduction on the amount of alimony they paid in the payer’s taxable year, and that receivers were to include alimony as income (as if they had earned the alimony themselves). An important implication exists due to the latter statutory tax law; alimony was tax in the marginal tax bracket of the receiver, who almost certainly made less in income, and was therefore in a lower bracket. This resulted in a net tax savings for the couple. The payer saw no personal benefit, could not use the money for themselves, and as divorcing spouses generally do not desire to give any of their income to their former spouse unless required to, the IRC allowed a deduction to offset the economic loss that would have been incurred by the payer. The receiver saw the benefit of the money and had control of its usage, so they were required to pay the tax. This system provided more financial optionality for the receiver, who was only awarded alimony because of the limitations their financial situation imposed on them.

\section*{II. Implications of Tax Changes}

The Internal Revenue Service summarized and clarified the implications of the changes: “Beginning Jan. 1, 2019, alimony or separate maintenance payments [were] not deductible from the income of the payer spouse, or includable in the income of the receiving spouse, if made under a divorce or separation agreement executed

after Dec. 31, 2018.\textsuperscript{27} The IRS explicitly stated who the changes apply to: generally "alimony or separate maintenance payments are deductible from the income of the payer spouse and includable in the income of the receiving spouse, if made under a divorce or separation agreement executed on or before Dec. 31, 2018, even if the agreement was modified after December 31, 2018, so long as the modification"\textsuperscript{28} does not change the terms of alimony or explicitly state that payments are “not deductible by the payer or includable in the income of the receiving spouse”\textsuperscript{29}.

\textit{A. Deduction Implications}

Because the (now outdated) deduction only applied to the payer, they therefore shoulder the economic losses caused by the amendment to Section 62 and repeal of Section 215. In the current code, there are no federal tax statutes to assist payers. Compared to the old code, payers now lose a larger proportion of their income to taxes, limiting their financial situation. A payer who makes $100,000 per year and pays $20,000 in annual alimony would lose over $4,000 in taxes\textsuperscript{30} under the current IRC when compared with the pre-TCJA IRC.

\textit{B. Tax Burden Shift Implications}

The receiver is harmed more than the payer by the repeal of Section 71. Income disparity is one of the most important factors for deter-


\textsuperscript{28} Id.

\textsuperscript{29} Id.

mining alimony\textsuperscript{31}; in other words, if each spouse earned an equal income, it is significantly less likely that alimony would be awarded at all. If incomes are different, the payer is almost certainly in a higher tax bracket and must pay the tax at a higher rate on the alimony before giving it to the receiver: this ultimately results in a loss for the receiver.

The pre-TCJA IRC provided a tax savings for the couple, and comparatively provided more resources for lower-wage-earning or non-wage-earning spouses. Thus, the changes to the federal statutory tax law almost certainly cause divorcees to pay more in taxes, placing a greater economic burden on the couple. This change neglects and fails to accomplish the purpose of alimony, when compared to the pre-TCJA IRC.

The United States Congress’ Joint Committee on Taxation estimated that these changes would generate $6.9 billion in tax revenue between 2018 and 2027. $6.9 billion appears substantial, but it amounts to 0.46 percent of the $1.5 trillion tax cuts provided by the TCJA\textsuperscript{32}. While proponents of repealing the alimony deduction may point out that it raises revenue for the federal government, it does so largely at the expense of people who can least afford to contribute to the reduction of the deficit by reducing their economic options.

C. IRA Contribution Implications

The IRS mandates that Traditional Individual Retirement Account (IRA) contributions must meet specific requirements: contributors (1) “must be under age 70 ½ at the end of the tax year”, and (2) you

\textsuperscript{31} Divorce Net, Alimony, Find out how Alimony (spousal support) is determined in a divorce (Feb. 23, 2020), https://www.divorcenet.com/topics/alimony.

“must have taxable compensation.” They state that taxable alimony is treated as compensation for IRA purposes, but because Section 71 was repealed and the burden of tax shifting from the receiver to the payer, alimony is no longer considered taxable to the receiver. This prevents receivers, who are usually lower-wage-earning individuals, from contributing money received via alimony to a tax-advantaged Traditional IRA account, hindering their chance for a financially secure retirement. The implications continue—contributions to a Traditional IRA account are tax deductible depending on whether you are covered by a retirement plan. Those covered are limited in their deduction amounts. Conversely, those who are completely uncovered are entitled to receive the full value of their contributions as a deduction. Deductions can amount to as much as $6,000 if you are younger than 50 years old or $7,000 if you are 50 or older, for the 2020 tax year. The consequences of the repeal of Section 71 extend beyond the decrease in payment amount due to taxes. In addition to receiving less money, receivers also face limitations surrounding retirement planning as it relates to Traditional IRA’s and the deductions associated with those IRA’s.

III. Solution

To combat the negative economic effects of divorce, it is imperative that federal and state tax codes focus on providing divorcees with the financial resources they need. With more resources, ex-spouses have a greater chance of moving past the many non-financial-related obstacles that accompany divorce. In many ways, the pre-TCJA IRC better served the needs of divorcees and was more in line with the purposes of alimony. Three changes to the current code will rectify existing issues with taxes associated with alimony: (1) reinstating Section 71, once again allowing alimony to be includable in the


34 Id.

35 Id.
income of the receiver; (2), reinstating an amended version of Section 215, entitling lower-income payers to receive a deduction for alimony; and (3) reinstating Section 62(a)(10), making alimony an above-the-line deduction for payers.

If reinstated, Section 71 will pave the way for many positive repercussions, most of which will benefit the receiver. Alimony will again be includable for the receiver and they will have the ability to use alimony to make contributions to a Traditional IRA, increasing the probability of a financially secure retirement. Additionally, income will no longer be includable for the payer, thus they would no longer bear the burden of tax. Instead, the burden will shift back to the receiver, who is usually in a lower tax bracket. The receiver would retain a greater proportion of their alimony. In other words, although the change is seemingly small, it will almost certainly result in a tax savings for the couple. Furthermore, all of the tax savings will go to the receiver therefore increasing their overall support.

As previously explained, reinstating and amending Section 215 will help the payer retain a greater proportion of their income. Instead of an exact reinstatement of Section 215, an amended version, that accounts for the need to reduce the deficit, may be most helpful. Preserving the alimony deduction for all, except the very highest income earning payers, will ensure all payers receive the resources they need while maintaining additional tax revenue, which would contribute to the reduction of the federal deficit. While the amount contributed to the reduction would be less, it is unjust to take from alimony-paying individuals who are already experiencing a tumultuous and expensive lifestyle change. To bring the deduction above-the-line, reinstating the amendment to Section 62 would be also necessary.

The losses incurred because of tax burdens shifts and the elimination of the deduction may seem insignificant, but they are more accurately depicted when considered in the context of divorce. With a $15,000 average cost of divorce, and the additional cost of supporting two households instead of one, life after divorce can be financially aggravating, and more expensive. Couples can pay more for housing, utilities, insurance, vehicles, and many other costs that were previously shared. These additional costs require divorcing individuals to
make on average 30 percent more if they hope to maintain an equal standard of living after divorce

IV. Conclusion

If the Internal Revenue Codes that pertain to alimony are not changed, thousands of divorcing Americans will continue to suffer financially. In the United States, there were over 780,000 divorces in 2017 alone. With a nationwide divorce rate of approximately 45 percent, it seems that divorce will continue to affect many. Thus, it is imperative that federal tax codes adhere more closely in fulfilling the purposes of alimony, eliminating financial disparities between payers and receivers. Although the post-TCJA tax code generates revenue for the federal government, it harms divorcing couples, making the process more painful and expensive, and making it more difficult to escape the negative financial repercussions.

This article has used previous and existing federal tax codes to examine the financially harmful tax treatment of alimony in the United States of America. We have identified specific issues with the existing federal tax codes. It seems evident that siphoning resources from divorcing couples, to provide a minor contribution to the deficit reduction, is ineffective. For this reason, we call on federal legislatures to reinstate Section 71, reinstate an amended version of Section 215, and reinstate Section 62(a)(10). These changes will bring tax codes more in line with the purposes of alimony, alleviate alimony-related financial issues, and empower divorcees because the laws


38 PolitiFact, Steve Sweeney claims two-thirds of marriages now end in divorce, Stephen Sweeney says ”67% of marriages now wind up in divorce” (Feb. 23, 2020), https://www.politifact.com/factchecks/2012/feb/20/stephen-sweeney/steve-sweeney-claims-more-two-thirds-marriages-end/.
will inherently value each spouses’ future as they move beyond the failed relationship, and on to a new life.
Imagine you are the owner of a small construction company and are contracted to build a large office building. As is customary, you signed a contract agreeing to complete the building by a specific deadline for a set amount of money. Included is a brief force majeure clause, which allows you to be relieved of the contract in the case of “unforeseeable circumstances” that might prevent completion of the project. During construction, heavy tariffs affect your main suppliers, exponentially increasing the projected cost of completing the project. Your company cannot afford the supplies necessary to complete the building, and you wonder if you can void the contract under the force majeure clause. As it stands, is this perfunctory clause sufficient to excuse you from your contract?

Force majeure protections are inherently broad by nature, causing them to vary by state, situation, and jurisdiction. Thus, determining what protections can be granted to contracting parties relies heavily upon the specific verbiage and phrasing within

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2 Max is a Junior at Brigham Young University studying Political Science. He plans on attending law school in Fall of 2021.

said clause.\textsuperscript{4} However, minimalistic or overparticular specific force majeure clauses may induce more problems than they would otherwise solve. The solution we propose therefore is two-fold: first, each party must be informed about potential unforeseen events that could damage said party’s infrastructure, capital, or ability to perform\textsuperscript{5}; then, aware of these potential dangers, parties should apply the necessary location and industry-specific specificity to their contracts. Instead of cutting and pasting generic force majeure clauses, we suggest that contracting parties draft explicit, location-specific force majeure clauses.

We will examine force majeure clauses at three varying levels of specificity: those contracts with no force majeure clause, an overly specific clause, or one that is too broad. Both the benefits and dangers of each level of specificity will be assessed, along with and how price changes or tariffs are managed in each varying case.

\textbf{I. BACKGROUND}

Force majeure clauses serve as a sort of contractual safeguard. When written into a contract, they allow one party to “suspend or terminate the performance of its obligations when certain circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible.”\textsuperscript{6} In the ever-changing world of contract law, unexpected circumstances often arise, making contracts difficult to fulfill. However, the line between difficult and impracticable can be blurred. In Restatement 2d, a legal treatise on contract common law, defines impracticable contract performance

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as involving “extreme and unreasonable difficulty, expense, injury or loss to one of the parties.”

Examples include shortages of supplies due to war, embargo, local crop failures, and unforeseen shutdowns. Such causes can natural disasters like earthquakes, tornadoes, hurricanes; man-made problems like riots, strikes, and government intervention can also be incorporated.

Because risk varies by region and industry, each party should be aware of the possible area specific risks that could hinder their ability to fulfill a contract within differing states. Attorneys Mark Augenblick & Alison B. Rousseau recognize that “There is no universally accepted definition of the requirements to successfully invoke force majeure. Different laws and jurisdictions take different approaches.” This is in part what makes force majeure clauses so difficult to interpret, as the challenge of determining what is impracticable or when a contract becomes void is left to the determination of the presiding judge. Consequently, each state and jurisdiction lead to differing results, creating inconsistency and uncertainty when dealing with contractual parties residing in different states.

To help mitigate this variance, parties will often take two different approaches. Some try to protect against every imaginable catastrophe in the included text, while others take the catch-all approach with general language, hoping for a generous reading in court. Which approach is preferable? It depends on the party’s industry and the region. For example, a housing contractor in Tornado Alley is much more concerned about defending against tornadoes than a contractor living on the coast. So, when drafting a contract, the first contractor will be sure to include defense against tornadoes specifically, rather than some ambiguous line about natural disasters. This

way, the damages are more likely to fall under the scope of force majeure.

For this reason, contract drafters have the options of including no force majeure clause, a narrow one, or a broad one. As the following examples show, trained experts still experience difficulties in determining adequate amounts of risk when drafting industry and region-specific force majeure clauses.

II. CONTRACTS WITH NO FORCE MAJEURE CLAUSE

To avoid the complication inherent with force majeure clauses, some seek to avoid them entirely. If no force majeure clause is included, there remains two ways in which the contracting parties may be excused from their obligations. First, the doctrine of “impracticability” relieves a contracting party from carrying out tasks deemed “impracticable.” Nationally, tasks that have been classified as impracticable are understood to be impossible to carry out or to complete. The second doctrine that relieves a party from a contract is “frustration of purpose.” The “frustration of purpose” occurs when circumstances do not allow for a contract to be carried out due to unforeseen events.

Leanne Krawchuk, an attorney specializing in mining law, explains, “the parties should also stipulate the specific [force majeure] events that they agree neither party should bear the risk of in the context of their particular contract.” Of course, the potential pitfalls in the mining industry are vastly different than the dangers of other industries. She also explains the need to pay attention to the “specific circumstances surrounding the contract and its subject matter (such as the services to be provided, the nature of the product to be


10 Id.

transported, the location of the mining project, the type of equip-
ment and labor used in performing the services).”

Across a wide
range of industries, firms face a wide range of dangers. A boilerplate
force majeure clause is simply unable to effectively cover all bases.
Mary McCormick, a business attorney at the McCormick interna-
tional law firm, warns against creating boilerplate force majeure
clauses. She argues that, “A good force majeure clause should be
customized to fit the parties, the industry and type of goods, and the
specific type of contract.”

Thus, region and industry-specific force
majeure clauses are necessary to account for the individual circum-
cstances of one’s work.

III. OVER-SPECIFIC FORCE MAJEURE CLAUSES

To avoid the problems mentioned in the previous section, it is usually
preferred to include even a standard force majeure clause. Addition-
ally, force majeure provisions should be treated less like shopping
lists of immunity and more like wish lists because simply listing
every imaginable threat does not guarantee protection.

In some
cases, it may do the opposite. For this reason, listing every possible
danger may result in a catch-22—that is the specific language, while
meant to increase protection, actually narrows the realm of avail-
ability. The innate reaction would therefore be to broaden the lan-
guage as much as possible, but this in and of itself presents its own
set of issues.

One such example is Publicker Industries v. Union Carbide Corp.
Union Carbide Corporation had agreed to sell a specialized type of
ethanol to the plaintiff for a fixed number of years. Within that time,
conflict in the Middle East caused production costs to spike well past

12 Id.

13 Mary McCormick, Force Majeure Clauses: Buried in Boilerplate But
Important, Martindale (Jun. 15, 2009), https://www.martindale.com/

14 Timothy Murray, “Drafting Advice: Avoiding Disastrous Force Majeure
lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/posts/drafting-
advice-avoiding-disastrous-force-majeure-clauses.
that specified in the contract. Notwithstanding the circumstance, Union Carbide remained locked into the contract, obliged to provide ethanol at a below-market price. In search of emergency relief, the Union Carbide invoked protection under the contract’s force majeure clause, which reads: “Neither party shall be liable for its failure to perform hereunder if said performance is made impracticable due to any occurrence beyond its reasonable control, including acts of God, fires, floods, wars, sabotage, accidents, labor disputes or shortages, governmental laws, ordinances, rules and regulations.”\textsuperscript{15} They were hoping to apply the clause specifically under the line “any occurrence beyond [the parties’] reasonable control.”\textsuperscript{16} However, the clause in question then narrows from “any occurrence” to a specific list of hypotheticals (fires, floods, etc.). This is an example of \textit{ejusdem generis}, specific language that narrows the broad introductory language that precedes it.\textsuperscript{17} Due to this interweaving, the defendant can no longer claim protection against unlisted events (e.g. price increases). As a result, the court ruled that Union Carbide could not find protection in the force majeure clause.\textsuperscript{18}

\textbf{IV. OVERLY BROAD FORCE MAJEURE CLAUSES}

While widening the language may seem optimal, the ambiguity may actually work to the parties’ disadvantage. For example, it fails to recognize smaller events that might cause damage to contracting parties’ contracts. This, again, is due to the fact that broad language is left to the judge’s interpretation if taken to court.

This can be seen in the case of \textit{Perlman vs. Pioneer Ltd. Partnership}, where William Perlman (plaintiff), signed an oil and gas lease agreement with Pioneer Limited Partnership and Kendrick Cattle Company (defendants). The contract contained a force majeure

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16 Id.  
\end{flushright}
clause that would excuse Perlman from performance if he was “prevented or hindered by...inability to obtain governmental permits.” 19 As Perlman sought to execute the agreement, a Wyoming state commission requested permission to investigate his work. Instead of complying, Perlman filed for a declaratory judgement to determine if he could be excused from performance under force majeure protection, claiming that his work was being hindered by the government. However, the court found that disruptions from state regulations were not specifically listed within Perlman’s force majeure clause. The court ruled that, “Courts should look to the language that the parties specifically bargained for in the contract to determine the parties’ intent concerning whether the event complained of excuses performance.” 20 Due to the broad nature of the force majeure clause in question, it was up to the determination of the judge if new state regulations were sufficient to void the contract. The court ruled in behalf of the defendants, establishing a statute stating that courts should not “interject terms that the parties did not bargain for.” 21 Because Perlman did not choose to include state regulations under the force majeure provision, he was denied protection.

