UNIVERSITY OF CENTRAL FLORIDA DEPARTMENT OF LEGAL STUDIES LAW JOURNAL

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Articles

Title IX: How Universities Continue to Consent to Campus Sexual Assault	Brooke Mason
Smoking Gun: Can Medical Marijuana Registry Cardholders Be Denied Second Amendment Rights?	Annalisa Gobin and Milady Planas Pinto
Trademark Troll? Louis Vuitton and the Relentless Quest for Brand Protection	Konstantin Gluvacevic
Guilty Until Proven Innocent: Examining the Mind Games and Inner Workings of the Interrogative Reid Technique	Christian E. Tabet
Social Equity and Medical Marijuana in Florida: An Analysis of Barriers Minorities Face in the Growing Medical Marijuana Industry	Anthony Santiago
When the Court Becomes Moot: *New York State Rifle & Pistol Association, Inc. v. City of New York, New York*	Danielle N. Hoyer
Necessary and Convenient: The Effect of Commerce and Necessary & Proper Clause of Jurisprudence on American Federalism	Janis Olkowicz
'Third Wave' of Bail Reform: Creating a Pretrial and Bail System That Fosters Racial and Financial Equity	Nefertari Elshiekh
Orphan Works: An Analysis Regarding Copyrights and its Implications for the United States	Alex Crispin
Puff Puff Pass: The Marijuana Opportunity and Reinvestment Act of 2019	Tiffany Liriano

UNIVERSITY OF CENTRAL FLORIDA

DEPARTMENT OF LEGAL STUDIES LAW JOURNAL

BOARD OF EDITORS FOR 2019-2020

Table of Contents

FOREWORD 4

INTRODUCTION 7

TITLE IX: HOW UNIVERSITIES CONTINUE TO CONSENT TO CAMPUS SEXUAL ASSAULT 12

SMOKING GUN: CAN MEDICAL MARIJUANA REGISTRY CARDHOLDERS BE DENIED SECOND AMENDMENT RIGHTS? 29

TRADEMARK TROLL? LOUIS VUITTON AND THE RELENTLESS QUEST FOR BRAND PROTECTION 41

GUILTY UNTIL PROVEN INNOCENT: EXAMINING THE MIND GAMES AND INNER WORKINGS OF THE INTERROGATIVE REID TECHNIQUE 55

SOCIAL EQUITY AND MEDICAL MARIJUANA IN FLORIDA: AN ANALYSIS OF BARRIERS MINORITES FACE IN THE GROWING MEDICAL MARIJUANA INDUSTRY 67

WHEN THE COURT BECOMES MOOT: NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC. V. CITY OF NEW YORK, NEW YORK 75

NECESSARY AND CONVENIENT: THE EFFECT OF COMMERCE AND NECESSARY & PROPER CLAUSE JURISPRUDENCE ON AMERICAN FEDERALISM 87

'THIRD WAVE' OF BAIL REFORM: CREATING A PRETRIAL AND BAIL SYSTEM THAT FOSTERS RACIAL AND FINANCIAL EQUALITY 109

ORPHAN WORKS: AN ANALYSIS REGARDING COPYRIGHTS AND ITS IMPLICATIONS FOR THE UNITED STATES 125

PUFF PUFF PASS: THE MARIJUANA OPPORTUNITY AND REINVESTMENT ACT OF 2019 137

FOREWORD

Dr. Alisa Smith, J.D., Ph.D.

Department Chair and Professor, Department of Legal Studies

For the last three years, it has been my honor to welcome readers to the University of Central Florida (UCF) Department of Legal Studies Undergraduate Law Journal. In these three short years, the journal has gained acceptance by the legal profession and among legal scholars from around the country. Additionally, the journal is now indexed as a scholarly journal and its articles are accessible through on-line academic databases.

As the journal's advisor, Professor Beckman deserves much of the credit for keeping students on course, providing them with the highest quality learning experience, and guiding *undergraduate* students in writing and editing this journal. As alluded to in Professor James Beckman's Introduction (see *infra* page 7), this third edition of the journal was produced at a particularly trying time—during an international pandemic. Despite the global upheaval, Professor Beckman and his students produced another superb edition.

Authoring and editing an undergraduate law journal have provided our students with a unique opportunity to engage in a deep understanding of the publication process, which is typically reserved for law students. Once again, this year's articles are outstanding in the quality of their research and writing, and the articles cover many current legal topics facing society. For example, the journal's lead article explores the Trump Administration's Department of Education changes to the handling of Title IX sexual harassment cases on college campuses. Additionally, authors published articles that analyzed issues that were pending before the United States Supreme Court, including those on gun control, the legality and ethics of interrogation techniques used by the police to obtain confessions, the aggressive brand protection of Louis Vuitton under existing trademark laws, the recent uses of the powers and limits of Congressional authority under the Necessary and Proper and Interstate Commerce clauses, the need for bail reform in the United States, the history and current dilemma of "orphan copyright works," and three articles focusing on de-criminalization of marijuana in the United States, ranging from the legality of medical marijuana registry cardholders being denied their Second Amendment rights to the barriers minority groups face in participating in the marijuana-growing industry.

The articles may be read selectively, depending on readers' interests, or sequentially, to explore diverse and current legal topics and issues. Whatever approach you take in reading the articles, you will find that they contribute to Oliver Wendell Holmes'

notion of the “intellectual marketplace of ideas,” and I am sure that you will have to remind yourself that these are the scholarly works of *undergraduate* students.

INTRODUCTION

James A. Beckman, Faculty Advisor

Professor, Department of Legal Studies

This third annual volume of the journal was produced amidst great national turmoil and angst. In Spring 2020, the United States experienced the worst pandemic (i.e., the COVID-19 or "Coronavirus") that the country has arguably seen since the Spanish Flu pandemic of 1918. As a result of the 2020 pandemic, the University of Central Florida (UCF), along with every other college and university in the country, was forced to move all academic activities and coursework to the online setting mid-semester and all remaining work was to be completed remotely for the rest of the semester. Students were moved out of residence halls and dormitories and even staff and faculty were instructed to work remotely "until further notice." Indeed, as of the writing of this Introduction, this journal is being assembled and final preparations are being made to send the manuscript to the printers even before the State of Florida or the country as a whole has returned to work.

Many in society during this period have been making sacrifices and learning to navigate through a "new normal" during a pandemic wherein over 90% of the population has been ordered to "stay at home" or "shelter in place," and the students on the editorial board of this journal are no different. Work continued on the journal largely as previously planned and scheduled—although all the work being done remotely. Students completed their writing, editing, article revisions, and other journal activities all while at the same time ensuring that their family members and loved ones were taken care of and also ensuring that they were able to pay their bills, make the next rent payment, secure groceries and other essentials—and the myriad of other activities that most take for granted on a routine daily basis. Additionally, for the first time in the journal's history, a co-authored article was submitted *and accepted* for publication. Co-authored articles are often more difficult to compose than sole authored pieces even in "normal times"—as it requires a great deal of coordination between authors both as to their research but also as to how the research findings are to be presented.

Also, ironically, the written and on-line discussions about the merits of the submitted articles has never been better than this year. Students produced over eighty written pages of single-spaced comments on the merits or deficiencies of submitted articles, which represented robust on-line debates—arguably surpassing the face-to-face debates in previous years.

The members of the journal, an incredibly talented group of undergraduate students by any metric, completed all necessary work while also dealing with all the logistical problems and perils brought about by this tragic pandemic. The journal that you have in front of you now was produced in perilous times and by students who were undaunted by the upheavals that all Americans endured. For their perseverance and hard work, I am impressed. You, the reader, should be too.

Additionally, it bears reminding that this journal was entirely produced by undergraduate students—both in terms of the authored articles and the editing of the accepted articles. The level of sophistication displayed by these students in the following pages is outstanding—again, not only in the work of the authors themselves, but also in the unseen work of the student editors who made each of the published articles better.

Since the inaugural issue of this journal in Spring 2018, the journal has been published annually each spring. This is the third issue. As in previous years, the first step was the selection of students to serve on the Editorial Board—a selection process that starts in the semester before work actually begins on the journal. To ensure that the best students are selected, each student on the Editorial Board has to be nominated by a faculty member of the Legal Studies Department. Of those nominated, I then invited those nominated students who had a clearly evidenced ability and experience in solid legal writing, research and editing to be in the Legal Studies "Law Journal" class and serve on the Editorial Board. Each one of these students are listed in full on the very first page of this journal.

During the first month of work on the journal, time was spent on discussing "best practices" of an editorial board, covering the well-established procedures of student-run law school "law reviews" and "law journals," select lessons in the proper usage of the *Chicago Manual of Style* and *The Blue Book for Legal Citations*, and other such preparatory activities. Each student on the Editorial Board is also required to research and write an article of their own—although there is no guarantee that their authored article will be published (and in fact, many are not).

As a result of a call for papers that went out to multiple academic departments on several occasions in late 2019 and early 2020, thirty-two articles were ultimately submitted by students for consideration. This is an increase from last year's submission total of thirty. Each of those thirty-two articles was sent directly to me as the Faculty Advisor. To conduct blind peer-reviews of these articles, I removed all identifiable author information for each submission and converted each file into a randomized PDF file labeled and given the title of a submission number ranging from one to thirty-two. As in years past, and to guide the Editorial Board in their critique

and blind peer-review of the submissions, an "Article Review Sheet" was utilized to aid in a proper review. This "Article Review Sheet" can be found at the end of this Introduction. As one may ascertain from perusing the review sheet, articles were evaluated on a bevy of different criteria, ranging from the writing style and proper use of citations and scholarly attribution, to the timeliness and currency of the topic being addressed in the article. Every editorial board member was tasked with reading each of the submissions. After individual reviews of the articles were conducted, the entire editorial board discussed the merits and deficiencies of each submission and ranked and voted on each submission. Of the thirty-two articles, the top fifteen articles were subjected to another round of discussion and another subsequent vote. Once the final ten articles were selected for publication, each article was assigned a team of two or three reviewers, who reviewed and edited the articles in detail.

As the Faculty Advisor for three years now, I continue to be amazed at the high caliber of work exhibited by the Editorial Board and the contributing authors. The Editorial Board members had to make difficult decisions about article selection and spent hours upon hours reviewing (and providing comments) on each of the thirty-two submitted articles. In the following pages, you will find the "best of the best" of those articles. These articles are thoroughly researched, solidly written, and deal with relevant and current issues. In perusing the following pages of this journal, I hope you will find articles that grab your attention, pique your academic and intellectual interests, and leave you with a desire to learn more about a given topic or controversy.

LEGAL STUDIES UNDERGRADUATE LAW JOURNAL

Department of Legal Studies

College of Community Innovation and Education, University of Central Florida

Article Review Sheet for the UCF Legal Studies Undergraduate Law Journal[1]

Timeliness, Currency and Overall Analysis

1. Does the article deal with a topic of current relevancy? Is it timely? 1 2 3 4 5

2. Does the article offer new information or new perspectives

[1] This review sheet was designed utilizing multiple resources dedicated to effective writing and designing top-notch research papers. See, for example, The University of Southern California: Research Guide: Organizing Your Social Science Research Paper: Theoretical Framework, http://libguides.usc.edu/writingguide/theoreticalframework. See also, Louis J. Sirico, Jr. and Nancy Schultz, *PERSUASIVE LEGAL WRITING*, 4th edition, Wolters Kluwer: 2015.

for the readers? 1 2 3 4
5

3. Is the article coherent for the intended audience(s)? 1 2 3 4
5

4. Are the qualitative or quantitative analyses appropriate? 1 2 3 4
5

5. Does the article offer a viable solution, an alternative approach, or a transition position to the problem the research defines? 1 2 3 4
5

6. Does the evidence and reasons support the conclusions and implications made by the author(s)? 1 2 3 4
5

Facts, Issues and Conclusions in Article

7. Does article include clear legal issues and most significant facts? 1 2 3 4
5

8. Does article have clear conclusion and/or answers? 1 2 3 4
5

9. Does article use and apply legal principles/rules? 1 2 3 4
5

10. Does article include all material facts? 1 2 3 4
5

11. Does article exclude extraneous facts? 1 2 3 4
5

12. Does article include unfavorable and favorable facts? 1 2 3 4
5

13. Is Article organized in a logical fashion? 1 2 3 4
5

Discussion Issues

14. Is Article organized around issues and sub-issues? 1 2 3 4
5

15. Devotes appropriate amount and depth of analysis consistent with the importance of the authority 1 2 3 4
5

16. Does Article utilize appropriate authorities? Does the article weigh or apply the authorities appropriately? 1 2 3 4
5

17.Explains why and how the legal rules applies to the topic of the article? 1 2 3 4 5

Writing Style, Organization and Proper Grammatical Usage

18. Article uses complete paragraphs and paragraphs are organized to communicate logical progression of ideas 1 2 3 4 5

19. Article uses thesis sentences to create logical progression 1 2 3 4 5

20. Article uses appropriate word choice and grammar 1 2 3 4 5

21. Article contains few excess words 1 2 3 4 5

22. Article uses complete sentences with subject and verb agreement 1 2 3 4 5

23. Article uses accurate punctuation and proper quotation marks 1 2 3 4 5

24. Article includes no contractions or slang 1 2 3 4 5

25. Article writes out numerals and abbreviates as appropriate 1 2 3 4 5

26. Article uses correct possessives and capitalizations 1 2 3 4 5

Proper Citation

27. Provides citation for every utilized quotation 1 2 3 4 5

28. All citations are substantively accurate 1 2 3 4 5

29. Names of authorities are accurate 1 2 3 4 5

30. Volumes and sources accurate 1 2 3 4 5

31. Year and court accurate 1 2 3 4 5

32. Page numbers of cases or articles correct 1 2 3 4 5

33. Pin point cites are utilized and are accurate	1	2	3	4	5
34. Typeface, spacing, italicizing, underlying, et cetera, are accurate	1	2	3	4	5

TITLE IX: HOW UNIVERSITIES CONTINUE TO CONSENT TO CAMPUS SEXUAL ASSAULT

Brooke Mason

INTRODUCTION

Rape has become a normative act in contemporary campus culture. Universities are jaded by the frequency of campus sexual assaults, mischaracterization of the pervasiveness of the act, and a desire to maintain a detrimental air of neutrality in institutional disciplinary hearings. The Department of Education's Office of Civil Rights (herein, "OCR") has cultivated Title IX guidance documents that allow federally funded universities to issue disciplinary sanctions that are disproportionate to the severity of findings of responsibility for sexual misconduct.

Although the term "sexual misconduct" under Title IX can encompass various capacities of offenses, this article will specifically refer to student-on-student sexual assault, attempted or completed, in referencing sexual misconduct.

Among undergraduate students, 23.1% of females and 5.4% of males surveyed reported experiencing rape or sexual assault through physical force, violence, or incapacitation.[2] In recent history, the push for more sexually safe environments has been met by the Department of Education's issuance of guidance documents to serve as a regulatory authority for university Title IX programs.[3] Institutions are expected to put in "good faith" compliance with current interim guidance documents until further

[2] Ramya Sekaran. The Preponderance of the Evidence Standard and Realizing Title IX's Promise: An Educational Environment Free from Sexual Violence 19 Geo. J. Gender & L. 643 (2018).
[3] U.S. Dep't of Educ. OCR Interim Q&A on Campus Sexual Misconduct 5 n.19, (Sept. 2017), *available* at https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

legislation is passed.[4] The documents afford universities the liberty to adopt either the preponderance of the evidence standard (herein, "POE"), i.e. "more likely than not," or the clear and convincing evidence standard, i.e. "substantially more true than not" (herein, "C&C).[5] Further, when an individual is found responsible for sexual misconduct, institutions allocate a disciplinary sanction with consideration of "how best to enforce the school's code of student conduct while considering the impact of separating a student from her or his education."[6]

This article explores how the application of Title IX guidance on college campuses is detrimental to the physical and psychological well-being of the victimized student and the health and safety of the campus community given the likelihood of an institution allocating inadequate disciplinary sanctions. First, this article describes a brief contemporary history of Title IX legislation and mandates. Second, this article provides a brief overview of Title IX university procedures. Third, there is a discussion of two Title IX cases from Florida State University. Fourth, there is a description of the emerging trauma theory of institutional betrayal and how it relates to victimization on college campuses. Ultimately, this article will conclude that there should be universal adoption of the C&C standard in Title IX sexual misconduct proceedings and that findings of responsibility for pervasive sexual misconduct should be met with expulsion.

HISTORY OF TITLE IX

In 1972, Title IX was signed into law by President Richard Nixon in response to years of Congressional debate surrounding discrimination in educational employment and admissions. Title IX is part of the Educational Amendments of 1972. It provides that "no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance."[7] The Act applies to all aspects of federally-funded education programs and activities, granting few exceptions.[8]

The statute's definition of sex discrimination covers a broad scope of issues related to women's access to higher education, athletics, career opportunities. There are no sexual assault specific provisions within Title IX, but the mass prevalence of campus

[4] *Id*. at 3
[5] *Id*. at 5
[6] *Id*. at 6
[7] Title IX, 20 U.S.C. §§ 1681-1688 (2012).
[8] *Id*.

sexual assault has required it to be provided for in campus proceedings. This article will exclusively deal with university Title IX procedures regarding sexual assault claims.

In 1980, the persuasive authority of *Alexander v. Yale University* was the first case to address sexual assault and harassment claims on university campuses.[9] *Alexander* was filed by four female undergraduate students and one male professor in response to their claim that Yale University condoned sexual harassment by not having the proper procedures for grievances to be addressed pursuant to Title IX.[10] The issue was whether Yale University's sexual misconduct complaint procedures complied with the rights afforded under Title IX in the Educational Amendments of 1972.[11] The court reasoned that the rights afforded under Title IX guarantee members of the university community a means of filing and resolving complaints of sexual assault.[12] The Second Circuit of Connecticut dismissed the claims of the plaintiffs, but this case serves as the first instance of when a university was sued for the wrongful handling of sexual misconduct claims.[13]

In 1990, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1990 (herein, "Clery Act") was passed in response to the 1968 rape and murder of a female freshman, Jeanne Clery, on Lehigh University campus by a fellow student, Josoph Henry. [14]This event brought forth a wave of acknowledgment of the under-reporting of crime on college campuses.[15]The Clery Act mandated that universities gather data on campus communities regarding sexual offenses and that this data be made publicly available in an annual security report.[16] The Act requires that sexual assault victims be afforded various rights from the university: notification of available counseling services, opportunity to change their academic and living situations, information regarding the outcome and appeal of any disciplinary proceedings, and the right to be present at any proceedings regarding the investigation.[17] The Clery Act affords victims with complete confidentiality of any

[9] *Alexander v. Yale Univ.,* 459 F. Supp. 1, 1977 U.S. Dist. LEXIS 12240 (United States District Court for the District of Connecticut December 21, 1977), *available at* https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-RGK0-0054-7359-00000-00&context=1516831.

[10] *Id*.

[11] *Id*.

[12] *Id*.

[13] *Id*.

[14] RAINN, "Clery Act" *available* at https://www.rainn.org/articles/clery-act.

[15] *Id*.

[16] Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. §§ 1092 (2019).

[17] *Id*.

allegations or university procedures.[18] The Clery Act was amended in 2013 by the Violence Against Women Reauthorization Act of 2013 (herein, "VAWA") to require institutions to collect and report statistics regarding sexual assault, dating violence, stalking, and domestic violence.[19] The Department of Education's Office of Civil Rights (herein, "OCR") has clarified that institutions are held to both Title IX and the Clery Act when investigating sexual assault claims.[20]

The United States Supreme Court ruling on the 1999 case of *Davis v. Monroe County Board of Education* was the first to establish institutional liability for a student-on-student sexual harassment and assault.[21] Aurelia Davis sued for injunctive and monetary relief against the Monroe County Board of Education, alleging that Aurelia's fifth-grade daughter, LaShonda, was being subjected to sexual harassment by a fellow student and that the school was complacent in fostering an environment for the behavior to continue.[22] The appellate court held that there were no grounds for a private cause of action concerning peer-on-peer sexual harassment afforded under Title IX.[23] The Supreme Court reversed and found that there is an implied right to take private action against a recipient of Title IX when the recipient acted with deliberate indifference to known acts that were so pervasive that they prevented the victim from accessing educational opportunities at the school.[24]*Davis* established a precedent of equal access to education for victims of sexual abuse and harassment by providing a mechanism that allowed victims to hold institutions liable for their negligence.[25]

In response to *Davis* and other similar subsequent cases, the OCR issued revised guidance for compliance with procedural guidelines and administrative enforcement of Title IX in the 2001 *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (herein, "2001 Guidance").[26] This guidance intends to distinguish between the standard for private litigation, as

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[18] *Id*.
[19] Violence Against Women Reauthorization Act, U.S.C.S. § § 113 P.L. 4, 127 Stat. 54 (2013).
[20] U.S. Dep't of Educ. OCR. *supra* note 2 at 2.
[21] *Davis v. Monroe County Bd. of Educ.,* 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839, 1999 U.S. LEXIS 3452, 67 U.S.L.W. 4329, 99 Cal. Daily Op. Service 3861, 99 Daily Journal DAR 4931, 1999 Colo. J. C.A.R. 2948, 12 Fla. L. Weekly Fed. S 280 (Supreme Court of the United States May 24, 1999, Decided), *available at* https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WJ6-77G0-004C-000V-00000-00&context=1516831.
[22] *Id*.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] U.S. Dep't of Educ. Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (Jan. 2001), *available* at https://www2.ed.gov/about/offices/list/ocr/docs/shguide.

defined in *Davis*, and the regulatory framework for how an institution should respond to sexual harassment and assault claims.[27] The institutional establishment of effective and well-publicized grievance procedures are defined and addressed here; a description of these procedures will be discussed later in this article. [28] In 2006, the OCR released its first "Dear Colleague" Letter (herein, "DCL"), which reiterated the usage of the 2001 Guidance in response to the continued growth of assault claims in institutions.[29]

Under President Obama's administration, the OCR released another DCL which addressed educational institution's failure to prevent sexual misconduct and outlined the policies and procedures for federally funded institutions to handle student-on-student sexual assault on April 4, 2011. [30] The 2011 letter mandated that all federally-funded universities adopt a POE standard, the same standard utilized in civil litigation, to use in administering student discipline.[31] It also suggested that universities offer an opportunity for appeals to both the reporting, i.e. the victim, and responding, i.e. the perpetrator, students, and it discouraged cross-examination of the parties.[32] Universities were prohibited from relying on criminal investigations to resolve Title IX and mandated that they establish policies and procedures to expedite and resolve complaints while affording accused students due-process protections.[33] Enforcement strategies and remedies for investigations were also outlined in this document.[34]

The OCR produced a "question and answer" document in 2014 to supplement the 2011 Letter and provide further clarification on the legal requirements and recommendations set forth.[35] The OCR's 2011 and 2014 guidance documents were then met with the establishment of university procedures that were criticized for having been too strongly swayed in favor of the reporting student, as they allowed for both double jeopardy and limited opportunity for cross-examination.[36] Proponents of the letter advocated that there was no new policy introduced in the documents but

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[27] *Id*.
[28] *Id*. at 14
[29] U.S. Dep't of Educ. Dear Colleague Letter (2006), *available* at https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html.
[30] U.S. Dep't of Educ. Dear Colleague Letter (2011), *available* at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.
[31] *Id*. at 11
[32] *Id*. at 12
[33] *Id*.
[34] *Id*.
[35] U.S. Dep't of Educ. Questions and Answers on Title IX and Sexual Violence (2014), *available* at https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.
[36] U.S. Dep't of Educ. Dear Colleague Letter (2017), *available* at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

rather that they served as a tool that reminded schools to promote equality on their campuses.[37]

Under the Trump Administration, the OCR rescinded the 2011 and 2014 Obama-era guidance documents in the 2017 DCL letter and its subsequent "question and answer" document. [38] The 2017 letter directed itself, the 2006 DCL letter and the revised 2001 Guidance as the current guidance utilized by institutions.[39] The 2017 guidance affords institutions with the ability to choose between using the POE standard and the C&C standard and suggests that the campus should apply the same standard in non-Title IX cases also.[40] The 2017 DCL also permits that institutions issue disciplinary sanctions with consideration of how best to enforce the school's code of student conduct while considering the impact of separating a student from their education.[41]

The latest issuance of Title IX guidance from the Trump Administration's OCR is the *Notice of Proposed Rulemaking* issued in November 2018.[42] This guidance suggests that institutions still have the discretion to decide between POE and C&C, but that they must additionally apply whichever standard to faculty proceedings and any additional proceedings outside the arena of Title IX.[43]

PRACTICAL APPLICATION OF CURRENT FEDERAL GUIDANCE IN TITLE IX PROCEDURES

Universities are required to adopt, publish and make accessible grievance procedures for "prompt and equitable resolution" of claims of sex discrimination, inclusive of sexual assault allegations.[44] The OCR's standard of "prompt and equitable" is met when the following elements are satisfied: "whether the school (1) provides notice of the school's grievance procedures, including how to file a complaint, to students, parents of elementary and secondary school students, and employees; (2) applies the grievance procedures to complaints filed by students or on their behalf alleging sexual misconduct carried out by employees, other students, or third parties; (3) ensures an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; (4) designates and follows a

[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] U.S. Dep't of Educ. OCR. *supra* note 2 at 5.
[41] *Id*. at 6
[42] U.S. Dep't of Educ. Title IX Notice of Proposed Rulemaking (Nov. 2018), *available* at, https://www.govinfo.gov/content/pkg/FR-2018-11-29/html/201825314.htm.
[43] *Id*.
[44] U.S. Dep't of Educ. OCR. *supra* note 2 at 3.

reasonably prompt time frame for major stages of the complaint process; (5) notifies the parties of the outcome of the complaint; and (6) provides assurance that the school will take steps to prevent recurrence of sexual misconduct and to remedy its discriminatory effects, as appropriate."[45]

When an allegation of sexual assault is made to an institution, it first must be filed with the Title IX coordinator's office.[46] Institutions are required to have a Title IX Coordinator who is tasked with coordinating the implementation and administration of procedures to resolve Title IX complaints.[47] Since there is no fixed time frame for a Title IX investigation, interim measures can be taken by the university based upon the nature of the case and the information provided.[48] These interim measures are available to both the reporting and responding students, and they can provide both parties with some degree of certainty in an otherwise possibly confusing process.

During the investigation, the institution, not the reporting and responding students, is responsible for gathering evidence to produce an impartial determination free from the interests of the institution itself. [49] The investigation ensues independently of any concurrent civil or criminal cases that may be filed by the parties.[50] A trained investigator is appointed to the case to review exculpatory, inculpatory, and circumstantial evidence to compile an investigation report.[51] Often, the reporting student, responding student, and witnesses are interviewed by the investigator.[52] The reporting and responding parties must have equal access to any rights and opportunities afforded to the other party.[53] The parties must also receive written notice of all allegations, potentially violated sections of the student conduct code respective to the university, the conduct of the individual that constituted the violation, and the facts surrounding the incident.[54]

After the investigation report is finalized, an institution has the discretion to utilize a decision-maker, with or without a hearing, to consider all the evidence presented to

[45] *Id*.
[46] *Id*. at 2
[47] *Id*. at 3
[48] *Id*.
[49] *Id*. at 3
[50] *Id*.
[51] *Id*. at 2
[52] *Id*.
[53] *Id*. at 4
[54] *Id*.

decide whether there is a potential violation of the student conduct code pursuant to the standard decided.[55]

If both parties are consenting, universities have the discretion to utilize hearings to resolve complaints.[56] These informal resolutions can mirror that of a mediation proceeding. However, this allowance conflicts with the suggestion of the 2001 guidance that "in some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis."[57] As an attempt to minimize the potentially traumatic nature of a hearing, some universities have curated an adaptive approach where the reporting and responding individuals do not ever see or speak to each other directly during a hearing.[58] These hearings have a hearing officer who serves as the sole authority and relays written questions from either party to each other and to witnesses.[59] During a live hearing, all the admitted evidence is represented to the hearing officer, and statements are taken from all the parties involved.[60] The reporting and responding students also have the right to have an advisor present, but the university has the discretion to determine to what extent the advisor can participate.[61]

If a finding of responsibility is found by the initial decision-maker, it is permissible that another or the same decision-maker issues a disciplinary sanction.[62] The guidance mandates that the institution impose a disciplinary sanction, the nature of which should consider the purpose of deciding how best to uphold the student conduct code and make a consideration for the impact of separating the responding student from their education.[63]

Universities are also not required to allow appeals, but rather have the discretion to determine whether only the responding party or both parties will have the opportunity to appeal a decision.[64] If a consequence does not match, it is returned to the same hearing officer or another hearing officer for reconsideration. If a victimized student had left the school for his or her own safety, there is no true recourse they

[55] *Id*. at 6
[56] *Id*.
[57] U.S. Dep't of Educ. OCR. *supra* note 25 at 21.
[58] U.S. Dep't of Educ. OCR. *supra* note 2 at 5.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *Id*. at 6
[63] *Id*. at 6
[64] *Id*. at 7

can take in court against the school to ensure that the perpetrator does not return to school to victimize other students.

PRACTICAL APPLICATION, CASE ANALYSIS: FLORIDA STATE UNIVERSITY

At the time of the writing of this article, there is limited information on what disciplinary sanctions look like after findings of responsibility are placed upon the responding student. Portions of this section were provided by a confidential source for this article, so the primary analysis will be based on the recent history of the Title IX program at Florida State University (herein, "FSU").

In 2016, FSU settled a Title IX lawsuit with Erica Kinsman for $950,000 after she was raped by the university's star quarterback, Jameis Winston, in 2012.[65] Kinsman and Winston had met on December 7, 2012, at a popular bar for college students in Tallahassee. Kinsman had taken a shot of alcohol with Winston, which she believes was tainted with a drug.[66] Winston took Kinsman back to his off-campus apartment, where the alleged rape occurred.[67] Kinsman then went to the hospital to obtain a rape kit, where she claims Tallahassee Police Officers instructed her not to press charges due to Winston's football fame.[68] Ultimately, Winston was never charged by police, and Kinsman had to withdrawal from FSU due to the violent threats and negative backlash she was receiving on campus.[69]

In December 2014, the university conducted a live two-day Title IX investigative hearing where university officials found that Winston was not found responsible pursuant to the POE standard utilized under FSU's *Student Conduct Code.*[70] Winston was cleared of any potential charges just days before FSU's football team had an important game.[71]

In January 2015, Kinsman filed a lawsuit against FSU in 2015, alleging the university's handling of the case violated her rights under Title IX. Eventually, the settlement of $950,000 was reached in addition to an agreement that FSU would agree to a five-

[65] Marissa Payne. Erica Kinsman, who accused Jameis Winston of Rape, tells her story in the new documentary "The Hunting Ground" (2015) *available* at https://www.washingtonpost.com/news/early-lead/wp/2015/02/19/erica-kinsman-who-accused-jameis-winston-of-rape-tells-her-story-in-new-documentary-the-hunting-ground/.
[66] *Id*.
[67] *Id*.
[68] *Id*.
[69] *Id*.
[70] *Id*.
[71] *Id*.

year commitment to implement sexual assault training and prevention programs and that the university would have to release information about these programs.[72]

A post-Kinsman settlement Florida State University publicized in their promise to uphold a safe campus for all in a press release on January 25, 2016.[73] In the statement, Florida State University President John Thrasher stated FSU "remains committed to making our campus safe for all students and our school free of sexual harassment and sexual assault. As I've said before, one sexual assault against or committed by an FSU student is one too many." The press release also noted the efforts that the university was striving to make in order to prevent sexual assaults and support survivors, including over "100 training sessions conducted on the FSU campus about dealing with sexual assault and how to prevent it," a required course for students to take about sex and relationships, and adding six new staff positions related to campus safety and Title IX. [74]

After review of both the federal guidance and FSU's administrative guidance, this article has determined that FSU is currently in compliance with the current federal mandates and is in the five-year period agreement with the Kinsman settlement. Yet, this effort has not been met with a decrease in campus sexual assaults. In FSU's 2018 *Annual Security and Fire Safety Report* published for the 2019-2020 academic school year, it was found that from 2016-2018 there were a total of 66 rapes reported by either students or university officials.[75] This is slightly more than the one sexual assault that is "too many" that President Thrasher referred to.

On November 11, 2017, an incoherent, unconscious seventeen-year-old freshman student[76] was allegedly raped in the back of a car by a graduate student, Patrick Nesmith Cox, during an FSU-sponsored club camping trip in Alabama.[77] Cox and the victim had been acquaintances through an FSU club prior to the assault. The victim alleges that she was drugged by Cox, which caused her to fall unconscious in the woods and then be carried by multiple students and placed in the back of the car where she was originally supposed to sleep. This vehicle is where the assault occurred. The victim returned to campus after the trip and obtained a rape kit and filed a report

[72] *Id*.
[73] *Id*.
[74] *Id*.
[75] Florida State University, 2018 Annual Security and Fire Safety Report, *available* at https://www.police.fsu.edu/sites/g/files/upcbnu1426/files/2018%20ASR%20FINAL.pdf.
[76] Unnamed due to protection of minor.
[77] Karl Etters, FSU Student Charged in Alabama Sexual Abuse, Tallahassee Democrat (Nov. 2017), *available* at https://www.tallahassee.com/story/news/2017/11/20/fsu-student-charged-alabama-sexual-assault/880135001/

with the Tallahassee Police Department. Cox, a Tallahassee resident, was initially charged with sexual abuse and sodomy and was extradited to Cherokee County, Alabama. In January 2019, Cox ultimately accepted a plea bargain of felony assault, since he had no prior convictions, and was issued probation in Tallahassee. The victim had also obtained a sexual violence injunction against Cox. The victim withdrew from FSU for safety concerns, as Kinsman had.[78]

FSU began its investigation of this claim in 2017. After a full investigative report was finalized, it was determined that there was a potential violation of FSU's *Student Conduct Code.* The investigation then proceeded to a live hearing in November 2019 utilizing a POE standard. Ultimately, Cox was found responsible pursuant to Section 1.e.1(a) of Florida State University's *Student Conduct Code,* which states that an individual who is under the age of eighteen and under the influence of involuntary drug or alcohol use cannot provide consent to sexual activity.[79]

The finding of responsibility was then met with the following disciplinary sanctions: a one-semester suspension with eligibility for readmission, making a PowerPoint presentation for students about sexual activity and consent, and drafting a detailed plan for what specific changes the perpetrator will make to avoid relapse while transitioning back into campus life.[80] If Cox does not incur any additional violations during the suspension, he will be eligible for readmission for the Summer 2020 semester. [81] These disciplinary sanctions are provided for in FSU's *Annual Security and Fire Safety Report*, which states that if there is a determination that sexual misconduct has occurred, FSU will base their disciplinary action on the severity of the misconduct, inclusive of "separation from University programs, termination from University employment, or exclusion from campus." [82]

INSTITUTIONAL BETRAYAL

Despite the push for reform of sexual assault campus culture and its sequalae of procedures, there is a deep disconnect and distrust between students and Title IX

[78] Payne *supra* note 66.
[79] 2020 Florida State University Student Conduct Code *available* at https://sccs.fsu.edu/sites/g/files/upcbnu1476/files/SRR/FSU%20Student%20Conduct%20Code%20Updated%20September%202019.pdf.
[80] Information gleaned from the Hearing Decision Letter made available to Patrick Nesmith Cox and the victimized student, but not publicized by Florida State University.
[81] Florida State University *supra* note 76.
[82] *Id*.

administrators.[83] A 2019 survey of 180,000 students from 33 universities found that few undergraduate students believe that campus officials conduct fair Title IX hearings, and most doubted that their claims would be taken seriously by university officials.[84] Only 15% of those who were victims responded that they had utilized a victim advocate program or the Title IX office after being assaulted. [85] With the publicized risk of institutional betrayal, many victims do not see the outcome of the process worth the trauma of enduring the investigation and hearing process. Sexual assault victims experience physical and psychological distress following an assault, but this article will be limited to discussion of the psychological effects. The lack of trust in the university Title IX system is fueled by the idea that the trauma and risk of proceeding forward with a Title IX investigation will only result in a less than favorable outcome.

Betrayal Trauma Theory (BTT) is a framework exploring the effects of interpersonal trauma, where an individual is subject to a traumatic event by an individual or institution that that individual had an attachment relationship with.[86] Institutional Betrayal, a subsidiary of BTT, is a theoretical construct describing how indirect betrayal by an institution can exacerbate symptoms of Post-Traumatic Stress Disorder (PTSD).

According to RAINN, 93% of juvenile (college-aged) victims of sexual assault knew their perpetrator before the incident occurred.[87] BTT describes how traumatic events that occur within the context of a relationship where the victim is dependent on or trusting of the perpetrator are processed and remembered differently.[88] Dissociation, eating disorders, self-harm, anxiety, depression and interpersonal difficulties are

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[83] Nell Gluckman, Students Say They Don't Trust Campus Title IX Processes. And They Doubt Their Own Reports Would Be Taken Seriously. The Chronicle of Higher Education (Nov. 2019) *available* at https://www-chronicle-com.eu1.proxy.openathens.net/article/Students-Say-They-Don-t/247399.

[84] *Id*.

[85] *Id*.

[86] Carly Parnitzke Smith, et al. Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma
Oregon Department of Psychology J. (2013).

[87] RAINN, "Perpetrators of Sexual Violence: Statistics" *available* at https://www.rainn.org/statistics/perpetrators-sexual-violence.

[88] Kathy Ahern, Institutional Betrayal and Gaslighting : Why Whistle-Blowers Are So Traumatized, J. of Perinatal & Neonatal Nursing (2018).

likely to occur in victims. [89] [90] A victim typically may also experience shame, shock, and fear of retaliation from the perpetrator.[91]

The trust elicited from a friend or acquaintance is analogous to the relationship that individuals often have with the communities that they are a part of. Large institutions, such as universities, often elicit a level of dependency and trust that members of that community will be provided with a safe educational environment. Research suggests that interpersonal abuse in a setting where there is institutional trust present is more psychologically detrimental to the victim.[92] A student who is sexually assaulted in their dorm room by another student that they are acquainted with is likely to experience more severe post-traumatic symptoms in the wake of the event. The victimized student may have difficulties adapting back into the university environment, such as attending classes and being involved with campus activities, because the abuse occurred in the context of a larger community that had inherently vowed to keep them safe.

A 2013 study of sexually-assaulted undergraduate women at a large, public university found that those who had experienced institutional betrayal had more severe post-traumatic symptoms.[93] When the betrayal occurred independently of the assault, either before or after, it was found to be particularly severe, developing two independent sources of trauma. The IBT theory has been provided as a lens for viewing the injustice of the current disciplinary sanctions issued to responsible parties.

SOLUTION

Rape is not a mistake; it is a violent and conscious decision by the perpetrator to exercise power and control over their victims. If an individual is found responsible of sexual misconduct in a Title IX proceeding, federal mandates will allow that perpetrator only to receive a consequence that is equitable to a "slap on the wrist." Universities are allowing predators back onto campus to likely victimize other students. A 2019 survey found that most men on campus who admitted to attempting

[89] *Id*.
[90] Parnitzke Smith *supra* note 86.
[91] David Stader, Campus Sexual Assault, Institutional Betrayal, and Title IX, The Clearing House (2017) *available* at https://eds.a.ebscohost.com/eds/pdfviewer/pdfviewer?vid=6&sid=1cc3ba67-eb65-4faa-83e0-32ce75bd70a9%40sdc-v-sessmgr01.
[92] Parnitzke Smith *supra* note 86.
[93] *Id*.

or committing rape are repeat offenders, 63% of those surveyed claimed to have committed an average of six rapes each.[94]

On college campuses, eight out of ten sexual assaults are committed by someone the victim knows.[95] Research has suggested that reactions to rape may be affected by the context in which it is portrayed.[96] A study of reactions of both acquaintance-rape ("date" rape) and stranger-rape scenarios reported that all classes of individuals tested perceived the acquaintance-rape victim as reacting more favorably to the assault even though there were no actual indications of favorable reactions depicted in either scene.[97] Campus sexual assault has become mischaracterized as less pervasive than other forms of violent crime due to this phenomenon.

Current federal mandates provide a means for institutions to continually promote this stigma by not requiring them to enact stricter penalties given the severity of the assault, providing for systematic institutional betrayal and continuance of campus rape culture.

In order to begin a cultural shift on university campuses, the federal guidance needs to promote the universal adoption of the C&C standard and a "zero-tolerance" policy where a finding of responsibility for pervasive sexual misconduct is met with expulsion from the university.

A. UNIVERSAL ADOPTION OF THE CLEAR AND CONVINCING EVIDENCE STANDARD

A finding of responsibility for severe sexual misconduct (attempted or completed sexual assault/rape) should be met with grave consequences that will impact the responsible individual's life. Therefore, the C&C standard, a higher threshold than POE, should be universally utilized.

The POE standard should not be considered as a viable option by the OCR because it promotes the misconception that campus rape is not an act worthy of a higher caliber of determination and consequence.

The current federal guidelines suggest that whichever standard is adopted by the university must also be utilized in non-Title IX proceedings. This article is only

[94]FSU, "FSU Toolkit on Healthy Relationships" (2020) *available* at https://fsutoolkit.csw.fsu.edu/module/one/important-facts-and-statistics/.
[95] RAINN *supra* at note 87.
[96]James V. Check, et al, Sex Role Stereotyping and Reactions to Depictions of Stranger versus Acquaintance Rape. J. of Personality and Social Psychology, (1983) *available* at https://eds.b.ebscohost.com/eds/pdfviewer/pdfviewer?vid=4&sid=8005d428-7d71-49a0-8b93-34528f69b7e7%40pdc-v-sessmgr02.
[97] *Id*.

suggesting that sexual misconduct cases adopt the C&C standard, and it is not suggesting universal application across all university proceedings. Given the pervasive nature of sexual misconduct, its subsequent proceedings should be treated differently than an allegation of cheating on an exam.

The adoption of this standard would better protect the interests of reporting and responding students by developing a higher likelihood that a determination of responsibility will be met with appropriate sanctions. In the 2019 FSU case, the victim was both a minor and incapacitated when they were raped, yet a finding of responsibility was met with sanctions that highly afforded the perpetrator many rights to return to campus. Accuracy is paramount to Title IX procedures, and the utilization of this higher bar will ensure that an appropriate finding is made.

B. "ZERO-TOLERANCE" CONSEQUENCES

A finding of responsibility for pervasive sexual misconduct pursuant to an institution's student conduct code should be met with expulsion. This penalty should be inclusive of a prohibition of being a student of the university, being a part of campus activities, and a finding of responsibility noted on the individual's transcript. Expulsion is within the scope of disciplinary sanctions that institutions can impose upon a responsible party, yet it is entirely underutilized.[98]

The current consequences given to a responsible party are inadequate to protect students from further assaults. Out of every 1000 reported instances of rape, only thirteen cases will be referred to a state prosecutor, and out of those thirteen, only seven cases will lead to a felony conviction.[99] Only 5 out of every 1000 rapists will be incarcerated.[100] It is well known that most sexual assault cases that are prosecuted will end in a plea bargain.[101] Most victims have to seek civil litigation and Title IX proceedings to attempt to obtain a semblance of justice and security.

In 2017, it was estimated that only 30% of students found responsible for sexual assault were expelled, and 47% were suspended.[102] Only 17% of those received

[98] U.S. Dep't of Educ. OCR. *supra* note 2 at 5.
[99]RAINN, "What to Expect from the Criminal Justice System" *available* at https://www.rainn.org/articles/what-expect-criminal-justice-system.
[100] RAINN *supra* at note 87.
[101] RAINN *supra* at note 99.
[102] Tyler Kingkade, Fewer Than One-Third Of Campus Sexual Assault Cases Result In Expulsion, Huffington Post (2017) *available* at https://www.huffpost.com/entry/campus-sexual-assault_n_5888742?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAE1tDAhE3l-1aZ60U5et2vfn92yY5dEQaO4fph-KO4eEXMOnBhwMcbh__DQxDflVDQvLQrev9qWH-4h7Q_nD97U-

educational sanctions and 13% were placed on academic probation.[103] Given the likelihood of recidivism of those found responsible of sexual assault, it is ludicrous that institutions are affording over half of those individuals the opportunity to return to campus.[104]

Recidivism is rampant amongst peer-on-peer sexual offenders. In 2015, it was estimated that 68% of college men who were found to have committed at least one act of "sexual coercion and assault" were repeat offenders.[105] Those who were found to be repeat offenders will also be likely to conduct more severe and violent acts on their victims.[106] Even if it is a responsible individual's first time being reported to Title IX, the risk of recidivism is compelling enough for that individual to be expelled from being a part of the university. This "zero-tolerance policy" is the only way to make a push effort for student safety from sexual misconduct.

The federal mandates allow for an entirely subjective decision for punishment and consideration of a potential impediment to the responding student's education.[107] The 2019 FSU example demonstrates how institutions have the liberty to meet severe and pervasive crimes with petty punishments. Rape is inarguably one of the most traumatic experiences that an individual can have, let alone rape followed by the betrayal by a campus that promised to keep them safe. Student safety needs to be the primary concern to universities when issuing a disciplinary sanction.

CONCLUSION

Nearly one in four women will experience either attempted or completed sexual assault while they are in college.[108] Florida State University and 7,000 other federally funded universities currently have federal permission to allow sexually violent predators to return to their campuses. Title IX was adopted in order to promote equality amongst classes and protect students from discrimination in educational environments. Unfortunately, the pursuit of equality has failed to protect students from being subject to environments filled with rampant sexual assault. The OCR must

h4lnrSTbrZRaCa7ZDrRHDc1P1UqZm3EMmrHg5EbSBnOcaZpedxamJ8Y_lBobCs8SdDnGK3agVidlagJX0ri_.

[103] *Id*.

[104] *Id*.

[105] Heidi M. Zinzow, A Longitudinal Study of Risk Factors for Repeated Sexual Coercion and Assault in US. College Men, 44 Archives of Sexual Behavior 213 (2015).

[106] *Id*.

[107] U.S. Dep't of Educ. OCR. *supra* note 2 at 7.

[108] FSU *supra* note at 94.

adopt the C&C standard and zero-tolerance disciplinary sanctions to begin to take progressive steps forward to protect campus populations from sexual assault.

SMOKING GUN: CAN MEDICAL MARIJUANA REGISTRY CARDHOLDERS BE DENIED SECOND AMENDMENT RIGHTS?

Annalisa Gobin and Milady Planas Pinto

In 2015, a firearm dealer in Nevada refused to sell a gun to an American woman. Although she had no criminal record, the dealer informed her that it was illegal for him to sell her a gun because she possessed a medical marijuana registry card. Even though the woman lived in a state where medical marijuana was legal and despite that she no longer used her registry card to obtain medical marijuana, nor did she use the drug, the dealer was acting in compliance with federal law by refusing the sale.[1]

In a backdoor effort to enforce gun control, policymakers have enacted a federal ban against gun ownership by individuals who possess a medical marijuana registry card. Pre-existing federal laws hold that individuals assumed to be under the influence of certain drugs, including medical marijuana, should not be allowed to own assault weapons.[2] This ban is enforceable under federal law regardless of whether or not the individual lives in a state where the substance has been legalized.[3] Today, citizens continue to allege that the ban is a violation of their Second Amendment constitutional right to bear arms. This article discusses whether Second Amendment rights can be limited in this context, whether the ban violates the Second Amendment of the U.S. Constitution, and why continuing to enforce the ban could be problematic for American law.

I. Can Second Amendment Rights Be Restricted?

Second Amendment rights are well-loved by a large swath of the American people. Attempts to alter or restrict the Second Amendment in any way are often met with

[1] Wilson v. Lynch, 835 F.3d 1083 (9th Cir. 2016).

[2] Wilson v. Lynch, 835 F.3d 1083, 1089 (9th Cir. 2016); 18 U.S.C. § 922(d)(3) ("It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person is an unlawful user of or addicted to any controlled substance."); 18 U.S.C. § 922(g)(3) ("It shall be unlawful for any person who is an unlawful user of or addicted to any controlled substance to . . . possess . . . or to receive any firearm or ammunition."); 27 C.F.R. § 478.11.

[3] Arthur Herbert, *Open Letter to all Federal Firearm Licensees*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (Sept. 21, 2011). https://www.atf.gov/firearms/docs/open-letter/all-ffls-sept2011-open-letter-marijuana-medicinal-purposes.

controversy. However, the United States Supreme Court has continuously pointed out that the "right to bear arms" is not guaranteed, nor is it limitless.[4]

When considering whether a law violates the Second Amendment, courts routinely begin with its text: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[5] When considering whether a law or statute violates Second Amendment rights, courts return to this definition. To support banning cardholders from owning guns, the Supreme Court responds to the arguments raised by opponents of the Act by asserting that limiting Second Amendment rights in certain ways does not prevent citizens from using guns for militia purposes.

According to the Court in *District of Columbia v. Heller*, "like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[6] In *United States v. Miller*, the Court held that only gun use for militia purposes is protected under the Second Amendment.[7] All other forms of gun ownership, including for self-defense and personal protection, are not guaranteed by the Second Amendment and may be restricted as the government sees fit.[8] Courts have relied on these precedents when approaching laws that prevent certain individuals from owning firearms.

Moreover, the Court stresses that restricting constitutional rights is not a new practice, nor is it exclusive to the Second Amendment. Just as the First Amendment right to freedom of speech is limited when it comes to matters such as terrorism, threats, and obscenity, there can be restrictions on the right to own and buy a gun under certain circumstances.[9] In *Heller*, the Court upheld the government's right to prohibit individuals from owning firearms by famously stating, "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill."[10]

Hence, Second Amendment rights, like most others, may be limited by the federal government. However, there is a difference between restricting a right and

[4] Wilson v. Lynch,835 F.3d 1083 (9th Cir. 2016).
[5] U.S. CONST. Amend. II
[6] District of Columbia v. Heller, 554 U.S. 570 (2008)
[7] United States v. Miller, 307 U.S. 174 (1939) (Justice James Clark McReynolds writes for the majority that because possessing a sawed-off double barrel shotgun is not related to the preservation of a well-regulated militia, the Second Amendment does not protect the possession of such an instrument).

[8] *Id.*
[9] *Heller*, 554 U.S. at 672.
[10] *Id.*

"unlawfully infringing" upon it. Both state and federal courts have recently addressed whether the ban violates the Second Amendment.

II. Does the Ban Violate Second Amendment Rights?

The Second Amendment can be limited as long as the limitations are constitutional, promote a legitimate government interest, and do not unlawfully infringe upon the right.[11] Whether the medical marijuana registry card ban stays within these guidelines is considered below.

A. Constitutionality Of The Federal Gun Control Act And The Controlled Substances Act

The ban against medical marijuana registry cardholders possessing firearms has been created and supported through two types of federal legislation: The Federal Gun Control Act and The Controlled Substances Act.[12] The Federal Gun Control Act of 1968 makes it illegal for any person who fits into any of the following categories to ship, transport, receive, or possess firearms or ammunition.[13] These laws prevent a state from issuing a concealed carry license/permit to anyone who fits into one of the categories: (1) Fugitives from justice, (2) persons who are unlawful users of or are addicted to narcotics or any other controlled substances, (3) persons adjudicated as a mental defective or who have been committed to a mental institution, (4) persons who have been convicted in any court of a crime punishable by imprisonment for a term exceeding one year, (5) persons who are under indictment for a crime punishable by imprisonment for a term exceeding one year, (6) military veterans discharged under dishonorable conditions, (7) persons who have renounced U.S. citizenship, (8) aliens illegally in the U.S, (9) persons subject to a court order that restrains them from harassing, stalking or threatening an intimate partner or child of such intimate partner, and (10) persons convicted in any court of a misdemeanor crime of domestic violence.[14] These categories of people have been judged to pose an increased risk to society, should they be able to lawfully obtain firearms.

The United States Supreme Court has upheld the constitutionality of the Controlled Substances Act.[15] The Controlled Substances Act was passed by the United States Congress and enacted in 1971 to define the types of drugs and substances that would

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[11] *Id.*
[12] 21 U.S.C.§ 812(b) (1970); 18 U.S.C. § 922(d)(3) (1948)

[13] *Id.*
[14] 18 U.S.C. § 922(d)(3) (1948).
[15] *Heller*, 554 U.S. 570,

be recognized as illegal in the United States under federal law. Users of the drugs specified within the Control Substances Act are referenced in the Federal Gun Control Act of 1968 and are prohibited from possessing firearms. Marijuana is currently listed as a schedule I drug in the Act.[16]

B. Medical Marijuana As A Schedule I Controlled Substance Under Federal Law

Courts have acknowledged that marijuana is now recognized as medicinal in some states (e.g., California, Nevada, Maine).[17] However, federal law does not share this contention. While state law has shifted to allow for the legal use of medical marijuana, federal law has remained unchanged. Under the Controlled Substances Act, all forms of marijuana are categorized as a Schedule I substance and are considered to be illegal by the United States federal government.[18] Other drugs categorized as Schedule I include heroin, LSD, ecstasy and magic mushrooms.

As defined in Section 102 of the Controlled Substances Act, Schedule I substances are described as having the following three characteristics:

1. The drug or substance has a high potential for abuse.
2. The drug or other substance has no currently accepted medical use in
   treatment in the United States.
3. There is a lack of accepted safety for use of the drug or other substance under medical supervision.[19]

While states have relied on new studies to legalize marijuana for medical use, the federal government has found these studies to be insufficient to change federal legislation. In 2001, The Drug Enforcement Agency (DEA) denied a petition asking that marijuana be rescheduled due to states recognizing its use for medical purposes stating:

> When it comes to a drug that is currently listed in Schedule I, if it is undisputed that such drug has no currently accepted medical use in treatment in the United States and a lack of accepted safety for use under medical supervision, and it is further undisputed that the drug has at least some potential for abuse sufficient to warrant control under the CSA, the drug must remain in Schedule

[16] 21 U.S.C.§ 812(b) (1970).
[17] 28 Legal Medical Marijuana States and DC: Laws, Fees, and Possession Limits, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (last updated Dec. 28, 2016).
[18] *Id.*
[19] *Id.*

I. In such circumstances, placement of the drug in Schedules II through V would conflict with the CSA since such drug would not meet the criterion of "a currently accepted medical use in treatment in the United States.[20]

The government maintains that the support of marijuana's use for medical purposes remains inadequate to reschedule and recognize it as a medical drug.[21] Further, they assert that its potential for abuse warrants its placement as a controlled substance.[22] Thus, medical marijuana will continue to be recognized as an unlawful substance under federal law in the United States and for purposes of the federal ban. Further, under the Supremacy Clause of the Constitution, state courts must apply this federal law.[23]

Opponents of the ban have claimed that the law makes the blanket assumption that any holder of a medical marijuana card is currently using medical marijuana.[24] The Federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) requires that dealers use a form, known as form 4473, to determine whether an individual is eligible to purchase a firearm.[25] One of the questions on the form asks gun consumers whether they use drugs or possess a medical marijuana registry card. The ATF has since clarified that the sale of a firearm to anyone who possesses a medical marijuana registry card, even if they do not use their prescription or disclose that they are not under the influence of medical marijuana, is prohibited.[26]

In *Wilson v. Lynch*, the Ninth Circuit found that holding a registry card was enough for a firearm dealer to establish probable cause that the holder is an unlawful drug user.[27] Under the United States Code of Federal Regulations, "an inference of current use may be drawn from evidence of recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time."[28] As established in *Wilson*, a marijuana registry card is circumstantial evidence of recent use or possession of marijuana.[29] Additionally, the court argues that the government

[20] Wilson v. Lynch, 835 F.3d 1083 (9th Cir. 2016).
[21] Mark Crane, *Doctors' Legal Risks With Medical Marijuana*, MEDSCAPE(Jun. 04, 2015), http://www.medscape.com/viewarticle/845686.

[22] *Id.*
[23] U.S. CONST. art. VI, cl. 2.
[24] *Wilson*, 835 F.3d at 1085.
[25] FORM 4473, FIREARMS TRANSACTION RECORD PART 1, BUREAU OF ALCOHOL,TOBACCO, FIREARMS AND EXPLOSIVES, DEP'T OF JUSTICE. (Oct. 2016).
[26] *See* Wilson v. Holder, 7 F. Supp. 3d 1104, 1110 (D. Nev. 2014).
[27] *Id.* at 1100.
[28] 27 C.F.R. §478.11.
[29] *Wilson,* 835 F.3d at 1100.

has a legitimate interest to prevent violent crimes caused by users of Schedule I controlled substances.

C. The Government Has an Interest In Preventing Violent Crime

In *United States v. Yancey*, the Seventh Circuit found that habitual drug users are more likely to have difficulty exercising self-control, which makes it more dangerous for them to possess a firearm.[30] The court reports that extensive research has demonstrated a relationship between drug use and violent crime.[31] The court then provides several studies to support its reasoning along with data.[32]

In *Yancey*, the court uses research to support the conclusion that drug addicts and habitual drug users are comparable to mentally ill individuals. The court reasons that drug addicts, like the mentally ill, have trouble making responsible decisions, and their behavior is unpredictable.[33] In both cases, intervention by the state is necessary to protect both the individual and the public from harm.

According to the court, while holding a medical marijuana card does not explicitly suggest that an individual is a habitual user or an addict, it does create the possibility for them to become one.[34] The court compares these circumstances to banning a convicted felon from owning firearms. The court reasons that while not all felons are dangerous, committing a felony demonstrates that there is a greater risk that this individual may abuse guns. Similarly, illegal drug usage also indicates an increased risk of violence.[35]

The court then considers the similarities between users of illegal drugs and felons by stating, "keeping guns away from habitual drug abusers is analogous to disarming felons… [W]e have already concluded that barring felons from firearm possession is constitutional."[36] As a result of the dangers habitual drug users pose and the lack of control they exhibit, the government found that Congress acts reasonably by prohibiting these individuals from possessing guns in the interest of public safety. As concluded by the Court: "we find that Congress acted within constitutional bounds by

[30] United States v. Yancey, 621 F.3d 681 (7th Cir. 2010).
[31] *Id.* at 686.
[32] *See United States v. Carter*, 750 F.3d 462, 466–69 (4th Cir. 2014) (citing and discussing four studies and two government surveys); *United States v. Yancey*, 621 F.3d 681, 686 (7th Cir. 2010) (citing all but one of the studies and surveys in Carter, plus an additional study).

[33] *Id.*
[34] *Id.*
[35] See *Dickerson v. New Banner Inst., Inc.,* 460 U.S. 103, 112 n.6 (1983). (Congress has a right to to "keep firearms out of the hands of presumptively risky people.").
[36] *Id.* at 684.

prohibiting illegal drug users from firearm possession because it is substantially related to the important governmental interest in preventing violent crime."[37]

In *Wilson*, the court accepts the research and studies used in *Yancey*, stating, "we therefore have no occasion to evaluate the reliability of the studies and surveys, and instead accept them as probative."[38]

As such, federal and state courts maintain that both the Federal Gun Control Act and Controlled Substances Act are entirely constitutional and a lawful exercise of the government's right to protect the country from violent crime.[39]

D. The Federal Ban Does Not Unlawfully Infringe Upon Second Amendment Rights

In Wilson, the court found that the enforcement of the ban was no greater than necessary to allow the government to pursue their interest in protecting the public from violent crimes.[40] Additionally, the court found that there is not a "constitutionally protected liberty interest in simultaneously holding a registry card and purchasing a firearm." [41]

Interestingly, in *Yancey*, the court declared that the Controlled Substances Act is less restrictive than the legislation that prohibits convicted felons or the mentally ill from possessing firearms.[42] The court states, "the Second Amendment, however, does not require Congress to allow [an individual] to simultaneously choose both gun possession and drug abuse."[43] Unlike other groups of people (i.e., felons, mentally ill), habitual drug users can regain their right to own firearms by simply ending their use of the forbidden drugs. The court states that the habitual drug user, himself, controls his right to own a gun. Therefore, this individual cannot successfully claim that the government is infringing upon their rights. Even less restrictive is the case of medical marijuana registry cardholders who may regain their rights by surrendering their card.[44]

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[37] *Id.*
[38] *Wilson*, 835 F.3d at 1093.
[39] *Id.*

[40] *Wilson*, 835 F.3d at 1092.
[41] District of Columbia v. Heller, 554 U.S. 570 (2008).
[42] *Id.* at 1092 (quoting Chovan, 735 F. 3d at 1138).
[43] *Yancey*, 621 F.3d at 687 ("[L]aws which regulate only the manner in which persons may exercise their Second Amendment rights are less burdensome than those which bar firearm possession completely.").

[44] *Id.*

Some courts have also responded to challenges that the ban is a violation of the Equal Protection Clause of the Fourteenth Amendment.[45] The Equal Protection Clause protects against discriminatory laws.[46] While this article focuses on violations of the Second Amendment, it is also important to note that courts have found that the ban does not violate the Equal Protection Clause.[47]

In *Wilson*, the court uses a two-part test to determine whether the ban violates the Equal Protection Clause.[48] The court states, "the first step in equal protection analysis is to identify the state's classification of groups… The next step in equal protection analysis would be to determine the level of scrutiny."[49] However, the court determined that the test does not need to be applied in these cases regarding the ban, because the rights of the group (medical marijuana cardholders) are not being fundamentally interfered with. As stated, the group may regain their rights by giving up their card.[50] Furthermore, there is no constitutional right to simultaneously hold a medical marijuana registry card and possess a firearm.[51]

In sum, the current opinion of both state and federal courts is that the ban does not unlawfully infringe upon Second Amendment rights.

III. Legal Issues Raised by the Ban

While the legal decisions made by the courts regarding the ban have been consistent so far, they are not concrete. The ban against medical marijuana registry cardholders from owning firearms is primarily based on medical marijuana's current classification as a Schedule I drug, which may be changed as new studies emerge. Moreover, this law may not only be unstable but also problematic in its current form. We predict that continuing to enforce the ban will emphasize its faults. Some potential challenges that have not yet been made in major courts are described below.

A. Alcohol is Not Considered a Controlled Substance

[45] U.S. CONST. Amend. XIV (" 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.").
[46] *See* Country Classic Dairies, Inc. v. Mont., Dep't of Commerce Milk Control Bureau, 847 F.2d 593, 596 (9th Cir. 1988).
[47] *Wilson,* 835 F.3d at 1098.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*

Thus far, courts have addressed several allegations made by opponents of the ban, however, a large number of issues remain uncovered. One of those unheard challenges attacks the core rationale of the legislation.

Alcohol is a substance widely known to lead to addiction, cause behavioral changes, and promote dangerous crimes.[52] More studies have been done on the adverse effects of alcohol consumption than on any other drug-like substance in the world.[53] Yet, no ban prohibits alcohol users or alcoholics from owning guns.

We have seen the Supreme Court compare marijuana users to the mentally ill and convicted felons but we have not seen a similar argument made that differentiates Schedule I drug users from consumers of alcohol. As previously stated, Schedule I substances: (1) have a high potential for abuse, (2) have no recognized medical purpose, and (3) are unsafe even under medical supervision. Through a general application, alcohol checks all of those boxes.

Alcoholism is a very real disease that demonstrates liquor's potential for abuse. Additionally, alcohol (other than the varieties used for antiseptic medical purposes) is mostly used for recreational purposes. Lastly, the high amounts of overdoses each year from both over-the-counter and prescription cough syrups show that even medical forms of alcohol should be used under medical supervision.[54] If arguments are made that using alcohol responsibly would not warrant its Schedule I categorization, the same argument can be made for the responsible use of medical marijuana. Further, it should be noted that a specific exemption had to be made for alcohol within the Controlled Substances Act.[55]

Contrary to the determination that medical marijuana usage suggests that individuals pose an increased risk to society, studies definitively show a link between alcohol and gun violence.[56] A study conducted in 2013 found that 34 percent of gun killers were drinking before committing a murder.[57] Another study estimates that 8.9 to 11.7

[52] Regulate Marijuana Like Alcohol Act, H.R. 1013, 114th Cong. (2015).
[53] G.J. Wintemute, Alcohol Misuse, Firearm Violence Perpetration, and Public Policy in the United States. PREVENTATIVE MEDLINE (2015).
[54] 21 U.S.C. § 802(6) ("The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.").
[55] G.J. Wintemute, Alcohol Misuse, Firearm Violence Perpetration, and Public Policy in the United States. PREVENTATIVE MEDLINE (2015).
[56] Joseph B. Kuhns, M. Lyn Exum, Tammatha A. Clodfelter, and Martha Cecilia Bottia, *The Prevalence of Alcohol-Involved Homicide Offending: A Meta-Analytic Review.* 18 HOMICIDE STUDIES 251–70 (2014).
[57] *Id.*

million firearm owners binge drink.[58] Researchers concluded that "ultimately, a prior alcohol conviction proved to be a stronger risk factor for gun violence than age, gender, or history of prior violent behavior."[59]

Research proves that alcohol consumption is the single most proven predictor of gun violence, yet alcohol is not a Schedule I substance. More surprisingly, alcohol is not considered a controlled substance at all. American citizens should expect that all major grounds of an issue are covered when their constitutional rights are on the table. When considering whether legislation violates the Equal Protection Clause, citizens ought to consider why medical marijuana registry cardholders are not given the same privileges as alcohol consumers.

B. The Adaptability of the United States Constitution

There should be concern that slow-moving legislation hinders medical progress. Further concern should center around how fast the U.S. Constitution can be altered to reflect important breakthroughs in science, medicine, and the law.[60] As for the medical marijuana gun ban, future conversations should focus on whether this is an instance of protecting the Constitution from instability or a showcase of its shortcomings to adapt to change in a timely manner.

The ban has emphasized a lag between federal law and state law. While state legislation is moving quickly to incorporate new studies and keep their laws current, federal law has fallen behind. The Supremacy Clause positions federal legislation to set laws that the states then follow. In the case of medical marijuana, some states have already rescheduled and legalized medical marijuana.[61] Lawmakers should consider whether this pattern of state law paving the way for potential changes in federal law is an appropriate precedent to set.

IV. Conclusion

Regardless of our stance on any of the issues discussed in this article, we urge lawmakers to prioritize reviewing the legislation that prohibits medical marijuana

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[58] G.J. Wintemute, Alcohol Misuse, Firearm Violence Perpetration, and Public Policy in the United States. PREVENTATIVE MEDLINE (2015).

[59] *Id.*

[60] Medical Marijuana is used as a last resort treatment for patients with terminal and severe illnesses. Examples of people who are waiting on medical marijuana to be legalized so they can obtain treatment have been covered in numerous articles. Proposition 215, Compassionate Use Act, CAL. HEALTH & SAFETY CODE
§ 11362.5 (1996).

[61] *As States Legalize Marijuana, Laws Remain Murky.* 1 JOURNAL OF PROPERTY MANAGEMENT 82, 28–29. (2017) https://search.ebscohost.com/login.aspx?direct=true&db=buh&AN=120661010&site=eds-live&scope=site

registry cardholders from buying or possessing guns (e.g., Form 4473, the Controlled Substances Act and the Federal Gun Control Act).

While courts continue to support the ban and currently hold that it does not violate any constitutional right, it would be unsurprising if American citizens began to make more complex arguments, such as pointing out that the ban discriminates between medical marijuana users and alcohol consumers. The discussion is unfinished for the strong action the ban initiates: denying Second Amendment rights to those who hold a medical marijuana registry card. Americans should not have to choose between their constitutional rights and an adequate method of treatment for their health conditions.

TRADEMARK TROLL? LOUIS VUITTON AND THE RELENTLESS QUEST FOR BRAND PROTECTION

Konstantin Gluvacevic

I. INTRODUCTION

At thirteen years of age, Louis Vuitton left behind his provincial life in the eastern French hamlet of Anchay and embarked on a journey to Paris by foot; this voyage, including the stops he would make to support himself by working odd jobs, would take two years to complete.[1] In Paris, a sixteen year old Vuitton apprenticed under the supervision of a distinguished box-maker, quickly acquiring himself a repute as being among the city's leading artisans in his craft.[2] This reputation led to his appointment as the personal box-maker and packer of Eugenie de Montijo, the Spanish countess who became Empress of France upon her marriage to Napoleon III; the famed clientele this appointment attracted prompted Vuitton to leave his apprenticeship and open a Parisian box-making and packing workshop of his own in 1854.[3] Over one hundred sixty years later, Louis Vuitton's eponymous brand, formally referred to as Louis Vuitton Malletier, has grown into a global leader in the fashion industry, earning the title of being the world's most valuable luxury brand for six consecutive years (2006-2012),[4] which it was also named in 2019.[5] That same year, Louis Vuitton was deemed the twelfth most valuable brand in the world, with a calculated brand valuation of $39.3 billion.[6]

Given this success, as well as the status symbol image that it has fostered, Louis Vuitton is consistently ranked among the most counterfeited brands in the world, with the Organization for Economic Co-Operation and Development specifically identifying Louis Vuitton as a brand that is at particularly high-risk for counterfeiting,[7] while valuing Louis Vuitton's trademark worth at $22.5 billion.[8] In response to the rampant

[1] Olivia Holborow, *Louis Vuitton*, Vogue UK, 2012, https://www.vogue.co.uk/article/louis-vuitton (last visited Feb. 17, 2020).
[2] *Id.*
[3] *Id.*
[4] Andrew Roberts, *Louis Vuitton Tops Hermes as World's Most Valuable Luxury Brand*, Bloomberg, 2012, https://www.bloomberg.com/news/articles/2012-05-21/louis-vuitton-tops-hermes-as-world-s-most-valuable-luxury-brand (last visited Feb. 17. 2020).
[5] *See* Forbes, *Louis Vuitton*, 2019, https://www.forbes.com/companies/louis-vuitton (last visited Feb. 17, 2020).
[6] *Id.*
[7] OECD/EUIPO, *Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact*, 2016, https://doi.org/10.1787/9789264252653-en. Citing the discussion at 54.
[8] *Id.* at 30.

counterfeiting, Louis Vuitton has adopted what it refers to as a "zero-tolerance policy" towards activities that may be damaging to the integrity of the brand.[9] On Louis Vuitton's website, under the "Brand Protection" tab, the fashion house published the aforementioned policy, outlining in detail its reasons for embracing such a strategy, as well as the exact measures it is taking to ensure the protection of its brand.[10] The published statement is divided into three headings that summarize Louis Vuitton's main motives for their uncompromising approach. These motives are:

1. "Respecting Heritage"
2. "Preserving Creativity"
3. "Fighting Illegality"[11]

Under "Preserving Creativity," Louis Vuitton states that its Intellectual Property Department manages "over 18,000 intellectual property rights including trademarks, designs and copyrights with support of 250 agents around the world," which include "lawyers and former law enforcement professionals based in Paris with regional offices in Tokyo, Hong Kong, Shanghai, Beijing, Seoul, Milan, Istanbul, Athens, Dubai, New York, and Mendoza."[12] The statement notes that these agents "initiated more than 38,000 anti-counterfeiting procedures" in 2017 alone.[13]

Despite the statement's somewhat self-righteous tone, these hardline tactics have courted Louis Vuitton significant controversy throughout its history, specifically throughout the last decade. Despite Louis Vuitton's commendable commitment to protecting its fabled heritage, safeguarding its creativity and original designs, and fighting against the criminal networks that are so often implicated in the trade of counterfeit goods, the aggressive and uncompromising legal strategy of their zero-tolerance policy often ignores the fundamental principles of trademark violations and crosses into the realm of absurdity. This absurdity has garnered the brand a standing as a "trademark bully."[14]

II. THE ROLE OF TRADEMARKS IN FASHION

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[9] Louis Vuitton, *Brand Protection*, 2020, https://us.louisvuitton.com/eng-us/la-maison/brand-protection
(last visited Feb. 17, 2020).
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Steve Baird, *How Fashionable is the Louis Vuitton "Trademark Bully" Label?* JD Supra, 2012, https://www.jdsupra.com/legalnews/how-fashionable-is-the-louis-vuitton-tr-27496/ (last visited Feb. 17, 2020).

A trademark refers to a distinguishable name, marking, or phrase that a company can legally use and protect for the purpose of identifying itself and its products.[15] Essentially, trademarks not only serve to aid consumers in discerning between the available goods and services, but also provide the means for companies to differentiate themselves and their products from that of their competitors. This is vital for gaining a competitive advantage in business. The extent that businesses register trademarks are far-reaching. Hasbro successfully trademarked the smell of Play-Doh;[16] Verizon Wireless has a trademark for the "flowery musk scent" it pumps in its stores;[17] Lucasfilm managed to trademark the sound produced by a lightsaber, which "consists of the sound of an oscillating humming buzz created by combining feedback from a microphone with a projector motor sound."[18] However, restrictions on trademarking do exist; such limitations include marks that contain "immoral, deceptive, or scandalous matter," the U.S. flag or coat of arms, the "name, portrait, or signature" of "a particular living individual except by his written consent," "the name, signature, or portrait of a deceased President of the United States during the life of his widow, if any, except by the written consent of the widow," similarities to marks already registered with the Patent and Trademark Office that can lead to consumer confusion and deception, and primarily geographic descriptions, among other restrictions.[19]

Accordingly, trademarks play a substantial role within fashion branding. Design features of clothing and accessories do not receive trademark protection as they are considered functional, and functionality is yet another one of the restrictions placed on trademarking.[20] In response to this restriction, brands have been resorting to excessive, outward use of their trademarked logos as means of protection from competitors, typically from fast-fashion brands.[21] While there is a debate as to whether fashion, which is characterized by a devotion to craftsmanship and imagination,[22] should be differentiated from the genuine functionality that defines

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[15] *Trademark* BLACK'S LAW DICTIONARY (11th ed. 2019).
[16] Rachel Siegel, *Remember How Play-Doh Smells? U.S. Trademark Officials Get It.* Washington Post, 2018, https://www.washingtonpost.com/news/business/wp/2018/05/24/remember-how-play-doh-smells-u-s-trademark-officials-get-it (last visited Feb. 17, 2020).
[17] *Id.*
[18] USPTO, Registration No. 3618321.
[19] *See* 15 U.S.C. § 1052 (2019). This is a part of the first subchapter, "The Principal Register," of the Lantham Act of 1946, the primary federal trademark statute of law in the U.S.
[20] *Id.*
[21] Jackie Mallon, *Logo Up, There's Mileage in the Monogram*, Fashion United, 2018, https://fashionunited.com/news/fashion/logo-up-there-s-mileage-in-the-monogram/2018102524210 (last visited Feb. 17, 2020).
[22] Seth DiAsio, *Fashion Has No Function: Diminishing the Functionality Bar to Trademark Protection in the Fashion Industry*, 38 Miss. C. L. Rev. 28 (2019).

apparel,[23] the current limitations of trademark legislation have created a barrier for any progress in the debate.[24] However, one method that may be appropriate for circumventing the functionality bar is emphasizing the distinction between *de facto* and *de jure* functionality. *De facto* functionality describes a design that, while functional, does not impact the overall functionality of the product;[25] this type of functionality does not necessarily prohibit the trademark protection of the design.[26] On the other hand, *de jure* functionality, which is reserved for designs based on functional shapes that improve the design's performance,[27] cannot be registered as such products are deemed "too important to consumers to allow a monopoly."[28] Thus, one can conclude that fashion would be associated with the former, while apparel would be associated with the latter. Yet, even this distinction, which possesses significant potential in the efforts to protect original designs, such as silhouettes, has its limitations. As a result of the distinction between *de facto* and *de jure* functionality being omitted in three separate Supreme Court decisions and within the 1998 amending of the Lantham Act of 1946, the U.S. Patent and Trademark Office does not presently consider the distinction between the two when granting registration approvals.[29] While a designation of *de facto* functionality would not always ensure the protection of design features, its application within trademark registration could provide substantial protection for fashion houses to safeguard their creative property and decrease their dependency on logos.

Given this limitation, fashion brands, such as Louis Vuitton, depend on logos as one of the few guarantees that their creative property will be protected. With its famed "LV" monogram logo as its safeguard to the brand's identity, Louis Vuitton seeks complete control of where, when, and how it seen. According to Colin Mitchell of Ogilvy's Global Strategy and Planning Group, which has closely worked with Louis Vuitton regarding its brand management, "we can't be opportunistic about whoever endorsed us this week. I think Cristal champagne, Tommy Hilfiger and Burberry, all hurt their brands with overexposure to celebrities. We use Sean Connery, Keith Richards, Bono. These are famous travelers. They're more aligned with where we want to take the brand."[30] This brand management vision, paired with their forceful legal department that has

[23] *Id.* at 34.
[24] *Id.*at 30.
[25] *Id.* at 35.
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] Derek Thompson, *Branding Louis Vuitton: Behind the World's Most Famous Luxury Label*, The Atlantic, 2011, https://www.theatlantic.com/business/archive/2011/05/branding-louis-vuitton-behind-the-worlds-most-famous-luxury-label/238746 (last visited Feb. 17, 2020).

access to an annual budget of €15 million (around $16.25 million as of February 17, 2020),[31] has led Louis Vuitton to take legal action against an eclectic group of entities over matters the brand has perceived to be either an attack on its creative property or a threat to its image. Particularly noteworthy cases are described in the following three sections.

III. LOUIS VUITTON'S LEGAL VICTORIES

Throughout its legal history, Louis Vuitton has claimed significant victories. While these victories can be interpreted as a victory for the laudable values Louis Vuitton described in their zero-tolerance policy,[32] one can simultaneously construe these victories as the catalyst that has fueled the brand's often unnecessarily aggressive and absurd legal approach. Nonetheless, significant legal insight regarding brand protection and the intricacies of trademark law can be extracted from the following cases.