Tariffs did not directly affect the Perlman vs. Pioneer Ltd. Partnership, but tariffs have become an increasingly familiar challenge among modern companies and businesses. Even if Perlman brought forth force majeure claims under the guise of tariffs, the court would again rule the same. This being due to the fact that Perlman and Pioneer Ltd. Partnership did not choose to include tariffs as an unforeseen event in their force majeure clause, their contract could not be void under force majeure provisions. However, under the new precedent, if Perlman had included tariffs in their force majeure clause, they would have been released from their contract. So, as can be seen in Perlman, there is simply too much risk to rely on generous interpretations of open-ended clauses.

19 Perlman v. Pioneer, 918 F.2d 1245 (5th Cir. 1991).
20 Id.
21 Id.
V. Proposal

To the untrained eye, the subtle differences between an overly narrow and an overly broad force majeure clause can be difficult to detect. Even small differences in language can make a significant difference in a contract’s interpretation. For example, a clause that reads “included” has vastly different meaning than “included, but not limited to.” In some cases, boilerplate provisions may be sufficient to mitigate both parties’ risk. In other cases, a customized clause may be appropriate. Unless a contract drafter is aware of these details, he or she risks exposure to unexpected liability.

We therefore propose that businesses draft force majeure clauses with the adequate level of specificity depending on the inherent risk in a specific industry and the regional issues where the businesses are located. For many small businesses and inexperienced negotiators, this process may be unclear. We suggest that contract drafters familiarize themselves with the industry and region-specific language that might be found in similar force majeure contracts. Using this historical method will allow drafters to assess what should and should not be included in the final contract. Ultimately, a well-constructed force majeure provision can provide protection against even the worst of circumstances. In situations between a company’s life or death, the impact of one force majeure provision cannot be overstated. Our previous examples demonstrate the challenges that even experienced legal counsel can face when seeking enforcement of their force majeure clauses.

One alternative solution to this problem is the creation of a standard force majeure provision for universal use in every contract. Proponents might suggest that this would remove ambiguity in how much protection a company can expect.22 We disagree, however, because each contract should represent a unique agreement with unique region-specific risks. The Lexis Practice Advisor Journal

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explains that even a generic force majeure clause, if not drafted carefully, “can leave the parties with fewer protections than they would have under the law without it.” As mentioned previously, each state classifies unforeseeable events differently, so a general “catch-all” force majeure clause is untenable in practice, due to the varying interpretations in each jurisdiction. For this reason, we reject proposing standardized force majeure clauses. We also do not suggest dramatic changes in legislation to force standardization of all force majeure clauses.

VI. CONCLUSION

A proper understanding of force majeure clauses gained through historical analysis will allow businesses to apply the necessary specificity to their contracts. By applying too little or too much detail, or failing to include such a clause at all, businesses may lose protection against unforeseeable events. However, careful consideration of the amount of risk that each party is willing to accept make it possible to determine the level of specificity that each contract requires according to the specific industry and region the party is located. The financial implications could mean the difference between profitability and bankruptcy.

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THE CENSUS, CITIZENSHIP, AND IMPROVED LEGISLATION: A CONSTITUTIONAL COMPROMISE

Kaitlyn A. Marquis 1

“Taken individually, each step [of government intrusion] may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen—a society in which government may intrude into the secret regions of man’s life at will.” 2

Justice Douglas [Osborn v. United States]

Why should the census avoid asking a question concerning citizenship? Are there alternatives in providing information to aid government functions while still protecting the rights of residents? In early 2019, the Trump administration requested that the 2020 census include an inquiry concerning the citizenship status of residents, for claimed reasons of better legislation (i.e. the allocation of government funds to the states and the drawing of electoral districts). The Supreme Court considered this issue in Dept. of Commerce v. New York. In sum, their opinion was, “not yet.” 3 The Supreme Court did not definitively conclude that it was unconstitutional to inquire about citizenship. Instead, they determined that the reason provided was

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insufficient to justify such an inquiry. Surely there is a better solution that more appropriately fulfills the constitutional demands of the census, while still satisfying the administration’s claim to certain information.

The decennial census is as old as the Constitution itself, and it enumerates the purpose of the census: to collect a count for the residents of the United States every ten years. The data collected is used to help government better meet the needs of residents based on population and region, allocate government funds to the states, and draw electoral districts. The Constitution gives Congress the authority to collect statistics through inquiries unrelated to counting residents can be included if they are lawfully considered as “necessary and proper for the intelligent exercise of other powers enumerated in the Constitution.”4 Based on this statement, the intended purpose behind including an additional inquiry in the census holds more weight than what the inquiry is. Neither the census nor Congress have claim over the personal information of residents. A question inquiring about citizenship tied to individuals and households could have negative consequences impacting the accuracy of the overall count of people currently residing in the United States. A question about citizenship causes the census to fail in its prescribed purpose of acquiring an accurate count of all residents in the United States. This does not mean that all government inquiries for certain information are illegal, though it does require that the specific inquiry meets the legal standards which prioritizes the privacy and security of all United States residents. Additionally, it shows that specific means by which the government acquires information are more appropriate than other potential processes. A government-issued survey, separate from the decennial census (similar to the American Community Survey, discussed below), collects data anonymously and reports it by region for the true purpose of better-suited legislation and improved appropriations. This solution is both legal and appropriate, and it does not interfere with the constitutional purpose of the census.

The summer of 2019 was filled with dialogue about ICE raids, comparisons between immigration centers and concentration camps, and few legislative solutions. Many immigrants—both documented and undocumented—fear deportation and would rather live a life under the radar than a life returning to the circumstances from which they fled. The individuals impacted by these raids are the same individuals that would likely abstain from the census, even if they are naturalized or legally residing in the United States. Even though the Census Bureau cannot legally share one’s citizenship status for the purpose of enforcing deportation, the ambiguity behind why an inquiry of citizenship is necessary continues to strike fear in the hearts of both documented and undocumented United States residents. Government certainly has a responsibility to protect citizens, but there is also a line between what is appropriate legal enforcement and what is unnecessary and invasive questioning of individuals. This article offers reasons arguing why the government should refrain from including a citizenship question on the census. It prescribes a solution, based on historical and legal evidence, that satisfies the demands and claims of the Trump administration for government access to certain information from residents.

I. BACKGROUND

A historical background of the census, including previous questions that have appeared on the census, provides context as to why the census appears as it does today. Additional context is given by explanations about the processes of other government surveys, such as the American Community Survey, and both the long form and short form of the decennial census. This background information includes concerns from states that would suffer greater consequences relating to a high volume of immigrants, as well as background information for how the census influences legislation and the legislative processes that follow the census.

As previously mentioned, an inquiry concerning citizenship has appeared on the census in previous decades. Censuses between
1820 and 1830 all featured questions regarding naturalization. After 1950, the census was administered in two forms, a long form and a short form, with only the long form including any questions relating to citizenship. In 2010, the long form was replaced by the American Community Survey, and the actual census was administered only in one form consisting of ten questions. The census has evolved through each presidential administration in conjunction to the changing needs and progression of society. These adjustments are not justified by a presidential administration’s agenda. Many inquiries and methods used to gather information from the 1800s are irrelevant and would be considered inappropriate today. For example, enumerators used to go door to door to collect census information. It was the enumerators who would determine one’s race based on physical appearance and skin color, rather than actual nationality. Just because a method was used in the past does not classify it as an effective, accurate, or ethical practice. Likewise, many of today’s needs are not reflected in census questionnaires of the past. It is essential that the census questionnaire and the methods by which information is collected evolve and improve over time, in order to best meet the intended purpose of the census.

Some may argue that there is no reason to separate the citizenship question from the census, as it has previously been included while the census still fulfilled its purpose. The facts suggest that historical precedent is not reason enough for something to remain in effect. The purpose of an adaptable government is to improve and reform government functions as needed. If the government could not evolve, no amendments would exist, and blatantly harmful statutes would still be in law. Thus, the issue at stake is not whether citizenship can permissibly appear on the census, but rather, whether including

6 Id.
7 Id.
8 U.S. Census Bureau, Through the Decades, https://www.census.gov/history/www/through_the_decades/ (last visited February 27, 2020).
a citizenship question on the census is an improvement. Including a question about citizenship on the decennial census could have the side effects of causing a misrepresentation of actual population.\textsuperscript{9} Mentioning citizenship would “invariably lead to a lower response rate,”\textsuperscript{10} and the census would fail to fulfill its prescribed purpose.

Misrepresentation is unduly problematic for states with large immigrant populations, such as California and Texas. Because the government relies heavily on census data to allocate state funding, a population undercount in states with a large immigrant population feasibly leads to under-funding and misappropriation of funding. There would be less money to support public schools, community maintenance, and construction projects, which would negatively affect both citizens and non-citizens alike.

Another concern for those in favor of including the citizenship question on the census is that the states with large undocumented immigrant populations would unfairly receive additional Representatives. However, this argument is convincingly refuted by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.\textsuperscript{11} Under this amendment, the controversial interpretation of the principal “one person, one vote” was ruled to mean that the total population, not just total voting-eligible population, can be used to draw electoral districts.\textsuperscript{12} Nonetheless, it would be constitutional for the United States government to distribute and require residents to participate anonymously in a survey for the purpose of gathering data when government-requested inquiries are not appropriate to include on the census. This is justified so long as the information is assessed by region rather than household. The Equal Protection Clause additionally declares that states can “more accurately” draw their own legislative districts to better reflect the ratio of the actual


\textsuperscript{11} Evenwel v. Abbott, supra note 10.

\textsuperscript{12} Id.
voting population if they so choose.\textsuperscript{13} Anonymous surveys would aid in this process for states that are especially concerned about having a more precise representation of eligible voters in their own electoral district.

The culmination of the facts supports the idea that the census should strictly follow constitutional restrictions, as well as strong support for the legality of an anonymous, regionally-reported survey for the purpose of satisfying government demands to better legislate and appropriate. Although there is no blatant violation of the Constitution by inclusion of a citizenship question, the purpose of the census calls for no additional inquiries beyond that of enumeration.

This article explores the legal precedent surrounding the United States Census as well as specific doctrines concerning a right to privacy and a compromise between government demands for information and the protection of citizens. The Constitution states that, “the actual Enumeration shall be made . . . within every subsequent Term of ten Years, in such Manner as they shall by Law direct.”\textsuperscript{14} The implications following this constitutional doctrine display few guidelines as to how far the scope of the census may reach. The support of additional legal doctrines, such as the right to privacy, lead to the conclusion that the census does not extend to infringe upon personal rights of any person in the United States. The Fourteenth Amendment directs that “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”\textsuperscript{15} This last inclusion, “nor to deny to any person within its jurisdiction the equal protection of the laws” guarantees equal protection to all persons within the United States. The constitutional guidelines surrounding the census as well as the right to privacy as stated in the Fourteenth Amendment support each other in a way such that a question

\begin{itemize}
\item \textsuperscript{13} \textit{Id.,} at 2-3.
\item \textsuperscript{14} U.S. Const. art II, § 1, cl. 3.
\item \textsuperscript{15} U.S. Const. amend XIV, § 1.
\end{itemize}
concerning citizenship both diverges from the constitutional purpose of the census and violates the right to privacy granted to all people.

II. PROOF OF CLAIM

The word “privacy” is never explicitly stated in the United States Constitution, yet by judicial review it is now a legal standard and a right protected under United States’ law. The right to privacy was first legally used by the Supreme Court in support of an opinion in 1965. The case of Griswold v. Connecticut 16 introduces the right to privacy by protecting the right to make personal decisions. Citing Poe v. Ullman, Justice Goldberg concurs in Griswold v. Connecticut with the opinion of the court, stating, the right of privacy is a fundamental personal right, “[emanating] from the totality of the constitutional scheme under which we live.” 17 Based on the First, Third, Fourth, and Fifth Amendments there is an implicit right to privacy. The wording of these amendments as found in the Constitution implies that these protections apply to all “persons,” and not just “citizens.” Thus, a right to privacy is granted and protected by law to all persons under the jurisdiction of United States law. The Fifth Amendment creates “a zone of privacy which government may not force him to surrender to his detriment.” 18 Surely, governmental force that could potentially result in a violation of rights upon which an individual or family has built a world can be considered a “surrender to his detriment,” and a violation of “the sanctity of a man’s home and the privacies of life.” 19 Whalen v. Roe 20 expands the scope to which the right to privacy applies by reaffirming the right to not disclose personal information. While these cases are based on questions of medical relevance, the principles behind a right to privacy do not change.

18 Griswold v. Connecticut, supra note 17.
19 Id.
In *Snyder v. Massachusetts* the opinion of the court reaffirmed judicial authority in the claim that protection of rights “rooted in the traditions and conscience of our people [is] to be ranked fundamental.”\(^{21}\) The conscience of the people today affirms that fundamental rights include protection and security within one’s home, and a decennial violation of those personal privacies is not something that would improve society, regardless of whether or not it is constitutional. The *Freedom of Information Act*\(^{22}\) and *FOIA Improvement Act of 2016*\(^{23}\) provide clarification in regard to regulations the Census Bureau must follow in order to protect these rights.

In defending the proposal to include a citizenship inquiry on the 2020 Census, the Trump administration claimed: “It is essential that we have a clear breakdown of the number of citizens and non-citizens that make up the U.S. populations. Imperative. Knowing this information is vital to formulating sound public policy, whether the issue is healthcare, education, civil rights, or immigration.”\(^{24}\) While there was great rhetorical weight given to the necessity of this information, there were not sufficient substantive claims made in support of this “imperative” need. Claiming a need is not the same as giving reasons for a need, and this claim by the Trump administration is therefore incomplete and fails to meet the legal standard. The Supreme Court determined that a question regarding citizenship on the census was not inherently in violation of the constitutional sphere of the census,\(^{25}\) but reasonable justification for including the question is still required. Regardless of both the potential and historical legality to include an inquiry of citizenship on the census, the Trump administration’s inability to provide proper justification

\(^{21}\) *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

\(^{22}\) See *The Freedom and Information Act*, 5 U.S.C. § 552 As Amended By Public Law No. 110-175, 121 Stat. 2524.


\(^{25}\) *Dept. of Commerce v. New York*, supra note 5.
for such a question is what ultimately resulted in the denial of their request. The proclaimed motives behind the inclusion of a citizenship question could still be met by introduction of a survey that follows proper conditions. Thus, by protecting all persons’ right to privacy and in being separate from the census, the constitutional design of the census is protected from potential future corruption in any administration. If the intentions of including the question are as stated, the proposed survey satisfies the demands of the executive for maximizing administrating the law, while still protecting a citizen’s right to privacy and right to not disclose personal information.

Introduction of an additional government-administered survey that follows these regulations is not beyond constitutional limits, so long as this survey remains separate from any official census processes. If the government feels certain information is necessary, relevant, and helpful for the performance of prescribed duties, then a survey administered in addition to, but separate from, the decennial census is appropriate under certain restrictions. In order to protect a citizen’s right to privacy as previously mentioned, the survey must be anonymous. Respondents will not have to provide any personal information, and all that is required is an anonymous response to the approved questions. Questions asked are not to infringe upon the privacy of any respondent and must be justified and relevant to the listed purposes of the survey. In addition to these requirements, the reporting of the survey must follow a regional pattern, rather than reporting following household jurisdiction. By separating these two questionnaires, resident’s right to privacy is protected while the government is still able to reach the desired goal of meeting the needs of residents.

With the introduction of a new government survey, multiple potential concerns arise. Some critiques may protest that the supplemental survey is a violation of privacy. Arguments asserting that privacy is violated through this action are refuted by the restrictions the government must follow in administration of the survey. Both the anonymity and regional reporting required in administration and reporting of the census protect respondents’ information and right to privacy, as defined by the Supreme Court.
In addition to violations of privacy, concerns about the incentive for honest and accurate responses may develop. Just because something is a law—such as following the speed limit, or a civic duty, such as voting—does not mean that people will comply to the government’s ideals. Many arguments against including citizenship questions on the census follow the logic that respondents may feel the need to respond dishonestly in order to protect themselves and their families. If this is an issue for the census, how could different consequences be expected of another government-issued questionnaire? Furthermore, what would motivate one to respond in the first place? This issue is not new or unique. It is fairly common for noncompliance by citizens to cause government programs or intentions to fall short. Because regulation is difficult with national programs, noncompliance and free riding lead to said programs having results that differ from the intended ideal. When citizens do not comply with the directions that are imposed in order to foster ideal functioning of programs and resources, the potential and purpose of the programs cannot be met. A government-regulated and administered survey is no exception to this pattern. While there is no perfect solution, common methods of incentivization, such as monetary rewards and other government-provided benefits, would increase, though not guarantee, a stronger response rate. In addition to incentives, emphasizing the purpose and protection behind the questionnaire would motivate individuals to respond as they understand that results of the survey are for the ultimate purpose of creating better-suited legislation on a more localized, regional level. Additionally, granting protection guarantees—and articulating said guarantees—to all respondents is a necessary component to the success of the survey. If protections of respondents are not made clear, response rates will fail to reflect the surveyed population and the entire purpose of the survey would not be satisfied. Mentioning literal and realistic outcomes such as increased funding for city parks, school programs, and infrastructure motivate voters to vote, so similar tactics that create a positive air surrounding the survey would ensure higher and accurate response rates.