A. AN INTERNATIONAL TRADE COMMISSION TRIUMPH

In December 2010, Louis Vuitton filed a complaint that purported violations of section 337 of the Tariff Act of 1930.[33] The central focus of the complaint alleged that trademark-infringing counterfeit goods, particularly the "LV" toile monogram, were imported into the United States with the intention of sale.[34] The respondents in the case were involved in an intricate counterfeiting scheme that was orchestrated by Jianyong Zheng and his wife, Alice Bei Wang. Their counterfeiting network implicated other companies and individuals, which were primarily based in China, California, and Texas.[35]

The U.S. International Trade Commission set up the investigation in January 2011,[36] during which time they considered the claims Louis Vuitton expressed in their complaint. One critical component of this case was based on Louis Vuitton's requests that the Commission issue a general exclusion order, henceforth referred to as GEO, which would bar the importation of the contested goods and set a 100 percent bond

[31] Kimiya Shams, *As Louis Vuitton Knows All Too Well, Counterfeiting is a Costly Bargain*, Forbes, 2015, https://www.forbes.com/sites/realspin/2015/06/25/as-louis-vuitton-knows-all-too-well-counterfeiting-is-a-costly-bargain (last visited Feb. 17, 2020).
[32] *See* Louis Vuitton, *supra* note 9
[33] *Certain Handbags, Luggage, Accessories, and Packaging Thereof*, USITC Pub. 4387, Inv. No. 337-TA-754 (Mar. 2013).
[34] *Id.* at 1.
[35] *Id.* at 3.
[36] *Id.* at 1.

during the presidential review period;[37] the specifics of these requests were finalized by the filing of a reply brief in April 2012.[38]

Ultimately, the Commission concluded that the facts presented by Louis Vuitton justified the Commission's granting of a GEO, and that such a grant "would not be contrary to the public interest."[39] Interestingly, the Commission made note of Louis Vuitton's "extensive civil and criminal enforcement activities within the United States," which include "filing a complaint in this investigation, sending cease and desist letters since 2007, and bringing trademark enforcement actions in United States District Courts."[40] Regardless, Louis Vuitton embraced their victory with its global intellectual property director, Valerie Sonnier, expressing her joy that "The chief administrative law judge recognizes the importance of protecting intellectual property and took the welcome step of ensuring that its orders include all merchandise that infringes on our Toile Monogram Marks, and not just products of the respondents in this case."[41] The significant injunctive relief granted to Louis Vuitton has also prompted academics to suggest the brand shift its focus from district courts to the International Trade Commission.[42]

B. THE CASE AGAINST HYUNDAI

Following the 2010 Super Bowl, Hyundai debuted a commercial titled "Luxury" during the post-game show.[43] The commercial features a "a one-second shot of a basketball decorated with a distinctive pattern resembling the famous trademarks of plaintiff Louis Vuitton Malletier, S.A."[44] According to the counsel for Hyundai, the commercial was a "humorous social commentary on the need to redefine luxury during a recession."[45] Conversely, counsel for Louis Vuitton argued that the commercial "diluted and infringed its marks" and argued trademark and unfair competition claims under New York and federal law.[46]

[37] *Id.* at 6.
[38] *Id.*
[39] *Id.* at 7.
[40] *Id.* at 10.
[41] Lauren Milligan, *Fake Vuittons*, Vogue UK, 2012, https://www.vogue.co.uk/article/fake-louis-vuitton-bags-vuitton-counterfeit-ruling-us (last visited Feb. 17, 2020).
[42] Jake Webb, *The Aftermath of Louis Vuitton: Why Bringing a Trademark Infringement Case in the ITC is a Viable Option,* 13 Nw. J. Tech. & Intell. Prop. 385 (2015).
[43] *Malletier v. Hyundai Motor Am*., 2012 U.S. Dist. LEXIS 42795 (N.Y. 2012).
[44] *Id.* at 2.
[45] *Id.* at 1.
[46] *Id.* at 2.

Louis Vuitton commenced action against Hyundai in March 2010, filing an amended complaint that asserted five causes of action.[47] The first and second counts claimed trademark dilution under the Lantham Act and New York General Business Law, respectively.[48] Similarly, the third and fifth counts asserted trademark infringement under two separate sections of the Lantham Act.[49] The fourth count claimed "common-law unfair competition under New York law."[50] Furthermore, it was established that Hyundai initially attempted to obtain permission to feature the trademarks from Louis Vuitton and several other luxury brands; Hyundai did not receive permission from any of the brands. Six brands rejected Hyundai's request, while other brands, Louis Vuitton among them, never responded.[51] Likewise, after receiving a cease-and-desist letter from Louis Vuitton regarding the imagery in the "Luxury" commercial, Hyundai continued to air the advertisement, arranging for the commercial to be aired "three times during the NBA All-Star Game weekend."[52] Louis Vuitton ultimately moved for summary judgement on its behalf on only the first two counts, while Hyundai moved for summary judgement in its favor on all five counts.[53]

Per U.S. District Judge Kevin Castel, Louis Vuitton's motion for summary judgement in its favor regarding the first two counts were granted, and Hyundai's motion for summary judgement was denied.[54] The United States District Court for the Southern District of New York expressed that Louis Vuitton successfully established blurring[55] while providing compelling evidence that the marks in the commercial exhibited high degrees of similarity to Louis Vuitton's.[56] Likewise, the court accepted the claims that Louis Vuitton's marks are not only distinct,[57] and that Louis Vuitton "exercises exclusive use of these marks," [58] but that Louis Vuitton's marks are also highly recognizable.[59] The case opinion further recognized that Louis Vuitton not only "submitted probative evidence of actual association between the marks"[60] and came forward with evidence in support of each statutory factors at 15 U.S.C. §

[47] *Id.* at 11.
[48] *Id.* at 12.
[49] *Id.*
[50] *Id.*
[51] *Id.* at 9.
[52] *Id.* at 11.
[53] *Id.* at 12.
[54] *Id.* at 79.
[55] *Id.* at 18.
[56] *Id.*
[57] *Id.* at 21.
[58] *Id.* at 23.
[59] *Id.* at 24.
[60] *Id.* at 27.

1125(c)(2)(B),"[61] but also established willfulness.[62] Similar reasoning was also applied towards the second count, trademark dilution under New York General Business Law.[63] Conversely, the court determined that unlike the counsel for Louis Vuitton, the evidence Hyundai's counsel presented for a jury to consider fair-use protection was not satisfactory due to the record showing no substantial evidence that Hyundai had intended to parody, criticize, or comment upon Louis Vuitton,[64] despite their "humorous social commentary" claims, or that their cited authorities support Hyundai's fair-use argument.[65]

IV. LOUIS VUITTON'S LEGAL DEFEATS

Despite its victories, Louis Vuitton is no stranger to an undesirable court verdict. Alongside the highs of their triumphs, its legal history is interspersed with crushing defeats. Ironically, these defeats can be viewed as an antithesis to their victories in the sense that despite the similarity in the arguments, the holdings of these cases illustrate the unpredictability that trademark disputes are associated with. In the following examples, one can observe Louis Vuitton attempting to apply the holdings of former victories to new cases, only to receive an unexpected verdict.

A. THE UNWAVERING FIGHT AGAINST MY OTHER BAG

Louis Vuitton's case against My Other Bag, henceforth referred to as MOB, has been heard by two New York federal courts, with both courts ruling in favor of the parody canvas bag maker.[66] Louis Vuitton's legal battle with MOB began in August 2013 after Louis Vuitton sent MOB a cease-and-desist letter that outlined its demand that MOB halt the production, marketing, and sale of goods that infringe the malletier's trademarks.[67] After MOB's dismissal of the cease-and-desist letter, Louis Vuitton proceeded with a formal lawsuit in January 2016, asserting three claims against MOB. First, and similar to the Hyundai case, Louis Vuitton alleged that MOB engaged in trademark dilution under the Lantham Act and New York General Business Law.[68] Louis Vuitton also alleged that its trademarks were infringed under federal law, and that the parody totes violate federal copyright law.[69] MOB was granted "summary judgement on all of Louis Vuitton's claims," with the court stating that MOB's use of

[61] *Id.* at 34.
[62] *Id.* at 39.
[63] *Id.* at 43.
[64] *Id.* at 46.
[65] *Id.* at 55.
[66] *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc*., 156 F. Supp. 3d 425 (N.Y. 2016).
[67] *Id.*
[68] *Id.* at 432.
[69] *Id.*

similar marks was considered fair-use as a parody,[70] and that there was no dilution by blurring as the critical component of dilution (association of the plaintiff's marks with the defendant's marks among members of the public) was absent.[71] The claims of trademark[72] and copyright[73] infringement were also denied by the court for this reason.

In his conclusion, U.S. District Judge Jesse M. Furman advised Louis Vuitton that in some cases, the best course of action is not to sue, but rather to see the humor and "the implied compliment" in a parody.[74] In December 2016, a dissatisfied Louis Vuitton appealed the district court's decision in the U.S. Court of Appeals for the Second District.[75] Nonetheless, the prior judgement was affirmed, and the appellate court noted that the first court "properly granted a competitor summary judgment on a trademark infringement claim given the obvious differences in its mimicking of the trademark holder's mark, the lack of market proximity between the products at issue, and minimal, unconvincing evidence of consumer confusion."[76] Still discontented, Louis Vuitton submitted to the Supreme Court a petition for writ of certiorari to the appellate court; this too was denied.[77]

B. THE WARNER BROS. SAGA

After the release of *The Hangover: Part II*, Louis Vuitton sent Warner Bros. a cease-and-desist letter expressing its dissatisfaction that a scene, which depicts character Alan Garner reacting to his luggage being moved by saying "careful that is…that is a 'Lewis' Vuitton," features a counterfeit bag produced by the company Diophy, not Louis Vuitton.[78] The complaint expressed concern over consumers being misled to believe that the counterfeit in the film is an authentic Louis Vuitton bag,[79] and this concern was worsened by the scene's inclusion in trailers and other promotional materials for the film.[80] Likewise, Louis Vuitton further noted that the "'Lewis' Vuitton" line has become "an oft-repeated and hallmark quote from the movie."[81] However, despite these concerns, the actual case was centered on the film's use of a

[70] *Id.* at 435.
[71] *Id.* at 438.
[72] *Id.* at 440.
[73] *Id.* at 444.
[74] *Id.* at 445.
[75] *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc*., 674 Fed. Appx. 16 (2d Cir. N.Y., 2016).
[76] *Id*. (Citing the case summary).
[77] *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.,* 138 S. Ct. 221 (2017). (A writ of certiorari refers to an order in which a lower court must submit its records to a higher court for review).
[78] *Louis Vuitton Malletier, S.A. v. Warner Bros. Entm't Inc*., 868 F. Supp. 2d 172 (N.Y. 2012).
[79] *Id.* at 175.
[80] *Id.*
[81] *Id.*

third-party counterfeit that was misrepresented as a genuine Louis Vuitton bag, and that this misrepresentation would "blur the distinctiveness of the LVM Marks," as well as "tarnish the LVM Marks by associating Louis Vuitton with the poor quality and shoddy reputation of the cheap products bearing the [Diophy] Knock-Off Monogram Design."[82] In this case, Louis Vuitton asserted false designation of origin and unfair competition under the Lantham Act, common law unfair competition, and New York General Business Law-violating trademark dilution.[83]

In June 2012, The U.S. District Court for the Southern District of New York granted Warner Bros. motion to dismiss Louis Vuitton's complaint.[84] The court found that the use of the Diophy bag within the film had artistic relevance to the plot,[85] and the use of the bag was not expressly misleading in regards to its source.[86] Therefore, the court utilized a precedent case, *Rogers v. Grimaldi* (1988), in which the same court determined that the Lantham Act "is incompatible to 'artistic works'" that meet the two aforementioned prerequisites.[87] Louis Vuitton's state law claims were also dismissed for this reason.[88] Unsurprisingly, Louis Vuitton filed an unsuccessful appeal a month later.[89]

V. ARE THERE CONSEQUENCES FOR LOUIS VUITTON'S BRAND PROTECTION EFFORTS?

As can be seen, Louis Vuitton is nothing short of an aggressive brand protector. Despite its extraordinary brand recognition and profits, the company unapologetically goes to great lengths to protect its image and creative property, but at what cost? Does it risk alienating its consumer base by targeting considerably smaller businesses, such as MOB? Its profits and annual growth may suggest otherwise. If it is not experiencing financial repercussions as a result of its "trademark bullying,"[90] why would it cease such behaviors? Furthermore, it is understandable that one may not view Louis Vuitton's legal strategy unfavorably based on the four cases described. While the cases described in the previous two sections are among the most notable in the malletier's legal repertoire, they are by no means an accurate sample of the lengths, often trivial, that Louis Vuitton goes to protect its brand.

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[82] *Id.* at 176.
[83] *Id.*
[84] *Id.* at 185.
[85] *Id.* at 178.
[86] *Id.* at 179.
[87] *Id.* at 177. *See also Rogers v. Grimaldi*, 695 F. Supp. 112 (N.Y. 1988).
[88] *Id.* at 184.
[89] Alexandra Stelgrad, *Louis Vuitton Appeals Court's Dismissal of Suit Against Warner Bros.*, Women's Wear Daily, 2012, https://wwd.com/fashion-news/fashion-scoops/hangover-part-three-6088476 (last visited Feb. 17, 2020).
[90] *See* Baird, *supra* note 14

For instance, one of Louis Vuitton's brand protection low points include sending the University of Pennsylvania Carey Law School a cease-and-desist letter that demanded the law school take down posters it created to promote its March 2012 fashion law symposium.[91] According to Louis Vuitton, the posters "misappropriated and modified" the brand's trademarked toile monogram.[92] Louis Vuitton further noted that in addition to the poster diluting the brand's trademarks, the Penn Intellectual Property Group's supposed status as "experts" will mislead others to assume such use of trademarks could be considered fair-use.[93] In reply, Robert Firestone, the university's associate general counsel, wrote Louis Vuitton an open letter wherein he asserted that the university will not be taking any actions in response to the cease-and-desist request.[94] Additionally, Firestone used the opportunity to publicly express why the university's poster does not infringe on Louis Vuitton's trademarks.[95] Firestone clarified that the poster was not used to "identify goods and services," and that there is no plausibility that confusion regarding this may have been experienced by the public.[96] Moreover, Firestone explained that Louis Vuitton's trademark most likely does not extend to "educational symposia in intellectual property issues," but in the case that it does, the university did not use the artwork as either a mark or a tradename, thus precluding liability;[97] however, even if the artwork had been used as a mark, the university would still not be accountable for the dilution of Louis Vuitton's trademark as the university's use was unmistakably non-commercial.[98]

Similarly, Louis Vuitton courted significant controversy in 2008 after sending a cease-and-desist letter to Nadia Plesner, a Danish artist selling t-shirts to raise awareness of the Darfur conflict.[99] The t-shirt in question, a satirical play on the celebrity culture of the mid-2000s and the media's priorities, features an image of an emaciated child from the region holding a miniature dog and a Louis Vuitton handbag.[100] After Plesner ignored the cease-and-desist letter in February 2008, Louis Vuitton filed an infringement lawsuit against the artist in April of the same year.[101] While Louis Vuitton

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[91] Reuters, *Louis Vuitton and Penn Offer Unintended Lesson in Trademark Law*, 2012, https://www.reuters.com/article/idUS308202321020120309 (last visited Feb. 17, 2020).
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] Sheila Marakar, *Louis Vuitton on Artist's Darfur Project: Bag It*, ABC News, 2008, https://abcnews.go.com/Entertainment/BeautySecrets/Story?id=4839919&page=1 (last visited Feb. 17, 2020).
[100] *Id.*
[101] *Id.*

originally sued Plesner for $7,500, her publishing of the cease-and-desist letter on her website prompted the brand to ask for an additional $7,500 for every day that Louis Vuitton's name appeared on Plesner's website.[102] In this instance, Louis Vuitton claimed that while the brand applauds "her efforts to raise awareness and funds for Darfur," the issue is solely based on Plesner's depiction of a Louis Vuitton bag, complete with a reference to the brand's renowned monogram,[103] and that Plesner as an artist should "respect other artists' rights and Louis Vuitton's intellectual property."[104]

VI. CONCLUDING THOUGHTS

From humble beginnings, Louis Vuitton established what would one day become the world's most valuable luxury brand. Even with the brand's astounding success, it openly embraces a questionable legal strategy that has led to its portrayal as a "trademark bully" among those versed in trademark law. However, when considering the brand's financial success, one may assume that this reputation has not diffused into the consciousness of the Louis Vuitton target consumer. But even if the brand's aggressive legal tactics were well-known, would that influence consumer choices? Would it have any impact on Louis Vuitton's goods being viewed as status symbols? The answer to this question will inevitably vary by individual, but if Louis Vuitton's exclusivity is based on its heritage, craftsmanship, and creativity, which the brand is committed to protecting, per its zero-tolerance policy, then may the reason for Louis Vuitton's success be rooted in its often extreme brand protection efforts?

In the final analysis, it may still be in the best interest of Louis Vuitton to refine the methods it utilizes to protect its brand. While Louis Vuitton's current methods can almost be described as egalitarian in the sense that they pursue a relatively unknown artist raising awareness for a humanitarian crisis with the same zeal as a global entertainment company that placed a counterfeit in its blockbuster film, this approach so often yields the brand undesirable outcomes. Also, just how long can Louis Vuitton continue with their current legal strategy before they risk a significant public relations crisis due to their trademark trolling? The resources Louis Vuitton spent on these failed legal actions could have been redirected in ways that could have significantly more positive impacts, such as investing in sustainable sourcing or in supply-chain efficiency, which would undoubtedly elevate the Louis Vuitton name. Nonetheless, there is nothing that could indicate that the brand will be departing from their current legal strategy, and given their success, why would they even seek out

[102] *Id.*
[103] *Id.* This is quoting a statement provided to ABC News by Victoria Weld, a representative for Louis Vuitton.
[104] *Id.*

change? It is almost certain that the future will see Louis Vuitton embroiled in various legal disputes over its trademarks, many of them frivolous, and there is some irony in this relentless quest. The sole reason Georges Vuitton, son of the famed malletier, introduced the iconic toile monogram, which is at the heart of many of their current legal disputes, was to prevent other craftsmen from copying Louis Vuitton trunks.[105]

[105] *See* Holborow, *supra* note 1

GUILTY UNTIL PROVEN INNOCENT: EXAMINING THE MIND GAMES AND INNER WORKINGS OF THE INTERROGATIVE REID TECHNIQUE

Christian E. Tabet

On the 20th of January 1998, a horrendous tragedy struck the small town of Escondido in San Diego, California. In what has remained an unsolved mystery,[1] Stephanie Crowe, at just twelve years old, was viciously murdered in the dead of night. While her family mourned, the police directed their suspicions toward Michael Crowe, Stephanie's fourteen-year-old brother. His lack of traditional grief-stricken reactions led the officers to see Michael Crowe as a suspicious party and the prime suspect for the majority of their investigation. Utilizing the Reid technique, Michael Crowe was "isolated and subjected to hours and hours of interrogation during which [he was][2] cajoled, threatened, lied to, and relentlessly pressured by teams of police officers."[3] In what the Appellate Court would later deem one of the most "disturbing display[s]" of interrogative coercion and false confessions,[4] Michael Crowe confessed to a crime he did not commit.

The torturous circumstances inflicted upon Michael Crowe, while extreme, are not totally uncommon. These methods of interrogation, like the Reid technique—a "go-to" method which maximizes anxiety in suspects and minimizes their resistance to confess—have had their place in a system of justice for many decades. They are used as a way of "gaining confessions and relevant information."[5] For centuries, many believed with certainty, that no sane person would confess to a crime where he or she was factually innocent; for a long time, these methods remained vastly unregulated and unchecked.[6] Historically, earlier methods included keeping suspects

[1] To clarify: for nine years Richard Raymond Tuite, who was a transient, was convicted for Stephanie Crowe's murder. His conviction was overturned in 2013, however, and the world was left to wonder: if Tuite did not kill Stephanie Crowe, who did? *See generally* Aleida K. Wahn, *Who Killed Stephanie Crowe in the Dead of Night?* Aleida Law (Dec. 13, 2013), http://www.aleidalaw.com/who-killed-stephanie-crowe/.

[2] During the interrogative process, police also detained and interrogated Aaron Houser and Joshua Treadway.

[3] *Crowe v. County of San Diego*, 608 F.3d 406, 432 (9th Cir. 2010).

[4] *See id.* at 432. (stating that: "Psychological torture is not an inapt description.").

[5] M. Peel, *Torture, History of*, *in* Encyclopedia of Forensic and Legal Medicine 560–64 (Jason Payne-James & Roger W. Byard eds., 2nd ed. 2016).

[6] *See* Nathan J. Gordon & William L. Fleishner, *Chapter 17 - Torture and False Confessions: The Ethics of a Post-9/11 World*, *in* Effective Interviewing and Interrogation Techniques 241–50 (4th ed. 2019).

in isolation, refusing them necessities, and inflicting pain and physical beatings.[7] This blatant physical abuse—which for a time was considered legal—gave way to deliberate psychological manipulation, coercing many individuals into guilty confessions. It was not until landmark cases,[8] like *Brown v. Mississippi* (1936), *Miranda v. Arizona* (1966), and several others[9]—along with research in the psychological sciences—that people started to grasp what really went on behind the observation mirror. As these harsh realities slowly came to light, a hard look at these tactics and techniques prompted the Courts to establish rules and precedents limiting what had been previously permissible in order to protect us from further unjust practices.[10]

While interrogative tactics are still relevant to the law and legal process, there still remains a fundamental issue with some of the techniques conducted in our legal system today. "Although the number of interrogation manuals and programs have increased over the last forty years, one cannot determine from them what constitutes common police practices."[11] While the training of law enforcement does occur, John. E. Hess[12] admits in *Interviewing and Interrogating for Law Enforcement,* that "with few exceptions, each generation of investigators begins anew, having profited little from the experiences of the previous. . . .few investigators learn from history, [and] they often fail to benefit from their own mistakes."[13] There exists a notion that interrogators can be trained as highly accurate detectors of deceptive behavior.

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[7] *See* Peel, *supra* note 6, at 244-46 for listed examples.

[8] "By the latter part of the eighteenth-century English and early American courts had developed a rule that coerced confessions were potentially excludable" – but much of this dealt only with the admissibility at trial and little to do with interrogative methods themselves. 3 J. Wigmore, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 823 (3d ed. 1940); *Developments in the Law—Confessions*, 79 Harv. L. Rev. 935, 954–59 (1966).

[9] For a discussion of history, and reference to relevant cases, *see generally* Legal Information Institute, "Confessions: Police Interrogation, Due Process, and Self-Incrimination." Cornell Law. (last accessed Feb., 2020), https://www.law.cornell.edu/constitution-conan/amendment-5/confessions-police-interrogation-due-process-and-self-incrimination.

[10] *See e.g., Brown v. Mississippi*, 297 U.S. 278 (1936), (discussing the admissibility of confessions, specifically those resulting from torture.); *see also Miranda v. Arizona,* 384 U.S. 436 (1966), (establishing the right against involuntary self-incrimination).; *Culombe v. Connecticut*, 367 U.S. 568, 570–602 (1961), (dealing with the issue that while the questioning of suspects was indispensable in solving many crimes, interrogation process[es] are not meant to be used to overreach persons who stand helpless before it); *supra* note 8.

[11] Saul M. Kassin et al., Police interviewing and interrogation: A self-report survey of police practices and beliefs., *Law and Human Behavior* 31, 381–400, 382 (2007), https://web.williams.edu/Psychology/Faculty/Kassin/files/Police%20survey%20ms%2007.pdf

[12] An authority drawing upon years of experience as an agent and instructor in the FBI academy.

[13] John E. Hess, *Part 1 - Interviewing*, *in* Interviewing and Interrogation for Law Enforcement 1–31 (Elisabeth R. Ebben ed., 2nd ed. 2015).

However, "social scientific studies have repeatedly demonstrated across a variety of contexts that people are poor human lie detectors and thus highly prone to error in their judgments."[14] These findings cannot be disregarded because they bear a direct impact on methods like the Reid technique, which is predicated on presumptions of guilt.

An investigation or interrogation is usually conducted with bias that there is some purported truth to ascertain at the suspect's expense. After a baseline of possible guilt or innocence is established, officers ask questions related to the crime. In the Reid technique, what follows depends upon the interrogator's interpretation of the suspect's verbal and non-verbal response cues. Should the officer decide a suspect's reactions indicate deception, the interrogation of a *guilty* suspect begins. These biased tactics employed during an interrogation phase, where the goal is to ascertain a confession—like the Reid technique used in the Stephanie Crowe Case—are inherently flawed and problematic.

Underlying psychological mechanisms that control human behavior and memory reveal why tactics like the Reid technique do not work. There is a need to reconsider how we approach this aspect of the criminal justice system for the sake of legal and ethical considerations. When we take into account that many of the nation's wrongful convictions overturned by DNA evidence involved some form of false confession,[15] it becomes clear that it is time to revisit whether these interrogative methods, like the Reid technique, have any place in the justice process as they are presently conducted.

THE UNDERLYING MECHANISMS OF PSYCHOLOGY

In the field of psychology, the psychological mechanisms of memory have always been a main subject of research. Memory, as we understand it, can be summarized as the culmination of what we remember and what gives us the capacity to learn and adapt. At any moment in our daily interactions, we take in large amounts of sensory information that are encoded and stored in the brain.[16] When memories are later retrieved, they often influence how we think, act, and behave. In a broader application, the "whats, hows, and whys" of this neurological ability allow a more in-

[14] Leo, Richard A., and Steven A. Drizin. "The Three Errors: Pathways to False Confession and Wrongful Conviction." *Police Interrogations and False Confessions: Current Research, Practice, and Policy Recommendations.*, Univ. of San Francisco Law Research Paper No. 2012-04, 9–30, 14 (last updated Sept. 4, 2013) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542901

[15] Innocence Project, "False Confessions & Recording Of Custodial Interrogations.", (last accessed Feb., 2020), https://www.innocenceproject.org/false-confessions-recording-interrogations/.

[16] The Human Memory, "What Is Memory?", (last updated Sept. 27, 2019), https://human-memory.net/what-is-memory/.

depth examination into interrogative processes, and why they prove to be problematic. These underlying psychological mechanisms influence the behaviors of those involved during the process of interrogative methods. Research has demonstrated that people, in general, will confess as an involuntary act of compliance—usually when they feel there is no other option. Additionally, when exposed to intense forms of misinformation, individuals experience confusion, which leads them to doubt their own beliefs. These findings are incredibly relevant to consider as we examine the interrogative processes of the law and the legal system.

Psychologically, human beings are highly susceptible to suggestion. This means, according to work conducted by expert Elizabeth Loftus, that individuals, under the right circumstances, can form "complex, vivid, and detailed false memories."[17] There are several reasons why false memories form, and Loftus explains that often "false memories are constructed by combining actual memories with the content of suggestions received from others."[18] The same is true for individuals who are coaxed into "visualizing" false memories during an interrogation. In fact, "false memories for perpetrating crime show signs that they may be generated similar to the way in which false memories for noncriminal memories are generated."[19] While this false construction can occur without psychologically abusive techniques, it is more common to see them at work together. In the context of highly suggestive environments then, like interrogations, memory can [and will] be impacted in a way that could generate falsities.

In environments where the stakes are high, like an interrogation, the pressure is high to catch the guilty party. For interrogating officers, this means gaining confessions which could be used towards convictions. This can prove problematic because findings suggest that suspects who are actually innocent can set in motion a sequence of events and/or behaviors that lead them to false confessions.[20] There may be social demands placed upon an individual that pressure him/her to remember. Memory may also be constructed as a result of "imagination inflation."[21] The latter will occur especially if individuals are encouraged not to be concerned with whether the

[17] Loftus, Elizabeth F. "Creating False Memories." *Scientific American* 277, no. 3 70-75, 75 (October 1997), https://www.researchgate.net/publication/13946572_Creating_False_Memories
[18] *Id.*
[19] Shaw, Julia, and Stephen Porter. "Constructing Rich False Memories of Committing Crime." *Psychological Science* 26, no. 3 291–301, Discussion (Mar., 2015), https://doi.org/10.1177/0956797614562862.
[20] Guyll, Max, Stephanie Madon, Yueran Yang, Daniel G. Lannin, Kyle Scherr, and Sarah Greathouse. "Innocence and Resisting Confession during Interrogation: Effects on Physiologic Activity." *Law and Human Behavior* 37, no. 5 366–75, Conclusion (2013), https://doi.org/10.1037/lhb0000044.
[21] *See* Loftus at 73.

memories are, in fact, real.[22] These external factors often amplify the psychological duress invoked by forceful interrogations. Resultingly, what might start as a routine method of Reid interrogation can quickly spiral into something much more psychologically sinister—as in the case of Michael Crowe.

The Court has long established that the constitutionality of interrogation techniques is judged by a higher standard when police interrogate a minor.[23] Juveniles are even more susceptible to suggestion, and the younger they are, the higher the risk of psychological torment. One need only look at the transcripts, however, to see that those standards were completely disregarded for Michael Crowe. Instead, Reid tactics were deliberately chosen to ascertain a confession.[24] Defeated and psychologically exhausted, Michael Crowe was forced to fabricate a story that was later used in his initial conviction. Years later, on appeal for a civil rights action, the blatant psychological manipulation and torture inflicted upon Michael Crowe factored heavily into the Court's decisions. During the trial, testimonial descriptions ranged from "the most psychologically brutal interrogation. . . ." to "the most extreme form of emotional child abuse ever seen before. . . ."[25] Any interrogative method which would result in these kinds of psychological horrors, especially when juveniles are concerned, bears no place in a justice system whose goal is to remain ethical and constitutional.

THE LOGISTICS AND LEGALITY OF INTERROGATIVE TECHNIQUES

Now, to their credit, law enforcement and criminal justice agencies have taken measures since the case of Michael Crowe to rectify some of the injustices of interrogations that preceded them. Manuals *do* exist and training protocols *have* been implemented. Notably, however, few agencies "place much emphasis on the development of skills involved in interviewing."[26] This policy of indifference, coupled with a vast array of techniques, makes interrogations challenging to regulate. There is no singular set practice. There exists many "types" of interviews and interrogations, but special focus is given to the Reid technique.[27] Since it was first used in the 1940s

[22] *Id.*

[23] *See In re Gault*, 387 U.S. 1, 55, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) (In an interrogation of a minor: "the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair").

[24] *Crowe v. County of San Diego*, 608 F.3d 406, 432 (9th Cir. 2010).

[25] *Id.* at 431-32.

[26] Hess, *supra* note 12, at 1.

[27] Located in the classic interrogation manual *Criminal Interrogation and Confessions*. Created by American psychologist and former police officer John. E Reid in the 1940/50s.

and 50s, the Reid technique has remained law enforcement's "go-to method."[28] It has been taught and used by more than 500,000 law enforcement and security professionals in the United States.[29]

The Reid technique is a multistep tactic which "increase[s] the anxiety associated with denial while reducing the anxiety associated with confession."[30] Structurally, this type of interrogation is designed to provoke and perpetuate a "high-stress" environment. These environments invoke a sense of exposure, unfamiliarity, and isolation, heightening the suspect's "get me out of here" sensation.[31] A typical setting usually consists of a small, soundproof room with only three chairs, maybe a desk, and nothing on the walls. The goal is to make suspects uncomfortable, powerless, and dependent. A one-way mirror is also often part of the room, which only serves to heighten the suspect's anxiety. The physical layout of an interrogation room maximizes a suspect's "flight or fight" response.[32] Taking into account what we know about psychology, these responses often inhibit logical reasoning, holding an unfair influence on human behavior. Considering the purpose of interrogations, and how the Reid technique is conducted, the capitalization of these psychological responses is inevitable.

During the course of a Reid interrogation, the goal is to cause a "mental-regression" which breaks down an individual's capacity to resist. As this capacity breaks down, the "ego defenses" diminish, and the suspect will experience an overwhelming desire to cooperate—which interrogators are encouraged to take advantage of. Prior to the beginning of this cycle, an initial interview would have been conducted to determine guilt or innocence. During this time, the interrogator "attempts to develop rapport. . . .and establish a baseline."[33] Once guilt has been "established," the *real* interrogation begins. Here, we often see investigators utilize perhaps the most controversial—although legal—tactic in this approach: "the false evidence ploy by which [officers] bolster an accusation by presenting the suspect with supposedly incontrovertible

[28] Hager, Eli. "The Seismic Change in Police Interrogations." The Marshall Project. The Marshall Project, (Mar. 8, 2017), www.themarshallproject.org/2017/03/07/the-seismic-change-in-police-interrogations.

[29] Orlando, James. "INTERROGATION TECHNIQUES." Connecticut General Assembly. OLR Research Report. (last accessed Feb., 2020), https://www.cga.ct.gov/2014/rpt/2014-R-0071.htm.

[30] Perillo, Jennifer T., and Saul M. Kassin. "Inside Interrogation: The Lie, the Bluff, and False Confessions." *Law and Human Behavior* 35, no. 4 327–37, 327 (Aug. 24, 2010), https://doi.org./0.1007/s10979-010-9244-2.

[31] Layton, Julia. "*How Police Interrogation Works*." HowStuffWorks, HowStuffWorks, (May 18, 2006), https://people.howstuffworks.com/police-interrogation.htm

[32] *Id*.

[33] *Id*.

evidence of his or her own guilt. . . .even if [it] does not exist."[34] Hypothetically this tactic would only put psychological pressure on the guilty party, as innocent individuals would largely remain unaffected. However, findings like those discussed in the above section[35] show this to be untrue. Instead, this type of interrogation often leads to both false memories and false confessions.

We see these findings played out in the interrogation of Michael Crowe. Over several days, and countless hours, the Reid technique broke a psychologically fragile boy's innocence. Blinded by cognitive biases, interrogating officers blamed Michael Crowe for the death of his sister from the beginning. It started when Michael Crowe was separated from his family, hours after his sister's body was discovered. He was forbidden to see them over several days.[36] Instead, he was questioned repeatedly, subjected to both tests and truth verification exams. The police, using a variety of overly aggressive tactics, first lied explicitly about the existence of physical evidence tying him to the crime.[37] When this approach did not work, they tried false sympathy. When this proved unsuccessful, they had him engage in memory fabrication, asking him to describe in explicit detail the events of how his sister was murdered.[38] Because Michael Crowe was innocent, he had no possible way of knowing anything the police wanted him to confess to—unless he lied.[39] Interrogators were cruel and relentless, stopping only until they received a confession from Michael Crowe, who had been manipulated and coerced into believing he was guilty.[40] In the time following the manipulated confession, Michael Crowe and two others were initially charged for the murder of Michael Crowe's twelve-year-old sister.

As research continues to show, the Reid technique can, and will, coerce confessions from suspected individuals. Although the case of Michael Crowe occurred in the past,

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[34] *Id*.

[35] *See supra* notes 19-20 and accompanying text.

[36] *See Crowe v. County of San Diego*, 608 F.3d 406, 419 (9th Cir. 2010). (Michael Crowe stating: "I spent all day away from my family. I couldn't see them. . . . You won't even let me see my parents. It's horrible.).

[37] *See Id.* (At this point Detective Claytor took over the interview. Claytor told Michael they found blood in his room, lifted fingerprints off the blood stains, and that the police now knew who killed Stephanie.).

[38] *See Id.* at 420. (Claytor told Michael that they were going to play a game, in which they would talk about the evidence and Michael would explain it.).

[39] *See Id.* at 420. (Michael gave responses such as "How am I supposed to tell you an answer that I don't have? I can't-- it's not possible to tell you something I don't know," and "You keep asking me questions I can't answer. What do you want me to do? Make something up? Lie to you?").

[40] *See Id.* at 422. (At the end of the interview Michael said, "Like I said, the only way I even know I did this because she's dead and because the evidence says that I did.).

it is still relevant to consider today, given that the Reid technique has continued to serve as the guideline for many investigators across the country.

THE UNIFICATION OF JUSTICE AND ETHICS

The criminal justice system was put in place to stand as a safeguard against lawlessness, anarchy, and chaos. Our laws, rules, practices, and policies are put in place to protect us from those who seek to act immorally. In this way, the justice system acts as a network of interconnected parts, all of which work together to keep the system running smoothly.[41] The culmination of these processes results in a socio-political "truth-seeking function." Because of this, we seek to enact justice when wrongs are committed against individuals, communities, or society. This "justice" is difficult to define, but it is partly understood alongside topics of ethics and morality.[42] Our own innate sense of morality sparks—within most of us—a desire to adhere to the law and to seek just retribution against those who do not. At the same time, however, legal practices, constitutional provisions, and ethical codes limit us from inflicting cruel and inhumane punishment. In this way, we endeavor to ensure the scales of justice and mercy remain balanced.

It is impossible then to discuss justice without considering the morality of the practices we employ to maintain it. While certain practices or processes may be permissible—and even "legal"—this does not automatically qualify them as ethical. Sometimes, a practice or technique holds a capacity to be unethical, and it can often be misused or conducted unjustly. This notion presents precisely why coercive interrogative methods (i.e., the Reid technique) must be reconsidered.

The practices used in Michael Crowe's interrogation were akin to torture.[43] Torture is most certainly a highly unreliable and ineffective method of coercion. It is hardly disputable that abusive psychological torture is rarely, if ever, justified—except in perhaps extreme cases. Why then are we using methods that deliberately prey upon the psychological vulnerabilities of others? Concededly, although the example of Michael Crowe's interrogation is extreme, it nevertheless speaks to the capacity these techniques have for unjust practices, false confessions, and the manipulation of

[41] National Center for Victims of Crime, "The Criminal Justice System." (last accessed Feb., 2020), https://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/the-criminal-justice-system.
[42] Miller, David. "Justice." Stanford Encyclopedia of Philosophy. Stanford University, (Jun. 26, 2017), https://plato.stanford.edu/entries/justice/.
[43] *See supra* note 4.

individuals. While these "regulated" forms of coercion in the Reid technique have been "legal," they are unequivocally ineffective, unreliable, and unjust.

The logistics of these techniques elicit confessions. For the guilty, these methods ascertain a confession for conviction and closure for a community. For the innocent, however, it coerces false confessions based on cognitive bias and psychological manipulation. Advocates of the technique, notably the company which developed it, assert that the technique in and of itself is not the reason for high levels of false confessions. Instead, they argue it is due to investigators applying inappropriate methods not endorsed by the technique.[44] While the techniques may not have been designed to be unjust, the empirical evidence speaks for itself. These kinds of interrogation techniques have led to civil rights actions and constitutional rights violations. Rarely, if ever, do the results of a Reid technique justify the means of improper and immoral treatment of individuals. Simply put, this manipulation and psychological torment should not be utilized in police interrogations, especially with regards to minors and people of diminished mental facilities.[45] During an officer's investigation, he or she has a duty to remain unbiased during the gathering and uncovering of evidence. Cognitive bias already creates an obstacle to impartiality. Employing an interrogation technique explicitly grounded on a subjective "presumption" of guilt, like the Reid technique, only serves to magnify them.

Because of these realities, the Reid technique is inherently unethical. It treats individuals as a means to an end. It is used as a way to coerce a confession, which helps lead to a conviction, and to one's eventual incarceration. When presented to the "finders of fact" (Jury), who also have a duty to remain unbiased, confessions make "very compelling evidence of guilt."[46] Studies have shown that confessions have a more incriminating effect than other forms of evidence[47]—and that individuals do not fully discount confessions, even when they see them as coerced.[48] Sometimes an innocent party's confession will prove false in time to save them from a guilty

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[44] *See* Orlando, James, "INTERROGATION TECHNIQUES." Connecticut General Assembly. OLR Research Report. (last accessed Feb., 2020), https://www.cga.ct.gov/2014/rpt/2014-R-0071.htm.
[45] *See generally* Gordon, Nathan J., and William L. Fleisher. "Interviewing Children and the Mentally Challenged." *Effective Interviewing and Interrogation Techniques*, 227–35 (2019).
[46] *See* Nathan J. Gordon & William L. Fleishner, "*Chapter 17 - Torture and False Confessions: The Ethics of a Post-9/11 World*", *in* Effective Interviewing and Interrogation Techniques 241–50, 247 (4th ed. 2019).
[47] *See* Kassin, Saul M., and Katherine Neumann. "On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis." *Law and Human Behavior* 21, no. 5 469–84, (1997), https://doi.org/10.1023/a:1024871622490.
[48] *See* Kassin, Saul M., and Lawrence S. Wrightsman. "Prior Confessions and Mock Juror Verdicts." *Journal of Applied Social Psychology* 10, no. 2 133–46 (1980), https://doi.org/10.1111/j.1559-1816.1980.tb00698.x.

sentence. Other times, countless individuals are wrongly convicted, unjustly imprisoned, and even sentenced to death for crimes they did not commit.[49]

THE FUTURE OF THE REID TECHNIQUE

The interrogation of Michael Crowe was not the first time the Reid technique elicited a false confession, and unless measures are taken to correct its use, the technique will not be the last. Michael Crowe and his two friends were fortunate enough to have the charges dropped when new evidence came to light.[50] Although the evidence was not investigated immediately, it did result in the eventual reversal of their convictions. Still, many other innocent individuals are not so fortunate.

The people who find themselves in these coerced situations believed in the system. During their questioning, they waived their protective rights, believing the system would protect them and the truth would come to light. Unfortunately, many innocent individuals instead found themselves victim to these unjust techniques and their outcomes. Luckily, programs exist to combat wrongful convictions, like the Innocence Project, but they often lack sufficient funding and resources to tackle the ever-growing avalanche of cases. Furthermore, there exists little to no resources to assist released individuals back into society from a period of their life spent unjustly incarcerated. It can take years, decades even, before cases are reopened, DNA is obtained, and the Court grants exoneration.[51] Still, some cases do not qualify for reevaluation,[52] and innocent individuals are left to spend their lives in a place they should never have been in the first place. With all of these things considered, why have we not stemmed the problem of coerced confessions from the start?

The argument has never been that holistically interrogations are conducted with the explicit intent to cause harmful psychological damage or abuse.[53] Nor is it that

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[49] Kassin, Saul M. "False Confessions." *Policy Insights from the Behavioral and Brain Sciences* 1, no. 1 (2014): 112–21. https://doi.org/10.1177/2372732214548678.

[50] *See generally* "Haunting Questions: The Stephanie Crowe Murder Case." Sign On San Diego. Union-Tribune Publishing Co., April 20, 2000, https://web.archive.org/web/20061230013932/http://www.signonsandiego.com/news/reports/crowe/index.html

[51] *See generally* The National Registry of Exonerations, Exoneration Registry. (last accessed Feb., 2020), https://www.law.umich.edu/special/exoneration/Pages/about.aspx.; *See also* "All Cases." Innocence Project. (last accessed Feb., 2020), https://www.innocenceproject.org/all-cases/.

[52] DNA evidence is not always easily accessible or attainable due to varying limitations and circumstances.

[53] To clarify: some argue that the inherent nature of a technique, like the Reid technique, requires psychological manipulation which borders (and often crosses the line into) torture. It is doubtful that law enforcement officers start with the intent to inflict torturous manipulation on individuals, especially ones who are indeed innocent.

interviewing/interrogative methods have no place in the criminal justice system. On the contrary, both interviewing and police questioning serve a vital part in the functions of the law and legal system discussed earlier.[54] But, put succinctly by Saul Kassin, "at some point, the [Reid] technique itself has to take responsibility."[55] And so, perhaps, it is time to put this technique to rest by following in the recent footsteps of one of the nation's largest police consulting firms[56]—one which has trained hundreds of thousands of cops and federal agents at almost every major agency[57]—in no longer using the Reid technique.

Research in the psychological sciences demonstrates how underlying mechanisms of human behavior and cognitive bias create too great an obstacle for the Reid technique to be successful. Inherently, the technique cannot be conducted impartially, thus contradicting the very obligation an investigative officer has. Empirical documentation in criminal justice reveals that overly coercive interrogation methods "are not an effective way of getting truthful information."[58] If we wish to provide a genuinely effective criminal justice system, we must be willing to acknowledge when certain techniques or practices do not work.

Our criminal justice system is predicated on the interplay between justice and ethics. There is thus no justification for the use of threats and psychological torture, which treats individuals as a means to an end. The costs and risks of this method have outweighed the benefits far too often to turn a blind eye. Irrefutably**,** in a system that champions "*innocence until proven guilty*," there is no circumstance which would justify unjust mistreatment, and we owe it to individuals like Michael Crowe to take a long, hard look at the techniques which try.

[54] *See* National Center for Victims of Crime, "The Criminal Justice System." (last accessed Feb., 2020), https://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/the-criminal-justice-system.
[55] Hager, Eli. "The Seismic Change in Police Interrogations." The Marshall Project. The Marshall Project, (Mar. 8, 2017), https://www.themarshallproject.org/2017/03/07/the-seismic-change-in-police-interrogations. (quoting Saul Kassin, a professor of psychology and expert on police interviews.).
[56] *See id.*
[57] *Id.*
[58] *Id.* (quoting Shane Sturman, the company's president and CEO).

SOCIAL EQUITY AND MEDICAL MARIJUANA IN FLORIDA: AN ANALYSIS OF BARRIERS MINORITES FACE IN THE GROWING MEDICAL MARIJUANA INDUSTRY

Anthony Christian Santiago

I. INTRODUCTION

Ensuring diversity and inclusion in the marijuana industry has been a difficult task.[1] Despite the growing marijuana industry, minorities in large have been unable to benefit from participating due to decades of disproportional enforcement of marijuana prohibition.[2] Statistics indicate a racial imbalance that spans decades. Although minorities and whites use marijuana at similar rates, minorities are far more likely to be held criminally liable.[3] This imbalance has created unique institutional obstacles for minorities who aspire to enter the marijuana industry. For the state of Florida to effectively promote diversity, the priority should be to enact legislation that addresses the institutional barriers currently preventing minorities from fair access to a rapidly growing medical marijuana market. The current medical marijuana statute does not address the critical institutional barriers that inhibit minorities. Before any further expansion of Florida's medical marijuana program, there should be a sensible social equity program implemented that addresses the unique barriers created by decades of disproportionate enforcement of marijuana prohibition.

2. THE DISPROPORTIONATE ENFORCEMENT OF MARIJUANA PROHIBTION

In June 2013, the American Civil Liberties Union (ACLU) published *The War on Marijuana in Black and White.*[4] The report resulted from a detailed analysis of arrest data gathered from the FBI's uniform crime reporting program (UCR) for marijuana

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[1]Aaron Schachter, *Growing Marijuana Industry Struggles to attract employees of color,* Nat'l Pub. Radio, https://www.npr.org/2019/02/21/695999248/growing-marijuana-industry-struggles-to-attract-employees-of-color

[2] *The War on Marijuana in Black and White*, Am. C.L. Union 4 ¶ 3 (June 2013), https://www.aclu.org/issues/smart-justice/sentencing-reform/war-marijuana-black-and-white (The report also finds that, on average, a Black person is 3.73 times more likely to be arrested for marijuana possession than a white person, even though Blacks and whites use marijuana at similar rates.)

[3]Patrick A. Langan, *The Racial Disparity in U.S. Drug Arrests*, Bureau of Just. Stat., U.S. Dept of Just., https://www.bjs.gov/content/pub/pdf/rdusda.pdf (Oct. 1995) (1995 report confirming racial disparity in drug arrests with minorities more likely to be arrested although whites use drugs at similar rates)

[4] *The War on Marijuana in Black and White*, Am. C.L. Union (June 2013), https://www.aclu.org/issues/smart-justice/sentencing-reform/war-marijuana-black-and-white

possession arrests in all fifty states.[5] The main conclusion of *The War on Marijuana in Black and White* was that black citizens are significantly more likely to be arrested for marijuana possession than their white counterparts, even though *both groups* use marijuana at similar rates.[6] Florida had one of the highest differences in arrest rates for whites and blacks.[7] In 2010, blacks were 4.2 times more likely to have been arrested for marijuana possession than whites in Florida.[8] Unfortunately, the data does not paint the whole picture because of what the ACLU calls the *Latino Data Problem*. The *Latino Data Problem* is an inconsistency in the arrest reporting that the ACLU attributes to Hispanic arrests being classified as white arrests by the data reported to the FBI. In turn, this makes the arrest disparity between whites and blacks seem much closer than what it is in areas with large Hispanic populations. [9]

The data is a key tool that helps put into scope the communities which can benefit the most from an effective social equity initiative and outreach that restores confidence in the government. For example, the state of Illinois had the highest racial disparity in marijuana arrests, according to the ACLU report.[10] To counter the damage caused by the legacy of injustice, Illinois has recently implemented one of the most robust social equity programs in the United States. The program is still in its infancy but is an example of the government taking a proactive approach to promote minority representation. The *Illinois Cannabis Regulation and Tax Act* goes to great lengths to acknowledge the damage marijuana prohibition has caused to minority communities.[11] The overall goal of the program is to allow for fair access to the marijuana industry for minorities with an emphasis on those in zip codes that were most harshly impacted by marijuana prohibition enforcement.[12]

Promoting diversity in the marijuana industry has been challenging because of the complicated history of marijuana prohibition and its enforcement.[13] Due to many factors beyond their control minorities lack the same fair access that their white counterparts have to the marijuana industry. The current policy alienates a significant portion of minorities in Florida. Aggressive enforcement of marijuana

[5] Id. at 4.
[6] Id.
[7] Id. at 144 (when compared to arrest rates of the other 49 states and District of Columbia arrest rates from 2010)
[8] Id.
[9] Id. at 32.
[10] Id. at 148 (In 2010 blacks were 7.6 times more likely to be arrested for marijuana possession than whites)
[11] 410 Ill. Comp Stat. 705 / 7 (2019)
[12] Id.
[13] Id.

3. THE MEDICAL MARIJUANA MARKET CONTINUES TO EXPAND

In November 2016, the citizens of Florida voted in support of Amendment 2, an expansion of the medical marijuana program to include additional debilitating medical conditions.[14] Since 2016, the medical marijuana program in Florida has grown exponentially. As of February 2020, the program has over 300,000 active card-holding patients and 233 dispensing locations operated by fourteen medical marijuana treatment centers (MMTC's) throughout Florida, according to the Office for Medical Marijuana Use (OMMU).[15] As of January 2020, the United States has eleven states that have implemented recreational adult-use marijuana programs and thirty-three state-sponsored medical marijuana programs.[16] The economic promise and possibilities of getting involved in the legal marijuana industry have enticed people who once opposed legalization like the former speaker of the United States House of Representatives, John Boehner.[17] The purpose of this article is not to advocate for a legalized adult-use program in the state of Florida. Still, the national trend indicates that once a state establishes a medical marijuana program, a recreational adult-use program becomes a more likely possibility.[18] There will likely be a further expansion of the current medical marijuana program or possibly a recreational program. Given the trend, the burden should be on the state of Florida to ensure fair access to its minority population to the medical marijuana industry.

Florida is one of the fastest-growing medical marijuana markets in the United States in revenue and the number of patients registered.[19] Despite the rapidly growing market, the state of Florida does not have an effective policy to ensure minority representation across the medical marijuana industry. Providing an effective social equity program is essential to ensuring diversity because it promotes fair access to a heavily regulated and hard to navigate industry. The history of the discriminatory

[14] Fla. Stat. § 381.986 (2) (2019) (list of qualifying medical conditions)
[15] *Weekly Update Feb. 7, 2020*, Office of Medical Marijuana Use, https://knowthefactsmmj.com/2020/01/03/2020-ommu-updates/
[16] Jeremy Berke and Skye Gould, *Legal marijuana just went on sale in Illinois. Here are all the states where cannabis is legal*, Bus. Insider, (Jan. 1, 2020), https://www.businessinsider.com/legal-marijuana-states-2018-1
[17] Elizabeth Williamson, *John Boehner: From Speaker of the House to Cannabis Pitchman,* N.Y. Times, (June 3, 2019), https://www.nytimes.com/2019/06/03/us/politics/john-boehner-marijuana-cannabis.html
[18] Jordan Waldrep, *How Medical Marijuana is Opening the Door to Recreational Cannabis*, Forbes, (Sep. 12, 2018), https://www.forbes.com/sites/jordanwaldrep/2018/09/12/how-medical-marijuana-is-opening-the-door-to-recreational-cannabis/#769fa9204cc7
[19] Maggie Cowee, *Chart: Medical marijuana markets expanding at varying rates, with Oklahoma, Florida setting the pace*, Marijuana Bus. Daily, (Aug. 13, 2019), https://mjbizdaily.com/medical-marijuana-market-growth-with-oklahoma-and-florida-leading/

enforcement practices not only prohibits those arrested but also damaged relationships with the communities most impacted. Citizens in the communities most damaged by marijuana arrests are skeptical of the government overall because of a complicated relationship with law enforcement and the criminal justice system.[20] The burden should be on the government to reach out and right the wrongs of the past.

According to the official *Leafly Jobs Report* published in February 2020, employment in the medical marijuana industry grew by 93% in Florida and currently employs over 15,000 Floridians.[21] Proposed legislation shows a desire to relax regulations on medical marijuana treatment centers, and aims to create a regulatory framework for medical marijuana retail facilities, further fueling market expansion.[22] The current sales figures show the medical marijuana market in Florida is exploding.[23] Since the state has such a tight grip on the current licensing process, Florida has entered a historic turning point. The time to address social equity in Florida is now. The more time that passes, the more likely minorities will be left behind.

The legislature has also shown a desire for further expansion of Florida's market. Senate bill 212 is a proposed bill that would establish medical marijuana *retail facilities*.[24] The overall purpose of the bill is to reduce restrictions on MMTC's and provide a regulatory framework for the establishment of *marijuana retail facilities*.[25] The language in SB 212 indicates that MMTC's in Florida will no longer be at the mercy of a *vertically integrated business model*.[26] The current medical marijuana law in Florida only allows for MMTC's to sell medical marijuana. They mandate the MMTC's to control all aspects of the operation from *seed to sale*, a cornerstone in the *vertically integrated business model*.[27] The current statute prohibits MMTC's from obtaining medical marijuana from any outside entity unless they receive special permission.[28]

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[20]Aaron Schachter, *Growing Marijuana Industry Struggles to attract employees of color,* Nat'l Pub. Radio, (Feb. 21, 2019) https://www.npr.org/2019/02/21/695999248/growing-marijuana-industry-struggles-to-attract-employees-of-color

[21] *Leafly Jobs Report 2020*, Leafly 8 (Feb. 2020), https://d3atagt0rnqk7k.cloudfront.net/wp-content/uploads/2020/02/06145710/Leafly-2020-Jobs-Report.pdf

[22] S.B. 212, Fla. Sen., Reg. Sess. (Fla. 2020), (proposed amendment to Fla. Stat. § 381.986)

[23] Susan Lundine and Ryan Lynch, *Florida's medical marijuana industry grows to an estimated $5.7B+*, Orlando Bus. J., (Feb. 15, 2019), https://www.bizjournals.com/orlando/news/2019/02/15/floridas-medical-marijuana-industry-grows-to.html

[24] S.B. 212, Fla. Sen., Reg. Sess. (Fla. 2020), (proposed amendment to Fla. Stat. § 381.986)

[25] Id.

[26] Fla. Stat. § 381.986 (8) (e) (2019)

[27] Id. Stat. § 381.986 (8) (d)

[28] Id. Stat. § 381.986 (8) (c)

The *vertical integration* model has placed significant supply constraints on MMTC's abilities to keep up with Florida's exploding demand.[29] This constraint has led to unbalanced competition. Of the fourteen MMTC's operating, one company consistently accounts for approximately half of all marijuana sold in the smoking form.[30] Senate Bill 212 would remove a constraint that is preventing other MMTC's from keeping up with the products needed to remain competitive and improve patient access. This legislation would create broader access to a lucrative market, and a priority of the state needs to be that minorities have fair access to enter that market.

4. FLORIDA STATUTE REGULATING MEDICAL MARIJUANA

Due to the barriers created by the aggressive enforcement of marijuana laws, a key focus of the government needs to be ensuring fair access to citizens most impacted by those previous policies. The current provisions in the medical marijuana statute fail to address critical institutional barriers that prevent equitable access for minorities in Florida. [31] The medical marijuana statute contains the language that attempts to address social equity in the medical marijuana market in Florida.[32] The first attempt is to address social equity is among medical marijuana treatment center (MMTC) license holders and intended to promote licensing to a class of black farmers defined by *Pigford v. Glickman* and *In Re Black Farmers.*[33] The second provision addresses diversity among the MMTC labor force. It mandates that every licensed MMTC in Florida have a diversity plan designed to encourage MMTC's to hire minorities and veterans.[34] The third provision is to help fund research to educate minorities about medical marijuana and the impact of the unlawful use of marijuana on minorities. A grant of ten dollars for every medical marijuana ID card will fund research done by FAMU.[35] The study will be an essential component of drafting adequate social equity provisions that best benefit minorities in Florida. It will provide accurate up to date data that can be the basis for sensible policy. While these three provisions are helpful, they do not establish an adequate social equity program.

As well as not having a proper social equity program, Florida does not include convictions of possession of small amounts of marijuana in the record sealing and

[29] *See* Samantha Gross, *FL patients hard-pressed to find smokable medical pot as demand increases*, Miami Herald, (Nov. 4, 2019) https://www.miamiherald.com/news/health-care/article236977295.html
[30] *See e.g. Weekly Update Feb. 7, 2020*, Office of Medical Marijuana Use, https://knowthefactsmmj.com/2020/01/03/2020-ommu-updates/
[31] Fla. Stat. § 381.986 (2019)
[32] Id.
[33] Id. Stat. § 381.986 (8) 2.
[34] Id. Stat. § 381.986 (8) (b)
[35] Id. Stat. § 381.986 (7) (d)

expungement program. To be eligible to work in the medical marijuana industry in Florida, an individual has to pass an in-depth criminal background check.[36] Even individuals whose only crime was misdemeanor possession of a small amount of marijuana are, in some cases, unable to enter the industry.[37] Since blacks were significantly more likely to be arrested for marijuana possession than whites across Florida, this creates a barrier from ensuring diversity by limiting the pool of potential applicants that have fair access to take part in the medical marijuana industry. [38]

5. DIVERSITY PROGRAM PROVISION FOR MMTC's

The current application for a medical marijuana treatment center license comprises of sixteen sections with a corresponding point value assigned to each section for a total of 1100 possible points.[39] While the statute mandates an MMTC has a diversity plan in place, the corresponding section for the diversity plan is only worth 100 of the possible 1100 total points.[40] The statute also states that they will prioritize applicants with strong diversity plans. However, the law does not define what the OMMU considers to be a *strong diversity plan*. On the contrary, the state of Illinois has distinct elements of what they consider a social equity applicant.[41] Without a uniformed objective measurement of what makes up a *strong diversity* plan, the OMMU cannot justly enforce the regulation. While the language within the statute may emphasize diversity, it would be difficult to convince any reasonable person that 100 points out of an 1100-point application will be the sole deciding factor in the license approval process, or that it is even a top priority.

The current statute provides the OMMU with authority to revoke an MMTC license for failure to comply with the diversity program.[42] At the moment, no language in the statute indicates a method or criteria the OMMU plans to use to evaluate the effectiveness of the implementation of diversity plans for existing MMTC's. An MMTC may have a very robust plan. Still, with no objective way of being able to grade the

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[36] Id. Stat. § 381.986 (9)

[37] Kyle Arnold, *Florida's medical marijuana industry is hiring, but stoners need not apply,* Orlando Sentinel, (Aug. 17, 2018), https://www.orlandosentinel.com/business/os-bz-working-in-marijuana-20180817-story.html

[38] *The War on Marijuana in Black and White*, Am. C.L. Union 143 (June 2013), https://www.aclu.org/issues/smart-justice/sentencing-reform/war-marijuana-black-and-white

[39] Office of Medical Marijuana Use, Application for Medical Marijuana Treatment Center § 13, https://knowthefactsmmj.com/wp-content/uploads/_documents/form-dh8013-ommu-042018-application-for-medical-marijuana-treatment-center-registration.pdf (Feb. 2020)

[40] Id.

[41] Ill. Dep't of Com. and Econ. Oppor'ty, Illinois Adult Use Cannabis Social Equity Program, https://www2.illinois.gov/dceo/CannabisEquity/Pages/default.aspx

[42] Fla. Stat. § 381.986 (8) (b) 10. (2019)

effectiveness of a diversity plan, the provision cannot be properly enforced on existing MMTC's and any potential license applicants.

6. CASE LAW DEFINING FLORIDA'S SOCIAL EQUITY PROVISION FOR MMTC LICENCE APPLICATIONS

There is only one provision within the medical marijuana licensing scheme that attempts to address social equity in the licensing process. The provision intends to promote priority access to MMTC licenses for a class of black farmers defined by *Pigford v. Glickman* and *In Re Black Farmers,*[43] which were two cases regarding discrimination against black farmers by the United States government that dates back to civil war reconstruction.[44] The provision fails to provide widespread relief. The class protected under the two cases only applies to a small group of black farmers across the United States, which is even a smaller group of black farmers within Florida, a minority within a minority if you will. The court acknowledges in *Pigford v. Glickman* that the discriminatory practices that they are granting relief to have significantly diminished the number of black farmers in the United States by stating:

For decades, despite its promise that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity of an applicant or recipient receiving Federal financial assistance from the Department of Agriculture," 7 C.F.R. § 15.1, the Department of Agriculture and the county commissioners discriminated against African American farmers when they denied, delayed or otherwise frustrated the applications of those farmers for farm loans and other credit and benefit programs. Further compounding the problem, in 1983 the Department of Agriculture disbanded its Office of Civil Rights and stopped responding to claims of discrimination. These events were the culmination of a string of broken promises that had been made to African American farmers for well over a century.[45]

Although the statute promotes priority access to Floridians eligible under the classification of *Pigford* and *In Re Black Farmers,* this current provision is very narrow. While beneficial to the protected class of black farmers, it barely scratches the surface on addressing the shortfalls of social equity and the medical marijuana licensing process in Florida.

7. CONCLUSION

[43] *In re Black Farmers Discrimination Litig.*, 856 F. Supp. 2d 1 (D.D.C. 2011)
[44] *Pigford v. Glickman*, 185 F.R.D. 82, (D.D.C. 1999)
[45] Id.

The lack of equitable access minorities have to the medical marijuana industry in Florida should be a dire concern and is an issue of economic justice. The medical marijuana industry, at a minimum, is here to stay and. If that is the case, then the state should facilitate policies based on fair access and economic justice to individuals who were most damaged by the disproportionate enforcement of marijuana prohibition. This issue in the medical marijuana industry has not received enough attention from the state of Florida. The current language within the Florida medical marijuana statute, even if enforced to the fullest extent, falls very short of ensuring fair access.

Social Equity in the marijuana industry is still in its very early stages. Because of a lack of precedent, it is hard to predict what measures will be useful in ensuring minority access. Regardless of how progressiveness the approach one thing clear, Social equity in the marijuana industy needs the same urgency and enthusiasm that was on display when state governments marched into minority communities to enforce the war on drugs. A continued failure to address social equity will ensure the status quo of disproportionate minority representation in the marketplace. While Florida does not have to implement policies as progressive as those of Illinois, inaction is no longer an acceptable approach.

WHEN THE COURT BECOMES MOOT: NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC. V. CITY OF NEW YORK, NEW YORK

Danielle Hoyer

I. Introduction

Article III, Section 2 of the United States Constitution states that the powers of all federal courts, including the Supreme Court, extend only to "cases" and "controversies."[1] Article III denies these courts the power "to decide questions that cannot affect the rights of litigants in the case before them,"[2] meaning that, if a court ruling has no effect on the parties involved, the case in question must be considered moot.

Even if a case initially contains a controversy capable of affecting the rights of the litigants, it is possible for a case to become moot during the judicial process. The arise of mootness may be attributed to "change in the governing legal framework,"[3] a change in a party's status,[4] or because the controversy is dissolved due to an action on behalf of one of the parties.[5] In such cases, as prescribed by Article III, mootness results in the case's dismissal. However, an exception is made to the mootness rule under four circumstances: class action representatives, the voluntary cessation doctrine, adverse collateral legal consequences, or the capability of repetition.

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[1] U.S. CONST. art. III, § 2.

[2] North Carolina v. Rice, 404 U.S. 244, 246 (1971). *See also*, Chafin v. Chafin, 568 U.S. 165, 172 (2013).

[3] Lewis v. Cont'l Bank Corp., 494 U.S. 473 (1990) (citing Diffenderfer v. Cent. Baptist Church of Miami, Inc., 404 U.S. 412, 415 (1972)).

[4] *See* Durham v. United States, 401 U.S. 483 (1971). In Durham, the Court decided that, because the petitioner died while his writ of certiorari was pending, the petition is dismissed as moot. However, the Court faced criticism for this holding because the case also vacated the criminal conviction for the deceased, and Durham was subsequently overturned in Dove v. United States, 423 U.S. 325 (1976). *See also,* DeFunis v. Odegaard, 416 U.S. 312 (1974). Petitioner DeFunis initially filed suit as a prospective law student seeking admission to the University of Washington. DeFunis prevailed in the Superior Court of Washington and began attending classes at the institution. The Washington Supreme Court reversed the decision, but by the time the Supreme Court of the United States reviewed this case he was preparing to graduate from the law school. This change in circumstances lead the Court to vacate the case due to mootness.

[5] *See* County of Los Angeles v. Davis, 440 U.S. 634 (1979). During hiring procedures, Los Angeles County and the County Board of Supervisors and Civil Service Commission planned to use a written test to identify top candidates for interview. However, a majority of the top candidates were white, and thus a class action lawsuit was filed due to the discriminatory nature of these hiring practices. Prior to litigation, petitioner took action towards improving their hiring practices, which prompted the Supreme Court to vacate the judgement of the lower court due to mootness.

At the time of this writing, the Supreme Court of the United States has recently heard arguments regarding a now-repealed gun law, previously implemented by the city of New York, that severely limited the transportation of firearms throughout the city.[6] The Supreme Court agreed to review the case in January 2019, but during the summer, the city of New York announced the ban had been lifted and urged the Court to dismiss the case prior to litigation;[7] the justices declined. *New York State Rifle & Pistol Ass'n v. City of New York, New York* was argued before the Supreme Court on Monday, December 2, 2019, and the biggest question up for debate is whether the repeal of the law rendered the case moot.[8]

This Article will explore whether dismissal of *New York State Rifle & Pistol Ass'n* is justified due to the mootness rule. The Article begins with an overview of the case and its procedural history through the judicial system. Next, the Article explains the four exceptions to the mootness rule and the cases that guided the evolution of these exceptions. Finally, the Article considers if any of the exceptions rightfully apply to the case of *New York State Rifle & Pistol Ass'n.* Ultimately, this Article asserts that no exception to the mootness rule applies in this case and that the Supreme Court should rightfully dismiss this case as moot.

I. Procedural History of *New York State Rifle & Pistol Ass'n v. City of New York*

The state of New York requires a license for individuals to possess a handgun within their homes.[9] This license is referred to as a "premises license."[10] This license only allows for the possession of the registered handgun within the home it is registered to and only allows the weapon to be transported "directly to and from an authorized small arms range/shooting club, unloaded, in a locked container, [with] the ammunition to be carried separately."[11] Therefore, under the 2013 law, those in possession of handguns were unauthorized to transport their weapon outside of the city limits and were confined to the seven public-use shooting ranges within New York

[6] 38 R.C.N.Y. §§ 5-23

[7] Amy Howe, *Argument analysis: Justices focus on mootness in challenge to now-repealed New York City gun rule*, SCOTUSblog (Dec. 2, 2019, 1:53 PM), https://www.scotusblog.com/2019/12/argument-analysis-justices-focus-on-mootness-in-challenge-to-now-repealed-new-york-city-gun-rule/.

[8] *New York State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45 (2d Cir. 2019), *cert. granted*, 139 S. Ct. 939. *See also* Howe, *supra* note 7.

[9] N.Y. Penal Law §§ 265.01, 265.20(a)(3).

[10] 38 R.C.N.Y. § 5-01(a).

[11] *Id*. § 5-23(a)(3).

City.[12] This law affected numerous licensed individuals residing within the state of New York.

The petitioners in this case include an individual who owns a separate home elsewhere in the state of New York, two men hoping to transport their weapons outside of the city of New York to further "hone their shooting skills," and members of the New York State Rifle and Pistol Association.[13] The New York State Rifle and Pistol Association asserts that this law prevented their members from participating in "shooting competitions or events outside of the borders of the city for fear of revocation of their premises licenses and of criminal prosecution."[14] Thus, the petitioners assert that the advancement of the city of New York's transportation ban "violates the Second Amendment, the Commerce Clause, and the fundamental right to travel."[15]

The district court and the Second Circuit Court of Appeals rejected the argument of the petitioners. The district court found that, when applying intermediate scrutiny, "the transport ban is reasonably related to the City's interest in public safety and crime prevention,"[16] while the Second Circuit Court of Appeals ruled that the transport ban "does nothing to limit [the] lawful use of those weapons," and thus protects the "core…of the Second Amendment."[17] The Second Circuit Court of Appeals went on to state that even though one of the plaintiffs could not transport his firearm to his second home, "the Rule does not substantially burden his ability to obtain a firearm for that home," and because an alternative exists, there is no Second Amendment violation.[18]

Initially, the city of New York, the respondents in this case, filed a brief in opposition during November of 2018.[19] However, by July of 2019, New York City amended its law to now allow for the transport of handguns within New York City and for residents to

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[12] Pet. for Writ of Cert. at 5, New York State Rifle & Pistol Ass'n v. City of New York, 139 S. Ct. 939, (No. 18-280) (argued Dec. 2, 2019), *available at* https://www.supremecourt.gov/DocketPDF/18/18-280/62499/20180904122332608_NYSRPA%20cert%20petition%209-04-18%20FINAL.pdf.
[13] *Id*. at 5-6.
[14] *Id*. at 6.
[15] *Id*.
[16] *Id*.
[17] New York State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45 (2d Cir. 2018) (No. 15-638-cv) at 17, *available at* https://www.scotusblog.com/wp-content/uploads/2018/09/18-280-opinion-below.pdf.
[18] *Id*. at 18.
[19] Br. in Opp'n, New York State Rifle & Pistol Ass'n v. City of New York, 139 S. Ct. 939, (No. 18-280) (argued Dec. 2, 2019), *available at* https://www.supremecourt.gov/DocketPDF/18/18-280/71552/20181109090818396_NYSRPA%20Brief%20in%20Opposition.pdf.

"take them to shooting ranges and second homes outside the City."[20] Furthermore, the City's new rule is in agreement with the new state law as it "allows people with premises licenses to transport their handguns, without geographic limitation, to shooting ranges, shooting competitions, or…[to] '[a]nother residence, or place of business, of the licensee, where the licensee is authorized to possess [his or her] handgun.'"[21] Now, because of these changes, the respondent argues that its actions have "render[ed] this case moot."[22]

However, petitioners claim that this case should not be rendered moot, as they are seeking binding, "declaratory relief that the transport ban is (and always was) unconstitutional," and that they, the petitioners, "have not obtained everything from the unilateral and begrudging changes in city and state law that they could have gotten were this case litigated to a favorable result."[23] Petitioners also assert that while they are now able to travel outside of the city with their firearms, they cannot make stops along the way.[24] Moreover, petitioners claim that the amendments to the law were only made to evade Supreme Court review and, in the future, New York City would be able to reinstate such a law.[25]

II. Mootness and the Supreme Court

As indicated, Article III of the Constitution limits the scope of federal court jurisdiction to "cases" and "controversies."[26] In order for a case to satisfy Article III:

"a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[27]

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[20] Br. of Resp't at 1, New York State Rifle & Pistol Ass'n v. City of New York, 139 S. Ct. 939, (No. 18-280) (argued Dec. 2, 2019), *available at* https://www.supremecourt.gov/DocketPDF/18/18-280/111236/20190805180416324_NYSRPA%20v%20CNY%20Brief%20for%20Respondents.pdf.
[21] *Id*. at 15.
[22] *Id*. at 13.
[23] Reply Br. for Pet'rs at 2 n.1, New York State Rifle & Pistol Ass'n v. City of New York, 139 S. Ct. 939, (No. 18-280) (argued Dec. 2, 2019), *available at* https://www.supremecourt.gov/DocketPDF/18/18-280/114641/20190904133735900_18-280rb.pdf.
[24] *Id.* at 11.
[25] *Id*. at 2 n.1.
[26] U.S. CONST. art. III, § 2.
[27] Friends of Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc., 528 U.S. 167, 180-181 (2000) (citing *Lujan* v. *Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)).

However, there is much debate as to whether the restriction of mootness for these parameters is an unwavering constitutional requirement or more of a prudential limitation.[28] Courts, including the Supreme Court of the United States, "routinely hear moot cases where strong prudential reasons exist to do so,"[29] thus it does not follow that mootness necessitates the dismissal of a case. The Supreme Court has exercised their discretion and accepted factually moot cases under four sets of circumstances: when the plaintiff is a class action representative, when a defendant ceases disputed conduct after the threat or commencement of litigation, when there remains a possibility of adverse legal consequences, and when similar legal challenges will escape review in the future.

A. Class Action Representatives

When the titular name in a lawsuit is representing the interests of multiple individuals, the case does not become moot upon resolution of the named party's conflict. Exemplified in the 1975 case of *Sosna v. Iowa*, Carol Sosna moved to Iowa and filed for divorce from her husband. An Iowa trial court dismissed Sosna's petition for divorce because the court stated that she did not "meet the Iowa statutory requirement" that requires a "petitioner in a divorce action" to be a resident of the state for one year prior to the filing of said petition.[30] The Iowa court cited a further lack of jurisdiction because her husband was not a resident of the state at all.[31]

By the time litigation commenced, Sosna had obtained a divorce in a different state and satisfied the residency requirement.[32] Therefore, the case was rendered moot regarding the interest of the named party and was dismissed by an Iowa trial court, until the appellant filed a class action lawsuit. Once it was verified that the appellant did represent a class of people "residing in Iowa for less than a year who desired to initiate divorce actions," the district court heard the case and rejected the appellant's claim, a ruling which the Supreme Court affirmed.[33]

Although Sosna did not prevail, her case, though moot, was heard and decided by the Supreme Court. The Court stated that "the class of unnamed persons…acquired a legal status separate from the interest asserted by [the] appellant," and this, therefore, "affects the mootness determination."[34] This case might initially appear to resemble

[28] Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 Geo. Wash. L. Rev. 562, 564. (August 2008).
[29] *Id*.
[30] Sosna v. Iowa, 419 U.S. 393 (1975).
[31] *Id*. at 395.
[32] *Id*. at 399.
[33] *Id*. at 393-394.
[34] *Id*. at 398.

a situation "capable of repetition, yet evading review,"[35] but this does not apply because, once Sosna satisfied the residency requirement, the barrier imposed by the Iowa law could not be applied again.[36] Instead, this case is an exception to the mootness rule because the law would be enforced against other members of the class and because, due to the length of time inherent in the judicial process, "no single challenger will remain subject to its restrictions for the period necessary to see such a lawsuit to its conclusion."[37] Thus, the Court analyzed this case as a controversy that may continue on, even if "the claim of the named plaintiff has become moot."[38]

B. Adverse Collateral Legal Consequences

The possibility of issues arising from an initial conviction can likewise prevent a case from becoming moot. For example, in *Sibron v. New York*, the petitioner was arrested for the unlawful possession of heroin, plead guilty at trial, and served his six-month sentence.[39] Due to the short sentence length, Sibron was released two months before he was allowed to present his case on appeal, which lead to a question of mootness.

The Court then considered whether an appeal is rendered moot when a convicted criminal completes their sentence. Because rendering the cases of convicted criminals moot on appeal would prevent "judicial review of deprivations of constitutional right,"[40] the Court ultimately found that "a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction."[41]

C. Voluntary Cessation Doctrine

When a party voluntarily ceases their wrongful, or illegal, actions after litigation has been commenced, the case is still not always rendered as moot. For example, in *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* Laidlaw, the owner of a wastewater treatment plant, received a permit to "discharge treated water into the North Tyger River."[42] While the permit limited the discharge of pollutants, Laidlaw began discharging pollutants into the river anyway, thus violating the Clean Water Act.[43] After a lawsuit was initiated by Friends of Earth, Inc., Laidlaw began complying

[35] Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972).
[36] *Sosna,* 419 U.S. at 419.
[37] *Id*.
[38] *Id*. at 402.
[39] Sibron v. New York, 392 U.S. 40 (1968).
[40] *Id*. at 52.
[41] *Id*. at 57.
[42] *Friends of Earth*, 528 U.S. at 175-176.
[43] *Id*. at 176.

with the permit, leading the appellate court to conclude that the case was now moot.[44]

However, on appeal, the Supreme Court determined that this case was not moot. Even though Laidlaw shut the treatment plant down entirely prior to Supreme Court review, the Court identified other interests in hearing the case.[45] Due to the existence of multiple financial penalties and the large sum of legal fees incurred by the Friends of Earth, Inc., the case could not be deemed moot as it "would not redress any injury [the] [p]laintiffs have suffered."[46] The Court held that Laidlaw had to comply and pay the civil penalties imposed for violating the Clean Water Act as these penalties not only "promote immediate compliance" of the law, but also "deter future violations."[47]

D. Capability of Repetition, Yet Evading Review

Roe v. Wade is an oft-cited example of a case that is moot on appeal but can occur again in the future while escaping judicial scrutiny. In 1970, "Jane Roe" was seeking an abortion in Texas. Unable to obtain one under Texas law, she filed suit against the district attorney of Dallas County, Henry Wade.[48] At the time the case was decided, the petitioner in question was no longer pregnant; she had the baby, and the outcome of this legal dispute could not affect her situation. Furthermore, this could not be considered a class action lawsuit because all other women pregnant and seeking an abortion in 1970 were also no longer pregnant.[49] Therefore, this case would be considered moot had the Court not previously carved out an exception for cases "capable of repetition, yet evading review."[50]

The Court noted that, in cases of pregnancy, "the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete."[51] Therefore, litigation regarding pregnancy often commences far too late in the pregnancy to have an effect on any litigants.[52] Thus, "[p]regnancy

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[44] *Id*. at 168.
[45] *Id*.
[46] *Id*. at 173.
[47] *Id*. at 185.
[48] Roe v. Wade, 410 U.S. 113, 120 (1973).
[49] *Id*. at 124.
[50] S. Pac. Terminal Co. v. ICC, 219 U.S. 498 (1911). The Southern Pacific Terminal Company negotiated a contract with a cotton seed exporter in which the exporter paid a discounted wharfage charge in exchange for shipping his products on railroads owned by Southern Pacific. A different cotton exporter filed a complaint with the ICC, but Southern Pacific terminated the contract before the appeal reached the Court. The Court held that the mere cancellation of the contract does not make the case moot where the conduct may be immediately repeated or continuing.
[51] *Roe,* 410 U.S. at 125.
[52] *Id*.

provides a classic justification for a conclusion of nonmootness" and the Court heard the case and ruled in favor of Roe.[53]

However, this doctrine was later adjusted in the case of *City of Los Angeles v. Lyons*. In this case, Lyons sought an injunction against the City of Los Angeles after a police officer placed him in a "chokehold" during a stop made due to a traffic violation.[54] One question presented for review as whether the case was rendered moot due to the police authorities "prohibit[ing] use of a certain type of chokehold" and placing a "6-month moratorium" on a different type of chokehold.[55] Because this moratorium was not permanent and because the "[i]ntervening events have not "irrevocably eradicated the effects of the alleged violation," the case could not be dismissed as moot.[56] However, the Court ultimately ruled against Lyons' initial injunction because "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects," thus it did not meet the threshold requirement set by Article III of the Constitution and federal courts do not have jurisdiction over this case.[57] Ultimately, the Court altered the "the capable-of-repetition doctrine" stating that it "applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality."[58]

III. *New York State Rifle & Pistol Ass'n v. City of New York* is Moot

The presumption is that a case is rendered moot when a defendant takes action to correct their conduct and avoid further violations, unless the conduct in question falls within one of the four exceptions. *New York State Rifle & Pistol Ass'n* does not fall within any of the four exceptions carved out by the Court because this is not a class action matter, there are no adverse collateral legal consequences, the voluntary cessation was not attached to any financial damages, and the petitioners cannot make "reasonable showing that [they] will again be subjected to the alleged illegality."[59]

As for the first two exceptions to the mootness rule, because the law no longer affects any of the individuals in this case, and because there is no indication that they will be affected by this law in the future, the appellant is not representative of a class. Hence, the exception made for class action lawsuits does not apply. Even if the petitioners could compose a class in this case, they would need to refile a class action claim

[53] *Id*.
[54] City of Los Angeles v. Lyons, 461 U.S. 95 (1983).
[55] *Id*.
[56] *Id*. at 101.
[57] *Id*. at 95-96, 101.
[58] *Id*. at 109 (citing *DeFunis,* 416 U.S. at 319).
[59] *Id*.

separately, and so the matter currently before the Court would remain moot. Regarding the exception for adverse collateral legal consequences, there are no unintended harms that may continue to occur, as a result of the initial law, now that the statute has been amended. The original law's impact will not continue to affect any individual, even those who were initially affected; as Justice Sotomayor pointed out during oral arguments, "the city has forsworn any future prosecution for past violations."[60] Therefore, the only exceptions this case could possibly fall under are those for voluntary cessation and the capability of repetition.