Restrictions placed on the government in creating, distributing, and reporting the survey protect the rights of both citizens and
residents of the United States, while the administration of the survey still satisfies the claims of the government to gain “imperative” information for legislative purposes. No new legislation is required to guarantee protection of respondents’ rights, since adequate protection is already offered under the law.

Most arguments against this prescription for a new survey will use the right to privacy argument. The right to privacy is not violated through introduction of this survey. So long as set guidelines are followed, right to privacy is protected and there is no reason for which a respondent should fear their personal information is not protected or that their right to privacy is violated.

Arguments may also be made questioning why these two questionnaires are not coupled together for purposes of simpler distribution. The census and the survey could still follow the set legal guidelines, and the census maintains its strict constitutional purpose of a decennial enumeration, and the survey comes with it and is still returned anonymously and reported by region. While this is possible, it defeats the purpose of maintaining strict adherence to constitutional prescriptions for the census. Additionally, when practical considerations are made for how these two questionnaires would realistically be returned, the census is distributed and reported by household and the protections granted in the survey following anonymous and regional restrictions would be weakened.

Aside from practical success of the survey, a much more fundamental question must be addressed: is fostering trust between government and residents even a requirement of a successful government? That depends on what the ideal government looks like according to the people under the jurisdiction of the government in question. While this is a more normative consideration, it is relevant and necessary to consider in order to guarantee the validity behind a requirement imposed upon the people by the government. Trust between a government and its people is not considered necessary to obtain success for countless regimes throughout the world. In the United States, this is not the case. Instilling an un-revocable level of both protection and amiability between the government and its people are the fundamental ideas upon which this country was founded and built, that ought to be reflected by every government institution.
Again, the issue is not whether there is protection of privacy in the census, but whether a citizenship question is relevant to the purpose of the census. The simple answer is that there is no relevance between a citizenship question and the enumeration of a population. Additionally, the Census Bureau is limited by the law that protects privacy, including personal information.

There is an additional argument claiming that the census precedes budget legislation and funding bills appropriately. Similar to the previously discussed arguments, this interest is irrelevant to the question at hand. A question on citizenship should have no impact on the distribution of funds, and excluding such a question would improve response rates. Offering a more accurate report and analysis of a population will allow appropriation processes to more appropriately meet the needs of communities nationwide.

Introducing a survey in order to support the strict constitutional regulations of the census also introduces additional costs, including the literal monetary cost of producing, distributing, and analyzing the survey. Beyond the costs of the government are the costs to the respondents, which include the additional time and effort of responding to more government inquiries. The benefits outweigh these real costs, as the result of response is appropriate government aid and benefits.

III. Conclusion

The Trump administration and Department of Justice have made claims about the necessity and relevance of including a citizenship question on the census, but even the arguments made by top Census Department of Officials in the nation were not sufficient to justify such inclusion.26 Because “the Census Act obliges everyone to answer census questions truthfully and requires the Secretary to keep individual answers confidential, including from other Government agencies,”27 exporting data concerning citizenship would be illegal. If the Supreme Court cannot be convinced by the arguments

26 Dept. of Commerce v. New York, supra note 4.
27 Id.
that the Department of Commerce has to offer, there is no reasonable argument that is reason enough to include the citizenship question on the census.

A question about citizenship has little to no relevance to the purpose of the census and including it will have the side effects of misrepresentation and potential violation of right to privacy. The administration claims a need to know citizenship, and there exists an institutionalized constitutional method for obtaining that information that appears to be an opportune means by which to obtain that end. Regardless, solutions are ideal when they support the fundamental values of society, as well as the protection of rights and defense of the Constitution. This is only attainable if the bounds to which the Constitution reaches are not stretched. The basic idea that the census and inquiries concerning citizenship ought to be kept separate is a much more complex issue when given more consideration. There are major implications following whichever course of conduct is pursued. The issue of right to privacy is one more broadly discussed in cases such as *Griswold v. Connecticut*,28 *Whalen v. Roe*,29 *Roe v. Wade*,30 and other major cases that establish protection of personal liberties concerning privacy. This right to privacy protects resident’s rights and personal information from unduly intrusive inquiries.

A broader consideration of the issue strengthens the fundamental rights that need protection such as privacy rights and information protection. The consequences of including the question satisfies the demands of the Trump administration but fails to remain loyal to the census in its constitutional purpose. By separating the questionnaires, the issues with including a citizenship question are wholly avoided, and by introducing a survey, the demands of the administration are met without potential violation of constitutional guidelines. This solution preserves the integrity of the Constitution and protects residents’ rights, while still allowing government processes that ultimately maximize public benefits.

28 *Griswold v. Connecticut*, supra note 16.
Ron Miller had been a general manager of a company for twenty-four years with no criminal record when his best friend asked him to allow a shipment of drugs to be delivered to his company’s address. Ron reluctantly agreed to help his friend, who was desperate for money. Before the drugs arrived, Ron backed out and asked his friend not to send the drugs, but by that point the shipment had already been made. The police tracked the shipment to Ron and arrested him. Even though Ron never knew the type nor the quantity of drug that was delivered to his company, the judge of Ron’s trial was required to base Ron’s sentence on mandatory minimum sentencing laws. Ron was unable to trade information for a lesser sentence.

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sentence because he played such a small role in the crime and he received a ten-year prison sentence.³

The sentencing judge stated the mandatory sentence had created a “vicious circle” because small crime players, like Ron, were getting long sentences, without any information to trade for a lower sentence because of his minor involvement.⁴ Thousands of people with no criminal record and minimal involvement in drug crimes have been sentenced to extensive time in prison without chance of parole under mandatory sentencing laws.⁵ This paper will discuss the history and consequences of mandatory minimum sentences (MMS), specifically in the realm of non-violent drug offenses. We will discuss the inefficiencies that result from MMS and suggest reform to addresses these shortcomings.

I. Background

Since their inception, the legislature has often used mandatory minimum sentences as a decisive tool to quell public fear. Congress first instituted MMS in 1790⁶ in response to the national crisis of piracy. The second round of federal MMS laws came during the Civil War, when Congress passed legislation requiring all Confederate spies to be killed upon conviction.⁷ It wasn’t until the turn of the 20th century, that a commission suggested the elimination of most MMS laws and


⁶ Crimes Act, H.R. Chap. IX, 1 Stat. 112 (1790).

many were repealed. During the 1900s, drug abuse became more prominent, and widespread outcry grew. Although they had been inefficient in the past, Congress once again turned to MMS laws in response to public fears. In 1951 and 1970, legislation was passed that required certain drug crimes to carry mandatory sentences.

In 1975, a bill was introduced that would authorize the creation of a commission purposed with creating sentencing guidelines for judges. Congress passed the Sentencing Reform Act as part of the Comprehensive Crime Control Act (1984), which created the United States Sentencing Commission (USSC). The USSC established federal sentencing guidelines that take into consideration factors relating “both to the subjective guilt of the defendant and to the harm caused by his facts.” The USSC cited sentencing disparity, lack of certainty of punishment and crime control as the judicial shortcomings which merited the creation of the sentencing guidelines. Although the guidelines are not strictly mandatory, judges are required to consider them when issuing sentences. If a judge decides to increase or decrease the sentence from what the guidelines suggest, they must state in open court what “aggravating or mitigating circumstances” warranted the departure.

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9 Id.


The creation of the USSC and implementation of federal sentencing guidelines did not solve the growing drug abuse problem.\(^\text{14}\) In the 1980s, many still feared that drug abuse could affect their homes, schools, and communities.\(^\text{15}\) The country was shocked when Len Bias died from a cocaine overdose in the summer of 1986, only two days after being drafted by the Boston Celtics.\(^\text{16}\) Congress, facing immense pressure to address the public fear of drug abuse, acted as they had in the past and quickly enacted strict legislation.\(^\text{17}\) While a typical bill takes one to two years to become law from the time it is introduced,\(^\text{18}\) the Anti-Drug Abuse Act of 1986 became law just five months after the death of Bias.\(^\text{19}\) Years after its passage, the principal drafting attorney of the Anti-Drug Abuse Act expressed his regret


\(^{18}\) Statistics and Historical Comparison, Gov Track (Feb. 27, 2020, 1:03 AM), https://www.govtrack.us/congress/bills/statistics.

\(^{19}\) Anti-Drug Abuse Act, H.R.5484, 99th Cong. (1986) (Sterling, the drafting attorney of the Anti-Drug and Abuse Act said that Congress “...had no hearings. We did not consult with the Bureau of Prisons, or with the federal judiciary, or with DEA, or with the Justice Department, to at least find out from those folks what would be the effect of mandatory minimums.”); Arit John, A Timeline of the Rise and Fall of ‘Tough on Crime’ Drug Sentencing, The Atlantic (Mar. 7, 2020, 9:40 AM), https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983/.
for being involved in the hasty process, and claimed that the bill "had been the worst legislation [he’d] ever been involved with."20

The Anti-Drug Abuse Act created MMS based on drug type and quantity. An individual convicted of trafficking 100 grams or more of heroin would face a minimum sentence of five years.21 The trafficking of one kilo or more of heroin would increase the sentence to a minimum of ten-years.22 The minimum sentences are enhanced if the trafficker had prior drug felony convictions, or if death or serious injury resulted from the drug offense.23 Other minimum sentences were created for crimes involving powder cocaine, crack cocaine, marijuana, and other drugs.

The safety valve provision was created to allow certain first-time drug offenders to be exempted from extreme MMS. Individuals who meet specific criteria may qualify for a sentence below the statutory minimum. The defendant must have no or a limited criminal history, the crime must be non-violent, the crime must not result in death or serious bodily injury, the defendant must not be an organizer in the offense, and the defendant must cooperate by truthfully providing all known information concerning the crime.24 Although there are many first-time offenders charged with drug offenses that carry MMS, very few are eligible for a reduced sentence. In 2015, only 13% of drug offenders qualified for the safety valve provision.25

Near the beginning of the 21st century, critics began to speak in opposition to MMS. A law professor said: “the weight of the evidence

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22 Id.

23 Id.


clearly shows that enactment of mandatory penalties has either no demonstrable marginal deterrent effects or short-term effects that rapidly waste away.\textsuperscript{26} Others that spoke against MMS postulated that they removed discretionary power from the hands of judges and created a proportionality disparity between the offender and the sentence, resulting in low-level offenders often receiving extremely harsh sentences.\textsuperscript{27} It wasn’t until 2010 that Congress responded by passing considerable reformative legislation. The Fair Sentencing Act made significant changes to MMS.\textsuperscript{28} The penalty for simple possession of crack cocaine was repealed, and the crack cocaine quantity threshold for five and ten-year MMS was increased. From 1993 to 2013, over 60% of drug offenders were convicted of an offense carrying a MMS. In 2014, the percentage began to drop. In 2016, it had fallen to 46.8%.\textsuperscript{29} It is unclear if the decrease in convictions carrying MMS can be completely explained by the Fair Sentencing Act, although the increased quantity thresholds certainly resulted in a reduction of the federal prison population.\textsuperscript{30}


\textsuperscript{27} Families Against Mandatory Minimums, \textit{Mandatory sentencing was once America’s law-and-order panacea. Here’s why it’s not working.}, Families Against Mandatory Minimums, 5, (Feb. 21, 2020, 11:47 PM). https://www.prisonpolicy.org/scans/famm/Primer.pdf.


\textsuperscript{29} Id.

\textsuperscript{30} Gregory Midgette & Steven Davenport & Jonathan P. Caulkins AND Beau Kilmer, \textit{What America’s Users Spend on Illegal Drugs, 2006–2016}, RAND Corporation (Mar. 9, 2020, 7:44 PM), https://www.rand.org/pubs/research_reports/RR3140.html (The decrease in convictions carrying an MMS could partially be the result of a general shift away from cocaine (which has strict MMS enforcement) to marijuana use (which has much lighter penalties)).
The First Step Act (2019) is the most recent piece of legislation that reformed MMS. It primarily focused on improving prison conditions for inmates, increasing their ability to earn time towards an early release for good behavior, and expanding the safety valve provision, potentially allowing for more low-level drug offenders to receive reduced sentences. Some MMS were also shortened. For example, conviction of a felony drug offense that used to carry a 20-year minimum sentence was reduced to 15 years. It additionally created new programs that seek to rehabilitate offenders through means other than imprisonment. In the summer of 2019, the Department of Justice announced that 3,100 inmates would be released and 1,691 sentences had been reduced due to the First Step Act. Currently, there is not adequate data available to measure the extent to which the First Step Act is affecting current prisoners and new drug offenders. Nonetheless, this reform marks a large step in the right direction.

The scope of this paper is limited to discussing the MMS laws for non-violent drug crimes. The remainder of the paper details the inefficiencies and faults created by the loss of judicial discretion. We argue that MMS involving drug offenses should be eliminated. We will show that eliminating them will restore discretionary power to


the judiciary when sentencing. We propose a course of action for the reformation of the federal sentencing guidelines. Judges will take these non-binding guidelines into account when determining sentences.

II. RESTORING JUDICIAL DISCRETIONARY POWER

Current reform has not been enough to resolve the problems created by the Anti-Drug Act. MMS restrict judges from exercising judicial discretion. After defining judicial discretion, the myriad of resulting problems will be discussed, including sentencing disparity and unduly harsh punishments, the unintentional transfer of discretionary power from judges to prosecutors, and the damaging effects of MMS on the US federal prison system. Notwithstanding the arguments that advocates cite to justify MMS, in the case of non-violent drug offenses, the costs far outweigh the benefits. Decisions on sentencing should be made by judges and not by legislators or prosecutors.

A. Judicial Discretion

The first substantial effect of MMS that we will address is the loss of judicial discretion. The other shortcomings and problems that will be discussed would be resolved by restoring the judiciary’s discretionary power. Judicial discretion is defined as “a judge’s power to make decisions based on fairness or a weighing of the facts and circumstances.”35 In other words, judges are able to give more personalized rulings by taking into consideration all available information. It must be well understood what the limits of judicial discretion are. Chief Justice John Marshall said, “Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.”36 Judges do not have the power


to choose to disregard the law, but rather ensure that it is effected properly.

The practicality of discretion is illustrated by the following example of a mother with two sons. One is very extroverted and loves to spend time with his friends. The other child is introverted and prefers to spend his free time watching TV. Both children skip class, and the mother finds out. Because the mother knows her children well, she is aware of the most effective approach to punishing them. She may restrict her extroverted child from seeing his friends and keep her introverted child from using the television. A third party, who does not know the individual children, might suggest that the mother use the same punishment for both children. Because they are so different, using the same punishment would not effectively discipline both children. This simple example shows the vital role discretionary power plays when applying punishments to unique individuals.

In the example of the mother, her discretion was used to decide the best punishment for her children. In our legal system, judicial discretion is used both in sentencing and interpreting the law. The degree to which judicial discretion may be exercised when interpreting a law is dependent on the specificity of the relevant statute. Laws that are strict and narrow leave little room for a judge’s interpretation. Conversely, broad laws that simply prohibit unsafe behavior, without making further specifications on what practices constitute unsafe conduct, leave it to the judiciary to determine what actions are considered breaking the law. For instance, a law that simply stipulates safe driving gives little to no direction to judges in how to interpret the law. However, if multiple judges begin to rule that texting and driving is unsafe, a legal precedent will be established. The precedent grows stronger or more binding as more judges rule similarly. Because the judiciary aims for a standard of consistency, a judge is unlikely to rule in contrary to a precedent that has already been established by many judges.37

The legislature will often pass clear and specific laws to preserve consistency in the legal system. By doing so, they establish a

binding precedent to which the judiciary must adhere. Historically, the legislation defining drug offenses has been quite strict; this was true even before Congress passed the Anti-Drug Act. There was not much room for judges to use their discretion when determining whether or not a certain action was a drug crime. However, judges were still able to exercise their discretion when issuing sentences for drug offenses before the implementation of MMS.