Although the City of New York voluntarily amended their law after litigation commenced, this does not mean that the case is not moot. In the case of *Friends of Earth, Inc.*, Laidlaw could not claim the case to be moot due to the multiple, financial civil penalties the company faced.[61] Moreover, similar to the "capable-of-repetition doctrine," the Court perceived these penalties as a deterrent to prevent Laidlaw from repeating the same actions because the polluting conduct could occur at a different plant.[62] In the initial lawsuit, appellant did not request any form of damages prior to their oral arguments before the Supreme Court, including monetary damages.[63] As indicated by Chief Justice Roberts' line of questioning during oral arguments, deciding this case as moot would not necessarily prevent a further lawsuit for monetary damages.[64] Thus, there is no serious incentive for the Court to provide declaratory or injunctive relief following this hearing.

Furthermore, in the 2012 case of *Moore v. Madigan*, the Seventh Circuit Court of Appeals ruled that an Illinois law blanketly prohibiting the concealed carry of a weapon was unconstitutional. As the Attorney General, Lisa Madigan, prepared to file a writ of certiorari to the Supreme Court, the legislature went on to amend the law in compliance with the Seventh Circuit, resulting in the case being declared moot prior to reaching the Supreme Court.[65] Consequentially, Illinois became the last state to

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[60] Mark Joseph Stern, *The Supreme Court's Second Amendment Revolution May Have to Wait*, Slate (Dec. 2, 2019, 4:31 PM), https://slate.com/news-and-politics/2019/12/new-york-scotus-gun-control-oral-arguments.html.

[61] *Friends of Earth,* 528 U.S. at 27.

[62] *Id*. at 193.

[63] *See* Br. of Resp't, *supra* note 20, at 7. *See also,* Adam Liptak, *Second Amendment Case May Fizzle Out at the Supreme Court*, The New York Times (Dec. 2, 2019), https://www.nytimes.com/2019/12/02/us/politics/second-amendment-supreme-court.html.

[64] *Id*.

[65] Mem. in Supp. of Mot. to Dismiss as Moot, Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012) (No. 11 C 405-WDS-PMF), *available at* http://michellawyers.com/wp-content/uploads/2012/12/Shepard-v.-Madigan_Memorandum-in-Support-of-Motion-to-Dismiss-as-Moot.pdf.

permit the possession of concealed handguns in public.[66] Similar to *Moore v. Madigan*, the removal of the City of New York's law should be enough to warrant the dismissal of the case as moot. The law of New York City, as it currently stands, does not violate the protections afforded in the prior cases of *District of Columbia v. Heller* nor *McDonald v. Chicago*;[67] individuals retain their fundamental rights to bear and transport arms. Therefore, this case should not be deemed an exception under voluntary cessation.

Finally, while the original law of the City of New York may theoretically be reapplied in the future, this case does not qualify as one capable of repetition, yet evading review. Although there are no preventative measures to forbid the legislatures from reinstating a law similar in nature to this one and no financial deterrents in play, as noted in *Lyons*, "past…illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects."[68] Moreover, the law was found to be constitutional at the lower courts, thus it is unclear whether the law in question was ever illegal. Nevertheless, this will not be a matter for the Court to decide because the law has already been revoked and there are no present adverse effects. Additionally, the capable-of-repetition doctrine only applies "in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality."[69] In this case, although petitioners have claimed that the City of New York retains the power to enact such a law once more, the petitioners have not made a reasonable showing suggesting they would do such.

The only possible constitutional issue left for review as a result of the new law is whether not being able to stop along a route, while transporting a gun, is constitutional. However, this will not be enough to prevent the case from being rendered moot. During oral arguments, Richard P. Dearing, an attorney for the City of New York, reported that "coffee stops and bathroom breaks 'are entirely permissible'

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[66] Greg McCune, *Illinois is last state to allow concealed carry of guns*, Reuters (Dec. 2, 2019, 2:31 PM), https://www.reuters.com/article/us-usa-guns-illinois/illinois-is-last-state-to-allow-concealed-carry-of-guns-idUSBRE9680ZB20130709.

[67] District of Columbia v. Heller, 554 U.S. 570 (2008). Heller challenged a D.C. statute that banned all handguns and required other registered firearms to only be stored unloaded and disassembled or bound by a trigger lock. The Court found that the Second Amendment applies to individuals in general, rather than just to a militia, and so the D.C. restrictions violate that amendment because they prevent the protected use of firearms for self-defense. McDonald v. Chicago, 561 U.S. 742 (2010). McDonald, a Chicago resident, sued the city over a statute that prevented him from owning a handgun. The Court concluded that individual self-defense is the primary component of the Second Amendment, and that this right is applied to the states through the Due Process Clause.

[68] *Lyons,* 461 U.S. at 95-96.

[69] *Id.* at 109 (citing *DeFunis,* 416 U.S. at 319).

under the new law."[70] Even Jeffrey B. Wall, an attorney for the federal government arguing on behalf of petitioners, stated that this was "a new controversy that arises from the new law, not the old controversy in the old law."[71] Hence, this question should not be up for review under the initial claim filed and instead should be addressed in a new challenge to the current law. The case of *New York State Rifle & Pistol Ass'n* falls under none of the four exceptions and, therefore, this specific challenge should be rendered moot.

IV. Conclusion

The original law of the City of New York may very well have been found to be unconstitutional by the Supreme Court had it been left standing. However, the Supreme Court, according to Article III of the Constitution, does not have the power to review this case because the original law of the City of New York is no longer a live controversy. The petitioners still may choose to file a new lawsuit over the meaning of the new law, as it pertains to stopping while transporting a firearm, and to file a lawsuit seeking monetary damages from the city, but these actions would still not permit judicial review of the unamended New York statute.

Ultimately, the question of whether this case will be found moot or if the Court sees a significant reason to rule on the issue will not be known for several more weeks. Many justices indicated during oral argument that the merits of this case do, in fact, seem moot,[72] but the law that inspired the initial lawsuit presented a valid question for the Court: how far are state lawmakers allowed to go when restricting the movement of personally possessed firearms? Defining the modern legal boundaries of the Second Amendment remains an ongoing task of the Supreme Court, but the absence of a live controversy in this case suggests that it is not the ideal vehicle to resolve the firearm transport question. While the legal questions within this case may provoke interest, the facts do not fall within any previously recognized exception to the mootness rule, and so for now they will likely remain unanswered.

[70] Liptak, *supra* note 63.
[71] *Id.*
[72] *Id.*

NECESSARY AND CONVENIENT: THE EFFECT OF COMMERCE AND NECESSARY & PROPER CLAUSE JURISPRUDENCE ON AMERICAN FEDERALISM

Janis Olkowicz

Introduction

Of all the rules, laws, and documents created within the United States jurisprudential system, the Constitution stands as a symbol of checks, balances, and government restraint. This seminal document sets the standard by which all federal rules, laws, and governing bodies must abide; but, for all the Constitution sets out to accomplish, it often lacks in sufficient detail to achieve its own purpose. As a result, the Federal Government is often left to decipher who has authority to enact legislation, and to whom the law applies. To settle disputes concerning its meaning, the Constitution appointed an arbiter—the Supreme Court—charged with the great power to decide how narrow or expansive each section should be interpreted, and when an authority figure has overextended its reach.

For nearly two and a half centuries, the Supreme Court has largely fulfilled this duty. Through its opinions, the Court has created a library of 570 volumes of judicial orders and declarations.[1] Year after year, the Court finds new meaning in the 4,543-word document, deferring to the wisdom and guidance of those who previously occupied the bench, and building precedent on top of precedent. And while the Constitution has been so broadly interpreted, the rights and limitations that it sets forth constitutes a statistically negligible amount of overall federal law, prone to broad and inconsistent interpretations.

As exemplified by the recent onslaught of media attention given to the judicial nomination process, the question of how the Constitution is interpreted, and by whom, is an issue of great public and political importance. This heightened level of attention can primarily be attributed to the political nature of judicial selection, and the awesome power that the select few unelected officials (serving lifetime appointments to the judicial bench) have to alter Americans' most basic rights. Supreme Court justices, through the power of judicial review, have the ability to change how the Constitution—the document that controls the essential functions of,

[1] SUPREME COURT OF THE UNITED STATES, *Bound Volumes*, https://www.supremecourt.gov/opinions/boundvolumes.aspx (Last visited Feb. 17, 2020).

arguably, the most powerful country in the world—is read.[2] With a Court that is currently comprised of only nine people, giving each justice an eleven percent vote, the power that individual justices carry is immense, and the power the Court wields as a whole is even heavier. Through a majority vote consisting of only five people, the Supreme Court can change the legal meaning of entire sections of the Constitution; one seldom-discussed side effect of this power is the Court's authority to rule that seemingly simple words have meanings beyond their plain-language definition. Through the power of argument, the Supreme Court has the influence to declare that the word "necessity" connotes convenience,[3] and that the word "commerce" includes the act of traveling to engage in such activities.[4] Although the distinction is seemingly trivial, the manner in which these words are interpreted can affect the future of, not only the parties of individual cases under which these definitions were decided, but the federalist system as a whole.

Considering the influence that each justice holds, the longevity and estimated time justices potentially have remaining on the bench is worth noting. Today, two sitting justices—Ginsburg and Breyer—were born in the 1930s and now are more than eighty years old; moreover, two thirds of the current Supreme Court bench are above the age of sixty.[5] As the likelihood of at least two justices being replaced in the next two election cycles are extraordinarily high, and the potential for that transfer of power to shift the political leanings of the entire panel, there is a vital need for public education on the effect judicial power can have on individual rights; therefore, a historical examination, and philosophical discussion, on the effects constitutional interpretations have on American federalism is both necessary and worthy of review.

Methodology

Through a historical review of Supreme Court jurisprudence concerning two important constitutional clauses, this article will reveal that, one case at a time,

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[2] The *Marbury* decision was a landmark case that established the power of judicial review, granting the Supreme Court the authority to declare federal laws unconstitutional. It began with a demand for the Secretary of State to serve a commission signed by former President John Adams. The Court determined that a law regarding writs of mandamus was unconstitutional, rendering it the first judicial decision to rule on the constitutionality of a federal legislative action. *Marbury v. Madison,* 5 U.S. 137 (1803).

[3] *McCulloch v. Maryland,* 17 U.S. 316 (1819).

[4] See *Gibbons v. Ogden,* 22 U.S. 1, 190 (1824).

[5] SUPREME COURT OF THE UNITED STATES, *Current Members*, https://www.supremecourt.gov/about/biographies.aspx (Last visited Feb. 17, 2020) (At the time of this writing, Justice Roberts is sixty-five; Justice Thomas is seventy-one; Justice Ginsburg is eighty-six; Justice Breyer is eighty-two; Justice Alito is sixty-nine; Justice Sotomayor is sixty-six; Justice Kagan is fifty-nine; Justice Gorsuch is fifty-two; Justice Kavanaugh is fifty-five. The mean age of all Justices on the bench is 67.2.).

federal power has gradually expanded through the centuries and shows no sign of slowing, the effect of which is the degradation and potential devolution of American federalism, the backbone upon which this country was founded. Because a comprehensive review of the Constitution in its entirety would be impracticable, this article will focus on the two clauses that are most vulnerable to abuse through overuse and backwards logic used to expand on the definitions of simple words and phrases. These two provisions are the Commerce Clause, and the Necessary and Proper Clause. Of all the various provisions of law written in the Constitution, these two clauses, read in a vacuum, are arguably among the most amorphous and arcane. The vague wording and simple phrasing avails itself to an endless array of interpretations. Despite an ever-increasing reliance on precedent, built upon precedent, built upon syntactical analyses of vaguely worded statements, judicial restraint is all that prevents the complete devolution of the federalist system through abuse of these clauses.

Through an examination of case law, and other primary and secondary sources, this article will show how judicial interpretation of the Commerce and the Necessary and Proper Clauses have permanently and irreparably altered the dynamic of power between the State and Federal governments in the United States. This will be primarily achieved by an evaluation of a selection of cases, each demonstrative of the constitutional era they represent. This article will also include the author's commentary on the various phases of judicial interpretation of these clauses, as well as how those phases have affected American federalism and the balance between State and Federal power.

The author hypothesizes that research will show that a historically broad interpretation of the Commerce and Necessary and Proper Clauses has weakened State sovereignty, and effectively limited the diversity of law among the States. When evaluating the impact that judicial interpretation of the two clauses have on federalism and States' rights, the author intends to draw conclusions based on deviations from neutral definitions and the original verbiage of the Constitution, and not through a political lens. This article is intended to be comparative in nature, and not an argument for or against States' rights concerning any individual judicial opinion or legislative proposal.

Federalism

(A) Origins of the Separation of Powers

Barron's Law Dictionary defines "federalism" as "a system of government wherein power is divided…between central…and local governments, the local governments maintaining control over local affairs, and the central government…deal[s] with

national needs."[6] The concept of separate State and Federal powers in American government was formalized by the Founding Fathers on July 4, 1776, as exemplified by the name they chose for this nation—the United *States* of America. In the context of geography, the word "state" typically refers to an independent, sovereign nation. The framers of the Constitution, by virtue of the Tenth Amendment, constructed a system of government wherein each State governs itself, and acts as its own sovereign nation, except where the Constitution outlines, they are beholden to Federal regulations.[7] To form the nation, the States united the Federal Government and bestowed upon it only limited and express powers, while reserving the vast residual powers to themselves.

Though some may argue that Federal expansion and control is necessary because the needs of the nation and protection of individual rights outweigh the needs of any individual State, it is important to note that the American federalist system was designed to provide for freedom of choice by preventing the central government from obtaining enough power to remove that choice from the people. Despite the Founding Fathers' attempts to meticulously outline the distribution of power, the State and Federal governments have been at odds to maintain power since the country's inception. To quote former Chief Justice John Marshall: "The question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist."[8]

(B) Experimental Laboratories

Among the more prominent voices on the importance of federalism and State choice is post-depression-era Supreme Court Justice, Louis Brandeis. In his oft-quoted dissent in *New State Ice Co. v. Liebmann*, Justice Brandeis warned of the risks concerning the overuse of section five of the Fourteenth Amendment by the Federal government.[9] *New State Ice Co.* addresses the question of whether an Oklahoma law that requires business owners to obtain a permit to sell and distribute ice was constitutional.[10] The appellee, Liebmann, was brought to court for attempting to sell ice without obtaining the requisite permit from the State.[11] The lower court ruled that the State law was unconstitutional under the Fourteenth Amendment, and the Supreme Court affirmed

[6] STEVEN H GIFIS, BARRON'S LAW DICTIONARY 212 (Baron's Educational Series, Inc., 6th ed. 2010).
[7] U.S. CONST. amend. X (The Tenth Amendment provides that any powers not granted to the federal government, nor prohibited, "are reserved to the States respectively, or to the people.").
[8] *McCulloch v. Maryland,* 17 U.S. 316, 405 (1819).
[9] U.S. CONST. amend. XIV § 5 (The Fourteenth Amendment states that "Congress shall have power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]." Justice Brandeis' warning in his dissent in *New State Ice Co.* refers to the overuse of Federal regulation of State industry under the auspices of the Equal Protection Clause.).
[10] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 271 (1932).
[11] *Id.* at 271.

the lower court's decision on the grounds that the Oklahoma law fosters monopoly, rather than prevents it, in a non-essential industry.[12] In his dissent, Justice Brandeis warned of the dangers that can arise from the unilateral restrictions on State governance by the Supreme Court and writes:

> *Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment…But in the exercise of this high power, we must be ever on guard, lest we erect our prejudices into legal principles.*[13]

In essence, Justice Brandeis' characterization of federalism is one in which States may enact laws that cater to their local needs, while other States observe the effects of the "experimental law." The observing States would then have the ability to decide if the law is beneficial for their own purposes, and whether it would be worthwhile to enact similar legislation in their respective territories. The appeal of allowing States to act as "laboratories" lies in ratio of risk versus reward. When a State enacts a law that is poorly received and produces negative or unintended consequences, only a single state is affected. The remaining states are discouraged from enacting similar laws; conversely, positive effects create an incentive for other States to follow the example of the pioneering state. This strategy results in States incurring far lower risk while benefitting from the lessons learned from others.

Justice Brandeis' social laboratory theory was criticized by his peers as romantic and unrealistic.[14] Others have claimed that his theory is flawed because it does not distinguish between "scientific experimentation" and "policy experimentation."[15] The claim is that lack of control over the variables involved with State legislation make it impossible to apply the scientific method to "state laboratories" with the same precision observed by traditional "scientific laboratories," and thus, a single State cannot serve as an indicator for success in other jurisdictions. While it is true that variables[16] between states are practically immeasurable, there is value in making decisions based on observation. In a nation as vast as the United States, most laws

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[12] *Id.* at 278-280.

[13] *Id.* at 311.

[14] G. Alan Tarr, *Laboratories of Democracy? Brandeis, Federalism, and Scientific Management,* G. Alan Tarr, Publius, Rutgers University, 38 (Winter 2001).

[15] *Id.* at 41.

[16] The United States is a vast nation, and each state has its own geography, industry, culture, demographics, economic situations, morals, traditions, and entire governmental systems that may or may not influence the effect of any single policy.

passed by a central governing body are unlikely to benefit every State in the Union. [17] Federalism allows States to enact legislation that is uniquely suitable for a given territory, but may, however, be harmful if applied to the whole country. Another benefit of federalism is that it is coupled with the freedom of movement. If a State government mismanages its power, residents have the ability to "vote with their feet;" to leave a State that enacts laws that are not conducive to their ways of life, and to relocate to a State that is more representative of their desires, needs, cultures, and ideals.[18]

As integral as federalism is to the American way of life, the power balance that allows it to function is incredibly delicate. According to Justice Brandeis' warning, the Supreme Court, through the issuance of prejudicial judicial opinions, has the power to end federalism in the United States altogether. Through a historical view of Supreme Court jurisprudence, it is clear that the ever-expanding scope of Federal jurisdiction through the Commerce and Necessary and Proper Clauses has exponentially increased the risk of Justice Brandeis' warning coming to fruition.

Necessary and Proper
(A) Enactment

Before analyzing the Commerce Clause, one must first understand the Necessary and Proper Clause, the prerequisite for all laws enacted by the federal government. Article I of the Constitution grants power to the federal legislature to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States." [19] In other words, the lawmaking powers of Congress are not limited by the arduous process of creating constitutional amendments. Congress has the authority to make *any* law so long as it is relevant or connected to one of its enumerated powers. According to the plain-language meaning of the Necessary and Proper Clause, there are only three limiting factors that prevent Congress from, to use the words of Alexander Hamilton, "passing all laws whatsoever": (1) The law must serve to carry out a power granted by the Constitution; (2) the law must be necessary; (3) and the law must be proper.

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[17] New Geography, *Which Countries would fit inside of Texas?* http://www.newgeography.com/content/005313-which-countries-would-fit-inside-texas (Last visited on Feb. 20, 2020) (By comparison, Texas alone is far larger than many European countries. In one image, an artist demonstrates the Lonestar State's massive scale by illustrating how many nations can fit within its borders.).

[18] Peter A. Lauricella, The Real "Contract with America": The Original Intent of the Tenth Amendment and the Commerce Clause, 60 Alb. L. Rev. 1377, 1381 (1997).

[19] U.S. CONST. art. I, § 8, cl.18.

Of all the provisions supplied by the Constitution, the Necessary and Proper Clause is distinct in its ambiguous verbiage, as well as its ubiquity, as a basis for Federal law; moreover, it is an anomaly in that the Founding Fathers never formally discussed its inclusion in the Constitution during the Constitutional Convention.[20] The clause was simply added by the Committee of Detail, as a stylistic choice, as opposed to an attempt to change or add to the existing powers enumerated in the Constitution; furthermore, there is no record of any official discussion on the potential impact that the clause may have on future policy.[21] Some claim that the lack of debate "suggests that the delegates were unaware of the capacity for controversy contained within the Clause;" however, the absence of a record of discussion does not necessarily imply that the inclusion of the Clause was unintentional, considering the controversy that immediately stemmed from its incorporation, and the level of scrutiny under which the rest of the document was considered. In the legal world, where the definition of a constitutional provision can hinge on a single comma, it is strange that an entire clause would make it into the nation's founding documents without scrutiny.[22]

Soon after the Constitutional was ratified, opponents began to express their concern over the clause's potential for unbridled abuse.[23] During the debates, opponents of the Constitution argued that the wording of the Necessary and Proper Clause served as "evidence that the national government had unlimited and undefined powers,"[24] and have the potential to be "used as a weapon against the sovereignty of the States."[25] Proponents, on the other hand, dismissed the worries of strict constructionists, believing them to be exaggerated attempts to dismantle the Constitution.[26]

Alexander Hamilton,[27] an advocate for the Necessary and Proper Clause, argued that "the constitutional operation of the intended government would be precisely the

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[20] Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 185 (2003).

[21] Mark A. Graber, *Unnecessary and Unintelligible*, 12 Const. Comment. 167, 168 (1995).

[22] See *United States v. Sprague,* 282 U.S. 716, 731-2 (1931) (The constitution is described as "an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought," and "its words and phrases were used in their normal and ordinary as distinguished from technical meaning."); *Also See District of Columbia v. Heller,* 554 U.S. 570, 576-8 (2008) (A discussion on the Founding Fathers' use of commas to create "prefatory" and "operative" clauses in the Second Amendment).

[23] *See Supra* note 23.

[24] *See Supra* note 21, at 185.

[25] CHARLES WARREN, The Supreme Court in United States History 500 (Little, Brown, and Company, Vol. 1, 1922).

[26] *Id.* at 503.

[27] *See Supra* note 21 at 195-199 (Alexander Hamilton was one of the Founding Fathers of the United States, and leader in the Federalist movement. Hamilton was a participant in the Constitutional Convention, and an avid supporter of a strong centralized government. As Secretary of the Treasury,

same if these clauses were entirely obliterated."[28] In his defense of the Clause's inclusion, Hamilton stated that the ability to enact laws that are necessary and proper to carry out the rights and duties enumerated in the Constitution are implied by the act of their enumeration.[29] Even if the Necessary and Proper Clause was not included, in Hamilton's view, the Constitution would still be interpreted in such a way as to provide a means to enact its enumerated powers. In Federalist Paper 33, Hamilton writes: "What is a power, but the ability or faculty of doing a thing?"[30] Hamilton not only defended the inclusion of the Necessary and Proper Clause in the Constitution, but was indignant towards those who had misgivings about its merits. Hamilton's indignancy is exemplified in Federalist Paper 33, where he claims the Necessary and Proper Clause was "held up to the people in all the exaggerated colors of misrepresentation as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated."[31] Notwithstanding the debate surrounding the Constitution's enactment, the Necessary and Proper Clause remains as a constitutional fixture, although the power that it entrusts upon the Federal government today is, perhaps, more than the Founding Fathers could have ever imagined.

(B) Jurisprudence

In 1800, a federal charter of a copper mine, through the authority granted by the Necessary and Proper Clause, sparked one of the first Supreme Court cases calling into question the meaning of the Necessary and Proper Clause.[32] Thomas Jefferson[33] vehemently opposed the charter, citing a lack of reasonable connection between it and any expressed powers granted by the Constitution; soon after, the Supreme Court published the opinion of *United States v. Fischer*.[34] In *Fischer*, Chief Justice John Marshall wrote the opinion of the Court, declaring that the Necessary and Proper Clause should be interpreted to include "any means which are…conducive to the exercise" of the enumerated powers,[35] an Opinion whose wording was not received well by the public. In response to the ruling, representatives from the State of Virginia

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Hamilton also proposed and defended the constitutionality of the National Bank that was the subject of the famous *Marbury v. Madison* decision).

[28] Graber, supra note 7, at 169.

[29] Alexander Hamilton, *Federalist 33,* National Archives (January 2, 1788), https://founders.archives.gov/documents/Hamilton/01-04-02-0190.

[30] *Id.*

[31] *Id.*

[32] *See Supra* note 26, at 501.

[33] *See Supra* note 21 (Thomas Jefferson was Secretary of State at the time that Alexander Hamilton initially proposed the creation of the National Bank. This is the same Thomas Jefferson who later became the third president of the United States.).

[34] *See Supra* note 26, at 501.

[35] *Id.* at 501-502.

proposed a constitutional amendment, requiring a "rational connection" to the enumerated powers.[36]

In 1819, the interpretation of the Necessary and Proper Clause was again called into question. The conflict arose when Alexander Hamilton, acting as Secretary of the Treasury, suggested the creation of a National Bank.[37] During the debates concerning the legality of the charter, James Madison[38] argued that the initial bank charter went beyond the limits allowed by the Constitution, arguing that any congressional act of power "should be pointed out in the instrument."[39] Madison further warned that "[w]hatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress."[40] Thomas Jefferson was also outspoken against the doctrine of "necessary and convenient," cautioning that "there is no one, which ingenuity may not torture into a convenience."[41] Despite the opposition, the bank's charter eventually passed.[42]

Soon after the signing of the bank's second charter, the bank launched an aggressive lending campaign, foreclosing on farm mortgages, and utilizing collection tactics that forced smaller banks out of business.[43] The economic crisis that ensued caused States to react by imposing taxes on banks not chartered by themselves.[44] The national bank's refusal to pay these taxes gave rise to *McCulloch v. Maryland*, a landmark case that drastically expanded the definition of the Necessary and Proper Clause.[45]

The crux of the issue in *McCulloch* is whether the chartering of the National Bank violated the Necessary and Proper Clause.[46] In the Supreme Court's ruling, written by Justice Marshall, the Court justifies the charter, claiming that the charter is neither permitted, nor prohibited, under the Constitution.[47] The opinion states that while all acts of Congress must remain both *necessary* and *proper*, the Constitution does not preclude Congress from deciding the means by which it deems necessary or proper to

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[36] *Id.* at 502.
[37] *See Supra* note 21, at 188.
[38] *Id.* (James Madison was another Founding Father, member of the First Congress, and was considered to be the chief drafter of the Constitution.).
[39] *Id.* at 189.
[40] *Id.* at 183.
[41] *Id.* at 196.
[42] PETER IRONS, A people's History of the Supreme Court, 122 (Penguin Books, 1999). (In 1816, although hesitant in doing so, and under political pressure brought on by the economic downturn caused by the War of 1812 James Madison, as President of the United States signed a second charter of the same bank.).
[43] *Id.*

carry out its duties.[48] In interpreting the Constitution, the Court draws a distinction between "necessary" and "absolutely necessary," claiming that the standard of "absolute necessity" would unnecessarily restrict Congress from carrying out its duties.[49] The Court defines the word "necessary" as "no more than that one thing is convenient, or useful, or essential to another."[50] As a result of the *McCullough* decision, the Constitution is now read to say, in essence, and by law, that Congress now has the power "to make all laws which shall be *convenient* for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution," setting a new standard for Congress to follow when enacting laws under all sections of the Constitution. No more is this attitude apparent than in the historical interpretation of the Commerce Clause. In the 201 years since this case was decided, *McCullough* has never been overturned, and its logic, derived from the Marshall Court continues to be relied upon by the Supreme Court today as the leading and seminal case in this area.[51]

Commerce Clause

The Constitution grants Congress the power to "to regulate commerce with foreign nations, and among the several States."[52] The Commerce Clause is distinctive due to the extent to which it has been interpreted beyond its plain-language meaning by both the United States Congress and the Supreme Court, particularly with regard to matters that, some may argue, are intrastate affairs. The dictionary defines "commerce" as "an interchange of goods or commodities;"[53] however, the meaning of the Commerce Clause has been gradually expanded through Supreme Court precedence, and is now interpreted as a legal basis for federal regulation of travel on roads and waterways,[54] civil rights legislation,[55] and limitations on crops grown for personal use.[56] Throughout history, Supreme Court interpretations on the extent of power that the Commerce Clause offers to federal legislators has waxed and waned,

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der political pressure brought on by the economic downturn caused by the War of 1812 James Madison, as President of the United States signed a second charter of the same bank.).

law wherein North Carolina taxes beneficiaries of trusts that are also State residents, regardless of whether the trust is in the state, or the beneficiary profits from it financially. As part of its reasoning, the Court defers to *McCullough*, stating that, in some areas, the Constitution imposes limitations on State power. *Id.* at 2226).

[52] U.S. CONST. art. I, § 8, cl. 3.

[53] Dictionary.com, *Commerce*, https://www.dictionary.com/browse/commerce?s=t.

[54] *Gibbons v. Ogden,* 22 U.S. 1 (1824).

[55] *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964).

[56] *Wickard v. Filburn*, 317 U.S. 111 (1942).

ranging from strict construction to the Constitution to liberal and expansive; nonetheless, the current, and overall trend appears to be unidirectional.

(A) Early Commerce Clause Jurisprudence

In early United States history, the Supreme Court was relatively silent insofar as the Commerce Clause was concerned. It was not until the 1824 case of *Gibbons v. Ogden* that the Supreme Court rendered its first significant opinion on Commerce Clause jurisdiction.[57] *Gibbons* was the first Supreme Court case to declare that the right to regulate interstate commerce is an exclusive right of the federal government.[58] The case was decided in the midst of the Industrial Revolution in the United States; during a time where roads and bridges were inadequate to reach much of the country, and steamboats were an invaluable tool for transporting merchandise to ports, cities, and trade hubs. To secure funding to build much-needed infrastructure, and to expand and facilitate trade, some States began to offer private businesses exclusive access to waterways in exchange for funding to build new roads.[59]

In 1798, New York was among the States who took advantage of this approach by granting a company, Fulton and Livingston, exclusive access to operate steamboats on its waterways.[60] Over the next decade, Fulton and Livingston's contract was extended while competitors took advantage of other opportunities to purchase exclusive access rights.[61] Aaron Ogden was a subcontractor for Fulton and Livingston, a company that had an exclusive license to the use of New York seaports.[62] In 1818, Fulton and Livingston filed a complaint with the State, and Gibbons was stopped and issued an injunctive order, prohibiting him from crossing the waterways between New Jersey and New York in his steamboat.[63] Although Gibbons never requested permission from New York State to cross local waterways, the Federal government issued Gibbons a permit "to navigate the waters of the United States, by steam or otherwise, for the purpose of carrying on the coasting trade."[64] In response to the injunction, Gibbons claimed that the New York Law is unconstitutional, and violated the Commerce Clause.[65]

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[57] Andrew Weiss, *Commerce Clause in the Cross-Hairs: The Use of Lopez-Based Motions to Challenge the*
Constitutionality of Federal Criminal Statutes, V. 18 No. 5 Stanford Law Review 1437.
[58] James M. McGoldrick, Jr., *The Dormant Commerce Clause: The Origin Story and the "Considerable Uncertainties"—1824-1925*, Creighton Law Review 243-244 (June 2019).
[59] Daniel B. Moskowitz, *A Federal Take on Trade,* V. 54, Issue 2 American History 22-23 (Jun 2019).
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Gibbons v. Ogden,* 1824 U.S. Lexis 370, 8 (1824).
[64] *Id.* at 301.
[65] *Id.* at 186.

The case was eventually brought to the United States Supreme Court, where Chief Justice John Marshall wrote the landmark opinion that permanently altered the balance of power between the State and Federal Governments. The opinion focuses primarily on the definition of "interstate commerce," and how that power affects States' rights to regulate travel and trade within its borders. In the Court's opinion, the word "commerce," in the context of Article I, Section 8 of the Constitution, is one that extends beyond "buying and selling, or the interchange of commodities."[66] In *Gibbons*, "commerce" consists, not only of the physical exchange of goods and services, but of any action that affects, facilitates, or hinders sales and trade. The Court's opinion describes commerce as a form of "intercourse" that consists of "all laws concerning navigation."[67] Ogden defended his position, citing the Tenth Amendment, and claiming that the Constitution gives States the rights to regulate themselves so long as no law or constitutional provision exists in conflict with State action.[68] The Supreme Court conceded to Ogden's claim, however, stated that the Commerce Clause is such a provision, as it is an exclusive right granted to the Federal Government under the Constitution.[69] The Court further justified its answer, claiming that the Supremacy Clause provides that the federal need to facilitate interstate commerce supersedes the economic needs of individual States.[70]

In a single historical instant, the Supreme Court dramatically shifted the balance of power in favor of the Federal Government. By broadly interpreting the definition of a single word—commerce—the Supreme Court expanded the reach of the Federal Government, and dramatically altered, not only the manner in which Commerce Clause jurisprudence is decided, but how the Constitution is interpreted as a whole. Because of the *Gibbons* decision, the word "commerce" has shifted from an enumerated power to regulate transactions, to a body of law in which the Federal Government has the exclusive right to control not only trade and sales, but anything that may affect such processes. Since *Gibbons* the Federal Government has used its power to regulate interstate commerce to control nearly every aspect of American business, including those that do not restrict travel, so long as its exercise bears a distant connection with interstate commerce. More directly, the *Gibbons* decision has laid the foundation for the creation of the entire Department of Transportation, which regulates roadways and travel, not only across state lines, but within states as well.[71]

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[66] *Id.* at 189-190.
[67] *Id.*
[68] *Id.* at 200-201.
[69] *Id.*
[70] *Id.* at 210-211.
[71] Department of Transportation, *FY 2021Budget Highlights*, pg. 5, https://www.transportation.gov/sites/dot.gov/files/2020-02/BudgetHightlightFeb2021.pdf (Last visited Feb. 17, 2020) (Today, the Department of Transportation alone projected budget of $89 billion for the year 2021, all of which is used in the creation, and enforcement of travel-related regulations,

(B) Scaling Back

In the 1890s, the Supreme Court began to rule against the constitutionality of federal laws that attempt to extend the scope of the Commerce Clause to businesses engaged exclusively in intrastate transactions. *A.L.A. Schechter Poultry Corp v. United States* is a landmark case that is representative of this trend. The appellants in this case, owners and operators of A.L.A. Schechter Poultry Corporation and Schechter Live Poultry Market, faced criminal charges for violating the "Live Poultry Code," among other federal regulations.[72] The appellants' business consisted of purchasing chickens for slaughter and resale.[73] The appellants' business was conducted almost exclusively in Brooklyn NY, although they occasionally made purchases in Philadelphia.[74] The Live Poultry Code "authorizes the President to approve codes of fair competition," and limit monopolies.[75] It also contains provisions that regulate various aspects of employment and operation of factories, and establishes a fifty cent per hour minimum wage, limits the number of hours an employee is allowed to work per week, and sets a minimum age to be for eligible employment.[76]

In their defense, the appellants challenged the Live Poultry Code, asserting that the Code violates the Commerce Clause, and undermines the authority that the Constitution grants to the Federal Government.[77] The government defended its position, stating that "adoption of codes must be viewed in the light of the grave national crisis."[78] While the Court acknowledged that exigent circumstances, including those under which the Federal Government has made its decision, must be taken into consideration, it ruled that "extraordinary conditions do not create or enlarge constitutional power," and "extra-constitutional authority…[is] precluded by

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none of which would have been possible without the legal foundation established by *Gibbons v. Ogden*.).

[72] *A. L. A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 519-21 (1935) (Appellants were originally charged eighteen counts of violation of the Code of Fair Competition for the Live Poultry Industry of the Metropolitan Area in and about the City of New York (Live Poultry Code), plus conspiracy to commit such acts. All but two charges for violation against the Live Poultry Code were upheld by the lower court).

[73] *Id.*

[74] *Id.* at 520.

[75] *Id*. at 521.

[76] *Id.* at 524.

[77] *Id.* at 519 (The defendants also claimed that the section of the Live Poultry Code that allows the President to approve of such codes is an "unconstitutional delegation of legislative power.").

[78] *Id.* at 528-529 (This case was decided in 1935, less than a decade after the Great Depression. In this case, the government claimed that the grave economic conditions gave rise to the need to enact legislation to mitigate the strain on the economy. The government claims that the legislation was enacted to facilitate national cooperation of companies involved in trade; however, the Court criticized the claim, and cited the code as "involuntary" and "coercive.").

the…Tenth Amendment."[79] As the entirety of the defendants' business was conducted within New York State, "the interstate transactions in relation to that poultry…ended" as the transactions in question "do not concern the transportation of the poultry from other States to New York."[80] To the question of where the Court draws the line concerning intrastate commerce's effect on interstate commerce, the Court states that "where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power."[81] The Court concluded that the hours and wages of employees engaged in local business "have no direct relation to interstate commerce," and that the Live Poultry Code "was not a valid exercise of Federal power."[82] The significance in this ruling lies in the imposition of jurisdictional limits on federal regulation of interstate commerce. It recognizes that, while the Constitution grants the Federal Government the power to regulate nearly every aspect of American business, its scope is limited to those whose business transactions transcend State borders.[83]

When reading cases on constitutional authority, it is necessary to look at not only the facts and circumstances surrounding individual cases, but more importantly, how they can be applied to other situations. The Live Poultry Code was intended to improve the lives of the working class. It established minimum wages, imposed maximum work hours, and abolished child labor; but in the context of jurisprudence on federal jurisdiction, Congress' intentions, and the good that a law is intended to achieve, is irrelevant if it simultaneously subverts Constitutional authority. *A.L.A. Schechter Poultry Corp.* is one of very few cases in United States history that imposes hard limitations on how broadly the Commerce Clause may be interpreted. The appellants in this case almost never conducted business outside their residential State, but were, nevertheless, subject to criminal charges under Congress' authority to "regulate

[79] *Id.*
[80] *Id.* at 542-43.
[81] *Id*. at 546.
[82] *Id*. at 549-50.
[83] *Id*. at 529-142 (In *A.L.A. Schechter Poultry Corp.*, the also ruled on the issue concerning the legislature's misappropriation of its constitutional authority by allowing the President to approve codes is another matter of great importance to Commerce Clause jurisprudence. In the Supreme Court's opinion, Chief Justice Charles Evans Hughes writes that the Court must look to whether Congress, in authorizing an act allowing the President to enact laws, has "abdicated" or "transferred" "the essential legislation functions" granted to it by the Constitution. As Congress has issued few, if any guidelines for activity under the Live Poultry Code, the Court ruled that Congress has, in effect, authorized another party (the President) to carry out a power exclusively reserved for the legislature, and therefore, misappropriated the law-making power granted to it by the Constitution. For those reasons, the Court deemed the portion of the Live Poultry Code, authorizing the President to approve certain portions of the code "virtually unfettered," and unconstitutional. Because of the *A.L.A. Schechter Poultry Co.* decision, the power to enact laws that interfere with interstate commerce must, at a minimum, be approved by the Legislative Branch, and cannot be delegated to the Executive Branch.).

commerce… among the several States."[84] Without the precedent of *A.L.A. Schechter Poultry Corp.*, the "interstate" portion of "interstate commerce" would, in essence, be meaningless. Both the Legislative and the Executive branches of the Federal Government would have a green light to impose regulations concerning the manner in which *all* American companies conduct their business, regardless of where and with whom it is conducted, and the States would lose the little power they have to regulate their internal business matters.

(C) A New Wave of Federal Expansion

The freedom gained by the States through the *A.L.A. Schechter Poultry Corp.* decision was short-lived, as a wave of Supreme Court decisions in the mid-1900s brought a new rise in Federal power, and the requirement that a business be directly engaged in business that crosses State lines to fall within Federal jurisdiction under the Commerce Clause came to an end. In 1942, the Supreme Court once again broadened its definition of the Commerce Clause to include interstate activities that have an *indirect* effect on interstate commerce. One prominent example of this expansion of Federal jurisdiction is the case of *Wickard v. Filburn.*

Wickard begins with a man on a farm. Filburn, the appellee, owned a small farm, which he used to sell dairy, eggs, and poultry.[85] Filburn also planted and harvested wheat, a portion of which he sold, and the other part, he used to for personal consumption, to provide food for his animals, and to seed his ground annually.[86] In 1941, the Federal Government sought action against Filburn for exceeding the maximum volume of wheat production, per the Agricultural Adjustment Act of 1938.[87] The Agricultural Adjustment Act claims authority under the Commerce Clause, and is used to regulate foreign and interstate wheat distribution, and "to avoid surpluses and shortages and the consequent abnormally low or high wheat prices."[88] Filburn challenged the Act, and claims against him, stating that his wheat production is local in nature and that, at most, his crop had an *indirect* effect on interstate commerce.[89] After analyzing national profits compared to the area of land dedicated to wheat production, the Court held that because private consumption of wheat accounts for the biggest variable affecting the market, farming for private consumption does *directly* affect interstate commerce.[90] As for Filburn's claims that the local nature of

[84] U.S. CONST. art. I, sect. 8, cl. 3.
[85] *Wickard*, 317 U.S. 114.
[86] *Id.*
[87] *Id.* at 114-9 (Under the Act, Filburn was allotted a maximum wheat crop of 11.1; however, he sowed more than double the allotted amount, and ultimately harvested 11.9 acres of wheat.).
[88] *Id. at 115.*
[89] *Id.* at 119.
[90] *Id.* at 127.

his production exceeds the scope of the Commerce Clause, the Court stated that "there is no decision of this Court that such activities may be regulated where no part of the product is intended for interstate commerce or intermingled with the subjects thereof."[91]

The attitude the Supreme Court expressed in *Wickard* is representative of a sixty-year trend towards the broadening of Federal power under the Commerce Clause.[92] In a single opinion, *Wickard* eradicated the requirement set forth in *A.L.A. Schechter Poultry Co.* wherein a business must engage in business directly in multiple States for federal jurisdiction to apply. Because of the *Wickard* decision, the Federal Government has the power to regulate any individual activity that can affect a market that spans across multiple states, *if enough individuals decide to engage in it,* and regardless of whether the activity is commercial in nature. While the logic in *Wickard* may seem reasonable when it is applied to Federal regulation of the wheat industry, it is cause for concern when examining other aspects of life for which it can be applied. For example, can Congress pass a law limiting the amount of groceries that stores that only sell locally sourced produce can sell? Using the same logic as *Wickard*, the restaurant business is a thriving industry that engages in both interstate and international commerce.[93] As the trend towards healthier eating habits continues to rise, some may choose to eat exclusively from home. While any individual that chooses to eat from home may not have any effect at all on interstate commerce, if enough people choose to exclusively eat from home, it can collapse the entire restaurant industry; therefore, grocery stores that only sell locally sourced produce directly can affect interstate commerce. While this is an extreme example, and a bill limiting grocery sales is unlikely to pass any time in the near future, given the breadth of power established by *Wickard*, such laws, and ones that are similar in scope, are not outside of congressional reach.

Another example of the expanding era of Commerce Clause jurisprudence involves a case wherein the appellant challenged the federal government's authority to enforce Title II of the Civil Rights Act of 1964.[94] The Act was created based on a request from President Kennedy to "promote the general welfare by eliminating discrimination based on race, color, religion, or national origin."[95] Under the Commerce Clause, the Act extended protections against discrimination to consumers, and prohibited business owners from refusing service to people because of their race.[96] *Heart of*

[91] *Id.* at 120.
[92] *See supra* note 19, at 1379.
[93] Many restaurants source their food and have chains in multiple states and countries. McDonalds, for example, has restaurants in nearly every state and country.
[94] *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 242 (1964).
[95] President John F. Kennedy, as cited in *Id.* at 245.
[96] *Id.* at 247.

Atlanta Motel, Inc. v. United States concerned an innkeeper that owned and operated a motel in Atlanta, Georgia.[97] Because of the hotel's proximity to two interstate highways, approximately twenty-five percent of the hotel's patrons came from other States however, the entire operation of the Heart of Atlanta Motel was conducted within the State of Georgia.[98] When the Civil Rights Act was enacted, the innkeeper sought injunctive relief against its enforcement, claiming a lack of Federal jurisdiction over the operation of his business.[99] As a regular part of the motel's operations, the innkeeper profiled patrons, and refused service to those who did not meet his standards on the basis of race. As part of his challenge to the Civil Rights Act, the innkeeper expressed his intentions to continue this practice.[100]

In his complaint, the innkeeper claimed that the Act violated his Fifth Amendment rights, and "deprived [him] of the right to choose [his] customers and operate [his] business as [he] wishe[d].[101] The Supreme Court ruled in favor of the Federal Government, and held that the Commerce Clause, alone is sufficient grounds for upholding the Act.[102] The Court defers to *McCullough v. Maryland* in concluding that the Constitution grants the Federal Government the power to enact laws that regulate intrastate commerce, so long as it *has an effect* on interstate commerce.[103] The Court ruled that because the innkeeper's business serves travelers from outside the state, the business does effect interstate commerce, "however 'local' [his] operations may appear," and therefore, he is bound to restrain from racially discriminating against his patrons.[104]

Despite the good intentions behind the Civil Rights Act, the holding in this opinion has implications that extend beyond the prohibition of racial discrimination. Through *Heart of Atlanta Motel*, the Supreme Court opinion has, once again, expanded the power of the Federal Government by broadening Commerce Clause jurisdiction to cover businesses that operate exclusively within a state, so long as customers from outside the State patronize the establishment. Part of what makes the *Heart of Atlanta Motel* decision troubling is that it does not provide a standard for determining how much patronage from out-of-state clients is required to declare that a business is engaged in interstate commerce. Would a single customer suffice? What if a business does not track where their patrons come from? Could there be an automatic presumption that businesses serve a certain percentage of out-of-state clientele?

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[97] *Id.* at 243.
[98] *Id.*
[99] *Id.* at 242.
[100] *Id.* at 243.
[101] *Id.* at 243-44.
[102] *Id.* at 250.
[103] *Id.* at 258.
[104] *Id.* at 258, 261.

With interstate travel becoming progressively more accessible, the logic used to regulate the Heart of Atlanta Motel has the potential to extend to virtually all businesses.

(D) New Beginnings?

The 1995 decision of *United States v. Lopez*, once again, marked a new era of jurisprudence surrounding the Commerce Clause. This was the first Supreme Court case in sixty years that ruled that Congress exceeded its authority under the Commerce Clause.[105] In *Lopez*, a student was arrested for bringing a gun to school, a direct violation of the Gun Free School Act of 1990.[106] The student challenged the law, calling it unconstitutional on the grounds that Congress has exceeded its scope of power by attempting "to legislate control over our public schools."[107] The Court ruled that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."[108]

When this case was first decided, it was viewed as the beginning of a new trend towards increasing judicial restraint in Commerce Clause jurisprudence. In only a year after the *Lopez* decision, motions to review the constitutionality of decisions concerning Commerce Clause jurisprudence were filed in more than eighty districts.[109] As time passes, the Supreme Court undergoes alternating phases of strict and loose construction of the Commerce Clause; the overall trend, however, seems to point towards a slow dissolution of congressional standards, and evermore encroachment on the States' Tenth Amendment right to regulate intrastate commerce. Despite the outcome of the *Lopez's* decision, efforts to scale back federal power are inconsistent, at best. Shortly after *Lopez* was decided, President Clinton, in his quest to "find a way to ban firearms in or near schools," and to solve the jurisdictional issue presented by the decision, proposed that Congress amend the act to require that the government prove firearms brought into school zones have traveled across state lines or are otherwise engaged in interstate commerce.[110] In response, "Congress changed the gravamen of the offense from possessing a firearm in a school zone to possessing a firearm 'that has moved in or that otherwise affects

[105] *See supra* note 19, at 1379.
[106] *See Lopez*, 514 U.S. at 551.
[107] *Id*.
[108] *Id.* at 551, 567.
[109] *See supra* note 58, at 1432.
[110] John M. Scott, *Constitutional Law—Supreme Court Invalidates Federal Gun-Free School Zones Act. United States v. Lopez, 115 S .Ct. 1624 (1995),* University of Arkansas at Little Rock Law Review. Vol. 18, Issue 3, 513, 530 (1996).

interstate or foreign commerce' in a school."[111] Regardless of the verbiage of the law, however, the intent of the Gun-Free School Zones Act is to use a the constitutional power to regulate interstate commerce to federally regulate an inherently non-economic activity.

In 2005, a decade after *Lopez,* the Supreme Court heard *Gonzalez v. Raich* and rendered a decision upholding the *Wickard* decision, as well as a Federal law that attempts to regulate intrastate activity. *Gonzalez v. Raich* concerns the Compassionate Use Act (CUA), a statute passed in 1996 by the California State Legislature.[112] The CUA legalized, with restrictions, the use of marijuana for medicinal purposes, despite possession, distribution, and sale of the drug being illegal under federal law at the time.[113] In 2002, the respondents in *Gonzalez* were prescribed medicinal marijuana, in compliance with CUA, to treat serious medical conditions.[114] Marijuana, at that time, was the only substance known to effectively treat the respondents' ailments. That August, however, the Federal Government became aware of the respondents' respective sources for the drug and destroyed the plants.[115] In response to the actions of the federal officers, the respondents sought injunctive relief from the courts, and challenged the Federal Government's jurisdiction to regulate the use of marijuana under the Commerce Clause.[116] The Supreme Court granted *certiorari* to resolve discrepancies between various lower court opinions on the issue, and to address an important question concerning Commerce Clause jurisprudence: Does the Constitution allow the Federal Government to regulate Schedule I substances[117] grown, harvested, and consumed within a single state?[118] In a 5-4 decision, the Supreme Court answered yes.[119]

In *Gonzalez,* the Supreme Court defers to *Wickard,* and ruled that the respondents' use of marijuana falls within Commerce Clause jurisdiction because it "substantially affects interstate commerce."[120] According to the Supreme Court, the fluctuations in

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[111] Seth J. Safra, *The Amended Gun-Free School Zones Act: Doubt as to Its Constitutionality Remains,* Duke Law Journal, Vol. 50, No. 2, pp. 637, 638 (Nov., 2000).
[112] *Gonzalez v. Raich*, 545 U.S. 1, 5 (2005).
[113] *Id.*
[114] *Id.* at 6-7.
[115] *Id.* at 7.
[116] *Id.* at 8.
[117] The United States Drug Enforcement Agency, *Drug Scheduling,* https://www.dea.gov/drug-scheduling (Last visited Feb. 17, 2020) (The United States Drug Enforcement Agency classifies marijuana as a Schedule I drug. "Drugs, substances, or chemicals are defined as drugs with no currently accepted medical use and a high potential for abuse." Per the DEA, the Schedule I drugs also include substances that are not listed, but are "substantially similar to or is represented as being similar" to listed substances.).
[118] *Gonzalez*, 545 U.S. at 8-9.
[119] *Id.* at 4, 9.
[120] *Id.* at 17.

demand by the use of home-grown marijuana could influence the interstate market for illicit substances, and therefore, affect interstate commerce.[121] The Court further justified its decision by stating that a rise in production of marijuana, even if grown and consumed locally, would also "frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety."[122]

The logic used to defend the *Gonzalez* and *Wickard* decisions persist to this day as the Supreme Court continues to rely on the intractability of illicit substances to expand federal jurisdiction under the guise of interstate commerce. In a 2016 decision, the Supreme Court, ruled that the Federal Government has jurisdiction over anyone who obstructs, delays, or otherwise affects persons engaged in interstate commerce, including dealers of illegal substances.[123] The Court defers to the *Gonzalez* decision in ruling that the sale of illicit substances qualifies as interstate commerce, even if the drugs, or persons engaged in its transactions, never leave the state.[124] "If the Government proves beyond a reasonable doubt that a robber targeted a marijuana dealer's drugs or illegal proceeds, the Government has proved beyond a reasonable doubt that commerce over which the United States has jurisdiction was affected."[125] Although federal power over intrastate matters fluctuate over time, overall trends, and the nature of power itself, suggest progressive and incremental expansion, with no clear indication of ever so much as slowing down.

Conclusion

After learning about the history of Necessary and Proper, and Commerce Clause jurisprudence, how is federalism affected, and why does all this matter? While the Constitution was designed to be steadfast and consistent, the Federal government has demonstrated a general tendency to use backwards logic and contradictory statements to achieve its goals. While many laws and policies enacted under the auspices of interstate commerce begin with good intentions, the use of linguistic gymnastics to pass them can lead to unintended consequences, including the degradation of plain-language rights and restrictions enumerated in this nation's founding document. The Founding Fathers meticulously crafted every word of the Constitution, and with only a few pages of text, they created a nation with built-in safeguards against tyranny. One vital tool they used to achieve this was the creation of federalism, or the separation of powers between the State and Federal

[121] *Id.* at 19.
[122] *Id.*
[123] *Taylor v. United States*, 136 S. Ct. 2074, 2077-2078 (2016).
[124] *Id.* at 2087 (*Taylor* upheld the *Gonzalez* decision that "the Commerce Clause gives Congress authority to regulate the national market for marijuana, including the authority to proscribe the purely intrastate production, possession, and sale of this controlled substance.").
[125] *Id.* at 2077.

governments; a device that further reinforces the system of checks and balances between the Executive, Legislative, and Judicial branches, as well as the States' ability to experiment with laws, as explained by Justice Brandeis.

Federalism is integral to the function of American society because the danger of a rogue central authority with little oversight far outweighs the dangers of a handful of states enacting laws that conflict with the customs and privileges that the rest of the country enjoys. It allows States to enact laws that work for their individual needs, and not necessarily those of other States. It promotes diversity of culture and thought, offering residents the ability to "vote with their feet," and to move to a State that better suits their familial, ethical, and economic needs. Without federalism, the United States government would lose the very thing that makes it special, and reduce itself to a single governing body that uniformly and indiscriminately enacts laws over an immense swath of land with no regard for local concerns, and that is why the unfettered power of judicial review is so disquieting. Admittedly, many of the opinions regarding the Commerce and Necessary and Proper Clauses are genuinely meant for the benefit of the people, but where should the line between judicial review and original intent be drawn? The Constitution was written with specific language; every word, and every phrase was considered with care and written with purpose, so why should "necessary" mean "convenient," when the plain-language meaning of the word connotes a need?

Despite the Constitution only allowing a limited number of defined federal powers, the Supreme Court's standard of convenience has allowed the Federal Legislature to grow exponentially, encompassing nearly every aspect of American life, overshadowing the power of the States one case at a time. Although the trials faced in America today are far from the oppression faced by colonists under the suffocating reign of King George III, the progression of expansion is, at the very least, cause for concern.

'THIRD WAVE' OF BAIL REFORM: CREATING A PRETRIAL AND BAIL SYSTEM THAT FOSTERS RACIAL AND FINANCIAL EQUALITY

Nefertari Elshiekh

I. Introduction

Americans, legislators, and advocacy groups are urging legislative action be taken to reform the bail system. Specifically, they seek to reform not only the use of cash bail, but the entire pretrial detention system. Proponents of reform argue that cash bail unfairly benefits the wealthy, who are more financially equipped to post bail, while the indigent must wait for trial in jail because they cannot afford it.[1] This 'two-tiered' system tips the scales inequitably in favor of the wealthy and forces those lacking financial resources to remain behind bars, even for crimes that would result in a lesser period of time in incarceration upon conviction than the actual pretrial detention. Such current system of cash bail fosters inequality and discrimination within the legal system and aids in an unnecessarily high number of pretrial detainees, the majority of whom come from disadvantaged socioeconomic classes and minority backgrounds.[2] Remaining in jail for an extended period of time has the ability to destroy the pretrial detainee's life even if he or she is found not guilty. The consequences of lacking the resource to post bail is greater than simply not returning home. While in jail, defendants are unable to work or attend school, resulting in a cascade of problems in the future. But the current system is not only costly for the defendants; high rates of pretrial detention cost the state an exorbitant amount of taxpayer money.[3]

The original intention behind bail was to incentivize defendants to appear on their court dates. Opponents caution that releasing defendants without bail, may discourage them from answering to the court for their crime. While most people who oppose eliminating cash bail agree that the system needs to be reformed, there is a lack of consensus on how to go about it. Since California became the first state to pass

[1] Seema Jayachandran, *Unable to Post Bail? You Will Pay for That for Many Years,* The New York Times (March 1, 2019), https://www.nytimes.com/2019/03/01/business/cash-bail-system-reform.html.

[2] Jonah B. Gelbach & Shawn D. Bushway, *Testing for Racial Discrimination in Bail Setting Using Nonparametric Estimation of a Parametric Model* (August 20, 2011), http://dx.doi.org/10.2139/ssrn.1990324.

[3] Bernadette Rabuy, *Pretrial Detention Costs $13.6 Billion Each Year,* Prison Policy Institute (February 7, 2017), https://www.prisonpolicy.org/blog/2017/02/07/pretrial_cost/.

a law eliminating cash bail in August 2018, other states across the nation have joined in, implementing varying levels of reform such as the use of risk assessment tools and consideration of the defendant's financial situation before setting bail.[4] From New York to Maryland, this "third wave of bail reform" is sweeping the nation in an attempt to revamp a system that promotes "wealth-based incarceration." [5]

II. The History of Cash Bail

The use of bail has been around since the days of colonial America. After America gained its independence in 1776, it implemented its own bail policy, enumerated in the Judiciary Act of 1789.[6] Paralleling English common law, the Act stated, "Those shall be let to bail who are apprehended for any crime not punishable in life or limb."[7] In other words, bail was offered to those who were charged with non-capital crimes. But this changed following the Civil War. The South began to use bail as a persecution tactic, depriving African Americans of it even if they were charged with misdemeanor crimes.[8]

This type of undue detention was not remedied until centuries later when the most substantive change since 1789 happened with the Bail Reform Act of 1966.[9] This Act favored defendants charged with non-capital crimes be released on their own recognizance.[10] However, if the judge had reason to believe that the defendant would not appear at trial, the judge could impose release conditions to ensure the defendant would appear, but it was supposed to be the "least restrictive condition."[11] As a result, this Act "created a presumption for releasing a suspect with as little burden as necessary."[12] It aimed to limit pretrial detention by promoting defendants' being released on their own recognizance as opposed to through cash bail since the latter method restricted the impoverished from being released. However, one controversial component of this Act was that for those charged with non-capital crimes, such

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[4] Vanessa Romo, *California Becomes First State to End Cash Bail After 40-Year Fight,* National Public Radio (August 28, 2018), https://www.npr.org/2018/08/28/642795284/california-becomes-first-state-to-end-cash-bail.

[5] Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. Crim. L. & Criminology 701 (2018), https://scholarlycommons.law.northwestern.edu/jclc/vol108/iss4/3.

[6] An Act to Establish the Judicial Courts of the United States, 1st Cong. § 33 (1789)

[7] *Id.*

[8] Shima Baradaran Baughman, *The History of Misdemeanor Bail,* 98 B.U. L. Rev. 837, 858 (2018).

[9] S. Res. 1357, 89th Cong. (1966) (enacted)

[10] *Id.*

[11] *Id.*

[12] *History of Bail,* Professional Bail Agents of the United States, https://www.pbus.com/page/14.

conditions of release would be imposed based on the likelihood that the defendant would fail to appear not because of the perceived danger of the defendant. In fact, the perceived danger was not taken into consideration when deciding the conditions of release. Rising crime rates led to an amendment to the 1966 Act in 1984, which stated that the perceived danger of the defendant would be a criterion for determining release.[13] This prompted a shift in which the use of cash bail increased while the use of release on recognizance decreased, ultimately contributing to the increase in pretrial detention rates for misdemeanor crimes. This sparked criticism as people believed the new criteria denied defendants their right to innocent until proven guilty because now they could be held without bail (even for misdemeanors) before any guilt was ever established, just because of the perceived danger.[14]

III. The Bail and Pretrial System Process

The main objectives of the pretrial system are to guarantee that the defendant will appear and ensure that additional crimes are not committed while limiting "restrictions on the defendant's liberty" because — as mentioned before — at this moment, the defendant has not been found guilty.[15] A judge may opt for conditional release, in which the defendant must obey specific in exchange for his release pending trial. Some of these restrictions include the defendant surrendering his passport, drug and/or alcohol testing, or a restraining order. Further, bail, which is the paramount method used to reduce the risk of failing to appear, is also categorized as conditional release. With bail, the defendant must post the specified amount, which is used as insurance for his appearance.[16] If the defendant shows up to all proceedings, he will get the money back at the end of the case.[17] However, if the defendant fails to appear, the bail is not returned.[18]

Some jurisdictions only require a percentage of the bail to be posted in order for the charged person to be released. Alternatively, if the defendant is unable to post bail themselves, a bail bonds company can pay the bail, with the defendant having to pay

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[13] H.J. Res. 648, 98th Cong. (1984) (enacted)

[14] *Preventative Detention*, Pretrial Justice Center for Courts (September 2017), https://www.ncsc.org/~/media/Microsites/Files/PJCC/PJB%209%20-%20Preventive%20Detention%20Brief%20FINAL.ashx.

[15] Will Dobb & Crystal Yang, *Proposals for Improving the U.S. Pretrial System,* The Hamilton Project (March 2019), https://www.brookings.edu/wp-content/uploads/2019/03/DobbieYang_PP_20190319.pdf.

[16] Adureh Onyekwere, *How Cash Bail Works,* Brennan Center for Justice (December 10, 2019), https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works.

[17] *Id.*

[18] *Id.*

a non-refundable fee, typically ten percent of the total bail amount, to the company.[19] If the defendant fails to appear, they are responsible for paying the remainder of the bail to the company.[20] A defendant can also have an unconditional release, in which the defendant is released on their own recognizance and promises to appear at all court proceedings. However, aside from being expected to show up at court and be a law-abiding citizen, there is no financial (or otherwise) incentive to ensure that he appears with this type of release.[21]

Within forty-eight hours of being arrested, the defendant will have a determination of probable cause hearing, and many jurisdictions incorporate a bail hearing in this meeting.[22] However, in most cases bail hearings are only a few minutes long, and often the defense counsel is not even present.[23] Since the hearing is brief, "the bail judges do not often take the time to make a careful determination about what bail an arrestee can realistically afford."[24] In other instances, a bail schedule is used, which utilizes a set bail amount given the offense, thus not taking into consideration individual circumstances such as the defendant's socioeconomic background and whether or not it is his first arrest.[25]

IV. Faults of the Bail System: Studies of Race and Wealth

Surprisingly, the majority of the US jail population has not been found guilty of a crime yet because they are pretrial detainees, meaning they are awaiting trial from jail. It is estimated that pretrial detainees constitute two-thirds of the jail population.[26] However, this number is on the rise, prompting questions regarding the constitutionality of the monetary bail system and whether it unduly criminalizes the poor. Under the current bail system, the less affluent remain detained prior to trial at substantially higher rates than the wealthy with this disproportionately impacting

[19] *Id.*

[20] *Id.*

[21] *Release on Own Recognizance,* Justia (May 2019), https://www.justia.com/criminal/bail-bonds/release-on-own-recognizance/.

[22] Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, The Academy for Justice (2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/2_Reforming-Criminal-Justice_Vol_3_Pretrial-Detention-and-Bail.pdf.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing,* 131 Harv. L. Rev. 1125 (2018).

people of color and Hispanics compared to white people.[27] Findings show that white people are more likely to be released on recognizance than black people.[28] In addition, the bail offered to black people ages eighteen to twenty-nine is "significantly higher" than the bail offered to other racial groups of similar crimes.[29] As a result, 41.6 percent of African American defendants are detained prior to trial in contrast to only 34.3 percent of white defendants.[30]

The story of Kalief Browder's incarceration and eventual suicide in 2015 received national attention, eliciting conversations regarding the need for bail reform. In 2010, Browder, who was sixteen years old at the time, was arrested for allegedly stealing a backpack.[31] His bail was set at $3,000, but since his family could not afford that, he was sent to Rikers Island, one of New York's most notorious jails.[32] He was imprisoned for three years, two of which were in solitary confinement, while he awaited trial.[33] In the end, the Bronx District Attorney's Office decided to dismiss all charges.[34] Therefore, he spent three years in jail, despite not being found guilty of a crime, meanwhile the maximum sentence for those found guilty of misdemeanor petty theft in New York is only twelve months.[35] In other words, Browder, an innocent kid, served triple the jail time compared to a person found guilty of a similar crime because he came from a poor family that could not afford bail. His lengthy incarceration pending trial prevented from receiving his high school diploma at the same time as the rest of his peers, one consequence of remaining in jail while he awaited trial. Two years after his release, Browder committed suicide.[36] The bail system in place allowed a sixteen-year-old child to spend three years in jail before he even received a trial to determine

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[27] Shima Baradaran Baughman, The Bail Book: A Comprehensive Look at Bail in America's Criminal Justice System (2017).

[28] *Bail Fail: Why the US Should End the Practice of Using Money for Bail*, Justice Policy Institute (September 2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail_executive_summary.pdf.

[29] *Id.*

[30] Baughman, *supra* note 27.

[31] Udi Ofer, *Kalief Browder's Tragic Death and the Criminal Injustice of Our Bail System*, ACLU (March 15, 2017), https://www.aclu.org/blog/smart-justice/kalief-browders-tragic-death-and-criminal-injustice-our-bail-system.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] N.Y. Penal Law § 70.15

[36] Michael Schwirtz & Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide,* The New York Times (June 8, 2015), https://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-riskers-island-for-3-years-without-trial-commits-suicide.html.

his guilt, three years for not only a minor crime, but one he didn't even commit. While Browder's story was tragic, it is not an anomaly, and it is stories like Browder's that have prompted people from politicians and advocacy groups right up to celebrities like Jay-Z to demand the end to cash bail.

Even more striking is the story of two San Francisco residents: Joseph Warren and Tiffany Li. Warren, who is African American, was arrested for welfare fraud, and his bail was set at $75,000.[37] He denied allegations that he stole $5,000 from the government, but because he could not afford bail, his options were to remain in jail pending trial or to accept a plea.[38] When *The Guardian* interviewed him after spending a month in jail, he described how he rarely eats the food, and since he is gay, he lives every day in constant fear that he will be assaulted.[39] Further, he admitted to having suicidal thoughts.[40] Suicide is the number one death amongst American prisoners, and unfortunately the prison conditions that result in high suicide rates are not exclusive to prisoners that have actually been convicted of a crime.[41] Meanwhile, Li, who is a real estate heir, was arrested for conspiring to murder her children's father and her bail was set at $35 million.[42] Due to her wealth, she posted bail and was able to await trial from her home. Therefore, despite being charged with a more serious and violent crime, Li was set free while Warren remained in jail for a lesser crime solely because of his inability to pay his bail. It is indisputable that something is egregiously wrong with a system that lets a person who allegedly conspired to commit murder free pending trial, but not someone who allegedly committed welfare fraud, when the former is clearly more of a danger to society than the latter.

V. Shift away from Release on Recognizance and toward Cash Bail

The Supreme Court established that "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[43] An individual should only be detained prior to trial if it is believed that they pose a risk to society or that they will fail to appear. However, if a defendant has been offered cash bail, a judge has

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[37] Sam Levin, *Wealthy Murder Suspect Freed on Bail as Man Accused of Welfare Fraud Stuck in Jail,* The Guardian (April 25, 2017), https://www.theguardian.com/us-news/2017/apr/25/california-bail-system-tiffany-li-joseph-warren.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] Alexi Jones, *New BJS Report Reveals Staggering Number of Preventable Deaths in Local Jails,* Prison Policy Initiative (February 13, 2020), https://www.prisonpolicy.org/blog/2020/02/13/jaildeaths/.

[42] Levin, *supra* note 37.

[43] *United States v. Salerno*, 481 U.S. 739, 755 (1987).

determined that they do not pose a substantial risk. Yet many of said defendants remain in jail. While the amount of bail differs depending on the state and crime, the median bail for felonies is around $10,000, but even lesser amounts are still too high for poor people, resulting in defendants remaining in jail over bail as low as $250.[44] In fact, only 15 percent of defendants are able to post bail set at $500 or less.[45] The excessive bail clause of the Eighth Amendment ensures that bail is not so "excessive" that only wealthy defendants would be able to pay it.[46] Yet proponents of reform argue that 'excessive' is both relative and subjective, and once paid can result in additional financial hardships such as paying for food and other expenses. As a result, even defendants who committed misdemeanors and pose no serious flight or public safety risk have to remain in jail simply because of their financial situations. In 1992, it was most common for defendants to be released on their own recognizance, but by 2006, the use of this form of release decreased by 33 percent.[47] In 2006, nearly seventy percent of defendants who were charged with a felony were offered cash bail, representing a shift consistent with the current bail system in which cash bail is favored over release on recognizance.[48]

What is also concerning is that while America only accounts for four percent of the world's population, it houses almost twenty-five percent of the world's total jail population and nearly twenty percent of the pretrial jail population.[49] On average, there are over five hundred thousand people in American jails that have not been convicted of a crime yet, and many of those people have been offered bail, but cannot afford it.[50] Of all those charged with a felony and are waiting for trial from jail, only five percent are being held without bail.[51] In other words, aside from that small percentage, if they were able to pay their bail, they would be able to return home to await trial, but instead, they remain locked up. Further, most pretrial detainees were charged with low level crimes. Research indicates that seventy-five percent of those

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[44] Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time,* Prison Policy Initiative (May 10, 2016), https://www.prisonpolicy.org/reports/incomejails.html.

[45] Nick Pinto, *The Bail Trap*, The New York Times (August 13, 2015), https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html.

[46] U.S. CONST. amend. VIII.

[47] Baughman, *supra* note 27.

[48] *Id.*

[49] *Mass Incarceration*, ACLU, https://www.aclu.org/issues/smart-justice/mass-incarceration.

[50] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Policy Initiative (March 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html.

[51] Baughman, *supra* note 27.

held pending trial were charged with minor crimes such as drug or property related crimes.[52] For a country founded on the idea of innocent until proven guilty, it is particularly striking that there are more people awaiting trial than there are people jailed for a drug crime. But this isn't a problem that only affects the defendants because the more people who remain in jail, the more costly it is for taxpayers. In fact, it is estimated that $38 million of taxpayer money is spent on pretrial detainees per day, for a total of $14 billion annually.[53]

VI. Consequences in Remaining Incarcerated Pending Trial

Further, those held pretrial have higher rates of conviction than their counterparts who were released because they are more likely to accept a plea, even if they didn't commit the crime, in order to get out of jail.[54] However, if they choose to go to trial, research shows that their likelihood of being convicted is thirteen percent greater than their counterparts who were released pending trial.[55] Further, not only are they more likely to receive a sentence that involves jail time, but they tend to receive a sentence that is forty-two percent longer.[56] Those who remain in jail pending trial have difficulty in gathering the resources necessary to present a strong case. It is harder for them to find witnesses and work with their counsel to prepare their defense whether it be because they have limited access to a phone or they are placed in a jail far away from their counsel, among various other reasons.[57] Regardless of whether they go to trial and are found not guilty, those detained prior to trial have already paid the non-monetary costs of being incarcerated from the stigma to losing their job, house to even losing custody of their children. One staggering observation is that pretrial detainees accrue forty one percent more non-bail court fees than their

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[52] Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, NYU Journal of Legislation and Public Policy (2013), https://www.nyujlpp.org/wp-content/uploads/2014/01/Jones-Give-Us-Free-16nyujlpp919.pdf.

[53] Nick Wing, *Our Money Bail System Costs U.S. Taxpayers $38 Million a Day,* HuffPost (January 24, 2017), https://www.huffpost.com/entry/money-bail-cost_n_58879342e4b098c0bba6d5c6.

[54] Hamilton Nolan. *Study: Pretrial Detention Makes Poor People Plead Guilty,* Splinter (January 26, 2018), https://splinternews.com/study-pretrial-detention-makes-poor-people-plead-guilt-1822448614.

[55] Juleyka Lantigua-Williams, *Why Poor, Low-Level Offenders Often Plead to Worse Crimes,* The Atlantic (July 24, 2016), https://www.theatlantic.com/politics/archive/2016/07/why-pretrial-jail-can-mean-pleading-to-worse-crimes/491975/.

[56] Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, SSRN Electronic Journal (2016).

[57] Wendy Sawyer, *Why Expensive Phone Calls Can Be Life-Altering for People in Jail - and can Derail the Justice Process,* Prison Policy Initiative (February 5, 2019), https://www.prisonpolicy.org/blog/2019/02/05/jail-phone-calls/.

counterparts who were released. This furthers the argument that cash bail contributes to a 'poverty trap,' in which those who were already unable to pay bail because of their socioeconomic standing now accrue even more court debt.[58] Additionally, research shows that pretrial incarceration is criminogenic because being detained pretrial increases the likelihood of committing another low-level crime by forty percent.[59]

Bail provides the opportunity for a defendant to not be punished with jail time before actually being convicted, thereby promoting 'innocent until proven guilty,' one of the most fundamental principles in the American legal system.[60] Yet, this opportunity is skewed in favor of the wealthy, who are more able to afford bail. As a result, impoverished people are forced to choose between suffering from financial hardship because of paying bail, languishing in jail even though they have not been convicted of a crime yet, or sacrificing their right to trial and accepting a plea in order to get out of jail. In 1979, California Governor Jerry Brown, advocated for bail reform in his State of the State Address, comparing bail to a "tax on poor people" with "thousands and thousands of people languish[ing] in the jails of this state even though they have been convicted of no crime."[61] He continued on to say, "Their only crime is that they cannot make the bail that our present law requires."[62] Nearly four decades later, in August 2018, Governor Brown signed Senate Bill 10, ending the use of cash bail in California.[63]

However, due to significant resistance from the bond industry, Senate Bill 10 is now on hold and will be up for vote on the November 2020 ballot. There are currently 3,200 licensed bail agents in California.[64] They face losing their jobs should this bill that eliminates cash bail receive enough votes in November. The bond industry argues that this bill will contribute to releasing dangerous criminals while also eradicating a

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[58] Stevenson, *supra* note 56.

[59] John Mathews II & Felipe Curiel, *Criminal Justice Debt Problems,* American Bar Association (December 10, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/criminal-justice-debt-problems/.

[60] *Coffin v. U.S.*, 156 U.S. 432 (1895).

[61] Jazmine Ulloa, *California Gov. Jerry Brown Signs Overhaul of Bail System, Saying Now 'Rich and Poor Alike are Treated Fairly,'* Los Angeles Times (August 28, 2018), https://www.latimes.com/politics/la-pol-ca-brown-signs-bail-reform-20180828-story.html.

[62] *Id.*

[63] *Id.*

[64] Jazmine Ulloa, *California's Historic Overhaul of Cash Bail is Now on Hold, Pending a 2020 Referendum,* Los Angeles Times (January 16, 2019), https://www.latimes.com/politics/la-pol-ca-bail-overhaul-referendum-20190116-stoy.html.

"$2-billon national industry."[65] Further, Bill Armstrong, who is in the bail industry expresses economic concern: "The system will also miss out on a sizeable amount of money from the bond industry. We pay taxes on every bond we write."[66] While the estimates of how much this bill could cost vary widely, the Assembly Appropriations Committee estimate that it could cost "in the hundreds of millions of dollars annually" with other estimates placing the cost at $200 million per year.[67] However, the Assembly Appropriations Committee also acknowledged that this bill could result in "millions of dollars saved annually in jail costs if fewer defendants are held before trial."[68] Therefore, the economic consequences of eliminating cash bail are still uncertain.

VII. Implementation of Risk Assessment Tools

California is looking to replace the use of cash bail with risk assessment, using an algorithm to determine if the defendant should be released pending trial, and if so, under what conditions. The intended goal is to provide judges with "scientific, objective risk assessment tools," with the hope that this will "increas[e] public safety, reduc[e] crime, and mak[e] the most effective, fair, and efficient use of public resources."[69] The algorithm determines the defendant's level of danger (i.e. the likeliness to commit another crime while out on release) as well as the likeliness to flee and miss future court appearances.[70] To make this prediction, the algorithm utilizes "risk factors that statistically correlate with nonappearance in court or commission of a crime pretrial."[71] While this differs depending on the risk assessment tool used, some factors include age at time of arrest, failure to appear on charges within the last two years, and prior misdemeanors and felony convictions, among others.[72] The information gathered is used to generate a raw score for each of the three categories: failure to appear, new criminal activity, and new violent criminal

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[65] *Id.*

[66] Bill Armstrong, *California Passed a Law to Put Me out of Business – and Taxpayers Will Get the Bill,* The Marshall Project (December 5, 2018), https://www.themarshallproject.org/2018/12/05/california-passed-a-law-to-put-me-out-of-business-and-taxpayers-will-get-the-bill.