B. Sentencing Disparity

By establishing mandatory minimum sentences for non-violent drug crimes, Congress established control over a significant part of the judicial process and took away the judiciary’s ability to exercise discretion when sentencing. Advocates of MMS argue that one reason Congress passed the Anti-Drug Act was to eliminate sentencing disparity. The principle of sentencing disparity is illustrated by the following example. If all judges punished the criminal offense of arson with five years in prison, a strong precedent would exist. It would become common knowledge that anyone convicted of arson would receive a five-year sentence. However, sentencing disparity would exist if some judges began to sentence differently for the same crime of arson. These different sentences could include a ten-year penalty in some instances or a one-year penalty in others. Sentencing


39 Id.

40 Legal Information Institute, Judicial Discretion, Cornell Law School (Feb. 27, 2020, 8:25 PM), https://www.law.cornell.edu/wex/judicial_discretion.

disparity weakens or even eliminates whatever sentencing precedent may exist. There are many reasons why a judge may use their discretion to order a sentence for an individual that isn’t commensurate with the precedent. A judge’s sentence might be influenced by their own personal belief. Aggravated or mitigated sentences could also be the result of the characteristics of the offender, such as the presence or lack of a criminal record, age, race, education, etc.

Sentencing disparity often carries a negative connotation. It has been defined as “unequal treatment [in criminal punishment] that is often of unexplained cause and is at least incongruous, unfair and disadvantaging in consequence.” Critics of sentencing disparity claim that it weakens the legal system by creating inconsistency in how the law is enforced. If the public believes judges are taking advantage of discretionary power, courts may become distrusted and disrespected. Judges may be accused of racism if whites and blacks receive different sentences after committing the same crime. Other critics point out that judges could misuse their discretion to practically let some people off the hook for crimes while severely punishing

44 Id., at 111.
Before the Anti-Drug Act was passed, sentencing disparity in non-violent drug offenses was prominent. By establishing MMS, the legislature addressed these concerns by reducing sentence disparity from 16% to 8% through the restriction of judicial discretion.48

However, it should be remembered that federal judges are appointed and voted on before they take office. They are individuals that have considerable legal experience and are trusted by a majority of government officials to oversee that the law is appropriately realized. Like other government officials, judges are subject to removal of office for abusing their power and office. They are not left free to act however they please. Historically, only fifteen federal judges have been impeached, and even fewer have been convicted and removed from office. The reasons for impeachment included bribery, perjury, intoxication on the bench, and, in two instances, favoritism towards litigants.49 Although action to remove federal judges is extremely rare, the existence of a removal process keeps judges accountable to their oath to interpret the law to the best of their ability.

The implementation of MMS reduced sentencing disparity as defined before. However, this was achieved at a significant cost: judges could no longer consider disparities between individual offenders. This often resulted in the imposition of overly harsh sentences. The stories of Johnny Patillo, Kemba Smith, and Brenda Valencia illustrate this principle. Johnny Patillo was a 27-year-old


African-American. He had obtained a college education and worked a steady job. In 1992, he accepted a neighbor’s offer of $500 to deliver a package containing illegal drugs to Texas. Patillo had no record of prior criminal activity. The package which Patillo attempted to deliver contained 681 grams of crack cocaine, which resulted in a minimum sentence of ten-years without the possibility of parole. The sentencing judge called attention to the overwhelming effect that the type of drug had on the sentence, stating “If the package contained a different narcotic, or a lesser quantity of the same substance, [the] defendant might have been sentenced to straight probation.” While the crime of drug trafficking cannot go unpunished, a ten-year prison sentence for a first-time offender who was minimally involved is excessive.

The outcome of Patillo’s trial was not unique. Another individual similarly affected was Kemba Smith. At the age of 19, she fell in love with Peter Hall, who was eight years older than Smith. After moving in with Hall, Smith discovered he was an abusive partner. Unbeknownst to Smith, he was also the leader of a multi-million crack cocaine ring and was one of the FBI’s 15 most wanted. Smith


made several attempts to leave Hall due to his physical and emotional abuse, but they were all unsuccessful.\footnote{United States v. Smith, 113 F. Supp. 2d 879 (E.D. Va. 1999) (Smith was a college student at Hampton University in Hampton, Virginia when she got involved in a drug ring that distributed cocaine and crack cocaine from New York City to the District of Columbia, Virginia, North Carolina, and elsewhere.); Kemba Smith, The Sentencing Project (Feb. 22, 2020, 1:08 AM), https://www.sentencingproject.org/stories/kemba-smith/.
} Later, Hall was found murdered. The courts held Smith accountable for the total amount of the drugs in his conspiracy charge. Smith testified before the Inter American Commission on Human Rights in 2006 that, “I did not traffic in drugs, but I knew my boyfriend did. I knew while living with him that he did not have a job and we were living off of the proceeds of his drug crimes. I never claimed total innocence and this is the reason why I pled guilty.”\footnote{Id.}
Smith was sentenced to 24 years in prison. The fact that she only delivered the money to Hall’s associates out of fear of her life, that she was a first-time offender, that her relationship was abusive, or that she was being charged with a non-violent crime did not matter. Similarly, Brenda Valencia’s life was forever changed by MMS. When she was 19-years-old, Valencia drove her roommate’s stepmom to West Palm Beach to pick up money from a cocaine dealer. The police raided the exchange, and Brenda was taken into custody with the actual drug dealers.\footnote{Mary-Jayne McKay, More Than They Deserve, CBS NEWS 60 MINUTES (Feb. 22, 2020, 1:15 AM), https://www.cbsnews.com/news/more-than-they-deserve/.
} Brenda had no previous record of breaking the law. She was charged with cocaine conspiracy and received a sentence of 12 years and 7 months in prison. This sentence is twice as many years as she would have received if she had been convicted of manslaughter.\footnote{Id.}

J. Spencer Letts\footnote{United States v. Patillo, 817 F. Supp. 839 (C.D. Cal. 1993).} declared “Statutory mandatory minimum sentences create injustice because the sentence is determined without
looking at the particular defendant." If MMS were nonexistent, Judge Letts would have been able to give the sentence that best fit the defendant based on all the facts and circumstances. In the case of Johnny Patillo, the sentence could have reflected the fact that he had no criminal record, was a college graduate, and held a job. Letts

and many other judges\textsuperscript{59} claim that MMS strip them of their power to correctly apply the law to unique individuals and situations. The presiding judge in any given case will hear many facts that pertain not only to the crime that was committed but also pertaining to the defendant. Judges have a significant opportunity to better understand the character, upbringing, and motives of the offender. Clearly, the presiding judge has an advantage in prescribing the correct punishment to

\textsuperscript{59} Lori Atherton, \textit{Federal Judge, Former US Attorney Discuss Mandatory Minimum Sentences at Michigan Law}, Michigan Law (Feb. 22, 2020, 12:49 AM), https://www.law.umich.edu/newsandinfo/features/Pages/Federal-Judge-Former-U.S.-Attorney-Discuss-Mandatory-Minimum-Sentences-at-Michigan-Law_112618.aspx, ("The most sacred quality that judges guard most is discretion, which is choice. Mandatory minimums take that choice away from a judge. You’re obligated to follow the statute, and if you don’t follow the statute, your decision is going to go to the court of appeals and get reversed. And judges don’t like to have their decisions reversed.” Avern Cohn, US District Judge); Rachel Martin, \textit{A Federal Judge Says Mandatory Minimum Sentences Often Don’t Fit The Crime}, NPR (Feb. 22, 2020, 12:08 AM), https://www.npr.org/2017/06/01/531004316/a-federal-judge-says-mandatory-minimum-sentences-often-dont-fit-the-crime ("These mandatory minimums are so incredibly harsh, and they’re triggered by such low levels of drugs that they snare at these non-violent, low-level addicts who are involved in drug distribution mostly to obtain drugs to feed their habit. They have a medical problem. It’s called addiction, and they’re going to be faced with five and 10 and 20-year and sometimes life mandatory minimum sentences. I think that’s a travesty.” Mark Bennett, Federal Judge of Iowa); Kevin Sharp, \textit{Another Federal Judge is Speaking Out against Mandatory Minimum Sentences}, Medium (Feb. 22, 2020, 12:13 AM), https://medium.com/@civilrightsorg/another-federal-judge-is-speaking-out-against-mandatory-minimum-sentences-e30301ad2211 (”If there was any way I could have not given him life in prison I would have done it,” said Kevin Sharp, the now-former federal judge, recalling a sentencing hearing in 2014. “What they did was wrong, they deserved some time in prison, but not life.”); Carimah Townes, \textit{Federal Judge Calls Attorney General’s Mandatory Sentencing Decision ‘Bad Policy’}, The Appeal (Feb. 22, 2020, 12:43 AM), https://theappeal.org/federal-judge-calls-attorney-generals-mandatory-sentencing-decision-bad-policy-489786fa8562/, (”There are many, many horror stories about the application of mandatory minimums to defendants who really should not have gone to prison for as long as they did... I think it’s bad policy to take the discretion away from trial court judges.” Judge William Smith Chief US District Court).
the offender. Regardless, the prison time is determined by a group of congressmen who will never meet the individual defendants nor hear the distinct circumstances accompanying each case.

Patillo, Smith, and Valencia are just a few of the thousands of people that have suffered many years in prison for their minimum involvement in a non-violent drug offense. None of these aforementioned defendants had a criminal record. We would expect the safety valve provision to have applied in each of these cases. Instead, the defendant’s complete lack of a criminal history in no way decreased their sentence, illustrating how impersonal mandatory minimum sentencing laws have made the judicial system punishments. Although it has been expanded, the safety valve provision is simply not efficient in ensuring low-level offenders are exempted from long, harsh punishments. Only completely repealing MMS will protect people like Patillo, Smith, and Valencia from spending years in prison.

Under MMS, judges are unable to consider disparities between different drug offenders and are forced at times to give the same sentence to first-time offenders and hardened drug dealers alike. Furthermore, one of the only reasons a judge can mitigate a MMS is if the offender cooperates by trading information or aiding in the arrest of

61 Id.
a different individual. Low-level offenders, such as Ron Miller, often do not have information to trade because they are barely involved. This results in dealers and high-level offenders often because they trade information for a lower sentence. A judicial system that may result in a first-time offender spending a decade or more in prison while drug kingpins barely see time behind bars is seriously flawed. Once the drug type and quantity have been identified, the “correct” sentence could be given by any person who can read a chart, and there no longer exists a need for a judge. This impersonality in sentencing can lead to excessive amounts of time spent in prison, particularly for first time offenders. The elimination of MMS is necessary to empower the judiciary to punish criminals while ensuring the sentence is appropriate for the individual offender.

C. Prosecutorial Discretion

An unintended consequence of mandatory minimum sentences was the transition of discretionary power from judges to prosecutors.64 The judicial branch was designed to be impartial and unbiased, ensuring fair trials and a proper interpretation of the law. Conversely, prosecutors have every incentive to see defendants found guilty and sentenced to serve time in prison. By restricting a judge’s ability to use discretion in sentencing, their role in a criminal trial is limited to determining what evidence the jury may hear by ruling on objections, and sentencing after the jury has ruled. On the other hand, prosecutors exercise their discretion throughout the proceedings of a criminal trial, including the decision of what charges are pressed against the defendant. It is true that judicial discretion is not entirely impartial or unbiased. Similarly, prosecutorial discretion is not without its own faults. In the late 1970s, a law professor claimed that prosecutorial discretion is “commonly exercised for the purpose of obtaining convictions in cases in which guilt could not be proven at trial,” “usually exercised by people of less experience and less

objectivity than judges,” and “commonly exercised on the basis of less information than judges possess.”

The following example exhibits prosecutorial discretion in action. A man is arrested and charged for two different drug offenses, respectively carrying a ten and twenty-year MMS. A prosecutor might cut a deal with the defendant, offering to drop the charges on the offense carrying a twenty year sentence on the condition that he plead guilty on the charge carrying a ten-year sentence. If the defendant accepts the deal and pleads guilty the first offense, he will be sentenced to ten-years in prison without being judged by a jury of their peers. Because the average sentence for a federal drug defendant who pleads guilty is five years and four months, while defendants that go to trial receive an average sentence of 16 years, many defendants feel they cannot afford the risk of taking their case to trial. Prosecutors are extremely proficient at obtaining guilty pleas; currently, only 3% of federal drug defendants go to trial. These conversations between defendants and prosecutors happen behind closed doors, leaving prosecutors free to use coercive tactics to elicit guilty pleas from defendants without any oversight.

The lack of transparency when prosecutorial discretion is exercised is very concerning. Contrarily, when a judge exercises their judicial discretion, it is a matter of public record. Every decision a judge makes during a legal proceeding is made manifest for scrutiny or praise, resulting in judges being considerably more accountable


when using discretion than are prosecutors. Whatever the reason justifying the restriction of judicial discretion may be, placing unchecked discretionary power in the hands of those with the most to gain from a trial resulting in a prison sentence is not the solution. MMS must be repealed before discretionary power can be put back into the hands of those best equipped to use it objectively and responsibly, the judges.

D. The Federal Prison Problem

Despite recent reforms, more than half of all prison inmates are convicted under Mandatory Minimum Sentences. From 1980 to 2014, the incarceration rate in the United States grew 220%, despite the fact that crime rates fell significantly over this same time period. Although MMS are just one element in the increase in incarceration rates, they are an incredibly significant one. In contrast, the primary elements of the incarceration boom were "changes in the severity of sentencing and enforcement."

A primary reason that MMS were put into effect was to act as a deterrent against crime. Since MMS have been enacted, extensive research has been conducted to measure their effectiveness in


71 Id.

72 Id.

73 Id.

stopping crime. It is estimated that a 10% increase in average sentence length corresponds to a zero to 0.5% decrease in arrest rates.\textsuperscript{75} Additionally, MMS may result in increased recidivism rates. Other research has found that for every year added to a sentence, the average rate of re-arrest for that crime goes up by 4-7%.\textsuperscript{76} Currently, nearly half of all offenders who serve a prison sentence are behind bars again within eight years.\textsuperscript{77} As prison populations increase, it becomes increasingly difficult for the basic health and safety needs of prisoners to be met. In prisons, rates of human immunodeficiency virus (HIV) and hepatitis C virus (HCV) are 5–28 times higher than in the general population, respectively.\textsuperscript{78} Based on the latest national figures available from the Bureau of Justice Statistics,

\textsuperscript{75} Executive office of the President of the United States, \textit{Economic Perspectives on Incarceration and the Criminal Justice System}, 4 (2016).


4,980 prisoners in US correctional facilities died in 2014.\textsuperscript{79} Additionally, 24,661 inmates were raped in 2015.\textsuperscript{80}

Longer sentences for non-violent drug offenders are excessively harsh and ineffective punishments. Since the implementation of MMS, the number of prisoners has risen to a point where the US now detains nearly 25\% of the world’s prisoners.\textsuperscript{81} This quantity of prisoners equates to a massive fiscal cost for the United States. The incarceration expenditures of the criminal justice system\textsuperscript{82} approach $80 billion.\textsuperscript{83} US citizens are forced to finance a flawed prison system that is not deterring future crime. Since poor living conditions resulting from mass incarceration\textsuperscript{84} could potentially explain the failure of prisons to rehabilitate offenders and decrease recidivism.


\textsuperscript{80} Alysia Santo, \textit{Prison Rape Allegations Are on the Rise: But the accusations are still rarely found to be true}, The Marshall Project (Mar. 7, 2020, 2:00 PM), https://www.themarshallproject.org/2018/07/25/prison-rape-allegations-are-on-the-rise.

\textsuperscript{81} Michelle Ye Hee Lee, \textit{Does the United States really have 5 percent of the world’s population and one quarter of the world’s prisoners?}, The Washington Post (Mar. 2, 2020 4:38 PM), https://www.washingtonpost.com/news/fact-checker/wp/2015/04/30/does-the-united-states-really-have-five-percent-of-worlds-population-and-one-quarter-of-the-worlds-prisoners/ (The USUS contains only 5\% of the world’s population).


rates, action to reduce inmate overpopulation is necessary. Repealing MMS would dramatically decrease prison populations. With fewer inmates to accommodate, prison conditions could be drastically improved. Furthermore, the US would save billions of dollars that could be invested in other reformatory programs to deter future crimes and rehabilitate offenders.

III. Proposal

There is a fear that following the repeal of MMS, the judiciary would possess virtually unchecked discretionary power. Judges would be free to rule as they please, sentencing in accordance with their personal preferences. It is true that each judge is unique. Pertinent facts and circumstances of each case will influence each particular judge’s sentence differently. Disparity, for better or worse, will certainly exist when judges may exercise discretion while sentencing. However, we propose a safeguard that could keep judges from exercising judicial discretion to push a personal agenda. We acknowledge that this is perhaps not a perfect solution. Regardless, alternatives to MMS need to be put forth and considered.

Federal sentencing guidelines play a key role in our proposal. However, as they now exist, the guidelines are quite similar to MMS in the amount of time a convicted offender will spend in prison. Comprehensive reform of the guidelines is necessary before they will effectively aid judges in determining the correct sentence for individuals. No suggestions for new guidelines will be discussed in this paper, but rather a broad reformatory process will be briefly outlined.