[67] Tony Bizjak, *How Will No Cash Bail Work in California? Here are the Answers to Common Questions,* The Sacramento Bee (August 29, 2018), https://www.sacbee.com/news/loca/crime/article217483800.html.

[68] *Id.*

[69] Laura & John Arnold Found., Research Summary: Developing a National Model for Pretrial Risk Assessment 2 (2013).

[70] *Id.*

[71] *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing, supra* note 26.

[72] *Id.*

activity.[73] The raw score is then converted to a score for each category based on a six-point scale.[74] Defendants are then categorized as either low, medium, or high risk.[75] For instance, if a defendant receives a scaled score of one for the failure to appear category that means the algorithm predicts there is a fourteen percent chance they will not appear, meanwhile a defendant who received a score of six has a fifty percent chance of failing to appear.[76] Individuals who are deemed a low risk will be released from jail without having to post bail whereas those who are determined to be a high risk will remain in jail, but will have the opportunity to argue for their release.[77] Medium risk defendants will either be detained or released based on the local court's ruling, and individuals charged with misdemeanors will be released without a risk assessment.[78]

While risk assessment attempts to objectively determine what should happen to the defendant, the judges aren't obligated to follow the determination; it is solely advice. In fact, in Cook County, Illinois, judges only align with the recommendation from risk assessment tools about fifteen percent of the time.[79] According to Professor Megan Stevenson, in Kentucky, ninety percent of the defendants should have been offered "immediate non-financial release" based on risk assessment tools, but in actuality it was estimated that only twenty-nine percent received non-monetary release at the first bail-setting.[80] With this in mind, the effectiveness of risk assessment tools in decreasing pretrial detention rates is heavily dependent on whether judges are mandated to adhere to the recommendation.

While states recently have been making reforms to the bail system, Washington D.C. mainly eliminated cash bail in the 1990s and has seen much success. Opponents to bail reform are concerned that defendants will fail to appear or they will commit another crime while they are released. However, using a risk assessment tool, D.C. released ninety-four percent of arrested people without cash bail, and statistics show that eighty-eight percent appeared for every court appearance and eighty six percent

[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *California Replaces Cash Bail with Risk Assessments Referendum*, Ballotpedia (2020), https://ballotpedia.org/California_Replace_Cash_Bail_with_Risk_Assessments_Referendum_(2020).
[78] *Id.*
[79] *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing, supra* note 26.
[80] Stevenson & Mayson, *supra* note 22.

were not rearrested for a crime.[81] Out of the fourteen percent that were rearrested, it is estimated that less than 2 percent were for violent crimes.[82]

VIII. Recent Changes to the Bail System on the State and Local Level

In contrast to the progress seen in California and Washington D.C., New York has experienced backlash over its attempts to reform bail with NYPD Chief of Department Terence Monahan arguing that it is "putting public safety at risk and is making it harder for the NYPD to combat crime."[83] According to the new policy, which went into effect on January 1, arraignment judges can no longer order bail or remand.[84] Instead, the judges are to release defendants on their own recognizance with the exception of those charged with violent felonies.[85] Nevertheless, some rapes, assaults, and robberies are categorized as nonviolent, and thus, the judge would be required to release the defendant.[86] In light of past injustices due to bail, it is no surprise that many New York legislatures agreed that some form of bail reform was necessary. However, the question is did New York go too far with such a lenient new policy? New stories are constantly emerging of defendants who, in light of the new reform, were released but then went on to commit another crime. In one particular case, Anthony Manson, was arrested for allegedly committing nine burglaries, yet he was released.[87] A mere eleven days later, he was arrested again for having committed six more burglaries while he was out on release.[88] Despite his actions demonstrating that he is a danger to society, he was released yet again. Unsurprisingly, he committed another burglary, stealing sunglasses worth nearly $4,000.[89] Manson himself was even surprised that they kept releasing him: "I'm surprised… I never could make bail before.

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[81] Emily Hamer & Sheila Cohen, *Poor Stay In Jail While Rich Go Free: Rethinking Cash Bail In Wisconsin,* Wisconsin Public Radio (January 21, 2019), https://www.wpr.org/poor-stay-jail-while-rich-go-free-rethinking-cash-bail-wisconsin.

[82] *Id.*

[83] Christian Murray, *High Ranking NYPD Cop Comes to Sunnyside and Says Bail Reform is Putting People's Safety at Risk*, LIC Post (January 30, 2020), https://licpost.com/high-ranking-nypd-cop-comes-to-sunnyside-and-says-bail-reform-is-putting-peoples-safety-at-risk.

[84] Barry Latzer, *New York's Bad Bail-Reform Law,* National Review (January 7, 2020), https://www.nationalreview.com/2020/01/new-york-state-bail-reform-law-wont-work/.

[85] *Id.*

[86] *Id.*

[87] Thomas Tracy et al., *Accused NYC Serial Burglar Released Again and Again and Again Thanks to New Bail Law*, Daily News (January 17, 2020), https://www.nydailynews.com/new-york/ny-package-thief-bail-law-20200117-b34klwhz5rhpdm6erlqffpqrky-story.html.

[88] *Id.*

[89] *Id.*

I always had to take an alternative: program or jail."[90] New York's new law allowed a serial burglar to continue to be released, thus perpetuating his spree. In fact, Monahan believes that the new bail law is responsible for an increase in crime throughout the city as major crime has increased by eleven percent compared to crime rates at this point in 2019.[91]

Particularly of concern is that New York's new policy revokes judges' authority to make bail decisions, which not only affects the defendant, but the entire society. Every case is different, but this new policy doesn't allow judges to take unique factors into consideration such as whether the defendant has failed to appear in the past or whether this is the defendant's first arrest. While the new policy does make strides in removing the imbalance between poor and wealthy defendants, it also forces a judge to release a defendant without bail, unless they committed a violent felony, without taking into consideration other factors that makes the defendant a danger to society.

In 2017, Maryland adopted Rule 4-216.1, which was "designed to promote the release of defendants on their own recognizance or, when necessary, unsecured bond."[92] Preliminary research indicates that the Rule 4-216.1 has contributed to several positive changes. For instance, in 2015, prior to the implementation of this rule, "52.5 percent of defendants were assigned bail at their initial hearing."[93] Just two years later, following the adoption of the rule, that percentage dropped over twenty percent with less than twenty two percent of defendants being given bail at their first hearing.[94] Along with the percentage of those given bail decreasing, there was a six percent increase in the number of defendants released on their own recognizance.[95] This would lead one to believe that this rule helped reduce the number of defendants held in jail pending trial. However, one stark observation is that following the adoption of this rule, the number of defendants held without bail increased by 11.6 percent, a

[90] *Id.*

[91] Murray, *supra* note 83.

[92] Rule 4-216.1. Pretrial Release -- Standards Governing, Md. Rule 4-216.1 (State and Federal Rules orders current through March 16, 2020.), https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5YJ9-BXW1-JC5P-G241-00000-00&context=1516831.

[93] Christine Blumauer et al., *Advancing Bail Reform in Maryland: Progress and Possibilities*, Princeton University School of Public & International Affairs (February 27, 2018), https://wws.princeton.edu/sites/default/files/content/Advancing_Bail_Reform_In_Maryland_2018-Feb27_Digital.pdf.

[94] *Id.*

[95] *Id.*

rate higher than the increase in release on recognizance.[96] While this rule was intended to encourage the release of defendants through non-monetary means, it has unintentionally contributed to an uptick in defendants not offered release pending trial. Even though there seems to be benefits to placing restrictions on cash bail or even eliminating it, the impacts in New York and Maryland are just a couple of examples that there can be perverse effects. Therefore, work still needs to be done to establish a bail system that both reduces the pretrial incarceration rates and promotes equality amongst different socioeconomic and racial groups.

IX. Conclusion

States with recent bail reforms have experienced varied outcomes, and not all have made society better off, such as in New York, whose extreme reform falls on one side of the spectrum. As a result, there is still the need for a solution that finds the balance between promoting equality through a system that doesn't criminalize the poor while also protecting society and judicial review of bail decisions. America continues to not only have the largest jail population, but also the highest pretrial imprisonment rate, a rate that is over four times the median worldwide rate.[97] Even more staggering is that this number has been increasing in recent years, which can be attributed to the fact that more people are being detained prior to trial. Previously, most defendants would be released on their own recognizance while they awaited trial, but now, judges have increased their use of cash bail, which results in only those who can afford bail being released.[98] The use of cash bail contributes to extensive pretrial incarceration rates, which is costly for both taxpayers and the government.[99] At the center of the discussion of cash bail is the disproportionate impact it has on impoverished people, but it also fosters racial disparities. In spite of the flaws with the current bail and pretrial detention system, how to reform the system is a point of contention. Some states have eliminated cash bail, but this has had perverse effects in New York. Other states have implemented risk assessment tools, but the results are just a recommendation, and therefore without enforcing judges' to align with the recommendation, the effectiveness of such assessment tools is arguable.[100] Therefore, the path to bail reform and a stronger equity in the legal system still has a long way to go, but discussions are being had to promote a more fair system; one that

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[96] *Id.*

[97] *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing, supra* note 26.

[98] *Bail Fail: Why the US Should End the Practice of Using Money for Bail*, *supra* note 28.

[99] Wing, *supra* note 53.

[100] Stevenson & Mayson, *supra* note 22.

entitles each person — no matter their race or wealth — to the presumption that they are innocent until proven guilty and that they should not be unduly punished with excessive bail.

ORPHAN WORKS: AN ANALYSIS REGARDING COPYRIGHTS AND ITS IMPLICATIONS FOR THE UNITED STATES

Alex Crispin

1. Introduction

Suppose an individual is trying to write a book. They have a general idea as to the direction they want their writing to go in; however, they have no idea how to begin. For their book to be successful, they need to find an approach that no one has explored before; or, at the very least, done so successfully. To gain some perspective and seek some motivation to begin their book, they decide to take a stroll through an abandoned library down the road; they think, 'surely, one can find some motivation here!'. They spend hours skimming through book after book, article after article; nothing. Then, they find a crumbled-up piece of paper hidden under a desk. Their curiosity peaks, so they open it. Alas, it is an idea of a topic with which they are relatively familiar. Better yet, they know that no one within that particular community has discussed this idea before; certainly, to no avail. They decide to write down, word for word, everything that was on that piece of paper, and they check for a name or publisher; someone to accredit this idea to, but there is nothing more than just a sentence on that paper. Just to be safe, they type the topic into the largest internet search engine; nothing. No name, no publisher, no thesis regarding this topic, just a piece of paper they found under a desk in an abandoned library.

Six months later, the book is published. Four months after the release of the book, tens of thousands of copies have sold, and they are reaping the benefits; life is good, and the 'American Dream' is undoubtedly coming into fruition. The individual wakes the following morning, and there is a notice of copyright infringement on their doorstep. They are confused because they have never used anyone's work without properly citing it and giving credit to the original owner, let alone, stolen someone's work purposefully. Next thing they know, they find themselves in court slapped with a judgment requiring them to pay $150,000, not including attorney's fees, and court costs to the estate of a man they had never heard of nor seen in their entire life.

Arguably, the most prevalent issue in the field of Intellectual Property law, both international and domestic, is that of the emerging orphan works problem.

> Orphan Works are any literary, pictorial or graphic illustrations, and photographs whereas the prospective user cannot readily identify and/or locate the owner(s) of the copyrighted material. This poses a legal risk of liability upon the prospective user for copyright infringement.[101]

Many countries around the world have either placed caps on the damages that can be awarded for copyright infringement pertaining to an orphaned work, issued exceptions to exclusive rights based on utility, and among a few other solutions, issued licenses on an individual basis.[102] However, the United States has been reluctant to do the same. This article will examine the history of orphan works and how it has become a significant problem in the United States, how the United States currently addresses copyrights with no locatable owner, and how other countries handle copyrights with no locatable owner. The purpose of this article is to provide the necessary prerequisite knowledge of orphan works in an attempt to better understand a thesis I recently published relating to the comparative analysis of orphan works legislation around the world.

1. **History of Orphan Works Copyright**

With the advent of technology, orphan works were an entirely unforeseen copyright issue, which was only exacerbated by the Copyright Act of 1976, which no longer required individuals to register a work for it to be copyrighted. Essentially, the Copyright Act established that any original work created after 1978, the date of its implementation, would automatically be considered a registered work. This leaves many prospective orphaned works users potentially liable for damages if they use such work. It also discourages many individuals from using said work in the first place, primarily due to the fear of copyright infringement liability. The United States Copyright Office noted in their 2006 Report on Orphan Works and Mass Digitization that multiple individuals complained about instances regarding their inability to use photographs, or did so with trepidation because they could not determine who took a photograph.[103] The United States Copyright Office goes on to describe, what perhaps could be perceived as unintended consequences of the Copyright Act of 1976,

[101] U.S. Copyright Office, "Orphan Works and Mass Digitization", *A Report of the Register of Copyrights*, 2015
[102] Id.., p. 48
[103] See, e.g., Spurgeon (54); Duffy (56); Duncan (65); Earnest (78); Arnold (108); Johnson (111); Fox (118); Rook (121).

by stating that "Archives, libraries, and museums maintain vast collections of photographs, very few of which have any indication of who the author was".[104] This exception leads to an instance regarding an institution attempting to acquire an orphaned work through a family member of the deceased originator of that work. Due to the Copyright Act's implementation of a 70-year life period for a copyrighted work from the date of its publishing, and 95-years for an anonymous copyrighted work from the date of its publishing,[105] the institution was left to balance the interests of the originator's family member, their own institutional goals, and their obligations under the copyright's act.

The severity of the orphan works problem can be understood a little more by analyzing the U.S. Supreme Court case of *Buck v. Jewell-LaSalle Realty Co.,* 283 U.S. 191 (1931). In *Buck*, the Supreme Court opined that "intention to infringe is not essential under the Act."[106] R. Anthony Reese, of the University of California at Irvine School of Law, clarifies this opinion by stating that it "leaves innocent infringers equally as liable for infringement as those who infringe knowingly or recklessly."[107] Consider the following illustrative example submitted by Aryeh L. Pomerantz, the author of an article that suggests the use of prescriptive easements to address the orphan works issue:

> A historian is writing a book about the history of the elementary school system in the United States. The Historian comes across a note from the parent to an anonymous teacher that the historian believes is particularly helpful in obtaining an understanding of the subject. The historian attempts to locate the copyright owner to obtain permission to include the note in the book, but her best efforts are to no avail. Before the Copyright Act of 1976, unless the note was registered, it would not be protected by copyright law. Under the current system, however, the note is covered by copyright. Therefore, including the note in the book would expose the historian to litigation and statutory damages, notwithstanding her efforts to obtain permission. Therefore, should the historian include the note in the book, the owner of the

[104] See, e.g., University of Washington Libraries (189) (describing collection of "about a million"
[105] U.S. Copyright Office, "Chapter 31: Duration of Copyright," Copyright, accessed February 10, 2020, https://www.copyright.gov/title17/92chap3.html)
[106] Buck v. Jewell-Lasalle Realty Co., 283 U.S. 191, 198 (1931).
[107] Reese, R. Anthony. "Innocent Infringement in US Copyright Law: A History." Colum. JL & Arts 30 (2006): 133.

copyrighted note could turn up and seek an injunction blocking the distribution of the book.[108]

Historically, there is a pretty clear pattern from the Courts of siding with the owners of copyrighted material over the prospective users of the same material; understandably so, to some degree. However, the States Court of Appeals for the District of Columbia Circuit's decision in *Eldred v. Ashcroft,* 537 U.S. 186 (2003), a case in which Petitioner's products were built on copyrighted works that had entered the public domain,[109] posed some vexing problems on any library seeking to maintain their collections of books or digital websites.

Orphan Works and the remnants of using them in the United States poses more than a legal issue. The fear of litigation alone can be enough, and often is enough to deter people from using said work. Due to the threat of litigation, instances involving the case of Suzanne White Junod of the United States Food and Drug Administration[110], or the case involving the A.R. Mann Library of Cornell University and their ten-year digitization project[111], and even the mere acquisition of copyrighted material such as the case with Michael J. Mahon[112] have been occurring more often throughout the United States. Many argue that orphan works do not affect society to the degree that is suggested by the United States Copyright Office. However, to discourage individuals from creating new works based on the incorporation of existing works would be to deny the progress of society; after all, the cycle of the 'thesis, antithesis, and synthesis' is necessary for progress.

2. How the United States Currently Addresses Orphan Works

The United States has been reluctant to implement legislative mitigation of the orphan works problem. There are differentiating opinions as to why the United States has not implemented any policies though several pieces of legislation have been

[108] Aryeh L. Pomerantz, Obtaining Copyright Licenses by Prescriptive Easement: A Solution to the Orphan Works
Problem (American Bar Association, 2010), 196-197.
[109] "Eldred v. Ahscroft." Oyez.org. Accessed October 28, 2019. https://www.oyez.org/cases/2002/01-618.
[110] Comment of Suzanne WhiteJunod, Ph.D., to Jule L. Sigall, Assoc. Register for Policy & Int'l Affairs, Copyright Office (Mar. 2,2005), http://www.copytight.gov/orphan/ comments/OW0161-Junod.pdf
[111] O About The Core Historical Literature of Agriculture (CHLA): Background of This Collection (Jan. 2005), http://chla.library.cornell.edu/c/chla/about.html.
[112] Comment of Michael J. Mahon to Jule L. Sigall, Assoc. Register for Policy & Int'l Affairs, Copyright Office (Mar. 8,2005), http://www.copyright.gov/orphan/comments/OW0233-Mahon.pdf.

created to address this issue. In the early 2000s, the Orphan Works Act of 2006 was proposed in the United States Congress. Initially, the bill was introduced into the Judiciary Committee of the United States House of Representatives, and further, into the Courts, Internet, and Intellectual Property Subcommittee. The bill subsequently died in the Congressional committees and in the courts. This essentially means the bill was not brought to the floor of its initially assigned committee. It is indeed noteworthy that a bill can 'die' for many reasons. Often, a bill will die because the subcommittee that it is assigned to will focus its attention on what they believe to be more pertinent bills, and the subcommittee's allotted time frame to vote will run out, and the bill will die. In this instance, however, the bill was voted through the subcommittee, but it was never seen by the Judiciary Committee. According to the United States Congress, the Orphan Works Act of 2006,

> Limits the remedies available in a copyright infringement action if the infringer proves that: (1) the infringer performed and documented a reasonably diligent search in good faith to locate the copyright owner before using the work, but was unable to locate the owner; and (2) the infringing use of the work provided attribution to the author and owner of the copyright, if known[113]

The next piece of legislation that was proposed to the United States Congress was the Shawn Bentley Orphan Works Act of 2008. This bill, counter to the previously proposed piece of legislation, began in the Senate and made significantly more progress. However, it, too, died after some time. The Shawn Bentley Orphan Works Act of 2008, according to the United States Congress:

> Limits the remedies in a civil action brought for infringement of copyright in an orphan work, notwithstanding specified provisions and subject to exceptions, if the infringer meets certain requirements, including proving that: (1) the infringer performed and documented a reasonably diligent search in good faith to locate and identify the copyright owner before using the work, but was unable to locate and identify the owner; and (2) the infringing use of the work provided attribution to the owner of the copyright if known. Requires a search to include methods that are reasonable and appropriate given the circumstances, including in some circumstances: (1) Copyright Office records

[113] Smith and Lamar, "H.R.5439 - 109th Congress (2005-2006): Orphan Works Act of 2006," Congress.gov, May 24, 2006, https://www.congress.gov/bill/109th-congress/house-bill/5439)

that are not available through the Internet; and (2) resources for which a charge or subscription is imposed.[114]

The Shawn Bentley Orphan Works Act or 2008 managed to pass the Senate with an amendment unanimously which meant that it needed to pass through the House of Representatives to be considered successful. Unfortunately, akin to its predecessor, it died in the House of Representatives' Judiciary Committee.

There is debate as to why orphan works legislation has not been successfully implemented in the United States, and it is not for lack of trying. The majority of arguments tend to sway towards the fact that the United States currently has a doctrine that protects against users of orphaned works; the Doctrine of Fair Use. Generally speaking, the Fair Use Doctrine allows the use of copyrighted material without the permission of the proponent, only if the use of the material is for purposes involving criticism, news reporting, teaching, and research.[115] It is noteworthy, however, that only a very general description of the Fair Use Doctrine can be conveyed because the Doctrine in it of itself is very subjective and counterintuitive to the framework of legal analysis that our Founding Fathers established; it's a case by case analysis. As L. Ray Patterson of the Duke University School of Law, posited, "This, of course, is because fair use is a derivative concept, not an original one, and the nature of its host, so to speak, should determine its content.[116] Some would argue that a case by case analysis of the law is beneficial because it allows for more close-ended arguments, as opposed to blanket arguments that encompass several different scenarios. However, with doctrines such as the Fair Use Doctrine, this ambiguity in language has led to a great deal of confusion around not only the legal community but the general public as well. The ambiguity of the language has allowed for arguments suggesting that Fair Use is the correct standard to be applied in copyright infringement. If someone does not want to be held liable, they should 'fairly use' the copyrighted material. An argument like that may have been permissible a century ago. However, with the rise of the internet and mass digitization, a more narrowly tailored interpretation of Fair Use is necessary. Not just for the sake of the Internet and its influence on the free exchange of ideas to promote our economy, but for the entertainment industry as well. According to Gideon Parchomovsky and Kevin A.

[114] Leahy and Patrick J., "S.2913 - 110th Congress (2007-2008): Shawn Bentley Orphan Works Act of 2008," Congress.gov, September 27, 2008, https://www.congress.gov/bill/110th-congress/senate-bill/2913)

[115] Yankwich, Leon R. "What Is Fair Use?" The University of Chicago Law Review 22, no. 1 (1954): 203-15. Accessed February 14, 2020. doi:10.2307/1598230.

[116] Patterson, L. Ray. "Understanding Fair Use." Law and Contemporary Problems 55, no. 2 (1992): 249-66. Accessed February 14, 2020. doi:10.2307/1191784.

Goldman of the University of Virginia Law Review, "As a result [of Fair Use ambiguity] artists working in media both new and old are unable to derive from copyrighted works the full value to which the public is entitled.[117]"

While the United States Congress has been relatively reluctant to comment on its decision to suppress the proposed solutions to the orphan works dilemma in the U.S., the Doctrine of Fair Use was a standard reference made in the debate on the House Floor.[118] Interestingly enough, the Orphan Works legislation that was proposed to the United States Congress included language that advocated for the preservation of the Fair Use Doctrine.[119] The need for orphan works legislation is imperative.

3. How Other Countries Handle Orphan Works

Highlighted by the United States Copyright Office, many other countries have grappled with the same challenges relating to finding solutions to a complex issue.[120] There are several pieces of legislation that have already been created by other countries. More than twenty countries have enacted legislation to address this issue.[121]

The Nordic Countries who have taken the initiative to implement their model of legislation have decided to allow licenses for numerous works within specific fields such as the broadcasting and reproduction of copyrighted material by libraries, archives, and museums.[122] These licenses are typically extended collective licenses, which allow for more variety concerning distribution. According to the United States Copyright Office, "When an extended collective licensing regime also covers the use

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[117] Parchomovsky, Gideon, and Kevin A. Goldman. "Fair Use Harbors." Virginia Law Review 93, no. 6 (2007): 1483-532. Accessed February 14, 2020. www.jstor.org/stable/25050387.

[118] Id.

[119] Id., United States Copyright Office, 70

[120] Id., United States Copyright Office, 18

[121] Approximately twenty countries have implemented the European Union's October 2012 Directive on Certain Permitted Uses of Orphan Works in national legislation. See infra note 80. Several additional
countries have adopted other types of orphan works legislation or legislation to address large-scale uses
through extended collective licensing. For additional information on foreign approaches to these issues, see
the charts attached as Appendices E (orphan works laws) and F (ECL laws).

[122] See JOHN AXHAMN & LUCIE GUIBAULT, INSTITUUT VOOR INFORMATIERECHT, CROSS-BORDER EXTENDED
COLLECTIVE LICENSING: A SOLUTION TO ONLINE DISSEMINATION OF EUROPEÂS CULTURAL HERITAGE? 29, 43
(2008), available at http://www.ivir.nl/publicaties/download/292.

of orphan works, such as in the Nordic countries, users of orphan works have to pay a fee to a CMO representing copyright owners, which then distributes the proceeds to those owners."[123] Similar to an escrow account, the money that is received by an individual seeking to purchase a license for the usage of a copyrighted work would be distributed to the rightful owner. Many commentators of the Nordic Model approach to orphan works have suggested that it will eventually turn into a system that collects fees with no one to distribute the money to because of the inability to track certain copyright owners.[124]

The initial European Union approach has a two-pronged solution to orphaned works. The initial proposal of the EU model was drafted in the *Impact Assessment on the Cross Border Online Access to Orphan Works.*[125] The EU analyzed the Nordic Model's

[123] *Id*., United States Copyright Office, 49

[124] See, e.g., Socy of Am. Archivists Initial Comments at 7("[R[epositories that are seeking to increase access
to our cultural heritage generally have no surplus funds. . . . Allocating those funds in advance to a licensing agency that will only rarely disperse them would be wasteful, and requiring such would be irresponsible from a policy standpoint. Extended collective licensing will only further impede noncommercial access to orphan works.")

[125] Commission Staff Working Paper: Impact Assessment on the Cross-Border Online Access to Orphan Works
Accompanying the Proposal for a Directive of the European Parliament and of the Council on Certain Permitted Uses of Orphan Works, COM (2011) 289 final (May 24, 2011), available at http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2011/sec_2011_0615_en.pdf ("EU Impact Assessment"). Like the United States, the European Union has been examining the issue of orphan works for many years. See, e.g., Communication from the Commission to the European Parliament, the Council, the
European Economic and Social Committee and the Committee of the Regions, i2010: Digital Libraries, COM (2005)
465 final (Sept. 30, 2005), available at http://eur
lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52005DC0465&from=EN (indicating that the EU may need to intervene
regarding the orphan works issue); Green Paper on Copyright in the Knowledge Economy, COM(2008) 466 final,
Brussels, 16 July 2008, available at http://eur-
lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52008DC0466&rid=1 (acknowledging the cross-border implications of
the orphan works issue); Commission Recommendation 2006/585/EC of 24 August 2006 on the Digitisation
and Online Accessibility of Cultural Material and Digital Preservation, 2006 O.J. (L 236), available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006H0585&rid=2 (encouraging member
states to adopt licensing mechanisms to facilitate the use of orphan works and promulgate lists of known
orphan works).

approach to using an extended collective licensing approach and rejected it due to its lack of requirements for users to conduct a diligent search before the use of the copyrighted work.[126] The 'diligent search' requirement is important because it shows the intent of the prospective user to avoid using a copyrighted work without the permission of the owner. However, there is some debate as to the ambiguity of the diligent search requirement. The European Union Model approach to orphan works, instead, uses a statutory exception, which generally establishes that certain permits may be granted for the use of orphan works if a diligent search is conducted, a single registry for storing the orphaned works is created. Reciprocity of the orphaned work is established.[127] Reciprocity for an orphaned work generally means that once it has been deemed an orphan by one member state of the EU, it must be deemed as an orphan by all of the member states of the EU. The benefit from establishing a registry among an entire supranational institution, such as the EU, is that when an owner of a copyright that has been deemed as an orphan resurfaces, the owner can then claim ownership of his/her work along with the appropriate compensation for the usage of his/her work; subject to the laws of each state, of course.[128] Like every legislative suggestion to solve an imminent problem, however, there is criticism for the European Union approach to the orphan works dilemma.[129]

There are approximately twenty countries that are currently enrolled in some sort of legislative model to mitigate the liability of orphan works copyright infringement or abolish it entirely. One of those countries is Hungary and their collective rights management, which enables libraries, archives, and other institutions designed for education to utilize certain works to disseminate them to members of the public through specific computer terminals.[130] Though Hungary's current collective rights management program resembles bits and pieces of the Fair Use Doctrine, Hungary has made a concerted effort in addressing the Orphan Works problem by abiding by the implemented European Union legislative model. [131] Germany is also a country that

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[126] *Id*., United States Copyright Office, 20

[127] *Id*.

[128] *Id*.

[129] See, e.g., Berkeley Digital Library Copyright Project Initial Comments at 22 (citing comments by European
public interest organizations criticizing the Directive for not applying to commercial users or uses, and for
exposing orphan work users to retroactive financial liability).

[130] Id., United States Copyright Office, 23

[131] 2013. évi CLIX. törvény a szellemi tulajdonra vonatkozó egyes törvények módosításáról (Act CLIX of 2013
on the Amendment of Certain Statutes Concerning Intellectual Property), §§ 5, 16, 24, 26, 27(b); see also Péter

has enacted legislation specifically designed to extend collective licensing to users for out-of-commerce works.[132] More similar to the United States, however, is the United Kingdom. David Cameron, the former Prime Minister, along with a panel of commentators described the orphan works problem as, "the starkest failure of the copyright framework to adapt,"[133] The United Kingdom established its model which was focused on providing narrow exceptions to allow users to purchase licenses as long as they fulfill the diligent search requirement and pay certain fees to a registry. Though this sounds eerily similar to the aforementioned models, the key distinction is that the license would be granted by the Secretary of State.[134]

The countries that were previously mentioned are just some of many who are either seeking to address this problem or have already addressed them. Fortunately, for the United States, a larger number of test countries allow for a more thorough analysis and comparison to determine the viability of either mimicked legislation or the creation of new legislation to solve the orphan works problem. Many would argue that orphan works legislation is as important as any legislative landmark decision, and only through the comparative analysis of other democratic countries can the United States test the viability of a piece of legislation to solve this issue.[135]

4. Conclusion

The diffusion of creativity in a nation of ingenuity is precisely why orphan works legislation is necessary. Ambiguity in the law often leads to the deprivation of certain rights and liberties. Though some may not refer to an individual's desire to be creative as a right, our intellectual progress and opportunity to use creativity and innovation to enhance economic growth as a nation certainly must be. The United States Copyright Act of 1976 repealed the necessity to file a created work to a registry for that particular work to be protected under the Copyright Act. Subsequently, any original work that is created in the United States receives automatic protection under the Act.[136] Due to the repeal of a requirement to register a work to the Copyright

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Mezei, The New Orphan Works Regulation of Hungary, 45(8) INTÂL REV. INTELL. PROP. 940 (2014) (discussing
the details of the recent amendment and Hungary's experience with its orphan works provisions up to the time of the amendment).

[132] *Id., United States Copyright Office, 27*

[133] *H*argreaves, Ian. "Digital opportunity: a review of intellectual property and growth." (2011).

[134] Enterprise and Regulatory Reform Act, 2013, sec. 77(3), § 116B.

[135] Crispin, Alex L., "Orphan Works: A Comparative Analysis of the United Kingdom, Canada, and Australia Regarding Copyrights and its Implications for the United States of America" (2019). *Honors Undergraduate Thesis.* 613. https://stars.library.ucf.edu/honorstheses/613

[136] S Dusollier, *Scoping Study on Copyright and Related Rights and the Public Domain,* WIPO Committee on Development and Intellectual Property, CDIP/7/INF/2 (4 Mar 2011), Annex 32.

Office, the problem of orphan works spread like wildfire. Every nameless document, piece of paper with no trail of ownership, photograph with no photographer information must now be handled with a significantly great deal of caution, and even that may not be enough. The fear of litigation alone is enough to deter people from pursuing their aspirations. Furthermore, the fear of litigation can often deprive them of their right to equality of opportunity; the opportunity to take the 'capitalist life by the horns' and run with it. There is more at stake than what is fair and what is not fair. The 'American Dream' could be entering the fight of its life. Orphaned works impede an individual's ingenuity, and without the proper legislation to either mitigate the liability of copyright infringement or eradicate the liability of copyright infringement, innovative ideas are going to get more difficult to stumble upon. And soon, one could find themselves in court slapped with a $150,000 judgement in favor of the plaintiff, the estate of a man you have never heard of nor seen in your entire life.

PUFF PUFF PASS: THE MARIJUANA OPPORTUNITY AND REINVESTMENT ACT OF 2019

Tiffany Liriano

Introduction

Among the most vexing issues that stand before the current sitting Congress, marijuana looms at the forefront. Over the past decade, marijuana laws have radically changed on the state level. In 2012, Colorado and Washington became the first states to legalize the use of recreational marijuana.[1] Since then, nine other states and the District of Columbia have followed suit.[2] What was initially considered a "traditional" drug, one that became engrained in the conscious of the public, now represents much more. Throughout the decades, marijuana's continued presence in the media has made it a cultural icon. From the jazz musicians of the 1920s[3] to the Hippies during the 1960s and 1970s[4] to the rappers of the 1990s through the present[5], notably Snoop Dogg and Wiz Khalifa, cannabis has managed to stay relevant and even grow in popularity. Cult classic films like Cheech and Chong's Up in Smoke (1978), Dazed and Confused (1993), Half Baked (1998), and Pineapple Express (2008) depict marijuana's success on the big screen.[6]

Since the days of Reefer Madness, a 1936 propaganda film meant to warn people of the dangers of marijuana,[7] the American public's perception of cannabis has come a long way. Today, nearly 66% of Americans now support legalization.[8] Even

[1] Keith Coffman & Nicole Neroulias, *Colorado, Washington First States to Legalize Recreational Pot*, REUTERS, Nov. 6, 2012, https://www.reuters.com/article/us-usa-marijuana-legalization/colorado-washington-first-states-to-legalize-recreational-pot-idUSBRE8A602D20121107.

[2] DISA GLOBAL SOLUTIONS, MAP OF MARIJUANA LEGALITY BY STATE (2019), https://disa.com/map-of-marijuana-legality-by-state.

[3] Emmanuel Marshall, *The Story of Marijuana & Music: Part 1 – Underground Jazz Joints*, LIVING LIFE FEARLESS, https://livinglifefearless.co/2017/features/story-marijuana-music-part-1-underground-jazz-joints/

[4] Clifton Middleton, *Cannabis The Hippie Revolution*, MEDIUM, July 23, 2019, https://medium.com/@cliftonmiddleton/the-hippie-revolution-650b9efd4c40.

[5] Amber Faust, *The History of Cannabis Pop Culture*, WIKILEAF, July 26, 2017, https://www.wikileaf.com/thestash/cannabis-pop-culture/.

[6] *Id.*

[7] Seth Ferranti, *When the Government Said Marijuana Made You Crazy*, OZY, Nov. 13, 2018, https://www.ozy.com/flashback/when-the-government-said-marijuana-made-you-crazy/88232/.

[8] GALLUP, U.S. SUPPORT FOR LEGAL MARIJUANA STEADY IN PAST YEAR (2019), https://news.gallup.com/poll/267698/support-legal-marijuana-steady-past-year.aspx.

marijuana's medicinal properties, such as its ability to treat pain, lack of appetite, nausea, and many other conditions,[9] are being recognized, evident by the thirty-three states and the District of Columbia that allow medical marijuana[10] and the thousands of patients reaping its benefits. Additionally, a third of these states have also passed legislation permitting recreational marijuana.[11]

However, as the national consensus on marijuana evolves, so does its image. The days of the lazy, incompetent stoners have passed. Cannabis aficionados now include innovators,[12] Nobel Prize winners,[13] Academy Award winners,[14] Grammy nominees,[15]

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[9] REP. EARL BLUMENAUER, THE PATH FORWARD: RETHINKING FEDERAL MARIJUANA POLICY 5 (2017).

[10] DISA GLOBAL SOLUTIONS, *supra* note 2.

[11] *Id.*

[12] Bill Gates and Richard Branson are both avid marijuana users. In *Gates: How Microsoft's Mogul Reinvented an Industry – And Made Himself the Richest Man in America,* the author, Stephen Manes wrote that "marijuana was the pharmaceutical of choice" for Bill Gates, co-founder of Microsoft, with a net worth of over $108 billion. Additionally, he publicly backed the 2012 referendum to legalize cannabis in Washington.
Beca Grimm, *50 Most Successful Marijuana Enthusiasts You Should Know*, ROLLING STONE, Apr. 20, 2017, https://www.rollingstone.com/culture/culture-lists/50-most-successful-marijuana-enthusiasts-you-should-know-114790/rihanna-33-116600/.
As for Richard Branson, founder of Virgin Group, which controls more than 400 companies in various fields, is very open about his cannabis consumption. He even sat down for an interview with *High Times* and has gone head to head with politicians regarding marijuana use, comparing it to alcohol.
Sam Becker, *12 Successful CEOs Who Have Admitted to Using Marijuana*, SHOWBIZ CHEAT SHEET, Feb. 17, 2018, https://www.cheatsheet.com/money-career/successful-ceos-who-have-admitted-to-using-marijuana.html/.

[13] Francis Crick and Richard Feynman have two things in common: Nobel Prizes and marijuana usage. Francis Crick won a Nobel Prize for discovering the double-helix structure of DNA. He is also a founding member of Soma, a legalize cannabis group. He also believed cannabis helped remove the filters of abstract thought. Another Nobel Prize winner, Richard Feynman, a physicist who helped develop the atomic bomb, used cannabis to enhance his out of body experiences while in a sensory deprivation tank. When he came out, he won a Nobel Prize for his theory of quantum electrodynamics.
James HSU, *10 Smartest Stoners Who Admitted to Smoking Weed*, THIRD MONK, http://thirdmonk.net/knowledge/smartest-stoners-admitted-smoking-weed.html.

[14] Matthew McConaughey has one Academy Award, more popularly known as Oscars, while Brad Pitt has two. However, not only are both actors' common household names, they both also use cannabis.
Jessica Delfino, *20 Celebrities Who Smoke Weed*, HIGH TIMES, June 20, 2018, https://hightimes.com/celebrities/celebrities-smoke-weed/.

[15] In her documentary *Gaga: Five Foot Two*, nine-time Grammy winner, Lady Gaga, discusses her issues with fibromyalgia and talks about her cannabis consumption. Of course, no conversation about marijuana and music is complete without mentioning Willie Nelson, who also has nine Grammy's, and Snoop Dogg and Wiz Khalifa. Although, Snoop Dogg and Wiz Khalifa have never won Grammy's, between the two they have been nominated over twenty times.
Id.

and even former presidents have admitted to using cannabis.[16] These people prove that the person matters more than the plant.[17]

Despite its widespread use and state legalization, all types of marijuana continue to be illegal under federal law. The legality of this iconic drug warrants further scrutiny. Congress has the power to unravel this mess and may be on track to do so with a new bill introduced into the House, the Marijuana Opportunity Reinvestment and Expungement (MORE Act). The MORE Act is a bill to remove marijuana from the Controlled Substances Act altogether.[18] In November 2019, it made history by becoming the first cannabis legalization bill to ever survive review in a congressional committee.[19] If enacted, not only would the MORE Act de-schedule cannabis, but it would also address the inequities exacerbated and created by marijuana prohibition by providing for reinvestment in persons adversely impacted by the War on Drugs[20] and providing expungement of certain cannabis offenses,[21] amongst other purposes.

Today, the MORE Act represents a clash of ideas, laws, and a deeply complex history. What follows is a commentary separated into three sections: the past, present, and future of cannabis in the United States. The first section of this article (Part II) explores the history of marijuana in America. The second section (Part III) analyzes the current status of marijuana by examining the growing support towards legalization. The third section (Part IV) looks toward the future of cannabis by dissecting the effects of the MORE Act, if enacted.