The current sentencing guidelines should be completely eliminated. The legislature and the USSC have access to an abundance of data on types of drug offenders, effects of current prison sentences, recidivism rates, the success of non-incarceratory programs, and more. Using this data, Congress can determine reasonable standards based on the offense, level of involvement, and criminal history of the offender. As the new guidelines are implemented, data will be gathered indicating whether they are leading to the successful rehabilitation of drug offenders. The results of situations where judges have departed from the guidelines will also be taken into
consideration. These new guidelines will ideally be subject to reform every few years. Over time, Congress would approach guidelines that suggest sentences with a strong track record of rehabilitating the offender and deterring future crimes. Since the guidelines are not mandatory, they would give judges a reasonable starting point when determining a sentence. If a judge makes an extreme departure from what the guidelines suggest, this could be cause for a prosecutor or defendant to appeal the sentence to a higher court.

IV. LOOKING FORWARD

Throughout history, Congress has passed mandatory minimum sentences to curb public fears. In 1986, the Anti-Drug Act was enacted in response to extreme drug abuse. Now, over 30 years later, MMS have stripped judges of judicial discretion, placed that discretion in the hands of prosecutors, and significantly inflated the federal prison population. Under our proposal, reformed federal sentencing guidelines would play a key role in allowing judges to exercise judicial discretion while maintaining the integrity of the judicial system. While we recognize this is not a perfect solution, action must be taken. Our reform would put sentencing power back in the hands of the judiciary and make a necessary step towards mitigating drug offenses.


Opioid use in the United States increased five-fold in the last decade. Every day ninety Americans die from drug abuse overdose. Is it illegal opioid trafficking, or is it a problem within the medical profession? Recent litigation strategies, like those used in the recent landmark case of *Oklahoma v. Johnson and Johnson*, show that opioid production and distribution are being linked to fueling the opioid epidemic. Oklahoma is just one of the states that have concluded that Johnson and Johnson, a large pharmaceutical company, is “overstating” the efficiency of opioids and “understating” the harmful effects of these drugs. Consequently, litigation has begun across the country charging pharmaceutical companies for causing the opioid crisis.

This paper will evaluate the legal theories, in particular public nuisance claims, backing the litigation brought against pharmaceutical companies, as seen in *Oklahoma v Johnson and Johnson*. However, it will not attempt to address whether these claims against pharmaceutical companies are right or wrong. Public nuisance is defined differently in each state, a broad definition of public nuisance will be

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applied as stated in the second restatement of torts as “an unreasonable interference with a right common to the general public.” This paper will show that public nuisance claims were never intended to apply in a widespread public health crisis affecting society as a whole equally and are therefore not appropriately applied to the opioid crisis. First, this paper will address the varying outcomes in public nuisance lawsuits as they have been applied to public health crises, including the associated controversy that arises from applying public nuisance law. Second, this article will argue that the rulings found in recent opioid trials have incorrectly applied the law of public nuisance to the opioid crisis. Finally, this paper will argue that determinations of liability for public health crises, in particular the opioid crisis, should be defined using alternative legal remedies, namely master settlement agreements, legislation, and toxic torts. Through these proposed remedies, public health crises can be properly litigated.

I. BACKGROUND

Public nuisance has its origins in property and criminal law. Until the 1970s, public nuisance claims were exclusive to property nuisance, generally requiring a special injury to the individual beyond that of the general public. We define property nuisance as an action taken on a landowner’s own property or the property of another which affects the health or safety or either an individual or the public at large. Furthermore, the requirement for special injury asserts the plaintiff must show the nuisance provided injury to himself beyond that of the general public. Subsequent precedent set limits to the vague language surrounding public nuisance, thus providing a way for judges to assess the validity of public nuisance claims. 6

However, in the 1970s arguments arose for public nuisance law to be applied to a wider range of environmental and social problems. Advocates for this change realized the vague language of

5  Restatement (Second) of Torts, § 821B (Am. Law Inst. 1979).

the public nuisance law and its possible application to wide-spread health issues. In the second restatement of torts, written in 1972, public nuisance was included, being described simply as “an unreasonable interference with a right common to the general public … whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience.” 7 With this more open interpretation of public nuisance describing it as a tort, claims arose over the next four decades seeking damages for social issues such as pollution, lead paint, asbestos, and tobacco. Over the course of the 80s, 90s, and 2000s, the majority of public nuisance claims pertaining to public health issues were dismissed by the state court of appeals and deemed an inappropriate application of the law because of an established precedent requiring a property nuisance and special injury to an individual beyond that of the general public, thus making the cases of large public health crises inapplicable.8

However, the recent success in applying public nuisance law to the nation’s ongoing opioid crisis in Oklahoma v Johnson and Johnson has revitalized the debate surrounding the interpretation of public nuisance. Johnson and Johnson were required to pay damages totaling more than 500 million dollars for their involvement in fueling the nation’s opioid crisis by marketing potentially harmful drugs. Their actions were viewed as interfering with a right common to the general public and thus a public nuisance.9 Since politicians and commentators are now calling the opioid epidemic the most prevalent public health crisis of our day, public nuisance claims are again being brought to the forefront of opioid litigation. This is perhaps due to the lack of response from legislative bodies and the fact that up to this point no regulations have kept pharmaceutical companies from engaging in aggressive marketing tactics. This paper argues that if the current application of public nuisance law were to continue, it would become a “catch-all” law for issues not

7 Restatement, supra note 3.
9 See Oklahoma v. Johnson and Johnson.
being addressed fast enough by the legislative bodies or where other applications have failed. However, as the precedent shows, courts are generally reluctant to accept this new application. The following sections will address the major public nuisance cases brought in varying public health crises, why they were either dismissed or accepted, and what remedies would have worked instead. This analysis will then be applied to the current opioid crisis to evaluate the similarities and differences between the preceding litigation.

II. APPLICATION OF PUBLIC NUISANCE

A. Pollution

In 1971, a California district court litigated one of the first public nuisance claims since the second restatement of torts, *Diamond v. General Motors*. The plaintiffs, composed of seven million individuals, accused 293 industrial organizations of committing public nuisance for emitting and discharging pollution into the air surrounding the Los Angeles valley. Because the automobiles emitted harmful substances simply from its intended use, the plaintiffs argued that the organizations willfully and maliciously harmed the environment and the health of the general public. The defendants were also accused of being negligent in their manufacturing and sale of automobiles. Accordingly, the plaintiffs sought billions of dollars in damages, as well as an injunction restraining the sale and standards of future automobiles in the Los Angeles County.\(^\text{10}\)

The court dismissed this claim for several reasons. First, the court rejected the idea that this case was a class action, meaning seven million individuals is too many for a legitimate lawsuit. Second, the court maintained that a private claim required that the public nuisance cause special injury to himself. This meant that each of the seven million plaintiffs would have to show special injury from the pollution. The court cited California Civil Code Section 3493 which provides: “A private person may maintain an action for a public

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nuisance, if it is especially injurious to himself, but not otherwise.”

Finally, the California state court saw the issue of pollution in the Los Angeles valley better left to the legislature.

This case showed the evolving view of some that the judiciary should be allowed to decide on matters of public policy. It also showed how reluctant courts are to take on this role. In *Diamond v. General Motors* the court did not think that it was appropriate to solve the problem of pollution in the Los Angeles valley. While some argue that the court should be more responsible for public policy due to the corruption, lobbying, and ineffectiveness from legislative bodies, in this situation the court did not think public nuisance was a valid claim to enact these changes.

Despite the reaction of the California state court to a public nuisance claim for a public health crisis, litigation continued against companies seen to be polluting the atmosphere and harming individuals. The new wording of public nuisance law seemed to extend the scope of its application to include all forms of actions hurting a community’s public health. Although, in most states the courts rejected these attempts, there are still some cases that have succeeded in using public nuisance law to regulate corporations. In *State v. Schenectady Chemicals*, the state of New York charged the owner of a chemical waste disposal with improperly disposing of the waste, thus being charged for the subsequent damages done to the soil and local water supply. The courts proclaimed: “We do not hesitate in recognizing the seepage of chemical wastes into a public water supply constitutes a public nuisance . . . the attorney general is clearly authorized on behalf of the state to commence legal proceedings to abate a public nuisance.”

While this appears to be a success for the new definition of public nuisance, there are some key differences between the decisions made in *Schenectady* and *General Motors* is that in New York. Most importantly is that the courts also cited public policy enacted by legislature determining the actions of the chemical waste site to be illegal prior to the action taking place. Alternatively, in *General

**B. Lead Paint**

The ongoing litigation of the toxicity of lead paint has been at the front of research. Initial litigation failed to hold the paint companies liable in the 1950’s because all regulations that were held by the FDA were being followed, yet the debate has continued. Recently decisions by the state courts in California have found several paint companies liable for public nuisance in the distribution of lead paint in past years, regardless of failed past attempts to apply public nuisance. The FDA laws now applying to lead paint have been updated, and the companies are to pay hundreds of millions of dollars into an “abatement” fund to investigate residential lead paint in the state’s ten most populous counties and remediate any dangerous conditions found there. The companies sold the paint legally, because the paint was following all federal regulations at the time.  

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13 See Oklahoma v. Johnson and Johnson.

This application of public nuisance can be misleading because the companies are not being held liable for the actual manufacturing or selling of the dangerous products, yet they are being held liable for the marketing of the paint, despite the fact that the paint was in accordance with regulations at the time. This can be misleading as to what we view as harmful to consumers. As seen from the result of the case marketing and advertising are the issues of safety and not lead paint. The banning of lead paint was not put into action until 1978, and the company was following all regulations that they were aware of prior to this period. “With its ruling, the California Superior Court became the first and only jurisdiction to accept a product-based public nuisance theory against lead-based paint manufacturers” 15

This is similar to the ongoing opioid crisis, specifically to the recent case of Johnson & Johnson v. Oklahoma, where a company was abiding all FDA regulations. Yet, it was held liable as a public nuisance due to its “aggressive marketing” (as stated by the New York Times) to doctors, and for not properly informing consumers of side effects.16 Public nuisance claims should not concern themselves with consumer use of a product. The Institute of Legal Reform explains why consumer use is not viable under public nuisance theory; “Allowing what is essentially a claim about a defective product to go forward under a public nuisance theory presents difficult issues of proof regarding causation and redressability.”17

As they were following all regulations that they were aware of, toxic torts would be the appropriate application. Toxic torts refer to the actual harm that the product caused to the consumer, which would be more applicable than their attempt to use public nuisance


through their marketing of opioids. Overall, opioids are the root problem that harms consumers, and which the state is seeking help and assistance for. By targeting the marketing, the root of the problem is not addressed; whereas, a toxic tort would encompass the opioids and the consumer misuse. This remedy is not used due to the specificity needed for a toxic tort claim.

C. Tobacco

While litigants continually bring cases against the tobacco industry, few of those are public nuisance claims. Of these claims made against tobacco companies most were dismissed by the courts due to pending settlement agreements or inapplicability of the law. The legal theories surrounding the tobacco litigation are perhaps the most similar to that of the current opioid litigation due to its significant stretch from the previous standards of special injury and nuisance to a property. With pollution, lead paint, and asbestos litigation, there is a claim for injury to property. However, with the manufacturing of cigarettes or opioid litigation, there is no claim of a misuse of property as the common law states is necessary for a public nuisance action.

In the 1997 case Texas v. American Tobacco Company, a count of public nuisance was brought against the American Tobacco Company. The state claimed, similar to the argument in the opioid litigation Johnson & Johnson v. Oklahoma, that the “defendants have intentionally interfered with the public’s right to be free from unwarranted injury, disease, and sickness and have caused damage to the public health, the public safety, and the general welfare of the citizens of the State of Texas.” 18 The courts dismissed this claim outright, citing Texas public nuisance law as “the use of any place for certain, specific prescribed activities such as gambling, prostitution, and the manufacture of obscene materials.” 19 This definition of public nuisance law is similar to statutes from other states by including a property nuisance. The defendants argued that since there was no misuse of property, there could be no claim of public nuisance.

19 Id. at 973.
The Texas state court said, “The State has not pled a proper claim, because it has failed to plead essential allegations under Texas public nuisance law. Specifically, the State failed to plead that Defendants improperly used their own property, or that the State itself has been injured in its use or employment of its property.” Therefore, this specific count of public nuisance was dismissed. The Texas State Court had one final note in saying, “The overly broad definition of the elements of public nuisance urged by the State is simply not found in Texas case law and the Court is unwilling to accept the state’s invitation to expand a claim for public nuisance beyond its ground in real property.”20 This response is similar to the responses we have seen in other public health issues: the courts are reluctant to broaden the definition of public nuisance law.

III. LEGAL REMEDIES

A. Master Settlement Agreement

Before public nuisance claims could be brought against tobacco companies on a large scale, a settlement agreement was reached. The Master Settlement Agreement, reached in November, 1998, included forty-six states and five of the largest tobacco manufacturers in the U.S. It included payments of billions of dollars to the states to mitigate the damage done by tobacco products.21 Furthermore, injunctions were handed down to limit the extent to which tobacco companies could advertise, market, and promote their products. Tobacco companies engaged in the settlement agreement to end the immense costs of future litigation that could have occurred. And while sceptics criticized the allocation of the money from this settlement, claiming that it hadn’t actually been spent on alleviating the health problems caused by tobacco, the Master Settlements

20 Id. at 973.

Agreement was successful in ending the large amount of litigation facing tobacco companies.

The option of a master settlement agreement may be appealing to the pharmaceutical companies now facing large amounts of litigation for the opioid crisis. As shown in the preceding paragraphs, the route of public nuisance claims has been unresponsive by the courts. It is unclear if the opioid litigation will find success in using public nuisance claims against drug manufacturers. Therefore, a master settlement agreement, similar in nature to that of the tobacco settlement, could be a good course of action for states and pharmaceutical companies wishing to end the litigation and establish liability for the opioid epidemic. A settlement agreeing to a fixed amount of reparations and injunctions pertaining to the marketing and advertising of these addictive drugs would be in the best interest of both parties as the unpredictability of future litigation is not desirable for the companies.

Potential objections to a master settlements agreement could come from the misallocation of damages received. In the tobacco settlement, many argue that the funds never reached those whose health was affected. Similarly, damages received from the opioid settlement may never be used to fund drug rehabilitation efforts. Furthermore, a master settlement agreement may seem undesirable to pharmaceutical companies because they believe they are in the position to win the litigation against them. However, the recent decision of Oklahoma v. Johnson & Johnson shows that the confusing nature of public nuisance law does not guarantee success in any state. If the courts continue to pursue and allow public nuisance claims, it would open the way for each individual court to decide a new definition of public nuisance despite the standing of special injury and property. Therefore, we argue that a better course of action would be to engage in a master settlement agreement.

B. Legislation

Another option would be for legislation to be made creating clearer and stricter regulations for pharmaceutical companies. The reason activists are pushing to broaden the definition of public nuisance is their dissatisfaction with the decisions made by the legislature. For
example, in the cases against pollution, litigants were dissatisfied with how relaxed the standards were for emitting pollutants into the air as well as how slow the legislative branch was at making changes. Similar complaints will be made about any opioid litigation; however, it would be more beneficial for statutes to be made setting clear standards of marketing operations, rather than relying on public nuisance claims. Similar to the case, *State v. Schenectady Chemicals*, public nuisance claims could be brought within the bounds of a state or federal statute. The aforementioned case cited heavily from the Resource Conservation and Recovery Act of 1976, and therefore showed that what those companies were doing was illegal.\textsuperscript{22} States, however, would probably be reluctant to accept this legal theory because it would mean a violation of due process if they attempted to continue the litigation against pharmaceutical companies. Legislation is necessary if clear standards want to be made as to what practices of opioid drug manufacturers are illegal. Public nuisance will continue to provide only vague and confusing results that vary significantly across the nation and within states. If the judicial branch wants to ascertain judgement against pharmaceutical companies, it must be done within the context of a specific statute or law.

**C. Toxic Torts**

We also propose that these cases (i.e.: lead paint, opioids, etc.) be tried within the scope of a toxic tort rather than public nuisance. When the public nuisance attacks the marketing of a product, a toxic tort brings us back to the original problem, the product. A toxic tort is “... a legal claim for harm caused by exposure to a dangerous substance—such as a pharmaceutical drug, pesticide, or chemical.”\textsuperscript{23} However, many people steer away from the application of a toxic tort because of the additional statement within the law that implies “In a toxic tort claim, the plaintiff (the person who sues) alleges that

\footnotesize

\textsuperscript{22} Resource Conservation and Recovery Act, 42 U.S.C §6901 (1976).

exposure to some dangerous substance caused an injury or illness.”24  Many people will avoid this application because a tort is seen as personal injury, and people find it difficult to sue large companies as an individual. The workload of addressing every individual involved within the scope of the respective health crisis is one that simply cannot be taken on without reform. But, the application of the law, and the solution will remain in addressing the problem in which we originally set out to correct.

IV. CURRENT OPIOID LITIGATION

A. Johnson & Johnson v. Oklahoma

The controversy of public nuisance is applicable more than ever due to the recent case of Johnson & Johnson v. Oklahoma. The pharmaceutical company was originally sued for 17 billion dollars in order to provide twenty years of rehabilitation funding for victims of opioid addiction. The State of Oklahoma decided that the company would instead payout 572 million dollars which would cover approximately one year of rehabilitation for those affected by the opioid health crisis.25  There are now approximately 2,000 additional pending cases seeking to employ similar legal strategies. The state had priority settled with other pharmaceutical companies (Purdue and Teva.), which resulted in sole responsibility lying on just one company, Johnson & Johnson. 26

The verdict was determined under a public nuisance law and was targeted at the marketing of the drug to doctors, without appropriately relaying the side effects of the products to the doctors. This

24 Id.


interpretation is made off of vague statements within the law pertaining to public nuisance. Aggressive marketing of drugs is not illegal under any FDA regulations of federal statutes as of yet. Johnson & Johnson was following all FDA regulations with the drugs it was making. Ultimately, the problem is consumer abuse of opioids not Johnson & Johnson’s marketing of products. Therefore, claiming that the companies marketing is a public nuisance does not address the root problem of opioid addiction. The state of Oklahoma chose to apply a law that did not alter the actual misuse of opioids, which are claimed to be addictive and harming to their state population. The actual public nuisance is the distribution and individual misuse of opioids, not the initial pharmaceutical market of the product.

V. Conclusion

The opioid crisis is complex, but that cannot be the reason that it continues to go unaddressed. There is a need for better applications to solve the current epidemic. A public nuisance argument is inappropriate and ineffective in dealing with the seriousness of this nation’s health crisis. With proposed solutions of applying toxic torts, master settlement agreements, and legislation to the nation’s health crisis, we argue the following benefits: safer pharmaceutical products with more cautious responsibility for providers, standard regulations for all parties involved of the creating and distribution of products, and concise laws applying to our nation’s health crisis. This country should protect health and well-being of its citizens, and if opioids are a problem, litigation should focus on the individuals and the specific negative effects of opioids. Public nuisance should only be applied when it does not have to be contorted to fit an argument and allow all the laws to uphold the best interest of the public.
In June of 2008, Jeffrey Epstein plead guilty in a Florida court on two counts of felony prostitution for nonconsensual sex acts against two girls under eighteen. Evidence showed, however, that the true scope of his crime encompassed dozens of underage girls. He was sentenced to eighteen months in jail but ended up only serving thirteen. Because of the terms of his prison sentence, Epstein was allowed to leave the jail during the day for work release. During these releases, he allegedly continued to abuse and traffic other

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young women throughout his shortened sentence. Nearly a decade later, the case was resurrected and turned into a federal sex trafficking investigation.

Allegations against Epstein began in 1985, continuing until the month of his arrest in 2019. To date, over one hundred Jane Does have come forward to testify of Epstein’s crimes against them. There is evidence to suggest that there are hundreds of victims who have not yet been identified. The ineffective human trafficking laws in Florida at the time allowed Epstein to roam free for decades, facilitating the perpetuation and aggravation of his crimes.

In a case similar to Epstein’s but with a very different outcome, the state of Texas convicted Steven Sumlin of continuous human trafficking in 2018 and sentenced him to fifty-five years in prison. Much like the Epstein case, Sumlin was accused of abusing and trafficking a sixteen-year-old girl and a twenty-two-year-old


10 Legaspi, supra note 3.

woman. Unlike the Epstein case and due to Texas’s aggravated human trafficking statute, Sumlin will be off the streets for the rest of his foreseeable life, unable to traffic any other people. The leniency displayed in the Epstein case cannot be allowed to continue.

This paper will argue that an aggravated human trafficking statute is an effective legislative response to human trafficking on a state level, and as such, should be adopted by all states. Such a statute would include a heightened penalty range with a maximum of life in prison with delayed parole eligibility. This sentence would be comparable to many states’ sentencing ranges for homicide. An aggravated human trafficking statute would be applicable for cases such as the trafficking of a minor, trafficking involving severe bodily injury, or trafficking involving multiple victims.

Section I of this paper defines human trafficking and provides context for the argument. Section II examines the current status of state-level human trafficking laws in the United States. Section III highlights efficient human trafficking laws in action through a 2018 federal human trafficking case, and extrapolates on that case to consider how state laws impact human trafficking victims and perpetrators. Finally, Section V lays out a proposal for changes to human trafficking laws at the state level, and Section VI addresses possible counterarguments.

I. BACKGROUND

For the purposes of this article, we will use the definition of “human trafficking” contained in the majority of state and local statutes. This refers to the act of knowingly subjecting persons to involuntary


labor servitude or nonconsensual sexual servitude.\textsuperscript{14} We will refer to human trafficking as “trafficking” from this point on. Thus, we will refer to the affected persons as “trafficking victims.” Although we do acknowledge that there is much debate regarding which term for affected persons is preferable, we have chosen “victims” to avoid the implication of racially-motivated crimes associated with the term “slave,” and to avoid the questions about consent often associated with the term “prostitute” or “prostituted person.”

Since 2002, the Counter-Trafficking Data Collaborative has identified nearly 25,000 cases of human trafficking in the United States;\textsuperscript{15} however, this is not representative of the true scope of this criminal industry. In 2018 alone, the National Human Trafficking Hotline recorded over 10,000 human trafficking cases.\textsuperscript{16} For context, it is estimated that forty million people are trafficked worldwide;\textsuperscript{17} however, only 91,416 individual cases have been identified and investigated since 2002.\textsuperscript{18} Further, there is high financial incentive for traffickers. Victims are frequently required to meet quotas ranging from $300 to $2,000 per night before they can return home.\textsuperscript{19} An Urban Institute study of eight major cities in the U.S. found that

\begin{thebibliography}{99}
\bibitem{14} \textsc{ala. Code} § 13A-6-152 (2012)
\bibitem{15} \textsc{The Counter-Trafficking Data Collaborative}, \url{https://www.ctdatacollaborative.org/map?type=us-states} (last visited Jan. 21\textsuperscript{st}, 2020).
\bibitem{18} \textsc{The Counter-Trafficking Data Collaborative}, see 13.
\bibitem{19} \textit{See, e.g.}, Linda Smith & Cindy Coloma, \textit{Trafficking Terms}, \textsc{Shared Hope International} (Nov. 1\textsuperscript{st}, 2013), \url{https://sharedhope.org/the-problem/trafficking-terms/}.
\end{thebibliography}
traffickers earned $6,000–$50,000 a week. With the combination of high financial reward and low risk of being caught, it comes as no surprise that government and non-governmental agencies alike believe human trafficking to be the fastest growing criminal enterprise in the world.

Nationally, human trafficking victims significantly outnumber homicide victims. In 2018, there were 23,078 identified trafficking victims and 16,214 homicides in the United States. This means that for every murder victim the public heard about, there was at least one identified human trafficking victim that the public did not hear about. Due to the underground nature of human trafficking, even this is probably a low estimate of the actual number of victims in the nation.

In 2018, 65.2% of identified human trafficking victims in America were women, and 71.8% of human trafficking cases involved sexual exploitation. Victims are forced every day to perform countless nonconsensual commercial sexual acts. The age breakdown is equally horrendous: 22.43% of victims are minors, most between the ages of twelve and seventeen; 46.5% of them are adults, most


24 2018 Statistics from the National Human Trafficking Hotline, see 20.
between the ages of eighteen and twenty-nine; while the ages of the other 32.1% of victims are unknown.\textsuperscript{25}

II. THE CURRENT STATUS OF HUMAN TRAFFICKING LAWS IN THE UNITED STATES

The “tough on crime” initiative and mentality of many state legislatures illustrates the commonly held belief that one of the most effective methods of crime prevention and deterrence is a strictly-enforced set of penalties for criminal action.\textsuperscript{26} However, in many states, this toughness evaporates when dealing with human trafficking. The statistical mean sentence a defendant can receive when convicted of trafficking an adult has a maximum of 27.03 years in prison and a minimum of 3.08 years in prison, with a maximum standard deviation of 27.98 and a minimum of 4.33.\textsuperscript{27} Human traffickers are believed by some authorities to be among the most violent of criminal offenders in the United States,\textsuperscript{28} taking away the life and liberty of other human beings every day, and yet, in many states, a jury doesn’t have the tools to legally sentence them to more than a relatively few years in prison. Within two decades of their conviction, a trafficker will be back on the streets, with the potential to return to their prior illegal activities. Studies have found that 60.1% of prisoners released in 2005, who had been convicted of similar offenses, such as rape or sexual assault, were arrested again within five years.\textsuperscript{29}

\textsuperscript{25} 2018 Statistics from the National Human Trafficking Hotline, see 20.


\textsuperscript{27} Data was collected from the 2017 and 2018 criminal codes of the 50 U.S. States, Washington D.C., and Puerto Rico, on file at the Howard W. Hunter Law Library at the J. Reuben Clark Law School.


In 2003, Washington was the first state to pass legislation criminalizing human trafficking.\textsuperscript{30} In 2016, Hawaii became the last state to pass some form of counter-trafficking legislation.\textsuperscript{31} Some, however, like Kansas, have not adequately defined human trafficking. While having technically criminalized human trafficking, Kansas narrowly defines it only as involuntary labor servitude and does not include nonconsensual commercial sexual servitude in their definition, thus only covering a small percentage of human trafficking cases as we have defined the term.\textsuperscript{32} In such states, attorneys attempting to prosecute traffickers are forced to use less applicable statutes, such as promoting prostitution.\textsuperscript{33} However, according to the codes, prostitution can be consensual, whereas human trafficking never is. It harms victims of human trafficking when states refuse to acknowledge trafficking for what it is—a heinous crime that takes away an individual’s freedom and ability to choose. As will be shown in the next section through a true story, the states that do acknowledge this and evidence it in their legislation can more effectively protect their citizens.


III. EFFICIENT HUMAN TRAFFICKING LAWS IN ACTION

Lauren (name changed) was seventeen years old and living in Seattle when she logged on to an Internet dating site. There she met Marsya, a movie producer, and they began to build a friendship. Marsya introduced Lauren to David, Marsya’s partner, who was also a movie producer and was seeking more young female actors. What Lauren wouldn’t learn until it was too late was that the only movies David produced were illegal child pornography films and that he and Marsya only cared about Lauren as a source of income. After growing to trust the couple and forming a close bond with them, Lauren moved in with them.

At first, David and Marsya showered Lauren with gifts and money at every turn. Slowly, they introduced her to the world of commercial sex. David coerced her into signing a contract stating that she would work for him as a prostitute under the guise of recording interviews for his documentary. Lauren was trafficked all over the country and was not allowed to keep any of the money she received. When she wanted out, David would threaten to sue her for breach of contract and would blackmail her with the explicit photos of her that he had. Then, he would continue to shower her with love and gifts, forming what is known as a “trauma bond.” Finally, after six months of this treatment, Lauren was able to escape. However, Lauren was not David and Marsya’s only victim. The FBI is still actively searching for more of David’s victims and requesting that


they come forward. 37 In 2018, a U.S. District Court convicted David of seventeen charges of sex trafficking and child pornography, and he was sentenced to thirty-three years in jail. Marsya was sentenced to three years.38

Stories like this one unfold across America every day, but Lauren is more fortunate than most trafficking victims. The UN estimates that only 1% of human trafficking victims are rescued.39 Further, many traffickers beat, rape, and threaten to kill their victims if they don’t comply. Traffickers often force victims to take drugs. Drug addiction makes victims even more dependent on their traffickers, who double as their dealers. Victims are taken all over the country, never staying in one place long enough to raise suspicions or ask for help. Their families may be threatened or told that they must pay off a supposed “debt” to the trafficker before the victim will be released. No matter how a victim’s story starts, nearly all of them end the same way: abuse, enslavement, rape, threats, and trauma.

Lauren, living in Washington—a state that has historically led the nation in counter-trafficking law—and having been trafficked across state borders, saw her trafficker receive a relatively high federal sentence of thirty-three years. However, what if the crimes against Lauren had not been federal? What if they had been restricted to a single state’s jurisdiction?

If Lauren’s story had taken place in a state that didn’t have such stringent protection of victims40—take Minnesota, for example—the outcome of her case would have been much different. There, David


would have been charged with and likely convicted of sex trafficking, since he compelled Lauren to stay in the industry against her will. He could have been sentenced to a maximum of fifteen years in prison. However, in the state of Minnesota, Lauren likely would have also been charged with prostitution because she “intentionally” signed the contract with David and willingly consented to entering prostitution.\footnote{Minn. Stat. § 609.324 (2019).}

But what if these crimes had taken place in a stricter state than Minnesota, such as Utah? Utah already has an aggravated human trafficking statute that likely would have applied in Lauren’s situation.\footnote{Utah Code Ann. § 76-5-310 (West, 2018).} If the trafficking offense involved rape or Lauren being held against her will for more than thirty days, then this statute would have applied, and David could have been sentenced to fifteen years to life. If not for this statute, then David’s maximum sentence would have been one to fifteen years, with a parole board determining how much of that he would actually serve in prison.

This was not a one-time criminal offense for David; he is believed to have victimized many people over a prolonged period, showing a consistent pattern of trafficking in persons. If he were only held in prison for fifteen years or less, as would be common in states without aggravated human trafficking statutes, nothing about his sentence would stop him from going right back to trafficking within a decade or two of the original offense.

IV. Proposal

As has been shown through comparing outcomes of previously discussed cases, legislation regarding human trafficking is instrumental in protecting victims, stopping traffickers, and preventing repeat offenses. Thus, it is imperative that lawmakers strictly examine the status of state human trafficking legislation. Although all states now have some form of counter-trafficking legislation in place, the addition of an aggravated trafficking statute would make existing legislation stronger and more effective.
Many states have already enacted valuable, effective legislation to combat human trafficking. For example, a notable few, such as Oklahoma, have already introduced higher sentencing ranges. These states are legislatively acknowledging human trafficking to be one of the worst crimes, judicially on par with homicide in many cases. There are five key pieces of legislation that these states have adopted that help derail the trafficking industry:

1. a human trafficking provision, preferably with specific mention of both sex and labor trafficking;
2. a clause allowing for the vacation of sentences for trafficking victims;
3. a state-wide counter-trafficking task force;
4. higher sentencing ranges on par with crimes such as homicide; and,
5. a maximum sentence of life with delayed parole eligibility for cases involving trafficking of minors, aggravated trafficking, or continuous trafficking.

These five pieces of legislation are valuable because they raise awareness, protect victims, and decrease repeat offenses. A state that does not prioritize these five points is likely not as effective as it could be in combatting human trafficking. Many states already have items 1 through 3. Items 4 and 5 are much less common, and arguably have the potential to make human trafficking laws much more effective. This is what we have been referring to as an aggravated human trafficking statute, and which we propose all states enact immediately.

43 Okla. Stat. tit. 21 § 21-748.
46 E.g., S.B. 5884, 64th Leg., Reg. Sess. (Wash. 2015).
48 E.g., Tex. Continuous Trafficking of Persons Code Ann. § 20A.03 (West 2018), see also, Utah Code Ann. § 76-5-310 (West, 2018)
The changes to counter-trafficking legislation that we have proposed would elevate the crime of human trafficking to a level judicially similar or equivalent to intentional homicide in many states. There are many benefits to the higher sentences available under the aggravated trafficking statute, but it will most significantly contribute to the fight against human trafficking while it is acting as a deterrent, a preventative measure, and a societal statement.

There is very little conclusive evidence to indicate whether higher sentencing ranges will deter people from committing crimes. Do criminals actually calculate the exact number of years they could spend in prison if they committed a specific crime? Almost certainly not. However, there is some evidence to indicate that longer sentences will deter persons from committing a crime more than if the penalties aren’t very high; additionally, it will also lower recidivism in convicted criminals.49

This statute will be most influential on the preventative front: if someone has created a business and livelihood out of the trafficking of persons for commercial sex, the surest way to stop them is to take them off the streets. Minor punishments like small fines or a few years in prison are likely to result only in the traffickers being more careful about concealing their crimes. The most effective way to truly prevent trafficking is to keep the perpetrators off the streets, which is only possible through higher sentencing ranges for those who have shown a pattern of continuous trafficking.

Further, an aggravated human trafficking statute will help stop trafficking by changing the way society views the buying and selling of human beings, as previously mentioned. This legislative action will become a catalyst for change in our society and will help to stop the demand for commercial sex.

Again, as lawmakers, law enforcers, and law interpreters, we must ask ourselves if we are truly doing all we can legislatively

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to deter, prevent, and prosecute human trafficking in our society. If Lauren lived in your state, would she be appropriately protected by the law, and would her trafficker be prevented from committing further crimes against her and other people? If not, then perhaps we need to reevaluate our legislation.

V. COUNTERARGUMENTS

Critics may argue that human trafficking is not morally equivalent to homicide and should therefore not have the same high degree of punishments. However, in many ways, human trafficking is morally equivalent to homicide. Though, fortunately, not all human trafficking cases end in death, all instances of human trafficking involve the involuntary relinquishment of a person’s capacity to make decisions for themselves. Human trafficking victims do lose their lives, in the sense that they are prevented from living freely. They are forced to submit to the will of other people on a daily basis. A victim of homicide is not given the right to choose to continue living, just as a victim of human trafficking is not given the right to choose how they will live. And, as many trafficking victims would testify, a life of being trafficked is not much of a life at all. Because of the extraordinarily high degree to which traffickers control and dominate their victims, it is both appropriate and necessary to elevate the crime of human trafficking to a higher moral standard.