II. The Past: A Brief History of Marijuana in the United States

[16] Former U.S. presidents Bill Clinton and Barack Obama have both admitted to experimenting with marijuana. While Clinton claims he "didn't inhale," Obama admits he "inhaled frequently…that was the point."
50 Successful Stoners Bucking the Pot-Head Stereotype, THE CHILL BUD, Aug. 20, 2015, https://thechillbud.com/50-successful-stoners-bucking-the-pot-head-stereotype/.
[17] Ryan J. Reilly & Robin Wilkey, *50 Successful Marijuana Users Who Prove the Person Matters More Than the Plant*, HUFFPOST, Apr. 18, 2014, https://www.huffpost.com/entry/most-famous-marijuana-users_n_5160073.
[18] Marijuana Opportunity Reinvestment and Expungement Act of 2019, H.R. 3884 § 2, 116th Cong. (2019).
[19] Nathan Yerby, *U.S. House Judiciary Committee Advances a Bill to Decriminalize Marijuana Nationwide*, ADDICTION CENTER, Nov. 22, 2019, https://www.addictioncenter.com/news/2019/11/u-s-house-judiciary-committee-bill-decriminalize-marijuana-nationwide/.
[20] H.R. 3884 § 5.
[21] H.R. 3884 § 9.

The hemp plant's importance dates back long before the birth of our nation to the seventeenth century when it was used in the production of rope, sails, and clothing.[22] In the late nineteenth century, marijuana was introduced into Western medicine and sold openly in pharmacies as a sedative, as well as to reduce inflammation and muscle spasms.[23]

At the turn of the twentieth century, Mexican immigrants introduced the recreational practice of smoking marijuana to the United States.[24] During Prohibition and the Great Depression, public and government concern regarding the potential harms of marijuana grew.[25] A series of anecdotal nonscientific reports linked the use of marijuana with violence, insanity, crime, and social deviance.[26] As a result, 29 states outlawed cannabis by 1931.[27]

In 1951, Congress passed the Boggs Act, listing cannabis as a narcotic and establishing minimum sentences for marijuana-related offenses.[28] A first offense marijuana possession carried a minimum sentence of two to ten years and a fine of up to $200,000.[29] Despite these harsh laws, marijuana was widely used and heavily associated with the counterculture movement of the 1960s.[30]

The 1970s and the Nixon administration launched a massive war on drugs[31] declaring drugs "public enemy number one."[32] In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970 (1970 Act).[33] The 1970 Act contained provisions that softened drug laws by repealing mandatory minimums for drug offenses, re-categorizing possession of a controlled substance as a misdemeanor, and probation for first-time offenders.[34] Title II of the 1970 Act included the Controlled Substances Act, which established five drug regulation schedules based on their medicinal values and potentials for addiction.[35] Schedule I was reserved for the most

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[22] BLUMENAUER, *supra* note 9, at 6.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE 87 (2013), https://www.aclu.org/report/report-war-marijuana-black-and-white?redirect=criminal-law-reform/war-marijuana-black-and-white.
[33] *Id.* at 86.
[34] *Id.*
[35] *Id.*

dangerous drugs with purported high potential for abuse, lack of any accepted medicinal use, and absence of any accepted use or benefits in medically supervised treatment.[36] Congress noted a lack of scientific study on marijuana and claimed more profound research was necessary to determine its health effects, and thus temporarily placed marijuana in Schedule I.[37] The same classification was given to drugs like heroin and LSD.[38] Meanwhile, cocaine and amphetamines were classified as Schedule II substances despite being dangerous and highly addictive.[39]

The 1970 Act also established the National Commission on Marijuana and Drug Abuse to assess the medical and addictive effects of marijuana.[40] The Commission's first report to Congress, Marihuana: A Signal of Misunderstanding, recommended that marijuana no longer be classified as a narcotic since that definition associated marijuana with more addictive drugs such as heroin and misled the public by exaggerating marijuana's harms.[41] The report conjointly recommended the decriminalization of marijuana in small amounts for personal use.[42] The following year, a second report, Drug Use in America: Problem in Perspective, reaffirmed the findings of the first report and again recommended decriminalization.[43] While the reports and their recommendation to decriminalize marijuana had gained widespread support, the Nixon administration ignored the Commission's findings.[44]

Even though Nixon disregarded the Commission's reports, his administration maintained a strong focus on rehabilitation and treatment.[45] Following the recommendation of the Commission on Marijuana and Drug Abuse, sixteen states decriminalized the personal use of marijuana, treating first-time possession of a small amount more like a traffic offense than a crime.[46]

The 1980s marked a return to a more aggressive approach to marijuana.[47] The focus on harm reduction and public health was cast aside under President Ronald Reagan, who, with the help of Congress, ratcheted the drug war to a full-fledged assault on

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[36] *Id.*
[37] *Id.*
[38] BLUMENAUER, *supra* note 9, at 7.
[39] *Id.*
[40] ACLU, *supra* note 32.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] BLUMENAUER, *supra* note 9, at 7.
[47] *Id.*

drug use, relying on increased arrests and incarceration as key strategic components.[48] New laws elevated federal penalties for marijuana possession.[49] Distribution of 100 marijuana plants carried the same potential penalty as possession of 100 grams of heroin.[50]

In 1984, the public alarm over drugs escalated with the rise of crack cocaine.[51] President Reagan responded with a wide net that swept up all drugs, including marijuana, by signing the Anti-Drug Abuse Act of 1986 (1986 Act).[52] This Act budgeted an additional $1.7 billion to the drug war and imposed mandatory minimum sentences for drug offenses.[53] Under the 1986 Act, judges were required to sentence individuals convicted of certain drug offenses to a minimum number of years, or more.[54] Congress decided that these mandatory minimum sentences would not be triggered by a person's actual role in a drug offense or operation, but by drug type and quantity instead.[55] Presidents George H.W. Bush and Bill Clinton continued to fight the drug war aggressively.[56] In 1989, during President Bush's tenure, the Office of National Drug Control Policy was created.[57] In its first strategy report, the Office made it clear that a central component of its approach to illegal drugs was arresting more people in targeted communities.[58] Continuing the legacy of his predecessors, during President Clinton's presidency, drug arrests rose 46%, and more blacks were imprisoned than ever before in American history.[59]

In 1996, California voters passed Proposition 215, becoming the first state to allow the sale and medical use of marijuana for patients with AIDS, cancer, and other diseases.[60] Since then, other states have made marijuana use partly legal for medical usage or completely legal for personal, recreational use.

III. The Present: The Status of Marijuana Today

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[48] ACLU, *supra* note 30, at 88.
[49] BLUMENAUER, *supra* note 9, at 7.
[50] *Id.*
[51] ACLU, *supra* note 32, at 88.
[52] ADAM RATHGE, PONDERING POT: MARIJUANA'S HISTORY AND THE FUTURE OF THE WAR ON DRUGS (2015), https://www.oah.org/tah/issues/2015/august/pondering-pot/.
[53] ACLU, *supra* note 32, at 88.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* at 89.
[60] BLUMENAUER, *supra* note 9, at 7.

Since California voters passed Proposition 215, other states have followed suit, by either making marijuana partially legal for medical use or entirely legal for recreational use. As of January 2020, thirty-three states and the District of Columbia have passed laws legalizing marijuana in some form.[61] A third of these states have also passed legislation allowing recreational marijuana.[62] This means that more states allow some form of marijuana consumption than the twelve states that do not.

As evident by the growing movement towards legalization in the states, there has also been a substantial shift in the American public's opinion on marijuana. When the issue was first polled, in 1969, only 12% of Americans supported legalization.[63] The latest Gallup poll found that 66% of Americans now support the legalization of cannabis for adult use.[64] Marijuana is the third most popular recreational drug in American, behind only alcohol and tobacco.[65] However, since it is still federally illegal, it is the most commonly used illegal drug in the United States.[66]

Despite the increased support for legalization, the federal government continues to classify marijuana as a Schedule I drug.[67] There are two ways the scheduling of marijuana can be changed: administrative action and congressional action.[68] Administrative rescheduling begins when an actor, an interested outside party or the Secretary of Health and Human Services (HHS), files a petition with the Attorney General.[69] The Attorney General forwards the request to the HHS Secretary, asking for a scientific and medical evaluation and a recommendation via the Food and Drug Administration (FDA).[70] After hearing the FDA's recommendation, the Attorney General, often through the Drug Enforcement Administration, conducts its own concurrent and independent review of the evidence to determine whether a drug

[61] DISA GLOBAL SOLUTIONS, *supra* note 2.
[62] *Id.*
[63] GALLUP, *supra* note 8.
[64] *Id.*
[65] BLUMENAUER, *supra* note 9, at 9.
[66] *Id.*
[67] 21 U.S.C. § 812(c)(10), (c)(17) (2019).
[68] John Hudak & Grace Wallack, *How to Reschedule Marijuana, and Why it's Unlikely Anytime Soon,* BROOKINGS, Feb. 13, 2015, https://www.brookings.edu/blog/fixgov/2015/02/13/how-to-reschedule-marijuana-and-why-its-unlikely-anytime-soon/.
[69] *Id.*
[70] *Id.*

should be scheduled, rescheduled, or entirely removed, depending on the petition's initial request.[71] The Attorney General can also initiate this process himself.[72]

Congress also has the power to reschedule marijuana.[73] Since Congress placed marijuana in Schedule I when it enacted the Controlled Substances Act (CSA) in 1970, it retains the authority to amend the Act by moving the drug to a less restrictive schedule or entirely remove it from the CSA.[74] Congress can also enact new legislation specific to marijuana.[75] The first bill that proposed to move cannabis from Schedule I to Schedule II was introduced in 1981.[76] Since then, similar bills have been introduced, all of which have died in the committee.[77] In 2011, a bill to remove marijuana from the schedule entirely also died in the committee.[78]

However, in July 2019, a new bill to completely de-schedule marijuana was introduced in the House of Representatives, The Marijuana Opportunity Reinvestment and Expungement Act (More Act).[79] Four months later, the House Judiciary Committee voted 24-10 in favor of the bill,[80] becoming the first cannabis-decriminalization bill to ever survive review in a congressional committee.[81] The MORE Act is presently moving forward to the next stage of the legislative process, which is a floor vote in the Democratic-dominated House.[82]

With over 50 co-sponsors, the MORE Act appears to have a high chance of passage in the House where Democrats control the chamber.[83] Of the thirty-four members of Congress who participated in the Committee vote, only two Republicans voted with twenty-two Democrats to present the bill to the full House for consideration and debate.[84] If the MORE Act were to pass the House, it would then move on to the Senate, where it is likely to face a tougher battle in the Republican-controlled

[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] FAS, THE LEGAL PROCESS TO RESCHEDULE MARIJUANA (2015), https://fas.org/sgp/crs/misc/reschedule.pdf.
[75] Hudak & Wallack, *supra* note 69.
[76] H.R. 4498, 97th Cong. (1981); Hudak & Wallack, *supra* note 69.
[77] Hudak & Wallack, *supra* note 69.
[78] H.R. 2306, 112th Cong. (2011); Hudak & Wallack, *supra* note 69.
[79] H.R. 3884, 116th Cong. (2019).
[80] Sean Williams, *The House Wants to Legalize Marijuana, but the MORE Act Has a Fatal Flaw*, THE MOTLEY FOOL, Nov. 24, 2019, https://www.fool.com/investing/2019/11/24/the-house-wants-to-legalize-marijuana-but-the-more.aspx.
[81] Yerby, *supra* note 19.
[82] *Id.*
[83] *Id.*
[84] Yerby, *supra* note 19.

Senate.[85] Republicans have a more adverse view of cannabis than Democrats or Independents.[86] The latest Gallup poll shows that 76% of self-identified Democrats and 68% of self-identified independents support legalizing marijuana in the United States.[87] While only 51% of self-identified Republicans on board with legalizing cannabis.[88]

IV. The Future: Effects of the MORE Act

Although states are moving toward legalization, the lasting effects of the War on Drugs are still evident. The harsh mandatory minimum sentences enacted in 1986, intended for "masterminds" and "managers" of large drug operations, stripped judges of their discretion to impose fair sentences tailored to the facts and circumstances of each case and the characteristics of individual defendants.[89] As a result, the vast majority of people receiving these harsh sentences are neither kingpins nor leaders, but low-level offenders.[90] Another byproduct of the war on drugs is the explosion of incarcerated people in the United States by 700% over the past 40 years.[91] In 1980, there were nearly 41,000 people behind bars, but as the war on drugs waged on, that number swelled to approximately half a million by 2015.[92]

Historically, Hispanic and black neighborhoods have been targeted with heavy-handed drug enforcement despite data showing similar rates of drug use across racial lines.[93] Despite this data, blacks are nearly four times more likely than whites to be arrested for marijuana.[94] The consequences of the disparities in arrests and sentencing disproportionately affect communities of color. Being labeled a "convict" or "felon" for the mere possession of marijuana prevents many people from obtaining employment, housing, procuring educational loans, welfare services, and other benefits individuals may need to get back on their feet after being incarcerated.[95]

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[85] *Id.*
[86] GALLUP, *supra* note 8.
[87] *Id.*
[88] *Id.*
[89] ACLU, *supra* note 32, at 88.
[90] *Id.*
[91] Trymaine Lee, *The City: Prison's Grip on the Black Family*, MSNBC, https://www.nbcnews.com/specials/geographyofpoverty-big-city (last visited Dec. 26, 2019).
[92] BRIAN STAUFFER, EVERY 25 SECONDS: THE HUMAN TOLL OF CRIMINALIZING DRUG USE IN THE UNITED STATES (2016), https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizingdrug-use-united-states#290612.
[93] Lee, *supra* note 92.
[94] ACLU, supra note 32, at 4.
[95] STAUFFER, *supra* note 93.

Moreover, these consequences often persist long after offenders have served their sentences[96] and can have lasting effects, not only on offenders but also on their families and communities.[97]

The MORE Act goes farther than previous cannabis legalization bills[98] with a new set of principles for marijuana focused on giving back to those most harmed by prohibition.[99] This Act would completely remove marijuana from the federal list of controlled substances[100] and create community reinvestment programs, funded by a tax on marijuana sales.[101] The MORE Act also requires federal courts to expunge juvenile delinquency convictions or adjudications for federal cannabis-related offenses.[102] Additionally, this bill includes several protections for marijuana-related businesses and prohibits an entity from declining to administer services, assistance, or loans to an otherwise eligible small business solely because it is related to a legitimate cannabis-related business or service provider.[103] Lastly, the bill prohibits the denial of federal public benefits,[104] the rejection or revocation of security clearance,[105] and the refusal of any benefits or protections under immigration laws based on cannabis use.[106]

A. The Decriminalization of Marijuana

The most anticipated effect of the MORE Act is the decriminalization of marijuana. Although states are moving toward legalization, cannabis is still illegal under federal law, meaning there are places where it is simultaneously legal and illegal to possess marijuana. The MORE Act would strike "Marihuana" and "Tetrahydrocannabinols" (THC) from the Controlled Substances Act.[107] Consequently, marijuana would no longer be illegal at the federal level, and states would have the final say over

[96] Lee, *supra* note 92.
[97] STAUFFER, *supra* note 93.
[98] *See, e.g.*, Ending Federal Marijuana Prohibition Act of 2017, H.R. 1227, 115th Cong.
[99] Queen Adesuyi & Matt Sutton, *House Judiciary Chairman Jerry Nadler and Senator Kamala Harris Introduce Sweeping Marijuana Reform Bill*, DRUG POLICY ALLIANCE, July 23, 2019, http://www.drugpolicy.org/press-release/2019/07/house-judiciary-chairman-jerry-nadler-and-senator-kamala-harris-introduce.
[100] H.R. 3884 § 2(a), 116th Cong. (2019).
[101] *Id.* § 4(a)-(b).
[102] *Id.* § 9(a).
[103] *Id.* § 6(b)-(i).
[104] *Id.* § 7(a).
[105] *Id.* § 7(b).
[106] *Id.* § 8(a).
[107] *Id.* § 2(a)(1).

marijuana policy within their borders.[108] Currently, marijuana is classified as a Schedule I drug,[109] alongside heroin[110] and LSD.[111] This highest classification is reserved for drugs with a high potential for abuse, no currently accepted medical use, and a lack of accepted safety for use under medical supervision.[112] Despite data indicating that marijuana is less addictive than both alcohol and tobacco[113] and the multitude of states recognizing the medicinal value of cannabis. A study by the Institute of Medicine showed that 32% of tobacco users, 23% of heroin users, 17% of cocaine users, and 15% of alcohol drinkers become dependent. In comparison, only 9% of marijuana users become dependent.[114]

The federal government, by giving marijuana a Schedule I classification, claims that marijuana has no currently accepted medical use and a lack of accepted safety for use under medical supervision.[115] They claim that there is a lack of scientific evidence demonstrating medicinal value.[116] However, the lack of scientific evidence is a direct result of federal law obstructing that very research, creating a Catch 22.[117] Despite the federal government's stance, state medical marijuana legislation indicates a recognition of the medicinal value of marijuana, with over 70% of states allowing medical marijuana use.[118]Furthermore, if a rigorous analysis had been done, alcohol and tobacco would be listed as Schedule I controlled substances because of their powerful addictive properties and deadly health effects.[119] Instead, they both remain legal substances. Alcohol and tobacco are known to cause cancer, heart failure, liver damage, and more.[120] While cannabis can increase appetite in patients with extreme weight loss associated with HIV/AIDS, treat nausea caused by chemotherapy, decrease pain, inflammation, and muscle control problems.[121] It can also help control

[108] Yerby, *supra* note 19.
[109] 21 U.S.C. § 812(c)(10), (c)(17) (2019).
[110] *Id.* § 812(b)(10).
[111] *Id.* § 812(b)(9).
[112] *Id.* § 812(b)(1).
[113] BLUMENAUER, *supra* note 9, at 9; INSTITUTE OF MEDICINE, MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 95 (Janet E. Joy et al. eds. 1999), https://www.nap.edu/read/6376/chapter/1.
[114] *Id.*
[115] 21 U.S.C. § 812(b)(1).
[116] BLUMENAUER, *supra* note 9, at 17.
[117] *Id.*
[118] DISA GLOBAL SOLUTIONS, *supra* note 2.
[119] BLUMENAUER, *supra* note 9, at 9.
[120] NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM, ALCOHOL AND TOBACCO (2007), https://pubs.niaaa.nih.gov/publications/aa71/aa71.htm.
[121] NATIONAL INSTITUTE ON DRUG ABUSE, MARIJUANA AS MEDICINE (2019), https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine.

epileptic seizures and treat mental illness and addiction.[122] Recent animal studies have shown that cannabis may help kill certain cancer cells and reduce the size of others.[123] According to the CDC, six people die from alcohol poisoning every day, and 88,000 people die annually due to excessive alcohol use in the United States.[124] Over 48,000 deaths each year are attributed to smoking tobacco.[125] Even more astonishing a figure, more than ten times as many U.S. citizens have died prematurely from cigarette smoking than have died in all the wars fought by the United States.[126] However, there are no recorded cases of death from a marijuana overdose.[127]

Drugs that are currently legal, such as alcohol, tobacco, and prescription drugs, have significant public health effects.[128] Since 2003, prescription drug overdoses have killed more people than heroin and cocaine combined, and their abuse is now America's fastest-growing drug problem.[129] By comparison, access to marijuana appears to relate to positive health outcomes.[130] In 2015, a National Bureau of Economic Research working paper found that the presence of marijuana dispensaries was associated with a 15% to 35% decrease in substance abuse admissions.[131] In 2014, a study in the Journal of the American Medical Association Internal Medicine found that states with medical marijuana laws saw a 24.8% reduction in opioid overdose deaths, compared to states without such laws.[132]

Decriminalizing cannabis would end the costly enforcement of marijuana laws and free up police resources. Between 2001 and 2010, there were 8,244,943 marijuana

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[122] *Id.*
[123] *Id.*
[124] CDC, ALCOHOL POISONING DEATHS (2015), https://www.cdc.gov/vitalsigns/alcohol-poisoning-deaths/index.html.
[125] CDC, SMOKING & TOBACCO USE (2018), https://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/.
[126] *Id.*
[127] NATIONAL INSTITUTE ON DRUG ABUSE, DRUG FACTS: MARIJUANA (2019), https://www.drugabuse.gov/publications/drugfacts/marijuana.
[128] BLUMENAUER, *supra* note 9, at 9.
[129] CDC, CDC GRAND ROUNDS: PRESCRIPTION DRUG OVERDOSES—A U.S. EPIDEMIC (2012), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6101a3.htm#fig2.
[130] BLUMENAUER, *supra* note 9, at 9.
[131] Christopher Ingraham, *How Medical Marijuana Could Literally Save Lives*, THE WASHINGTON POST, July 14, 2015, https://www.washingtonpost.com/news/wonk/wp/2015/07/14/how-medical-marijuana-could-literally-save-lives/.
[132] Paul Armentano, *JAMA: Medical Cannabis States Possess Lower Rates of Opiate-Induced Fatalities*, NORML, August 25, 2014, https://blog.norml.org/2014/08/25/jama-medical-Cannabis-states-possess-lower-rates-of-opiate-induced-fatalities/.

arrests, 88% of which were for plain marijuana possession.[133] In 2010 alone, there were 889,133 marijuana arrests—300,000 more than arrests for all violent crimes combined.[134] Arresting people for marijuana possession costs the United States between $1.19 billion and $6.03 billion annually.[135] These costs include police, judicial, legal, and correctional expenses.[136] Incarcerating marijuana offenders costs the United States an estimated $600 million per year.[137] Harvard economist, Jeffrey Miron, has calculated that cannabis legalization would save between $7.7 billion and $13.7 billion annually.[138] Instead of arresting people for marijuana, police officers could focus on serious crimes, including rape, assault, and homicide.

Legalizing marijuana would also boost the economy. The cannabis industry (adult-use and medical) in the United States could exceed $24 billion in revenue by 2025.[139] For every $1 spent in the marijuana industry, between $2.13 and $2.40 in economic activity is generated.[140] Tourism, food, real estate, construction, and transportation are a few of the industries that benefit from legal marijuana.[141] In 2016, the legal marijuana industry generated $7.2 billion in economic activity and added millions of dollars in federal taxes paid by cannabis businesses.[142] In Colorado, marijuana brings in more tax revenue than alcohol.[143] A study by the University of California Agricultural Issues Center estimated that the legal marijuana market in California

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[133] ACLU, *supra* note 32, at 8.
[134] *Id.*
[135] *Id.* at 71-75.
[136] *Id.* at 76.
[137] KATHERINE BECKETT & STEVE HERBERT, THE CONSEQUENCES AND COSTS OF MARIJUANA PROHIBITION 28 (2009), https://faculty.washington.edu/kbeckett/The%20Consequences%20and%20Costs%20of%20Marijuana%20Prohibition.pdf.
[138] DAVID G. EVANS, THE ECONOMIC IMPACTS OF MARIJUANA LEGALIZATION 2 (2013), https://www.drugfree.org.au/images/pdf-files/library/Medical_Marijuana/MarijuanaLegalization-DavidEvans.pdf.
[139] Alicia Wallace, *Report: America's Marijuana Industry Headed for $24 Billion by 2025*, THE CANNABIST, Feb. 22, 2017, https://www.thecannabist.co/2017/02/22/report-united-states-marijuana-sales-projections-2025/74059/.
[140] Alan Pyke, *Marijuana's $2.4 Billion Impact in Colorado Is A Lesson For 5 States Considering Legalization*, THINK PROGRESS, Oct. 28, 2016, https://thinkprogress.org/5-states-weighing-marijuana-legalization-would-reap-enormous-economic-benefits-study-suggests-cb06831d154b/.
[141] Lauren Dixon, *How Growing Marijuana Legalization Could Affect the Economy*, TALENT ECONOMY, Dec. 20, 2016, https://www.chieflearningofficer.com/2016/12/20/marijuana-legalization-affect-economy/.
[142] BLUMENAUER, *supra* note 9, at 16.
[143] Debra Borchardt, *Colorado Now Reaping More Tax Revenue from Pot Than from Alcohol*, FORBES, Sept. 16, 2015, https://www.forbes.com/sites/debraborchardt/2015/09/16/colorados-pot-tax-revenues-are-higher-than-alcohols/#7449ef923c30.

could generate $5 billion annually.[144] On January 1st, 2020, Illinois made nearly $3.2 million on its inaugural day of recreational sales.[145]

Opponents against legalization argue that legalizing cannabis would increase teen use, inflate traffic deaths and DUIs, and intensify crime.[146] However, research proves quite the opposite. Researchers at the Washington University School of Medicine found that "the rates of marijuana use by young people are falling despite the fact more U.S. states are legalizing or decriminalizing marijuana use and the number of adults using the drug has increased."[147] According to a report from RAND, marijuana use among 8th graders in Washington decreased following legalization in 2012, from 9.8% in 2010 and 2012 to 7.3% in 2014 and 2016.[148] Among tenthraders, use fell from 19.8% to 17.8%.[149] Colorado teens between twelve and seventeen years old reported a nearly 12% drop in marijuana use just two years after adult-use was legalized, according to the National Survey on Drug Use and Health.

Moreover, traffic deaths and arrests for DUIs do not increase and may decrease in places where marijuana is legal. Traffic deaths dropped 11% on average in states that legalized medical marijuana.[150] Arrests for driving under the influence have decreased in Washington and Colorado.[151] Besides, studies show that drivers under the influence tend to be more cautious and take fewer risks than drunk drivers, such as making fewer lane changes and reducing speed.[152] Benjamin Hansen, an economics professor

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[144] Patrick McGreevy, *Legal Marijuana Could Be A $5-Billion Boon To California's Economy*, LOS ANGELES TIMES, June 11, 2017, https://www.latimes.com/politics/la-pol-ca-pot-economic-study-20170611-story.html.

[145] Tara Law, *Illinois Rakes in Nearly $3.2 Million in Recreational Marijuana Revenue on First Day of Legal Sales*, TIME, Jan. 5, 2020, https://time.com/5759092/illinois-marijuana-legalization/.

[146] PROCON.ORG, RECREATIONAL MARIJUANA (2018), https://marijuana.procon.org/.

[147] Jim Dryden, *As More States Legalize Marijuana, Adolescents' Problems with Pot Decline*, WASHINGTON UNIVERSITY SCHOOL OF MEDICINE, May 24, 2016, https://medicine.wustl.edu/news/states-legalize-marijuana-adolescents-problems-pot-decline/.

[148] RAND Office of Media Relations, *Adolescent Marijuana Use Fell After Legalization in Washington; Study Highlights Need to Use Better Data to Follow Youth Use Trends*, RAND, Dec. 19, 2018, https://www.rand.org/news/press/2018/12/21.html.

[149] *Id.*

[150] Ronnie Cohen, *After States Legalized Medical Marijuana, Traffic Deaths Fell*, REUTERS, Dec. 28, 2016, https://www.reuters.com/article/us-health-marijuana-traffic-death/after-states-legalized-medical-marijuana-traffic-deaths-fell-idUSKBN14H1LQ.

[151] DRUG POLICY ALLIANCE, SO FAR, SO GOOD: WHAT WE KNOW ABOUT MARIJUANA LEGALIZATION IN COLORADO, WASHINGTON, ALASKA, OREGON AND WASHINGTON D.C. 6 (2016), http://www.drugpolicy.org/sites/default/files/Marijuana_Legalization_Status_Report_101316.pdf.

[152] D. MARK ANDERSON & DANIEL I. REES, THE LEGALIZATION OF RECREATIONAL MARIJUANA: HOW LIKELY IS THE WORST-CASE SCENARIO? 7 (2016), http://www.drugpolicy.org/sites/default/files/Marijuana_Legalization_Status_Report_101316.pdf.

at the University of Oregon who studied traffic deaths post-medical marijuana legalization, stated that "public safety doesn't decrease with increased access to marijuana, rather it improves."[153]

Lastly, opponents argue that if cannabis is decriminalized, crime will increase. However, studies show that crime actually decreases. According to FBI crime statistics, violent crimes in Washington decreased in the years after legalization.[154] Studies also show that medical marijuana dispensaries reduced crime in their neighborhoods due to increased security presence and foot traffic.[155] Research further indicates that people drink less alcohol in places where marijuana is legal.[156] Alcohol, unlike cannabis, increases the likelihood of aggressive and violent behavior.[157] The National Institute on Alcohol Abuse and Alcoholism estimates that 25-30% of violent crimes in the United States are linked to the use of alcohol.[158] By contrast, the government does not even track violent acts specifically related to marijuana use, as the use of marijuana has not been associated with violence.[159] Therefore, a shift from drinking to cannabis use will decrease crimes related to alcohol, such as domestic violence and assault.

B. The Establishment of Reinvestment Programs

The MORE Act would also establish an Opportunity Trust Fund[160] subsidized by a 5% tax on cannabis products.[161] The purpose of this fund is to support communities adversely impacted by the War on Drugs by enacting various reinvestment programs. If passed, the reinvestment programs created by the MORE Act and funded by the Opportunity Trust Fund would be as follows: the Community Reinvestment Grant

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[153] Cohen, *supra* note 152.
[154] Melissa Santos, *What Actually Happened to Violent Crime After Washington Legalized Marijuana*, THE NEWS TRIBUNE, July 26, 2017, https://www.thenewstribune.com/news/local/marijuana/article163750293.html.
[155] UCI Paul Merage School of Business, *Closing Medical Marijuana Dispensaries Increases Crime, According to New Study*, UCI PAUL MERAGE SCHOOL OF BUSINESS, July 11, 2017, https://merage.uci.edu/press-releases/2017/07/closing-medical-marijuana-dispensaries-increases-crime-according-to-new-study.html.
[156] Ruth Graham, *Is Marijuana Good for Public Health?*, JSTOR DAILY, Oct. 8, 2014, https://daily.jstor.org/marijuana-and-public-health/.
[157] MARIJUANA POLICY PROJECT, MARIJUANA IS SAFER THAN ALCOHOL: IT'S TIME TO TREAT IT THAT WAY, https://www.mpp.org/marijuana-is-safer/ (last visited Jan. 27, 2020).
[158] *Id.*
[159] *Id.*
[160] H.R. 3884 § 4(a)(1)(a), 116th Cong. (2019).
[161] *Id.* § 4(b)(1).

Program,[162] the Cannabis Opportunity Program,[163] and the Equitable Licensing Grant Program.[164]

The Community Reinvestment Program would allocate funds to administer services for individuals most adversely impacted by the War on Drugs.[165] An "individual most adversely impacted by the war on drugs" is an individual with an income below 250% of the Federal Poverty Level for at least five of the past ten years; and has been arrested for or convicted of a cannabis or controlled substance-related offense, except for a conviction involving distribution to a minor, or whose parent, sibling, spouse, or child has been arrested for or convicted of such an offense.[166] These services include job training, reentry services, legal aid for civil and criminal cases, including expungement of cannabis convictions, literacy programs, youth recreation or mentoring programs, health education programs, and substance use treatment services.[167] 10% of the funds available through the Opportunity Trust Fund would go towards substance use treatment services,[168] while 50% would contribute to the remaining services financed by the Community Reinvestment Program.[169]

The next reinvestment program is the Cannabis Opportunity Program. This program would provide funds to make loans under the Small Business Act for cannabis businesses owned and controlled by socially and economically disadvantaged individuals.[170] Under the Small Business Act, "socially disadvantaged individuals" are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.[171] "Economically disadvantaged individuals" are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.[172] 20% of the Opportunity Trust

[162] *Id.* § 5(a)(2)(a).
[163] *Id.* § 5(b)(1).
[164] *Id.* § 5(b)(2).
[165] *Id.* § 5(a)(2)(a).
[166] *Id.* § 5(b)(3)(A).
[167] *Id.* § 5(2)(a)-(b).
[168] *Id.* § 4(a)(1)(c)(2).
[169] *Id.* § 4(a)(1)(c)(1).
[170] *Id.* § 5(b)(1).
[171] 15 U.S.C. § 637(a)(5) (2019).
[172] *Id.* § 637(a)(6)(A).

Fund would be available to the Administrator of Small Business Administration to carry out this program. [173]

Lastly, the Equitable Licensing Grant would disburse funds to eligible State or localities to develop and implement equitable licensing programs that minimize barriers to cannabis licensing and employment for individuals most adversely impacted by the War on Drugs.[174] To qualify for this grant, each grantee would have to include in its cannabis licensing program at least four of the following:

> (A) A waiver of cannabis license application fees for individuals who have had an income below 250 percent of the Federal Poverty Level for at least 5 of the past 10 years who are first-time applicants.
>
> (B) A prohibition on the denial of a cannabis license based on a conviction for a cannabis offense that took place prior to State legalization of cannabis or the date of enactment of this Act, as appropriate.
>
> (C) A prohibition on criminal conviction restrictions for licensing except with respect to a conviction related to owning and operating a business.
>
> (D) A prohibition on cannabis license holders engaging in suspicionless cannabis drug testing of their prospective or current employees, except with respect to drug testing for safety-sensitive positions, as defined under the Omnibus Transportation Testing Act of 1991.
>
> (E) The establishment of a cannabis licensing board that is reflective of the racial, ethnic, economic, and gender composition of the State or locality, to serve as an oversight body of the equitable licensing program.[175]

The remaining 20% of the Opportunity Trust Fund would go towards the implementation of the Equitable Licensing Grant.[176]

[173] H.R. 3884 § 4(a)(1)(c)(3), 116th Cong. (2019).
[174] *Id.* § 5(b)(2).
[175] *Id.* § 5(b)(2)(A)-(E).
[176] *Id.* § 4(a)(1)(c)(4).

C. The Expungement of Juvenile Delinquent Federal Cannabis Offenses and Resentencing

Additionally, the MORE Act would require federal courts to expunge juvenile delinquency convictions or adjudications for federal cannabis-related offenses.[177] The Act allows for any individual under a criminal justice sentence for a federal juvenile delinquency cannabis-related offense to file for resentencing.[178]

If enacted, the MORE Act commands each federal district to conduct a review and issue an order expunging each conviction or adjudication of juvenile delinquency for a federal cannabis offense entered before the date of enactment of this Act or on or after May 1, 1971.[179] They must also issue an order expunging any associated arrests[180] and notify an individual of such expungement and its effects.[181] An individual who has had an arrest, conviction, or delinquency adjudication expunged may treat the offense as if it never happened and would be immune from any civil or criminal penalties related to perjury, swearing, false statements, or for failure to disclose such offense.[182] At any point after the date of enactment of this Act, any individual with a prior conviction or adjudication of delinquency for a cannabis offense may also file a motion for expungement.[183] After expungement, the court must seal all related records, and they must only be made available by a court order.[184]

The MORE Act also grants individuals who are serving a criminal justice sentence for a juvenile delinquency federal cannabis offense the opportunity to file a motion to conduct a sentencing review hearing.[185] After a sentencing hearing, a court shall expunge each conviction or adjudication of delinquency for a federal cannabis offense and any associated arrest.[186] Next, the existing disposition will be vacated and, if applicable, any remaining sentence or disposition should be imposed as if this Act were in effect at the time the offense was committed.[187] Lastly, the court shall order

[177] *Id.* § 9(a)(1).
[178] *Id.* § 9(b).
[179] *Id.* § 9(a)(1).
[180] *Id.*
[181] *Id.* § 9(a)(2).
[182] *Id.* § 9(c).
[183] *Id.* § 9(a)(3).
[184] *Id.* § 9(a)(4).
[185] *Id.* § 9(b)(1).
[186] *Id.* § 9(b)(2)(A).
[187] *Id.* § 9(b)(2)(B).

all records related to the offense be vacated, sealed, and only available through a court order.[188]

D. Other Effects

The last three provisions of the MORE Act discussed in this commentary include several protections for cannabis-related legitimate businesses[189] and prohibits the denial of federal public benefits,[190] the rejection or revoking of security clearance,[191] and the refusal of any benefits or protections under immigration laws based on cannabis use.[192] Under MORE, an entity cannot decline to administer services, assistance, or loans to an otherwise eligible small business solely because it is related to a legitimate cannabis-related business or service provider.[193] Furthermore, no person may be denied any federal public benefit, such as public housing, disability, or a professional license,[194] based on their cannabis usage or a conviction or adjudication of juvenile delinquency for a cannabis offense.[195] Federal agencies may not use past or present marijuana use as criteria for granting, denying, or rescinding a security clearance.[196] Finally, for the purposes of immigration laws, this Act states that an alien may not be denied any benefit or protection under immigration laws based on any event relating to cannabis.[197]

V. Conclusion

For decades now, cannabis has played an important role in American society. Despite its illegality, marijuana's influence has managed to withstand the test of time and remain prevalent in American media and culture. From medicinal to criminal, it is a pressing issue before Congress. The states have voted. The data has been analyzed. Yet, the federal government continues to classify marijuana as a Schedule I controlled substance,[198] reserved for the most dangerous and addictive drugs, and above cocaine and meth, which are classified as Schedule II controlled substances.[199]

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[188] *Id.* § 9(b)(2)(C).
[189] *Id.* § 6(b)-(i).
[190] *Id.* § 7(a).
[191] *Id.* § 7(b).
[192] *Id.* § 8(a).
[193] *Id.* § 6(b)-(i).
[194] 8 U.S.C. § 1611(c)(1) (2019).
[195] H.R. 3884 § 7(a).
[196] *Id.* § 7(b).
[197] *Id.* § 8(a).
[198] 21 U.S.C. § 812(c)(10), (c)(17) (2019).
[199] 21 U.S.C. § 812(a)(4), (c).

When marijuana was initially listed as a controlled substance, its classification was intended to be temporary, pending more research into its health effects.[200] Upon the research's completion, the National Commission on Marijuana and Drug Abuse recommended that marijuana no longer be classified as a narcotic since this definition misled the public by exaggerating marijuana's harms and endorsed decriminalization.[201] However, the Nixon administration ignored the Commission's findings.[202] It is time the federal government takes steps to remedy what is essentially a colossal mistake and move marijuana to its rightful place among unscheduled substances, like alcohol and tobacco.

As the first cannabis legalization bill to make it through the House Judiciary Committee, the MORE Act goes farther than any current piece of federal legislation at attempting to undo the devastating effects of prohibition, particularly on marginalized communities.[203] Despite the historic vote, the MORE Act still faces an uphill battle to passage.[204] Although the MORE Act, with over 50 co-sponsors, is expected to receive a favorable vote if it reaches the House floor, the bill's fate in the Republican-controlled Senate is much less certain.[205] Some advocates believe that only a more modest proposal to exempt state-approved cannabis activity from federal prohibition stands a chance in the Republican-controlled body.[206] Nevertheless, it is clear that the American people are ready for legalization, the question is, is the federal government?

[200] ACLU, *supra* note 32, at 86.
[201] *Id.* at 87.
[202] *Id.*
[203] Sarah Gersten, *The MORE Act: Taking a Closer Look*, GANJAPRENEUR, Dec. 2, 2019, https://www.ganjapreneur.com/the-more-act-taking-a-closer-look/.
[204] *Id.*
[205] Williams, *supra* note 81.
[206] Tom Angell, *Vote to Federally Legalize Marijuana Planned in* Congress, FORBES, Nov. 16, 2019, https://www.forbes.com/sites/tomangell/2019/11/16/vote-to-federally-legalize-marijuana-planned-in-congress/#3882e2b6201b.