Some may argue that the changes we have proposed—and even the prosecution of human trafficking as a whole—are not worth pursuing because of the difficulty in discerning between voluntary prostitution and nonconsensual prostitution. Some may even argue that the best way to combat nonconsensual prostitution is to legalize sex work so that it is more accessible and regulated. First, it is important to note here that legalizing prostitution would come with several negative side effects. For example, where prostitution is legal in Nevada, the Lyon County Sheriff’s Office found that one out of every three legal brothel workers exhibited symptoms of potential
human trafficking.\textsuperscript{50} This is evidence that human trafficking exists even in places and in industries that allow for commercial sex. Thus, legalizing prostitution would not eliminate human trafficking, and perhaps would even make it worse. Furthermore, there will always be a need to prosecute human trafficking, and to do so distinctly from prosecuting prostitution. With the rise of the movement to legalize prostitution, we find ourselves at a dangerous tipping point in the war against human trafficking. Instances of human trafficking can be difficult to identify. Law enforcement officers often discover trafficking cases by investigating reports of prostitution. Therefore, if anti-prostitution laws are removed from state legislation, we lose an important safeguard against trafficking. It is vitally important, now more than ever, that we strengthen our counter-trafficking legislation so that it can stand on its own to protect trafficking victims, whether they are hidden under the guise of legalized sex work or not.

From 2014 to 2017, Hawaii dealt with this exact issue, in part because the state did not have a trafficking statute separate from its prostitution statute. In 2014, a video surfaced of Justin McKinley abusing a young woman. This woman testified that McKinley had kidnapped, abused, and trafficked her for months.\textsuperscript{51} Originally, a jury indicted McKinley on one count of first-degree promoting prostitution, two counts of first-degree sexual assault, and one count of kidnapping.\textsuperscript{52} However, the case was thrown out in 2016 on grounds that the Supreme Court of Hawaii overruled in 2017 when they reinstated the case and sentenced McKinley to fifteen years in prison.\textsuperscript{53}

\textsuperscript{50} Lyon County Sheriff’s Office, LCSO Internal Audit Report on Brothel Compliance Requirements (2018).

\textsuperscript{51} State of Hawai’i, v. Lawrence L. Bruce & Justin McKinley, 411 P.3d 300 (Haw. 2017)

\textsuperscript{52} 2 indicted on charges or raping, forcing woman into prostitution, Star Advertiser (Jun. 17, 2014), https://www.staradvertiser.com/2014/06/17/breaking-news/2-indicted-on-charges-of-raping-forcing-woman-into-prostitution/

If Hawaii had an aggravated human trafficking law, he likely would be serving more time and the case would have proceeded more smoothly.

Some may argue that this is a social issue, not a legislative one. Although it is certainly true that significant social change is necessary if we are to truly eradicate human trafficking, the legislative change must lead the way. Approximately 20.6% of all men enter the sex buying market at least once in their lives. In 2014, it was estimated that 64% of all men had consumed pornography in the last month, with female consumers rising to comparable numbers as well. This normalization of the buying and selling of people desensitizes individuals and the society at large to the sexual exploitation of men, women, and children. If we are to stop trafficking, we need to stop normalizing abuse. This social change is only possible if the laws change first. If human trafficking is legislatively regarded as the heinous crime it is, the minds of the people will follow suit.

VI. CONCLUSION

As has been shown, the states are not united regarding how to prosecute human trafficking. But in order to fight this criminal enterprise, prosecutors and judges across the country must have the proper tools. It is essential that each state have a statute specifically criminalizing human trafficking, giving these crimes their own legal category. Then, in order to effectively prevent, deter, and punish these crimes, all states that already have such a statute must enact an aggravated human trafficking statute, allowing for penalty ranges up to life in prison in the more severe human trafficking cases, such as those

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55 Proven Men Porn Survey on Porn Use and Addiction: Frequency of Pornography Viewing by Men, 2003 Barna Group,
that involve children, severe bodily injury, death, or multiple victims over a prolonged period.

When legislative bodies treat human trafficking as the serious crime that it is, law enforcement and community members will take it more seriously and be more aware of the signs they should be looking for. The higher penalty range may act as a deterrent as well, and will prevent serial traffickers from reentering the business as soon as they complete their sentence. It is for these reasons that we invite lawmakers to reevaluate their counter-trafficking statutes, and to strengthen or implement an aggravated human trafficking statute.
REALIGNING FEDERAL STATUTES: CONTRADICTIONS BETWEEN THE FEDERAL ARBITRATION ACT AND THE NATIONAL LABOR RELATIONS ACT

Denise Han

Christopher Steele and Brendan Leveron were employees at a private maintenance company named Pinnacle. Both Steele and Leveron reported that Pinnacle allegedly forced them to work overtime without just compensation—an allegation that, if proven valid, would violate the Fair Labor Standards Act and California state law. They also claimed that Pinnacle was guilty of unfair business practices, retaliation and whistleblowing violations, and a failure to account. Soon after Steele and Leveron filed these allegations, they discovered that their predicament was not unique across the firm. In 2012, they decided to represent their fellow employees in a class-action suit which so that they could share the costs of hiring a lawyer, paying court fees, and gathering evidence.2 As part of their hiring process, though, Pinnacle had forced their employees to sign agreements to binding individual arbitration. Because these contracts were already in place by the time Steele and Leveron’s case reached the courts, the court dismissed the case and compelled all Pinnacle employees to settle their cases in arbitration. Without the opportunity to participate in a class-action suit, each employee would need to provide for all costs associated with the lawsuit and surrender their fate to the

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decision of only one arbitrator or panel with no option of appeal. In addition to this, they would forfeit their opportunity to represent and assist hundreds of fellow employees who found themselves without the means of pursuing litigation.

Similar situations are occurring across the nation as businesses and large corporations increasingly utilize the Federal Arbitration Act (the “FAA”)\(^3\) to prevent class action suits. Currently, the number of cases directly affected is in the tens of millions.\(^4\) The issue centers on the legal system prioritizing the enforcement of questionable contract provisions over employees’ constitutional right to sue within their financial ability. Most recently, the Supreme Court of the United States overturned the Supreme Court of California’s decision in *Epic Systems Corp. v. Lewis* and ruled that class action waivers were enforceable under the Federal Arbitration Act.\(^5\) Because this ruling essentially allows employers to use the Federal Arbitration Act as a loophole through which they may prevent their employees from seeking redress, it reveals the more specific ethical and legal underpinnings of this nation’s jurisprudence.

This article examines the recent decision made by the Supreme Court of the United States in *Epic Systems Corp. v. Lewis* regarding the unconscionability of class action waivers in employment law under the FAA and the NLRA and explores the implications of public policy and business decisions. By weighing these contradictions in the legal system, this article advances the claim that either the judicial court system must overturn the recent decision, or the legislature ought to realign the goals of the Federal Arbitration Act with those of the National Labor Relations Act (the “NLRA”) and enact an amendment to the FAA, expressly deeming class action waivers in arbitration agreements as unenforceable.

Section I of this article explains the background and history on the Federal Arbitration Act. Section II examines the potential conflict

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between the purposes of the Federal Arbitration Act and class action suits in employment law. Section III explores the current discourse regarding the conflict between the Federal Arbitration Act and the National Labor Relations Act in the context of the recent court ruling in *Epic Systems Corp. v. Lewis*. Section IV explicates the potential consequences of this article’s claim.

I. WHAT IS THE FEDERAL ARBITRATION ACT?6

Essentially, the Federal Arbitration Act provides that contract clauses requiring arbitration between parties must be upheld. As a method of dispute resolution, arbitration is a low-cost and time-efficient alternative to judicial litigation that also benefits more parties. The Federal Arbitration Act capitalizes on this benefit.

Section 2 of the FAA provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.7

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6 Prior to the Industrial Revolution, judges and magistrates in the United States viewed arbitration with hostility. The forthcoming industrial boom brought with it an overwhelming quantity of lawsuits, making it difficult for U. S. courts to address all of the cases in their queues. To streamline the judicial process, President Calvin Coolidge signed the United States Arbitration Act (the “Federal Arbitration Act” or “FAA”) into law, which “declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

In 2001, the Federal Arbitration Act’s application to specifically employment contracts first came under scrutiny. Section 1 of the FAA provides that:

...“commerce”, as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.  

In 2001, the Supreme Court clarified the application of this section in *Circuit City Stores, Inc. v. Adams*, ruling that employment contracts that included arbitration agreements were not exempt from the FAA. In the opinion, the Court further interpreted Section 1 of the FAA to apply more narrowly to employment contracts with seamen, railroad employees, and other transportation employees. To exclude all employment contracts from the scope of the FAA would “[fail] to give independent effects to the statute’s enumeration of the specific categories of workers which precedes it.” Under this reasoning, arbitration agreements in employment contracts that exist outside of the enumerated industries in Section 1 are now fully enforceable by law.

II. THE FEDERAL ARBITRATION ACT v. CLASS ACTION SUITS

By understanding the historical application of the Federal Arbitration Act and class action suits in employment law, we can better see that the two share the same overarching purpose—to streamline the judicial process and decrease costs of litigation. The only difference between the two lies in who their primary beneficiaries are—the FAA on the side of the employer and class action suits on that of the employee.

Before 1995, courts were unsure of how to interpret the phrase “involving commerce” in Section 2 of the FAA. Consequently, industries pressured the courts to define what implications the phrase would have in relation to the FAA and its applications. The FAA was also ambiguous in other areas that have only been clarified in recent decades. For instance, it was only in 1984 with *Southland Corp. v. Keating* that it became clear that the FAA applied in state courts as well as in federal courts. Previously, the FAA was “by all accounts intended to be ‘a procedural statute applicable only in the federal courts.’” In the decades between the enactment of the FAA and the year 1984, the courts viewed arbitration as an alternative method of dispute resolution between businessmen, not between other parties involved in commerce such as consumers, employees, investors, and others unless these parties had agreed to arbitrate. In 1967, however, the Court held that the FAA applies in diversity cases in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, implying that the FAA creates substantive law instead of regulating mere procedure. Finally, in 1995, the Supreme Court held that the phrase “involving commerce” signaled the full exercise of Congress’s power under the commerce clause. In other words, the FAA applies to contracts affecting all commerce—not only those with interstate connections.

In some instances, state courts and legislatures have attempted to invalidate or restrict certain mandatory arbitration agreements, but the Supreme Court has consistently decided that the FAA overrides any state laws or regulations. The reasoning originates from


12 *Id.* at 739.


14 *Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995).*
the Supremacy Clause of the Constitution. Additionally, as the Court has noted, the FAA “was designed to overrule the judiciary’s long-standing refusal to enforce agreements to arbitrate.” Section 2 compels courts to place arbitration agreements on equal footing with all other contracts. States thereby act unlawfully when they single out arbitration clauses with the purpose of treating them differently to other contracts. The Federal Arbitration Act itself does not contain an express preemption clause. However, the Court has held that, pursuant to implied preemption principles, the FAA supersedes state laws that “undermine the goals and policies of [the Act].”

The Court has also determined that the FAA’s “overarching purpose...is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” This way, corporations may seek proper redress or resolve legal disputes more quickly and easily in an authorized setting. After all, arbitration takes an average of 475 days to reach a decision, while the traditional judicial forum might take anywhere from 2 to 3 years to reach a similar decision.

In summary, the Federal Arbitration Act has three overarching purposes: 1) to grant legitimacy to contract law, 2) to streamline judicial proceedings, and 3) to offer a low-cost and time-efficient alternative to litigation for businesses.

17 Id. at 477.
18 Id. at 478.
A. Class Action Suits in Employment Law

Why then were class action suits originally allowed in employment disputes? Justice Ginsberg enumerated and implied several reasons in her dissenting opinion in *Epic Systems Corp. v. Lewis*: 20

1. Individual employee claims are small, “scarcely of a size warranting the expense of seeking redress alone;”

2. Employees can gain effective redress “by joining together with others similarly circumstanced;”

3. Employees may match the clout of employers in setting terms and conditions of employment, and

4. Judicial proceedings may be streamlined, lowering cost and time demands in litigation for individual employees.

Class action suits in employment law, then, were allowed for reasons that mirror those of the Federal Arbitration Act. It seems the difference is that class action suits serve the needs of the employee while the FAA protects the interests of the employer. Regardless of whether Congress meant for this application of the FAA to be biased, the judicial system is allowing it to take on that exact nature.

Outside of employment law, the Supreme Court ruled on *American Express Co. v. Italian Colors Restaurant*, a case regarding class action suits and the FAA within the context of a violation of antitrust laws. The class action plaintiffs’ main assertion was that individual litigation, as required by their contracts with American Express, would cost employees far more money to prove their case than they could ever receive in damages. The Court acknowledged that the class action plaintiffs had no cost-effective remedy to American Express Company’s alleged violation of the antitrust laws but held that an arbitration agreement that precluded class-wide proceedings

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was still enforceable. Their reasoning was that the FAA could only be overridden in the event of a “contrary congressional command.”

In recent years, employers have increasingly instituted class action waivers in their employment contracts to restrict employees’ rights to bring a legal action. Specifically, they have nestled an individual dispute resolution requirement into their arbitration clauses to effectively disregard the rights granted to employees in the National Labor Relations Act (the “NLRA”) and take advantage of the coverage offered by the FAA. Section 7 of the National Labor Relations Act guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Similarly, Section 8(a)(1) of the NLRA prohibits employers from interfering with, restraining, or coercing employees in their exercise of the rights guaranteed in Section 7. Unfortunately, the Supreme Court has validated employers’ interferences with the right of employees to join in concerted judicial activities. The Court’s recent decisions regarding the FAA—like Epic Systems Corp. v. Lewis—suggest that the American judicial system, when forced to choose between a human being and a corporate entity, will consistently side with the latter.

III. IN THE CONTEXT OF EPIC SYSTEMS CORP. V. LEWIS

On May 21, 2018, the Supreme Court published a majority decision regarding the case Epic Systems Corp. v. Lewis. This was a consolidated case that also included Ernst & Young v. Morris and National Labor Relations Board v. Murphy Oil USA, Inc, all of which were

21 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).
grappling with the discrepancies in the Federal Arbitration Act and the National Labor Relations Act.\textsuperscript{25}

Epic Systems Corporation (“Epic”) is a healthcare data management software company based in Wisconsin. Like other companies, Epic requires all of its employees to sign an arbitration agreement that effectively waives the employees’ rights to participate in or benefit from any class, collective, or representative proceedings. This means that any legal dispute between an employee and the company must be resolved through individual arbitration.\textsuperscript{26}

In February 2015, Jacob Lewis, a former employee at Epic, sued the corporation for denial of overtime wages in violation of the Fair Labor Standards Act of 1938. The issue was that Lewis, despite having signed the arbitration agreement previously mentioned, filed his suit in federal court individually and on behalf of a class of employees similarly affected. Epic reacted by citing the waiver clause of its arbitration agreement as evidence supporting its motion to dismiss Lewis’ suit. The federal district court ruled that the waiver was unenforceable under Section 7 and Section 8 of the National Labor Relations Act. With the reasoning that “concerted activities” included class action suits, the federal district court denied Epic’s motion to dismiss. However, Epic Systems Corporation appealed. The U.S. Court of Appeals for the Seventh Circuit upheld the decision of the lower court, adding that the class-action waiver in the arbitration agreement was unenforceable under the saving clause of the FAA as well. Epic Systems Corporation appealed yet again with a petition for certiorari to the Supreme Court of the United States. The Supreme Court issued a writ of certiorari and addressed \textit{Epic Systems Corp. v. Lewis} in late 2017.\textsuperscript{27}

Much of the \textit{Epic Systems v. Lewis} case dealt with the interpretation of the FAA, being that the act serves as the basis for the absolute enforceability of arbitration agreements. As mentioned before, the Supreme Court noted in \textit{American Express Company v. Italian}

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\textsuperscript{25} Epic Systems Corp. v. Lewis, 138 S. Ct., 1612 (2018).
\textsuperscript{27} Id.
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Colors Restaurant that a “contrary congressional command” could override the enforcement of an arbitration agreement pursuant to the FAA. 28 Epic Systems Corp. v. Lewis essentially brought this exception into question and forced the court to decide if class-action suits were protected under the NLRA and as such were non-waivable under the FAA. 29

The Supreme Court responded by reversing the lower courts’ decision and upholding the validity of employment contracts that force employees to give up their right to collective litigation against their employer. Five justices argued that the express terms of the FAA should overcome the implied or subjective interpretation of the rights afforded to employees by the NLRA. 30 Additionally, they noted that the Supreme Court “had previously allowed for arbitration of statutory claims even when those other statutes expressly allowed for collective litigation.” 31

In dissent, Justice Ginsburg analyzed the situation within a historical context and argued that by upholding the validity of class-action waivers in arbitration agreements, the Supreme Court was essentially prioritizing the FAA in subordination of employee-protective labor legislation such as the NLRA and the Norris-LaGuardia Act. 32 These two pieces of legislation were originally enacted to “correct power imbalances between employers and employees” 33. In her review of relevant case law, the FAA, and the NLRA, Justice Ginsburg concluded that nothing merited the dismissal of fundamental protections afforded to employees by the National Labor Relations Act.

Thus, the ruling on Epic Systems Corp. v. Lewis begs the question: is it just to allow arbitration agreements to restrict employees’
statutory rights with the sole purpose of achieving the FAA’s underlying objective to streamline the judicial process?

In past cases, the Court has answered this question with a resounding “yes,” repeatedly concluding that an arbitration can, in fact, restrict the enforcement of a right. In *Gilmer v. Interstate/Johnson Lane Corp.*, for example, the Age Discrimination in Employment Act (“ADEA”) came into conflict with the Federal Arbitration Act, and the Court ruled that the claim alleging a violation of the ADEA could be subject to compulsory arbitration. The Supreme Court held that an arbitration agreement could be upheld in a securities application. However, past cases like *Gilmer* differ from *Epic Systems Corp. v. Lewis* in material fact. Whereas *Gilmer v. Interstate/Johnson Lane Corp.* dealt with deciding what kinds of contracts were exempt from the Federal Arbitration Act, *Epic Systems* prioritized the issue that the consideration in the arbitration agreement eliminates both a judicial and arbitral forum for concerted activity, a right provided by the NLRA. This should be deemed illegal consideration. Additionally, without class action suits, these employees would be deprived of their right to seek redress because of the additional financial, time, and employment burden it would place on these plaintiffs.

In order to resolve the legality and ethics of using the Federal Arbitration Act to waive the right to collective legal action, we must explore two avenues of reasoning: 1) Do the rights in the Federal Arbitration Act preclude those of the National Labor Relations Act? and 2) Does public policy and the legal system mandate the enforceability of arbitration agreements in the context of employment law?

A. Do the rights in the Federal Arbitration Act preclude those of the National Labor Relations Act?

This question deals specifically with the *American Express Company v. Italian Colors Restaurant* ruling that allows the enforcement of an arbitration agreement to be overridden by a “contrary

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congressional command.” which, in this article, we will narrow to be the NLRA. The conflict between the FAA and the rights afforded by the NLRA should push either the judicial system or the legislative system to act in support of class action rights. As mentioned previously, the NLRA forbids employers from interfering in any way with their employees’ exercise of rights, individually and collectively, that are within the scope of the NLRA. According to a majority of the Supreme Court, the NLRA is not an exception to the FAA on the basis of a “contrary congressional command.”

The principal argument is that the NLRA fails to expressly indicate class action suits as a right included under “concerted activities.” However, precedent indicates that express terms are unnecessary. In *Shearson/American Express Inc. v. McMahon*, the Court established a test to determine whether any congressional command is “deducible from...text or legislative history” or from an inherent conflict between arbitration and the statute’s underlying purposes. This well-established test strongly suggests that implied terms in a congressional command are sufficient to infer the existence of those terms.

Justice Gorsuch argues that even while examining the implied rights of the NLRA, he found no evidence that the NLRA evinces congressional intent to bar application of the FAA. He compared the NLRA to other statutes with more express rights in favor of class action suits and “observed that it would be anachronistic to construe Section 7 to confer class action rights, considering that Federal Rule of Civil Procedure 23 did not exist until 30 years after the NLRA was enacted” (HLR). The majority opinion justifies its ruling

35 Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013).
based on a strict, narrow interpretation of law. While a majority of the Supreme Court deemed this interpretation as legally sound, a minority dissented. The dissenting opinion evinced a broader interpretation of the NLRA to uncover its implied meaning. Justice Ginsburg interpreted the NLRA in its historical context, concluding that its purpose was "to place employers and employees on a more equal footing." In order to effectively negotiate the terms of employment, employees must have the capacity to match the clout of their employers—something that can only be achieved through collective means.

The enormous power that employers wield in drafting employment contracts should not excuse them from observing relevant statutes such as the NLRA. The problem of unbalanced power exists in all legal fields and is one that the courts have anxiously strived to remedy. For example, courts have historically determined that we, as people, deserve to be represented in court regardless of our financial capabilities. Although the scope of this paper falls squarely within civil law, an example in criminal law may help to illustrate the historical attitude of the legal system. It is clear that an individual would not have the personal clout to defend him- or herself against the prosecutorial power of the United States of America. As such, the Sixth Amendment has been interpreted to provide an indicted citizen with a defense attorney regardless of whether he or she can afford it. This equality of representation is one of the central premises upon which our legal system is founded.

In consumer law, we see a similar conflict occurring in arbitration agreements and class action waivers between corporations and consumers. Because companies generally draft contracts of

adhesion\textsuperscript{41} in their favor, they often include individual arbitration clauses that either escape the consumer’s awareness or force the consumer to agree to it. After all, these companies understand that arbitration has “traditionally been more beneficial to the corporate defendants.”\textsuperscript{42} Litigation in a judicial forum can already be especially costly for the individual plaintiff, but these costs can become even more onerous when the plaintiff is an individual consumer seeking redress from a large corporation through arbitration. The high costs of seeking redress would most certainly outweigh the potential damages or relief to be recovered through legal action. Although these employment contracts are not necessarily categorized as contracts of adhesion, the central concern still applies: the costs for an individual plaintiff in either a judicial forum or arbitration would be onerous, especially against a large corporation.

If the purpose of the National Labor Relations Act is “to place employers and employees on a more equal footing,” then corporations have consistently flouted employees’ rights by using the lack of express terms in their arbitration clauses as their main defense.\textsuperscript{43} This loophole in the Federal Arbitration Act, which corporations have abused time and time again, is a serious threat to the NLRA’s congressional command.

The Federal Arbitration Act demands that courts subject arbitration agreements to the same laws that govern contract law. If arbitrations are contrary to an existing statute, then the consideration of

\textsuperscript{41} An adhesion contract (also called a “standard form contract” or a “boiler-plate contract”) is a contract drafted by one party (usually a business with stronger bargaining power) and signed by another party (usually one with weaker bargaining power, usually a consumer in need of goods or services). The second party typically does not have the power to negotiate or modify the terms of the contract. Adhesion contracts are commonly used for matters involving insurance, leases, deeds, mortgages, automobile purchases, and other forms of consumer credit. Cornell Law School Legal Information Institute, https://www.law.cornell.edu/wex/adhesion_contract_(contract_of_adhesion) (last visited Jan. 28, 2020).

\textsuperscript{42} Sarah Clasby Engel & Sherry Tropin, Class Action Arbitration: A Plaintiff’s Perspective, 5 FIU L. Rev. 145 (2009).

\textsuperscript{43} Epic Systems Corp. v. Lewis, 138 S. Ct., 1612 (2018).
the arbitration agreement is illegal and deemed—not only uncon- 
scionable as other courts have decided—but void or unenforceable. 
Contract law stipulates, “Even where such nullity is not specifi- 
cally directed by the legislature, public policy is generally thought 
to require it, either to punish lawbreakers by withholding societal 
assistance from an illegal transaction, or to maintain the integrity of 
the judicial process.” 44

As such, if the judicial system fails to reconcile the FAA with the 
NLRA for its lack of express rights, the legislative system must then 
uphold employees’ judicial rights by express congressional command.

B. Does public policy and the legal system mandate the enforceability 
of arbitration agreements in the context of employment law?

Public policy supports the substantive right to class action suits, 
so the legal system must support public policy because it affects 
nearly all aspects of public and private life. It “importantly shapes 
the responses to public risks…which jeopardize the welfare of the 
community as a whole. The legal system also shapes the social, 
political, and economic environment in which public risks arise and 
are responded to.” 45 Several possible risks of deeming individual 
arbitration agreements in employment contracts as unenforceable 
have been outlined in past case decisions and current legal dialogue. 
Courts and legal professionals are concerned that doing so might 
undermine contract law, increase court traffic, or encourage more 
employee lawsuits.

However, in the matter of this claim undermining contract law, 
this article does not support a broad rejection of the Federal Arbitra- 
tion Act but rather a firm rejection of questionable contract practices.

44 See, Validity of Contracts Which Violate Regulatory Statutes, 50 Yale L.J. 1108 (1941). (“Even where such nullity is not specifically directed by the legislature, public policy is generally thought to require it, either to punish lawbreakers by withholding societal assistance from an illegal transaction, or to maintain the integrity of the judicial process.”) (emphasis added)

In *Shotts v. OP Winter Haven, Inc.*, the Supreme Court of Florida asserts, “With respect to which contract defenses...constitute ‘generally applicable contract defenses’ for purposes of section 2 [of the FAA], we conclude that public policy clearly is such a defense, for if an arbitration agreement violates public policy, no valid agreement exists.” 46 *Global Travel Marketing, Inc. v. Shea* emphasizes the same principle: “No valid agreement exists if the arbitration clause is unenforceable on public policy grounds.” 47 The Supreme Court of the United States itself explained in *Doctor’s Associates, Inc. v. Casarotto* that “generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [the Federal Arbitration Act].” 48 Considering the purpose of the NLRA, the Court, for lack of legal contract consideration, cannot possibly enforce arbitration agreements within employment contracts. Upholding their enforceability would actually be undermining public policy and, as a result, contract law.

The risk of possible increase in court traffic is valid but not as threatening as generally believed. Class action suits help fulfill the main purpose of the Federal Arbitration Act, which is “to streamline judicial proceedings.” 49 The consolidation of these claims into class action suits allows for efficient class-wide redress in terms of time and money. Though the allowance of class action suits in employment law may increase court traffic, lawmakers and judges’ more pressing concern should be the heavy decrease in legal claims brought against companies by employees. This decrease does not act as evidence that companies are improving corporate governance, but rather indicates that employees are unable to afford the costs of pursuing individual

arbitration claims, given that such costs far outweigh the potential rewards that employees could receive from damages.\textsuperscript{50}

Some may argue that the number of legal claims decreased because most of them were frivolous to begin with. This argument, though possible in a minority of cases, is overall specious. Indeed, some corporations worry that if they were to refrain from enforcing arbitration agreements, they would encourage more employees to bring lawsuits against them. But these corporations must realize that although class action suits would make judicial proceedings less costly for the individual, these costs are not insignificant. Enacting legal claims might even cause conflict and tension within the workplace if plaintiff-employees still work for the employer in violation. An individual would only feel the need to launch a class-wide complaint if employers actually violated the law, and did so in a fashion that affected more than a handful of employees. To offset possible frivolous cases, the corporation is perfectly justified in including an attorney fee provision clause in their employment contracts.

Additionally, proponents of mandatory arbitration agreements may reasonably believe that class action suits are an immense expense and detriment to firm cash flow. However, they are missing the bigger picture. As legislative acts, such as the Sarbanes-Oxley Act of 2002,\textsuperscript{51} mandate corporate governance, we see that enacted laws must be slowly moving towards increasing the responsibility of businesses and employers. If a firm truly wants long-term cash flow and high firm value, would it not want to have the foresight to incorporate this attitude and firm culture of accountability sooner rather than later? Part of this requirement is providing an avenue for addressing mistreatment of employees that is equitable to both parties. In the long run, firm managers and investors will profit from learning how to better manage and be accountable to employees.

Thus, the risks of upholding the right to collective legal action over the enforceability of arbitration agreements can be mitigated by simple measures. On the other hand, the risk of enforcing class


action waivers certainly jeopardizes the welfare of the community. Already, it has quashed the ability of employees to seek legal redress for violations of their rights, which in and of itself is a violation of employees’ ethical rights.

In addition to this, mandatory arbitration clauses have also prevented employees from seeking redress when they have experienced sexual harassment at their jobs. In a letter sent to the House of Representatives and the Senate, the attorney generals of every state, the District of Columbia, and the U.S. territories admonished, “The secrecy requirements of arbitration clauses...disserve the public interest by keeping both the harassment complaints and any settlements confidential ...This veil of secrecy may then prevent other persons similarly situated from learning of the harassment claims so that they, too, might pursue relief.” 52 Essentially, these attorney generals called for legislation to exempt sexual harassment victims from mandatory arbitration clauses in employment contracts. Silencing claims of mistreatment is a disservice to not only public interest, but to business interest as well.

Given the recent decision in Epic Systems Corp. v. Lewis, the Supreme Court is unfortunately keener on enforcing imbalance in favor of corporations rather than reprimanding them for their gross disregard for public policy and business ethics. Clearly, the financial well-being of a corporation is vital to the lifeblood of a nation. Corporations are entities that have been and will continue being protected by the judicial system—as they should be. However, these companies still must adhere to their duties to public policy and ethical behavior. If businesses fail to follow regulations imposed upon them by labor law, employees must have some method available to them for seeking equitable redress that is financially feasible.

Since public policy mandates the right of employees to seek judicial redress, either the judicial system or the legislative system must move forward to uphold this right by either overturning the precedent set by Epic Systems or by passing a legislative act.

As we prepare to take the next step, let us look again at the two questions we considered earlier: 1) Do the rights in the Federal Arbitration Act preclude those of the National Labor Relations Act? And 2) Does public policy and the legal system mandate the enforceability of arbitration agreements in the context of employment law?

Justice Ginsburg poses a question in her dissenting opinion: “Does the Federal Arbitration Act permit employers to insist that their employees, whenever seeking redress for commonly experienced wage loss, go it alone, never mind the right secured to employees by the National Labor Relations Act ‘to engage in...concerted activities’ for their ‘mutual aid or protection’?” Similar to the answer to the question posed by Justice Ginsburg, the answers to both of these questions “should be a resounding ‘No.’”

IV. POTENTIAL CONSEQUENCES

It is beyond the scope of this article to predict what the outcome would have been for Epic Systems Corp. v. Lewis had the Court decided to allow a class action suit to form and press charges against Epic. However, such a decision would have at least enabled the judicial system to impart a more equitable result for the parties represented in the case.

At the moment, the Supreme Court’s ruling has effectively silenced employees’ concerns. Empirical evidence shows that only a fraction of employment claims is actually filed in arbitration.

Furthermore, Reuters suggests that the effects of the Court’s decision extend beyond legal implications. Shareholders value corporate governance; when they invest capital in a firm, they are also placing trust in that firm’s corporate culture. Mandatory arbitration

54 Estlund, supra note 51, at 689-700.
agreements silence employees and prevent investors from obtaining a crucial source of private information regarding any alleged mistreatment of employees that could be part of that corporate culture. Information is vital in semi-efficient markets such as those in the United States, and the lack thereof could not only slow efficiency of financial markets but also negatively affect shareholder wealth.

It follows, then, that the opposite of enforcing mandatory arbitration agreements—allowing employees the forum of judicial class-action litigation—would actually serve to increase the value of the firm and maximize shareholder wealth, which is the principal purpose of any firm or manager. More employee information enables investors to more accurately gauge firm value and make necessary changes. Whether the firm is publicly or privately traded, investors and managers benefit from this greater exchange of information—especially if that information will cause a significant adjustment of expectations.

If employees’ claims are not barred from class action proceedings, the number of employee claims would not magically increase but the number formally filed certainly would. Employers would be held more accountable to responsible and ethical corporate governance.

To be fair, employees do have options other than litigation to effect change within their employer. They may complain to the Department of Labor—known as “whistleblowing”—and have those officials investigate the company. However, this begs the question: is the judicial system really working at its best if whistleblowing is the only way to seek proper redress? Another option lies entirely in the hands of lawmakers; the legislature may pass new bills outlawing class action waivers to expressly make them contrary to congressional command. In 2017, lawmakers proposed bills doing exactly that with the Arbitration Fairness Act of 2017 and the Restoring Statutory Rights and Interest of the States Act of 2017. Unfortunately, little progress or movement has been observed since.

The very purpose of the Federal Arbitration Act is subservient—legally and ethically—to that of the National Labor Relations Act. Even so, the Supreme Court has upheld arbitration agreements that have gone as far as violating the implied purpose of congressional acts that protect the rights of employees—specifically, the right to seek judicial redress within their financial means. This right is mandated by both precedent and public policy. Upholding this right would not only maintain the integrity of the legal system but also benefit the very corporations that fight against it. Corporate governance would be enforced more heavily, thus maximizing long-term shareholder wealth. The economy as a whole would become more efficient from the increase in transparent information if the legislature or judicial system held all corporations to this same standard.

And what if the majority opinion in Epic Systems Corp. v. Lewis really is the most legally sound? Then, all the more reason that the legislature must remedy the loophole that businesses are increasingly abusing to quash the substantive rights of their employees. The ethical and public policy-related discussions of this article still hold.

We turn back to the legal and governmental system. If the Supreme Court does not overturn its decision in Epic Systems Corp. v. Lewis in subsequent cases, the immediate solution to this gross injustice to the interests and rights of employees is clear. The legislature ought to realign the goals of the Federal Arbitration Act with those of the National Labor Relations Act and enact an amendment or a clarifying congressional act to the Federal Arbitration Act, expressly deeming class action waivers in arbitration agreements as unenforceable.